

CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | August 22, 2017

The Benefits of Coordination Between the Chief Diversity Officer and the General Counsel

Michael W. Peregrine

The concept of a chief diversity officer (“CDO”) has in recent years expanded to the point where it has become an established leadership position within many Fortune 1000 companies. And now with the legal implications of some CDO decisions and strategies becoming more publicly recognized, it is clear that the successful pursuit of the CDO’s important agenda will be enhanced by close cooperation and coordination with the general counsel (“GC”).

The company’s board of directors may ask the CEO to facilitate this coordination through a formal process that clarifies roles and board expectations regarding reporting relationships. This process could be patterned on similar protocols between the GC and other senior officers that exist in many corporations. It would also be complementary with related board efforts to provide appropriate workforce protection for the CDO (and other key officers).



The CDO’s Role

The position of CDO is grounded in the premise that corporate commitment to diversity and inclusion will have a positive impact on business outcomes, particularly when organized and led by a senior executive officer with dedicated duties.

Indeed, several recent studies demonstrate that increased diversity will support the achievement of important business goals, including improving market share, capturing new markets, “driving” innovation in the workplace and helping the corporation satisfy emerging best

practices with respect to social responsibility.

Many CDOs have large staffs and ample budgets, occupy a prominent position within the organizational hierarchy, and often report directly to the CEO. The principal duties of the CDO typically involve the full array of efforts necessary to increase workplace diversity and inclusivity. Depending upon the organization, this could involve matters of board composition and individual director search and nomination; executive talent development; employee and executive recruitment and retention; corporate culture development; employee training; policy creation and amendment; and support of corporate marketing initiatives aimed at diverse consumers.

Where Duties Overlap

Yet many of the duties and responsibilities of the CDO by their nature implicate legal and ethical considerations that are the primary jurisdiction of the company's GC—both with respect to the oversight of the legal risk profile of the company, and to the support of the board in the exercise of its governance responsibilities. These include matters of labor and employment law; reasonableness of compensation; employee benefits; litigation and government controversy, and corporate governance.

Specific examples of where material overlap can occur could include the following, among others:

- Negotiation of executive employment agreements that include diversity goals as part of incentive compensation arrangements;

- Addressing diversity-based implications of pay-equity data and proposed responses;

- Implementation of affirmative action plan/recruitment and other hiring related policies;

- Interpretation and consistent application of discipline under corporate codes of conduct and ethics (e.g., those relating to "harmful speech");

- Assuring compliance with state and federal laws and regulations relating to hiring, employee conduct and workplace culture/conduct;

- Whether to offer employee benefits to employees' same-sex partners;

- Engagement of outside counsel to address particular diversity-grounded issues or concerns, and the interpretation of any related advice or recommendations;

- Development of board/corporation policies relating to social responsibility;

- Advising the governing board on its responsibilities relating to oversight of corporate culture;

- Supporting individual and full board evaluation processes;

- Responding to governmental inquiry or investigation-based on diversity or inclusion-related allegations; and

- The preparation of public statements or responses to media inquiries concerning diversity or inclusion-related concerns.

An interesting intersection of the roles and responsibilities of the CDO and the general counsel was the recent, highly public controversy regarding the workforce culture at a prominent international ride-sharing company. The corporation was forced to respond to allegations of employee harassment, discrimination and retaliation. Outside counsel was retained to investigate the circumstances and report to the board on its findings. The board accepted a series of recommendations from the outside counsel meant to address identified concerns. These included the need to increase the profile of the company's head of diversity and the efforts of his diversity department, to expand the duties of that individual to specifically include matters of inclusion, to establish a direct reporting relationship to the CEO, and to take such other action as necessary to reflect an elevated status for the diversity and inclusion office and to demonstrate the company's commitment to the issue.

Another such intersection involves corporate governance, and the GC's role as a leading governance advisor to the board. It is now a best practice that boards develop a framework for identifying appropriately diverse candidates, in a manner that allows the nominating or corporate

governance committee to consider women, minorities and others with diverse backgrounds and experiences as candidates for board service. The GC ordinarily advises the board on the director recruitment and nomination process, and can be expected to assist in implementing best practices as they relate to diversity and inclusion. These are issues on which the CDO may also be expected to advise the board, making it highly appropriate for the two officers to coordinate their efforts.

What “Coordination” Means

The ability of both the CDO and the GC to perform the full scope of their duties depends in part on the extent to which the board and executive leadership recognize that while those roles differ in many instances, they overlap in many other significant instances.

Effecting a workable system of coordination and cooperation between the CDO and the GC should not require the proverbial “re-inventing the wheel”. The GC is very familiar with such arrangements given her regular interaction with other corporate officers whose duties have clear legal implications, including the Human Resources Director, the Chief Privacy Officer, the Chief Information Security Officer, the Internal Auditor and particularly the Chief Compliance Officer.

The essence of such a system is two-fold. **First**, that both officers

are completely free to perform their duties to promote the interests of the organization as articulated in their respective job descriptions. **Second**, that they use their best efforts to maintain open lines of communication with respect to performance of those of their duties that overlap or are otherwise complementary. The goal is to facilitate open and timely communication, and to jointly address issues where appropriate.

Such issues would include: (i) coordination (as appropriate) of respective presentations to the board to assure consistency and to avoid duplication; (ii) avoiding restrictions on the CDO’s ability to interact with government regulators; (iii) identifying circumstances under which the CDO may engage outside counsel or other advisors; (iv) coordination of all internal reviews and investigations commenced (and all disciplinary actions initiated) in response to diversity or inclusion-based concerns; (v) appropriate application of the attorney-client privilege; and (vi) shared GC/CDO responsibility for proposing and implementing revisions to the organizational policies, procedures and ethical codes.

The ultimate goal is to take advantage of opportunities to consolidate advice and reporting on particular matters, in order to reduce legal and reputational risk to the company. It is most certainly **NOT** to marginalize the hierarchical prominence or responsibilities of either officer, to

filter the advice or recommendations of an officer, or place barriers to her reporting to the CEO or to the board.

Conclusion

The CDO has an exceptionally important range of responsibilities given the critical relationship of diversity and inclusion to corporate business strategy and reputation. Many of those overlap with equally important responsibilities of the GC concerning the legal risk profile of the organization and matters of corporate governance. The effective exercise of those overlapping responsibilities, and the broader achievement of corporate diversity goals, is supported by board-initiated measures aimed at formalizing coordination between the CDO and the GC in a manner that supports, and protects against the dilution of, their respective duties.

Michael W. Peregrine, a partner in McDermott Will & Emery, advises corporations, officers and directors on matters relating to corporate governance, fiduciary duties and officer/director liability issues. His views do not necessarily reflect the views of McDermott Will & Emery or its clients.