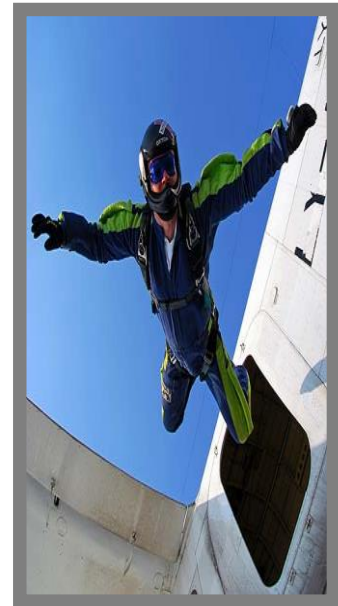


The *Real* Happy Marriage Between Legal and Compliance & Ethics

(What Lawyers, In-House Counsel, and Others in Transition Need to Know)

Donna Boehme, Compliance Strategists LLC
Judi Nocito, Compliance Strategists LLC
Patrick Gnazzo, Better Business Practices

Society of Corporate Compliance & Ethics
18th Annual Compliance & Ethics Institute
National Harbor, September 15, 2019



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SESSION OVERVIEW: What do Lawyers & In-House Counsel Need to Know about Compliance & Ethics?

- ❖ Compliance and Legal have different, separate, but (mostly) mutually supportive mandates
- ❖ Compliance is not a legal function, but lawyers and in-house counsel have many critical roles in program
- ❖ The Board and many others in the organization play key roles too
- ❖ A 7-element, "check the box" approach is a recipe for disaster
- ❖ True Compliance & Ethics expertise (SME) is earned in the field and with the profession and compliance networks.
- ❖ Lawyers in transition should know how to manage "scary topics" of compliance e.g. risk assessments, investigations, whistleblowers and discipline- and actively embrace their new mandate

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Sample Mandate

- + *To design and oversee an effective compliance program that can (i) detect and remediate, or prevent, corporate misconduct and fraud, before those problems are discovered by third parties (such as plaintiff attorneys, investigators, prosecutors, regulators, NGO, or the media) who will then force the organization to resolve these problems on terms that they demand (such as fines and penalties, debarment, reputational damage, business interruption, or court-mandated monitor arrangement) and (ii) support a culture of accountability and ethical leadership throughout the organization.*
- as presented to RAND Board on May 2018

- + "Dear CCOs: What is Your Mandate?" {preread}



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Task	Compliance Role	Legal Role	Key Interfaces	Scenarios
C&E Training	<ul style="list-style-type: none"> Develop training program and schedule to address high-priority risks (e.g. based on risk assessment), including most effective use of resources such as subject matter experts Determine appropriate format and mode for delivering training (e.g. e-training vs. f-t-f, conducted by Company vs. outside trainer) Review training modules and presentations for clarity and effectiveness of messages, and consistency with global C&E messages supporting overall compliance program Oversee delivery & impact of training; identify gaps 	<ul style="list-style-type: none"> Review and advise on content of training as a legal subject matter expert in specific risk areas (e.g. FCPA, antitrust, sexual harassment) Bring specific legal training needs to the attention of Compliance based upon experience in advising the businesses Assist in resolving legal issues raised in training sessions 	<ul style="list-style-type: none"> Compliance & Legal to collaborate closely, with Compliance determining the overall architecture & topics of the training program & Legal providing subject matter expertise & assisting in program delivery. Legal as subject matter experts in areas of required training & Compliance to be responsible for overview of most effective plan/means of training & communication consistent with overall Company compliance program 	<ul style="list-style-type: none"> Foreign trade controls are identified as a high-priority, but not well-understood legal risk area at a BU risk workshop. Compliance works with Legal to develop a training program to address the risk with Legal specialist attorney as SME & train-the-trainer. Compliance collaborates with Legal to retain outside trainer for certain regions Legal, as "Risk Owner" monitors delivery & impact of training, reports periodically to Compliance

Task-	Compliance Role	HR Role	Key Interfaces	Scenarios
Allegations/ Investigations	<ul style="list-style-type: none"> Develop investigation guidelines to apply across all risk areas to ensure consistency in approach and to reduce risks of defamation, unfair termination, retaliation and to protect confidentiality. Lead and oversee investigations and response to allegations of unethical or illegal conduct reported to Compliance via Helpline, directly to Compliance staff, or otherwise as appropriate in accordance with the company's Escalation Protocol. Make training on investigation guidelines available to HR, IT, Security, Audit, Legal and others who may undertake incident investigations. 	<ul style="list-style-type: none"> Lead some investigations (harassment, discrimination, etc.) and ensure that these are done consistently with the investigation guidelines. Maintain investigation records for incidents and discipline and make information available in particular cases to E&C, Legal and the businesses as needed. Provide information on comparable situations and disciplinary steps taken. 	<ul style="list-style-type: none"> HR and Compliance should keep one another apprised as significant investigations are ongoing. HR and Compliance need to collaborate on recommended discipline, particularly in more significant cases. To ensure consistent enforcement throughout the enterprise, consider developing disciplinary guidelines or review committee for misconduct occurring particularly at given management level and above. Compliance needs to ensure appropriate management of whistle-blower employees once issues are raised – developing and implementing best practice protocols throughout the enterprise. 	<ul style="list-style-type: none"> HR investigates and confirms alleged bullying incidents by location manager and consults with Compliance, Legal and business leadership on discipline, as well as appropriate enhancements to the Compliance program, including additional employee training and messaging to underscore company values and available issue resolution processes.

So What are the Takeaways?

- + If you are In-House transitioning to Compliance, you have a different mandate, which requires a different mind-set.
 - Need to look beyond a Legal “lens”
- + If you are Legal supporting Compliance, your work will greatly benefit from understanding how the two mandates differ and intersect.
- + If you are Compliance reporting to Legal ... it’s complicated.
- + If you are “double-hatted” Legal and Compliance, good luck and Godspeed!

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MODULE 1: What Is a Compliance & Ethics Program? (brief refresher)

- + Multi-disciplinary management control system;
- + consistent with relevant standards;
- + that seeks to “detect, fix and prevent misconduct” and support an ethical culture that encourages accountability, transparency, and a culture of integrity.

