



ACC's CLO ThinkTank Series 2005

“THE CLO’S ROLE IN CORPORATE GOVERNANCE : WHAT’S NEXT?”

Hosted by Laura Stein, CLO of The Clorox Company

**September 9, 2005
10:00 a.m. – 2:00 p.m.
Ritz-Carlton Hotel, San Francisco**

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Participants’ Briefing Materials

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**ACC'S CLO THINKTANK – GOVERNANCE AND COMPLIANCE: WHAT'S NEXT?
SEPTEMBER 9, 2005, SAN FRANCISCO**

MAJOR TOPIC AREAS FOR CONSIDERATION

The following outline sets forth several areas within the vast governance landscape that require ongoing attention by CLOs of major companies, some of which may be particularly relevant for collaborative consideration by the participants in the ThinkTank. The topics are organized according to broad conceptual categories that reflect either a principal governance functional area, or the organizational or administrative relationships of the CLO of a typical large public company.

The outline does not seek to answer the issues it raises in these areas or to steer a discussion of them in any particular direction. The resources identified in the Bibliography (Tab 5) contain extensive commentary on most of the issues, although some of the issues, while not novel, have not received much helpful published consideration. Where a particular topic or issue is discussed in the selected reading materials included in this Briefing Book (Tab 4), a notation is made to that effect.

I. Enhanced Focus on Traditional Legal Standards

- A. State Law Fiduciary Duties *[Addressed in Selected Readings]*
 - 1. Fundamentals of Loyalty, Care and Good Faith
 - 2. Implications of Recent Cases such as *Disney, Oracle, Emerging Communications*
 - 3. Status/Viability/Direction of the Business Judgment Rule
- B. Disclosure-Driven Federal Law and SRO Requirements
 - 1. Earnings Release and Conference Call Protocols
 - 2. Earnings and Other Guidance Protocols, including the “Pre-Release” Phenomenon
 - 3. Regulation FD and Other Selective Disclosure Limitations
 - 4. SEC Disclosure Review Committee and Related Disclosure Controls and Procedures *[Addressed in Selected Readings]*
 - 5. Special Sarbanes-Oxley Overlay

II. Board Composition and Related Matters

- A. Proper Balance of Outside/Inside Directors – Functional Independence of Directors to Perform “Critical Eye” Role *versus* Requisite Knowledge of Business Operations to Provide Strategic Direction and Support to Management
- B. Director Nomination/Recruitment Processes
 - 1. Implications of “Professional” Directors
 - 2. Implications of Interlocking Director Situations
 - 3. Potential Extension of Financial Literacy Criteria to Most or All Directors – Best Practice *versus* De Facto Requirement in light of Enhanced Scrutiny of Director Performance
 - 4. Shareholder Input Issues [*Addressed in Selected Readings*]
- C. Lead Outside Director, and Meetings of Independent Directors Only, Issues [*Addressed in Selected Readings*]
- D. Gathering Storm for the Separation of Board Chair and CEO Positions

III. Board Performance and Process Issues

- A. Board and Individual Director Assessments
 - 1. Internal Processes
 - 2. Outside Programs
 - 3. Benchmarking Potential
- B. Ongoing Director Education Regimes [*Addressed in Selected Readings*]
 - 1. Internal Processes, including Role of CLO and Regular Outside Counsel
 - 2. Outside Programs
 - 3. Potential for Collaborative Programs Among Several Companies
- C. Roles and Proper Relationships of Prescribed Standing Committees of Independent Directors – e.g., Audit Committee, Compensation Committee and Nominating Committee – to the Full Board and its Deliberative Processes



1. Distinguishing Between Proper *Decision-making* Authority *versus* *Recommendation* Power
 2. When Is Too Much Delegated, Even if Legally Permissible?
- D. Time Commitment of Directors [*Addressed in Selected Readings*]
1. Practical Expectations – How Determined? How Monitored? How Enforced and What Consequences?
 2. Implications of Directors Serving on Multiple Public Company Boards
- E. Recordkeeping of Board Deliberations [*Addressed in Selected Readings*]
1. Proper Content and Level of Detail in Minutes
 2. Disposition of Preliminary Drafts of Minutes
 3. Note-taking by Individual Directors at Meetings — Disposition and Other Issues
- F. Functionality of “Board Books” and Other Information Delivery Systems for Directors
1. How Much Is Enough? Too Much? CLO’s Role in Deciding?
 2. Security and Confidentiality Protocols
 3. Disposition of Drafts Items That Are Not Delivered
 4. Post-Meeting Disposition of Board Books
- G. Utilization of “Independent” Legal and Other Professional Advisors – Functional Analysis of Added Value *versus* Added Expense
1. By the Full Board
 2. By Prescribed Standing Committees of Independent Directors
 3. In Special Purpose Situations

