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A seat at the table  
The roles of the legal  
department in corporate policy

## Introduction

Companies are increasingly examining (or reexamining) their roles and policies in areas such as environment, social, and governance (ESG) matters; diversity, equity, and inclusion (DEI); and privacy. They are doing so for several reasons, including expectations from investors, employees, customers, and other stakeholders, as well as regulatory requirements. Companies whose policies do not address these expectations or requirements may risk reputational and other forms of damage, affecting revenue, profitability, and the ability to attract talent, among other consequences. Appropriate policies that are disseminated throughout the organization, interpreted, kept current, and consistently enforced may not eliminate these and other risks; however, they can mitigate them and create value at the same time, such as by assuring employees that policies are in place and informing them where they can be found.

Drafting “appropriate” policies is a critical step, but it is only a first step. Even the best policy will not mitigate risk or create value if no one knows about it, if questions about its meaning or interpretation are not addressed, if it is not kept current, or if it is not consistently enforced.<sup>1</sup> As a result, organizations typically need to look beyond a policy’s creation and consider how its policies will be disseminated, interpreted, updated, and enforced once they are in place. Beyond that, publicly held and some other companies need to be able to communicate their policies and achievements in ESG, DEI, privacy, and more to investors and other stakeholders.

Where does the chief legal officer (CLO) and the legal department fit into this process? We suggest that they have a seat at the table—and that sometimes, that seat needs to be at the head of the table.

## Establishing the need

The CLO is sometimes referred to as the “conscience of the company.” There are several reasons for this, including that CLOs and their teams are trained to understand risks and to communicate to their clients not only the nature of risk, but also practical methods of addressing it. For these reasons alone, the CLO or the legal department is often the first or best advocate to explain how a failure to address policy risks can damage a company and how addressing risks early on can create value.

## Creating the policy

The legal department’s role in creating a policy can vary, depending upon the nature of the policy and the matters it needs to address. For example, policies on privacy are driven largely or exclusively by legal and regulatory requirements and prohibitions, including some that may differ or even be inconsistent when subsidiaries or operations in multiple jurisdictions are involved. Accordingly, the legal department’s role in creating a privacy policy may be front and center—at the head of the table—so that policies can be correct and consistent throughout the organization, including domestic and foreign subsidiaries.

While other policies, such as those affecting DEI and ESG, have legal and regulatory ramifications, other groups within management may have equal or greater roles in crafting those policies. In such circumstances, the legal department may sit at the side of the table rather than the head.

## Training

As mentioned earlier, even the best policy will not mitigate risk or create value if no one knows about it, or if questions about its meaning or interpretation are not addressed. Here, again, the legal department may not sit at the head of the table, but it has an important role in reviewing (or, in some cases, developing, or having a voice in developing) training programs for the organization. Privacy policies provide a good example of the latter, as requirements and prohibitions affecting subsidiaries (particularly those outside of the United States) may differ greatly from those addressed in more general policies. But even when that is not the case, the CLO or members of the legal team should review training programs to determine whether they contain any inaccuracies or need to be modified to reflect organization-specific approaches to policy issues, specific regulatory requirements applicable to the company’s industry, or other factors.

## Interpretation

Few, if any, policies can possibly address every single matter that arises. Accordingly, interpretive questions tend to arise once a policy is disseminated and training programs are conducted to educate the workforce about it. The legal team can be essential to this process. First, attorneys are trained and accustomed to interpreting laws and regulations that may be unclear or incomplete. Second, the legal function is likely to know of court rulings, statutory or regulatory changes, and other developments that can help to answer interpretive questions or that can provide a degree of consistency as interpretations proliferate.

## Keeping policies current

Policies need to be kept current to reflect constantly changing laws and regulations, but updating them can be extremely challenging. Laws and regulations at which policies are directed can change often and without notice. Moreover, they can differ widely depending upon the jurisdiction, particularly for organizations that operate globally. The legal department is a critical resource in this area. Among other things, attorneys are generally well-versed in monitoring legal and regulatory developments; as a result, they are likely to be the best “early warning system” that a policy regarding ESG, DEI, or privacy, for example, needs to be modified. This may be particularly important in a large or global organization, where the legal department can marshal local counsel (internal as well as external) to keep abreast of relevant developments and sound the necessary alarms.

1. FindLaw, “[Employers Must Enforce Policies Uniformly](#),” updated March 26, 2008.

## Enforcement

Having a policy that is not enforced may create greater risk than having no policy at all. For example, the failure to discipline an employee who makes negative comments about a coworker's race, gender, or other attributes may suggest that the policy in question exists only on paper and can create or exacerbate many risks—legal, reputational, and cultural, to name only a few. Many attorneys are skilled at developing disciplinary procedures for incorporation into corporate policy that treat similar violations effectively and consistently.

## And more

As illustrated previously, the CLO's role goes far beyond "mere" compliance with law. At many organizations, the CLO plays a key role in helping leadership understand the risks that policies are designed to address and the opportunities they provide; communicating to leadership the expectations of both external constituencies (including investors, regulators, customers, suppliers, and other stakeholders) and internal constituencies (such as the workforce); developing strategies to address risks and the expectations of those constituencies; and communicating to those constituencies how leadership is addressing risks and expectations. Moreover, to the extent that CLOs oversee governance at subsidiaries, both domestic and foreign, they are in a unique position to perform similar functions with respect to policies on a global basis throughout the organization.



## Questions for the CLO and legal department

Who in your organization is responsible for informing leadership about risks, including those arising from ESG, DEI, or privacy matters? Who develops approaches to addressing these risks? If it is not you or the legal department, do you have a role (a "seat at the table") in these processes?

Have you participated in demonstrating that policies such as DEI, ESG, and/or privacy can add value? If not, what might you do to become involved in that process?

What is your role, or that of your department, in developing corporate policies? Would you characterize this role as active (i.e., direct participation in developing these policies) or passive (i.e., limited to reviewing someone else's efforts)?

How does your company provide training throughout the organization on its policies? What is your role (or that of your department) in that process? If it is limited, what actions might you take to enhance it?

Who is responsible for enforcing policies, including developing appropriate disciplinary actions, and seeing to it that they are applied consistently? If it is not you (the CLO) or your department, do you have any role in this process?

Do you enlist the support of other counsel (internal or external) to keep you abreast of legal and regulatory developments that may necessitate changes to your policies? If so, do you enlist this support in all jurisdictions?

Do you take proactive measures, through risk sensing or other means, to obtain real-time metrics and information related to reputational risks and noncompliance matters?

How does your company develop required and other communications around your ESG, DEI, and privacy activities to demonstrate that your company is "state-of-the-art" in these areas?

## Start the conversation



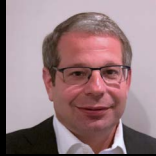
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