



SOCIETY OF
CORPORATE
COMPLIANCE AND ETHICS

THE INCREASING IMPORTANCE OF PERSONS WITH GLOBAL COMPLIANCE EXPERTISE TO BOARDS OF DIRECTORS OF MULTINATIONAL/INTERNATIONAL COMPANIES

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Agenda

We will discuss the following topics:

- ▶ **1) Why this topic?**
- 2) How can having a person with global compliance expertise on a Board of Directors help companies with a global footprint?
- 3) What should the CCO's reporting line and reporting processes look like in a global company?
- 4) Takeaways

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Why this topic?

THE PROBLEM:

DEMANDS ON BOARDS OF GLOBAL COMPANIES TO EXERCISE PROPER COMPLIANCE OVERSIGHT ARE INCREASING. AT THE SAME TIME, GLOBAL COMPLIANCE IS BECOMING MORE AND MORE COMPLEX. OFTEN, BOARDS ARE NOT EQUIPPED SUFFICIENTLY TO UNDERSTAND THE COMPLEXITIES AND, CONSEQUENTLY, ARE UNABLE TO FULFILL THEIR DUTIES TO EXERCISE PROPER COMPLIANCE OVERSIGHT.

THE SOLUTION:

GLOBAL CO'S OR LEGAL OFFICERS WITH GLOBAL COMPLIANCE EXPERIENCE ARE NEEDED ON BOD'S

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The Board of Director's duties with respect to compliance

DIRECTORS ARE FIDUCIARIES TO THE ENTERPRISE THEY SERVE. THEY HAVE A DUTY OF CARE AND A DUTY OF LOYALTY TO THE COMPANY AND THE SHAREHOLDERS.

FOR COMPANIES DOING BUSINESS IN THE U.S., COMPLIANCE OVERSIGHT, FALLS UNDER THE DUTY OF CARE.

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What does compliance oversight involve?

Oversight has evolved. Oversight today involves having knowledge of the content of the compliance program, all aspects of its operation (including, monitoring, auditing, training, internal reporting, etc.) and ensuring effectiveness of the program. It involves not only knowing the right questions to ask but having probing discussions with Management and the CCO around those questions.

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Demand on Boards for compliance oversight is increasing

- ▶ The New 2019 DOJ Evaluation of Corporate Compliance Program Guidelines for assessing the effectiveness of compliance programs sets out certain expectations for Board involvement in compliance. The Guidelines place great emphasis on the Board being more knowledgeable about compliance.
- ▶ New Guidelines encourage more active participation by Boards in compliance reviews; Boards must not only ask right questions but, have substantive discussions to truly assess effectiveness.
- ▶ Threat of Director liability for failure to discharge the duty of compliance oversight is real and increases the pressure on Boards for meaningful oversight.

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Many Boards for global companies are not properly equipped to carry out their compliance oversight duties

- ▶ Board make-up for global companies typically is not sufficient to ensure compliance oversight obligations are met (especially in highly-regulated industries).
- ▶ Boards assign oversight obligations to already overloaded Audit and Compliance Committees where finance topics monopolize the committee's time.
- ▶ Lack of Board expertise is a common complaint among CCO's and CLO's because it makes risk management very difficult. They feel they cannot gain any traction within the company for a truly effective global compliance program because "tone at the top" is lacking.

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Examples of global breaches in compliance

- ▶ Global compliance breaches are costing companies hundreds of millions of dollars, eroding profits and damaging reputation not just of the singular business involved in the compliance breach but often across divisions because "clean" entities are afraid to do business with "unclean" entities.
- ▶ "The Scarlett Letter" effect: Once branded as a wrongdoer, it is hard to escape your past.
- ▶ Often times, it seems global companies are caught off guard by U.S. exposure because the compliance violation took place entirely between two non-U.S. entities

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Example #1 : LifeWatch AG (2012)

