

Compliance & Ethics Professional

May
2016



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

Meet Jay Martin

Vice President Chief Compliance Officer
Senior Deputy General Counsel
Baker Hughes Incorporated
Houston, TX

See page 14

27

The role of
compliance and ethics
in company culture

Frank Ruelas

31

Ethical dilemmas:
Making responsible
choices

Muna D. Buchahin

37

China's anti-corruption
crusade: A global
company's guide

Nadine Tushe

41

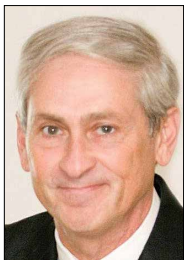
The 3 Cs of
business resumption

John J. Graham and
Cris Mattoon

by Jeffrey M. Kaplan

The role of the Board

Since the 1996 *Caremark* case,¹ boards of directors have been expected to oversee their respective companies' compliance and ethics (C&E) programs. The legal—and indeed, economic—case for placing this obligation on boards is clear: A company's



Kaplan

directors tend to have more of a long-term perspective than do its executives, and the benefits of strong C&E are largely long term in nature.

But as a matter of law (as well as business logic), boards are not expected to manage a C&E program (or indeed anything about a company).

So what exactly should they focus on?

First and foremost is culture, as cultural challenges often require board-level intervention to be satisfactorily addressed. Moreover, boards are increasingly becoming adept at understanding and improving corporate cultures. Among other things, directors should assess tone at the top, the extent to which a company has a speak-up culture, and whether, in the company generally or any of its parts, there is an undue pressure to achieve business results.

Second, incentives are an appropriate topic for board oversight. This includes both consideration of whether general incentive structures could promote non-compliance (e.g., if senior manager pay is based 100% on short-term results) and also the degree to which compensation and promotions are tied to C&E “performance” (such as training completions in a manager's business unit).

Third, boards should pay attention to the area of discipline. In particular, they should determine if the company's standards of conduct are being enforced in a fair and

sufficiently rigorous manner—particularly where wrongdoing by managers is involved. Nothing is, to my mind, more poisonous to a C&E program than the sense that the rules only apply to “the little people.”

Fourth, a board needs to be satisfied that a company has an effective risk assessment process. While there are many facets to this, the principal consideration is whether the process actually produces information that can be used in enhancing the various elements of the C&E programs (which many risk assessments fail to do). In other words, does the assessment provide “news you can use”?

First and foremost is culture, as cultural challenges often require board-level intervention to be satisfactorily addressed.

Fifth, and partly driven by *Caremark* and the Sarbanes-Oxley Act, directors should assess the efficacy of the hotline and other measures for encouraging reports of suspected violations. This entails consideration both of process (e.g., hotline policies and procedures) and results (through hotline metrics).

Finally, a board needs to be comfortable that the C&E function is fit for purpose. Among the many topics here are the independence and clout of the function—as well as its integration into the day-to-day business of the company. *

1. *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

Jeffrey M. Kaplan (jkaplan@kaplanwalker.com) is a Partner with Kaplan & Walker LLP in Princeton, NJ