

Monthly Newsletter

July 2020

Upcoming Webinars

July 15

Changing Dynamics of Board Support for a CEO in Time of Crisis
12:00 PM - 1:00 PM CT

July 23

The Silver Lining of COVID: Better human capital. Better value proposition. Better strategic agility.
12:00 PM - 1:00 PM CT

July 30

Exit through the Boardroom
10:00 AM - 11:00 AM CT

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Art is a partner in the Business Law Department of Tucker Ellis. He chairs PDA's Private Equity and Family Office Committee. His 25+ year law practice focuses on mergers and acquisitions, financings, business law, IP / digital, real estate and dispute resolution involving many industries, predominantly counseling middle-market growth to mid-sized public companies and the related investment community.

Board Oversight in a Post-Pandemic World – Governance in Anticipation of Heightened Director Duties

All directors of private companies have fiduciary duties of due care and loyalty which govern their conduct and oversight of the companies they serve. These fiduciary duties require the director to discharge them with care, adequate information, competence, diligence and good faith. Heightened standards by which they are judged evolve under the law as new theories of liability are asserted against Boards. While the COVID-19 pandemic has resulted in many reactive company measures in response to a rapid pace of ongoing developments, we do not yet fully know how the Board's oversight will be scrutinized.

Applying Heightened Duties in a Post-Pandemic World

Corporations, the workforce, governments and consumers are coming to grips with operating in an ongoing pandemic and post-pandemic world. It will take a bit longer, however, to see how litigation and liability unfolds as a result of the impact of both pandemic and social justice issues on business performance, viability and business models. The combination of these issues may bear upon virtually every aspect of the business and threaten its continuing existence. Litigation and exposure can be expected to arise from the changed landscape and expectations of the workplace, stockholders, creditors and consumers.

On top of this, it is quite probable that the private company Board's fiduciary duties will continue to evolve with heightened standards of conduct for

timely policy-making, oversight, monitoring and reporting. Boards and their private companies will face increased scrutiny and potential liability for the unprepared Board as a result. Boards cannot assume mere delegation to officers will insulate from liability.

The following are just a few of the many areas potentially in need of heightened proactive attention by Boards in our post-pandemic world.

Staying Open, Reopening + Returning to Work – Safety from Contagion

There will be instances of employee health consequences and deaths arising from an alleged exposure to COVID-19 in the workplace, and the Board must be prepared to establish that it and the company were proactive and took all reasonable and necessary measures to protect personnel from exposure in the workplace and from work-related travel. The Board should consider establishing an oversight, monitoring and reporting system for health and safety matters for its workforce related to COVID-19. This means more than simply a policy of following CDC and OSHA guidelines. Data should be gathered so the Board has necessary information for establishing new policies and taking actions. Each business may have different needs.

Working Remotely

Many businesses contemplate a continuation at least in part of remote work by employees. Every business must assess how remote work

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impacts current personnel policies and risk of employment related liability, in areas such as performance evaluation, training, benefits eligibility, paid time off policies and monitoring, carryover of unused days, recording of work hours, reporting to superiors, employee discipline, employee dismissal and other matters. Policies and handbooks will need to be rewritten. While this all might sound like the responsibility of the Human Resources and legal departments, the pervasiveness of issues and need to be aware likely will require a heightened level of Board involvement and oversight. Consider what claims and exposure from employee lawsuits might arise in the new normal for your business. As far-fetched as it might sound, consider, for example, whether the company might pay a remote-work benefit (even if nominal) for the employee's use of space at home, when the company requires or encourages working from home.

Duties to Creditors

Now more than ever, timely data and forecasting is essential, and forecasting must be updated constantly. Consider which reporting tools may require an upgrade, so that the Board and the company will be less reliant on the need for filtering, assembly and preparation of reports by officers for key data. For many, the Board will need to be engaged in an almost constant level of oversight and evaluation regarding the company's positions on solvency, risk under credit facilities and finance covenants, capital raising, ongoing viability and liquidity, in order to be proactive and not reactive in taking necessary actions to protect the company. Layoffs must be made in a timely manner in reliance on sound information and forecasts, and in accordance with the law. The Board will need to continue to be proactive in assessing and acting on any restructuring needs. New business opportunities should be evaluated with extra care.

Social Justice and Equality Principles

Boards will need to take the recent developments in social justice and equality in the workplace seriously. The effect of these developments is far more pervasive than the relatively small number of organizations opting to govern and run according to ESG principles and working to improve their ESG scorecards. Boards will need to consider all constituents and stakeholders, and will need to understand the statistics of their organization in

relation to hiring and advancement of persons of protected classes. Directors should be careful not to simply react to apparent pressures, before conducting a thorough assessment and establishing an understanding of where the company has done well and where it can improve.

Prepare to Defend the Paycheck Protection Program Loan Audit

The PPP provided companies ranging from small business to larger organizations with necessary, potentially forgivable, loans as part of the CARES Act. While many Boards have been involved in the discussions with management about company eligibility, the standards surrounding eligibility and use for PPP purposes might create potential for uncertainty of compliance. The Treasury Department also introduced criminal sanctions to address PPP abuses, and established future SBA audits. In preparation for the SBA audit, the Board should ensure it has received a reasonably thorough report with supporting data from management regarding (among other things) compliance with PPP standards for the loan application, eligibility, size, affiliate disclosure, basis of need, exhaustion of funds from other sources, hiring and retention decisions, and use of the funds for PPP purposes. While the directors might not need to take Board action to approve the report, they certainly have a duty to ask questions, seek clarifications and elicit further information for reasonable assurance of company compliance and preparedness for an SBA audit.

Concluding Remarks

Recent corporate and business developments of a magnitude and pace we have not seen in our lifetimes dictate greater oversight, monitoring and systems be established by the Board. All private company directors should be aware of the potential to be held to heightened standards in areas impacted by the pandemic. Directors should re-examine the frequency of Board meetings and executive updates. Make sure your Board is provided timely and relevant information necessary to make decisions that are protected by the business judgment rule. The Board should also establish a protocol for emergency meetings to address issues that surpass established standards. The attentive, well-prepared Board will protect not only the private companies they serve, but also themselves.

[Disclaimer: The views, thoughts, and opinions expressed in the text belong solely to the author, and not necessarily to Tucker Ellis LLP.]

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