A cost-benefit analysis for your ethics program?

The naked king and the whistleblower
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A cost-benefit analysis for your ethics program?

BY JOE MURPHY, CCEP-I

This March I attended SCCE’s European Compliance & Ethics Institute in London, and as always heard a variety of interesting and thought provoking points. One discussion in particular caught my attention and deserves further thought. During a presentation about evaluating compliance and ethics programs, one person in the audience who was an ethicist took the position that practitioners should be doing cost-benefit analyses to prove the value of an ethics program.

This certainly surprised me, coming from an ethicist. While it sounds logical at first, there are some real pitfalls to relying on cost/benefit to justify an ethics program. I would lead off the discussion, though, with a supportive point. I believe it is wise for practitioners to be able to demonstrate business and economic benefits from a compliance and ethics program. There are a number of factors that would contribute to such an analysis: the value of a company’s reputation; the possible savings from avoiding violations and the litigation that follows; protecting the company from waste, fraud and abuse; improved employee morale; and improved ability to recruit new talent, ranging from the workers up to the board. Protecting reputation alone would be more than enough to justify a compliance and ethics program. These benefits and more should be in the practitioner’s toolbox to use when needed.
But here is the concern. The “cost/benefit” should only be an add-on argument. The prime argument is not economics, but rather that acting in an ethical manner is the right thing to do. This can be a surprisingly strong approach to take, and one that has more appeal to employees and the public. The fact that it helps the business is a plus, but not the core driver.

ONCE YOU FALL INTO THE ECONOMICS APPROACH YOU ARE TRAPPED. ECONOMIC THINKING IS NEAT, LOGICAL, COMPELLING, AND VERY OFTEN COMPLETELY WRONG IN PREDICTING HUMAN BEHAVIOR.

While this point may sound a bit high-minded, there is also an analytical reason not to rely on the “cost/benefit” approach. It may indeed sound intuitive to prove in the economic benefit of an ethics program. You may be able to show that a dollar or Euro or pound invested in compliance returns 10% or 15% or some other impressive figure. But once you have reduced the decision making to mere numbers you are inviting your own downfall. What the advocates of a cost/benefit approach are missing is the concept of opportunity cost. That is, if we are working only by the numbers then you should invest not merely where you get a positive return, but where you get the most positive return.

Using opportunity cost, you begin by recognizing that you have only so much capital available. Wherever you invest that dollar you have given up the opportunity to invest it elsewhere. Thus you do not invest in an activity to obtain a 7% return when the same dollar would reap a 10% return elsewhere. Otherwise you have lost that additional 3%.

Thus, from an economic perspective, if you are going to rely on cost/benefit you need to show not just that an investment in ethics pays off, but that it has a return greater than any alternative investment. This is an open invitation to the sales and marketing folks, and the new ventures folks, to show that investing in ethics is a mistake because they can bring in a higher return through their activities: selling, marketing and new market development. Do the advocates of ethics cost/benefit really think they can out-fox people who make their living selling and promoting? (Here a look
back at what cost-benefit analysis did in the Pinto case would be instructive.)

Once you fall into the economics approach you are trapped. Economic thinking is neat, logical, compelling, and very often completely wrong in predicting human behavior. When you start reducing everything to “costs” you leave the real world and enter into a fantasy world where everything can be predicted and decided by using numbers. For people who love math and logic it is a wonderland. But for the rest of us it is fatal fantasy. If you fall into this trap there is no escape and you will likely always lose your arguments.

How do you rebut the marketing or sales advocate who can prove his case that doing just this one thing this one time will be amazingly profitable? Sure, ethics may pay off most of the time, but if the company just uses this one underhanded trick once, or cheats on this one bid, or lies to the government this one time, it will double its money. How can you, having tied yourself to cost/benefit, beat these “one-off” compelling cases? Have you not walked right into this trap by tying yourself into this numerical approach to business?

My advice is to recognize what our field is about. We are not about simply making money and maximizing profits. We are not about mathematical formulae. We are about doing the right thing and preventing business crime and unethical conduct. Will it help the business? We certainly hope so and we believe in the long term ethical businesses do better than those that lie, cheat and steal. But when it comes to distinguishing right and wrong, it is not a cost/benefit analysis. We do this work because it is the right thing to do.

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The naked king and the whistleblower

BY LUIS ALVIA SUAREZ

One of the childhood fairy tales that I remember is the one of a medieval king who was cheated by three dirty scoundrels, hiring their services to make a suit whose main wonder, besides the rich fabrics, was that it could not be visible to the eyes of those who were the sons of a crook. After months of work—it’s clear, at the expense of the kingdom’s profit and loss account—it arrives on the final day. For the true misery of the king, for it is then that he reaches full account of his obscure origin, when he doesn’t see any dress at all. The praises of his vassals to the elegance of the clothing just increase his pain. The mockery goes down when the black groom holding the reins—perhaps a guy that might have little to lose—says: “Majesty, you may very well think I am the son of a crook, but as I feel that I am not, I have to tell you that you have no shirt.”

Who among us has ever seen any naked executive…but I am asking you: Who has been in the role of the black groom? If I am recalling that story, attributed to the Spanish middle-age fairy tales of “El Conde Lucanor,” it is because it has to do with the conclusion reached during one of the working sessions at the SCCE European Compliance & Ethics Institute: the worldwide number of countries that are truly protecting whistleblowers today is zero. Donna Boehme couldn’t say it in a louder voice: “Sit a whistleblower at
“your table.” Sometimes people ask me how is it possible that, despite so many controls implemented, so many expert consultants and executives, still failures occur in companies, giving rise to serious breaches of the market rules, and so far from what would reasonable diligence and care require from those who are responsible for taking decisions?

Is it just because they don’t listen? Is it because they are misguided? The press has recently echoed the fact that in the UK is born an association with the aim to provide support to “whistleblowers” who have lost their jobs. Killing the messenger is not a good solution to the problem; however, that these kind of associations appear indicates that we are still far from “sitting a whistleblower at the table”—as Donna Boehme recalled at the SCCE European Compliance & Ethics Institute—and still far away from considering the added value that someone, without fear of consequences, tells us that the king has no clothes. In our story, the black groom made his king stop spending money on feeding four knaves who ate his fortune on the pretext of making a magic dress. The fairy tale does not tell us, however, what happened to this first medieval “whistleblower”…I hope he was rewarded and recognized as a hero.

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The courage of our convictions: An undervalued leadership trait

BY FRANK J. NAVRAN

In the spring of 2000, I was invited to address a conference of high-level business, non-profit and academic leaders who had convened to support the launch of a new, non-profit ethics center in St. Petersburg, Russia. Among the attendees was Vladimir Putin’s former university professor and faculty advisor.

The proposed center would initially be funded by a grant from a US-based corporate foundation and was being launched as a joint venture with a US-based ethics center and a small, non-profit, consulting company with an established presence in St. Petersburg. This new center’s mission was to encourage and facilitate ethical business conduct in the emerging “free-market” environment in Eastern Europe. It was a courageous decision and I was proud to be invited to be part of the process.

As the keynote speaker I was asked to set the tone for the conference. That was to include acknowledging the value of the endeavor and thanking those responsible for this new venture. I was also asked to help set the bar—to give the center a target and a definition for success, to make the case for raising the standards for ethical business conduct in an environment corrupted by ineffective government and the presence of a powerful and violent criminal element.

