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A CLEAR TWENTY-FIVE YEAR TREND IN GREATER BOARD ETHICS

Summary. This paper documents more than 20 years of Board effort, particularly in global companies, to obtain a proper balance between ethics and compliance oversight management. Further, it discusses the development of mature compliance systems to integrate ethics and rules-based ethics programs in response to the US Revised Federal Sentencing Guidelines (2004). In addition to leadership of individual directors, legal developments in corporate governance and the regulations and rules in the company's business(es) have been the key factors in this growing Board involvement.

Keywords: Boards of Directors, compliance systems, corporate governance, ethics training programs

WIĘKSZE ZAANGAŻOWANIE ZARZĄDÓW W KWESTIE ETYCZNE – WYRAŹNA TENDENCJA NA PRZESTRZENI DWUDZIESTU PIĘCIU LAT

Streszczenie. Artykuł przedstawia charakterystykę ponad 20 lat działań zarządów, w szczególności firm globalnych, mających na celu uzyskanie właściwej równowagi między etyką i zarządzaniem. Ponadto omawia rozwój dojrzałych systemów zgodności dążących do zintegrowania etyki i opartego na zasadach etycznych programu wdrożonego w odpowiedzi na Znowelizowane Wytyczne Ogłaszania Wyroków w Stanach Zjednoczonych (2004). Przeprowadzone badania dowodzą, iż kluczowymi czynnikami, mającymi wpływ na większe zaangażowanie zarządów w kwestie etyczne, były nie tylko działania przywódcze poszczególnych dyrektorów, ale także zmiany prawne związane z ładem korporacyjnym oraz zmiany w przepisach dotyczących działalności gospodarczej.

Słowa kluczowe: zarząd, system zgodności, ład korporacyjny, programy szkoleń z etyki

Note: This article is adapted from the author's study, *Ethics Issues and Programs: The Role of the Board*, The Conference Board, RR 1487, (2011)

For more than twenty years, the increasing complexity of compliance systems – particularly in global companies – and the pressures on boards to exert ethical leadership has pushed Boards to obtain a proper balance between ethics and compliance oversight and micromanagement.

Further, since the 2004 Revised Federal Sentencing Guidelines, Boards have taken on the additional responsibility of director ethics compliance and training. The research findings in this report, The Conference Board's first since 2004 on the subject of director engagement with ethics issues, document board efforts to deal with the broadening scope of their ethics responsibilities. They also describe mature compliance system efforts to integrate principles- and rules-based ethics program elements. Highlights include:

- The 2011 survey finds that both US and non-US company ranking of the four key factors in director ethics issues is unchanged since 2004: (1) general legal developments; (2) regulations and rules relevant to the company's business; (3) leadership/support by individuals/top managers; and (4) law concerning role of boards in overseeing programs.
- With respect to the 2010-11 *general legal developments* factor of director top priorities, two anti-corruption issues are especially important: (1) the increase in FCPA prosecutions that began in 2007; and (2) the UK Bribery Act. Of these two, because it entails ongoing prosecutions, the stepped up FCPA enforcement activity is of the greatest immediate concern. The high level interest in the UK Act, which went into effect July 2011, is matched by an equally high level of understandable ignorance regarding its terms.
- 2011 survey respondents documented much greater engagement by the full board than was the case in the 2004 study which found that nearly all the boards of participating companies delegated program oversight responsibility to one or more committees. To get a better sense of how and in what way boards were involved in ethics and compliance programs, the 2011 survey divided the oversight function into three different phases: (1) design/revision; (2) implementation; and (3) monitoring for effectiveness. In each instance, a plurality of companies said that the full board shared ethics program oversight responsibility – most often with the audit committee – but sometimes with other committees – notably, governance.
- While many boards still look to the general counsel for ethics and compliance information, a narrow plurality of 2011 responses preferred an ethics or compliance officer in the interest of obtaining more detailed answers to questions. CEOs ranked third and internal auditors fourth. COOs, CFOs and heads of human resources also got a few responses. Boards are casting a wide net in seeking ethics related information from other company sources such as the CEO, CFO, Internal Auditor and Head of Human resources. In a few companies, compliance and human resources share ethics and compliance reporting responsibility.
- The 2011 survey also asked respondents if within the last three years the board has helped to resolve specific ethics issues confronting the company and one third said that it had. Of this group, nearly two-thirds (63 percent) devoted

