

Compliance & Ethics Professional

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A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

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Meet Kenny Rogers

Director, Ethics and Business Conduct
Huntington Ingalls Industries
in Newport News, VA

See page 14

27

**Building an
effective compliance
champion program**

Bruno Falcone

31

**A definition
of ethics in
business**

Anthony Smith-Meyer

35

**Striking a balance: Integrity
due diligence and data privacy**

Guido van Druenen and
Tabitha Gaustad

43

**Contracting and
Compliance: Every business
needs a contracting policy**

MaryEllen O'Neill

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by Roy Snell, CHC, CCEP-F

Greg Triguba



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There is a rule of thumb that says, "If you can't recognize everyone, then recognize no one." I think that philosophy is for cowards.

I recently wrote an effusive article about one of our staff members. In retrospect,



Snell

I could have done a better job making the point that I was trying to acknowledge the *entire* staff by sharing an example of *one member* of it. But now, having clarified my intentions, I would like to share an example of one of our many great volunteers.

Greg Triguba helped SCCE from Day One. No questions asked, he jumped right in to help. Greg is a frequent writer and speaker. He and I talk occasionally, and he has a wealth of ideas. Many of his ideas are great—and are often implemented—but he understands that we can't use them all. He understands that, with ideas coming from many of our 15,000 members, SCCE can't go in all directions at once.

He is always smiling, loves to be involved, and is committed to this profession. He cares about everyone. He takes time to help people who are new to our profession. He speaks at Academies many times a year, covering the same subject each time, and is borderline neurotic

about improving his presentation before doing it again—he wants it to be current and fresh.

Some people think *everything* is important because they don't *know* what is important. Greg, on the other hand, is able to keep it simple, helpful, practical, and not abstract—because he *knows*. Greg really has a great understanding about the role of the compliance officer and the function of a compliance program. We don't involve people like Greg in our organization because of their pedigree; we love people like Greg because they just *get* it.

Greg is a former in-house compliance officer at both Eddie Bauer and Intuit. He has also held compliance roles at Qwest Communications, Nationwide Insurance/Financial, and in the Air Force, where he inspected nuclear missile sites in Europe. He is now a consultant, and he won't accept any job in any subject area in which he is not proficient. He is fair, ethical, and exudes integrity. He helped create the Certified Compliance & Ethics Professional (CCEP)[®] certification. He has spent countless hours, at his own expense, to help the Compliance profession. And he—like many of you—deserves recognition.

So kudos to Greg—and to everyone else who contributes to the Compliance profession. *



FEATURES

- 14 **Meet Kenny Rogers**
an interview by **Adam Turteltaub**
- 27 **[CEU] Building an effective compliance champion program**
by **Bruno Falcone**
An effective compliance champion program can add value to the company and play an important role in helping employees do the right thing.
- 31 **A definition of ethics in business**
by **Anthony Smith-Meyer**
A robust discussion of what it means to be ethical may have a profound impact on the value we create, productivity, and the sustainable success of our objectives.
- 35 **Striking a balance: Integrity due diligence and data privacy**
by **Guido van Drunen and Tabitha Gaustad**
The due diligence process designed to protect and limit risk can also have the potential to create risk if privacy laws are violated.
- 43 **Contracting and Compliance: Every business needs a contracting policy**
by **MaryEllen O'Neill**
A contracting policy should outline the requirements and address every stage in the contracting lifecycle, from the identification of needs in the RFP until the end of the contract.

COLUMNS

- 3 **Letter from the CEO**
ROY SNELL
- 21 **EU compliance and regulation**
ROBERT BOND
- 25 **Compliance, Life, and Everything Else**
THOMAS R. FOX
- 39 **A view from abroad**
SALLY MARCH
- 81 **Byrne on governance**
ERICA SALMON BYRNE
- 82 **The last word**
JOE MURPHY

DEPARTMENTS

- 6 **News**
- 12 **People on the move**
- 22 **SCCE welcomes new members**
- 40 **SCCE congratulates newly certified designees**
- 83 **Takeaways**
- 84 **Events calendar**

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“ Relationships! Relationships! Relationships! ”

See page 18

ARTICLES

49 [CEU] Engaging leadership in Ethics and Compliance, Part 3: Fostering leadership actions

by Jason L. Lunday

Leaders will do a better job of setting the right tone for subordinates if compliance staff provide assistance, guidance, tools, and resources for better communications and role modeling.

57 [CEU] Collecting and evaluating effective compliance program metrics

by Timothy Hedley and Ori Ben-Chorin

Four kinds of metrics that organizations can collect and analyze to demonstrate the worth of their compliance programs.

61 How I built a Compliance department with no previous experience

by Marcia Boaventura

Not everything in Brazil is about scandal and corruption. How one company is making strides toward compliance and transparency.

65 SEC enforcement actions against CCOs: Outlier or new trend?

by Thomas R. Fox

A look at two enforcement actions that suggest that more chief compliance officers may be facing fines and/or incarceration.

69 Certification pressure: Assess, release, and advance calmly

by Walter E. Johnson

Sage advice for preparing for a certification exam from someone who has been there.

73 The difference between Ethics and Compliance—and why understanding the difference is critical to successful leaders

by Charles A. Neff and Julie J. Gresham

The terms “ethics” and “compliance” are often used synonymously, but the difference between the two can be very important for your training, communications, and overall culture.

77 Coughing up the Individuals: Implications of the Yates Memo

by Eric R. Feldman

What the Yates Memo means and does not mean for organizations as they pursue individual accountability in investigations of wrongdoing.

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Supreme Court rejects major insider trading case

The U.S. Supreme Court recently declined to hear a case of two insider trading convictions that were overturned by the 2nd Circuit Court of Appeals. In a ruling that marks a further setback to the U.S. Department of Justice in its crackdown on insider trading, the top court allowed two hedge fund managers, Todd Newman and Anthony Chiasson, to walk free after having been convicted in 2012 for trading on inside information about Dell and Nvidia Corp. As reported in a recent

news story by *Reuters*, “Manhattan U.S. Attorney Preet Bharara, whose office prosecuted Newman and Chiasson, said under the ruling he would have to think ‘long and hard’ about whether he could prosecute a chief executive for tipping friends and family to make trades. ‘We think there is a category of conduct that arguably will go unpunished going forward,’ Bharara said in conference call with reporters.” For more details, see: <http://bit.ly/ReutersTopCourtNews>

EU court rules data transfer pact between U.S. and Europe is invalid

Multi-national tech companies will need to re-think their European marketing strategies and operations after a European court deemed an international data sharing agreement invalid. As reported by *The New York Times*, “Europe’s highest court [recently] struck down an international agreement that allowed companies to move digital information like people’s web search histories and social media updates between the European Union and the United States. The decision left the international operations of companies like Google and Facebook in a sort of legal limbo even

as their services continued working as usual. “The ruling, by the European Court of Justice, said the so-called safe harbor agreement was flawed because it allowed American government authorities to gain routine access to Europeans’ online information. The court said leaks from Edward J. Snowden, the former contractor for the National Security Agency, made it clear that American intelligence agencies had almost unfettered access to the data, infringing on Europeans’ rights to privacy.” For more details, see: <http://bit.ly/NYDatastory>

Survey: Chief Compliance Officers paid well

A new survey by SCCE of 647 chief compliance officers shows that in 2015, the average salary for CCOs is \$150,207, and total compensation is \$179,753. The respondents represent CCOs who work in business sectors other than healthcare and who oversee at least 26% of their organization’s legal and regulatory risk. Those CCOs that possess certifications can earn significantly more, according to the survey. Average total compensation for CCOs with a Certified Compliance and Ethics Professional (CCEP) is \$192,268; average total compensation for those with Certified Fraud Examiner (CFE) is \$206,600;

and average total compensation for those with Certified Public Accountant (CPA) is \$260,564. The survey, which was tabulated by Industry Insights, Inc., also breaks down the salary data by several categories, including industry of company, percent of company’s legal and regulatory risk areas in which CCO is involved, total budget of Compliance department, size of company, and more. The survey also provides salary information for other compliance positions, including assistant/specialist, manager, director, and vice president. To download the complete survey, see: <http://bit.ly/SCCE2015salarysurvey>

Read the latest news online ► www.corporatecompliance.org/news

Regulatory

Petition seeks overhaul of U.S. EPA testing following VW scandal

In a sign that regulatory fallout from the VW emissions scandal is only just beginning, an environmental group has called for new and more stringent test of cars and light trucks. As reported by *Bloomberg Business*, “An environmental group is seeking to have every model of car and light trucks sold in the U.S. undergo on-the-road emissions tests, adding to calls for more aggressive efforts following revelations that Volkswagen AG rigged its vehicles to fool laboratory-based screening. The Center for Biological Diversity petitioned the Environmental Protection Agency to

require the on-road tests, replicating what the agency already does for heavy-duty diesel trucks.

“VW’s appalling actions show why the EPA must require on-road tests to catch car company cheats,” said Kristen Monsell, an attorney with the Tucson, Arizona-based nonprofit group. “There’s no good reason for the EPA not to employ every method possible to detect fraud and protect public health and our climate. The Volkswagen debacle ought to be a wake-up call.” For more, see:

<http://bit.ly/moreroadtesting>

OIG recommends improvements to OSHA whistleblower protections

Although OSHA has made improvements to its whistleblower protections in recent years, the Department of Labor Office of the Inspector General has concluded that the agency could do more to strengthen protection. As reported by *The National Law Review*, “The Department of Labor Office of Inspector General has issued a report assessing what improvements have been made to the DOL’s Whistleblower Protection Program since the OIG’s 2010 report titled *Complainants Did Not Always Receive Appropriate Investigations under the Whistleblower Protection Program*. The OIG concluded that the program has improved, but opportunities exist for OSHA to further strengthen the program. In particular, the OIG found:

“OSHA has improved the administration of its Whistleblower

Programs. The number of whistleblower reviews by investigators that did not meet the essential elements dropped from approximately 80 percent in 2009, to 18 percent during the period covered by this audit (October 1, 2012 through March 31, 2014). However, opportunities exist for OSHA to further strengthen the administration of its Whistleblower Programs to ensure reviews of whistleblower complaints are complete, adequate, and meet statutory timeframes. Furthermore, OSHA needs to strengthen communication with federal agencies with jurisdiction to investigate whistleblowers’ alleged violations of safety, consumer product, environmental, financial reform, and securities laws to determine if violations of these laws occurred.” For more, see:

<http://bit.ly/OSHAwhistleblowerreport>

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– Steven Dillard, Compliance Manager, Altria

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SCCE *conference news*

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SCCCE's 4th Annual European Compliance and Ethics Institute is moving to a new location, Prague, in 2016. The ECEI provides an invaluable opportunity to learn the latest practices for effectively addressing challenges facing the European compliance and ethics community. Learn directly from experienced compliance and ethics professionals through both formal presentations and informal networking events. Help improve your compliance and ethics programme and develop your expertise, in this growing and evolving profession. Hot topic sessions include:

- ▶ Data Security Technology 101 for Compliance Professionals
- ▶ Compliance Programs in light of the 2015 Spanish Criminal Code Reform
- ▶ Digital Behaviour Among Millennials and Beyond: Managing digital risk in the workplace
- ▶ Fight, Flight, or Freeze: What will you do when you discover a corruption incident?
- ▶ Preparing for the EU General Data Protection Regulation
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Contact Tracey Page at +1 952 405 7936 or email her at tracey.page@corporatecompliance.org with any questions about SCCE's website.

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Letter from the CEO

Can't miss Roy Snell's musings in *Compliance & Ethics Professional*?

You can see all of his Letters from the CEO on the SCCE website.

Some of his columns in the past year include, "We will all pay for the lack of compliance officer independence," "I'm as mad as hell, and I'm not going to take this anymore!," and "I want you to read this article because I want to impact your influencing skills."

You can also look at more past columns from Roy at <http://bit.ly/roy-snell>. His articles date all the way back to 2004. So catch up or just keep up-to-date, your choice.

Video of the Month

Why should students consider a career in compliance and ethics?



Paul E Fiorelli, JD, CCEP, MBA, Professor of Legal Studies and Co-Director, Cintas Institute for Business Ethics, Xavier University, discusses the good points of the Compliance profession and why people should consider it as a career. See this video and others at: <http://bit.ly/sccevo1m-12>

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Contact Stephanie Gallagher at +1 952 567 6212 or email her at stephanie.gallagher@corporatecompliance.org with any questions about social media.

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A Hill To Die On



By Donna Boehme
dboehme@compliancestrategists.com

Recently, the great Roy Snell wrote a column that all new CCOs should take to heart: "Everything I Know About Compliance I Learned in Kindergarten: Just Say Yes" says CCO's should not act as "The Department of No" rather, they should find more ways to say "Yes."

Roy is right on the money. But this also puts a spotlight on one of the most important skills a CCO can develop: judgment, or more specifically, knowing what is worth fighting for.

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Will leadership now look at their compliance officer in an entirely different way? Roy Snell on where the Yates DOJ Memo may take us
<http://bit.ly/1YKx6SS>



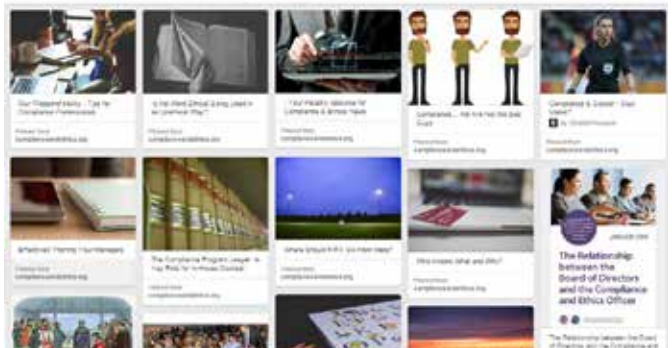
Where I Think the Yates DOJ Memo Will Take Us - The Compliance and...

By Roy Snell roy.snell@corporatecompliance.org In the past, organizations were able to privately discipline leadership, without scrutiny as to the...

COMPLIANCEANDETHICS.ORG | BY STEPHANIE GALLAGHER

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Find the latest **SCCENet** updates online ► www.corporatecompliance.org/sccenet

► GIACT Systems, LLC, a provider of real-time data for payment risk analysis, named **Robert McAlear** as Executive Vice President, Marketing and Product Strategy; and **Holly Merrill** as Chief Compliance Officer.

► The U.S. Department of Justice has hired **Hui Chen**, the former head of compliance for Standard Chartered Bank and ex-assistant general counsel at Pfizer Inc., for its controversial new position of Compliance Counsel.



► CHS Inc. (NASDAQ: CHSCP), the nation's leading farmer-owned cooperative and a global energy, grains and foods business, announced that **John "Jack" Lenzi** has joined the company as Vice President, Corporate Compliance.

► Hercules Technology Growth Capital, Inc. (NYSE:HTGC), a leading specialty finance company to high-growth venture capital-backed companies, is pleased to announce the appointment of **Melanie Grace** as General Counsel and Chief Compliance Officer.

Received a promotion? Have a new hire in your department?

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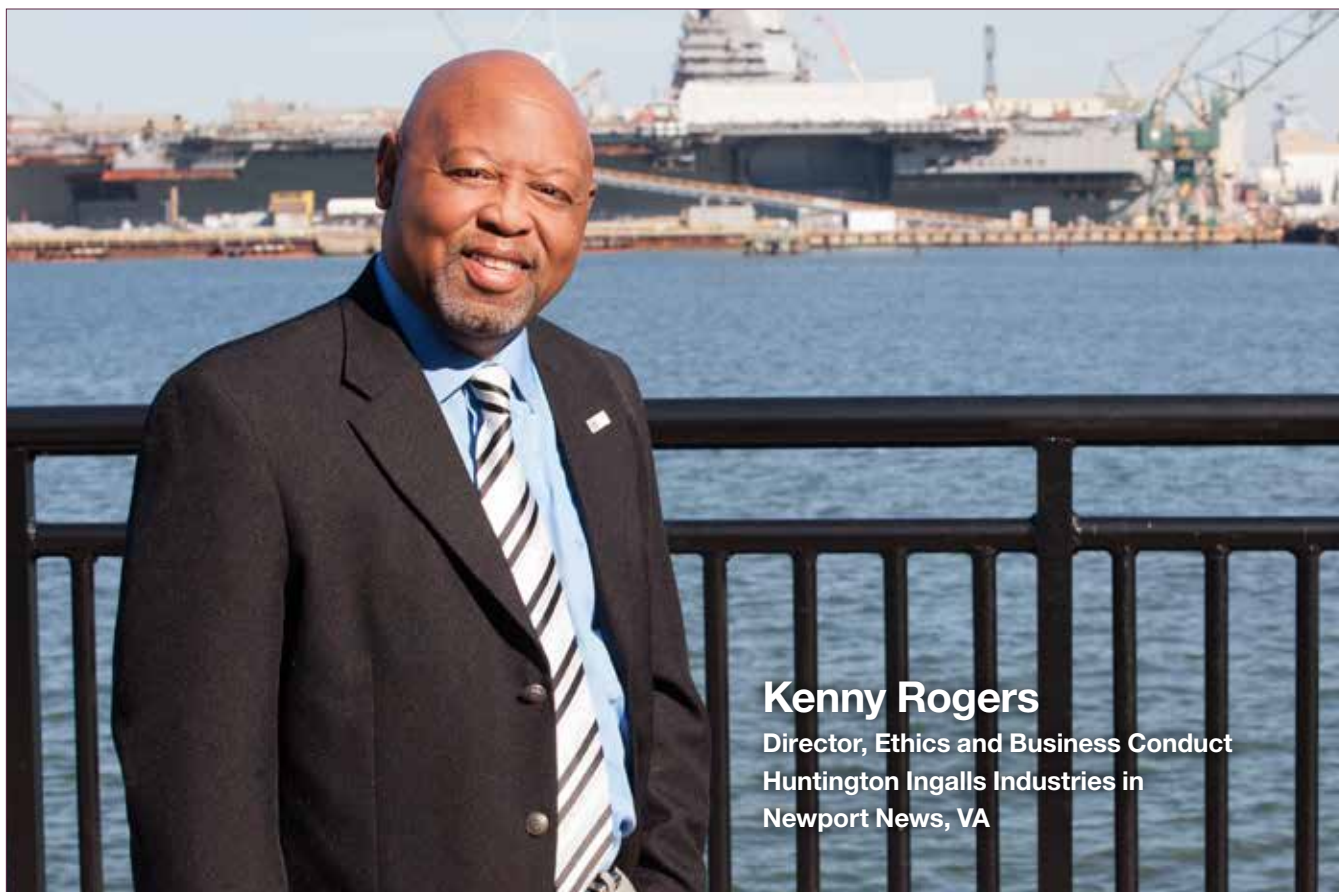
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A Strategic Advisor to Multinationals

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Kenny Rogers

Director, Ethics and Business Conduct
Huntington Ingalls Industries in
Newport News, VA

an interview by Adam Turteltaub, CCEP, CHC

Meet Kenny Rogers

Kenny Rogers (kenny.rogers@hii-co.com) was interviewed in September of 2015 by **Adam Turteltaub** (adam.turteltaub@corporatecompliance.org), Vice President Membership Development for SCCE.

