

Governance Watch

Reopen Ready: Managing Governance and Legal Risks in the New Normal(s)

May 18, 2020



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The COVID-19 Crisis & Sino-American Rivalry

CORONAVIRUS (COVID-19) CONTENT

COVID-19 Reset & Recovery: Adapting Feedback and Performance Systems during and after a Crisis

May 13, 2020 | PUBLICATION



COVID-19: Extraordinary Crisis Leadership Required

May 13, 2020 | PUBLICATION



COVID-19 recession shows different recovery path than global financial crisis

May 12, 2020 | CHARTS



Massive job losses extend across industries

May 08, 2020 | CHARTS



Panelists



Michael Ullmann
Executive Vice President, General Counsel
Johnson & Johnson



Michael Albano
Partner
Cleary Gottlieb Steen & Hamilton



Jennifer Kennedy Park
Partner
Cleary Gottlieb Steen & Hamilton



Paul Washington (Moderator)
Executive Director, ESG Center
The Conference Board



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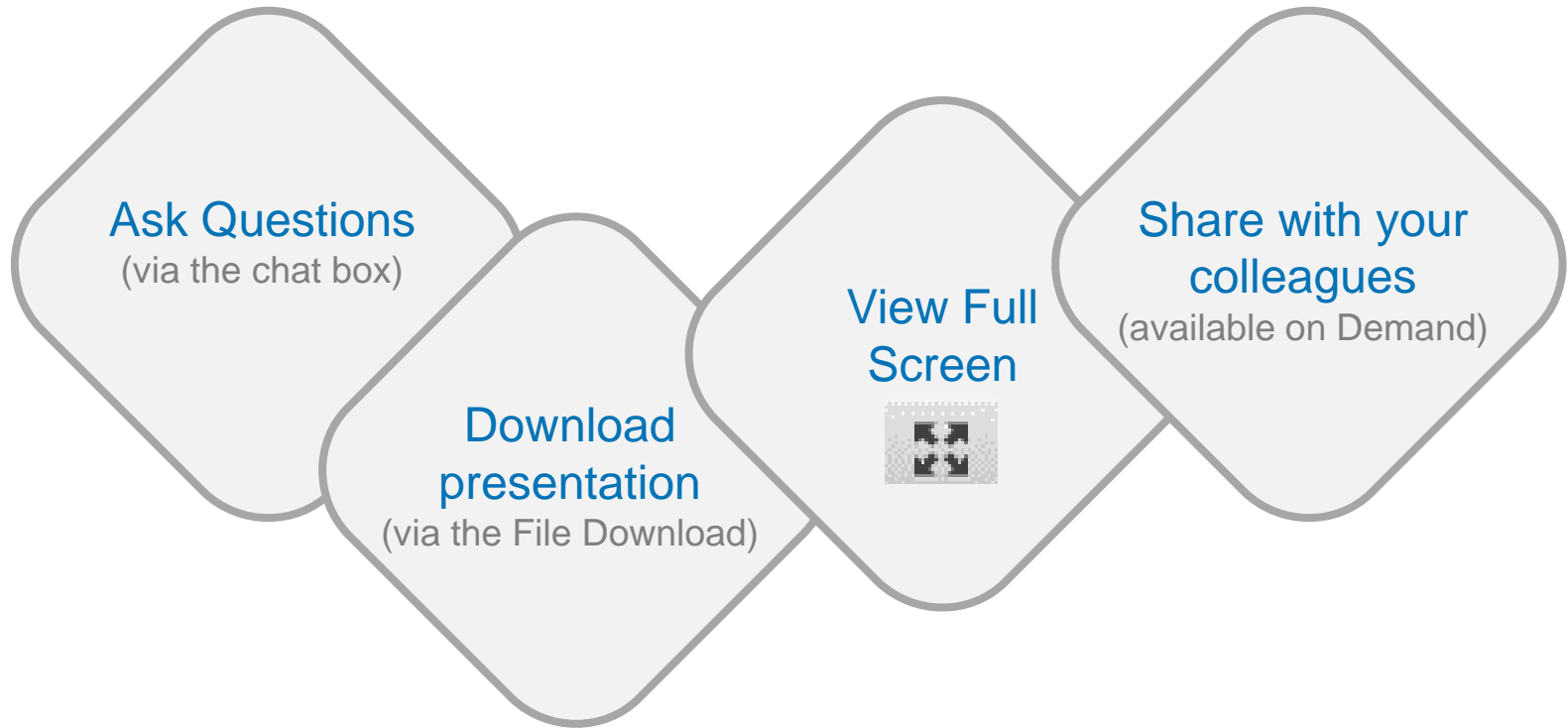
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Upcoming Conference Board Webcasts on COVID-19