board discussion to some aspect of corruption risk. Environmental and sales or marketing issues were a distant second, and boards were least often engaged in director or top management appearance or conflict of interest problems. The participants cited few complaint or location specific examples. The exception was corruption, where four companies reported incidents in China, two in Singapore, and one in Korea.

1. Involvement

The focus of this article is on a how Boards and Directors respond to the ethics challenges that the company faces and to the growing mandate worldwide for board oversight of company ethics and compliance programs – a trend that The Conference Board has been surveying and documenting since its first corporate ethics survey was conducted in 1986.

Since 1986: Steadily Increasing Board Role

Since its first business ethics report of the 1986 survey findings in 1987, The Conference Board has documented a steady increase in Board involvement and concern with ethics issues. For example, in a report by The Conference Board published in 1987, 21 percent of survey participants said that their company's directors participated in the drafting of the company's code of ethics. By 1998, it had risen to 78 percent.[1]

In response to the 1991 promulgation of the U.S. Federal Sentencing Guidelines, companies have developed business ethics programs of scope and vigor. And from the Guidelines' inception, meaningful oversight by the board of directors was identified as a vital element in a successful corporate ethics and compliance program.

Since 1991, the Guidelines have steadily enhanced the Board's role in promoting ethical conduct and compliance program oversight. The U.S. Sentencing Commission Guidelines Manual issued November 1, 2010 provides that due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

- The organization shall establish standards and procedures to prevent and detect criminal conduct,
- The organization's *governing authority* (emphasis supplied) shall be knowledgeable about the content and operation of the compliance and ethics program and shall

[1] Berenbeim R.E.: Global Corporate Ethics Practices: A Developing Consensus, The Conference Board, Research Report, 1243-99-RR, 1999.

exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program[2,3].

The 2011 survey indicates that both U.S. and non-U.S. company rankings of key factors in director ethics issues, focus is on the need for director and senior executive leadership support. Further, both U.S. and non-U.S. companies had the same ranking for the top four factors: (1) general legal developments; (2) regulations and rules relevant to the company's business; (3) leadership/support by individuals/top managers; and (4) law concerning role of boards in overseeing programs.[4]

The high level of U.S. director involvement in company ethics and compliance issues has been consistent since the promulgation of the U.S. Federal Sentencing Guidelines for Organizations (1991). Since the 1996 *Caremark* decision, U.S. directors had been aware at least of the need for Board attention to company ethics programs. In *Caremark*, the Delaware Court of Chancery held that directors can be liable for failing to insist on *sufficient* compliance measures (emphasis supplied) (see box).[5]

As for what constitutes sufficiency in this regard, the U.S. Federal Sentencing Guidelines for Organizations provide widely accepted standards for effective compliance systems (See Boxes on *Caremark* and on test for effective compliance systems.).

With respect to 2010-11, two recent corruption related legal developments have been the focus of additional board concern: (1) the steep increase since 2007 in FCPA prosecutions (see Box); and (2) the UK Bribery Act (see Box). The stepped up FCPA enforcement activity is of the greatest immediate concern. The high level of interest in the UK Bribery Act is matched by an equally high level of ignorance about the final text of an act that was announced on March 30, 2011 and will go into effect on July 1, 2011. A Deloitte Financial Advisory Services LLP poll of 1000 business professionals reported on April 19 found that 78 percent of the respondents expected greater enforcement resulting from the legislation but that 73 percent were unfamiliar with its provisions.[6]

Stepped Up FCPA Enforcement

Stepped up FCPA enforcement continued in the first quarter of 2011; there were four corporate settlements of U.S. Securities and Exchange Commission ("SEC") charges, two of

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[2] The commentary defines governing authority as the Board of Directors or if the organization does not have a Board of Directors, the highest level governing body within the organization. US Sentencing Commission Guidelines Manual, November 1, 2010, p. 506.