AT: Let's dive in right to the juicy and challenging stuff. You work for a company that produces nuclear aircraft carriers and submarines. That's very high profile work, and also has great risks to it. How does the nuclear work impact your compliance program? On the one hand, I can see people being accustomed to exercising extra care in all they do. But I could also see a reaction

of, "Hey we've got a nuclear reactor here. Everything else is secondary."

KR: Our employees, especially our shipbuilders, take great pride in our long standing legacy of "Always Good Ships." They understand why we are building these ships and more importantly, the dedicated sailors we are building them for. I think nuclear work impacts our compliance program across the enterprise in a very positive way. The nuclear culture at Newport News Shipbuilding is founded in safety and adherence to process. Non-compliance in nuclear shipbuilding and nuclear operations

is not an option. While not all of our business operations are involved in nuclear work, the nuclear culture can and does inform our ethics and compliance programs across the enterprise. It is certainly reflected in our unrelenting focus on compliance and personal integrity and accountability.

AT: Tell me about your compliance and ethics programs. How are you organized at HII?

KR: Our company has both a compliance program and ethics program. Our compliance program is headed by the chief compliance officer who works in the Law department, and our ethics program is headed by the corporate business conduct officer (BCO) who works in Human Resources.

AT: What are the challenges of being organized in two separate departments?

KR: None—we make it work! Our compliance and ethics programs work hand-in-hand to focus on ethical conduct and compliance with the law. We meet and talk regularly, share ideas, and really support each other. One program cannot be effective without the other. For example, our theme is “Ethics and Compliance—Shaping the Culture.”

AT: How do you set a tone throughout the organization, even to people far away from the risky part of the business?

KR: Every business unit has its own risks, so no matter how far from corporate headquarters, each business has a compliance plan with detailed work plans,

based on their risks. Those plans involve compliance plan managers, accountable executives, and business conduct officers. It’s a grassroots approach to ethics and compliance. Additionally, we have a number of initiatives, campaigns, and activities that we conduct throughout the company to ensure a consistent tone throughout the organization, such as our annual CEO ethics video, quarterly corporate newsletters, monthly ethics and compliance highlights, and annual ethics and compliance awareness week activities.

AT: As a defense contractor, you have to be very attuned to the government’s expectations, which can be very complex. How do you stay on

top of what is happening from a regulatory perspective?

KR: Internally, Human Resources and the Law department, and especially the compliance officer, share with me any regulatory changes or updates they come across. Externally, my peers at various defense companies, and various organizations like SCCE, help us stay on top of what’s happening out there. I can’t overemphasize how important it is to network with other ethics and compliance officers during the annual SCCE Institute, and utilize the various resources we have available to us as compliance and ethics professionals.

AT: What about staying on top of best practices?

KR: This is where I am so thankful for organizations like the SCCE and the Defense Industry Initiative (DII). Without your

Externally, my peers at various defense companies, and various organizations like SCCE, help us stay on top of what’s happening out there.

organizations, the conferences, your monthly publications, etc., staying on top of best practices would be very hard, if not impossible to do. As you know, compliance and ethics professionals are very busy with their day-to-day responsibilities and activities. Being able to attend the annual DII Best Practice Forum and Compliance and Ethics Institute allows me the opportunity to stay abreast with the latest and greatest best practices out there. Also, we've reached out to talk one-on-one with companies similar to ours about their E&C programs and best practices.

AT: The federal government has been very clear that it expects its larger contractors to help its subcontractors develop compliance and ethics programs. What have you been doing?

KR: This is an area that really has our attention. We have hundreds of business associates we deal with. We perform our due diligence prior to formation of a business relationship with a business associate. We also monitor the business associate on a periodic, ongoing basis for as long as the business relationship exists. We insert clauses into our procurement contracts requiring subcontractors to comply with standards of business conduct contained in the HII Codes of Ethics and Business Conduct booklet. We provide a summarized pamphlet "Business Associates Brochure" to each business associate. Our business associates agree to keep their standards of business conduct in place during the performance of its services and to require its employees to abide by those standards. Our company is committed to working only with business associates that are reputable

and adhere to ethics and business conduct standards that are similar to HII's.

AT: What have you learned about the challenges that smaller companies face, and more importantly, how to meet those challenges?

KR: Overall, HII has approximately 38,000 employees, most being employed by our two largest shipyards in Virginia and Mississippi. But over the last couple years, we acquired three small businesses—Stoller Newport News Nuclear (SN3) and the Undersea

Solution Group, which were familiar with government contracting requirements, and, UniversalPegasus International (UPI) which was engaged exclusively in commercial contracts.

The challenge has been to bring these businesses in harmony with the existing HII programs, and providing the resources and guidance to meet the new requirements, while not being overly burdensome. My role at corporate is to guide and assist them, and work with them to set up sustainable and thoughtful ways to manage ethics and compliance risks.

AT: Although HII technically is a new company, it has a very, very long history going back 129 years in the shipbuilding business. How does the history help support the compliance program?

KR: In our largest shipyard, Newport News Shipbuilding, there's a very large chiseled granite rock that holds a brass plaque etched with a quote from the yard's founder, Collis P. Huntington. Its statement is as important to our ethics culture today as it was back then:

Overall, HII has approximately 38,000 employees, most being employed by our two largest shipyards in Virginia and Mississippi.

“We build good ships here; at a profit if we can, at a loss if we must, but *always good ships.*” That statement has set a tone for generations of shipbuilders, and there’s no better ethics and compliance message. Every ship built at HII over the many years has had its lessons, its challenges, and its opportunities. Our compliance program is built around the lessons learned over the years. From the very beginnings of the company, we have always operated in an environment with a myriad of ethical, legal, and contractual obligations that impact every aspect of our business.

AT: HII was spun off from Northrop Grumman back in 2011, and you were there at the time. Northrop has a very long and substantial compliance program with a great deal of history. How did you leverage that history when you set up an independent compliance program?

KR: You’re right! Northrop Grumman does have a very long and substantial compliance program, and when we spun from them in 2011, we chose not to reinvent the wheel. We embraced those parts of the compliance program that worked best for our businesses and enhanced or created new processes to meet our company’s vision and goals. For example, our Code of Ethics, training modules, and corporate procedures resemble Northrop Grumman’s in many respects, but our compliance plans were created by us to address our risks, and those laws, regulations, contractual obligations, and industry best practices applicable to us.

Compliance exists to focus on the opportunity employees have to commit misconduct, and Ethics focuses on preventing employees from rationalizing misconduct.

AT: What were some of the challenges you faced in terms of creating a new compliance program just for HII?

KR: Our company has always had a strong compliance program, and we enhanced that program by organizing it around the fraud triangle and certain core principles that look much like the Federal Sentencing Guidelines. We had three big challenges in formalizing our compliance program. First, we had to define what compliance means at HII. Second, we had to explain how it’s different than ethics. Third, we had to design

a system that kept ownership for compliance with the business units and their leaders. So, we defined compliance as the prevention, detection, and remediation of misconduct. Compliance exists to focus on the opportunity employees have to commit misconduct, and Ethics focuses on preventing employees from rationalizing misconduct. Finally, we created business unit ownership by outlining important areas of compliance in detailed compliance plans, and making executives accountable for giving employees the tools the employees need to succeed at compliance.

AT: One of the things I noticed about your program is that you refer to your helpline as the “OpenLine.” What was the thinking behind selecting that term?

KR: Northrop Grumman (NG) Shipbuilding, the predecessor to HII, adopted the NG OpenLine program. The OpenLine was established more as a helpline for employees, not just a “hotline” for reporting suspected violations of fraud, waste, abuse,

law, or company policy. In fact, the advice and assist role of the OpenLine is highly regarded, because it routinely identifies issues before they become violations. This facilitates a self-governing environment, which is fundamental to the success of our ethics and compliance program. Our OpenLine process includes more than just telephone calls to a third-party provider. Inquiries are also routinely received from e-mails, memos, letters, and walk-in visitors. Using the term OpenLine helps our employees feel comfortable to report any issue, not just suspected illegal or unethical behavior.

AT: Working with the board is something that compliance officers are finding their footing with. What's the relationship between Compliance and the Board?

KR: Our Board cares greatly about ethics and compliance, and is highly engaged in our compliance program. Our Board is briefed at least annually on our compliance program, and our Chief Compliance Officer, Chad Boudreaux, briefs the Audit Committee on a regular basis.

AT: Let's talk about your career for a bit. You came into Compliance not from Legal or Internal Audit, but from the business unit. What did you think you knew about compliance when you started the job?

KR: What I thought I knew about compliance, I gained from a combination of my almost 27 years in the United States Air Force in Aircraft Maintenance Training

and working as a senior facilitator with the company. I thought I knew what it would take to help shape an ethical culture at our company. I thought I knew enough about compliance to make an immediate difference. I thought I knew how to engage employee and senior leadership. I thought I knew a lot about risk assessments and adult education and training.

I received my certification from SCCE at the right time (November 2010). We spun off from Northrop March 2011. SCCE helped prepare me to move our company program to the next level.

AT: And what did you find out you didn't know?

KR: I didn't know that every day would present a new challenge or opportunity to address. I didn't know or understand all of the elements of an effective ethics and compliance program. I didn't know the depth and breadth of the compliance laws. What an eye opener!

Thank God Northrop Grumman had created a Business Conduct Officer's (BCO) Handbook to use for guidance. They also had annual BCO conferences to train and support their BCOs. It was during my time with NG that I found out about SCCE and their certification program. I received my certification from SCCE at the right time (November 2010). We spun off from Northrop March 2011. SCCE helped prepare me to move our company program to the next level.

AT: How has your background in the business helped you in doing your compliance job?

KR: Relationships! Relationships! Relationships! I can't over emphasize how import the relationships you establish early in your career can help you do your job

later in your career. Some of the people I've met along the way are now the ethics and compliance champions I depend on to support the program. Understanding the business helps you understand the culture and how things really work. There's a saying I like to use that goes "It's not who you know—but who knows you." I like to think the relationships I established before I got into ethics and compliance have helped me elevate our program.

AT: I can't end this interview without touching on your name. Earlier this year, I interviewed an HCCA/SCCE member, and his last name was Outlaw, a fitting name for a compliance officer. Does it help having the name of a celebrity when you go about your work? I can see it as a way to break down walls of resistance.

KR: Yes I'm always getting teased about my name. I have used my name as a great ice breaker when I'm being introduced and teaching class, especially when I try to sing

a verse from the Kenny Rogers song "The Gambler": "You have to know when to hold them, know when to fold them, know when to walk away, know when to run." That song always gets a good laugh.

AT: You've also worked with a lot of other people with interesting names, I think I heard.

KR: During my career, especially my military Air Force career, I had the pleasure of working with a few famous named people: Willie Nelson, Jimmie Hendrix, and Chuck Berry. As a matter of fact, at one point, a NCO named Willie Nelson was my supervisor and we use to get teased all the time. Our Communications department actually did a humorous article on us. One of my best friends today is named Hank Williams. The truth is, none of us can really sing.

AT: Well, as a Turteltaub, I never make fun of other people's names. Thanks so much for giving us your time.

KR: My pleasure. Thanks for asking! *

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by Robert Bond, CCEP

Ethics and data privacy

Even if Scott McNealy was right in 1999 (when he reportedly said, “You have zero privacy anyway – Get over it.”), individuals deserve respect for their privacy. This respect does not have to be imposed by law, but should be a matter of integrity and ethics.



Bond

Recently the European Data Protection Supervisor (EDPS) published Opinion 4/2015, entitled “Towards a new digital ethics – data, dignity and technology.” The Opinion was published on 11 September 2015 and follows on from the previous Opinion on the General Data

Protection Regulation, which aims to assist the main institutions of the EU in reaching the right consensus on a workable, future-orientated set of rules to bolster the rights and freedoms of the individual.

The latest Opinion focuses heavily on Article 1 of the EU Charter of Fundamental Rights, namely that “human dignity is inviolable and must be respected and protected.”

The Opinion sets out a number of principles which state that the fundamental rights to privacy and to the protection of personal data must reflect the protection of human dignity more than ever; that technology should not dictate values and rights; in today’s digital environment, adherence to the law is not enough and we have to consider the ethical dimension of data processing; and finally that these issues have engineering, philosophical, legal and moral implications.

The Opinion outlines a four-tier, big data protection eco-system namely:

1. Future-orientated regulation of data processing and respect for the rights of privacy and data protection;
2. Accountable data controllers that determine personal information processing;
3. Privacy conscious engineering and design of data processing products and services; and
4. Empowered individuals.

Recently the European Data Protection Supervisor (EDPS) published Opinion 4/2015, entitled “Towards a new digital ethics—data, dignity and technology.”

The Opinion looks at a number of recent developments namely big data, the Internet of Things, cloud computing, drones and connected autonomous vehicles.

The Opinion proposes the creation of a European Ethics Advisory Board made up of academic, legal and other professionals in the arena, to advise the EDPS on the ethical issues of big data and related activities.

The Opinion preceded a meeting in The Hague in late October on similar topics by the Privacy Advisory Group of the United Nations, where the discussions on ethics and big data were chaired by me. *

Robert Bond (Robert.bond@crsblaw.com) is a Partner at Charles Russell Speechlys LLP in London.

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by Thomas R. Fox

September 2015 was the most momentous month ever for Compliance

The month of September brought more monumental shifts in anti-corruption compliance than have ever occurred in a 30-day period. Rather amazingly, these tectonic changes have all come from areas, information, and events



Fox

which were not Foreign Corrupt Practices Act (FCPA) enforcement actions. I had thought things could not get any bigger in the FCPA world than the Wal-Mart corruption scandal in Mexico in 2012, the GlaxoSmithKline PLC bribery scandal in China in 2013, the Petrobras bribery scandal in

Brazil and across the globe in 2014, and the FIFA arrests in May 2015, but it turns out things can change in the Compliance world for other reasons as well.

In early September the Yates Memo was released, wherein the Department of Justice (DOJ) changed its focus from prosecuting of companies in white collar matters such as the FCPA, to a focus on prosecuting individuals. While the contours of this change are still being worked out in practice, the DOJ has made it clear that if a company wants to receive *any* cooperation credit, it will have to focus its internal investigation on culpable employees first and fully disclose all information to the DOJ. The Yates Memo, coupled with its public announcement by author Sally Yates that the DOJ wants senior executives pursued aggressively, changes the

internal investigation dynamics in ways that have yet to be fully assessed.

The second announcement in mid-September was the leak of the name of the new DOJ Compliance Counsel, Hui Chen, Standard Chartered's former head of anti-bribery and corruption compliance. Chen served as an assistant general counsel at Pfizer, in the DOJ in Washington DC, and as an Assistant US Attorney in Brooklyn. The creation of this position portends that the DOJ will be looking more closely at FCPA anti-corruption compliance programs to see if they meet the minimum standards or are closer to best practices. This requires companies to actually *do compliance* and not simply put a paper program in place and say they have an effective compliance program.

Finally, in late September came the stunning admission by Volkswagen that it engaged in a years-long, world-wide emissions testing fraud involving its signature diesel autos, where it intentionally installed a "defeat device" to falsify pollution results. Why is an environmental compliance scandal so significant for anti-corruption compliance? First and foremost, it demonstrates the interconnectedness of all compliance. Perhaps more importantly, it will be the first test of the Yates Memo and the new DOJ Compliance Counsel. All in all, quite a month. *

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by Bruno Falcone, CCEP-I

Building an effective compliance champion program

- » A solid compliance champion program may be an efficient and cost effective way to further improve your compliance program.
- » Compliance champions are not only compliance ambassadors, but should be educated and empowered to provide compliance training, help identify the major risk areas, and much more.
- » The compliance champion should be someone who really wants to be in that position, truly believes in compliance, is perceived as model of ethics and integrity, is able to influence others, thinks strategically, and exercises leadership.
- » Compliance champions should be nominated by the head of function, in agreement with the compliance officer, with buy-in and oversight by the senior management.
- » A robust compliance champion program allows the compliance officer to get different views of the business and provides the organization the opportunity of having not only compliance officers speaking about compliance, but business people themselves.

As the Compliance profession continues to grow in prominence around the world and resources are often limited, a solid compliance champion program may be an efficient and cost effective tool to increase awareness, build a strong compliance culture, disseminate ethical values and the importance of ethical behaviour, and engage all levels of the organization.



Falcone

In a nutshell, it can be simply stated that compliance champions work as compliance ambassadors and facilitate the liaison between their own internal functions and the compliance officer on compliance-related topics. That statement is accurate, but the compliance champion role should not be limited thereto. Compliance champions

should be educated and empowered to provide compliance training themselves, roll out written standards coming from the compliance officer within their own business units, implement their own initiatives in order to address their department-specific compliance needs as previously aligned with the compliance officer, help identify the major areas subject to exposure, and encourage employees to speak up whenever they encounter potential violations.

Who should serve

To be effective in the role, a compliance champion should be someone who really wants to be in that position, truly believes in compliance, is perceived as a model of ethics and integrity, demonstrates accountability

and professional maturity, and is able to influence others, think strategically, and exercise leadership. It does not mean that it is mandatory that the compliance champion is in a senior leadership position; much to the contrary, diversity is key. The more diversified the team is, the easier it will be for the potentially risky areas to be identified and remediated. He/she should be able to effectually communicate with all levels within the organization.

The compliance officer should also encourage compliance champions to consistently share their experiences with each other and communicate within the compliance champions network itself.

It is not up to the compliance officer to nominate compliance champions, albeit the compliance officer does play an essential role in helping identify who could potentially add real value as a compliance champion. That is one of the reasons why the more the compliance officer knows the company's staff and understands the organizational structure, the easier it will be for the compliance officer to have the best compliance champions on board.

As always, tone from the top is a must and, therefore, compliance champions should be appointed by their respective heads of function in agreement with the compliance officer and the buy-in and oversight of the senior management. In order to ensure empowerment and accountability, nominations should be formally announced

and nominators need to fully understand what the compliance champion role really is and how the compliance champion will interact with the compliance officer.

Responsibilities

Compliance champions typically do not report to the compliance officer, meaning that the compliance champion's performance needs to be closely followed up by his/her manager and systematically discussed with the compliance officer throughout the year. It also needs to be previously agreed by the nominators and the compliance officer how much of the compliance champion's time will be available for Compliance. That is a key success factor for the compliance champion program.

That previous discussion should be as open and realistic as possible, and the commitment for the compliance champion to dedicate a certain length of time to Compliance should be firm and permanent. No one wants to invest money, effort, and resources in building a compliance champion program to then jeopardize its execution merely because of lack of time. It is understandable that urgent situations may always come up, but Compliance does need to be on the compliance champion's priority list.

