Compliance & Ethics Professional®

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Meet Joseph Suich

Chief Compliance Officer
GE Power
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by Roy Snell, CHC, CCEP-F

How consultants and outside counsel can make more money

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If you show up everywhere…you are memorable nowhere.

Every outside consultant and attorney should become involved in a community, build a network, and become a household name within a community filled with clients and potential clients. All too often consultants/attorneys go speak at a half dozen different communities or professional associations and build little to no name recognition in any of them. Many hang out at conferences with their peers at their professional association. Their peers promise to send them business. Some outside counsel and consultants hang out at the professional association of the clients who give them their business.


Snell

I have watched people who do this for 20 years. They use their marketing time and a little of their marketing/sponsorship dollars to build a brand of their last name. In my opinion, the traditional sponsorship of the bags or advertising the company brand on a website or a magazine is not as effective as marketing of an individual's last name. I would get a booth and hang out with the people in the community. I would attend every break, lunch, and reception. I would speak, write, blog, and do a little social media at my desk when I am tired of everything else. I would do the dinners and sponsor receptions which, unlike other marketing opportunities, involve people meeting people. When an RFP is developed or an urgent call goes out, it goes to a person the RFP author or panicked individual knows. That decision often has little to do with the recollection of the firm's name.

> Some communities lead a charmed, stress-free life and may pick vendors based on how pretty or handsome the vendor is.

The compliance community may be different than other buyers. Some communities lead a charmed, stress-free life and may pick vendors based on how pretty or handsome the vendor is. Other communities may pick vendors based on how elegant their corporate speak is. If any group wants to know the person they are bringing in from the outside, it is the Compliance community. They are often

dealing with a disaster or potential disaster. At a minimum, the compliance buyer is dealing with in-house counsel and a CEO who are watching them closely. The Compliance community wants to know what the consultant/outside counsel is likely to say to their board, C-suite, or Legal department before a word is spoken. And they pick people whom they have talked to, seen speak, and read their articles, not a couple times a year, but several times a year. The Compliance community is going to hire people from their community the vast majority of the time. Their preordained RFP or panicked call is going to go to the counsel/consultant they know the best, trust, and want to win the bid.

Attorneys have an overwhelming propensity to hang out with other outside counsel, which I am sure is personally rewarding, but I am not sure it's always as financially rewarding as hanging out with clients and potential clients. Outside attorneys go to outside counsel association meetings to get their CLEs when they could get CLEs with their clients at their client's professional meetings. Outside counsel and consultants promise each other that the call for help and billable hours is just around the corner. All the while, a few of their peers are going to events put on by associations like HCCA and SCCE that are full of their clients and prospective clients. They find new clients through their clients. They show support for their client's profession. Some get the certification their clients have. They become household names amongst a group of people who have a budget, "panicked compliance moments" and issue RFPs.

Yes of course RFPs occasionally are often just an exercise that buyers go through because they have to. Sometimes RFPs are sent to 3-5 or so outside counsel and consultants, one of which is the one the client already knows they are going to pick. These preordained RFPs are awarded to the attorneys/consultants who are writing, blogging, speaking, and attending meetings of the very people who issued the biased preordained RFP. These preordained RFPs are going to people who focused most of their non-billable time to one or two client communities that are most densely populated with potential clients. I get a kick out of people who complain about preordained RFPs. Attorneys and consultants are mad at the potential client when they should be mad at themselves for not becoming the household name in the buyer's community like the person who did get the preordained RFP.

Sometimes RFPs are sent to 3-5 or so outside counsel and consultants, one of which is the one the client already knows they are going to pick.

You have to ask yourself a question: At the end of the year, what is the total amount of the money you made that came from your peers who promised to send you business and what percent came directly from clients who sent you business? If 80% of your business comes from your peers, go to conferences with your profession. If 80% of your business comes directly from clients, you should spend your time at their conferences. If you do not have enough billable hours, you should spend your time with the community that helped you get the most billable hours you do have. Look, this is not really my opinion. This is just 20 years of observing those who are making the most money and getting the most billable hours in the Compliance community. I would mention their names, but everyone in the compliance community already knows who they are. ✳

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SCCE
Society of Corporate Compliance and Ethics

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> The differences between very good and best-in-class programs are smaller than you may think…
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Uber's toxic work culture spills into public spotlight

After having just weathered a damaging boycott launched by unhappy customers, the ride-sharing behemoth Uber now faces an even bigger crisis attributed to an allegedly unrestrained culture that prizes performance over legal and ethical behavior. The problem first caught the public's eye in February when a blog of a former Uber engineer, Amy Fowler, detailed her alleged experiences with sexual harassment, discrimination toward women, and the inaction of human resources regarding such complaints. A recent article by *The New York Times*, based on dozens of interviews with current and former staff, shows that Fowler's experiences may be common at the tech start-up that has seen explosive growth since its founding in 2009. As described in its report:

"The focus on pushing for the best result has also fueled what current and former Uber employees describe as a Hobbesian environment at the company, in which workers are sometimes pitted against one another and where a blind eye is turned to infractions from top performers." The company faces three current lawsuits in two countries involving sexual harassment and hostile environment, despite a company policy that requires employees to use private arbitration in lieu of suing in court. Uber CEO Travis Kalanick has condemned the behavior and has brought in former U.S. Attorney General Eric Holder to conduct an investigation. For more details, see *The Times* story: *http://bit.ly/Uberculture.*

Appeals Court rules DOJ has veto power over False Claims Act settlements

A recent court ruling in the 4th Circuit Court of Appeals answers a question few may have thought necessary to ask: If a whistleblower and defendant in a False Claims lawsuit decide they want to settle, can they? The court's answer: Not so fast! According to a report by *Reuters*, the case involved whistleblowers' claim that South Carolina nursing home chain Agape fraudulently pushed thousands of Medicare patients into medically unwarranted hospice treatment. A dispute arose when a lower court denied the whistleblowers' use of a statistical sample to prove their case. That ruling would have required the whistleblowers to spend $16-$36 million to have a review done of 10,000 or more files. Instead, the whistleblowers quietly settled with Agape. Though the DOJ declined to shoulder the cost for the review, it deemed Agape was let off too easily and vetoed the settlement. In its ruling, the 4th Circuit said, "We would be remiss not to recognize that the Attorney General's absolute veto authority is entirely consistent with the statutory scheme of the FCA. Congress has granted the Attorney General the broad and unqualified right to veto proposed settlements of qui tam actions." For more details, see the Reuters report: *http://bit.ly/FCA4thcircuit.*

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

Regulatory

DOJ issues new guidance on corporate compliance programs

Recently the U.S. Department of Justice (DOJ) released a list of "important topics and sample questions" it uses when evaluating the effectiveness of corporate compliance programs.

The DOJ guidance, named "Evaluation of Corporate Compliance Programs," notes that the existence and effectiveness of a compliance program—factors known as the "Filip Factors"—form a starting point, but more detail is needed. As the guidance states, "Because a corporate compliance program must be evaluated in the specific context of a criminal investigation that triggers the application of the Filip Factors, the Fraud Section does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case. There are, however, common questions that we may ask in making an individualized determination. This document provides some important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program." The list features 11 topics and includes "analysis and remediation of underlying misconduct," "senior and middle management," "autonomy and resources," and more. For more details download the guidance: *http://bit.ly/DOJcorpcomply.*

U.S. poised for regulatory reform

Among the Trump administration's early executive orders are two aimed squarely at regulatory reform.

- **Executive order 13771**, "Reducing Regulation and Controlling Regulatory Costs," directs all federal agencies to repeal two existing regulations for every new regulation proposed, and to do so in such a way that the total cost of regulations does not increase. Still to come, guidance from the Director of the Office of Management and Budget on "processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years." For more details, see the order: *http://bit.ly/EO13771.*
- **Executive order 13777**, "Enforcing the Regulatory Reform Agenda," orders the head of each federal agency to designate an agency official as its Regulatory Reform Officer and to establish a Regulatory Reform Task Force to oversee regulatory reform initiatives and policies. The order says agencies should seek to repeal regulations that "inhibit job creation," are "ineffective," impose costs that exceed benefits or "create a serious inconsistency or otherwise interfere with regulatory initiatives and policies." For more details see the order: *http://bit.ly/EO13777.*

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SCCE *conference news*

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The program will cover a wide range of higher education compliance hot topics including conflict of interest, risk assessments, investigations, monitoring, Title IX, the Clery Act, and many more!

By registering as an attendee for the Higher Education Compliance Conference, you'll gain complimentary access to HCCA's Research Compliance Conference. The parallel schedule gives you the freedom to attend sessions at either conference—two for the price of one.

At the conclusion of the conference, the Certified Compliance & Ethics Professional (CCEP) exam will be administered. Attendees of the conference have the opportunity to earn sufficient continuing education units (CEU) to meet this requirement for taking the certification exam.
Learn more at *corporatecompliance.org/highered*

Find the latest conference information online ▶ www.corporatecompliance.org/events

SCCE *website news*

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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Web Conferences

SCCE offers a number of great web conferences throughout the year. Topics cover everything from compliance programs to risk management to cybersecurity. You can see the full list of upcoming web conferences at *Events > All Events > Web Conferences* on the SCCE website.

And if you missed a web conference or simply want to share it with your coworkers, you can buy the recording by looking under *Products > Web Conference Recordings*. You can also sign up for a web conference subscription there, giving you access to 10 web conferences while saving you hundreds of dollars.

Video of the Month

How do you win acceptance of a compliance program at a government agency?

Patrick W. Kelley, Chief Compliance Officer, Office of Integrity and Compliance, FBI, talks about involving people in the program and getting their buy-in. See this video and more about government agency compliance programs at: *http://bit.ly/sccevotm-2017-04.*

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Podcasts — *complianceandethics.org/category/podcasts*

Ever wish you could get compliance insights and expert interviews right from your phone? Now you can! SCCE's podcast, "Compliance Perspectives," brings the experts to you.

Tom Fox on Leadership [Podcast]

January 4, 2017 by SCCE – Leave a Comment (Edit)

Tom and Kortney sit down in Minneapolis to discuss Tom's new ambassadorship and his newest venture, his leadership podcast – 12 O'Clock High. They also discuss the impact of generations on leadership styles,

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▶ American Transmission Company in Waukesha, WI has hired new team members: **Sherri Gross** is Manager of Internal Audit, Corporate Ethics & Compliance; **Ross Miller** is Senior Internal Audit Project Manager; **Jean-Marie Poindexter** is Internal Audit Project Manager; and **Jeremy McGlothlin** is Senior CIP Compliance Specialist.

▶ **Kathlynn L. Self** has been promoted to Vice President and Chief Compliance Officer at Universal Weather and Aviation, Inc. in Houston, TX.

▶ True Health Diagnostics, a health services company in Frisco, TX, has appointed **Robert J. Rossi** as Senior Vice President and Chief Compliance Officer.

▶ Oversight Systems in Atlanta, GA has named **Mike Rivers** as Chief Technology Officer. Rivers brings more than 20 years of software product development, security strategy and operational excellence in financial services technology to this executive leadership position.

▶ The Trump Organization in Washington DC has tapped **Bobby Burchfield,** a prominent Washington lawyer who worked with both Bush administrations, to be the company's Ethics Adviser. **George Sorial,** a Trump Organization executive, will be Chief Compliance Counsel. *(For more, see Roy's blog post at complianceandethics.org/wsj-trump-compliance-counsel)*

RECEIVED A PROMOTION? Have a new hire in your department?

If you've received a promotion, award, or degree; accepted a new position; or added a new staff member to your Compliance department, please let us know. It's a great way to keep the Compliance community up-to-date. Send your updates to:

liz.hergert@corporatecomplaince.org

GET TO KNOW SCCE STAFF

Kortney Nordrum, Project Manager

What's your main responsibility at the Association?

My responsibilities fall in a few different areas. I manage our external exhibits and travel often to speak with others about our associations. I'm also the host and editor of our podcast, Compliance Perspectives. When I'm in the office, I also edit our business ethics publication, *ethikos*, as well as managing Corporate Compliance & Ethics Week. I also like to help out with marketing when I can.

Nordrum

How long have you been working here?

Since December of 2013.

What did you do before joining the Association?

I was a practicing attorney and worked as a consultant for Thomson Reuters.

What's the most rewarding part of your position?

Meeting and talking with people! I love getting the opportunity to meet our members at our live conferences and learn about their compliance challenges. In my exhibiting role, it's great to introduce people to our organizations and speak to them about all the great resources we have to offer. I'm a people person, so the more I can talk to people, the happier I am.

What was your most memorable moment working with the membership?

My first Compliance & Ethics Institute in 2014. I was blown away by the number of attendees I had interacted with online who actually sought to meet me in person. It was surreal that people I had never met were instantly my new friends.

How would you describe people who work in Compliance?

In one word: Open. Our members and compliance professionals are the most open and friendly professionals in the world. It's so refreshing to interact and learn from professionals who are so willing to share their experiences and what they've learned with others.

What do you find most motivating or inspiring about your work here?

So much of compliance and ethics is about problem solving. Working in and supporting compliance allows us to challenge ourselves to help them solve problems, and it keeps us on our toes to provide the best resources and services.

What else should the members know about you?

I'm a staunch Minnesota Vikings fan, a crazy dog mom, and a die-hard supporter of the Oxford comma.

SCCE *blog highlights*

Contact SCCE at +1 952 933 4977 or email helpteam@corporatecompliance.org with any questions about SCCE's blog.

Hotlines – Best Practices

By David Dodge, Sports Officiating Consulting, LLC, david@sprtsoc.com

Over twenty years ago, former inspector general of Health and Human Services Richard Kusserow and his daughter Carrie Kusserow were operating the third largest hotline service company in the country. Based on what they learned, they authored a tool kit and practical guide for establishing and managing a hotline operation, entitled "Ultimate Hotline Resource Manual." Today this manual remains one of the best resources for compliance professionals for information on establishing, improving, evaluating, and managing a hotline program. They continue providing concierge hotline services.

While it is impractical to capture all of the best practices cited in the manual, I have selected some of the most appealing:

- Whenever possible, there should be a single hotline which addresses all areas of concern. It is better to have a single focal point for taking calls and a system to route them rather than having several hotlines with different objectives.
- While live operator hotline service is still preferred as the best debriefing method, web-based reporting is growing as a desired option by millennials. It should not be used as a replacement for live telephone reporting, but if offered together would be a best practice.
- Employees and others should be encouraged to use the hotline as the avenue of last resort, not supplanting the usual reporting up the chain of command or to HR.
- Those answering the hotline should never volunteer any information not included in written policies and procedures.
- Callers to the hotline should be debriefed with open-ended questions, not standardized script questions.
- Make sure that the hotline operators review notes of the call with the caller to assure that all points have been answered accurately.
- For quality purposes, it is advisable to make periodic test calls to the hotline at different days and times.
- Once a report is verified, every attempt should be made to resolve it first at the work group level.
- Hotline training should be a part of new employee orientation and refresher training should be conducted at least annually.
- Assure that there is ongoing auditing and monitoring of the hotline.

The above pointers are a few of the Kusserows' suggestions for efficient and effective hotline management. A number of publications are available here without charge, discussing hotline related issues. Experienced compliance officers will likely have additional tips based on their own experience. ✳

For more compliance news and insights, visit ***The Compliance & Ethics Blog*** *at complianceandethics.org and don't forget to subscribe to the daily digest at http://bit.ly/SCCEBlogSubscribe*

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by Jennifer Kugler, CEB

Is your team "built-in"?

It's not a secret that it takes longer to get work done today, and compliance-driven activities aren't immune to this. In fact, compliance reviews slow down the third-party onboarding process by about 17 business days. For most companies, that feels like an eternity, especially when it's not clear why things take so long.

Kugler

One of the major reasons why compliance activities are slow is that they tend to sit outside of normal workflows. This stand-alone—or "bolt-on"—approach creates a significant burden for employees since it requires extra steps and handoffs. What's more, employees are more likely to avoid compliance processes if they have to step outside of their day-to-day workflows to get them done.

In contrast, compliance teams providing "built-in" support achieve success by connecting activities to existing workflows, coordinating efforts with other functions, and designing processes that minimize the burden on the business. But transforming from bolt-on to built-in compliance is not an overnight task. It requires teams to redesign certain burdensome activities and necessitates that compliance coordinate better with other assurance functions.

Beyond process changes, the move to built-in requires compliance professionals to sharpen skills that aren't readily in use. CEB has identified eight compliance team skills that are necessary to effectively embrace the built in philosophy. In order of importance, they are: strategic focus, solutions orientation, deciding and initiating work, policy writing, anticipating risks and trends, collaboration, conflict resolution and negotiation, and knowledge of business strategy.

While these are the skills that are critical to any built-in team, each team member is likely at a different point on their journey to proficiency, so understanding team maturity is key.

First, identify the skills and knowledge your team needs to develop in order to effectively support the business. Your list should include business-relevant, function-specific, and soft skills. For each skill, identify the steps to move from beginner to advanced.

From there, ask each team member to assess proficiency for each skill. Where there are gaps between current and expected skill levels, create a tailored personal development plan that leverages existing training within your company as well as other sources, like external conferences, memberships, and trade groups. You should also identify whether there are topics that necessitate team-wide upskilling and allocate group in-person or virtual group time for them.

Making the decision to move to a built-in approach to compliance requires more than just changing processes. To truly be successful, leaders need to ensure their teams are ready to enable the changes that built-in compliance—and the business—require. ✳

Jennifer Kugler *(kuglerj@cebglobal.com) is Principal Executive Advisor at CEB in Arlington, VA.*

an interview by

Meet Joseph Suich

Joseph Suich (joseph.suich@ge.com) was interviewed in January of 2017 by **Adam Turteltaub** (adam.turteltaub@corporatecompliance.org) Vice President, Strategic Initiatives and International Programs at SCCE/HCCA, based out of Minneapolis, MN.

AT: Before we dive into the heart of the interview where we discuss elements of your compliance program, I want to take a moment to talk about your background. What struck me about it isn't just that you spent more than 10 years at GE. It's something not listed: that you have generations of GE employees in your family, and you are the first one not working on the factory floor or in an administrative support role. That's got to be a tremendous asset to this work. I'm assuming it gives you insight few others have.

JS: You can say I come from a GE family. I like to tell the story of my then 80-year-old grandmother, who worked for years making appliances at the GE Boston Avenue plant in Bridgeport, CT during the 1940s. Well, my grandmother suggested that I mention her name to my GE interviewer when I applied as a GE intern, because she was convinced GE would remember her. I am not sure if it worked, but I got the job. My wife also worked at GE, as did her mother, father, two uncles, and grandmother.

To me, all this adds two things to my role. First, this is not just a company; it is my family's company. I do my very best not only to protect it, but also to allow us to win the right way in the global economy. I expect the same passion from my team. Second, it gives me empathy. This may sound unusual for a compliance officer, but I think our employees are trying to do the right thing in often unclear situations. I am not talking about people who knowingly break the law or look the other way. These people don't last at GE or similar organizations. But I empathize with our sales, service, and project teams who are trying to do the right thing with often confusing laws or policies that even lawyers have a hard time interpreting. I think it is our job as compliance professionals to make our programs easy to understand and follow—much easier said than done.

Our parent company, Boston-based GE, is the world's largest digital industrial company, with $123.7 billion in 2016 revenues, more than 300,000 employees, and operating in about 170 countries.

AT: You're operating on a very global stage. I think it would be good if you gave people a sense of the scope of GE Power. It's a huge enterprise.

JS: Our parent company, Boston-based GE, is the world's largest digital industrial company, with $123.7 billion in 2016 revenues, more than 300,000 employees, and operating in about 170 countries. Headquartered in Schenectady, New York, GE Power is GE's largest industrial business, with approximately $27 billion in revenue in 2016 and more than 55,000 employees serving customers in more than 150 countries and about 2,000 private, state-owned, and government customers. Within GE Power, we have six sub-businesses, each operating with their own business strategy and model: Gas Power Systems, Steam Power Systems, Nuclear Power Services, Power Digital Solutions, and Water & Process Technologies. I work as the global Chief Compliance Officer and Counsel for GE Power.

AT: How is the GE Power compliance team structured to oversee such a large and distributed business?

JS: GE has more than 400 full-time compliance professionals in the company. Across the whole company, we have strong corporate, global operations, audit, and global growth compliance teams that allow us to work horizontally and leverage scale with topics impacting all divisions. Each of GE's divisions has a compliance structure tailored to its risks and business.

The GE Power compliance team is made up of 29 full-time compliance professionals. Some of us are lawyers, but not all, because having various compliance professionals (sourcing, finance, audit, etc.) brings different views and scope to our function. Each of GE Power's six individual sub-businesses has a compliance officer who is dedicated to that sub-business. Each must be familiar with the sub-business's equipment, service, project and digital offerings, business model, and external strategy—no exceptions. Simply "peanut buttering" a corporate compliance program and hoping it seeps down to the risks does not work at GE. Each compliance program,

while of course having horizontal aspects to leverage scale, also must be tailored to each sub-business's risks.

This also goes for our 13 regional CCOs. These compliance officers, similarly, must be attuned to the regional risks and coordinate these efforts with the six sub-business CCOs. For GE, this structure is simple but effective. We also have a small headquarters team that focuses on our open reporting system, project-specific risks, high-risk payments, and training.

Another important piece to our structure is a group of employees we call Compliance Liaisons in functions such as Labor & Employment, Sales, International Trade Controls, Controllership, etc. These folks are not full-time compliance professionals, but rather join all our compliance meetings, work outs, etc. to ensure we avoid a siloed approach—often the root cause of so many "misses" in our profession. They raise issues we typically would not think of and allow us to be more business focused. I run the above GE Power compliance team and report to the GE Power General Counsel, Keith Carr.

AT: You've spent a lot of time with GE working in Eastern Europe and Russia, an area known for having some corruption issues. Any advice for a compliance officer with responsibilities in this region?

JS: To be honest, I love Eastern Europe and Russia. I would rather vacation in Bulgaria than Florida. In addition to having a Hungarian name, I did my undergraduate and graduate work before law school in Eastern European and Russian Studies. In my opinion, Eastern Europe/Russia is still finding itself in a 21st-century environment, as the latest generation feels neither a connection to nor is fettered by the recent past. But, I think there is still a general distrust or skepticism of institutions, and this can carry over to companies and their compliance functions.

In addition to having a Hungarian name, I did my undergraduate and graduate work before law school in Eastern European and Russian Studies.

While not unique to this area, I suggest a few actions are a must in this often high-risk region. First, follow the money. Strong controllership and audit is a must. Look for the anomalies in payments and invoices. It is OK to be skeptical when you pay third parties. Keep it simple—in addition to all the required due diligence and verification of need, be sure someone "owns" reviewing the bills.

Second, educate your workforce on red flags, because the troubling fact patterns may not be as obvious to them as they are to you (e.g., last-minute adds of a third party to a deal, an unwarranted "administrative" fee to get a permit, a permit fixer recommended by a government agency, etc.).

Third, people will raise issues if they believe something will happen, and they should never be retaliated against. This trust does not come overnight and can be easily lost due to sloppy program execution.