[Window On Innovating During and Beyond COVID-19 \(May 27, 12:00 PM ET\)](#)

In this webcast, innovation leaders from different industries share their experiences on how to make choices for the short term that are informed by identifying and accelerating future opportunities.

[The ESG Imperative \(July 2, 11:00 AM ET\)](#)

Strategic priorities have been thrown into turmoil as organizations grapple with the impact of COVID-19 lockdowns on everyday operations. Given the change of priorities, will climate change regain the priority standing that it had just months ago and where do the emerging opportunities for collaboration lie?

[COVID-19 & The Future Of Global Supply Chains \(July 16, 11:00 AM ET\)](#)

The closure of economies in the wake of COVID-19 has fractured supply chains the world over, adding pressure for diversification or reshoring. Yet, these are two distinct options and neither is easy to implement. Which sectors are more likely to be affected and which ones might prove immune?



Recent Conference Board Content on COVID-19

7 Key Areas for Board Attention during the COVID-19 Crisis

This essay suggests constructive steps that boards can take in seven areas: governance, strategy, risk oversight, employee, customer, and investor relations, and fulfilling the company's broader role during this crisis.

Executive and Director Compensation Reductions in the COVID-19 Era

As many businesses discharge, furlough, or drastically reduce pay to large shares of their workforces, some compensation committees are announcing their decision to cut base salaries for C-suite executives as well as board cash retainers. The Conference Board, in collaboration with Semler Brossy's research team and Esguage Analytics, is keeping track of SEC Form 8-K filings by Russell 3000 companies announcing these reductions. For the live database and some helpful visualizations of key trends across business sectors and company size groups, [click here](#).

Five Ways a Sustainability Strategy Provides Clarity in a Time of Crisis

The COVID-19 pandemic is requiring companies to focus on survivability. This is also a time, however, for companies to consider the value of their existing sustainability strategies. Companies with robust sustainability programs are more likely to perform well during a downturn. And five key elements of a fully developed sustainability program should improve a company's ability to prosper in the long run.



Recent Conference Board Webcasts on COVID-19

[Investor Expectations & Engagement During the COVID-19 Crisis](#)

A great deal of attention has been paid to how companies are navigating the COVID-19 pandemic, yet there has been little focus on investor expectations and engagement with companies during this time. In this webcast, we hear what investors want to know, as part of the proxy season engagement discussions, about the company's response to the COVID-19 pandemic and how ESG discussions are playing out this year.

[COVID-19: Tackling Key Governance & Legal Issues](#)

Boards and senior management are making decisions related to COVID-19 that will be scrutinized by multiple stakeholders. This webcast addresses critical governance and legal issues in handling this crisis – from how to stay on top of ever-changing directives from federal, state, local, and international authorities, to the frequency and focus of board meetings, to key disclosure and contractual challenges.

[How COVID-19 Might Impact Consumers' Attitudes about Sustainability](#)

This webcast builds on recent research by The Conference Board on consumers' attitudes about sustainability. Hear about the role sustainability plays for consumers in the age of the COVID-19 health and economic crisis, how health plays into that, and how companies are responding.

[COVID-19 and the US Labor Market: Emerging Impacts and Implications](#)

The COVID-19 pandemic continues to upset parts of the US economy and is yielding historic surges in unemployment claims and drops in consumer confidence. The Conference Board is tackling this unprecedented shock using a scenario-based forecasting approach.



