

ACC's CLO THINKTANK EXECUTIVE REPORT

“THE CLO's ROLE IN CORPORATE GOVERNANCE & COMPLIANCE- CANADA”

This Executive Report provides an overview of discussion results from ACC's CLO ThinkTank session titled “The CLO's Role in Corporate Governance & Compliance” held in Toronto, Ontario on September 29, 2006. ACC's CLO ThinkTank sessions are designed to provide a forum for CLOs who wish to exert greater leadership at the bar, in the courts, and in the halls of government on emerging issues of greatest concern. Following is summary information on key topics and takeaways, discussion point highlights, and follow-up initiatives identified by these CLO thought leaders.

ThinkTank participants included the following legal leaders in Canada:

- David Allgood, Executive Vice President and General Counsel, Royal Bank of Canada
- Deborah Alexander, Executive Vice President, General Counsel & Secretary, The Bank of Nova Scotia
- Richard Bailey, Senior Vice President & Deputy General Counsel North America and ACC Board Member, Kraft Foods Global, Inc.
- Sian Burgess, Senior Vice President, Corporate Secretary & Chief Compliance Officer, IGM Financial
- Elizabeth DelBianco, Chief Legal Officer, Celestica
- David Drinkwater, Chief Legal Officer, Nortel Networks
- Simon Fish, Executive Vice President, General Counsel & Secretary, Inco Limited
- Sean McMaster, Executive Vice President and General Counsel, TransCanada Corporation
- Christopher Montague, Executive Vice President & General Counsel, TD Bank Financial Group
- Dorothy Quann, Vice President, General Counsel & Secretary, Xerox Canada, Ltd.
- John Tobia, Vice President, General Counsel Legal, Aastra Technologies
- Sheila Wagar, Senior Vice President, General Counsel and Secretary, Great West Life Insurance Company, London Financial and Canada Life Financial

KEY TOPICS

Below is a list of key topics discussed during this CLO ThinkTank session:

- **Disclosure Committees**
- **Relationships with Auditors**
- **Organizational Structure for Compliance**

- **Supporting the Board**
- **Personal Liability for Lawyers**
- **Hot Topics Issues**

KEY TAKEAWAYS

Thought leaders participating in this session described a number of ideas and practices. Listed below are some top themes and takeaways. Ideas on additional issues are described in the Discussion Highlights section below, and thoughts on action items are summarized in the final section on Conclusions & Proposed Action Items.

- **Disclosure Committees and their composition, standards, processes and the scope of matters reviewed are of great interest.** Committee composition and company culture inform disclosure practices and the scope of issues evaluated. Practices vary, and participants share ideas on strategic practices that may be helpful.
- **Defining materiality and timing of disclosures are key challenges.** Materiality for financial issues may be different than materiality for strategic decisions, and prior practices for disclosing material matters may impact expectations for future disclosures.
- **Preparing disciplined minutes that detail the process for decisions is important and if properly prepared can be helpful.** Minutes are increasingly on the radar of outside auditors and others, including disclosure committee meeting minutes and Board minutes.
- **Relationships with outside auditors have changed in the past five years.** Auditors are requesting more information, and interactions with audit firms for non-audit services are more formal and adversarial. Limited liability for auditors is an issue that can be negotiated, and participants share practice ideas for auditor interactions and successfully negotiating engagement provisions.

DISCUSSION HIGHLIGHTS

DISCLOSURE COMMITTEES

Disclosure Committees/ Composition: Participants describe various structural models for their disclosure committees. Number of committee members and leader on point as committee Chair vary from company to company. For all, the Chief Legal Officer (CLO) is a member of the committee; for some, the CLO Chairs the committee. Disclosure committees range in size from around 8 members, including 4-5 chief business executives (e.g., CLO, COO, CFO, CRO, CEO) plus the financial leaders for the company's three principal business platforms, to committees of around 50 individuals that include significant numbers of individuals from the business units (might be 30 or so from the business units). Participants discuss the importance of having business input. One company's Disclosure Committee doesn't include the CFO but instead includes the Controller and Treasurer. Participants note that the size of the disclosure committee group may impact the scope and rigor of discussions: interestingly, the most rigorous debate may occur in smaller group discussions.

Disclosure Committees/Frequency of Meetings: Participants describe a range of practices with regard to frequency of Disclosure Committee meetings. One company's Disclosure Committee meets on a weekly basis; another company's committee meets quarterly but also has the ability to meet on an ad hoc basis. For ad hoc meetings, that company's Disclosure Committee policy enables disclosure decisions to be delegated to any two of the 'chief' officers (e.g., CLO, COO, CFO, etc..) who are members of the committee. In addition, the company's Disclosure Committee tries to include the committee's secretary

in any ad hoc meetings to take minutes, and the subject of the meeting is included on the agenda for the next quarterly meeting of the full Disclosure Committee.

