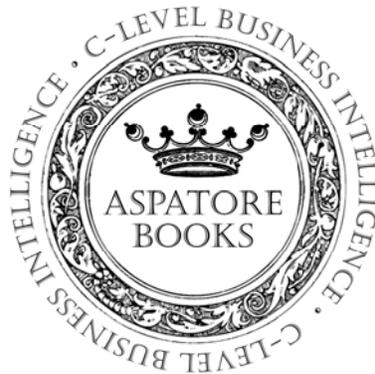


I N S I D E T H E M I N D S

Corporate Governance and Compliance Client Strategies

*Leading Lawyers on Developing Compliance
Procedures, Monitoring Governance Issues, and
Avoiding Problematic Situations*



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Corporate Governance: A Balanced Approach to Best Practices

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Corporate Governance Law

As a corporate governance practitioner, more so than in other areas of corporate law, I act as a counselor to my clients in the traditional sense of the term. I help them navigate the changing landscape of applicable regulatory schemes in complying with Sarbanes-Oxley, stock exchange listing requirements, and the like. I assist in developing corporate governance practices and policies, and I appropriately document, memorialize, and implement such practices and policies.

Most importantly, I counsel my clients on recent developments and the ever-evolving concepts of accepted best practices in the corporate governance area and how those developments affect my clients. In developing a corporate governance program, it is critically important to understand the business of the client and the industry (or industries) in which they operate and compete. Appropriate policies and procedures designed to promote the ethical and appropriate conduct of a company's officers, directors, and employees must be carefully tailored to fit the needs of your client to achieve those objectives without unduly burdening the organization with preconceived notions of generalized best practices. Imposing multiple layers of governance procedures that only serve to increase the burdens and expense of compliance are wasteful and can result in the perverse outcome of actually reducing the overall effectiveness of your governance program. As energy is diverted from pursuing truly meaningful and effective governance initiatives, participants develop negative views toward a company's compliance policies that affect their desire to pursue, and effectiveness at complying with, a company's governance framework. It is hard, if not impossible, to inculcate a positive corporate culture of compliance if those who are primarily responsible for implementing compliance policies are overwhelmed and exasperated with marginally useful layers of policies that have been adopted in the name of good governance or best practices.

Valuable Counsel

There are two primary ways my colleagues and I create meaningful value for our clients in the corporate governance context. First, in creating governance and compliance programs, we help them strike the appropriate

balance between good governance and operational and administrative feasibility and efficiency. We help our clients determine what “best practices” and “good governance” mean in the context of their business and particular set of circumstances. Second, we have developed a unique expertise in dealing with corporate crises, especially when internal investigations are warranted or required. Our ability to navigate through a major crisis can make, and has meant for certain clients, the difference between managing through the crisis and losing control of the problem.

In terms of governance and compliance disputes, my approach is, regardless of which side I am representing, to frame the discussion in terms of what is the best outcome for the company. By doing this, it is easier to establish a positive working relationship that provides both sides with a useful construct to keep a dialogue open and to frame the issues that are important to the client.

As corporate governance lawyers, we routinely assist our clients in the following areas:

- Developing or updating governance and compliance programs (including preparing a code of ethics, a code of business conduct, independence standards for board members, and board committee charters)
- Advising boards and board committees on strategic governance issues and special situations (including options back-dating issues, need for special committees, and interested director transactions)
- Conducting corporate internal investigations
- Assisting in Sarbanes-Oxley and related regulatory compliance

Practical Advice for the Governance Practitioner

Design governance programs that are specifically tailored for the company you represent. Structure them to achieve the goals of good governance while taking into serious consideration the specific circumstances affecting a client and the industry (or industries) in which the client operates. Do not layer needless or unduly repetitive processes or procedures simply because someone else has done it or because it has been popularly declared a best practice. Have the confidence and acquire the experience to design and

implement reasonable governance policies and practices with which a client can realistically comply on an ongoing basis. This produces significant savings for your clients in terms of both dollars spent and energy expended.

There has already been a lot of editorializing on the financial hardships and inefficiencies resulting from Sarbanes-Oxley, especially on smaller companies. The actual costs of compliance along with the growing burdens on management's time and energy spent on corporate governance compliance have continued to rise, notwithstanding the surfeit of consultants, attorneys, and other experts who all promise to make compliance more efficient and cost-effective. By keeping abreast of the latest news and developments, talking with thought leaders and other practitioners, and gaining the confidence to think independently, one comes to rely less on so-called "experts" and more on one's own knowledge, experience, and judgment.

