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Nonprofit Corporations

Advising the Nonprofit Audit Committee

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Many sophisticated nonprofit corporations have embraced the concept of a discrete audit committee as a means of achieving the Sarbanes-Oxley Act-derived goals of financial integrity and transparency of financial statements. There is a general recognition that the constituents of the nonprofit corporation have an interest in these goals on a par with that of the shareholders of the for-profit corporation. However, the duties, obligations, and challenges of the nonprofit audit committee entailed in fulfilling these enhanced functions can be substantial. In order to be effective, the prudent nonprofit audit committee will call upon corporate counsel to advise it with respect to a wide variety of organizational and operational issues and unique developments relating to such functions.

Serving as “staff” to the audit committee is consistent with the generally expanded role of the corporate coun-

sel, post-Sarbanes. The materially enhanced focus on accountability in governance calls upon the corporate counsel to serve the nonprofit board with respect to a variety of new demands which are grounded in law and regulation, including conflicts management, corporate secretary duties, governance policies and director fitness. Advising key committees of the board¹ is a particularly prominent part of this expanded role for corporate counsel.

The nonprofit audit committee serves in a crucial “gatekeeper” role, and regular access to corporate counsel is important in enabling the committee to fulfill its enhanced role. As Sarbanes-Oxley principles spread throughout the corporate world, the nonprofit audit committee is called upon to address controversies once thought limited to public companies, including: restatement of financial statements; revenue recognition policies; material weaknesses in internal controls; “whistleblowing” and other internal disclosures of alleged accounting irregularities; issues related to auditor independence; and other similar matters. Nonprofit corporations with nine- and ten-figure budgets now face these types of issues with increasing regularity. Many—if not all—of these issues have material legal (as well as financial) significance to the nonprofit corporation, and audit committee members will be expected, as a standard of conduct, to rely closely upon corporate counsel in their related deliberations.

Accordingly, this article is intended to serve as a guide to corporate counsel and board members alike on

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¹ E.g., governance, executive compensation, and audit.

the range of issues on which counsel may regularly be called upon to advise the nonprofit audit committee. The authors' goal is to help corporate counsel enhance the effectiveness of the audit committee for the benefit of the nonprofit corporation.

1. Organizational Matters

Corporate counsel can provide material assistance to the nonprofit corporation in the organization of the audit committee, whether as a new standing committee of the board, recently separated in function from the finance committee, or as reconstituted in scope from a pre-existing committee to meet corporate responsibility standards.

The first role of corporate counsel in this regard is to help educate board and audit committee members on new legal developments and related public policy considerations. This would include reviewing the Sarbanes-Oxley audit committee requirements (which—although not directly applicable to nonprofit corporations—provide useful guidance as to “best practices”) and providing a brief understanding of the cataclysmic corporate accounting scandals that led to the corporate responsibility environment. While summaries of the Enron and WorldCom scandals are important, brief reviews of the allegations of accounting and financial irregularities that have been raised in the nonprofit sector (e.g., *AHERF*, *PipeVine*, *The Nature Conservancy*) may be particularly instructive.

It will also be important to review any relevant state law or relevant public statements of state charity officials on the role of the nonprofit audit committee. For example, some states are beginning to mandate the formation of an audit committee for the nonprofit corporation in certain circumstances,² while in other states, charity officials may have issued pronouncements about their expectations for audit committees.³ The overall educational goal is to familiarize committee members with the basic public policy considerations that emphasize strong audit committee oversight as a “first line of defense” with respect to financial accountability issues and an important governance “best practice” for the nonprofit corporation.

A second important organizational task is to draft a comprehensive charter for committee operations. The charter should be a “roadmap” to guide the committee in the performance of its duties. Adherence to charter-articulated activities can also serve as a powerful defense to any subsequent challenge to the business judgment of committee members. The committee charter should incorporate any specific tasks required by state law in connection with the auditor-client relationship, including oversight of non-audit services proposed to be provided by the nonprofit's auditors, and should take into account those tasks required by Sarbanes-Oxley. The charter should also incorporate tasks related to non-audit-related oversight functions assigned to the committee (e.g., corporate compliance—see below). Publicly traded companies are required periodically to

publish their audit committee charters in their proxy statements, and such charters (as available) can provide valuable guidance in drafting nonprofit audit committee charters.⁴

Along the same lines, corporate counsel should advise the board and the audit committee with respect to powers and responsibilities that the Board may wish to delegate to the Committee. For example, Sarbanes-Oxley § 301 requires that public company audit committees have the authority to appoint, compensate, and oversee the work of the outside auditor.⁵ Other “best practices” commentators have suggested that it is appropriate for the full board of directors to act on such matters, upon the specific recommendation of the audit committee.⁶ Thus, whether the audit committee's powers are direct and exclusive, or advisory, is a matter on which the board and the committee will want to seek the advice of counsel.