Before moving on to my prepared remarks, I offered the 60 or so invited guests the following prologue.
I would like to thank the conveners of this conference for affording me the opportunity to speak on a subject dear to my heart—“The Future of Business Ethics in Russia.” I have had the opportunity to speak on the subject of business ethics in a number of different venues all around the world. But this is different. This is special. After all, Russia is my ancestral home. To put my remarks in perspective, please allow me to presume and impose a little of my personal history on these proceedings.

In Moscow, sometime around 1913–14, a young college student and his 16-year-old girlfriend found themselves in a terrible situation. They were deeply in love and hoping to marry, when the young man overstepped the bounds of political correctness, speaking out, as college students are often wont to do, against what he perceived as imperial tyranny and injustice in the very early days of what would later become the Bolshevik Revolution. As a visible activist (some might say “revolutionary”) on campus, he was targeted by the Czar’s secret police and arrested. After what passed for a trial in that era, he was found guilty and exiled to Siberia.

His girlfriend, the daughter of a local merchant, was heartbroken. Being both strong-willed and not one to fear hardships, she opted to take the situation in hand and set it right. The story is that she begged, borrowed, or stole her mother’s jewels in order to implement her plan. She knew which prison her lover had been sent to and took that long, arduous, and dangerous trans-Siberian train ride to her destination. There, with her mother’s jewels in hand, she bribed the guards and facilitated her lover’s escape. Together, they made their way west, back through Moscow, where they said their goodbyes, then onward, via England to the United States, where they passed through Ellis Island to pursue a new life and the promise of freedom—a dream they shared until their deaths in the 1970s.

That young college student and his brave, 16-year-old girlfriend were my maternal grandparents. And here we are, in the first year of the new millennium, and I have
been invited to this beautiful and historic city to present a keynote at the first-ever International Ethics and Anticorruption Conference, hosted in Russia.

Ironic, isn’t it? After all, if it weren’t for a little good, old-fashioned, Russian corruption, I never would’ve been born. But that was then and this is now.

**Survival at all cost**

I have related that same story on numerous occasions since. For me it is a testament to the power of the human spirit in the face of adversity. If we find someone or something we care for so deeply, we will draw on all of our courage and ingenuity to find a way, in the face of even the most daunting challenges, despite whatever barriers society and/or government might have placed in our way, to succeed. It can be understood as a variation on our need for self-preservation—the survival instinct. In my grandmother’s case “survival” was broadly defined as: “I can’t live without that man.” It is the same psychological imperative as drove early man, but in modern society we often confuse physical “needs” with social or psychological “wants.”

As I understand it, deep in our human psychology is a survival instinct: *survival at all cost*. And, since organizational psychology is an extension of human psychology, that drive extends to organizations as well. But, is facing “…even the most daunting challenges, despite whatever barriers society and/or government might have placed in our way” appropriate organizational behavior? Is doing whatever it takes to drive the stock price higher, best a competitor, or conquer a market adequate motivation for violating society’s standards of ethical business conduct? Is this what leaders do?

With that as context, we can perhaps better understand why there are so many organizations that are willing to take ethical shortcuts in their pursuit of survival/success, and why there are so many so-called “leaders” who are willing to sacrifice their own integrity in that pursuit.

If you believe in sacrificing one’s integrity in the pursuit of organizational goals, read no further, because I am going to argue the opposite position.

**AS I UNDERSTAND IT, DEEP IN OUR HUMAN PSYCHOLOGY IS A SURVIVAL INSTINCT: SURVIVAL AT ALL COST. AND, SINCE ORGANIZATIONAL PSYCHOLOGY IS AN EXTENSION OF HUMAN PSYCHOLOGY, THAT DRIVE EXTENDS TO ORGANIZATIONS AS WELL.**

In today’s economic climate, survival is a real issue for every organization. Confidence about our collective and individual futures has been replaced with uncertainty at best, dread at worst. If the giants of the past can fail, then so can we. What was the old saying? “As GM goes so goes the nation.” (In 1953, at the peak of its dominance, GM president Charles Wilson told Congress that what was good for the country was good for GM, and vice versa.)
Every organization is rethinking their inevitability and recognizing their uncertainties. Whether we are talking about a small entrepreneurial venture, a small department in a larger organization, or a corporate giant, the story is the same. Survival is a top priority. Everything else depends on that fundamental. Nothing else matters if this organization ceases to be. The same is true in regard to government. Society has demonstrated a strong appetite for cuts in government and even those believing they were promised lifetime employment are facing uncertainty.

**Treating the symptoms**

By all means, we have to get our economic house in order. But, just as a doctor wants to drive down a dangerous fever, we must recognize that we are treating a symptom. A fever is a sign that the body is battling to restore its health. Our current economic situation is a battle for our fiscal health. But we have to look at the big picture—what are the causes. Fighting symptoms is a necessary but insufficient (interim) step. Finding and addressing the cause(s) is where victory will be won.

I propose that among the causes behind much of what ails our economy, our industries, and our society can be captured in the simple notion of a disregard for “ethics”—values-based behavior (from the Greek word ethos, meaning customs). Wealth is not an “ethical value.” It is not a value at all. It may be a goal or an objective, but it is not a fundamental principle that defines right and wrong, good or bad, fair or unfair.

If we are to address the problems at hand, we need to understand causality. We need to find and treat causes, all the while attending to symptoms. I propose those causes can be better understood if we frame them in reference to our individual and shared values. Generally, we see ethical values to include promises or obligations such as:

- **Accountability**—to accept responsibility for the consequences of our actions
- **Compassion**—to treat others out of our sincere concern for their interests and needs

- **Courage**—to do what is right, good, and fair, even when doing so is difficult

- **Duty**—to act in ways that serve a common or greater good

- **Fairness**—to balance equity and equality in how we treat others

- **Honesty**—to tell the whole truth

- **Honor**—to fulfill all one’s duties and obligations

- **Integrity**—to adhere to our values and keep our promises

- **Respect**—to honor the inherent value of every person

- **Trust**—the residue of promises fulfilled

Values are the principles that define what is right, fair, and good. And, they are universal. Our common human values can be found in every society. Interestingly, while the values are universally shared, they can often be defined in different cultural contexts by different specific behaviors. It can be as simple as our body language. In some cultures averting one’s eyes while speaking to another can be seen as indicative of uneasiness or deviousness. In other cultures that same behavior may be a sign of humility or respect—the ethical thing to do.

To understand today’s challenges it can be helpful to use our values to define what we observe—both conformance with and violations of those common principles that define what is right, fair, and good. And, to identify what other principles might be in place that are contrary to these ethical principles.

Specifically, I suggest we consider greed, ambition, and self-interest—three variations on a theme. Although we all espouse the ethical values noted above, in “real life” the values that seem to be driving the individual and collective conscience of many organizations more closely resemble, greed, power, wealth, possessions, status, … all the trappings of our egos.

There are those who claim that, “extraordinary times call for extraordinary measures.” It
was certainly the argument my grandparents used in justifying why it was appropriate for little Anna to engage in theft and bribery. But while extraordinary measures might be justified, do they legitimize unethical measures? And, if so, what defines “extraordinary times”?