There should be at least one compliance champion for each area, not only business units but also supporting functions. However, for the most critical functions (and depending on how extensive a department is within

Compliance champions typically do not report to the compliance officer, meaning that the compliance champion's performance needs to be closely followed up by his/her manager and systematically discussed with the compliance officer throughout the year.

the organization, such as a large sales force team), it might make sense to have more than one compliance champion within the same function, provided that each of them covers different pieces and has different goals. After a comprehensive risk management assessment, the compliance officer should be able to determine what sort of network structure makes more sense for the compliance champion program.

It might be appropriate to replace a compliance champion from time to time, and this should be deemed as a natural move, not necessarily detrimental to the compliance champion. Sometimes giving the opportunity to different professionals might increase motivation, gather different perspectives, and refresh and benefit the Compliance champions program as a whole.

The compliance officer must ensure that specific training sessions are regularly provided and specific meetings are held with compliance champions in order not to lose the momentum. Because communication is an essential part of any compliance program and compliance champions are expected to be the first line of compliance people on the ground, able to respond to routine queries and identify what matters need to be escalated to the compliance officer, it is of utmost importance that they are informed about any compliance-related initiatives in advance of other employees and be given clear guideline on what is expected from them.

Compliance champions are not compliance officers, and using them as such would be a deviation from the compliance champion program. They have in common the basic purpose of preventing, detecting, and responding to misconduct, but their responsibilities are totally different. Building and continuously improving the compliance program is under the responsibility of the compliance officer. The compliance champion

program should be a part of the full compliance program. As a consequence, compliance champions do not need to be specialists on the subject-matter, but they do need to have a basic understanding of compliance, including the seven essential elements of compliance and how an effective compliance program can offer significant benefits to their organization.

Compliance champions also need to be fully aware and updated on the compliance program and the laws and regulations affecting the company's businesses. This means that compliance champions are not only required to attend compliance champions meetings, but proactively engage in the discussions and contribute to the continued improvement of the compliance champion program. Additional S.M.A.R.T. goals (i.e., Specific, Measurable, Achievable, Results-focused, and Time-bound) for compliance champions would be implementing their own initiatives, previously aligned with the compliance officer, to address their function's specific needs, and also providing basic training on compliance-related topics.

A robust compliance champion program also allows the compliance officer to get different views of the business and provides the organization the opportunity of having not only compliance officers speaking about compliance, but business people themselves.

Conclusion

In view of the foregoing, I am convinced that an effective compliance champion program can add value and play an important role in assisting the compliance officer to successfully partner with the business, help employees do the right thing, protect the company's reputation, and ensure a sustainable growth for the organization. *

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by Anthony Smith-Meyer

A definition of ethics in business

- » Ethics is conceptual, yet in need of a clear definition that goes beyond the mere rules of law.
- » Leaders, employees, and others must breathe life into what would otherwise translate to platitudes and public image exercises.
- » Values that are robust enough to withstand challenge need enforcement, and hence strong leadership.
- » Analysing and evaluating the impact of decisions and views on one's stakeholders is an important part of this process.
- » A company distanced from the consequences of its actions has all the greater need for an ethical decision process, if it is to experience enduring success.

Ethics in business is a fundamental topic for our times and our society. It inspires much debate, but offers little in the way of easy solutions. Other than “know thyself,” there are no “rules of thumb” or shortcuts to learn—hardly an easy task.



Smith-Meyer

Ethics in business (or the lack thereof) continues to dominate the headlines. What “ethics” actually means in the context of business is difficult to ascertain. Does it have any practical meaning in a world that defines success in terms of financial performance and continuing growth? Is ethics a movable feast, an immeasurable measure of social justice sought by many, agreed on by none?

Ethics, I believe, is a very personal concept. The idea of what is right and what is wrong is something born of the core values we hold as individuals. We bring these values into society and to our organisational affiliations where, conforming to the laws of “force and counterforce,” we are influenced by interaction in return. Balancing those values

when they conflict is an ethical tightrope that is even more a matter of personal focus and conviction.

Ethics, I believe, is a very personal concept. The idea of what is right and what is wrong is something born of the core values we hold as individuals.

Group ethics and culture

Ethics is conceptual, yet in need of a clear definition that goes beyond the mere rules of law. Individually, we can go on a retreat or a pilgrimage to search for our values. We can write articles and books on the subject. Ethics in a business or organisational context is more complex, however. An organisation has no “spirit” or memory. It is a vehicle, and in like manner with a car, its ethical condition is a reflection only of

those who occupy it. These occupants each bring their individual values to the table, or indeed, behind the wheel. To determine a group or organisational ethic, there needs to be a conscious and managed discourse on values and organisational culture. The organisational ethic therefore, is more about (1) the process of establishing values that people within it can share, and (2) the decision-making

governance that ensures organisational priorities, including values, are kept alive and respected.

Once established, the organisation may have an ethical image, or even a “way we do things around here” ethos within it. An organisation does have a history and a reputation that may attract a certain type of employee or engender client loyalty. But it has no consciousness of self; this collective awareness has to be institutionalised and communicated.

This institutionalised culture that guides its members has to combine with its leadership and others associated with the organisation. They have to support each other, to breathe life into what would otherwise translate to platitudes and public image exercises, or meaningless placards on the wall.

Organisational values and the ethical discourse within an organisation do not, therefore, come from any mystical source or invisible hand. Nor can they be artificially “injected” into the organisation from outside

influences. For an organisation to have values that resonate with its adherents, that have moral authority, and that are robust enough to withstand challenge, these values need enforcement, and hence strong leadership. There must be a strong proponent of “doing things the right way” on the basis of a transparent agenda of values.

Shareholders, employees, suppliers, clients, and government, along with the individuals who make up the board and the executive—all have concerns and considerations to be taken into account when establishing this agenda of values.

Stakeholder considerations

Analysing and evaluating the impact of decisions and views on one’s stakeholders is an important part of this process. Shareholders, employees, suppliers, clients, and government, along with the individuals who make up the board and the executive—all have

concerns and considerations to be taken into account when establishing this agenda of values. Such values are not rules however, and “the ethical thing to do” is a moving target. It depends on many influences, including the changing nature of impact on stakeholders. It is therefore an ongoing debate in a firm, in changing circumstances, where the gravity of an outcome can change from one moment in time to another, where strong values offer the moral compass by which difficult decisions can be made.

In nature, there is a concept known as the “trophic cascade”. It occurs when a change is introduced into the established food chain and, similar to chaos theory, there is a domino effect on the behaviours of others in that food chain as they

adjust to a new reality—to their benefit or to minimise their cost. The manner in which this cascade shapes itself is nearly impossible to predict. What seems true, however, is that by introducing a new factor into an environment, the ecosystem may be strengthened or weakened accordingly. Within an organisation, the awakening and strengthening of its ethical spirit will find its way to decision makers at all levels, and will have surprising impact and outcomes. This is hard to measure directly, if not impossible, but it can be observed. I myself will stand testimony to that.

Logically therefore, an organisation may have values, but not a rigid set of ethics. To interpret these values and apply them to ethical judgement, the firm must, above all, “know itself.” In other words, an organisation must know its purpose, its value. It must have clarity on *how* it wants to produce and deliver that purpose. The meaning of those values and their relative importance may change over time, in line with society and available choices. Values should never, however, be able to be discarded or set aside due to temporary inconvenience and self-interest. If they are, then this is the road to ethical damnation.

All of the above sounds cumbersome. It sounds like a lot of hard work. It would be fair to ask, why? And why has it become so?

Building a lasting success

There was a time where proximity to stakeholders made the consequences of

one’s actions more obvious, even in an unconscious manner. That, however, was in the day of local markets and investors, where reputations were made and lost on observed behaviour, and translated into profit or loss in those same markets. The finger, therefore, points at globalisation. Consider

the anonymity of the myriads of investors behind institutional investors and the statistical veil of market segmentation and analysis. They leave the company isolated and in something of an ethical bubble. Who should they work for, if not the shareholder?

The market left to its own devices is shown to fail, again and again, as players seek only to gain at the expense of others. That is the reason we have laws and regulations in the first place.

However, this is to forget and deny any original purpose and aspiration. Enduring companies were not created in the desire for enrichment alone; the desire was to create something to be valued by the founders and by its clients.

Reducing the measure of success down to net profit for distribution to shareholders is a dangerous path. Overemphasis of this mindset, and its promotion by radical, free-marketers who claim that the markets will find the best solution for society, etc., are (in my humble opinion) lost to reason. The market left to its own devices is shown to fail, again and again, as players seek only to gain at the expense of others. That is the reason we have laws and regulations in the first place. A world without the reassurance of an institutional framework is a distrustful place. A company distanced from the consequences of its actions has all the greater need for an ethical decision process, if it is to experience enduring success.

The introduction of wolves into Yellowstone had consequences beyond the expected cull of the deer population. It enriched local fauna, increased the bear population, created a new habitat for song birds, and strengthened the riverbanks. Equally, I would argue that the introduction of a living, breathing debate around the ethics of our organisational behaviour will not only reduce the risk of misconduct and loss of reputation, but will also have a profound impact on the value we create, productivity in the long term, and the sustainable success of our objectives. Perhaps we may even term this unpredictable

enrichment of our organisational purpose, the trophic success for the benefit of our company, society, and ourselves. *

The thoughts and musings of this article are derived from the author's participation in a Round-Table Debate on Ethics in Business, which appeared in the Journal of Business Compliance, issue 03-04/2015. A transcript of the full debate may be obtained for free on their website: <http://journalofbusinesscompliance.com/download-free-trial.html>

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by Guido van Drunen and Tabitha Gaustad

Striking a balance: Integrity due diligence and data privacy

- » Integrity due diligence has become an expected part of the overall due-diligence process, due to the increased regulatory requirements for robust and comprehensive compliance programs.
- » Companies should construct third-party due-diligence programs in consultation with in-country legal and privacy counsel to understand what data is allowed to be collected and under what circumstances.
- » Companies leveraging service providers to conduct third-party due diligence should ensure that such checks are conducted appropriately.
- » Companies should give careful consideration to their data collection, review, and retention protocols, particularly of foreign parties, because data privacy laws and sanctions can differ widely from those in the U.S.
- » Formal guidance for the use of third-party due diligence and monitoring for policy compliance can help companies navigate compliance with relevant data privacy, anti-bribery, and corruption laws.

Conducting due diligence has been a long-standing practice as it relates to mergers and acquisitions. However, as privacy regulations have changed, many due-diligence practices have not necessarily



van Drunen

kept up with those changes. Failure to be current on privacy regulations can create problems for an organization that conducts due diligence if it inadvertently violates laws and regulations with potential legal ramifications. The concept of integrity due diligence continues to evolve and mature, especially for multinational companies.



Gaustad

Integrity due diligence has become an expected part of the overall due-diligence process, due to the increased regulatory requirements for robust and comprehensive compliance programs. More than ever, today's highly-regulated

business environment reaffirms the need to conduct due diligence to meet both basic risk mitigation requirements and statutory requirements. The U.S. Sentencing Commission's Federal Sentencing Guidelines, guidance offered by the U.S. Securities and Exchange Commission and the U.K. Ministry of Justice, as well as that provided by a variety of other non-U.S. regulators feature due diligence on specific transactions as well as third parties with respect to mitigating risks associated with the violation of bribery and corruption laws.

Depending on the objectives, there are a variety of types and levels of due diligence available, such as transactional due diligence and third-party due diligence. What is the concept of due diligence and why do we do it? Furthermore, why does a process designed to protect and limit risk also have, due to certain regulations, the potential to create risk?

Defining due diligence

Before assessing the specific risks in relation to due diligence and data privacy, it is important to understand the definition of due diligence. *Merriam Webster's Dictionary* definition of *due diligence* is: *2: Research and analysis of a company or organization done in preparation for a business transaction (as a corporate merger or purchase of securities).*

There can be a legal obligation to conduct due diligence, but the term will

more commonly apply to voluntary investigations of a particular target investment. In short, and in most cases, due diligence is the process whereby a buyer assesses a potential investment or purchase of an asset or entity to determine if it meets their particular investment criteria.

The premise for conducting due diligence is that it enhances the ability for the acquirer to make a better decision through the removal of some of the risks that naturally exist, due to the asymmetry surrounding the possession of information about the company to be acquired before an investment is made.

Given these explanations, the question arises with respect to risk: Are you allowed to have that data?

More specifically, integrity due diligence can and does take on many different forms and/or approaches. Basic due diligence conducted on third parties typically includes the screening of public records to identify the interests those third parties may have

in corporate entities in order to review and better understand the respective corporate background and the corporation's potential interests. This type of due diligence also seeks to better understand related parties, investor information, reputational issues, litigation matters, links to illegal activity, political and/or government affiliations, donations, sanctions, and debarments.

Enhanced due diligence is generally reserved for higher risk relationships or used as

an aid to resolve inconsistencies and may include interviews and site visits.

In operating compliance programs, companies have the potential to collect information that could, independently or collectively, be considered personal or sensitive, such as addresses, phone numbers,

In operating compliance programs, companies have the potential to collect information that could, independently or collectively, be considered personal or sensitive, such as addresses, phone numbers, and criminal history.

and criminal history. There are differing requirements for obtaining, collecting, and retaining this type of information, which are governed separately by each jurisdiction. Failure to comply with either anti-bribery or data protection regulations can expose a company to potential monetary fines and criminal penalties. In light of these considerations, the issue becomes: How can companies simultaneously comply with both relevant anti-bribery laws and data protection regulations?

Want vs. Need

There is a difference between what a company wants to know about a third

party, what it needs to know, and what it is legally allowed to collect. Fortunately, regulators generally understand this distinction. That said, companies cannot use the complex global data privacy landscape to avoid performing requisite due diligence. According to regulators, companies can be misinformed about what is legally allowable overseas with respect to data collection.

Achieving compliance

Some commonalities exist among various privacy frameworks around the world which converge on a number of guiding principles, including minimizing the collection of information to what is necessary and avoiding the collection of personal information to the extent possible; limiting the use of the data collected to its specifically-identified, intended purpose; obtaining explicit consent from data subjects to collect their data; and taking appropriate measures in the handling and protection of data collected.

One way that companies meet some of these global data privacy requirements is to leverage the contracting process. Clauses can be written into contracts to secure:

- ▶ Acknowledgement of the company's policies regarding data privacy and anti-bribery and corruption, and
- ▶ Acknowledgement of the third party's obligations to comply with the company's anti-bribery efforts, such as due diligence, training requirements, and certification processes.

To account for this, companies should construct third-party due diligence programs in consultation with in-country legal and privacy counsel to understand (1) what data is allowed to be collected and, more importantly, (2) under what circumstances the data is allowed to be collected. This

consultation should extend beyond a discussion of acquiring the data and should detail what restrictions, if any, apply once the data is collected, including those impacting use (distribution) and retention.

The regulators are watching

Although these measures to achieve compliance may sound overly burdensome and problematic, regulatory scrutiny is such that this level of diligence is very necessary. For example, the French data authority Commission nationale de l'informatique et des libertis (CNIL) reiterated that:

subject to international treaties or accords and to applicable laws and regulations, all persons are prohibited from requesting, seeking or transferring, whether verbally, in writing or in any other form, any documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign criminal or administrative litigation procedures.¹

Additionally, although France may have a reputation in this area, it is not the only country or jurisdiction that is working on the issue. For example, the 2009 amendments to the German Federal Data Protection Act provide that German data protection authorities may order cessation of the collection or processing of data and assess fines of up to 300,000 euro for violations of local law. In addition, certain countries have enacted blocking statutes that explicitly prevent disclosure of certain categories of information and entail harsh criminal sanctions for its transfer abroad.

Finally, we may also consider the fairly recent case in China in which Peter Humphrey and his wife were sentenced to prison terms for various violations as part of the

activities they undertook in the operation of their due diligence business.² A Shanghai court convicted Mr. Humphrey and his wife, Yu Yingzeng, of illegally purchasing personal information on Chinese citizens. The trial, verdict, and sentencing were closely watched for their implications on the treatment of business data. Mr. Humphrey was sentenced to two-and-a-half years of incarceration and fined. The case involving foreign investigators, according to the Chinese government, highlights legal risks—such as violating privacy or state-secret laws—of holding or relaying personal information of Chinese citizens. Anxieties are already high among firms that specialize in or depend on due-diligence background checks on potential business partners and employees; for example, to avoid running afoul of corruption legislation like the U.S. Foreign Corrupt Practices Act.

The examples above represent three jurisdictions with three distinct different risks that can be faced by those conducting due diligence offshore. One should note these jurisdictions are all Top 10 economies, making them impossible to ignore.

Using service providers

Companies leveraging service providers to conduct third-party due diligence should ensure that such checks are conducted appropriately. Questions organizations might consider asking their third-party due-diligence providers include, but are not limited to:

- ▶ What measures does the service provider use to comply with data protection and privacy laws?
- ▶ What types of data does the service provider typically collect?
- ▶ Are there any limitations on the types of data the service provider can collect in certain jurisdictions due to lack of permissions?
- ▶ What does the service provider retain (e.g., with respect to non-public data sources)?
- ▶ What collected data may be transferred outside of collection jurisdiction?
- ▶ What protocols does the service provider observe in these transfer situations?

Companies should be prepared to offer due diligence service providers their legal frameworks for data protection and data privacy to help ensure consistent and appropriate delivery of services.

Piecing it together

Companies should give careful consideration to their data collection, review, and retention protocols as they relate to due diligence, particularly of foreign parties that are subject to data privacy laws and sanctions that can differ widely from those in the U.S. Establishing formal guidance concerning the use of third-party due diligence and monitoring the actual practice for policy compliance can be an effective way for companies to navigate compliance with relevant data privacy, anti-bribery, and corruption laws. Importantly, there is no one-size-fits-all, and different jurisdictions present different risks. The way to address the issue is to carefully navigate the requirements that will enable one to execute due diligence effectively without running afoul of another regulatory authority. As data privacy continues to evolve globally, companies should revisit their due-diligence program protocols to ensure on-going compliance. *

1. Katherine Morga: Data Privacy and the Foreign Corrupt Practices Act: A Study of Enforcement and Its Effect on Corporate Compliance in the Age Of Global Regulation. May 2013. Available at <http://bit.ly/scholarship-law>.
2. Carrie Gracie: "Investigator Peter Humphrey warns over GSK China ordeal" *BBC News*, July 10, 2015. Available at <http://bit.ly/GSK-China>

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by Sally March

Coming soon

Drago Kos, the chairman of the OECD’s Working Group on Bribery, gave us a preview of what to expect when he spoke at the SCCE CEI in October. Enforcement, enforcement, enforcement. And a focus on whistleblowers.



March

The Organisation of Economic Cooperation and Development is a “club” of 34 countries around the world, dedicated to economic development. The OECD Convention on Combating Bribery came into effect in 1999 and has been adopted by 41 countries, including Argentina, Brazil, Russia and South Africa. It is the reason we have the UK Bribery Act and anti-corruption laws in nearly every country in which we do business. The Working Group is comprised of representatives of each country and acts as a peer review (and peer pressure) group, checking what each country is doing and encouraging it to do more.

