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## Top 10 Takeaways

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# SESSIONS

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## **Ready, Set, Zoom: How COVID-19 is Impacting Business Litigation**

**Andy Wronski**, Partner, Foley & Lardner LLP

**Ann Marie Uetz**, Partner, Foley & Lardner LLP

**David Frank**, Vice President, Assistant General Counsel Litigation, Fiserv

## **The Rapidly-Changing Landscape of the Board's Role in Overseeing Corporate Compliance**

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**Rohan Virginkar**, Partner, Foley & Lardner LLP

**Mary Huser**, VP, Deputy General Counsel, Risk and Regulatory, Airbnb

## **The Board's Role in Evaluating Third Party Cybersecurity Risks**

**Jennifer Urban**, Partner, Foley & Lardner LLP

**Mike Overly**, Partner, Foley & Lardner LLP

**Angela Johnson**, Chief Information Security Officer and Vice President of Supply Chain, Children's Hospital of Wisconsin

**Che Bhatia**, Vice President, Cyber Resilience, Aon's Cyber Solutions (formerly Stroz Friedberg)

**Yusuf Cassim**, Vice President, Associate General Counsel, Charles Schwab & Co., Inc.

## **Audit Committee Hot Topics**

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**Ellen Richstone**, Director, eMagin Corporation, Orion Energy Systems, Inc., and Superior Industries International, Inc.

