

Corporate Governance: A Roadmap for the New General Counsel and Board Secretary

September 2009

Robert N. Walton and Michael L. Whitener

► *In this issue: With corporate governance under ever-increasing scrutiny, the new general counsel and company secretary has little time to waste when it comes to ensuring that the company is following sound governance practices. This issue of VistaLaw Views offers a guide for getting started.*



Good governance depends on a wide range of functional groups throughout an organization. You need to get on top of things quickly to make sure all such groups are doing their share.

Congratulations! You've just accepted a new position as the general counsel and board secretary with an organization that, from all appearances and based on your careful due diligence, enjoys good management and a promising future. The company might be privately held, publicly traded or a non-profit. You could be the first person in your new role, or maybe you're succeeding someone else. Perhaps you're a governance maven, or possibly you're making your debut in the boardroom.

Whatever combination of these or other variables might be the case, two things are clear when it comes to the organization's corporate governance: first, it is now chiefly your responsibility; second, however thoroughly you investigated the organization before accepting its offer, your access to the board's and management's internal workings has been very limited up until now. It's time to get up to speed on the intricacies of the company's governance operations so that you can either ensure their continued effectiveness or implement any needed changes.

In our book, *Corporate Governance for New Directors: The Basics and Beyond* (Aspatore Books 2008), we outlined the tools and preparations necessary for first-time board members to carry out their duties capably and to avoid some of the potential pitfalls that directorships can entail. Many of the recommendations there can be useful to a general counsel and board secretary, particularly a new one. The focus here, however, is on the key role the corporate secretary plays in keeping board operations running smoothly, an essential prerequisite for directors to do their jobs properly. To that end, this issue of *VistaLaw Views* is intended as a guide for the new general counsel, board/company secretary or governance officer on what steps to take in the first sixty days on the job. Based on governance projects we've undertaken for clients in the U.S. and abroad, as well as generally recognized best practices, it sets out a roadmap of how to get up to speed quickly on your company's governance and position yourself to proactively steer its future.

1. The Org Chart: Think Inside the Boxes

This first step is probably the easiest, as in all likelihood the work has already been done prior to your arrival. A good organizational chart should identify all corporate entities and affiliates, their entity type (corporation, partnership, limited liability company, etc.), the jurisdictions in which they are incorporated and licensed to do business, and their ownership structure. Depending on the complexity of your company, the org chart might be a few simple boxes on a page or something resembling a complicated electrical diagram. In either event, make sure it's up to date. If you're in the potentially enviable position of joining a company that's growing so quickly that no one has had time to capture all the organizational information in one place, chances are that governance is going to require a significant amount of your attention, at least in the short to medium term. In that case, creating a comprehensive org chart should be step one, as it will be among the most consulted reference tools in your governance role.

2. Directors and Officers: Meet the New Bosses (Not the Same as the Old Bosses)

Effective interactions with your company’s directors and executives will be essential to your success. As the general counsel, you’ll be dealing with the senior executives on a daily basis and will soon get to know each of them well. You’ll likely have met most of your fellow executives through the interviewing process and, since your interpersonal skills presumably contributed to your landing the job, you’re already on your way to working effectively with them.

Good governance touches and depends on a wide range of functional groups throughout an organization, however, so use your first few weeks on the job to broaden your contacts beyond the “C” level. Reach out to the next level in key departments such as finance, risk management, regulatory (which, in some organizations, is separate from legal) and internal audit. Make a point of identifying, reading up on and meeting your external auditors and outside corporate counsel. Likewise, if you’re in an organization with multiple affiliates, contact your counterparts in the other entities to share knowledge and adopt consistent approaches regarding governance practices.

With respect to the board, fostering a collaborative working relationship might take more time, given the somewhat less frequent contact with the directors. To set off on the right foot, you’ll want to familiarize yourself with the board basics as soon as possible. This means identifying the chairman, vice chairman and each director, their appointment or election dates, length of terms, committee appointments, and any particular shareholder group each might represent. A relatively simple exercise, to be sure, but it can be time consuming if your governance responsibilities extend to multiple organizations under a parent company umbrella.

