



## **Regulatory: The Evolving Role of the General Counsel** *How general counsel can assist the board in risk oversight.*

By [Gardner Davis](#)  
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The board of directors' fiduciary duty of care includes a well-established responsibility to monitor potential risks facing the company. In the 1996 landmark case of *In re CareMark International, Inc. Derivative Litigation*, Chancellor Allen recognized that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists."

Recently, however, the identification, assessment, management and oversight of business risks have become an obsession of politicians, regulators and academics.

The role and expectations of the board in the area of monitoring and evaluating risk have expanded substantially over the past several years due to greater scrutiny of business overall and the continuous increase in oversight regulation and corporate governance reforms. For example, under a recent SEC disclosure requirement, a company must disclose: (1) the extent of the board's role in risk oversight of the company; and (2) the effect that the board's risk oversight function has on its leadership structure.

The general counsel's role has necessarily expanded to assist the board of directors in the risk oversight function. The general counsel is expected to advise and assist the company's board of directors and committees of the board in overseeing actual or potential risks associated with the company's business, operations and practices.

As a result of this increased emphasis at the board level on risk, the role of the general counsel has expanded from providing traditional legal counsel to advising on nonlegal risks such as public relations issues.

The general counsel is uniquely positioned to ensure that the basic corporate structure, governance documents and compliance environment of the company meet the evolving standards. However, the general counsel's dual role as the corporation's chief legal officer and a member of the executive management team and the role as advisor to the board raises potential issues.

The general counsel faces ethical and practical considerations when working with the independent chair or lead independent director of the board regarding risk oversight issues. The management team expects the general counsel to be an advocate for management's strategies and business plans. On the other hand, the lead director expects candid and frank disclosure of risks and potential problems.

The corporation benefits from a culture where senior managers will freely share concerns with the general counsel, as the lawyer for the company. However, to the extent the general counsel is viewed as the "policeman," executives may be reluctant to be candid.

Finally, the general counsel must avoid being labeled as too cautious or negative by the board of directors or management. The exercise of sound business judgment involves risk taking. The general counsel, management and the board must realize that risk oversight does not mean risk elimination.

*This column is the second in a series of articles on the impact of increasing and evolving governmental regulation and reform in the corporate governance arena.*

*[Gardner Davis](#) is a partner in the Transactional & Securities practice of Foley & Lardner LLP.*

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