And last, employees will take their cue from their leaders even more than any compliance officer. Since leaders hire them, fire them, promote them, and pay them, then they will follow their leader. Ethical leaders, who will walk away from an improper deal or support their employees if they lose a deal to act with integrity, are a must. If leaders are not

setting the right culture, the program will not work. I don't think any of the above actions are particularly proprietary, and they are not unique to Eastern Europe and Russia, but they have worked for us at GE.

AT: Trying to reach people all over the world is a great challenge. How do you keep your finger on the pulse of what is going on?

JS: The main way I keep the pulse of what is going on is via reliance on an empowered global compliance team. At GE, we interact in a matrixed organization and work together as an extended team to ensure that matters are escalated as necessary, as well as to leverage scale and ensure that learnings are shared globally with the entire team and throughout all our divisions. As an example, GE's Chief Compliance Director Al Rosa holds quarterly video calls with all his division CCOs, and I do the same with my staff and Compliance Liaisons. We also use "flash calls" (15-minute, no-pitch calls that any member of our team can set up to discuss or provide lessons learned on a topic). These provide great value and help to empower the team.

I have seen how a small team of true change agents can drive a world-class program.

The idea of an empowered team is one I would like to expand upon a bit. I have seen how a small team of true change agents can drive a world-class program. The differences between very good and best-in-class programs are smaller than you may think—and one of the biggest factors is the team behind the program. A team of A+ players have the courage to constructively challenge each other (particularly their manager), speak with sincerity for the good of the company versus personal gain, stay cool under pressure, are facilitators of an integrity culture, and are outcome based. We operate using horizontal working teams (via what we call the GE Store) and actively seek out opportunities to engage with each other to maintain trust and leverage relationships, which enables a free flow of communication and idea sharing.

AT: One issue that many wrestle with in this area is the helpline. In some cultures, people won't go near them because of their history in totalitarian states. How you do you get people to pick up the phone?

JS: We have what we call our Open Reporting system. The system includes an internal hotline, yes, but also our 600 or so Ombuds scattered throughout the world at a multitude of locations. These Ombuds are full-time employees who, in addition to their everyday roles, also serve as trusted and approachable employees who will intake compliance concerns raised by our employees. Employees may also raise compliance concerns with their manager, Human Resources, Compliance, Legal or Audit, or anonymously through the internal hotline. Most of our concerns do not come from the hotline, but rather are raised to our Ombuds or managers. This makes sense to me, because people often will want to raise issues with people they know and trust.

In some areas like Russia, my own experience has shown me that very few concerns are raised anonymously. Therefore, establishing trust in your program is so important. People will use an open reporting system—regardless of the conduit—when they believe that speaking up will be welcomed by leadership and that action will take place because of the concern raised, with no retaliation against the concern raiser. A sloppy

program or poor execution can damage a program quickly, and the stakes are high. Recent self-inflicted compliance issues in the news today could have been avoided via people speaking up. I truly believe that a Speak Up culture is the pinnacle of a good compliance program, and the benefits go beyond compliance. A Speak Up culture allows for a more engaged workforce ready to challenge the norm, push back on stale business practices, raise better customer initiatives, and feel better about their environment and organization. It is a business advantage.

The compliance app was in response to feedback from our employees, particularly our early career workforce who want it fast, now, and in mobile form.

AT: And how else do you both encourage people to come forward in person and to just find out what they're thinking?

JS: We want our employees to come forward to do the right thing. And that comes from creating the right culture, a culture led by your leaders. In addition, however, I think it is good to message both your organization's compliance wins and challenges. For example, GE has developed "compliance hero" videos where an employee who displayed courage to do the right thing is highlighted. It is imperative that we clearly relay to our employees that those who come forward with problems, even ones they inadvertently created but were done in good faith, will be supported. We also provide hundreds of small compliance awards, thank you notes, and recognitions to our employees each year, as well as internal raffles associated with compliance tests or quizzes.

This recognition does not drive the behavior and culture by itself, but I think it helps to strengthen it. We likewise produce numerous real-life story videos of internal and external challenges and best practices we want to flag to our employees, usually no more than a few minutes each. The videos are placed in weekly e-newsletters, websites, shown at business meetings, etc. For us, we are always working to balance promoting the good outcomes of compliance, but also being transparent about the challenges. Through these examples and other practices, we have created a Speak Up culture, one that will hopefully catch major misses before they happen.

AT: You mentioned the GE Power compliance app for mobile devices. There aren't too many compliance teams who have their own app. What was the genesis of the initiative?

JS: The compliance app was in response to feedback from our employees, particularly our early career workforce who want it fast, now, and in mobile form. During our SEEK (Simplify, Educate, Empower and Know) compliance simplification initiative, our employees said to us that a 40-page PowerPoint presentation or training a year ago simply was not effective. Our employees want to act in the right way, but demand a program simple enough to follow and have a clear understanding of who to call when issues become complex. As a result, we created an app using VOC (Voice of the Customer), because we consider our employees our internal customers. Our corporate compliance team was the first to launch a compliance app, and we leveraged this work. The Power app

contains functions that were requested by our sales force, many of which are different or additional to those suggested by the compliance team. The app allows our GE Power compliance team to move at the speed of business. We call it "compliance on the go."

AT: So, walk us through what the app offers employees.

JS: The app offers a variety of functions, such as obtaining approval for a dinner with a government customer, raising a compliance concern, available resources and phone numbers for questions based on regions and business units, dawn raid procedures, logging a competitive contact, and more. Our corporate team is creating a newer version app with similar features to be leveraged across GE.

We did some mass internal promotion and a video on how to use the app to ensure employees understood the app's purpose and the ways to use it.

AT: What's been the feedback from employees?

JS: Feedback has been good. We did some mass internal promotion and a video on how to use the app to ensure employees understood the app's purpose and the ways to use it. Still, we continue to publicize it as we hope for even greater use in the future.

AT: When we spoke previously, you mentioned an interesting approach to risk management that you have, called the Risk Roll Up. It's not your typical top-down risk assessment, but in many ways a bottoms-up one. Walk us through how it works.

JS: The Risk Roll Up (RRU) is a great way to drive the often-elusive tone at the middle of our organization, identify issues top leadership may not be focusing on, and make leaders the face of compliance to your employees. The RRU is a multi-business, manager-led, employee-driven compliance risk assessment. The RRU applies a bottom-up approach where each manager meets with their reports, selecting three of the 16 GE integrity policies (e.g., International Trade Controls, Anti-Money Laundering, Working with Governments) to discuss.

Our compliance team prepares both training and simple tools for the managers to use beforehand. The tools consist of one page on each policy, a video on each policy, and one GE Power near miss or case study we want our employees to not repeat. The manager, now prepared, will then run his or her Risk Roll Up session by a certain date for completion. Thousands of questions are answered on the spot, and thousands more are put into a tool where a subject-matter expert responds to both the manager and the employee who raised the question. The manager then meets with his/her own manager and so on, until the entire business has "rolled up" to the CEOs of the GE Power sub-businesses, and those CEOs will then report out to our GE Power CEO Steve Bolze on top compliance issues as identified by their employees, rather than a top-down approach.

The process works to drive the "unknown unknown" issues to the compliance team, makes managers in the middle the faces of compliance to their employees, requires managers to better understand the compliance topics to teach, and potentially results in the avoidance of multiple major misses and

business interruptions. This program is in addition to GE's robust Open Reporting program, and the RRU happens on a large scale (e.g., GE Power alone rolls up to more than 37,000 employees).

AT: What I also find interesting about this approach is that it forces everyone in the organization to talk about compliance and to do so in many ways, like every other business issue. How else do you engage your leaders? Is that helping to change the perception of the role of Compliance?

JS: The Open Reporting program and Risk Roll Up are just parts of GE's overall compliance rhythm to make compliance an everyday part of our operations and owned by all employees. We also have periodic compliance review boards with our business and regional CEOs and their staffs to discuss and address compliance issues and review related metrics. Similarly, we hold yearly regional compliance operating reviews with business leaders in those regions where they, as compared to the compliance officers and lawyers, are expected to present on and discuss possible solutions and approaches to compliance issues impacting their business. Some of other elements include: (1) compliance minutes at staff meetings to "look around corners" to find problems before they happen; (2) the use of video "real-life stories" or near misses to avoid repeats; (3) compliance videos and communications in our weekly newsletter to the divisions; and more. The compliance material for a large or small organization must be fresh, interesting, mobile, and, most importantly, relevant to the teams interacting with it. Employees will listen to and engage with a compliance program presented in a simple and relevant manner—and they take their cues from their leaders. That is why all employees own compliance at GE, and it is driven by our business leaders.

The Open Reporting program and Risk Roll Up are just parts of GE's overall compliance rhythm to make compliance an everyday part of our operations and owned by all employees.

AT: Finally, let me close by asking, where do you see Compliance evolving next, both in GE and in general?

JS: This is a great question, and one I ask myself almost every day. What steps do we need to take now to position our compliance programs for success in the future within our business? While every business's future compliance program will vary toward future business growth playbooks, some program elements are likely to be universal. First, in-house compliance can never again be a back room function. Even more than now, our function needs to be tied to the business teams and the business objectives, and we also need to be customer facing. Compliance is culture-facilitating and not police-like; we must be bold enough to say no when it must not be, and yes when it can be. In our compliance pipeline of the employees who will lead our function into the future there needs to be a new type of leader—leaders who are more global, more digital, who go beyond the metrics, go beyond the basics of a compliance program, and are more comfortable with change. These are the type of employees

we'll look to lead. No longer is being a good compliance lawyer or auditor enough.

Second, data analytics and smarter monitoring must be a greater part of our programs. In the Compliance field, we have yet to tap into the true power of data analytics and the ability to predict and avoid compliance misses before they happen. Monitoring will also play a greater role. As our compliance programs become even simpler to be better understood, and even more mobile to meet the speed and needs of business and an early career workforce, smarter monitoring needs to provide the balance. New monitoring should replace old monitoring; people looking at work flows and spreadsheets hoping to find trends or non-compliance anomalies will be replaced with analytics that spot misses or trends sooner and with more precision at less cost. Having a program coder on a compliance team's staff is now as important as a finance specialist. Lastly, there is a need for even stronger relationships and transparency between corporations and global government agencies. Only by working together, with both parties clearly setting expectations and explaining complexities and challenges, can we properly level the playing field for companies, like GE, that will only do business with integrity. In short, I am positive and excited about the future for our function.

AT: Thank you, Joseph for giving us some insights into the workings of GE. ✳

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by Steven Priest

A commitment to integrity

Ethics and compliance professionals need to focus on strengthening a culture of integrity if they want to have any hope of minimizing misconduct and enhancing the organization's reputation. Extensive research in the fields of ethics, compliance, organizational culture, safety, and profitable organizations identifies five key organizational attributes at the foundation of a sustainable, high-performance culture:

Priest

- Commitment
- Communications
- Character
- Courage
- Candor

"5 C's" are memorable, but what do these attributes mean? This column unpacks the first C: Commitment. Sustainable, high-performance cultures are committed to doing the right thing—not just as a matter of marketing or positioning—but as an uncompromising stance embodied by the words and actions of leaders and recognized by employees and business partners.

It turns out you can't fake commitment. Employees are especially sensitive to how the company acts in a time of crisis or stress. Does the organization still act with integrity as its lodestar, or do financial concerns prevail? Whether in good times or challenging times, research indicates that companies that actively emphasize seemingly conflicting goals do best at the sustainable high performance that flows from a commitment to doing the right thing. They emphasize:

- **Customers, employees, and shareholders/owners:** This is a short form of stakeholder theory, which often adds suppliers and communities to the mix. Empirically, it turns out the latter two are unnecessary to drive sustainable performance.
- **Performance and principles:** Employees are not naïve. They know corporations and non-profits will go out of business if they don't perform financially, resulting in a situation not good for anybody. But principles need to be the same priority as performance, or both are lost.
- **Short term and long term:** Companies that are driven solely by the need to report great quarterly reports are more likely to do things that are questionable from a compliance or reputational perspective. The quarter is important, yes, but not at the expense of the annual or five-year goal.
- **Innovation and compliance:** A culture of total compliance shuts down innovation. A "just do it" culture can easily lead to excessive compliance risks.

F. Scott Fitzgerald wrote, "The test of a first-rate intelligence is the ability to hold two opposed ideas in mind at the same time and still retain the ability to function." First-rate companies—those that achieve sustainable high performance—are those that emphasize seemingly disparate goals, while remaining true to a commitment to doing the right thing no matter what. ✳

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by Joe Koenig

The right questions, the right way, the right time

» The deceptive will take advantage of poorly worded questions.
» Questions and settings need to minimize contamination.
» Questions need to be simple, precise, and direct, and use mutually understood words.
» Telling lies is stressful; truth is peace.
» Know truth. Know deception.

As we put together our communication strategies, we need to think about asking the right question, the right way, at the right time. For ethical fact-finding and decision-making, questions need to be structured correctly. Questions need to be simple, precise, and direct, and use only mutually understood words. And, we have to ask them at the right time. If any of that is missing, we may close the door on getting the truth.


Koenig

As with scientific and forensic procedures, our communication process is subject to contamination. Contamination is anything that affects a response. There are times when we may wish to employ intentional contamination, where we try to influence a statement one way or the other. In this article, I focus on unintentional contamination. To get truthful information and to detect deception, the questions we ask need to minimize contamination.

Contamination

Unintentional contamination can occur as we walk into the interview room, as we begin the questioning process, in the type of interview room itself, as noises inside and outside the room, etc. Everything contaminates. Even no contamination can contaminate. One-on-one interviews are by far the best, since a second interviewer will contaminate. The way we present ourselves, our choice of interview rooms, our question strategy, our question structure, how we ask our questions, when we ask our questions, and our question presentation are all considerations. We need to consider how each of these variables may affect the subject's responses and include those considerations in our communication strategy.

Questions with introductions will contaminate the response, such as "*Would* you *say* …?" "*Can* you *say* ...?" "To the *best of your knowledge* ...?" "What *can* you tell me? These questions are defective—and easily allow the deceptive to wiggle out of telling the truth. I can "say" anything. The wording "*to the best of my knowledge*" allows me to tell only what I know, and what, after all, is "knowledge?" Is the knowledge deduced, observed, inferred, or imputed? The deceptive will take advantage of poorly worded questions and provide

misleading answers. Contaminating questions make the responses unreliable. Avoid contaminating questions at all costs.

Define the terms first

The compliance officer who asks, "Did you follow *procedures*?" or the attorney who asks: "Do you have *chattel*?" "What are your *current liabilities*?" "What is the *value* of your *assets?"* is just asking for a misleading answer. The auditor who asks: "What are the *risks* in your operation?" "What are your *key* processes, procedures, and controls?" "What do you *view* to be the main *risks* in your area?" The words *procedures*, *chattel, current, liabilities, value, risks, key, view* all need to be defined and mutually understood before using them in questions. The deceptive will seize the opportunity to respond with partial truths to poorly defined questions. If cornered on an answer, they can always use the excuse, "I took the question to mean …" Even truthful people may unintentionally provide misleading answers. Words matter. The old adage, "Garbage in, garbage out," applies. So, what is a well-constructed question?

In my book, *Getting the Truth* (available at *https://goo.gl/qgDmxl*), I define lies as partial truths—there is a modicum of truth in every lie. As we grow up, we hone our ability to lie (i.e., tell partial truths) by including some truth in our statement. We convince ourselves (i.e., rationalize) that a statement with some truth is not a complete lie. Only statements with no truth at all are lies. People consider partial truths to be truthful statements. Remember, people want to tell the truth.

Detecting deception

Nature compels peace. Telling lies is stressful. A body under stress seeks peace. Our focus then, needs to be on structuring questions to allow truthful people to tell the complete truth—and make it very difficult for deceptive people to tell partial truths. If they don't answer the question, they did. If they don't deny it, they probably did it.

We also need to calibrate the subject's communication pattern during the introductory phase of the interview, when asking non-threatening questions: "How long have you been with the company?" "How about Saturday's game?" "Where do you live?" These all help you calibrate to the subject's communication patterns. Take note of how the subject communicates. Sense their eye, eyebrow, lip, and body movements; their breathing, word, and blinking rates; the hand movements they use to explain; their vocabulary and eye contact. All of these observations constitute the subject's unique communication pattern. This calibrated pattern provides you with their communication standard and allows you to compare their communication pattern while responding to critical/threatening questions. If the pattern changes, you need to find out why. The cause(s) could be deception, a noise in the room, a poorly worded question, one of the words in the question distracted the subject, etc.

It's very difficult to detect skillfully worded deceptive statements. Lance Armstrong's statement, "I've said it for seven years—I haven't doped." provides us with an example. Deceptive people are wordsmiths, and we, as interviewers, need to use that trait to our advantage. We do that by forcing subjects to give us precise responses using mutually understood words that can't be misinterpreted. Keep in mind that truthful people will not intentionally provide partial truths. Typically, truthful responses are simple, precise, and direct. Truthful people want us to know the complete truth. Deceptive people don't. Use that to detect deception.

The response, "I didn't do it," when it stands alone without explanation, contains the components of a truthful response. But you can rely on it only when there is no doubt about what "it" is and "it" is consistent with the evidence and circumstances. And, the context matters. Was it blurted out? Was it in response to a question? Is it consistent with the subject's calibrated communication pattern?

The responses: "I couldn't do it," "I wouldn't do it," "I'm telling you I didn't do it," "I can tell you there is no way I did it," "I am not guilty," "As God is my witness, …" —all suggest deception.

A handwritten statement

I regularly employ a powerful handwriting technique that addresses many of these issues using a plentiful amount of plain, unlined paper—unstructured by design and plentiful to encourage thorough responses. It also provides a report, a personally handwritten statement, that can't be improved upon, since it records the interview in the subject's own handwriting and the subject's own words and thoughts. Once I'm in the interview room with the subject, I introduce myself with minimal conversation. I ask the subject non-threatening questions about their full name, address, time with the company, etc. During this time I'm calibrating the subject to determine his/her communication pattern.

After that short introductory session, I then tell the subject I will handwrite my questions and ask them to respond in their handwriting. I typically use different color inks for my handwriting and the subject's.

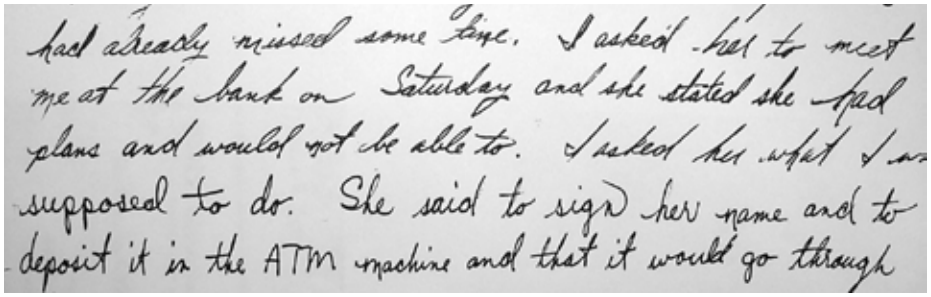
I will start with the command, "Tell me what happened." I will also leave the room, telling them I will wait outside and to notify me when they complete the response. This further minimizes contamination. I'm not sitting there fidgeting, looking at my phone, or distracting them in any way. It also leaves them alone with their thoughts. This is a powerful technique. People tend to write things and thoughts they won't verbalize, especially when they are alone.

> The command to write out a response to "Tell me what happened" on an unlimited supply of plain white paper sets up a very complex process.

The command to write out a response to "Tell me what happened" on an unlimited supply of plain white paper sets up a very complex process. The subject has to compose the response knowing where she starts will determine where she finishes.

We then have several pages of a handwritten explanation of what happened, produced with minimal contamination. I look at that statement to see if there are signs of stress in the composition, noting areas of sensitivity: cross outs, rewrites, flow disruptions, different handwriting styles, etc.

To illustrate, look at the following picture (on page 34) of a statement I obtained using the above principles. The subject's ex-wife accused him of taking personal checks made payable to her, forging her name, cashing the checks, and keeping the money. I minimized contamination. There is little that I said or did to influence his statement. Remember: It is harder to lie than to tell the truth. Deception requires a much higher thought process than truth-telling. Deception is therefore, more stressful. Here is a portion of his five-page statement responding to "Tell me what happened":


had already missed some time. I asked her to meet me at the bank on Saturday and she stated she had plans and would not be able to. I asked her what I was supposed to do. She said to sign her name and to deposit it in the ATM machine and that it would go through

Note the handwriting changes dramatically when the subject writes, "She said to sign her name …" Something caused that difference in writing. Was the cause deception, the pen, or a noise in the room? The fact it occurs when he provides his main defense suggests stress. Stress, in this case, probably reflects deception.

My first question to him once I returned to the room was, "You wrote *'She said to sign her name ...'* Please tell me about that." Ask the right question, at the right time, in the right way. I asked that question in that way with those principles in mind. I wanted him to know his deception was identified immediately and to maintain the stress level following the difficult task of completing the statement. He later confessed to me that his ex-wife did not give him permission to sign her name. Just like in nature, water seeks its own level. There is peace in truth. Although he lost his financial institution job, he was now on his path to rebuild his life.

My next step in this statement-taking process is to ask the subject to define their words by asking, "What did you mean when you wrote, *'I then made the entry?'*" Force them to define their language and their meaning; then use their words, now defined and mutually understood, when constructing questions.

Constructing the questions

Well-constructed questions (i.e., commands) contain mutually understood words constructed simply and precisely. Again, the goal is to minimize contamination.

"Were you ever at 765 Moross?"
Better: Show picture of 765 Moross and ask, "Were you ever inside that building?"
("at" is not precise; "inside" is better; also, subject may not know address).

"What is your net worth?"
Better: "What does the phrase "net worth" mean to you?" then, "What is your net worth?"
(define the word, then use the word after it is mutually understood).

"When was the last time you saw Nicole?"
Better: When did you last see Nicole?
(six words vs. eight words; also simple and precise).

"Did you kill your wife?"
Better: "What happened to your wife?"
"She was killed."
"What do you mean?"
"Someone shot her."
"Did you shoot her?"
("kill" needs to be defined).

"**What do you think happened?"**
Better: What happened?

"Do you have any chattel not already listed?"
Better: "Do you have any personal property not already listed?"

"**Do you know who took the money?"**
Better: "Who took the money?"

(akin to, "What can you say ...", but more precise).

"Can you say you did not take the money?" *Better:* "Did you take the money?"

Conclusion

There is much to learn in developing the skills necessary to conduct ethically sound and good fact-finding interviews. We need to minimize contamination, knowing that everything we do (and don't do) will contaminate. We need to help prevent deception by asking properly constructed questions, at the right time, in the right way, using only mutually-understood words. We need to know how deceptive people use words in our questions to provide deceptive answers. We need to remember people want to tell the truth and deceptive people rationalize that a partial truth is not a lie. We also need to know what kinds of responses to expect from truthful people, so we know when we're being told the truth. Know truth. Know deception. ✳

Joe Koenig *(Joe.Koenig@kmiinvestigations.com) is Owner of KMI Investigations LLC in Grandville, MI.*

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by Thomas R. Fox

What's in your (corporate) wallet?

Samuel L. Jackson asks, "What's in your wallet?" in a ubiquitous television advertisement for a Capital One bank card. I thought about this question from the angle of the compliance professional, in connection with risk, risk management, and the supply chain. So to paraphrase Jackson, "What's in your *supply chain*"? This question came to my mind from a couple of recent reports of bad acts by suppliers and their customers.

