

BEHAVIORAL ETHICS AND COMPLIANCE

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2 GENERAL RELEVANCE OF BEHAVIORAL ETHICS TO COMPLIANCE & ETHICS

- The overarching finding that we are not as ethical as we think, as described by Jim.
- The importance of this general lesson is based on the notion that the greatest challenges to having effective C&E programs in organizations is often more about the “will” than the “way.”
- That is, what is lacking in many business organizations is an understanding that strong C&E is truly necessary.
 - After all, if we are as ethical than we think, then effective risk mitigation would be just a matter of finding the right punishment for an offense and the power of logical thinking would do the rest. Behavioral ethics teaches that that assumption is ill-founded.
 - Pre-1991 approach.

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3 SPECIFIC AREAS OF RELEVANCE

- Helps determine what compliance measures work and what don't.
- Jim discussed this with his ideas about:
 - Social norms, framing, choice architecture, among other things.
 - I will build on his analysis and make some other suggestions.
- The importance of data.

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4 RISK ASSESSMENT

- There are two main ways that behavioral C&E can enhance risk assessment.
 - One is helping those involved in assessment efforts have a better understanding of behavioral risks — meaning an understanding based on behavioral science. That might be considered a “substantive” use.
 - The other is more procedural in nature — using what the science tells us about human behavior to design better internal preventive measures.

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5 RISK ASSESSMENT – CONT.

- Studies relevant to both aspects of risk assessment have shown that individuals tend to optimistically predict their own future moral conduct but accurately predict the less moral future behavior of others,
- For those conducting risk assessments, the path suggested by this research is clear: to the maximum degree possible, one should structure the inquiry so that it is not seen as asking about the interviewee's own risks but those of others.
- And, in providing information about others, at least in the aggregate, employees of an organization will likely be helping you analyze risks that in fact involve themselves.

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6 RISK ASSESSMENT – CONT.

- Build notion of inner controls into risk assessment.
 - Morality-based internal factors that aren't always fit for purpose.
- Build the notion of victim distance into risk assessment.
 - Ben Franklin as a behavioral ethicist?
- Being rushed as a cause of risk.
 - Good Samaritan" experiment
- Is the road to risk paved with good intentions?
 - Moral licensing.

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7 TRAINING AND COMMUNICATION

- Several behavioral ethics studies show that people are more accepting of wrongdoing if it develops gradually than if it occurs suddenly.
- This is commonly known as a “slippery slope,” and these studies show is that it is a significant risk factor.
- The outcomes of the slippery slope experiments should be discussed in training, at least at a high-level — particularly when training managers. It can be presented as part of broader message that managers need to be not just personally honest but alert to ethically perilous situations

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8 TRAINING – CON.T

- Research also shows that simply making ethics more prominent — that is, reminding people about it — can impact behavior. Moreover, this works best if the reminder is done as close as possible to the time that someone is making a decision. These experiments can be very helpful when it comes to making training and other communications more effective. This was discussed by Jim
- Just-in time C&E communications have, in some ways, been around for a long time but only to a very limited degree. Opportunities for new or enhanced just-in-time communications exist for many C&E areas including (but definitely not limited to): anti-corruption — before interactions with government officials and third-party intermediaries; competition law — before meetings with competitors (e.g., at trade association events); insider trading/Reg FD — during key transactions, before preparing earnings reports; protection of confidential information — when receiving such information from third parties pursuant to an NDA; conflicts of interest — around procurement decisions; accuracy of sales/marketing — in connection with developing advertising, making pitches; and employment law — while conducting performance reviews.

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9 TRAINING – CONT.

- Training managers on behavioral ethics. One approach:
 - – A brief explanation of the findings of behavioral ethics research.
 - – An explanation that managers' C&E duties include identifying seemingly negligible risks in their respective parts of the organization that could over time adversely affect trust there.
 - Slippery slopes.
 - – An expectation that these risks will be addressed by managers when speaking to the workforce (e.g., in townhalls, staff meetings, etc.) and through written communications.
- Not standalone but part of broader management training.
- Another approach: behavioral ethics videos.

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10 ENFORCEMENT

- Research relating to “motivated blindness” — which derives from a psychological concept which describes the tendency for people to easily miss information that contradicts what is in their own best interest — is relevant to two distinct elements of a C&E program:
 - resolution of conflict of interest issues and
 - decisions involving possible investigations of and discipline for violations of legal or ethical standards.
- Focusing on the latter point, research underscores the importance of the Sentencing Guidelines expectation that organizations discipline employees not only for engaging in wrongful conduct but “for failing to take reasonable steps to prevent or detect” wrongdoing by others — something relatively few companies do well (and some don't do at all).

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11 ENFORCEMENT – CONT,

To meet this important expectation, companies may wish to consider taking the following measures:

- build the notion of supervisory accountability into their policies — e.g., in the managers' duties section of a code of conduct;
- speak forcefully to this issue, and the underlying behavioral science research, in C&E training and other communications for managers;
- train investigators on the notion of managerial accountability and address it in the forms they use so that they are required to determine in each case whether a manager having been asleep at the switch led to the violation in question;
- publicize (in an appropriate way) that managers have in fact been disciplined for supervisory lapses;
- have auditors take these requirements into account in their audits of investigative and disciplinary records

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12 DOES BEHAVIORAL ETHICS SPEAK TO ISSUE OF POSITIONING OF CECSO?

- Framing – Jim reviewed concept
- May be a reason to have a CECSO who also wears the General Counsel hat since by definition these risks don't appear to be ethics-based; i.e., the GC in most companies is more likely to be part of what is ostensibly a general business discussion than is a non-GC CECSO.

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13 PROGRAM ASSESSMENTS.

- Given the biases challenging C&E program design and implementation assessments can be important for a company
- Also suggests need for independent assessment.
- A program assessment can be seen as a delivery device for behavioral ethics and compliance.

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14 FOR FURTHER INFORMATION

- <http://conflictofinterestblog.com/2020/01/behavioral-ethics-and-compliance-index-2020.html>

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