[3] US Sentencing Commission, Guidelines Manual, §8B2.1. Effective Compliance and Ethics Program, November 1, 2010, p. 504-509.

[4] Participants were asked to rank nine factors in order of importance. Overall rankings were determined by the highest median number for a particular response.

[5] In re Caremark International Inc. Derivative Litigation, 698 A2d. 959 (Del. Ch. 1996).

[6] http://blogs.wsj.com/corruption-currents/2011/04/19/deloitte-poll-73-are-unfamiliar-with-bribery-act-provisions/.

which also entered into deferred prosecution agreements with the U.S. Department of Justice ("DOJ"). There were also five guilty pleas, two sentencing decisions, and one settlement with the SEC by individual defendants.

One of these cases involved the largest FCPA violation forfeiture to date ($149 million) by an individual. On March 11, 2011, Jeffrey Tesler pleaded guilty to one count of violating the FCPA and one count of conspiring to violate the FCPA. The plea agreement disclosed that, from 1994 through June 2004, Tesler conspired with TSKJ, on whose behalf he acted as an agent and consultant and then-CEO of Kellogg, Brown & Root, Albert Jackson Stanley, to pay roughly $132 million in unlawful payments to Nigerian government officials to secure their support for TSKJ's participation in the project to build liquefied natural gas facilities at Bonny Island. The Bonny Island contracts were valued at over $6 billion. In addition to the forfeiture, Tesler faces up to ten years in prison.[7]

The impact of increased FCPA enforcement is affecting business decisions. According to the latest Dow-Jones State of Anti-Corruption Compliance survey of 306 multinationals, 56 percent of the participants reported ending or avoiding agent, distributor, consultant or joint venture partnerships because of anti-corruption liability concern. The figure was up from the 2009 finding of 52 percent. Further, forty percent believed that their company lost business to a competitor with fewer scruples or liability concerns.[8]

Despite these increased risks, a KPMG survey finding reported on June 1, 2011, suggests that despite the known compliance risks of working with third parties in some countries:

- Two in five U.S. and U.K. organizations with written anti-bribery and corruption policies do not distribute them to agents, distributors, vendors, brokers, joint-venture partners or suppliers.
- Three in five companies with compliance programs that incorporate employee training do not require any third-party representatives to participate in the training.
- Nearly one in three U.S. and one in four U.K. companies require training less than once a year.
- Three in five companies do not exercise "right to audit clauses" in third party contracts.
- More than half of the U.S. and 10 percent of the U.K. companies do not obtain periodic compliance certifications from those with whom they do business in other countries.

[7] Hastings P.: Stay Current, www.paulhastings.com/assets/publications/1878.pdf.

[8] Rubenfeld S.: Corruption Concerns Cause Companies to Abandon Partners, wsj.com/corruptions-currents, March 30, 2011.

The KPMG survey also pointed to significant shortcomings in how companies develop, implement and maintain anti-bribery and corruption policies:

- One in five respondents said their companies don't have communication and training programs.
- One in two of the respondents' organizations do not have a committee responsible for overseeing anti-bribery and corruption compliance.
- Three in four U.S. and three in five U.K. respondents said their organization does not have a full-time dedicated anti-bribery and corruption compliance officer.
- A third of the companies do not perform anti-bribery and corruption risk assessments.