An expensive lesson

Ask some CEOs, and I suspect that the mere threat of a sharp drop in share value could be sufficient to justify “whatever it takes.” That is not idle speculation. Allow me to recount a sad story. I am blurring the details to maintain some degree of anonymity for those involved. The story involves a US-based power company that was building a nuclear-power plant. For the sake of this tale I am assuming the cost of a new nuclear power plant to have been in the $3 billion dollar range at the time of this incident, and the construction window, from project approval to turning the lights on, to be about 8-10 years. By any measure, that is a huge investment.

I was in the office of the Vice President-Nuclear of the power company, while its occupant was packing his personal belongings. He had just been fired. I asked him how it came to this. How did he find himself being fired? His story can be told as this:

It seems like every day I was getting calls from the boss regarding the progress of the plant. He had the project timeline and wanted to be certain that we met each and every target date. The pressure was palpable. “I don’t care what it takes. We have to meet the schedule. The Board is breathing down my neck. Even a tiny slip will have an adverse affect on the share price, and that affects my performance review and I promise you, it will be reflected in your as well. If you can’t get the job done, on time, I’ll find someone who can.

The message was loud, clear, and not subject to interpretation. Keep to the schedule. The first slip-up will be your last.

Naturally, the VP put pressure on those down the line. It seems that pressure flows downhill—one of those laws of organizational nature. No one was willing to be responsible for missing a milestone so everyone did whatever it took to check the appropriate box, on time, on schedule.

IT SEEMS THAT PRESSURE FLOWS DOWNHILL—ONE OF THOSE LAWS OF ORGANIZATIONAL NATURE. NO ONE WAS WILLING TO BE RESPONSIBLE FOR MISSING A MILESTONE SO EVERYONE DID WHATEVER IT TOOK TO CHECK THE APPROPRIATE BOX, ON TIME, ON SCHEDULE.
as a monument to the drive to survive. No one in that organization had the courage to do the right thing. The Board lacked the courage to take a short-term hit from the investor community for missing a deadline. The executive team was afraid to fall short lest the Board replace them with someone who could do the impossible. The project manager was covering his posterior, and everyone down the line took their cues from above and did whatever was needed to be able to check the “completed” box on schedule. No courage. No accountability. No integrity, honesty, or fairness. It was an organization that sacrificed its integrity for a short-term check mark on a schedule, fearful that “they” would not understand and would fire the first person foolish enough to tell the truth—foolish enough to tell the emperor that he had no clothes.

Imagine that you have just been hired as the new VP-Nuclear at this company. What would you do? How would you go about changing the culture?

Meet my latest hero
It was October, 2008. The financial markets were melting. The presidential candidates were on the way back to Washington to vote on the TARP proposal. I was on a commuter train to New York City to attend the St. John’s ethics conference. I am not a usual commuter and did not know the rules of commuter train etiquette. In my ignorance, I struck up a conversation with the young lady sitting next to me. The usual banal questions: “Do you make this commute every day? How long does take? What do you do?” Yes, she made this commute everyday and has been doing so for two years. She and her husband had decided it would be better for the children to live in the suburbs, and she typically used the commute for “quiet time”—a not so subtle hint that I was intruding. And she was the CFO of a midsize insurance company.

Never one to recognize subtle hints, I went on to ask her, “Given the times we’re in, how’s it going at your company?” “Better than most,” was her reply. “Sounds like there’s a story there,” I countered, and indeed there was. She had been on the job for less than a year. During her first week she met with each of her direct reports. One of the people reporting to her managed the company’s investment portfolio. She had asked all of her reports for a briefing, and he proceeded to explain their overall investment strategy. A cornerstone of that strategy was investments in what he referred to as “securitized debt.” She was unfamiliar with the concept and asked for an explanation. His reply was, in her words, “disconcerting.” He said, “We don’t really understand how it works, but it is Triple-A rated and were making a boatload of money.
And besides, everybody else is doing it.” Not completely satisfied with his response, she charged him to do a little research and come back in a couple of days with a more detailed explanation of how securitized debt really works. Two days later he was back, but his answer essentially the same.

Her position, she explained, was that she was not willing to have anything in their investment portfolio that she could not thoroughly explain and defend their board. If he couldn’t come up with something better than “everybody else is doing it,” then she had no choice but direct him to divest their portfolio of whatever he couldn’t explain and reinvest those monies in things that were more conventional. As a result of her position, when the financial world around her had begun to collapse, their investments were on much more solid ground than those of her colleagues and competitors. So, given the state of the economy, the financial circumstances in her company were “better than most.”

Since that train ride, I’ve probably told the story 100 times and prefaced each telling with a reference to this young CFO as “my latest hero.” After all, what is a hero? My dictionary characterizes a hero as a person who is admired and/or idealized for his/her courage, outstanding achievements, or noble qualities. My seatmate on the train exhibited all of those attributes. In my mind, the insight gained from the story is not that a young CFO could demonstrate heroic courage in the financial industry, but rather that such courage is so rare in the C-Suite as to be noteworthy.

Her sense of survival was tied to the long-term success of her institution, not short-term personal gain. She had her priorities right. There is no right way to do the wrong thing. There are any number of wrong ways to do almost anything. And there is a right way, if we are willing to look for it and bold enough to choose it.

Discerning right from wrong
Corruption can be as small and subtle as failing to ask the right question or failing to ask for more when you get an insufficient answer. There may be times when extraordinary circumstances can justify doing what you know is wrong. I often argue that some “wrongs” may be necessary—as was the case with my dear, sweet grandmother. Bribing a guard is wrong—but, in context, it was the lesser evil. When compared to the wrongs committed by the state against the man who would be my grandfather, the bribes paid to buy his freedom may be deemed justifiable.

It comes down to a simple proposition in my view. None of us is perfect and none of us...
lives in a perfect world or works for a perfect organization. We cannot use the universality of imperfection as a justification for doing what we know is wrong or tolerating when others do so. There are circumstances where the “wrong” is so grievous that violating an organizational standard, such as confidentiality of company information, might legitimately be subordinated to ignoring the violation of an ethical standard. Sometimes blowing the whistle (reporting a known violation to the ethics office, or if that is not effective, to the authorities) can be the right thing to do.

It takes inordinate courage to do the right thing in some instances. It may even require doing what others would deem the wrong thing, such as going public with “confidential” information when that information reveals significant misconduct or illegal activities. Sometimes we have overriding obligations to society that simply compel us to do what may not be in the short-term best interest of our group, unit, division, or company.

There are times when our conscience tells us that there is a greater good to be served. There are times when doing what others may deem “wrong” is really right. The wrong is that those others might lose something that they value, but are not entitled to. It may be that they are defending an indefensible and unsustainable position and that you, doing what is right, are perceived as a threat. It may be that the “authorities” within your organization are as wrong as the authorities were when my grandma traveled to Siberia and freed the man she loved. It may be that sometimes two “wrongs” do make a “right”—especially if one of the “wrongs” is only deemed to be wrong because it violates the special interest of those empowered to make the rules or set the standards.