Fox

The first was Texas-based Blue Bell ice cream, which back in 2015, was involved with a scandal involving listeria tainted ice cream. The company was forced to recall its entire products lines, to shut its operations for several months, and to completely eradicate the unsanitary plant conditions which led to the listeria outbreak. It was a massive effort and cost. The company paid a $850,000 fine to the state of Texas as well.

Blue Bell had resumed operations and was trying to put its food processing nightmare behind it when, last fall, Blue Bell products with cookie dough flavoring were found to have listeria in them. The company was forced to issue yet another recall for all cookie dough flavored products and face the wrath of its customers yet again. Fortunately for Blue Bell, this time it was not the direct cause of the listeria; it came from the supplier of the cookie dough flavoring for the ice cream.

The second example comes from the ongoing Volkswagen scandal, where its software supplier, the Robert Bosch company, agreed to pay a fine of $327.5 million for its role in developing the underlying software that enabled VW's fraudulent defeat device. Robert Bosch understood what the code it wrote would do, and the legal implications, when it sought full indemnity from VW in 2008, yet the company caved into pressure from one of its largest customers.

The first was Texas-based Blue Bell ice cream, which back in 2015, was involved with a scandal involving listeria tainted ice cream.

For Blue Bell, the supply chain customer, the lesson is that you must have ongoing monitoring and auditing of your key supply chain partners. For the supplier, Robert Bosch, the lesson is if your customer mandates that you engage in activity you know is illegal, no contractual indemnity in the world will protect your company. Both of these expensive lessons will resonate far into the future for both organizations.

So what is in your (corporate) wallet? Is it a supplier that provides tainted supplies which you incorporate into your final product, or is it a customer that requires your company to supply a legal product which will be used for illegal purposes? ✳

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by Colleen Dorsey, Esq.

The Compliance & Ethics profession and why it matters to Millennials

» Compliance and ethics professionals are needed in every organization of every size and every sector.

» The U.S. Sentencing Commission's Guidelines, Chapter 8 gives organizations an incentive to have an effective compliance and ethics program in place.

» Corporate scandals, such as Enron in the early 2000s, solidified the need for specialized professionals to guide corporations in compliance and ethics.

» The job market for well-educated and dedicated professionals in Compliance is strong.

» Regulatory oversight is essential to good business, no matter who is in the White House.

Perhaps the best way to describe what and why compliance and ethics (C&E) professionals matter is to think about what would happen in their absence. If there were no C&E professionals involved in professional sports organizations, what would happen? If there were no C&E professionals involved in the manufacturing of toys, cars, carpet, telephones, or airplanes, what would happen? Every company in existence has compliance and ethics needs. Whether a company identifies the individuals filling these roles with titles that include the words "compliance" and/or "ethics" varies from company to company. Rest assured, they all have them. And if they don't, they will.

Dorsey

In fact, over the past several years, not only are more companies naming these roles appropriately, they are creating wholescale C&E programs and the departments to house them. This comes with the company-wide creation of a system of policies, processes, procedures, and controls around compliance, as well as the establishment of an ethical corporate culture.

> If there were no C&E professionals involved in the manufacturing of toys, cars, carpet, telephones, or airplanes, what would happen?

How and when did this start? In 1991, because of the inconsistency and—in the opinion of some—the leniency of how sentences were being handed down by judges to organizations (vs. individuals) across the country, the Federal Sentencing Guidelines for Organizations (FSG)[1] introduced a whole new section to deal with organizations that

have broken the law. The FSG (now known as the USSC *Guidelines Manual*) brought a more consistent approach to the handing down of sentences for corporations that found themselves in trouble.

Chapter Eight of the *Guidelines Manual* applies when the corporation finds itself in the sentencing stage. The court, with guidance from the Department of Justice, looks to sentence the corporation and assesses culpability scores based on the language in the *Guidelines* and the facts of the corporation's case. One of the factors reviewed in determining culpability scores is whether the corporation has in place an effective C&E program. In order to even be considered to have an effective program, at the outset, the corporation must exercise due diligence to prevent and detect criminal conduct and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. If a corporation's C&E programs do neither of these things, the corporation will not meet the standard as a preliminary matter, and culpability scores will be assessed accordingly.

One of the factors reviewed in determining culpability scores is whether the corporation has in place an effective C&E program.

Chapter Eight of the *FSG*, along with the very public criminal behavior of several corporations in the early 2000's (think Enron, WorldCom, Tyco, to name just a few), got the attention of corporations and their boards of directors. Compliance and Ethics began to gain traction as a separate and justifiable profession in its own right. Every year that passes, we see more and more focus on this critical area of corporate infrastructure.

Today, a quick search of job opportunities that involve the C&E function can yield dozens of results. Opportunities for new compliance professionals may come with the title of compliance analyst, compliance specialist, risk manager, compliance consultant, or something else entirely. Whatever the title, the essential point is that Compliance and Ethics as its own profession is here to stay.

I might add that this is true regardless of who is in the White House. The need for well-educated and dedicated professionals in this sector is interminable. Oil, healthcare, banking, tobacco—these are industries that will always be highly regulated. The danger and/or critical importance to the infrastructure of the United States is just too great to consider any measurable decrease in regulatory oversight. Moreover, as a conversation with a leading bank executive revealed, even if President Donald Trump were to dial back some of the Dodd-Frank Act or other regulatory schemes, a lot of businesses will likely keep some of these structures in place, because they make good business sense.

To come full circle as to why the C&E profession matters and, more importantly, why young people today who are searching for a worthwhile profession should consider such a career track, I simply ask, what will happen if you don't? ✳

1. United States Sentencing Commission: *Guidelines Manual*. November 2016. Available at http://bit.ly/ussc-guide-manual

Colleen Dorsey *(colleen.dorsey@stthomas.edu) is Director Organizational Ethics & Compliance for University of St. Thomas School of Law in Minneapolis, MN.*

by Meric Craig Bloch, CCEP-F, CFE, PCI, LPI

"This is the business we've chosen."

In *The Godfather 2*, Hyman Roth, an aging Jewish gangster patterned after the famous Meyer Lansky, makes this statement to Michael Corleone to explain some of the painful realities of organized crime. As a compliance officer specializing in investigations, the phrase always resonated with me.

Bloch

A good friend recently resigned from her compliance officer job because of frustration with her organization's leadership. Another good friend left his compliance officer job when a new leader came into the company. They were both valued colleagues and continue to be good friends.

In my years teaching investigations, conducting investigations, and helping organizations build investigation programs, I regularly had to showcase the value of the process to persuade others to accept it. Like the rest of you, I know that we cannot change the human nature of our employees, that we accept that we have to show return on investment (ROI), and that we hope that shows of support from our organization are proof that they "get it" this time.

But like every job, nothing for a compliance officer is permanent. Compliance programs can be big or small. Internal or outsourced. Resource-rich or impoverished. Relevant or paper programs. Championed by thought leaders or minimally managed by other department heads.

We are quick to point out the impact our programs have on the organization. Don't we talk about integrity agreements and the Yates Memo, among other things, to show how misconduct will affect the organization? Should we also consider the impact it has on us?

For example, workplace investigations focus on what goes wrong in your company, not what goes right. You'll rarely investigate the high-fliers who are taking your company to new levels of business success. You will become more acquainted with the people at the other end of the talent and job-performance spectrum. The issues you confront often offend your own sensibilities. People are often fired, careers are impacted, and family lives altered. In some cases, people go off to jail. You get to watch it all from the other side of the table.

So, what have we learned? We know that we see the value of an effective compliance program, but others may not see it. We see the need for an organization's leadership to "own" the program, but many of them don't. We work to show them the ROI of a good program, but many see us as just another mouth to feed on the org chart. We see the value of a good investigation and feel the personal cost, but many see us only as the "company cops."

This is not meant to discourage people. You probably do work for a good company with good people. For the most part, the reasons you joined these people are still there. But be realistic about what your leadership will likely support with both their funds and their authority. Focus on singles and doubles rather than home runs. Your job does not allow you the luxury of idealism and warm feelings of unconditional love.

We are compliance officers and investigators. This is the business we've chosen. ✳

Meric Craig Bloch *(mbloch@shrinenet.org) is Corporate Director, Investigations for Shriners Hospitals for Children. He has conducted over 400 workplace investigations of fraud and serious workplace misconduct, and is an author and a frequent public speaker on the workplace investigations process.* *@fraudinvestig8r*

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- Information on new laws, regulations, and rules affecting international compliance and ethics governance

by Emily Dyer, CIPP/US and Femi Richards, JD, MPP, CIPP/US, CCEP

The framework for developing an effective compliance program

» An effective compliance program is multifaceted and should be assessed periodically to ensure that it is operating effectively.

» Risk assessments are critical to facilitating institutional compliance efforts and increasing awareness of the probability and likely impact of business risks.

» It is important to document and align risk-mitigating control strategies with the organization's risk appetite.

» The implementation of a documented audit plan is indispensable in driving accountability and enhancing transparency.

» Instances of non-compliance identified though audits should be documented, reported, and remediated in accordance with applicable policies and legal requirements.

Many organizations make the mistake of treating compliance as if it were a discrete *project* rather than an ongoing *process* that is central to an organization's culture. As such, many organizations devote the lion's share of their resources to simply developing their compliance programs and pay far too little attention to ensuring the program's ongoing effectiveness. Simply put, it is important that organizations look beyond the baseline objective of documenting a written compliance program and, instead, recalibrate their focus toward adopting practical methods of determining: (1) whether all of the critical elements of an effective compliance program are in place; and (2) if they are, in fact, being followed (e.g., programmatic audits).

Dyer

Richards

This article outlines a practical framework for structuring an efficient and effective risk-based compliance program. There is no "one size fits all" approach for every organization, but there are several core components that must exist to have an effective program.

There is no "one size fits all" approach for every organization, but there are several core components that must exist to have an effective program.

"Trust, but verify."[1] This phrase was made famous not by a compliance professional, but by former President Ronald Reagan; and

although he was not referring to an official compliance policy, the phrase should be the mantra for any organization's compliance professionals, no matter the industry in which they reside.

Once a compliance audit program has been developed and implemented with the imprimatur of the Audit Committee and/or senior management, it is natural to assume that the dictates contained therein will be followed by the masses. Assumptions, however, should not be the basis of a sophisticated compliance regime. Rather, a compliance program that contains robust monitoring and auditing standards designed to ensure that the appropriate controls have been put in place to identify and mitigate the organization's greatest perceived risks is a much more pragmatic and effective approach. The program should be sustainable and socialized throughout the company so that all employees perceive it as business as usual and not something for which the compliance group has sole responsibility.

Today's compliance professionals are tasked with safeguarding their organization's operational functions and must consider not only reactive, but preventative methods to detect deficient enforcement of their company's policies, procedures, and standards, as well as any laws that may regulate their industry. Because no one compliance program is applicable to all organizations, this program should be structured according to your business's unique risk appetite.

Because no one compliance program is applicable to all organizations, this program should be structured according to your business's unique risk appetite.

The role of Internal Audit

The groups responsible for audits should be knowledgeable about the processes and procedures they enforce and be independent of the operations they assess; maintaining objectivity is key to the success of these important functions. If the Audit function does not fall under the organization's legal umbrella, it is important to obtain counsel's advice on the type and scope of the audits being conducted, as well as the privilege status of the program. Audit may play a number of roles within a company, including but not limited to:

- Establishing an ethical culture by being a key component of good governance;
- Providing assurance to management;
- Ensuring compliance with regulatory and other obligations, such as laws, contracts, etc.;
- Preventing, detecting, and correcting wrongdoing;
- Instilling values, ethics, and standards;
- Facilitating accountability;
- Providing insight and recommendations;
- Participating in fraud investigations as needed;
- Identifying risks that an organization faces;
- Testing the effectiveness of controls designed to protect the organization from risk; and
- Advising the organization on controls, policies, and procedures.

According to the Institute of Internal Auditors (IIA)'s *Standards for the Professional*

Practice for Internal Auditing (Standards) 1110.A.1, "The internal audit activity should be free from interference in determining the scope of internal auditing, performing work, and communicating results." Regardless of where the functions reside, the structure and reporting lines adopted for the Compliance and Internal Audit functions should promote independence, objectivity, consistency, and business understanding.[2]

Key components of an effective compliance program

The following framework is designed to help guide compliance departments in structuring an efficient and effective risk-based program.

Developing risk assessment objectives

Warren Buffet famously said that, "Risk comes from not knowing what you're doing."[3] This is true both in the world of investing and in compliance. Before one can implement a robust compliance program, it is vitally important to have a sophisticated understanding of the risks that one is attempting to review and assess. A risk assessment is an effective tool in this regard. When executed properly, risk assessments provide management with the information necessary to:

- Evaluate the nature, probability, and severity of all potential legal, compliance, and business risks;
- Consider the prior history of the organization (and similarly situated organizations), especially any prior criminal, civil, or regulatory enforcement actions; and
- Identify and evaluate reasonable steps the organization can take to prevent and detect the specific risks to which the organization is exposed.[4]

Warren Buffet famously said that, "Risk comes from not knowing what you're doing." This is true both in the world of investing and in compliance.

Risk assessments should not be misconstrued as clever tools designed to prevent management from taking all risks. To the contrary, in order for most enterprises to be successful in meeting their organizational objectives, some degree of risk must be accepted. However, the most successful organizations are those that coordinate the application of their risk knowledge and marshal appropriate resources to minimize the impact of undesirable outcomes by preventing, detecting, and mitigating the specific risks to which the organization is exposed.

Choosing which risks to assess

Should an organization make efforts to assess and mitigate each and every conceivable risk? The short answer is no. The U.S. Sentencing Commission's *Guidelines Manual* states that an organization "shall periodically take appropriate steps to design, implement, or modify each requirement [of its compliance and ethics program] to reduce the risk of criminal conduct identified through this process."[5] Although limiting the risk of criminal conduct is admirable, thoughtful compliance professionals and executives working within forward thinking organizations will seek to be more than just lawful. Indeed, following the law is truly a

minimum standard of conduct as opposed to a more useful approach that involves identifying and mitigating those discrete risks that could have significant negative impacts to the organization if not properly addressed. These risk areas might include:

- Financial issues
- Customer retention
- Legal and regulatory environment
- Competitor activity
- Technology developments
- Changes in business models, product portfolio, or markets
- Changes in organization structures, systems, or processes
- Third parties, outsourcing, and off-shoring initiatives
- Supply chain
- Employee skill retention, hiring, succession planning, and diversity
- Privacy, data governance, and security
- Record retention

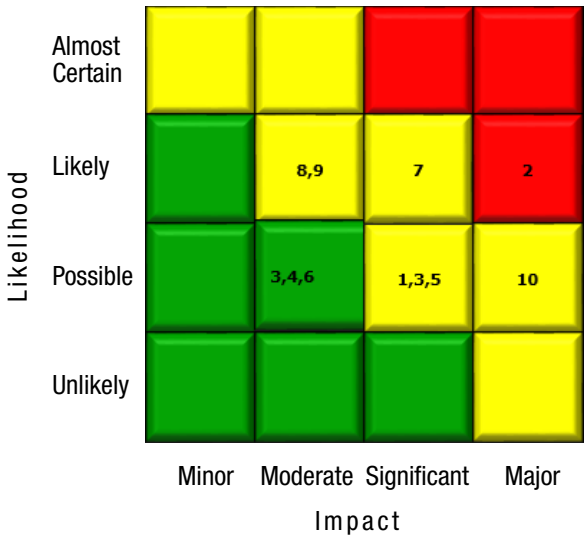
It is important for an organization to be cognizant that the risks inherent in one business sector may not be the same risks inherent in another. For example, a global oil and gas company would have to contend with vastly different risks than a company that provides elder care services. Further, even when the key risks are known, legal and compliance professionals should not be complacent, because risks tend to change as the organization changes. For example, a medical practice moving from paper medical files to electronic medical records may realize increased efficiencies, but would also have to contend with the risks associated with potential security breaches and other unauthorized access to patient information.

Prioritizing the risks

Once the risks have been identified, it is important to prioritize or catalogue the risks. One possible prioritization tool is a risk matrix (Figure 1). In its simplest form, the matrix assesses each risk in terms of "likelihood" or probability of the risk occurring (e.g., high, medium, and low) and "impact" or the potential effect on the organization if the bad outcome materializes (e.g., minor, moderate, significant, and major). There is no "one size fits all" approach to prioritizing risks, and each organization should develop a format that meets its specific objectives.

Figure 1. Sample Risk Matrix

Sample Risks and Risk Matrix	
1	Succession planning
2	IT Security
3	Tax exposure
4	New products
5	Intellectual property
6	International expansion
7	Shareholder value
8	New acquisitions
9	Pricing
10	Vendor management



After prioritizing the risks, it is important to document the specific mitigating controls

or safeguards to address each of the risks as well as assigning individual/departmental accountability for executing the risk mitigation activities. The purpose of the risk-mitigating control strategies is to reduce each risk area to a residual level in line with the organization's risk appetite.

Using the risk assessment to drive risk mitigation efforts

The important role of a compliance professional does not end with the completion of a risk assessment. Rather, it is the beginning of the process of assessing the effectiveness of strategic projects and operational initiatives, designed by an organization, to mitigate the risks identified during the assessment process. It is important to be mindful that the purpose of the Audit function is to confirm compliance with objective standards rather than the implementation of controls/practices designed to reduce operational/organizational risks. The role of "implementer" clearly resides with the management of an organization. That said, once the mitigating controls have been implemented, it is then appropriate to audit and monitor the effectiveness of these controls to identify any deficiencies and further drive accountability for risk management within the organization.

The results of the risk assessment are also very helpful in determining which operational and programmatic functions/areas should be the subject of regular, periodic audits and monitoring activities. Unless the Compliance department possesses limitless resources, it will be necessary to prioritize its audit and monitoring activities as part of a risk-based analysis.

The results of the risk assessment are also very helpful in determining which operational and programmatic functions/areas should be the subject of regular, periodic audits and monitoring activities.

Adopt an appropriate auditing reference model or standard

Auditing programs are designed to ascertain whether an organization's compliance programs are operating with sufficient effectiveness to provide reasonable assurance that key risks are being mitigated properly. But here again, there is no such thing as a "one size fits all" approach. Many different approaches to auditing can be successful for a given organization. The key is adopting a workable standard that is appropriate for the size, complexity, nature, and scope of the organization's activities.

> According to the Institute of Internal Auditors:
>
> internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objective by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance process.[6]

For audits that are of a financial nature, the American Institute of Certified

Public Accountants (AICPA) sets forth Generally Accepted Auditing Standards (GAAS) designed to govern the auditing of financial statements. The GAAS sets forth 10 standards: three general standards in such areas as training, independence, and professional standards of care; three fieldwork standards involving planning, collection of evidence, and achieving a sufficient level of understanding of the audited entity; and four reporting standards concerning statements regarding adherence to GAAS principles, identification of circumstances where GAAS principles were not observed, adequacy of disclosures by the principles of the audited entity, and the expression of the auditor's opinion regarding the financial statements.

If the audit in question involves the adequacy of personal information safeguards related to privacy, the AICPA has developed practical guidance as part of its Generally Accepted Privacy Principles (GAPP), which is designed to help organizations design and implement sound privacy practices and policies. The GAPP framework contains 10 privacy components and related criteria that are essential to the protection and management of personal information and can be helpful as a basis for developing effective privacy auditing programs.

These privacy components and criteria are based on internationally known fair information practices included in many privacy laws and regulations of various jurisdictions around the world and include the following subject areas: (1) management; (2) notice; (3) choice and consent; (4) collection; (5) use, retention, and disposal; (6) access; (7) disclosure to third parties; (8) security and privacy; (9) quality; and (10) monitoring and enforcement.[7]

The GAPP framework contains 10 privacy components and related criteria that are essential to the protection and management of personal information and can be helpful as a basis for developing effective privacy auditing programs.

For each of the 10 privacy components within the AICPA framework, there are relevant, objective, complete, and measurable criteria provided for evaluating an entity's privacy policies, communications, and procedures and controls. Privacy policies are written statements that convey management's intent, objectives, requirements, responsibilities, and/or standards. Communications refers to an organization's communication to individuals, internal personnel, and third parties about its privacy notice and its commitments therein, and other relevant information. Procedures and controls are the other actions an entity takes to achieve the stated criteria. An organization's compliance framework should, in its totality, address each of the 10 privacy components within the AICPA framework, even though it is not necessary for discrete aspects of the audit plan to address each specific AICPA privacy component. Other organizational groups, such as the Legal department or

a Privacy Office, may also have assurance responsibilities that touch on privacy issues that are not within the Compliance department's scope.

In the information security arena, the ISO 27002 standard has emerged as a reputable framework for erecting administrative, physical, and technical safeguards designed to reasonably protect the privacy, confidentiality, and security of sensitive information. These safeguards span the gamut of preventative controls (i.e., measures designed to prevent the occurrence of bad outcomes) and detective controls (i.e., measures designed to identify bad outcomes once they have occurred). It is important to note that the ISO security framework by design is broad—rather than prescriptive—in nature, and it may be appropriate for an organization to make adaptations appropriate to its unique circumstances.[8]

Document a formal audit plan

An audit plan should take into consideration an organization's greatest perceived risks with respect to privacy and security. If an organization has adopted certain standards or frameworks, such as ISO or GAAS, the audit plan should incorporate, document, and map its audits to such standards or frameworks. The audit plan should also describe the organization's risk assessment process and how its audit plan aligns with the organization's strategic compliance with the same. The amount of detail in the audit plan should mirror the scope and intricacy of the audits described therein. Before finalizing the audit plan, the following questions should be answered:

- What's the objective of the program? Is it included in the audit plan?
- Have audit goals and methodologies been defined?
- Does the audit plan include audits that are designed to mitigate risks identified in a risk assessment?
- Does the audit plan describe how it maps to applicable laws and frameworks (e.g., FCRA, ISO)?
- Are implementation, schedules, timing, and resource allocation covered in the audit plan?
- Has your organization's Legal department conducted a review of the audit plan? Has the privilege status of the plan been established?
- Does the audit plan allow for periodic reviews and updates?
- Is the audit methodology the same from year to year? If so, is it time to remove stale audits or vary the methodologies?

The audit plan should be reviewed and updated on an annual basis, based on the organization's risk assessment or as the risk landscape changes. In order to ensure the highest level of enforcement, the audit plan should be drafted at the direction of the organization's chief audit executive, chief legal officer, general counsel, or a senior-level executive with a similar title. The audit plan should be disseminated throughout the organization, its board members, and stakeholders accordingly. According to a 2014 PriceWaterhouseCoopers study:

> Once internal audit and stakeholders explicitly agree on the breadth of what the organization expects from internal audit, it is critical that the function stands firm on executing against its scope…With expectations clearly and collaboratively defined, internal audit should be empowered to manage its resources and activities so that expectations are fulfilled.[9]

Reporting

In order to derive the greatest value from a compliance program, the results of audit activities must be reported to key stakeholders. This is particularly true when the focus of the audit efforts is on providing assurance of the effectiveness of internal compliance programs. The U.S. Sentencing *Guidelines* require that the company's governing authority (i.e., the board of directors) understand the content and operation of the compliance program and exercise reasonable oversight with respect to its implementation and effectiveness.[10]

Similarly, Sarbanes-Oxley places responsibility for the creation and operation of a company's compliance program on both senior management and the Audit Committee of the board of directors.[11] A robust compliance program is helpful in supporting management's efforts to inculcate and reinforce an organizational culture that supports ethics and compliance. This support is in the form of an evaluation of the internal controls used to prevent, detect, and mitigate conduct that is detrimental to the organization. Although the accountability for erecting an effective compliance framework resides with management, compliance professionals are an indispensable resource in the evaluation of an internal control and compliance structure.

