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Both Sides Now

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The seminal Sarbanes-Oxley Act does not directly apply to nonprofit corporations. Yet many of their general counsel have become champions of “corporate responsibility.” Some have had to overcome skepticism from their organization’s leadership, who objected to committing their charity’s resources to the governance cause. Why, then, do some nonprofit GCs fight this particular battle? Their reasons, and the strategies behind their success, should be useful to their for-profit counterparts.

LESSON ONE: IT PLAYS IN PEORIA

It’s all about perception. When a nonprofit faces financial or governance problems, its constituency isn’t going to care whether SOX applies or not. The nonprofit general counsel recognizes that concerns with financial integrity and accountability are not limited to publicly traded companies. Business scandals always seem to resonate with the media and the public, both of which tend to hold nonprofits to the same unforgivingly high standard of conduct applied to for-profits (such as *The Washington Post’s* highly publicized exposé of The Nature Conservancy). A “Sarbanes doesn’t apply to us” defense isn’t going to work. Once a corporate reputation is “in play,” it’s awfully hard to get it back -- especially for an organization with a charitable mission.

LESSON TWO: A KICK IN THE WALLET

In most instances, a nonprofit director is a volunteer who serves out of dedication to a specific mission. However, no director signs on to board service with the expectation of placing his personal assets -- or reputation -- at risk. And the average nonprofit board member is smart enough to figure out that the director liability horror stories appearing daily in *The Wall Street Journal* could just as easily apply to him. Allegations of bad faith -- and gaps in directors and officers insurance coverage -- rarely know any boundary between the for-profit and nonprofit worlds. In a seller’s market for director services, the nonprofit general counsel knows that embracing corporate responsibility is critical in order to protect a director’s liability profile.

LESSON THREE: THE WHOLE NINE YARDS

In the nonprofit world, the biggest worry, on the state level, is a business compliance-based action instituted by the state attorney general. Oftentimes, this takes the form of either an invasive review of corporate/board proceedings, or litigation designed to pursue equitable relief against the corporation or its directors, or to remove assets from board control. Derivative litigation, from dissident directors or an organization’s members, is also a possibility.

These are big-time, big-ticket challenges, and a tepid response to corporate responsibility by the board won’t be enough of a shield. The nonprofit general counsel recognizes that only a thoughtful and forceful response will be a deterrent. No matter that the organization’s response is more than the law requires.

In many instances there is no specific law, but rather a broad stroke of regulatory authority governing the nonprofit. In such a case, only overwhelming evidence of a board’s good-faith oversight efforts can offer meaningful protection against a regulatory or derivative challenge.

LESSON FOUR: HAD TO DO IT ANYWAY

To many nonprofits -- especially in health care -- corporate compliance is a way of life; it's a critical component for any organization (whether nonprofit or for-profit) that conducts business with the federal government. So when the Federal Sentencing Commission speaks -- as it did with new guidelines that went into place in November -- lots of nonprofits have to listen. The updated guidelines say that boards of directors must exercise reasonable oversight over their organization's compliance program. Many GCs at nonprofits are approaching their boards with a combined mission -- since we've got to look at our oversight practices for compliance, doesn't it make sense to do that with respect to boardroom practices, and to the balance sheet as well?

LESSON FIVE: IT'LL PAY FOR ITSELF

For the typical nonprofit general counsel, adding more line items to the expense column can be a career-limiting activity. It's one thing to propose a new governance activity; it is entirely another thing to find a way to pay for it. Looking at it from a "big picture" perspective, though, the economic benefits of corporate responsibility become pretty clear, pretty fast.

These benefits come from a variety of sources -- the rating agencies, which place a greater value on the attributes of good governance; corporate donors, which seek assurances of corporate accountability before they make charitable contributions; D&O insurers, which are more comfortable with corporations that demonstrate a commitment to governance; and key constituents who are more comfortable in making employment/purchasing/support commitments to an organization that demonstrates that it truly "gets it" when it comes to corporate responsibility. From that perspective, governance compliance pays for itself.

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