KING & SPALDING

Goals for Boards in the COVID-19 Era

March 2020

Introduction

The COVID-19 pandemic is an unprecedented event in human history, with massive impacts on people and organizations around the world. Companies in the United States have been evaluating and responding to the crisis for several weeks, but the unique nature of the event makes it difficult to predict how future stages will unfold. We study charts and graphs showing how the disease has impacted various groups, but no one can describe with certainty how we will move from the current reality to “business as usual.”

Companies should leverage the experiences and perspectives of their boards as they navigate this crisis. The diversity of skills, experiences, and perspectives can help each company navigate this unprecedented time. No single officer or director will have a play-book for the company to follow, but these company leaders should collaborate to provide the direction that is most likely to ensure success.

We believe that in responding to the COVID-19 crisis, the board of directors can play a critical role by focusing on four key groups – the company’s people, its investors, senior management and the board itself. These materials provide suggestions for public company directors to consider to help their companies navigate this unique moment.

GOAL

Take Care of Your People

- Take Care of Your Investors
- Collaborate with Senior Management
- Ensure Board Effectiveness

Health, Safety, and Economic Security Paramount

The COVID-19 pandemic has placed the entire population under enormous stress. As directors set the “tone at the top” for the company, perhaps the first question to employees or any other stakeholders should be “How are you feeling; are you OK?” Businesses will revisit their strategies and seek to control costs, but your people and the broader world are watching how you treat your employees and other stakeholders. Difficult decisions need to be made, but understand the full range of consequences for being seen as uncaring or greedy. Onlookers must believe that the board’s primary concern has been the health and safety of the company’s workforce, vendors, customers, and communities.

- **People First.** Key decisions and messaging should always be viewed through a “people-first” lens. If the message is a tough one, take care to communicate it in a clear and compassionate way. As an example, the raw emotion in Marriott CEO Arne Sorenson’s message to employees blunted the negativity associated with the company’s furlough program.

- **Be Compassionate.** Take special care in responding to “shelter-in-place” and “stay home” orders. Internal and external messaging is critical, even for essential infrastructure that must remain open. Framing the obligation to stay open as being part of the fight against the disease, while expressing compassion for those who must work, is important.

- **Prepare for Diagnosis Disclosure.** Plan ahead for what the company will report about COVID-19 related diagnoses. What will be disclosed publicly if diagnosis is of the CEO or another key executive, or a group of other employees? There will be precious little time to think through these complicated issues when a diagnosis is made.

Anticipate Challenging Compensation Decisions

The dramatic economic effects of the pandemic shine a spotlight on already politicized compensation decision-making.

- **Share the Burden.** Companies that do not share the economic burden throughout the organization risk condemnation and additional scrutiny. Expect many companies to announce CEO and executive pay cuts and voluntary bonus declinations in the coming weeks.
- **Reward Your People If Possible.** Some organizations may go further and provide additional economic incentives for working through this challenging time. For example, Citigroup announced it will pay 75,000 US employees making less than $60,000 a year an award of $1,000 in April.
- **Rethink Targets.** The timing of this pandemic has complicated setting performance targets for 2020 (both LTI and STI). It may be prudent to delay decisions that have not yet been made. For those targets that have been set, avoid the temptation to reset them now. If new awards will be made now, consider new targets that are (1) shorter-term (e.g., quarterly), (2) non-financial, and/or (3) relative rather than absolute. Compensation committees may also identify adjustment factors that may be used in the committee's discretion at the end of the performance period to give management some clarity while retaining flexibility. For all decisions, carefully consider optics - will this be seen favorably by employees, shareholders, proxy advisors, enforcement agencies? It will also be important to consider accounting implications.
- **Address Grant Pricing.** There are also complicated issues about grant pricing. For grants not yet made, consider using a trailing average price to mitigate the potential of pricing on an anomalous day. Ensure governing documents allow changes and that there are no unintentional accounting impacts or (for options) Internal Revenue Code Section 409A implications. Companies that have recently granted options may consider repricing once business conditions have normalized, but note that repricing needs to either be explicitly permitted by the plan without shareholder approval (rare) or approved by shareholders (who largely abhor the practice).