In addition, while both countries now have stringent anti-bribery and corruption laws – the U.S. Foreign Corrupt Practices Act of 1977 (FCPA) and the U.K. Bribery Act of 2010 – the KPMG survey found that only 43 percent of U.S. executives said their programs comply with the U.K. Bribery Act, while 46 percent of U.K. executives responded affirmatively with regard to the FCPA. Further, nearly 80 percent of U.S. respondents said they still had little to no knowledge of the U.K. Bribery Act's provisions, while 32 percent of the U.K. executives said they still didn't understand the U.K. law's requirements.[9]

Ethics Programs – the Role of the Board: 2004 Findings and Questions for 2011

The Conference Board's first study on this subject – *Ethics Programs – the Role of the Board* (2004), sponsored by *Microsoft*, established that many companies have taken steps to formally involve the board in their ethics programs. Since the release of that report, the 2004 Revised Sentencing Guidelines and the world economic crisis have given rise to a need to revisit these issues. How are Boards responding to these new challenges? Are they succeeding or failing? Finding it easy or difficult? Making a difference in program effectiveness or not?

The U.S. Federal Sentencing Guidelines, *Caremark*, stepped-up FCPA enforcement, and the UK Bribery Act provide ample reasons for more focused Board oversight of company ethics performance and programs and they raise questions as to how these concerns have been converted into Board level action; specifically with regard to the following subjects and activities:

- What are the organizational issues in board oversight of ethics programs (full board/committee) monitoring?

[9] Majority of U.S. and U.K. Execs Say Corruption Still Hampers Ability to Expand, Do Business in Some Countries: KPMG Poll, PR Newswire, United Business Media, June 1, 2011. The survey was conducted in October and November of 2010 among executives who had anti-bribery and corruption responsibilities in companies with 200 or more employees and more than $300 million in revenue in the United States and £200 million in the United Kingdom and that were subject to regulations such as FCPA or the U.S. Bribery Act.

- How much time is spent on ethics issues? With which company officer(s) does the board/committee have contact?
- Does the board receive ethics training? If so what activities are included in such training?
- What types of possible violations/ethical questions has the board or relevant committee(s) actually addressed?
- What is done to assure director ethical conduct?

BOX

The Caremark decision

The Caremark decision (*In re Caremark International Inc. Derivative Litigation*, 1996 WL 549894 (Del. Ch. Sept. 25, 1996)) decided by the Delaware Court of Chancery holds that a director who fails to take steps in good faith to require her company to develop and implement a corporate ethics program could, in some circumstances, face **personal** liability to shareholders for losses arising to the company.

Citing the Organizational Sentencing Guidelines, the Court opined that the Guidelines carry "penalties that equal or often massively exceed those previously imposed on corporations. The Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts."

Further, the Court states that directors are obligated for a good faith attempt "to assure that a corporate information and reporting system, which the board concludes is adequate, exists." Failure to do so under some circumstances may (in theory at least) render a director liable for losses caused by non-compliance with applicable legal standards.

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The U.S. Organizational Sentencing Guidelines (1991)

The Corporate Sentencing Guidelines encouraged companies to develop broadly aimed corporate compliance and ethics programs.[10] Using a "carrot-and-stick" approach to business crime prevention, the guidelines provide tangible incentives for companies to develop compliance programs. Having "an effective program to prevent and detect violations of law" at the time of an offense entitles a company – in some circumstances – to a substantial

[10] The growth in Ethics and Compliance Officers' Association (ECOA) membership reflects this development. The ECOA was formed in 1992 (shortly after the guidelines became effective) with 12 members to serve as a trade association of ethics and compliance officers. As of March 15, 2011, the ECOA had more than 1200 members in over 30 countries – an increase of twenty percent since 2004 when the last study was published.

reduction in a potentially ruinous fine. In addition, the guidelines broadly articulate what elements such a program should entail.