Sometimes, bribing a guard to save the life of the one you love, whose only “crime” was offending the powers that be, is a beautiful wrong. Survival is a strong motive. Sometimes it is the survival of our sense of fairness, or goodness—not our physical survival—that is in play. And sometimes it is as simple as saying “no” when others suggest, encourage, or direct you to do what you believe is wrong. The courage of our convictions is a powerful tool in creating and sustaining an ethical working environment and ensuring ethical action the workplace. The courage to do the right thing could have saved a multi-billion dollar nuclear power plant. The courage to do what some might deem the wrong thing (bribing the guards in a Russian prison) in fact, saved my grandfather—and indirectly produced me.

We all have our ideals. We all face circumstances where our ideals are challenged and where we must make difficult choices. Those are the times when we are tested, where the depth
of our commitment to what we profess is tested. Do we truly believe in what we say is right, fair, good, and just, or are those merely words on a poster hanging on a wall in the office?

We may not have to get on a train to Siberia and bribe the guards in a prison to enable us to live according to our values. We may not have to demonstrate the courage and commitment of little, 16-year-old Anna, who risked everything because of love. We may not even have to demand competence and accountability from those whom we lead. But we all have to rise to the occasion and stand up for what we believe in, nearly every day at work. We have to recognize and face up to the challenges we face when our values are questioned, our standards threatened, or our principles compromised. We need to have at least that much courage.

In a recent series of articles, I explored what I referred to as the seven most commonly adopted values. Courage was included in that list. While I believe I was accurate when I included it among the most frequently adopted, it seems to me that it is not always as prominent in the thinking of those who shape the culture of today’s organizations as one might hope. My favorite CFO (the woman who refused to do something just because everyone else did it) displayed remarkable courage. The fact that it is remarkable—worthy of remark—is sad. Would that it were so commonplace that her actions were unremarkable.

Postscript
Finally, there is a postscript to this story. The St. Petersburg ethics center that we established lasted only about two years. It had very little impact. The criminal elements in the area employed sufficient violence to overpower the wishes of those in the business community who wanted to do the right thing. Fear can be a powerful motivator. The center was allowed to quietly fade from existence. It was a sad and painful loss. We will never know what could have been. Perhaps, someday, we will have the courage to try again.

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Business and modern slavery: “Just enough” is no longer just enough

BY CLANCY RUDEFORTH

Amidst the headlines of the horrendous working conditions endured by many migrants on Thai fishing boats several weeks ago, another unique story involving modern slavery was reported in the media. Global construction giant, Vinci Construction has been sued by workers’ rights group Sherpa and accused of facilitating forced labour in its operations in Qatar; a country where exploitation of migrant populations in the construction sector, ahead of the 2022 football World Cup, has been well-documented.

Also last month, the U.S. District Court jury ruled that Alabama-based Signal International was guilty of labour trafficking, and ordered to pay $12 million. Its co-defendants, a New Orleans lawyer and an India-based recruitment agency, were also found guilty and ordered to pay an additional $915,000 each in what has been dubbed the largest labour trafficking case in American history.

Could these two cases spark a wave of litigation against multinational companies for failing to recognise and address the possibility of modern slavery in their operations and supply chains?

That is certainly a possibility. The tide is changing and governments aren’t waiting for companies to voluntarily act but are increasingly requiring companies to step up their efforts to tackle modern slavery in their supply chains.
Recently, the UK Parliament passed the UK Modern Slavery Act—the first legislation of its kind in Europe that requires British companies to report on the steps they are taking to ensure any goods produced or services provided by their workers are free of modern slavery. Importantly, it also seeks to place a legal responsibility on company directors to ensure that these statements are upheld. Proposed amendments to the draft Bill would have compelled companies to act (not only report) on findings from their efforts to identify modern slavery. Those amendments were not passed, however, provide an indication of the potential direction for more stringent regulation in the future.

The United States through its Executive Order also reflects a regulatory trend toward holding companies responsible for their anti-slavery actions—and inactions—overseas. The US Federal Acquisition Regulation requires government contractors and their suppliers to certify that they and their suppliers do not facilitate modern slavery. While obviously not the case currently, it is a possibility that tackling slavery in supply chains could in the near future become on par with issues like anti-bribery and corruption; where legislation in the US and UK has demonstrated how law can improve multinational corporate behaviour. For bribery and anti-corruption, regulation has pressured and motivated companies to take concrete action to address the impacts of their activities on vulnerable populations. Anti-corruption considerations are key aspects of a company’s operations and risk management systems, and led to the creation of industry groups and voluntary initiatives such as the Extractive Industry Transparency Initiative, to improve collective performance. Companies that fail to tackle bribery and corruption have been exposed to campaigns, lawsuits and other civil and legal pressures. As lawmakers’ weapons against modern slavery expand and improve, the same scenario will become true for companies with respect to modern slavery in supply chains.

The message for companies is to attack modern slavery openly and aggressively. Consumers will demand improvements: recent polls indicate that consumers would pay significant premiums for products and services shown to be free of modern slavery.

Under the UN’s “Protect, Respect and Remedy” framework, businesses have a responsibility to respect human rights, including the fundamental rights not to be held in slavery or servitude. In an effort to meet that responsibility, Vinci, for example, publicly commits to ensuring “total transparency in its practices and those of its subcontractors.” It is also a member of the UN Global Compact, a “soft law”
business and human rights initiative that seeks to mainstream fundamental human rights principles. But despite its commitments, Vinci’s failure to adequately consider and address the alleged abuses on vulnerable populations has had severe and immediate impacts.

Global organisations are recognising the legal imperative to go further as soft law solidifies. Many have begun institutionalizing respect for human rights by incorporating the widely-endorsed UN Guiding Principles on Business and Human Rights into corporate governance policies and procedures. The Guiding Principles and complementary Reporting Framework provide businesses with a solid procedural platform from which to launch their efforts to address modern slavery. As Vinci is now recognising, failure to meet and exceed soft law requirements can lead to very hard reputational, legal and economic consequences. Doing “just enough” is no longer just.

Forced labour is illegal in every single country. Yet it persists, pervading a range of industries in the global economy and generating US$150 billion in illegal profits a year. According to the Walk Free Foundation’s Global Slavery Index, an estimated 35.8 million people are currently living in modern slavery many of them hidden in the supply chains of global companies around the world. Most companies would find slavery in their supply chains, if they dug deep enough.

It is time for businesses to accept their pivotal role in the fight against modern slavery. Practical improvements can include anti-slavery criteria in procurement decision-making, systematic due diligence and risk assessment in line with the UN Guiding Principles, multi-tiered supplier engagement, workplace on site assessments, industry wide collaboration, and enhanced reporting on the ways in which they are avoiding causing or contributing to modern slavery.

It will always be difficult, if not impossible, to guarantee absence of exploitation in complex manufacturing and supply chains (just as “zero tolerance” safety policies do not guarantee the absence of accidents). Unscrupulous recruiting agents and floor managers will continue to seek to exploit vulnerable workers. Nevertheless, mitigating exploitation risk matters. Companies that act now can protect and enhance their brands, and the rights and livelihoods of those people they have a responsibility to respect.

Clancy Rudeforth is Legal Advisor for the Global Business Authentication, a programme of the Walk Free Foundation, which provides businesses with the tools they need to tackle slavery in their supply chains.
On May 15, the Society of Corporate Compliance and Ethics (SCCE) sponsored a one-day workshop in New York City. One prominent speaker, Michael Bromwich, spoke about “Addressing your highest risk: the C-suite” and talked briefly about why generally good people, or at least those perceived as such, are capable of doing very bad things. He touched on the too often overlooked area of Behavioral Ethics, which is the focus of this regular column.