Corporate counsel should also be the primary resource for addressing issues relating to independence and qualifications of audit committee members. Provisions addressing committee member “independence” and financial expertise are grounded in Sections 301 (“Standards Relating to Audit Committees”) and 407 (“Disclosure of Audit Committee Financial Expert”) of Sarbanes-Oxley.⁷ These general themes of committee member independence and financial expertise are carried over into the nonprofit sector by means of public policy considerations, “best practices” and, in some cases, state law. Independence standards may also emerge from proposed charity oversight legislation currently being considered by Congress. Corporate counsel can be of substantial assistance by advising the committee on an appropriate definition of “independence⁸,” the proper extent of independence (e.g., the entire committee membership or only a portion/majority thereof), financial literacy and other standards for committee membership.⁹

Finally, corporate counsel may assist the committee in the drafting of fundamental governance and corporate policies relating to issues within the responsibility of the audit committee. These might include: (a) adoption of policies that constitute the “low hanging fruit” of Sarbanes-Oxley (e.g., prohibition on interference with auditors; adoption of a code of ethics for financial officers; policies regarding document retention; policies regarding non-audit services by auditors; etc.); and (b) a “reporting up” process to facilitate legitimate “whistle-blowing” activity dealing with the financial reporting and internal controls of the corporation.

⁴ See Item 7(d)(3)(iii) of Schedule 14A promulgated under Section 14(a) of the Securities Exchange Act of 1934.

⁵ 15 U.S.C. § 78f(m).

⁶ The Report of the American Bar Association Task Force on Corporate Responsibility (James H. Cheek, Esq., Chair); ©2003 American Bar Association (hereinafter, “Cheek Report”), p. 65-66. The Cheek Report is available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf.

⁷ 15 U.S.C. §§ 78f(m), 7265.

⁸ See, e.g., California Government Code § 12586(e)(2).

⁹ See, e.g., State of Minnesota's Memorandum in Support of Petition to Appoint Special Administrators, *In the Matter of HealthPartners, Inc.*, a Minnesota Charitable Trust-District Court-Probate Division, State of Minnesota, County of Hennepin (No. 03-1587); see also 12 HLR 959, 6/19/03.

² See, e.g., California Government Code § 12586 (effective Jan. 1, 2005).

³ See, e.g., “Internal Controls and Financial Accountability for Not-for-Profit Boards,” New York Attorney General Eliot Spitzer, Charities Bureau <http://www.oag.state.ny.us/charities/charities.html>.

2. Core Functions

Corporate counsel may be of substantial assistance in advising the nonprofit audit committee in connection with day-to-day “core” committee issues, as contemplated by the committee charter. These core operational issues might logically include such matters as: (a) engagement and termination of the independent auditor; (b) oversight of the audit relationship and the work of the auditor; (c) confirmation of the scope of services provided by the auditor; (d) responding to periodic reports from the auditor, including those which express concerns; (e) oversight of internal audit staff; (f) preparation of management representations and certifications; (g) responding to “management letters” and related communications from the auditor; (h) receiving reports relating (and responding) to potential financial irregularities within the corporation; and (i) addressing issues of auditor independence.

For example, it is not uncommon for corporate counsel to become involved in the negotiation of the audit firm’s engagement letter. Counsel’s legal expertise can be valuable to the audit committee in addressing such issues as term and termination, scope of engagement (*i.e.*, covered and non-covered services), the staffing of the audit engagement (*i.e.*, the proper mix of partners, managers and less experienced associates), and indemnity and “exculpatory” provisions purporting to limit the liability exposure of the auditor. Involvement of corporate counsel can also assure a proper and efficient communication chain between management and the auditor when controversies arise. This can help to focus the auditor’s attention on facts and related analysis, and not on drawing *legal* conclusions from those facts (*e.g.*, describing certain facts or findings through the use of words, phrases and terms which have clear legal connotations or are otherwise legal terms of art).

