

The Evolving Relationship Between the General Counsel and the Board

Over the last few years, the role of the general counsel (GC) has grown in both scope and stature. Once seen purely as a legal advisor, many general counsel now spend much of their time as an advisor, regularly providing strategic direction to the CEO and to the board of directors. Recent corporate scandals have made boards and C-suite officers even more keenly aware of the general counsel's unique legal and ethical perspective and ability to help mitigate organizational risk.

On October 25, 2016, NACD, Farient Advisors, Katten Muchin Rosenman, PwC, and Sidley Austin hosted the first joint meeting of the Compensation Committee Chair and Risk Oversight Advisory Councils. Council delegates were joined by Richard Buchband, the senior vice president, general counsel, and secretary of ManpowerGroup, and by James A. Hixon, the executive vice president for law and corporate relations at Norfolk Southern Corporation, for an exploration of the evolving relationship between the general counsel and the board. The discussion focused on the indicators of an effective partnership between the general counsel and the board, including the following:

- Aligned role expectations
- Open and direct communication
- Enhanced dialogue on risk oversight

Aligned Role Expectations

All parties in the room agreed that for the board's partnership with the general counsel to be successful, the pieces must be in place from the very beginning. The general counsel's job description should not focus solely on the legal aspects of the job, but should recognize the GC's increased breadth of responsibility, including corporate secretarial responsibilities, compliance and ethics oversight, communications with government officials, and the handling of charitable contributions, among other duties.

Because a strong board–GC relationship begins with candidate selection, several directors reported that even though hiring is *“ultimately the CEO's decision,”* they had their board's lead director, compensation committee chair, and/or audit committee chair meet with GC candidates: *“The board needs to have a view on, and visibility into, the selection process.”* GCs noted that internal succession planning in their organizations also includes exposure to the board. Said one, *“Directors have a chance to meet and engage with high-potentials on my team through presentations at meetings,*

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where they can act as a subject matter expert on a particular topic. I see it as an important part of the talent development plan, along with rotating through different divisions and functions of the company.”

Participants said that during the hiring process, board directors should ask the right questions to determine what level of role the general counsel will have. *“Does the general counsel report to the CEO? Is he or she a member of the executive team? How does the CEO anticipate the general counsel interacting with the board?”*¹ One general counsel said that he knew the organization was envisioning *“the right kind of GC role”* when he interviewed with two directors during his hiring process.

Once the new GC is hired, it can be hard, however, for the general counsel to navigate simultaneously providing support to directors and the CEO. Much has been written recently about the conflict general counsel may face internally. During the session, a director asked, *“How do you balance your allegiance to the CEO [and the board] when there are differences in perspectives?”* Both the general counsel and the directors in the room acknowledged this tension. One general counsel responded, *“That’s the greatest potential conflict because in a sense you’re serving two masters, so to speak. It’s especially hard if the CEO and the board are at odds. But transparency goes a long way [toward making] sure the CEO understands the parameters of the role. The GC has a fiduciary duty to the company, which should be understood. If a GC has to raise his or her hand and say it explicitly, it’s a sign that the relationship [with the CEO] has disintegrated.”* A council delegate made a similar observation from the board’s perspective: *“The GC is not the board’s advisor; they are an advisor to the company. It’s essential to avoid confusion on the part of directors on this issue.”*

Open and Direct Communication

Once a general counsel is in the role, both the board and the GC should work to establish a direct line of communication. One general counsel said, *“An indicator is whether directors call you between meetings; then there’s a trusting relationship.”* Another general counsel noted, *“I think we’ve seen an evolution in areas in which the GC is welcome to have an opinion.”* GCs said that understanding directors’ measures of a successful relationship can go

¹ Italicized comments are from delegates or guests who participated in either the meeting on Oct. 25, 2016, or related teleconferences on Nov. 3, 2016, and Nov. 4, 2016. Discussions were conducted under a modified version of the Chatham House Rule, whereby names of attendees are published but comments are never attributed to individuals or organizations (excepting cohosts of the event).

a long way. *“I ask for feedback,”* stated one general counsel. *“I want to know how I’m doing. If I don’t ask someone on the board how I am and my team is doing, I’m not going to get the information I need.”*