IV. Special Management-Focused Issues

- A. Implications of Increasing Scrutiny on Executive Compensation [*Addressed in Selected Readings*]
1. Movement for Enhanced Disclosures Requirements

2. Potential for “Substantive” Limitations or Parameters – e.g., Pay for Performance, etc.
 3. Potential Implications for Global Companies of Regulatory Standards or Other Protocols in International Jurisdictions
- B. Implications of CEO and CFO Certification Requirements under Sarbanes-Oxley
1. Disclosure Controls and Procedures Generally [*Addressed in Selected Readings*]
 2. SEC Disclosure Review Committee Protocols [*Addressed in Selected Readings*]
 3. Processes for Up-the-Line Internal Certifications [*Addressed in Selected Readings*]
 4. International Component for Significant Overseas Operations
- C. Insider Trading and Other Market Activity Protocols
- D. Functional Code of Ethics Processes and Issues
1. Up-the-Ladder Reporting Systems
 2. “Whistle-Blower” Protocols and Issues Generally
 3. Tracking Substance to Form — i.e., Achieving Compliance with the Spirit as well as the Letter of Ethics Standards [*Addressed in Selected Readings*]
- E. Functional Utilization of Compliance Programs in Key Legal and Operational Areas
1. Antitrust
 2. Environmental
 3. Fair Labor Standards
 4. Diversity, Equal Opportunity and Antidiscrimination
 5. Foreign Corrupt Practices Act
 6. Potential Special International Component for Overseas Operations
- V. Special Shareholder-Focused Matters**

- A. Responding to Enhanced Shareholder Activism Initiatives
 - 1. Inclusion (or Not) of Shareholder Proposals in Proxy Materials
 - 2. Input on Director Nomination/Selection Processes
 - 3. The Movement for Majority Voting in Director Elections
[Addressed in Selected Readings]
 - 4. Implications of the Potentially Divergent Interests reflected in the Institutional versus “Public” Shareholder Dichotomy
- B. Governing for Creation of Long-Term *versus* Near Term Value
- C. Ongoing Shareholder Relations Issues, Including the Proper Coordination of the Investor Relations and Corporate Governance Functions

VI. Special Considerations for the Chief Legal Officer

- A. The CLO as Counselor and Advisor versus the CLO as “Watch Dog”, with respect to Spectrum of CLO’s Internal Relationships:
 - 1. Relationship with Board and Board Committees as Entities
 - 2. Relationship with Individual Directors
 - 3. Relationship with CEO, and with Board Chair if not same person as CEO
 - 4. Relationships with Other Company Personnel, Including Non-Officers
- B. Implications of Formal Professional Responsibility Rules
- C. Relationship of the CLO with Regular Outside Counsel to Company
- D. Relationship of the CLO with Outside Counsel Engaged to Perform Special and/or Independent Functions
- E. Implications of the Possible Dichotomy Between the CLO’s Role in the Risk Management Function *versus* the “Vestal Virgin” Concept of the Compliance Function (See item VII. B below.)

VII. The CLO in Relationship to Leadership of the Compliance Function as Distinguished from Leadership of the “Pure” Corporate Governance Function

- A. Principal Business Model Options:

1. Law department with the CLO, or a senior law department attorney reporting directly to the CLO, is charged with direct oversight of general compliance duties throughout the company.
 2. Law department coordinates with or supports an independent chief compliance officer (or other internal controls function personnel) which officer is charged with direct responsibility for general compliance – other than for corporate governance – throughout the company.
 3. Law department advises the company’s respective business units that otherwise have direct and independent compliance function responsibilities – other than for corporate governance – but Compliance leaders (such as a chief compliance officer) report directly to the CEO or a board committee, but not to the CLO.
- B. Pros, Cons and Other Issues Implicated by the Several Models
1. Is compliance fundamentally a business or a legal function? Does it matter in establishing and implementing an appropriate and efficient administrative regime?
 2. If compliance is deemed to be a business function, and is led by a non-lawyer, what are the implications of not having any attorney-client privilege associated with the function?
 3. Can the CLO both lead compliance initiatives and defend the same policies if they fail? (Also, see item VI. E above.)
 4. If the CLO is the direct compliance leader, what are the CLO’s personal fiduciary responsibilities in that capacity? Is the CLO a “lawyer” with a “client” in that functional role? If so, what are the professional responsibility implications? If not, what are the implications of losing the attorney-client privilege?
 5. What are the likely market or “industry” implications of which model is adopted? If each model can be effective, is one better or worse than the others in terms of public and market perceptions?
 6. What are the principal implications of the respective models for overseas operations?