



International IP Summit: Leading and Thriving Through Prolonged Uncertainty: A Conversation with General Counsels

Overview

The role of the general counsel is varied. This presentation aims to discuss how general counsels are complying with their various fiduciary, professional, and ethical obligations. Specially, it will cover and provide practical guidance on how a general counsel must navigate and avoid ethical misconduct when dealing with: (1) ESG compliance, (2) navigating relationships with Russia and China, (3) ethical data sharing, (4) antitrust concerns, (5) white collar investigations and (6) avoiding pandemic-related ethical pitfalls.

Duty to Ensure ESG Compliance

- The SEC ESG task force is in charged of “analyz[ing] disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies.”
 - In May 2022, the SEC announced settled charges and a \$1.5 million penalty for alleged misstatements and omissions in fund disclosures regarding ESG considerations.
- “Greenwashing” is the use of misinformation to gain investor confidence in an ESG claim.
- Private plaintiffs’ bar has also initiated several actions asserting greenwashing.
- Public company's have an obligation to follow the SECs regulations.
- Corporations should be including their general counsel in ESG efforts to reduce their exposure to risks. Counsel should take active roles in ESG to ensure compliance with SEC guidance.
 - As “guardians” of corporations, general counsels are responsible for and owe a fiduciary duty to the companies that employ them.
 - To uphold this duty they can identify, monitor, and assess relevant sustainability issues and ensure the disclosures are rigorous, factual, and not “aspirational.”

Ethically Navigating Relations with China and Russia

- The invasion of Ukraine has led to widespread sanctions against Russia. While the sanctions are strict, they do not constitute a total embargo against Russia.
- China remains Russia's largest trading partner and continues to serve as an important market for many global industries. Dealings with China are further complicated by U.S. national security concerns on IP theft and human rights concerns.
- Companies have compliance and ethical decisions to make regarding continued involvement with Russia and China.
 - General counsel must consider the legal risk, economic risk, and reputational risks that may come up when working with these countries.
- A company's general counsel must be aware of the shifting landscape to provide accurate legal advice. This can be done by monitoring:
 - compliance with rapid legal sanctions against Russia,
 - transactions that could potentially trigger enforcement actions and governmental scrutiny,
 - shifting tensions with China and implications that may have on company operations.
- While general counsels cannot control all actions taken by employees, they can set up effective compliance systems that monitor employee activities and demonstrates the corporation's commitment to effective sanction compliance.

Ethically Navigating Relations with China and Russia

- Given the global nature of business, general counsel must pay a heightened level of attention to high-risk transactions and ensure that business teams run their decisions through the legal team to avoid running up against sanctions.
 - In cases where a company sends information or items to a restricted countries, general counsel must use heightened scrutiny to avoid ethical violations.
- Beyond understanding the law, general counsels must understand the corollary effects of the restrictions on business with China or Russia.
 - For example, when the sanctions against Russia began to roll out, it was still legally permissible to undertake certain actions, but certain non-legal institutions refused to process or allow certain transactions to take place.
- To prevent future transactions or collaborations from being blocked or impeded by the shifting regulatory landscape, general counsels should work with their company to implement forward-looking risk assessments and heatmaps.
- For countries like China, where there is not a country wide ban, general counsels must be mindful of which parties their company can transact with and be mindful of what information is being sent to avoid fines for violations.
 - There are certain parties that you must get a special license to work with, these license requests are usually denied.
 - Concerns over IP theft have created higher regulation and scrutiny around sending blueprints.

Evolving Data Landscape and Ethical Data Sharing

- Data protection and privacy restrictions are constantly changing.
- To avoid missteps, a general counsel must consistently be well informed about developments in these areas to properly advise company leaders about the legal ramifications of business decisions.
- They must also balance ethical considerations that may be relevant to the corporation's values.
- Some common practices to ensure ethical data use include:
 - following industry set diligence standards for the acquisition of data from third parties,
 - minimizing and limiting data collection to ensure compliance, and
 - to the extent possible working with limited de-identified data to avoid compliance issues.

Rising Antitrust Issues Require Greater GC Involvement

- Corporations are giving antitrust and competitions issues more internal scrutiny. In part due to a shifting landscape in the US.
 - Certain industries are more in focus, such as health care and agriculture.
- Antitrust issues with respect to labor markers are on the rise. This includes identifying and stopping illegal wage fixing of employee's salaries and non-poach agreements within specific industries.
- US Government agencies are focusing on existing laws to correct monopolistic tendencies, such as the Clayton Act, which governs mergers and the legality of transactions that may substantially lessen competition or tend to create a monopoly.
 - There are increased policy changes being implemented to slow down potentially monopolistic transactions and grant greater subpoena power to the government.
 - DOJ blocking more vertical deals. The agency is to issue new merger guidelines soon.
 - There seems to be a greater trend towards litigating to prevent deals from going through verses allowing remedies.
 - Seeing increased skepticism on whether structure or behavioral remedies can be used to justify transactions.
- As general counsel, it is important to recognize the landscape and trends business leaders are seeing and keep up with them in order to predict outcomes and offer some certainty to business teams.

Rising Antitrust Issues Require Greater GC Involvement

- Important for general counsels of global companies to understand shifting foreign antitrust trends on top of domestic changes.
- In the UK and the EU, companies are seeing similar trends to those coming up in the US as well.
 - For instance, EU entities are also enforcing more restrictions on vertical mergers.
- While regulations have been broadly consistent, there have been a few recent conflicting decisions between EU and FTC guidance.
 - This is important for general counsels to note, and potentially engage with outside counsel to resolve conflicting guidance, particularly for territories that may be high risk.
- For multi-territory transactions, important to be on top of cross-agency filings.
- Overall, to do antitrust work successfully in-house, one must know and understand the business and business strategy. Understanding past strategy and having a forward-looking mentality is key.
 - Important to pay attention to DOJ policy changes and implement compliance programs to avoid issues.

Duty to Report White Collar Crimes

- General counsels must be vigilant about preventing and reporting financial fraud by:
 - implementing policies and compliance programs and constantly evaluating these programs, and
 - reporting financial fraud when discovered to help the corporation receive cooperation credit.
- When potentially problematic documents are unearthed, companies and general counsels, must do their diligence and think critically about what information to report to the government.
 - The government looks favorably upon voluntary disclosures, but its also important to avoid pre-emptively reporting non-issues.
- Corporate cooperation can be key.
 - More frequently seeing charges against individuals versus the corporation when appropriate.
 - Recent SEC settlement invoked the Sarbanes-Oxley Act which requires culpable and non-culpable CEOs and CFOs to reimburse issuers for certain bonuses, incentive, equity-based compensation, and stock sale profits in instances where the issuer must prepare an accounting restatement as a result of misconduct.

Avoiding COVID-Related Ethical Pitfalls

- During the pandemic, many attorneys worked remotely which blurred the line between personal and professional lives. There has been a rise in the number of lawyers and judges who were punished for unethical behavior related to the pandemic.
- Working from home created unique confidentiality issues.
 - Model Rule 1.6 requires lawyers to keep all information relating to a representation confidential.
 - Lawyers working from home must be mindful of where and when they are taking client calls and who may be listening.
- From a business perspective, there has been a rise in COVID fraud cases related to false representations regarding work done in the COVID space and health care fraud.
 - As general counsel, one must be aware of these new ethical issues and implement policy to address and prevent such situations from arising.