Mr. Bromwich inferred (I’m interpreting a bit), competitiveness or the obsession to win at any cost can cause otherwise rational individuals to engage in misconduct. Competitiveness becomes a mind altering intoxicant that gives the ultimate high.

During a follow-up question, I added to Mr. Bromwich’s insightful observation by calling it a “lost sense of self” when a person’s identity is defined by winning, degrees, bonuses, and other societal measurements of success suffocating inner well-being.

Fear, greed, insecurity and the inability to strip away all the outward signs of success to better understand ourselves contribute to the crisis in ethics today.

In May, Labaton Sucharow LLP, in collaboration with Mendoza College of Business at the University of Notre Dame, released a report documenting the widespread disregard for ethics among financial service professionals.
Key findings from the report, “The Street, The Bull and The Crisis: A Survey of the US & UK Financial Services Industry”, include:

- “47% of respondents find it likely that their competitors have engaged in unethical or illegal activity in order to gain an edge in the market … This figure jumps to 51% for individuals earning $500,000 or more per year.”

- “More than one-third (34%) of those earning $500,000 or more annually have witnessed or have firsthand knowledge of wrongdoing in the workplace.”

- “23% of respondents believe it is likely that fellow employees have engaged in illegal or unethical activity in order to gain an edge.”

- “25% would likely use non-public information to make a guaranteed $10 million if there was no chance of getting arrested for insider trading.”

- “Nearly one in five respondents feel financial services professionals must at least sometimes engage in illegal or unethical activity to be successful.”
“27% of those surveyed disagree that the financial services industry puts the best interests of clients first. This figure rises to 38% for those earning $500,000 or more per year.”

“33% of financial services professionals feel the industry hasn’t changed for the better since the financial crisis.

Perhaps one of the most disturbing findings is that one in ten respondents “signed or been asked to sign a confidentiality agreement that would prohibit reporting illegal or unethical activities to the authorities.”

In a speech in late winter, Federal Reserve Chair Janet Yellen spoke of “pervasive shortcomings” in corporate values. Stress tests for banks, a mechanism to assess the financial health and prudence of senior executives, do not address the systematic disregard for ethical values.

Despite the fines, penalties, and an endless bad press for the financial services sector nothing has changed. Those making decisions impacting their entity’s balance sheet with the potential to negatively impact consumers and overall economy are still not being personally held accountable.

How many unscrupulous bankers making decisions that hurt the economy have been named in the newspapers? Very few. In part, this reflects the ineffectiveness of today’s media, but also a conditioning and acceptance by the greater public to allow ethics to become faceless and generalized by blaming legal entities created on paper rather than holding individuals publically and criminally accountable.

The Dutch Banking Association is now requiring bankers to take an oath. The oath is an attempt to awaken conscience, consciousness, genuine civic and social responsibility, and to give life to an institution’s values statement which often includes integrity. Personal oaths is one tool to complement individual accountability in a public manner.

No organization’s culture can be changed, regardless of its size, without including behavioral ethics. Ethics has a human face. Understand human nature to nurture an individual’s better angels and collectively each person’s perspective within the organization contributes to shifting the cultural paradigm. ■

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Leadership: The game changer for an effective speak-up policy

BY DOMINIQUE DUSSARD

An effective speak-up policy is an important part of a compliance and ethics (C&E) program. By encouraging employees to seek guidance or raise concerns, it contributes to the protection of the company’s values and, ultimately, improves the health of the organization and the welfare of its employees. Therefore it should play a significant role in inspiring trust vis-à-vis and within the company. Speak-up policies (also known as reporting) are common practice in today’s business environment, but their acceptance and effectiveness are still very much variable and unstable. This is largely attributed to the different perceptions that exist from region to region, between industries, or across varied companies. Ironically, there are even cases when speaking up instills a sense of systemic mistrust across an organization.

Multiple and diverse causes are at the origin of such contradiction. Generally, cultural sensitivities play a tremendous role in this sentiment; however, they are often combined with other factors, including a lack of awareness, unclear procedures, and a fear of retaliation. Loyalty dilemmas can also present a significant hurdle for organizations. For example, an individual may decide to abstain from speaking up on the assumption that the risks of immediate sanction (i.e., dismissal) to his colleague(s) are greater, in comparison with the risks for the entire organization which appear to him
as uncertain, undefined, or long term. This is an often underestimated threat for companies.

The major challenge associated with this process is changing the perception over the long term to improve effectiveness and reliability of C&E policies. A central aspect of the solution lies in management’s attitude towards speaking up and, in particular, how it is reinforced through their leadership. And it may come as no surprise that in today’s business environment, we still see more cases where the role of management in disseminating the C&E messages, rules, and procedures (including speaking-up) to their direct reports is significantly lacking.

Sustainable results require management leaders at all levels to support these policies proactively as part of their day-to-day jobs. On the one hand, senior managers must set the right tone at the top and assign the appropriate resources. On the other hand, line managers must, in conjunction, ensure that the C&E message positively permeates through the entire organization. Line managers are typically in daily contact with employees and are, in most cases, the best individuals to explain the rationale behind the C&E policies, as well as illustrate the importance of the values in the way they conduct business. They are also best positioned to understand the context and extent of any risk that may arise and decide the best course of action, which may well require the involvement of other C&E resources. Although other means such as hotlines should be offered as a place to call for individuals that prefer speaking to a third person, line management should preferably be the first port of call for employees to seek guidance or raise concerns.

Starting with line managers to influence change

Line managers must first be convinced that taking on this pivotal role will enhance the trust and respect within their team. Effective speaking up should not be viewed as a threat to their authority, but as a golden opportunity to better manage risk, thereby fostering a stronger sense of leadership—especially since the first contact with an employee may either engender trust or, on the contrary, induce mistrust, both in a durable manner.

In addition, line managers need to be prepared and equipped to take on this role, which requires several types of education and training. In particular, it’s important to reinforce through training the attitudes and behaviors that they must exude when assuming this role. Another important element to consider is the preparation of a clear and appropriate message that reflects the company’s culture. Being the carriers of that message, line managers or their representatives should be part of the preparation process. Still too often, managers receive a communication package entirely designed by corporate departments.
Further, in my view, to maintain their leadership engagement and hence achieve sustainable results, managers should be entrusted (together with their teams) with the C&E performance evaluation process through a procedure of self-assessment. This type of procedure should reveal the effectiveness of the manager’s leadership as a manager, the extent to which the C&E message has influenced the team, and the need for further clarification, education, and support from the C&E department.

As a result, senior management may be inclined to exert a greater control and influence on the C&E resources and processes. Perceptions play an important role in the success of the program, and such control and influence may result in a hampered confidence in the independence and objectivity of the speak-up system. A vicious circle can then appear: more exposure leads to more (biased) control and more (biased) control weakens the credibility of the speak-up policy, which leads to higher uncontrolled risks and greater exposure.

So how can this problem be avoided? Only senior management can influence and ensure that every decision made is based on the criteria of independence, credibility, and maximal efficiency.

