

Checklist

Director's Duty of Oversight in the Wake of Covid-19

Thomas Brown, Gregory Demers, Deanna Minasi,
and Christopher Nienhaus, Ropes & Gray

**Bloomberg
Law**

[Read Professional Perspectives](#) | [Become a Contributor](#)

Reproduced with permission. Published February 2021. Copyright © 2021 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please contact permissions@bloombergindustry.com

Director's Duty of Oversight in the Wake of Covid-19

Contributed by *Thomas Brown, Gregory Demers, Deanna Minasi, and Christopher Nienhaus, Ropes & Gray.*

Key Considerations for Directors Navigating Crisis

Whatever the particulars of the approach a company has to managing the significant financial and operational disruptions that Covid-19 may continue to cause, a defined, regular reporting structure between a responsible officer and the Board will be critical to defending against *Caremark*-like claims. In light of the courts' heightened focus on directors' duty of oversight and the increased risks associated with the ongoing Covid-19 pandemic, directors should consider the following guidance when discharging their obligations to implement and monitor reporting systems and controls:

1. Implement Reporting Systems and Controls

Each company's enterprise risk management system must include adequate risk reporting systems and controls. These systems and controls should be tailored to the company's industry and operations and must account for applicable laws and regulations. The Covid-19 crisis also demands that each company implement systems and controls to monitor risks associated with the pandemic, taking into account public health regulations and guidelines issued by federal agencies and state and local municipalities. Boards will need to be actively engaged in establishing these new protocols and ensuring that they are appropriately adapted to meet the needs of the company, its customers and its employees throughout the evolving crisis. And there should be a clearly defined reporting structure between a responsible officer and the Board.

2. Develop a Risk Reporting Protocol

The board should develop a protocol to guide management regarding risk reporting. Pursuant to this protocol, risks should be categorized and regularly reported to the board by senior management. The board may also form special committees to more closely monitor recognized risks, and would be well advised to form a committee established specifically for monitoring and reporting risks associated with Covid-19, many of which will be novel risks with significant economic and non-economic implications.

3. Monitor Company Operations

The board should remain apprised of identified risks and seek regular status updates on remediation efforts. The board should also ensure that management complies with all applicable reporting requirements. Issues may arise during the Covid-19 crisis that require immediate attention and expedited decision-making. Staying actively in the company's evolving risk profile and remediation efforts will help ensure that directors make informed decisions regarding a course of action during the crisis.

4. Meet Regularly to Consider Changes to the Company's Risk Profile

Regular meetings to discuss the company's risk profile can help the board remain apprised of risks that exist within the company, and reduce liability if risks are not timely raised. Such meetings are particularly important if there are material changes to the company's operations or applicable laws and regulations, and they are critical in light of the developing government regulations and guidelines related to Covid-19.

5. Document Risk Reporting and Monitoring Efforts

Risk reports from senior management should provide sufficient detail on risks and compliance issues as well as the status of remediation efforts. In the Covid-19 era, this includes information regarding infections or deaths of employees or customers, the status of company facilities and supply chains, compliance with government requirements, threats to the company's cybersecurity, and liquidity constraints. Board meeting minutes should reflect discussions concerning risk reporting, management's remediation efforts, and authorization regarding external risk and compliance reporting.

6. Ensure Sufficient Support and Resources

The regulatory landscape of the Covid-19 response may continue to evolve at a rapid pace. The board should ensure they have sufficient support and resources, including outside counsel, to help navigate the developing government requirements and guidelines and ensure compliance with their oversight responsibilities.

7. Regularly Review Risk Reporting Systems and Controls

While the board should review the company's reporting systems and controls on an annual basis to determine if updates are necessary to ensure accurate risk reporting and monitoring, reporting systems and controls related to Covid-19 must be reviewed and evaluated on a more frequent and regular basis.