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7 Elements of an Effective C&E Program

Management Commitment & Resources	<ul style="list-style-type: none"> • "Walk The Talk" • High Level Personnel • Structured For Success
Standards, Controls & Procedures	<ul style="list-style-type: none"> • Code and policies are clear, written, & accessible to all • Beyond "legalese," i.e., understood by humans
Training & Communication	<ul style="list-style-type: none"> • Job related & continuous, multimedia/blended • Board training
Substantial Authority Personnel	<ul style="list-style-type: none"> • Avoid discretionary authority to managers likely to violate • Background checks including for promotions & new hires
Monitoring, Evaluation, Reporting & Audit	<ul style="list-style-type: none"> • Metrics & measurement • Confidential reporting lines • Reports to senior management & board
Enforcement, Discipline & Incentives	<ul style="list-style-type: none"> • No "double standard" • No retaliation • Performance alignment
Review & Modify Program	<ul style="list-style-type: none"> • Ongoing risk assessment • Including response after breaches • Investigations

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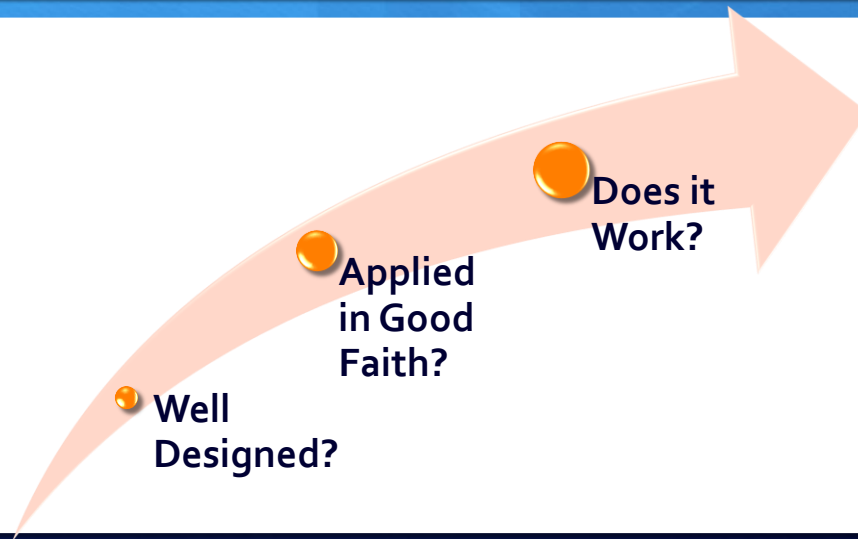
The DOJ/SEC Resource Guide: The Importance of an "Effective" Ethics & Compliance Program

- + Guidance reiterates significant incentives to design and implement "effective" compliance program – amount of fine, declination, DPA or NPA, or monitorship
- + *"In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation."*

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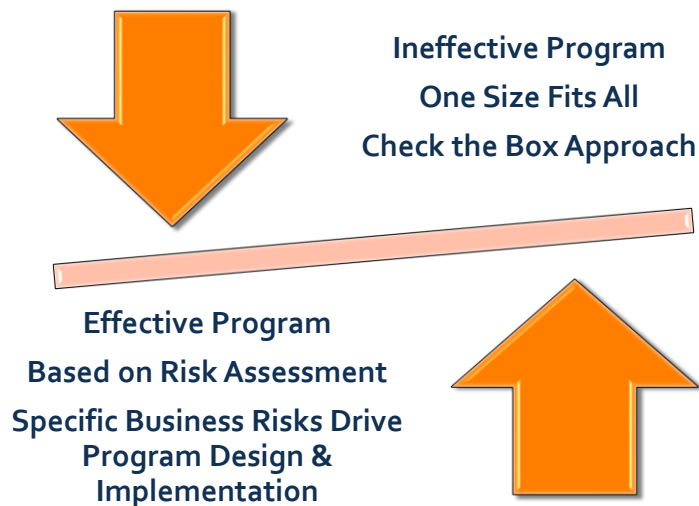
The DOJ/SEC Resource Guide: The Three Critical Questions



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The DOJ/SEC Resource Guide: Well Designed?



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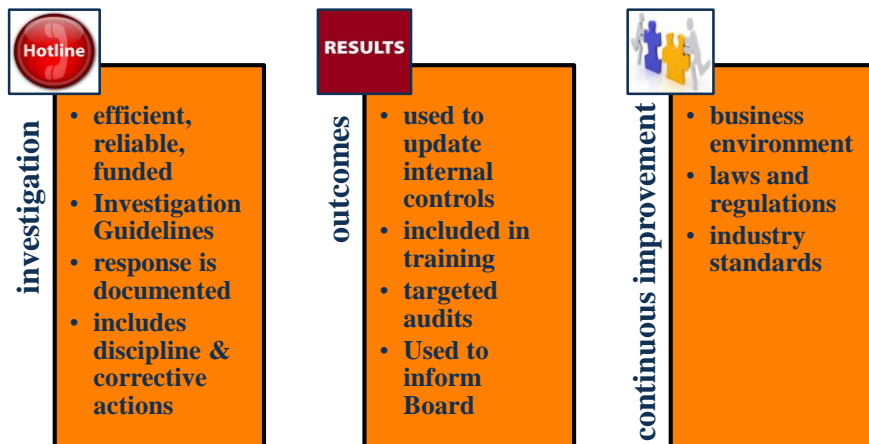
The DOJ/SEC Resource Guide: Applied in Good Faith?



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The DOJ/SEC Resource Guide: Does it Work?



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Compliance & Ethics Reduces Corporate Misconduct

Global Business Ethics Survey – The State of Ethics & Compliance in the Workplace - www.ethics.org/GBES

- + GBES 2018 Survey found:
 - + Strong ethics culture companies: 88% reported misconduct
 - + Weak ethics culture companies: 52% reported misconduct
- + In 2017, 47% of employees reported personally observing misconduct at their company, which is a 4% decrease from 2013 (51%).
- + 69% of employees in 2017 reported misconduct they observed which is a 23% increase since 2000.
- + Strong ethical cultures can significantly reduce wrongdoing but only 1 in 5 employees report that their company has a strong ethical culture.
- + GBES Survey found when comparing strong vs. weak cultures:
 - + Employees in weak cultures are 3x more likely to indicate they observe misconduct and experience pressure to compromise standards;
 - + Employees at companies with weak cultures are 41% less likely than those at strong ethical culture companies to report observed misconduct;
 - + Further, employees at weak culture companies face more retaliation than their counterparts after reporting observed misconduct, those employees were 27% more likely to experience retaliation.