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Reopen Ready: Managing Governance and Legal Risks in the New Normal

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Michael Albano and Jennifer Kennedy Park

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The New Normal

- **Change is the new normal.** Business disruptions related to COVID-19 are likely to continue for some time. The transition from lockdown will likely happen gradually, and at different paces in different communities.
- **Flexibility is key.** In preparing for the new normal, businesses should be prepared to adapt their response as the COVID-19 situation develops.
- **Everyone needs a plan.** Both businesses deemed non-essential that are reopening, as well as those deemed essential who may be transitioning from limited operations to increased capacity, should plan for the new normal.

“As coronavirus spreads, workers say employers are putting them at risk”

Mar 20, 2020 | Boston Globe

“... worker who died from COVID-19 sues for wrongful death”

Apr 7, 2020 | Reuters

Potential Legal Risks

Companies owe a duty to their employees to provide a safe working environment as well as a non-delegable duty to invitees to make conditions on the property reasonably safe and to conduct business operations with reasonable care. Businesses that fail to do so face a range of risks, including:

- Negligence claims, including wrongful death and third-party claims;
- Employment claims;
- Statutory or regulatory enforcement actions;
- Discrimination claims;
- Contractual claims;
- Breach of fiduciary duty claims;
- Labor unrest; and
- Reputational harm.

Mitigating Legal Risks: Developing a Plan

Businesses should document the steps that the company is taking to protect health and safety. This includes staying updated on the evolving legal landscape and monitoring and enforcing compliance.

- Businesses should consider implementing a **Communicable Disease Policy** (“CDP”) that addresses the risks relating to COVID-19 (and other infectious diseases) and outlines the steps the company is taking.

The advantages of having a CDP in place include:

- Mitigating legal risks by:
 - Establishing the reasonableness of company actions in the face of negligence claims;
 - Showing a good faith effort to adequately monitor operations in the case of breach of fiduciary duty claims; and
 - Demonstrating mitigation in the event of statutory and regulatory enforcement actions.
- Complying with federal and state guidelines that recommend reopening companies implement a plan to address COVID-19, including:
 - White House Coronavirus Task Force, [Opening Up America Again](#); and
 - U.S. Occupational Safety and Health Administration, [Guidance on Preparing Workplaces for COVID-19](#).
- Benefitting from possible federal and state immunity regimes that protect businesses who have plans in place to ensure compliance with safety regulations from liability suits.

Preparing for the New Normal: Components of a CDP

- **Who:** A CDP should be designed to protect the health and safety of stakeholders including:
 - “Essential” and “Non-Essential” workers
 - High risk individuals
 - Exposed/unwell individuals
 - Parents with childcare needs
- **What:** A CDP should document the measures and steps the company will take, drawing from:
 - International, federal and state guidelines
 - Industry-specific guidance
 - Industry peers and practice
- **When:** Consider the following factors in the reopening timeline:
 - National plan, state and local orders
 - Phased approach
 - Corporate citizenship
- **Where:** Location matters.
- **Why:**
 - Prioritizing health and safety
 - Communicating with stakeholders
 - Promoting good corporate governance
 - Mitigating legal and other risks

Preparing for the New Normal: Corporate Governance

As companies adapt and make changes to business operations, it's important to ensure there are robust reporting systems and controls in place to keep the Board of Directors informed of key developments, including:

- **Prior to reopening** – risks associated with continued or increased capacity and important developments that occur as policies are laid out;
- **Plans for reopening** – how company plans account for regulations as well as what monitoring and compliance processes are in place;
- **Change of plans** – triggers for closing or decreasing operations; and
- **Communication** – what communications it will receive, and how regularly, regarding the impact of COVID-19 on continued operations and the progress of returning to full operational status.

Boards must exercise core oversight and risk management responsibilities by:

- Reflecting discussions and decisions in Board minutes; and
- Considering a dedicated COVID-19 sub-committee.

