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How the Chief Legal Officer Can Support Leadership's Response to Social Justice Concerns

Corporate leadership should recognize the CLO as a strong resource for advice and counsel on political and social challenges and the potential consequences.

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It's the surprise corporate governance issue of 2021 to date, and shows no sign of going way.

The increasing expectations on leading businesses to respond to social justice concerns are confronting boards with political challenges they have not previously faced. The manner of their response may have significant consequences for their stakeholders. Corporate leadership should recognize the CLO as a strong resource for advice and counsel on these challenges and potential consequences.

We're not talking about traditional legal concerns, per se. They're certainly not the type of issues that wind up in the CLO's inbox most days. They're social issues separate and distinct from the "ESG" initiatives incorporated within a company's own specific business decisions and strategies. They're national in prominence and "hot button" in scope. They traverse industry sectors and choice of entity formation. They're the kind of social issues that seek out the company, rather than vice-versa.

More often than not they arise from the political/legislative/public policy arena. Examples include the North Carolina "bathroom bill," the controversy over the 2020 Presidential transition; and the controversial voting legislative proposals now arising in several states. Other headline issues revolve around gender and ethnic equality, immigration, taxation, just wage concerns and police defunding proposals. There will be others. And they are an extension of the core concern, as earlier expressed by BlackRock CEO Laurence Fink, that society is increasingly looking to the corporate world to address social and economic issues that government has failed to solve.

The pressures on companies are real. The massive corporate backlash against proposed Georgia voting legislation was prompted by harsh criticism of corporate timidity by a group of leading Black CEOs. In a recent opinion piece in The New York Times, NAACP President/CEO Derrick Johnson argued that companies have a responsibility "to ensure that we maintain a stable democracy." The prominent Yale professor Jeffrey Sonnenfeld similarly argues that "ensuring social cohesion in democracy is part of a CEO's job of managing the strategic environment."

And the risks to companies are also real. With a decision to become socially active comes the risk of political condemnation from the opposite end of the spectrum, retaliatory legislative reaction at both the state and federal levels, and possible negative impact on operations. With a decision not to become involved comes reputational damage, calls for accountability, workforce culture concerns and a similar potential for negative financial impact. Very much a "damned if you do, damned if you don't" situation.

All of this presents unanticipated and perhaps unwelcomed pressure on corporate management and governing boards. It is one thing to willingly implement management-developed and board-supported environmental, social and governance initiatives within the organization and its community; it is entirely another thing to be forced to respond to external social justice pressures, especially when they come from key corporate stakeholders such as employees, consumers, communities and even vendors.

A company's decision as to whether—and if so how—to make its voice heard on issues of social justice requires the deep collaboration of management and the board. There's no best practice here, no generally accepted approach. For example, some companies may prefer an aggressive, highly visible approach while others may prefer a lower profile, working through groups such as the Business Roundtable. Yet no matter the style, the CLO can play an especially pivotal role in the decision-making process. In her various roles she can truly "see the whole field" in terms of risk and reward and offer great value as a result.

In many ways, the social activism challenge is the perfect extension of what Ben Heineman Jr. described as the CLO's role as "lawyer-statesperson;" serving her client not only as technical legal advisor, but also as business partner to management and wise counselor.

As technical legal advisor to management and the board, she can advise on the legal risks that could arise from elements of a company's social activism. As a valued business partner to management, she can assist her executive colleagues in anticipating these complex challenges. As the wise corporate counselor, she is able to assist leadership in evaluating the issue through the prism of organizational ethics—the "what is right" question.

This is not a "stay in your own lane" situation. Section 2.1 of the model Rules of Professional Conduct specifically contemplates circumstances in which the lawyer, when rendering advice, can refer not only to law but also to other considerations, "such as moral, economic, social and political factors that may be relevant to the client's situation." Indeed, there are situations in which purely technical advice can be inadequate and relevant moral and ethical considerations are appropriate to consider.

Whether American companies are truly engaging in a "spiritual awakening" through their social activism, as Professor Sonnenfeld suggests, may be open to debate. But what's not open for debate is that the opportunities for them to become socially active are certainly increasing. Corporate leadership must be prepared to respond to calls to share the organization's voice on leading social justice issues of the day. Such a response must reflect a thoughtful balance of risk and reward, and can be well-supported by meaningful contributions from the CLO.

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