

The background of the slide features a blurred image of a person in a dark blue suit. Overlaid on this is a collection of white icons representing people in business attire. A hand with a finger pointing upwards is positioned in the center, with the fingertip touching the icon of a man in a suit, which is the largest and most prominent. Other smaller icons of men and women are scattered around, some in the foreground and some in the background, creating a sense of a larger group or board.

# The Significance of the Modern Corporate Secretary Role to Private Company Boards of Directors

Prepared by:  
Paul Marcela  
*Governance Partners Group, LLC*

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# **The Significance of the Modern Corporate Secretary Role to Private Company Boards of Directors**

By  
Paul Marcela, President  
Governance Partners Group, LLC  
Alpharetta, GA  
770-815-4445  
[paul.marcela@governancepg.com](mailto:paul.marcela@governancepg.com)  
[www.governancepg.com](http://www.governancepg.com)

## **ROLE AND RESPONSIBILITIES**

The modern Corporate Secretary is an invaluable resource to the Board and a critical member of the executive management team. The Corporate Secretary is responsible for ensuring that the Board of Directors has the proper advice and resources to discharge its fiduciary duties to a company's shareholders. Under state corporate laws, every company is required to have a Corporate Secretary. While a key responsibility of the Corporate Secretary is the artful preparation of minutes of the Board's actions during Board and Committee meetings to reflect the Board's proper exercise of its fiduciary duties, the role of the Corporate Secretary has expanded over time to include many other managerial and administrative responsibilities. The Corporate Secretary in any company has become a key consultant to the Board of Directors and the executive management team, providing advice regarding Board responsibilities and logistics. As a result, the Corporate Secretary has evolved to become a senior corporate officer who provides strategic

advice to a company's Board about corporate governance issues due to a greater focus on corporate governance by Boards and executive management

The Corporate Secretary often becomes not only a critical advisor to the Board regarding the design and ongoing maintenance of a sustainable governance framework, but also a key member of the executive management team relative to the implementation and support of that framework. The modern Corporate Secretary performs critical managerial and administrative responsibilities in the following six categories:

- Corporate governance structure design, implementation and maintenance
- Corporate governance program and process development and enhancement
- Board of Directors and Board Committee support
- Corporate governance service provider engagement and management
- Executive management team collaboration
- Legal entity governance management

The Corporate Secretary is responsible for the design, implementation and maintenance of a properly structured corporate governance framework. This framework typically includes a Board of Directors and Board Committees, such as the Audit Committee, Finance Committee, Compensation Committee and Risk Management Committee. The Board and each Board Committee meet at regular intervals, and each Committee Chair reports to the Board regarding the deliberations and decisions of his or her Committee. The Board deliberates and makes decisions regarding issues and transactions that are material to the Company's operations and its future. The Corporate Secretary performs

the critical role of ensuring that the Board and each Board Committee operates according to the provisions of the Company's Articles of Incorporation, Bylaws and Board and Board Committee Charters as well as other foundational documents of the Corporation.

In the category of corporate governance program and process development and enhancement, the Corporate Secretary is responsible for the efficient and effective operation of the Office of the Corporate Secretary, the identification and implementation of best corporate governance practices, the facilitation of periodic corporate governance program and process development, review, enhancement and implementation and the development and implementation of delegation of authority and resolution approval processes. The Corporate Secretary also serves as an advisor to the Board, often with the assistance of outside consultants, to address Board governance concerns and improve Board effectiveness, conduct corporate governance audits, administer Board evaluations and Board skills assessments, facilitate Board retreats, assist with the resolution of succession planning issues and design and implement Director education and orientation programs.

With respect to Board and Committee support, the Corporate Secretary manages Shareholder, Board of Directors and Committee meetings. He or she attends those meetings and prepares minutes of those meetings. In addition, the Corporate Secretary presents resolutions to the Board of Directors for approval of material transactions and corporate authorizations. Other responsibilities of the Corporate Secretary in this category include the management of corporate compliance with Board and Committee charters and foundational documents such as a company's articles of incorporation and by-laws,



collaboration with shareholder services staff and maintenance of key corporate documents and records.

The Corporate Secretary is also responsible for the engagement and management of third party corporate governance service providers to enhance the efficiency and effectiveness of the operation of the Office of the Corporate Secretary. These specialized service providers include:

- Board reporting solutions;
- Board portal providers;
- Legal entity management system providers;
- Non-U.S. subsidiary management firms;
- Registered agents;
- Stock transfer agents;
- Director education resources;
- Annual meeting service providers;
- Shareholder identification services;
- Abandoned property compliance services; and
- Director recruiter and related services.

It is important for the Corporate Secretary to develop productive relationships with these types of corporate governance service providers.

The Corporate Secretary regularly collaborates with a corporation's executive management team to (a) plan Board and Committee meetings, (b) develop related meeting objectives, (c) identify matters for Board and Committee discussion and decision-making and (d) develop, distribute and present Board and Committee materials.

Legal entity governance management is another critical responsibility of the Corporate Secretary in a company that has subsidiaries. The Corporate Secretary will serve as the Corporate

Secretary for a company's subsidiaries, joint ventures and other domestic and non-U.S. legal entities. This responsibility involves ensuring that the company appropriately manages its global legal entities, facilitating periodic subsidiary Board of Directors meetings and maintaining subsidiary corporate minute books.

The Corporate Secretary's performance of this broad set of responsibilities in these six categories reflects the substantially expanded role of the modern Corporate Secretary.

