The Risk Intelligent
general counsel
Discard the compass
and get a GPS

Risk Intelligence series
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Preface

This publication is part of Deloitte’s series on Risk Intelligence — a risk management philosophy that focuses not solely on risk avoidance and mitigation, but also on risk-taking as a means to value creation. The concepts and viewpoints presented here build upon and complement other publications in the series that span roles, industries, and business issues. To access all the white papers in the Risk Intelligence series, visit: www.deloitte.com/risk.

Open communication is a key characteristic of the Risk Intelligent Enterprise™. We encourage you to share this white paper with your colleagues — executives, board members, and key managers at your company. The issues outlined herein will serve as useful points to consider and discuss in the continuing effort to increase your company’s Risk Intelligence.

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Keeping an organization on course, from the legal and ethical perspective, has rarely been more challenging. In simpler times, this could usually be accomplished with the compass, if you will, of legal expertise and ethical guidance. Today, navigating the complexities of business and financial strategies and of ever-evolving products and practices, and the legal and regulatory risks they pose, calls for the global positioning system (GPS) of Risk Intelligence.

Greater risks, new regulatory demands, heightened stakeholder expectations, and increasing financial pressures present new challenges...
The Risk Intelligent Enterprise™

Risk Intelligence is Deloitte’s philosophy of, and approach to, risk management. It consists of practices that:

• Address a broad spectrum of risks across the enterprise, including strategic, operational, financial, regulatory, reporting, security, legal, compliance, reputational, property, IT, and environmental risks, among others
• Acknowledge the need for specialization by business and function, but also across organizational “silos”
• Consider the interaction of multiple risks rather than focusing on a single risk or event and consider the potential impacts of multiple threats
• Create common terms and metrics for risk and a culture in which people account for risk in every activity
• Support risk taking for reward and value creation, rather than pure risk avoidance

Deloitte has established the concept of the Risk Intelligent Enterprise as an approach that provides senior executives and board members, as well as managers of functional areas and business units, with a practical framework for considering, managing, and governing risk. Risk Intelligence extends the practices of risk management and risk governance beyond traditional modes, with the goal of promoting a broad, integrated approach to risk.

The Risk Intelligent general counsel

Risk Intelligent GCs can assist their organizations in developing Risk Intelligent practices and in enhancing risk management and risk governance, particularly in regard to legal, compliance, and regulatory risks. This document, prepared for GCs — and for CROs, CCOs, other senior executives, and board members interested in legal and regulatory risks — provides a starting point for anyone who needs to manage or oversee legal risks in the current environment.
Past and future directions

Business people have sought direction from legal counsel since the earliest days of contract law, as the need to negotiate agreements, manage contingencies, and pursue remedies grew. With the advent of modern regulatory agencies, statutes pertaining to business activities, and ever-evolving liability case law, large enterprises typically included attorneys on their senior staff. Today, as an integral member of the senior executive team, the GC typically assists management in navigating the legal and regulatory issues that surround virtually every activity and function in every public company.

Traditionally, the GC has been responsible for:
• Advising management on legal and regulatory compliance risks in the normal course of business and on ways to minimize, avoid, mitigate, or manage them
• Advising management on advantageous legal and regulatory strategies to pursue in special situations, such as business combinations and divestitures, product liability suits and other actions at law, and international transactions
• Managing the in-house legal function and its resources, budget, workflow, and performance
• Crafting responses to legal challenges from public or private entities and effecting settlements or handling litigation, typically in conjunction with external counsel
• Conferring with external counsel on general and specific matters of law, regulation, actions at law, regulatory actions, and potential legal risks
• Working with external counsel on matters related to litigation and internal investigations

Although the role of the GC has continually evolved, the increasing number and severity of risks now posed to organizations in many industries call upon the GC to provide even more direction. The forces driving these risks include:

Regulatory demands: Both in specific industries and in general, regulations have become more numerous and more complex, domestically and globally. Notable industries affected include financial services, health care, pharmaceuticals, defense industries, consumer goods, energy, transportation, and international trade. General areas affected include privacy, intellectual property, environmental impact, labor practices, money laundering, terrorist financing, anticorruption, economic sanctions, and international business practices.
Disclosure and oversight demands: Demand for increased disclosure and oversight has left many executive teams and boards seeking direction. Securities and Exchange Commission rules for proxy statements now require disclosure of the board’s role in risk management. What is that role? How should it be disclosed? Separately, whistle-blower provisions in Dodd-Frank may drive a need for increased internal investigations. Dodd-Frank also requires training to assure employees that there will be no repercussions if they point out illegal or unethical actions within the organization.