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Recommended Reading

- + *In Compliance 2.0, mandate is king!*, Donna Boehme, <http://compliancestrategists.com/csblog/2015/11/02/in-compliance-2-0-mandate-is-king/>.
- + *Dear CCOs: What is Your Mandate??*, Donna Boehme, <https://www.corporatecomplianceinsights.com/dear-ccos-mandate/>.
- + *Why Compliance Officers Need Independence*, Donna Boehme, <http://compliancestrategists.com/csblog/2017/02/21/compliance-officers-need-independence/>.
- + *Skydiving into Compliance, with eyes wide open*, Donna Boehme, <http://compliancestrategists.com/csblog/2013/12/20/skydiving-compliance-eyes-wide-open/>.
- + *Who Needs Compliance Subject Matter Expertise?*, Donna Boehme, <http://compliancestrategists.com/csblog/2015/11/06/who-needs-compliance-subject-matter-expertise/>.
- + *3 Nails in the Coffin of 'Compliance 1.0'*, Donna Boehme, <http://compliancestrategists.com/csblog/wp-content/uploads/2015/03/3-Nails.pdf>.
- + *Five Signs that Compliance 2.0 is the New Normal*, Donna Boehme, <http://www.fcablog.com/blog/2016/8/3/donna-boehme-five-signs-that-compliance-20-is-the-new-normal.html>.
- + *The GC and the CECO: Partners at the Table*, Patrick Gnazzo, <http://compliancestrategists.com/csblog/wp-content/uploads/2014/07/The-GC-and-the-CECO-Partners-at-the-table-Gnazzo.pdf>.

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Recommended Reading continued

- + *GM's DIY Compliance: #WhatCouldPossiblyGoWrong?*, Donna Boehme, <http://compliancestrategists.com/csblog/wp-content/uploads/2014/10/GMs-DIY-Compliance-WhatCouldPossiblyGoWrong.pdf>.
- + *Volkswagen Emissions Cheating Scandal – Another Compliance 1.0 Train Wreck*, Donna Boehme, <http://compliancestrategists.com/csblog/wp-content/uploads/2015/10/VW-Scandal.pdf>.
- + *The Fall: VW and the Consequences of the Emissions Scandal* (Boehme interview), <http://compliancestrategists.com/csblog/2015/10/26/vw-und-die-folgen-des-abgasskandals-boehme-interview/>.
- + *Open Letter to Ben Heineman: The Real 'Happy Marriage' Between the GC and the Chief Compliance Officer*, Donna Boehme, <http://compliancestrategists.com/csblog/2012/05/02/open-letter-ben-heineman-real-happy-marriage-gc-chief-compliance-officer>
- + *Mike Scher talks with the 'Lion of Compliance'*, Michael Scher, <http://www.fcpablog.com/blog/2015/3/30/mike-scher-talks-with-the-lion-of-compliance.html>.
- + *Mike Scher to Donna Boehme: Show us Compliance 2.0*, Michael Scher, <https://www.fcpablog.com/blog/2016/8/22/mike-scher-to-donna-boehme-show-us-compliance-20.html>.

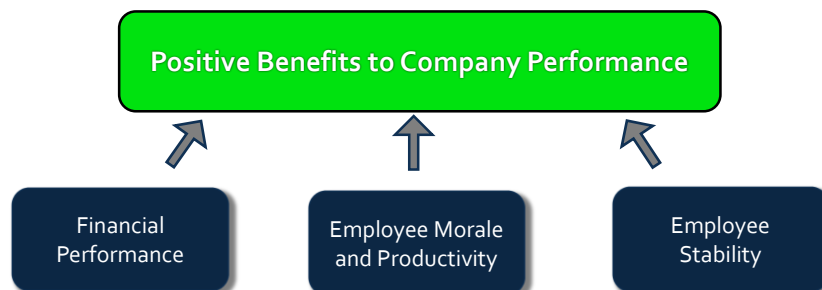
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Positive Benefits to Company Performance

An effective compliance program:

- (1) Protects a company's reputation;
- (2) Ensures investor value and confidence; and
- (3) Reduces uncertainty in business.

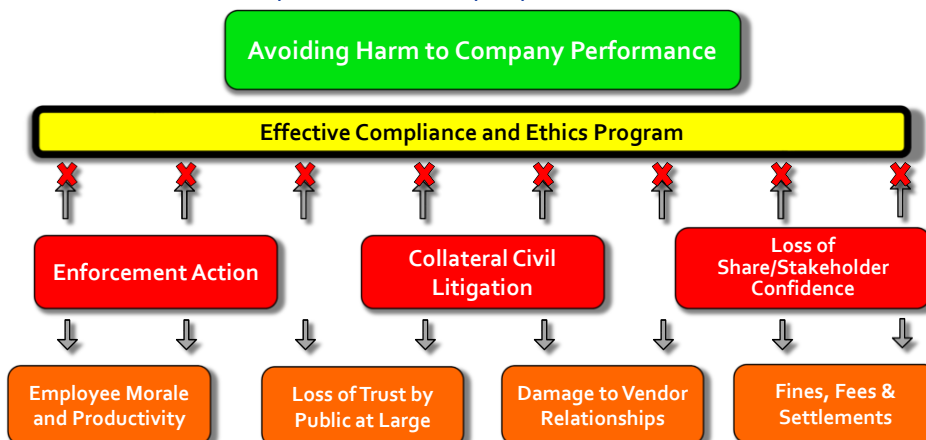


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Compliance & Ethics Protects a Company

In a global marketplace, an effective compliance program is a critical component of a company's internal controls.