The “effective program” definition sets forth the following due diligence steps:

– Establish compliance standards and procedures “that are reasonably capable of reducing the prospect of criminal conduct.”
– Assign specific “high-level personnel” to oversee compliance with such standards and procedures
– Utilize due care not to delegate substantial discretionary authority to those with a propensity to engage in wrongdoing
– Communicate effectively compliance standards and procedures to employees and other agents
– Attempt to achieve compliance through auditing and monitoring systems and by having a system whereby employees and other agents could report criminal conduct without fear of retribution
– Enforce standards through appropriate disciplinary mechanisms
– After an offense is detected, respond to the offense, including improving the program to the extent necessary

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The Foreign Corrupt Practices Act – Stepped-up Enforcement Since 2007

Although the Federal Corrupt Practices Act (FCPA) was enacted in 1977, vigorous enforcement efforts only began in 2007. The statute’s broad sweep and the recent and dramatic increase in investigations and prosecutions makes corruption an increasing focus of director concern and discussion. The FCPA's anti-bribery provisions make it illegal to offer or provide money or anything of value to officials of foreign governments or foreign political parties with the intent to obtain or retain business.

The anti-bribery provisions apply to "issuers," "domestic concerns," and "agents" acting on behalf of issuers and domestic concerns, as well as to "any person" that violates the FCPA while in the territory of the United States. The term "issuer" covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d). In this context, the approximately 1,500 foreign issuers whose American Depository Receipts ("ADRs") are traded on U.S. exchanges are "issuers" for purposes of this statute. The term "domestic concern" is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has a principal place of business in the United States.

In addition to the anti-bribery provisions, the FCPA's books-and-records provision requires issuers to make and keep accurate books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. Finally, the FCPA's internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Regulators have frequently invoked these latter two sections – collectively known as the accounting provisions – in recent years for a host of reasons, including quality of evidentiary proof or as a mechanism for compromise in settlement negotiations.

Stepped-up FCPA Enforcement (2007-2010)

As recently as 2007 the number of FCPA enforcement actions nearly tripled over the previous year and remained at that level through 2009. In 2010, there were nearly twice as many enforcement actions as there had been in 2009. And these efforts now include industry-wide investigations, a focus on prosecuting individuals, and heightened levels of international anti-corruption cooperation and enforcement.

Although the level of enforcement activity has been rising steadily over the past seven years, 2010 witnessed an 85 percent increase in enforcement actions over 2009, which was itself a record year. The 26 enforcement actions brought by the SEC exceed the previous high of 20 actions in 2007, and the 48 cases filed by DOJ is nearly double the 2009 record of 26 actions and settlement amounts also reached historic highs.[11,12]

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UK Bribery Act (2010)

The UK Bribery Act has a broader reach and offers considerably less guidance to companies than the U.S. Foreign Corrupt Practices Act. In contrast to the FCPA, the Bribery Act includes private sector behavior. For example, it is unclear whether it bars entertainment practices beyond unspecified levels. And unlike the FCPA, it does not exempt facilitation payments for nominal amounts to facilitate governmental performance of non discretionary functions such as customs approval.

Critics argue that the principle-based elaboration of *adequate procedures* (risk assessment, top level commitment, due diligence, clear, practical policies and procedures, effective implementation, and monitoring and review) lacks the Safe Harbors on which companies depend for guidance. On January 31, 2011, UK Justice Secretary Ken Clarke announced that the Bribery Act’s effective April 2011 date had been pushed back because of

[11] www.gibsondunn.com/Publications/Pages/2010Year-EndFCPAUpdate.aspx.
[12] Ibidem.

intense business lobbying. This action triggered a warning from the Organization for Economic Cooperation and Development (OECD) that British companies could be put on an OECD export "blacklist" if the government continues to delay the Bribery Act's enforcement.[13]

The Ministry of Justice published its Guidance Document on March 30, 2011 and announced that the act will come into force on July 1, 2011 – allowing subject companies time to implement the *adequate procedures* that constitute a defense to charges for failure to prevent bribery by an individual acting on behalf of the company. The final Guidance principles are:

1. **Proportionate Procedures**: Proportionality is said to be central to the Guidance. Businesses need to assess their exposure to potential bribery and implement appropriate procedures in light of this risk;
2. **Top-Level Commitment**: The position is consistent with that included in the draft Guidance, instructing that high level management must lead by example to eradicate bribery throughout an organization;
3. **Risk Assessment**: Businesses must periodically assess their exposure to bribery and corruption both internally and externally and document these assessments;
4. **Due Diligence**: This principle ensures businesses have a risk-based approach in determining who will perform services on behalf of the business;
5. **Communication (including training)**: Training has been expressly included in this principle, recognizing its importance in preventing bribery; and
6. **Monitoring and Review**: This will assist businesses in establishing the policies appropriate to their business and no doubt act as evidence of the implementation of adequate procedures.

