Board Responsibility for Ethics and Compliance

By Nicole Di Schino

In recent months, the DOJ and SEC have made it abundantly clear that they are focused on prosecuting individuals for their part in FCPA violations. In light of this additional attention, board members and others responsible for company compliance programs must be even more diligent about meeting their obligations. In a recent conversation with The FCPA Report, Jean-Marc Levy and Susan Divers of training, advisory and education company LRN discuss the nature of a board’s compliance and ethics responsibilities and provide suggestions for how board members can fulfill their anti-corruption compliance duties. See “Directors and CCOs Share Insights on Maximizing a Board’s Impact on Compliance” (May 4, 2016).

FCPAR: Who on the board should have primary responsibility for ethics and compliance? Certain committee members? Or the board as a whole?

Levy: We are increasingly seeing the full board take responsibility, which is a positive shift. Historically, many boards thought of ethics and compliance as something that should be the purview of the risk committee or the audit committee, not something that the board as a whole needed to feel responsible for.

That view is starting to change for a couple of reasons. First, board members are becoming increasingly concerned about their own personal responsibilities and liabilities. Second, board members are beginning to recognize that an effective, values-based ethics and compliance program has the benefit of addressing many different risks within an organization.

[See also The FCPA Report’s four-part series on audit committee responsibilities before, during and after an investigation: “Five Steps to Take Before the Investigation Begins” (Feb. 19, 2014); “Determining When and How to Proceed” (Mar. 5, 2014); “Retaining Counsel, Gathering Information and Documenting the Investigation” (Mar. 19, 2014); and “Remediating and Disclosing the Investigation to the Government and the Public” (Apr. 2, 2014).]

Boards Should Focus on Driving an Ethical Culture

FCPAR: What are the major ethics and compliance issues facing board members today?

Levy: The number one issue that boards are facing is trying to understand what their role should be with respect to ethics and compliance and learning how to drive a compliant culture within their organizations. While some of the more sophisticated boards have already realized that the entire board needs to worry about ethics and compliance, many individual board members still lack clarity about what their personal roles and responsibilities are.

Divers: Until about a year ago, I was the chief ethics and compliance officer for what’s now a $20 billion worldwide company, and I briefed the board many times. In my experience, the board often knows it should be asking questions, but frequently doesn’t know what those questions should be. We are also seeing a shift from boards focusing on a checklist of compliance issues, such as training or a code of conduct, to focusing on company culture, which we know is what really drives compliance.

Assessing the Company Culture

FCPAR: What steps can board members take to improve the company compliance program?

Levy: We believe that the most effective way to drive ethical and compliant behaviors is through a values-based program rather than a rules-based program. Accordingly, the first thing a board should do to improve its company’s compliance program is to perform a cultural assessment of the organization.
The best way to understand what a company needs to do from an ethics and compliance perspective is to gauge the health of the organization's ethical culture.

**FCPAR: What tools can board members use to make this cultural assessment?**

**Levy:** A rigorous assessment requires analysis techniques that are validated and supported by data. Many boards engage a consultant to perform such an assessment.

For example, at LRN we have developed some very sophisticated statistical models that have been tested by independent academics. The models show that certain observable behaviors are directly linked to the culture and the values of an organization. Using that type of information, a consulting organization can conduct a data-centric assessment of the behaviors exhibited by the company's employees and the perceptions of the culture and behaviors within the organization.

A cultural assessment allows a company to benchmark the various attributes of its culture against those attributes at other companies, such as the company's competitors or another peer group. Similarly, a data-based assessment can be used to perform an “MRI” of the company culture – it can help a multinational corporation with diverse divisions in diverse industries or geographical areas to understand how its company culture varies in different locations. That in turn can help a company identify the areas of risks that arise as a result of those cultural differences.

**FCPAR: Could you give us an example of the type of information a cultural assessment might uncover?**

**Divers:** Assessments inevitably identify hidden issues. There is almost always a major surprise for the board and the C-suite.

For example, we performed an assessment of a major aerospace company and determined that one of its divisions had an extremely autocratic leadership and that there was a real discouragement of speaking up. The combination of autocratic leadership and secrecy correlates with a high level of compliance failure. Because of the assessment, the company was able to address that issue before there was a major compliance failure. The company worked with that division to bring it into a model more compatible with the values of the whole company.

