FOUR KEY AREAS IN M&A AND GOVERNANCE BOARDS SHOULD FOCUS ON POST PANDEMIC

By George Casey

ALTHOUGH WE HAVE NOT conquered the virus yet, we all hope that the world is gradually emerging from the global pandemic, one of the most challenging and uncertain times in our memory. As the economy has improved and companies are optimistic about their business, boards are reflecting on lessons learned from the pandemic and assessing the path forward for their companies.

Key Areas of Focus for Boards and Management

- Board members will remember for a long time the hectic early days of Covid-19 when the economy came to a grinding halt and markets experienced large-scale volatility. Some companies had well-developed contingency plans and started operating in emergency mode quickly. Other companies that could not expect the type of disruption that unfolded had to adjust their business model and develop an emergency plan within days. Now that boards can function again in a more normal way, it is a good time for boards and executive management to assess their preparedness for unforeseen developments and have a robust contingency plan in place. Boards and management should also refresh their companies' business plans, as the business plan and valuation based on it are key to assessing both friendly and unsolicited proposals. This is particularly important given the uncertainties caused by new variants and the resulting impact on business and economic environment.

- Market volatility in the early days of the pandemic forced many companies to defend against potential unwelcome attempts by activists to accumulate significant stakes at crash-level stock prices, which led to an increase in poison pill adoptions. Some defensive measures were embraced by shareholders, but some raised eyebrows and were challenged. Notably, the board of the Williams Companies was held by the Delaware Chancery Court in breach of fiduciary duties, and the poison pill it adopted was invalidated. The decision was a reminder that boards should review their defenses during quiet times, not when defensive tools need to be deployed in a battle for survival. Boards would be well advised to find a time later this year or in early 2022 to review them.

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- Contrary to what some expected, the pandemic did not put ESG on hold but pulled ESG considerations into a focal point as boards had to deal with the major impact of the pandemic on their employees, customers and communities. Climate-focused ESG brought headlines when an ESG activist won three seats on Exxon's board after a contested election and had two resolutions approved by a majority vote of shareholders. Shell was also ordered by a Dutch court to reduce CO_2 emissions by 45 percent by 2030. ISS and Glass Lewis in the meantime announced updates to their policies and guidelines that included racial/ethnic board diversity, board refreshment and environmental and social risk oversight.

  In light of these developments, boards and management need to make sure they review their corporate governance, have an ESG strategy in place and communicate it to shareholders. In M&A, ESG-focused due diligence, mitigation of ESG risks and maximizing ESG integration in transactions have also become important considerations for directors and management.

- Unrelated to the pandemic, but to some extent influenced by it, regulators in different countries have tightened their regulatory stance on a number of issues. Of particular importance to M&A is the regulatory approach to foreign investments and antitrust enforcement. Cross-border M&A deals, particularly involving critical infrastructure, technology and data collection, will draw scrutiny in the U.S. and in Europe, as much more strict regulations came into effect in individual countries and the EU as a whole. On the antitrust side, U.S. and EU antitrust authorities have increased their focus on M&A transactions and have blocked a number of them. President Biden's executive order on promoting competition called for the DOJ and FTC to review merger guidelines and to challenge prior bad mergers and announce a policy of greater scrutiny of mergers involving dominant players purchasing nascent competitors. Boards need to be aware of regulatory risks and assess deals with them in mind.

Different companies have different priorities and face different challenges, but board engagement and oversight could not be more important during these uncertain times.

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