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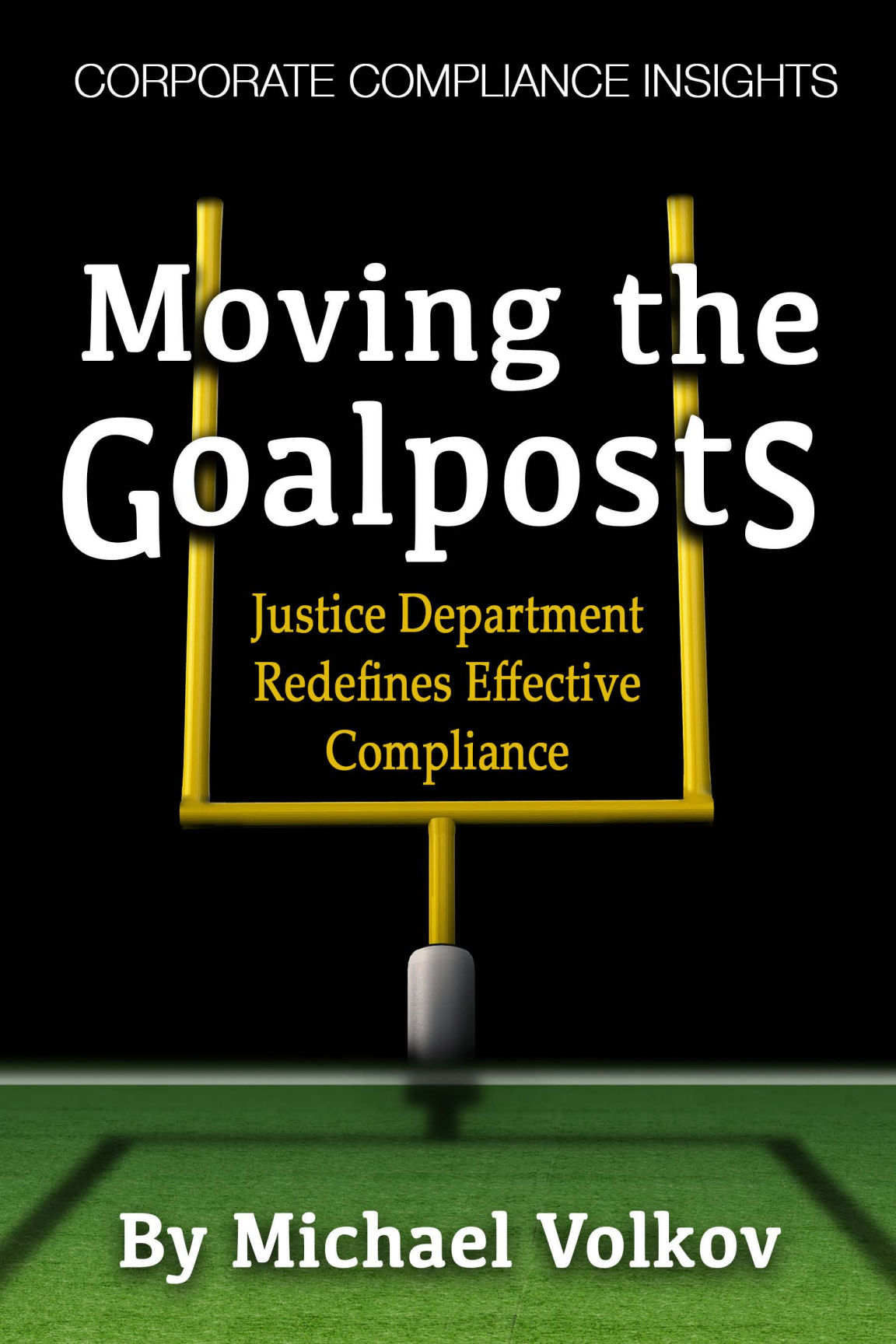

Moving the Goalposts

Justice Department Redefines Effective Compliance

By Michael Volkov

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Also By Michael Volkov

Question Everthing: Effective Due Diligence and Third-Party Risk Management

The Art of the Internal Investigation

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To hard-working, dedicated compliance professionals, who demonstrate each and every day the importance of "doing the right thing."

Foreword

"Change is the law of life. And those who look only to the past or present are certain to miss the future." – John F. Kennedy

In one way or another, almost everything I write about can be boiled down to one word: change. Change is good, even when you think it is difficult or bad. When you look back on your life, and if you are able to do so with courage and candor, you will notice the importance of change to your personal and professional development. In fact, as you look back, hopefully you will recognize that change has been a good thing, a positive force in your own life, whether it was overcoming tragedies, finding love, embracing new challenges or securing accomplishments.

Over the last year, we have witnessed important changes in the compliance profession. In particular, we have witnessed an important evolutionary moment in the growth and influence of compliance. There is no turning back now. The compliance profession demanded recognition, resources and influence, and recently the seeds have been sown to ensure compliance officers

get what they want. This is a critical time for the compliance profession, and this book is an attempt to capture the moment, recognize the change and prepare for the future.

Setting the Stage

In the compliance profession, change has occurred at a rapid, almost unfathomable rate. The compliance profession was moribund until the turn of the century, living in the backwater of health care providers and beginning to grow at a relatively slow rate in terms of resources and influence. The scandals of the early 2000s and the financial collapse later in the same decade created a corporate governance vacuum for corporate compliance.

