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ON BOARD

The General Counsel's New Opening to the Governance Committee

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The recent release of two important commentaries on corporate governance offers an excellent opportunity for the general counsel to provide value to the board's governance committee in the performance of its traditional charter responsibilities.

The first is the Commonsense Principles of Corporate Governance, prepared by a diverse consortium of leading corporate, finance and investment executives. Released on July 21 to significant publicity, the document contains a set of eight basic recommendations and guidelines concerning the roles and responsibilities of boards, companies and shareholders. These include board composition, director responsibilities, shareholder rights, public reporting, board leadership, management succession planning and compensation of management.

The second of these commentaries received less media attention with the more understated Aug. 3 release of the 2016 Governance Principles from the influential corporate policy organization



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The Business Roundtable. This commentary reflects a comprehensive update of the widely read 2012 version of its Principles document. The new version addresses what the group perceives as the key principles of governance, and also such fundamental issues as board responsibilities, roles of key corporate actors, committee responsibilities and other elemental governance concerns historically treated by the organization.

While different in structure, detail and focus, both commentaries offer serious recommendations on a broad array of critical elements of governance that affect not only publicly traded corporations, but also, in many respects, privately held companies and sophisticated nonprofits as well (e.g., health care and health insurance; "disease charities"; and also institutions of higher education). On its own, the release of either of

these two commentaries would have been a significant event worthy of governance committee attention. For two sets of substantial commentaries to be released in close proximity is particularly consequential—and a primary reason for the general counsel to bring them to the governance committee’s attention.

Board committees are generally expected to schedule periodic educational sessions designed to brief committee members on recent trends, developments and “best practices” that affect committee duties. The expectation is that these sessions will position committee members to evaluate whether the trends and developments affect the practices of the committee, the board and the corporation, and if so, how. For many committees, the general counsel is a leading source of educational information and analysis.

This is particularly the case with the governance committee, which is expected to monitor corporate governance and to recommend changes to board structures and practices as considered appropriate. With respect to each of these new commentaries, the governance committee should understand not only their individual substance, but also what changes they propose from current, accepted practice and what their combined release suggests about the evolving state of corporate governance in America.

The general counsel, among all board advisers, is well positioned to digest the commentaries and

advise the committee on their collective relevance to the corporation’s own governance practices. The guidelines and recommendations set forth in the commentaries directly implicate legal matters relating to board structure, and the exercise of fiduciary duties by board and committee members. These are, of course, matters that are traditionally addressed on behalf of the board by the general counsel. Indeed, since the enactment of the Sarbanes-Oxley Act, governance committees have increasingly turned to the general counsel for advice on how board practices are affected by state and federal law and regulation, judicial decisions and principles of corporate responsibility.

This is not to suggest, however, that the general counsel should be the exclusive staff adviser to the governance committee. Indeed, the committee greatly benefits from the thoughts and perspectives of a diverse set of experienced governance advisers. A team approach (in which the general counsel plays a coordinating role) can be an effective way of advising the committee on developments, such as these commentaries, that directly relate to law and legal responsibilities.

Providing advice on the new commentaries will not be an easy task for the general counsel. They must be digested and presented to the governance committee in a condensed manner that highlights the various forces that prompted their release. The general counsel will need to anticipate board questions: What’s

new and different in these recommendations? Which, if any, of the recommendations are relevant to the corporation’s governance practices? He or she will also want to present options for addressing the most relevant themes. Yet through this effort, the general counsel can help build an important record that the committee exercised good faith in its consideration of the commentaries.

The recent release of these two important corporate governance commentaries is an appropriate near-term agenda item for the board’s governance committee. The company’s general counsel, working in coordination with other advisers, is well positioned to advise the committee—and can provide significant value in doing so.

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