The ultimate goal is for information to flow freely within an organization, as a result of a speak-up policy that inspires trust, prevents risk, and mitigates the impact of any misconduct.

In sum, the game changer for an effective speak-up policy is that line managers serve as C&E leaders to carry and live organizational values; however, support from senior management and the proper training is necessary for their success. The right tone at the top is simply not enough. Senior management must also allocate the necessary resources and appoint adequate personnel. The imperative objective is to secure the independence and robustness of the C&E program. Only then will managers be able to exert full leadership and be credible with employees.

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**Getting senior management involved**

Inspiration and the commitment to a culture of compliance should originate from the top. Interestingly enough, the reality is that significant non-compliance occurrences often involve members of the senior management, which in turn generates skepticism from employees, their representatives, and managers about the effectiveness of speaking up. In addition, the regulatory landscape is getting stricter and more complex, and with the authorities and stakeholders expectations being raised, the responsibility of senior management to influence good behavior has been increasingly scrutinized.
In our secondary school, there was a student who was known for cheating. In fact, he not only cheated but also had a strong belief that cheating was halal (permissible). When one of the other students refused to let him cheat off him (because cheating is not allowed), he would answer that cheating is not haram (forbidden). “This is not even cheating,” he’d say, “it’s only helping a friend out.” When the teacher of English caught him cheating, he would defend himself, saying: “Teacher, this is the language of the West. Then, it is permissible to cheat in it.” He would always try to convince his fellow students that they had the right to cheat in subjects such as geology, history, and geography because they are “useless and a waste of time.” He would find various excuses for cheating. His only aim was to get the degree, regardless of the means.

In the world of business and companies, we sometimes meet people who remind us of this student. For instance, there are employees who violate the regulations, laws, or policies of their company and their excuse is: “All employees do this,” or “No one is going to get hurt,” or else, “I have the right to do it because the company has not given me what I deserve.” Through these expressions, the employee seeks to convince himself that his “violations” are right. Another example is the employee who takes the office stationery home to his children, saying that everyone does it. Or, another employee will consider his malicious complaint against his colleague as “revenge” after the latter’s earlier complaint against him. More,
an employee will justify getting “an amount of money” from one of the suppliers by saying that “it hurts no one—no one will know about it anyway.” Another instance is an employee who extends his business trip for an additional day and claims that he did not complete his work and that he deserves that day due to the huge efforts he made during the year. Other employees will reduce the profits in the financial statement they present to the Income Department in order to pay a lower amount of Zakat (obligatory charity). Or, they will increase the profits in the financial statement to be presented to the banks in order to get a bigger loan.

Adhering to work ethics means that the employee should be honest and avoid the excuses that urge him to justify violations. It also means that he should ask for the advice of his superior or the officials in the Human Resources, Legal, and Work Ethics departments if he faces any problem or if he finds himself in a situation where he is reluctant to do something or to take a decision. In fact, adhering to work ethics implies that the employee is capable of making the right decision that is in agreement with the company’s values, integrity, regulations, and laws. This protects both the company from losing money or reputation and the employee from getting sanctions such as reprimands or dismissal.

As for our former fellow student, I have to tell you that, in spite of all his excuses, he never got away from the punishment of the school headmaster. His recurrent cheating attempts served only to tarnish our reputation amongst teachers and invigilators who used to call us the “Class of Cheaters,” although there was only one cheater in the class!

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Trouble abroad for Kilkarian Electronics

BY BRETT INGERMAN AND ELLEN GINSBERG SIMON

This is the second in a series of articles that confront real-life compliance and ethics problems and offer practical solutions.

“This meeting of the Kilkarian Electronics’ Governance, Regulatory, and Compliance Committee shall come to order.”

Chief Compliance Officer Claire Candida Owens observed her colleagues around the table, who included General Counsel Gordon Corman, Vice President of Human Resources Harriet Rogers, Chief Risk Officer Riley Orbach, and Head of IT Ichabod Traynor. Since instituting Kilkarian’s GRCC, her interactions with these faces had become consistent and productive. Today’s meeting, however, promised to present a number of challenges.

“Ivan, are you on the line? We’re ready to begin when you are.” said Claire. Chief of Internal Audit Ivan Ackerman’s voice cracked on the speaker phone.

“Thanks, Claire,” Ivan drawled in his relaxed Southern style. “I appreciate you all getting up so early for this call. It’s the end of the day here in Indonesia. Our on-site audit in Jakarta has raised a number of concerns relating to some of our third-party agents and sales intermediaries here. In some cases, it’s pretty clear to me that no one should have approved doing business with some of these agents. Certainly, if any of us had been consulted, we would have
nipped it in the bud. I think it will require involvement of the full team to address these problems.”

“Ivan, why don’t you tell us some of specific issues that concern you?” CRO Riley chimed in.

“Well here’s a fun example: one of the sales agent relationships in particular caught my eye because the particular agent demanded to be paid in an offshore account. I couldn’t find any real information to support his expertise or ability to assist our electronics business here, and, frankly, I couldn’t find him. I tried going to the address he supplied to our local office, and I ended up on a wild goose chase.”

Riley laughed.

“No, seriously. I ended up at a chicken farm on the outskirts of Jakarta. Unless Kilkanian is expanding into the poultry business, I’m pretty sure he provided a false address for his ‘office.’ Further investigation suggests he doesn’t even live in Indonesia.”

Claire and Harriet exchanged looks of disbelief.

“But didn’t the local office do any due diligence before contracting with this guy? How could something like that happen?” asked Gordon, beads of sweat appearing on his brow.

“It looks like the local office selected this guy because a government official suggested that they use him.” Ivan continued. “They share the same last name, so I’m betting that he’s related somehow to the official. He billed himself as someone who can ‘make things happen’ and demanded a great deal of liberty to ‘get the job done local-style.’ Since this conversation is privileged, Gordon, I’ll just tell you that the people in this office responsible for making third-party contracting decisions are not the most objective or disinterested people. Someone outside of here needs to be vetting these decisions, especially in situations where about 10 red flags go up after just a cursory attempt at diligence.”

“This sounds like a law school issue-spotter exam.” Gordon grumbled. “In fact, it sounds eerily similar to what happened at Alstom. The DOJ has made it perfectly clear that the Foreign Corrupt Practices Act requires us to exercise due diligence and take precautions to make sure we only enter into business relationships with reputable parties. We can be held liable for knowing that improper payments are
being made just for demonstrating deliberate ignorance or willful blindness.”

“I agree that this should have been an easy one to spot,” responded Ivan. “But let’s face it. Each country in which we operate has so much liberty that we simply don’t have a good handle on who all of our third parties are worldwide. Our database of third parties is woefully out of date. I can’t get a handle on how the decision to do business with this guy and a number of other individuals and entities was made. There doesn’t appear to be a uniform process or approach to due diligence.”

“Ivan, are you saying this is a systemic problem?” Claire asked.

“Absolutely. And it requires a systemic answer. I’m bringing this to the GRCC because this is not just an Indonesia operations concern. Our due diligence process around third parties is not organized, streamlined, or properly documented. It also doesn’t take into account the varying levels of risk to which the company is exposed around the world.”