#### IMPORTANCE TO PRIVATE COMPANY BOARDS OF DIRECTORS

The performance of the Corporate Secretary role in a professional and robust manner is very important to private company Boards of Directors. Private companies need to comply with the corporate laws of the states of their incorporation and manage related legal liability risks. It is important for private companies to practice good corporate governance in order to be able to mitigate legal risks related to applicable state corporate laws and to be prepared for sale, "going public" and financing transactions and provide corporate governance related documents to third parties such as external auditors and regulatory authorities. The Corporate Secretary brings unique value to the Board regarding its implementation of good corporate governance practices and is therefore charged with the responsibility to fulfill the many demands that are placed on him or her by the Board in order to manage the Board's adherence to good corporate governance practices designed to address both legal liability risks and transaction preparedness requirements.

The two key legal risks faced by private companies that can be mitigated by the practice of good corporate governance by a company's Board of Directors, as facilitated by a company's Corporate Secretary, relate to "piercing the corporate veil" actions and breach of fiduciary duty claims. First, plaintiffs in a lawsuit against a corporation will often ask the judge presiding over the lawsuit to "pierce the corporate veil", or ignore the separateness between a corporation and its shareholders, and hold shareholders responsible for the liabilities of the corporation. While there are several factors that a court will consider when determining whether to allow the "corporate veil" to be ignored, a key consideration is whether the corporation has operated as a legal entity separate from and independent of its shareholders. The risk of "piercing the corporate veil" is significantly reduced when the corporate governance of the corporation is robust, properly documented and transparent. In order for a corporation to defend a "piercing the corporate veil" action, the corporation's Corporate Secretary should artfully prepare Board and Committee minutes and otherwise document that the Board took appropriate actions to maintain the separate legal existence between a corporation and its shareholders. This includes the preparation of accurate and detailed records of important decisions made by the Board as the governing body of the corporation and the proper maintenance of corporate minute books and related corporate documents.

Second, shareholders of a private corporation may claim that the corporation's Board of Directors breached its fiduciary duties of care and loyalty or failed to follow what is known as the "business judgment rule". The ability to defend against these types of shareholder lawsuits is reduced when Board and Committee decision-making is diligently and properly documented by the corporation's Corporate Secretary. To document the Board's exercise of its duties of care and loyalty and



observance of the “business judgment rule”, the Corporate Secretary should prepare minutes to demonstrate that the Directors of the corporation:

- Are informed, well-advised and deliberative;
- Make careful and educated decisions;
- Exercise reasonable diligence in gathering and considering all material information;
- Explore, understand and weigh alternative courses of conduct that may be available;
- Weigh benefits versus harm to the company and its subsidiaries when considering specific courses of action;
- Obtain independent advice from experts and understand their findings and the basis for their recommendations;
- Have a reasonable basis for believing that information provided to the Board is reliable; and
- Take time to make informed decisions.

There are also “transaction readiness” dynamics underlying the proper performance of the Corporate Secretary role in private corporations relative to implementing sale, “going public” and financing transactions and responding to requests for corporate governance related documents by external auditors and regulatory authorities. A private company needs to be prepared to provide accurate and complete corporate governance documentation as part of the due diligence process that is a critical to any corporate sale, “going public” or financing transaction. Transactional due diligence requires demonstration of good corporate governance and internal controls, and transaction closings require documentation of transaction authorization and officer signature authority. Also, a private company that is preparing for an “initial public

offering” must be sure that it has a robust corporate governance structure in place in advance of going public so that it can comply with public company SEC and listing requirements when the IPO is implemented. Finally, private companies, through their Corporate Secretaries, must be able to adequately respond to requests for high quality corporate documents by their lenders, external auditors and tax and other regulatory authorities.

In summary, a private corporation will be better able to defend against plaintiffs’ attempts to “pierce the corporate veil” and shareholder lawsuits claiming breach of fiduciary duty, execute corporate transactions and provide required information for financial statement, tax and other audits if the corporation robustly follows good corporate governance practices and procedures with the proactive and professional assistance of an experienced Corporate Secretary.

### INTERNAL OR EXTERNAL SOURCING OF THE CORPORATE SECRETARY ROLE

Private company Boards of Directors will typically elect a company employee who has other managerial and professional responsibilities to the role of the Corporate Secretary. That employee is usually the private Company’s attorney on staff, if there is one, or the Company’s Chief Administrative Officer or Chief Financial Officer who may not be an appropriately experienced or knowledgeable Corporate Secretary by background or training. In order to enhance the performance of the role of the Corporate Secretary in those companies, there are external consultants who are available to provide external corporate governance support. A company that seeks to improve the robustness of its

corporate governance capabilities can engage those specialized corporate governance consultants in order to enhance corporate governance capabilities without increasing staff, allow company officers who are charged with performing the Corporate Secretary role to focus on their primary managerial and professional responsibilities and enable the company's corporate governance function to be performed by an experienced professional corporate governance professional. It can be a distraction and a liability to have an officer, such as the Chief Administrative Officer or the Chief Financial Officer, perform the Corporate Secretary role. An outside corporate governance service provider has the resources and relationships to fully deliver the services of an expert and professional Corporate Secretary in cases where internal professionals who have been assigned the Corporate Secretary responsibility do not have the experience, background, resources or time to do so.

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**A Word About the Author:** Paul Marcela was a member of the Dow Corning Corporation Law Department for many years. While at Dow Corning, one of his primary responsibilities was the management of the Company's Office of the Corporate Secretary on a global basis. Paul more recently served as general counsel and secretary of two Cerberus Capital Management portfolio companies. During his tenure with those mid-market private equity owned companies, he developed the concept of a professional services firm exclusively devoted to providing an outsourced Corporate Secretary function to companies that seek to fully or partially outsource the Corporate Secretary function. That concept led to Paul's formation of Governance Partners Group, LLC.



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