Communication with the board should also maintain a degree of objectivity. Most general counsel assume responsibilities as the corporate secretary and so are heavily involved the preparation and delivery of board materials. Ward Atterbury of Katten observed that the general counsel should ensure that the information presented to directors is not overly narrow or “massaged” by management: *“The GC, as gatekeeper, needs to ensure that the board is getting the full picture—the good, the bad, and the ugly.”* Meeting participants agreed: *“I review all the material that goes to the board. If I think a presentation is biased or lacking, I’ll make that comment,”* stated one general counsel. *“If I think it’s lacking, or seems biased, I’ll comment. If [the revisions] are still not adequate, I will ask for a private session with the audit committee chair or chair of another relevant committee.”* One general counsel affirmed the necessity of skepticism in the boardroom, describing a recent instance in which a director called into question management’s presentation: *“[It was] exactly what the director was supposed to do. If it seems too good to be true, maybe it is. Ask the questions.”*

Once a direct and open line of communication is established, general counsel may play a greater role in board meetings—for example, joining executive sessions. While participants’ views varied on whether there was a permanent role for general counsel in executive sessions, many felt that their presence could be helpful. One director stated, *“The good [general counsel] are very valuable. If we feel they should have a seat at the table, we like to keep them in sessions even when we excuse management. It’s a good way to bridge things.”* Another delegate reported, *“We take a slightly different approach. The board chair does a one-on-one meeting with the GC either before or after every meeting, sometimes both. That provides a forum where issues can be raised in confidence.”* General counsel supported the idea of inclusion because it makes responding to directors’ concerns easier. One said, *“I don’t know what happens in executive sessions unless I’m included for a legal issue. If I’m not there, I sometimes figure out there are questions that I could have answered if I’d been there.”* One delegate cautioned, *“It’s critical to establish rules of engagement. The GC needs to understand that it’s the chair’s job to go to the CEO after the executive session and provide feedback, not theirs, so that there are no mixed messages.”*

A direct and open relationship between the general counsel and the board also makes it easier for directors to identify issues that may require the aid of outside counsel. One general counsel noted, *“There are many cases when you don’t need to maintain outside counsel. You may just need*

By the Numbers

WHICH CYBER-RISK OVERSIGHT PRACTICES HAS THE BOARD PERFORMED OVER THE LAST 12 MONTHS?

37%

Leveraged internal advisors, such as internal auditors or the general counsel, for in-depth briefings.

Source: 2016–2017 NACD Public Company Governance Survey, 27.

an advisor to come in on a one-time basis.” Directors indicated that they appreciate having the general counsel suggest instances that may warrant outside support.

Enhanced dialogue on risk oversight

According to the 2016–2017 NACD Public Company Governance Survey, 81 percent of general counsel present risk information to the board. Discussions on such topics as corruption, compliance and ethics, and regulatory changes are now commonplace, often built into strategic conversations about international expansion, talent development, and new product or service offerings.² The role of the general counsel is not just to highlight these areas, but also to educate the leadership team and directors about how these risks may present themselves. The GC can provide the same type of advice when working with the board to prepare the proxy statement and other disclosures.

To do so effectively, however, the GC must have a thorough understanding of the company’s business as well as its risk appetite. Using compliance as an example, one general counsel said, *“I present a range of possible approaches to the board, from ultraconservative to more risky. How would a regulator look at our FCPA [Foreign Corrupt Practices Act] training and reporting under each approach? Similarly, with non-GAAP financial measures, what would a more conservative versus slightly more aggressive approach look like? Have we anticipated the questions regulators could ask? Are we comfortable that we might get a comment letter? If you’re going to be uncomfortable with that, make a different set of decisions at the outset.”*

Meeting participants highlighted cyber-risk as an area in which general counsel and directors can continue to partner given their shared desire to learn more. One general counsel stated, *“I raise my hand and say I’m not an expert either, but I want to help the board and the company identify the right expertise.”* Directors agreed; one stated, *“At the board level, I don’t think the board can ever dig deep enough to understand what’s going on under the covers.”* Paula Loop, leader of PwC’s Center for Board Governance and Investor Resource Institute, said, *“Generally, GCs have good barometers to gauge what outsiders might expect from the company. If it is a new issue, like cybersecurity, it will be important for GCs to focus on getting up to speed just like everyone else.”*

² National Association of Corporate Directors, unpublished data from the 2016–2017 NACD Public Company Governance Survey (Washington DC: NACD, 2016).

