

Client Alert

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Should the Board of Directors Create a Special Committee to Oversee the Corporation's Response to the Pandemic?

In recent years, discussions of corporate governance best practices have included the pros and cons of having a separate Risk Committee of the Board of Directors. While there has been increased focus on the Board's oversight of the corporation's assessment and control of risks, it is not always clear that a Risk Committee is the best approach for non-financial institutions. Often, the assessment and control of multiple types of risks is handled better if spread among several existing committees instead of being assigned to a newly created Risk Committee. Dividing responsibility among multiple committees can make better use of the expertise of all Board members in the oversight of the wide variety of risks facing the corporation. For example, financial and accounting risks fit naturally in the Audit Committee while oversight of governance and reputation risks should fit well with the Nominating and Governance Committee and compensation and other employee benefit related risks are the natural province of the Compensation Committee. Creating a separate Risk Committee also increases the scheduling challenges that Boards would face by adding another Board committee, noting the time constraints that many Boards, and especially Boards with a small number of directors, already encounter with their existing committee structure.

Thus, Board oversight is contextual and Risk Committees do not provide a one-size-fits-all solution. In the context of the current COVID-19 pandemic, however, an increased focus on Board oversight, and the creation of a good record of Board oversight, is especially important. In that unique context, many Boards may find it advantageous to establish a Special Committee to oversee the corporation's response to the multiple and complex challenges presented by the pandemic. In more normal times, a Board and its committees may be able to exercise proper oversight while meeting, say, five or six times a year. But for many companies, that schedule is unlikely to be an option today as the corporation must deal with daily challenges that are important, multi-faceted, filled with uncertainty and constantly evolving. To confront these challenges, some form of weekly or even more frequent Board or committee oversight may be appropriate.

Many Boards may find themselves stretched in exercising active oversight right now without increased reliance on one or more committees. While more frequent Board updates seem essential, with most Board members likely already occupied fully trying to address the pandemic in other contexts, it may not be practical to convene the Board but every so often. While delegation of the Board's oversight responsibilities to one or more existing committees is an option, it may not be the best option. Establishment of a Special Oversight Committee may give the Board and the corporation a better opportunity to get the benefit of Board members who collectively are best suited to exercise oversight in this unique set of circumstances. Such a committee could be composed of those Board members who are in the best position to participate in conference calls frequently and on short notice. Use of a Special Committee also would enable the Board to select a group of committee members whose combined experience and expertise best qualify them to address the special challenges that the pandemic presents for the corporation. In addition, the combination of more frequent Board meetings and the establishment of such a committee would provide an excellent framework for providing high quality corporate oversight as well as a demonstrable record of such oversight, which record may be important in years to come as corporations deal with the fallout of the pandemic.

Of course, the law does not require a Board to form a committee to oversee a crisis. It is also important to remember the proper delineation of roles between the Board and management. The issue is how each Board can best discharge its fiduciary duties. Ultimately, the optimal approach for each Board will depend on the particular circumstances facing the corporation, including the extent to which the corporation is being affected by the pandemic (including whether it is facing an existential threat), the number of directors and their experience, the number of Board committees already in place, the ability of the directors to devote sufficient time to overseeing risk, and management's ability to manage risk, among other things.

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