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New ACC CLO Survey Provides Key Governance Guidance

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By Michael W. Peregrine

Corporate boards are offered valuable guidance on their oversight of the corporate legal function by the 2023 edition of the Chief Legal Officers Survey ("Survey") from the Association of Corporate Counsel ("ACC"). A highlight of this year's Survey is the increasing direct involvement of CLOs in corporate business affairs, as opposed to having more limited exposure to such matters.

The annual ACC Survey is an important resource to help boards consider the role of legal affairs in the executive leadership team, and as to the size, structure and hierarchical positioning of the company's legal department. This is critical to the board's fundamental oversight obligation to assure that the company has a properly functioning legal affairs component.

Over the past several years, the Survey has been particularly valuable in identifying trends such as greater visibility of the CLO with the C-suite and the boardroom, and increased CLO operational authority over related functions such as compliance and ethics. It has also suggested areas in which such visibility and authority could be enhanced, such as in reporting relationships and interaction with the governing board. This year's edition is no different in those respects.

From a corporate governance perspective, the Survey's most notable conclusion is that the influence of the CLO position within company leadership continues to advance. This is demonstrated by specific Survey findings that speak to:

- *Attendance at Board Meetings*: 82% of responding CLOs indicate that they regularly attend board of directors meetings. This level of participation has increased year-over-year based on prior Survey results, and is generally positive in terms of board interaction with the legal function. Nevertheless, given the

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enormous value of having legal counsel attend board meetings, it is alarming that almost 20% of respondents do not have such access. This raises uncomfortable suggestions about the extent of CLO visibility within the leadership structure of those organizations.

- *Interaction with Executives*: Another positive indicator is that 70% of responding CLOs regularly meet with business leaders to discuss operational issues and risk areas. This level of interaction, which also has increased in recent years, is a positive sign that executive-level employees recognize the value of engaging with internal legal counsel on a regular basis. This practice is critical to the ability of an organization to mitigate legal risks. It is a practice which the board should strongly encourage.
- *Consultation on Business Matters*: In a similar vein, 65% of responding CLOs are regularly sought out by members of the executive leadership team for input on business decisions. Like the result on interaction with business executives generally, any indication that executives seek out the advice of the CLO on business decisions is positive from a board oversight perspective. However, the fact that 35% of respondents are not regularly solicited for their

input on business decisions should be a yellow flag for their boards.

On the other hand, it is disturbing that only 44% of respondents-a steady percentage over the last several years-indicate that they regularly participate in board executive session practice. The consistent involvement of the company's senior legal officer in executive sessions has been a recommended practice since the Sarbanes-Oxley era, and enhances the effectiveness and completeness of executive sessions (the CEO's likely discomfort notwithstanding).

Another overarching governance take-away relates to the role, and organizational "reach" of the CLO-which, of course, speaks to the internal influence and hierarchical presence of the corporate legal function. This "role and reach" is demonstrated by specific Survey findings that speak to:

Job Title: While the majority of respondents report having the title of "General Counsel," those reporting that they have the title of "Chief Legal Officer" has increased to 25%. While there is no universally accepted definition of the CLO position, it is generally interpreted as one which carries greater responsibility and a higher position on the organizational depth chart.

Additional Roles: Over 50% of the respondents also report holding the title of corporate secretary. This is significant from a corporate governance perspective since the role of the corporate secretary typically incorporates specific governance related tasks such as assuring that the directors have access to the resources necessary to fulfill their fiduciary duties; serving as primary contact for individual directors with questions about board processes; working with the chair and the CEO to set the board agenda, and contributing significantly to the design and ongoing support of an effective governance platform. The CLO, with its core governance responsibilities, is an ideal fit for this role.

Reporting to CEO: An important Survey result is that the number of CLOs with a direct reporting relationship to their company's CEO (or most senior executive officer) has stabilized at the 80 percent level over the last several years. This is clearly the most satisfactory result from a governance perspective, as it places the CLO in a direct line of communication with the senior executive officer of the company.

What is far less satisfactory is that of those responding CLOs who do not report to the CEO, 42% of them report to the CFO. This is a reporting relationship which is discouraged by many statements of governance principles for potential conflicts relating to financial reporting and disclosure, and the development, internal promotion, negotiation and board review of major transactions.

Reporting to Board: A discouraging Survey result is that only 51% of CLOs indicate that they also have a reporting relationship to the governing board. This is another governance yellow flag, given the general expectation that the CLO also serves the board as its primary legal advisor (absent conflict). Without a reporting relationship with the CLO, the board may have a more difficult time obtaining the advice of the CLO and monitoring the continued effectiveness of the company's legal department.

Reporting to the CLO: Over the last several years, one interesting theme in survey results has been the organizational footprint of the CLO position, such as the increase in the number of corporate functions that report to the CLO.

Chief among these is the compliance function, as almost 80% of respondents indicated the corporate compliance staff reports to the CLO. This high percentage has remained constant in survey results for several years running. Other functions where almost 50% of respondents indicated a reporting relationship to the CLO include (in declining order) privacy, ethics and risk. Interpreted collectively, this data reflects a growing recognition that the legal, risk, and compliance functions are so closely intertwined that it is in the best interests of the company to encourage direct communication and coordination among these officers.

The Survey reflects the increasing acceptance of the CLO as a key corporate adviser with a broad portfolio (technical expert, business partner to management, wise counselor). It also confirms the overall value of a CLO hierarchically positioned to both influence corporate strategy and support the role of corporate governance. With these and other Survey conclusions, the board committee responsible for the oversight of the department of legal affairs may benefit from a review of the Survey and a discussion with the CLO of its results and observations.

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