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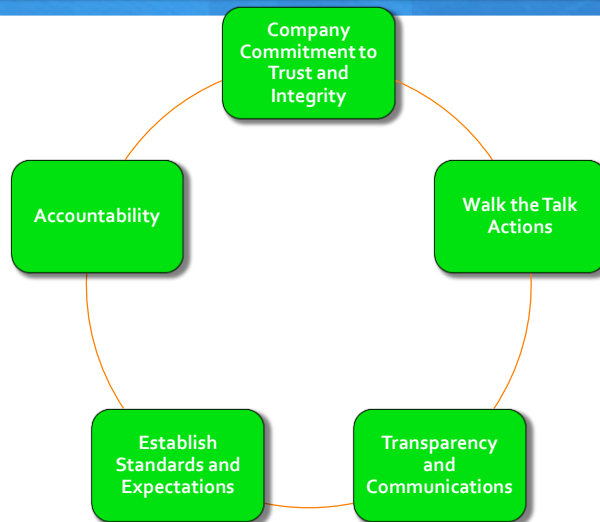
Research Confirms That Ethical Companies Are More Profitable

- + United Kingdom's Institute of Business Ethics (IBE) concluded that ethical companies are more profitable because of their ethical culture.
- + The 2003 report "Does Business Ethics Pay" took a sample of FTSE 350 firms
 - + Ethical Companies outperformed other companies based on : (1) market value added (MVA); (2) economic value added (EVA) and (3) price/earnings ratio.
- + The IBE study concluded: "[T]here is strong indicative evidence that large UK companies with codes of business ethics/conduct produced an above-average performance when measured against a similar group without codes."

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A Culture of Ethics



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Culture Starts with Leadership Commitment

- + CEO and board must walk the talk – managers and employees observe senior leaders and their behavior
- + Symbolic actions can be important
- + Public statement by CEO and/or Chairperson of Board: Visible and active commitment to compliance program (external and Internal)
- + CEO requires direct reports and all managers to communicate compliance message
 - + Each year senior managers commit to specific task to promote compliance and ethics
 - + Each year senior managers evaluated based on the compliance and ethics program factor (eg Novartis)(See Joe Murphy white paper-SCCE)
- + Compliance and ethics modules distributed throughout organization to local offices (in foreign language) and promoted by local management
- + Use social media to promote leadership commitment to compliance

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Nine Steps the CEO Can Take to Help Embed an Ethical Culture

(Thanks to Joe Murphy!)

1. Keep the Company's Code of Conduct on desk and bring to meetings with other papers
2. Elevate and empower your CCO with direct reporting to Board and adequate resources
3. Require ethics and compliance reports by senior business managers (make sure CCO attends meetings).
4. Insist that compliance and ethics be tied into the officers' and employees' financial incentives and evaluations (egNovartis)
5. Adopt ethics as part of business decisions. (Pass on any gift received; reject a business deal if ethical and compliance risks too high)
6. Set an example. Take training first; Do safety walk-through, call the company helpline with a question, call and ask a field line manager about his/her role in the code of conduct roll-out and training.
7. Recognize outstanding compliance & ethics performance.
8. Insist on the toughest discipline when one of the top brass breaks the rules or threatens retaliation.
9. Obtain an independent outside review of compliance & ethics program

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Push Positive Incentives for Ethics

- + Manager and employee evaluations should include a compliance and ethics component (WellsFargo)
- + "Treasure what you measure"
"What gets measured is what gets done"
- + Create ethics awards, recognition, and weekly reminders and support for ethical behavior. Commitment must be rewarded.
- + Schedule an Ethics Week to highlight compliance and ethics with daily events



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RECOMMENDED READING

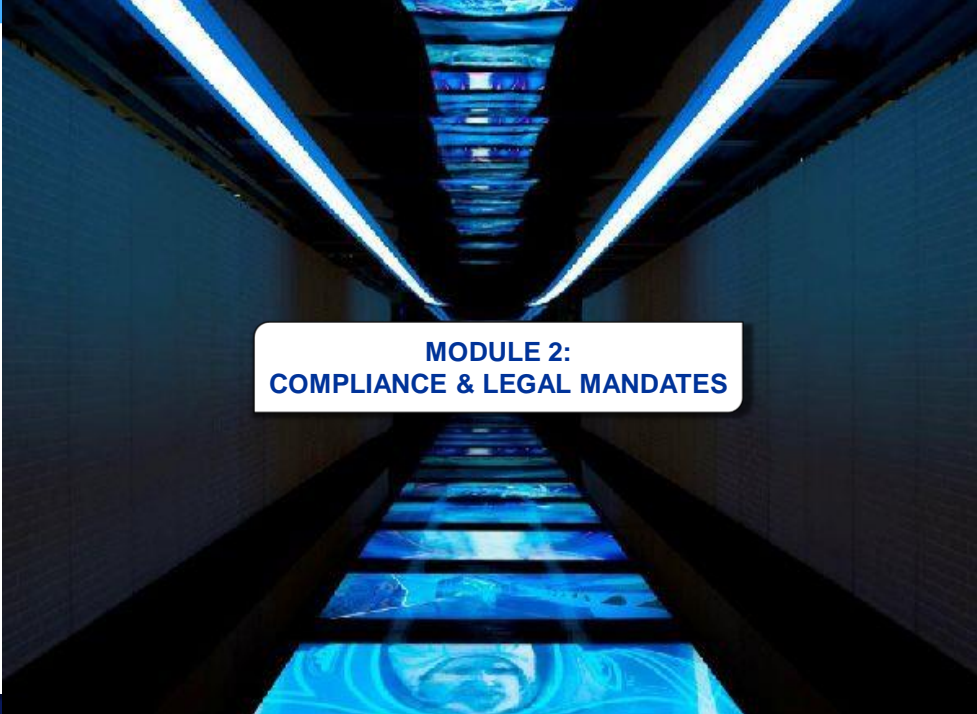






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MODULE 2: COMPLIANCE & LEGAL MANDATES

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Compliance & Legal- Different Mandates



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The Many Titles/Roles of the CECO

Chief Compliance Officer
 Chief Ethics & Compliance Officer
 Director of Global Compliance
 VP –Business Practices & Compliance
 AGC- Compliance
 GC & CCO
 Global Ethics Director

 Leader of Compliance & Ethics Function
 Ethical Culture Leader
 Overseer of Compliance & Ethics Program
 Subject Matter Expert of C&E
 Door Opener/Empowerer of Team
 Finder & Developer of Subject Matter Experts
 Trusted Advisor & Educator to Management
 Rally Chair/Symbol for Employees
 Direct Access Reporter to Board
 Educator to Board
 Liaise to Regulators

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"Must Have" Foundation for any Lawyer Doing, Supporting, or Transitioning into Compliance

- + Understand what constitutes an effective program beyond a "7 Elements" checklist
- + Clarity on the different mandates of Legal, Compliance & other key enabling functions e.g. HR, and how they interact
- + Self-assessment: What additional skills, knowledge, and experience do I need to perform the job well?