Disclosure Committees/Committee Chair: Participants discuss pros and cons of having a CLO versus a CFO or COO as committee chair. Views include challenges of having the committee be too ‘accounting or finance-driven’ when a CFO chairs, and having the committee take on issues broader than business when CLO or others chair.

Disclosure Committee/Policy: One company describes as a leading practice having a very developed Disclosure Policy that is revised annually and submitted to the Audit Committee of the Board for review and approval. The policy and associated disclosure processes are described as enhancing and improving the company’s approach to due diligence on disclosure issues.

Disclosure Committees/Standards re Material or Significant Matters: Participants discuss challenges in defining material matters and timing for disclosure. View raised that U.S. disclosure standards are far less onerous, and participants describe challenges working with U.S. partners. Among the leading practices implemented by companies is a practice that defines certain matters as ‘material’ and certain matters as ‘significant.’ The definition of ‘material’ follows the definition in the Securities Act. ‘Significant’ matters are defined as those that an investor would want to know about. The company’s policy requires disclosure of material matters in accordance with regulatory requirements. Significant matters receive internal attention and are funneled up within the organization with flexibility on decisions regarding outward reporting. The issue of timely disclosure for material matters can vary from company to company—particularly for a company with a volatile stock price. In addition, the approach to defining materiality can vary from company to company depending upon who sits at the table and the company’s culture. Participants describe how materiality for financial issues may be different than materiality for strategic decisions that may not involve as large a dollar amount but involve opening a new market or launching a new product. Past practices may also impact decisions on materiality and inform expectations. This presents challenges for a company that may have had a practice of disclosing at a certain level and now wants to shift and carve back—potential liability concerns.

Disclosure Committees/Scope of Matters Considered; Sarbanes-Oxley impacts: The scope of matters evaluated by the committee can depend in large part on the composition of the committee and the committee Chair. Some participants describe the impacts of Sarbanes-Oxley and having a Chair with financial expertise as tending to bring too much of a financial or accounting perspective to issues considered by the committee. Some question whether the committees are discussing the most appropriate substantive matters and whether these discussions are truly candid or instead have a ‘check-the-box’ approach. One company has all press releases reviewed by the Disclosure Committee (review may occur by email). For this company, the scope of matters extends beyond review of financial disclosures to reputation management. One company describes having a separate Corporate Media Relations Policy and an in-house lawyer on point for supporting these issues so that they are not brought generally to the Disclosure Committee. Some companies have a separate Reputational Risk Committee that considers matters impacting the company’s reputation generally. Some companies without reputational risk committees note that Executive Leadership teams or the CEO and COO consider these types of matters and may use a ‘front page test’ to determine the best course of action on disclosure.

Disclosure Committees/Minutes: Participants discuss the importance of having good, disciplined minutes that reflect whether an issue of importance was fully discussed (but without including specifics on the amount of time spent discussing a given matter—instead consider: ‘after extensive discussion’). The importance of documenting the process and the fact that discussion occurred is noted as a good practice, and that documenting the process but not the rationale is common although some regulators press for documenting the rationale. Participants describe a desire to try to protect minutes on advice of counsel

although note the importance of care in drafting minutes and draft them with the idea that they may be public one day. Some participants share that outside auditors have requested committee minutes.

Disclosure Committees/Guidance and Targets: Participants describe analyst pressure for information. Practices vary on whether to provide guidance or instead give targets (or provide neither) and on how best to educate the ‘street.’

Disclosure Committees/Diligence and Lawyer Certifications: Participants discuss various approaches for providing sub-certifications in support of financial disclosures, including one company’s practice that has the lead lawyers for each line of business provide a certification regarding legal issues for that line of business.

Disclosure Committees/Role of Outside Counsel: Participants describe limited role (if any) of outside counsel in the process. For some, outside counsel has no role in the quarterly disclosure process; for others, outside counsel may perform some limited review of material disclosures.

RELATIONSHIPS WITH AUDITORS

Relationships with Auditors/Scope of Requests; Changes: Relationships with outside auditors are more distanced than five years ago. Auditors want to see more than they did before, and they want access to the Chair of the Audit Committee. Participants express concerns about the scope of information requested by auditors and how this may impact privilege protections and litigation considerations. Participants describe a multi-million dollar increase in incremental costs relating to audit fees and processes.

Relationships with Auditors/Non-Audit Services: The process for retaining firms for non-audit services (e.g., tax advice, consulting, etc.) is more formal and adversarial. Auditors are very interested in their own liability. Limitation of liability provisions in engagement provisions is a hot topic. Some participants have successfully negotiated provisions limiting auditor liability to negligence rather than the auditor-requested fee cap limits. One participant describes a process by which the company evaluated the various terms of engagement with a particular auditor for all of its subsidiary companies and found a broad range of provisions; the company was able to successfully negotiate to the best provision company-wide (e.g., ‘most favored nation’ status).

