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GC's Critical Public Policy Role in an Age of Upheaval

Government

Law Department Management



The views expressed in this article are those of the author and do not necessarily reflect those of the Association of Corporate Counsel. Mr. Heineman is a keynote speaker at the ACC General Counsel Summit in Paris in early June, where he will discuss in greater detail the issues of GC leadership on public policy, ethics, and risk.

Contemporary CEOs must not only be experts at addressing the commercial verities of products, markets, and competitors, but, aided by general counsel, they must also have the experience and capability to address business-in-society issues — legislation, regulation, investigation, enforcement, and litigation — that create risk and opportunity in all dimensions of corporate activity. These societal issues are the ultimate test of corporate citizenship — of whether a company can carry out the essential mission of global capitalism: fusing high performance with high integrity and sound risk management. And this test must be met in an era characterized by significant political discontinuities, as well as deep distrust of corporations, in all corners of the globe.

As a lawyer-statesperson who is a technical expert, wise counselor, and an accountable leader, the general counsel has an increasingly critical role in helping the CEO, and the corporation, meet these important “business in society” issues. As a result of the inside counsel revolution which has made her a core member of the top management team, the GC as lawyer-statesperson must go beyond the basic question, “is it legal?” to the ultimate question for corporate action, “is it right?” In so doing, the GC must focus on duties to the stakeholders; to the rule of law; and to securing public goods upon which society and the company depend and which cannot be attained through the market alone. The insistent and sustained focus on “what is right”— and on these duties — are guideposts as the general counsel helps the CEO and the corporation navigate through dramatic policy challenges in this era of upheaval.

The policy problems

Companies have historically faced striking complexity in dealing with public policy. Nations across the globe enact an ever-changing array of detailed legislation and regulation to protect workers, consumers, investors, and the public welfare. These diverse rules shape what companies can and cannot do. And the impact of policy regimes on business varies dramatically due to different approaches to government in different nations: on whether the nations operate through systems of state capitalism, socialism, populism, state-centric industrial policy, or liberal market economies; and on whether they operate under rule of law or rule of men/corruption.

Importantly, corporations must today navigate the fierce cross currents of geopolitical uncertainty and change: from the “illiberal democracy” in Eastern Europe to the confused (and confusing) nativism, protectionism, and populism in the United States, United Kingdom, and other nations in Western Europe; from the re-assertion of aggressive Russian power to Chinese quest for control over Southeast Asia; from massive corruption in Brazil and South Korea to ongoing tribal hatred; and religious conflicts of the Middle East. Moreover, corporations must also help devise policy responses to a host of major, widespread, and recurring global issues that threaten the health of capitalism: e.g., terror, cyber warfare, corruption, pandemics, inequality, migration, and aging.

In this epoch of turbulence, two vexing policy dilemmas stand out in the near term for global companies:

- How can companies navigate the nativist and protectionist leanings of substantial segments of the electorate (see the US election and Brexit) while continuing to support policies and practices suited to a free-market, open-border vision of globalization that many corporations still posit as the long-term future of the world economy?
- How can companies resist the temptation to “pig out” at the trough of pro-business initiatives that seek to deregulate and dismantle the protections in such areas as financial services, energy and environment, healthcare and immigration, and try instead to advocate changes that fix genuine regulatory problems, but continue to protect the public good and promote the

broad public interest rather than simply advancing narrow, short-term corporate interests?

Popular distrust of business

As they attempt to deal with this highly charged policy and political environment, corporations face the salient problem of intense distrust of business in many quarters. For example, the current popular revolt in the United States is more sharply critical of business than the general anti-corporate undercurrent that has long been present in American politics.

The public distemper stems, in part, from genuine problems of recession and a changing economy that have left people behind. But well-publicized problems in the corporate community have added to political dysfunction, leading to low levels of trust in business' role in policy and politics. These include: a steady drumbeat of corporate scandals; ever higher executive compensation combined with stagnant real income of average citizens; corporate mistakes relating to leverage and liquidity as a major cause of the Great Recession; the belief that business elites have disproportionate influence due to money in politics; and the public's perception that corporate involvement in public affairs is in the service of "crony capitalism," the range of subsidies, loopholes, franchises, concessions, etc. that have little or no basis in advancing the broad public interest.

GC role inside the corporation: systematic and forward-looking

To meet these daunting challenges, corporations need a strategic, forward-looking, and balanced approach to government and public affairs. But many don't have one, instead adopting only defensive, short-term, or narrowly self-interested "government relations" tactics. A systematic, prospective approach must start with the CEO's commitment to robust corporate processes that explicitly include a public policy dimension — an approach the general counsel (or the GC in tandem with an SVP-Public Affairs) coordinates across diverse policy subjects, business units, and geographies.

The CEO must make clear to division business leaders and to senior staff executives that their annual plans should include and integrate three dimensions of global public policy issues:

- What is the *desirable policy* (policy formulation at corporate headquarters);
- What is *feasible policy* (policy enactment in political capitals); and,
- How can enacted *policy become effective* (policy implementation by different units of government)?

In annual strategic reviews, business and senior staff leaders should present a prioritized agenda of offensive and defensive policies relating to their line of business, or area of expertise in nations across the globe, so that the CEO can make decisions on priorities and resources and have muscular follow-on reviews.

This governmental process depends on having both policy experts and political experts inside the corporation, many who will be direct or strong dotted line reports to the GC. The policy experts are key team members located at headquarters with business and corporate unit leaders. They have domain knowledge either in specific industries (e.g., health or energy) or in general crosscutting subjects (e.g., taxes or trade). They help lead the annual strategic process, which designs desirable policies in the context of corporate and societal trends. The political experts, by contrast, are located — not at corporate or division headquarters — but in the political capitals. Their "clients" are the decision-makers in the legislature, the executive, and the regulatory agencies. These experts help

enact and implement the desirable policies, translating proposals into feasible results through communication, advocacy, and alliance-building. Their expertise is acute knowledge of global, political, and governmental processes, and an understanding of how to get things done with integrity in Beijing, Budapest, Brussels, or Boston.

