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COMPLIANCE BUDGET

Effective Compliance in the Spotlight: Roles, Reality and Real Life Suggestions

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As enforcement globalizes, stakeholder corporate responsibility expectations broaden and the compliance industry matures, the substance and outcomes of compliance programs are squarely in the spotlight – with programs being judged not just on their paper and process, but on their results. Emphasis on the effectiveness of compliance programs in achieving their mandate has come under renewed attention in the last year, with the release of new Department of Justice (DOJ) guidance from Assistant Attorney General Brian Benczkowski on Selection of Monitors in Criminal Division Matters in October 2018 and updated guidance on the Evaluation of Corporate Compliance Programs in April 2019 (ECCP). These releases also coincide with other external factors pushing effective compliance to the forefront, including:

- an increase in local anti-bribery and corruption legislative regimes and enforcement outside of the U.S.;
- an ongoing pattern of international cooperation between regulators; and
- the continued expansion of stakeholder expectations at the investor, community, consumer and NGO levels illuminating new areas and depths of corporate responsibility expectations.

While implementing and maintaining an effective compliance program may seem complex and overwhelming, the key to success is simplicity. With stakeholders providing a clear case for the "why" of compliance, and enforcement providing the guidance for the "what," it is left to corporations and counsel to provide the "how" to implement compliance. This article provides a set of simple strategies, drawn from years of in-house compliance experience, that can help compliance professionals develop the "how" of effective compliance within their companies' business model, via:

- understanding the three key roles held by ethics and compliance personnel and how they work together to protect and grow the company and the program;
- embracing the reality that there is no perfect program, and using it to create a continuous state of improvement; and
- utilizing a set of practical real-life suggestions to help maximize program value and impact.

See "Analyzing the DOJ's New Evaluation of Corporate Compliance Programs" (May 15, 2019)

Three Key Roles for Compliance

Ethics and compliance professionals, as well as their legal advisors, (collectively Compliance) are required to fulfil three key roles interchangeably:

1. guide;
2. problem-solver; and
3. gatekeeper.

As guides, Compliance informs company strategy, illuminates potential risks to be factored into business decisions and helps the company incorporate corruption-related mitigation tools and costs into its business plan and approaches.

Once a potential opportunity or compliance touchpoint has been identified, the skills of a problem-solver become key to identifying alternative and compliant paths to a goal – enabling responsible business growth.

The last and more traditional role of gatekeeper is there to protect the company when a path or goal is non-compliant, outside of reasonable risk tolerance or is not capable of realistic mitigation.

Ideally, the majority of Compliance's time is devoted to guiding and problem solving. Functioning in these first two roles helps Compliance have both the visibility and the credibility to effectively serve as a gatekeeper when needed.

The stronger the Compliance pull from the business and the earlier Compliance has a seat at the table, the more likely Compliance will be able to function as a guide or problem-solver. The guide-and-problem-solver model is where Compliance not only mitigates risk and protects value, but also creates value in the decision-making process – moving Compliance from a cost-center to a value-center. The company may also begin to view opportunities in a way that creates less demand for the gatekeeper and more demand for the guide. Understanding and identifying when and how Compliance is operating in these roles and engaging with the business to show the correlation of value and timing for Compliance engagement can increase the practical effectiveness of a company's program.

See "Five Tools Every Chief Compliance Officer Needs for Effective FCPA Compliance: Title, Authority, Access, Budget and Culture (Part One of Two)" (Apr. 3, 2013); Part Two (Apr. 17, 2013).

Embracing Reality: There Is No Perfect Program

It is vital to acknowledge that no company will ever be "finished" with compliance, nor is there a "perfect" program. A good program is tailored to:

- how a company goes to business;
- the external environment; and
- internal culture and leadership.

These three things are constantly changing, and thus a program should be continuously evolving. Embracing a state of continuous improvement and a mindset of conscious unease is critical. As the ECCP makes clear, the mere fact that compliance challenges arise is not, by itself, proof of an ineffective or poorly designed compliance program. Rather, the quality of a company's detection and response to these challenges, as well as the strength of the company's remediation and feedback-loop, are also important indicia of effectiveness.