Many of us remember vividly the BAE deal to sell fighter jets to Saudi Arabia and the allegations of corruption involving a Saudi prince. The Serious Fraud Office (SFO) in the UK dropped its investigation under intense pressure from the British and Saudi governments. The U.S. DoJ stepped in, and BAE pled guilty to charges of false accounting and making false statements in connection with the deal. To put it mildly, the U.K. had egg on its face, particularly with the U.S. and other OECD members. Parliament adopted the UK Bribery Act the following year.

Since then, the Working Group on Bribery has been quietly applying pressure behind the scenes to encourage every member state

to step up its investigations and prosecutions of bribery cases. Mr. Kos and Chuck Duross, a former US representative to the Working Group, tell us that sharing of information among national agencies is constantly improving. Witness the Alstom case which began with an investigation in Switzerland and has led to enforcement action in the U.S. and U.K., HP in Germany, Yarra in Norway. Stay tuned. The Working Group seems to be getting real traction.

On average, the bribes equaled nearly 11% of the total value of a transaction and 34.5% of profits.

It also published a report on foreign bribery that may make interesting reading for compliance officers. In the majority of cases, bribes were paid to obtain public procurement contracts. The next most frequent were bribes to customs officials. On average, the bribes equaled nearly 11% of the total value of a transaction and 34.5% of profits. As someone once said of Siemens, if you’re paying that much in bribes, you need a better business model. And if your management tells you they don’t need training (“Why don’t you focus on the people three and four levels down?”), tell them that in 41% of cases, bribes were paid or approved by senior management, not infrequently by the CEO. *

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by MaryEllen O'Neill, JD, CCEP, CSSGB

Contracting and Compliance: Every business needs a contracting policy

- » Every business must at some point procure goods or services from another business.
- » Contracting is fraught with legal and financial risks.
- » A business must be able to clearly and accurately detail what it wants/needs before going to market.
- » A good contracting policy should cover the entire lifecycle of a contract.
- » A successful contracting process is directly related to the amount of effort put into the process.

Given the fact that no two businesses are exactly alike, even if they are in the same industry, it would be hard to come up with a comprehensive list of policies every business must have. However, every business, no matter its size or type, must go to the marketplace to procure products or services at some time, and in so doing enters into contracts, a process which is rife with potential issues and difficulties. If the business is a government contractor, the issues and potential pitfalls increase tenfold. Therefore, in addition to a code of conduct, a good contracting policy is a must for every business. This policy should address every stage in the contracting lifecycle, from the identification of the need until the end of the contract. A good contracting policy is essential to assuring sound legal contracting practices within a business.

The size and nature of a business will govern the details of its contracting policy. Below are suggested elements for a good contracting policy.

Initiation/RFP

The first concept a good contracting policy should address is when a contract is needed for the purchase of services and goods. A business's risk tolerance will help determine whether a contract is required for every purchase, or if a contract will be required for certain types of purchases and/or purchases over a particular dollar threshold. For example, a business might determine that all purchases of goods in excess of \$10,000 require a contract. It might also determine that all purchases of services, such as consulting or temporary employment agencies, etc., require a contract regardless of the dollar amount.

After delineating which purchases require contracts, the next point a policy should address is how to initiate the contracting process once the identification of the need is made. A business should clearly determine and detail what it wants before it goes to market. This step is often accomplished with a Request for Proposal (RFP). A good RFP details exactly what the

business is looking for, as well as when and how it wants the goods or services delivered. Clearly and accurately detailing the “what, when, and how” is critical to actually receiving the desired end result. Vendors will respond to the information provided in the RFP. If a business asks for the wrong product/service to be provided at the wrong place, in the wrong manner, or at the wrong time, then that is what it will get. Junk in equals junk out. The amount of time and effort spent clearly and accurately detailing in the RFP what is required is reflected in the responses to the RFP and the success of the contracting process.

Once the RFP completed, it is ready to be sent to vendors. A contracting policy should provide guidelines for how the RFP should be sent out, and the minimum number of competitive vendors it will be sent to. The policy should also address how the business will respond to questions or issues raised by the vendors in this initial stage. Once the responses are received, they have to be evaluated. The contracting policy should outline the requirements for evaluating the vendors’ responses. The nature and complexity of a business and the procured products and services should be a determining factor in the development of these requirements.

Contract review prior to execution

Once a vendor is selected, the next step is to negotiate the contract. Assuring a contract

protects all of a company’s interests, limits its liabilities, and is in compliance with the company policies as well as with laws and regulations, is not a one-person job. There should be several subject matter experts (SMEs) who review and sign-off on a contract before it is executed, and a good contracting policy will recognize this. The actual cost of a contract should not be the determining factor of who reviews a contract; the cost of a contract’s failure or the cost if problems arise are often far higher than the initial contract cost. Many issues with a contract can be identified and remedied before a contract is signed, if it is reviewed appropriately.

There are several different SMEs whose review of the contract should be in the contract review process.

The business unit requiring the purchase

The business unit that requires the purchase is the only group that truly knows what it wants, when, and how it wants the product or service. This unit has to review the contract to make sure it is getting exactly what it wants. A business unit should not be allowed to identify a need and a budget, then walk away, only to come back later to say the contract does not provide them with what they wanted. It is easier and cheaper to negotiate what you want in a contract before it is signed. It will almost always cost more to amend the contract to change what, when, or how you want your product or service.

Once a vendor is selected, the next step is to negotiate the contract. Assuring a contract protects all of a company’s interests, limits its liabilities, and is in compliance with the company policies as well as with laws and regulations, is not a one-person job.

Legal

Every business has standard contracting legal provisions; those lines in the sand they have drawn to limit their liability if something goes wrong. So obviously, when two businesses come together in the contracting process, those drawn lines are going to be pushed around a bit. Does the business care if a dispute over the contract is heard in one state's court system versus another? Yes. The location can make a big difference if it results in one party having a "home court advantage," or if a state's previous court rulings would favor one party, or if the court system lacks experience with the contract subject matter. It may make a difference if it simply means the business will have to travel across country to argue a dispute. Similarly, it makes a big difference whether disputes are resolved through litigation or through binding arbitration. If binding arbitration is used, how many arbitrators will be on the panel and who appoints them? What about the limits on liability—where should they be placed? These and so many other legal liability provisions should be reviewed by a lawyer.

Finance/Tax

All purchases have a financial impact and the larger the purchase, the larger the implication. Given this, someone in the Finance department should be involved in

the review of a contract before a contract is finalized.

Risk

Someone in the business should also review the contract to see how it fits within the company's risk tolerance profile. Does the contract contain a provision that requires the vendor to maintain insurance? If yes, are the required insurance policy types applicable to the contract subject matter? Are the

insurance policy limits sufficient in the event of an issue with the product or service?

IT

Regardless of how sincerely a business unit may believe it has its own IT "experts" or has its own IT "special needs," all contracts that touch IT in any way (e.g., off-the-shelf software, cloud applications,

specially created applications, hardware) should be reviewed by the IT department to determine how the proposed purchase fits within the business's overall IT structure, strategy, security practices, and to assure a consistent approach to building and maintaining an IT environment. The IT department may be able to alert a purchaser that the product or services are already being provided in the same or similar manner in another business unit, and instead of entering into a new contract, all that is required is to amend an existing agreement to expand the provided services. Too often multiple departments enter into multiple licenses

The IT department may be able to alert a purchaser that the product or services are already being provided in the same or similar manner in another business unit, and instead of entering into a new contract, all that is required is to amend an existing agreement to expand the provided services.

for similar products, because there was no cohesive oversight, or there was a failure to follow the oversight requirements. Because the contracts were negotiated separately, the end result, is that businesses wind up with different legal liabilities and obligations, and end up paying more for the various licenses than it would have had it entered into one enterprise contract.

Compliance

A multitude of different external and internal compliance matters should be reviewed for by the Compliance department before a contract is signed. Some potential basic issues are: Does entering into the contract breach any of the business's policies? Do any

of the business's policies or processes have to be changed once the new product or service is implemented? Is the proposed contract in conflict with other contractual or business arrangements? Will the contract create an issue with regulatory authorities? Are there employee or customer privacy concerns that need to be reviewed and addressed? Are there security issues? Given the numerous potential issues, a business should consider bringing in the Compliance department at the very beginning of the contracting process and not just in the final review stages.

Other review

Depending on the contract, other departments may be called upon to provide their expertise. For example, HR may be called upon if

the contract is going to impact employees or retirees.

Contract oversight

A contracting policy should not end with a contract's execution. The policy should have provisions pertaining to contract maintenance, audit, and termination. Contract management/

The policy should have provisions pertaining to contract maintenance, audit, and termination. Contract management/oversight (from identifying the need through contract execution, into implementation, and through termination) is managed by various offices within businesses.

oversight (from identifying the need through contract execution, into implementation, and through termination) is managed by various offices within businesses. Some companies allow each business unit to manage its own procurement process, but other companies have a separate purchasing business unit to oversee and manage contracting

and contracts for the entire company.

Regardless of where the responsibility lies, it is important to make sure not only that the product or service contracted for is delivered, but that the terms of the contract are being adhered to. A good contracting policy should provide for some sort of audit of at least a portion of current contracts each year to make sure the terms are being followed.

Contract termination and post-contract termination disposition

Finally, a contracting policy should address what happens to the contract's documents once the contract is terminated, whether because it has been completed or for cause, including how long to retain the contractual record. This part of the policy may simply

refer to a company's document retention policy. If a retention policy does not exist, the contracting policy should include specific periods of time that contracts should be maintained. The retention period may vary depending on the contract subject matter, the reason for termination, as well as laws and regulations with which the business must comply.

Conclusion

Crafting a contracting policy may be difficult, because a good contracting policy by its nature is complex; it must address so many different

issues in a manner that satisfies all of a business's contracting requirements and needs appropriately. However, taking the time and effort to create a policy that addresses your company's contracting needs and risks will help prevent many contracting issues later. *

The views expressed herein are the author's own and are not meant to represent those of any other individual, organization, or company.

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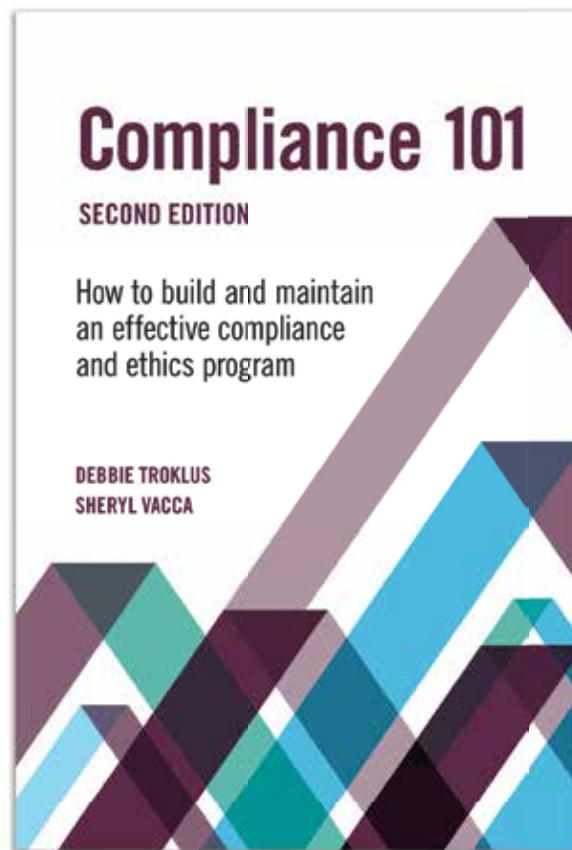
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by Jason L. Lunday

Engaging leadership in Ethics and Compliance, Part 3: Fostering leadership actions

- » Having a clear understanding of why leaders may not actively reinforce a compliant culture, ethics and compliance (E&C) staff can help leaders take actions that set the right tone for their subordinates.
- » E&C staff can provide leadership with assistance and resources to demonstrate their commitment, actively communicate about it, and support the overall ethics and compliance management system.
- » E&C staff also can guide leaders with their efforts to reinforce their own subordinate leaders' responsibilities down to front-line managers.
- » E&C staff needs to regularly gather data on leadership's efforts at reinforcing ethics and compliance to identify what does and does not work and the challenges leaders continue to face.
- » Using outcomes from this data collection, E&C staff can continue to provide leadership with updated tools and resources to help them more effectively reinforce ethics and compliance.

Parts 1 and 2 of this series on engaging leadership in ethics and compliance focused on why leaders may be reluctant to address ethics and compliance and how the E&C staff can effectively engage leaders in this mission. This article discusses how E&C staff can help leaders to take specific actions that support those goals.

Once ethics and compliance (E&C) staff have made a case to leaders for the importance of ethics and compliance and engaged them through learning about their styles, priorities, and needs, the real work begins in getting leadership to reinforce ethics and compliance. (Note: For this article, I use the terms "ethics and compliance" but in any company, other terms may resonate better, such as integrity, responsible conduct, responsible

business, or another term.) Such efforts take an organization a long way toward creating and sustaining a strong leadership tone at all levels in support of a robust ethical culture. And although E&C staff can tell leaders what they need to do and even get them to commit to take these steps, without the guidance, tools, and resources to actually take action, leaders' good intentions likely will dissipate or outright fail.

An important hurdle to help leadership overcome is the mistaken perception of the required time commitment. Even leaders who support E&C goals may be reluctant to devote much time, given other pressing priorities. This is short-term thinking. Festering, unaddressed issues likely will balloon into larger ethics and compliance



Lunday

failures, which most assuredly will occupy significant time to correct. An ounce of prevention most certainly is worth a pound of cure. Leaders will need to address these issues anyway, and reinforcing E&C issues upfront typically involves much less time and effort than after simple questions or concerns turn into major problems. In fact, the basics of E&C reinforcement do not need to be time consuming at all; upfront reinforcement should not involve substantial time, but rather involves using minimally incremental time alongside other leadership activities.

E&C staff first needs to help leaders recognize that ethics and compliance leadership involves important competencies and skills. Because of the profound influence that a leader has over his/her subordinates and other junior staff, a leader must set a tone of responsible conduct for staff. The E&C function needs to help leadership develop and demonstrate the following key skills, including:

Walk the walk

Employees may listen to what leaders say, but they really watch what leaders do and take their cues from observed behaviors. Nothing undermines E&C objectives faster than a manager saying one thing and then doing the opposite. E&C staff needs to help leaders understand how to demonstrate responsible conduct that others will see.

Consistently and demonstrably act responsibly

Leaders need to avoid taking actions that others may interpret wrongly, such as taking shortcuts that may appear to violate standards of conduct. Instead, they should find responsible solutions that support both corporate priorities *and* standards of conduct. Leaders need to be explicit about their activities and, as warranted, take the time to clarify their actions to staff to help them understand.

Nothing undermines E&C objectives faster than a manager saying one thing and then doing the opposite. E&C staff needs to help leaders understand how to demonstrate responsible conduct that others will see.

Seek guidance themselves

At times, *all* individuals need assistance regarding E&C issues; this is how we develop as professionals. An important hallmark of leaders is when they know they benefit from others' help; it is also an important lesson to convey to

subordinates. What's more, leaders should provide examples of when they sought guidance, such as from Legal, Human Resources, E&C staff, or even their own manager. Doing so makes it acceptable to subordinates to do the same.

Raise questions about past or prospective business practices

This is especially a job of leaders—to find and solve problems to help the company avoid damage and improve operations. Even when encouraged to do so, employees still look to leadership to see if it is acceptable to raise concerns. A skilled leader does not jump immediately to accusations, but rather

raises questions and concerns thoughtfully to identify a problem and its root cause and investigate possible solutions.

Talk the talk

Leaders need to regularly and effectively communicate about ethics and compliance—their actions need to be reinforced by their words. This communication accomplishes multiple objectives: It reinforces senior leadership's commitment, it balances the *what* to accomplish with *how* to accomplish it, it keeps E&C at the front of employees' minds, it builds trust between leaders and their subordinates, and it provides "permission" for staff also to talk about these issues themselves. E&C staff can guide leaders regarding what, when, and how to talk about ethics and compliance.

What to talk about

Leaders should both communicate about and discuss ethics and compliance issues by building their skills with the following:

- ▶ **Talk about E&C benefits and commitments.** Discuss the company's and the leader's own commitments to corporate values and E&C objectives and the benefits that come from this commitment. Tie E&C benefits to overarching corporate objectives and priorities, such as increased customer loyalty, greater employee discretionary effort, and improved relations with other stakeholders.
- ▶ **Discuss past and prospective E&C challenges.** These challenges are a natural part of any job, so all employees should expect to encounter them. Leaders should make employees comfortable with identifying, assessing, and resolving these issues. A leader should regularly raise examples of past challenges that he/she and other leaders confronted

and possibly may face going forward. Leaders can talk about the following to encourage staff to learn from their or others' experiences:

- a. Past company experiences that either reinforced responsible conduct or showed the pitfalls of not acting responsibly. (In certain cases, it will be helpful to first check with the Legal department before discussing sensitive topics.)
 - b. Their own or other leaders' past experiences at other companies.
 - c. Competitors' or other companies' experiences.
 - d. Experiences of family, friends, or colleagues at other companies.
- ▶ **Talk about one's own decision-making process.** Leaders also should share with subordinates how they make responsible decisions, their intentions in doing so, and what guided them to this decision (e.g., corporate values, code of conduct).
 - ▶ **Discuss E&C resources.** In addition to leaders using resources themselves, leaders should let staff know it is not only all right to use these resources, but it is expected that they do so—that the company's and their own success depends on it. Convey that no one can or is expected to have all the answers; what is important is that staff can identify when to seek out needed help. Leaders can talk about their own experiences in how and why they sought help or the problems that occurred when they did not and should have done so. Leaders should let staff know using resources is a strength that shows mastery of resource management, not a sign of weakness. These discussions also can help staff to remain vigilant for emerging issues if they know what their superiors have encountered and the related ramifications.

When to talk about it

Leaders should be talking about the above topics everywhere and anywhere they talk about business so that employees see E&C issues are integral to business strategies and operations. What is important is to link E&C with other business goals and priorities to convey that leadership sees the two as complementary. Leaders should raise E&C issues regularly at staff meetings, in one-on-one meetings with staff when setting performance objectives, when discussing project objectives and plans, when reviewing operational results and assessments, and in performance evaluation discussions. It is easier to raise these issues as they are emerging, rather than after they become full-blown problems.

How to talk about it

Leaders have many options for how to talk about these E&C issues. They can share personal experiences with current or former employers, whether they were successful outcomes or “lessons learned.” Leaders can pass down senior leadership’s stories. Leaders might share stories of friends and professional colleagues (assuming they have permission from the original storyteller). Leaders also might ask staff questions about how they would act responsibly in a given situation, inquire about options, and the reasons that support the options (this is less risky than asking for their final answer).

Recognize the conduct of others

Employees are motivated when they are recognized by their leaders. Recognizing them also helps to turn positive actions into ongoing behaviors. Leaders can recognize others’ responsible decisions and actions when they occur, such as:

- ▶ Complimenting colleagues (e.g., in person, in a memo to their manager).