- ▶ LifeWatch AG (now LifeWatch GmbH) was a Swiss public company with a U.S. subsidiary. It developed and provided medical solutions and remote cardiac diagnostics to patients primarily in U.S..
 - ▶ Whistleblowers in the U.S. exposed False Claims Act violations and AKS schemes that led to fines of \$18.5 million (annual revenues of less than \$100 million at the time of settlement), and a 5-year CIA.
 - ▶ The CEO and Chairman of the Board at the time did not take compliance in the U.S. seriously and did not enforce a culture of compliance because he underestimated the government's commitment to enforcement.
 - ▶ All Board members were non-U.S. citizens
 - ▶ No Director had compliance expertise or U.S. compliance training and no corporate compliance program existed in the company.
 - ▶ The DOJ showed little leniency toward the company because of what it considered to be the company's lack of commitment to compliance.

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Example #2 Teva Pharmaceuticals (2016)

- ▶ Teva Pharmaceuticals Industries Ltd., an Israeli company, is the world's largest manufacturer of generic drugs.
- ▶ Teva agreed with the DOJ and SEC to resolve FCPA violations through a deferred prosecution agreement and total payments of \$283 million in criminal fines and \$236 in disgorgement of profits.
- ▶ FCPA violations (including, bribes to doctors and having government officials on the payroll) occurred in Ukraine, Russia and Mexico.
- ▶ Teva's liability in the U.S. stems from the fact that it trades on the New York Stock Exchange.
- ▶ In response to the settlement, Teva expanded and strengthened its Board.

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Example #3: Telia (2017)

- ▶ Telia Company AB, is a Sweden-based telecommunication provider.
- ▶ Telia agreed to a settlement charges related FCPA violations in the amount of of \$965 million \$457 disgorgement of profits and \$508 in criminal fines.
- ▶ Telia paid bribes to a government official in Uzbekistan in order to win business.
- ▶ Telia's FCPA exposure arises from the fact that it registered as an issuer and traded on the NASDAQ.

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Example #4: TechnipFMC (2019)

- ▶ TechnipFMC is a London-headquartered global provider of oil and natural gas technology and services
- ▶ TechnipFMC is listed on the New York Stock Exchange
- ▶ TechnipFMC is the result of a merger between Technip S.A., a Paris-based company and FMC Technologies, Inc. a Houston-based company. Technip paid bribes to Brazilian officials in order to obtain contracts while FMC paid bribes to Iraqi officials in exchange for lucrative contracts.
- ▶ The company paid DOJ \$296 million to resolve the criminal FCPA charges and entered into a 3-year Deferred Prosecution Agreement
- ▶ Both predecessor companies had long histories of bribery and corruption.
- ▶ Public documents do not address the Board's compliance oversight.

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Example #5: Google (2019)

- ▶ Google fined \$57 million by French regulators for violating European Unions's General Data Protection Regulation (GDPR).
- ▶ This is an example of a multinational U.S. company fined by a foreign government for failing to comply with data-privacy laws of the foreign country.
- ▶ Cannot conclude from this fine that the Google Board failed to meets its compliance oversight obligations.
- ▶ Google does not appear to have any Directors with global compliance experience on its Board despite, a) being a global high-Tech data company; and b) data privacy and security being a target of government enforcement agencies.

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- 4) Takeaways

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What is meant by "global compliance expertise"?

Global corporate compliance experience in the substantive industry of the company on which the Board Member will sit.

- ▶ "Global compliance expertise" as that term is used here means, a corporate compliance officer (optimally, a certified professional) or legal counsel with global compliance experience. Someone who has worked with many countries, cultures and knows the substantive compliance rules and risk areas for the company's industry.
- ▶ Unless the industry is the financial industry, the Board member needs experience other than financial auditing and financial compliance experience.

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The case for global compliance expertise on Boards of global companies: Six great reasons

Reason 1

DOJ considers the availability of compliance expertise on a Board an important factor in assessing effectiveness of a compliance program.