**Jennifer Cavanaugh**, Audit Partner and the National Professional Practice Director, Grant Thornton LLP

**William Hall**, Entrepreneur, General Partner, Procyon Advisors

## **Beyond Bunny Hugging – ESG, Investor Expectations, and Reporting Trends**

**Pete Tomasi**, Of Counsel, Foley & Lardner LLP

**Michael Kirwan**, Partner, Foley & Lardner LLP

**Laura Clark**, Chief Financial Officer, Rexford Industrial Realty, Inc

**Brendan Sheehan**, VP-Senior Credit Officer, Moody's Investors Service

**Shontra Powell**, Global Director - Strategic Planning, Johnson Controls Inc.

## **ROUNDTABLES**

### **What Does the Election Mean to Your Board?**

**Scott Klug**, Director, Public Affairs, Foley & Lardner LLP

**Dennis Cardoza**, Director, Public Affairs, Foley & Lardner LLP

**Mike Capuano**, Director, Public Affairs, Foley & Lardner LLP

### **Diversity and Inclusion: Beyond the Boardroom**

**Jeanne Gills**, Partner, Foley & Lardner LLP

**Anat Hakim**, Senior Vice President, General Counsel, Eli Lilly and Company

**Sharon Barner**, Vice President, General Counsel and Corporate Secretary, Cummins Inc.

**Maria Green**, Independent Director, Littelfuse

**Richelle Parham**, Managing Director, WestRiver Group

## Ready, Set, Zoom: How COVID-19 is Impacting Business Litigation

- 1. More Delays:** COVID-19 ground courts to a halt, but as the extent of the crisis became clear, judicial activity slowly began to resume through the aggressive use of technology to conduct operations. As a result, courts face a massive backlog of civil cases, many of which do not have any defined schedule. For the foreseeable future, cases will take longer to prepare and get to the finish line.
- 2. Increased Reliance on Technology:** Technology has played a key role, as virtual depositions and court proceedings have quickly become the norm. Indeed, many practitioners, including judges, believe the increased reliance on video-conferencing technology is here to stay.
- 3. Fewer Jury Trials:** Although video-conferencing technology is suitable for certain aspects of civil litigation, there is an overwhelming consensus that jury trials must be conducted in-person. Only a few jurisdictions have experimented with jury-trial-by-video, and the results were inconclusive. Thus, if a case is set for trial, and plaintiff has made a jury demand, all involved will have to hurry up and wait.
- 4. Less “Perry Mason” Moments:** What differentiates a litigator from a trial lawyer is the ability to build a rapport with a witness, judge, or juror, read verbal and non-verbal cues, and adjust quickly and effectively on the fly. The trend toward remote hearings and bench trials, however, forces a lawyer to persuade in two dimensions rather than three, meaning it is much more difficult to be an effective advocate. As such, the most important and hotly contested cases will likely still be litigated face-to-face.
- 5. Less Settlements:** The backlog of cases and delay has forced many litigants into mediation, and major providers (JAMs and AAA) are aggressively marketing their virtual mediation products. Although there are some benefits to virtual mediations (easier to coordinate schedules, greater availability to participate, etc.), there is reason to believe parties may reach settlements less often. For example, the lack of personal time invested (i.e., no travel), increased level of distraction, lack of inter-personal connection and possible technological issues combine to bring the effectiveness of virtual mediation into question.
- 6. More Contract and Force Majeure Litigation:** COVID-19 significantly disrupted key supply chains and other commercial relationships. As a result, contractual force majeure declarations became the norm, and many companies found themselves on both ends of the issue—seeking to enforce the contract, while also excusing their own lack of performance. Without a doubt, in the wake of the pandemic, many companies are well advised to scrutinize their contractual force majeure provisions in an effort to reallocate risk.
- 7. More (Or Less?) Bankruptcy Filings:** Generally, COVID-19 has not resulted in a spike of corporate bankruptcy filings. With that said, there has been an increase in hard hit industries, such as retail, fast casual dining and hospitality. An infusion of government cash and cooperative lenders have staved off the worst for now; however, the honeymoon will not last forever. Without a sustained economic recovery, increased bankruptcy activity seems inevitable.
- 8. More (But Different) Employment Litigation:** COVID-19 has spawned a whole host of new employment considerations. Employers that operate across the United States must analyze a variety of state and local requirements that are ever evolving. Some in-person work considerations include physical distancing, testing, cleaning, and mask requirements. Additionally, employers must consider OSHA requirements, as well as FFCRA and other leave issues. At bottom, seek legal counsel early and often.
- 9. More Commercial Insurance Claims:** Business interruption litigation has exploded. More than 1,250 cases have been filed in state and federal courts with more on the way. Because the outcome of such claims turns heavily on the policy language, it is imperative to review each policy to determine the viability of any legal claim.
- 10. More Need for Regular and Effective Communication between Outside and Corporate Counsel:** Close communication and partnership between outside and corporate counsel are more important than ever, and each must appreciate the importance of key commercial relationships and business pressures precipitated by an unexpected dispute with an uncertain outcome. As such, outside and corporate counsel must share reasonable expectations for budgets, scheduling, goals, and outcomes.

## The Rapidly-Changing Landscape of the Board's Role in Overseeing Corporate Compliance

1. The “business-as-usual” approach to the board’s oversight of corporate compliance program no longer applies. Enforcement authorities and the courts are expecting directors to proactively implement an oversight system and then monitor it; and senior management to conduct a thorough risk assessment and adopt a compliance infrastructure addressed to the key risks identified by that assessment.
2. Failure by the board to exercise proper oversight has consequences – and can result in shareholder derivative and class action lawsuits. Shareholders are increasingly focused on ensuring the company’s risk disclosures are tailored to the specific risks faced by the company and reflect the actual consequences if those risks were to materialize.
3. Boards should be in regular dialogue with company management about compliance matters, including to understand how the company deals with issues such as #MeToo and diversity and inclusion.
4. How the board and senior management communicate about – and model – ethics and compliance speaks volumes about a company’s culture of compliance and how effective a corporate compliance program is likely to be.
5. An effective compliance program should not only try to prevent violations of law and company policy, but must also have processes in place to detect and appropriately respond to potential violations.
6. An “effective” compliance program doesn’t mean preventing and detecting every violation, but companies must constantly evolve and improve their compliance programs in order to be effective.
7. There is no “one size fits all” approach to compliance programs; rather, the business realities and individualized risks faced by each company should guide how its compliance program is structured and focused.
8. Companies should leverage data in order to assess and demonstrate the effectiveness of compliance programs and/or specific processes or controls.
9. Unlike in years past, ethical lapses are now the top reason that CEOs are terminated or are forced to resign by their boards.
10. The guiding principle of successful and effective corporate compliance programs is simple: “Always Do The Right Thing.”



