Corporate Secretaries – Law Firms

The Role Of The Corporate Secretary In The New Post-Sarbanes/Oxley Arena

The Editor interviews ***Warren J. Casey*** *and* ***Michael T. Rave****, Partners, Day Pitney LLP.*

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Editor: How has corporate governance changed and evolved since the implementation of Sarbanes-Oxley in 2002?

Rave: Corporate governance has evolved into a completely new aspect of management responsibility. Most companies have created disclosure or compliance committees and many valuable resources are being devoted to these efforts. For the outside lawyer there are both pros and cons. On the pro side it is easier to get the attention of management when you think there may be a problem. On the con side there is much more pressure on the outside lawyer. In many instances there is not much time to react to issues when they arise. Companies might not realize that a disclosable event has occurred until just prior to a filing deadline. The consequences are much more severe as well. No one wants to have to explain to the CFO that they can't file a Form S-3 because they have lost the ability to incorporate by reference or they have missed an 8-K deadline.

Casey: Probably the most important positive impact of Sarbanes/Oxley is that every director now is extremely concerned about transparency. Each director wants to ensure that whatever is going on inside the company is appropriately and adequately publicly disclosed. They do not want any surprises on Wall Street or in Nebraska. They want to make sure that everything that should be disclosed makes its way up to the appropriate people within the organization and is appropriately disclosed.

Editor: And the role of the corporate secretary in the new post-Sarbanes arena?

Rave: The role of corporate secretary in many companies has developed into somewhat of a "disclosure czar" position. In addition to the traditional role of keeping corporate minutes, attending to the corporate books and attesting to certain documents, in many cases the corporate secretary's responsibilities are reaching into all facets of the corporate disclosure regime. Many corporate secretaries have an active role in monitoring the reporting chain that allows CEOs and CFOs to sign their 302 and 906 certifications. They are also often crucial in implementing disclosure and internal control and procedures. Other responsibilities include SEC periodic reporting obligations, Section 16 reporting controls and assisting the nominating and compensation committee in compliance with SEC and SRO rules. As a result, the corporate secretary position has developed into a position of great responsibility.

Casey: The corporate secretary is often the disclosure gatekeeper and makes sure that all business matters are adequately documented within an organization so that disclosure can be made in a proper and timely fashion. The corporate secretary also plays a significant role in recording board and committee meetings. This responsibility is much different from a number of years ago when it was accepted practice to keep shorter and less informative minutes.

Editor: Do you think that a corporate secretary's responsibilities can be assumed by the general counsel? Is there any consideration given to the idea that general counsel and the corporate secretary ought to be the same person?

Rave: In many instances they are the same person. General counsel obviously are substantially involved in the disclosure process, but it often is advisable to have other executives at a similar level of management actively involved in the disclosure regime, as it adds an extra layer of protection.

Casey: It depends on how the disclosure regime works within any particular company. Overall, having an independent party look at disclosure documents like the Form 10-K and annual meeting documents is important. Advising the CEO and the board of legal matters is one of the general counsel's main responsibilities. It would benefit a company if an independent person working alongside the general counsel, who was not involved in giving legal advice, also reviewed the disclosure documents. Unfortunately, many companies may not be able to afford having two high-level executives splitting these duties and, if that were the case, the general counsel would act as corporate secretary.

Editor: Assuming that the role of the corporate secretary is a position separate and distinct from general counsel, to whom should the corporate secretary report?

Rave: The corporate secretary should report directly to the CEO. I believe that reporting to the general counsel is not appropriate since the corporate secretary must work with the general counsel in developing and implementing the company's disclosure policies. If the corporate secretary reports to the CEO, then he or she is allowed a degree of autonomy and independence that is vital to the overall disclosure and corporate structure. This is better corporate governance.

Casey: I agree. The CEO is responsible for the entire organization and while there may be some thought that the corporate secretary should be separate and more independent, that person is an officer and officers should report to the CEO.

Editor: Should the board of directors have the right to approve the hiring and firing of the corporate secretary?

Rave: No, I believe that that right should remain within the discretion of the CEO, subject to board approval or ratification. Obviously, the corporate secretary might work closely with several members of the board, including the respective chairmen of the nominating and compensation committees, and such directors might have questions about a corporate secretary's performance, but the responsibility of hiring and firing should, in the first instance, remain with the CEO.

Casey: Under most by-laws, the board approves officer hirings and terminations, but it is the CEO who recommends hiring and firings. If an officer, whose hiring had been approved by the board, fails expectations, the board would convey its feelings to the CEO, or visa versa, and ultimately a consensus would be reached one way or the other. The CEO is the party that is most responsible for hiring and firing.

Editor: With respect to the governing board, what are the pitfalls that today's directors ought to be aware of?

Rave: It is the job of directors to be skeptics. Probing and asking difficult questions is mandatory. Officers must be kept on their toes in the board room. If tough questions are not asked, certain crucial information which could change the outcome of the discussion might not be relayed. Directors will be protected by the business judgment rule only if they have exercised due care. Courts appear to be defining "due care" more broadly than in the past. If the board is complacent, it will not be effective.

Casey: Directors must be continually diligent. You will continue to see the number of board and committee meetings increase since Sarbanes/Oxley. Regular meetings are augmented by more committee meetings and special meetings, not only in connection with significant events, but in order to acquaint directors with ongoing operating matters. Also, it is crucial for boards to ensure that the finance department is adequately staffed. At a time when companies are looking for ways to cut costs, because of the continued complexity of financial reporting, cutting finance staff may not be prudent.

Editor: Have either of you encountered the situation where companies have found it difficult to recruit people for the board because of the increase in the exposure to liability that directors face today?

Rave: I have not. Directors today may be more acutely aware of their potential liability, but board members do not join boards thinking that the worst will occur – most directors think they have much to offer a company and are honored to be asked to share their knowledge. And they believe, accurately, that adequate diligence will reduce their exposure to liability.

Casey: I agree. Directors have become activists in terms of asking questions, being skeptics, and requiring appropriate and adequate answers in a timely manner. Directors know that this manner of behavior will protect them from liability. The change in the environment has allowed them to be more aggressive in obtaining information and addressing problems.

Editor: In the light of that liability, where do you draw the line between directors' responsibilities – including long-term strategy and oversight of the business – and responsibilities of the CEO and the senior management team for day-to-day operations? Where does policy end and operational responsibility begin?

Rave: It is the directors' job to formulate long-term strategy and communicate that with the executive officers, primarily the CEO. Assuming the CEO is on the same page, the board has to permit the CEO and the executive officers to implement that strategy. It is not the board's job to manage day-to-day operations of the company.

Casey: I think the line between strategy and implementation has essentially stayed the same, but the level of tension on both sides of the line has increased.

Editor: Some commentators have noted that, since Sarbanes, the board of directors is so caught up in process that it cannot focus on substance, i.e. the policies and strategies that will dictate the company's long-term success. Is that a fair assessment?

Rave: Although directors have many more "new" responsibilities these days, they must never forget that their primary job is to develop the company's strategies. In some cases the process requirements of Sarbanes has forced some boards to become much more active, with greatly improved governance. So while there is a tremendous amount of additional process that boards and committees need to undertake, in many cases it has focused attention on substance, and that is helpful.

Casey: I think the added process has significantly increased the flow of information, the hours spent in board and committee meetings and the time devoted to reviewing information outside of meetings. All of this has made directors much more focused on strategy and substance.

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