

From the Boardroom to the Courtroom: The Convergence of Civil, Criminal and Regulatory Litigation - Meeting Takeaways

- 1) Discussion flowed from a Dechert, LLP proprietary film, *A Price Worth Paying?*, which portrayed a board of directors and management discussions that lead to civil, criminal, and regulatory actions. This professionally produced film showed how seemingly typical business decisions, which yield to pressures, can destroy companies and careers.
- 2) The Board Chair must take care when seeking a new CEO to fully involve the Board.
 - a. Vett several qualified candidates, understanding past achievements beyond the resume.
 - b. Understand, debate, and approve of new CEO's strategy, timetable, and costs.
 - c. Debate and approve a compensation package that 1) has proper incentives for reasonable short and long term improvements and 2) which is reasonable in light of industry norms, and 3) which is palatable to shareholders.
- 3) The Board Chair should not seek approval of individual directors for major decisions (such as an acquisition) prior to a board meeting, where robust debate is needed, given human nature to not voice strong objections when other directors have already decided to support a decision.
- 4) Board meeting minutes should reflect rigorous debate before a vote. The corporate secretary may keep detailed notes of who said what, but not include that detail in the formal minutes. Those notes can be privileged and temporary.
- 5) The CEO should not have the authority to cut compliance activities. A CEO's concern for their short-term bonus incentive or their concern for being vulnerable to a takeover should not override the need for strict and comprehensive compliance auditing and training, especially when there is some evidence of the need for outside counsel.
- 6) The corporate General Counsel should not allow any changes by management to board-approved standards and procedures for internal regulatory compliance audits and whistleblower follow-up.
- 7) Unusual reporting of significant improvements warrant more than usual scrutiny, especially in foreign jurisdictions, where business practices are less rigid than in western countries. Activities which may be legal or common practice in a foreign operation can result in legal action for a company at its home office.
- 8) Use outside counsel when issues are critical and require full objectivity to get to the very bottom of what happened. It may be a price worth paying.