



FOLEY & LARDNER LLP

# General Counsel Board Effectiveness

FOLEY & LARDNER'S 2005 NATIONAL DIRECTORS INSTITUTE

Corporate Governance Reform:

***What's Next?***

## **GENERAL COUNSEL BOARD EFFECTIVENESS**

Corporate governance reforms have caused the role of the general counsel to change over the past several years. In particular, because members of the board of directors are being faced with more responsibility and potential liability, the role of the general counsel as an advisor to the board has expanded. General counsel are charged with ensuring that directors are informed about their duties and about the decisions they are being asked to make.

The changing role of general counsel was examined at a breakout session titled "General Counsel Board Effectiveness" during Foley & Lardner LLP's 2005 National Directors Institute (NDI) held on March 10, 2005 in Chicago.

### **General Counsels Wear Multiple Hats**

Today, general counsel in the United States are being asked to wear multiple hats. In most companies, the general counsel serves as corporate secretary, advisor to the board, compliance officer, and advisor to the business. Often, the general counsel's role as devil's advocate aids in the reaching decisions; too many hats can cause the general counsel to lose sight of this role. Therefore, it is important that the role of general counsel is clearly defined to ensure they are paying appropriate attention to all responsibilities

In addition to too many hats, the expectations placed on general counsel also can cause them to lose sight of who their client is. The general counsel must always remember that the company is their client, followed by the shareholders. The general counsel serves as an advisor to the board to ensure that the best interests of the company and the shareholders are being met. As all general counsel know, this task is not always easy as the general counsel also is a business lawyer who works with management on day-to-day legal matters. The general counsel is required to understand both the company and the industry. In situations where conflicts arise between the board and management, the general counsel may advise the board to retain its own independent counsel.

It is equally important for general counsel to make certain the members of the board of directors understand that their primary obligation is to the corporation and its shareholders. General counsel should advise the board as to their role and responsibilities.

### **The Changing Role of General Counsel**

When asked the question of whether or not his role as a general counsel has changed over the past two to three years, John Howard, General Counsel of W.W. Grainger, Inc., responded that without a doubt there has been a definite change in the role of general counsel over the past three years. This change is in large part due to the fact that directors are spending a great deal more time making sure that

they are doing their jobs properly. Directors are focusing more on corporate governance and the process for making sure the right things are done. As a result of this, Bryan Blankfield, General Counsel of Oshkosh Truck Corporation, stated that he spends much more of his time advising and counseling directors on their duties as directors in this era of corporate governance reform.

General counsel also are spending more time focusing on whether or not the company has the right processes in place to ensure that the board is best able to make wise decisions and that the board and the company are complying with increased corporate governance requirements. However, it is important that general counsel do not focus on the process at the expense of the day-to-day operations of the company. As Mr. Howard pointed out, the shareholders do not want the company to be the best-monitored but worst-managed company in your industry.

General counsel also are being invited to attend all director meetings, including committee meetings. In addition to asking for the general counsel's presence at meetings, directors also are asking more questions both at and between meetings. General counsel should be in tune with the pressures on directors and should provide board members with all of the information that they both need and want to know. To anticipate the questions of directors and to gather the information necessary to provide the answers, general counsel today are spending more time looking to others both inside and outside their industry.

### **The Importance of General Counsel Continuing Education**

Today's focus on director independence has led to an "independence paradox" in the sense that directors' independence from the companies they serve has made them more dependent on the general counsel for information. One of the most effective ways for general counsel to assist the board is to research issues and to look to others for information. To reach the best decision, board members must understand the alternative means of accomplishing a task and the benefits and drawbacks of each alternative. To provide these alternatives, general counsel must be informed about developing trends. General counsel can become informed through both formal and informal means. Deborah Davidson of the National Association of Corporate Directors (NACD), an educational, nonprofit organization, informed the breakout session that NACD provides resources of information and education for both general counsel and directors. In conjunction with the Association of Corporate Counsel, NACD presents an annual course entitled "What the Board Really Expects from the General Counsel and the Corporate Secretary." This program emphasizes the general counsel's role in risk oversight and examines the following three areas in which effective boards depend most on the general counsel:

- To be information gatekeepers to help the board effectively monitor risk to the company
- To be guardians of the board's relationship with truly independent outside advisors, when appropriate

- To be active advocates of good corporate governance when fraud is suspected or the company is in crisis

In addition to formal programs like this, general counsel also can talk amongst themselves. General counsel in Milwaukee, Wisconsin, where Bryan Blankfield is located, meet quarterly to discuss issues they are facing. General counsel can often look to industry associations for discussions amongst general counsel. General counsel can and should use groups like this as a means for gathering best practices information.

