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NEWSLETTER

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COVID-19: Board of Directors' Role and Challenges

COVID-19 has plunged the entire Swiss economy into a severe crisis. As the highest level of corporate leadership, the board of directors must confront the crisis' repercussions. Both the immediate fallout and aftermath of the crisis must be actively navigated. The board of directors choosing to remain passive and in the background during the crisis risks facing accountability issues. The crisis does not change the board of directors' responsibilities.

I. THE BOARD OF DIRECTORS' LEADERSHIP ROLE

The impacts of the COVID-19 crisis do not change the board of directors' duties and responsibilities. On the contrary, the board of directors must actively fulfill its leadership role during this crisis. Management and reporting cycles need to be adjusted. It is recommended to hold board of directors meetings in regular and shorter intervals. This may be done by way of audio or video teleconferencing or other equivalent communications media. If the executive management is not represented on the board of directors, the former's participation in these meetings would be considered best practice.

These board meetings focus on the COVID-19 crisis' impacts on the company, immediately required measures, along with business model and strategy reviews. Should the business model and strategy appear unsustainable, the requisite changes must be undertaken. This may also include the decision to partially or completely halt business operations.

Reporting and communications between the board of directors and executive management are to be intensified.

It is vital that the board of directors is regularly and frequently briefed on new developments and the corresponding impact on business operations by executive management during the periods between board meetings as well.

Especially during this time of crisis, it is recommended to record board meeting minutes in more detail and to document meeting discussions in a transparent and comprehensible manner. Furthermore, reporting and communications between the board of directors and executive management must be well documented.

It is the responsibility of the chairman, or of another member of the board designated by the board of directors, to ensure that the board fulfills its leadership and coordination roles.

II. FOCUS ON LIQUIDITY PLANNING

Liquidity planning takes on the highest priority. Cost structure adjustments frequently cannot keep pace with rapid drastic revenue reductions. This must be reflected in the overall liquidity planning as well as in the specific liquidity management measures.

The primary management measures consist of:

- Short-time work (i.e. reduced working hours)
- COVID-19 emergency and stop-gap loans
- Foregoing distribution of dividends, so long distribution has not yet been decided on in the shareholders meeting
- Crediting dividends already decided on in the shareholders meeting as assets, if need be involving subordination
- Subsidies and loans from shareholders and business partners
- Review of financing agreements for potential breaches of contract (e.g. default) as well as negotiations with banks and other lenders
- Termination of unsustainable business operations. This may involve massive staff cuts
- Negotiations with business partners and tax authorities regarding payment deferrals or other forms of financial relief (e.g. temporary rent decrease)
- No distributions of non-operating capital

III. OVER-INDEPTEDNESS AND RESTRUCTURING MEASURES

In case of impending over-indebtedness, the board of directors must, also in this time of crisis, act immediately by completing an interim balance statement regarding the going concern and liquidation values. This interim balance statement must be reviewed by an accredited auditor.

If the company's creditors' claims are covered neither by the going concern value nor by the liquidation value, the company is overindebted. In this case, the board of directors must immediately implement restructuring measures or file for bankruptcy with the competent court.

While liquidity considerations for the time being take highest priority, the board of directors nonetheless needs to keep a close watch on the potential issue of over-indebtedness. Therefore, timely contingency planning, involving the consideration of possible scenarios and restructuring measures, is advisable. A recommended step in this direction would be, for example, to complete monthly unaudited interim balance and profit and loss statements.

IV. RESIGNATION FROM THE BOARD OF DIRECTORS

Resignation from the board of directors generally is not a recommended course of action. Board members remain accountable for their conduct up to the time of their resignation and can thereafter still be held liable for acts or negligence that occurred during their tenure. The failure to act while an active member of the board can therefore not be remedied by resigning.

V. LIABILITY, RESPONSIBILITIES

If a member of the board of directors does not fulfill his/her responsibilities and duties, he/she is, in principle, personally liable.

The board of directors and executive management are jointly liable for damages caused by negligence or intentional breach of duty. Individual instances of breach of duty may further be subject to criminal prosecution.

Based on experience, liability issues primarily arise from failure to act, lack of involvement and conflicts of interest. If the board of directors makes reasonable decisions in a transparent decision-making process, based on appropriate information and without conflicts of interest, there generally is not a basis for liability claims.

VI. CONDUCTING OF THE ANNUAL SHAREHOLDERS MEETING

Due to the current prohibition to assemble, annual shareholders meetings may temporarily be conducted without the shareholders being physically present.

In case of a large number of shareholders, the use of independent voting proxies is the primary option. In case of a small number of shareholders, submission of votes by advance written declaration to the meeting's committee, or a video conference, during which shareholders can appropriately exercise their rights, are the primary options. The formalities concerning invitation to the shareholders meeting must be observed, particularly the providing of sufficient advance notice and proper listing of agenda items.

VII. CLOSING REMARKS

This crisis presents a challenging test of the board of directors' capabilities. The board must be proactive, fully assume its leadership role and be willing to make difficult decisions. Only in this way can the board of directors make its contribution to the company's survival and continued viability.

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