The Role of the General Counsel in Corporate Strategy

Moderated by,
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Agenda

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- Role of the Lawyer in Corporate Strategy
- Key Legal Inputs in Corporate Strategy
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Overview

The Organization for Economic Cooperation and Development provides the following broad description of the responsibilities of the Board:

*The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board’s accountability to the company and the shareholders.*

Today’s focus will be on the first component—how the Board engages in “strategic guidance” and, more particularly, how the corporate GC aids that objective.
Corporate Strategy

The Board’s strategic planning role grows out of its legal obligations:

- A corporation is managed by or under the direction of the Board of Directors (Del. Gen. Corp. Law § 141(a))
- “Management” in this context means supervision, direction and control, not direct management of operations
- The Board may satisfy its obligations by “thoughtfully appointing officers, establishing or approving goals and plans, and monitoring performance.” (Grimes v. Donald, Del. Ch. 1995)
- Directors’ fiduciary duties include a duty to implement a corporate information and reporting system and to monitor or oversee operations (Stone v. Ritter, Del. S.Ct. 2006)
Corporate Strategy

Corporate strategy is a critical item for board engagement, but there is no one-size-fits-all approach to strategy. It includes matters such as:

- Providing advice and counsel to the CEO and management on the business environment, challenges, and corporate objectives
- Reviewing and providing input on strategic plans, execution plans, risk policy, annual budgets and business plans
- Setting performance objectives
- Monitoring implementation and corporate performance
- Approving and overseeing major capital expenditures, acquisitions and divestitures
- Implementing executive succession planning
Role of the Lawyer in Corporate Strategy

The role of the GC and the in-house legal department in corporate strategy is evolving

- Historically, “legal” may have been thought of as a technical function limited to transaction execution or legal compliance
- Due to the increasing significance of legal matters to a company’s business, many GCs and other in-house lawyers have grown into the role of business advisor and counselor throughout the organization
  - Interaction with the board
  - Interaction with senior functional heads (e.g., corporate development, sales and marketing, product groups, finance/accounting, R&D, HR)
Role of the Lawyer in Corporate Strategy

The role of the GC and the in-house legal department in corporate strategy is evolving

- Among the reasons for this development are
  - Importance of the rapidly changing legal and regulatory environment to a company’s ability to define and achieve its strategic objectives
  - Importance of M&A and financing activities to many companies’ strategies, which inherently involve legal issues and judgments
Key Legal Inputs to Corporate Strategy

Impact of Regulation

- Virtually all companies, even those not in regulated industries, face rapidly expanding and ever-more complex regulatory environments.
  - Increased regulation in the financial, securities, safety and health and consumer protection areas can affect many companies
  - Regulatory complexity is compounded by the fact that many laws delegate implementation to administrative agencies, which may have substantial discretion to develop rules and decide how they will apply to particular industries and companies
- Companies operating in international markets and emerging markets face additional challenges
  - Overlapping and potentially inconsistent regulatory regimes can further complicate a company’s regulatory obligations
Key Legal Inputs to Corporate Strategy

Impact of Regulation (cont.)

- The board needs to understand the legal and regulatory environment in which the company operates to carry out its oversight responsibilities, to assess the business’s performance and to assist management in developing corporate strategy.

- A major function of the GC is to advise the board on the impact of current regulation on present and future business plans, to anticipate changes in regulation and to advise the board on best means to respond to regulatory developments
  - This can include not just telling the board what can happen and how to comply, but also advising on means to influence regulatory outcomes (such as lobbying or participating in administrative rulemaking)
Key Legal Inputs to Corporate Strategy

Risk Management

- Since the onset of the financial crisis, corporate risk management has been a focus of corporate governance and regulatory interest
- In particular, regulators have focused the role of the board of directors in the risk management and oversight process
  - SEC regulations adopted in 2009 require disclosure regarding the extent of the board’s role in risk oversight, such as how the board administers its oversight function, and the effect that this has on the board’s leadership structure (Regulation S-K, Item 407(h))
- Many corporate risks are financial and operational, but can still have a legal impact, e.g., risks relating to financial reporting and controls, technology (cybersecurity and social media), safety and health, and corporate social responsibility
Key Legal Inputs to Corporate Strategy

Risk Management

- Risk management includes establishing a level of risk tolerance that the organization will accept in seeking to achieve business objectives
- Setting these risk tolerances is a major component of the corporate strategy process, and one in which the board will have input
- The board will look to the GC to provide risk analysis where a risk can have legal impacts on the company
Key Legal Inputs to Corporate Strategy

Impact of Disputes and Litigation

- Legal disputes and litigation have always been a cost of doing business for most companies, especially in the litigious US environment.

- The complexity and cost of litigation continues to be affected by a number of factors, including:
  - Continually increasing volume of data subject to production (emails, etc.), which affects costs as well as creates collateral risks arising from failure to disclose responsive information.
  - Increased government investigation activity and aggressiveness of investigators in seeking financial penalties and other relief.

- Many disputes can involve matters that are core to the company’s business and strategy, such as intellectual property.
Key Legal Inputs to Corporate Strategy

Impact of Disputes and Litigation (cont.)

- Management of disputes and litigation is, of course, a core responsibility of the GC and the in-house legal department.

- Given the increasing cost and complexity of litigation matters, as well as the potential impact on the company’s ability to achieve its business objectives, the company’s approach to litigation and disputes can be important to its business strategy.
  - For example, should the company engage in an aggressive litigation strategy to protect key IP?