The Guidance Document prohibits the facilitation payments permitted as an FCPA exception.[14]

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2. Board Oversight of Ethics Programs

Ethics or compliance programs (as they are often called) utilize internal policies and procedures to prevent and detect violations of law, regulations, and rules, and to promote ethical behavior by and within the company. Common elements of such programs include:

[13] http://cachef.ft.com/cms/s/0/07b244dc-2d3e-11e0-9b0f-00144feab49a.html#ixzz1GDdOPHp8.

[14] In Like a Lion, Out Like a… The UK Ministry of Justice Guidance Sets a New Tone for the Application and Enforcement of the UK Bribery Act, www.velaw.com, March 30, 2011.

- codes of conduct;
- communication of standards through training;
- methods to encourage employees to report possible violations to management;
- enforcement mechanisms through investigation and discipline; and
- oversight and review to achieve ongoing improvement.

These systems are nearly universal. 94 percent of the 2011 survey participants said that their company had such a program – a figure that is almost identical to the 2004 finding of 97 percent. Many of these efforts are mature systems – more than one-third (37 percent) of the 202 2011 survey respondents said that their program had been in effect for more than ten years.

Despite the near universal prevalence of ethics and compliance programs, questions persist as to the adequacy of Board familiarity with ethics issues and understanding of standards for effective oversight and monitoring of company ethics and compliance programs. A May 12, 2010 Rand Corporation symposium of directors, ethics and compliance officers, stakeholders and thought leaders with non-profit and government experience catalogued a wide range of these concerns. The symposium's report notes three *major* themes:

1. Director compliance program oversight is "broadly hampered" by a lack of training and awareness on the part of many outside directors. Targeted efforts to educate directors on this aspect of board responsibility, on effective ways to discharge it are needed;
2. directors need more information to exercise their primary responsibility to understand company risks, strategies, and operational concerns. With respect to ethics and compliance there is a need for better understanding of the firm's "ethical culture" and, more concretely, about all aspects of the ethics and compliance program; and
3. Chief Ethics and Compliance Officers (CECOs), properly positioned and empowered, can serve as a major conduit to the Board on ethics and compliance issues.[15]

2011 Board and Committee Roles – More Engagement of the Full Board

The contrast between The Conference Board's 2011 and 2004 surveys document that boards are now more conversant with ethics and compliance challenges and documents how they have responded to them; first, by engaging the full board to a greater degree in ethics issues and compliance program oversight, and second, by delegating program monitoring

[15] For the full report, see Greenberg M.D.: Directors as Guardians of Compliance and Ethics within the Corporate Citadel: What the Policy Community Should Know. RAND Corporation, Santa Monica, CA 2010, www.rand.org/pubs/conf_proceedings/CF277. Also available in print form.

tasks to managers with special competence and relying on functional executives – particularly in human resources – for additional input.

The 2011 survey documents significant full board involvement in addition to delegated program oversight responsibility to one or more committee. To get a better sense of how and in what way boards were involved in ethics and compliance programs, the 2011 survey divided the oversight function into three different phases: (1) design/revision; (2) implementation; and (3) monitoring for effectiveness. In each instance, a plurality of companies said that the full board shared ethics program oversight responsibility – most often with the audit committee – but sometimes with other committees – notably, governance.

Program design/revision – is the phase that is most likely to utilize shared responsibility (42 percent) while only 27 percent depend exclusively on the committee structure. The board is solely responsible in twelve percent of the cases while it is in no way involved in 19 percent of the participating companies.