The nonprofit audit committee should seek to share, directly and promptly with counsel, communications from the auditor that speak to matters with clear legal implications for the corporation, such as improper accounting entries, misrepresentation of financial results, misallocation of corporate assets, incorrect billing arrangements with government payors, etc. The general counsel is responsible for advising the governing board as to the legal risk profile of the corporation. It is therefore important that the general counsel be involved (either directly or through outside counsel that reports to the general counsel) in the analysis of such auditor’s reports, in any discussion thereof with the auditor, in reporting on the matter to the full board and in recommending and implementing such remedial or corrective action as may be necessary.

Similarly, corporate counsel should be directly involved in the process by which “whistleblowing” complaints to the audit committee are evaluated and responded to. The audit committee is well advised to assume in each such instance that, in the current corporate responsibility environment, controversies arising from the auditor or whistleblowing reporting processes are extremely likely to have material legal implications. Corporate counsel will also be positioned to share information with the corporate compliance officer as may be necessary for proper coordination with, and administration of, the compliance process.

The audit committee should also seek the regular advice of corporate counsel when called upon to address

issues of auditor independence. This is particularly the case when the committee is considering the engagement of the corporation’s auditor for the provision of non-audit services (*e.g.*, the nine services prohibited under Sarbanes-Oxley § 201 and related Securities and Exchange Commission (“SEC”) and Public Company Accounting Oversight Board (“PCAOB”) rules).¹⁰ While this particular provision of Sarbanes-Oxley does not apply directly to nonprofit corporations (absent specific legislation providing for such¹¹), the applications of auditor independence issues to nonprofit corporations is well-established.¹²

In addition, outside auditors are increasingly applying the standards relating to internal control over financial reporting that are applicable to public companies under Sarbanes-Oxley § 404 in non-public company settings, and the audit committee may want to establish procedures for periodic evaluation of internal controls, certification of financial statements by senior officers, etc. that are similar in some respects to those required under Sarbanes-Oxley. The audit committee will likely find it very helpful to obtain input by counsel on the requirements applicable to public companies and whether the policies underlying those requirements can be beneficial if adapted to particular nonprofits.

Finally, corporate counsel can serve a highly useful purpose in attending to certain important ministerial matters for the committee, such as preparing agendas, resolutions and meeting minutes. These written documents have assumed a higher level of importance (from a liability profile perspective) in the corporate responsibility environment.

3. Other Committee Functions

Despite the already-extensive responsibilities of the audit committee in the post-Sarbanes environment, some nonprofit organizations assign certain duties to the audit committee beyond oversight of the auditor relationship. Typically, these additional duties include oversight of the corporate compliance program and supervision of the conflicts of interest-related policies of the board and of the corporation.

In this regard, one of the principal tasks of corporate counsel is to advise on the continued appropriateness of the expanded committee role, and how that expanded role effects such key audit committee features as committee member independence and availability for audit oversight duties. For example, some nonprofit corporations lack a sufficient pool of qualified directors from which they may fully staff separate audit, compliance and governance committees. That leads to a tendency (out of necessity) to combine separate and sometimes disparate activities into one committee. The apparent relationship between the activities justifying the combination is that they all relate to matters of (personal or corporate) integrity. The board should seek corporate counsel’s advice as to whether the board’s ability to respond effectively to all these activities will be compromised by combining them into one “super-committee.”

¹⁰ 15 U.S.C. § 78j-1(g); 17 C.F.R. § 210.2-01(c)(4); PCAOB Bylaws and Rules, Interim Rule 3600T.

¹¹ See, *e.g.*, California Government Code § 12586 (e)(1).

¹² Minnesota Attorney General Mike Hatch Business Compliance Review of Allina Health System, September 24, 2001 (*see, e.g.*, 10 HLR 1509, 10/4/01).

This is particularly the case, given the importance of devoting adequate committee time to oversight of the audit function and the various regulatory pronouncements on the importance of vigorous board oversight of the compliance process.¹³

For example, the audit committee may be assigned the role of evaluating conflicts of interest disclosures, as well as transactions involving directors or members of senior management and the corporation. The role of enforcing the corporate conflicts policy and in evaluating disclosed conflicts requires an in-depth understanding of the corporate law “duty of loyalty” and of the exempt organization tax concepts of self-dealing, private inurement/public benefit, and intermediate sanctions. Furthermore, proper conflicts management requires the skills of persons who are capable of projecting potential conflicts of interest by comparing director disclosure forms against the strategic plan of the corporation and individual agendas for governing board meetings. These are all skills which benefit from specialized legal training.