Addressing non-compliance

Prior to publishing its policies and standards, an organization should have an approved methodology in place to address incidents of non-compliance so that it can manage such incidents effectively if they occur. The following are important points to consider when creating a policy to handle non-compliance:

- Review policies and standards to ensure they include language sufficient to allow the organization to take action against incidents of non-compliance.
- Obtain approval from Human Resources and the appropriate Legal departments to ensure any proposed adverse action taken against employees is consistent with applicable laws and organization policy.
- Educate and inform all stakeholders as well as those to which the policies apply.

In the event of a policy violation, an organization must carefully review the incident and take appropriate remedial action, which may include coordinating with applicable regulatory agencies. According to the U.S. Sentencing *Guidelines for Organizations*:

> the purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense. In some cases in which a remedial order potentially may be appropriate, a governmental regulatory agency may have authority to order remedial measures. If a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.

Further, the U.S. Sentencing *Guidelines* note that the:

> failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting

> criminal conduct. However, if criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.[12]

Even if a compliance organization is simply tasked with assessing an organization's compliance with company policy and not uncovering criminal activity or fraud, it is still vital for the organization to follow the audit plan, including any escalation or remedial procedures that are included in the organization's policies, in order to preserve the integrity of the compliance program.

Conclusion

In our fast-paced business environment, organizations tend to only focus on compliance matters when there is a crisis or when a compliance-focused approach is demanded by the marketplace (e.g., customers, regulators, shareholders). This is ill-advised. A compliance program should not be seen as an episodic series of reactive decisions, but rather as an integrated process that is ingrained within an organization's culture. Once established, the compliance program should be reviewed and evaluated periodically to ensure its ongoing effectiveness in the face of an ever-evolving threat landscape. It is OK to trust, but it is even more important to verify. ✳

1. Ronald Reagan quote from BrainyQuote.com website at http://bit.ly/ron-reagan
2. KPMG: Internal audit's role in modern corporate governance (Thought Leadership series). Available at http://bit.ly/kpmg-audit
3. Warren Buffett quote from BrainyQuote.com website at http://bit.ly/warren-buffett-quote
4. *The Corporate Compliance Answer Book*. Holland & Knight LLP ed., 2010.
5. United States Sentencing Commission, *Guidelines Manual*, §8B2.1. (Nov. 2012)
6. The Institute of Internal Auditors website available at http://bit.ly/IIA-about-auditing
7. CIPP Guide: Generally Accepted Privacy Principles (GAPP). Available at http://bit.ly/CIPP-guide
8. ISO/IEC 27002:2013, *Information Technology – Security Techniques – Code of Practice for Information Security Management* (October, 2013)
9. PriceWaterhouse Coopers: 2014 State of the internal audit profession study. March 2014. Available at http://bit.ly/pwc-audit-study
10. United States Sentencing Commission: *Guidelines Manual*, §8B2.1. (2012)
11. Sarbanes-Oxley § 301, 15 U.S.C. § 78f(m)(4).
12. United States Sentencing Commission: *Guidelines Manual*, §8B1.2. (2013).

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by Jeffrey M. Kaplan

"Conflict of Interest World"

In the wake of the dispute surrounding President Trump's approach to the conflicts of interest (COIs) arising from his vast but not fully transparent business interests, it is worth stepping back and asking: "What, as a general matter, is at stake when it comes to handling COIs?"

Kaplan

To begin, and as is partly true in the President's case, COI issues often exist outside of an established legal framework (although this is not the case with all COI areas). Thus, the handling of COIs provides a genuine opportunity to test an individual's or organization's "ethical mettle" that is not present with most other more compliance-based risk areas.

Second, employees often see COIs as a having a personal dimension that is not found in most other risk areas. For instance, when a fellow employee hires a relative or otherwise profits by using her position at the company, that can be viewed as unfair to those who "play by the rules."

Third, because most harmful COIs at companies involve managers or others in positions of power, a company seeming to have a double standard between higher ups and "the little people"—to borrow from a saying attributed to the late Leona Helmsley that "only the little people pay taxes"—can undermine the sense of organizational justice at a company, to the detriment of the company's ethical culture.

Finally COIs can—if not properly addressed—lead to economic harm on two levels.

One of these was noted by Nobel prize winning economist Paul Krugman in a piece last year in the *New York Times*[1] about then-President-Elect Trump's COIs: "What's important is not the money that sticks to the fingers of the inner circle, but what they do to get that money, and the bad policy that results." The issue, as he put it, is one of bad incentives, and the problem exists not only in the political realm but also the private sector.

> What's important is not the money that sticks to the fingers of the inner circle, but what they do to get that money, and the bad policy that results.

The flip side of this is the disincentives that COIs can have. That is, when fearful of hidden COIs, individuals and organizations are less likely to engage in various productive activities requiring trust. "Conflict of Interest World," as one might call it, is "a place of needlessly diminished lives, resources and opportunities."[2] ✳

1. Paul Krugman: "Why Corruption Matters," *The New York Times*, November 28, 2016. Available at http://bit.ly/ny-times-why
2. Jeff Kaplan: "Why conflicts of interest matter – it is both the incentives and disincentives," *Conflict of Interest Blog*, November 29, 2016. Available at http://bit.ly/coiblog

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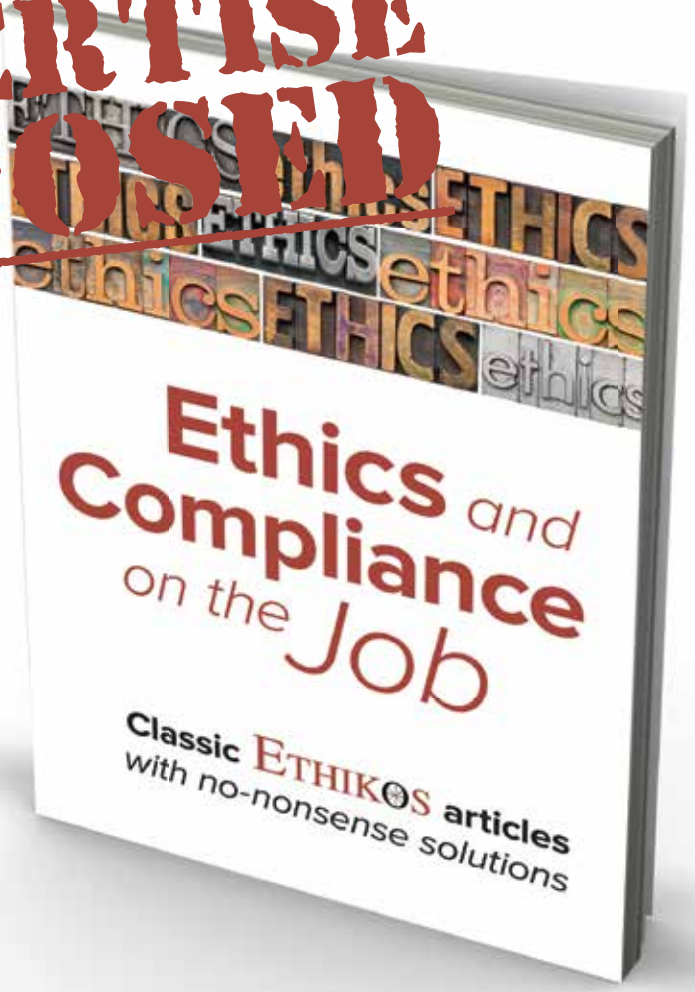

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by David P. Nolan

FCPA due diligence: Starting 2017 on the right note

» Identify the risks involved when using third parties or acquiring a business outside the U.S.

» Determine the risk levels and research needed for information gathering from the third party or merger and acquisition (M&A) target.

» Decide which due diligence measures to undertake in order to reduce these risks.

» Understand the basic requirements to be compliant with the two principal global laws: the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act.

» Identify gaps in your compliance activities to mitigate regulatory risks, reduce the likelihood of fraud, and minimize costs.

Effective Foreign Corrupt Practices Act (FCPA) due diligence processes require thought and consideration of risk. The stakes are much greater when you are orchestrating a major foreign acquisition or retaining third parties to represent your business. To be compliant with global anti-bribery laws, it is essential to identify and mitigate risk; failure to do so can result in criminal and civil penalties.

Nolan

Due diligence investigations whether as a necessary part of an acquisition process or retention of a third party, should primarily be based on complying with two principal global laws: the FCPA and the UK Bribery Act. Under these laws, conducting due diligence on these targets is not an option, it is required.

Incidentally, don't get too tied to the titles of third parties; they all must be reviewed. Third parties may include suppliers, independent sales agents, vendors, brokers, customs agents, logistic companies, consultants, attorneys, tax advisors, and others. A less technical definition of "third parties" is simply any person or entity that acts on your organization's behalf.

Identifying risk

The primary regulatory objectives for conducting due diligence on third parties are to determine if:

- The third party is qualified (i.e., suitable for the task at hand)
- The third party is reputable
- The party has ties to foreign officials (i.e., politically exposed)

To be compliant with global anti-bribery laws, it is essential to identify and mitigate risk; failure to do so can result in criminal and civil penalties.

In addition to third-party risk, when buying a business outside the

U.S. or UK, your concerns should be tied to, among other things, the size of the transaction, the nature of the deal (e.g., are you the primary stakeholder?), and certainly the risks associated with doing business in the geographies involved. For example, if you are buying a business headquartered in Germany (low risk) that makes goods in the Philippines (high risk) and China (moderate-to-high risk) and has sales agents in Russia (high risk), you have a lot of work to do in multiple places to assure compliance.

Unfortunately, there is no database available today that meets the needs of all these diligence requirements. In our experience, comprehensive databases are anything but. Global databases simply are not capturing critical information, despite claims of "real-time data" and "24-hour coverage."

Therefore, we have found that site visits are often an essential part of diligence in assessing a target, especially in less transparent markets. A site visit often reveals that a manufacturing company is a sales office in an apartment, or a vacant lot, for example. We also perform extensive media research in the local language to find out whether a party is politically-exposed or has been charged with corruption. And of course, identification and interviews of knowledgeable sources in the industry can be vital in assessing whether a vendor or other third party is reputable and suitable for your needs.

Defining risks

The level of due diligence should be elevated if one or more of the following risks apply:

- Government contracts are at stake;
- Government inspections and regulations are implicated;
- Former government employees are involved;
- Industry sectors are known to have a history of corruption or FCPA violations;
- Location is in less transparent countries under Transparency International rankings;
- Principals or shareholders of the third party are registered/incorporated in off-shore tax havens, such as Panama, British Virgin Islands, Belize, and others;
- Payments are made to off-shore accounts;
- No registered address, no physical location;
- Requests are made for up-front payments; or
- Businesses are unregistered.

Getting information from the third party or M&A target

We recommend that our clients use questionnaires that are executed by the target or third party. Ask for, in both English and the local language:

- Date of incorporation
- Proper full name of entity and also related entities
- Identities of all shareholders, key managers, and directors
- The third party's or target's code of conduct
- History of compliance violations
- Person responsible for compliance
- Bank and other commercial references
- Identification of employees with current or former government ties

A low-risk third party could be defined as one that does not touch any of the risks

listed above; a high-risk third party would be one that may touch one or more of the above listed risks. Examples of high-risk third parties are ones where the business operates in a country or region known for a lack of transparency, or the business owner was a high-ranking government official, or the entity being reviewed operates in an industry known for corruption.

Levels of due diligence

To effectively perform due diligence, research should be performed in English and the local language. Policies of countries differ when making certain information available. In many countries, the government does not provide access to criminal and/or civil litigation records. In other countries, the beneficial owners of the business are not required to be identified. (Actually, that is a problem in certain states in the United States as well.)

We recommend using the following three tiers for mitigating risk, and research methods can, of course, be changed (you can mix and match) to meet the needs of the project.

Level I research

- Corporate registration records
- Verification that principal individual is a shareholder/director/manager of entity
- Global watch and sanctions lists
- State-owned or state-controlled company
- Politically exposed persons (PEP)
- Adverse media

Level II research

Perform all Level I research, plus the following research:

- Criminal and civil litigation research (where available)
- Corporate affiliations (where available)
- Directorships and disqualified directorships (where available)
- Government regulatory searches (where applicable)
- Bankruptcies and insolvencies
- Liens, judgments, fines, and/or other financials (where available and applicable)
- Comprehensive media
- Social media
- Verification of credentials (when possible)

Level III research

Perform all Level I and II research, plus:

- Discreet site visits to verify operations and/or residence, may include interviews on site
- Reputational interviews
- Research of most recent financial records and credit data

Conclusion

Deciding which due diligence processes to perform for doing business outside the U.S. or UK, whether considering acquisition of a company or retention of a third party, should primarily be based on complying with two principal global laws: the FCPA and the UK Bribery Act. Under these laws, it is incumbent upon the businesses to identify and analyze the risks, perform appropriate research based upon the risks, and document due diligence planning and activities. This approach can help a business if you are ever faced with a time-consuming and potentially expensive government investigation. ✳

David Nolan *(dnolan@klink-co.com) is Vice President at Klink & Co, Inc. in New York, NY.*

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Hear from your peers

Kristen D. Andriola Behar, CCEP
Compliance Manager
Panasonic Corporation of North America
Newark, NJ USA

1) Why did you decide to get certified?

My company recently decided to revamp and, in some ways, formalize the compliance and ethics program. For me, being CCEP certified was a way to ensure that the program and my role would be taken seriously not only by my new boss but by our employees as a whole.

2) How do you feel having the CCEP certification has or will help you in your career?

Being CCEP certified has helped quantify the experience and knowledge I bring to the table. When my company was looking at how I would fit into our new program, being a certified compliance and ethics professional increased my visibility. Additionally, I'm finding that since obtaining this certification, it's been easier to grow my network of fellow ethics and compliance professionals for ideas and benchmarking.

3) Would you recommend that your peers get certified?

Absolutely. I obtained my certification while attending the Basic Academy, which is a mix of new and very seasoned compliance and ethics professionals. While the Academy contains far more practical tools to bring back to work than you would expect, and new peers to network with, the exam and certification will help quantify your commitment to continue to expand your knowledge and position in the Compliance and Ethics field.

by Thomas R. Fox

The hiring of family members under the FCPA

» Hiring a family member of a foreign official for an internship or a job may violate the FCPA under certain circumstances.
» All job candidates must meet minimum hiring criteria.
» HR internal controls should not be over-ridden by business unit personnel.
» You must segregate the son or daughter of a foreign official from working on any business the foreign official may send your company.
» HR is a key component in any best-practices anti-corruption compliance program.

There have now been three Foreign Corrupt Practices Act (FCPA) enforcement actions involving the hiring of family members of foreign government officials and those of employees who worked at state-owned enterprises. In November 2016, JPMorgan Chase (JPM) and its subsidiary, J.P. Morgan Securities (Asia Pacific) Limited (JPM-APAC) collectively paid $268 million to resolve its matter. Earlier this year, in February Qualcomm Corp[1] paid a fine of $7.5 million for the hiring of family members of officials of state-owned enterprises who could direct business or provide licenses to the company to do business in China. These cases built upon the first FCPA enforcement actions involving such hiring: Bank of New York-Mellon (BNY) in August 2015, where BNY paid $14.8 million to resolve its FCPA violations in the hiring of two sons and one nephew of officials at Sovereign Wealth Funds of an un-named Middle Eastern country.

Fox

There were two key elements identified which led to FCPA violations. The first was that the family members hired did not meet the companies hiring standards and/or did not meet their standards for continued employment after they were hired. Second, all hires were made to obtain or retain business, in violation of the FCPA. In the cases of BNY and Qualcomm, the hires were made at the insistence of their fathers (or uncle); JPMorgan took this approach to an entirely new level by targeting family members for hire, with the hiring designed to influence the retention or obtaining of business.

> If a candidate does not meet the company's criteria for hiring, it is an obvious red flag that must be investigated and cleared.

Reasons for hire and lack of fitness

If a candidate does not meet the company's criteria for hiring, it is an obvious red flag that must be investigated and cleared.

BNY

There were clear statements by the BNY Mellon officials involved that hiring this son and nephew were being done to obtain or retain business. As reported in the SEC Cease and Desist Order (BNY Order[2]), Mellon employees felt they were "not in a position to reject the request from a commercial point of view" even though it was a "personal request" from Official X. One employee stated: "by not allowing the internships to take place, we potentially jeopardize our mandate with [the Middle Eastern Sovereign Wealth Fund]." Finally, to demonstrate the nefarious nature of the arrangement and lack of transparency in the entire process, this another BNY Mellon employee said, "[W]e have to be careful about this. This is more of a personal request…[Official X] doesn't want [the Middle Eastern Sovereign Wealth Fund] to know about it." The same employee later directed his administrative assistant to refrain from sending email correspondence concerning Official X's internship request "because it was a personal favor."

The second foreign government official, (Official Y), "asked through a subordinate European Office employee that BNY Mellon provide an internship to the official's son, Intern C." As a senior official at the European Office, Official Y had authority to make decisions directly impacting BNY Mellon's business. Internal BNY Mellon documents reflected Official Y's importance in this regard, stating that Official Y was "crucial to both retaining and gaining new business" for BNY Mellon. One or more European Office employees acting on Official Y's behalf later inquired repeatedly about the status and details of the internship, including during discussions of the transfer of European Office assets to BNY Mellon. At the time of Official Y's initial request, a number of recent client service issues had threatened to weaken the relationship between BNY Mellon and the European Office."

BNY Mellon not only waived its own hiring requirements, it did not even go through the pretense of meeting with them or interviewing them.

Moreover, none of the three individuals met the BNY Mellon requirements for its internship program; they met neither the academic nor professional requirement to obtain an internship. BNY Mellon not only waived its own hiring requirements, it did not even go through the pretense of meeting with them or interviewing them. Finally, these three individuals were provided with "bespoke internships [that] were rotational in nature, meaning that Interns A, B and C had the opportunity to work in a number of different BNY Mellon business units, enhancing the value of the work experience beyond that normally provided to BNY Mellon interns."

Qualcomm

In the Qualcomm matter, consider these business justifications for hiring a child of an official, as set out in the SEC Cease and Desist Order (Qualcomm Order[3]). One Qualcomm employee wrote, "We received a request from the GM of [the telecom company's subsidiary] to help find

an internship position for her daughter (currently studying in the U.S.) within QC. I discussed this with [high-level official] and determined that it would be important for us to support given our cooperation with [the subsidiary]." Regarding the hiring of a son of a state-owned enterprise employee, Qualcomm employees believed that hire "would be important for us to support given our cooperation with [the subsidiary]." Specifically, the internship "would be good because we are doing quite a bit with [the subsidiary]."

What is even more amazing about the hiring of the son is that after the initial hiring interview, he was rated as a "No Hire" because not only was he not a "skill match" for the company, but he did not even "meet the minimum requirements for moving forward with an offer." Finally, among the Qualcomm team involved in the interview process, "there was an agreement that he would *be a drain (not even neutral)* on teams he would join." Yet he was offered a job as a "special favor." [Emphasis added].

What is even more amazing about the hiring of the son is that after the initial hiring interview, he was rated as a "No Hire" because not only was he not a "skill match" for the company, but he did not even "meet the minimum requirements for moving forward with an offer."

JPMorgan

However, JPMorgan Chase took it a step further with its "Client Referral Program." According to the SEC Cease and Desist Order (JPMorgan Order[4]), it required each potential hire under the program to have "Clear accountability for deal conversion and accountability for abuse of the program." The JPMorgan Order went on to note that the "revised program was managed by the JRM business support team with input from senior JPM-APAC investment bankers." Certain senior bankers were given a "quota" of referral hires that could be made each year. Subsequent JRM reports from 2009 through 2012 contained the same language regarding the "revised" referral hiring program with the selection criteria of a "[d]irectly attributable linkage to business opportunity." These presentations were discussed with the head of investment banking for JPMorgan APAC and other JPMorgan APAC senior executives."

In addition to the tying of business to those employed under the Sons and Daughters hiring program, there was the additional problem that these hires did not meet JPMorgan Chase's basic hiring and retention standards. According to the JPMorgan Order, one company representative described those hired under the program "as a protected species requiring [senior management] input. His reporting line to you is accountable but like national service." Both the JPMorgan Order and Non-Prosecution Agreement[5] were replete with document evidence that the hires did not meet minimum hiring standards and they often failed to

meet minimum standards for retention at the company.

Standards to use going forward

I believe there are three basic questions a Human Resources (HR) department and the Compliance function need to ask and answer in the analysis of the hiring of a family member of foreign official or employee of a state-owned enterprise. They can also be installed as internal controls. I would phrase the three questions in the following order and manner:

1. Does the candidate meet your firm's hiring criteria?
2. Did the foreign official whose family member you are considering for hire demand or even suggest your company hire the candidate?
3. Has the foreign official made or will they make a decision that will benefit your company?

If the answer to the first question is No and the second two inquiries is Yes, you may well be in a high-risk area for violating the FCPA. You should investigate the matter quite thoroughly and carefully. Finally, whatever you do, document, document, and document your investigation, both the findings and the conclusions.

The questions can be set up as internal controls. This is another example of how a company can operationalize compliance and burn it into the fabric and DNA of an organization. Further, it provides another level of oversight or "a second set of eyes" on the hiring process around hires that are high-risk under the FCPA or other anti-bribery/anti-corruption regime such as the UK Bribery Act.

It must be emphasized again that there is nothing in the FCPA which prohibits the hiring of a family member of a foreign government official. However, it is inherently high risk under the FCPA. As such, it must be assessed and managed appropriately. The clear import from these enforcement actions is that if a candidate does not meet your company's minimum hiring standard, it is the end of the exercise—Full Stop. If the candidate does meet the minimum hiring standard, then they need to go through the rest of the standard hiring process, whatever that may be for your company. However, if this candidate has a parent or relative who has sole discretion over sending business to your company, the risk may be too high to manage. ✳

If the candidate does meet the minimum hiring standard, then they need to go through the rest of the standard hiring process, whatever that may be for your company.

1. SEC Cease-and-Desist Order, Qualcomm Incorporated. March 1, 2016. Available at http://bit.ly/cease-desist-order
2. SEC Cease-and-Desist Order, The Bank of New York Mellon Corporation. August 18, 2015. Available at http://bit.ly/NY-Mellon
3. Ibid, Ref #1.
4. SEC Cease-and-Desist Order, JP Morgan Chase & Co. November 17, 2016. Available at http://bit.ly/jp-morgan-chase
5. Department of Justice, press release: RE: JPMorgan Securities (Asia Pacific) Limited Criminal Investigation. November 17, 2016. Available at http://bit.ly/jp-morgan-chase-2

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by Jason L. Lunday

Managing values: A vital element of culture, ethics, and success, Part 3

» Managing corporate values involves four key efforts that help navigate the risks of an ineffective initiative.
» Company leadership must identify and obtain agreement on the identified values that truly represent the company and its journey.
» Leadership must effectively articulate and then communicate the values to employees and others.
» Leadership needs to carefully ensure holistic integration and institutionalization of the values.
» Over time, leadership needs to strengthen and ensure sustainability of the values.

