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The Board's Compliance Committee: A Transformative 2017 Agenda

From the Experts

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The board's compliance committee will encounter a challenging agenda in the coming year. A series of recent corporate controversies, regulatory developments and judicial decisions combine to prompt the committee to take a closer look at its own level of diligence, the key elements of the company's compliance program and, most significantly, employee acceptance of the compliance culture. The outcome of this review could transform both the way the committee exercises oversight of the compliance program, and the focus of compliance officers. The general counsel is well-suited to provide guidance in this process.

Standard of Conduct

Given the increasing focus on director accountability, the compliance committee could benefit from a general counsel briefing on their fiduciary responsibilities overseeing the compliance program. This briefing would provide guidelines, unique to the corporation's legal status and industry sector, on the level of attentiveness which the law and enforcement agencies expect from compliance committee members.

Compliance may be enhanced if committee members have a greater awareness of how their oversight responsibilities are practically manifested in terms of diligence and attentiveness. Indeed, the committee should understand what courts, regulators or third parties might interpret as "inadequate or flawed" compliance oversight. For example, the Delaware courts' "bad faith" standard for sustaining a *Caremark*



"breach of oversight duty" claim may not be the same lens through which state or federal regulators evaluate director conduct in the context of compliance program effectiveness.

Scope of Compliance Program

Several new developments may encourage the committee to evaluate the scope of the existing compliance program. Prominent among these is the new report, "Principles and Practices of High-Quality Ethics Programs," released by the Ethics and Compliance Initiative. The report identifies specific principles and practices that characterize "high quality ethics and compliance programs," or in other words, those that transcend minimum effectiveness standards such as those contained in the Federal Sentencing Guidelines. It is, in

essence, a call for more comprehensive and sophisticated compliance programs.

A related development is the effort by some regulatory agencies to extend their enforcement to areas that may not currently be covered by the compliance plan. A leading example is renewed federal enforcement of violations of the antitrust laws dealing with price-fixing and market allocation. Under this new approach, legitimate antitrust exposure can arise from a broad spectrum of individual and organizational conduct that has traditionally been perceived to be within the realm of corporate operations, and can affect employees and others who may not regularly interact with the compliance department.

Information Reporting Systems

The compliance committee also is well-advised to review the various

mechanisms through which it receives critical information about potential legal compliance concerns. Such a review is warranted based on recent media reports suggesting the failure of traditional reporting systems to adequately alert corporate leadership of potentially problematic behavior.

These media reports point the compliance committee to several potential breakdowns in the reporting structure. First is lack of awareness by low and mid-level management of their obligation to pass “up the management chain” compliance concerns shared with them by employees for whom they have a supervisory relationship. Second is the risk of perception—if not the reality—that “whistleblowers” are routinely punished (e.g., by reassignment, pay reduction, termination) for reporting concerns of wrongdoing. Third is the risk that compliance complaints raised at lower employee tiers are not effectively monitored by appropriate levels of management and are reported to their superiors and to compliance officials in an uncoordinated or inconsistent manner. This substantially reduces the ability of legal and compliance supervisors to identify trends of possible improper activity.

Coordination of Program Leadership

The compliance committee may also increase its efforts to coordinate the duties and responsibilities of the growing number of corporate officers involved, to one degree or another, with matters of legal risk and compliance. This would logically include, for example, not only the general counsel and the chief compliance officer but also the chief risk officer, the internal auditor, the chief privacy officer, the chief information officer and the human resources director.

The committee’s focus could include adopting a written description of the respective roles and responsibilities of the various officers; establishing a protocol governing acceptable communication and collaboration between the positions; confirming the hierarchical position of the compliance officer; clarifying internal horizontal and vertical reporting rights and requirements; and assuring coordination on the engagement of outside

counsel and application of the attorney client privilege.

Efforts to clearly delineate the respective duties of these key corporate officers can reduce the risk of administrative waste and inefficiency; can defuse the potential for internecine confusion and tension; avoid issues being assigned to the wrong officer; limit the extent to which compliance issues “fall within the cracks;” enhance the sustainable application of the attorney-client privilege and reduce false distinctions between organizational and legal risk.

Acceptance of Culture

Likely the most-daunting challenge facing the committee is the need to evaluate whether the compliance “message” is accepted broadly throughout the organization. Several recent, prominent corporate controversies have highlighted the potential for conflict between compliance initiatives and economic realities. They make it clear that compliance messages are sometimes drowned out by competing business strategies and compensation initiatives that have a direct, personal impact on employee pay and advancement.

In one instance, the organization delivered repeated, strong messages warning employees against certain practices. Compliance leaders learned much too late that performance goals were actually motivating employees to disregard compliance risks and engage in those allegedly inappropriate practices. This and other, similar examples upset the long-held view that the allocation of the proper amount of resources (e.g., budget, staffing, programming) is the most effective way to embed an organizational culture of compliance.

This potential for conflict should prompt leaders to discuss how best to identify corporate strategies or incentives that have the potential for undermining compliance messages and guidelines. Compliance committees should consider whether the organization’s “culture of compliance” is truly embraced across every employee tier.

The committee should keep in mind that the U.S. Department of Justice business prosecution guidelines have long



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encouraged prosecutors, in reviewing the effectiveness of a compliance program, to determine whether employees “are convinced of the corporation’s commitment to” that program.

The Bottom Line

Corporate counsel should encourage the compliance committee to consider adjusting its 2017 agenda to address emerging issues arising from increased regulatory enforcement, continued focus on board responsibility and greater stakes associated with compliance program effectiveness. These emerging issues might, in certain instances, require the committee to adopt new and more focused measures to ensure their program’s credibility and success.

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