The audit committee is frequently also charged with corporate compliance oversight. The corporate counsel’s role in the compliance process, whether acting as the corporation’s compliance officer or in effecting close communication with a separate corporate compliance officer, is well-documented.¹⁴ The corporate counsel may assist in assuring prompt and effective coordination between the audit committee and the compliance committee or compliance department. This is particularly helpful if separate internal “whistleblowing” processes are used for reporting financial/accounting and regulatory concerns, respectively.

An equally important task that may fall within the jurisdiction of the nonprofit audit committee is compliance with the important provisions of Sarbanes-Oxley § 802 (“Criminal Penalties for Altering Documents”), some of which apply broadly to all corporations, including nonprofits. For example, Section 802 includes 18 U.S.C. § 1519, which applies criminal penalties to any act of destroying, fabricating or concealing evidence when done with intent to obstruct, impede, or influence an investigation or proper administration of any matter within the jurisdiction of any U.S. department or agency or any Chapter 11 bankruptcy proceeding, or in relation to or in contemplation of such a matter or investigation. This has direct implications for an organization’s document retention practices.

Section 802 also added 18 U.S.C. § 1520, which criminalizes the willful failure of an accountant to preserve financial audit papers of companies registered under the Securities Exchange Act of 1934 and required the SEC to adopt related rules, the violation of which is also criminal. The goal of this section is not only to penalize the willful failure to maintain certain audit records but also to require safeguards for the retention of corporate

audit records. While not directly applicable to nonprofits, it reflects a policy concern regarding preservation of records that the nonprofit audit committee may wish to consider.

The corporate counsel can play a valuable role in advising the committee and in responding to particular issues that may arise under these and similar statutory requirements and policy considerations from time to time. Corporate counsel should be heavily involved in assisting the audit committee if these or other unrelated activities are added to the audit committee charter. In this regard, to the extent the Audit Committee is delegated responsibility for establishing standards of conduct and/or conducting internal investigations, active involvement by corporate counsel is important in establishing and preserving the confidentiality of investigative materials and other documents and communications through the attorney-client privilege.¹⁵ Corporate counsel should, of course, be careful to insure that the corporation has a “privilege policy” so as to protect attorney-client and “work product” documents and communications from inadvertent disclosure and to create the proper record to claim these privileges.

4. Committee Education; New Developments

Corporate counsel can make a significant contribution by regularly advising the audit committee concerning new developments of likely interest to committee members. In the corporate responsibility environment, continuing committee member education is demonstrative of “good faith,”¹⁶ and corporate counsel is well-positioned to take a leading role in that effort.

Committee education efforts typically focus on two distinct areas: (i) new legal/corporate governance developments which directly affect the role of the nonprofit audit committee and the manner in which it carries out its duties; and (ii) translating to the nonprofit sector the implications of financial “headlines” relating to matters normally within the scope of an audit committee’s jurisdiction.

For example, the committee should look to corporate counsel for advice on changes to state and federal law and regulations as they relate to the role of nonprofit corporate board members in general and audit committee members in particular. Given the potentially higher level of expertise among audit committee members, they are likely to be particularly sensitive to developments (including new judicial decisions) that impact the standard of care required of directors and committee members. Audit committee members should also seek the advice of corporate counsel with respect to the nonprofit relevance of SEC rulemaking and enforcement actions initiated under Sarbanes-Oxley.

Similarly, audit committee members will turn to corporate counsel for advice on “the Wall Street Journal effect,” *i.e.*, the specific implications to the nonprofit corporation of the financial controversies regularly reported on in the business press. Nonprofit audit committee members will typically seek to remain informed about new developments, but often will need to view those new developments through an “interpretative

¹³ See generally, *e.g.*, OFFICE OF INSPECTOR GENERAL, DEP’T OF HEALTH & HUMAN SERVICES, AND AMERICAN HEALTH LAWYERS ASSOCIATION, CORPORATE RESPONSIBILITY AND CORPORATE COMPLIANCE: A RESOURCE FOR HEALTH CARE BOARDS OF DIRECTORS (2003); OFFICE OF INSPECTOR GENERAL, DEP’T OF HEALTH & HUMAN SERVICES, AND AMERICAN HEALTH LAWYERS ASSOCIATION, AN INTEGRATED APPROACH TO CORPORATE COMPLIANCE: A RESOURCE FOR HEALTH CARE BOARDS OF DIRECTORS (2004) (hereinafter “Integrated Approach Monograph”).

¹⁴ See generally, *e.g.*, Integrated Approach Monograph, *supra* n. 13.

¹⁵ *Upjohn v. U.S.*, 449 U.S. 383, 101 S. Ct. 677 (1981).