This is the last installment of a three-part series. The second part appeared in our March 2017 issue. Part 2 of this article addressed the five types of values and their role in ethics and compliance.

In truth, values-based management is not simply a project; it's a continuous process that begins with an initial effort. For those companies willing to take the leap, managing values can involve four major components:


Lunday

- Values identification and agreement
- Values articulation and communication
- Values integration and institutionalization
- Values strengthening and sustainability

Companies that invest the attention, time, effort, and resources to "do values right" should first understand the ways that an organization's values are adopted.

Values identification and agreement

Leadership first needs to identify what the organization's values are and should be and, once identified, ensure concurrence throughout the organization. It should seek out those beliefs that have led to the organization's success and are needed for continuing success. Collins and Porras suggest identifying those principles that are not simply intended for short-term success, but reflect the enduring tenets of the company.[1]

Leadership first needs to identify what the organization's values are and should be and, once identified, ensure concurrence throughout the organization.

In identifying values, it is important to remember that different global regions do

not necessarily define terms and concepts the same way. Also, different locations that operate with greater autonomy and under unique cultures may differ in how they define the local unit's values. For example, a regional office in a far-flung location may find that entrepreneurialism is critical to its success, which may be not as true at the corporate headquarters; this is likely even more true for an acquired subsidiary that operates under a different name and maintains distinct operations. So, it is important to arrive at a set of values that reflect the *whole* enterprise (unless certain groups will operate autonomously) and gain confirmation and requisite buy-in. One rule of thumb holds that a company should have no fewer than three and no more than seven values—any more can be hard for employees to remember and can lead to confusion. Freeman and Auster advocate a method called *Values through Conversation* to elicit the right values. They explain:

> Values statements are useful, but they must be the result of the outcomes of both conversations and behavior, which come first. The statements must be grounded in both the reality of what a business is actually doing and in its aspiration to do better.[2]

In the best case, seeking agreement around the identified values is not a separate step, but is integral to their identification. Unless leadership can approach the effort with open minds and willingness to listen to different ideas, it risks looking for tacit agreement with its predetermined list. As Freeman and Auster counsel, the values discernment process must be a conversation. And that conversation must include the board, due to its role in overseeing corporate culture, and the employee base, who will be expected to represent the values. Some companies may extend the conversation to customers, third parties acting for the company, and other stakeholders.

A company can identify the right values from a number of sources. To start with, it may adopt values from the external culture. Employees may bring with them their local community's strong work ethics to their jobs.

A company can identify the right values from a number of sources. To start with, it may adopt values from the external culture. Employees may bring with them their local community's strong work ethics to their jobs. Apparently, one reason that so many technology companies locate in California's Silicon Valley is to take advantage of a technologically-oriented and innovative local workforce. And as mentioned previously, an obvious value for a health system is the concern for caring in the healthcare field.

Companies may adopt values based on those beliefs and behaviors that, over time, clearly contribute to the company's success. Again, consider DuPont's commitment to safety—a core value that the company found served its interests

well over the years. Or consider 3M's commitment to innovation—a value that has led to a number of new products and commensurate terrific bottom-line results, as well as spurred on employees to "think outside the box." The company's Pollution Prevention Pays program, developed in the mid-1970s, was a means of capitalizing on its value of innovation to find creative ways to reduce the company's impact on the environment—*and* reduce costs. Today, that innovative mindset has involved 6,300 projects, each of which reduced costs while eliminating or reducing pollutants.[3]

Third, a company's leadership may bring their own values to the company culture. It was former CEO Robert Wood Johnson II who first articulated Johnson & Johnson's Credo in 1943 as a way to express what he felt were the principles that had helped the company to thrive over its many years. And it was Bill Hewlett and Dave Packard who formulated "The HP Way" at their namesake company when they recognized that HP's success was tied not just to a duty to shareholders, but to its many other stakeholders as well. This mindset led the company to institute many employee-friendly practices that, the two founders believed, heavily contributed to the company's success.[4]

In the end, Freeman and Auster guide that an organization's values should come from an authentic place. Values should not be developed as marketing gimmicks. Too often, public relations staff lead these efforts instead of supporting them under senior leadership's behest and active guidance. To this end, Freeman and Auster suggest that an introspective examination ferrets out those beliefs that are core to an organization's true nature and aspirations.[5] Such an effort is not accomplished superficially or in a two-hour workshop.

Mistakes with Corporate Values

- Saying we have values but not clarifying what they are
- Setting values that are not truly authentic to the company
- Expecting employees simply to adopt the values without mechanisms for institutionalizing them
- Not leading from the top
- Attempting to layer a new values statement on top of the organization business processes instead of actively integrating the values and all aspects of the company's culture and operations

Values articulation and communication

Leadership needs to clearly and compellingly express the values in written form. Employees must be "on the same page" regarding the values; they need a shared understanding. Also, how the values are expressed should inspire employees' conduct. Easily remembered values help immensely. When I worked at Premier Inc., our first value was simply but eloquently put: "Integrity of the individual and the enterprise." Another value used alliteration to aid memory: "A passion for performance." One may argue that the written articulation of the values only serves as a reminder of what employees already know, but keep in mind that as new employees join the organization, they will need to understand

the values, what they mean, and the type of behavior the values should engender.

Also, leadership should be mindful that investors, customers, suppliers, and other external stakeholders will read the values statement, so it should be articulated with this in mind. Overly worded and complicated values just make it harder for anyone to understand and recall. "[Shared values], if well-articulated, make meanings for people. And making meanings is one of the main functions of leadership," state Peters and Waterman.[6] Lencioni points out that a blandly written values statement likely will fail to differentiate a company from its competitors,[7] much less inspire employees to embrace a unique culture.

Leadership may name the organization's values in many ways. It may state them as the company's beliefs, principles, philosophy, tenets, or simply The (Company) Way. (For this article, we use the term "values" generically.) In the best of companies, this formal recognition is a non-event, because leadership is simply clarifying what employees—and hopefully customers, suppliers, and other parties—already know. Still, formally articulating the values serves as a public pronouncement of the organization's awareness of and commitment to them, and it helps to ensure that all of the company's operations, geographies, and other demographic groups are working in lockstep.

Next, leadership needs to effectively communicate the values. Hanging the Lucite-encased values on the boardroom wall is a good step, but it is only one of many ways to communicate them. In setting the tone, the more that leadership discusses the values in a convincing and compelling way, the better the employees will pay attention. A very helpful approach is to talk about the values in company stories—where the company succeeded and failed, and how the values played a role. The Booz/Aspen survey found that 85% of respondents rely on their CEO to support their values, and 77% indicated that this support is among the most effective ways to promote the values.[8]

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As mentioned above, communicating the values to external stakeholders helps to show employees that the company has committed to acting according to its values in interactions with customers, suppliers, and others. This step also gives employees a cause to rally around, and it helps in employee recruitment by informing prospective candidates of the company's commitments and expectations. Leadership's communications must balance its desired results with the way those results are obtained, and talking about the values is a principal step in the latter part.

Values integration and institutionalization

The intent should not be to integrate the values into operations, but rather the other way around. In the best companies, the values-operations integration should be natural, because the strongest unwritten values will influence how operations develop. The values should continually

impact leadership's thinking regarding strategy, business development, operations, financial, and other important discussions and decisions. Think about those leadership teams that, when considering new business ventures, ask themselves whether their founders would have ventured into the new business area. What's more, the values should play a central role in employee recruitment and onboarding, performance measurement, and employee recognition systems: Values should influence conduct at its deepest level. Lencioni states that leadership should constantly remind employees that the values serve as the basis of every significant business decision.[9] As Peters and Waterman explained, a company's core values are what the strategy, structure, systems, management style, employee skills, and other corporate initiatives should revolve around and align with.[10] Freeman and Auster advise that "[a] second avenue of conversation would be to do a systems check across the company to see whether key processes were consistent with the stated values."[11]

The best companies find a way to institutionalize values management. The Booz/Aspen study found that financial leaders are better at integrating values and operations than their competitors. For instance, 94% of these leaders indicate that they have practices in place to align values with business partners, and 75% indicate that their practices are effective in fostering behaviors that build better business performance.[12] Lencioni cited an example of one company that institutionalized its value of customer service by naming its conference rooms after important customers and displaying artwork from customer annuals reports on its walls.[13]

The Booz/Aspen study found that financial leaders are better at integrating values and operations than their competitors.

At Premier, we operated a values team that oversaw and managed values communication, education, and recognition efforts. Three senior executives ran the team, all of whom reported directly to the CEO. The team included employees from throughout the company at various levels. This team also was responsible for evaluating employees' ongoing commitment to the values, and whether employees believed that leadership demonstrated its own commitment to the values and supported employees' related efforts. I am familiar with other companies that use similar "values team" approaches. Institutionalization ensures that values remain on the forefront of the company's agenda.[14]

To determine whether values have been institutionalized, one check I have used over the years is to query employees about what their company actually values. This leads to either the employee listing off a set of principles that may or may not align with the company's stated values (and is of great value in its own right), or employees asking whether I am testing their recall of the corporate values. Notre Dame's business school asked this question of its alumni regarding their own companies: 70% indicated that their companies had a formal values statement, but 27% couldn't recall a single value the company statement included.[15] My own queries have yielded similar results of employees'

Management's Practices to Reinforce Values

- Explicit CEO support to reinforce values (85%)
- Corporate values statement (81%)
- Performance appraisals (77%)
- Internal communications (74%)
- Training (70%)
- Nonmonetary rewards (56%)
- Recruiting and hiring (54%)
- Internal monitoring/audit (50%)
- Third-party review of management (24%)

Source: Booz/Aspen study

unfamiliarity with their company's values; many seem pleased if they can recite a couple of their corporate values.

Values strengthening and sustainability

An important role in values management is to continually strengthen the influence that the company's values have over business activities and to ensure the values' long-term viability. As the business world experiences heightened challenges, companies need to make certain that their values remain front and center to guide leaders' and other employee' decisions. Some companies conduct periodic assessments of not only the process by which they manage their values, but also of the values themselves. Prior to the 1982 Tylenol crisis, then-CEO Jim Burke had taken the company through a review of Johnson & Johnson's famous Credo—first written in 1943—to see if the Credo stood up to the contemporary business environment. Although it was tweaked in the margins, overall company employees confirmed its relevance, and the process underscored the Credo's ongoing vitality. So, as the Tylenol poisoning first unfolded, Burke attributed employees' commitment to the Credo for why individual employees on their own volition began pulling Tylenol off of store shelves prior to any management direction.[16] Johnson & Johnson continues to regularly assess employees' perceptions of the Credo.[17] So, one approach is to periodically measure employees' perceptions of the values over time—their relevance to a company's mission and other key objectives, employees' commitment to the values, and the extent to which employees witness leaders and their peers demonstrating the values in their actions.

IBM offers another example of a company's efforts to strengthen and sustain its values. In 2003, the company instituted a "Values-Jam" to engage employees in discussions about the company's basic principles. In a worldwide social networking "meet-up," thousands of staff came together over the company's Intranet to discuss the values and how they shape decision-making. The event led IBM to update its values for the contemporary environment with renewed vigor.[18]

In another case, The Body Shop, a company known for advocating responsibility in its supply chain, in 1994 found itself under scrutiny for not living up to its professed values. Journalist Jon Entine wrote that certain of its cosmetics had been tested on animals, a violation of one of the company's five values.[19] The company undertook a stringent assessment of its manufacturing and sourcing processes to determine where it fell short. Since then, each year the company publishes its Values Report to determine whether its operations demonstrate the

company's commitment to its core values and, if not, what corrective actions it needs to take. Interestingly, the company's report plays on the term "value chain" indicating the linkages between developing, sourcing, and selling its products.[20]

With respect to values' sustainability, Peters and Waterman point out that while business strategies may change, the core values should be enduring. (This does not mean that a company's values will not be modified, only that such modifications should reflect a deliberate process and align with the company's culture.) Still, how a company's values were written in an earlier generation may not fit with contemporary forms of expression, prompting a need to update their language. This was just the case when Johnson & Johnson revisited its Credo. Following Burke's internal assessment in the late 1970s, the company slightly modified the Credo, such as eliminating references to "the help of God's grace," perhaps given the company's quickly growing global footprint and inclusion of employees of many faiths.[21] But the Credo's core ideas of commitment to certain stakeholders before stockholders remained.

A company's *commitment* to those values that reflect its culture and contribute to its success are what must be sustained, not the wording of any particular value definition. It is *values management* that makes the difference in business success, not steadfast adherence to any particular term—especially if the term no longer aligns with the company's culture and overriding purpose.

Looking forward

The last word is certainly not written on the importance, functioning, and benefits of corporate values to business success. As more companies go beyond simple values statements to active values management, we should anticipate a litany of stories that reinforce the real significance that values can contribute to companies. Additional best practices are certain to emerge from companies' greater efforts to optimize the values-operations alignment. And, as companies' ecosystems expand, we should expect to see the reach of values grow to a company's many partners and stakeholders. It will be exciting to see the many new ways that companies' employees identify to live their values. And, in turn, we should witness increased synergy and synchronicity between the *values* that companies demonstrate and the *value* that they provide. ✳

1. James C. Collins and Jerry I. Porras: "Building Your Company's Vision" *Harvard Business Review*, September-October 1996. Available at http://bit.ly/collins-porras
2. R. Edward Freeman and Ellen R. Auster: *Bridging the Values Gap: How Authentic Organizations Bring Values to Life*. Berrett-Koehler Publishers, Inc., 2015.
3. 3M company website: "Sustainability In-depth: The Pollution Prevention Pays (3P) Program" Available at http://bit.ly/prevent-pays
4. David Jacobson: "Founding Fathers" *Stanford Alumni* magazine, Stanford University, July/August 1998.
5. Ibid, Ref #2.
6. Tom Peters and Robert H. Waterman, Jr.: *In Search of Excellence*. Grand Central Publishing, 1982. Summary available at http://bit.ly/peters-waterman-in
7. Patrick M. Lencioni: "Make Your Values Means Something" *Harvard Business Review*, July 2002. Available at http://bit.ly/lencioni-values
8. Booz Allen Hamilton/ Aspen Institute Survey: Deriving Value from Corporate Values. 2005. Available at http://bit.ly/BAH-aspen
9. Idem.
10. Robert H. Waterman, Jr., Thomas J. Peters, and Julien R. Phillips: "Structure is Not Organization" *Business Horizons*, Kelley School of Business, Indiana University, Bloomington, June 1980.
11. Ibid, Ref #2.
12. Reggie van Lee, Lisa Fabish, Nancy McGaw: "The Value of Corporate Values. Boos Allen Hamilton/Aspen Institute Survey" 2005. Available at http://bit.ly/BAH-survey
13. Lencioni. Ibid, Ref #7
14. Jason Lunday and Megan Barry: "Being a Values and Ethics Company in a Compliance World" *EPAC Magazine*, The Ethics Practitioners' Association of Canada, January 2006.
15. Notre Dame Deloitte Center for Ethical Leadership: "Do Corporate Values Make a Difference?" University of Notre Dame, (undated). Available at http://bit.ly/NDDC-ethical
16. "Ethics at Work: What Companies are Doing to Strengthen Public Interest?," speech by Gary Edwards, Hong Kong Special Administrative Region (HKSAR) Conference on Business Ethics, May 4, 1994.
17. Idem.
18. Notre Dame Deloitte Center for Ethical Leadership: "Refreshing Corporate Values: Big Blue's How-To" newsletter, undated. Available at http://bit.ly/NDDC-values
19. Jon Entine: "Shattered Image: Is The Body Shop Too Good to Be True?, *Business Ethics*, September 1994. Available at http://bit.ly/body-shop-Entine
20. "The Body Shop 2011-2013 Values Report" Available at http://bit.ly/body-shop-report
21. Ibid, Ref #16

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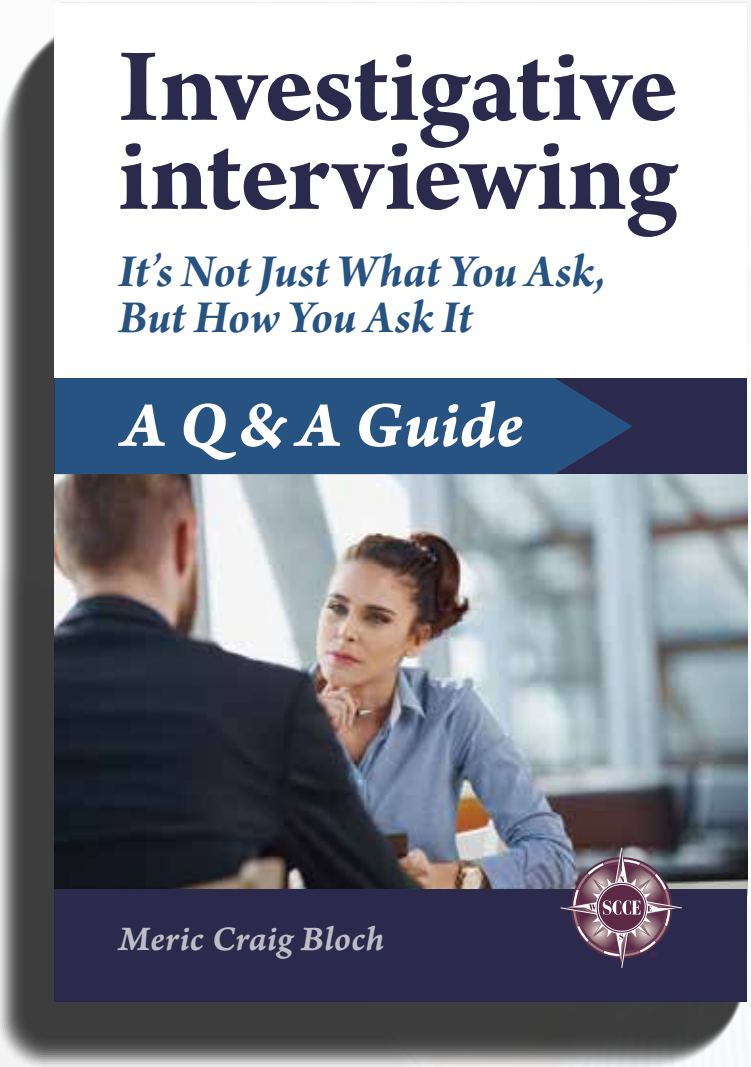
LEARN THE ART AND SCIENCE OF INVESTIGATIVE INTERVIEWING

By Meric Craig Bloch, Esq, CCEP, PCI, CFE



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by Jennifer L. Kennedy, BA

10 things I know

I have never read the column "What I Know For Sure" in *O, The Oprah Magazine*. I am, however, borrowing a similar idea from a friend, Jill Kelly, and the article she wrote, "10 things I know for sure—sort of," for *PR Week* (August 12, 2015).

Kennedy

The idea of these "things I know" rings true in every profession. Throughout my career as a compliance professional, I have come to identify the following as "things I know to be true":

1. **They don't think like we think**. I don't usually have an Us v. Them mentality, but in this instance, it's true. Working in Compliance is having a unique view of the business. We are not only a part of the structure, but are also apart from the structure.
2. **Documentation matters**. I am amazed at the number of people who attend meetings and don't take notes. Maybe they have a better memory than I do; I can barely remember what I ate for lunch yesterday. But, I take great notes. I have a stack of notebooks in my office and I refer to them as needed when I need the details of a specific meeting or event.
3. **Talk less, listen more.** There's a world of information out there if you only take the time to really listen, not the listening where you're smiling and nodding and making mental To Do lists. Pay attention. Words matter. Our businesses rely on what the compliance team has to say, so make sure you're communicating clearly and concisely.
4. **Be a problem solver (not just a problem finder)**. Finding problems is great; solving them is better. If you can't do that, you become part of the problem. Nothing is more frustrating for me as a compliance professional than meeting with people who can only see the issue and don't want to be part of the fix.
5. **Take risks.** Compliance folks tend to be cautious. Sometimes you have to push your team or organization in a way that makes people uncomfortable. That's OK. Be willing to take the risk.
6. **Love what you do**. It may sound silly, but I love compliance work. Always have. If I didn't, I'd find another path.
7. **Compliance is a marathon, not a sprint**. There's no quick path to compliance. There's no easy way through. Commit to the long haul.
8. **Be ready for change**. Be ready for the terrain to change quickly and drastically. You need to be adaptable. Businesses look to their compliance team to lead the way when the landscape changes. If you can't push through, you put your organization at risk.
9. **Keep an eye on the long game**. You need to keep an eye on where you want to go. You also need to be able to see around corners as they relate to your organization. Being able to do this is invaluable, and it will keep you, and your company, from ending up somewhere you never saw coming.
10. **Be prepared to rock the boat**. There are times when compliance has to stand up and push back; if you're afraid to do that, compliance isn't the place for you. As a colleague of mine says, "Sometimes you gotta burn that bridge."

Keep track of your list. The "things you know" will serve you well. ✳

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by Sam Aina, CPA, CIA, CFE and Pam Hrubey, CCEP

Root cause analysis: Enhancing event response and corrective action

» Identifying the underlying root causes or system-related factors at play will help determine the proper corrective actions.

» Systemic flaws need to be addressed to prevent recurrence of an incident.

» Using multiple approaches allows leaders to get different perspectives that could expose more than one root cause of a problem.

» Using a graphic depiction of the problem, such as a fishbone diagram, logic tree, or fault tree, can help uncover an explanation of the event.

» Be sure to document and validate the results and collect metrics to be presented to the Audit Committee and board of directors.

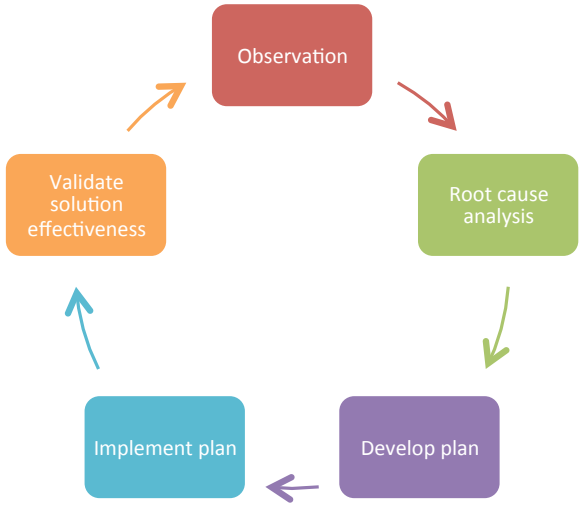
Successful implementation of the corrective action cycle can help organizations find and fix systemic problems to either mitigate or prevent negative business results. The following five important considerations can help organizations as they begin to implement the cycle:

Aina

Hrubey

- **Implementing the full corrective action cycle**—identifying an issue, determining the root causes, preparing a plan that addresses the root causes, implementing the plan, and following up to ensure the issue has been resolved—is essential for the corrective action cycle to be successful (see Figure 1).
- **Applying the discipline of root cause identification** enables more effective action planning and associated implementation.
- **Identifying the source of problems** rarely yields only one root cause and can take many forms; organizations may want to try more than one root cause identification approach, depending on the nature of the problem, to increase the likelihood that all root causes are identified.

