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How Boards And Officers Should Prep For New Trump Admin

By **Keerthika Subramanian and Jon Mantis** (December 2, 2024, 5:14 PM EST)

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In the run-up to the 2024 presidential election, key decision-makers at public companies generally delayed or pared back significant, opportunistic dealmaking activity until the victor of the election was determined. In the wake of President-elect Donald Trump's decisive victory, public company leaders are preparing for an uptick in dealmaking in 2025.

This expected increase in deal volume is driven by, among other things, the perception that the U.S. Department of Justice and Federal Trade Commission under the new Trump administration will adopt a more lenient and passive approach to antitrust enforcement than those agencies under the Biden administration.

Despite public company leaders' greater appetite for dealmaking, their enthusiasm is tempered by concerns over Trump's signature policymaking priorities discussed on the campaign trail — notably, the implementation of sweeping tariffs and a historic mass deportation of immigrants lacking permanent legal status.

While the economic, legal and practical implications of the foregoing policymaking priorities have been discussed at great length by political pundits, legal scholars, Wall Street analysts and economists in the weeks following the election, relatively little attention has been focused on the unique challenges public company officers and board members face in navigating these unprecedented, historic policy challenges.

Unlike other personnel at public companies, officers and board members owe various fiduciary duties to the companies they serve and the stockholders of such companies, including, but not limited to, a duty of care.

Here, we provide practical, actionable tips for officers and board members of public companies incorporated in Delaware to ensure they uphold their duty of care when addressing these policy challenges.

Managing the Impact of Proposed Tariffs

On the campaign trail, then-presidential candidate Trump proposed instituting a range of unprecedented tariffs, including, among other things, a 10% tariff on all U.S. imports regardless of

country of origin, as well as a 60% tariff on products from China.

On Nov. 25, Trump announced that he would sign an executive order on the first day of his term that would impose a 25% tariff on all goods from Mexico and Canada until such countries curbed the flow of migrants and illicit drugs into the U.S. He further announced an additional 10% tariff on China until it took decisive action to stem the flow of fentanyl into the U.S.

It remains to be seen if these proposals will materialize or if they will be used merely as threats to enhance the incoming administration's leverage in negotiations with foreign countries. Nevertheless, if these proposals are implemented, it is expected that U.S. companies will pass the increased costs associated with the tariffs to consumers already weary from persistent high inflation following the COVID-19 pandemic.

Passing increased costs to already beleaguered consumers may lead to reduced consumer demand and, ultimately, declining revenues over time and a lower return on investment for stockholders. Therefore, officers and board members must explore other ways to manage the expected price increases from tariffs. Not only is this a business imperative, but also it is an imperative from a fiduciary duty perspective.

Duty of Care

Officers and board members owe the companies they serve, and the stockholders of such companies, a duty of care.

Under Delaware law, the duty of care requires officers and board members to be properly informed and act with care when making decisions on behalf of a company and its stockholders. While many states such as New York and California have statutorily codified the duty of care, the duty of care in Delaware is largely a product of case law.

Delaware courts have adopted a reasonable person standard that requires board members and officers to exercise the same care that a similarly situated, careful and prudent person would use. They have typically afforded officers and board members a significant amount of discretion in exercising their duty of care, thereby enabling officers and board members to take calculated business risks when making decisions and acting on behalf of companies and stockholders.

Delaware courts have held that judges and stockholders are not adequately positioned to question the past decisions made by officers and board members and have declined to hold them liable for poor decision-making in hindsight, citing the business judgment rule.

In order to rely on the business judgment rule in the event of potential stockholder litigation over their strategic response to the tariffs, officers and board members must demonstrate they were fully informed, and acted in good faith and in the best interest of the companies they serve. Officers and board members can satisfy the requirements of the business judgment rule if they undertake contingency planning because its exercise requires, among other things, that officers and board members be fully informed.

The core features of such recommended contingency planning are best captured by the three Cs.

Comprehensive

Such contingency planning should be comprehensive in scope and explore various methods to offset the expected adverse economic impact of the tariffs. In particular, officers and board members should evaluate the following alternatives to fully passing along all costs to consumers:

- Absorbing some of the increased costs from the tariffs and implementing broad cost-cutting measures to offset such absorbed costs;
- Phasing out the use of China-based suppliers in favor of suppliers in other low-cost, foreign jurisdictions such as India;
- Locally sourcing suppliers in the U.S. at negotiated rates that are both favorable and fixed;
- Manufacturing their own supplies and vertically integrating such in-house manufacturing capabilities over time; and
- Exploring the greater use of cost-effective artificial intelligence to offset the increased costs from the tariffs.