In 59 percent of the cases where a committee has some authority it is the audit committee that exercises it, while 24 percent of the respondents assigned some responsibility to governance. Some companies, as later comments indicate, assign certain oversight to audit and other elements of program review to governance. A few participants said that Public Policy or Ethics Committees were engaged in some way. Corporate Risk and Compensation committees were also mentioned.

Survey participants described ways in which tasks were divided between Audit and Governance. Typical of this group was the CFO of a U.S. civil engineering firm who said that "Audit oversees the program while governance reviews objectives as they relate to Board members (e.g., conflict of interest)". The Vice-President Counsel and Corporate Ethics Officer of a U.S. marketing firm described a similar approach where "audit oversees the *compliance side of issues* while Governance provides guidance on policies that are more *mission directed*. And the CEO of an information technology company said that his organization delegates the code drafting to Governance and leaves the rest to Audit. One company involves more than two committees, and in very specific ways. As the ethics and compliance director of a U.S. energy company explained, "Audit supervises the *overall process* while Compensation handles employment concerns, and finance focuses on financial and conflict of interest issues" – to cite just two of the other committees that may be involved.

Program implementation – is the phase in which the full Board is least likely to be involved. 31 percent say it plays no role. Responsibility is most likely to be shared between the full board and one or more committees but this is much less likely to be the case (32 percent) than with program design (42 percent) or with monitoring for effectiveness (35 percent).

Audit is the committee on which roughly 60 percent of the surveyed boards rely in all three phases of ethics and compliance involvement: (1) implementation (63 percent); (2) design/revision (59 percent) and effectiveness monitoring (57 percent). Companies turn to Governance in addition to (or instead of) audit for program design/revision (24 percent), for implementation (25 percent) and for effectiveness monitoring (16 percent). Other board committees are much less often involved. As a consequence, no generalization can be made about their engagement.

By its very nature introducing a program also needs functional department collaboration – particularly with respect to training – human resources, rather than other committees of the board, is a logical choice for involvement in the implementation phase; but in a particular situation described by the vice-president and chief compliance officer of a U.S. extraction company human resources implemented the program with ethics committee oversight.

Monitoring for Effectiveness – is the function that is most likely to engage the Board in some way. Less than 10 percent (9 percent) of the respondents say that their company's board is not involved (compared to a little less than one-fifth for program design and nearly one-third for implementation) while nearly one-sixth (16 percent) vest sole authority in the full board. Audit is the committee most likely to be involved (57 percent) with Governance (16 percent) next. A few companies utilize Ethics or Public Policy committees.

When the Audit and Governance committees are both engaged, how do they divide the monitoring tasks between them? One example was provided by the vice-president and chief compliance officer of a U.S. pharmaceutical company who said that the board delegates responsibility for ethics program oversight to governance and enterprise risk management to audit.

There are at least two possible benefits from committee delegation. First, it allows those with oversight responsibility to develop experience and expertise-akin to the financial acumen expected and increasingly required of audit members. In addition, committee review permits more time than the full board would have for deliberation of current problems and forward-looking discussion of potentially sensitive and complex issues.

Which Executive Is Principally Responsible for Reporting to the Board?

While many boards still look to the general counsel for ethics and compliance information, a narrow plurality of responses preferred an ethics or compliance officer in order to obtain more detailed answers to questions. CEOs ranked third and internal auditors fourth. COOs, CFOs and heads of human resources also got a few responses.

Boards are also casting a wide net in seeking ethics related information from other company sources such as the CEO, CFO, Internal Auditor and Head of Human Resources. In a few other cases, compliance and human resources share responsibility.