- The board will look to the GC to advise it on the strategic impact of major litigation and disputes, including foreseeable legal threats and appropriate legal actions to protect the company’s business and key assets.
Key Legal Inputs to Corporate Strategy

Compliance

- Ensuring compliance with laws and promoting ethical corporate behavior can itself be an important element of corporate strategy
- The compliance function consists of a system of controls—including policies, procedures, and reporting and investigative mechanisms—designed to ensure compliance with laws, regulations, and corporate policies
- While compliance often involves legal matters and often requires legal input and advice, in many companies the compliance function is not part of the legal function and is headed by an officer who does not report to the GC
Key Legal Inputs to Corporate Strategy

Compliance (cont.)

- Because compliance relates closely to other aspects of corporate strategy, including regulation and risk management, and because it often involves legal matters, the GC may have an important role in assisting management and the board in evaluating the company’s compliance structure.
Legal and Ethical Constraints

Legal and ethical principles can affect how an in-house lawyer participates in business strategy

- Preserving the objectivity and integrity of the in-house lawyer’s legal advice
  - Lawyer’s ethical duties run to the corporation, not the CEO or other members of management (Model Rule of Professional Conduct 1.13(a); SEC Rule 205.3(a))
  - Lawyer has duties to take action if it becomes aware of possible illegal activities, including potentially reporting to law enforcement (Model Rule of Professional Conduct 1.13(b); SEC Rule 205.3(b))
  - The board relies on the GC to ensure legal compliance and to protect the corporation’s legal interests
  - Participation in strategy should not be allowed to compromise the lawyer’s ability to “say no” when warranted
Legal and Ethical Constraints

- Potential impact on the attorney-client privilege
  - Business advice provided by an attorney is not protected by the attorney-client privilege (*US v. IBM*, 66 F.R.D. 206, 212 (SDNY 1974))
  - Likewise, reports to an attorney concerning general corporate or business decisions are not privileged, unless they can be read to include an implied request for legal advice (*Simon v. G.D. Searle*, 816 F.2d 397, 402-04 (8th Cir. 1987))
  - When the lawyer’s activities are broader than just legal matters, there is a greater risk that his or her communications will be characterized as “business,” not “legal”
  - Lawyers participating in strategy should take steps to make clear when communications involve legal advice and are intended to be privileged and when they are not
Presenters
Damien Atkins

Damien Atkins is currently the General Counsel and Secretary of the Panasonic Corporation of North America, the principal North American subsidiary of Osaka, Japan-based Panasonic Corporation and the hub of its branding, marketing, sales, service, product development and R&D operations in the U.S. and Canada. Panasonic's operations in North America include R&D Centers, manufacturing bases, business-to-business and industrial solutions companies and consumer products with sales and service networks throughout the U.S., Canada and Mexico.

Mr. Atkins was formerly Senior Vice President and Deputy General Counsel and Chief Compliance Officer of AOL Inc. where he oversaw Securities Regulation, Corporate Governance, Labor & Employment and Global Compliance matters. Mr. Atkins graduated from New York University School of Law and holds a bachelor's degree from Stanford University.
Judy Branzelle

Judy Branzelle is Chief Legal Officer and General Counsel for Goodwill Industries International Inc. She focuses on legal issues regarding non-profits and intellectual property protection. Judy is a member of the Non-Profit Committee for ACC, and the Internet Committee for the International Trademark Association. She served on the ASAE Legal Counsel and has been a speaker on intellectual property and other legal issues.

Judy was the recipient of the 2015 Outstanding Chief Legal Officer for the National Capital Region, Association of Corporate Counsel.
Rob Lavet, General Counsel, is responsible for managing all legal affairs for SoFi and its affiliate entities. Prior to joining SoFi, he served as a Principal in the Education and Litigation practice groups of the Washington, DC law firm of Powers Pyles Sutter & Verville (PPSV) where he represented financial institutions and post-secondary institutions on a wide variety of regulatory, litigation and transactional matters.

Prior to PPSV, Rob served as General Counsel to Sallie Mae, a Fortune 300 company and the largest provider of education finance. Before his 16 year career with Sallie Mae, Rob served as a Partner in the Washington D.C. law firm of Cole Corette & Abrutyn specializing in corporate and securities litigation. He was named a top Washington D.C. corporate counsel in 2015.

Rob holds a J.D. from Georgetown University Law Center and a B.A from the University of Pennsylvania.
Kellye Walker

Kellye Walker is Corporate Vice President and General Counsel for Huntington Ingalls Industries, America’s largest military shipbuilding company and a provider of manufacturing, engineering and management services to the nuclear energy, oil and gas markets.

Serving in this role since January 2015, she has overall leadership responsibility for HII’s law department and outside counsel, which provide a broad range of legal advice and support for the company’s business activities, including corporate governance matters, compliance, litigation management, and mergers and acquisitions.

She earned a bachelor’s degree at Louisiana Tech University and a Juris Doctor at Emory University School of Law. She is a member of the American Bar Association and a former board member of the Association of Corporate Counsel.
Stephanie C. Evans advises domestic and international clients on a wide range of corporate transactions, with a particular focus on mergers and acquisitions, joint ventures, strategic alliances and financings. She regularly advises boards and special committees in connection with transactions and provides advice on governance and commercial transactions.

Her clients include private and public companies in a variety of industries, including financial services, defense and technology. She is active with emerging growth companies throughout their development cycle. She was previously Vice Chair of the Corporate Practice Group. Ms. Evans also worked as an associate in the Global Investment Banking Group of Deutsche Banc Alex. Brown.
Questions?

Thank you!!