TOP TAKEAWAYS

International Issues in the Boardroom

1. **Considerations Relating to the Acquisition of Companies with Foreign Subsidiaries**

   When considering acquiring a company with a foreign subsidiary, the Board must consider whether it is willing to take on the risks involved in doing business in the relevant foreign country. The Board must be familiar with the relevant legal and regulatory constraints and should consider alternative structures that are available in the foreign jurisdiction that might be more beneficial than the recognized U.S. structures. With Board oversight, management should carefully analyze and plan for on-the-ground needs of doing business in the foreign market.

2. **What Happens When the Deal Goes Wrong?**

   When doing business internationally, the Board should make a plan of action to undertake in the event things go wrong. In order to cultivate a meaningful plan, the Board must consider and have a good reason for choosing the applicable law, dispute process, enforcement mechanisms, forum and related procedural considerations at the time of undertaking a foreign acquisition. The Board should choose a governing law that it understands and in which it has confidence.

3. **Duty of Oversight**

   In 2013, the Delaware Court of Chancery heard the Puda Coal case, a shareholder derivative lawsuit stemming from director misappropriation of corporate assets of a Delaware corporation with significant business operations in China and the corresponding duty of loyalty of the outside directors of the company. The Court acknowledged that circumstances are different in every case, but independent directors need to monitor what the other directors are doing, and that often will mean that independent directors need to be physically present in, and understand the native language of, the geographic location in which a business has significant operations.

4. **Determining if the Director of a Foreign Subsidiary Needs D&O Insurance**

   In determining the scope of the D&O insurance necessary for a company, the Board should make a determination on the following two matters: (1) whether the country in which the company is doing business permits "admitted" insurance and (2) the scope of the applicable law in the country relating to indemnification of officers and directors. Based on the above and following consultation of the attendant risks with an insurance broker, the Board can then make a decision as to the scope of the insurance purchased. . Ultimately the decision is as unique as the company and will depend, among other things, on: (a) revenues and assets in a foreign country; (b) location and citizenship of Directors; (c) the local indemnification laws; and (d) the local claims environment.

5. Understand the Risks

The Board should be apprised of the risks associated with the company doing business in a foreign jurisdiction, including risks associated with the legal and cultural processes associated with doing business in the market, the likelihood and type of corruption likely to be encountered, and the stability of local currency.

6. Engage Knowledgeable Local Managers and Partners

Directors should seek to engage on-the-ground managers and partners with experience in conducting business in the foreign jurisdiction. Such managers and partners should understand the local language, risks and customs.

7. Extraction of Value in Foreign Contracts

The Board should consider how to extract value from any proposed contract so that all parties can be paid appropriately and in a timely manner. This will involve drafting contracts carefully so that the mechanism by which parties can collect amounts owed to them and the governing law and forum for resolving any related disputes are clearly defined.

8. Top 10 Risks

The top 10 risks facing companies doing business in foreign jurisdictions include:

a. Damage to reputation/brand
b. Economic slowdown/slow recovery
c. Regulatory/legislative changes
d. Increasing competition
e. Failure to attract or retain top talent
f. Failure to innovate/meet customer needs
g. Business interruption
h. Third-party liability
i. Computer crime/hacking/viruses/malicious code
j. Property damage

9. Performance

The Board should consider moving beyond mere "compliance" to ensuring international program performance including:

a. Ability to efficiently manage international data
b. Access to information on local customs/practices
c. Clear understanding of coverage/retention levels and areas of intentionally uninsured risk
d. Local broker service model that supports business needs, including communication, contract review, claims and counsel
e. Insurance markets capable of offering consistent, controlled solutions
f. Appropriate local policy terms/conditions that meet business requirements
g. Effective management of third party contracts and transfer of risk
h. Issuance of certificates of insurance or other evidence of coverage on a timely basis
i. Ability to demonstrate proper premium allocation methodology and IPT payment in the event of a local audit
j. Risk strategies linked with corporate Tax strategies
k. Efficient loss adjustment process
l. Claims payment aligned with Risk Management objectives

10. Know When to Walk Away

In analyzing a potential investment in an foreign jurisdiction, the Board must be prepared to recognize an unsuccessful venture and cut the company's losses when appropriate.

For more information

For more information on International and Emerging Market Issues in the Boardroom, please feel free to contact the moderators directly:

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