Teasing out cause and effect in these years is a difficult task. On the one hand, the Justice department's unprecedented use of criminal white-collar statutes and its promotion of compliance caused corporations to invest in compliance. At the same time, corporate governance leaders and research combined to elevate the importance of compliance as a means to "prevent and detect" corporate wrongdoing, but – more importantly – they demonstrated that robust compliance is unto itself a positive financial driver.

Forward-thinking corporate leaders immediately understood the importance of these trends and embraced compliance as a proactive force in corporate governance. The compliance movement quickly caught fire, and the Justice department and regulators continued to push for increased focus on corporate compliance as a means to prevent corporate wrongdoing and financial scandals that could threaten the economy in the future.

In the last year, we have witnessed another transformational push in compliance. The Justice department retained a compliance expert, Hui Chen, a subject matter expert, and appointed her to the position of Justice department Compliance Counsel. Since her arrival at the Justice department, we have witnessed important new developments in the Justice department's expectations concerning effective ethics and compliance programs.

The Justice Department's Issuance of "Evaluation of Corporate Compliance Programs"

In an unusual move, in early March 2017, the Justice department quietly issued an important document in the dead of night – "Evaluation of Corporate Compliance Programs."

We have no explanation from the Justice department for the issuance of this document with little fanfare. I can speculate, but I suspect there was a personnel issue that explained why the issue was released with neither notice nor explanation. Whatever the reason, the document itself collects a number of recent trends, provides relevant questions surrounding the trends and confirms the importance of the explained trends. To those who brushed aside the importance of the compliance document, they ignore the implications of any statement made by DOJ prosecutors in day-to-day interactions, negotiations and enforcement matters.

Aside from the overall analysis of the document, the checklist or question format provides an important tool for companies to use in assessing their own compliance programs. It is not the only tool available, nor the most important tool, but it is one exercise among many that provides important insights and analysis.

It is important to review the document and point out important notes, questions and trends. The formulation and the collection of questions gives compliance practitioners another source to

develop effective tools, benchmarks and frameworks for analysis.

I want to take some time to review the topics and questions and point out trends and new areas for focus and attention. Compliance practitioners should review the document carefully, address the issues that are identified and seek increased internal support based on this new and important document.

At the outset, I would urge every chief compliance officer to provide a copy of the document to the board members and audit/compliance committee members and make sure there is adequate discussion of the evaluation document. This is a board-worthy document and should be given to each board member for review and analysis. A board that is educated on the importance of a compliance program should understand the questions, the relevance of each and the need to identify potential issues for analysis and discussion with the CCO. A board has to take the time to learn and understand how a compliance program operates, how to conduct oversight and how to monitor the compliance program. This checklist gives the board a valuable tool to do so.

The Compliance Evaluation lists 11 separate topics for review.

1. Analysis and Remediation of Underlying Misconduct

The first question is relevant in those circumstances when the company is responding to misconduct that results in a government investigation. However, I think the questions asked provide important insights when a company suffers misconduct that does not result in a government investigation.

Companies often face situations where they discover misconduct, impose discipline and remediate the problems discovered and then move on. This happens more often than misconduct resulting in a government disclosure or a government investigation. In either case, the questions are certainly relevant.

The questions appear to be fairly basic, but depending on the circumstances, they can be deadly accurate in pointing out compliance deficiencies. A "root cause" can implicate not only employee misconduct or failure to exercise proper oversight, but also extend to such issues as a company's culture, tone-at-the-top and other issues with significant implications for the company's operations. It is too easy to blame a rogue employee, a concept that has neither relevance nor significance to legal and compliance practitioners who understand how compliance programs work.

2. Senior and Middle Management

The DOJ's questions, as written, provide some important clues as to how it assesses tone at the top. These clues are not surprising and only underscore repeated admonitions from compliance professionals.

A CEO and senior leaders are judged not just by their words, but also by their actions. A company that relies on its recorded statements by a CEO indicating the company's commitment to compliance falls short in its tone by failing to demonstrate through his/her actions how they lead a compliance program.

A second interesting issue revealed by the questions is how a company monitors the conduct of its CEO and senior leadership team. A company has to assess the risks that its C-Suite creates and then tailor its compliance program to address these risks.

The DOJ's questions in this area suggest that this is a critical part of an effective ethics and compliance program.

The questions relating to shared commitment reflect the DOJ's focus on how companies "operationalize" their compliance program. The DOJ recognizes that a compliance program is dependent on cooperation and coordination among key functions (e.g., legal, finance, audit, human resources) and this inquiry is designed to focus attention on the coordination of key functions to a common objective – promoting ethics and compliance.

Finally, this area of questions highlights an important trend: the existence of compliance expertise on a corporate board. In recent years, corporate governance experts have been highlighting the need for corporate boards to bring compliance expertise to the board. It is a much-needed requirement, and the DOJ's question is designed to reinforce this need.

In the same vein, the DOJ made sure to remind everyone that CCOs need to have adequate time to report to the board or the supervising committee and must have private or executive sessions where they can discuss compliance issues with the board or committee members.

The Role of the CCO

The DOJ's Compliance Evaluation highlights important trends in the role and independence of the chief compliance officer. The DOJ has stopped short of requiring direct reporting of a CCO to a CEO or other senior officer, but it is inching closer to

such a demand.