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Maintain or Enhance Investor Communications

View your investors as your people, too. Directors may play an important role in keeping them safe, informed, and confident in the company. Now, more than ever, it is important for the company to communicate effectively with investors.

- **Update Forward-Looking Statements.** Consider whether any prior disclosures should be revised. Although there is no general duty to update forward-looking statements, updates may be required in certain situations and may be important in enhancing investor confidence. Take special care with guidance. Many companies have suspended guidance and we expect many more will soon. Doing so with minimal negative consequences requires productive relationships and the right communications with key investors.

- **Reconsider Risk Factors.** Risk factors should be reevaluated and updated to reflect the current reality. Companies have noted increased risks associated with declining consumer demand, supply chain disruptions, hiring and retention, and access to capital, among other things. In addition, given recent SEC enforcement focus on risk factors, take extra care to be certain that the language reflects potential risks and uncertainties, rather than events or impacts that the company is actually experiencing.

- **Address Potential Soft Spots**. Consider the company's capital position and strategy – for example, effect on dividends, share repurchases and capital expenditures – and communicate expectations to investors.

- **Remain Vigilant of Selective Disclosure and Insider Trading Issues.** COVID-19 creates another area where people inside the company will likely know more than those outside of it. That can turn into a Reg FD or insider trading/tipping issue if someone at the company shares COVID-19 related data selectively outside the company. Volatile markets, and insiders attempting to time purchases or needing to sell shares, present challenges for compliance with insider trading policies.

Prepare for an Unusual Proxy Season

Many companies are moving to virtual or hybrid annual meetings for 2020, with many state governments changing or clarifying rules to permit the practice. While the legal department will determine how to ensure the meeting is legally compliant, directors can ensure it is both effective and avoids unnecessary damage to the company's relationships with investors. Directors should share their perspectives with management in planning the annual meeting.

- **Logistical Concerns.** Running a virtual or hybrid meeting is different than an in-person affair. Companies should think carefully about invitation lists, shareholder participation (particularly shareholder proponents), and contingency plans if things get out of hand.
- **Director Participation.** Even in a virtual meeting, director participation is valuable. Director presence and participation was one of the key principles of a multi-stakeholder effort to identify virtual meeting "best practices" in 2018. That report calls on companies to *"[e]nsure shareowners have access to board members. It is important for virtual participants to have the opportunity to see, hear and ask questions of board members and particularly independent board leadership."*
- **Investor Relations Demands.** Note that investors and investor advocates may be looking to punish companies that use a virtual or hybrid meeting in ways deemed unfriendly to shareholders. Although investors and advisors have dropped absolutist positions against virtual meetings, they seek assurances that companies will not use them once the crises has ended and that companies will continue to seek robust shareholder input. For example, the Council of Institutional Investors has requested that companies organize virtual meetings to provide video feed of key participants and a continuously-updated queue of shareholder questions. Maximizing the efficiency of the meeting and minimizing shareholder complaints requires finesse.

Consider Threats to the Company and Defenses

Dramatic declines in stock prices, uncertainty about strategies going forward, and in some instances, loss of senior executives have left many public companies vulnerable to challenges by activists or other industry participants or investors. Experienced directors can be a huge asset in advancing activism defense preparations while management teams are busy dealing with critical operational challenges.

- **Assess Current Activist Vulnerability.** What were the company's exposures before the COVID-19 pandemic? What vulnerabilities have arisen as a result of the pandemic and current economic environment? What measures can restore stability to the company?
- **Adopt Common-Sense Defenses.** Given substantial stock price dislocation, a number of companies are much more vulnerable to activist intervention today than a few weeks ago. As an example, it may be prudent for the company to have a shareholder rights plan / "poison pill" on the shelf that it could quickly adopt if necessary. Companies should evaluate this and other structural defenses.
- **Maintain or Expand Engagement Efforts.** The company must continue to engage effectively with all categories of investors, from the largest passive investors to individual investors who have their retirement assets in company stock. In certain circumstances, directors may play a particularly important role in shareholder engagement.

