

# CORPORATE COUNSEL

An **ALM** Website

corpcounsel.com | September 10, 2018

## The General Counsel and the Corporate Code of Conduct

*Michael W. Peregrine*

The corporate code of conduct has been thrust into prominence by its role as the platform from which many prominent corporate leaders have been terminated because of allegations of egregious personal behavior. With that prominence has come concerns that the code is in fact a flawed means of evaluating conduct—that it is fundamentally a general statement of expectations, and was never intended to be used for such consequential purposes.

The board should confront those concerns by reviewing the suitability of the code as an educational and enforcement vehicle. It is critical that corporations have the ability to punish aberrant employee and leadership behavior. Codes of ethics and conduct are key tools by which the board can exercise its oversight responsibility for workforce culture and, by extension, promote talent development and protect the corporate reputation.

Addressing possible code weaknesses is consistent with this oversight duty.

The general counsel is the logical corporate officer to guide the board in its evaluation of code of conduct effectiveness. She knows the legal risks to the organization arising from flawed code enforcement. She appreciates the value of precise document language and intent. She is experienced in coordinating issues with other corporate officers (e.g. chief human resource officer, chief compliance officer). Most importantly, she understands the long-term organizational value created by a positive and protective workforce culture.

Codes of conduct and business ethics have long been a staple of corporate governance, emerging along with greater public interest in consumerism, concern for the environ-



Credit: garagesstock/Shutterstock.com

ment and other indicia of social awareness. Their use proliferated during the Enron/WorldCom era, with many corporations adopting various statements of conduct, business ethics and/or governance principles in response to identified governance failures that led to the enactment of the Sarbanes-Oxley Act.

Codes are not, in most cases, a legal requirement but they are intended as an extension of the corporation's good faith commitment to principles of corporate responsibility and to an appropriate and welcoming workforce environment.

As a result, many codes address concepts such as harassment, discrimination, fraternization, anger, bullying and other abusive behavior, bias and conflict, use and appropriation of corporate assets and opportunities. Some incorporate statements of governance principles. But there is no generally accepted format or content for these codes.

As a result, they vary in scope, content and length. Some—especially those that are applicable only to board and executive leadership—are only a few pages in length and emphasize broad concepts and general statements of expectations. Others—especially those applicable to the entire workforce—are lengthy and more detailed.

In addition, many of the topics covered by the code of conduct may also be the subject of more detailed treatment in other corporate policies. For example, matters of harassment, discrimination, anger and bullying could also be the subject of detailed human resources policies. Issues related to conflict, confidentiality and appropriation of opportunity are most likely also addressed in a traditional conflicts of interest policy. Concerns with relationships with vendors and suppliers may also be addressed in the corporate compliance plan.

Any material overlap can create substantial confusion and lack of coordination. This could extend to such matters as internal education on code provisions; what are the controlling policies and procedures; specific definitions of elements of conduct; how to report allegations; and identification of the corporate executive(s) responsible for both providing code interpretation and guidance, and addressing individual allegations.

Furthermore, many codes aren't specific with respect to key procedural issues. These include the manner in which allegations are reported and recorded; notification of the targeted officer or director; and assuring both the confidentiality of allegations, and that the investigation is conducted promptly, thoroughly and objectively.

More basic is the fact that many codes lack clarity on the penalties assigned to particular violations, and how those penalties are meted out. Is there a "one size fits all" approach (i.e., termination of service/employment)? Are there gradations of penalties? Is the determination of penalty in the sole discretion of a particular body? As expressed in this article by The Wall Street Journal, given the subjective nature of many elements of a code, fair treatment

of the accused is a legitimate consideration.

If left unaddressed, these and other issues can limit the effectiveness of the code of conduct and frustrate the ability of the board to exercise workforce culture oversight. In addition, flawed procedures can cause constituents to lose confidence in the equity applied in the interpretation of the code. All of these can increase the organization's exposure to future legal claims by the subject executive or director, whether grounded in breach of contract, defamation or civil rights violations (claims regarding race, gender, age discrimination, etc.).

**Michael W. Peregrine**, a partner at the law firm of McDermott Will & Emery, advises corporations, officers, and directors on matters relating to corporate governance, fiduciary duties, and officer and director liability issues. His views do not necessarily reflect the views of the firm or its clients.