In the topic area relating to stature [of a CCO], the DOJ lists important issues for a company to consider in designing its compliance function – specifically, a company has to consider how the compliance function compares with other strategic functions in the company in terms of "stature, compensation levels, rank/title, reporting line, resources and access to key decision-makers." Most companies will fall short on this list of key components. It is rare these days to find compliance elevated to meet all of the requirements listed by the DOJ, and there does not seem to be any sense of urgency in corporations to address these important issues. On the contrary, companies claim they are moving forward on these issues but when you examine them carefully, however, they fall woefully short in most instances.

While there has been an important elevation in the role of CCOs in most companies, CCOs do not have the stature of comparable functions, nor the "line of sight" across the organization to carry out their responsibilities. CCOs continue to lag behind comparable functions in terms of compensation, rank/title, reporting line and access to key decision-makers.

I want to highlight one area in particular where CCOs are suffering: resources. Unlike internal auditors who can demand additional resources needed to comply with basic financial Sarbanes-Oxley requirements, audit/compliance committees fail to respond to resource needs in the compliance arena with any urgency, usually putting off such requests or seeking interim, Band-Aid solutions. CCOs have been beaten down on this issue and need to bring this to the forefront. There is nothing more damaging to a company's ethics and compliance program than continuing strangulation of effectiveness by lack of resources.

Companies have a better record in fostering CCO independence and autonomy. The DOJ's questions in this area, however, reinforce this trend by asking if the CCO has a direct reporting line to the board and how often they meet. A robust reporting relationship with direct access to the board is a critical requirement for a compliance function.

The DOJ's questions, however, go a little further by asking how the performance of compliance function is reviewed; who determines hiring, compensation and firing of CCOs; and what other steps are taken to ensure independence of the compliance function.

Companies need to focus on this question and have the board hire, fire and negotiate terms and conditions for the CCO. A corporate board is the ultimate entity responsible for compliance, and this needs to be reinforced by putting the board in charge of the CCO's contract and compensation.

The DOJ's questions on empowerment include an interesting set of questions focused on whether there have been specific transactions or deals "stopped, modified or more closely examined" as a result of compliance concerns. This inquiry is creative and reflects an understanding of how a robust compliance program could influence a company's business operations.

The question, however, is misguided and reflects an immature understanding of how a compliance function may influence business operations without resulting in a specific intervention. Indeed, in some cases, a compliance function, if given a seat at the business table, may create a general frame of reference that will avoid a more specific "confrontation" between business and compliance resulting in a change in a specific deal or transaction.

Nonetheless, the question sets out an interesting perspective that a CCO should consider when interacting with business operations.

Finally, the Compliance Evaluation questions focus on outsourcing compliance functions. This is an important issue because it raises an important question: are companies relying on outside consultants, accountants and law firms to conduct basic compliance functions? We have seen a cottage industry around compliance grow. However, it important to distinguish between day-to-day operations and functions that provide value to the overall operation of a compliance program. The question of outsourcing and what is outsourced is important to consider, because in many cases, it may be a means to obfuscate or delay internal consideration of basic resource needs for compliance programs.

Risk Assessment and Risk Management

To design and implement an effective ethics and compliance program, companies have to conduct a risk assessment and tailor its policies and programs to its risk profile. The DOJ's Compliance Evaluation reinforces this framework for a compliance program.

Risk Assessment

At the outset, a company must adopt a specific methodology for its risk assessment, determine the types of information it will collect and analyze and establish the metrics it will use to inform its compliance program.

No longer can a company avoid such a requirement by claiming that such an analysis is "obvious" or that it is part of the internal

audit function given the different objective of an internal audit risk profile.

A company should commit to a fulsome risk assessment, preferably every three years, with annual check-ups or analyses to address potential changes in risk profiles.

Design of Policies and Procedures

With this foundation in mind, the DOJ Compliance Evaluation asks how a company designs and implements its compliance policies and procedures, who has been consulted in the process and what role, if any, business units play in the design of such policies and procedures.

The DOJ's Compliance Evaluation continues to inquire how the company assesses whether its procedures have been effectively implemented and whether the function with ownership of the policies and procedures has been held accountable for supervisory oversight.

Once again, the DOJ has emphasized the importance of "operationalizing" a compliance program. A company can craft policies and procedures and announce and adopt them, but companies must also ensure that the policies and procedures are implemented and that they are being adequately supervised. In this regard, the DOJ underscored the importance of communicating company policies and procedures "to employees and third parties."

This typically requires that important gatekeepers and policy owners collaborate and communicate with each other to implement policies and procedures and identify potential red flags that may occur.

The DOJ's Compliance Evaluation looks to the issue of

"operational integration" for compliance programs and raises several important issues.

As an initial matter, companies have to examine any individual(s) who are responsible for integrating policies and procedures into the overall business operation. This requires creation and oversight of compliance controls.

In focusing on important functions in this area, the DOJ points to the role of: (1) payment systems, (2) approval/certification process and (3) vendor management. The DOJ is highlighting the bread-and-butter issues of compliance implementation.

In the anti-corruption context, the DOJ asks the critical question: how was the misconduct or bribery funded? In other words, follow the money – was it false purchase orders? Petty cash? Employee reimbursements? Discounts? These are very typical sources of funds for illegal bribery and the DOJ wants companies to create robust controls around these specific areas.