Relationships with Auditors/Importance of Good Working Relationship: A practice described by one participant includes meeting with the auditor on almost a weekly basis. The company has established a very good working relationship with its auditor and is able to provide verbal assurances in response to auditor information requests. Participants note differences working with onsite auditors versus auditor representatives versus national office standards.

COMPLIANCE ORGANIZATION

Compliance Organization/ Centralized vs Decentralized: Some participants have received feedback from regulators that they do not like centralized reporting and instead prefer matrixed reporting. Others note challenges of having personnel report organizationally to country heads while at the same time following headquarters-centralized compliance programs.

Compliance Organization/ CLO as CCO: Some CLOs are also the CCO for their organizations.

Compliance Organization/ Internal Audit (IA): To whom should IA report? For some companies, IA reports directly to the Audit Committee. For some, IA reports to the CCO, who in turn reports to the CEO. Can IA report to the compliance function or law department if IA audits them?

Compliance Organization/ Compensation: Should compensation for compliance personnel be in forms other than stock-based (e.g., cash only)? Participants query whether this approach would encourage an inappropriate disconnect to business risk and a ‘just-say-no’ mentality.

CLO AND THE BOARD

CLO & Board/Executive Sessions: CLOs describe participation in executive sessions; most participate in these sessions on an invitation basis from the Board. Several CLOs participate in executive sessions of the audit committee of the Board. Practices relating to executive sessions include preparing minutes that reflect the occurrence of the executive session.

CLO & Board/ CLO as Board-appointed position: One CLO notes the company’s practice of having the CLO position as a Board-appointed position. Each year, that company’s Board designates certain positions as mission critical positions, and the CLO position is among them. The CLO shares that this does not have a chilling effect on management’s interest in interacting with the CLO and that impacts of this practice include heightened governance and the CLO position being viewed as more independent.

CLO & Board/ Minutes: Board minutes are an increasing disclosure concern to regulated companies.

PERSONAL LIABILITY FOR IN-HOUSE LAWYERS

Personal Liability/Many Hats for CLOs: CLOs wear many hats. Participants describe the challenges of segregating the various roles, and whether a CLO who is also a Chief Compliance Officer or a Chief Risk or Privacy Officer can be an effective advisor to herself.

Personal Liability/ Signing Contracts on Behalf of the Company: If a CLO has given advice on a contract, can he/she now sign it? Would this open the CLO to personal liability? Issues surrounding advising on an agreement and signing it in another official capacity can be thorny.

Personal Liability/ Legal Opinions: One participant describes a practice that does not allow in-house lawyers (other than the CLO) to provide legal opinions. The only lawyer for that company that may provide a true legal opinion is the CLO.

Personal Liability/ Insurance Coverage: Participants discuss insurance available through the law society, and scope of coverage. Some companies have opted out and provide indemnities. Most participants share that they don’t procure separate insurance coverage for in-house lawyers and note that exclusions in traditional insurance products may swallow the protections.

ADDITIONAL HOT TOPICS

Solicitor-Client Privilege/In-house Lawyers for Parents and Subsidiaries: The BCE case brings issues of parent-sub relationships and in-house lawyer counseling into the spotlight. Practices to address concerns regarding preserving privilege include using joint defense agreements and co-counsel relationships for in-house lawyers who advise companies with which they do not have a direct employment relationship.

Solicitor-Client Privilege/ Limited Waiver and Self-Evaluative Privilege Initiatives: Participants discuss limited waiver for providing privileged documents under compulsion. In addition, they discuss legislative initiatives to obtain self-evaluative privilege and how industry associations are working with provincial regulators.

Outside Law Firm Conflicts/ Waiver Requests: Practices for response to waiver requests vary. Some participants have ‘no waiver’ policies; others only provide waiver on advance consent. Challenges in dealing with conflicts include situations where law firms have merged but their internal processes aren’t centralized. Practices to help avoid conflicts situations and help law firms vet potential conflicts include

periodically providing lists of all company affiliates and subsidiaries to law firms so they can run conflicts checks through their databases.

Outside Law Firm Conflicts/ Business vs Legal: Practices to help protect companies when outside law firm work is innovative include requiring the law firms to sign a non-compete and/or confidentiality agreement. In addition, some participants implement practices prohibiting outside law firms from advertising successes working on company matters—they don't want to see their deal sin print.

CONCLUSION & PROPOSED ACTION ITEMS

The session ended with the CLOs sharing ideas on possible tools or action items, including:

- **Develop Meaningful Benchmark Resource on Legal Expenses:** both internal and external that can provide 'apples-to-apples' data given the varying nature of business and associated legal work. .
- **Resources on Metrics for In-House Law Departments:** develop meaningful metrics to help demonstrate value provided by law department and for having legal services provided in-house.
- **Insurance Protections for In-House Lawyers:** consider evaluating available insurance protections within Canada for in-house lawyers.