Riley spoke up. “I’ve been worrying about this for ages. We do business in a wide variety of jurisdictions, some of which have quite a reputation for corruption. Why are we treating Karachi the same as Detroit? The risk isn’t the same, although in that case it might be a toss-up!” Riley snickered. “Anyway, my point is, some locations and some types of contracts do require special attention, but we don’t have the resources to conduct full-blown examinations of every single third party with whom we deal. There must be a compromise solution.”

“Claire, are you there?” Ivan inquired.

Claire had been seeing the rest of her summer flash before her eyes, and it pretty much only involved third-party due diligence.

Despite her silence, Ivan presented the punchline she was ducking. “How can we meet the DOJ’s expectations in terms of third-party due diligence in such a far-flung enterprise with such a wide variety of locations and partners without breaking the bank or spending all of our time doing nothing but due diligence? We need a workable system, and anything would be better than the non-system we have right now.”

“EACH COUNTRY IN WHICH WE OPERATE HAS SO MUCH LIBERTY THAT WE SIMPLY DON’T HAVE A GOOD HANDLE ON WHO ALL OF OUR THIRD PARTIES ARE WORLDWIDE.”

A Workable System
The concern with which the Kilkianian team has been confronted is one that touches scores of multi-national corporations on a daily basis: how to conduct business overseas in the face of ever-increasing legal and compliance risks. Laws such as the US Foreign Corrupt Practices Act and the UK Bribery Act present companies with the risk of corporate criminal liability for bribes paid by or through third parties. As Gordon Corman noted, under the FCPA liability for “knowing” about an improper payment can be triggered not only by actual knowledge but by conscious disregard, deliberate ignorance, and willful blindness.
It is, therefore, in every multi-national corporation’s best interests to implement a risk-based, third-party due diligence process designed to examine the details of transactions involving third parties, as well as the third parties themselves, in order to assure itself that it is forming business relationships with reputable partners and not exposing itself to unnecessary risk. In fact, the government expects companies to conduct thorough due diligence to mitigate such risks and, in the event of a problem, will be all too ready to scrutinize a company’s due diligence procedures to determine whether they were robust enough to meet those expectations. Those include the performance of due diligence, having a clear understanding of who a company’s third-party partners are, and taking whatever actions are necessary to mitigate the chance that those third parties will engage in corrupt activities.

The company’s third-party due diligence process should be transparently outlined in a company-wide policy or procedure to ensure consistency of practice and clarity of expectations. A robust third-party due diligence program ought to include four main elements:

1. Identification of Third Parties
2. Third-Party Risk Assessments
3. Conducting Due Diligence
4. Third-Party Approval and Follow-Up

Any company seeking to get a handle on their ongoing overseas business relationships must not only implement its procedure with respect to new third parties, but it concomitantly must examine and perform due diligence on its existing base of vendors. Consider this cleaning house so you can move forward with a solid understanding of your company’s relationships and weed out any third parties whom you discover to be inactive, sub-par, or an anti-corruption risk. Thus, a thorough third-party due diligence process will encompass and apply these four steps to two separate populations: (1) existing third-party relationships; and (2) new and renewing third parties.

Identification of Third Parties

The first step in any third-party due diligence program is to make sure the company has identified the universe of third parties with whom it conducts business. Third parties can be defined to include, among others: vendors; distributors; sales agents; service providers; consultants; customs brokers; lobbyists; joint venture partners; and customer organizations.

This process includes ensuring that the company maintains a list or database containing basic information about each third party, such as their name, locations, contracting
dates, contact information, the names of principals, and records of previous due diligence performed. It also may involve an examination of which third-party relationships remain active and removal from the list of third parties with whom the company no longer transacts business. There is often an existing technical solution to this problem—leveraging accounts payable and other finance databases to identify current third parties.

Third-Party Risk Assessments
After identifying and creating an inventory of the body of active third parties, a company should conduct a risk assessment to determine which third parties can be classified as “high risk.” Some companies choose to take a tiered approach, categorizing third parties in two or three classes based on the risk level associated with the entity (see below for risk factors). They then apply a higher level of due diligence to the riskier entities.

A risk-based approach is ideal because it promotes the most efficient use of limited resources. Compliance personnel can focus their time, energy, and budgets on a more thorough vetting of third parties that are classified as “high risk” based on a number of factors.

Risk assessments should be overseen by an individual assigned responsibility for the relationship with the third party, although ideally the process will include outside, impartial input from personnel in legal, compliance, internal audit, security, or local experts. The process should include collection of financial and other data, completion of a business justification for retaining the party, and assignment of a risk score before proceeding to conducting any further required due diligence on the third party.

While risk assessments should be tailored to a company’s particular activities and operations, certain common factors to consider in conducting risk assessments include:

- The geographic location of the third party (Transparency International’s Corruption Perceptions Index is a useful tool for assessing the level of in-country corruption);
- The type of industry—some industries inherently involve greater risk, and a review of previous enforcement actions against similarly situated companies can help to identify trouble issues;
- The level and type of interactions with government officials by the third party on the company’s behalf—direct engagement with non-U.S. government officials to secure contracts or sales is inherently higher risk;
§ Relationships between the third party and a non-U.S. government official or politician;

§ The scale of the third party’s operations;

§ The third party’s level of expertise and qualifications in the industry;

§ The third party’s reputation;

§ Any past instances, reports, or investigations of corruption by the third party;

§ A valuation of the third party’s services to ensure payments are appropriate;

§ Compensation structure, payment currency requested, and bank account location;

§ The level of company supervision over the third party’s activities;

§ Whether the third party has access to any company funds or assets;

§ How the company learned of the third party (Was it recommended by a government official or a customer?)

Keep an eye out for red flags that indicate the need for more in-depth scrutiny and trust your gut. A third party who supplies inaccurate information about itself or is unwilling to provide information, does not appear to have any particular expertise related to your business, asks for payment not commensurate with local standards, seeks an unusual compensation method such as payment to an off-shore account, or appears to have engaged in previous acts of corruption ought to be subjected to heightened scrutiny.

On the basis of the assessment, each third party should be assigned a risk score and categorized in the appropriate risk tier. The risk assessment process should be well-documented to support whatever risk score is determined.

**Conducting Due Diligence**

After having ranked third parties in terms of the level of risk they present, companies can conduct a risk-based approach to due diligence. The due diligence process should be set out in a formal, written procedure applicable to all employees worldwide. The procedure should clarify the individuals responsible for overseeing the process, describe what high risk or red flag behavior should trigger additional attention, delineate who is responsible for signing off on third parties that present such concerns, explain the process for obtaining approval, discuss reference checks on third parties, describe the process of conducting interviews,
cover conflicts of interest, and provide for proper record-keeping of due diligence materials amassed.

Due diligence involves investigating and gathering data, validating that data, and then evaluating the level of risk indicated according to that data. At a very basic level, internet and media research should be conducted on all third parties. Ideally, a company will append formal questionnaires to their third-party Due Diligence Procedure to be completed as part of the due diligence process. This should include a questionnaire designed to address third parties likely to interact with non-U.S. government officials or presenting other compliance risks. The third parties complete the questionnaire and submit it to the individual responsible for the relationship.