Preparing for the New Normal: Employees, Customers, Guests

Companies should consider taking the following steps to prepare their businesses for reopening:

— **Before employees and customers return:**

- *Prepare facilities* – rearrange facilities and post signage to promote social distancing, transition to new technologies that allow for reduced contact, install protective equipment (e.g., Plexiglas barriers) and sanitizer stations and prepare common areas for closure or limited use
- *Take measures to promote good hygiene* – clean and disinfect work stations, determine and order appropriate PPE, and post signage broadcasting proper hygiene measures

— **Once in office:**

- *Monitor access to the premises* – implement temperature screening, testing, and/or questionnaires for all employees and guests, transition to low-contact sign-in measures, determine applicable commuting or transportation policies, and minimize intra-office and business travel
- *Create enforcement mechanisms* - facilitate channels to report non-compliance (e.g., designated social distance monitors, hotlines), and ensure compliance with applicable laws

— **In case an individual falls ill:**

- *Benefit Plans & Policies* – educate employees on applicable benefit plans and policies (e.g., paid sick leave)
- *React to exposed or unwell individuals* – implement procedures in the event that an employee contracts COVID-19 or a customer falls ill (e.g., process for isolation, deep-cleaning protocols, 14 day quarantine, contact tracing, re-entry plans)

Preparing for the New Normal: Operators, Vendors, Suppliers, and Contractors



A company may also wish to develop additional procedures to ensure that operators, vendors, suppliers, and other contractors are prepared to support its efforts to protect health and safety. This includes:

- Conducting diligence regarding measures adopted by operators, vendors, supplies, and contractors; and
- Requiring operators, vendors, supplies, and contractors to adhere to company policies.

Preparing for the New Normal: Communicating the Plan

Companies should devise clear communication strategies for different stakeholders including:

— **Employees, customers and guests (including operators, vendors, suppliers, and contractors):**

- Empathy and tone at the top
- Training and educating on new policies
- Public-facing signage broadcasting evolving protocols
- Designating points of contact for questions and support

— **Shareholders and investors:**

- Addressing increasing calls by institutional investors for enhanced human capital management disclosures, including return to office plans for protecting employee health and safety
- Reflecting the Board's role in risk oversight and the extent of that oversight in proxy disclosures

— **Community and ESG**

- Broadcasting company plan to the public and highlighting efforts to respond to community impacts of the COVID-19 crisis
- Providing narratives regarding how COVID-19 has impacted progress towards other ESG goals and/or changed the company's focus



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EDUCATION

Georgetown University
Law Center, J.D.
Duke University, B.A.

Michael “has an amazing capacity to handle big projects and he has extensive experience in the transactional world.”

Chambers USA, 2020

Michael Albano’s practice focuses on executive compensation and benefits matters.

He advises clients on disclosure, governance, taxation, design and negotiation of executive compensation agreements and arrangements, as well as the executive compensation and benefits aspects of mergers and acquisitions; pension investment and ERISA fiduciary matters, including in the fund formation context; private equity compensation and governance matters at both the upper tier and portfolio company levels; and employment law and related issues.

