SANGRA MOLLER LLP
Barristers & Solicitors

LEGAL CURRENCY
A Client Communication

KEY CONSIDERATIONS FOR DIRECTORS DURING THE COVID-19 PANDEMIC

Directors will have a key role to play as businesses react and manage their affairs in light of the COVID-19 pandemic.

Canadian directors are tasked with managing, or supervising the management of, the business and affairs of a corporation. In doing so, they have two principal duties:

- the *duty of loyalty* – to act honestly and in good faith with a view to the best interests of the corporation; and
- the *duty of care* – to exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances.

When directors make decisions on a fully-informed and reasonable basis, without a conflict, such decisions generally receive deference under the business judgement rule.

While these duties do not change as a result of the pandemic, there are a number of heightened or unique risks and considerations for directors in the current environment, some of which are described below.

I. RISK RESPONSE AND KEY CONSIDERATIONS

In carrying out their duties, directors must act on an informed basis. In the COVID-19 context, this entails understanding specific risks to the corporation and its stakeholders and conducting board-level discussions regarding management's strategies for mitigating and addressing such risks.

A common theme during the current pandemic is the heightened financial and liquidity risks faced by corporations.

In assessing and responding to the current pandemic, key considerations for boards include:

- receive regular information on the financial position and short- and medium-term liquidity needs of their corporations, along with detailed information regarding availability of bank and bond financings and existing and potential credit facilities and lines of credit;
- familiarize themselves with key covenants under existing loans and credit facilities in order to be able to assess availability and potential default scenarios;
- review prior financial guidance, risk factors and other forward-looking disclosures to assess the need for updates;
- evaluate potential transaction opportunities that may result from the existing market environment;
- re-evaluate compensation strategies and consider changes were required, including in regards to retention of critical employees;
- review any existing share buyback or dividend policies;
- examine existing capital spending and other business plans to ensure continued viability; and
- seek guidance, where appropriate, from regulators.

II. MAINTENANCE OF KEY COMMUNICATION CHANNELS

A pillar of effective board decision making is the maintenance of critical communication channels. This involves, among other things: (i) close and regular contact with chief executive officers and other management; and (ii) maintaining communication lines with key stakeholders.

The maintenance of effective communications will help ensure that directors both understand the risks facing their corporation and its stakeholders on a real-time basis and that they are in a position to take appropriate steps to mitigate such risks.

Effective communications with stakeholders are necessary from an employee, investor and public relations standpoint. Corporations will find it critical that they formulate appropriate messaging during the pandemic in order to properly and effectively communicate information to stakeholders.

II. ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG)

In recent years, the concept of sustainability and other ESG principles have risen to the top of the corporate governance agenda. This is especially so as key institutional investors have developed ESG guidelines and begun embracing the view that the long-term success of a corporation depends not only on its short-term profitability, but also on its overall social purpose and sustainability.

The ESG response of corporations will likely come under heightened scrutiny during the current pandemic as investors and the public pay closer attention to how they respond at such a critical juncture.

One ESG area of particular focus in the current environment is the management of health risks of employees and customers. For example, retailers of essential goods face specific risks to the health of their employees and customers as a result of their necessary continued operation during the pandemic. A key issue facing boards of directors will be to understand such risks and, along with management, develop effective strategies for their mitigation and minimization.

III. SUCCESSION PLANNING

Pandemics raise specific issues regarding succession planning for key management. Given the heightened risk of temporary or permanent losses of key executives, boards of directors should review succession plans in order to ensure that contingencies are in place in the unfortunate event that members of management are unable to perform their roles.

IV. SHAREHOLDER ACTIVISM

In recent weeks there have been a number of examples (mostly in the United States at this time) of shareholder activists and corporate raiders commencing attacks. Increased market volatility as a result of the pandemic and the dislocation of market and book values may give rise to increased shareholder activism and raise the prospects of opportunistic takeovers.

The directors of publicly traded corporations should assess the risk of activism and takeover threats in light of the current pandemic and consider reviewing their takeover defence readiness with their advisors.

V. INSIDER TRADING

The impact of COVID-19 on the financial position and performance of corporations is a fast-moving situation. For publicly traded corporations, this raises important securities law considerations as the potential for insider trading and "tipping" is heightened.

Public company boards should review their existing insider trading policies to ensure that appropriate mechanisms are in place for continued compliance with securities laws on insider trading and tipping. This would include, among other things, having appropriate policies for trading blackouts and other restrictions to ensure that corporate insiders and other persons in a "special relationship" with the corporation are not trading in a corporation's securities when there is material undisclosed information.

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