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The Moment Demands An Effective Team

The role of the board is to oversee management, but in a crisis situation, collaboration is more critical than ever. Boards must remember their responsibilities and diligently oversee their organizations while avoiding making it more difficult for the company to navigate this unprecedented situation.

- **Focus on the Shared Goal.** The company's executive and board leadership are in this together, for the benefit of the organization, its shareholders, and other stakeholders. Team members should demand excellence from each other and be willing to have difficult discussions, but always remain focused on this fundamental and shared goal.
- **Recognize the Burden.** The pandemic and its effects have placed many management teams under incredible stress. Prioritize critical board oversight requests, and recognize that unnecessary demands can draw significant resources away from leadership and truly pressing issues.
- **Be a Resource.** Remember the immense stress your management team is under. The board's message to management should be clear–"We are ready to help in any reasonable way."
- **Know Your Role**. Independent directors are responsible for overseeing the work of management, but they are not supposed to function as the CEO. Each part is critical, and each team member needs to play his or her part.
- **Ask Questions.** Boards can help the management team avoid blind spots and stay focused on the most important matters by asking informed questions and demanding compelling answers. The next slide includes important questions boards should address with their management teams to help steer their company through the challenging days and weeks ahead.

Discuss Key Issues With Management

- **Strategy.** How has the company's strategy changed and what further changes are appropriate?
- **Operations.** How do "shut down" and "stay at home" orders affect the company's operations, on a short- and longer-term basis? Is the supply chain intact and how will it look in one month/six months?
- **Risk Oversight.** COVID-19 was a "Black Swan," but now that the pandemic is here, what related risks does the company face – workforce; supply chain; cybersecurity; liquidity? How will they be tracked and mitigated?
- **Financial Reporting**. Are internal control and financial reporting functions effective? Are those functions equipped to handle issues that are likely to arise, such as asset impairments?
- **Political**. How might proposed or enacted legislative and regulatory changes affect the company and its personnel?
- **Communications**. Has the company been effective in its communications, internally and externally? Are new approaches warranted? How has the company's brand and goodwill been affected, so far?
- **Mergers and Acquisitions.** What should be put on hold, and what should be accelerated or considered given the changing risk and opportunity landscape?
- **Succession Planning**. What if a senior officer is (or multiple senior officers are) incapacitated? What if multiple members of a key business unit or function are simultaneously incapacitated?
- **Capital Allocation.** How does the pandemic affect capital expenditures and return? Will the company have viable access to the capital markets? Should capital be shifted from shareholder return to business investment?
- **Crisis Management.** How has the company's crisis management function performed to date, and how will it function in the next phase of the COVID-19 crisis? What has the company learned that could enhance the crisis management plan generally?
- **Playing Offense.** Are there new opportunities the company could capitalize on?

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In a time of crisis, the board will need to meet more frequently, to monitor and support the work of management. Boards should consider modifying practices in light of these changes.

TO DO

- **Ensure Technology Meets Organizational Needs**. Much attention has been appropriately placed on improving remote work technologies, including enhancing Virtual Private Network (VPN) access for employees. BUT, effective remote board meetings likely require more than just a dial-in.
- **Clarify Information Flow Protocols.** Given the pace and severity of developments, it can be easy to become overwhelmed by too much information. Are directors satisfied with the information and management communications they have received? Determine what gets elevated to whom on the board, and check-in regularly to ensure no disconnect between the board and senior management.
- **Emphasize Cyber Safety**. A recent Harvard Business Review article notes, "[B]oth employers and employees need to take the utmost care to protect themselves as well as confidential company information." Board members are not immune from cyber attacks and savvy wrongdoers recognize the treasure trove of information being distributed to directors by new technologies.
- **Enhance Documentation.** Given the potential severe impact of the crisis on certain companies, thoroughly documenting the description of COVID-19 related board discussions may be warranted.

TO ASK

- **Committee Structure.** Are there new committees that could contribute to the work of the board?
- **Director Availability.** Are we prepared if directors may not be able to serve the company?
- **Director Protections.** Does the company have in place appropriate protection for its directors – indemnity agreements, adequate D&O coverage, and other measures?