- ▶ Recognizing subordinates or other junior employees through performance reviews, awards, or recognition in a staff meeting.
- ▶ Communicating about responsible employees and actions up the chain; let your senior leaders know who is upholding the company’s commitment to E&C.
- ▶ Being honest and complete in performance evaluations. If the evaluation does not have a section for ethics and compliance, consider commenting on this issue under the premise that it is an essential skill for company employees as outlined in the company’s code of conduct. Lobby the company to add a section on ethics and compliance to highlight it as an important skill.

Likewise, employees’ irresponsible action also should be identified, albeit in a different way. This should be done with proper consideration, especially given any needed confidentiality issues. If the action was unintended, then the employee should be corrected. If intentional, the employee should be reprimanded and corrected. Human Resources and E&C staff can help leaders with how to handle these situations constructively, so that the employee is properly corrected, the appropriate message is conveyed, and the organization’s risk is mitigated.

As with anything that is managed, leaders can track their progress. They can record how often they compliment subordinates, whether verbally, through a department memo, or a note to the employee’s personnel file. They also can institute their own annual performance step of evaluating an employee on their commitment to E&C goals.

Provide guidance for questions and concerns

It is not enough to provide guidance to staff on ethics and compliance issues when they

ask—leaders need to seek out opportunities to provide this guidance. At any one time, it is unlikely that everything is operating smoothly. It is more likely that some staff are not asking questions or communicating concerns or problems that are festering that can lead to bigger problems down the road—which a leader does not want to learn about the hard way. It requires effort, but is far better to learn of challenges early on, when they can be evaluated, prioritized, and appropriately resolved. So, a leader needs to be constantly vigilant and can do so through these approaches:

- ▶ Communicate that your door is open for questions and concerns—and mean it.
- ▶ At meetings, query staff about emerging problems. Encourage any reluctant staff to talk with you after the meeting.
- ▶ During one-on-one meetings with staff, solicit questions or concerns when individuals may be more likely to talk in private about sensitive issues.
- ▶ In staff memos, again solicit questions or concerns about E&C issues that could undermine successful operations.
- ▶ Tell stories that recognize staff who have raised questions or concerns that helped to address problems early on before they became bigger problems.

When subordinates do ask for guidance, help them to walk through a problem assessment and decision-making process. This helps to make them better decision makers. Help them by asking:

- ▶ What information can they reference to help them?
- ▶ What issues should factor into their decision?
- ▶ In this situation, what responsibilities does the company have, and to whom?
- ▶ What are the possible consequences of each decision?

- ▶ What alternatives are available?
- ▶ What is likely the best choice?
- ▶ Who else might they check with regarding their intended response to the issue?

Also, leaders should support staff who raise concerns by backing their actions. If a leader agrees with his/her staff's concerns, the leader has the ability to add muscle to the issue through their leadership credibility.

A 2013 Ethics Resource Center nationwide survey found that 82% of employees' reports of suspected misconduct are made to their manager.¹ Given this fact, leaders should be trained specifically how to respond to reports of suspected misconduct and not to attempt to bootstrap a response. E&C staff should specifically educate leaders on how to receive these reports and follow up with the employees who made reports. This is a sensitive topic that places a company at higher liability if not properly handled.

Support the E&C system

Leaders should be supporting corporate systems designed to foster ethics and compliance. These include policies, procedures, and resources. To support these systems, leaders can:

- ▶ Identify E&C training relevant to subordinates, and encourage staff to take required training; recommend voluntary training as needed.
- ▶ Provide guidance and reporting to assist your employees in applying the values, code of conduct, policies, and other related expectations.
- ▶ Monitor employees' activities for signs of needed assistance with questions or problems.
- ▶ Use performance evaluations to review subordinates' responsible or irresponsible conduct.

Supporting the system also means using leadership and management skills to seek changes to the system when it does not serve the organization's goals. No system is perfect; it is likely that the ethics and compliance staff wants leaders' input to help make E&C activities more relevant to and effective as part of the business's core operations and, hence, more successful.

Guide subordinate leaders

A longstanding problem in E&C management involves leaders who embrace the E&C message, but do not actively flow it down to their own subordinate leaders. In past years, "tone at the top" received active attention as a method to reinforce the E&C management, followed in successive years by "tone in the middle" and, more recently, "tone at the bottom" of the leadership hierarchy. All leaders need education and guidance to demonstrate ethics and compliance leadership. Too often the tone at the top does not cascade down, because senior leaders do not think to foster and support their subordinate leaders' own efforts. At the same time, while leaders at any level should expect it from their superiors, they should not wait for their seniors to reinforce ethics and compliance goals to them. Each leader is responsible for setting the proper tone in his/her work group. And any lack of senior support should be called out.

E&C ongoing support

Educating leadership on the above competencies is an essential starting point, but the work is not done there. After a flurry of effort at applying new skills, leadership's actions likely will diminish over time, which sends the wrong message to employees. E&C staff should manage against this risk by working with leadership to provide a steady level of reinforcement over time. E&C needs to support leadership's efforts by:

- ▶ Regularly soliciting for feedback from leadership and other employees to identify what is and is not working. Leaders continue to face challenges in demonstrating a commitment to ethics and compliance, in communicating with employees about it, and in determining what more they need.
- ▶ Regularly evaluating leadership's efforts, including metrics that demonstrate successes and weaknesses, perhaps segmented by level, business unit, function, and even individual leaders.

These above efforts should feed into:

- ▶ Hosting regular leadership training, such as periodic manager training, components embedded in functional training, and training for promoted or new leaders on the need for leadership engagement, outcomes, and techniques.
- ▶ Compiling and regularly communicating best practices that share how leaders with the best demonstrated skills reinforce ethics and compliance.
- ▶ Regularly reminding leaders about E&C reinforcement and communicating to them about company E&C successes, best practices, and emerging challenges they can address and other E&C messaging. These communications can be provided through leadership memos and talks, internal news items, newsletters, blogs on emerging concerns to watch for, internal and external best practices, corporate resources updates, new techniques, and recognition of leaders for effective E&C reinforcement.

Quick start actions

To get started while planning or considering a broad-based effort, E&C staff can take some immediate steps, such as:

- ▶ Communicating this article’s callout boxes (below) to leaders to help them talk about E&C issues.
- ▶ Asking leaders to come up with: (a) one personal story, and (b) a story they heard from someone else that reinforce the E&C message and that they can commit to communicating in the coming days or weeks.
- ▶ Asking leaders to reflect on their own career when someone senior to them reinforced a commitment to ethics and compliance, and then asking them how they can incorporate the same in their own efforts.

can further empower them to effectively reinforce ethics and compliance by guiding the opportunities and types of messages. Coordination of these efforts among leadership and E&C staff leverages the value of both groups to provide stronger reinforcement than either one alone can provide; it employs the leader’s credibility and style with E&C staff’s knowledge and strategic perspective. Helping leadership to reinforce E&C is among the most important initiatives for E&C staff, because it harnesses leadership’s credibility, authenticity, and influence, broadening the number of people advocating for E&C objectives. *

1. Ethics Research Center: 2013 National Business Ethics Survey of the U.S. Workforce, 2014. Available at <http://bit.ly/ethical-leadership-eci>

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Conclusion

Leaders are busy people with many competencies and skills to master. E&C staff

Short, Compelling Leadership Questions

Leaders can promote a commitment to E&C and prompt employee thinking about E&C issues by asking questions like the following:

- How do our corporate values or the code of conduct apply to this issue?
- Does your professional code of conduct apply here and, if so, how?
- What resources does the company provide to help us to resolve issues like this?
- How do we demonstrate our integrity in addressing this customer expectation?
- How do we communicate our commitment to responsible business when working with this supplier (or other third party)?
- Do any laws or regulations apply to us in pursuing this line of business?

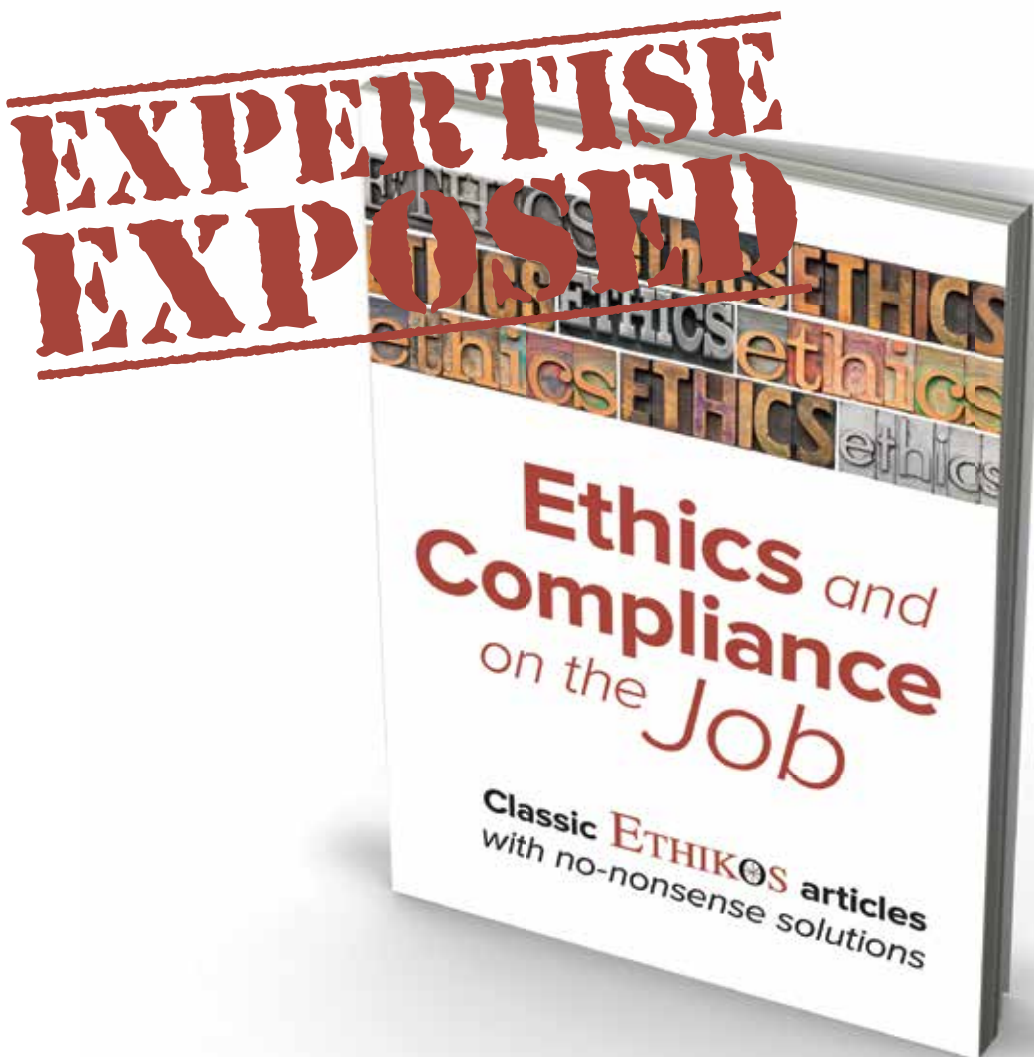
Short, Compelling Leadership Messages

Leadership can reinforce an E&C commitment by following operational communications with these types of messages:

- Remember, as we move forward on this project, we are always guided by our corporate values and code of conduct in the work we do.
- In meeting this customer request, our reputation for integrity depends on how each of us demonstrates our corporate values and commitment to our standards of conduct.
- The quality of the products and services we provide are underscored by how well we exemplify our corporate values and high standards.

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by Timothy Hedley, PhD, CPA, CFF, CFE; and Ori Ben-Chorin, JD

Collecting and evaluating effective compliance program metrics

- » Organizations should seek to develop, collect, and measure creative multi-dimensional metrics.
- » Organizations should consider evaluating qualitative/subjective indicators, which can be helpful in evaluating so-called “soft” or “entity-wide” controls that do not lend themselves easily to quantitative analysis.
- » Forward-looking metrics can alert the organization as to future risks and are also important to collect and evaluate.
- » Organizations should seek to capture near-miss metrics and report on them to management and the board, and if called for, to regulators as well, because doing so will demonstrate that compliance controls are working.
- » Organizations can obtain deeper insights by comparing one standard metric against another.

As modern compliance programs grow in size, sophistication, and importance, their leaders are increasingly under pressure to demonstrate to management and the board the effectiveness



Hedley



Ben-Chorin

of such programs and their ability to prevent, detect, and respond to fraud, misconduct, and compliance violations. One of the key ways of evaluating program effectiveness is through collecting and assessing compliance program metrics, which is part and parcel of effective compliance program management, as noted by the Federal Sentencing Guidelines that instruct organizations to “... take reasonable steps to ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct.” However, in doing so, many compliance professionals often achieve limited

results, because they collect only basic metrics and forgo other, most sophisticated varieties.

This article provides insight into various types of metrics that organizations can collect and consider. The first are one-dimensional summary statistics, which provide only the most basic insight into program effectiveness. The second are key performance indicators, which are multi-dimensional and lead to greater insight into compliance program effectiveness. The third are forward-looking metrics, which can alert the organization as to future risk. The fourth and perhaps most intangible, are near-miss metrics, which attempt to quantify thwarted misconduct.

The importance of using effective metrics

Although most, if not all, institutional compliance officers are aware of the need to measure program effectiveness by using metrics, many collect and measure only a small number of basic, one-dimensional metrics. Such summary statistics may

include, for example, the number of calls to the organization’s employee hotline, number of investigations launched or closed, and the number of training courses completed. These basic and quantitative (also sometimes called backward looking) metrics, while certainly useful, do not typically inform management as to whether or not the organization is adequately managing risk and, as such, may not convey the full picture of program effectiveness. In fact, such metrics may be too simple.

Using multi-dimensional metrics

Measuring only the most basic quantitative/objective metrics may fail to inform management and the board as to whether the organization’s compliance program is effective. Instead, organizations should seek to develop, collect, and measure creative multi-dimensional metrics, as illustrated in Table 1.

Using qualitative/subjective metrics

Beyond the quantitative metrics of the type described above, organizations may also wish to consider evaluating qualitative/subjective indicators. Such metrics, while perhaps more difficult to gather, can be helpful in evaluating so-called “soft” or “entity-wide” controls that do not lend themselves easily to quantitative analysis. Qualitative indicators are most easily collected through fielding an internal

employee perception survey that seeks to understand employee perceptions, attitudes, and behaviors vis-à-vis key compliance program initiatives. Such a survey can measure employee perceptions in the following key areas, among others:

- ▶ Awareness of laws, regulations, and organizational standards
- ▶ Pressure to engage in misconduct to meet business objectives
- ▶ Effectiveness of communication and training efforts
- ▶ Propensity to raise concerns to management or through a hotline
- ▶ Consistency of discipline and accountability, and
- ▶ Commitment to integrity exhibited by local leaders (tone at the top) and managers (tone in the middle)

Table 1: Basic vs. multi-dimensional metrics

One-Dimensional Metric	Multi-Dimensional Metrics	
Number of calls to the Ethics hotline	Nature of allegation (e.g., by type of allegation)	Number of allegations made anonymously versus self-identified personnel.
	Number of allegations of non-compliance/misconduct (per risk area/per quarter/per business unit/per geographic location, etc).	Number of allegations per reporting mechanism (e.g., number of reports to hotline/webline, legal function, compliance function, supervisor/manager, etc).
	Number of allegations resulting in an internal investigation (e.g., per quarter, as well as per operating unit, geographic location, per department, per line of business, etc).	Number of days to respond to an allegation for each reporting mechanism (e.g., hotline, webline, telephone, verbal to supervisor/manager, etc).

Fielding an employee integrity survey can help compliance professionals identify and understand compliance program strengths and weaknesses that would otherwise prove difficult to detect. Importantly, such a survey can also provide management with the ability to benchmark the effectiveness

of compliance initiatives over time, through re-administration of the survey.

Using forward-looking metrics

Forward-looking metrics can alert the organization as to *future* risks and as such are also important to collect and evaluate. For example, after training employees on compliance with the requirements of the U.S. Foreign Corrupt Practices Act (FCPA), many organizations track as a metric the number of employees who completed the training and/or have passed/failed its comprehension test. However, what typically does not get tracked is arguably even more interesting.

One indicator of potential future risk is the Intranet “click rate” (i.e., web traffic) on the organization’s own internally-posted policies and procedures related to compliance with the FCPA. If the click rate on the FCPA policy went up substantially more than the click rate on other policies employees were trained on, such data may help demonstrate the effectiveness of the training (i.e., training caused more employees to review the policy). Furthermore, the decision by a larger (perhaps unanticipated) number of employees to review the FCPA policy may indicate that FCPA is perceived as a higher risk for the organization. Similarly, a higher click rate in one geographical location over another may foreshadow an enhanced

need for training or perhaps a previously unknown risk in the particular location.

Moreover, the organization may seek to evaluate as a metric how fast training click-rate indicators are trending. For example, a 99% FCPA training completion rate may have been achieved, but if it took 90 days and multiple email reminders to reach that rate, perhaps it’s fair to say that employees were tuning out the training and treating it as unimportant. Conversely, if 99% of the training was completed in 5 days, perhaps the training was too short or simplistic and should be revamped. Forward-looking metrics are becoming more important to track, and Table 2 below provides a number of additional examples of such metrics.

Table 2: Additional “Forward Looking” Metrics

<p>Increase in vendor dependencies may suggest risk from diminished control.</p> <p>Increase in the number of customer interaction channels may suggest a greater future risk.</p> <p>Increase in the number of regulatory changes may suggest a greater risk due to increased complexity.</p>	<p>Increasing trend in negative customer survey results may suggest increasing risk in the corresponding business.</p> <p>Aggressive profitability targets compared to past performance may suggest increasing risk from actions needed to meet goals.</p>	<p>Missed remediation timelines may suggest risk management and resource issues.</p> <p>Declining risk-specific training events may suggest an increased risk resulting from lack of technical compliance knowledge.</p> <p>Declining average years of experience for employees in key business units may suggest diminishing risk-specific technical compliance skills.</p>
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Using near-miss metrics

Organizations can also collect and evaluate near-miss metrics that are often even more challenging to capture. For example, if the compliance program was able to thwart misconduct before it even happened, is that an indication that the program is working properly? If so, how can one capture in metric form the fact that misconduct was thwarted? There are various methods of

capturing such data, for example, by tallying the number of calls to the organization's hotline (or perhaps customer complaints) in a key compliance risk area, both before and after risk mitigation activities occurred. If the number of calls was reduced substantially after mitigation efforts, this may be a good indicator that potential misconduct may have been averted.

Organizations should seek to capture their near miss metrics and report on them to management and the board, and if called for, to regulators as well, because these further support the suggestion that compliance controls are working as intended.

Trend analysis

Finally, it is always a good practice to compare a standard metric against another to obtain a deeper insight. For example, compliance staff can measure the rate of employee hotline calls on FCPA issues in one region of the country versus another. The staff can also compare the rate of calls in the first quarter with call rates in the second quarter.

