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CLO as ‘Governance Referee’: Brokering Turf Battles Between Board Committees

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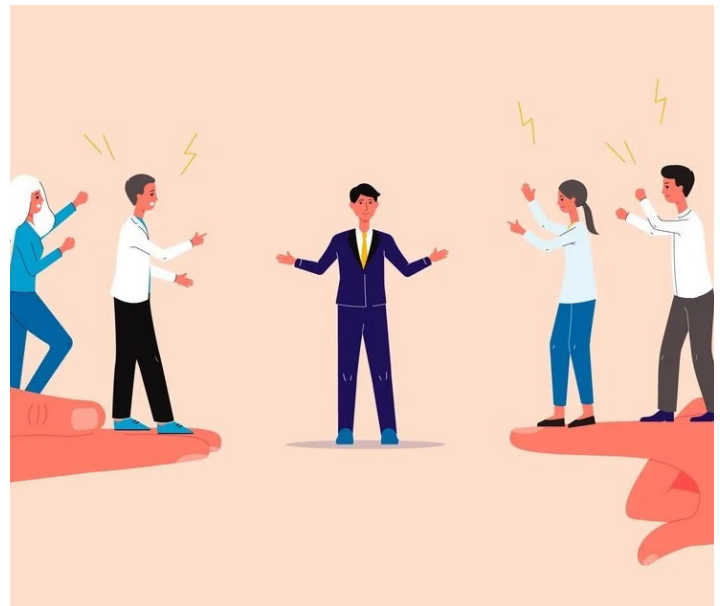
The chief legal officer is sometimes called upon to resolve disagreements between board members, and between executive leadership and the board. As primary governance adviser to the organization, and as a “wise counselor” to both the board and management team, this is now becoming a critical role for the CLO.

A series of recent developments is serving to expand the CLO’s role as “governance referee” in order to address jurisdictional conflicts arising between board committees. These developments include the Department of Justice’s (DOJ) emphasis on the use of executive compensation in the compliance program; the DOJ’s enforcement of President Joe Biden’s executive order on preserving competition; the “Great Resignation” and the need to refocus on executive retention and succession planning; and the current economic volatility threatening operational results and financial stability.

Each of these developments is complex and implicates the responsibilities of several committees. The issue is overlap in charter responsibilities between board committees—who does what? And absent informed governance choreography, the overlap can create inefficiencies, confusing priorities and conflicting signals.

The kinds of turf battles that can arise between board committees include:

The Executive Compensation Committee vs. the Audit & Compliance Committee. This conflict arises from DOJ’s new emphasis on the use of executive compensation as a corporate compliance tool. The Executive Compensation Committee will likely want to evaluate any effort to add compensation claw backs, incentives and deterrents within the context of its traditional compensation analysis. The Audit & Compliance Committee is likely to view the implementation of these matters as a strict compliance oversight imperative.



Mediation and settlement of business conflicts
flat vector illustration.

By sabelskaya

The Search & Succession Committee vs. the Executive Compensation Committee. This conflict arises from a combination of increasing inflationary pressures on compensation, and the Great Resignation’s impact on responsibility for senior level executive retention. The Search and Succession Committee will understandably seek authority to make executive compensation decisions necessary to recruit and retain valued executives in a very fluid market; the Executive Compensation Committee will likely want to keep such compensation decisions within the confines of its established practices and philosophy.

The Human Resources Committee vs. the Audit & Compliance Committee. This conflict addresses talent retention and recruitment in response such to topics such as the “Great Resignation;” “Women in the Workforce” concerns and “Quiet Quitting” phenomena. The

HR Committee will be focused on measures necessary to recruit and retain employees, and maintain their job satisfaction, in the context of a volatile labor market. The Audit & Compliance Committee will be very concerned with monitoring those activities strictly to avoid significant legal challenges given the DOJ's enforcement focus on "naked" no-hire/wage-fixing/no poach and ancillary arrangements between companies.

The Audit & Compliance Committee, the Finance Committee and the Strategic Planning Committee.

This conflict relates to the question of pursuing organic versus inorganic growth in the context of the Biden administration antitrust policies. The Audit & Compliance Committee is likely to be very concerned with aggressive, and frequently successful, merger enforcement practices of the DOJ and the FTC. The Finance Committee is likely to be very concerned with the cost of defending a government merger challenge. The Strategic Planning Committee is likely to be focused on the ability to pursue inorganic growth, particularly in the company's service area.

The Governance Committee, the Strategic Planning Committee and the Audit & Compliance Committee.

This conflict relates to the use of overlapping boards as a growth/collaboration/partnership option. The Governance and Strategic Planning Committees may be likely to encourage leadership pursuit of overlapping directorships to achieve a variety of legitimate inorganic growth initiatives. The Audit & Compliance Committee may be broadly opposed to such efforts as inconsistent with the antitrust-related provisions of the organization's corporate compliance program

The Enterprise Risk Management Committee vs. The Finance Committee. Here, both committees may seek to assert primary responsibility for board oversight of the current economic situation (i.e., rising inflation and the expectation of recession) and its potential impact on the organization.

The Audit & Compliance Committee vs. the Enterprise Risk Committee. In this case, both committees may seek to assert primary responsibility for identifying, and monitoring management's reporting to the board on mission-critical risks.

And of course, there are more examples, many of which are organization-specific. In most instances, none of these conflicts or overlapping interpretations reflect improper intent. These are not situations involving bad faith, miscommunication or a power grab attempt. Rather, they are often the byproduct of governance factors such as vague or uncertain committee charter language, ambiguous delegation from the full board or uncertain guidance from management staff to the committee.

And, increasingly, it is a specific development that creates the confusion, such as a new law or enforcement practices, a significant cultural development or change in economic circumstances. In those situations, one committee can fairly claim jurisdiction given the nature of the law, while another committee can fairly claim jurisdiction given the operational issue that is implicated.

The CLO, as primary legal adviser to both the executive leadership team and to senior management, can take a series of steps to help resolve these conflicts in support of informed board oversight and decision making.

From a proactive perspective, he can recommend an overview of the board's committee practice that would focus on the appropriateness of committee structure and delegation, the precision and coordination of their respective charters, horizontal coordination between committees, and effective committee staff support from management.

From a reactive perspective, he can facilitate communications between the respective committees and with board leadership on the proper interpretation of their respective charters, the application of relevant law to the issue at hand, and on possible resolution of the dispute that could be approved by the board.

Most importantly, the CLO is in a position to bring the potential for overlapping jurisdiction to the board's attention, thus empowering individual directors and committee members to identify the warning signs of potential conflict.

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