The integration of policy and politics across the diverse issues facing the corporation is the sine qua non of success, and a key task of the general counsel. The policy expert needs advice from the political expert on what is feasible in setting priorities at corporate headquarters; the political expert needs constant contact with the policy expert to assess the desirability of policy changes in political capitals, as governmental decision-making processes follow their inevitable twists and turns. Beyond finding the right policy and political experts with the assistance of the GC, the CEO must ensure that the corporation is led by broad-gauged people at both staff and operational levels who are not just experts in business, but have deep understanding of politics, policy, ethics, societal trends, country risk, modern communication, and citizenship.

GC role outside the corporation: fairness and trust

This era of political distemper makes the GC's role in corporate public policy even more critical. Just as "short-termism" in business is fought by strong, strategic companies, so great companies must also address the risk of "short-termism" in the public policy arena because politics can be fickle as the pendulum swings back and forth. To regain basic public trust, corporations need to keep their eyes on the true north of what is "right" in the long term for stakeholders and society, and not succumb to near term pressures for protectionism or one-sided, narrow-minded and solely self-interested pressures to eliminate, as opposed to modify constructively, basic regulatory regimes. To carry out this mission, the general counsel needs to adhere to the following core principles in public policy. Each of these subjects is worthy of extended, book-length discussions, but here are the headlines:

- **Develop fairer, clearer facts in policy disputes.** Corporations and other parties could work with public officials to devise better, honest methods for establishing a record of consensus facts in legislative and regulatory disputes, and identifying the assumptions underlying *both contested facts* and more naked opinions so that the battle of experts under a "public interest" standard is more clearly understood by decision-makers and the public. "Facts" used to craft legislation and regulation may (or may not) be agreed upon historical information, but they may also be "predictions" about what will happen in the future which are necessarily based on assumptions that need explication for fair evaluation.
- **Balance values in conflict.** Corporations and other parties should identify and acknowledge the values on both sides of most regulatory and legislative debates, and make a good faith effort to balance fairly the values in conflict, e.g., finding a fair resolution between the verities of equity and efficiency in social welfare legislation or between access, cost-control, and quality in healthcare legislation, or between expedition and safety in drug approvals, or between short-term cost and long-term benefit in environmental regulation.
- **Defend globalization while addressing its problems.** The rise of nationalism, nativism, and protectionism in the United States and Europe is a great threat to the international economic system. Corporations must have the courage to explicate the benefits of globalization for people across the world and to defend cross-border trade and investment against demagogic leaders and politicians. (Business leaders were almost incomprehensibly silent about these issues during the American election.) But, at the same time, business needs to acknowledge globalization's discontents — job loss, inequality, environmental, and labor standards, etc. — and address those directly, too, e.g., through safety net programs for displaced workers.

- **Build broad coalitions.** Too often corporate public policy efforts take place in the self-referential echo chamber of business trade associations or groups. Working with other interested parties to create coalitions that include, but are not limited to, business allies, increases the chances of broad-minded approaches that can secure approval and provide durable benefits. Indeed, there is no united “business community,” and disagreements among business actors (e.g., importers v. exporters, tech v. industrial) means broader coalition building is necessary.
- **Promote bi-partisanship and compromise.** Corporations should seek bipartisan or nonpartisan solutions to our most pressing problems to mitigate the anger and hostility exchanged across the aisle on so many pressing national issues. Too often relations between and among public officials and interest groups look like an intractable “blood feud” that demonizes opponents or that bemoans an approaching Armageddon. Business, especially, should use calm and reasoned civil discourse, recognizing that there are usually legitimate opposing views in policy debates and that necessary compromises do not demand total victory.
- **Take ethical action in the absence of regulation.** If a serious problem exists, and regulation either isn’t enacted or is revoked, companies need to consider seriously whether voluntarily to adopt ethical standards to address the problem for the benefit of stakeholders. An example is the recent regulation requiring investment advisors to follow a “fiduciary” standard for the benefit of the customer when recommending investments for retirement accounts rather than using the traditional “suitability” standard, which allowed for conflicts between customer and the firm. Although the current administration is threatening to revoke the rule, a number of firms have said that they will follow the “fiduciary standard” voluntarily even if revocation occurs.

There should be no mistake. These complex issues — relating to facts, balance, globalization, coalitions, bipartisanship, compromise, and ethics — will be vexing and controversial for the business community. Some companies will resist because, *inter alia*, they believe their particular, self-centered substantive position trumps (pardon the phrase) more civil practices and more balanced solutions. And, others will, of course, disagree on what is “right” as they approach issues from a conservative or progressive orientation.

Nonetheless, a profound question is whether corporations, by putting priority emphasis on these and other salient issues in the political culture (like limits on money in politics and more complete and timely disclosure), can help heal, rather than exacerbate, the manifest ills in governmental systems — ills posing serious threats to the maintenance of a healthy constitutional democracy and a sound mixed economy. These issues are at the core of what corporate citizenship means, in my view. This subject is too vast for a single corporation, but seeking to create broad based “coalitions of the willing,” extending far beyond corporations, may be the way past the dystopian present — what leading political scientist Francis Fukuyama has warned is “political decay” In Western democracies. But the challenges are immense for corporations, and general counsel, to play this positive role.

To paraphrase Tom Paine, these are times that try CEOs — GCs’ — souls.

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