

Is Your Board Ready?

10 tips for boards facing an emerging crisis

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Whether it's a cybersecurity breach, #MeToo or discrimination allegations, or an international pandemic, a corporate crisis can come in many forms. In today's environment, the need for an organization to be prepared to manage a crisis is greater than ever. The board has an important role during a crisis, and the following 10 tips are intended to help the board prepare.

1 Ensure clear lines of communication with management. During a crisis, a board needs to maintain close contact with the CEO, CFO and other appropriate senior officers to ensure that it is properly informed of developing facts and can effectively exercise its oversight responsibilities. The board should make sure that its expectations for information are made clear to senior management and that the frequency and the level of detail provided are like Goldilocks' porridge—just right.

2 Consider the board's role in crisis communications. Often, a board will be judged by how effectively the company communicates to its stakeholders during a crisis. The board should have an opportunity to provide input on the company's crisis communications plan. Every communications plan should include protocols for the review and approval of all company communications, including review by legal and other external advisors. While the board does not need to review every communication, the board may want to provide input on the protocols as well as the overall communications strategy and key themes.

3 Keep fiduciary duties in mind. A board must understand its fiduciary duties of care and loyalty in the context of the crisis, which may differ from the more familiar standards for ordinary business decisions or strategic transactions. Especially during a crisis, directors must execute their oversight obligations (part of the duty of loyalty), which require boards to have in place systems or controls sufficient for proper oversight of the company's business and to properly monitor those systems or controls (so-called *Caremark*¹ duties). It is important to remember that board records can demonstrate diligent board oversight, or the lack thereof. For example, in a recent Delaware case, plaintiffs sufficiently alleged that food safety had not been a regular topic of discussion at board meetings of an ice cream company faced with a lethal listeria outbreak, and pointed out that the topic was not mentioned in board minutes.² In another Delaware case, a company facing an accounting restatement produced documents showing its audit committee typically met only once per year, never for longer than one hour, and often missed important issues that later needed to be addressed through action by written consent.³

4 Consider whether to delegate to a committee. For certain situations, a committee of the board can act with more agility and responsiveness than the full board and provide additional oversight. A board may delegate oversight of specific matters to an existing board committee or form a new committee. Forming a new committee of the board involves complex considerations and may not be right for every situation, especially in the absence of a conflict of interest. Any committee tasked with crisis-oversight responsibilities should be composed of directors with appropriate



subject-matter expertise and availability to join frequent meetings. Such committees also need to regularly report to the full board, as all directors on the board are still obligated to fulfill their duty of oversight.

5 Hold frequent board meetings. In a crisis, the board or a committee will often be provided oral briefings or “updates” by telephone or video conference. When possible, these “updates” should be held as formal board or committee meetings, even if not all directors are able to attend. Oftentimes, the number of board and committee meetings on a given matter is a more persuasive fact to demonstrate that the board satisfied its fiduciary duties than the number of informal update calls. In addition, the number of board and committee meetings will be disclosed in the next proxy statement and is often an important factor in securing the incumbent directors’ re-election. However, some consideration should be given to director attendance, as public companies must also disclose which of their incumbent directors attended fewer than 75% of the aggregate number of board and committee meetings each year. To increase attendance, consider scheduling regular board update meetings (for example, at the same time every week) during the crisis.

6 Strike an appropriate balance in production of board materials. It is helpful to have documents prepared for the board’s review to improve the quality of board discussion and provide a record that the board was kept informed. However, board materials are not necessary for every meeting. Recurrent production of board materials when the board is meeting frequently may divert management’s time and effort from dealing with the crisis.

7 Evaluate board or committee recordkeeping practices. Minutes should be taken at every board or committee meeting called to discuss the crisis. Minutes should create a comprehensive record of the board’s diligence and oversight, but reflect an understanding that the minutes may be subject to discovery by adverse parties. The minutes should demonstrate the full scope of information received and topics discussed by the board, including both “good news” and challenges. Note in minutes that the board engaged in active discussions on the topics presented in order to avoid inadvertently drafting minutes that make it appear that directors were passive recipients of information. Where possible, discussions of risk management and compliance should occur at the full board or appropriate committee level rather than in executive sessions, when a formal record of such matters will often not be taken.

8 Understand what documents create your record. Board minutes and materials included with the minutes (such as management presentations) may be available to stockholders making books and records demands under Delaware law, which requests often precede litigation and may form the substantive basis for a potential derivative lawsuit. Delaware courts have recently expanded the scope and type of documents stockholders can receive under these requests. For example, emails and text messages between directors (even from personal devices) and informal director notes taken during board meetings have been required to be

produced as corporate records. Therefore, boards should exercise caution when using electronic communications and taking informal notes during meetings.

9 Monitor liquidity and solvency. If the crisis creates liquidity concerns, the board should develop a plan for regular updates on the company’s liquidity and capital resources. For example, the board may request regular briefings on the company’s cash position, burn rate, outstanding indebtedness, borrowing capacity and compliance with financial covenants. The board may also want to review the company’s cash conservation plans, including dividend coverage and share repurchase activity, as well as compensation plans. Be mindful of the need to engage restructuring and insolvency advisors before it is too late.

10 Lean on advisors. Involve legal counsel and other appropriate advisors or technical experts early in the process. Depending on the nature of the crisis, it may be necessary to have independent advisors or experts reporting directly to the board or a committee rather than to management. **CS**

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For a more in-depth discussion of the board’s responsibilities in a crisis, refer to Hogan Lovells’ June 2020 publication, “Practical insights for boards of directors in the time of COVID-19.”

1. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).
2. *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).
3. *Hughes v. Hu*, C.A. No. 2019-0112-JTL (Del. Ch. 2020).

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