Conclusion

General counsel play an important role when it comes to supporting and advising the board. It is important early on to define that role as one that includes a strong and trusting relationship with directors. General counsel should recognize that directors' expectations of them go beyond the traditional legal role. A director stated it succinctly: *"What separates good from great? Great ones understand the business and have great business judgment. You value them as much for their business judgment as for their legal acumen."*

For Further Reading

National Association of Corporate Directors, ["Board Advice for 1st Time General Counsel"](#), BoardVision (video), Dec. 26, 2016.

Jörg Thierfelder, ["The Role of the General Counsel with the Board of Directors,"](#) EgonZehnder, 2011.

National Association of Corporate Directors, [Cyber-Risk Oversight](#), Director's Handbook Series (Washington DC: NACD, 2017). Teraesa Vinson and John Amer, ["The General Counsel as Senior Leader: More Than 'Just a Lawyer,'"](#) Korn Ferry Institute, June 10, 2015.

National Association of Corporate Directors, [Director Essentials: Strengthening Risk Oversight](#) (Washington DC: NACD, 2016).

Hugh Welch, ["Perspective: Why the Role of General Counsel Is Expanding,"](#) *Bloomberg Law*, March 1, 2016.

National Association of Corporate Directors, ["Optimizing General Counsel-Board Relations,"](#) *NACD in the News*, Sept. 1, 2016.

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*This list includes delegates, partners, stakeholders, and guests who participated in all or part of the meeting on Oct. 25, 2016, and/or in a related teleconference on either Nov. 2, 2016, or Nov. 4, 2016.

About the Advisory Council on Risk Oversight

With a focus on the common goal of a sustainable and profitable corporate America, the National Association of Corporate Directors (NACD) created the Advisory Council on Risk Oversight. Since 2012, this council has brought experienced risk and audit committee chairs from Fortune 500 companies together with key shareholder representatives, regulators, and other stakeholders to discuss ways to strengthen corporate governance in general—and risk oversight in particular. PwC and Sidley Austin LLP collaborate with NACD in convening and leading the council.

Delegates of the council have the opportunity to engage in frank, informal discussions regarding their expectations for risk governance practices, processes, and communications, and to share observations and insights on the changing business and regulatory environment. The goal of the council is threefold:

- Improve communications and build trust between corporate America and its key stakeholders.
- Give voice to directors engaged in risk oversight and related matters and improve the quality of the national dialogue on the board's role in risk governance.
- Identify ways to take risk oversight practices to the next level.

NACD believes that the dialogue facilitated by this advisory council is vital to advancing the shared, overarching goal of all boards, investors, and regulators: a sustainable, profitable, and thriving corporate America.

About the Compensation Committee Chair Advisory Council

In support of a sustainable, profitable, and thriving corporate America, the National Association of Corporate Directors (NACD) created the Compensation Committee Chair Advisory Council. Since 2011, this council has brought experienced compensation committee chairs from Fortune 500 companies together with key shareholder representatives, regulators, and other stakeholders to discuss ways to strengthen corporate governance in general and the work of the compensation committee in particular. Farient Advisors LLC and Katten Muchin Rosenman LLP collaborate with NACD in convening and leading this council.

Delegates of the council have the opportunity to engage in frank, informal discussions regarding their expectations for compensation practices, processes, and communications and to share observations and insights on the changing business and regulatory environment. The council's purpose is threefold:

- Improve communications and build trust between corporate America and its key stakeholders.
- Give directors engaged in the compensation arena a voice and a forum in which to exchange perspectives with regulators, standard setters, investors, and other important constituents on committee-related matters.
- Identify ways to take board leadership and compensation committee practices to the next level.

NACD believes that the open dialogue facilitated by this advisory council is vital to advancing the shared, overarching goal of all boards, investors, and regulators: to build a strong, vibrant capital market and business environment that will continue to earn the trust and confidence of all stakeholders.

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