## The Board's Role in Evaluating Third Party Cybersecurity Risks

- 1. Scope:** It is critical for the board to understand and approach cybersecurity as an enterprise-wide risk management issues – not just an IT issue. The board should set the expectation that management will establish this enterprise-wide risk management framework, including ensuring that the effort will be appropriately budgeted and staffed, not just with adequate resources, but with diverse resources that can address each unique business unit or service area of the enterprise.
- 2. Engagement:** Active engagement from the board is a key component to successful enterprise-wide risk management. The board is in a unique position to approach risk from a high-level, allowing the board to see each component of the enterprise and how they come together. Creating and maintain access to appropriate cybersecurity expertise and identifying and understanding the specific legal implications of, and financial exposure to, cyber risks is critical. This means ensuring that cyber risk management is given regular and appropriate time on board meeting agendas.
- 3. Criticality:** Understand and take stock of what systems, solutions, and vendors are critical. Understanding the criticality of particular vendors and/or services can help inform the company as to how to address the risk presented (i.e., whether the company should accept, mitigate, or transfer such risk.). Critically assessments will also allow the company to tailor its due diligence strategy, termination and transition plans, and contracting requirements as necessary to effective and efficiently address specific cyber risks.
- 4. Due Diligence:** Thorough, focused, due diligence is critical to identifying third-party cybersecurity risks, and can be a company's first line of defense to cyber risks. The board should have an understanding of the company's due diligence program, and should ensure that due diligence goes beyond on-boarding and continues on an ongoing basis over the course of the vendor relationship. Further, due diligence should not be one-size fits all, due diligence efforts should take into consideration the relative criticality of, and risk presented by, specific vendors and the services they provide.
- 5. Accept, Mitigate, Transfer:** Once due diligence has uncovered potential cyber risks, the board must assess whether the company should accept, mitigate, or transfer that risk.
- 6. Contracting:** Effective contracting can offer the company ways to both mitigate and transfer cyber risk. For example, ensuring a vendor contract includes appropriate warranties, liabilities and insurance requirements can help transfer some risk to the vendor or other third parties (i.e., insurers). Similarly, including appropriate prohibitions or limitations on subcontracting and/or assignment can help mitigate fourth-party risk.
- 7. Transferring Risk:** When looking to transfer risk, the board should consider not only the risk posed by specific vendors and services, but whether the company itself is taking on unnecessary internal risk. The board should consider whether there are processes the company is doing-in house that could be outsourced and shifted to third-parties.
- 8. Termination/Transition:** It is important to consider not only up-front risk, but what risks may be presented by a vendor or the services they provide in the event that those services end or are terminated. This requires both internal assessment (i.e., whether the company has a contingency plan for critical vendors) and external mitigation efforts (i.e., ensuring that appropriate transition-services are included in critical vendor contracts).
- 9. Cloud Sourcing:** The board should understand how services are delivered, whether via cloud or on-premises, and the different challenges that each method presents. Risk management efforts should be customized to these unique challenges and approach cloud and on-premises vendors and services differently. A key factor to this customized approach is understanding the unique cyber risks presented by cloud sourcing and key areas where those risks can and should be mitigated (or avoided), including service expectations, contracting practices, data considerations, and regulatory issues.
- 10. Auditing/Assessment:** Continuing to effectively assess and address third-party cybersecurity risks requires ongoing maintenance of the company's risk management framework. The board is in a key position to approach risk mitigation in a forward-thinking way, as the board is able to see beyond current company operations and anticipate future needs. The company's risk management framework must be regularly evaluated and updated as necessary to address new operations and new risks. The board can be a critical component to this auditing process, and should ensure that the framework continues to fit, and prioritize, the needs of the company as it continues to evolve.