Outsourcing and business alliances: The use of outsourcing, sales channels, business alliances, and other third-party arrangements continues to grow. Yet, an organization cannot outsource risk or responsibility for risk. Moreover, risks assumed by third-party providers can become risks to your organization. Due diligence regarding any channel partner, joint venture partner, or third-party provider of outsourced services should include close vetting of legal records, cases, and applicable regulations and statutes.

Sustainability and corporate responsibility: Particularly in the EU, but elsewhere as well, regulatory agency, consumer, supplier, and investor expectations are evolving regarding sustainable (“green”) practices. Areas affected include product content, materials sourcing, labor practices, emission controls, water usage, conflict minerals, and recycling. Understanding related legal and regulatory risks is paramount, but so is addressing financial and reputational risks that can arise from these issues.

Ethical codes and corporate culture: High-profile legal cases and media reports regularly cite corporate environments that have been deemed prone to reckless risk taking, or otherwise systemically compromised. A Risk Intelligent GC can play an important role in supporting the ethical code of the enterprise and instilling a corporate culture of respect for that code, as well as for the law, regulations, and appropriate conduct.

Other forces: Additional drivers of risk include the increasing use of class-action suits by various parties and, separately, shareholder activism and related proxy battles, shareholder resolutions, negotiations with management, and legal action. The risk environment is also such that GCs often advise management on the organization’s risk appetite and on disclosure of the risk appetite.

In addition to senior executives, board members also want guidance regarding their legal and regulatory risk oversight responsibilities. Board committees — notably audit and, in financial institutions, risk committees — are grappling with new rules regarding the board’s role in risk management. The GC is positioned to advise the board in this area and to suggest when it may be appropriate for the board to consult its own counsel.

Of course, GCs also face challenges apart from rising risks and regulation. Workloads are increasing. Resources are scarce. Cost control is a priority. The war for talent continues. Managing relations with external counsel remains a high priority. Collectively, these factors make effective, efficient management of legal and regulatory risk that much more important.
Steering toward Risk Intelligent positions

Risk Intelligent role distinctions
In charting a course through legal, regulatory, and compliance risks and despite the necessary overlap in roles, which occurs in smaller organizations, the Risk Intelligent GC should keep the following role distinctions in mind:

• The CRO typically takes an enterprise-wide view of risk, usually reports to the board, and oversees management’s methods of identifying, measuring, mitigating, reporting, and managing risk.

• The CCO typically focuses on controlling, auditing, monitoring, managing, and reporting external and internal compliance risks.

• The GC typically advises the CRO on the legal aspects of risks posed to the organization, including the legal implications of strategies, initiatives, operational issues, and financial reporting, and interprets and helps prioritize regulations for the CCO, who then implements internal control measures to achieve compliance.

Given the potential costs of addressing legal risk events, such as litigation or regulatory agency actions and the potential follow-on financial and reputational risks, GCs benefit their organizations greatly by taking a Risk Intelligent approach. Such an approach is enterprise wide and proactive, and recognizes the interrelatedness of risks. It enables the GC to heighten people’s awareness of the legal risks that accompany specific job responsibilities and decisions, and to provide a balanced perspective of risk across the enterprise.

In light of these developments, the Risk Intelligent GC has a valuable role to play vis-à-vis other executives working to address risks (see Sidebar, “Risk Intelligent role distinctions”). This role differs from that of the CRO, whose risk-related responsibilities are too broad to enable him or her to focus intensely on legal risk. The GC’s role also differs from that of the CCO, whose focus on regulatory risk and compliance processes complements that of the GC, but does not include the rendering of legal advice or the full range of legal risks. As the interpreters of laws and regulations as they apply to the organization, GCs assist CCOs and management in understanding and prioritizing regulatory compliance risks, thus improving compliance resource allocations.

Risk Intelligent GCs can be particularly valuable in helping management to:

• Understand the legal risks inherent in initiatives that aim to grow revenue, increase profits, reduce costs, or expand markets

• Promulgate an understanding of the significance of legal risks and how serious, and even devastating, they can be to the business

• Cope with the complexity of doing business in foreign jurisdictions with their own laws, regulatory regimes, business customs, and legal conventions

• Prioritize legal and regulatory risks such that risk management, internal controls, IT and other resources — and internal and external legal resources — are properly allocated

• Consult on the development of methods of assessing, monitoring, mitigating, and managing legal risks and their potential consequences and advise management on implementation

• Establish a culture in which employees and other stakeholders understand the ethical dimensions of their jobs and conduct themselves according to the ethical code of the enterprise
Regarding the latter point, GCs can assist in supporting a Risk Intelligent culture in which people align their interests, values, and ethics with those of the organization’s risk strategy, appetite, tolerance, and approach. They can also help establish a culture in which people consider risk as part of their job-related activities. The goal is to create a culture in which people balance risk taking and risk aversion, exercise appropriate responsibility and accountability for risk, and make appropriate decisions with regard to risk.

