

Restructuring:

Top Ten Questions For Boards to Consider During a Down Cycle

Board Decision Making in a Down Cycle

The decision making process undertaken by the Board of Directors¹ always requires “good governance” and adherence to the rules of the road requires even more vigilance in these unprecedented times. Here are ten questions for Boards to consider as they navigate complex issues in the down cycle surrounding COVID-19.

¹ For limited liability companies, references to the Board of Directors is to the Board of Managers or Managing Member, as applicable, and for partnerships, the general partner or managing partner.



Question 1

What Is the Role of the Sponsor, Directors and Management?

- The Board of Directors continue to govern, consistent with the companies' charter documents, and delegation to Management, but adherence to the process of Board decision making requires heightened attention by the Sponsor, the Directors and Management.
- Sponsors, Directors and Management will be called upon to seek out and review more information, dig deeper in their analysis, and meet more often.
- Fiduciary Duties continue to apply. Sponsors have dual fiduciary duties to the Sponsor's investors along with any controlling shareholder duties.
- Directors and Management have fiduciary duties of care, loyalty and good faith.
- When a company is insolvent, Sponsors, Directors and Management should focus on exercising reasonable, data driven, vetted judgment to maximize the value of the entire enterprise as a whole for all stakeholders.

Question 2

Should We Have More Board Meetings?

- Yes, during any period of stress, and particularly in the daily changing COVID-19 environment, it is critical to hold Board meetings often so that real time information can be considered, diligence can be undertaken, input from experts obtained, and reasoned data driven analysis can proceed.

Question 3

Should We Have Detailed Board Presentations and Minutes?

- Board meetings to include comprehensive agenda topics, Management and advisors written presentations, and other pertinent legal, operational and financial documentation.
- Minutes to include the agenda, presentations, documents provided, and a notation of participants, subjects covered and duration, but avoid unnecessary adjectives and adverbs, or transcript like detail.
- Be consistent with the company's public disclosures.

Question 4

What If a Director Resigns?

- Resignation itself does not breach any fiduciary duties, unless it causes immediate harm, but a Company cannot be in a position of not having a functioning Board or being left in control of unqualified persons. The Company needs a functioning Board to make decisions regarding restructuring options.
- Resignation does not change the historical record and any claims that may arise from past actions.
- Resignation can create public relations issues with stakeholders.

Question 5

What Is the Role of Independent Directors?

- Provide credibility and neutralizing conflicts, particularly in connection with self-dealing transactions, and controlling shareholder transactions, and provides support for entire fairness standard (fair process and price).
- Burden shifting to plaintiff if the transaction was negotiated by a special committee of independent and disinterested directors.

Question 6

What Red Flags Should Directors Focus On?

- Declining financial metrics, potential covenant breaches, adverse macro-economic factors, regulatory issues, litigation, burdensome contracts/licenses, audit concerns.
- Transactions with Insiders.
- Conflicts of interest.
- Absence of Independent Directors or a Special Committee.
- Absence of current, detailed Management analysis and input from outside advisors.
- Absence of comprehensive and documented regular meetings.

Question 7

What Should We Ask Management to Do?

- Provide detailed and regular reporting, identify risk factors and mitigation strategies and implement procedures to implement the same.
- Provide detailed plans to address health and safety of all stakeholders and understand the risks facing the company relating to COVID-19.
- Prepare on a regular basis business plan and financial plan updates as circumstances evolve.
- Review all strategic opportunities, including potential acquisitions, divestitures, financings, sales.

Question 8

What Advisors Do We Need?

- Legal. Financial. Operational. Industry Experts.
- Sooner rather than later.
- Legal counsel should attend all Board meetings and make presentations where appropriate.

Question 9

When Should We Engage with Stakeholders?

- Well in advance of an impending business issue, risk or default.
- Engaging key stakeholders at an early stage is vital.

Question 10

What Is the Scope of Privileges and Who Can We Talk to?

- The scope of the attorney-client privilege is complex and fraught with risk of waiver.
- Generally applies to Board members. May extend to former Board members.
- Heightened risk of waiver – communications with outside Directors; portfolio company counsel and Board members; Special committees; between Board members.
- Communications should be formal and emails, text messages and social media should be avoided.
- In bankruptcy, trustee holds the privilege and may waive it.
- Board member considering potential resignation should consult personal counsel.

Contact Us

We stand ready and able to help you think through these questions and position you for the best possible outcome.

Financial Restructuring



Michael Goldstein
Co-Chair, New York
+1 212 813 8840
mgoldstein@goodwinlaw.com



William Weintraub
Co-Chair, New York
+1 212 813 8839
wweintraub@goodwinlaw.com



Gregory Fox
Partner, New York
+1 212 459 7348
gfox@goodwinlaw.com



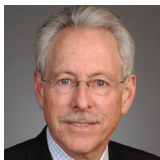
Howard Steel
Partner, New York
+1 212 459 7412
hsteel@goodwinlaw.com



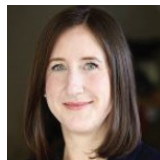
Céline Domenget Morin
Partner, Paris
+33 (0)1 85 65 7180
cdomengetmorin@goodwinlaw.com



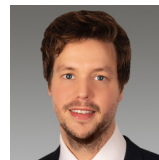
Simon Thomas
Partner, London
+44 (0) 20 7447 4860
stthomas@goodwinlaw.com



Daniel Glosband
Of Counsel, Boston
+1 617 570 1930
dglosband@goodwinlaw.com



Kizzy Jarashow
Counsel, New York
+1 212 459 7338
kjarashow@goodwinlaw.com



Harry Ghillemyn
Counsel, Luxembourg
+352 27 86 67 76
hghillemyn@goodwinlaw.com



GOODWIN