Take your board preparation to the next level by preparing (or have someone assemble for you) a briefing book on the directors of your organization and any of its subsidiaries. If your company jointly owns (or is owned by) another entity, you’ll want to collect information on each shareholder entity and its key players. For individual directors, gather key biographical information, which might already be on the company’s website or easily available through some online research. You’ll also want to scour the corporate files, including the board and committee minutes, to develop a sense of each director’s perspective and contributions, based on the positions he or she has taken on issues before the board and the extent to which that member is active and vocal in meetings. Wherever possible, include a photo of each director in your briefing book and make an effort to connect the names with the faces before your first board or committee meeting. It will save you the need to consult a seating chart during a meeting or avoid the awkwardness of interrupting the discussion in order to ensure the correct speaker is reflected in the minutes.

3. Company Records Part I: Collect Core Documents

As you turn to getting a handle on corporate details beyond what you might have learned before joining the company, your first priority will be to make sure the governance records are complete. For companies undergoing significant growth or change, there is a good chance that they are not. Working with internal or external counsel, support staff or other executives who have been involved in your company’s governance recordkeeping – and, if necessary and as needed, the board chairman – identify, collect and familiarize yourself with the basic core documents. For each of your company’s legal entities, these will include:

- ▶ **Incorporation documents**, including articles of incorporation/association, charters, bylaws, shareholder agreements and other documents created when the corporation was established, as well as any subsequent amendments
- ▶ **Board meeting materials**, including each meeting’s agenda, minutes and resolutions
- ▶ **Committee information**, including charters, membership lists, minutes and reports

You’ll want to scour the corporate files, including the board and committee minutes, to develop a sense of each director’s perspective and contributions, based on the positions he or she has taken on issues before the board and the extent to which that member is active and vocal in meetings.

Best practices strongly encourage some manner of electronic storage in the interest of security and confidentiality, accessibility for key personnel, and records retention and backup.

- ▶ **Shareholder materials**, including annual meeting agendas, minutes and resolutions
- ▶ **Executive reports to the board** that are not already included in board meeting materials
- ▶ **Financial reports** from accountants and external auditors
- ▶ **Internal audit reports**

All of these pertain to the formation of the company and its ongoing board and executive activities. You also will want to identify and secure ready access to other documents that you're likely to consult with some frequency in your position. These include:

- ▶ **Contracts** with key vendors and customers
- ▶ **Employment agreements** with senior executives
- ▶ **Insurance policies**, especially those relating to D&O coverage
- ▶ **Government-issued licenses**, if any
- ▶ **Any filings** the company and any of its subsidiaries have made with federal agencies, secretaries of state or regulatory bodies

Finally, moving beyond company-specific documents and filings, you'll clearly need to stay current on legal and regulatory requirements applicable to your business, such as:

- ▶ **Listing requirements**, if the company is public, for each exchange on which shares are traded, including each exchange authority's insider trading rules
- ▶ **Rules and regulations** specific to your company's sector or industry

4. Company Records Part II: Control the Collection

Once you're confident that your records are complete and current, it is equally important for you to ensure that they are stored and maintained properly. For organizations with one or a handful of legal entities, records management can be and often is handled without great difficulty by a well-organized filing system. Even for small organizations, however, best practices strongly encourage some manner of electronic storage in the interest of security and confidentiality, accessibility for key personnel, and records retention and backup. Whatever the size of your company, it is worth looking into available records management systems if you are not already employing one.