**FCPAR: What is the board's role in performing a cultural assessment?**

**Levy:** Although the board may request that a cultural assessment be performed, the C-suite should be leading the process. The board should then be presented with the results in the form of a heat map identifying the key risks that are relevant to particular employee populations as well as an explanation of what is going to be done to address those risks.

**Educating the Board About Compliance**

**FCPAR: Thinking specifically about FCPA and anti-corruption compliance risks, should a specific committee be responsible for FCPA compliance?**

**Levy:** Most boards are still unclear about who should be responsible for anti-corruption compliance. Traditionally it has been the purview of the audit or risk committee. However, many boards are becoming increasingly uncomfortable with delegating that responsibility to a committee.

If that responsibility is delegated to a specific committee or a specific board member, the delegation should be very clear and the committee's performance should be evaluated. FCPA review should be included in the evaluation process that many boards of directors are now mandated to go through. For example, the boards of directors of NYSE-listed companies are required to conduct a performance evaluation at least annually. Many governance committees from non-NYSE listed companies have also adopted this practice.
**FCPAR: What type of training should board members be getting on anti-corruption issues?**

**Divers:** Even if the board is delegating responsibilities to a specific committee or specific board members, all board members should take the company's internal training. In addition to educating the board, that process helps the board to understand how the company is educating its workforce.

[See “Training Insights From In-House Experts “: Part One (Jun. 1, 2016); Part Two in this issue.]

**FCPAR: Once a board member has received training, how can he or she stay up-to-date on anti-corruption issues?**

**Divers:** Reading case summaries is really the best way to stay current on the FCPA because it shows what happened to other companies. At LRN, we believe the best way for people to learn about an area is through stories and narratives.

**Levy:** Board members should also stay current on their company's policies and procedures. The board should regularly be informed about what new controls, processes or policies the company enacted as a result of different compliance challenges or changes in the regulatory environment. The board must ensure that whoever is in charge of monitoring these things is actually on top of them so it can't be just a once-a-year process. In today's environment the company should be updating its compliance program on a regular basis. If the compliance function is working properly, each quarter there should be something that has been changed or identified as a new area of risk because of a change in the regulatory landscape.

[See The FCPA Report’s Series on Compliance Program Assessments: Kaplan & Walker’s Jeffrey Kaplan (Nov. 4, 2015); AlixPartner’s Susan Markel (Feb. 24, 2016); CREATE.org’s Pamela Passman (Apr. 6, 2016).]

**The Board’s Role in Day-to-Day Compliance**

**FCPAR: What are the board’s responsibilities with regard to day-to-day compliance?**

**Levy:** The main responsibility of the board is to make sure that the company’s management team can model the kind of leadership that the board expects. Directors can work with the CEO and other top executives to help the executives very clearly communicate their commitment to doing business in an ethical way.

The board should also be mirroring the type of behaviors that they would like to see from their senior executives. For example, if the board wants management to encourage a two-way conversation with employees about compliance, it should be open to having a two-way conversation with management.

[See “Five Tools Every Chief Compliance Officer Needs for Effective FCPA Compliance: Title, Authority, Access, Budget and Culture (Part Two of Two)” (Apr. 17, 2013) (tone at the top).]

**FCPAR: How often should the board be communicating with the chief compliance officer or other people who are responsible for the company’s compliance program?**

**Levy:** All the time. Clearly we know that boards are drowning in information and responsibilities, and that their role is constantly changing, but because this is so deeply rooted in the company culture, and the board is ultimately the owner of the company’s culture, this is one of the things for which board members are absolutely responsible. Because this focus on culture is a critical component of the success of anyone’s ethics and compliance program, the topic of ethics and compliance should be a standing agenda for every single board meeting. It’s just as important as going over the company’s financials if not more so.
Divers: I agree. The more board attention there is to ethics and compliance, the more management attention there will be as well.

[See “Five Tools Every Chief Compliance Officer Needs for Effective FCPA Compliance: Title, Authority, Access, Budget and Culture (Part One of Two)” (Apr. 3, 2013).]

FCPAR: Are there any other actions board members can take to help foster a strong compliance culture?

Levy: One of the things we are seeing, particularly at companies with significant anti-corruption-related risk, is for board members to perform site visits and country visits. There is some evidence that boards who actually play an active role in visiting specific locations tend to do better and be more sensitive to anti-corruption issues.

[See “Anti-Corruption Compliance Best Practices for Boards of Directors” (Jun. 12, 2013).]