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The case for global compliance expertise on Boards of global companies: Six great reasons

Reason 2

Helps facilitate substantive discussion, evaluation and assessment of the effectiveness of the global compliance program in line with DOJ Guidelines and the fiduciary duty of compliance oversight.

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The case for global compliance expertise on Boards of global companies: Six great reasons

Reason 3

Ensures presence of "tone at the top."

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The case for global compliance expertise on Boards of global companies: Six great reasons

Reason 4

Ensures strategic priorities include compliance and compliance considerations.

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The case for global compliance expertise on Boards of global companies: Six great reasons

Reason 5

Serve as a mentor to Executive Management: Supplying missing expertise.

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The case for global compliance expertise on Boards of global companies: Six great reasons

Reason 6

Ensures the Board asks the right compliance questions during M&A with global companies to take advantage of the DOJ leniency program.

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How do we convince Global Boards to appoint a person with global compliance experience as a Director?

Suggestions

- ▶ Find an adversary or two (perhaps the CEO and a member on the Audit and Compliance Committee or Executive Committee) and sell them on the need using the arguments set out in the earlier discussion.
- ▶ Present the Board with their two options during your annual report:
 - ▶ Option 1: Wait until something happens; the wait and see approach (high risk)
 - ▶ Option 2: The proactive, smart approach (compliance costs far less than non-compliance)



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The CCO in a global company is often in a sandwich position

- ▶ The CCO is typically sandwiched between Management and the Board.
- ▶ The DOJ requires the CCO to have direct and autonomous access to the Board (governing authority) in order to ensure the Board receives timely, complete and accurate information.
- ▶ Yet, practically, Boards do not want to address day-to-day operational issues. This can become even more complex in a global company where each country has its own CO and maybe no CCO.



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Reporting lines and reporting processes for CCO's in a global company

- ▶ The CCO should have a direct reporting line to the CEO for purposes of day-to-day business.
- ▶ The CCO should have dotted line reporting to the Board or committee responsible for compliance oversight.
- ▶ The CCO should have regular informal discussions with the Chair of the Audit and Compliance Committee (or Chair of the Compliance Committee, if it is separate)
- ▶ The CCO should present quarterly reports to the Committee, in person plus an executive session.
- ▶ The CCO should present annually to the entire Board.

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Takeaways


- ▶ Boards of global companies face increasingly complex global compliance landscapes and increased obligations to exercise oversight of the corporation's compliance activities.
- ▶ Having a Director on the Board of a global company with global compliance expertise and familiarity with the industry should be a best practice in line with DOJ recommendations.
- ▶ The recommended reporting line and reporting processes for global CCO's is similar to that of non-global companies.

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Any Questions or Comments?




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Thank you for coming.

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Additional Reference Material

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The Simple Facts:

- ▶ Board make-up for global companies typically is not sufficient to ensure compliance oversight obligations are met (especially in highly-regulated industries).
- ▶ Boards without compliance expertise typically view compliance as a nuisance topic or afterthought and allocate very little time to compliance oversight obligations
- ▶ Boards without compliance expertise may not fully understand their obligations and therefore, do a poor job of oversight.
- ▶ Boards use Audit and Compliance Committees to discharge oversight responsibilities but finance and audit functions typically monopolize their time.
- ▶ Frustrations are high for the Board, Compliance Officers and Legal Officers in regard to the compliance oversight obligations.
- ▶ A need and an opportunity exists for both global Compliance Officers and Legal Counsel with global compliance expertise on Boards of Directors of both U.S. companies with a global footprint and Non-U.S. companies doing business in the U.S.

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▶ **Typical Board Make-up:**

- ▶ Board make-up for global companies typically is not sufficient to ensure compliance oversight obligations are met (especially in highly-regulated industries).

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Board Make-up of Corporate Boards for companies headquartered outside the U.S.:

Generally, Directors of non-U.S. company's come from countries other than the U.S.. They typically have not done extensive business in the U.S.. Consequently, they do not understand and/or underestimate the legal and compliance exposure they face when doing business in the U.S. and the need for strict adherence to laws and regulations.