Figure 1: The corrective action cycle



- **Completing the corrective action cycle** requires following up via audit, monitoring events, or doing an assessment to ensure issue resolution.
- **Using technology** can help organizations track and report the corrective action cycle steps and can facilitate information sharing with internal and external stakeholders, including Internal Audit and the board of directors.

Many organizations find themselves in high pressure environments with tight regulations and increasingly intense external scrutiny, raising the bar on expectations to improve their ability to find and fix problems to prevent negative business results.

Implementing the corrective action cycle is challenging for organizations to accomplish practically and efficiently. For example, organizations can complete an investigation and find an individual at fault, but may fail to recognize that systemic issues also contributed to the situation. This failure can lead to a lack of ethics and compliance program effectiveness.

Limitations associated with corrective action

Corrective action is one element of an effective compliance program and is often tied closely to investigation and disciplinary action. It is relatively easy to identify the individuals involved in possible misconduct when a report is received through an organization's compliance reporting process.

Implementing the corrective action cycle is challenging for organizations to accomplish practically and efficiently.

More challenging, however, is identifying the underlying root cause or system-related factors at play in the situation. Perhaps management communications created an impression that employees should "do whatever it takes to get the sale," and this drove employees to operate out of compliance with company expectations. Maybe policies and procedures were unclear, training was unavailable or ineffective, or the organization's culture fosters an entrepreneurial approach that eschews following the rules.

Numerous barriers can have an impact on an organization's ability to identify the root causes of a systemic failure. Perhaps time pressures, a lack of training, or a lack of awareness prevents investigators from seeing the potential for a systemic cause. Perhaps the problem is misinterpreted, or there is insufficient or unreliable information.

Root cause analysis

Root cause analysis is a logical approach to problem solving because, if carried out effectively, it can help identify systemic flaws that need to be addressed. A well-performed root cause analysis considers the potential multiple root causes across an organization's people, processes, and technology, but an inadequate root cause analysis misses one of these components or ends abruptly at the identification of a single root cause without considering the potential for additional causes of the same problem.

Root cause analysis can take many forms. Every organization, function, and problem is unique, and the approach chosen for performing a root cause analysis will be equally unique. To determine what approach to take, management should consider:

- The nature of the problem
- The organization's past experience with root cause analysis approaches
- The culture of the organization and of the function or functions involved in the analysis

These considerations may help leaders determine that they want to use multiple methods or approaches to look at an issue. Using multiple approaches allows leaders to get different perspectives that could expose more root causes of a problem.

Sakichi Toyoda, founder of Toyota Industries Co., Ltd., developed the Five Whys method in the 1930s.

To illustrate a root cause analysis, we will apply four methods that are commonly used to support implementation of corrective action to a fictional scenario. The methods used in this article are:

- Five whys
- Ishikawa diagram (or fishbone diagram)
- Logic tree (or issue tree)
- Fault tree

We have simplified each analysis for illustrative purposes. In a real root cause analysis, the approach would be more thorough and would include additional steps, including documentation and validation of results.

Illustrative case study

A global organization has developed a new product for the Asian, European, and North American markets. In order to be customer-centric, the organization decides to manufacture the product regionally to meet product demand and to prepare customer support materials in local languages.

Once production has begun, demand unexpectedly rises in North America, because of competitor quality challenges. The organization decides to source products for the North American market from Asia and Europe to minimize delay in meeting the rising demand.

Unfortunately, shortly after implementation of the new sourcing plan, customer complaints around the world soar. The organization fires the product manager, blaming her for a failure to prepare for the sourcing transition. In spite of this action, customer complaints continue to flood the organization.

Five Whys

Sakichi Toyoda, founder of Toyota Industries Co., Ltd., developed the Five Whys method in the 1930s. The Five Whys involve:

- Asking "why" five or more times
- Drilling down to identify the root cause of a problem with each why
- Repeating the process as many times as necessary with a different sequence of questions to uncover all of the root causes of a problem

The Five Whys method is often used in conjunction with the other methods outlined in this article.

In the case study example, implementing the Five Whys might result in the following.

1. Why has there been an increase in customer complaints?
North American consumers have received products with package instructions written in Kanji. Asian consumers have received products with English package instructions. European customers have received products without package instructions.

2. Why are these package instruction issues occurring?
Packaging and instruction production and manufacturing processes were not set up to handle unique requirements of global customers.

3. Why are these variable instruction and packaging requirements not integrated into the manufacturing processes?
Policies and procedures do not consider the need for package instructions to meet variable regional specifications.

4. Why didn't management's policies and procedures include instructional and packaging considerations for regions in which manufacturing occurs for a different region?
The company has never had to manufacture products in one region for sales and distribution in another region, nor has it ever experienced sudden spikes in demand in a given region that require using manufacturing capacity in other regions.

5. Why hasn't management considered and planned for the regional manufacturing facilities to make products for different regions or for sudden spikes in demand for other regions?
The company does not have a business continuity plan, nor has it planned for sudden changes in market demand.

Ishikawa diagrams, also known as fishbone or cause-and-effect diagrams, were developed in the 1960s by Kaoru Ishikawa to show the specific causes of an event.

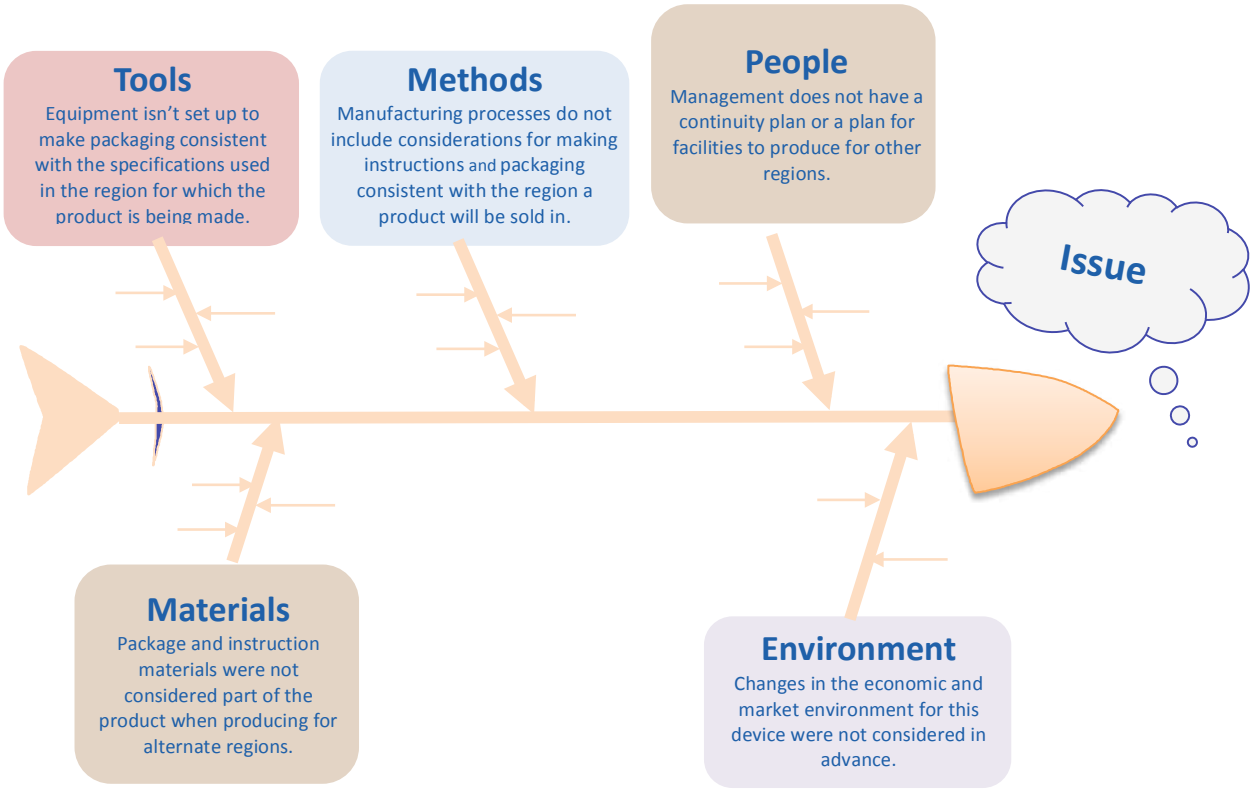
In this analysis, and when applying any root cause method, the answer to the last question in the string of whys is not the only answer or root cause requiring a corrective action; often multiple answers to questions in the string of whys require corrective action. Additionally, the whys could potentially continue or branch off at any point, extending beyond the five in this simplified example.

Ishikawa diagram

Ishikawa diagrams, also known as fishbone or cause-and-effect diagrams, were developed in the 1960s by Kaoru Ishikawa to show the specific causes of an event. Ishikawa diagrams are often used during product design to identify, in progressive levels of detail, the possible causes of quality defects as well as to identify causes of problems during investigations. Causes are grouped into categories including people, methods, tools, materials, and environment. Organizational leaders ask questions for each category to generate an understanding of the factors associated with a problem. Questions include:

- What happened, or what was the problem?
- Why did it happen?
- How can it be corrected to stop it from happening again?

Figure 2: Example of an Ishikawa diagram



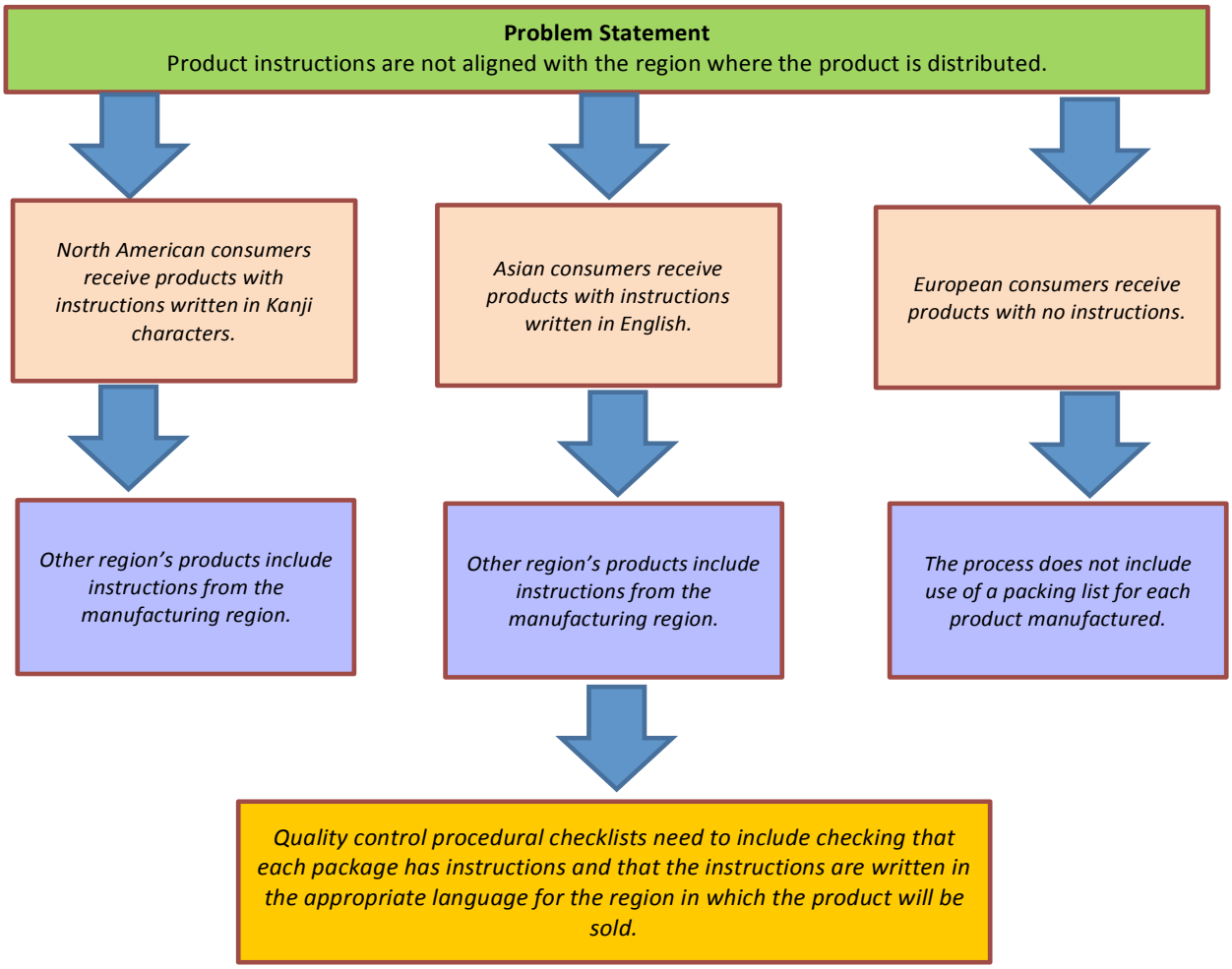
The questions for each category are shown as a diagram that resembles a fish skeleton (see Figure 2). Each bone shows the contributing causes of each category. To expand the analysis, additional categories could be added to the diagram or a branching set of bones could expand out from a cursory cause identified for a given category. When developing the corrective action plan, it is likely that management will find issues that need to be corrected in each category of the diagram.

Logic tree

A logic tree (or issue tree) is a visual problem-solving tool that breaks down a situation into discrete pieces to make it easier to search for all possible causes of a problem. The logic tree is named for the graphical depiction of a tree (i.e., a problem is broken down into component parts and then it branches out as details are added). Using a logic tree helps to simplify complex problems and to see the logic behind the root causes of each component of a problem. A logic tree can also be used for determining lead indicators for lag measures to solve for a specific objective, such as how to increase productivity.

For our case study, we broke the initial problem into component parts based on the different issues that were identified in different geographies (See page 80). As with other methods of root cause analysis outlined in this article, it is likely that a real analysis of a situation would involve components branching out and perhaps going into further detail about the cause to get to the end roots of the problem.

Figure 3: Example of a logic tree



Fault tree

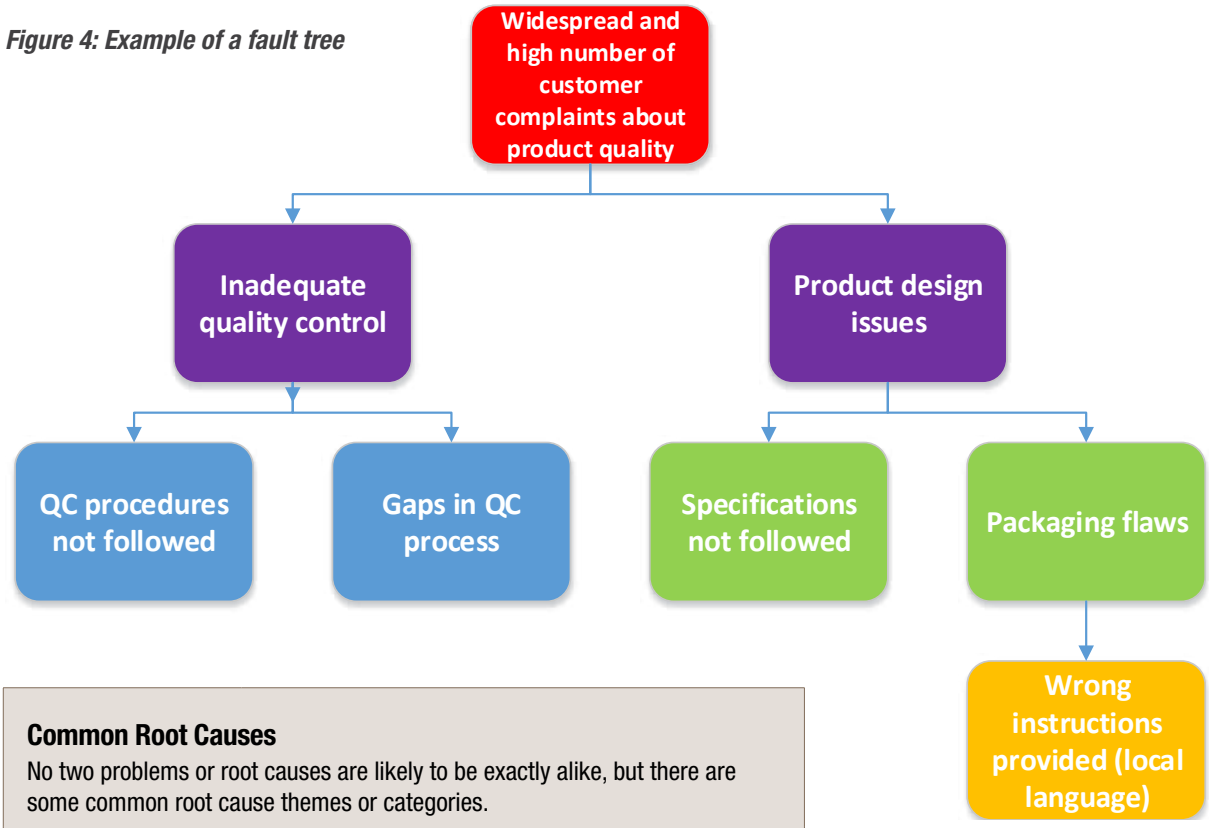
The fault tree method was developed in the early 1960s by Bell Laboratories to test the U.S. Air Force's Minuteman missile system. The fault tree approach uses a top-down view to help identify potential causes of a system failure. Used frequently to anticipate and prevent non-compliance, the fault tree method also is used to identify weaknesses in planned corrective actions or to identify issues with implementation plans associated with new requirements or regulations.

Using the fault tree involves five steps:

1. Define what went wrong or could go wrong
2. Understand the system in which the undesired event occurs
3. Construct the fault tree
4. Evaluate the fault tree
5. Design and implement controls for the identified hazards

Applying the case study in the fault tree (see Figure 4), the top of the tree describes the product quality complaints by customers. Separate branches of the tree identify possible causes for the quality complaints, and each of those branches divides into a second, and even a third, level of cause for the preceding branch. If a company is able to do this exercise in advance of a failure, it can hopefully identify the potential causes of a negative business result and put appropriate measures and controls in place to prevent it.

Figure 4: Example of a fault tree



Common Root Causes

No two problems or root causes are likely to be exactly alike, but there are some common root cause themes or categories.

Accountability	Ownership is unclear, leading to oversight failures.
Documentation	Required information is incomplete, missing, or inadequately recorded.
Fraud	Facts are intentionally misrepresented or assets are stolen.
Human Error	Intended activities are not executed or performed properly.
Inefficiency	Formal steps are not taken to define and routinely adjust processes to maintain efficiency and/or best practices.
Misaligned Operations	People, processes, and technology are not effectively aligned to achieve the common objective.
Monitoring and Oversight	Activities necessary to accomplish objectives are not monitored adequately.
Personnel Capabilities	People assigned do not have skills or training that match the expectations of the assigned role.
Physical Safeguards	Lack of physical safeguards over assets, including cash, inventory, controlled substances, or physical security like doors, windows, and fencing.
Policies and Procedures	Written, formal directions designed to enforce organizational behavior in a fashion that is aligned with the organization's goals and values is missing, outdated, or inadequate.
Segregation of Duties	Responsibilities are not split appropriately, creating a lack of checks and balances.
Strategic Miscalculation	Unanticipated event; miscalculation of environmental or other factors.
System Access	Access is not aligned with role because of inadequacies in set up, removal, or ongoing monitoring of users.
Technology Alignment, Design, Configuration	Systems implemented do not improve process efficiency and/or are difficult for untrained users to operate; systems are not configured to provide checks and balances.

Developing and implementing corrective actions

The purpose of root cause analysis is to establish or recommend corrective actions to mitigate the real problem and not just the symptoms of the problem. Clear and precise identification of a root cause or causes adds value by supporting effective corrective action, because it can educate management about why a problem exists and promote consensus for a corrective action.

Although quality root cause analysis can help prevent the recurrence of a problem when effective corrective action is taken, it will be clear that not all root causes were adequately identified or addressed if the problem recurs.

Once a problem's root causes have been identified, it is important to move quickly to develop and implement solutions to reduce the likelihood a problem will recur. The following questions should be considered during the development and implementation of a corrective action:

- Who should be involved?
- How much time will be needed to plan, develop, and implement a solution?
- Do the circumstances warrant redesigning the process, refreshing process documentation, or purchasing new equipment or technology?
- Who is responsible for making key decisions?
- Is there a timeline for the corrective action?
- Who will approve plans?
- Who will pay the bill, and how much will the solution cost?
- Who is keeping track of the budget and the planning and implementation timelines, as well as maintaining communication about the corrective action?

During the planning and implementation phases of the corrective action cycle, it is important to think broadly and strategically about who needs to be involved in the process. Planning and implementation are both activities that require ongoing, transparent communications with broad groups of stakeholders.

It is also valuable to keep a record of the team's decisions. A decision log is helpful if regulators, partners, or other external parties demand information about what was done, when, and why, as well as information about costs associated with the corrective action.

Validating solution effectiveness

After developing and implementing a plan that addresses the root causes associated with the identified problem, it is time to verify that the implemented solution has fixed the problem. Validating solution effectiveness requires three types of actions that occur at different times during the corrective action cycle:

1. During the root cause analysis, the team should verify that the analysis makes sense based on what is known about the specific situation.
2. During development and implementation, the team must verify that a robust plan is developed to address the root causes of the problem. A robust plan will include information such as who is responsible, who is accountable, what resources are required, what milestones are anticipated, and what new behaviors are expected.
3. To complete the corrective action cycle, the team needs to verify that the plan is implemented in a way to sustain the solution over time.

In our case study example, it may make sense to ask the Internal Audit team to include a periodic check into the sustainability of any solutions implemented to address the product quality gaps experienced after demand unexpectedly increased in North America.

It is important to keep track of the implemented solutions and the associated validation of the solution's effectiveness. This can be done through auditing, monitoring, or assessment. You may also wish to keep track of corrective actions taken across your organization on a more comprehensive level. Follow-up can be a challenge for organizations, especially when multiple corrective actions are underway. Technology can help to track corrective actions during and after plan implementation. Using technology allows an organization to track corrective actions more easily by step in the cycle, by due date, by issue type, by responsible party, and by business area.

If an outside regulator or other stakeholder requests an explanation of what happened, documentation will increase your credibility. You will be able to quickly and accurately describe the root causes of the problem, the fixes implemented to resolve the root causes, and the validation you did to make sure the problem was fixed. It also may be important to get advice from your legal counsel about documentation requirements, depending on the industry you are in and the specific lines of business of your organization. The Audit Committee and the board of directors also are interested in metrics associated with corrective action.

How to get started

Successful implementation of the corrective action cycle can help organizations find and fix systemic problems to either mitigate or prevent negative business results. After an issue has been identified, a thorough investigation with input from several perspectives should uncover the root causes.

Involve both key experts and individuals who may not consider themselves experts, but who routinely use the business process, in the evaluation of the associated issues. It is critical to understand how work is actually being done, since it is possible that employees are following a process other than what may be documented in the organization's records. As a part of the mitigation effort, take the time to update process documentation, if necessary.