Moreover, the rate of calls on a particular risk area can be compared both before and after the organization conducts its related employee training event. Increased calls to the hotline from one region can highlight a potential issue in that region, such as lax enforcement of controls. In much the same way, an increasing trend of calls related to the risk of FCPA immediately following training may indicate that the training was,

in fact, effective in educating employees about the compliance with this risk area.

Conclusion

Organizations that collect and assess high-quality compliance program metrics can obtain great insight into the effectiveness of compliance controls. Many organizations collect one-dimensional summary statistics

which provide only the most basic insight into program effectiveness. Such organizations should also collect multi-dimensional metrics which can lead to greater insight into control effectiveness; forward-

looking metrics, which can alert the organization as to future risk; as well as more intangible near-miss metrics, which may allow compliance officers to quantify thwarted misconduct. *

This article represents the views of the authors only, and the information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

1. United States Sentencing Commission: Federal Sentencing Guidelines for Organizations, Chapter 8, §8B2.1. Effective Compliance and Ethics Program. Available at: <http://bit.ly/guidelines-manual>.

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Organizations that collect and assess high-quality compliance program metrics can obtain great insight into the effectiveness of compliance controls.



by Marcia Boaventura, CCEP-I

How I built a Compliance department with no previous experience

- » We have chosen to have a very small department, where only myself and an assistant work. To complete the team, we can count on other partners with expertise in this field.
- » We have implemented controls to only effect business partnerships with companies that value ethical and transparent conduct in business as much as we do.
- » We celebrated Corporate Compliance & Ethics Week for the second year, with the theme “We are listening to you” and distribution of headphones to all employees.
- » During the trajectory for Compliance department implementation, the Brazilian Anticorruption Law went into effect.
- » Not everything in Brazil is about scandal and corruption. We do have honest companies that perform their actions with ethics and transparency.

I have been working for 15 years in a Brazilian company named United Medical, now part of Biotoscana’s Group in Latin America. It is a small company, taking into account its number of employees; we have around 100 people working here. We work with a portfolio of innovative high-technology products that are developed by world leaders in research and development. During these 15 years, I had already worked in the major areas of the company, such as marketing, sales, controllership, and event management. I have International Business Management degree that is very far from the legal training that people working as compliance officers usually have.



Boaventura

In the beginning

Our suppliers are American and European companies and, since the beginning, I have had Foreign Corrupt Practices Act (FCPA) and UK Bribery Act training in order to be able to work within the required ethical precepts. In the beginning, we had no Code of Conduct and Ethics or any other written policies, but we did know how we should act when conducting our business. I had already gotten knowledge of the several fields covered by the company, many times I was the person at the front line during audits performed by these business partners, and this gave me a very important expertise in this field.

Around 2013, the board of directors called to invite me to assume the command of the implementation of the company’s

Compliance department. The first thing that I said was, “But I do not have a Legal background.” They answered, “We do not believe that it is a key qualification for this job, and you have something that is much better. You know about the company and the market, you have an excellent relationship with our international suppliers, and we believe that you can develop a great job as compliance officer. We would like to invest in you in order to provide you all the knowledge that is necessary to work in this field.” And that is how it happened. I took a Compliance and Corporate Governance course at a university in São Paulo. I attended several events and meetings related to this field, and then I got the most valuable recognition that I have—the Certified Compliance & Ethics Professional—International (CCEP-I), just after ending the Basic Compliance & Ethics Academy held here in Brazil by the SCCE.

We have chosen to have a very small Compliance department, where only myself and an assistant work, and to complete the team, we can count on other partners with expertise in this field—a legal assessor, one person for risk monitoring, and we also have the Wave Compliance (<http://www.compliancewave.com/>) that provides a library including several training materials.

During the trajectory for Compliance department implementation, the Brazilian Anticorruption Law went into effect. The judiciary and the inspection bodies

started to reinforce the need for ethical actions; even important politicians from the government have been condemned, and nowadays, large companies and their managers are being investigated. If the corruption fight is a priority, the Brazilian Anticorruption Law came to accomplish it.

How far we've come

Nowadays, almost two years later, our Code of Conduct and Ethics is being released

Nowadays, almost two years later, our Code of Conduct and Ethics is being released for the second time, with new updates. We have performed classroom and online training, proofing the attendance of employees.

for the second time, with new updates. We have performed classroom and online training, proofing the attendance of employees. We have, among others, a specific policy for relationships with third parties, and we have implemented

controls to only effect business partnerships with companies that value having an ethical and transparent conduct in business as much as we do. Furthermore, we have constituted a Compliance Committee that meets every quarter to assess complaints and potential risks, as well as to review the planning and evolution of the Compliance field.

We just celebrated Corporate Compliance & Ethics Week for the second year. The theme “We are listening to you” was suggested by the SCCE, and we are distributing headphones to all employees. During this week, we literally dress up the company with Compliance garb, when even the elevators receive stickers

containing the Corporate Compliance & Ethics Week message, and we perform several activities. The purpose is to create an environment that is favorable for the inclusion of all collaborators in the discussion and to reinforce the knowledge of our Code of Conduct & Ethics, the company's culture, and the relevance of compliance in our business. This action does not go unnoticed by external visitors to our company during this week.

In the beginning of this year, I started my Business Law MBA, not because it is a market requirement, but because I want to be continuously prepared to develop in my job. This year I attended for the first time the 14th Annual Compliance &

Ethics Institute in Las Vegas. I know that I still have a lot to learn, that the journey is long, and that the learning has to be continuous. Being a compliance officer is a job that has to be built day by day, persistently gaining followers and replicators of the compliance culture. Many times the result is slow and almost unnoticeable, but whenever it does happen, it is rewarding.

I could not forget to mention the support I have gotten from the board of directors for the Compliance department creation, as well as their engagement in compliance actions that bring an ethical atmosphere in the working environment.

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The tone from the top is vital for successful compliance officer work.

We could confirm that we are on the right track when we recently were audited by one of our major American partners with more than 7,000 employees across six continents. That audit was able to recognize our evolution and serious commitment with the implementation of the Compliance department.

Looking forward

The example from the company where I work and from many others shows that not everything in Brazil is about scandal and corruption. We do have honest companies that perform their actions with ethics and transparency.

The fight against corruption is a process that starts with simple attitudes within each company; it does not matter what size it is. And, whenever the corruption is disclosed, exposed, and investigated, and the impunity is not accepted anymore, a more transparent and honest system can be created. This is the scenery that we are living with at this moment in our country, and I am very glad to have accepted this challenge and to have the opportunity of being part of this great change in my country! *

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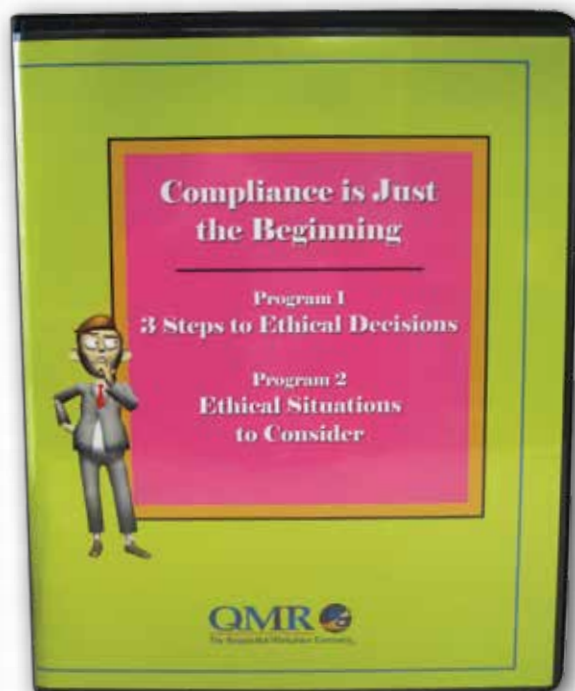
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by Thomas R. Fox

SEC enforcement actions against CCOs: Outlier or new trend?

- » The SEC is now prosecuting chief compliance officers (CCOs) personally.
- » The SEC itself cannot agree on the appropriate standard for prosecuting CCOs.
- » The prior standard for prosecution of CCOs was intentional or willful conduct.
- » The effect of prosecuting CCOs for anything less than egregious behavior will have a chilling effect.
- » The SEC may have inadvertently made the CCO's job much more difficult.

This past spring there were two Securities and Exchange Commission (SEC) enforcement actions involving claims against chief compliance officers (CCOs) that have rattled many in the Compliance



Fox

community. Both actions came out of the financial services sector and not healthcare compliance, anti-corruption compliance (such as under the Foreign Corrupt Practices Act [FCPA]), or some other area of compliance. They have nonetheless caused many in the Compliance community to wonder if the SEC has made a strategic shift to put more of an enforcement focus on CCOs. Scott Killingsworth, in a blog article entitled, "CCO Liability: Winds of Change at the SEC?"¹ went so far as to say that ... financial-services compliance officers are the "canaries in the coal mine" when it comes to personal liability risk.

"The winds may be changing. Poor performance may be replacing bad behavior as the threshold for SEC enforcement actions, and the result may be to hold compliance officers accountable for the misconduct of others.

The two enforcement actions were styled *Blackrock Advisors LLC and Bartholomew A. Battista* (Blackrock)² and *SFX Financial Advisory Management Enterprises, Inc. and Eugene S. Mason* (SFX).³

Blackrock

The Blackrock case involved an internal conflict of interest which led to a \$12 million fine paid by the company. The company had a conflict of interest policy. However, according to the Cease and Desist Order, the CCO liability turned on BlackRock's CCO; Battista was responsible for the design and implementation of BlackRock's written policies and procedures reasonably designed to prevent violations of the Advisers Act

and its rules. Battista knew and approved of numerous outside activities engaged in by BlackRock employees (including Rice), but did not recommend written policies and procedures to assess and monitor those outside activities and to disclose conflicts of interest to the funds' boards and to advisory clients. As such, Battista caused BlackRock's failure to adopt and implement these policies and procedures.

Bartholomew A. Battista was fined \$60,000 separately.

SFX

According to the SFX Cease and Desist Order, the company President, Brian Ourand, "misappropriated at least \$670,000 in assets from three client accounts." The company was ordered to pay a civil penalty of \$150,000. However, the SEC accused SFX CCO Eugene Mason of three general violations. First, Mason did not effectively implement "an existing compliance policy requiring that there be a review of 'cash flows in client accounts.'" Second Mason did not require an appropriate segregation of duties in that he did not guarantee that account cash flow reviews were done by someone *other than* the president. This caused the following statement in SFX's brochure to be untrue: "Client's cash account used specifically for bill paying is reviewed several times each week by senior management for accuracy and appropriateness." Finally, and perhaps most troubling, while CCO, Mason was in the midst of an internal investigation following the discovery of [the president's] misappropriation, the company did not

conduct an annual review of its compliance program. The SEC believed that "Mason was responsible for ensuring the annual review was completed and was negligent in failing to conduct the annual review."

Egregious misconduct and intent

Both of these enforcement actions would seem to contradict previous SEC public statements about enforcement actions involving CCOs. SEC Director of Enforcement, Andrew Ceresney, as a Keynote Speaker at Compliance Week 2014, noted there were general types

Both of these enforcement actions would seem to contradict previous SEC public statements about enforcement actions involving CCOs.

of CCO conduct which would draw SEC scrutiny, "when the Division believes legal or compliance personnel have affirmatively participated in the misconduct, when they have helped mislead regulators, or when they have clear responsibility

to implement compliance programs or policies and wholly failed to carry out that responsibility." It would seem that neither the Blackrock enforcement action nor the SFX matter met those three categories.

If this situation was not muddled enough, in a rare public statement, SEC Commissioner Daniel Gallagher issued a statement detailing his reasons for dissenting in both enforcement actions. He stated, in part:

Both settlements illustrate a Commission trend toward strict liability for CCOs under Rule 206(4)-7. Actions like these are undoubtedly sending a troubling message that CCOs should not take ownership of their firm's compliance policies and procedures, lest they be held accountable

for conduct that, under Rule 206(4)-7, is the responsibility of the adviser itself. Or worse, that CCOs should opt for less comprehensive policies and procedures with fewer specified compliance duties and responsibilities to avoid liability when the government plays Monday morning quarterback.⁴

Then SEC Commissioner Luis A. Aguilar issued his own statement, where he countered that:

I also do not believe that the two recently settled cases signify the beginning of some nefarious trend to use Rule 206(4)-7 to target CCOs. The facts involved in these cases—these very few cases—for violations of Rule 206(4)-7 demonstrate egregious misconduct that included the following:

- ▶ Failure to implement policies and procedures to prevent an employee from misappropriating client accounts;
- ▶ Failure to conduct an annual review and making a material misstatement in Form ADV;
- ▶ Failure to design written policies and procedures for outside business activities;
- ▶ Failure to report a conflict of interest; and
- ▶ Aiding and abetting an investment adviser's failure to adopt and implement written compliance policies and procedures.⁵

Aguilar went on to state that:

the Commission has approached CCO cases very carefully, making sure that it strikes the right balance between encouraging CCOs to do their jobs competently, diligently, and in good faith, and bringing actions to punish and deter those that engage in egregious misconduct. In making this determination, the Commission

cautiously evaluates the facts and circumstances of each case, and considers many important factors such as fairness and equity.

Finally there were remarks by SEC Chairperson Mary Jo White made at the Compliance Outreach Program for Broker-Dealers in Washington DC on July 14, 2015 where she stated:

To be clear, it is not our intention to use our enforcement program to target compliance professionals. We have tremendous respect for the work that you do. You have a tough job in a complex industry where the stakes are extremely high. That being said, we must, of course, take enforcement action against compliance professionals if we see significant misconduct or failures by them. Being a CCO obviously does not provide immunity from liability, but neither should our enforcement actions be seen by conscientious and diligent compliance professionals as a threat. We do not bring cases based on second guessing compliance officers' good faith judgments, but rather when their actions or inactions cross a clear line that deserve sanction.⁶

White's remarks would seem to return the equilibrium back to the Ceresney standard, which he articulated in 2014, which appears to be one of intent, or at least willfulness. There must be some type of affirmative action by a CCO that would bring a SEC enforcement action.⁷

I asked Scott Killingsworth if he saw such intentional conduct with the SFX CCO, Mason. He responded, "No, in a common-sense use of the term, no. Did he affirmatively participate in the misconduct? Absolutely not. Did he help mislead authorities? No, he reported it to the

authorities. He investigated and reported it to the authorities. Then the third criteria in Ceresney's speech was, wholly failing to carry out your responsibility to implement compliance programs or policies. Well, [Mason] failed to carry out one policy effectively and that was reviewing this particular set of accounts and catching it. I don't think he met any of the criteria in Ceresney's speech, and so this feels like either a change in policy by the SEC or if it's not a change in policy, maybe there is some facts that we don't know." He went on to say that "If there are, if the facts are worse than what they put in the order, the SEC ought to come out and explain that to us and how that fits within what we thought was the SECs enforcement policy."

Summary

These two enforcement actions certainly bring SEC enforcement against CCOs into a different light. It is difficult in reading the Cease and Desist Orders to see how the inactions of the CCOs somehow rose to the intentional conduct standard articulated by Ceresney, or even the egregious standard that Commissioner Aguilar set out in his response to Commissioner Gallagher. Further, while these actions do not involve CCOs in a FCPA compliance program, a healthcare CCO, or someone else outside financial services sector subject to Rule 206(4)-7, clearly a precedent for enforcement actions against CCOs is now in place. If

The job of a CCO is difficult enough. If the SEC is going to now move to some type of strict liability standard for CCOs, that is a sea change—and one that I do not believe will foster much positive benefit going forward.

this is a change in enforcement priorities, the SEC needs to clearly state this to the Compliance community. If enforcement actions against CCOs meet the Ceresney standard for willfulness or the Aguilar formulation for egregious conduct, those standards need to be laid out with the facts which support those allegations as set out in the court filings, so that CCOs and companies can understand the basis for those enforcement actions.

The job of a CCO is difficult enough. If the SEC is going to now move to some type of strict liability standard for CCOs, that is a sea change—and one that I do not believe will foster much positive benefit going forward. *

1. Scott Killingsworth: "CCO Liability: Winds of Change at the SEC?" *Compliance and Ethics blog*, June 19, 2015. Available at <http://bit.ly/cco-liability>
2. *United States Before the SEC v. Blackrock Advisors LLC and Bartholomew A. Battista*. Available at <http://bit.ly/sec-blackrock>
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by Walter E. Johnson, MSA, CHC, CCEP-I, CRCMP

Certification pressure: Assess, release, and advance calmly

- » Conducting a self-assessment helps with identifying subject-matter strengths and weaknesses.
- » Numerous resources are available to help certification candidates achieve successful results.
- » Studying for a certification exam may overlap with research and work-related responsibilities.
- » Establishing a schedule is essential to accomplishing objectives.
- » Evaluate progress before scheduling the certification exam.

Compliance 2.0 is here!¹ This means progress continues as our profession achieves more independence and well-deserved recognition. According to casual conversations and personal observations, more organizations are requiring compliance certification. Some organizations are demonstrating their commitment by requiring hired candidates to become members of and be certified with the Society of Corporate Compliance & Ethics.



Johnson

For many, there is pressure associated with pursuing compliance certification. Some are able to pursue a compliance certification at their own pace. For others, there are required timeframes, varying among organizations from 3 months, to 6 months, to one year.

Many candidates prepare for the certification exam privately. In his column, Art Weiss shared that he didn't tell his boss that he was going to take the certification exam, in case he didn't pass.² I remember not sharing my certification pursuit with my boss, also.

Months later, I was interviewing for a compliance position outside of my

organization. The hiring manager asked, "Would you consider sitting for the compliance exam?" After this interview, I scheduled the exam. There is pressure learning a new role, a new organization, and a new industry while studying for an examination. I decided to take the exam early to complete one item on my future To Do list. For certification candidates experiencing pressure to achieve certification outside of their preferred timeframe, here are a few recommendations.

Conduct a self-assessment

Compliance needs vary among organizations. As a result, compliance and ethics roles vary. This includes reporting structures, working relationships, and exposure limitations to the entire compliance and ethics program. Conducting a self-assessment is a great approach to preparing for the certification exam. The Compliance Certification Board (CCB) recommends using the Detailed Content Outline for the applicable certification exam.³ This is helpful for identifying strengths and weaknesses in the subject areas. Certification candidates who identify strengths and

weaknesses are one step closer to reducing pressure.

Initially, certification candidates should begin by evaluating their experience in the Compliance profession. Whether it is several months or several years, having experience is a strength. Next, evaluate the extent that their compliance role has exposure to all elements of a compliance and ethics program (CEP). For example, many compliance roles have exposure to an entire CEP, but others have access to only a few elements. If the certification candidate's role focuses on policy and training activities, then areas requiring improvement are the remaining elements (i.e., investigation, auditing, monitoring enforcement and discipline, reporting and prevention).⁴ Then, certification candidates should evaluate their knowledge and application of common regulations associated with the certification that they are pursuing.

At the end of the self-assessment, certification candidates should have two lists. The first list identifies strengths and another list that identifies topics requiring attention. This process is necessary and meant to be enlightening.

