



2020 Earnings Seasons: A Board Leadership Opportunity

by Kathy Graham

SEC Financial Expert and Associated Banc-Corp, AIG Funds, Legg Mason Closed End Funds, and Hochschild Mining plc Board Director Eileen Kamerick, Deloitte Vice Chairman and National Managing Partner, Center for Board Effectiveness Deb DeHaas, and Legal Corporate Governance Expert and The University of Chicago's Michael J. Marks Professor of Law Todd Henderson offer their most important recommendations to boards for this year's earnings seasons.

1. Kamerick regarding FINANCIAL REPORTING:

"This year is anything but a routine time in terms of financial reporting. Management teams and audit committees are in the uncomfortable position of being exhorted by the SEC to provide as much detail as possible regarding future operating conditions and resource requirements, yet it's at a time when there are almost infinite numbers of variables and virtually nothing is certain.

Since the SEC is particularly focused on companies providing forward-looking information, firms will need to avail themselves of safe harbor rules for forward-looking statements, although the SEC has stated that it will not second-guess "good faith attempts" by companies to provide appropriately framed forward-looking statements.

Management and boards need to challenge themselves to be frank about how they are addressing, planning for, and taking steps to manage the effects of COVID-19, and their efforts need to extend far beyond typical disclosures. The regulatory bodies are urging companies to disclose detailed forward-looking information, which could not only be useful to investors, but would also "enhance valuable communication and coordination across our economy"¹ as industries and organizations work together to drive the recovery.

Boards now have an opportunity to strike a tone of leadership against the virus by addressing disclosure issues thoughtfully and proactively (while seeking counsel from their lawyers and auditors) in order to make a good faith effort to "get it right." The stakes have never been higher in terms of effective disclosure practices, but the road map does exist to operationalize management's disclosure practices.

The Management Discussion and Analysis ("MD&A") section in the quarterly 10Q filings requires that the company disclose the risks and opportunities for the company as viewed "through the eyes of management." Similarly, companies should pull together their disclosure committees from a broad cross-section of management to endeavor to do their best in describing—through management's eyes—what challenges they face and how they plan to surmount them. If successful, this effort could result in the dissemination of best practices that, in turn, could accelerate the defeat of the virus and hasten the economic recovery.²

2. Henderson regarding LEGAL:

"Remember that the intent of securities laws is to have large public companies release the information that they would

naturally disclose if they were a small private company.

Consider if there were only 10 owners in your company and a catastrophe strikes. You would tell them:

- How you were thinking of the new risks, then provide them with concrete steps to mitigate those risks.
- Your previous short-term and long-term forecasts, followed by the new short-term and long-term forecasts, how those forecasts have changed, and the key variables that caused those changes.
- That the information just shared is not perfect and could change since the company is experiencing an exogenous developing shock.
- That you will continue to keep them informed as changes occur.

This same type of messaging should be the communication flow of large public companies to their myriad stakeholders.”

3. DeHaas regarding ACCOUNTING/GOVERNANCE:

“Agility & Flexibility: Board and management are engaging more to meet fast-paced changing issues. Being thoughtful about processes and how best to work together can result in: 1) more informal interactions; 2) a review of what information is most important and when appropriate; and 3) a fuller utilization of Board/committee members’ unique skills/experiences, including their capabilities to be sounding boards for key management.³

Key Decision-making Criteria: Boards need to understand and ensure appropriate documentation of the assumptions and key criteria used in management decisions. They should work with management to determine how best to be transparent about these criteria with vital stakeholders. Some important questions to consider may include:

- What information haven’t we studied and who/where might we discover what that information/questions are?
- Are we being too slow to change? What innate tendencies, cognitive biases, or mental shortcuts are we unknowingly taking?
- Put aside today for a moment and focus on the recovery. What are the most likely future scenarios and how can we respond to capture potential opportunities in each one?
- What could go wrong, and if it does, what can we do now to avoid that scenario or minimize it?

Risk Oversight: The most critical risks have shifted significantly as a result of COVID-19. Identifying those key risks, understanding their potential impacts, confirming whether the full board or a committee will oversee them, and updating the Risk Factor Disclosures accordingly is essential. Given various work force challenges during this pandemic, it is particularly critical to address crucial risks involving IT security, cyber, supply chain/third parties, internal controls, and succession planning for key roles.”

Crisis communication standards state that in catastrophic events, leaders need to respond quickly with clear explanations of what the company is doing to manage operations, keep stakeholders safe physically and digitally, and detail the expected path to recovery.

With the immediacy of social media, providing correct information publicly quickly is key to taking charge of current and future perceptions of your company. These conversations result in more stakeholder cooperation, fewer negative regulatory and stakeholder reactions, and the greatest ability to contain damage while identifying opportunities for positive outcomes.

In every crisis lies an opportunity. Following Kamerick’s, DeHaas’, and Henderson’s recommendations offers Boards a leadership opportunity to guide their company’s communications throughout this year’s challenging earnings seasons.

¹ “The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19;” SEC Chairman Jay Clayton, SEC Director William Hinman, Division of Corporation Finance; 4/8/20; Public Statement at SEC.gov.

² For more information on this topic by Kamerick, read “Audit Contends With ‘Endless Variables’ on Covid-19,” Lindsay Frost, *Agenda*, 4/20/20; agendaweek.com.

³ For more information on enhancing agility and flexibility, read Deloitte “COVID-19 and the board: A chair’s point of view.”