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Sarbanes-Oxley's Legacy for Corporate Counsel

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On the 15th anniversary of the Sarbanes-Oxley Act, (the Act), enacted July 30, 2002, in-house counsel should pause to reflect on how the on-going legacy of that seminal law continues to impact the role of the general counsel, lawyers' professional responsibilities, and the relationship of corporate counsel to governance. This anniversary also provides a teaching moment for younger lawyers unaware of this legacy, and for corporate leadership to better understand the critical responsibilities of corporate counsel to good governance.

U.S. Securities and Exchange Commission building

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Background

The Sarbanes-Oxley legacy is grounded in: (i) the Act itself; (ii) the perceived role of lawyers in the corporate scandals that prompted the Act (*e.g.*, Enron, WorldCom); (iii) corporate responsibility-related best practices arising from the Act; (iv) revisions to multiple sections of Model Rules of Professional Responsibility concerning client confidentiality and "reporting up-and out"; and (v) the increase in prominence of the general counsel as technical expert, wise counselor and partner to management.

This legacy directly impacts the role of inside and outside counsel to this day. For that reason, it is appropriate and necessary to understand the connection to Sarbanes-Oxley and the background that led to the Act so that corporate counsel can more effectively advise their clients on matters relating to corporate responsibility. This is especially the case for younger lawyers who may not have been practicing while the Enron/Sarbanes environment was evolving.

The law was enacted in response to the series of notorious and crippling accounting controversies that had occurred in prior months, involving such companies as Enron, Adelphia, Global Crossing, WorldCom and others. For example, the financial collapse of Enron the previous December was the largest bankruptcy in U.S. history to that point.

As the American Bar Association (ABA) noted at the time, lawyers were perceived as contributing to those controversies by failing to fulfill their proper role as it relates to the corporation and its governance. A particular concern was that in many instances, the desire to acquire or keep client business, or otherwise advance within the corporate executive structure, induced lawyers to serve the interests of the "hiring executives", instead of addressing the long term interests of their client (the corporation).

The Sarbanes-Oxley Act

The Act was structured to protect the interests of investors and to provide stability to the financial markets, both of which had been badly shaken by the accounting scandals. Indeed, the speed with which legislation moved through Congress reflected the enormous gravity of the circumstances on both the U.S. and global economies.

To that end, Section 307 of the Act directed the SEC to adopt rules setting forth minimum standards of professional conduct for lawyers practicing before the SEC. Those rules: (a) require lawyers to report evidence of a material violation of the securities laws—or a breach of fiduciary duty—to the chief legal officer of the issuer and, in certain circumstances, to the governing board; and (b) permit them—in certain circumstances—to disclose outside the organization confidential information relating to the lawyer's appearance before the Commission, without issuer authorization.

Spillover Impact

But the "Sarbanes" legacy for lawyers is primarily found in the extent to which its themes have been carried forward in countless other corporate responsibility-centered doctrines and source materials. Principal among these are amendments to state codes of professional responsibility; numerous important public commentaries from notable legal and ethical observers; and the compilation of governance "best practices" directly prompted by the Act.

The most obvious example of this extension is found in the Sarbanes-prompted amendments to state codes of professional responsibility relating to confidentiality of client information (Rule 1.6) and the organization as the client (Rule 1.13(b).

These amendments served to: (a) refine the role of lawyers in supporting the flow of information and analysis on legal compliance matters within the corporation they represent; and (b) clarify the limitations placed on the lawyer's ability to disclose to third parties confidential information with respect to the client's potential criminal or fraudulent conduct. [The expectation was that the new rules would help prevent the types of internal oversight, reporting and disclosure failures which contributed so heavily to the notorious pre-Sarbanes corporate scandals.]

Another significant example is how the Act gave vitality to the concept of corporate responsibility and related best practices regarding the role of the corporate counsel and her hierarchical prominence. Seminal monographs prepared in the aftermath of the law's enactment by the ABA and the Bar Association of New York City have become primary resource material with respect to the role of corporate counsel generally, and as they relate to corporate governance in particular.

Incisive commentaries by prominent observers such as Ben Heineman ("The General Counsel as Lawyer-Statesman") and E. Norman Veasey ("The Indispensable Counsel") prompted the recognition of new best practices relating to the role of corporate counsel as technical adviser, business partner to management and wise counselor.

Conclusion

The Act and its progeny have had an enormous impact on the responsibilities of corporate counsel, and on her relationship to the client's governance, executive leadership, financial and compliance functions. It has also instituted new levels of accountability on corporate counsel, as well as directors and executives.

Greater leadership awareness of the forces shaping the role and responsibilities of corporate counsel will likely enhance the effectiveness of counsel. So general counsel should consider using this 15th anniversary as a teaching moment to take corporate leadership at every level—board, executive leadership, financial management, legal and compliance— for a brief trip down "professional responsibility lane". Remind these leaders how the Act has changed the way that corporate counsel interacts with them (and vice versa). And also consider having a similar conversation with younger lawyers in the client's legal department, who may not have been practicing in 2002.

Corporate counsel may want to remember the words of George Santayana: "Those who cannot remember the past are condemned to repeat it."

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