Compliance & Ethics for Lawyers and In-House Counsel
Preconference P12

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PRECONFERENCE OVERVIEW:
What do Lawyers & In-House Counsel Need to Know about Compliance and Ethics?

- Compliance and Legal have separate, but (mostly) mutually supportive mandates
- Compliance is not a legal function, but lawyers & in-house counsel have many critical roles in program
- Role of Privilege, Confidentiality & Other Legal Principles in a Compliance Context
- Understand how to manage “scary topics” of compliance e.g. Risk Assessments, Investigations, Whistleblowers & Discipline

GROUP TO CHART TOPICS
RIPPED FROM THE HEADLINES
Takeaways for Lawyers & CCOs
MODULE 1:
WHAT IS A COMPLIANCE AND ETHICS PROGRAM?
(a quick refresher)

- A multi-disciplinary management control system
- consistent with relevant standards (including the Organizational Sentencing Guidelines)
- that seeks to “detect and prevent misconduct” and support a culture of accountability and transparency
  - Impacts, influences and monitors “how things are done around here”

7 Elements of an Effective C&E Program
(Organizational Sentencing Guidelines)

<table>
<thead>
<tr>
<th>management commitment &amp; resources</th>
<th>standards, controls &amp; procedures</th>
<th>training &amp; communication</th>
<th>monitoring, evaluation &amp; reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “walk the talk”</td>
<td>• clear, written, accessible</td>
<td>• job related &amp; continuous</td>
<td>• metrics &amp; measurement</td>
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<tr>
<td>• high level personnel</td>
<td>• beyond “legalese”</td>
<td>• multimedia/blended</td>
<td>• confidential report lines</td>
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<tr>
<td>• structured for success</td>
<td>• understood by humans</td>
<td>• Board training</td>
<td>• reports to senior management &amp; Board</td>
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<tr>
<td>• resources</td>
<td></td>
<td></td>
<td>• ongoing risk assessment</td>
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<tr>
<td>enforcement, discipline &amp; incentives</td>
<td></td>
<td></td>
<td>• including response after breaches</td>
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</tbody>
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- no “double standard”
- no retaliation
- performance alignment
- substantial personnel authority
- avoid discretionary authority to managers likely to violate
- background checks
- promotions & new hires
BUT DOES IT "WORK"?

- As recently confirmed in the FCPA Resource Guide, all these elements of a compliance program must "work" together in a manner that actually does the job

  => And drives the right culture

  => Design + Implementation + Impact

Examples: Wal-Mart, SAC

MODULE 2: COMPLIANCE & LEGAL MANDATES

- COMPLIANCE
  To design, implement (as a function and through others) and oversee an effective compliance and ethics program covering the C&E risks of the organization, including reports to senior management and the Board

- LEGAL
  To advise on a wide range of legal matters, assess and manage legal risks, defend the company against legal threats, instruct outside counsel & report to senior management and the Board
The Many Titles/Roles of the CCO

Chief Compliance Officer
Chief Ethics & Compliance Officer
Director of Global Compliance
VP –Business Practices & Compliance
AGC- Compliance
GC & CCO
Global Ethics Director
**********
Leader of Compliance & Ethics Function
Overseer of Compliance & Ethics Program
Subject Matter Expert of C&E
Door Opener/Empowerer of Team
Finder & Developer of Subject Matter Experts
Trusted Advisor & Educator to Management
Rally Chair/Symbol for Employees
Direct Access Reporter to Board
Educator to Board
Liaise to Regulators

Legal, Compliance, HR and other parts of the Company should be visualized in a (compliance) Venn Diagram

Legal

Compliance

HR
“Must Have” Foundation for any Lawyer Doing, Supporting or Transitioning into Compliance

- Understand what constitutes an effective program beyond a “7 Elements” checklist

- Clarity on the different mandates of Legal, Compliance & other key enabling functions e.g. HR, and how they interact

- Self-assessment: What additional skills, knowledge, and experience do I need to perform the job well?

  => And a plan to get them

Separate and Distinct Functions

- Different but complementary mandates
- Key partners in many different workstreams
- Sometimes the mandates will conflict
  => and that’s a good thing

“The lawyers tell you whether you can do something, and compliance tells you whether you should…We think upper management should hear both arguments.”

  - Office of Inspector General, HHS (Pfizer)

“It doesn’t take a pig farmer from Iowa to smell the stench of this conflict.”

  - Sen. Charles Grassley (Tenet)
MODULE 3: THE MANY ROLES SUPPORTING THE COMPLIANCE PROGRAM

- In-House Counsel/Legal Department are invaluable partners to Compliance
- Yet there is often confusion about overlap & interface (“fence” problem)
- Defining roles is the solution & the empowering factor
- Often the difference between a high-performing program and a hot mess!