If the internal message is that the Compliance program is now complete or "perfect" it may have the unintended consequences of:

out-sourcing ethics - making the business feel less responsible for their own ethical decisions (*e.g.*, "If Compliance doesn't stop me, it must be okay");

- creating reluctance among Compliance, business team members, and even internal audit, to speak-up to identify weaknesses (*i.e.*, creating an alignment of incentives to sweep things under the rug); and
- missing the next emerging risk touchpoint or corruption vehicle (*i.e.*, need to stay one-step ahead of the "bad guys").

Indeed, the ECCP directs DOJ prosecutors to consider whether a compliance program has "evolved over time to address existing and changing compliance risks," in light of a company's actual experiences of misconduct by employees.

See "A Close Look at the New ECCP's Commentary on Compliance" (May 29, 2019).

Seven Practical Tips to Realize Value and Program Impact

With no finish line for the work of Compliance, the role can be both exhausting and, at times, overwhelming. With this in mind, below are a set of simple suggestions for realizing the greatest benefits from your existing program, while maintaining a dedication to productive self-criticism and continuous improvement.

1) Map and Leverage Existing Company Strengths

The key here is to know the tools and resources Compliance may already have at its disposal companywide. There are often significant resources such as systems, processes and initiatives that are already established by the broader business or other functions that can be leveraged for Compliance impact.

It is well worth examining, or even conducting a survey of, the broader company landscape to map and identify what the company currently has at its disposal across functions. Consider what, for example, already exists in how the company operates in other functions like supply; health, safety and environment (HSE); human resources (HR); internal audit; finance; and enterprise risk management (ERM). There will likely be numerous existing resources Compliance can tap into.

For example, internal audit may have existing software that it uses to pull data samples that could be leveraged for second-line compliance monitoring. Finance may have systems for credit and commercial viability checks that could be extended for use in elements of know your customer (KYC), trade sanctions and anti-bribery-related adverse media due diligence. Similarly, HSE and quality control functions can be utilized by Compliance to leverage investigation protocols and crisis response toolboxes. Compliance messaging can also be incorporated into existing HR on-boarding processes and routine communication initiatives.

It's easier, less expensive and more effective to integrate Compliance into how a company's business operates and leverage what already works. While the increasing array of Compliance specific services and systems are often tempting; approaching new initiatives by first mapping existing business workflows can help Compliance stay simple, integrated and holistic. This step can also help prevent Compliance from developing in a silo.

A good place to start is by mapping the business workflow – from how suppliers who want to work with the company are identified to how services or products are delivered. It is also helpful to identify what other function the company, at its core, identifies the most with, and does well, then leverage that strength. For example, if the company is in extractives or heavy industry, it may identify with and have a mature infrastructure around safety, from training to supplier on-boarding and incident response. If the company is in food or medical products it is likely to have high cultural pride and awareness, as well as a mature program, around quality control. Identify integration, leverage and cut-and-paste opportunities for Compliance in these areas of existing company strength.

See the Anti-Corruption Report's three-part guide to risk assessments: "Types of Assessments" (Jun. 26, 2019); "Techniques and Building a Team" (Aug. 7, 2019); and "Where to Look for Risk and Risk Ranking" (Sep. 4, 2019).

2) Talk in Business Terms

Talking and working in the terms of the company's business are key to making any compliance program truly effective and can have the added bonus of resulting in significant cost and time savings. Look at the language and terms already embedded into the business or company strength areas. The more Compliance can communicate in embedded business terms, and avoid compliance specific terminology or legal language, the more understandable, efficient and effective its program will be.

For example, when constructing a program for dealing with third-party-related risks and identifying higher-risk partners, consider the advantages of using the company's existing supply taxonomy and terms of reference. Rather than putting together a standalone definition for high-risk third parties that only a lawyer could love, utilize the existing vendor registration identification categories to target the highest-risk third parties by scope, type of work and jurisdiction. This strategy requires Compliance to take the time to learn and listen to the business approaches, processes and terms – an exercise that has its own standalone benefits. It has the added advantage of reducing the amount of additional training and communications to ensure terms are understood by the business, an essential foundation element to executing controls effectively.

