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BUILDING A GLOBAL COMPLIANCE & ETHICS PROGRAMME: LEADERSHIP

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EXPERT FORUM

BUILDING A GLOBAL COMPLIANCE & ETHICS PROGRAMME: LEADERSHIP



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Debnath: What are the key ingredients for an effective compliance function?

Anthony: Today, an effective compliance function is an essential part of an organisation's ability to build trust with its customers, suppliers, employees and other stakeholders. For a compliance function to be effective, there are several key ingredients it must contain. It must have a designated chief compliance officer (CCO) who has a direct reporting line to the board. The CCO should have a clear mandate to identify, rectify and prevent compliance failures. The compliance function must enjoy sufficient independence from the business to perform its role objectively, including a direct line of communication from staff to the CCO. It must also have the ability to accurately assess the organisation's risk and design, and implement appropriate controls based on those risks. There must also be written policies and procedures in place that clearly set out what is and what is not acceptable, together with the relevant sanctions. Adequate training must also be provided in order to ensure that key policies and messages are well understood by all staff. Finally, the compliance function must be adequately resourced and made up of a skilled team which is able to perform its role, including training, auditing and monitoring, effectively.

Eastwood: There are many factors that underpin an effective compliance function. First and foremost,

the board and the company's senior management team must understand, respect and support the compliance function. This is a critical foundation block. Compliance personnel must also have relevant experience and qualifications, the staffing and budget, ideally a standalone budget, to carry out their responsibilities effectively. Internal relationships are a crucial ingredient of success. The compliance team should work closely with other functions, such as legal, risk, finance, human resources, procurement, sales, internal control and internal audit, all of whom should recognise and carry out their own responsibilities for delivering effective compliance. The compliance function should also have a direct reporting line to one or more board members and to the audit committee. Compliance reporting to the board and audit committee should be documented. Finally, the compliance function should form relationships of partnership and trust with external counsel who should provide complementary technical expertise, experience, independence and challenge.

Debnath: Can the compliance function be truly independent from the business? Should it be?

Eastwood: The compliance function's position within an organisation, and related reporting lines, will vary depending on the size and nature of the organisation. Increasingly, and in larger organisations in particular, compliance will be a standalone

function with clear autonomy and independence. Often, however, compliance will be positioned within another function, commonly the legal department, but it could also be within the human resources or risk functions, for instance. To the extent possible, people with responsibility for compliance should be organised independently from the operational part of the organisation. Organisational structure aside, it is very important that, wherever compliance is positioned, its responsibilities, functions, reporting lines and authority of compliance are clearly documented and understood within the business, to preserve its independence. Compliance, like other second lines of defence, should act independently of the business it monitors and controls. It verifies and monitors that the business operates in accordance with external and internal rules and regulations. The compliance function's remuneration model should not contain significant performance-based elements which might compromise the independence of compliance staff.

Durant: For a compliance function to be effective and add value to an organisation, it must have a close working relationship with the business. It must understand how the business operates, the risks it faces and be able to anticipate its needs. This close relationship is integral to the delivery of good service.

However, it can also become an obstacle to the achievement of objectivity, which is essential for the compliance function when dealing with significant and sensitive issues, particularly where there is pressure from shareholders and other stakeholders who are focused on continuing growth. Managing

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FTI Consulting*


this contradiction is one of the major challenges facing the compliance function today. The compliance function should be independent from the business in order for it to have the credibility required to build trust with its customers, suppliers, employees and other stakeholders, including regulators. Furthermore, when required, the immediate desires of the business and financial stakeholders will have to be overridden in the interest of compliance.

Debnath: What can compliance do to be taken seriously by senior management and the board?

Anthony: For compliance to be taken seriously by senior management and the board it is important for it to be able to explain the benefits it can bring to the business, rather than focusing on the ultimate risk of fines, penalties and sanctions resulting from a regulatory breach. The compliance function should use its seat at the top table to explain that having a clear and effective compliance programme is not only the right thing to do, but that it also makes good business sense. The benefits of a comprehensive compliance function include establishing customer trust and brand loyalty by building a reputation as a business that does the right thing. No-one wants to do business with an organisation that has a known reputation for non-compliance with regulations. It should also help to attract and retain high-quality individuals – good staff do not want to work for a business under investigation by a regulator and may vote with their feet. It should also encourage the business to apply best practices in areas where it tends not to invest, such as IT processes, recordkeeping and data protection. A compliance function should help the company to focus on supply chain management, for example the reduction of suppliers, as managing third-party risk for a large number of suppliers that are rarely

used is a major and costly challenge. Initiating an effective information governance programme can help the business to identify, consolidate and analyse its records, which, in turn, will quickly and clearly demonstrate compliance to a regulator, auditor, the public and other stakeholders. This data can also be used for mining existing and new customers, as well as identifying cost savings. Finally, compliance can boost the bottom line by simply avoiding large-scale fines and penalties issued by regulators. A business that spends less time dealing with a regulatory investigation has more time to concentrate on its business strategy and gaining market share from its competitors.

