

## Important Reminders for U.S. Boards of Directors Navigating COVID-19

by Deborah S. Birnbach, Lisa R. Haddad, John T. Haggerty, Adam Slutsky

While COVID-19 will affect the operations of different companies in different ways, the boards of directors of every company should think critically about their oversight role in the context of this unprecedented global pandemic. Here are some things to remember based on the intersection of the pandemic with directors' duties.

- 1. Risk Oversight.** Understandably, management teams are dealing with the crisis in real time, all the time. But the Board is critical to risk oversight. In June 2019, the Delaware Supreme Court revived a stockholder derivative lawsuit against the directors of ice-cream manufacturer Blue Bell Creameries ([\*Marchand v. Barnhill\*](#)), which was a single-product company with a product that was subject to critical FDA food-safety testing and standards. The decision hinged on the Supreme Court's view that Blue Bell's directors conceivably may have acted in bad faith by not more proactively taking specific and targeted actions to set up a "system of controls" to alert it to food safety compliance issues—an "essential and mission critical" area for the single-product company. One of the action items for boards coming out of this decision, as well as a subsequent related decision from the Delaware Court of Chancery concerning the company [\*Clovis Oncology\*](#), was to consider and identify such "essential and mission critical" risks. COVID-19 is unique in that it may present a mission-critical risk to virtually every company. More than ever, directors need to confirm that their companies have protocols and procedures in place to ensure information flow to the board on the state of the company's business and financial condition, no matter how busy the management team is, including through potential committees specifically formed to address risk, as well as setting explicit expectations with management to report regularly on the pandemic's effects on operations.
- 2. Disclosure Oversight.** [On March 4, 2020](#), SEC Chairman Jay Clayton reminded "all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments." The SEC "encourages all companies and other related persons to consider their activities in light of their disclosure obligations under the federal securities laws," such as "refrain[ing] from engaging in securities transactions with the public and to take steps to prevent directors and officers (and other corporate insiders who are aware of these matters) from initiating such transactions until investors have been appropriately informed about the risk." Boards should continue to take steps to ensure that corporate disclosures are accurate and complete against the backdrop of constantly evolving circumstances, including by considering risk factors (e.g., about global macroeconomic uncertainty generally and disruptions to business operations specifically) and earnings guidance (e.g., the accuracy of previously issued guidance and whether and when to issue additional guidance).
- 3. Insider Trading.** [On March 23, 2020](#), the co-directors of the SEC's Division of Enforcement issued a public statement warning of the potential increased prevalence of insider trading as a result of COVID-19: "Given these unique circumstances, a greater number of people may have access to material nonpublic information than in less challenging times. Those with such access – including, for example, directors, officers, employees, and consultants and other outside professionals – should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading." While pre-existing Rule 10b5-1 trading plans will provide an affirmative defense against accusations of insider trading, creating or modifying such plans during this turbulent period

presents heightened risks, because Rule 10b5-1 plans can be created or modified only when the insider is not aware of material non-public information (MNPI), and the existence of MNPI is far more likely than normal in light of the disruptive force of COVID-19. Similarly, while it is typically best practice to enter into a Rule 10b5-1 plan during an open trading window under a company's insider trading policy, traditionally open trading windows may no longer be open as a result of MNPI relating to COVID-19.

**4. Risk Mitigation.** With all the challenges companies and their boards are facing, preparation for litigation or demands to inspect books and records may not be top of mind. But boards should remember to maintain corporate formalities during this period. For example, although virtual communications naturally will increase during the COVID-19 pandemic, boards still can and should maintain corporate formalities to memorialize their decisions; otherwise directors may find themselves on the receiving end of broad litigation-style requests for their electronic data instead of the discrete set of corporate books and records that ordinarily suffice under Delaware law. And boards should try to ensure that their minutes (or other board materials referenced in or attached to the minutes) explicitly refer to COVID-19 issues when discussed and reflect their thoughtful consideration of those issues.

Please reach out to Goodwin's [M+A/Corporate Governance](#) team to review or continue the discussion.

\* \* \*

Also visit Goodwin's [Coronavirus Knowledge Center](#), where firm lawyers from across the globe are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

---

## CONTACTS:

### **Deborah S. Birnbach**

Partner

+1 617 570 1339

[dbirnbach@goodwinlaw.com](mailto:dbirnbach@goodwinlaw.com)

### **Lisa R. Haddad**

Partner

+1 617 570 8311

[lhaddad@goodwinlaw.com](mailto:lhaddad@goodwinlaw.com)

### **John T. Haggerty**

Partner

+1 617 570 1526

[jhaggerty@goodwinlaw.com](mailto:jhaggerty@goodwinlaw.com)

### **Adam Slutsky**

Partner

+1 617 570 8243

[aslutsky@goodwinlaw.com](mailto:aslutsky@goodwinlaw.com)

---

© 2020 Goodwin Procter LLP. All rights reserved. This informational piece, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP, Goodwin Procter (UK) LLP or their attorneys. Prior results do not guarantee similar outcome.

Goodwin Procter LLP is a limited liability partnership which operates in the United States and has a principal law office located at 100 Northern Avenue, Boston, MA 02210. Goodwin Procter (UK) LLP is a separate limited liability partnership registered in England and Wales with registered number OC362294. Its registered office is at 100 Cheapside, London EC2V 6DY. A list of the names of the members of Goodwin Procter (UK) LLP is available for inspection at the registered office. Goodwin Procter (UK) LLP is authorized and regulated by the Solicitors Regulation Authority.

**IRS Circular 230 Disclosure:** To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this informational piece (including any attachments) is not intended or written to be used, and may not be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.