

Board Oversight of the Compliance & Ethics Program: How Do You Know What You Know?

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During the two decades since the *Caremark* decision and since the U.S. Sentencing Guidelines for Organizations became effective, volumes of guidance have been written about board of directors' oversight of corporate compliance and ethics ("C&E") Programs.

Thinking purely in terms of resource commitment, the costs of reacting to legal violations and reputational damage can be crippling to an organization's bottom line and to its focus on day-to-day operations. For these reasons, an effective C&E Program that proactively assesses and manages C&E risks can materially enhance shareholder value. Board oversight and support are essential to ensuring the C&E Program's success.

But if the C&E Program report is only a small part of a quarterly board meeting, how can the board have meaningful oversight? The simple (glib?) answer is this:

"Ask the right questions."

I was recently asked to help a newly-appointed board member prepare for their first Audit Committee meeting, in which their Chief Ethics & Compliance Officer ("CECO") would be giving their quarterly C&E Program report. Rather than getting "into the weeds" with an exhaustive list of questions, I suggested reflecting on a high-level consideration during the meeting:

"How do you know what you know?"

I advise board members (and legal and business executives) to ask this when learning about the company's compliance and ethical profile, particularly if they are only getting infrequent reports on their C&E Program. The following are the inquiries I recommend for rigorous oversight:

1. Who is delivering the C&E Program report and what is their reporting line?

Roles and responsibilities for the C&E Program vary widely across companies, whether publicly-traded or privately-held, as does the depth of Program reporting. Typically, the

CECO or General Counsel (“GC”) delivers the report, but they might not have first-hand experience with the Program’s day-to-day operations.

Boards are expected to evaluate the “independence” of the CECO (or C&E staff) and the adequacy of C&E Program resources. This “independence” has been a hot topic in the legal and C&E fields, as it sometimes run counter to reporting relationships. Here are a few points worth considering:

- If the CECO is delivering the report to the board, are they also the person with day-to-day responsibility for managing the C&E Program? If not, is the day-to-day manager at the board meeting and given the opportunity to speak? Would they feel comfortable raising an issue with a board member one-on-one?
- If the CECO reports to the GC, does the CECO have the “independence” (in both authority and opportunity) to provide advice to senior executives and the board that might differ from that of the GC’s legal advice?
- If the CECO is also the GC, he or she separate his or her legal advice from his or her ethical advice? Wearing these two hats is complicated. The role of the GC is to advise the company regarding laws and regulations. Sometimes, doing what is “right” requires going beyond simply doing what is lawful. A GC wearing two hats must be able to articulate this distinction when advising the board.

2. What are the CECO’s tools for evaluating C&E Program effectiveness?

In simple terms, a full 360’ review of Program effectiveness requires three perspectives. Has the CECO undertaken:

- A C&E Program Assessment against the legal and regulatory requirements—and best practices in your industry? Any benchmarking?
- A C&E Risk Assessment to ensure potential risks in current and planned operations have been identified? Are C&E risks that could have a significant impact on the business being effectively managed?
- A C&E Culture Survey to understand employee perceptions about whether the organizational culture embraces compliance with laws, policies, the company’s Code of Conduct and Core Values? Even the greatest C&E Program on paper can be rendered ineffective in practice, if the business leadership fails to make clear that achieving business results cannot come at the expense of “doing the right thing.”

The board must be satisfied that the C&E Program is meeting external requirements, managing risks effectively and is embedded in day-to-day operations. In order to have meaningful oversight of the C&E Program, board members should ensure that they know “how they know what they know.” This means requiring independence, rigor and transparency in the assessment and reporting processes.



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Finally, as part of its oversight, the board is wise to require that leaders are accountable for understanding the business value of proactively managing C&E risks and for creating a culture committed to compliance and to ethical decision-making. While this board inquiry might cross over into another board committee's agenda, I have seen board members recommend tying C&E risk management to executive compensation, which gave a laser-like focus to driving ethical leadership and building a culture of integrity.

While board oversight is a more complex topic than can be covered in detail in this article, hopefully even the most experienced board members will find this review to be a useful "refresher" of their oversight role. In my experience with boards over the years, incisive questions from board members, as well as processes implemented by the leadership team and the board, have played a critical role in pressing forward to diligently manage C&E risks.



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Debbie Hennelly founded CES in 2004. She has spent more than 25 years developing and implementing compliance and ethics programs for organizations, from small companies to some of the largest multinationals. Debbie brings her legal and engineering background to creating practical approaches for compliance and ethics risk management, integrated into an organization's operations and culture.

Debbie has worked on both sides of the client/vendor relationship, holding senior in-house roles in public and private companies, as well as working in two specialty vendor companies. She spent more than 10 years in legal and compliance roles in AT&T, Lucent Technologies, Avaya, BP and Avon Products, and served as general counsel and chief compliance officer for two privately-owned companies, Sonneborn and PeroxyChem, reporting to their CEOs and meeting quarterly with their Boards.

Earlier in her career, Debbie spent 5 years in law firms, with Bryan Cave in Washington, DC, and with Riker Danzig in New Jersey. Prior to practicing law, she was a civil/environmental engineer and supervised construction for Exxon Company, USA.

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