

## Coordinating “ERM” Reporting Through the General Counsel

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**Reporting to corporate leadership on the most critical system-level enterprise risks may be improved if coordinated through the health system general counsel.** Such a focused reporting model is prompted by a combination of the seismic change within the health industry post-ACA, the evolution of relevant enterprise risks, and the extreme importance attributed to timely, efficient, and contextual reporting on critical risks to the system board.

This proposed shift in reporting models is intended to apply only to the *highest* and *most fundamental risks* facing the health system; e.g., those risks that are truly “enterprise level” in nature and that have the potential to materially affect the long term strategy, sustainability, reputation, and business model of the health system. It is not intended to disrupt existing management-to-leadership reporting arrangements for the other, more traditional risks facing the health system; e.g., governance, transactional, technological, finance, business management, and legal/regulatory compliance.

The more focused reporting model seeks to address concerns with the continued efficiency of arrangements that provide multiple corporate officers (e.g., Compliance, Internal Audit, Information Security, Quality) with concurrent risk reporting access to leadership. The pressure on such reporting structures has grown with the pace and sophistication of industry change. Given its increasingly complex agenda, the ability of the system board to *digest* and *react* to true enterprise risk information could be frustrated by multiple different reporting channels and voices. In particular, the potential for the board to be confused by these diverse voices is significant. Since the vast majority of critical enterprise-level risks involve substantial elements of law and regulation, it is eminently reasonable to ask the general counsel to coordinate the reporting of those risks—subject to appropriate checks and balances.

This is not about limiting the rights, responsibilities, or job descriptions of key corporate officers with enterprise risk-related responsibilities. It is not intended as a subterfuge by which the voices of corporate executives are to be discreetly muffled or diverted. It is certainly not intended as a means to deny the board necessary access to members of its executive leadership team. Rather, it is all about how best to position the board, and its risk-related committees, with the most efficient upstream reporting possible on critical enterprise risks.

The discussion on critical enterprise risk reporting models may be informed by the following considerations.

### Why a Change?

A series of recent developments provide a basis for reconsidering the merits of the traditional “multiple voices” reporting model.

Most obvious is the change wrought by the dramatic consolidation of health care providers. The assets under ownership or management by these systems are at a level almost incomprehensible a decade ago. The sheer size of these systems and their integrated activities may in certain situations exacerbate their exposure to enterprise risks.

Most systems have expanded their management structures to address needs caused by their size and organizational complexity. As a result, many corporate executives may share responsibility for aspects of the operation from which enterprise risk may develop or be affected. More than one executive may feel it is her responsibility to report on enterprise risks that arise within her job description. In addition, there is increasing risk for role confusion amongst officers with direct risk responsibility (e.g., internal auditor, compliance officer, and general counsel), including efforts that have the effect of eroding the traditional duties of the general counsel.

New types of enterprise risks are emerging; e.g., the capabilities and limitations of technology, the security of patient information, the threat of pandemics, the increase in financial insolvency of some providers, competitive challenges from a consolidated yet diversified market.

The litigation and enforcement climate also has changed considerably; e.g., the government’s particular focus on combatting health care fraud, the substantial increase in whistleblower claims, and the uncertain implications of the “Yates Guidelines.” And at the same time, emerging case law serves in many cases to narrow the availability of the attorney-client privilege<sup>1</sup> and the “advice of counsel” defense.<sup>2</sup>

### What This Says About Risk

These and other developments suggest a sea-change from those circumstances that prompted the original thinking on upstream enterprise risk reporting. Health system boards are being asked to manage an increasingly demanding and complex agenda. Management-to-board reporting mechanisms that are potentially redundant, overlapping, or uncoordinated are not only inefficient, but can frustrate board member efforts to truly comprehend the significance and implications of individual risk reporting.

Notably, much of the historical writing and analysis concerning enterprise risk management (ERM) has, to date, come from the accounting and consulting industries, not the legal profession; in some cases, the law’s perspective has been

lacking in the ERM dialogue. But it's not that the traditional perspectives on upstream ERM reporting were wrong; not at all. Rather, it is that both the risk—and governance—landscapes have changed enough to raise the question of whether a different reporting system for critical risks might be more effective under the circumstances.

