

Publications

Monitoring and Oversight in the COVID-19 Era

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A board's core duties to employ reasonable and effective oversight of management and business operations are even more important in this unique COVID-19 era. Beyond potentially harming the company's business value and reputation, failure to adequately monitor corporate risks can expose directors to personal liability for breach of fiduciary duty. This alert discusses the contours of those duties and how boards can mitigate risks of claims of inadequate monitoring and oversight arising from the COVID-19 pandemic.

The Basis for Monitoring and Oversight Duties

Monitoring and oversight obligations are well-established, flowing from the 1996 decision *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996). Last month, the Delaware Chancery Court reaffirmed and summarized these *Caremark* duties:

The board of a Delaware corporation has a fiduciary obligation to adopt internal information and reporting systems that are 'reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance. . . 'Failing to make that good faith effort breaches the duty of loyalty and can expose a director to liability.'

Hughes v. Hu, C.A. No. 2019-0112-JTL, 2020 Del. Ch. LEXIS 162, at*39 (Del. Ch., April 27, 2020) (citations omitted).

Caremark instructs that board engagement and involvement are required to manage the mission critical risks that affect a corporation's operation. Even though *Caremark* set a high bar to establish directors' liability for breach of the duty of oversight, recent Delaware decisions have permitted such claims to proceed, potentially boding ill for directors who are not engaged and vigilant in these exigent times. Several recent pronouncements clarify directors' oversight obligation:

- A board's good faith efforts to establish reasonable systems of monitoring and reporting must focus on "mission critical" issues for the company and address a company's central compliance risks. *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).
- Even where a board institutes a reporting system, adoption of a system *alone* may not be enough to avoid liability. Robust and meaningful interaction is required to insulate directors from breach of fiduciary duty claims. *Clovis Oncology Derivative Litigation*, C.A. No. 2017-0222-JRS, 2019 Del. Ch. LEXIS 1293 (Del. Ch., Oct. 1, 2019).

Effective Monitoring and Oversight in the COVID-19 Era

Consideration should be given to the following factors to safeguard a board in the discharge of its monitoring and oversight duties.

Establishing an Oversight System

- Implement a reporting and monitoring system that is specifically tailored to your business.
- Establish and publish the board level monitoring criteria, and proof of management compliance is essential.
- Review current reporting and monitoring policies and procedures for any gaps created by the unique circumstances facing the company and amend them, if necessary.
- Consider additional, separate minutes and records to establish robust oversight by the Board.
 - Document inputs and contributions from subject matter experts, financial experts, etc., to demonstrate not only attention to current impacts and trends but also attention to reasonably foreseeable impacts on value.

Demonstrate Interaction between the Board and Officers

- Establish regular supplemental meetings or another communication program to document robust and **active interaction** between management and the board. Episodic contact with compliance or risk personnel and/or carrying on business as usual may not be enough in this era.
- Increase board and management communication and encourage management teams to make more regular contact. **But:** ensure that the tone and content of the management communications are appropriate in the circumstances, particularly when viewed in hindsight.
- Be able to demonstrate that management's recommendations and policies were not simply rubber-stamped, but were afforded insightful engagement and challenging by the board.

Specific Steps to ensure Caremark Oversight in a COVID-19 World

- Consider forming a COVID-19 sub-committee whose authority focuses on enhanced and timely reporting and monitoring.
- Recall that **Facebook's 2019 settlement** with the FTC over privacy claims included a condition that Facebook establish a board privacy committee, engage third-party compliance assessors, and provide quarterly privacy certifications to the FTC. Implementing a committee on the front end may help

reduce the risk of liability.

- A very active executive committee could obviate the need for a dedicated subcommittee.
- For COVID-19 specific initiatives — *g.*, salary maintenance, health and safety procedures, employment-related issues — carefully document optional, financial, social and other factors before implementation and review them on a regular, ongoing basis.
- As the SEC’s disclosure guidance on COVID-19 discusses, companies must carefully assess impacts of the pandemic on operations, disclosure obligations, and internal controls, and be diligent to ensure that dissemination of material information relating to COVID-19 meets the requirements of their disclosure obligations under Regulation FD and otherwise. See [here](#).
- Demonstrate consideration of the impacts and address ongoing operational and strategic issues with particular focus on how the COVID-19 pandemic may affect critical decisions regarding:
 - Liquidity
 - Access to capital
 - Governmental support programs
 - Dividends
 - Work force composition
 - Work force safety
 - Supply chain
 - Compensation
 - Shareholder relations
 - Business operations and opportunities

As always, feel free to reach out to Vorys for additional guidance and advice on mitigating risk in the COVID-19 era.

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VORYS COVID-19 TASK FORCE

Vorys has established a comprehensive COVID-19 Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.