Similarly, the DOJ wants companies to examine who approved the particular expenditure, third party or vendor that was part of the illegal scheme. If the process did not work in the past, companies have to remediate these controls to make sure they work in the future. Finally, if vendors were involved in the misconduct, companies have to review how vendors are selected and how they are paid.

Third-Party Risk Management

In a clear reflection of the importance of third-party risk management, DOJ's Compliance Evaluation outlines important

issues – some old and some new – to managing third-party risks.

At the outset, the DOJ brings a fresh approach to reviewing how companies manage their third parties and incorporate identified risk into the process. The DOJ underscores the importance of integrating third-party risk into the procurement and vendor management process. Those companies that have failed to bring together third parties and the procurement function are woefully behind in this area.

Third-party risk controls have to address basic issues, including the business justification for the third party, the contact management and drafting process to ensure accurate description of services to be performed, agreement to appropriate payment terms, verification of third-party work performed pursuant to a contract and confirmation that the amount paid is commensurate with the work to be performed.

In reviewing and approving a third-party relationship, a company has to analyze the incentives created by the relationship and how the company will monitor the third party's activities.

In this area, the DOJ has injected a fairly new inquiry and requirement. Companies have to train those "responsible persons" on the compliance risks and how to manage those risks. Additionally, DOJ asks how a company created incentives (if any) for compliance and ethical behavior by the third party.

The DOJ's Compliance Evaluation repeats many well-known requirements for companies to identify and resolve specific red flags during the due diligence process. In a new twist, however, the DOJ asks if "similar" third parties ever been "suspended, terminated or audited as a result of compliance issues." The DOJ encourages companies to ensure risky vendors are not reauthorized or used again to provide services. While this risk

may appear to be relatively minor in comparison to other areas, recent enforcement actions have focused on situations in which prohibited third parties reappeared or continued to be used by companies.

Training, Internal Investigations and Audits

The DOJ's Compliance Evaluation questions provide important indications of "new" trends and approaches to compliance functions and issues.

Training

In the area of training, the DOJ's Compliance Evaluation reiterates its concern that companies tailor training programs to their specific risk profile. In the FCPA Guidance issued in 2012, the DOJ explained that training programs should be tailored to specific audiences.

The DOJ has refined this requirement to focus on training "employees in relevant control functions." This refinement is more significant than it first appears. An accounts payable employee serves in a "relevant control function" involving the payment of money to vendors and suppliers. An employee responsible for third-party due diligence checks serves in a "relevant control function" responsible for third-party risk management. The list continues with a large number of "relevant control parties." Companies have to design a variety of training programs to address these specific risks and controls.

Companies have to ensure that they provide training in different languages as needed, and they have to measure the overall effectiveness of their training programs. Similarly, companies

have to make sure that employees can access guidance on legal and compliance issues.

Reporting Misconduct and Investigations

In a shot against legal and internal audit departments, the DOJ's Compliance Evaluation asks whether compliance has had full access to reporting and investigative information. Turf battles are often fought over these issues, and the DOJ is clearly stating that the compliance function has to receive access to investigative information.

Companies often fall short on their internal investigation functions, failing to make sure they are conducted properly, fairly, independently and consistently across the organization. The DOJ's questions reiterate the importance of meeting such standards when conducting internal investigations.

The DOJ's Compliance Evaluation reiterates the importance of sharing investigative findings with senior leadership, addressing compliance concerns raised by internal investigations and understanding senior management and supervisory lapses that may have occurred when investigating misconduct.

Discipline and Incentives

The DOJ's Compliance Evaluation requires careful evaluation of misconduct and accountability of managers and employees. In particular, the DOJ emphasized the importance of disciplining supervisors for failures to exercise proper supervision. In this context, the DOJ stated that it expects a company to keep track and weigh its overall disciplinary program to ensure consistent treatment and accountability for misconduct.

In addressing the discipline process, the DOJ expects to see a broad range of functions (e.g., human resources, compliance, legal) involved in the review of discipline. In promoting the discipline and consequences functions, the DOJ included questions concerning disclosure of disciplinary actions to communicate to managers and employees the importance of ethical conduct.

The DOJ reiterated the importance of creating positive incentives for ethical behavior.

Audit Function

Interestingly, the DOJ's Compliance Evaluation includes a detailed set of questions concerning a company's audit function. These questions show that the DOJ is embracing a robust examination of the company's audit function in recognition of the growing importance of monitoring and auditing to the overall effectiveness of a company's compliance program.

The DOJ's examination includes:

- The number and type of audits, especially in high-risk areas;
- The reporting of audit findings and remediation progress;
- The involvement of board and senior management in follow-up to audit findings and remediation;
- The examination of potential misconduct and audit and testing of relevant controls, collection and analysis of compliance data and interviews of employees and third parties; and
- The testing of controls.

The DOJ's analysis suggests that it is focusing on an important relationship: compliance and auditing/monitoring. While companies often coordinate these functions, the DOJ is expecting increased collaboration and focus on compliance controls and auditing.

Operationalizing a Compliance Program

An effective compliance program is built on internal coordination and relationships. Applying the Justice department's terminology, an effective compliance program is one that is operationalized. At first glance, you may think this is something new. It isn't.