### The Reporting Goals

The oversight of organizational ERM is a primary responsibility of the governing board, and those committees through which ERM is processed. This is particularly the case with those critical risks that threaten the organization's business strategy, business model, and sustainability. The board must be proactive in assuring that organizational-appropriate risk identification, management, and reporting protocols are in place, assigning clear measures of responsibility and accountability with specific members of the management team and periodically reviewing, in detail, the sufficiency of these protocols and assignments.<sup>3</sup> While the author is not aware of any recognized "best practice" in the area, many boards choose to retain primary authority for overall risk management, and delegate to standing committees the responsibility for the specific risks as described in the committee charter (e.g., Quality, Legal & Compliance, Audit, Finance).<sup>4</sup>

Many recent corporate governance scandals seem to incorporate an element of internal management-to-board reporting failure; some (e.g., GM) more spectacular than others. A leading lesson from these scandals is the importance attributed to presenting useful information to the board/risk committee in a timely fashion, and in a manner *and context* that are meaningful to the board/committee. Issues that "keep management awake at night" need to be immediately brought to the board/committee's attention. The higher the quality of the information, the more effective the board/committee action is likely to be. This is especially important where courts and/or enforcement agencies hold the board and its committees to a greater level or responsibility with respect to ERM-related matters.

### The Focused Reporting Model

For these reasons, there may be considerable value in separating the reporting model for the highest and most fundamental risks facing the health system from that which is applied for reporting the other, more traditional risks facing the health system; e.g., governance, transactional, technological, finance, business management, and legal/regulatory compliance. The system general counsel would be responsible for coordinating the reporting of the former types of risks; while responsibility for reporting on the latter types of risks would remain in those corporate officers with related management responsibility.

The premise is that these fundamental risks are those with the greatest potential to materially affect the long term strategy, sustainability, reputation, and business model of the health system. They are risks on which senior leadership must be made aware in an expeditious manner that provides leadership with a concise understanding of the circumstances, and

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of known available options. Traditional reporting models in which multiple different corporate executives have simultaneous access to the board concerning particular risk events carry the potential for delaying board action (e.g., accommodating individual executive schedules); confusing the circumstances (too many different perspectives on the same set of facts); and lacking an overarching legal perspective (where the general counsel has not been involved in the risk identification or its disclosure to leadership). They also may not qualify for attorney-client privilege protection.

Other possible concerns arise when the general counsel is excluded (intentionally or unintentionally) from initial management-to-board presentations on critical enterprise risks. This typically arises when a decision is made that only the "line executives," with responsibility for the operational area from which the risk arose, should be involved in the presentation. It also may arise in situations where the board unknowingly conflates and confuses the roles of the compliance officer and the general counsel, and turns to the compliance officer, rather than the general counsel, to take the lead in resolving enterprise risks with clear legal implications.<sup>5</sup> (That, of course, is symptomatic of a more pervasive governance problem).

These concerns may be minimized through a reporting model that provides for the general counsel to be responsible for reporting of the most critical system-level enterprise risks. Such a "single voice" model would require that corporate officers who become aware of such types of risks coordinate with the general counsel on the ultimate upstream reporting of those risks.<sup>6</sup> Such coordination would be premised upon an initial determination by the general counsel that the identified risk indeed presented a critical system-level risk. Health

# Analysis

care industry examples of such critical, high-level risks might include (but would not be limited to) the following:

- » *Legislative:* The enactment of state or federal laws that could have a direct and extraordinary impact on the conduct of the health system's business in its current format. The primary recent example of such a critical enterprise risk is the enactment of the Affordable Care Act.
- » *Enforcement:* Any criminal charge against the system (this would bring mandatory debarment into the equation); any criminal charge against any management level employee that relates to the business of the health system; a civil investigation that is likely to result in a settlement that will include the potential for debarment or the imposition of a corporate integrity agreement; a civil investigation that involves potential exposure (think big, non-technical Stark violation) that would threaten the financial viability or strategic options of the health system.
- » *Judicial/Administrative:* The imposition of monetary damages or equitable relief against the system of such a magnitude that it would threaten its continued viability; a decision upholding the order of an antitrust enforcement agency to block a proposed transaction or to direct divestiture of significant assets (e.g., a hospital).
- » *Licensure:* The loss of any license, permit, or recognition that would directly and immediately impact the system's ability to provide its core provider services (e.g., loss of tax-exempt status; loss of hospital license; loss of enrolled provider status with the Centers for Medicare & Medicaid Services), which would render the facility unable to bill or collect from federal health care programs.
- » *Quality of Care:* Significant problems in dealing with a public health emergency; significant life safety/environment of care issues (i.e., a mold issue in a main building, a leaking underground storage tank that threatens or actually contaminates property and requires major remediation); unaddressed and pervasive quality of care concerns (e.g., physician, medical technology) that lead to extreme reputational, licensure/accreditation, or financial risk.
- » *Financial:* Unusual financial developments (e.g., a missed covenant) that carry the potential to evolve into challenges to ratings, changes in cost of capital, and creditor demands (which can include management change, forced strategic transactions, and the like)—and, ultimately, insolvency.
- » *Information Technology:* A massive data breach where either the sensitive information of a significant number of individuals has been obtained by cyber-criminals; a critical operating system such as a health care provider's electronic

medical record has been penetrated and locked pending payment of a ransom to the thief; key networked medical devices used by the hospital have been compromised by a cyberattack; or the integration of clinical data from multiple sources causes data integrity issues that affect the delivery of care to a broad cross section of patients.

