
PRACTICAL CONSIDERATIONS FOR DIRECTORS: COVID-19

As COVID-19 continues to impact global businesses, directors face unprecedented challenges. Director oversight in this period is critical to assure the enterprise is protected. Among the issues directors should consider are the following:

Liquidity

The Issue: Many businesses are experiencing liquidity issues as a result of decreased revenues from operations slowdowns or shutdowns. Other businesses are strapped for liquidity because the COVID-19 crisis has led to overwhelming demand for their products or services. Meanwhile, lending institutions are receiving multiple draw requests a day and dealing with numerous distressed borrowers. Lenders are also considering the implications of COVID-19 on material adverse change covenants and representations, which could limit draw capability.

Recommended Actions: Directors should consider taking steps to protect a company's liquidity position. These may include: (i) maximizing draws on any available revolver after considering risks of a draw, (ii) reducing or postponing unnecessary expenditures and capital programs, (iii) identifying opportunities to preserve liquidity (e.g. negotiations with landlords on lease payments), and (iv) identifying alternative sources of liquidity.

Practical Tip: Once a decision is made to draw, a company should promptly make draw requests. In some cases, lenders will not be able to timely process requests due to the volume of such requests.

Impact on Financing

The Issue: The COVID-19 crisis may cause violations of existing credit documents that are outside the control of management or directors. These violations could be as simple as triggering a material adverse effect clause, or as complex as losing a major supply contract or missing financial covenants. At the most serious, depending on the length of the crisis and companies' available liquidity, companies may not be able to pay their loan facilities when due.

Recommended Actions: Directors should make sure that the company has evaluated its credit documents and made a realistic assessment of whether an event of default has occurred, or is likely to occur. Early communications with lenders and other stakeholders can be important in mitigating the impact of the COVID-19 crisis on financing. Identifying alternative sources of financing may also be important.

Practical Tip: Review credit documents for technical defaults and clean them up where possible to avoid issues with lenders as the crisis continues.

Productivity

The Issue: The move to remote working for non-essential businesses in many parts of the country is raising concerns about productivity. Not only are employees outside of the normal work environment, but also in many cases, employees are dealing with home-schooling, reduced childcare, and concerns about family members. Focusing on business may be difficult for many of them.

Recommended Actions: Directors should support an internal communications plan that focuses on teambuilding while people are out of the office. Regular communication is important, whether by videoconference, phone, email, or text. Providing employees with the technology and support needed to do their jobs as seamlessly as possible is also critical.

Practical Tip: Consider setting group or team goals so that employees continue to collaborate while outside the office.

Furlough or Reductions in Force

The Issue: In some cases, companies may need to furlough workers or implement a reduction in force.

Recommended Actions: Directors should confirm that the company is executing the furlough or reduction in force in a manner consistent with law. The WARN Act and similar state laws impose obligations on companies that downsize. Some states, such as California, may provide state WARN Act relief. The legal and regulatory environment is changing quickly and directors should closely follow new employment laws and regulations that may establish new legal obligations.

Practical Tip: Consider talking to your lenders or shareholders about establishing programs that mitigate the impact on employees. We have already seen some lenders and shareholders take steps to protect employees or reduce the crisis's impact on them.

Force Majeure

The Issue: Many contracts have force majeure provisions that parties may consider employing as a defense to contractual obligations or, conversely, they may wish to argue against their applicability.

Recommended Actions: Directors should be cognizant of the consequences of exercising force majeure defenses. Understanding how your company's contracts work and whether force majeure can benefit or harm your business will be important to protect the enterprise.

Practical Tip: Before exercising a force majeure clause, consider the unintended consequences of doing so, including the impact on insurance coverage.

Disclosure and Reporting

The Issue: The Securities and Exchange Commission (SEC) has indicated that businesses should provide investors with “insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments.” Companies with reporting obligations need to consider what this edict means given that, for many, the impact of COVID-19 are uncertain, at best.

Recommended Actions: Directors should stay on top of the SEC’s substantive guidance on disclosure and any extensions of reporting deadlines. Directors should also ensure that disclosure is comprehensive and, when questions arise, should err on the side of providing more rather than less information. Directors, particularly those on the audit committee, should work with the auditors to understand their guidance.

Practical Tip: Review what other companies and competitors are doing on disclosure to inform your view of market expectations.

Insurance Review

The Issue: The COVID-19 crisis may impact a company’s insurance coverage depending on the exclusions or conditions within its policies. Certain policy exclusions may be implicated by the crisis, or by decisions made in response to the crisis. This concern applies to all types of insurance, including business interruption insurance and D&O policies.

Recommended Actions: Boards of directors should have legal counsel review all of their insurance policies for COVID-19-related impacts.

Practical Tip: Pay particular attention to the terms of any business interruption insurance—in some cases, there may be exclusions for pandemics.

Board Meetings and Minutes

The Issue: Regular board meetings and clear and timely minutes can protect a company in the event of eventual COVID-19 related litigation. Keeping a strong record of board meetings and participation can be integral in avoiding or defending future litigation.

Recommended Actions: Directors should engage in regular meetings and ensure that minutes are complete and timely.

Practical Tip: Consulting outside advisors and counsel in real time on issues that implicate fiduciary duties can help trigger business judgment rule protection later on.

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