Crisis Management and the Board of Directors

This outline should be used in conjunction with our memo
Risk Management and the Board of Directors

October 2021

Role of the Board in Crisis Management

- **The Board should encourage crisis preparations**
    - The Board should be carefully attuned to the risk profile and vulnerabilities of the Corporation with a view toward anticipating and preparing for potential crises
    - Work with management to identify key risks and vulnerabilities and understand how management is assigning responsibilities
    - Meet with external advisors as needed
    - Ensure the Corporation has formed crisis response teams and understands who will do what
    - Regularly review crisis response plan(s) with management and advisors
    - "Tone at the top" can be important in a crisis; reputation for good citizenship, a strong compliance culture, transparency and productive engagement with stakeholders build reservoirs of goodwill that can be helpful in a crisis
- **The Board should understand its role in the Corporation's response to crises**
    - Each crisis is different, but in most instances, when a crisis arises, directors are best advised to manage through it as a collegial body working in unison with the CEO and management team
    - While special committees with separate advisors can be situationally appropriate, they also risk dividing the Board and excluding important perspectives from key decisions; accordingly, such committees should be created with caution and only in cases of legal necessity or when the benefits clearly outweigh the potential harms

- Once a crisis starts to unfold, the Board and the CEO need to be proactive and provide careful guidance and leadership in steering the Corporation through the crisis
- If there is credible evidence of a violation of law or corporate policy, the allegation should be investigated and appropriate responsive actions should be taken
- The Board, however, should be mindful not to overreact, including by reflexively displacing management or ceding control to outside lawyers, accountants or consultants
- The Board should ensure it is fully informed and aware of the flow of information and all aspects of the crisis and the response

- **In the aftermath of a crisis, the Board should regularly assess with management the Corporation's preparedness for future crises and any "lessons learned"**

Goals of Crisis Management Plan

- In the short-term, the goal of the Board and management is to ensure the continuity of core business operations
- In the long-term, if a crisis is handled well, the Corporation will emerge in one piece, its operations still intact and reputation on the mend, with the opportunity to incorporate "lessons learned"
- If handled badly, the Corporation can teeter on the brink of failure, lose important stakeholders, suffer enormous financial costs and reputational damage
- Preparation is critical to effectively managing a crisis

Preparing for a Crisis

- **Management should establish core crisis teams, develop crisis response plans and define roles and responsibilities in a crisis situation**
    - Corporate leadership: Chairman/CEO/Lead Independent Director (with the Board apprised when escalation is appropriate)
    - Key internal leaders below the CEO
    - General Counsel and outside legal advisor
    - Public Relations, Investor Relations and internal communications

- Project-specific specialists
  - Relevant specialist (*e.g.*, cybersecurity, accident engineer, product scientist)
  - Accountant
  - Industry consultants
  - Financial advisor where relevant (not necessary to retain one in advance, but advisable to have someone in mind)

- **The Board and management should consult with appropriate external advisors during "peacetime" regarding**
  - Potential threats
  - Legal and financial capacity to withstand threats

- **Management should develop a communication protocol in the case of a crisis**
  - Speak with a single, trained voice
  - Create up-to-date "team list" with 24/7 contact information
  - Refer any investment and financial community communications to the CEO, CFO or Director of Investor Relations
  - Refer any media communications to the Director of Corporate Communications

- **Advance preparedness is essential**
  - Management and the Board must be well informed
  - Management must be prepared to respond

- **Information is power**
  - The Board and management should create a **risk-aware culture** in which problems are anticipated and recognized in a timely manner
  - Management should regularly review:
    - Information and control systems (at least annually)
    - Legal profile (at least annually)
    - Shareholder base (continuously)

        - Financial and business flexibility (consideration of value-enhancing alternatives)
    - Avoid self-inflicted crises
        - Stop any bad practices and/or illegal activities as soon as recognized

- **Learn from your competitors—including from their mistakes**

- **No single crisis response plan template fits all crises, but there are predictable patterns in the way most crises unfold**
    - Where possible, anticipate foreseeable kinds of crises
    - Custom tailoring is the best prescription

<u>**Responding to a Crisis**</u>

- **All external communications should flow through the CEO; the Board should not speak on behalf of the Corporation**

- **Early response is critical—management should assemble the right crisis team immediately**

- **The Board should stay up-to-date on new developments and oversee management's response**

- **The Board and management should assess the Corporation's grasp of the relevant facts**
    - Investigate facts further, if necessary, including through use of outside consultants

- **Management should regularly brief the Board and relay material information**
    - The CEO should confirm for the Board that a team is in place and inform the Board as to next steps
    - Key Board leader(s) should be given interim updates, as appropriate, in between regularly scheduled meetings
    - As needed, special Board meetings should be scheduled

- **Management will need to engage openly and actively with key stakeholders** (*e.g.*, employees, shareholders, customers, suppliers and regulators)
  - The Corporation should evaluate the likely effect of a statement on all constituencies, including regulators and potential litigants as well as the public
  - Avoid communicating mixed or inconsistent messages
  - Use a pre-designated spokesperson or control group to deliver the public message
- **Be cautious about publicly committing the Corporation to a definitive position at the outset of a situation, other than confirming the Corporation takes the matter seriously**
- **Maintain and monitor Corporation morale**
- **The Corporation should seek to maintain control of the situation and avoid over-reaction**
  - Internal investigations should be designed to uncover the relevant facts
  - Think ahead—one problem often leads to another
  - Analysis, yes, but not paralysis
  - Maintain the right balance between responsiveness and maintaining control
    - Stay in the driver's seat as much as possible
- **The Board and management should remain focused on the issue at hand**
  - Limits to the investigation should be carefully set and reset if necessary
  - Important to stay focused and solve the immediate problem causing the crisis without creating additional problems
  - After the crisis has been contained, consideration can be given to a broader-scale compliance audit
- **Credibility with regulators and prosecutors is critical**
  - Cultivate a reputation for integrity and compliance

- Under the current enforcement regime, demonstrations of extraordinary cooperation may be rewarded—consider contacting regulators at an early stage
    - Avoid giving detailed factual explanations until the Corporation has a firm grasp of the facts
    - The goal is to demonstrate that the Corporation and regulators are on the same side—both want to stop any wrongdoing, take corrective action and engage in appropriate remediation

- **Management should guard attorney-client privilege**
    - Under DOJ's Prosecution Principles, cooperation credit does not depend on waiver of privilege
    - SEC's Enforcement Manual also provides that Staff should not ask for waiver of privilege

- **Management should resist the urge to discipline too early**
    - Impulse to discipline reflexively should be resisted
    - Discipline is often more wisely one of the last steps in an investigation
        - The Corporation should not act without full information
        - Strong discipline may alienate other employees whose cooperation would be valuable
    - Consider bringing in a settlement specialist when there are numerous claimants

<u>Recovery: After the Crisis</u>

- **When the smoke clears, the Board should work with management to learn from experience**
    - Openly assess responsibility and accountability
        - Information reporting and control systems
        - Response structures
        - Prevention systems
    - Revitalize, revise and renew key elements of corporate culture and risk management

- **The Corporation should evaluate ways to address any negative reputational impacts**
    - With customers and suppliers
    - With regulator(s)
    - With the investment community and shareholders
    - Take steps to restore employee morale
- **No corporation is crisis-free—the Corporation is not alone**