As attorneys trained in the law and in the ethical framework of their profession, GCs have earned the trust and confidence of executives, directors, business unit heads, and shareholders. This credibility — and the fact that their responsibilities extend to virtually every area in the enterprise — positions GCs to play an important role in establishing a Risk Intelligent culture.

For example, Risk Intelligence holds that risks — including legal risks — extend across the enterprise and are can be most usefully viewed and addressed across organizational silos. GCs have the enterprise-wide perspective needed to effect this approach with regard to legal risks. Risk Intelligence also holds that risks are interrelated and interactions among risks can amplify risk. Given that legal risks can arise from many business, strategic, financial, tax, property, security, IT, and other risks — and, conversely, that legal risks can give rise to business, strategic, financial, reputational, and other risks — GCs can benefit themselves and their organizations by developing Risk Intelligence.

Additionally, in the context of Risk Intelligence, the GC should no longer act or be viewed as a “deal-killer,” keeping management, the board, and the enterprise safe from legal risks by reflexively taking an overly risk-averse posture. Such a posture may result in the legal function being excluded from information flows or losing its place at the table, either of which may undercut its effectiveness. Many companies in which the legal function has exercised veto authority too freely, ignored business realities, exaggerated risk, or exhibited disordered priorities have seen their competitiveness undermined. The goal of Risk Intelligence is proactive management of risks, particularly risks assumed in the course of value creation.

By adopting the principles of Risk Intelligence (see “Nine Principles of Risk Intelligence” on inside back cover), GCs may be able to improve their ability to accomplish several goals and in turn benefit their enterprises. This implies that GCs should have a seat at the table when any substantial risk is being considered. Indeed, they also should be there to identify legal and regulatory risks associated with new products and services, business partners, and market initiatives (particularly in foreign jurisdictions) and to help develop ways of mitigating and managing these risks.

Risk Intelligent GCs can help bridge the gap between governance and management of legal and regulatory risks by working with the board, the executive team, and risk management on relevant policies and procedures. They can also help align practices for identifying, reporting, assessing, monitoring, and managing legal risks across the organization. Given that the consequences of legal risks can be quite significant, GCs should assist executives and risk managers in prioritizing legal and regulatory compliance risks, both within those risk categories and in relation to other risks. That way, risk management resources can be allocated accordingly.
Balancing concerns

Within the scope of their legal expertise and related responsibilities, GCs should strive to help their organizations to:

• **Balance internal transparency against related concerns:** An enterprise may aim to balance the need for internal transparency regarding risks against potential exposures that can arise from circulating information on risks and risk management too freely. Issues in this area typically include disclosure requirements, confidentiality and prudence, and strategic and competitive considerations.

• **Balance public transparency against potential concerns:** An enterprise may also aim to balance public transparency regarding risk against potential exposures to unwarranted regulatory scrutiny or legal action due to disclosure of inappropriate information. Issues in this area typically include those cited in the preceding point.

• **Balance traditional enterprise risk management (ERM) against robust risk management:** In Deloitte’s view, traditional ERM may lead to a “check the box” approach to risk management. While this approach may fulfill the goals of convenience and coverage in certain areas, those goals should be weighed against the benefits of broad, integrated, Risk Intelligent ERM. GCs who embrace, rather than discourage, the risk communication that Risk Intelligence fosters generally serve their organizations well.

As the enterprise’s guide to legal matters, the GC does not typically make decisions regarding transparency and disclosure, but rather advises management and the board regarding useful, prudent, and required levels of transparency, communication, and disclosure concerning risk. Explicit advice from GCs fosters productive discussion and conscious decisions, which can preclude or at least minimize potential confusion and decision by default.

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Refining your knowledge of risk

In risk management, knowledge is power. In addition to knowledge of strategic, financial, tax, competitive, regulatory, legal, security, privacy, property, IT, and reputational risks, it is a worthwhile consideration to develop awareness of rewarded and unrewarded risk.