When considering the foregoing alternatives, officers and board members should also weigh the following factors:

- Industry-specific headwinds;
- The company's likelihood of meeting its short-term and long-term contractual obligations, and, in particular, the company's likelihood of falling into financial distress in light of the upcoming maturity cliff;
- The impact of any retaliatory measures — i.e., trade wars and/or tit-for-tat tariffs — on the company's business and the company's ability to offset the same;
- Expected escalating geopolitical tensions between the U.S. and its North American neighbors;
- Expected increased geopolitical conflict between the U.S. and China; and
- Other Trump administration priorities that may in fact counterbalance the impact of the tariffs.

For example, the significant costs imposed by the tariffs may push deeply distressed companies into Chapter 11 bankruptcy. However, the company may, as a result of the Trump administration's expected less-stringent approach to antitrust enforcement, be able to merge with a competitor and avoid Chapter 11 bankruptcy, thereby protecting the interest of stockholders who would otherwise recover nothing in Chapter 11 bankruptcy.

On Nov. 18, Spirit Airlines was forced to file for Chapter 11 bankruptcy because the DOJ, citing anticompetitive concerns, had sued to block its merger with JetBlue. The U.S. District Court for the District of Massachusetts found in favor of the DOJ in May 2023.

Commence

Officers and board members should commence the contingency planning early. Although it is unclear if the proposed tariffs will come to pass, officers and board members should not wait to commence their contingency planning.

Compile

Officers and board members should compile a meticulous record documenting all activities taken in furtherance of the contingency planning. This record will prove to be a key element of their defense in the event of stockholder litigation.

Managing the Impact of the Mass Deportation of Immigrants Lacking Permanent Legal Status

In addition to enacting sweeping tariffs, then-presidential candidate Trump also vowed on the campaign trail to conduct the largest deportation campaign in U.S. history. President-elect Trump confirmed that he intends to declare a national emergency and use the U.S. military to conduct the mass deportation initiative.

It is expected that this mass deportation campaign will lead to widespread labor shortages in industries that depend heavily upon migrant labor, such as construction, agriculture and hospitality. Not only will the mass deportation initiative adversely affect companies operating in these three industries, but it will also have negative implications across the entire supply chain.

The mass deportation campaign is expected to result in labor shortages, production delays, intensified challenges in transporting goods to their final destinations, higher prices for goods and services, and higher wages for domestic workers.

Passing increased costs to already cash-strapped consumers struggling with rising inflation is not likely to be a long-term, winning solution for companies and their stockholders. Accordingly, officers and board members must seek to manage the anticipated negative consequences of the mass deportation campaign.

Similar to the tariffs discussed above, not only is this a business imperative, but it is also an imperative from a fiduciary duty perspective.

Duty of Care

Officers and board members can preserve the availability of the business judgment rule defense if they undertake contingency planning to manage the impact of the mass deportation campaign on their businesses. The key components of such contingency planning are best characterized by the three Cs:

Complete

Officers and board members should take a complete approach with respect to contingency planning.

First, they should seek to understand the precise impact of the mass deportation campaign on their

businesses. Next, they should explore ways to mitigate the negative impact of labor shortages on their businesses.

In particular, officers and board members should evaluate the following solutions to ameliorate labor shortages:

- Requiring greater productivity from employees not subject to the mass deportation campaign; and
- Exploring how cost-effective AI can be leveraged to offset labor shortages.

For example, in the agriculture industry, AI plays a crucial role by automating labor-intensive tasks, boosting overall efficiency and supporting the existing workforce. Numerous new AI-based firms are already offering solutions tailored to the agricultural sector.

For instance, FarmWise manufactures mechanical weeders, allowing one worker operating the weeder to replace 34 workers. Another company, Global Unmanned Sprayer Systems, manufactures autonomous sprayers for orchards and vineyards, allowing three operators with eight GUSS sprayers to effectively replace 15 workers and 12 tractors modified for spraying.

Finally, officers and board members should also explore ways to offset the negative impact of labor shortages across the supply chain on their businesses. Such methods may include, but are not limited to, the following:

- Switching to suppliers that may be less affected by the mass deportation campaign;
- Developing in-house transportation and logistics capabilities, and vertically integrating these capabilities over time;
- Adopting cost-cutting measures to offset price increases.

Convene

Early preparation is key. Officers and board members should convene a working group consisting of personnel and advisers to brainstorm solutions to manage the negative effects of the mass deportation campaign on their businesses.

Chart

Officers and board members should diligently document their contingency planning efforts for use in the event of stockholder litigation.

Conclusion

In anticipation of these historic, unprecedented policy challenges, officers and board members should pursue proactive, comprehensive contingency planning to not only advance the best interests of the companies they serve and the stockholders of such companies, but also to properly exercise their fiduciary duty of care.

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