The Justice department's adoption of the term "operationalized" is meant to distinguish between a compliance program that exists on paper versus a compliance program that is implemented and operating.

This is no simple accomplishment, nor one that can be achieved in a short period of time. Instead, a chief compliance officer has to recognize from the start (or early on) that a compliance program that operates by itself or among the compliance staff is destined to fail.

An effective compliance program depends on the business accepting responsibility for compliance as an important element of their job. As a compliance manager for China told me, "If I do not take responsibility for compliance in China, no one will." It is one thing to say that, but it is another to carry out your duties with compliance in mind.

When the business side of the company understands its compliance obligations, the company has made an important first step in the process of transforming the compliance program from a paper program to an effective program. But that is not the end of the story, nor all that is required.

An effective compliance program also requires careful coordination with related functions needed to leverage compliance resources and activities to promote an ethical culture and mitigate risk.

A CCO knows who his/her natural partners are in this area. They include the company's internal legal department, human resources, internal audit, financial operations and information technology. If a company has a robust security department, a CCO has to expand its band of brothers and sisters to include security.

Like world diplomacy, a CCO has to use his/her interpersonal skills to convince related functions to join together to implement important compliance policies and procedures. Just like any significant diplomatic mission, the first step in this process is to create an appropriate structure or set of procedures to govern the creation of an internal compliance committee.

This is perhaps the most important compliance structure – a committee dedicated to operationalizing a company's compliance program through collaboration and coordination with each important function.

The compliance committee should be established with a charter,

and the CCO should be the chairperson of the committee. Each important function should be represented on the committee to ensure that issues can be addressed and communications across the organization are enhanced.

With the committee in place, and with each function represented, the CCO has to build a unified front to break down the compliance silos and hopefully prevent any operational walls from developing between or among the related functions.

A CCO has to get the buy-in from each of the representatives. This can be difficult when the representative from a function views itself as the one and only representative to handle responsibilities in its domain. To convince them, a CCO has to explain that coordination with the compliance function will leverage the function's resources and ability to operate efficiently.

For example, consider the important issue of training of new employees; the HR department often carries out this function, but in some cases, I have seen compliance officers assisting in training new employees. Depending on HR resources, a compliance department may be able to help HR by conducting new employee training or parts of the program.

Conversely, when a CCO has to conduct an internal investigation where there may be related HR issues with potential code of conduct or legal violations, the investigative team may include a compliance representative and an HR staff member. In this case, the CCO is able to leverage investigative resources by collaborating with an HR staff member. Given the experience of HR staff in conducting employment-related investigations, HR staff members are natural partners with

compliance staff when conducting internal investigations. I intend to examine some specific issues that arise when a CCO seeks to operationalize a company's compliance program. A CCO must be willing to embrace diplomacy, collaboration and compromise to achieve the compliance nirvana: an effective ethics and compliance program.

Compliance and Business Buy-In

We all know that a compliance program without business buy-in is, by definition, an ineffective compliance program. The level of business support ranges from "mouthing" support to full-fledged embrace and ownership of compliance program controls. By "mouthing" support, I am referring to business staff who say they understand compliance and use the right words, reflecting an understanding of compliance issues, but fail to attend to, embrace or advance compliance issues.

When it comes to "operationalizing" compliance, a meaningful commitment from business staff is critical. The challenge is to explain why compliance is relevant to business staff dedicated to promoting sales, manufacturing and other revenue-generating activities. From the business perspective, compliance is viewed as a cost center separate from business activities.

To counter this perception, senior management and compliance have to explain how compliance increases revenue, promotes the company's reputation and can be used as a sales advantage in a competitive marketplace. Successful and sustainable businesses understand the importance of an ethical culture and a commitment to compliance. Business staff needs to understand

this value and embrace senior management's expectation that the business commit to promoting ethics and compliance.

If the CEO understands the importance of ethics and compliance, a CCO is often successful in securing business buy-in. In the absence of CEO support, however, the CCO's job is difficult, if not impossible. A CCO cannot carry the burden of building a culture of ethics and compliance without the support of senior management, and the CEO in particular. A CCO can talk 'til he or she is blue in the face, but the message and importance of ethics and compliance will not stick without more support and commitment from the CEO and senior managers.

Even with the support of the C-Suite, a CCO has to build bridges and convince middle managers and other business players that compliance is critical and can be leveraged for an advantage in the competitive marketplace.

Customers, suppliers, vendors and other outside parties are increasingly focused on minimizing potential risks by interacting with companies committed to trust and integrity. A company that suffers from a poor reputation for ethics and compliance will have greater difficulties in the marketplace, resulting in lower revenues and sales performance. These are not controversial ideas.

A sales employee looks to promote any advantage the company may have over its competitors. CCOs have to communicate in a similar manner that the company's commitment to ethical practices includes its business practices. A trustworthy business partner is a valuable relationship in today's marketplace, especially where competitors may be cutting corners or avoiding

compliance issues in hope of securing business.
To support this effort, a compliance officer should look to developing compliance materials (online and hard copy) that can be used by sales personnel to include in sales pitches and marketing materials. As part of competitive tenders, bidders are required to produce materials concerning their compliance programs.

If a compliance officer builds the competitive advantage idea with the business, the compliance officer has to educate the sales staff on their obligations to preserve and promote the company's ethical culture, reporting on employee misconduct and ensuring that company policies and procedures are followed.