To begin this process, first identify the required functionality. All systems available should be able to capture basic corporation information – entity type, corporate addresses, contact information, etc. – and allow you to store, organize and retrieve documents. Consider other capabilities that might be useful to you, such as whether and how easily each system can:

- ▶ Track ownership, officer and director details
- ▶ Allow you to make global changes across the organization quickly and easily (e.g., add the same director to multiple boards)
- ▶ Generate event notifications regarding compliance dates, filing deadlines and recurring tasks
- ▶ Allow a combination of “view only” and editing privileges to authorized users
- ▶ Generate reports and create templates
- ▶ Provide full-text search capability
- ▶ Create an audit trail
- ▶ Generate organization charts and board calendars
- ▶ Manage contracts, intellectual property, banking and signature information, tax compliance information and stock option information

The size and complexity of the organization will determine the usefulness of the various bells and whistles offered. Some services – as we discovered while researching various vendors for one client – can be a little too U.S.-centric to support non-U.S. based global organizations.

Next, research the available vendors and request demonstrations. There are several companies offering online entity management products, including Bridgeway, Computershare, Datacare Software and CSC. Each of them happily will arrange web-based demos to exhibit their products and address any questions.

Finally, assess the qualities and costs of each service before making a selection. Most of the vendors we have studied offer similar functionality and features, but differentiating factors can include the following:

Preparing a master calendar of all board and committee meetings well in advance will save a lot of headaches later. When it comes to creating form templates for minutes, agendas and resolutions, the work might have been done for you already, but don't hesitate to improve upon them before adopting them.

- ▶ **IT considerations:** Do you have the IT resources to purchase a perpetual license and host the database in-house, or is a vendor-hosted SaaS (software as a service) solution better? The former has the advantage of requiring only a single up-front license investment and might be more economical over the long run. SaaS solutions, on the other hand, permit a lower up-front investment and less IT Department involvement, as they require only a web browser and password to access the documents and work areas.
- ▶ **Ease of use:** How intuitive and user-friendly is the interface? If significant training is required to use the system, will access be limited to you and your team? Alternatively, will you want to send board members a single link to a secure virtual data room so that they can view board materials online?
- ▶ **Dependability:** If a SaaS solution is preferred, how secure is the system? Likewise, is the vendor sufficiently established that you need not worry about its continued operations? If you decide to change vendors, can your data be transferred to another system easily and inexpensively?
- ▶ **Scalability:** Is the system sufficiently scalable to meet the needs of your company's expected growth?
- ▶ **Pricing:** This can range significantly, depending on the vendor and type of solution, from a few thousand dollars a year to several thousand per entity, and it might also vary depending on the number of users.

5. Board Activity: Ensure Smooth Operations

To maintain (or achieve) smooth board and committee operations, you'll need to know well in advance when meetings are taking place and have on hand some basic templates pertaining to their standard activities. As with the org chart, the heavy lifting here might already be done for you. If it hasn't been, you'll need to turn your attention to this quickly. Fortunately, it should not be very difficult.

For starters, review – or, if necessary, create – the master calendar of board and committee meetings covering at least the year ahead. Work with the chairman to set the timetable for any board meetings not yet scheduled. Do this within your first 30 days, if possible, as there is no underestimating the logistical and scheduling challenges of coordinating multiple board members' calendars if meetings are not set well in advance.

As for commonly used templates, review meeting notices, agendas, resolutions and minutes for previous board, committee and shareholder meetings. Create what isn't already available and improve what you don't like in the existing examples before adopting them as your templates.

Benchmarking is an effective tool to determine where the company is on target with respect to corporate governance and where it is not.

6. Practices and Policies: Benchmark to Best Practices

A useful way to quickly gauge the overall state of a company's governance is to conduct a benchmarking exercise comparing its policies and practices to well-established best practices. The *Principles of Corporate Governance* published by the Organisation for Economic Co-operation and Development (OECD) is a good starting point, as are governance surveys and guidelines published by other global organizations such as the World Bank's International Finance Corporation (IFC). Helpful tools and sample policies are also available through membership associations and non-profit institutes like the Society of Corporate Secretaries and Governance Professionals, the National Association of Corporate Directors (both based in the U.S.), the European Corporate Governance Institute, the India-based Academy of Corporate Governance, and Dubai's Hawkamah Institute, which focuses on the Middle East. A number of stock exchanges also publish codes and guidelines for good governance that can be highly instructive even if your company is not publicly traded.