Rewarded risks are generally those taken in the pursuit of value. Unrewarded risks provide no upside potential — only the avoidance of penalties, loss, or regulatory censure. Which risks are worth taking?

• **Rewarded risks:** Rewarded risks usually call for investing financial, human, and other resources in anticipation of returns. These risks are worth taking, provided they are the right ones. Of course, management rarely knows beforehand which rewarded risks (or, rather, potentially rewarded risks) are the right ones. Management, therefore, makes calculated decisions regarding which investments may yield the most favorable returns or competitive advantage.

• **Unrewarded risks:** Public companies must comply with payroll-tax withholding laws, observe health and safety requirements, and comply with reporting requirements. Although compliance produces no revenue or profit, failure to comply holds penalties. Unrewarded risks (which include risk of waste, loss, security breaches, and other noncompliance-related risks) cannot be ignored, but the incentive for addressing them is value protection, not value creation. In general, unrewarded risks are not worth taking.

Risk Intelligent GCs can point out unrewarded risks and ways of avoiding them, particularly when they accompany rewarded risks. This is often the case in initiatives involving new products, new markets, and investments in other companies, especially in foreign jurisdictions. In general, significant unrewarded risks should be considered off-limits in that the direct consequences of illegal activities and regulatory noncompliance can be severe.

Also, rewarded risks may pose legal risks that may escape ordinary due diligence. For example, could the failure of a business strategy hold potential for a shareholder suit? Could an investment in a foreign entity hold reputational risk even if the legal risks are negligible? When local foreign laws or customs differ from those of the home country, what other risks may arise?
**Considering questions**

Risk Intelligence may serve as a guide to addressing a number of complex but common questions GCs and their organizations face, including the following:

- Which strategic, financial, tax, property, human resources, country, environmental, security, privacy, and IT issues might present legal or regulatory risks?
  
  - Product introductions, investments, business combinations, and sourcing decisions can hold readily identifiable strategic and financial risks. Identifying the legal risks that these initiatives could hold may take a bit of risk mapping, scenario planning, and analysis — and legal expertise.

- Which legal and regulatory risks also present follow-on business, financial, or reputational risks?
  
  - Certain legal or regulatory risks, or actions at law by employees, customers, regulatory agencies, business partners, or the public, may hold strategic, business, financial, and reputational risks. Such risks should be recognized, considered, and, when appropriate, managed.

- How should the enterprise go about identifying, measuring, monitoring, and managing legal and regulatory risks?
  
  - The GC should be involved (in a consultative or decision-making role) in assessing the legal risks and exposure presented by any major decision or initiative (with “major” to be determined by the executive team and board in conjunction with the GC). For example, legal risks should be considered in planning responses to natural or man-made crises.
With regard to risk-related responsibilities, what is the proper role of the GC vis-à-vis the executive team, board of directors, and CRO?

- The GC should be involved in assessing the legal risks and exposures presented by any major decision or initiative considered by the senior leadership team. This involvement may, however, be complicated by the varying levels of stature and access that GCs enjoy in various countries, for example the relatively high stature and access of GCs in the United States in contrast to their counterparts in the European Union and elsewhere.

What is the relationship of the GC to the senior executive team?

- A Deloitte survey of General Counsels in 10 countries revealed that approximately two-thirds of respondents said corporate counsel is now a member of the senior management/executive team, compared to 47 percent five years earlier. (For more on that report, see Sidebar: “Key Findings of the Deloitte Corporate Counsel Report, 2011.”) As members of senior management, GCs have the credibility within their organizations and, usually, access to the board that will enable them to most significantly impact risk-related policies.

These are only a few examples of the many ways in which a Risk Intelligent GC can benefit his or her organization.

Key findings of the Deloitte Corporate Counsel Report 2011

In 2010, Deloitte conducted a survey of 887 respondents who were corporate counsel or the equivalent position in Asia/Australia, the United States, Canada, the United Kingdom, and Europe. In the context of the current document, relevant key findings from this survey, published in 2011, include the following:

- Companies were more likely than they were five years previously to rely on GC for communications with regulators and less likely to place that responsibility with an external law firm.

- Maintaining regulatory compliance was cited as the greatest legal risk by about two-thirds (65 percent) of respondents, both currently and five years previously; other risks were ranked as the greatest threat by no more than 10 percent of respondents.

- Eighty percent of respondents reported greater activity among regulators over the last five years; conducting investigations was cited most often as the focus of regulators.

