

NATIONAL
DIRECTORS
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NDI Executive Exchange

What's on Your Mind?

Share and Discuss the Corporate Governance Issues Impacting Your Business

General Counsel's and Corporate Secretary's Role With Your Board

Thursday, November 17, 2011

12:30 p.m. – 1:45 p.m.

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2011 NDI EXECUTIVE EXCHANGE – CHICAGO – NOVEMBER 17, 2011
General Counsel’s and Corporate Secretary’s Role with Your Board

Panelists: Denise Cade, John Christy, Steve Fivel, Irwin Shur, Ed Mason, Pat Quick

Time: 12:30 p.m. – 1:45 p.m.

Subjects for Discussion

1. Under what circumstances should the Board or a Board Committee retain “independent counsel”, and if such counsel is retained, what role should the General Counsel or Corporate Secretary play in the context at issue?
 - (a) What factors are relevant in identifying the corporate transactions/events/circumstances giving rise to retention of independent counsel?
 - (b) Once the decision is made that an independent counsel should be retained, what criteria should be applied in selecting a particular counsel? Among other things, can the firm have performed services for the company in the past?
 - (c) While the Board or applicable Board Committee will make the final decision regarding whether to retain independent counsel and who that will be, at a practical level, who should drive the process of identifying the need for and selection of special counsel?
 - (d) If the Board or a Committee retains independent counsel, who is the client? Are there any special privilege-related issues?
 - (e) Under what circumstances may the General Counsel or Corporate Secretary communicate with the independent counsel?
 - (f) Who negotiates the fees and reviews the statements? Do the company’s usual outside counsel policies apply?
 - (g) Who maintains copies of written communications?
 - (h) Under what circumstances may the General Counsel and/or regular outside counsel serve as counsel to the Audit Committee? The Compensation Committee? Under what circumstances may that not happen?
2. To what extent should the General Counsel or Corporate Secretary facilitate communications or act as an intermediary between (a) directors or (b) directors and other members of management? In particular, what role should the General Counsel or Corporate Secretary play in assisting and advising an independent chair/lead director/presiding director and in facilitating communications between that director and the CEO?

- (a) What regular access and communications generally occur between Board meetings among directors, between directors and management, and between an independent chair/leader director/presiding director and the CEO? What generally are the purposes and benefits of these communications?
 - (b) What special circumstances might alter the need for such communications and in what ways?
 - (c) To what extent are commonly understood and applied guidelines appropriate in setting expectations regarding such communications and, if so, for what purposes?
 - (d) What role, if any, does the General Counsel or Corporate Secretary have in facilitating communications or acting as an intermediary between and among these persons? Is the General Counsel acting as lawyer, a member of management or in some other official or unofficial capacity?
3. To what extent should a company facilitate direct communications between shareholders and directors, and what role should the General Counsel or Corporate Secretary have in this process?
- (a) Are there particular corporate transactions/events/circumstances that make this especially appropriate?
 - (b) What are the potential risks and benefits in facilitating direct communications between shareholders and directors? Consider Reg. FD and the proxy rules.
 - (c) Assuming such direct communications do occur, in what forum(s) should they occur? Should they be webcast? Should shareholders be required to submit subjects and questions in advance?
 - (d) What education/training of directors is necessary or appropriate prior to such direct shareholder communications occurring? Who should be responsible for such training, and how should it happen? How does the company ensure consistent and legally compliant communications with shareholders?
 - (e) Are there emerging trends in this area?
4. What role should the General Counsel or Corporate Secretary play in preparing the meeting agendas for Board and Audit, Compensation and Governance Committee meetings, and in doing so, how should he or she interact with the CEO, Chair or lead/presiding director, committee chairs and/or relevant members of management? What role should the General Counsel or Corporate Secretary play in initiating or facilitating discussion regarding governance topics among members of the Governance Committee or the full Board? How does a General Counsel or Corporate Secretary function most effectively in interacting with the Compensation Committee, the CEO and other senior management, the HR department, the outside compensation consultant and other relevant players with respect to executive compensation matters (including plan

design, award design and terms)? Should the General Counsel or Secretary attend Committee meetings?

- (a) How involved should the General Counsel or Corporate Secretary be in preparing/monitoring meeting agenda and accompanying materials for the Board and Board Committees? Are these responsibilities ones in which the General Counsel or Corporate Secretary should take the lead from the CEO, Chair or lead/presiding director and committee chairs, or should he or she be more proactive?
 - (b) To what extent is it the General Counsel or Corporate Secretary's responsibility to confirm that the information provided the Board and Board Committees is consistent with the directors' exercise of their fiduciary duties of care?
 - (c) How does the General Counsel or Corporate Secretary determine how active to be with each Board Committee and in what ways? How does this vary, depending on which Board Committee it is?
 - (d) If a director or member of management requests the General Counsel or Corporate Secretary to include an agenda item, what protocol should the General Counsel or Corporate Secretary follow?
5. How does a General Counsel function most effectively in dealing with the Board, Board Committees, the Chair or presiding director, individual directors, the CEO and/or other senior officers? Among other things, who is the General Counsel's client?
- (a) How best does the General Counsel represent the company, as the client, while facilitating effective communications with the Board, individual directors, the CEO and other members of management? Is this more a theoretical than practical issue?
 - (b) How does the General Counsel deal practically with issues where the interests of individuals on the Board or in management may diverge from the company's interests?
 - (c) How does the General Counsel best remind directors and members of management that he or she is not their personal attorney?
 - (d) How should the General Counsel respond to a request from a director or member of management to keep something confidential?
 - (e) Under what circumstances does the General Counsel have an obligation to disclose to one or more directors?
6. What role should the General Counsel or Corporate Secretary play on the subject of Board composition, including diversity and director attributes?

- (a) To what extent should the General Counsel or Corporate Secretary act as a resource in working with the Board and Governance Committee on issues of Board composition? Under what circumstances is it appropriate for the General Counsel or Corporate Secretary to be an active “change agent” within the company on these issues? Should the General Counsel or Corporate Secretary maintain a running scorecard of attributes?
- (b) How might the General Counsel or Corporate Secretary work practically with the Board and/or Governance Committee in helping access high-quality diverse director candidates?
- (c) What role does the General Counsel have in new director training and education?