

Conflicts & Controversies in the Compliance World.

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Three Questions:

- Will GDPR & privacy be traps for diligent compliance?
- Is the #metoo response of mandating more training & policies the best answer?
- Is ISO 37001's approach of certifiable compliance management standards helpful or harmful?

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GDPR & Strong Privacy Protection

- Fines up to 20M Euros or 4% global turnover
- Mass civil actions
- Ambiguous language
- Laws globally mimicking GDPR
- California's law

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History of EU privacy & C&E

- CNIL and helplines
- Are helplines "disproportionate" ?
- No anonymous calls?

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Privacy in the US: more history

- FCRA & outside investigators: FTC opinion
- Asking permission to investigate?
- Giving complete file?
- HR professionals to the rescue in Congress

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Legitimate Privacy Interests & C&E

- Protect legitimate interests
- Secure private information
- Restrict access
- Appropriate notification

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Risks to C&E from Unrestricted Privacy Laws

- Helplines/Speak up
- Due diligence
- Criminal background
- Official in political party
- Investigations
- Audits

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What C&E needs

- Policies that promote & protect C&E programs
- Joseph E. Murphy, **Policies in conflict: Undermining corporate self-policing**, 69 Rutgers U.L. Rev. 421 (2017)
- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827324

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#metoo

- Multiple scandals:
 - In all types of organizations
 - Even federal courts

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One response: State/City Mandates

- California - train 2 hours, every 2 years
- States, e.g., Maine & Connecticut
- NYC & NY State Policies & training
- What enforcement record on these mandates?

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What the US Supreme Court said:

- Defense in some harassment cases
 - Reasonable preventive efforts
 - Victim fails to use
- Defense to punitive damages
- Preventive steps taken by the company
- Have to be “reasonable”

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What Do Companies Usually Do?

- Have a Policy
- Offer Training
- Tell people to call HR
- Investigate

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Other important compliance areas are not so limited

- What credit would your FCPA program get with only:
 - A policy
 - Some training
 - Telling people to call HR
 - Then investigating

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What causes harassment?

- Lack of knowledge about a policy? Not knowing it was wrong?
- Or is it all about POWER --taking advantage because you can.

Example: Steve Wynn

Q. "Did you take the harassment training?"

A. "No, I didn't need it"

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What is Lacking?

- A full management approach
- The USSGs 7 steps
- The same things you would do for any other C&E risk

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Why not a full C&E approach?

- Senior management commitment
- A powerful CECS
- Risk Assessment
- Evaluation – do the steps/training work?
- Communication (not just classroom training)
- Incentives/Promotions

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So what could go wrong for C&E?

- When the paper & preaching doesn't work, commentators & law professors will tell us:
 - C&E does not work!
 - Don't give C&E any credit
- Agencies & Governments may listen

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ISO 37001

- Getting your program certified?
- What could possibly go wrong with that?
- At least you would know you were "done"!

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Where is ISO 37001 from?

- The UK standard
- 19600 – compliance management systems
- AS 3806 – Australia
- ISO standards in safety, quality, environmental management
- Do we need more guidance? OECD, DOJ/SEC guide, UK Adequate Procedures, etc.

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Read ISO 37001: Could there be some concerns?

- Readability
- Certify to broad generalities?
- Is it readily comprehensible?
- Some odd provisions

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Who Would Do the Certification?

- *You* pick the certifier
- Who will you pick?
- How much will certifiers do & check?
- Who can certify?

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What is the Impact of Certification?

- You can pull people together to get an actual result
- What happens after you pass?
- How much due diligence when a contractor is certified?
- Where is government on this?

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ISO 37001 is worth knowing about

- Governments, 3rd parties could require it
- It could happen in other compliance areas
- See The ISO 37001 anti-corruption compliance program standard: *What's good, what's bad, and why it matters (2019)* by Joseph Murphy
- <http://tinyurl.com/y6yf8myc>

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In Conclusion- Bottom Line

- C&E professionals know what we are doing – let us do it!
- Will the future of C&E be set by others who don't know C&E?
- SCCE represents the global voice of compliance & ethics
- We need to speak up! We need YOUR voice to be heard

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