Evaluate resources

Success and longevity in the Compliance profession requires many resources. Whether it is written material, electronic media, or human resources, compliance professionals may relieve pressure and unnecessary stress by appropriately relying on these resources.

Achieving successful results for the certification exam requires many resources, also. Depending on the certification candidate, their experience and exposure to an effective compliance program determines whether or not they will require more or fewer resources than another certification candidate.⁵ When preparing for the exam, candidates need to determine whether they are reviewing

information to be successful in the compliance role or preparing for the exam. In many cases, the certification candidate must achieve both.

Certification candidates should identify the resources that they plan to use for focusing on the exam. Before studying, they should identify primary resources and secondary resources. Conducting a self-assessment will assist with determining which resources are primary and secondary. By comparing identified resources to the exam's Detailed Content Outline, they can confirm they have the necessary resources to pursue their studies.

Flexibility and confidence are important. Some certification candidates tend to doubt they have secured the appropriate resources midway through their schedule. Second-guessing resources midway should be avoided. Adding another resource is acceptable, but several resources may question the integrity of the self-assessment.

By diversifying resources, certification candidates may experience an engaging learning experience. Traditionally, textbooks are a primary resource for learning. For compliance, federal regulations are a primary resource, also. Both resources are appropriate for certification studies, but there are others worth considering.

Professional journals and association-related publications are valuable resources. Our peers contribute to these publications to promote awareness and establish best practices. According to Scher, "*Compliance & Ethics Professional* magazine contains impressive answers that he doesn't recall learning in law school or a law firm practice".⁶

Compliance quizzes are available in written or electronic format. These are great for getting immediate feedback. Additionally, they can improve reading and response times when taken repeatedly. Professional associations create some quizzes and individuals create the others.

Social media is a great tool for quick feedback, also. Certification candidates requiring clarity on topic can post a question using social media to obtain insight from their peers. Additionally, they can review previous discussions. Many times, a discussion is available in the archives with several responses.

Networking is useful, also. When necessary, certification candidates should contact their peers. Roy Snell, CEO of HCCA/SCCE, says, don't hesitate to call him about anything any time.⁷ Many compliance professionals demonstrate the same sentiment. A brief conversation may provide clarity and alleviate unnecessary pressure.

Time management

For some, their perception of insufficient study time leads to certification pressure. As discussed, a successful self-assessment identifies strengths and weaknesses. Conducting a resource review identifies primary and secondary resources. The next step is to develop a schedule. The schedule can be separated into three categories to assist with accomplishing objectives. The categories are weekday, weeknights, and weekends. Certification candidates can determine when to study topics by separating weaknesses (and strengths) into the following categories: most attention, some attention, and least attention.

Setting a schedule is important, but certification candidates are encouraged to be reasonably flexible. Personal and professional events occur that may require undivided attention. By having a set schedule, certification candidates have

leverage in proposing meeting times around their schedule.

Assuming the workweek is Monday through Friday, lunch break is a great time for reviewing information quickly. When reading, the common attention span is 20 minutes before a break is necessary.⁸ Because

many organizations designate 30 minutes for lunch, this is a great opportunity for certification candidates to review study resources and enjoy a meal.

Here is a schedule for certification candidates to consider:

Weekdays. Read during the 30-minute

lunch break. When I was a certification candidate, I read either a compliance article or a chapter from a compliance book. On Friday, schedule an hour meeting and dedicate this to exam preparation. When I was a certification candidate, I participated in a conference call with other certification candidates. Sometimes, I discussed content with a fellow member of the Compliance department.

Weeknights. Dedicate this time reviewing resources that require some attention. There is more time during a weeknight to review information than lunchtime. At the same time, de-stressing from the workday and sufficient rest are important. Certification candidates should use this time wisely by maintaining a work-life balance to reserve energy for the next day.

Weekends. Dedicate this time to reviewing resources that will transition subject-matter weaknesses into strengths. For certification candidates who have a short time to achieve certification, reducing or eliminating social activities to ensure

By having a set schedule, certification candidates have leverage in proposing meeting times around their schedule.

long-term success is worth consideration. Weekends provide numerous hours to cover multiple topics and test comprehension. No television, turning off the ringer to house phones, and placing my cell phone on another floor was one approach to eliminating distractions.

Re-assess and advance calmly

After completing studying objectives, certification candidates should conduct another self-assessment. The second self-assessment can be less intense. At this stage, certification candidates are assessing their understanding of the reviewed materials. A recommended strategy is to review a compliance topic and be able state the background, purpose, risks, and best practices for mitigating those risks. Here are a few questions worth asking:

- ▶ Why was a regulation established?
- ▶ When was it established?
- ▶ What was happening at the time the regulation was established?
- ▶ Have there been revisions since its inception?
- ▶ What are common risks associated with this regulation?
- ▶ What are best practices for mitigating risks?

Certification candidates should ask these questions for each compliance topic that they review during their final assessment.

Here's how to ask these questions while assessing your understanding of the Foreign Corrupt Practices Act.

- ▶ Why was Foreign Corrupt Practices Act established?
- ▶ When was Foreign Corrupt Practices Act established?
- ▶ What were some of the concerns (both business and society) at the time the

Foreign Corrupt Practices Act was established?

- ▶ Have there been revisions since its inception?
- ▶ What are common risks associated Foreign Corrupt Practices Act?
- ▶ What are best practices for mitigating risks?

The ability to recite an entire regulation is impossible for many. Also, it is unnecessary for certification. Knowing the purpose of a regulation, where to research it for more details, and best practices for mitigating risks are more important.

Certification candidates who are capable of successfully answering all the self-assessment questions for most of their study topics should consider themselves ready to schedule the certification exam. It is common for certification candidates to be uncertain about exam readiness. There are a few factors contributing to this uncertainty, such as not knowing what to expect on test day, second-guessing materials, and doubting retention of reviewed materials. After completing the self-assessment, certification candidates should be confident that this process has prepared them for the certification exam. This is the moment for certification candidates to relax and advance calmly to scheduling the exam. *

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by Charles A. Neff and Julie J. Gresham

The difference between Ethics and Compliance—and why understanding the difference is critical to successful leaders

- » Understanding the difference between ethics and compliance allows leaders to more effectively employ both functions to prevent employee misconduct.
- » With the three elements of the fraud “triangle”—opportunity, rationalization, and pressure—employees are more likely to commit misconduct.
- » The “anti-biotic” for each of the three elements are found in companies with strong and complementary compliance and ethics programs and ethical leaders whose leadership style naturally incorporates motivating or pressuring employees ethically.
- » A strong compliance program addresses the opportunity to commit misconduct; a strong ethics program addresses the rationalization employees engage in to commit misconduct; and ethical leaders apply the right kind of motivation to put healthy pressure on employees to perform.
- » A compliance program that is too risk adverse or not driven by risk can damage a strong ethical culture.

What’s the difference between ethics and compliance, and why does it matter?

Leaders who understand the difference have a powerful advantage in the fight against employee misconduct, and their companies are likely maximizing the benefits of having functions that focus on both ethics and compliance. More importantly, leaders who do *not* understand the difference are likely missing an extraordinary leadership opportunity and also risk inadvertently promoting unethical and non-compliant behavior—even as they are pouring millions of dollars into ethics and compliance.

Conventional Wisdom: Compliance Simply Means Following the Law.

Ethics and compliance professionals often explain the difference between ethics and compliance as:

Ethics and compliance are essentially different sides of the same coin. Compliance is following the law, while ethics is doing what is right regardless of what the law says. Compliance is something that the government requires you to do. Ethics, on the other hand, is something you choose to consider when taking action.¹



Neff



Gresham

The shorter version is: Compliance equals legal requirements, and ethics equals doing the right thing. Both statements are true, but the equation risks relegating compliance to a series of work instructions and ethics to a bumper sticker. Although this conventional view of compliance and ethics can be helpful in understanding the difference, it's not actionable. Other than nod in agreement, there's not much a leader or employee can do. This construct also implies that compliance has little value to a company unless a government enforcement or regulatory agency cares about a particular issue.

Compliance Means Preventing Misconduct— Not Simply Following Laws.

Complex, multinational corporations need their ethics and compliance functions to provide information, tools and systems that leaders and employees can deploy and use. A company can extract the highest value from its compliance organization when that organization focuses on preventing misconduct. The fact is costs and reputational harms of employee misconduct have ruined some companies and many CEOs. There will never be enough corporate resources to ensure each employee is following every law all of the time. What's more: Not all laws have clearly delineated rules that can be followed easily. Under the Foreign Corrupt Practices Act (FCPA), for example, bribing a foreign official is a crime, but the FCPA does not provide a specific dollar amount for gifts and gratuities to foreign officials. In that example, a compliance organization must manage the opportunity—one that is not legally prescribed—employees have to commit bribery under the FCPA, and an ethics organization must sort through the related ethical issues. So, if compliance is not only about following the law but also preventing misconduct, including fraud and criminal

acts, then what should companies expect from their compliance organizations, and how does that fit with the expectations of their ethics organization?

The “Fraud Triangle”

Let's start with the “fraud triangle.” Developed years ago by Donald Cressey to help detect employee misconduct, the fraud triangle has three elements: opportunity, rationalization and pressure. Although often referred to as a triangle, picture a Venn diagram with three circles labeled “opportunity,” “rationalization” and “pressure” partially laid over each other. Where the three circles intersect, misconduct, including fraud, is more likely to occur. If fraud occurs when the three elements of the fraud triangle intersect, how do we prevent this intersection? To answer that question, we need to examine each of the three elements of the fraud triangle (or circles of our Venn diagram), and how a company might manage each of those three elements to reduce the likelihood of misconduct.

Opportunity (and Compliance)

A company can reduce the opportunity to commit misconduct with a strong and effective compliance program. There's no doubt this means rules must be clear and accessible. Those rules mean little, however, if they are not coupled with systems and processes that reduce an employee's opportunity to commit misconduct. A strong compliance program will not only focus on the appropriate procedures and training, it will examine business systems, internal controls and approvals designed to prevent misconduct. In the case of the FCPA, most companies with reasonably strong compliance programs have set explicit limits on gifts, and they have put systems in place to track employee travel, spending and reimbursement. Those are all designed to

reduce the opportunities employees have to violate the law.

Rationalization (and Ethics)

Likewise, a company can reduce the likelihood that employees will rationalize misconduct by investing in a strong ethics program. For most employees, ethical behavior can be taught and learned. An ethics program should exist to teach employees and leaders how to behave ethically through training, messaging, living a company's values and facilitating a continuous conversation about ethics, integrity and doing the right thing. Companies with effective ethics programs also hold employees accountable when they fail to live up to the company's ethical standards. We often hear of companies having a "values-based culture." Most often, those are companies with strong ethics programs that hold employees accountable for knowingly violating the company's standards. Since the FCPA has no explicit limits on gifts, if a company chooses to not define explicit limits, then it must count on the ethical training and values of employees to handle correctly the giving of gifts to foreign officials. But even in a strong values-based culture, is that good enough?

Pressure (and Leadership)

One critical skill of an ethical leader is to motivate employees to perform ethically and in accordance with the law. If there is too much pressure to perform without ample emphasis on performing with integrity, then employees are more likely to commit misconduct. Great leaders understand that

they must balance the pressure to perform with the requirement that employees act with integrity. "Fix it—I don't care how" is a very different message than: "We need to fix this problem, but we must follow the rules and our process when we fix it." The message must be clear that results only matter if the processes to achieve those results are also followed. If a business development unit, for

instance, is tasked and rewarded for obtaining new contracts, then the messages leaders send about bribery and following the company's internal process are critical. One need only read the latest headlines (the day does not matter) to know that messages

to win contracts and hit certain targets at all costs increase the risk of employees committing misconduct. There are many other ways that successful leaders can lead to reduce the pressure employees may have to commit misconduct, such as setting a realistic pace, formally considering ethics and compliance in big decisions, and creating a culture that gives employees a safe space to speak up.

The Difference Between Ethics and Compliance and the Importance of Leadership.

Our version of the fraud triangle and its importance to ethics and compliance can be summarized as follows: (a) Ethics should focus on reducing an employee's ability to rationalize misconduct; (b) compliance should focus on shrinking the opportunity for misconduct; and (c) leadership should focus on reducing unhealthy pressure to perform or meet certain targets. So the difference between ethics and compliance is that ethics focuses on employees' rationalization of misconduct,

One critical skill of an ethical leader is to motivate employees to perform ethically and in accordance with the law.

and compliance focuses on reducing the opportunity employees have to commit misconduct. Although those are important distinctions, they mean little if leadership is not focused on motivating employees in positive ways—in ways that minimizes the pressures to perform *without* integrity. By focusing on managing the pressure that exists to commit misconduct, leaders send explicit messages that performance must never come at the expense of following the process or their company's values.

Why Understanding the Difference Between Ethics and Compliance Matters

Compliance and ethics programs must be balanced, defined, and supported by strong leadership. Compliance erodes ethics when rules and processes are too unwieldy, too voluminous or too overbearing. In those cases, employees often stop following the rules and start rationalizing what rules to follow. Soon they are likely operating outside the controls designed to further compliance.

The Army War College recently published a paper titled, "Lying to Ourselves, Dishonesty in the Army Profession." That study asserted that an Army officer could not complete all of his or her compliance obligations—even if they were the only obligations the officer tried to execute. Once that happened, officers became "ethically numb" and began to rationalize why he or she would follow one rule but not another. This violates the code of ethics hammered into young officers during formative leadership training and then drives cynicism and skepticism of the Army's ethical teachings. In those cases, compliance starts to erode, rather than complement, a strong

The Army War College recently published a paper titled, "Lying to Ourselves, Dishonesty in the Army Profession."

ethics program. This doesn't mean companies shouldn't have strong compliance programs. It does mean that smart companies need to have risk-based compliance programs that consider the effects of compliance requirements on their ethics programs. If a company chooses to ignore compliance and rely totally on a "values-based culture," then employees are at risk of doing something the employee thinks is "good" or more efficient that may in fact be violating a law.

There's nothing wrong with viewing ethics and compliance as different sides of the same coin, but it limits the value of each function. Leaders who consciously employ (a) ethics to attack their employees' ability to rationalize misconduct,

(b) compliance to reduce employees' opportunities to commit misconduct, and (c) leadership to reduce the pressures to commit misconduct really have *three* valuable coins at their disposal. More importantly, those leaders can sleep well at night knowing they put their employees in the best possible position to succeed. *

The authors would like to thank Chad Boudreaux, the Chief Compliance Officer at Huntington Ingalls Industries (HII) and Kenny Rogers, the Director of Ethics and Business Conduct at HII, for their leadership, support and contributions to this article.

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by Eric R. Feldman

Coughing up the Individuals: Implications of the Yates Memo

- » The Yates Memo serves to address criticism that the Department of Justice has been reluctant or unwilling to prosecute individuals involved in corporate misconduct.
- » Key steps are outlined that help strengthen the DoJ's pursuit of individual wrongdoing and provides prosecutors with specific guidance and perspective.
- » The memo places a spotlight on the quality, sufficiency and professionalism of a company's internal investigations.
- » The thoroughness of a company's handling, investigation, and management of alleged wrongdoing and misconduct is likely to come under greater scrutiny as part of the government's assessment of corporate ethics and compliance programs.
- » Moving forward, organizations will need to more aggressively investigate and pursue individual accountability to be considered for Deferred Prosecution Agreements (DPA's) and other opportunities to mitigate liability.

For several decades, the continually evolving and increasingly more sophisticated Compliance profession has lamented the absence of significant, sustained, and meaningful white-collar prosecutions of individual executives as a key, limiting factor in creating the kind of deterrent necessary to strike a dagger through the heart of corporate fraud. Sure, we have the notorious stories of CEOs who have either stolen millions from their companies (e.g., Tyco's Dennis Kozlowski; Adelphia's Jonathan Rigas), or engaged in such unscrupulous and devastating accounting practices that federal prosecutors could not avoid taking significant public action (e.g., Enron's Kenneth Lay and Jeff Skilling, Worldcom's Bernie Ebbers, and HealthSouth's

Richard Scrushy). But these cases have been the exception rather than the rule, with individual accountability often blurred by well-intentioned prosecutions that resulted in a multitude of deferred or non-prosecution agreements offset by relatively unimpressive fines and penalties, but few prosecutions of the individual executives, board members, or other corporate bad actors who either committed or "recklessly disregarded" the frauds that were occurring in the company.

Clearly, the efforts of corporate ethics and compliance (E&C) officers to create and sustain a strong ethical culture have been hampered, to some extent, by the absence of any real threat that those responsible for corporate wrongdoing will end up doing the "perp walk." On the contrary, the costs of companies getting caught engaging in ethical misconduct (e.g., fines, penalties, and



Feldman

even litigation costs) is often seen as a “cost of doing business” in a highly regulated environment.

Until recently, that is. The U.S. Department of Justice (DOJ) issued a Memorandum in September to federal prosecutors on Individual Accountability for Corporate Wrongdoing, referred to as “the Yates Memo,” after Deputy Attorney General Sally Yates, its author. The Yates Memo is widely regarded as the DOJ’s response to criticism that they tend to prosecute companies rather than individuals, a criticism that reached a crescendo in the aftermath of the 2008 economic crisis amidst cries that “no one went to jail” (the fact that no one may have actually broken existing laws at the time, notwithstanding).

The Yates Memo sets out six key steps to strengthen the DOJ’s pursuit of individuals in corporate wrongdoing, although critics have said it is nothing more than a restatement of the Department’s existing approach. The main points of the Memo are:

- ▶ In order to get credit for cooperation with an investigation/prosecution, companies must provide the DOJ with all relevant facts relating to the individuals responsible for misconduct.
- ▶ The DOJ’s criminal and civil corporate investigations should focus on individuals from inception.
- ▶ The government’s criminal and civil attorneys handling corporate investigations (i.e., DOJ prosecutors and civil attorneys from various agencies) should be in routine communication with one another.
- ▶ In most cases, culpable individuals will not be released from civil or criminal liability when resolving a matter with a company.
- ▶ DOJ lawyers should not resolve matters with a corporation without a clear plan

to resolve individual cases, and should formally record the reasons for any decision not to proceed against the individuals.

- ▶ The DOJ’s civil attorneys should consistently focus on individuals as well as the company, and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

The subtext of the Memo is that only companies that meet the cooperation requirements can qualify for a deferred prosecution agreement (DPA).

What the Memo does not mean

So, what does this Memo mean for companies whose behaviors and corporate E&C programs have been driven by the tenets of the Federal Sentencing Guidelines for Organizations (FSG)? Actually, it means a lot. First, let’s address what this policy pronouncement *does not* mean.

1. It *does not* mean that companies no longer need to demonstrate that they have an effective and meaningful E&C program. This is still of paramount importance to the DOJ, Securities and Exchange Commission (SEC), and most regulatory agencies as they determine whether or not to prosecute companies for the ethical misconduct perpetrated by “bad actors.”
2. It *does not* mean the government has diminished its concern about the strength of corporate ethical cultures in preventing and detecting fraud or other misconduct. The government will continue to look at the effectiveness of ethics training, alignment of the right corporate incentives, anonymous reporting hotlines, and employees’ comfort level in reporting issues when

determining whether to give companies credit, or even prosecute at all, under the FSG.