## Audit Committee Hot Topics

- 1. Production:** After the initial challenges faced by companies at the start of the COVID-19 pandemic, many companies are now focused on balancing safety with the quality of products and services. Companies must place emphasis on how they get their product “out-the-door” while scrutinizing and managing their communications plan with everyone from their supply chain to their stockholders. With their involvement in enterprise risk management, audit committees should pay close attention to the interplay between the delivery of the company’s products and services and the ability of the company to continue to safely and efficiently meet such demand.
- 2. Fraud:** With a shift to working remotely, a company’s board, committees and management must be extremely diligent regarding its internal controls and processes. What used to be able to be corroborated in person by simply “walking down the hall” must be done digitally. Give thought to how procedures must change in a remote working environment and how to implement heightened levels of diligence by your company’s employees, including document flow, requests for payments, protection of sensitive and confidential information and how to prevent phishing and cyber threats.
- 3. Whistleblower Allegations:** Many companies are experiencing increased whistleblower complaints in the last four to five months. Not all allegations result in material issues, but each allegation must be thoroughly evaluated and procedures need to be implemented that allow the audit committee to assess the validity of these allegations remotely.
- 4. Going Concern:** Far from being a rubber stamp, audit committees must diligently focus on their company’s going concern analysis. Part of this analysis will focus on review of liquidity, impairment and other forecasts as mentioned directly below.
- 5. Conduct Forecasts:** In an age of uncertainty, differentiated forecasts for time, market, etc. are vital to looking at worst-case scenarios around your company’s liquidity position and ability to comply with its applicable debt covenants. Consider whether there are anticipated fundamental changes to the industry you are in and whether or not such changes need to be included in the forecasts. If necessary, bring in outside industry experts to assist with the forecasts as the past is no longer a predictor of the future. For companies that are acquisitive, conduct impairment forecasts to better understand current financial impacts of past acquisitions.
- 6. Full Board Participation:** The full board, and not just the audit committee, should be heavily involved in forecasting scenarios involving the next six months, nine months and year. Work of the full board should also be closely reviewed by the audit committee and with the assistance of the company’s independent auditors.
- 7. Work Closely with Auditors:** In the age of COVID-19, work especially closely with your company’s auditors to determine inputs for impairment tests and forecasts, provide backup for analysis quickly and assist with investigations. Prepare a plan with your auditor regarding your upcoming year-end audit and how such an audit will look in the age of the majority of your accounting department likely working remotely.
- 8. Increased Responsibilities:** Audit committees and boards are facing increased responsibilities and a heavier workload. With COVID-19 and environmental, social and governance hot topics, committees and boards are increasingly facing a lack of bandwidth. Consider increasing the frequency or length of meetings to allow the committees and boards to properly exercise their fiduciary duties. Now is not a time to create subcommittees – it’s time for boards and committees to roll up their sleeves and “get to work.”
- 9. Cybersecurity:** Preferably before needing to conduct an investigation, create a clear process with the right individuals and experts. Include external lawyers and auditors to help in the process as necessary. As part of developing your company’s process, consider in advance what your cyber insurance covers, what is currently in place to deter cybercrimes, and what your competitors and your industry are doing and train your employees once you have an established plan.
- 10. Internal Audit Function:** In the age of COVID-19, establish an “external” internal audit group. If your company has foreign operations, committee members and internal auditors may not be able to get to the location at issue due to health and safety or travel restrictions. Developing a group of onsite members of the internal audit group can act as the group’s eyes and ears in foreign countries.

