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Private Directors Association Newsletter February 2017
Significance of the Corporate Secretary to Private Company Boards

Upcoming Events

Transitioning the Family Business to a Formal Board Structure

February 15, 2017
Starts 5:30 PM

Willis Towers Watson
71 South Wacker Drive
Chicago, IL 60606

Private Company Governance Summit 2017

May 10-12, 2017

Location:
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Chicago, IL

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MAY 10-12, 2017
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Contributing Editor: Paul Marcela was Associate General Counsel and Assistant Secretary of Dow Corning Corporation, and more recently Paul served as general counsel and secretary of two Cerberus Capital Management portfolio companies. Paul has developed a professional services firm exclusively devoted to providing a fully or partially outsourced Corporate Secretary function for companies that seek to outsource the function.

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Role and Responsibilities: The corporate secretary is generally responsible for ensuring that a board has the proper advice and resources to discharge its fiduciary duties to shareholders, comply with state corporate law and provide effective management oversight. The role of the corporate secretary has expanded to include many managerial and administrative responsibilities in addition to preparing minutes of board meetings. Today, the corporate secretary provides the board with critical advice about its role and responsibilities and assists the board with meeting logistics.

The corporate secretary is also responsible for the design, implementation and maintenance of a properly structured corporate governance framework and performs the critical role of ensuring that the board and its committees operate according to the provisions of the company's articles of incorporation, bylaws, charters, and other foundational documents.

In addition, the corporate secretary is responsible for the identification and implementation of best corporate governance practices and the facilitation of periodic corporate governance process development, implementation, and improvement. The corporate secretary also helps the board to conduct corporate governance audits, administer board member evaluations and skills assessments, design and implement director education and orientation programs and conduct board retreats.

To support the board and its committees, the corporate secretary manages shareholder, board and committee meetings and attends and prepares minutes of those meetings. The corporate secretary regularly collaborates with the chair of the board to plan board and committee meetings, develop meeting objectives, identify matters for board and committee discussion and decision-making and develop, distribute and present board and committee materials and presents resolutions to the board for approval of material transactions and authorizations.

Legal entity governance management is another critical responsibility of the corporate secretary in a company that has subsidiaries. This responsibility involves ensuring that the company appropriately manages its global legal entities, facilitating periodic subsidiary board of directors meetings and maintaining subsidiary corporate minute books.

In addition, the corporate secretary is responsible for the engagement and management of third party corporate governance service providers, such as board portal providers and legal entity management services, to enhance the efficiency and effectiveness of the operation of the office of the corporate secretary.

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Chicago Board of Directors

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Director	Cindy Burrell
Director	Kristi Daeda
Director	Don Delves
Director	Venita Fields
Director	Bruce Goldstein
Director	Bill Hass
Director	M. Jay Heilbrunn
Director	Dan McHugh
Director	Morris Saunders
Director	Rebecca Wing

The performance of this broad set of responsibilities reflects the substantially expanded role of the modern corporate secretary.

Importance to Private Company Boards: The robust performance of the corporate secretary role is very important to private company boards. Corporate secretaries are typically charged with responsibility to manage the board's adherence to good corporate governance practices designed to mitigate corporate law compliance risk, be prepared for various corporate transactions, and provide corporate governance related documents to third parties.

Private companies need to comply with state corporate laws and manage related legal liability risks. There are two key corporate legal risks faced by private corporations that can be mitigated by the practice of good corporate governance by a company's board. First, plaintiffs in a lawsuit against a corporation will often ask the judge to ignore the separateness between a corporation and its shareholders (or to "pierce the corporate veil") and hold shareholders responsible for the liabilities of the corporation. The risk of "piercing the corporate veil" is greatly reduced when a board's corporate governance practices are robust and properly documented. The corporate secretary should carefully prepare board and committee minutes and otherwise document that the board took appropriate actions to maintain the separate legal existence between the corporation and its shareholders.

Second, shareholders will often claim that the board breached its fiduciary duties of care and loyalty or failed to follow what is known as the "business judgment rule". The ability to defend against these types of shareholder lawsuits is enhanced when the corporate secretary diligently and properly documents board and committee decision-making by artfully preparing meeting minutes to show that the board exercised reasonable diligence in gathering and considering appropriate information that is important to making significant decisions, including the positive and negative aspects of alternative courses of action and independent expert advice and recommendations.

There are also "transaction readiness" reasons for a board to practice good corporate governance. The corporate secretary must be able to provide corporate governance related documents to parties to corporate transactions as part of transactional due diligence and closing processes.

Finally, corporate secretaries must be able to adequately respond to requests for high quality corporate governance documents by the company's lenders and external auditors and tax and other regulatory authorities.

Corporate Secretary Support Services: Boards will typically elect as the company's corporate secretary an employee who has many other professional and managerial responsibilities. That individual is usually the company's chief administrative officer, chief financial officer or general counsel, whether internal or external, who may not have the relevant experience, background, resources, or time to adequately perform the role. In those circumstances, specialized external corporate secretary support service providers can enhance the performance of the corporate secretary role because they have the resources and relationships necessary to fully deliver the services of an expert and professional corporate secretary. A company can engage those service providers in order to improve its internal corporate secretary capabilities without increasing staff. This allows company officers that are also elected to be the corporate secretary to focus on their primary professional responsibilities while enabling the company's corporate secretary responsibilities to be performed by experienced external corporate governance professionals.

It is important for corporate secretaries to perform their obligations to the board and its committees in a robust and thorough manner to enable the board to govern the corporation as effectively as possible. **Body of Knowledge Categories: Board Operations and Law**