¹⁶ E. Norman Veasey, “Counseling Directors in the New Corporate Culture,” 59 *The Business Lawyer* 1447 (August 2004).

screen” provided by corporate counsel. Staying abreast of new developments is necessary to sharpen directors’ analytical skills and help establish the broad committee agenda. The insight and experience of corporate counsel are valuable in distinguishing for the committee between those matters that are completely unique to publicly traded companies and those that are also relevant to nonprofits.

5. Conducting Internal Investigations

It is an unfortunate fact of corporate life today that organizations—both for profit and nonprofit—may be called upon from time to time to conduct discreet internal reviews or investigations relating to financial or accounting concerns, including those that are presented by corporate “whistleblowers.” These are separate and distinct from internal reviews that primarily relate to the laws and regulations directly applicable to the specific line of business of the corporation and which are typically conducted under the leadership of the compliance officer, such as violations of “operational” legal requirements imposed by industry regulation, or of fiduciary violations by corporate officers or directors. Corporate counsel can be of invaluable assistance in advising the audit committee throughout the internal review process, on issues ranging from the structure and scope of the review, to protection of the whistleblower from retaliation, to the appropriate use of outside professional advisors, to preservation of the attorney-client privilege, to evaluating the results (and legal implications) of the review and reporting internally within the corporation and, perhaps, externally to appropriate regulatory authorities.

6. Practical Considerations

One of the most valuable benefits of the corporate counsel serving as staff to the nonprofit audit committee is counsel’s ability to offer guidance and direction on some of the more “practical” aspects of committee operations. These might logically include: (a) the ability of the committee to spot, and differentiate between, “yellow flags” and “red flags”; (b) anticipating and resolving potential conflict of interest issues as they may arise; and (c) the proper standard of fiduciary conduct as it may apply to a particular circumstance, among other related, practical matters.

Particularly in the wake of recent controversies involving prominent for-profit corporations, and similar controversies, the audit committee should seek the advice of corporate counsel on the types of developments, transactions, events, and occurrences (or non-occurrences) that might prompt the committee to make further inquiry of management, the auditor, or others. Counsel’s ability to track ongoing developments in the nonprofit and for-profit worlds and apply them to the corporation’s individual situation can provide helpful perspective for the audit committee.

Similarly, the committee will need to be vigilant for potential conflicts of interest issues that may arise with committee members on certain matters. This may particularly be the case if the committee does not consist solely of “independent” members. Corporate counsel can assist committee members in anticipating potential conflicts and addressing the propriety of individual disclosures, and in facilitating conflict review by the appropriate board committee.

The audit committee should also seek the input of corporate counsel in connection with its legal risk profile, especially with respect to exercise of oversight and attentiveness. Most noteworthy in this regard are three important factors: (a) the willingness of the SEC to pursue claims against outside directors who, in the view of the SEC, “were reckless in their oversight of management and asleep at the switch”;¹⁷ (b) the significance of “specialized knowledge” of certain directors and audit committee members (*see, e.g., Ahold, Emerging Communications*); and (c) the practical lessons of high-profile audit committee controversies (*see, e.g., the report submitted to the SEC in August, 2004 by a special committee of independent directors of Hollinger International*).¹⁸

With respect to the first factor, corporate counsel is well positioned to advise audit committee members on the current status of SEC enforcement actions against outside directors, the standards applied by the SEC in electing to pursue such actions, and the related implications for nonprofit corporate governance. SEC officials have stressed in public comments their enforcement efforts to address the role of gatekeepers (including the audit committee) and hold them accountable for failing to discharge their legal responsibilities.¹⁹ With respect to the second factor, both the audit committee and the full board will benefit from the input of corporate counsel as to the liability risks of particularized knowledge of board and committee members. This is particularly the case in the aftermath of the controversial decision of the Delaware Chancery Court in *Emerging Communications*.²⁰ For purposes of director recruitment and retention, if for no other reason, the attentive board will seek the advice of corporate counsel on whether, and if so the extent to which, outside directors must exercise greater diligence in reviewing matters for which they may possess particularized knowledge.

Perhaps most importantly, corporate counsel can provide great value by briefing the board on the practical implications of developing issues, such as the controversial role of the Hollinger International audit committee. In that matter, the specifically commissioned Independent Directors’ Report was highly critical of the audit committee’s “inert behavior” and for being “ineffective and careless over a prolonged period of time” in connection with its oversight and review of transactions involving members of corporate management, among other things, even though the Report noted that the committee was “repeatedly and deliberately misled.”²¹ “Lessons learned” from controversies such as Hollinger International can prove immensely useful to nonprofit

¹⁷ See Stephen M. Cutler, Speech by SEC Staff: The Themes of Sarbanes-Oxley as Reflected in the Commission’s Enforcement Program (Sept. 20, 2004), available at <http://www.sec.gov/news/speech/spch092004smc.htm>.