→ And a plan to get them

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Separate and Distinct Functions

- + Different but complementary mandates
- + Key partners in many different workstreams
- + Sometimes the mandates will conflict
 - and that's a good thing

"The lawyers tell you whether you can do something, and compliance tells you whether you should...We think upper management should hear both arguments."

- Office of Inspector General, HHS (Pfizer)

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The Controversies: Where Should Compliance Report? Should The GC Also Be The CECO?

- + PWC State of Compliance Survey → More CECOs reporting to CEO
- + In the UK, more CECOs report to CEO than in US. Also, more Compliance departments are independent.
- + In the US, momentum for direct, unfiltered access to the Board and Senior Management by the person with "day to day" responsibility
- + Recent Corporate Settlement Agreements or pressure from Regulators/Investors have increasingly required separation of Compliance from Legal, including in HealthCare and some Big Banks
 - + Barclay's, HSBC, UBS, Goldman, JP Morgan, Novartis (IG HH&S Guidance)
- + WalMart: Decision #1: Separating Legal and Compliance
- + Novartis: 2014 appointment of independent CCO with seat on executive leadership committee + holding all risk management functions["Novartis: A New "Rock Star" in Compliance and Ethics" (preread)]

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The "Double-hatted" GC & CECO

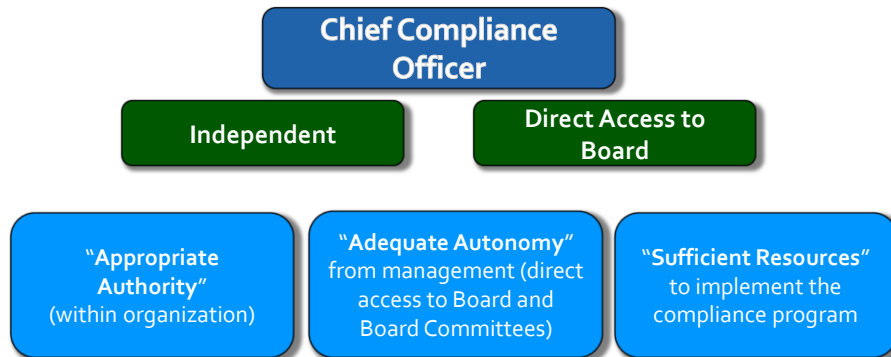
- + GC is a full-time job
"[T]he GC should not be CCO ...because rigorous oversight of the compliance processes demands too much time."
- Ben Heineman, former General Electric GC
- + Different/conflicting mandates
- Jay Jorgensen, Wal-Mart CECO: CECO can't wear half a hat"
- + Smaller companies can make a stronger case for a double-hatted role
- + Clear momentum for independent CECO that works closely & collaboratively with Legal - "separate but equal"
- + "Our GC is totally awesome" argument

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Structure, Authority & Resources

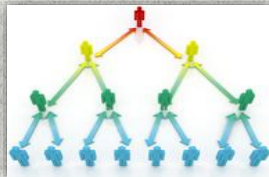
Separate Chief Compliance Officer with direct reporting authority to the Board of Directors or Compliance/Audit Committee



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Empowering CECOs: Gaining Clout



Reports to CEO & Board (not GC)
Deloitte 2015 Compliance Trends Survey

2015	2014	Change
57%	44%	↑ 13%



Stand Alone CECO (Not In Dual Role)
Deloitte 2015 Compliance Trends Survey

2015	2014	Change
59%	50%	↑ 9 %



Member of the C-Suite (Seat At The Table)
Deloitte 2015 Compliance Trends Survey

2015	2014	Change
50%	37%	↑ 13 %

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Governance Structure

- + Most common reporting structure:
 - + CCO to Audit Committee
 - + 20 Percent of Companies have established separate Compliance Committee at the Board level
- + More companies considering adding an ethics and compliance professional to the Board (eg Siemens JV)
- + Quarterly meetings between CCO and Board Committee
- + Executive session at each quarterly meeting
- + Annual meeting with full Board
- + Regular informal communications with committee chair

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Recommended Reading

Roy's thoughts on Transitioning from the GC's Office to Compliance <http://ow.ly/zNKvq>

Skydiving Into Compliance - With Eyes Wide Open by Donna Boehme <http://ow.ly/AsOBE>

What Asch's Line Experiment Can Teach Us about Conformity & In-House Lawyers wp.me/p4qgeS-6S

The GC and the CECO: Partners at the Table by Patrick Gnazzo <http://ow.ly/zVLYi>

When Legal and Compliance Don't See Eye-to-Eye by Donna Boehme <http://ow.ly/zVOBo>

[The CCO as Ethical Culture Leader](#)

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Scenario A: CECO & Direct Access to the Board

Jennifer is CECO at Best Made Plans, Inc. BMP manufactures consumer lawn care products. BMP engineers have identified a serious product defect that causes blades to fly off machines and potentially harm users/consumers. A number of consumers have lost limbs and suffered major injuries, and 5 consumers have been killed. Steve, the GC, is responsible for handling all product liability litigation. Steve and his department aggressively litigate issues, sometimes settling and other times going to trial. The product defect exists in a large number of BMP's product lines. Steve resists efforts by engineers to acknowledge problem claiming that it could harm litigation. Engineers go to Jennifer and advise her of the problem. Jennifer talks to Steve and they disagree as to when and how to address the product liability problem.



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Scenario A: CECO & Direct Access to the Board

What are the issues?

What actions, if any, should Jennifer take?

Should she immediately seek a meeting with the board of directors to report the problem?



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Recommended Reading

- ❖ When The In House Lawyers Run Amuck by Michael Volkov <http://ow.ly/zLaCS>
- ❖ What is your CECO's line of sight? by Donna Boehme <http://ow.ly/zHnNP>
- ❖ In Love and Compliance: You Get What You Want by Donna Boehme <http://ow.ly/AsNXD>



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MODULE 3: The Many Staff Functions Supporting the E&C Program

- + Legal, HR, Audit, IT, Security and others are invaluable partners to Compliance
- + Yet there is often confusion about overlap and interface ("fence" problem)
- + Defining roles is the solution and the empowering factor
- + This often makes the difference between a high-performing program and a hot mess!