Client Relationships

Determine the Issues

The key to establishing effective and productive client relationships is to focus from the beginning on identifying the issues of concern to your client and understanding their expectations with respect to, and motivations for seeking, your counsel. It is the rare exception when a corporate governance client has a problem for which there is an obvious or straightforward answer.

Understanding what really motivates our clients allows us to focus more quickly and effectively on their concerns rather than wasting time and money and foregoing opportunities that really help our clients. Always remain open to alternative strategies and remain flexible throughout an assignment. Having alternatives is usually quite important in governance disputes, since there are often a number of ways to resolve or mitigate an issue. This increases your ability to take advantage of new facts, discoveries, changes in your opponent's circumstances, or new thinking and developments in your case. If client expectations are unrealistic, however, be sure to address this firmly, but not patronizingly. It's often a process of

helping them understand what is realistic and achievable. This is where building up trust and credibility with your client is critical.

In the end, clients are the ultimate decision-makers with respect to how to resolve their issues and concerns. If a client has a view as to how to proceed that is within the applicable legal and ethical boundaries but differs from how I would like to approach the matter, I will try to persuade my client as to the merits of my approach. I will note the possible pitfalls of their approach, and if I feel particularly strongly about a case, I may sometimes raise the issue to my client's superiors. However, if I am unsuccessful, the client has the ultimate right to evaluate my advice and make a decision on how to proceed.

Ultimately, trust is what really counts and what gets them comfortable with what a reasonable position should be. In that regard, offer them a base case scenario, along with optimal and least desirable case outcomes to help define the parameters of their expectations.

Important Questions

It is critical to get a general understanding of the company's operations. This includes information on what it does, what industries it operates in, who the company's management and directors are, what the current state of the company's governance practices and policies are, and any indication of why they may be contacting counsel. Learn as much about your client and their specific needs and concerns as possible, because this will go a long way in helping to identify your client's motivations. In a highly concentrated industry, particularly one that involves significant foreign operations, bribery, price fixing, or other collusive or coercive behavior, these insights are critical in understanding what is motivating them to enhance their appearance of good governance.

Be prepared in advance of a meeting to maximize the time. Proactively come up with questions and ideas in advance, and anticipate questions they may ask, as this will usually make the first meeting more productive. The most important objective when meeting with a new client is to identify with as much clarity as possible what the client is looking for in counsel. If the

client has a very specific idea of what they are looking for, you can quickly turn your attention to thinking about how best to address the issue.

If the client does not have a specific issue or assignment in mind, it becomes important to try to identify the culture or attitude of your client toward governance in general. How the client feels about governance matters is critical to shaping how best to help them identify what it is they are looking for. Are they generally concerned, or do they have an instinctive dislike or distrust of corporate governance? Are they obtaining counsel on their own, or has someone suggested they talk to me? These are important questions to consider, because it will affect the working relationship between attorney and client.

It is difficult to generalize the questions that should be asked of new clients, since it is so highly dependent on the particular facts and circumstances of a particular case. However, in any governance dispute, a key question will always be whether there was an appropriate policy, procedure, or training in place to address the conduct in question. For example, if there is a Foreign Corrupt Practices Act, antitrust, or sexual harassment matter that rises to the level of a question of governance, the first question to ask is what policies were in place to prevent the purported misconduct and whether the employees ever had appropriate training in the applicable rules or company policies. In the context of a compliance matter, almost by definition it involves a stated rule, regulation, or policy that has not been complied with, in which case, the real question then is whether the policy was clear and whether there was appropriate notice of the policy.

Appropriate Documentation

In the context of a governance dispute, counsel should review any documents that will give insight into the contemporaneous thoughts and actions of the relevant participants. If the client is an individual, it is a good idea to see their notes, any memos they have written or that others have written that relate to that person, and sometimes most importantly, their relevant e-mails. If we are representing the board or a board committee, or if their action is in question, we always ask to see the board and committee meeting minutes and any actions taken by consent.

This type of documentation is critical in understanding what actually happened in connection with the dispute. Subsequent writings can be suspect since they may well have been prepared with a specific purpose in mind. Contemporaneous writings, such as an immediate memo, e-mails, and so on, tend to more accurately reflect what a person was thinking or concerned about at the time. Establishing intent is often a crucial question in determining whether a breach occurred and, if it did, how serious it was.

