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Advising the 'Cultural Revolution' in the Boardroom

From the Experts

By Michael W. Peregrine

Corporate boards have begun exercising more vigorous and direct oversight of the organization's corporate culture in what has become a significant emerging governance trend. This trend reflects an increasing awareness of how matters of culture and reputation correlate to the success of an organization, and to the board's efforts to sustain long-term corporate objectives. The general counsel is well-positioned to advise the board on culture oversight matters.


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What is particularly unusual, if not "revolutionary," about this trend is that it is a board-specific initiative. Rather than simply establishing goals and expectations for management to implement, boards are becoming much more proactive and engaged when it comes to oversight of culture (Arianna Huffington and Uber is a prime example). They are "owning" the role.

Defining 'Culture'

In this context, "culture" expands upon the long acknowledged virtues of "tone at the top" to broader considerations of executive, group and organizational behavior and values, and the factors that drive them. In some respects, this focus on culture is not new; leading governance observers and treatises have long emphasized the expectation that boards will actively cultivate a corporate culture that demonstrates the company's commitment to ethical standards, integrity, fair dealing and compliance with applicable law.

Indeed, the concept of board of oversight of corporate culture is embedded in the core principles of "corporate responsibility" that arose from the Sarbanes Oxley era. As defined at that time by the American Bar Association, the term includes both behavior by corporate leadership that conforms to law and results from the proper exercise of fiduciary duties; and ethical behavior beyond that demanded by minimum legal requirements. Over the succeeding years, some leading companies specifically incorporated elements of these concepts into governance principles and corporate charters.

Elements of the Trend

Boards are now seeking to define a more assertive culture oversight role (particularly in times of crisis) without subverting management's core responsibilities. This renewed focus reflects a greater recognition that aberrant corporate culture can be the catalyst for significant organizational risk.

Perhaps the most prominent public example of this has been where compensation incentives in the financial and pharmaceutical industries have driven harmful behavior that conflicted with previously expressed organizational values. Another prominent example is workplace environments that seemingly tolerate harassment or disrespectful executive treatment of employees, especially on the basis of gender, race or sexual orientation.

There is also an increasing recognition that positive, board-driven corporate cultures can have a significant impact on driving long term corporate value, enhancing risk management and corporate compliance initiatives and supporting commitments to sustainability.

Some corporations formalize their focus on culture oversight through specific reference in governance policies and procedures that articulate board duties and responsibilities. Others reference elements of culture oversight in the charters of existing committees such as compliance/risk and compensation. Still others assign oversight responsibility to dedicated standing "corporate responsibility" committees.

The legitimacy of this trend was tacitly confirmed by the March 28 announcement of the National Association of Corporate Directors that its 2017 Blue Ribbon Commission will explore the role of the board in overseeing its organization's corporate culture. The underlying presumption of the NACD analysis is that oversight of culture is directly related to an organization's success or failure.

This trend can also be seen in many recent reported efforts of boards to address challenges that implicate organizational culture and ethics. Prominent among these is the leading role that the Uber board has taken in connection with the company's efforts to overcome recent scandals, and implement changes in key aspects of corporate culture (e.g., the extent to which management allegedly fosters aggressive competition for management approval while tolerating inappropriate behavior by high performing employees). Wells Fargo plans on surveying its entire workforce on its culture, with the assistance of an academic who works in the field.

The General Counsel's Role

The general counsel is particularly well suited to advise the board on culture oversight matters. Being uniquely positioned at the intersection of law, finance, operations and strategy enhances the general counsel's ability to advise the board on the implementation and oversight of a culture that permeates the organization. This knowledge allows the general counsel to effectively coordinate board oversight of culture with the key committees and executives with pre-existing ties to corporate culture considerations. The general counsel can also serve as a conduit to the board for culture—related activities relating to risk management and compliance.

Notably, the general counsel has long been viewed as a leading protector of the corporate reputation, with the responsibility to address not only the question of "what is technically legal," but also the sometimes more pressing question of "what is right."

Summary

A notable new governance trend is the affirmative consideration by boards of the extent they can, and should, exercise oversight over corporate culture. This trend reflects an increased awareness of how a positive culture is a strategic asset for the corporation, while an aberrant culture can pose significant reputational and legal risks.

The general counsel can be a valuable partner to the board in its consideration of how best to monitor, and implement changes to, organizational culture.

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