Leading Employee Benefits and Executive Compensation Lawyer

Chambers USA, Legal 500 US, Best Lawyers in America and Super Lawyers

NOTABLE EXPERIENCE

- Works with clients on COVID-19 related matters including:
 - A leading private investment firm on its global return to office policies and procedures
 - General advice to an entertainment technology company regarding assistance that may be available under the various CARES Act programs
 - A leading mining company in identifying and developing mitigation strategies for risks arising out of continued mining and other operations during the COVID-19 pandemic
 - A cultural center in connection with potential COVID-19 relief
- Public companies and boards of directors, including Alphabet/Google, International Flavors & Fragrances, JELD-WEN, and Kindred Healthcare concerning executive compensation and governance matters
- Privately-held companies, including numerous private equity portfolio companies such as Allied Universal, Care Centrix, CityMD, Duravant, Hygiena., Sotera, and Wencor concerning compensation and governance arrangements
- Private equity firms such as TPG and Raine in the design and negotiation of various bespoke compensation, governance and separation arrangements with key personnel
- BlueMountain in the settlement of a proxy contest at PG&E
- Regularly advises public, private and venture companies on the employment and executive compensation-related aspects of domestic and cross-border merger and acquisition transactions:
 - International Flavors & Fragrances in its \$45.4 billion merger with DuPont’s Nutrition & Biosciences business and in its \$7.1 billion acquisition of Frutarom
 - Warburg Pincus in its acquisitions of Sundyne, Pregis, Labstat, Duravant, Gabriel Brothers, Universal Services of America, Guardsmark, Sterigenics, Wencor, Electronic Funds Source, CROSSMARK, and Endurance International Group; and sale of EFS
 - Google in numerous transactions, including its \$2.1 billion acquisition of Fitbit, \$2.6 billion acquisition of Looker, \$1.1 billion business cooperation agreement with HTC relating to its smartphone design business, acquisition of Fossil’s smartwatch technology assets and certain employees, the sale of its Motorola Home Business to ARRIS, and its acquisitions of cwest, Socratic, FameBit, Orbitera, Owlchemy, Motorola Mobility, Waze Mobile, Wavii, Wildfire Interactive, The Dealmap, Admeld, AdMob, and Everything is the Best
 - Agilent Technologies in its \$1.165 billion acquisition of BioTek and acquisition of ACEA Biosciences
 - Allied Universal in the acquisition of SOS Security, sale of an equity stake to CDPQ, \$1 billion acquisition of USSA, and previously in Universal Services’ merger with AlliedBarton creating Allied Universal
 - Bemis in its \$6.8 billion merger with Amcor
 - CityMD in its acquisition of Summit Medical Group



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EDUCATION

Georgetown University Law Center, J.D.
Boston College, B.A.

Jennifer Kennedy Park's practice focuses on compliance programs, white-collar defense, enforcement actions, and complex disputes. She has handled some of the most complicated matters affecting non-U.S. entities in the last five years. Jennifer advises global corporations and financial institutions on interactions with regulators and authorities, including regarding compliance and remediation programs and issues related to third party vendors. Jennifer has experience dealing with the DOJ, FRB, OCC, CFTC, SEC, DFS, FINRA, OFAC, European Commission, UK FCA, SFO, and other authorities around the world. Given her experience, Jennifer is also expert on issues of privacy and confidentiality, cross border conflicts of law and complex matter management.

Recipient of the "2016 Women of Power & Influence Award"

National Organization for Women – New York City

"Top Litigator Under 40"

Benchmark Litigation, 2018

Named a "Rising Star"

New York Law Journal

World's Top 100 Women in Investigations

Global Investigations Review

NOTABLE EXPERIENCE

- Works with clients on COVID-19 related matters including:
 - A leading mining company in identifying and developing mitigation strategies for risks arising out of continued mining and other operations during the COVID-19 pandemic
 - Asset management and private investment companies in connection with the formulation and rollout of their global reopening plans
 - Compliance and pre-enforcement work related to receipt of CARES Act funds
 - Pro bono work relating to immigration proceedings during the COVID-19 crisis
- Serves as a thought leader for the white-collar, crisis management and litigation practice areas, having co-authored numerous alerts such as COVID-19 response plans
- BHP Billiton, Vale and Samarco to conduct the external investigation into the cause of the breach of the Fundão tailings dam, one of the largest environmental disasters in history
- Vale in investigations relating to disclosures around the recent dam collapse in the Minas Gerais state
- Bosch in connection with investigations and civil litigation in the United States relating to the Volkswagen emissions matter, including undertaking a full scale compliance remediation program
- The board of directors of a financial institution in connection with its response to an OCC consent order and the remediation program related thereto
- Advising a leading pharmaceutical company in an FCPA investigation spanning Europe and Central America
- A major financial institution in criminal investigations by the DOJ and other authorities into potential bribery and money laundering by Unaoil
- HSBC in criminal and regulatory investigations in various parallel investigations being conducted by, among others, the DOJ, the CFTC, the SEC, the UK Financial Conduct Authority, the European Commission, and other regulators in Europe and Asia regarding allegations of manipulation and collusion in the setting of benchmark reference rates
- Advising the Board of Directors of a major financial institution in investigations by the DOJ, DFS, OFAC and the Manhattan District Attorney into sanctions violations
- Routinely advises companies and conducts investigations related to insider trading
- Routinely advises public and private companies on policies, procedures and training related to discrimination and harassment, including advising several Fortune 500 companies in investigations relating to allegations of sexual harassment against board members



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