Eastwood: Compliance has to demonstrate that it understands the business, to work within existing structures and processes to the extent possible, and to 'make the case', which is not always easy without a ready crisis and when the company's finances are stretched. Emerging legislation, with a particular focus on expanding corporate criminal liability and increased enforcement activity, particularly outside the US, are important factors. The approach toward the compliance of investors and financial institutions, and increased external scrutiny for the press and non-governmental organisations (NGOs), are equally important considerations which compliance should highlight with senior management and the board. How will the CEO handle a well-informed intervention at the company's annual general meeting (AGM)? Is



senior management comfortable with the increased array of compliance-related representations and warranties demanded by financial institutions?

Debnath: How does compliance justify pursuing worthy and important compliance initiatives and projects, when cutting costs seems the order of the day?

Eastwood: The cost of getting compliance wrong can, of course, be prohibitive, both in terms of fines, lost business, debarment, litigation and related remediation costs. The impact on individuals can also be significant, including fines, prison sentences and termination of employment. Benchmarking can be a persuasive tool, and regular independent external assurance, as 'expected' by regulators and investors, can help senior management and boards to grasp the importance of effective risk identification and prevention.

Furthermore, a robust compliance programme can enhance the value of a company's brand, particularly in light of

the increased focus on responsible business conduct from investors, suppliers and customers alike.

Durant: As with all businesses, the key focus is on the bottom line and compliance is often seen as a mandatory cost to the business, using up valuable time, effort and resources with very little benefit. For compliance teams to justify pursuing worthy and important compliance initiatives and projects, they need to clearly explain the risks and benefits associated with their work. Most businesses understand the risks associated with non-compliance, namely fines, penalties and sanctions, but many companies do not fully understand the benefits that the compliance function can bring to the business, including boosting the bottom line by simply avoiding the hefty

fines and penalties issued by regulators. A business that spends less time dealing with regulatory investigations has more time to focus on its core business and growth targets.

Debnath: **How can senior managers demonstrate a genuine and unflinching commitment to doing the right thing – walking the walk, as well as talking the talk?**

Anthony: For any compliance programme to be effective and have value to the business it must be fully supported by senior management with

a genuine commitment to doing the right thing. To demonstrate this, a company should have a defined organisational structure, with clearly documented roles and responsibilities for the board, chief executive and CCO. The company must also appoint the right people for the right job. For example, the CCO should be a person beyond reproach and someone who has the respect of all employees. The CEO and board must issue clear and regular internal and external statements about the importance of compliance to keep it top of mind. The company should also highlight good and bad examples of compliance. For example, do not hide the things that went wrong and use them as 'lessons learnt', setting out how it has responded to setbacks. Companies should also ensure that the key compliance and ethics messages cascade down throughout the global organisation on a regular basis. The rules should be applied consistently and companies should ensure that they do not make exceptions for any employee, irrespective of their seniority or geographic location. Finally, senior management should actively participate and wherever possible lead in all compliance training and events.

Eastwood: Senior managers should reflect on the compliance-related information they request and review as a matter of course. To what extent is there documented evidence of consideration of compliance-related matters? Can senior management point to concrete actions undertaken to demonstrate

leadership in the company's compliance and related remediation efforts? Are senior management picking up on compliance shortcomings? How have senior management overseen and responded to apparent misconduct and related investigations? Are senior management prepared to turn away business opportunities, dismiss successful employees, entertain voluntary reporting to the authorities and meet the consequences? What do staff say about senior management? The answers to these questions can be very revealing.

Debnath: Should compensation be tied to compliance goals and objectives?

Eastwood: It is important that a business considers the implications of its incentives and rewards – including third-party remuneration structures – on compliance. In addition, compliance should be able to point to specific instances of actions taken, such as promotions or awards being denied, as a result of compliance and ethics considerations. There should be compliance goals and objectives and the annual employee appraisal is a good opportunity to reinforce the importance of compliance. Whether compensation should be tied to compliance goals and objectives is more moot, however. Employees should not need to be incentivised to act in accordance with external and internal rules and regulations. On the other hand, a failure to so act should impact on compensation, long-term prospects and, depending

on the circumstances, should lead to termination of employment.