At a minimum, a questionnaire should seek to gather information regarding:

- Ownership structure, contact information, names of principals, and other basic corporate information;
- The third party’s financial situation;
- Whether any key employees are connected or related to non-U.S. government officials;
- Whether non-U.S. government officials are connected to the third party in any capacity, including ownership, and whether any such officials might stand to gain from the relationship;
- The scope of the intended work;
- The key personnel expected to carry out the work;
- The state of the third party’s own compliance program, including its internal policies;
- Why the third party is needed to perform the intended function and its expertise in the area;
- Compensation and payment methods;
- References; and
- Any past enforcement actions, legal proceedings, or investigations that might call into question the third party’s past performance and ethics.

An independent business unit, such as compliance or legal, should participate in the process of validating the information gathered for high-risk third parties. The review process should include opportunities for such consultation.
Third-party Approval and Follow-Up

Once the third parties have been ranked according to risk and the relevant information has been amassed, appropriate decision-makers must make a determination whether or not to conduct business with the party. For lower-risk third parties, this might only require that the local compliance team or local management sign off on the relationship after receiving and reviewing the third party’s questionnaire.

In the case of high-risk parties, the process should require review by a higher level within the organization, such as a central or regional compliance office. If approved by local management or compliance, the questionnaire should be floated to that higher level for consideration, with an opportunity to go back to the third party with follow-up diligence questions. In cases raising red flags, companies should consider requiring additional, final review and approval by legal counsel. A general counsel’s office in New York is less likely to be able to personally benefit from a particular third-party relationship in contrast with local office management. The extra layers of review ensure that objective, non-local individuals with greater expertise on anti-corruption have a chance to weigh in on the decision.

After the company decides to engage a third party, it should ensure that this process has been well documented and retain the evidence of its decision-making process to demonstrate good faith in the event that something goes wrong in the future. Furthermore, it is essential that the company put certain controls in place through contractual provisions. These terms should include: the third party’s agreement to adhere to the company’s compliance policies, Supplier Code of Conduct, and other significant procedures; a right of termination in case of a violation of any of those policies or anti-corruption laws; the company’s right to audit the third party; the third party’s maintenance of accurate records and books; reporting obligations to the company; and terms limiting the party’s interactions with Non-U.S. government officials.

Another good measure is to require the third party to certify in writing their adherence to the company’s compliance policies. Providing training to the third party on those policies and expectations is also a useful tool.

Just as companies change over time through turn-over or culture shifts, however, so do third parties. It is incumbent upon companies to continue to monitor the activities
of its business partners through periodically scheduled risk assessments, updated due diligence, annual re-certifications of compliance with its policies, and audits to track payments, expenses, and other activity.

When all is said and done, the company will have a streamlined third-party base and procedures in place to maintain high standards for approval of new third parties. In the event of a compliance breach, it will also be able to demonstrate to government regulators its good faith efforts to avoid such situations through a consistent, trackable procedure.

* * *

Ivan Ackerman and Claire Owens sat in a corner of Pour Decisions, the neighborhood watering hole, at the end of a long day.

“Claire, I know this Third-party Due Diligence Project has been all-consuming for you these past few months, but I have to tell you.” Ivan sipped his Natty Boh. “It is already paying off. We’ve cut down the number of third parties in our database by one third. And now we are tracking all of the due diligence performed in our consolidated database, and have much better insight into what’s going on overseas. The folks in Sourcing called me the other day and couldn’t be happier. This new process has helped them clean house and strike better deals with far fewer vendors. And I heard the head of Finance telling the CEO on a conference call how relieved he is to know that the vendors we are paying have been risk-assessed.”

Claire nodded in agreement. “It’s been a monster of a project, but it’s been worth it. I’m confident that it will not only improve our operations because we’re contracting with better vendors, but also provide us the coverage we need in case something ever does go wrong. No one can say we aren’t trying our best to vet these vendors!”

Head of IT Ichabod Traynor burst through the door. He scanned the room quickly, and made a bee-line for Ivan and Claire.

“Claire, this is bad. This is so, so bad.”

“Calm down, Ivan. Whatever it is, I’m sure we can handle it.”

“But Claire, someone’s hacked our system. I don’t know who, I don’t know how. But remember Sony? Anthem? Yeah, that’s us today. I think all of our customer information has been exposed. I think I’m having a stroke.”

Ivan and Claire looked at each other and shook their heads. They put down their half-full glasses, stood up, and each took Ichabod by one arm. They escorted him back across the street to Kikanian’s headquarters where they called an emergency session of the GRCC.

Brett Ingerman is Chair with DLA Piper Compliance Practice, and Ellen Ginsberg Simon is an Associate with DLA Piper Compliance Practice.
How to avoid ruining your code of conduct

BY ROY SNELL

We don’t have a problem with tone at the top—we have a problem communicating the tone at the top. And one of the great missed opportunities is the code of conduct. They are too long and complicated. I have never agreed with the consensus on the structure, purpose, and development process for a code of conduct. Years ago most read like a legal document. Luckily, those days are primarily over with. However, most codes of conduct are about as inspiring as a restaurant menu. The instruction manual for my car is often more understandable than some codes of conduct. That’s because codes of conduct are often written by technicians, edited by a sea of people, and then run through a committee.

If you ever want to suck the life out of a document, have it created by committee. If you ever want to make a document much longer than it needs to be, have more people edit it. I agree you have to bring people along by involving them in the compliance program, but let’s do that some other way. Ruining the code of conduct for the sake of bringing people along is just not worth it. It’s the only document of its kind in the organization. And beware of the communications department. They are perfect. Perfection tends to lack inspiration. It’s not their document. The code of conduct needs to be inspiring, and to be inspiring you have to take chances. In fact, I would exclude everyone you can. I would involve
one person: your boss or the CEO. And tell them their role is to run interference for you, not edit. Their job is to stop people from ruining your code. Don’t leave others out of the compliance and ethics program development. Bring them all along. Just let them edit all the other documents, including the training that affects their area of interest. I would informally get feedback from people about the code but don’t delegate the content to them.

**THE CODE OF CONDUCT IS…**

- A statement of something the company and its employees aspire to
- A message from the leadership
- A communication between the compliance and ethics program and the employees
- The compliance and ethics departments’ document
- A commitment of every employee
- Should be marketed as strongly as any product or service the company produces

The point is, you have only one compliance and ethics document to inspire the employees, and that is the code. It’s the company’s code but it’s the compliance and ethics department’s responsibility to get it right and own it. It should come from the heart. It should set the tone. It should be understandable. There is a Flesch-Kincaid reading scale in the spelling checker in Word. Use it and shoot for the lowest grade level you can. I just checked this document and it was at a 5.5 grade scale. Minutes later, as I continued to edit, it went to 6.5. The more you edit and the more people you involve, the more you lose the purpose and simplicity of the code of conduct. You should run your code through Flesch-Kincaid and keep checking it as people ruin your document. Here is a tip to achieve a low score on the Flesch-Kincaid scale…use small words and short sentences. It’s not hard. Tell the people who want to ruin your code that you will not exclude their material. However, you may include it in some other document.
We don’t have a problem with tone at the top in this country—we have a problem communicating the tone at the top. The best code of conduct I ever read was one page. If it’s short…

- Everyone can see the code everywhere they go.
- It can be a part of every handout at every meeting the company conducts.
- Employees will read it and understand it.
- Third parties will read it.
- It can be on the wall of every meeting room.

It is the apex document for your compliance and ethics program. Treat it like that—and don’t use words like apex.

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