- Five issues were considered to be “a top issue” by one-third of respondents:
  - Breaches of competition or antitrust laws
  - Insider trading
  - Fraud
  - Breaches of directors’ and officers’ duties
  - Stock market disclosure

- With regard to resolution of disputes and litigation:
  - Negotiated settlements were the most common method for resolving commercial and regulatory disputes.
  - About two-thirds (69 percent) of respondents said the volume of large disputes and litigation had remained the same over the past five years and about one-third (31 percent) reported an increase in them.
  - Among larger companies, 40 percent of respondents said that the volume of large disputes and litigation had risen over the past five years.

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1 Deloitte Global Corporate Counsel Report 2011: How the game is changing
Key tasks for Risk Intelligent GCs

How can a GC put Risk Intelligence into practice?
Here are specific tasks you can consider undertaking in order to put the principles of the Risk Intelligent Enterprise into action in your organization.

Enhancing identification of legal risks
Depending on your organization and current mode of identifying and assessing legal and regulatory risks, this may involve taking steps to:
• Secure a place at the table before rather than after strategies are formulated and decisions are made
• Broaden and deepen the role of due diligence in any initiative or investment involving a relationship with a third party
• Assess legal risks from a qualitative standpoint and, whenever possible, quantify the potential nonlegal impacts on the organization’s business, customers, and investors in percentages (e.g., potential business lost) or monetary terms (e.g., potential drop in share price)

Enhancing legal risk monitoring and reporting
Risk Intelligent GCs can bring a new level of rigor to the monitoring and reporting of legal risks, which may involve taking steps to:
• Recognize potential legal and regulatory consequences or impact of risks that are not legal or regulatory
• Integrate monitoring and reporting of legal risks — and of risks with potential legal or regulatory impact — with existing ERM systems, or institute new reporting capabilities
• Provide clear guidelines and communication mechanisms by which information about legal risks can escalate up to the legal department and the GC

Improving legal department operations
Risk Intelligence can serve as a guide to GCs striving to address challenges in managing their legal functions and resources, when they apply it in their efforts to:
• Prioritize legal and regulatory risks that the organization faces
• Allocate legal department resources, particularly to addressing legal and regulatory risks
• Use legal process outsourcing, regulatory compliance outsourcing, and external counsel to good advantage

Contributing to the corporate culture
As noted, Risk Intelligent GCs are usually well positioned to assist management and the board in establishing an ethical, Risk Intelligent corporate culture. Toward that end, the GC may:
• Assist in defining the ethical code and ways in which it may be reinforced
• Conduct internal investigations and remediation efforts when ethical breaches are discovered or reported
• Provide input on senior management hiring and compensation decisions
• Work with the board and its committees, and with the executive team, the CRO, CCO, and business unit leaders regarding awareness, monitoring, reporting, and management of legal and regulatory risks
Setting the direction in legal risk management

This is a challenging time for GCs, particularly in highly regulated industries. It is also a time when Risk Intelligence may help GCs to provide the fresh thinking, broader understanding, cross-functional cooperation, and specific expertise required to bring management of legal and regulatory risks to the next level in their enterprises.

We recognize that risk management is one of the many responsibilities of the GC. However, legal risks can present serious, even existential, threats to the organization and its stakeholders; therefore, managing them is a responsibility that must be fulfilled timely and properly. We believe that the principles of the Risk Intelligent Enterprise can assist GCs in this regard.
Nine fundamental principles of the Risk Intelligent Enterprise

In a Risk Intelligent Enterprise:

1. A common definition of risk, which addresses both value preservation and value creation, is used consistently throughout the organization.

2. A common risk framework supported by appropriate standards is used throughout the organization to manage risks.

3. Key roles, responsibilities, and authority relating to risk management are clearly defined and delineated within the organization.

4. A common risk management infrastructure is used to support the business units and functions in the performance of their risk-related responsibilities.

5. Governing bodies, such as boards and board committees, have appropriate transparency and visibility into the organization’s risk management practices to discharge their responsibilities.

6. Executive management is charged with primary responsibility for designing, implementing, and maintaining an effective risk program.

7. Business units are responsible for the performance of their business and for the management of risks they take within the risk framework established by executive management.

8. Certain functions, such as HR, finance, IT, tax, and legal, have a pervasive impact on the business and provide support to the business units as they relate to the organization’s risk program.

9. Certain functions, such as internal audit, risk management, and compliance, provide objective assurance as well as monitor and report on the effectiveness of an organization’s risk program to governing bodies and executive management.
Contact us

To learn more about Deloitte’s governance and risk services or to contact one of our global leaders, please visit: www.deloitte.com/risk.