Situational Factors

The financial status of my clients typically does not affect the strategy for resolving a governance dispute in the way it might in other tort or contractual dispute contexts. Governance issues often have non-monetary consequences or raise questions of policy or prevention rather than compensation, and money plays a less significant role in resolving such disputes. We typically represent senior management, the board of directors, or a committee of the board in governance matters.

Our approach to corporate governance and compliance matters is usually focused on the specific needs and concerns of the client. Their attitude and receptiveness to governance reform directly impacts the scope and success of our governance advice. If clients are highly motivated and genuinely concerned about an issue, it is obviously easier to effect meaningful change in a firm's governance practices. If the client is indifferent, or at times even hostile, to the concept of governance reform but nonetheless feels they need advice, we will endeavor to provide the best advice possible. However, while we can create and/or improve a client's governance policies, we cannot control a client's enthusiasm for enforcing or complying with them.

Trouble Areas

Truly Independent Directors

Companies continue to have problems implementing meaningful measures to ensure appropriate director independence. It is predominantly a problem for small to mid-sized clients, although large ones are not immune from it. Although several companies have articulated fairly well-defined standards

for independence and their annual certification process (to the extent it actually takes place), it is often inadequate to legitimately reach a defensible determination of independence. Independence tends to be treated and evaluated in a formulaic, check-the-box manner. While checklists can be helpful, they should serve as the starting point for the analysis and not the conclusion. Truly independent viewpoints from independent board members are one of the best checks on the board itself, and on a company, in keeping a client out of trouble.

Settlement of Governance Disputes

Clients in corporate governance and compliance matters are usually more likely to settle disputes than perhaps in other areas of the law because the risks and negative publicity associated with such disputes are often not worth the risk of proceeding. There is also a growing sense that governance disputes in the post-Enron era are more susceptible to media abuse and mischaracterization and can take on a life of their own wholly unrelated to the actual harm or financial impact on the company in question. In light of these circumstances, a significant question can be raised when a client may not want to settle a governance or compliance dispute on reasonable terms. Obviously, if an individual or company's reputation has been materially and unfairly impugned, the aggrieved party may not want to settle for anything less than a full repudiation of the charges or claims levied against them. If, as is commonly the case, the facts are not dispositive and, despite best efforts, the client is simply being unreasonable about settling, counsel should evaluate whether other areas of leverage exist to achieve a settlement that is more favorable to your client. If the client persists in being unreasonable and simply will not settle (or will only settle on unachievable terms), the best we can do is to advise our client of the risks and our view of their position and ultimately do the best we can for our client.

Practical Advice

Advise clients on the appropriate balance to strike between good governance and operational and administrative efficiency. This holds true whether representing senior-level management or the board of directors. Help them determine what best practices and good governance mean in the context of their business.

Stress the need to have truly independent board members, and educate existing board members (who have often served for long periods of time) about what it really means to be independent. Moreover, as with most governance advice, approach the topic of independence with a balanced and realistic view of the needs and responsibilities of the board. It is often desirable to have one or more board members who are critical to guiding management's strategic policies or otherwise provide valuable insights, yet who remain independent of management. As long as the board has a healthy majority of truly independent directors, they can usually provide the appropriate safeguards and protections for the company and its shareholders. In many cases, the reactionary call for total independence on a board is misguided and ultimately harmful to the best interests of shareholders and other stakeholders.

Personal Strategies

The best strategy for helping clients with their corporate governance-related issues is to truly listen to their needs and concerns. Take the time to understand what drives those needs and concerns, and develop a solution that specifically addresses them. The vast majority of the time, success hinges on the confidence you inspire in your client. If the client trusts you and your judgment, you will have a much easier time accomplishing your goals and implementing appropriate advice. Following this strategy can provide a roadmap in developing and inspiring the confidence needed to be successful.

Christopher Boies is a partner in his firm's New York City office. His main practice areas include corporate finance, mergers and acquisitions, corporate governance and business advisory work. He heads the firm's corporate practice. Since joining Boies, Schiller & Flexner LLP in 1998, Mr. Boies has represented prominent corporate and individual clients including several major energy companies, numerous international financial and investment groups, and a variety of manufacturing and industrial concerns in a number of important transactional matters involving mergers and acquisitions advisory work, project and corporate finance matters, and contract interpretation, construction, and amendment issues.

In 1990, Mr. Boies graduated summa cum laude and Phi Beta Kappa from Hamilton College. In 1994, he graduated from Yale Law School. He is admitted to practice in New York.

Dedication: *This chapter is dedicated to Zachary, Andrew, and Caroline.*



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