

What Boards Should Do to Assure Ethics, Compliance Chiefs Have More Power

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By Michael W. Peregrine

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The new survey, from the consulting firm LNR and Tapestry Networks, concludes in part that directors of major corporations seek greater organizational authority and visibility for their chief ethics and chief compliance officers. This reflects the surveyed directors' (i) increasing concern with ethics and compliance issues; (ii) interest in developing stronger relationships with these senior officers; (iii) desire that these officers have more stature and standing, and access to greater resources; and (iv) overarching uncertainty as to the correct governance

"home" for ethics and cultural oversight.

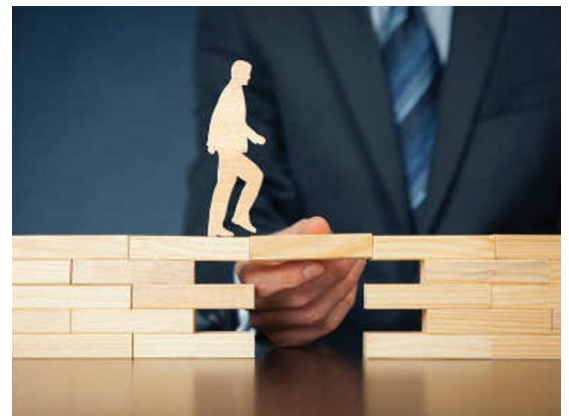
These are important corporate responsibility goals, and they merit full consideration by corporate leadership teams. But that discussion should go forward with four corollary acknowledgments:

First, that most boards have it within their existing powers to make sure that these changes occur.

Second, any such changes should be coordinated within existing organizational legal and risk structures and authorities.

Third, leadership should use the opportunity to confirm that their chief legal officer as well has the necessary authority and visibility to effectively perform her duties.

Fourth, the structural implications (e.g. board oversight and



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management-to-board reporting relationships) of enhanced culture and ethics roles require thoughtful consideration.

Board Authority. Governing boards need not be excessively deferential to management or other constituencies when pursuing enhancements to legal, ethics and compliance protocols. Their obligations under corporate law, and their aspirational goals under best practices, provide a strong framework—as well as clear motivation—for requesting the necessary chang-

es. These laws and best practices make clear the responsibility of the board to exercise oversight of the company's legal affairs, and the effectiveness of its ethics and compliance programs.

The organizational benefits of enhanced stature and visibility for ethics and compliance officers are self-evident. The new survey is a helpful prompt to governing boards to endorse such enhancements and to direct—not simply request or encourage—management to implement them. Such action would reflect well on the board's good faith commitment to maintaining a culture that, as the Federal Sentencing Guidelines describe, "... encourages ethical conduct and a commitment to compliance with the law."

Coordination. The board should be particularly careful in making sure that any enhancements to the roles of the chief ethics and chief compliance officers appropriately complement the roles of other officers with intersecting responsibilities. The responsibilities of many chief compliance officers incorporate tasks that relate to whether a statute, regulation or organizational policy has been violated.

Similarly, the role of many chief ethics officers includes the evaluation of personal conduct in the context of not only corporate policy, but also of a wide range of employment, privacy and human resources-related statutes and regulations.

In these situations, the board should insist that any expanded job descriptions of the chief ethics and the chief compliance officers are coordinated with those of the chief legal officer and respect the ultimate responsibility of the CLO for matters that require the interpretation of law.

There should be clarity amongst the board, management and the three officers themselves as to where their duties are similar, where they overlap and where they are distinct. Given their enhanced position in the organizational hierarchy, there should also be clarity on when the chief ethics officer and the chief compliance officer can engage outside counsel, and when he/she is expected to work directly with the CLO.

Such clarity should also assure that the CLO is the officer identified by leadership to direct internal investigations designed to assess compliance with law, as

opposed to those intended to assess compliance with internal policies (which could, in certain circumstances, be the province of another officer such as the CCO).

This type of coordination guidance might also extend to the level of horizontal communication between the chief ethics officer, the chief compliance officer, the chief legal officer, the chief risk officer, the internal auditor and such other executives whose responsibilities implicate the identification, interpretation and mitigation of specified enterprise risks. Separate and distinct from protections intended to provide unfettered vertical access and reporting rights for ethics and compliance officers, the board should seek to preserve some form of regular coordination and collaboration amongst officers with risk related duties.

The Chief Legal Officer. Just as the board is concerned with the structure, positioning, access and resources of the ethics and compliance leaders, so should it be with that of the Chief Legal Officer. Efforts to increase the authority and visibility of ethics and compliance should serve as a reminder to evaluate the

need for similar upgrades for the department of legal affairs. The board has an obligation to monitor the effectiveness and hierarchical status of the legal affairs function, and it should not always assume without inquiry that it is supported at a “best practices” level.

Appropriate areas for review might include title and authority; sufficiency of in house staff and related resources; vertical reporting rights to the CEO; participation in board and committee meetings; executive session participation and board oversight of hiring, retention and termination of the CLO.

Also, as noted above, the board should be careful not to adopt updated job descriptions for the ethics and compliance leaders that encroach on the traditional duties of the CLO. Further, non-emergency board access by each of the legal, compliance and ethics officers should be

carefully coordinated to serve the information needs of the board. Enhancing the roles and stature of those important executives should not come at the expense of the role and stature of the CLO.

Governance Structure. The survey acknowledges the struggle some companies encounter in establishing effecting proper committee oversight and management-to board relationships for officers with ethics and culture responsibilities. Enhancing the authority and visibility of ethics and culture officers in particular requires thoughtful consideration of the most effective governance support structure. It should also underscore the importance of board support for appropriate resources for each of the legal, compliance and ethics departments (as opposed to a single, restricted budget from which all three departments must draw).

Summary

The results of the new LNR/Tapestry Network survey offer promising guidance to boards on their oversight of key corporate responsibility functions. The hope is that the survey’s release will prompt corporate boards to give close consideration to possible upgrades to the roles of their ethics, compliance—and legal—officers. Such a board-driven initiative would be consistent with its oversight obligations and responsible given the current legal, regulatory and ethical environment. The Chief Legal Officer is uniquely well suited to guide the board and executive leadership through this analysis.

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