

AMERICAN BAR ASSOCIATION
TASK FORCE ON CORPORATE RESPONSIBILITY
SECTION OF BUSINESS LAW
SECTION OF TAXATION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
YOUNG LAWYERS DIVISION
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW
TASK FORCE ON IMPLEMENTATION OF SECTION 307 OF
SARBANES-OXLEY ACT OF 2002
LAW PRACTICE MANAGEMENT SECTION
SECTION OF FAMILY LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED:** To promote improvement in the governance of public corporations and to
2 enhance corporate responsibility, the American Bar Association adopts and endorses
3 the following corporate governance practices:
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- 5 **1. The board of directors of a public corporation must engage in active,**
6 **independent and informed oversight of the corporation’s business**
7 **and affairs, including its senior management.**
8
- 9 **2. In order to improve the effectiveness of such oversight, the board of**
10 **directors of a public corporation should adopt governance principles**
11 **(more fully specified in Part VI of the Final Report of the Task Force)**
12 **that (a) establish and preserve the independence and objectivity of**
13 **directors by eliminating disabling conflicts of interest and undue**
14 **influence or control by the senior management of the corporation**
15 **and (b) provide the directors with timely and sufficient information**
16 **and analysis necessary to the discharge of their oversight**
17 **responsibilities.**
18
- 19 **3. The directors should recognize and fulfill an obligation to disclose to**
20 **the board of directors information and analysis known to them that is**
21 **relevant to the board’s decision making and oversight**
22 **responsibilities. Senior executive officers should recognize and**
23 **fulfill an obligation to disclose, to a supervising officer, the general**

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- 24 counsel, or the board of directors or committees of the board,
25 information and analysis relevant to such persons' decision making
26 and oversight responsibilities.
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28 **4. Providing information and analysis necessary for the directors to**
29 **discharge their oversight responsibilities, particularly as they relate**
30 **to legal compliance matters, requires the active involvement of**
31 **general counsel for the public corporation.¹**
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33 **5. A lawyer representing a public corporation shall serve the interests**
34 **of the entity, independent of the personal interests of any particular**
35 **director, officer, employee or shareholder.**
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37 **6. The general counsel of a public corporation should have primary**
38 **responsibility for assuring the implementation of an effective legal**
39 **compliance system under the oversight of the board of directors.**
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¹ If a public corporation has no internal general counsel, it should identify and designate a lawyer or law firm to act as general counsel. The responsibility for implementing these recommended policies may necessarily be delegated to some extent by the general counsel to subordinate lawyers.

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- 7. Public corporations should adopt practices in which:**
 - a. The selection, retention, and compensation of the corporation's general counsel are approved by the board of directors.**
 - b. General counsel meets regularly and in executive session with a committee of independent directors to communicate concerns regarding legal compliance matters, including potential or ongoing material violations of law by, and breaches of fiduciary duty to, the corporation.**
 - c. All reporting relationships of internal and outside lawyers for a public corporation establish at the outset a direct line of communication with general counsel through which these lawyers are to inform the general counsel of material potential or ongoing violations of law by, and breaches of fiduciary duty to, the corporation.**
 - 8. The Model Business Corporation Act and the general corporation laws of the states, and the courts interpreting and applying the duties of directors, should more clearly delineate the oversight responsibility of directors generally, and the unique role that independent directors play in discharging that responsibility in public company settings.²**
 - 9. Engagements of counsel by the board of directors, or by a committee of the board, for special investigations or independent advice should be structured to assure independence and direct reporting to the board of directors or the committee.**

² Among the specific oversight matters which should be considered in relation to the Model Business Corporation Act or its commentary and the state corporate laws as well as in relation to important guidance such as the *Corporate Director's Guidebook*, are at least the following: selecting, evaluating and compensating the chief executive officer and other members of senior management; reviewing, approving, and monitoring fundamental financial and business strategies and the performance of the company relative to those strategies; assessing major risks facing the company; and ensuring that reasonable processes are in place to maintain the integrity of the company and the corresponding accountability of senior management, including processes relating to integrity of financial reporting, compliance with law and corporate codes of legal and ethical conduct, and processes designed to prevent improper related party transactions. Federal law (particularly the securities laws, including the rules and regulations adopted by the SEC) also plays a significant role in affecting and promoting corporate responsibility.

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- 10. The SEC and state attorney disciplinary authorities should cooperate in sharing information in order to promote effective and appropriate enforcement of rules of conduct applicable to counsel to public corporations.**
 - 11. The courts, law schools and lawyer professional organizations such as the ABA should promote awareness of, and adherence to, the professional responsibilities of lawyers in their representation of public corporations.**
 - 12. Law firms and law departments should adopt procedures to facilitate and promote compliance with rules of professional conduct governing the representation of public corporations.**