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Top Topics for Directors in 2017

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By: Kerry E. Berchem, Rick L. Burdick, Garrett A. DeVries, Gorav Jindal, Christine B. LaFollette, David H. Quigley, Rolf Zaiss

Here is our annual list of hot topics for the boardroom in the coming year:

Corporate strategy: Oversee the development of the corporate strategy in an increasingly uncertain and volatile world economy with new and more complex risks

Directors will need to continue to focus on strategic planning, especially in light of significant anticipated changes in U.S. government policies, continued international upheaval, the need for productive shareholder relations, potential changes in interest rates, uncertainty in commodity prices and cybersecurity risks.

Political changes: Monitor the impact of major political changes, including the U.S. presidential and congressional elections and Brexit

Many uncertainties remain about how the incoming Trump administration will govern, but President-elect Trump has stated that he will pursue vast changes in diverse regulatory sectors, including international trade, health care, energy and the environment. These changes are likely to reshape the legal landscape in which companies conduct their business, both in the United States and abroad.

With respect to Brexit, although it is clear that the United Kingdom will, very probably, leave the European Union, there is no certainty as to when exactly this will happen or what the U.K.'s future relationship, if any, with the EU will be. Once the negotiations begin, boards will need to be quick to assess the likely shape of any deal between the U.K. and the EU and to consider how to adjust their business model to mitigate the threats and take advantage of the opportunities that may present themselves.

Shareholder relations: Foster shareholder relations and assess company vulnerabilities to prepare for activist involvement

The current environment demands that directors of public companies remain mindful of shareholder relations and company vulnerabilities by proactively engaging with shareholders, addressing shareholder concerns and performing a self-diagnostic analysis. Directors need to understand their company's vulnerabilities, such as a de-staggered board or the lack of access to a poison pill, and be mindful of them in any engagement or negotiation process.

Cybersecurity: Understand and oversee cybersecurity risks to prepare for increasingly sophisticated and frequent attacks

As cybercriminals raise the stakes with escalating ransomware attacks and hacking of the Internet of Things, companies will need to be even more diligent in their defenses and employee training. In addition, cybersecurity regulation will likely increase in 2017. The New York State Department of Financial Services has enacted a robust cybersecurity regulation, with heightened encryption, log retention and certification requirements, and other regulators have issued significant guidance. Multinational companies will continue implementation of the EU General Data Protection Regulation requirements, which are effective May 2018. EU-U.S. Privacy Shield will face significant legal challenge, particularly in light of concerns regarding President-elect Trump's protection of privacy. Trump has stated that the government needs to be "very, very tough on cyber and cyberwarfare" and has indicated that he will form a "cyber review team" to evaluate cyber defenses and vulnerabilities.

SEC scrutiny: Monitor the SEC's increased scrutiny and more frequent enforcement actions, including whistleblower developments, guidance on non-GAAP measures and tougher positions on insider trading

2016 saw the Securities and Exchange Commission (SEC) award tens of millions of dollars to whistleblowers and bring first-of-a-kind cases applying new rules flowing from the protections now afforded to whistleblowers of potential violations of the federal securities laws. The SEC was also active in its review of internal accounting controls and their ability to combat cyber intrusions and other modern-day threats to corporate infrastructure. The SEC similarly continued its comprehensive effort to police insider trading schemes and other market abuses and increased its scrutiny of non-GAAP (generally accepted accounting principles) financial measure disclosures. 2017 is expected to bring the appointment of three new commissioners, including a new chairperson to replace outgoing chair Mary Jo White, which will re-tilt the scales at the commissioner level to a 3-2 majority of Republican appointees. 2017 may also bring significant changes to rules promulgated previously under Dodd-Frank.

CFIUS: Account for CFIUS risks in transactions involving non-U.S. investments in businesses with a U.S. presence

Over the past year, the interagency Committee on Foreign Investment in the United States (CFIUS) has been particularly active in reviewing—and, at times, intervening in—non-U.S. investments in U.S. businesses to address national security concerns. CFIUS has the authority to impose mitigation measures on a transaction before it can proceed and may also recommend that the President block a pending transaction or order divestiture of a U.S. business in a completed transaction. Companies that have not sufficiently accounted for CFIUS risks may face significant hurdles in successfully closing a deal. With the incoming Trump administration, there is also the potential for an expanded role for CFIUS, particularly in light of campaign statements opposing certain foreign investments.

Board composition: Evaluate and refresh board composition to help achieve the company's goals, increase diversity and manage turnover

In order to promote fresh, dynamic and engaged perspectives in the board room and help the company achieve its goals, a board should undertake focused reassessments of its underlying composition and skills, including a review and analysis of board tenure, continuity and diversity in terms of upbringing, educational background, career expertise, gender, age, race and political affiliation.

Executive compensation: Determine appropriate executive compensation against the background of an increased focus on CEO pay ratios

Executive compensation will continue to be a hot topic for directors in 2017, especially given that public companies will soon have to start complying with the CEO pay ratio disclosure rules. Recent developments suggest that such disclosure might not be as burdensome or harmful to relations with employees and the public as was initially feared. The SEC's final rules allow for greater flexibility and ease in making this calculation, and a survey of companies that have already estimated their ratios indicates that the ratio might not be as high, on average, as previously reported.

Antitrust scrutiny: Monitor the increased scrutiny of the antitrust authorities and the implications on various proposed combinations

Despite the promise of synergies and the potential to transform a company's future, antitrust regulators have become increasingly hostile towards strategic transactions, with the Department of Justice and Federal Trade Commission suing to block 12 transactions since 2015. Although directors should brace for longer antitrust review, to help navigate the regulatory climate, work up-front can dramatically improve prospects for success. Company directors should develop appropriate deal rationales and, with the benefit of up-front work, allocate antitrust risk in the merger agreement. Merger and acquisition activity may also benefit from the Trump administration, taking, at least for certain industries, a less-aggressive antitrust enforcement stance.

Environmental disasters and contagious diseases: Monitor the impact of increasingly volatile weather events and contagious disease outbreaks on risk management processes, employee needs and logistics planning

While the causes of climate change remain a political sticking point, it cannot be debated that volatile weather events, environmental damage and a rise in the diseases that tend to follow are having increasingly adverse impacts on businesses and markets. Businesses will need to account for, or transfer the risk of, the increasing likelihood of these impacts. The SEC recently announced investigations into climate-risk disclosures within the oil and gas sector, to ensure they adequately allow investors to account for these effects on the bottom line. The growing number of shareholder resolutions and suits addressing climate change confirm that investors want this information, regardless of the position of the next administration.

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