

Compliance Expertise: Not a Board Composition Priority

When it comes to adding new competencies to the board, compliance need not be at the top of the list.

By Michael W. Peregrine

Corporate director nominating processes are increasingly focused on subject-matter competencies as an important criterion in populating boards. In many industry sectors, evolving economic, regulatory, competitive and technological factors are creating board agendas of previously unanticipated complexity and difficulty. Shifting, broader and more diverse organizational business portfolios are placing greater pressure on oversight responsibilities. Depending upon the type of board, and the scope of its work and challenges, very different directors with different skillsets are likely to be required. What are the director competencies the organization needs to succeed? To provide meaningful support to senior management? The effectiveness with which a board provides oversight and direction will be enhanced by nominating candidates with an affinity for the organization's strategic direction and related challenges.

Yet when it comes to adding new competencies to the board, compliance need not be at the top of the list. That's not meant to diminish the board's fundamental compliance oversight responsibilities. Nor is it meant to denigrate the important function compliance plays within the organizational profile and the substantial value attributed to the contributions of the compliance officer. Rather, it's meant to acknowledge that there are many other subject-matter competencies and areas of expertise that warrant board membership before compliance. It's meant



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to acknowledge that compliance goals can be achieved at the governance level by appointing directors with character and analytical competencies that will sharpen board oversight capabilities. It's also meant to recognize a growing threat of confusion at all levels of corporate leadership as to what constitutes "compliance," how it differs from the expanding role of the general counsel and how the two functions can be better coordinated.

For example, many boards are actively seeking directors with expertise in such atypical backgrounds as information technology, intellectual property and cybersecurity, to name a few. This targeted focus reflects the increasing importance that IT contributes to corporate success; the necessity associated with protection of the organization's own intellectual property; and the vitality attributed by regulators, industry experts and governance observers to increasing board-level emphasis on cybersecurity measures. Indeed, the focus on cybersecurity governance

commitment has been evidenced of late by a new [survey from the National Association of Corporate Directors](#), a [policy speech by Luis Aguilar](#) of the U.S. Securities and Exchange Commission and a [recent feature in the Wall Street Journal](#). Separately, in the health-care industry, competency-based governance has been [cited by Moody's Investor's Service](#) as an important element in creating and measuring organizational value. And these are only a few of many examples of needed competencies.

Placing a priority on areas of director competencies (apart from compliance) can nevertheless serve to complement the board's commitment to its [core Caremark obligations](#). The success of board compliance oversight is less dependent on the presence of a "compliance expert" on the board, and much more dependent on populating the board with individuals with the necessary skills to exercise constructive skepticism. The analytical capabilities of effective board members—to be able to read and interpret reports and presentations; to be able to evaluate and comprehend proposals; and to be willing to "push back" and challenge management on initiatives that raise questions—are critical to creating a boardroom climate in which ethics, risk management and corporate responsibility will be dominant elements.

Appointing a director to serve as the compliance expert on the board could also have the unintended consequence of encouraging the other board members to be excessively deferential to that director, to the great detriment of the board and its compliance focus. A board compliance expert is also unnecessary when in most sophisticated organizations, both the general counsel and the chief compliance officer have direct access to the board and regularly attend (as staff) meetings of the board and of its key committees.

Appointing a compliance expert to the board would also needlessly contribute to the growing confusion between the roles and responsibilities of the general counsel and of the compliance officer. "Compliance" is a term for which

a precise definition is becoming dangerously elusive. It is increasingly being applied to reference a broad organizational commitment to adherence with applicable law; i.e., more as a state of corporate consciousness than as an executive job description. In many industries, the term "compliance" is being applied with such elasticity as to encroach on duties traditionally the province of the chief legal officer. This is particularly the case with respect to such crucial tasks as the evaluation of legal risks, the conduct of corporate investigations, the application of the attorney-client privilege and the responsibility for protecting the reputation of the corporation. It is also at odds with many new surveys that depict the expanding organizational prominence of the general counsel.

In fact, there are far more productive measures the board can take in support of the compliance function than creating a designated board position for a compliance expert. These include supporting the hiring of a properly qualified candidate for the chief compliance officer position; assuring a fulsome budget and staff for the compliance department; and supporting the board access of the compliance officer. And most importantly, the board should confirm that management has adopted clear and appropriate job descriptions and lines of reporting authority for, and communication protocols between, the general counsel and the compliance

The board can and should be assertive in adopting measures that support the presence of a vibrant, effective compliance program that teams productively with the general counsel. Actively seeking board members with compliance expertise just isn't necessarily one of them.

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