A compliance officer and the business have a two-way relationship; they each have expectations from the other to promote the company's compliance program while securing commercial advantages in the marketplace. If explained in this fashion as a win-win proposition, compliance and business can become lasting friends in the corporate governance landscape.

Compliance and Financial Controls

A chief compliance officer has a number of important relationships to attend to in the corporate governance landscape. A critical relationship needed to "operationalize" a compliance program is a partnership between a CCO and the chief financial officer and his/her key constituents, including the internal auditor and comptroller.

Unfortunately, a recent survey revealed that only 37 percent of

CFOs actively participate in their company's anti-corruption compliance program.

That is a disappointing indicator of a serious compliance gap. CCOs and CFOs have to work together, and they can leverage each other's resources. If a CFO works in the silo of financial controls, Sarbanes-Oxley and other financial systems, a CCO is by definition failing to meet the effectiveness standard. It is easy to understand why this is the inevitable result.

Let's consider some basic financial coordination requirements: if payments are made to third parties, vendors and suppliers without appropriate controls to ensure proper payments are made (1) pursuant to a contract; (2) with a valid invoice for services rendered; and (3) to an account confirmed in the name of the third party, supplier or vendor, the company could easily experience a corrupt scheme to extract money and use third parties, vendors and suppliers to make illegal bribery payments to government officials.

Additionally, if the financial controls for reimbursement for gifts, meals, entertainment and travel expenses did not include appropriate compliance requirements for authorization, documentation and confirmation, the company is at risk for bribery schemes involving inappropriate gifts, meals, entertainment and travel payments.

In this respect, the accounts payable function plays a critical role in monitoring and identifying potential compliance violations; an accounts payable staff member is the front line of defense for noticing inappropriate fees in an invoice, unexplained services or other documentation failures when reviewing invoices from

third parties, vendors and suppliers, as well as reimbursing employees for gifts, meals, entertainment and travel expenses. Remember, the land of financial controls is defined by "materiality" – transactions and controls that could result in a material weakness in the financial reporting systems. Money used to further a bribery scheme can be secured through multiple nonmaterial transactions, requiring CFOs to administer and coordinate with CCOs to identify and investigate such transactions for corruption risks. When a CFO works with blinders, they are likely ignoring significant corruption risks.

Bringing these operations together should not be very hard. The Internal Auditor, who reports to the CFO, is a natural partner for CCOs. In every organization, you should expect that the CCO and Internal Auditor work closely together given their naturally aligned objectives – to ensure overall compliance with internal controls, including the company's compliance program.

A CFO, however, cannot delegate the responsibility for the company's financial controls to the Internal Auditor. Instead, the CFO has to work with the CCO to ensure that financial controls are designed around compliance program elements and needs. A CFO who fails to do this is creating a serious financial risk to the company.

CFOs need to come down from Mount Olympus and bring their scribes to begin work on drafting and coordinating the design of financial controls to include appropriate compliance controls and ensure money is authorized for legitimate purposes, guard against bribery schemes and facilitate accurate maintenance of books and records.

Given the stakes, CFOs can bring about change to their profession; and if they do, they will find a warm welcome from CCOs throughout the corporate governance world.

Compliance and Human Resources

HR is a natural partner for compliance. They share common goals and can leverage each other in terms of resources.

As previously noted, HR and compliance share a common goal of instilling and promoting a culture of ethics. HR promotes employee satisfaction as a means to ensure productivity and compliant behavior. Compliance shares the same goal of ensuring behavior in keeping with the company's code of conduct and all legal and regulatory restrictions.

The bottom line for each is an ethical company that has low levels of misconduct and strong morale in order to maximize financial performance. Compliance and human resources promote and enforce policies and procedures in the workplace, conduct training programs and handle incidents of alleged misconduct. They each are responsible for monitoring and promoting a culture of ethics in the company to reflect the company's mission and values.

One important area of overlap is the training function. HR is responsible for onboarding new employees (including new senior executives and directors), conducting orientation, introducing the company's code of conduct and initially certifying compliance with the code of conduct. HR has a number of training responsibilities relating to employee conduct, including sexual harassment training, conflicts of interest, discrimination, security and other day-to-day areas of responsibility.

Compliance has its own topics for training, centering on substantive areas such as anti-corruption, cybersecurity, antitrust, anti-money laundering, export controls and sanctions.

Human resources and compliance should coordinate their programs and use each other to reinforce specific topics of importance or issues of mutual interest. When they work together as training partners, they can leverage available resources, rely on common training content suppliers and schedule training programs to minimize inconvenience to employees.

Two other areas of mutual interest include corporate culture and internal investigations.

HR conducts the bulk of internal investigations related to employment issues. On occasion, these investigations can expand into substantive areas that may require compliance involvement, such as conflict of interest investigations or retaliation against whistleblowers. Compliance has to work closely with human resources to promote organizational justice, a hotline system, prompt investigations and reinforcement of a culture dedicated to responding to employee concerns. As part of this responsibility, middle managers have to be trained and equipped to handle employee complaints.

Finally, compliance and HR need to attend to corporate culture by monitoring employee behaviors and attitudes. More is needed than a routine corporatewide annual survey. A proactive approach to monitoring corporate culture includes focus groups, interviews and targeted surveys to high-risk areas and operations.