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Some Common Roles for In-House Counsel

- ✓ Compliance Officer
- ✓ Lawyer for the Compliance Function
- ✓ Subject Matter Expert (SME)
- ✓ Risk Owner e.g. Anticorruption, Competition
- ✓ Investigator
- ✓ Case Manager
- ✓ Regional Liaison

Interface tools are helpful as a starting point to create clarity

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Some Common Roles for HR

- + Subject Matter Expert (SME)
- + Investigator
- + Trainer
- + Risk Owner (Harassment, discrimination)
- + Repository of employee data to ensure appropriate, targeted training and discipline

Interface tools are helpful as a starting point to create clarity

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Legal, Compliance, HR and other parts of the Company
should be visualized in a (compliance) Venn Diagram



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Compliance Infrastructure

Internal Management Compliance Committee

- + Operational: Task-oriented facilitators, not policy makers, not micromanagers
- + Solid Charter is critical
- + Monthly meetings
- + Key Representatives:
 - + Legal
 - + HR
 - + Financial
 - + Audit
 - + Information Technology
 - + Chief Operating Officer



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MODULE 4:

Privilege, Work Product, Confidentiality & Other Legal Principles

- + Through a Compliance Lens
- + Myths and Realities

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The “Lawyer” Privilege

- + Anything a lawyer does is privileged
- + If a client is involved the privilege is weakened
- + If a lawyer thinks and writes something it’s protected as work product
- + Anybody who reports to a lawyer is under the privilege
- + But this privilege applies only when the lawyer is riding a unicorn

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Attorney-Client Privilege: The Facts

- ✓ Privilege is a common law concept – “secret professional” is the civil law equivalent
- ✓ Non-lawyers can play a role in compliance matters even if conducted under privilege
- ✓ Protection requires a client asking for confidential legal advice but “advice privilege” is different to “litigation privilege”
- ✓ Non-lawyers can act under counsel’s direction & control
- ✓ In the US => “Upjohn letter” (warnings to employees)
- ✓ BUT: for EU Competition, privilege for in-house counsel not generally recognized (Akzo Nobel). Unlike UK & US

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Work Product Protection

- ✓ In the US, work product privilege does not require lawyer
- ✓ The rule covers preparation relating to litigation by a “party”
- ✓ But it is always best to use lawyers for case preparation, even when non-lawyers are involved
- ✓ Don’t forget – it also applies for potentially bringing a case against someone else
- ✓ Protection is only qualified for fact gathering, but absolute for counsel’s mental impressions

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But Isn’t It Safer To Have Lawyers Do Everything & Claim Blanket Privilege For All Compliance Activities?

- ✓ How do you prove your case that you had an effective program in place if you cloak everything with privilege
- ✓ Sharing with the government likely waives attorney-client privilege
- ✓ The best protection is to fix what you find
- ✓ Claiming privilege for everything undercuts your credibility
- KBR case in US

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Barko v. Halliburton Update

- + Court of Appeals decision resolved issue by upholding claim of privilege to internal investigation conducted under direction of General Counsel
- + Privilege claim still will involve document-by-document review and claim-by-claim analysis

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Legal Ethical Issues for Compliance Lawyers

- + Who is the client?
- + Employee warnings?
- + Duty to escalate
- + In the US, SOX 307 escalation
- + Confidentiality & disclosure

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Scenario B: The Case of the Golden Mooncakes



Tom is CCO for GeoExplora, a UK metals exploration firm. He reports to the CFO. Last week there was big trouble at the company's China mining JV, when local Chinese media reported claims from anonymous whistleblowers that the JV had used travel agencies to arrange expensive "Harvest Moon Festival" trips for local officials, including special gold-filled mooncakes sold for \$1000 each, and "consulting contracts" with a number of their family relatives. The GeoExplora Asia legal team works closely with the JV and Asia Regional VP. Tom is informed that the Compliance Committee, which includes the GC, has decided to refer the matter to the Asia legal team and its outside expert for review. The GC tells the CCO that from now on, due to privilege issues, the Asia legal team will work directly with the outside expert and the Regional VP, and Compliance will be excluded.

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Scenario B The Case of the Golden Mooncakes

What are the issues?

Who are the stakeholders?

How should this be resolved?



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Recommended Reading

When The In House Lawyers Run Amuck
by Michael Volkov <http://ow.ly/zLaCS>

There Is No Bark to the Barko Case
by Michael Volkov <http://ow.ly/AsPUB>

Titanic Shift - Whistleblower Presses Challenges
Over Access to KBR Docs nationallawjournal.com/legaltimes/id=...



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**KEEP
CALM
IT'S
BREAK
TIME**

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Module 5: "Scary Topics"

Topics where Compliance and Legal often interface
-- and sometimes disagree

Examples:

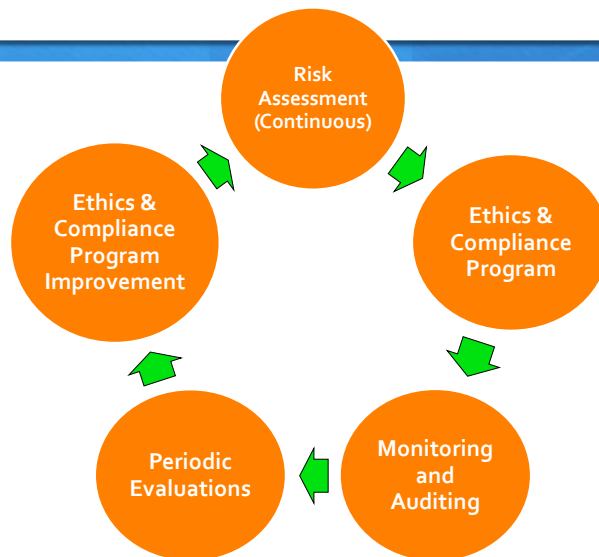
Risk Assessment
Discipline
Whistleblowers



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Continuous Improvement Cycle



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Advice of Counsel

- + A documented advice of counsel, blessing whatever action you take, is an extra layer of protection
- + Advice of counsel negates (is contrary to) criminal intent
- + When you rely on advice of counsel, you are acting, by definition, in good faith
- + Build advice of counsel into as many decisions as you can



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Risk Assessments

- + The foundation of an effective ethics and compliance program
- + The only way to determine what risks need to be addressed and how to allocate resources
- + Some GC's FEAR risk assessment and seek to avoid it
- + UTC story



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Ethics & Compliance Approach to Risk Assessment

- + Risk assessment is only as good as the information in the room
- + Legal SMEs are key players in the process
- + Natural area of collaboration between Compliance and Legal
- + Can leverage ongoing risk assessment activities with CECO oversight
- + Any problems or risks need to be addressed by action or plan of action

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Risk Assessments - Build in Documentation

- + Document key decision points that you may need to defend sometime down the road
- + Every time you take an action that may have compliance consequences, it needs to be documented
- + Explain good faith basis by which you approached the issue and then why you resolved the issue as you did
- + Remember: "If it is not documented, it did not happen."