Boards made up of primarily or entirely non-U.S. directors do not understand that:

- a) The U.S. is a highly litigious country (class actions, shareholder activists, private whistleblowers);
- b) Has very active government enforcement agencies;
- c) Allows piercing of the corporate veil to reach the foreign parent;
- d) Global reach of the Foreign Corrupt Practices Act (FCPA);
- e) Personal and criminal liability exists for Corporate Officers and Directors in the U.S. for compliance violations

**** IN SHORT, THEY UNDERESTIMATE THE RISK TO THE PARENT COMPANY OF COMPLIANCE VIOLATIONS AND DO NOT MAKE COMPLIANCE A GLOBAL PRIORITY****

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Board make-up of corporate boards for global companies headquartered in the U.S.:

Directors of U.S.- headquartered companies generally are U.S. citizens who do not understand the laws and regulations in other countries or have not had sufficient business experience in other countries. That limited knowledge could get the company in trouble when they expand their global footprint.

Global U.S.-based companies often have U.S. Directors with little or no experience doing business around the globe and do not understand:

- a) International compliance risks associated with expansion into global markets, particularly emerging markets where understanding business practice risks and culture is critical;
- b) Complex privacy and security laws that may hinder profitability or can result in enforcement actions for breaches;
- c) Cultural differences

This knowledge is critical when evaluating and weighing potential strategic opportunities against the risks they may present.

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- ▶ Lack of Board expertise is a common complaint voiced by CCO's of global companies based both in the U.S. and outside the U.S., Global Chief Legal Officers and General Counsel for U.S. Operations.
 - ▶ This trend is not industry specific; it reaches MedTech, pharmaceuticals, telecommunications and gas and oil industries
 - ▶ The frustration is high among Legal and Compliance Officers because it makes risk management very difficult and they feel they cannot gain any traction within the company for a truly effective global compliance program because "tone at the top" is lacking (i.e. appropriate level of support from the Board is absent).
 - ▶ This lack of understanding by Boards leads to beliefs that Compliance and Legal are going overboard, are being too conservative and are hindering growth. Consequently, their concerns do not receive the consideration by the Board which they deserve and may lead to problems later.

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The case for global compliance expertise on Boards: Five key ways compliance expertise helps Boards meet their duty of care

1) Global Compliance expertise on a Board helps facilitate substantive discussion, evaluation and assessment of the effectiveness of the global compliance program in line with DOJ Guidelines

- ▶ The New 2019 DOJ Evaluation of Corporate Compliance Program Guidelines for assessing the effectiveness of Compliance programs places great emphasis on the Board being more knowledgeable about compliance and exercising reasonable oversight of the company's compliance and ethics program.
- ▶ New Guidelines encourage more active participation by Boards in compliance reviews; Boards must not only ask the right questions but, they are expected to have substantive discussions to truly assess effectiveness (i.e. is what they are doing working in practice).
- ▶ New Guidelines now include, as a factor in assessing effectiveness, the availability of compliance expertise actually on the Board versus mere access to a consultant with compliance expertise.
- ▶ Boards without compliance expertise typically allocate little time to compliance oversight obligations.
- ▶ Boards without compliance expertise typically do not know the right questions to ask to ensure the global compliance program is effective.
- ▶ Having compliance expertise on the Board will ensure the right probing questions are being asked and discussed.

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The case for global compliance expertise on Boards: Five key ways compliance expertise helps Boards meet their duty of care (cont.)

2) Ensures presence of "Tone at the Top"

- ▶ Having a person with global compliance expertise on the Board of the parent company signals the Board's commitment to enterprise-wide compliance by setting the "Tone at the Top".
- ▶ Sends the message to all global subsidiaries or divisions that compliance is of utmost importance to the Parent Company and non-compliance will not be tolerated.
- ▶ Boards must ensure GM's or top executives globally buy in to compliance or leave the company. This is part of a Board's global oversight over the compliance program. The Director with compliance expertise can take the lead in this regard.
- ▶ Having compliance expertise on the Board will ensure compliance oversight receives appropriate consideration and obligations are dealt with in a professional manner.