ANNEX

Team Bios

Laura I. Bushnell

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Laura Bushnell is a partner in our Corporate, Finance and Investments practice who specializes in counseling management and Boards of Directors of private and public companies, particularly in the life sciences and technology sectors, on capital raising matters, strategic transactions and corporate governance.

Laura has represented issuers, investors and financial institutions in numerous capital-raising transactions, including venture capital and seed financings, crossover rounds, strategic investments, initial public offerings, follow-on and secondary offerings, recapitalizations and PIPE financings.

In addition, Laura frequently serves as primary outside counsel to emerging growth companies. In this capacity, she advises management on such matters as corporate governance, disclosure and Securities and Exchange Commission (SEC) reporting obligations, employment and equity compensation, fiduciary duties, strategic transactions and acquisitions, commercial agreements, and compliance with securities laws.

She is a regular speaker on a range of transactional and governance topics.

Laura has been recognized as a leading Venture Capital lawyer in California by Chambers USA. She serves on the Board of Trustees of the UC Santa Cruz Foundation and the Board of Directors of the Legal Aid Society of San Mateo County. She chairs the Dean's Advisory Council of the Baskin School of Engineering, University of California Santa Cruz.

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Jeanie Cogill is a partner in King &Spalding's Corporate, Finance and Investments practice. She specializes in the executive compensation, employee benefits and ERISA fiduciary areas of law.

Jeanie advises public and private companies across a variety of industry sectors on all aspects of executive compensation arrangements, including equity incentive programs, employment agreements, change in control protections, incentive programs and nonqualified deferred compensation plans. .Jeanie also regularly advises clients on executive compensation and employee benefits issues arising in the context of mergers and acquisitions and financing transactions. Jeanie helps employers, management, and plan fiduciary committees design, establish and administer tax-qualified pension plans, health and welfare plans and fringe benefit programs, and counsels them on their fiduciary, tax and other compliance responsibilities.

Jeanie also counsels investment managers and their principals, including sponsors of hedge funds, private equity funds and real estate funds, on the fiduciary responsibility and prohibited transaction provisions of ERISA, including the structuring and administration of private commingled funds that are marketed to employee benefit plans and tax-advantaged accounts.

Richard Fields

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Rich Fields advises public company boards of directors, C-suite executives, and in-house counsel on issues related to corporate governance, board leadership, and stakeholder engagement.

Rich's expertise includes board composition and leadership, effective disclosure, activist and other shareholder interventions, shareholder and other stakeholder engagement, board and director evaluations, and other complex issues involving boards and corporate leaders.

Rich is an authority on corporate governance and board leadership and a sought-out author and speaker. He regularly appears in Agenda, Ethical Boardroom, Governance Minutes, and C-Suite Insight, has lectured at a corporate governance course at Harvard University, and presented at events for NYSE Governance, Equilar, and others. Rich was one of four global winners of the Millstein Center for Global Markets and Corporate Ownership's Rising Star of Corporate Governance Award in 2015.

Rich co-chaired the Shareholder-Director Exchange Working Group and was a principal architect of the SDX Protocol, a guide for shareholder engagement supported by investors today representing more than $15 trillion in assets under management.

Prior to joining King & Spalding, Rich was a partner at Tapestry Networks where he worked closely with the chairs of compensation and audit committees, independent board chairs and lead directors, and the stewardship leaders of the world's largest asset managers. At Tapestry, he led scores of roundtable dialogues for board leaders, senior governance professionals, regulators, political leaders, and other key players in the corporate governance and shareholder landscape.

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Dixie Johnson represents businesses and individuals in securities enforcement investigations and conducts internal investigations for corporate board committees and companies. As a partner on our Securities Enforcement and Regulation team and our Special Matters and Government Investigations team, Dixie also serves as Deputy Practice Group Leader for Government Matters, a collection of ten government-facing practices within our firm. She appears regularly before the SEC, DOJ, FINRA, PCAOB and other federal and state authorities. Since she joined King & Spalding in early 2014, the government has closed almost thirty investigations without charging Dixie's clients.