### **The Importance of Continuing Director Education**

Ms. Davidson also emphasized the importance of continuing education for directors. NACD has noticed that the changing climate in corporate governance and the fear of potential liability has led directors to ask for more information. Ms. Davidson is a strong believer that education is the best antidote to fear. NACD has established a program that will provide directors with a certificate upon completion of certain director effectiveness courses. General counsel can further director education by staying informed of both accredited and non-accredited courses being offered to directors, and presenting this information to their company's directors. Companies also should encourage directors to attend outside programs and implement a budget for this purpose. In addition, companies can provide in-house training to directors.

### **The Role of Independent Consultants and Outside Counsel**

In today's climate where the New York Stock Exchange (NYSE), NASDAQ, the Investment Company Act of 1940, and the Sarbanes-Oxley Act (SOX) emphasize the significance of independent directors as well as the independence of those advising them, directors often want someone on their side. The general counsel is charged with knowing when directors should be seeking the advice of outside consultants. There will be times when directors are unaware that outside advice should be sought and times when directors request outside advice unnecessarily. However, any time outside consultants are used, the general counsel should make certain that directors are still fulfilling their role as advisors and not acting merely as monitors relying on others to make decisions for them.

The role of the company's outside counsel also is very important to ensuring that the general counsel and the board are being effective. General counsel should look to outside counsel to assist with the most complicated issues. The use of outside counsel ensures that a real discussion of alternative views occurs. In addition, the use of outside counsel adds to the credibility of the general counsel and demonstrates to the directors that a true discussion and analysis of the issues has occurred. Outside counsel also can be an excellent source of information as to what other companies are doing in similar situations.

## **The Importance of Information**

As noted previously, directors today are seeking more information from their company's general counsel. As has always been the practice, it is the responsibility of the general counsel to provide directors with their largest source of information, the board book. General counsel often decide what information should be placed in these books. In making this decision, general counsel must walk the fine line of what is too much information. However, as Mr. Blankfield indicated, the concerns of directors today are causing general counsel to come down on the side of being more inclusive and delivering the books to directors at an earlier date. In addition, directors' desire to be prepared has led general counsel to distribute more information to directors between meetings.

## **The Role of General Counsel at Board Meetings**

Mr. Howard pointed out that time is of the essence in all board meetings. It is the job of the general counsel to help ensure that this time is fully utilized. General counsel should spend time before each meeting reviewing what needs to be accomplished in the meeting. Although the CEO and the outside directors ultimately control the agenda, the general counsel must ensure that the final agenda is understandable and that enough time is allotted to allow directors to make wise decisions, particularly with respect to all new items of business. After each meeting, the general counsel should take time to prepare the minutes. Although there is no set rule for how comprehensive minutes must be, general counsel should decide on a format and be consistent. Ms. Davidson pointed out that the Society of Corporate Secretaries and Governance Professionals has published a great deal of information on the best practices for acting as corporate secretary.

## **Summary**

In summary, although the roles of the general counsel are changing and the duties are expanding, the most important thing to remember is that for both the board and the general counsel to be the most effective, the board must believe that the general counsel is independent, competent, and fair. General counsel can demonstrate these characteristics by providing directors with the information that they need and the answers to the questions that they ask. The general counsel is the guardian of the decision-making process. One of the most important jobs of the general counsel is to provide the board with the tools they need to make the best decisions for the company and its shareholders.

### **For More Information**

For more information on the “General Counsel Board Effectiveness” session, please feel free to contact the speakers directly.

Bryan Blankfield  
Oshkosh Truck Corporation  
920.233.9241  
bblankfield@oshtruck.com

John Howard  
W.W. Grainger, Inc.  
847.535.4341  
john.howard@grainger.com

Deborah Davidson  
National Association of  
Corporate Directors  
202.572.2096  
djdavidson@nacdonline.org

Yvette VanRiper  
Foley & Lardner  
313.234.7107  
yvanriper@foley.com

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