3. It *does not* diminish the need for companies to self-report fraud or ethical misconduct to the government. In fact, the self-reporting requirement is more important than ever in the cooperation calculus.

What the Memo does mean

What the Yates Memo *does* mean is that the quality, sufficiency, and professionalism of a company's internal investigations will be factored into civil and criminal investigations more consistently. At a conference hosted by Global Investigations Review (GIR) on September 22, 2015, Assistant U.S. Attorney General (Criminal Division) Leslie Caldwell clarified the purpose of the Yates Memo, stating that it has created a new policy focus for all prosecutors in the DOJ. Specifically, Caldwell said the Memo was aimed at correcting situations where some U.S. Attorneys' Offices "were quick to resolve cases with corporations without really even investigating individuals," or attempting to identify who was responsible.

Attorney Caldwell also said the Memo was intended to press companies under investigation to do more than just "comply with a subpoena," that is, to give the Department the facts, especially about what happened, who did it, who knew, who participated, and who said what. By directing companies to provide all relevant facts in order to qualify for any cooperation credit, the DOJ is pushing companies to conduct thorough, proactive, and timely investigations into the individuals involved. As a result, the Memo sends the message that if a company expects leniency, even if it has created a strong ethics and compliance

program in accordance with the FSG, it will have to expose the individuals involved in wrongdoing. Deputy Attorney General Yates summarized the essence of her Memo when she said, "We mean it when we say, 'You have got to cough up the individuals.'"

Based on Yates' Memo and Caldwell's public statements, companies should consider the following points about their internal investigative capabilities:

- ▶ Companies must develop a thorough process to triage all serious employee complaints and allegations at the corporate level, rather than permit lower-level managers to address misconduct as they see fit.
- ▶ Companies should conduct thorough, proactive, and timely investigations into potential, substantial violations of the law.
- ▶ Corporate E&C officers will need to be able to demonstrate that they follow appropriate investigative processes. Appropriate processes may involve use of outside counsel; professionally trained, certified fraud examiners or investigators (internal or external); and other measures indicative of integrity and independence.

Conclusion

Developing and maintaining a substantial and robust E&C program that prevents and detects employee wrongdoing will help lighten the burden created by this new DOJ focus on individuals. This program should be subject to regular independent third-party assessments to ensure its effectiveness and credibility with government agencies. *

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by Erica Salmon Byrne

Independence, again

In late September, the news broke that approximately 11 million Volkswagen vehicles had been fitted with software that systematically evaded emission controls. The cars could sense that they were being tested for environmentally harmful fossil fuel byproducts



Salmon Byrne

and would trigger controls in the car that changed emission levels. As expected, a giant hue and cry followed. Lawsuits were filed. Government investigations were opened. The CEO lost his job. The board established a special committee and hired outside counsel to conduct an internal investigation. Billions were reserved—

likely not nearly enough—to cover legal fees and fines. The stock tanked. All the steps and events one has come to expect when corporate misconduct is uncovered.

But as Charles Elson, director of the Weinberg Center for Corporate Governance at the University of Delaware, told the *New York Times*, the real surprise is not that this happened but that it didn't happen sooner.¹ For the why behind that statement, one need look no further than the executive committee's decision to move forward with plans to name the chief financial officer of Volkswagen as the chairman of the supervisory board. This continues a pattern of naming insiders with long company tenures to crucial positions at the company, one that reinforces the existing culture within the organization, intensifying the "echo chamber" effect. Some have asked why there were no whistleblowers involved; culturally, how could there have been? The structure of the organization, the lack of independent voices inside the company

and in the community, and the absolute control exercised by the Porsche family are governance challenges that Volkswagen will have to overcome (or be bailed out by the German government).

The CEO lost his job. The board established a special committee and hired outside counsel to conduct an internal investigation.

One can legitimately debate whether it is appropriate to split the chair and CEO roles, or the extent to which outside views contribute to a company's profitability, but I would argue that independence matters. In good times, it may be difficult to quantify exactly how an independent director impacts shareholder returns. But in bad times—or, in Volkswagen's case, the worst of times—having someone familiar with the organization that is not "of" the organization is critical.

As the investigation plays out over the years—and yes, it's likely to take years and billions of dollars—Volkswagen will join a long list of corporate scandals studied around the globe for an answer to the question: "Why?" To which I would respond "Independence, again." *

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by Joe Murphy, CCEP, CCEP-I

Will the right to be forgotten become a tool to dodge background checks?

The EU, under the banner of privacy, has invented a concept called “the right to be forgotten.” The idea seems to be that people should be able to prevent past stories about their activities from showing up in web searches.

But we have already seen privacy laws



Murphy

intended for good purposes used in ways that raise questions. Privacy has been used to make it difficult for working people to report violations on company helplines (e.g., limiting or prohibiting anonymous reports), thus making it easier for bosses to retaliate.

Of course, there are concerns when governments assert untested new powers. If government controls people’s conduct based on broad concepts like privacy, what are the limits? Of course, this right is not absolute. But after the “right to be forgotten” emerged, Google tried to comply by limiting searches in EU-based servers. But privacy regulators in Europe pressed on, demanding they limit searches on any servers on Earth. This certainly raises some difficult, perhaps frightening, questions. If they can limit computers, why not all other sources of information that is supposed to be “forgotten”? Can they also suppress individuals posting things on their Facebook pages? Will this new right stop with servers? Will similar controls eventually apply to newspapers and libraries? If Europe can do this, why not oppressive countries even more determined to control what their citizens can read and learn?

Why should this matter for compliance professionals? One of our tasks is to prevent the hiring of those likely to commit violations. We also conduct due diligence on third parties our companies do business with. For example, is that agent management wants to hire someone with a record of paying bribes? This is difficult work, but with the Internet we at least have a practical tool.

But now comes the right to be forgotten. What happens to the record of a miscreant who has lied, cheated, and stolen in the past? This person has asserted her right to be forgotten, and sued everyone who has a record of her crimes. What about the record of someone who has made a practice of paying bribes? The ministers in his home country, recognizing his “right to be forgotten,” have proceeded against every entity that keeps any record of this criminal’s past conduct. Internet companies, wary of hyper-vigilant privacy police, take the path of least resistance (and expense) and cave in to the pressure to enforce this “right.”

Thanks to the privacy bureaucrats, perhaps your future employee or agent can lie, cheat, and steal, and then pursue the “right to be forgotten,” to enable him or her to try it all again while working for you. Maybe it is time the bureaucrats talk with us in Compliance and Ethics first, before they blaze these new paths. *

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Building an effective compliance champion program

Bruno Falcone (page 27)

- » A solid compliance champion program may be an efficient and cost effective way to further improve your compliance program.
- » Compliance champions are not only compliance ambassadors, but should be educated and empowered to provide compliance training, help identify the major risk areas, and much more.
- » The compliance champion should be someone who really wants to be in that position, truly believes in compliance, is perceived as model of ethics and integrity, is able to influence others, thinks strategically, and exercises leadership.
- » Compliance champions should be nominated by the head of function, in agreement with the compliance officer, with buy-in and oversight by the senior management.
- » A robust compliance champion program allows the compliance officer to get different views of the business and provides the organization the opportunity of having not only compliance officers speaking about compliance, but business people themselves.

A definition of ethics in business

Anthony Smith-Meyer (page 31)

- » Ethics is conceptual, yet in need of a clear definition that goes beyond the mere rules of law.
- » Leaders, employees, and others must breathe life into what would otherwise translate to platitudes and public image exercises.
- » Values that are robust enough to withstand challenge need enforcement, and hence strong leadership.
- » Analysing and evaluating the impact of decisions and views on one's stakeholders is an important part of this process.
- » A company distanced from the consequences of its actions has all the greater need for an ethical decision process, if it is to experience enduring success.

Striking a balance: Integrity due diligence and data privacy

Guido van Drunen and Tabitha Gaustad (page 35)

- » Integrity due diligence has become an expected part of the overall due-diligence process, due to the increased regulatory requirements for robust and comprehensive compliance programs.
- » Companies should construct third-party due-diligence programs in consultation with in-country legal and privacy counsel to understand what data is allowed to be collected and under what circumstances.
- » Companies leveraging service providers to conduct third-party due diligence should ensure that such checks are conducted appropriately.
- » Companies should give careful consideration to their data collection, review, and retention protocols, particularly of foreign parties, because data privacy laws and sanctions can differ widely from those in the U.S.
- » Formal guidance for the use of third-party due diligence and monitoring for policy compliance can help companies navigate compliance with relevant data privacy, anti-bribery, and corruption laws.

Contracting and Compliance: Every business needs a contracting policy

MaryEllen O'Neill (page 43)

- » Every business must at some point procure goods or services from another business.
- » Contracting is fraught with legal and financial risks.
- » A business must be able to clearly and accurately detail what it wants/needs before going to market.
- » A good contracting policy should cover the entire lifecycle of a contract.
- » A successful contracting process is directly related to the amount of effort put into the process.

Engaging leadership in Ethics and Compliance, Part 3: Fostering leadership actions

Jason L. Lunday (page 49)

- » Having a clear understanding of why leaders may not actively reinforce a compliant culture, ethics and compliance (E&C) staff can help leaders take actions that set the right tone for their subordinates.
- » E&C staff can provide leadership with assistance and resources to demonstrate their commitment, actively communicate about it, and support the overall ethics and compliance management system.
- » E&C staff also can guide leaders with their efforts to reinforce their own subordinate leaders' responsibilities down to front-line managers.
- » E&C staff needs to regularly gather data on leadership's efforts at reinforcing ethics and compliance to identify what does and does not work and the challenges leaders continue to face.
- » Using outcomes from this data collection, E&C staff can continue to provide leadership with updated tools and resources to help them more effectively reinforce ethics and compliance.

Collecting and evaluating effective compliance program metrics

Timothy Hedley and Ori Ben-Chorin (page 57)

- » Organizations should seek to develop, collect, and measure creative multi-dimensional metrics.
- » Organizations should consider evaluating qualitative/subjective indicators, which can be helpful in evaluating so-called "soft" or "entity-wide" controls that do not lend themselves easily to quantitative analysis.
- » Forward-looking metrics can alert the organization as to future risks and are also important to collect and evaluate.
- » Organizations should seek to capture near-miss metrics and report on them to management and the board, and if called for, to regulators as well, because doing so will demonstrate that compliance controls are working.
- » Organizations can obtain deeper insights by comparing one standard metric against another.

How I built a Compliance department with no previous experience

Marcia Boaventura (page 61)

- » We have chosen to have a very small department, where only myself and an assistant work. To complete the team, we can count on other partners with expertise in this field.
- » We have implemented controls to only effect business partnerships with companies that value ethical and transparent conduct in business as much as we do.
- » We celebrated Corporate Compliance & Ethics Week for the second year, with the theme "We are listening to you" and distribution of headphones to all employees.
- » During the trajectory for Compliance department implementation, the Brazilian Anticorruption Law went into effect.
- » Not everything in Brazil is about scandal and corruption. We do have honest companies that perform their actions with ethics and transparency.

SEC enforcement actions against CCOs: Outlier or new trend?

Thomas R. Fox (page 65)

- » The SEC is now prosecuting chief compliance officers (CCOs) personally.
- » The SEC itself cannot agree on the appropriate standard for prosecuting CCOs.
- » The prior standard for prosecution of CCOs was intentional or willful conduct.
- » The effect of prosecuting CCOs for anything less than egregious behavior will have a chilling effect.
- » The SEC may have inadvertently made the CCO's job much more difficult.

Certification pressure: Assess, release, and advance calmly

Walter E. Johnson (page 69)

- » Conducting a self-assessment helps with identifying subject-matter strengths and weaknesses.
- » Numerous resources are available to help certification candidates achieve successful results.
- » Studying for a certification exam may overlap with research and work-related responsibilities.
- » Establishing a schedule is essential to accomplishing objectives.
- » Evaluate progress before scheduling the certification exam.

The difference between Ethics and Compliance—and why understanding the difference is critical to successful leaders

Charles A. Neff and Julie J. Gresham (page 73)

- » Understanding the difference between ethics and compliance allows leaders to more effectively employ both functions to prevent employee misconduct.
- » With the three elements of the fraud "triangle"—opportunity, rationalization, and pressure—employees are more likely to commit misconduct.
- » The "anti-biotic" for each of the three elements are found in companies with strong and complementary compliance and ethics programs and ethical leaders whose leadership style naturally incorporates motivating or pressuring employees ethically.
- » A strong compliance program addresses the opportunity to commit misconduct; a strong ethics program addresses the rationalization employees engage in to commit misconduct; and ethical leaders apply the right kind of motivation to put healthy pressure on employees to perform.
- » A compliance program that is too risk adverse or not driven by risk can damage a strong ethical culture.

Coughing up the Individuals: Implications of the Yates Memo

Eric R. Feldman (page 77)

- » The Yates Memo serves to address criticism that the Department of Justice has been reluctant or unwilling to prosecute individuals involved in corporate misconduct.
- » Key steps are outlined that help strengthen the DoJ's pursuit of individual wrongdoing and provides prosecutors with specific guidance and perspective.
- » The memo places a spotlight on the quality, sufficiency and professionalism of a company's internal investigations.
- » The thoroughness of a company's handling, investigation, and management of alleged wrongdoing and misconduct is likely to come under greater scrutiny as part of the government's assessment of corporate ethics and compliance programs.
- » Moving forward, organizations will need to more aggressively investigate and pursue individual accountability to be considered for Deferred Prosecution Agreements (DPA's) and other opportunities to mitigate liability.



Upcoming Events

December 2015

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		WEB CONFERENCE: What you need to know about Safe Harbor		WEB CONFERENCE: Athletics vs. Academics: UNC'S sanctions at your University?	Regional Compliance & Ethics Conference Dallas, TX	
6	WEB CONFERENCE: What you need to know about Supply-Chain Compliance with UK Modern Anti-Slavery Legislation	WEB CONFERENCE: Learning from CEO's: How Modeling Trumps Every Other Part of a Compliance Program				
International Basic Compliance & Ethics Academy Dubai, UAE			CCEP-IP Exam	WEB CONFERENCE: The Real Deal on Form I-9		
20					<i>SCCE Office Closed</i> Christmas Day	
27						

January 2016

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					<i>SCCE Office Closed</i> New Years Day	
3						
10	WEB CONFERENCE: Trust me! Insights into Ethical Leadership	WEB CONFERENCE: Launching an Information Governance Program				
17						
24						
31						

2015

Regional Compliance & Ethics Conferences

December 4 | Dallas, TX

International Basic Compliance & Ethics Academies

December 13–16 | Dubai, UAE

2016

Utilities & Energy Compliance & Ethics Conference

February 21–24 | Houston, TX

European Compliance & Ethics Institute

March 20–23 | Prague, Czech Republic

Higher Education Compliance Conference

June 5–8 | Baltimore, MD

Basic Compliance & Ethics Academies

February 8–11 | Scottsdale, AZ
 March 7–10 | New Orleans, LA
 April 25–28 | Boston, MA
 June 13–16 | San Francisco, CA
 August 8–11 | New York, NY

International Basic Compliance & Ethics Academies

May 23–26 | Brussels, Belgium
 July 11–14 | Singapore
 August 22–25 | São Paulo, Brazil

Regional Compliance & Ethics Conferences

February 26 | Boston, MA
 March 11 | Minneapolis, MN
 April 8 | Chicago, IL
 April 15 | Scottsdale, AZ
 May 6 | Miami, FL
 May 20 | San Francisco, CA

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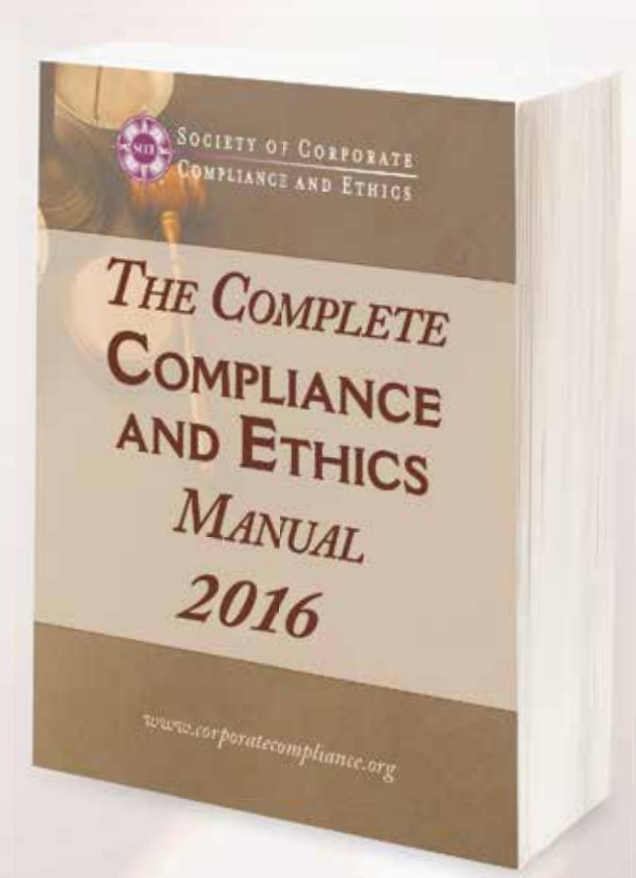
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Utilities & Energy Compliance & Ethics Conference

February 21–24 • Houston, TX

European Compliance & Ethics Institute

March 20–23 • Prague, Czech Republic

Higher Education Compliance Conference

June 5–8 • Baltimore, MD

Compliance & Ethics Institute

September 25–28 • Chicago, IL

Board Audit & Compliance Committee Conference

November 7–8 • Scottsdale, AZ

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February 8–11 • Scottsdale, AZ

March 7–10 • New Orleans, LA

April 25–28 • Boston, MA

June 13–16 • San Francisco, CA

August 8–11 • New York City, NY

September 12–15 • Chicago, IL

October 3–6 • Las Vegas, NV

November 14–17 • Orlando, FL

December 5–8 • San Diego, CA

INTERNATIONAL BASIC COMPLIANCE & ETHICS ACADEMIES

May 23–26 • Brussels, Belgium

July 11–14 • Singapore

August 22–25 • São Paulo, Brazil

December 11–14 • Dubai, UAE

REGIONAL COMPLIANCE & ETHICS CONFERENCES

February 26 • Boston, MA

March 11 • Minneapolis, MN

April 8 • Chicago, IL

April 15 • Scottsdale, AZ

May 6 • Miami, FL

May 20 • San Francisco, CA

June 10 • Atlanta, GA

June 23–24 • Anchorage, AK

September 16 • Washington, DC

October 7 • New York, NY

November 4 • Dallas, TX

November 18 • Seattle, WA - **NEW**

December 9 • Philadelphia, PA - **NEW**

