

# CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | December 4, 2017

## On Board: The GC and the Confluence of Culture and Compliance

The daily headlines are prompting boards to think hard about their responsibilities for overseeing organizational culture: not only what “culture” means in the context of the board’s fiduciary duty, but also who among the executive leadership team is best suited to advise them on their culture-related responsibilities.

*Michael W. Peregrine*

The daily headlines are prompting boards to think hard about their responsibilities for overseeing organizational culture: not only what “culture” means in the context of the board’s fiduciary duty, but also who among the executive leadership team is best suited to advise them on their culture-related responsibilities.

The need for the board to identify its primary advisors on workforce culture oversight is now “front and center” due to a series of significant recent events. These include several major corporate controversies, the widespread media focus on sexual harassment in the workplace, and the recent release of the National Association of Corporate Directors (NACD)



Blue Ribbon Commission Report, “Culture as a Corporate Asset.”

These and other developments are working to provide more substance to both what constitutes this new fiduciary

oversight obligation, and whom should be its key oversight adviser(s).

Many signs point to the general counsel to fill that role, given her service as both technical legal adviser and ethical

counsellor. But one of the most compelling reasons falls into the “been there, done that” category—that the general counsel’s experience as the board’s chief adviser on compliance program oversight is a compelling qualification for her to serve as its chief adviser on workforce culture oversight.

There are notable similarities between the emerging board obligation to oversee workforce conduct, and its historical oversight obligations with respect to legal compliance. At their core, both obligations are based on a need to monitor and motivate employee behavior in a manner reflective of corporate mission and values—and law. They both recognize that appropriate, consistent culture across the entire organization is a unifying force, and an organizational asset.

The skills which the general counsel brings to the board as its chief adviser on compliance program oversight are several. These include assisting the board in assuring that the corporation’s compliance program satisfies effectiveness criteria established by the Department of Justice Fraud Division, and the Federal Sentencing Guidelines,

respectively. Of particular importance in this regard is supporting the guidelines-based expectation that the board will “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” This standard contemplates an active and substantive level of board oversight; i.e., that the board must be “knowledgeable” about the content and operation of the compliance and ethics program, and that it is to exercise “reasonable oversight” with respect to program implementation and effectiveness. The general counsel supports the board in satisfaction of those standards.

The general counsel also makes recommendations on the scope of law and regulation that form the framework of the compliance program. In addition, she assists the board in its ability to detect problems, the “yellow” or “red” flags of risk, and in pivoting from a position of oversight to one of active investigation when the circumstances so require. Another task is to advise the board on the manifestations of its compliance commitment in the board structure, organizational hierarchy

and compensation arrangements. She also assists the board in its efforts to coordinate legal compliance with matters of enterprise risk, and in fashioning internal and external communications and regulatory contact regarding legal compliance. These tasks correlate directly to the range of advice the board needs to satisfy its workforce oversight obligations.

Indeed, the NACD recommendations of its Blue Ribbon Commission describe a workforce culture oversight obligation in a manner that is similar to the board’s legal compliance oversight obligations. These similarities include: the extent to which clarity of cultural expectations should be manifested in written policies; the expectation of active oversight of culture by the full board; the extent to which the results of culture oversight reviews inform matters of board composition, succession planning and continuous governance improvement efforts; the need for culture issues to be integrated into board/management discussions regarding strategy and risk; the utilization of qualitative and quantitative data in making assessments of

culture; making culture a criterion in the CEO selection and evaluation process; and assuring that incentive compensation and promotion goals and protocols are designed to reinforce desired cultural outcomes.

Several recent, highly publicized workforce-related controversies serve to emphasize the connection between corporate culture and the board's compliance oversight process. Prominent among these was the Wells Fargo matter, involving a sales-driven business model within its Community Bank division. This aggressive model applied increasingly unrealistic sales goals for consumer banking product. When combined with a lack of accountability at the division leadership level and other leadership failings, it led to improper and unethical behavior (e.g., the sales of products that consumers neither needed nor used) and reputational damage on a wide scale. The focus of the company's internal investigation was, in part, on how its risk and compliance function failed to identify for corporate governance the problematic cultural behavior. This controversy served to alert corporate

boards to the very real potential within organizations for significant organizational conflict between corporate culture, and business realities and incentive goals.

Another similar matter involved widespread allegations of workforce discrimination, harassment, and retaliation within a well-known ride sharing company. The recommendations of outside counsel, following its internal investigation, were broad based; many of which mirror the Federal Sentencing Guidelines' elements of an effective compliance program; e.g. executive accountability; revised governance structures; culture enhancements; specialized employee training; expanded internal controls, improved complaint processes and expanded human resources policies and procedures.

Taken collectively, these developments underscore the fact that the board's oversight obligations with respect to both workforce culture and corporate compliance are grounded in several consistent principles. These include the relationship of individual employee conduct to organizational value; the scope

of laws intended to incentivize positive employee conduct; the intense media and regulatory interest generated by deviations from conduct-related policy; and the expected level of board engagement in assuring that organizational values are instilled in employees. These are all concepts and with which the general counsel is most familiar from her role as legal compliance program advisor to the board.

These shared principles (as well as the referenced overarching developments) commend the selection of the general counsel as a primary (but not its exclusive) advisor to the board on the exercise of its workforce culture obligations.

*Michael W. Peregrine, a partner at the law firm of McDermott Will & Emery, advises corporations, officers, and directors on matters relating to corporate governance, fiduciary duties, and officer and director liability issues.*