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The case for global compliance expertise on Boards: Five key ways compliance expertise helps Boards meet their duty of care (cont.)

3) Ensures overall strategic priorities include compliance and compliance considerations

- ▶ The Director with global compliance experience will serve as an ally on the Board for the CCO and CLO as they team up to propose updates to the compliance program, seek additional funding for tools, training or personnel or present solutions to compliance issues that have arisen. Hearing from "one of their own" respected Board members in addition to Management can be powerful and persuasive in ensuring compliance is always a strategic priority.
- ▶ The Director essentially becomes part of the enterprise-wide risk management strategy for the CCO and the CLO and helps ensure compliance needs are addressed by the Board and oversight is thorough.
- ▶ The Director with global compliance experience also ensures that compliance issues are considered and addressed as part any discussion of new business strategies (i.e. expansion into emerging markets; data privacy and security across borders if data is at issue). Others on the Board may not have the insight or know what questions to ask.
- ▶ A respected Director bringing up compliance as "one of their own" can remind the Board of their fiduciary duty of care to preserve shareholder value and protect reputation through meaningful compliance oversight.
- ▶ An independent Director with compliance expertise can serve as a check and balance or counter to Board's often expressed views that Compliance or Legal are overdoing it.

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The case for global compliance expertise on Boards: Five key ways compliance expertise helps Boards meet their duty of care (cont.)

4) Mentor to Executive Management: Supplying missing expertise

- ▶ While Directors typically should "stay in their lanes" and not get involved in the day-to-day operations, a Director with global compliance expertise, *with prior approval of the CEO and Chairman*, may participate in Compliance Committee meetings and risk assessments. This is especially recommended if global expansion is being explored and the CCO is not as versed in global compliance, the CCO is new to the Company, or the Company has CO's by country and not a single global CCO. In these situations, the Director can supply valuable insight and support to ensure a cohesive and thorough evaluation.
- ▶ Global compliance programs are complicated. Country-specific adaptations will be necessary. There can be no "one size fits all" program; just a common framework that focuses on concepts that guide behaviors because of differences in laws, culture and how businesses operate in any particular country. Board needs a checklist of concepts and should ask for translations of each country's compliance program as part of its duty of care and oversight responsibilities to ensure all key concepts are included. This can be handled by the Director with compliance experience.
- ▶ It is also important in this context to understand the exceptions to the FCPA put in place in recognition of cultural and operational differences to enable companies to be successful. A Director with global compliance experience can supply supplemental or missing expertise or be a sparring partner for the CCO and CLO on these issues.

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The case for global compliance expertise on Boards: Five key ways compliance expertise helps Boards meet their duty of care (cont.)

5) Contribute to the Mergers and Acquisition process by helping Board ask the right compliance questions both pre- and post-acquisition.

- ▶ Approximately one year ago, the DOJ issued supplemental guidance stating that the FCPA Corporate Enforcement Policy would apply to all potential criminal wrongdoing discovered by an acquirer in the course of a merger or acquisition, not just to FCPA violations.
- ▶ Policy states that successor companies that self-report criminal wrongdoing, including FCPA violations, discovered during pre-acquisition due diligence or post-acquisition integration, take appropriate remedial measures and implement an effective compliance program, would decrease the likelihood of any enforcement action being brought by the DOJ.
- ▶ DOJ insists that an acquirer is in the best position to "right the ship by applying strong compliance practices to [an] acquired company."
- ▶ Global compliance expertise on the board can help ensure the board is asking the right questions during the due diligence process and also post-acquisition during the integration process. In particular, during the M&A process involving acquisition of a foreign or multinational company, the Director can, along with legal counsel, help facilitate discussion and guide the board through the decision-making process in regard to walking away from a deal if any criminal conduct such as FCPA violations comes to light during pre-acquisition or self-reporting of such conduct if it is discovered post-acquisition.
- ▶ The Director can also liaise with the CCO and CLO on behalf of the Board to understand the situation and report back.