## Beyond Bunny Hugging – ESG, Investor Expectations, and Reporting Trends

- 1. The Year of ESG:** U.S. and E.U. based public and private companies face a variety of formal and informal stakeholders with increasing interest in Environmental, Social and Governance (“ESG”) information. ESG considerations now play a significant role in consumer and investor decision-making as well as credit ratings.
- 2. In the U.S., the Investor is the Regulator:** Investors and customers are driving the path forward on ESG matters. Investors and customers demand data on ESG matters that is material, concrete and actionable and is more than just aspirational. Although the U.S. Securities and Exchange Commission (“SEC”) has adopted disclosure rules for mine safety, conflict minerals, and climate-related risks, the SEC has yet to implement significant environmental disclosure requirements. Relying on a principles-based approach, the SEC allows issuers to determine what is material and whether environmental matters are material to a particular issuer.
- 3. ESG Considerations Apply Enterprise-wide:** Under voluntary and E.U.-mandated ESG reporting frameworks, ESG-related governance for all corporate elements should be woven into the fabric of the corporate story. All functions within the organization should be aware of ESG metrics and their impact.
- 4. From Looking Back to Looking Forward:** ESG reports had historically been disclosed on a “point in time” or backwards-looking basis. However, ratings agencies and investors are increasingly looking for ESG matters to be forward focused, requiring scenario analyses and resilience discussions for risks and targets for improvement.
- 5. External ESG Standards May Predict Long-Term Performance:** To assist investors with determining the implications of ESG factors for a company’s long-term success, companies need to have meaningful ESG reporting practices. Investors, customers, supply chain actors and activists are demanding that companies adhere to external ESG operating standards and to report comprehensive ESG data and operating information on a variety of platforms.
- 6. Emerging Consensus for ESG reporting:** Existing reporting standards are numerous and are often quite different, presenting an “alphabet soup” of potential frameworks from which to choose. However, the Sustainability Accounting Standards Board (“SASB”) and the Task Force on Climate-related Financial Disclosures (“TCFD”) are beginning to emerge as the leading frameworks for reporting on ESG matters. BlackRock, Inc. has advocated for these two frameworks, as has the European Commission. The majority of NDI panel attendees utilize either TCFD/ SASB or the GRI reporting framework. MSCI and CDP are other separate reporting frameworks with some adherents.
- 7. Choice of Framework May Drive Outcomes:** The fragmentation of the various reporting frameworks can often lead to discrepancies in the grading of companies. Accordingly, companies should be aware of the differences between the frameworks (for example, ISS quintile scoring), as well as similarities (CDP/TCDF and GRI).
- 8. Still Room for Improvement:** Despite the emerging consensus, critics of current sustainability or social responsibility reports object to the selective nature of ESG reporting, the lack of transparency in how the data is derived and the inconsistency among issuers that prohibits a meaningful comparison of performance and risk factors.
- 9. Sustainability Still Matters:** Companies have reported that resources dedicated to ESG reporting have been protected from budget-cutting that other corporate departments experienced due to the economic downturn resulting from the COVID-19 pandemic, indicating that ESG reporting retains its importance even during an economic crisis.
- 10. Stay Tuned for 2021:** The Biden campaign advocated for increased climate risk reporting, and the incoming Biden administration is considering candidates for SEC chair that include advocates of mandatory ESG disclosures.