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Not Your Father's Investigation

- + Investigations are where the rubber meets the road ("closing the loop" of the compliance program)
- + All other elements can be present, but if investigations don't uncover the right facts to decision-makers, program is mere window-dressing
- + Area of high scrutiny for any program evaluation
- + How are investigations carried out in your organization?

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7 Investigation Myths

1. Legal should conduct all investigations.
2. Compliance should conduct all investigations.
3. If the matter is privileged, non-lawyers can't be involved.
4. We can use experienced investigators from other parts of the company without further training.
5. Any lawyer or HR person can conduct effective investigations – it's an innate job skill for them
6. Investigation training is about detecting fraud, how to interview, how to detect lying.
7. Best way to control confidentiality is to give warnings in writing to all lead investigators & witnesses.

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Hallmarks Of Effective Ethics & Compliance Investigations

- ✓ Clear written investigation guidelines, including confidentiality, objectivity, impartiality, professionalism, timeliness, competence & non-retaliation
- ✓ Investigation training for all who lead or support investigations
- ✓ Good triage protocol; need to know list
- ✓ Nonretaliation policy includes protections for CECO
- ✓ Everyone understands their role, including line management
- ✓ CECO has line of sight (random audits)

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Internal Investigations & Discipline



- + Separate internal investigations unit within the E&C function
- + Coordination of strategy, evaluation and discipline/actions with Legal, HR and other appropriate functions
- + Written procedures and forms/templates for interviews and reports
- + Track investigations and measure results
- + Publicize discipline in numbers to avoid privacy problems
- + Positive incentives for compliance
 - + Personnel evaluations and promotions
 - + Rewards for ethical conduct (e.g. bonuses); compliance metric is part of management bonuses
 - + Publicize compliance accomplishments or performance internally

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Discipline

- + One of 7 elements - "uniform & consistent"
- + Organizational Justice => can't guarantee the results but can guarantee the process
- + It's easier to fire the mailroom guy than the high-flyer
- + A common area of "mandate conflict"
- + Every company has a defining moment (2 war stories)
- + Coaching/Soft landing vs. Public Hanging/Transparency



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Whistleblowers (The Company's Dilemma)



- + Company needs WBs to come forward and raise issues before they reach the media and regulators
- + The goal of an effective E & C program: to detect and prevent wrongdoing
- + BUT..... whistleblowers are often
 - 1) fired
 - 2) forced out
 - 3) shunned
 - 4) demoted
 - 5) marginalized
 - 6) harassed
 - 7) did we say **shunned?**
- + Challenge: mindset of management
- + Consider: "Take your whistleblower to lunch"

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3 Undeniable Truths About Whistleblowers

- + WBs are not always "model employees" - Example: ex-UBS banker Bradley Birkenfeld (the "Tarantula")
- + Bounty programs level the playing field
- + If you leave misconduct on the table, someone is now more likely to report it ("arbitrage")

"The Undeniable Truths About Corporate Misconduct and Whistleblowers" (Boehme 2012)

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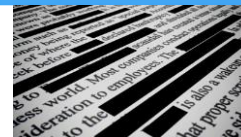
Number of countries around the world where whistleblowers are liked, honored, and respected

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Scenario C: The Case of the Redacted Culture



Gretel is CCO of Starr, Inc., a German manufacturing multinational operating in 60 countries. She reports to the SVP, GC & Corporate Secretary. In 2012, the company entered into a plea agreement with US regulators in connection with a factory explosion in which 23 employees and contractors were killed. The plea agreement required significant “enhancements” to the compliance program. Gretel and her team have worked with an outside expert to develop a culture assessment and focus groups as part of an internal evaluation of Starr’s compliance program. The first confidential focus group has been completed, and issues of fear, retaliation and reluctance to raise concerns were observed. Colleagues from Legal have now raised concerns about focus group results because they are not privileged and may be subject to discovery by plaintiffs in the ongoing class action. The SVP-GC asks Gretel to “table” the culture assessment indefinitely.

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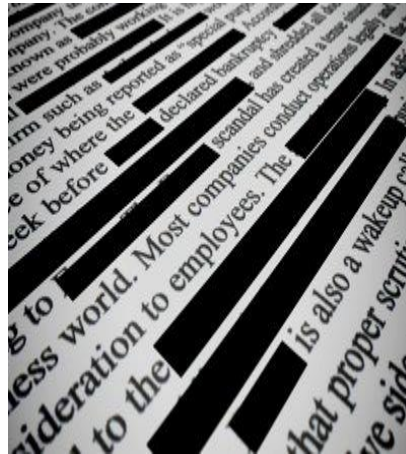
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Scenario C: The Case of the Redacted Culture

What are the issues?

Who are the stakeholders?

How should this be resolved?



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Scenario D: The Case of Zack, the Very Bitter, Problem Employee



Steve, VP HR at BestSale, Inc, receives a visit from Zack, a purchasing manager in the company's government contracts division. Zack is known to HR as a problem employee who is currently under a performance improvement plan with his supervisor. Today, Zack is concerned about some irregularities he has observed in an ongoing bid process for some defense items. He has taken extensive notes and wishes to raise a concern as encouraged by the Code of Conduct. Steve suspects the complaint is spurious and refers the matter to Legal, which decides to conduct an investigation of Zack, bringing in an outside employment law firm to interview Zack and his teammates. Later that week, Steve sees Jackie, the Chief Compliance Officer in the cafeteria and mentions the issue to her in passing.

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Scenario D: The Case of Zack, the Very Bitter, Problem Employee

What are the issues?

Who are the stakeholders?