See "A Bribe by Any Other Name: 101 Ways People Refer To Corruption" (Sep. 6, 2017).

3) Create and Incorporate the Compliance Constituency

Identify Compliance's natural constituency of supporters within the company, and then set out to create more Compliance constituents and integrate them into the Compliance program.

A company can start by identifying the individuals at all levels that represent the biggest compliance "pulls". Tone at the top is foundational, but programs also need key members of the compliance constituency in the middle levels of an organization, where the leaders with the most day-to-day employee impact sit. For example, identify the business leaders that most often call Compliance, that invite Compliance to meetings, that drive strong training completion numbers or engage and ask questions about Compliance dashboards and reports.

The risk owners within the business also represent a natural compliance constituency. Consider teaming up with business risk owners to prepare and co-present tailored compliance messaging and face-to-face training. This can lead to greater audience engagement by using relevant or real-life challenges suggested by the business themselves. This also provides an opportunity for Compliance subject matter experts to spend time and deepen communications with the risk owners in the business. Compliance may also find that everyone assigned to that training shows up on the first round (saving time and money), if their regional supervisor is also introducing or co-presenting the training.

Potential compliance constituents can also be found in those in the business or other functions who want the same information or have similar or overlapping objectives with Compliance. Compliance can use the mapping techniques discussed above to identify these potential constituents and propose value-add opportunities via a natural point of connection or alignment. Offering and demonstrating how compliance tools could also be used and leveraged for traditional business purposes, is a great way to illustrate that Compliance understands business, budgets and bottom-lines.

For example, information contained in data feeds often used for Compliance related due diligence and adverse media analysis may have potential commercial value for the supply, finance and HSE functions. Accordingly, Compliance should be looking to both leverage and hook on to business and other function initiatives, while also identifying where Compliance tools could add dual-use value to the business or other functions.

See "Creating a Values-Based Compliance Code and Recruiting Compliance Champions to Spread the Message" (Nov. 4, 2015).

4) Integrate Technology

In an age of continuous innovation and increased pressure to reap the most value for time and money, technology is an increasingly integral part of a compliance program. For example, many companies are embracing e-training, which can provide many benefits, including:

- a baseline education foundation;
- easy customization;
- tailoring for risks of employee role type;
- an opportunity to develop a library approach for incorporating feedback and real-life scenarios from investigations and audits; and
- a way to free expert compliance personnel time to conduct face-to-face training for higher-risk groups.

A compliance program should also take advantage of specialized technology solutions housed within other functions of the organization. Compliance due diligence and processes can be embedded into customized systems – rather than remaining in external bolt-on approval processes outside of the business' normal activities. For example, if the company's HR department moves to a new companywide software solution for recruitment and on-boarding this presents the opportunity to incorporate Compliance related checks on government official connections and trade sanctions risks into a one-stop system for the business end-user.

Importantly, the ECCP increased focus on internal measurement and analysis of program effectiveness also indicates the potential value of data and analytics.

See the Anti-Corruption Report's four-part series on measuring compliance: "Getting Started" (Aug. 2, 2017); "Seven Areas of Compliance to Measure" (Aug. 16, 2017); "How to Measure Quality" (Sep. 6, 2017); and "Gathering and Analyzing Data" (Sep. 20, 2017).

5) Make a Business Case for Compliance Resources and Automation

Capital expenditures, return on investment and time horizons may not be the primary terminology of Compliance personnel, but putting things in context is a necessary skill. The ability to use context, metrics and marketing to make the "business case" for Compliance should be in every chief compliance officer's job description. The ability to make a clear and simple business case for a particular control, resource, system or budget that Compliance is targeting will often turn on being able to market compliance internally by illustrating how the company can promote the process, commitment and results externally to meet ever increasing regulator, investor and stakeholder expectations.