3. Has Increasing Board Involvement Contributed to Company Success in Confronting Ethics Issues?

Although 81 percent of the survey participants who responded to the question and half of the total sample said that [they believed] that board oversight had contributed to the company's success in confronting ethics issues, no specific incidents were given of the board's role in handling an ethics crisis or in improving an ethics program. Instead, some respondents focused on the board's role in setting a "tone at the top" and the per se organizational significance of board and committee involvement. Other participants mentioned the engagement, intelligence, and experience that individual directors brought to board room ethics deliberations. The closest that respondents came to offering concrete board contributions to ethics issues and programs were the two individuals who cited risk and strategy as areas where the Board's involvement had contributed to company success in confronting ethics issues.

Ways in which board's oversight on ethics issues can be improved:

To a much greater degree than was the case in 2004, 2011 survey participants implicitly and, in some cases, explicitly acknowledge director familiarity with ethics and compliance processes and stress the need for strengthening existing areas of contribution and finding new or more focused areas of involvement:

Strengthening existing areas of contribution – entails more focused insistence on management accountability. For example, while saying that the Chief Compliance Officer's direct reporting to the board and the CEO had given the CECO enhanced independence", a Director of Ethics and Compliance of a U.S. pharmaceutical company added that further improvement could be achieved with "more clear request[s] for management accountability on ethics awareness and corrective measures". While citing "discussions at board meetings of both specific issues and general principles" as a positive contribution, a Counsel of Compliance and Ethics of a U.S. energy company added that "more focused discussion at more frequent intervals" was also needed.

New or more focused areas of involvement – recommendations included the need for more detailed board ethics training, better communications, and new processes. With regard to training, the CEO of a Canadian insurance company provided a detailed description of Director needs: "The Board requires more targeted, relevant training to underscore their oversight role and the role of the CECO and compliance program". He concluded by commenting on the need to "eliminate filtering of CECO reports by senior management". As for specific outputs, respondents mentioned process changes, and publication and circulation of reports (see box).

BOX

Recommended Changes for Improved Board Ethics Oversight

- risk assessments
- regular reports on the training program
- more regular reports on specific issues
- active director participation in the company's annual business conduct conference
- publication of the board's review of the ethics program
- finding better program effectiveness measures
- more energetic exploration of 'best practices' from other privately held enterprises

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Finally, a few participants talked about the need to discuss what ethics oversight actually *means* and the challenges it poses in "confronting *traditional* ways of doing things and working through the changes needed to eliminate that thought process". Looking at ethics issues in new ways was described by the General Counsel of a U.S. Financial Organization as obtaining "a fuller understanding of the impact that factors such as organizational culture and the use of incentives have on ethical behavior". And the vice president and chief compliance officer of a U.S. manufacturer discussed the need for an ethics program to have broad functional department participation and collaboration: "[I] would like to see the board/committee turn to other functional leaders and ask them to report on how ethics and compliance has been driven through their organizations and how they are partnering with those functions".

4. Appendix

Respondent Profile

Industry:	**Percentage:**	**N:**
Manufacturing (industrial)	19%	35
Business and professional services	19	35
Financial services	11	21
Manufacturing (consumer)	7	14
Utilities	7	13
Government/not-for-profit/administrative	6	11
Wholesale and retail trade	5	10
Health care	4	9
Energy	4	8

Communications/publishing/software	4	7
Construction	3	6
Manufacturing (technology/computer)	3	6
Transportation and warehousing	3	5
Agriculture and mining	2	4
Other services	2	4
Other, please specify	1	2
Total	100%	190

Headquarters location:	**Percentage:**	**N:**
United States	82%	156
France	3	5
Belgium	2	4
Canada	2	3
The Netherlands	2	3
Norway	1	2
South Africa	1	2
Sweden	1	2
Switzerland	1	2
United Kingdom		
One response:		
Australia		
Brazil		
Czech Republic		
Germany		
Hong Kong		
India		
Philippines		
Singapore		
Indonesia		
UAE		
Total:	**100%**	**191**

Revenues (n = 182):

Amount:	**Pct.**
Less than $1 billion	28
$1 billion to under $5 billion	27
$5 billion to under $10 billion	13
$10 billion to under $20 billion	14
$20 billion to under $40 billion	9
$40 billion or more	9

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