Durant: Current legislation in several countries means that compensation should align with performance. But in the eyes of investors, performance is determined by sales and profits which may lead to unethical behaviour. However, companies are explicitly stating in their remuneration policies and code of conducts that compensation is linked to ethical behaviour. This leads to a dilemma for management who may be torn between profits at all costs and compliance. Linking compensation to compliance goals and objectives helps to focus management's attention, emphasises the importance of compliance, rewards people for doing the right thing and motivates staff. However, there are risks that need to be considered when linking compensation to compliance goals, such as promoting obsessive focusing on one target. Any improperly structured programme may promote bad behaviour and could encourage the manipulation of performance indicators to generate the desired financial result.

Debnath: What local labour law and any other pitfalls need to be considered by

the compliance function when a company operates in numerous countries?

Anthony: In today's fast-paced environment, it is imperative that compliance functions keep up to date with changing regulations in the countries in which they operate, none more so than local labour

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*Wayne Anthony,
FTI Consulting*

laws. The compliance function must accept that one size does not fit all, however. They must develop a clear understanding of local laws and requirements to ensure that the business' policies and procedures do not conflict with local statutory regulations, thus avoiding violations of employment law, such as termination without cause or proper notice, illegal non-compete clauses prohibiting related work or non-payment of statutory severance, which may be higher than under the businesses policies. Other

labour-related issues include when a business seconded employee overseas, which can have added complications as the employee may have rights in both the home and host country. There is also a risk where an employee is seconded to a country where compliance may not have been fully embedded, which can result in the employee potentially bringing non-compliant activities back to their home country. Other pitfalls compliance functions need to be aware of when operating in global organisations are cultural differences between countries, for example whistleblowing can be culturally difficult in certain countries, such as France, Turkey and parts of the Middle East. Also, at the beginning of 2019, Germany, France and Britain established a mechanism to avoid US sanctions and conduct non-US dollar trade with Iran. The initial focus is on humanitarian goods to help the Iranian people, but the intention is to allow European companies to trade in a wider range of goods, even those subject to US sanctions. However, there is a major concern whether the US Treasury will view the mechanism as a target for sanctions, warning any European entity trading with Iran with US connections or using dollars that it can be subject to punitive fines. This legislative difference will be a major challenge for companies operating in Europe and the US.

Eastwood: The boundaries between a human resources and a compliance issue might not always be clear. Human resources should be working

“Human resources should be working hand in glove with the compliance function; it is an important ally.”

*Sam Eastwood,
Mayer Brown*

hand in glove with the compliance function; it is an important ally. It is also important that compliance is mindful of important limitations and stipulations of different countries' labour laws, which might restrict the ability to have an anonymous reporting line, for example, or require employee consultation prior to the introduction of new or revised internal rules and regulations. Local labour laws should inform, and can complicate, local compliance processes and associated investigations.

Debnath: What advice would you offer on carrying out timely, impartial and fair investigations and then following-up with remedial actions?

Eastwood: In-house investigation capabilities are becoming more sophisticated. An effective compliance programme will raise issues that need to be investigated; it is not a good sign when companies assert that they have not had any internal investigations or whistleblower reports. Companies should rely on experienced in-house personnel, if possible, to carry out internal investigations, although there are times when external resources are critical, either to partner with the in-house team or to provide robust, well resourced independent expertise. Responding to whistleblowers requires particular skill, and training for all who are likely to be involved is imperative. Companies should certainly have procedures for triaging, handling and reporting on investigations, an investigation protocol, standards for assessing the quality and speed of investigations and a documented process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations.

Durant: When undertaking any internal investigation, especially those involving employees, it is crucial that the investigation starts as soon as the allegation or information concerning the potential breach emerges. Delays in commencing an investigation risk the loss of crucial electronic and hardcopy information. Also, memories can fade and stories can change over time. Furthermore, if it leads to a subsequent regulatory enquiry, it will be imperative for the business to demonstrate that it

took appropriate, timely and proportionate actions in response to the allegations. The investigation must be, and must be seen to be, impartial and fair from the very beginning to avoid any potential accusations at a later stage. This will reduce the chances of any subsequent litigation from the employees accused of wrongdoing. It will also give any regulator peace of mind that matters are not being simply swept under the carpet by a 'compliant' internal team. If there are any concerns that the business cannot conduct, or be seen to conduct, an impartial investigation, it should consider instructing a third-party to undertake the investigation. It is also important to establish an open dialogue with all concerned parties, including those accused of the wrongdoing and any regulator, to ensure that there cannot be any retrospective criticism. There may also need to be some dialogue with other stakeholders, such as unions, customers and suppliers, to ensure that the company retains their confidence. Finally, when conducting investigations, it is important for businesses to learn from a breach and quickly put measures in place to stop it from happening again. A robust remediation programme resulting from an investigation is important to demonstrate to any regulator, employees, shareholders, customers and other stakeholders that the business is serious about compliance and has taken all the necessary steps to prevent a reoccurrence. **RC**