Automation can be controversial in a compliance context. The value debate between algorithms versus professional judgment, often rages on in compliance periodicals and blogs. In reality, it is not a mutually exclusive battle, but rather a balance. They both can and should comfortably share the space in an effective resources-to-risk based compliance program.

A compliance program should always favor substance over form. However, improvements in form available via automation – such as increased quality and consistency of information gathering and retention – can be effective at improving substantive compliance. Depending on the nature of the risk and particular business model, the greatest advantage posed by automation may be in allowing expert human resources the time and remit to focus on the biggest value-adds, highest compliance risks and face-to-face engagement with the business in the roles of guide and problem-solver.

The costs involved, while often appearing high at the outset, may be well worth it in the long run. Making a clear argument for return on investment is the key. For example, an electronic training management system that allocates modules to employees and tracks completion may seem like a large upfront expense. Consider, however, the time spent by compliance experts, managers and HR teams to complete this critical compliance process manually. This information can be surveyed across full-time employee hours spent at each point in the training life cycle (identification, assignment, remediation and reporting) to present a convincing business case to justify the investment.

See "Measuring the ROI of Compliance" (Feb. 21, 2018).

6) Use External Experts Where Needed and Internal Ingenuity Everywhere Else

Reaching the right balance between the use of internal and external resources is always challenging for Compliance in terms of making the best possible use of available expertise and budget. Requesting review by external experts and supplementing the skills and capacity of internal staff are important tools to ensure that a compliance program is operating effectively. Outside expertise brings the value of divergent thinking and a broader view on emerging risks from experts involved with a wide range of clients tackling similar issues in different ways.

It is important to remember, however, that it is the company's program. It is amazing what a compliance team can achieve with the resources already at hand. Every communication initiative does not need a professional camera crew and communications team. In one example, compliance personnel used a smart phone and basic movie app to create a video that broke records for the number of views in an electronic newsletter. The video was a simple and engaging montage of compliance personnel's children in short clips answering the question "What is a bribe?" It also created an opportunity for the compliance team to connect on a personal level with people in the business in a light-hearted but memorable way.

Further, legal and accounting firms provide free resources that they use as an opportunity to demonstrate their knowledge and expertise. An in-house compliance program should be fully leveraging all such available updates, newsletters, webinars, in-house training and reference materials on offer.

Compliance should also assess the use of technology from various external service providers for opportunities to streamline and to ensure it is operating in a cost-effective way. For example, where multiple e-platforms are utilized for storing case and investigation materials with external firms, it is worth investigating opportunities to pull back control of company data, confidentiality and costs, by contracting directly with platforms that external firms can then use. There are, of course, pros and cons with each approach, but without investigating the options, a company may be left open to unknown risks and leaving cost savings on the table.

See "How to Make the Most of Limited Compliance Resources" (Dec. 13, 2017).

7) Be Creative

No company or program will have infinite resources to devote to compliance systems and processes, but necessity is the mother of invention. For example, rather than a quick fly-in trip to conduct a regular visit with a joint venture or local community team, consider re-configuring the visit as a joint one-day working conference together, sharing best practices, work-shopping ideas in side meetings and leveraging internal and external speakers. For a similar cost the impact will be far greater, as will be the potential to use the event in future communications and marketing materials both internally and externally.

In terms of creative thinking, an aspect of the ECCP that will challenge many existing programs is the steer towards proactively incentivizing compliance and ethical behavior for a company's employees and third parties. Rather than just focusing on prevention, detection and discipline, the concept of incentivizing and rewarding good behavior in a tangible, effective and transparent manner will no doubt inspire creative thinking within many companies.

Ultimately, while the task of ensuring "effectiveness" can appear complex and overwhelming, tangible successes are achievable when Compliance understands roles, embraces realities, and focuses on simple, practical and persuasive value-adds.

See "How Nadège Rochel of Hollister Inc. Uses Monopoly, a Deli Counter and Emotional Intelligence to Promote Compliance" (Aug. 7, 2019).

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