Some Common Roles for In-House Counsel

- Compliance Officer
- Lawyer for the Compliance Function
- Subject Matter Expert (SME)
- Risk Owner e.g. FCPA, Antitrust
- Investigator
- Case Manager
- Regional Liaison
Interface tools may be helpful as a starting point to create clarity.

Mandate & Compliance Oversight

Whatever the role, all compliance activities and compliance roles in the organization, including in-house counsel, should be subject to CCO oversight.
THE CONTROVERSIES:  
WHERE SHOULD COMPLIANCE REPORT?  
SHOULD THE GC ALSO BE THE CCO?

- 2010 Amendments to Sentencing Guidelines
  “Reporting to the Board”
  - Must have direct, unfiltered access to the Board and Senior Management
  - Must be the person with “day to day” responsibility
  Can that be a GC with another full-time job?

- Recent Corporate Settlement Agreements or pressure from
  Regulators/Investors have increasingly required separation of
  Compliance from Legal, including in HealthCare and some Big Banks
  - Tenet Healthcare (Grassley quote)
  - Pfizer Agreement
  - Goldman Sachs
  - HSBC
  - Barclays
  - JP Morgan

★ Handouts

THE “DOUBLE-HATTED” GC & CCO

- GC is a full-time job
  “[T]he GC should not be CCO …because rigorous oversight of the compliance processes demands too much time.”
  - Ben Heineman, former General Electric GC

- Different/conflicting mandates

- Smaller companies can make a stronger case for a double-hatted role

- “Our GC is totally awesome” argument

- Clear momentum for independent CCO that works closely & collaboratively with Legal
  - “separate but equal”
PWC State of Compliance Survey*  
– Reporting Trends

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<th>Year</th>
<th>GC</th>
<th>CEO</th>
<th>CFO</th>
<th>Audit</th>
<th>Other</th>
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<td>2013**</td>
<td>29</td>
<td>32</td>
<td>10</td>
<td>4***</td>
<td>10</td>
</tr>
<tr>
<td>2012</td>
<td>35</td>
<td>32</td>
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<td>14</td>
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<tr>
<td>2011</td>
<td>41</td>
<td>32</td>
<td>6</td>
<td>8</td>
<td>13</td>
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* In conjunction with Compliance Week  
** Combined US & UK statistics  
*** 2013 Survey cited Internal Audit, not Board Audit

MODULE 4: PRIVILEGE, WORK PRODUCT, CONFIDENTIALITY & OTHER LEGAL PRINCIPLES

- Through a Compliance Lens
  - Myths and reality
The “Lawyer” Privilege

- Anything a lawyer does is privileged
- If a client is involved the privilege is weakened
- If a lawyer thinks and writes something it’s protected as work product
- Anybody who reports to a lawyer is under the privilege
- But this privilege applies only when the lawyer is riding a unicorn

Attorney-Client Privilege: The Facts

- Non-lawyers can play a role in compliance matters even if conducted under privilege
- Protection requires a client asking for confidential legal advice
- Non-lawyers can act under counsel’s direction & control
- “Upjohn letter”
- BUT: in EU, privilege for in-house counsel not generally recognized (Akzo Nobel). Unlike UK & US.
Work Product Protection: The Facts

- Under FRCP, work product privilege does not require lawyer
- The rule covers preparation relating to litigation by a “party”
- But it is always best to use lawyers for case preparation, even when non-lawyers are involved
- Don’t forget – it also applies for potentially bringing a case against someone else
- Protection is only qualified for fact gathering, but absolute for counsel’s mental impressions

Interesting Theory from 2013 PWC State of Compliance Survey

- Fewer CCOs report to GC in the UK (18%) than in US (37%)
- Report cites “legal privilege” concern in US as possible reason
But isn’t it safer to have lawyers do everything and claim blanket privilege for all compliance activities?

- How do you prove your case that you had an effective program in place if you cloak everything with privilege
- Sharing with the government likely waives attorney-client privilege
- The best protection is to fix what you find
- Claiming privilege for everything undercuts your credibility

Legal Ethical Issues for Compliance Lawyers

- Who is the client?
- Upjohn/Miranda warnings?
- Duty to escalate
- SOX 307 escalation
- Confidentiality & disclosure
SCENARIO A – TBP AT SESSION

MODULE 5: “SCARY TOPICS”

- Topics where Compliance and Legal often interface
- And sometimes disagree
- Examples: Risk Assessment, Discipline & Whistleblowers
Risk Assessments

- The foundation of an effective compliance program
- The only way to determine which risks to cover & how to allocate resources
- Some GC’s FEAR risk assessment & seek to avoid it
- Pat Gnazzo UTC story

Compliance Approach to Risk Assessment

- Compliance risk assessment only as good as the information in the room
- Legal SMEs are key players in the process
- Area of collaboration between Compliance & Legal
- Can leverages existing risk assessment activities with CCO oversight
- Any problems or risks need to be addressed by action or plan of action
Discipline