Compliance and HR each collect important information concerning corporate culture – complaints, employee misconduct and employee morale. Compliance and HR can help each other by sharing such information, analyzing it together and developing action plans.

Considering all the areas of mutual interest, compliance and HR share much in common and need to ensure that they communicate, cooperate and develop their common interests in compliance and employee morale.

Companies are always fighting against stovepipes. It is inevitable but offices, divisions and/or functions within a company are always seeking an "advantage" in competition against other parts of the company.

A company dedicated to teamwork and collaboration is always fighting against the forces of resistance and turf protection. Stovepipes undermine corporate functions and overall global management and resource allocation. Information has to be shared across offices, divisions and disciplines.

The more specialized an office, the better their arguments for resisting collaboration. The most important force against negative internal forces are positive personalities and leaders. Those managers with a vision for the total organization, those who see the big picture, are often the confident ones who seek out collaboration.

Compliance officers often have to struggle with the leader of human resources. Human resource managers always see their operations as "specialized," requiring unique talents, procedures and processes. They use these arguments to protect their turf.

Compliance and HR are important partners. In many cases, HR

can identify potential compliance problems through employee morale or complaints. If the complaints increase from a specific office or department, that is a red flag for compliance officers.

Compliance and HR work together on training, new hire orientation, internal HR investigations, exit interviews, employee complaints and potential litigation. Information sharing between the two is important and coordination can bring great results for both functions.

HR professionals recognize they work in a high-risk and critical area for the company. They need to set up procedures for dealing with employees and making sure they minimize litigation risks. They also are able to identify disgruntled employees who may turn to whistleblowing as a way to vent their frustrations with the company.

Despite their specialized profession and the importance of their function, HR managers need to embrace compliance officers. They can share important information and develop better strategies for pre-emptively dealing with employment and compliance issues. HR conducts important exit interviews, which can provide compliance with important information about corporate culture.

In addition, HR has a significant role to play in internal investigations and disciplinary actions. HR needs to sit on any executive compliance committee, assist in any disciplinary process at the conclusion of an internal investigation and ensure that consistent discipline is maintained in the company.

The trick is for both offices to recognize the benefits of collaboration and reject any need to preserve their turf or protect themselves from each other. It requires big personalities and big vision.

Compliance and Legal

Here is a profound grasp of the obvious: lawyers can be difficult people. Some like to condemn the profession in its entirety (and carry with them a collection of lawyer jokes). As an attorney, I beg to differ. Many professions include and reward difficult people. For example, CEOs have the highest incidence of psychopathy among professionals. Lawyers are no different and are expected to zealously advocate on behalf of their clients.

Lawyers and compliance professionals are natural partners. With the rise of the compliance profession, lawyers became more territorial. For some reason, some lawyers felt they had to defend their territory in the corporate governance world.

Lawyers' resistance, however, has diminished through the years. There is more than enough work to go around for a CCO and a legal team to help design and implement an effective compliance program. Lawyers are starting to embrace the new landscape without feeling so threatened. (Some cynics may say that lawyers had no choice given the importance of the compliance profession).

As compliance programs mature, so do lawyers, and so has their relationship with the compliance profession. An effective compliance program requires lawyers and compliance professionals to work together. If they are at odds with each other, the program will suffer serious, debilitating effects. To that end, a general counsel and CCO have to ensure a smooth, working partnership. In fact, they can make each other look good by sharing in compliance and legal successes.

Lawyers can be excellent compliance practitioners so long as they

recognize the essential difference between legal and compliance work. A lawyer defines and advises on the law – the rules of the road. Compliance officers develop controls, policies, procedures and systems designed to ensure that corporate actors stay within the rules of the road.

Lawyers do not define the company's ethical culture. On the contrary, the board, senior management and the CCO define, instill, promote, manage and measure the company's culture. A company's culture is its most effective internal control, and it is up to the CCO to embrace this responsibility and bring all the key players to the table. Of course, the general counsel should be part of the discussions, but the general counsel should not define the company's culture.

In-house counsel are essential partners in conducting training, providing important legal guidance and analyses, marshaling due diligence and conducting internal investigations. Lawyers carry a valuable asset: the legal privilege, an essential tool when a company investigates and determines the nature and scope of a potential legal violation. Lawyers are key partners when it comes to the internal investigation function and working with compliance to develop helpful protocols and investigation tactics and strategies.

Lawyers also play a valuable role in contract management – a key tool used to mitigate risks. A company's contract system is an important aspect of its internal controls, and the design and inclusion of risk mitigation provisions in appropriate contracts is a critical aspect of the company's contracting system.

Compliance officers integrate legal analysis to design and implement appropriate controls. A CCO needs to work closely with the general counsel to ensure that compliance and legal

questions are appropriately handled, that controls adequately cover legal risks and that such controls are updated when legal interpretations and enforcement positions are adjusted.

Besides maintaining a positive working relationship, a CCO and a general counsel must coordinate and communicate regularly. They are natural allies when assessing risk, but they need to recognize they each have a different perspective.

A CCO is the guardian of the company's ethical culture. A general counsel is the protector of the company's legal risks. A company has to recognize that a legal analysis is not the same as adherence to ethical principles. Once this basic tenet is understood, a CCO and a general counsel can build a lasting friendship and partnership as part of the company's effective compliance program.

Questions and Issues

The Justice department's recent guidance, consisting of 110 separate questions organized around specific compliance topics, has raised a number of interesting substantive and procedural issues.