Remember, regulators and key stakeholders expect organizations to be in a position to find and fix problems, and then to ensure that those problems do not recur. Be sure to evaluate the corrective action over time to make certain that the problem has not recurred. Routinely practicing root cause analysis is one way to increase the likelihood that your ethics and compliance program is effective over time. ✳

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November 13–16 ▪ Orlando, FL
December 4–7 ▪ San Diego, CA

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May 5 ▪ Miami, FL
May 19 ▪ San Francisco, CA
June 9 ▪ Atlanta, GA
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August 25 ▪ São Paulo, Brazil
September 8 ▪ Washington, DC
November 3 ▪ Dallas, TX
November 10 ▪ New York, NY
November 17 ▪ Seattle, WA
December 8 ▪ Philadelphia, PA

by Maria Lancri

Anti-corruption issues: New French Sapin II Law on transparency

» The Sapin II Law provides for a compliance obligation and describes what a compliance program should be.

» The Sapin II Law provides for some extraterritorial reach.

» To issue recommendations and control the implementation of this program, the law creates an anti-corruption agency.

» The French DPA has now been enacted, very much inspired by the UK procedure.

» Are all these new tools going to be convincing enough to consider that France's fight against corruption has reached international standards?

Now that the *Conseil constitutionnel* has validated the Sapin II Law and the law has been enacted and published on the 10th of December 2016,[1] it is time to see what is going to change in France in matters involving corruption. As this is the tradition in France, the law deals also with other issues, all of which are in relation with transparency.

Lancri

As a consequence, the present article will deal with issues relating to corruption but also with surrounding issues such as whistleblowing, compliance programs, the anti-corruption agency (*Agence française anticorruption,* or the Agency), the deferred prosecution agreements (DPAs), and the registry of beneficial ownership.

This law is going to be accompanied in the coming months by application decrees that aim at detailing some of the provisions, and we will mention it whenever a decree is due to complete an article of the law. Other provisions will be supplemented by recommendations to be issued by the Agency as part of its missions.

> As this is the tradition in France, the law deals also with other issues, all of which are in relation with transparency.

Preliminary remarks

The drafting of the law raised a lot of opposition, from the *Conseil d'état* which is in charge of reviewing the draft prior to its submission, to the Parliament which was opposed to implementing a DPA in the French legal system, and to some deputies and/or senators who thought to limit the powers of the new Agency and reinstate wider powers to the court when validating the DPA. It is

important to take this background into account when analyzing the law and to recall that it is the result of a compromise.

In its two latest reports on the implementation of the Anti-Bribery Convention,[2] the OECD strongly criticized the French anti-corruption framework for its lack of efficacy in combatting corruption of foreign public officials. A first step towards a meaningful reform was made with the law on the 6th of December 2013,[3] which increased significantly the sanctions for corruption offences.

However, in its Phase 3 report from December 2014,[4] the OECD deemed the measure insufficient. In particular, the OECD pointed to the insufficient number of cases pursued and the requirement under French law for a certain number of obstacles to legal actions, such as the requirement of reciprocity of criminalization contained in articles 113-6 of the *Code pénal*.

In its two latest reports on the implementation of the Anti-Bribery Convention, the OECD strongly criticized the French anti-corruption framework for its lack of efficacy in combatting corruption of foreign public officials.

It is in this context that the Sapin II Law was introduced. The law aims to update the French law to put it in line with international standards and to increase its credibility in the fight against corruption, and thus, moving forward, to allow French businesses being prosecuted abroad to invoke the principle of *non bis in idem* (i.e., not punishing twice for the same crime) with reasonable chances of success.

Extraterritorial reach of French anti-corruption law

On the model of what is being done in other countries, the Parliament accepted to extend the jurisdiction of French anti-corruption law to violations committed overseas by a French national, a person usually residing in France, or an entity that has at least a part of its business activity in France.

Note that this provision was inserted in order to place France on a level playing field with other countries and, considering that several important French companies have been prosecuted in foreign countries over the last years (mainly in the U.S.), on the basis of a similar law.

The law also deletes the obligation, in case a person in France is considered an accomplice to a corruption violation committed in a foreign country, to await a definitive decision of a foreign court prior to engage a procedure in France.

Note that this modification was made to comply with the recommendations from OECD that considered that the former system slowed down prosecution of corruption acts in France.

The French anti-corruption agency

A study on potential methods of modernizing the French system of detection, prevention, and co-ordination of the fight against corruption by the Ministry of Justice concluded that France's neighboring countries had a "'*modern* and effective approach to anti-corruption,' including notably the creation of internal detection and prevention frameworks within businesses, the absence or insufficiency of which can be penalized."[5,6]

As a matter of fact, when preparing the draft bill, the government went to visit the British Serious Fraud Office (SFO) to see what could be implemented in the French system of law, while at the same time respecting the allocation of roles and responsibilities with the prosecutors and the courts.

The *Agence française anticorruption* is a service with national jurisdiction that reports to both the Ministry of Justice and the Ministry of Budget.

Note that it is not an independent administrative authority such as the *Autorité de la concurrence* (the competition authority) or the *Commission nationale informatique et libertés* (the data protection authority). As such, it shall not have sanction powers as wide as those authorities, except for the implementation of the compliance programs.

The main missions of the Agency will be to:

- Centralize and spread information in order to help to prevent and detect acts of corruption;
- Make recommendations to help public and private bodies to prevent and detect corruption (recommendations adapted to the size of the entities and the nature of the risks identified);
- Control measures taken by the administration to prevent and detect corruption;
- Control the compliance by private bodies with the obligation to prevent/detect anti-corruption;
- Sanction non-compliance to said obligation;
- Control the implementation of the compliance obligation sanction;
- Supervise the application of the blocking statute when foreign decisions are being executed;
- Inform the public prosecutor; and
- Release an annual report.

To perform its obligations for the control of compliance programs, both with the public bodies and with private corporations, the Agency may have access to any professional document. The Agency may request the disclosure of any professional document by the organization being controlled, proceed to on-site verifications of the documented information, and interview any person whose participation appears necessary. The Agency may be assisted by third-party experts.

To perform its obligations for the control of compliance programs, both with the public bodies and with private corporations, the Agency may have access to any professional document.

Note that at this stage, it is not considered that the Agency is authorized to proceed to dawn raids as the prosecutors remain in charge of controlling and prosecuting corruption acts. As for the third-party experts, a decree should come to detail the conditions for their appointment, certainly to ascertain their qualification and independence.

One of the main missions of the Agency, once it is set up (until then the current *Service central de prevention de la corruption [SCPC]* remains in force), is going to make sure the compliance programs are properly implemented by corporations. It will then

issue a report with recommendations to the controlled corporation. (Note: This article went to press just before the decrees were published in March 2017.)

In the event the controlled corporation does not comply with adaptations requested to their compliance program, the Agency may use a whole set of sanctions, from warning and injunction, to pecuniary sanctions up to €200,000 for individuals and €1 million for corporations. The injunction and the pecuniary sanction may be published by the Agency.

The sanctions will be pronounced by the Sanctions Committee whose functioning is due to be detailed in a decree. In addition, in the case of a corruption or influence-peddling offence, the law provides for an additional penalty of compliance where the company must put in place an anti-corruption compliance program. The implementation of this program is controlled by the court, in application of general criminal law, with the help of the Agency.

The law has an extraterritorial effect, as it provides that the aim of the compliance program is to detect and prevent corruption and influence-peddling matters, both in France and overseas.

In the event the company does not comply with this complementary sanction, a new monetary sanction may be decided by the court. The monetary sanction will be the same as the one that applies to the offense for which they were originally condemned to implement a compliance program.

The compliance program

Contrary to what exists in other countries, where it is the guidelines that provide for what should be in a compliance program, in France the law itself envisions an obligation on businesses to put in place an anti-corruption compliance program. The French government believes that this obligation will increase businesses' competitiveness and development, and maintain a fair, level playing field for all businesses in relation to anti-corruption.

Scope of application

Companies will have to implement a compliance program if they (1) have more than 500 employees or belong to a group with their headquarters in France that has more than 500 employees, and (2) achieve a consolidated turnover of more than €100 million.

Thereby, French subsidiaries of foreign companies that are above the thresholds must submit to the law. Smaller ones are not required to submit, but they still should follow programs issued in application of the country from which their mother company is from.

The law has an extraterritorial effect, as it provides that the aim of the compliance program is to detect and prevent corruption and influence-peddling matters, both in France and overseas.

Note that the law covers both corruption and influence-peddling matters. As a consequence, companies may have to amend their applicable code of conduct to make sure they cover this specific incrimination.

Note that this obligation of prevention is the responsibility of the management of the company, the corporate officers (e.g., presidents, managers, executive board members) and not of the corporate structure

itself, although when it comes to the sanction for failing to implement a program, then it applies both to the corporate structure and to the management. The drafters of the law are thereby following the current trend, which is to engage the personal responsibility of the corporate officers. The administration added several times that clearly this responsibility cannot be delegated, for instance, to a compliance officer. This issue is still being discussed.

Scope of the program

The companies in the scope have to implement "measures and procedures" that form a compliance program very similar to what is already stated in other systems of law:

- **Code of conduct**
  This code should define and detail the different types of behaviors that are forbidden, because they may be qualified as corruption or influence-peddling acts. Note that in order to ensure the enforcement of this code, the law also specifies the code should be an annex to the work rules of procedure. As such it shall be subject to a process of consulting the staff representatives/works council as mentioned in article L 1321-4 of the Labor Code. As a consequence, prior to any interpretation from the administration, it is considered that corporations that had already consulted their staff representatives to implement their code of conduct, but who did not attach the code as an exhibit to the rules of procedure, will have to consult their staff representatives again.
- **Whistleblowing scheme**
  The aim of this scheme is to gather information from employees regarding misconducts or situations that are contrary to the company's code of conduct. A whistleblower hotline needs to be implemented in most of the companies. Note that this measure is different from the one we describe in the "Protection of the whistleblowers" section below, although the technical implementation of both whistleblowing lines of report may be done through one sole line.
- **Risk mapping**
  This mapping should take into account the economic sector and geographical zone. The provision specifies that the documentation should be regularly updated and should identify, analyze, and prioritize the risk exposure of the company to external solicitations of a corrupt nature.
- **Third-parties due diligence**
  The due diligence procedure should be used to evaluate the situations of clients and first-tier suppliers as well as intermediaries with reference to the risk mapping. Note that to comply with the obligation, corporations may have to collect sensitive personal data on the said third-parties. It is going to be necessary that the authorities clearly state what kind of personal information corporations are allowed to retain, maybe through a modification of the data protection law.
- **Accounting control procedures**
  The provision specifies that it should be ensured that the books, records, and accounts are not used to mask corruption or influence-peddling. The controls could be carried out by the company's own accounting and financial oversight services, or by an external auditor in the case of the completion of auditing on the certification of accounts, referred to in article L823-9 of the *Code de commerce*.
- **Training Program**
  This program has to be of a general application, but it should aim at training employees who are exposed most to risks of corruption and influence-peddling.

- **Disciplinary system**
  To allow for sanctioning of company employees in the case of a violation of the company code of conduct. Note that in application of French Labor Law, to be able to enforce the sanctions, a company should first submit its code of conduct to the staff representatives in order to make the code part of the company's rules of procedure as mentioned above.
- **Internal audit and evaluation mechanism**
  To control the implementation of the rules.

The new Agency would hold the initiative to publish recommendations to guide companies in the creation and implementation of anti-corruption measures and procedures, and to allow them to conform to their obligation of prevention and detection of acts of corruption. These recommendations are to be adapted to the size of the entities and to the nature of the risks identified and should be updated in view of the evolution of practices. For the time being, the guidelines issued by the SCPC in 2015 are still to be referred to.[7]

The French DPA

One of the innovations of the law is that it provides for a DPA procedure entitled "C*onvention judiciaire d'intérêt public"* (public interest judicial convention). During the judicial investigation and before the public action is initiated, this convention can be proposed by the prosecutor in charge, on the basis of his discretionary prosecution power, to the corporate entity in violation of corruption provisions under the condition it accepts the following obligations:

- To pay a monetary penalty of a maximum amount of 30% of the annual turnover, calculated on the basis of the advantages provided by the violations;
- To implement, under the monitoring of the Agency, a compliance program for a duration of 3 years;
- To compensate the Agency for the costs incurred by the Agency in this process in an amount limited in the convention; and
- To compensate the victims, whenever they are identified.

Once the corporate entity accepts the proposed convention, it is submitted for validation to the judge who is going to verify that the judicial convention is justified and whether it is in accordance with the above.
Some more details about the convention:

- The judicial convention is a procedure that can be used to settle several types of violation of the criminal law: active or passive corruption; public or private, national or international corruption; influence-peddling; or laundering of tax fraud proceeds;
- This judicial convention is entered into with the corporate entity and does not prevent prosecution of the individuals who would be liable for the violations. This provision was essential to reassure opponents to this new procedure that it was going to be used as a tool to avoid personal liability;
- This judicial convention does not entail any recognition of liability on the part of the corporate entity or any mention in the criminal report. It was necessary that this provision be explicit in order to avoid having corporate entities who enter in this judicial convention from being prevented from participating in public procurements processes;
- The judgment validating the judicial convention, the convention, and the amount of the sanction will be published on the Agency's website to ensure publicity.

Note that in the end, the drafters did manage to introduce a DPA in the

law. However, the drafting is not fully satisfactory because:

- Powers to enter and to validate a settlement are divided between different public bodies;
- No national jurisdiction was specifically granted by the text to the National Financial Prosecutor, which is going to slow down the building of a consistent approach; and
- The prosecutor or the judge who approves the settlement is given no guidance by the law to determine the amount of the penalty to be awarded.

Hopefully, the Ministry of Justice will issue guidance to (1) urge the competent public bodies to work together to build a consistent practice of this new law, and (2) provide some kind of framework to be used by magistrates.

The beneficial owner registry

The law creates a registry of beneficial owners of all registered companies that have headquarters in France and establishments of foreign companies registered in France, adding thereby another tool to fight against terrorism, money laundering, and corruption.

The beneficial owner is defined by the financial and monetary code as "the individual that controls, directly or indirectly, the client, or the individual for which the transaction or an activity is conducted."

Note that a decree will specify what information needs to be filed with the registry, which will be held by the Registry of Companies (RCS), and what information will not be rendered public but remain accessible to the administration.

The beneficial owner is defined by the financial and monetary code as "the individual that controls, directly or indirectly, the client, or the individual for which the transaction or an activity is conducted."

The protection of whistleblowers

In a section that is totally independent from the corruption chapter, the law provides for the implementation of a mechanism to protect whistleblowers when they reveal information. To be protected by this mechanism, the whistleblower must be an individual who selflessly and in good faith reveals or signals a crime or an offense; a serious and clear violation of an international commitment (ratified or approved by France); an international organization's unilateral decision entered into on the basis of said commitment, law, or a regulation; a serious threat; or prejudice for the general interest that this individual is personally aware of.

Facts, information, or documents, whatever their format or support, covered by national security, medical secret, or legal privilege are excluded from the protection of this regime.

The protection granted to the whistleblowers who conform with the obligations above are such that:

- No one can be barred from a recruiting procedure, terminated, or be discriminated against, directly or indirectly, in particular in terms of compensation or advancement;
- A person who signals a secret protected by law is not criminally responsible if such revelation is

necessary and proportionate to the safeguarding of the interests at hand and is in compliance with the law;
- If the whistleblower made the revelation in good faith or in compliance with the law, it is the responsibility of the accused party to prove that the decision to reveal was justified by objective elements foreign to the revelation.

Note that the term *whistleblower* is widely defined and can be an employee or not. Also, the scope of the information a whistleblower can reveal is very wide on purpose, because it covers general interest issues. That notion is not defined by the law and was introduced in the law to protect whistleblowers, such as the ones in the Luxleaks matter[8] who revealed questionable conducts rather than crimes or offenses.

This mechanism operates as follows for companies:
- Private organizations of 50 employees or more have the obligation to set up a whistleblowing mechanism (hotline);
- The mechanism should receive alerts from employees and also outside and temporary partners;
- This mechanism must ensure the confidentiality of the identity of the whistleblower, of the accused person, and of the information collected;
- In the event of a violation of this confidentiality obligation, the sanctions applied may be up to 2 years of imprisonment and €30,000 of monetary penalty.

Note that a decree will be entered into to detail other functioning conditions.

To set up this mechanism, the company needs to follow two procedures:
- Inform and consult the works council about the project;
- Because the mechanism is going to collect personal data, comply with the data protection obligations and file a request for authorization with the data protection agency (the CNIL), if the mechanism does not comply with the general authorization AU-004.

In the event the employer does not answer on the admissibility of the alert within a reasonable time, the whistleblower can signal the alert to the judicial or administrative authorities or to professional organizations.

An alert can be received, directly or indirectly, by an employer or a representative appointed by the employer. In the event the employer does not answer on the admissibility of the alert within a reasonable time, the whistleblower can signal the alert to the judicial or administrative authorities or to professional organizations. If they do not answer within three months, then the whistleblower can go public. In case of a serious and imminent danger, the alert can be brought directly to the authorities.

Conclusion

As for corruption matters, the law aims to elevate the country's laws with regards

the fight against corruption to the highest international standards, following on from the progress made with the law of the 6th of December 2013. Is the law going to satisfy foreign authorities and the OECD who have oftentimes criticized France for its failure to grasp the issue seriously enough? It might be too soon to say and we should wait for the law to be actually implemented by all the stakeholders to judge whether it is a success or not.

The success of the law will depend largely on several factors among which: (1) the Agency is granted the appropriate means (i.e., budget and people) to be efficient; (2) the law is accompanied by an active policy of pursuing cases of corruption; and (3) judges to whom the DPAs are going to be submitted for validation agree on the process.

One must recall that a lot of French judges believe that a settlement in a criminal matter does not allow them to exercise fully their criminal jurisdiction or to take into account all particularities in the application of the principle of individualization of sentences. For them, it is also a way to make corporations less willing to take their responsibilities, especially when the law provides for an absence of guilt on their part when accepting the settlement.

This reform, in and of itself, may not offer protection against prosecution to French companies abroad. It does however serve the important function of obliging them to put in place anti-corruption programs. This should, at the very least, allow companies to prevent corruption and present them with the means to best defend themselves in front of judges overseas, provided their compliance program is effective and appropriately adapted. ✳

1. LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique. Available at http://bit.ly/legifrance-2
2. OECD: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. 2011. Available at http://bit.ly/oecd-combating
3. LOI n° 2013-1117, 6 déc. 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière : JO 7 déc. 2013, p. 19941. Available at http://bit.ly/legifrance-3
4. OECD: France: Follow-up to the Phase 3 Report & Recommendations. December 2014. Available at http://bit.ly/oecd-phase-3
5. UK Bribery Act, *section 7. 2010*
6. Article 102 of the Swiss Criminal Code (Suisse Penal Code).
7. French Guidelines for the Reinforcement of Prevention of Corruption in Commercial Transactions. Available at http://bit.ly/french-guide
8. BBC News: "LuxLeaks scandal: Luxembourg tax whistleblowers convicted" June 29, 2016. Available at http://bit.ly/bbc-europe

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Want to engage with your employees for *more effective* ethics training?

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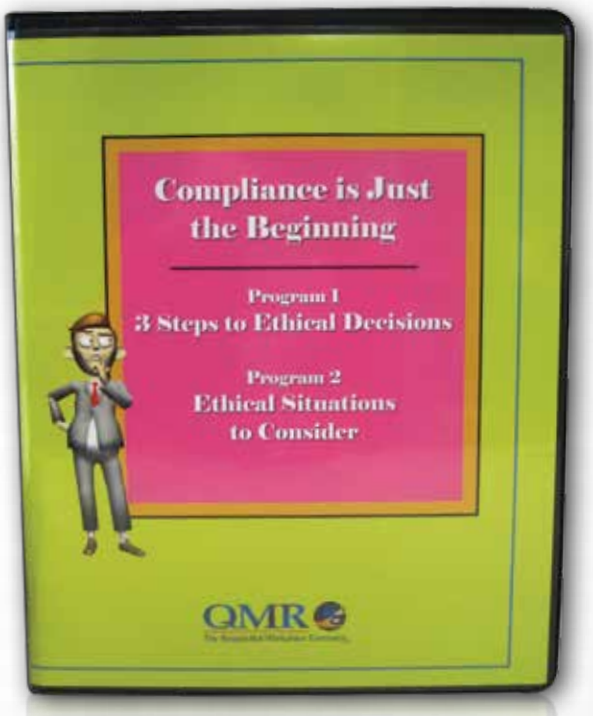

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by Gary J. Ross, Esq. and Mary C. Nistico, Esq.

Hidden liabilities: The role of Compliance in M&A risk management

» Buyers should thoroughly assess the compliance programs of any potential targets before going through with a merger or acquisition.

» After closing, buyers may be liable for ongoing compliance defects in a target's business, even if they occurred solely prior to closing.

» If a buyer fails to perform thorough due diligence before going through with an acquisition, the buyer may be over-valuing a target.

» Buyers also risk ramifications such as loss of reputation.

» Buyers should create a questionnaire for targets that covers potential compliance pitfalls, highlight any compliance concerns in the target's answers, and determine if any remediation is required prior to the closing of a deal.

When contemplating an acquisition, prospective buyers devote countless hours and resources to analyzing potential targets. These analyses often center on factors such as potential synergies, the target's ability to generate cash flow, and the target's market share with respect to a particular good or service when compared to its competitors. One factor that often goes under-evaluated, however, is the potential risk related to any deficiency in the target's legal and regulatory compliance.

Ross

Nistico

In a regulatory landscape where complex requirements keep stacking up and regulator tolerance for error hovers near zero, compliance is an area rife with pitfalls for many companies. Today's global company is responsible for juggling legal and regulatory burdens not only specific to its business sector (i.e., FINRA regulations for broker-dealers, U.S. Department of Health and Human Services rules and regulations for healthcare professionals, etc.), but also those which span across sector divides to reach all US companies, such as the Foreign Corrupt Practices Act (FCPA), as well as foreign regulations in other countries where it operates (i.e., restrictions/sanctions imposed by the European Union). In addition, enforcement of various laws and regulations has become easier in recent years as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 expanded the Securities Exchange Commission's (SEC's) ability to use administrative proceedings, in lieu of dealing with the court system, to render civil penalties against companies. This environment creates a need for buyers in merger and acquisition (M&A) transactions to conduct thorough due diligence on the legal and regulatory

compliance programs of targets prior to closing a deal.

Case law

The failure to conduct adequate due diligence on a target's compliance regime prior to closing can saddle a buyer with liability for the target's prior or ongoing compliance transgressions. In instances in which a buyer purchases the ownership interests of a target but does not take over the day-to-day operations, the buyer may be unaware of compliance defects that begin (or continue) after a deal is completed. However, the fact that a buyer is not involved in the management of a new acquisition does not absolve it from the legal responsibility for such acquisition's failure to abide by relevant laws and regulations.

