The Abrupt GC Departure: How to Avoid Being Blindsided

By Veta T. Richardson

Amid general counsel comings and goings in recent weeks, two abrupt departures stand out, and boards of directors should take notice. At CBS, Lawrence P. Tu left his chief legal officer role in February, with plans to stay on as an advisor for a few weeks to ease transitions. Meanwhile, at Tesla, Dane H. Butswinkas announced his resignation and intent to return to a prior outside counsel role. He had served as Tesla's GC for only two months.

While we can hardly assert any special insight regarding what might have prompted their departures, given the general counsel's leading role on ethical and compliance matters for a company, an abrupt departure should catch the attention of the board. Directors should seek to understand the reasons for the departure and satisfy themselves that an abrupt resignation is not an indicator of greater troubles.

Additionally, directors should continuously evaluate where their own relationship with the general counsel stands. Have they been proactive in building the relationship in good times to draw on the strength of the relationship in times of trouble? Have they built trust, candor, and respect?

GC as a Board Ally

In all contexts, lawyers advise clients. For the GC, his or her fiduciary duty is to the company. Directors know that their own mandate is the same. Their duty is to the company alone. With these interests aligned, the GC is a crucial ally of the board.

While the fallout of a GC departure may be more high-profile at a large public company, the consequences are even more grave for small and mid-sized enterprises. The departures at CBS and Tesla will have significant impacts, but in both instances, the general counsel is backed up by a large law department. Large teams typically have deep talent benches, well-established work processes, and redundancy built into their practice of corporate law. This may not be the case at a smaller organization, with fewer resources and a leaner law department. Even medium-sized companies may rely on a solo practitioner—one strong GC assisted by teams of external counsel and other service providers. These companies and their boards will feel the departure of the general counsel more acutely than most. For that reason, directors of enterprises of all sizes should closely monitor the GC relationship with management.

What's a GC to Do?

It is the GC who spots possible ethical quandaries before they happen, who advises the company on compliance, and who can ensure that risk is taken into consideration at every step of the way. How can the board ensure that the GC can do his or her job, feels comfortable in the role, and is more likely to stay in the position rather than leave unexpectedly?

To be effective—to anticipate issues and risks and then to elevate their importance—GCs need to be well positioned. They must have access to risk-fraught company plans then have the ability and access to discuss the risks with key company decision makers.

First, the GC should report to the CEO. This way, there are no intermediaries blocking access to the company's top leader. This reporting structure also sends the message to all employees and stakeholders that ethics and compliance are important to the company. The GC has the CEO's ear on these matters.

Surprisingly, in research on this topic by the Association of Corporate Counsel, we've tracked that eight in ten companies use this reporting structure for their chief legal officer (CLO). The 2019 *ACC CLO Survey*, which includes insights from more than 1,600 CLOs in 55 countries, revealed that only 78 percent of GCs enjoy a direct reporting relationship to the CEO. This organizational best practice is more common in the United States, where 82 percent of CLOs report directly to the CEO. At larger companies, CLOs are much more likely to report to the CEO. Our analysis of the Fortune 500 found that at least 93 percent of Fortune 500 GCs report directly to the chief executive.

Second, the GC needs to have a strong relationship with the board. This ensures alignment in the company's prioritization of ethics and compliance. Just over two-thirds (68 percent) of all GCs who responded to the 2019 *ACC CLO Survey* state that they regularly attend meetings of the board at which key ethical and compliance issues will be discussed.

Notably, we tracked a correlation between these two indicators of a GC's effectiveness. A GC or CLO who reports directly to the CEO is much more likely to "almost always" attend board meetings versus those who do not report to the CEO (75 percent versus 46 percent). We tracked similar figures when measuring how the CLO is viewed by fellow members of the C-suite. While 76 percent of all CLOs who report to the CEO stated that they are "often sought by the executive team for input on business decisions," only 48 percent who do not report to the CEO answered affirmatively. Similarly, 79 percent of CLOs who report directly to CEOs say they "frequently meet with business leaders to discuss operational issues and risk areas," compared to 62 percent who do not enjoy a direct reporting line to the CEO.

The consequences of fallout from a GC departure are even more grave for small- and mid-sized enterprises.

A Seat at the Table

It makes sense. Those who report to the CEO have more influence within the organization. A CLO who reports to the CEO will have a seat at the table when it comes to executive team debates, boardroom discussions, and other events that shape a company's trajectory.

With the ability to communicate risk to the CEO, C-suite peers, and the board, the CLO also gives these leaders a better understanding of how risk will affect the company. The open dialogue means that the GC will be able to provide better strategic advice, helping the company mitigate risk and make strong business decisions that put ethics and compliance first.

The impact of this seat at the table becomes even clearer with recent corporate scandals in mind. In Europe, the Danske Bank money laundering scandal might well have been prevented if the GC had the ability to communicate ethical lapses directly to the CEO.

In 2012, Danske Bank's GC had his reporting line redirected from the CEO to the chief financial officer. In 2014, Danske's in-house lawyers urged an internal investigation prompted by whistleblowing allegations. Other senior executives overruled a decision to investigate, so a full inquiry never took place. Just a few short years later, scandal erupted.

We will never know what could have been prevented if the bank followed better governance practices. But the thwarted investigation alone demonstrates why putting roadblocks between the GC and the CEO is a bad idea.

The Age of the CLO

Because so many business decisions today have legal considerations, most companies realize the importance of a well-positioned chief lawyer and design their corporate reporting structure accordingly. The entire health of an organization depends on strong governance and ethical leadership. Thus, we are fully entrenched in the "Age of the Chief Legal Officer," with CLOs gaining a stronger ability than ever before to shape the company's future by contributing their analysis of risk, legal recommendations, and strategic business advice. The law department is a crucial ally to the board, and this is why an abrupt and unexpected change in its leadership should be of interest—even a red flag—to the board.

Together, directors and the GC can ensure the right tone from the top and a proactive approach to matters of ethics and compliance.

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