## What Does the Election Mean to Your Board?

### *Top 10 Takeaways and Implications from the Presidential and Congressional Elections:*

1. President-elect Joe Biden flipped Pennsylvania, Wisconsin, and Michigan – the three states that propelled Trump to the presidency in 2016. The Midwest flipped because of several key demographics, including working-class whites; conservatives in the suburbs; and black voters.
2. Picking up three seats in Georgia and North Carolina, Democrats will hold their majority in the House of Representatives.
3. House Republicans gained a net of at least seven seats to narrow their margins and poise themselves to possibly retake the House in 2022. Many pickups, including that of South Florida (FL-26, FL-27) and several of 2018's "Blue Wave" seats, came as surprise. Of the new Republican members elected, a record 17 are women.
4. The Senate will be decided by two Georgia races, both of which are headed to runoff elections in January. Currently, Republicans hold their majority at 50 - 48. Kelly Loeffler (inc-R) and David Perdue (inc-R) face challenges from Democrats Raphael Warnock and Jon Ossoff, respectively.
5. In the first 100 days of the 117th Congress and Biden Presidency, Democrats will prioritize legislation related to: campaign finance/good government reform; transportation stimulus; drug pricing; voting rights; sexual orientation and anti-discrimination; immigration reform; gender pay equity; gun safety; climate action; and healthcare expansion. President-elect Biden is more likely to work with Majority Leader Mitch McConnell (R-KY), as they are friends and worked together in the Senate.
6. As the Supreme Court is expected to uphold at least most of the ACA, Democrats will look to strengthening and expanding several key ACA measures, including the inclusion of a Public Option and expanding Medicaid in the 14 states that have not already done so.
7. There is bipartisan agreement in Congress that drug pricing must be lowered and surprise medical billing must be put to an end. The 117th Congress will reintroduce H.R. 3 "Elijah E. Cummings Lower Drug Costs Now Act" and H.R. 1425 "Patient Protection and Affordable Care Enhancement Act" to address these issues.
8. President-elect Biden ran on a platform for a pro-labor, pro-worker administration. He has pledged to create a Cabinet-level working group comprised of labor representatives to focus on union organizing and collective bargaining. To the extent to which that happens is yet to be determined, especially with control of the Senate being an undecided factor.
9. During the lame duck session, Republicans and Democrats in Congress will attempt to compromise on and pass an omnibus package of 12 spending bills in order to fund the government for FY2021 and avoid a government shutdown.
10. With the surge of COVID cases across the country and the statements from state and local government officials that they do not have enough money to administer upcoming vaccines, there may be pressure on Congress to act on a COVID relief bill before Biden takes office on January 20, 2021. Democrats continue to hold steady with \$2.4 trillion in spending as their starting point for negotiations with the White House and Republicans. Republican offers remain significantly lower – they cite the growing deficit and many doubt that an additional stimulus package is needed.



## Diversity and Inclusion: Beyond the Boardroom

1. Board diversity is becoming increasingly important to major investors like State Street Global Advisors because it is needed to meet Sustainability Accounting Standards and Environmental, Social and Governance Standards. As such, board diversity should be important to companies, too.
2. Along the path to securing a board seat, it is important to build and maintain relationships; know and highlight the mix of skills, expertise and experience you have; and look for opportunities to serve in positions that may lend themselves to becoming a board member.
3. Legislation to encourage, or even mandate, board diversity is gaining traction nationwide, as well as worldwide.
4. Companies' willingness to increase the diversity of the pool of qualified candidates will result in more diverse candidates being considered throughout the selection process and ultimately becoming board members.
5. Before embarking on a journey to sit on a corporate board, understand your current company's culture and whether your CEO is supportive of you serving on another company's board.
6. Diversity matters because it promotes creativity, encourages greater consideration of alternatives, and provides access to a wider range of perspectives
7. New directors should – among other things – (i) have a board-ready bio that distinguishes you, (ii) beware of trying to make drastic changes at the outset, (iii) learn the basics of the company, (iv) understand where you can provide the most value and (v) identify mentors.
8. Companies that do not prioritize inclusion may struggle to attract and retain top talent and younger workers.
9. Boards and management teams should be reflective of the people that they serve, and lack of diversity can result in leaders saying and doing things that could be detrimental to a company's stock or their own careers.
10. In order to improve board diversity, people of color who are represented in boardrooms must help search firms and organizations tailor their searches to recruit people of color and offer up the names of other minorities when board seats become available.



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