¹⁸ Excerpts of the Report Commissioned by Special Committee of Hollinger International Board, as reprinted in *The New York Times*, September 1, 2004; Morton A. Pierce, “While You Were Sleeping,” *D&O Advisor*, Winter 2005 at p. 43.

¹⁹ See Cutler, *supra* n. 17; *see also* Giovanni P. Prezioso, Speech by SEC Staff: Remarks before the Vanderbilt Director’s College (Sept. 23, 2004), available at <http://www.sec.gov/news/speech/spch092304gpp.htm>.

²⁰ *In re: Emerging Communications, Inc. Shareholders Litigation*, Del. Ch., Cons. C.A. No. 6415 (May 3, 2004).

²¹ See Report, *supra* n. 18.

audit committees, and the most likely messenger for such lessons is the corporate counsel.²²

Corporate counsel may also be supportive to the committee self-assessment process. For example, counsel can aid the committee in interpreting the application to nonprofits of statements by the PCAOB relating to factors which auditors should consider in evaluating committee effectiveness and the adequacy of internal controls.²³ The concern is that in the absence of specific rules developed for the nonprofit industry, PCAOB pronouncements could be used by regulators and courts as “default” standards of audit committee conduct. Corporate counsel can help the committee prepare its own response to such standards before one is externally imposed.

Another practical role for corporate counsel to play is advising on proper procedure when the nonprofit corporation itself (*not* its auditors) discovers an accounting irregularity through application of its own internal controls and procedures. A particular concern in such situations is whether the auditors will nevertheless regard such corporate self-discoveries as “material weaknesses” that require disclosure. This phenomenon may make it even harder for companies to determine how best to address potentially questionable accounting issues that arise. The corporate counsel may be able to assist the audit committee in evaluating proper remediation of the error and related communications with the corporation’s auditors in order to minimize the adverse impact of such disclosures on the audit report.

7. General Counsel v. Outside Counsel

Although we have applied the broad concept of “corporate counsel” throughout the above discussion, it is the authors’ perspective that many of the articulated roles herein for counsel can be well handled by the inside general counsel versed in corporate and finance

²² See also Bedell, Griffith and Tharpe, “Audit Committees: Meeting Responsibilities While Avoiding Pitfalls,” D&O Advisor, Winter 2005. [Note: This article is recommended as an excellent overview of the challenges and obligations facing the audit committee.]

²³ PCAOB Standard No. 2, ¶ 55.

law. The general counsel is well suited to determine the most appropriate time (if at all) to involve outside counsel in the work of the audit committee. Indeed, the general counsel will likely brief the audit committees on those circumstances that warrant either the involvement of the corporation’s regular outside corporate counsel or an independent counsel to be engaged directly by the audit committee. Thus, the general counsel can serve not only as “staff” to the committee, but also as a resource for the engagement of outside counsel when circumstances so require.

Conclusion

The aftermath of Sarbanes-Oxley and the scandals that led up to it have placed many new obligations on public company audit committees. While many of those obligations have not—yet—been imposed as legal requirements on nonprofit boards, state and federal legislative activity is already beginning in that area. Many forward-thinking nonprofit boards are likewise beginning to assimilate some of the Sarbanes-Oxley-derived practices into their own operations and establish, or more broadly empower, their own audit committees. However, while public companies have been under pressure for some time to enhance the profiles of their audit committees and, in many cases, have provided additional resources (and additional compensation) for those committees, nonprofit audit committees may well be composed of volunteer directors who need help to understand and fulfill their new responsibilities.

Corporate counsel can provide an invaluable resource in this regard. By advising the nonprofit audit committee both on new developments that are specifically applicable in the nonprofit sector, as well as on the implications of new regulations and trends in the for-profit sector, corporate counsel can help the committee navigate its way through the maze of emerging standards. Further, the practical skills of foresight, analysis and investigation that are part of corporate counsel’s “toolkit” can be of significant assistance to the audit committee in the implementation of its expanded role. Working as a team, the audit committee and corporate counsel can position the nonprofit corporation to “stay ahead of the curve” as new corporate accountability practices become ingrained in the nonprofit sector.