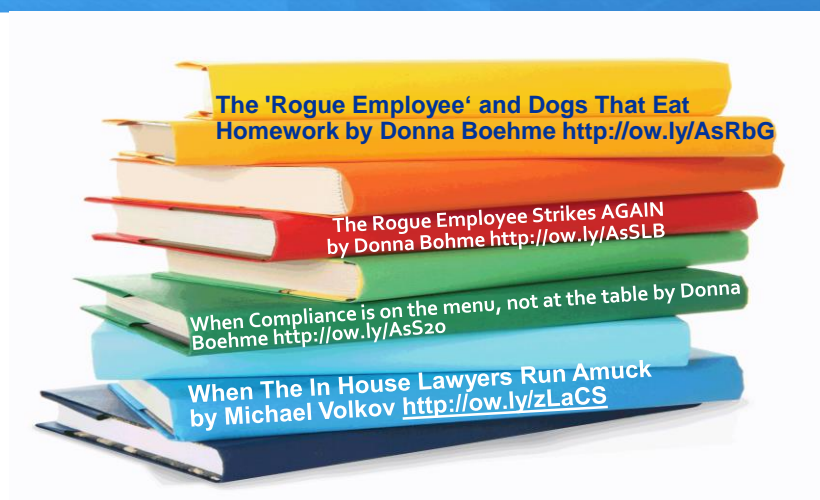
How should this be resolved?



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Recommended Reading



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MODULE 6: Compliance As An Alternate Career Path

"If you are someone who still gets angry over abuses of power and still has a desire to make things better . . . Compliance and ethics . . . might be just the right path for you"

"Compliance Careers for Lawyers," Ch. 6, Murphy & Leet,
"Building a Career in Compliance & Ethics"

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What the Effective CECO Brings to the Table

Integrity, Gravitas
Business & Political Savvy
Engagement & Communication Skills
Project Management
Collaboration & Problem Solving
Organizational Justice
Leadership, Courage & Judgment
Perseverance
Team, Crisis & Change Management
Know What You Don't Know
Humility



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500 Year Old Wisdom For The CECO

"There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things."

*Niccolò Machiavelli
The Prince, 1513*



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The Role of the Compliance Lawyer

- + The CECO does not need to BE a lawyer
(although the law can be an excellent background)
- + He/she just needs to HAVE a good lawyer
- + What are the legal risks of the compliance program?

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Transition Tool Kit

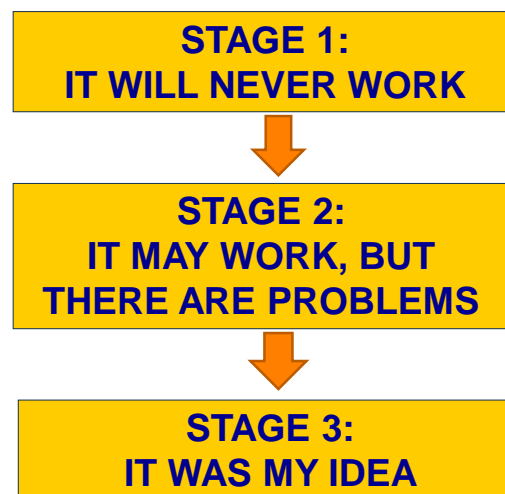
- + Understand the relevant regulations/guidance.
- + Do you have mandate, independence, line of sight, seat at the table + resources to do the job?
- + Understand new mandate, and how it differs from your old one.
- + Create a training program for yourself.
- + Listen and learn the business.
- + Establish internal and external networks. Don't be isolated.
- + Tap into social media networks + consume compliance news.
- + Develop an elevator speech.
- + Have a short and long term plan.



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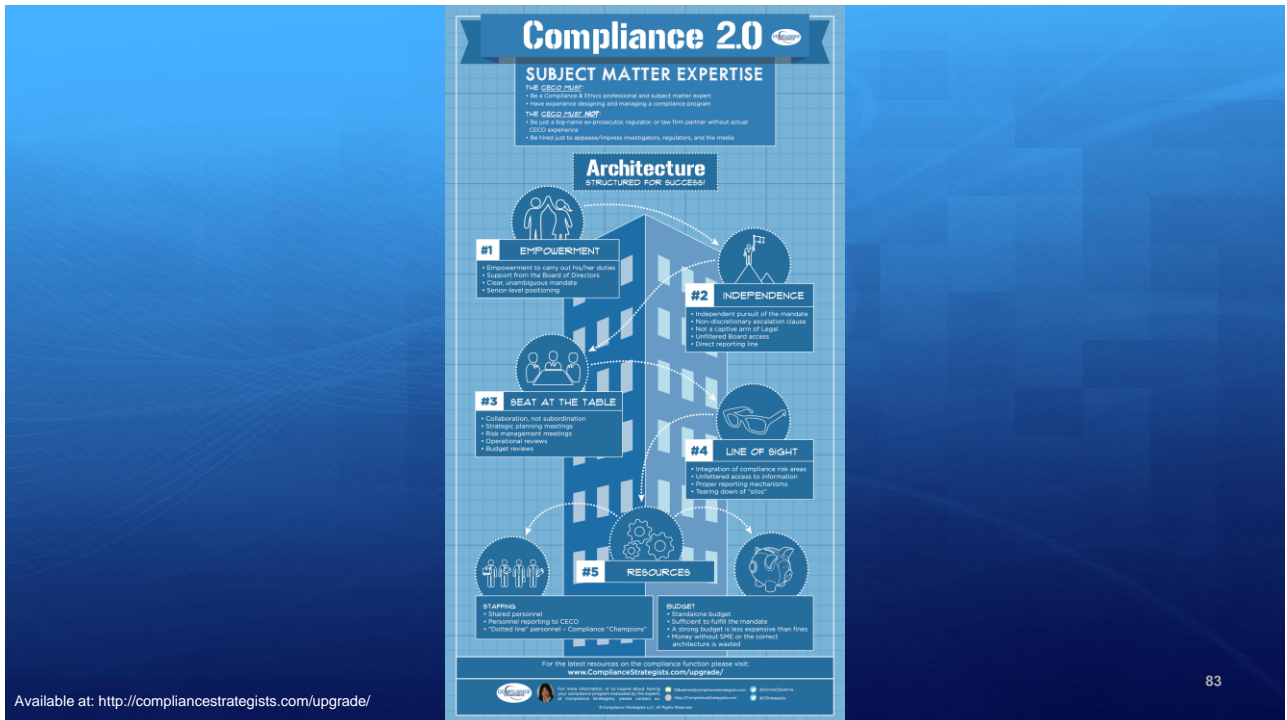
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EVOLUTION OF A COMPLIANCE OFFICER'S IDEA



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