Boards of Directors and Compliance: Four Areas of Inquiry

In an article in the December 2011 issue of Compliance Week Magazine, entitled *"Board Checklist: What Every Director Should Know"*, author Jaclyn Jaeger reported on a panel discussion at the Association of Corporate Counsel's 2011 Annual Meeting, held in October. The discussion was centered on four core areas upon which Directors should focus their attention: (1) structure, (2) culture, (3) areas of risk and (4) forecasts. The article focuses on each of these areas together with some questions proposed by panel participant Amy Hutchens, General Counsel and Vice President of Compliance and Ethics at Watermark Risk Management International, which she suggested a Board should ask of the company's Chief Compliance Officer (CCO) or General Counsel.

Structure Questions

This area consists of questions which will aid in determining the fundamental sense of a company's overall compliance program. The questions should begin with the basics of the program through to how the program operates in action. Hutchens believes that such inquiries should allow each Board member to communicate the main elements of a compliance program. With those concepts in mind, Hutchens suggests that Board members ask some of the following structure questions.

- Who oversees the operation of the program?
- What is in the Code of Conduct? Is each Board member aware of corporate standards and procedures?
- How are complaints being received?
- Who conducts investigations and acts on the results?
- What corporate resources are being devoted to the compliance and ethics program?
- How much money is allocated to the program?
- What types of training is required? How effective is it?
- Have any compliance failures been detected? If so, how was such detection made?
- If a company's compliance program is less mature, what are the charter compliance documents?
- If a company's compliance program is more mature, there should be queries regarding the roles of the General Counsel vs. a Chief Compliance Officer. If a CCO is required, where would such person sit in the organization and what is the CCO reporting structure?

Culture Questions

This area of inquiry should focus on the culture of the organization regarding compliance. Board members should have an understanding of what message is being communicated not only from senior management but also middle management. Equally important, the Board needs to understand what message is being heard at the lowest levels within the company. Hutchens suggests that Board members ask some of the following culture questions.

- When did the company last conduct a survey to measure the corporate culture of compliance?
- Is it time for the company to resurvey to measure the corporate culture of compliance?
- If a survey is performed, what are the results? Have any deficiencies been demonstrated? If so, what is the action plan going forward to remedy such deficiencies?
- Did any compliance investigations arise from a cultural problem?
- Regardless of any survey results, what can be done to improve the culture of compliance within the company?
- If there were any acquisitions, were they analyzed from a compliance culture perspective?
- Are there any M&A deals on the horizon, have they been reviewed from the compliance perspective?

Areas of Risk

Here Hutchens recommends that Board members "need to know what process is being used to identify emerging risks." Such risk analysis would be broader than simply a legal/compliance risk assessment and should be tied to other matters, such as "business continuity planning and crisis response plans".

Another panel participant Jennifer MacDougal, Senior Counsel and Assistance Secretary of Jack-in-the-Box, noted that "the board of directors need to use their expertise and ask the right questions". Hutchens suggested that in the areas of risk, questions which a Board should ask are some of the following.

- What is the risk assessment process?
- How effective is this risk assessment process? Is it stale?
- Who is involved in the risk assessment process?
- Does the risk assessment process take into account any new legal or compliance *best practices* developments?
- Are there any new operations that pose substantial compliance risks for the company?
- Is the company tracking enforcement trends? Are any competitors facing enforcement actions?
- Has the company moved into any new markets which impose new or additional compliance risks?
- Has the company developed any new product or service lines which change the company's risk profile?

Forecast

Hutchens believes that "a truly effective and informed board knows where the company stands not only at the present moment, but also has the strategic plan for how the compliance and ethics program can continue to grow." My colleague Stephen Martin suggests that such knowledge is encapsulated in a 1-3-5 year compliance game plan. However, a compliance program should be nimble enough to respond to new information or actions, such as mergers or acquisitions, divestitures or other external events. If a dynamic changes, "you want to get your board's attention on the changes which may need to happen with the [compliance] program." Hutchens believes that such agility is best accomplished by obtaining buy-in from the Board through it understanding the role of forecasting the compliance program going forward.

The four-part approach suggested by Hutchens lays out a clear and logical program for a Board of Directors not only to understand its role in the compliance function but to play an active role. Any *best practices* compliance program has several moving parts, a CCO to lead the compliance program, a Compliance Department to execute the strategy and an engaged Board of Directors who oversee and participate. We applaud Hutchens approach and commend it for use by a company's Board of Directors.