From an enforcement standpoint, how will DOJ prosecutors use the questions in negotiating FCPA enforcement settlements? This will vary depending on a number of considerations, including the nature and scope of the violations, the size and geographic footprint of the company and the weight eventually given to the individual questions.

We all know that compliance is not an exact science. But at the same time, we know what looks and smells like an

effective compliance program, as well as one that falls short. As prosecutors apply these questions to determine how a company responds and remediates its compliance program to prevent future violations, prosecutors have to take great care to avoid narrow solutions to broad problems. To put it another way, DOJ prosecutors should encourage companies to design and implement compliance solutions that are tailored to the company's individual circumstances without imposing knee-jerk or standard solutions.

In the process, DOJ prosecutors have to encourage companies to develop their own unique solutions that reflect their own corporate culture and that appear to be designed in furtherance of their companies' compliance programs. On the other hand, this flexibility should not be an excuse for allowing companies to avoid adequate remediation by improving culture, implementing improved controls and making a sustained effort to enhance the compliance program.

At the same time, DOJ prosecutors have to provide additional guidance on exactly how the questions will be used, how the weight given to various questions will be scored and how much companies are expected to do under this new and robust compliance evaluation. There is no question that the DOJ has raised the bar on compliance programs. The DOJ's strategy is to encourage companies to improve their compliance programs and this action will do just that; companies should respond to the new guidance by evaluating their programs under this new set of questions.

Compliance officers have even more reason to meet and discuss the issues raised by this new evaluation tool with senior management and the board. To the extent that companies fall short, CCOs have to inform the audit/compliance committee

and senior management that the company needs to undertake a new effort with additional resources to implement an effective compliance program.

To be sure, a new self-evaluation and remediation effort is needed. If companies ignore the import of the DOJ's new guidance, they are only increasing the risk of an enforcement action and a more severe resolution than would otherwise occur.

CCOs, however, have to avoid what I call the "Chicken Little strategy" – it does not serve anyone's interest to speak about the new compliance program standards by instilling fear in the board or senior management. On the contrary, the DOJ's new compliance standards should encourage companies to enhance their compliance programs as a means to improve corporate culture, develop long-term sustainable growth, improve financial performance and avoid significant enforcement and legal risks.

About the Author

Michael Volkov is the CEO of The Volkov Law Group LLC, where he provides compliance, internal investigation and white collar defense services. He can be reached at mvolkov@volkovlaw.com. His practice focuses on white collar defense, corporate compliance, internal investigations, and regulatory enforcement matters. He is a former federal prosecutor with almost 30 years of experience in a variety of government positions and private practice.

Michael maintains a well-known blog: Corruption Crime & Compliance, which is frequently cited by anti-corruption professionals and professionals in the compliance industry. He has extensive experience representing clients on matters involving the Foreign Corrupt Practices Act, the UK Bribery Act, money laundering, Office of Foreign Asset Control (OFAC), export controls, sanctions and International Traffic in Arms, False Claims Act, Congressional investigations, online gambling and regulatory enforcement issues.

He has assisted clients with design and implementation of compliance programs to reduce risk and respond to global and US enforcement programs.

He has built a strong reputation for his practical and comprehensive compliance strategies. He served for more than 17 years as a federal prosecutor in the U.S. Attorney's Office in the District of Columbia; for 5 years as the Chief Crime and Terrorism Counsel for the Senate Judiciary Committee, and Chief Crime, Terrorism and Homeland Security Counsel for the Senate and House Judiciary Committees; and as a Trial Attorney in the Antitrust Division of the U.S. Department of Justice.

Michael also has extensive trial experience and has been lead attorney in more than 75 jury trials, including some lasting more than six months. His clients have included corporations, officers, directors and professionals in internal investigations and criminal and civil trials. He has handled a num-

ber of high-profile criminal cases involving a wide-range of issues, including the FCPA and compliance matters, environmental crimes, and antitrust cartel investigations in countries all around the world.

Representative Engagements

- Successfully represented three officers of a multinational company in two separate criminal antitrust investigations involving a criminal antitrust investigation in the District of Columbia and the Southern District of New York.
- Defended pharmaceutical company before the Food and Drug Administration and Senate Finance Committee relating to application for approval of generic drug.
- Conducted internal investigation which exonerated company against allegations of false statements in submissions to the FDA and against improper conduct alleged by Senate Finance Committee.
- Represented company before the US State Department on alleged violations of ITAR which lead to voluntary disclosure and imposition of no civil or criminal penalties.
- Advised several multinational companies on compliance with anti-corruption laws, and design and implementation of anti-corruption and anti-money laundering compliance programs.
- Advised hospitals, pharmaceutical companies and medical device companies on compliance issues relating to Stark law and Anti-Kickback law and regulations.
- Conducted due diligence investigations for large multinational companies for anti-corruption compliance of: potential third party agents, joint venture partners and acquisition targets in Europe, Africa, Asia and Latin America.

- Represented individual in white collar fraud case in Alexandria, Virginia and secured dismissal of criminal charges and expungement of criminal record.
- Represented company before Congress and Executive Branch in effort to modify Justice Department regulations concerning use of federal funds.
- Advised and assisted World Bank in review of global corruption policies, enforcement programs and corruption investigations and prosecutions.

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