In February 2015, the Goodyear Tire & Rubber Co. (Goodyear) agreed to pay $16.2 million to settle charges from the SEC alleging that subsidiaries in Kenya and Angola violated the FCPA…

Goodyear

In February 2015, the Goodyear Tire & Rubber Co. (Goodyear) agreed to pay $16.2 million to settle charges from the SEC alleging that subsidiaries in Kenya and Angola violated the FCPA by paying bribes to increase tire sales. Goodyear purchased majority ownership interests in these subsidiaries in 2006, but left the day-to-day operations of both entities to be run by their respective founders and local management. Under these managers, the SEC alleged, bribes of approximately $3.2 million dollars were paid to both government and non-government entities. In addition, the SEC found that with respect to one of the subsidiaries, the practice of using bribery to procure business was already in use at the time Goodyear was considering purchasing a majority interest in the company. Although Goodyear had no hand in these transgressions, its lack of compliance due diligence, both prior to and after acquiring these companies, was enough to render it responsible for their occurrence. The SEC concluded that "Goodyear did not detect or prevent these improper payments because it failed to conduct adequate due diligence when it acquired [one of the subsidiaries], and failed to implement adequate FCPA compliance training and controls after the acquisition,"[1] and therefore, violated the books and records provision of the FCPA.

Scotts Miracle-Gro

Courts and regulators have made it a point to assert that even a delay, as opposed to an outright failure, in proper compliance monitoring and reporting with respect to a newly acquired business could leave a company with large settlements to pay. In 2005, Scotts Miracle-Gro Co. (Scotts) entered the birdseed business by acquiring Gutwein & Company Inc. (Gutwein). Prior to the acquisition, Gutwein treated its birdseed with pest control additives in order to avoid insect infestation, even though these additives were not approved by the Environmental Protection Agency (the EPA) for this use. The use of the illegal pesticides continued for two years following the merger, at which point Scotts conducted a voluntary recall of its wild bird food products because of the additives and voluntarily disclosed the matter

to the government. A federal investigation into Scotts' actions was launched, prompting Scotts Chairman and CEO Jim Hagedorn to state that Scotts had "learned a lot from these events and that new people and processes have been put in place to prevent them from happening again."[2]

Despite Scotts reporting the issue and taking measures to see to it that the compliance failures that produced the breach were corrected, the company ultimately had to answer for the violations. The price was high: A plea bargain resulting in a $4 million fine and performance of community service for 11 criminal violations of the Federal Insecticide, Fungicide and Rodenticide Act, in addition to more than $6 million in penalties plus another $2 million donated to environmental projects as part of a separate settlement with the EPA. Scotts sold its birdseed business in 2014, but the ramifications of its compliance failures still linger, as a class action suit is currently underway in California federal court.

Scotts sold its birdseed business in 2014, but the ramifications of its compliance failures still linger, as a class action suit is currently underway in California federal court.

ServiceLink

Both the Goodyear and the Scotts incidents involved compliance failures of subsidiaries that continued after the closing of an acquisition, but a buyer can also be held liable for compliance failures that only occurred prior to closing, as was illustrated recently. In January 2017, the Federal Reserve, Office of the Comptroller of the Currency and Federal Insurance Deposit Corp. (together, the Agencies) announced a fine against ServiceLink Holdings (ServiceLink) for the actions of its predecessor company, Lender Processing Services (LPS), more than six years earlier. In 2011, LPS was part of a large settlement between the Agencies and various financial companies involving industry-wide misconduct and unsafe or unsound practices in foreclosure-related services. As part of this settlement, LPS entered into a consent order on April 13, 2011 (the Consent Order) with the Agencies to ensure LPS's compliance with relevant laws and regulations going forward.

In 2014, LPS was purchased by Fidelity National Bank and then merged into ServiceLink, a move that caused ServiceLink to absorb the Consent Order along with LPS. ServiceLink and the Agencies agreed to an amendment of the Consent Order whereby ServiceLink would agree to pay a $65 million for improper actions "which resulted in significant deficiencies in the foreclosure-related services that LPS provided to mortgage servicers."[3] The Agencies' press release also signaled that ServiceLink's responsibility for LPS's misdeeds will not end with the fine, stating that "the [A]gencies continue to monitor [ServiceLink's] compliance with other provisions of [The] [O]rder."[4] This sort of successor liability has also proven to be an issue with respect to the FCPA.

eLandia

In 2007, eLandia International, Inc. (eLandia) purchased Latin Node, Inc. (Latin Node) through a stock purchase with Latin Node's

parent. After the closing, eLandia found suspicious payments made by Latin Node to government officials in Honduras and Yemen prior to the transaction and promptly disclosed this discovery to the proper authorities. The Department of Justice gave eLandia credit for its actions, stating in a press release that:

> eLandia's counsel voluntarily disclosed the unlawful conduct to the Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the Department; cooperated fully with the Department in its ongoing investigation; and took appropriate remedial action, including terminating senior Latin Node management with involvement in or knowledge of the violations.[5]

In a plea deal, Latin Node was made to plead guilty to violating the FCPA and pay a $2 million fine—a fine for which eLandia ultimately had to agree to provide the funds.

Despite these proactive and cooperative actions, however, eLandia did not escape consequence. In a plea deal, Latin Node was made to plead guilty to violating the FCPA and pay a $2 million fine—a fine for which eLandia ultimately had to agree to provide the funds.

Considering the risks

Legal and regulatory fines and liabilities are not the only means by which questionable compliance activities inherited through a merger or acquisition can negatively impact a buyer. News of a regulatory investigation or details of unsavory activities published by the press may influence public perception of the target and, by association, the buyer, resulting in brand damage. Such damage could result in a loss of consumer trust, an unwillingness for others in the marketplace to associate or collaborate with either the target or the buyer, and a loss of morale among employees. In addition, acquiring a company with poor compliance on cybersecurity and privacy matters can mean acquiring a company that is vulnerable to cyberattacks. This can result in jeopardized sensitive and confidential data, such as corporate secrets, intellectual property, employee personal information, and customer credit information.

If a buyer fails to perform thorough due diligence on the compliance program and track record of a potential target before going through with an acquisition, that buyer is assuming a great many risks, such as:

- the risk of having to pay hefty fines and settlements pursuant to regulatory orders or class action suits;
- the risk of poor public perception reducing the marketability of the target's (and by association, perhaps, the buyer's) goods and/or services; and
- the risk of cyberattacks compromising valuable corporate information and intellectual property.

By failing to consider these risks, a buyer may be over-valuing a target. A hefty fine and negative press could cause a buyer to sell a recent acquisition at a loss. The acquisition to enter the wild bird food business cost Scotts Miracle-Gro $77 million; it later sold

its US and Canadian wild bird food business, including intangible assets and certain on-hand inventory and fixed assets, for only $4.1 million in cash and an estimated $1 million in future earn-out payments.[6] Likewise, a cyberattack on a newly acquired target whose main value lies in its trade secrets could render a pricey purchase valueless.

Due diligence

In order to avoid these pitfalls, prospective buyers should place a high priority on running thorough legal and regulatory compliance checks on any potential target. As an initial matter, a buyer should identify all potential compliance risks related to the target that could impact the buyer after closing. This involves creating a risk exposure map that focuses on items such as industry/sector, products/services, and countries of operation, so the analysis is properly tailored to only those laws, rules, and regulations that govern the target. From here, the buyer can create a due diligence questionnaire that probes the target's compliance program and track record with respect to the issues identified on the map, with the prominence of an issue on the questionnaire being proportional to its risk level. Once the potential target returns a completed questionnaire, the buyer should highlight any concerns the answers present and determine if any remediation is required prior to the closing of a deal.

If the buyer ultimately determines to go forward with a transaction, it should become involved in the newly acquired company's compliance program, regardless of whether the buyer will be hands-on in other aspects of the target's day-to-day operations. The buyer should use the post-closing period to implement any needed compliance improvements in the newly acquired target company that were identified during the pre-transaction diligence phase. In addition, the organizational changes and internal shake-ups that often accompany an acquisition can spell trouble for compliance initiatives.

Empirical studies show that "[o]rganizational changes in a company during post-merger integration can exacerbate compliance risks because they distract employees, create new control gaps and affect the company's culture. This, in turn, affects worker behaviors and decisions."[7] As such, it is important that compliance initiatives and trainings are a central part of any post-transaction integration.

Conclusion

In short, the complexity and harsh enforcements present in today's compliance landscape render it essential for prospective buyers to conduct thorough assessments of the compliance risk exposure of any potential target prior to closing a merger or acquisition. Acquiring an in-depth knowledge of a potential target's compliance program and track record can keep a buyer from getting into a business relationship that later proves damaging and allow it to develop effective remedies to compliance deficiencies before they become major issues. ✳

1. The Securities and Exchange Commission (SEC), Release No. 74356, in the Matter of Goodyear Tire & Rubber Co. February 24, 2015 at ¶11. Available at http://bit.ly/sec-litigation
2. Department of Justice, press release: "Scotts Miracle-Gro Will Pay $12.5 Million in Criminal Fines and Civil Penalties for Violations of Federal Pesticide Laws" September 7, 2012. Available at http://bit.ly/scotts-fines
3. Board of Governors of the Federal Reserve System, joint press release: "Federal Banking Agencies Fine ServiceLink Holdings $65 Million" January 24, 2017. Available at http://bit.ly/ServiceLink-fine
4. Idem.
5. Department of Justice, press release: "Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine" April 7, 2009. Available at http://bit.ly/Latin-Node-fine
6. Scotts Miracle-Gro, Form 10-Q for the quarterly period ended March 29, 2014, page 8. Available at http://bit.ly/scotts-quarterly
7. Karin Holloch: "United States: Managing Compliance Risks In M&A Transactions" McDermott Will & Emery. October 20, 2014. Available at: http://bit.ly/Karin-Holloch

Gary J. Ross *(Gary.Ross@JacksonRossLaw.com) is the Founder and Managing Attorney and* ***Mary C. Nistico*** *(Mary.Nistico@JacksonRossLaw.com) is an Associate at Jackson Ross PLLC in New York City.*

by Kristy Grant-Hart

Punish one, teach 100

The Mafia has a saying: "Punish one, teach 100." I'm certain this works for criminal enterprise, and I'm equally sure it works in corporations as well. This saying reminds us that what happens to one person teaches many others about the consequences of their behavior.

Grant-Hart

We need to be aware of what we're teaching employees when we deal with misconduct. Here are some lessons you may inadvertently be giving.

You can get away with all kinds of misbehavior here as long as it isn't too egregious.

When policies, procedures, and rules aren't followed, does anyone correct the action? Do you have whistleblowers or managers who aren't afraid to confront misbehavior or does everyone let things slip under the rug because it is too uncomfortable to deal with it? If people see that no one is punished for breaking the rules, they will quickly learn that they can break the rules with impunity as well. You must ensure that the culture of ethics and compliance becomes normative in your business, so that breaking the rules is dealt with swiftly and with reproach.

You get special treatment if you're important.

One of employees' most commonly expressed frustrations is that people lower in the corporate hierarchy have to follow the rules while managers and senior executives never seem to get into trouble. Even worse than that, in many companies it is common practice to quietly sign a mutual non-disparagement clause as part of a settlement agreement when senior people have been caught breaking the rules. It seems easier than to publicly acknowledge the misdeeds or fire the executive publicly. Employees see this and it makes them furious. In cases like this, if your organization *doesn't* punish one, 100 will notice and harbor resentment.

One of employees' most commonly expressed frustrations is that people lower in the corporate hierarchy have to follow the rules while managers and senior executives never seem to get into trouble.

Justice is important here, and we take the rules seriously.

Implemented correctly, deterrents are highly effective. When people can see that the organization is fair but firm, it is easy to decide to act in accordance with the rules. By appropriately and consistently punishing people who break the rules (whether that's a simple verbal correction or a termination, depending on the seriousness of the breach), you give employees faith that their actions matter and that they will be held accountable for their behavior.

Never forget that whether you choose to punish *or not* to punish one person, hundreds, if not thousands of others, are learning. ✳

Kristy Grant-Hart *(KristyGH@SparkCompliance.com) is the Managing Director of Spark Compliance Consulting, and author of the book,* How to be a Wildly Effective Compliance Officer. *ComplianceKristy.com @KristyGrantHart bit.ly/li-KristyGrantHart*

by Joe Murphy, CCEP, CCEP-I

Tools for evaluating your compliance program

One of the most challenging issues for compliance and ethics professionals is how to evaluate a compliance program. There is quite a bit that has been said and written on the topic. Often there is reference to surveys as a key tool, but experienced professionals know that surveys are not enough. Depending on the risk area and function being evaluated, and the purpose of the evaluation, there are a number of possible tools. In this column, I offer a simple list of possibilities.

Murphy

- Desk audits. This is a review of the program design—does it meet applicable standards? This can be done sitting at your desk, looking at the design of your program, and comparing it to the Sentencing Guidelines and other standards.
- **Counting inputs and outputs.** Some results can be counted (e.g., billing errors in healthcare, numbers of helpline calls, etc). Similarly, inputs such as numbers of training sessions and numbers of audits can be counted. Benchmarking allows you to compare your results with peer companies.
- **Focus groups**. These give intensive insights on what is happening in the business.
- **Individual interviews.** Interviewing a cross section of individuals gives an even deeper, more intensive picture.
- **Audits.** A traditional tool that can help in evaluations.
- **Tests.** Testing out systems, such as placing test calls to the helpline.
- **Statistical analysis.** Analyzing key figures for possible red flags. For example, in EEO compliance, checking the status of protected groups (e.g., numbers promoted).
- **Exit interviews.** Asking exiting employees what they saw and heard while they were here.
- **Deep dives**. Using several of the tools focused on one business unit, such as on-site audits, focus groups, and interviews.
- **Self-assessments.** Having managers do their own program assessments in their own units. This is not independent, but it can help engage the managers.
- **Test runs.** Doing a mock presentation to an in-house, skeptical lawyer to see if you can tell a convincing narrative about your program. This will quickly highlight gaps in the program.
- **Surveys.** People usually think of these as a tool to see what employees think. But they are only as good as the survey tool used and the manner of its implementation, and the results can be misleading.
- **Peer reviews.** Having a team of compliance professionals from comparable companies (but there are antitrust risks if they are competitors) review your program.

This list is offered to provide food for thought. Each item could take its own column to explore, but this list can provide a starting inventory. ✳

Joe Murphy *(joemurphyccep@gmail.com) is a Senior Advisor at Compliance Strategists, SCCE's Director of Public Policy, and Editor-in-Chief of* Compliance & Ethics Professional *magazine.*

Takeaways

April 2017

Compliance & Ethics Professional

Tear out this page and keep for reference, or share with a colleague. Visit www.corporatecompliance.org for more information.

The right questions, the right way, the right time

Joe Koenig (page 31)

- The deceptive will take advantage of poorly worded questions.
- Questions and settings need to minimize contamination.
- Questions need to be simple, precise, and direct, and use mutually understood words.
- Telling lies is stressful; truth is peace.
- Know truth. Know deception.

The Compliance & Ethics profession and why it matters to Millennials

Colleen Dorsey (page 39)

- Compliance and ethics professionals are needed in every organization of every size and every sector.
- The U.S. Sentencing Commission's Guidelines, Chapter 8 gives organizations an incentive to have an effective compliance and ethics program in place.
- Corporate scandals, such as Enron in the early 2000s, solidified the need for specialized professionals to guide corporations in compliance and ethics.
- The job market for well-educated and dedicated professionals in Compliance is strong.
- Regulatory oversight is essential to good business, no matter who is in the White House.

The framework for developing an effective compliance program

Emily Dyer and Femi Richards (page 43)

- An effective compliance program is multifaceted and should be assessed periodically to ensure that it is operating effectively.
- Risk assessments are critical to facilitating institutional compliance efforts and increasing awareness of the probability and likely impact of business risks.
- It is important to document and align risk-mitigating control strategies with the organization's risk appetite.
- The implementation of a documented audit plan is indispensable in driving accountability and enhancing transparency.
- Instances of non-compliance identified though audits should be documented, reported, and remediated in accordance with applicable policies and legal requirements.

FCPA due diligence: Starting 2017 on the right note

David P. Nolan (page 55)

- Identify the risks involved when using third parties or acquiring a business outside the U.S.
- Determine the risk levels and research needed for information gathering from the third party or merger and acquisition (M&A) target.
- Decide which due diligence measures to undertake in order to reduce these risks.
- Understand the basic requirements to be compliant with the two principal global laws: the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act.
- Identify gaps in your compliance activities to mitigate regulatory risks, reduce the likelihood of fraud, and minimize costs.

The hiring of family members under the FCPA

Thomas R. Fox (page 61)

- Hiring a family member of a foreign official for an internship or a job may violate the FCPA under certain circumstances.
- All job candidates must meet minimum hiring criteria.
- HR internal controls should not be over-ridden by business unit personnel.
- You must segregate the son or daughter of a foreign official from working on any business the foreign official may send your company.
- HR is a key component in any best-practices anti-corruption compliance program.

Managing values: A vital element of culture, ethics, and success, Part 3

Jason L. Lunday (page 65)

- Managing corporate values involves four key efforts that help navigate the risks of an ineffective initiative.
- Company leadership must identify and obtain agreement on the identified values that truly represent the company and its journey.
- Leadership must effectively articulate and then communicate the values to employees and others.
- Leadership needs to carefully ensure holistic integration and institutionalization of the values.
- Over time, leadership needs to strengthen and ensure sustainability of the values.

Compliance at a tech startup

Sam Aina and Pam Hrubey (page 75)

- Identifying the underlying root causes or system-related factors at play will help determine the proper corrective actions.
- Systemic flaws need to be addressed to prevent recurrence of an incident.
- Using multiple approaches allows leaders to get different perspectives that could expose more than one root cause of a problem.
- Using a graphic depiction of the problem, such as a fishbone diagram, logic tree, or fault tree, can help uncover an explanation of the event.
- Be sure to document and validate the results and collect metrics to be presented to the Audit Committee and board of directors.

Anti-corruption issues: New French Sapin II Law on transparency

Maria Lancri (page 85)

- The Sapin II Law provides for a compliance obligation and describes what a compliance program should be.
- The Sapin II Law provides for some extraterritorial reach.
- To issue recommendations and control the implementation of this program, the law creates an anti-corruption agency.
- The French DPA has now been enacted, very much inspired by the UK procedure.
- Are all these new tools going to be convincing enough to consider that France's fight against corruption has reached international standards?

Hidden liabilities: The role of Compliance in M&A risk management

Gary J. Ross and Mary C. Nistico (page 95)

- Buyers should thoroughly assess the compliance programs of any potential targets before going through with a merger or acquisition.
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Upcoming Events

April 2017

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2 European Compliance & Ethics Institute Prague, Czech Republic	3	4 WEB CONFERENCE: Responding to Global Compliance Risk in Our Supply Chains	5 WEB CONFERENCE: The Importance of Understanding Ethical Risk to an Organization's Reputation and Integrity CCEP-I Exam	6	7 Regional Compliance & Ethics Conference Scottsdale, AZ	8
9	10	11	12 WEB CONFERENCE: What Content Marketing Techniques Can Teach Us About Building a Compelling Compliance Program	13	14	15
16	17	18	19	20	21	22
23	24 Basic Compliance & Ethics Academy® Chicago, IL	25 WEB CONFERENCE: The Current Cybersecurity Threat Landscape: a primer for compliance professionals	26	27 CCEP Exam	28 Regional Compliance & Ethics Conference Chicago, IL	29
30	1	2	3	4	5	6

May 2017

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1 Basic Compliance & Ethics Academy® San Francisco, CA	2	3	4 CCEP Exam	5 Regional Compliance & Ethics Conference Miami, FL	6
7	8	9	10 WEB CONFERENCE: The Current Cybersecurity Threat Landscape: a primer for compliance professionals	11	12	13
14	15 International Basic Compliance & Ethics Academy® Amsterdam, Netherlands	16	17	18 CCEP-I Exam	19 Regional Compliance & Ethics Conference San Francisco, CA	20
21	22	23	24	25	26	27
28	29	30	31	1	2	3

European Compliance & Ethics Institute
April 2–5 | Prague, Czech Republic

Higher Education Compliance Conference
June 4–7 | Baltimore, MD

Internal Investigations Compliance Conference
June 15–16 | Orlando, FL

Compliance & Ethics Institute
October 15–18 | Las Vegas, NV

Board Audit Committee Compliance Conference
November 6–7 | Scottsdale, AZ

Basic Compliance & Ethics Academies
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April 24–27 | Chicago, IL
LIMITED SEATS
May 1–4 | San Francisco, CA
August 7–10 | New York, NY
September 11–14 | Philadelphia, PA
October 2–5 | Nashville, TN
November 13–16 | Orlando, FL

International Basic Compliance & Ethics Academies
15–18 May | Amsterdam, Netherlands
10–13 July | Singapore
21–24 August | São Paulo, Brazil
25–28 September | Madrid, Spain

Regional Compliance & Ethics Conferences
April 7 | Scottsdale, AZ
April 28 | Chicago, IL
May 5 | Miami, FL
May 19 | San Francisco, CA
June 9 | Atlanta, GA
June 22–23 | Anchorage, AK
August 25 | São Paulo, Brazil

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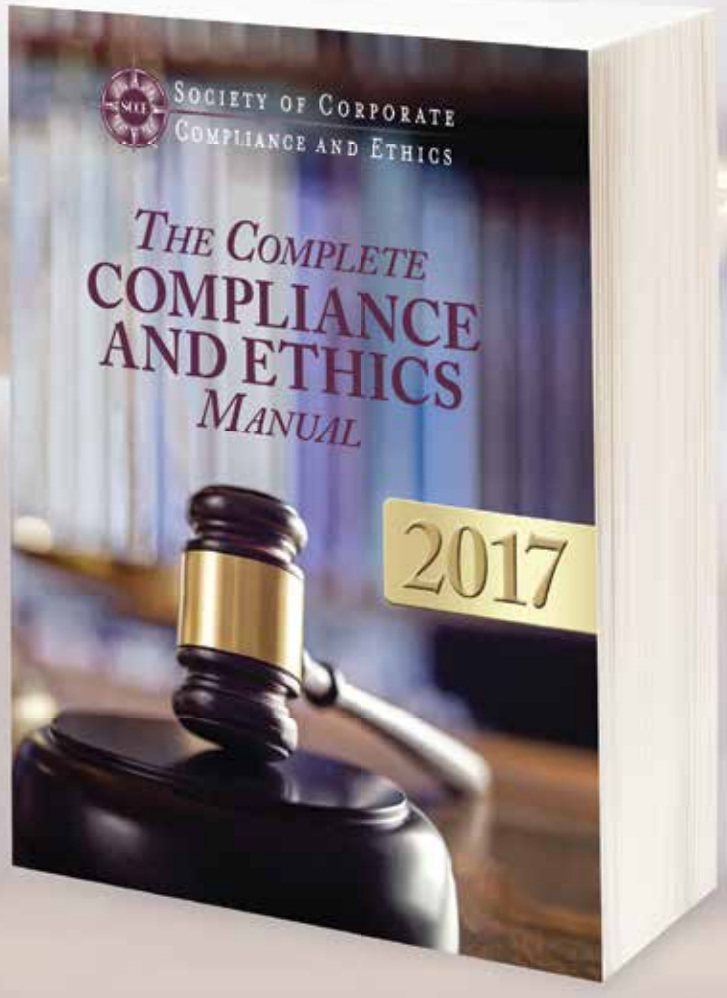
- 5 updated topic areas



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