

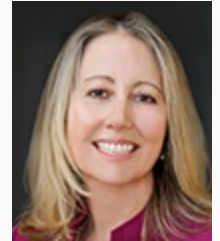
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# An opportunity to assess and strengthen board oversight

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By Rebecca Walker, JD

Rebecca Walker ([rwalker@kaplanwalker.com](mailto:rwalker@kaplanwalker.com)) is a partner in the law firm of Kaplan & Walker LLP, located in Santa Monica, California, and Princeton, New Jersey. She is a member of the Advisory Board of CEP Magazine.



Rebecca  
Walker

Robust board oversight of a compliance program is critically important to creating adequate program independence and authority. With the recent Delaware court decisions in *Boeing*, *Marchand v. Barnhill*, and other cases, the importance of board oversight has been further underscored. These decisions create an important opportunity for organizations to review and update both their documentation and their practices regarding board oversight of compliance programs, including audit committee charters, compliance and ethics (C&E) program charters, and escalation protocols. This article provides a brief recap of two important recent cases, then discusses board oversight documentation and practices.

### Delaware case law

In the seminal decision of *In re Caremark International*,<sup>[1]</sup> the Delaware Chancery Court established that directors have a duty to oversee a corporation’s compliance program. The court in *Caremark* also made clear, however, that the standard for liability in *Caremark* cases is high. Despite this high bar, in several recent cases, Delaware courts have denied motions to dismiss *Caremark* claims and thereby created important guidance to companies seeking to ensure effective board oversight practices.

In 2019, the Delaware Supreme Court decided *Marchand v. Barnhill*,<sup>[2]</sup> in which the court addressed the importance of board oversight of “compliance issues intrinsically critical to the company,” and pointed to the board’s failure to implement and oversee a compliance system related to that company’s most critical risk area: food safety. The court in *Marchand* stated that there is “a bottom-line requirement that is important: the board must make a good faith effort—i.e., try—to put in place a reasonable board-level system of monitoring and reporting.”

In 2021, the Delaware Chancery Court decided *In re Boeing Company Derivative Litigation*,<sup>[3]</sup> a derivative suit stemming from the 2018 and 2019 crashes of the Boeing 737 MAX airplane. The *Boeing* court discussed the audit committee’s oversight of Boeing’s compliance program in some detail. Boeing’s audit committee charter assigned that committee with responsibility for (among other duties) meeting with the chief compliance officer to review the ethics and business conduct programs and compliance with related laws and regulations. The audit committee also received annual updates regarding the compliance risk management processes, although those updates did not address airplane safety. The court ruled that the board’s failure to oversee compliance in the mission-critical risk area of airplane safety gave rise to a reasonable inference that the directors breached their duty of oversight.

The court in *Boeing* also addressed the board’s failure to “have a means of receiving internal complaints about

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airplane safety.” The court stated that, “without a Board-level reporting mechanism, safety issues and whistleblower complaints reported to the [management-level safety review board] did not come to the Board’s attention. Neither the Audit Committee, nor any other Board committee, reviewed whistleblower complaints related to product safety.” In addition, the court discussed the audit committee’s failure to assume oversight of the company’s response to the very serious concerns at issue in that case in a timely manner.

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