- One of 7 elements - apply principles of discipline consistently
- Organizational Justice => can’t guarantee results but can guarantee process
- It’s easier to fire the mailroom guy than the high-flyer
- A common area of “mandate conflict”
- Every company has a defining moment (2 war stories)
- Coaching/Soft landing vs. Public Hanging/ Transparency

Compliance Disciplinary Caution

- Discipline for failure to take reasonable steps to prevent or detect criminal conduct
- No “ostrich (head in the sand)” defense
- It's almost never the “Rogue Employee”
- This means the bosses are at risk in an investigation
- The client is the corporation, not the senior managers
- Mechanisms to ensure consistent discipline

★ Handout
Whistleblowers (The Company’s Dilemma)

- Company needs WBs to come forward and raise issues before they reach the media & regulators

- The goal of Organizational Sentencing Guidelines compliance program: “to detect and prevent wrongdoing”

- BUT…… whistleblowers are often 1) fired 2) forced out 3) shunned 4) demoted 5) marginalized 6) harassed 7) did we say shunned?

- Challenge: mindset of management

- Consider: “Take your whistleblower to lunch”

3 Undeniable Truths About Whistleblowers

- WBs are not always “model employees”

- Bounty programs level the playing field

- If you leave misconduct on the table, someone is now more likely to report it (“arbitrage”)

Example: ex-UBS banker Bradley Birkenfeld (the “Tarantula”)

“The Undeniable Truths About Corporate Misconduct and Whistleblowers” (Boehme 2012)
MODULE 6: NOT YOUR FATHER’S INVESTIGATION

- Investigations are where the rubber meets the road ("closing the loop" of the compliance program)

- All other elements can be present, but if investigations don’t uncover the right facts to decision-makers, program is mere window-dressing

- Area of high scrutiny for any program evaluation

- How are investigations carried out in your organization?
7 INVESTIGATION MYTHS

1. Legal should conduct all investigations.

2. Compliance should conduct all investigations.

3. If the matter is privileged, non-lawyers can’t be involved.

4. We can use experienced investigators from other parts of the company without further training.

5. Any lawyer or HR person can conduct effective investigations – it’s an innate job skill for them.

6. Investigation training is about detecting fraud, how to interview, how to detect lying.

7. Best way to control confidentiality is to give warnings in writing to all lead investigators & witnesses.

HALLMARKS OF EFFECTIVE COMPLIANCE INVESTIGATIONS

- Clear written investigation guidelines, including confidentiality, objectivity, impartiality, professionalism, timeliness, competence & non-retaliation
- Investigation training for all who lead or support investigations
- Good triage protocol; need to know list
- Nonretaliation policy includes protections for CCO
- Everyone understands their role, including line management
- CCO has line of sight
SCENARIO C – TBP AT SESSION

MODULE 7: COMPLIANCE AS AN ALTERNATE CAREER PATH

“If you are someone who still gets angry over abuses of power and still has a desire to make things better . . . Compliance and ethics . . . might be just the right path for you”

“Compliance Careers for Lawyers,” Ch. 6, Murphy & Leet, “Building a Career in Compliance & Ethics”
The Role of the Compliance Lawyer

- The CCO does not need to BE a lawyer (although the law can be an excellent background)
- He/she just needs to HAVE a good lawyer
- What are the legal risks of the compliance program?

★ Handout

A Little Test:
In which country have government regulators ever said all of the following:

- Adopting a code of conduct without negotiating with the workers violates national labor laws?
- If you hire someone outside your company to investigate a worker, you have to get the worker’s permission first, and disclose all the results to the worker when the report is done?
- You should not ask about criminal convictions on job applications?
- National labor law prohibits you from telling those interviewed in an investigation not to discuss the investigation with others?
Recommended Reading (1)

- Murphy & Leet, Building a Career in Compliance and Ethics (2007)


- Boehme, “The Real Happy Marriage Between the GC and the Compliance Officer” – (Corporate Counsel 2012)

- NY State Bar Association Opinion 650 – 6/30/93 (3-93)

- Five Essential Features of the Effective Compliance and Ethics Officer Position (now part of Chapter 2 of SCCE Manual with Q&A)

Recommended Reading (2)

- Tabuena, “Fitting a Square Peg into a Round Hole” (2009)

- Snell, “Just how Independent Should the CECO Be (from Legal)?” (Boehme interview 2011)

- Gnazzo, “The Chief Ethics and Compliance Officer – A Test of Endurance”
  Bentley College White Paper (2011)

- Boehme, “Making the CCO an Independent Voice in the C-Suite” (Corporate Counsel 2013)

- Boehme, “There’s No Crying in Compliance” (SCCE 2013)
Comments or Questions?

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