To make the exercise worthwhile, identify a broad range of categories and subcategories and check them against your company's written rules and procedures. In the first instance, see if your company's policies at least address the identified topics. (Even if they do, you'll need to go back and assess their adequacy and effectiveness.) Examples of best practices identified by OECD, IFC and others include the following:

▶ Commitment to Corporate Governance

- Company adheres to a written corporate governance code or manual
- Board is responsible for developing corporate governance practices
- Board is trained on governance issues
- Formalized code of ethics is provided to all personnel

▶ Good Board Practices

- Directors act on fully informed basis, in good faith, with due care, in best interest of company and shareholders
- Board treats all shareholders fairly
- Board applies high ethical standards and exercises objective judgment
- Board fulfils key functions (enumerated)
- Board members have access to accurate, relevant and timely information
- Non-executive and independent directors are identified in annual report
- Board members are evaluated annually

▶ Robust Control Environment and Processes

- Internal audit function reports to board or audit committee
- External auditor is appointed at annual general meeting
- External audit firm does not provide services to company other than audit

▶ High Standards of Transparency and Disclosure

- Corporate information is prepared and disclosed in accordance with high standards of accounting and financial/non-financial disclosure
- Financial information is disclosed on company website
- Related party transactions are disclosed to shareholders via annual report or otherwise
- Annual report discloses corporate governance policies and practices
- All material matters are disclosed in timely and accurate manner

Good governance requires the company to adopt, embrace and enforce core policies setting out its governance practices, its obligations to shareholders and its obligations under the law. A governance manual and a training program are important elements in fulfilling these obligations.

▶ **Strong Protection of Shareholder Rights**

- Shareholders are notified more than 20 days in advance of shareholders meeting and furnished with sufficient/timely information in advance
- Shareholders select and remove directors and participate in decisions concerning fundamental corporate changes
- All shareholders of same series of a class are treated equally
- Minority shareholders are protected from abusive actions of controlling shareholders
- Company procedures do not make it unduly difficult or expensive to cast votes
- Company prohibits insider trading and abusive self-dealing
- Board members and management must abstain from voting on issues where there is potential conflict of interest

Conducting such a benchmarking can be time consuming, but it is a relatively straightforward exercise that may be delegated to a team member or assigned to outside counsel. It can provide a very effective tool for you to determine (and to communicate to the board) where your company is on target with respect to corporate governance and where it is not.

7. Corporate Governance Manual: Lead by Example

Beyond the rules and procedures governing board operations, good governance requires the company to adopt, embrace and enforce certain core policies setting out its obligations to shareholders and under the law. These policies should form the basis of the company’s governance manual applicable to all employees. A comprehensive governance manual should include among its topics and core policies the following:

▶ **Overview of the Company’s Governance**

- Governance: the company’s definition and governance philosophy
- Governance framework: laws and policies governing the company
- The role of the board: membership, operational procedures, board committees
- Management function: executive officers, key compliance functions, external audit

▶ **Core Policies**

- Code of ethics and business conduct, detailing the company’s rules on conflicts of interest, insider trading (if applicable), giving and receiving of gifts, confidentiality and reporting violations
- Directors code of ethics and annual certification
- Company articles of association
- Financial approvals describing levels of signature authority and amounts
- Related party transactions rules
- Shareholder relations/corporate communications
- Board committee charters
- Employment policies
- Procurement policies

8. Governance Training: Spread the Word

Once you’ve mastered the substantive details and operational tasks to the point where you’re the go-to governance person you were hired to be, you’ll want to impart that knowledge, or at least key elements of it, to others in the organization. For governance to be effective, it requires more than the efforts of a company secretary, however focused and organized he or she might be.