- » *Benefits:* Significant potential weaknesses in the operation and maintenance of the retirement plans (and assets) under health system sponsorship and control.

And, of course, there are others . . .

It would be the general counsel's decision, based on all the available management team input, as to whether an identified risk reached the "critical" threshold. If that risk did not reach such a threshold, the individual executive would address the risk with the board committee to which she generally reports on risk and other issues. If, on the other hand, the identified risk did reach the threshold, the identifying executive(s) would closely coordinate with the general counsel in the evaluation of the risk, its potential implications to the health system, available options for addressing the risk, and near term action recommendations for the board. The general counsel would be responsible for making ultimate decisions on the characterization of the circumstances for purposes of the board information packet, and on the ultimate presentation (and recommendations) to the board, and whether other executive(s) should accompany her in presenting to the board.

The board could certainly ask that other officers, with subject matter expertise (e.g., the Chief Information Security Officer, the Chief Financial Officer, the Vice President of Human Resources), subsequently supplement the general counsel's initial risk presentation to the board. Should in the course of the coordination the executive who originally identified the risk disagree with any element of the general counsel's action, that executive would have the right to bypass the general counsel and report directly to the Chief Executive Officer (CEO) and to the board. Of course, no part of the general counsel's coordination role would be allowed to limit the regularly provided access of corporate officers—especially the compliance officer—to senior management and the board.

## The Benefits

From a governance perspective, this model achieves several important benefits. First, it provides a focused, single voice from which the board will receive its initial briefing on the particular enterprise risk. Second, because of the mandated horizontal coordination, the "single voice" will be an informed one, incorporating the views and perspectives of experienced colleagues. Third, the single voice should facilitate efficient boardroom discussion, avoiding needless distraction and redundancy from multiple different executive presenters. Fourth, responsive measures may be easier to implement if leadership can communicate its plan through the "single voice"

to the management team. Fifth, the “single voice” model neither precludes the CEO and the board from seeking the direct input from other executives nor prevents key officers from bypassing the “single voice” and speaking directly to the board if the circumstances warrant.

The health system general counsel is uniquely qualified to serve as this single voice. First (and as noted above), the vast majority of critical-level enterprise risks are likely to have material legal implications, and only the general counsel of all the executives is qualified to interpret those implications for the board. Second, the general counsel’s presentation to the board is more likely to constitute attorney-client privileged communications. Third, the general counsel’s presence will help support the ability of the board to satisfy its fiduciary duties in the conduct of the meeting. Along the same lines, the general counsel’s presence will allow the board to raise fiduciary duty questions in a “real-time” basis. Fourth, the general counsel is the executive most capable of structuring the discussion to achieve for the board key protections such as the business judgment rule and reliance on advice of counsel. Fifth, the general counsel is best suited to evaluate the particular enterprise risk in the context of all the other legal issues facing the health system; the general counsel truly “sees the whole field.”

From a corporate responsibility perspective, the American Bar Association has noted:

Providing information and analysis necessary for the directors to discharge their oversight responsibilities, particularly as they relate to legal compliance matters, requires the active involvement of the general counsel . . .<sup>7</sup>

The “single voice” model also is consistent with the increasingly accepted view that the general counsel of a sophisticated enterprise (such as a health care system) has highly consequential responsibilities and thus should occupy a position of hierarchical importance within the organization.<sup>8</sup> This view reflects an evolving role for the general counsel, by which she is increasingly viewed as a leading and valued member of the executive team. The general counsel’s responsibilities are perceived as extending beyond traditional legal tasks to include governance and risk management, and providing material contributions toward the development of business strategy.

The “single voice” model also helps to reduce risks that can arise from organizational “siloiing.” Key elements of this model are the coordination, and cooperation, amongst key officers with awareness of particular enterprise risks, and the general counsel. For the model to achieve its goals, they must work as a team (and should be incentivized accordingly). The “teaming” nature of the model should help prompt executives to identify and act upon risks as presented, pursue them with diligence and incisiveness, and share their understanding and analysis with the general counsel. This, as opposed to the infamous “GM

Nod,” the cultural failing to which much fault was attributed in connection with that organization’s ignition switch scandal.

## Summary

The health system board’s ability to process and react to critical enterprise risks may be enhanced by adopting a focused reporting system, in which the general counsel is the corporate officer responsible for delivering the risk briefing. The general counsel’s duties in this regard would incorporate substantial coordination with system executives with responsibility for those operational areas from which the risk has emerged. It would incorporate checks and balances that would assure that the board could have continued access to those corporate officers, whether in connection with its initial consideration of the risk or any subsequent follow up. The goal of this “single voice” reporting model is to streamline the ability of the board to understand the scope and extent of the particular critical enterprise risk. ☐

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## Endnotes

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