Dixie brings to her clients solid judgment and strategic insight from over 30 years of experience in representing public companies, financial institutions, investment managers, broker-dealers, public accounting firms, boards of directors and boards of trustees, law firms, corporate officers and others. She is widely recognized as a legal industry leader in securities enforcement, regulatory compliance, corporate governance and crisis management.

Board committees call on Dixie to investigate accounting and disclosure-related whistle-blower allegations and look to her for guidance in times of crisis. She regularly interacts with lead directors, presiding directors, and non-executive board chairs from many of the largest companies in the world. She is a Fellow of the American College of Governance Counsel and, for five years, was a member of the Lead Director Network.

Public companies and regulated entities seek Dixie's representation in complex securities-related government investigations. C-Suite officers and other professionals look to Dixie for representation in internal and SEC or other investigations when their careers are on the line. She is a lawyer's lawyer, representing law firms and lawyers under scrutiny. Her bench is deep and highly skilled. She analyzes lessons learned and especially enjoys counseling clients on how to avoid problems in the future.

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Elizabeth Morgan is a Partner in our Capital Markets practice. Elizabeth represents issuers, investors and underwriters in a wide variety of capital markets and corporate matters spanning a range of industries.

Elizabeth represents clients in connection with public and private offerings of both equity and debt securities including initial public offerings, secondary offerings, liability management transactions and securities issued in connection with mergers and acquisitions.

In addition, Elizabeth frequently advises public company clients on Securities and Exchange Commission reporting and disclosure requirements, governance issues and other corporate and securities matters. Her experience also includes a variety of syndicated loan transactions, leveraged acquisition finance, mergers and acquisitions and other strategic corporate transactions.

Cal Smith

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During his more than two decades of practice, Cal Smith has been involved in numerous high profile M&A and other corporate transactions for public companies, including spin-offs and related strategic initiatives designed to unlock value for his clients.

Cal also has extensive experience counseling boards of directors, CEOs and other C-Suite executives with respect to strategic alternatives, activist defense, fiduciary duties and corporate governance matters, including engaging with institutional investors and other key governance constituencies. Cal was Corporate Secretary of Georgia-Pacific Corporation when it was acquired by Koch Industries, Inc. in a deal valued at $21 billion. Cal's practice also involves significant capital markets-related work.

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Jeff Stein advises boards of directors of public companies and members of senior management with respect to corporate governance, and assists leading public companies in their securities compliance and reporting. As a partner in our Capital Markets practice, Jeff also represents companies in a variety of financing transactions, including derivatives.

Jeff advises boards of directors on all aspects of board performance and corporate governance, including the responsibilities of boards and senior management, board development and self assessments, and board operations. Jeff advises public companies with respect to their reporting obligations under the federal securities laws, as well as transactions in securities. Jeff also represents public companies in a broad range of public offerings and corporate finance transactions, as well as swaps and derivatives.

Jeff was active in the development of the firm's Lead Director Network and its Southeast Board Leadership Network. Both are groups of lead directors, presiding directors and non-executive chairmen that meet to discuss how effective board leadership can improve corporate performance.

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Keith Townsend specializes in representing public companies with respect to governance matters, mergers & acquisitions and capital markets transactions. Keith is the former global head of the firm's Corporate practice and currently serves on the firm's Policy Committee (board of directors).

Over the last 20 years, Keith has substantial experience working on a broad range of public company M&A transactions, including stock-for- stock strategic mergers, tender offers, spin-offs, cross-border transactions, statutory cash mergers and divestitures. Recent transactions include TSYS in its $54 billion merger of equals with Global Payments, Transocean in its $3.4 billion cross border tender offer to acquire Songa Offshore and its $2.7 billion take-private of Ocean Rig, ConocoPhillips' $13.3 billion sale of its Western Canada assets to Cenovus Energy, Post Properties in its $17 billion combination with Mid America Apartments and the IPO and subsequent sale of Endochoice to Boston Scientific. He also has significant experience representing issuers in IPOs and offerings of debt, preferred stock and hybrid securities, including the recent Up-C IPO of EVO Payments.

Keith has substantial experience in advising boards and the C- suite for public company clients on governance issues, Securities and Exchange Commission reporting and disclosure requirements, activism and other corporate and securities matters.