About the Authors

Robert N. Walton is a principal and co-founder of VistaLaw International, based in its Washington, D.C. office. Rob advises VistaLaw clients on transactional, compliance and corporate governance matters. He is the co-author of *Corporate Governance for New Directors: The Basics and Beyond* (Aspatore Books 2008). Rob can be reached at rwalton@vistalaw.com.

Michael L. Whitener is a principal and co-founder of VistaLaw International, based in its Washington, D.C. office. Michael's legal practice focuses primarily on international corporate transactions, assisting software and other high-technology clients develop their global businesses and protect their intellectual property at home and abroad. Michael is the author of *Creating Software Alliances* (2007) and co-author of *Corporate Governance for New Directors: The Basics and Beyond* (2008), both published by Aspatore Books. Michael can be reached at mwhitener@vistalaw.com.

About VistaLaw International

VistaLaw International, with offices in Paris, London, Madrid and Washington, D.C., is a legal services firm created by former in-house counsel dedicated to providing practical, cost-effective legal advice to global companies. VistaLaw's services include regulatory compliance reviews, corporate governance and structuring, drafting and negotiation of commercial contracts, and handling of merger and acquisition transactions. For more information, visit www.vistolaw.com.

Employees at all levels should receive a basic tutorial on the governance manual and core policies, with an emphasis on their individual responsibilities. The manual should be required reading and referenced and acknowledged in future employment agreements. Training may be conducted through live or pre-recorded webinars, or, if the size of the organization makes it logistically feasible, rolled out in live sessions on a department-by-department basis. For certain key individuals, including those in the executive ranks and anyone involved in compliance activities and functions, live training (in person or via web or video conference) is strongly recommended, regardless of the organization's size.

For board directors, you cannot assume that all of them have extensive experience in the boardroom and are well versed in governance issues (though your research on each director in Step 2 above should give you some idea). In any case, even experienced board members should be given refresher training on a periodic basis. In addition to the topics covered in employee training, board training should address the role of the board, guidelines for effective participation, risk management strategy, financial management and director legal obligations and liability. Such training programs could take place as part of an offsite meeting with the board, combined with other activities aimed at fostering collegiality and developing stronger working relationships.

9. Director Evaluation: Assess Your Key Assets

Prior to organizing board training and offsite team building activities, you might first explore with the chairman the benefits of conducting a confidential evaluation of the effectiveness the board, in order to determine areas of strengths and weaknesses, any concerns of individual directors and opportunities for enhancement of performance. Such an evaluation could be conducted at the levels of the board as a whole, the committees and the individual directors.

Although best practices dictate that the chairman should conduct reviews of board members on an annual basis, an objective, third party expert might best undertake a comprehensive assessment of the board's overall effectiveness. If you choose to take this route, research suitable attorneys and management consultants to determine which independent governance specialists would be appropriately qualified to perform the proposed evaluations. Next, draft a brief request for proposal describing the intended scope of and deliverables for the project. Finally, contact the selected corporate governance experts and solicit proposals to provide director evaluation services from each of them.

Conclusion: Start Now

While any one of the steps above could be expanded to include greater detail, we believe they are a good starting point for the new general counsel, company secretary or head of corporate governance. Some of our suggestions are relatively simple and can be quickly accomplished, while others will take more time and resources. Undoubtedly, individual circumstances might obviate the need for some tasks and emphasize the priority of others. In any case, it is essential to begin the process early, while you have the momentum of being new to the role and, presumably, the necessary support of those who hired you for such an important governance role in the first place.

This VistaLaw Views article is for informational purposes only, is not intended to serve as legal advice in specific situations, and its use does not create a lawyer-client relationship.

VistaLaw International LLC

International Square
1875 I Street N.W. Fifth Floor
Washington, DC 20006, USA
Tel: +1 202-429-5526