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How do we convince Global Boards to appoint a person with global compliance experience as a Director?

- ▶ Step 1: Understand the Board member cycle and selection process
 - ▶ As a CCO or CLO/GC, you have (or should have) opportunities to interact with the Board members. Take advantage of those opportunities to understand the selection process.
 - ▶ Example: How many Board members are being added? Does the Board identify areas of need and search for candidates with that expertise? Does the Board simply search for qualified board members without focus on expertise? Does the Board use headhunters to find candidates?
- ▶ Step 2: Develop a Strategy
 - ▶ Armed with the information from Step 1, find an adversary or two (perhaps the CEO and a Board member on the Audit and Compliance Committee) and sell them on the need using the arguments set out in the earlier discussion.
 - ▶ Practical tip: Tailor your pitch to the match how candidates are selected.
- ▶ Step 3: As the CCO and/or CLO, *subtly* plant the idea during each opportunity you have to present to the Board on compliance issues and show how it could help them meet their obligations in a complex global enterprise.
 - ▶ Practical tip: Be careful not to overdue or lecture. Board members and executives tend to tune out if you do this and you will lose valuable support.

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Reporting lines and reporting processes for CCO's in a global company

- ▶ Reporting lines for a CCO in a global company are not all that different.
 - ▶ Where complexities arise is when each country has its own CO. In those circumstances, ideally, the country-specific CO's should report in to the CCO (with dotted line to the GM of the country for day-to day matters) who would then have umbrella responsibility for the Global Compliance Department.
- ▶ The CCO should have a direct reporting line to the CEO for purposes of day-to-day business.
 - ▶ This ensures the proper messaging and respect for compliance without overburdening the Board or committee responsible for compliance oversight
 - ▶ The CEO is also better positioned to provide the CCO with meaningful input on day-to-day compliance matters
- ▶ The CCO should have dotted line reporting to the Board.
 - ▶ This enables the CCO to report directly to the Board, bypassing the CEO and Senior Management. This should be used only in circumstances of extreme conflict of interest where the CEO or Management is implicated in the misconduct. This dotted line allows compliance with the DOJ directive of autonomy.

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Reporting lines for CCO in a global company (cont.)

- ▶ The CCO should have regular informal discussions with the Chair of the Audit and Compliance Committee (or, if the company is sophisticated enough to have Director with compliance expertise enough, that Director would participate as well).
 - ▶ This enables the CCO to keep the Chair abreast of any developments.
 - ▶ This enables the CCO to address any day-to-day issues not acted upon by the CEO such as requests which require unbudgeted expenses like additional staffing, supplemental training or consultants.
 - ▶ This is where the CCO would, ideally, begin the discussion of bringing on a board member with compliance expertise.

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Reporting lines and reporting processes for CCO's in a global company (cont.)

- ▶ Quarterly, the CCO should give a live report to the entire committee responsible for compliance oversight detailing compliance performance and challenges. The board should also be prepared to have substantive discussions about the program to ensure its effectiveness. Ideally this would also involve a closed-door executive session if requested by the committee or with just the committee members and the CCO thus allowing the CCO an opportunity to raise any issues of concern or hear concerns from the committee members.
 - ▶ This executive session also highlights the CCO's:
 - ▶ Direct access to the Board;
 - ▶ Autonomy from Management; and
 - ▶ Demonstrates the CCO's status and power within the organization.
 - ▶ Finally, at least annually, the CCO should meet with the entire board to ensure their familiarity with the program and have fulsome discussions about the program, changes or updates needed and the enforcement trends. This should not be squeezed in during the last 10 minutes of the meeting while everyone is packing up to go home. Global compliance is complex.

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