Doing Compliance: Design, Create, and Implement an Effective Anti-Corruption Compliance Program

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Chapter 1: Where it all begins – Commitment from senior management and a clearly articulated policy against corruption

“TONE AT the top” has become a phrase inculcated in the compliance world. The reason it is so important to any compliance program is because it does actually matter. Any compliance program starts at the top and flows down throughout the company. The concept of appropriate tone at the top is in the US Sentencing Guidelines for organizations accused of violating the FCPA; the FCPA Guidance; the UK Bribery Act’s Six Principles of Adequate Procedures; and the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (OECD Good Practices). The reason all of these guidelines incorporate it into their respective practices is that all employees look to the top of the company to see what is important. Or, to follow my colleague Mike Volkov in quoting Bob Dylan, “You don’t need to be a weatherman to know which way the wind blows.”

The US Sentencing Guidelines reads: “High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program… and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”

The OECD Good Practices recommends: “…strong, explicit and visible support and commitment from senior management to the company’s internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery…”
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Principle 2 of the Guidance to the UK Bribery Act reads: “The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.”

The FCPA Guidance, under the section entitled “Commitment from Senior Management and a Clearly Articulated Policy Against Corruption”, states, “Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a ‘culture of compliance’ and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business.”

However, the DOJ and SEC expect senior management to do more than say the right things. They both expect that such a message will be pushed down the ranks of an enterprise so that “A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure. In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.”

The FCPA world is riddled with cases where the abject failure of any ethical “tone at the top” led to enforcement actions and large monetary settlements. In the two largest monetary settlements of enforcement actions to date, concerning Siemens and Halliburton (for the actions of its former subsidiary KBR) respectively, the government specifically noted the companies’ pervasive tolerance for bribery. In the Siemens case, for example, the SEC noted that the company’s culture “had long been at odds with the FCPA” and was one in which bribery “was tolerated and even rewarded at the highest levels”. Likewise, in the Halliburton matter, the government noted that “tolerance of the offense by substantial authority personnel was pervasive” throughout the organization.
At the top
So how can a company overcome these employee attitudes and set, or re-set, its “tone at the top”? In a 2008 speech to the State Bar of Texas Annual Meeting, reprinted in *Ethisphere*, Larry Thompson, PepsiCo executive vice president (EVP) of governmental affairs, general counsel (GC), and secretary, discussed the work of Professor Lynn Sharp at Harvard. From Professor Sharp’s writings, Mr Thompson cited five factors which are critical in establishing an effective integrity program and setting the right “tone at the top”:

1. The guiding values of a company must make sense and be clearly communicated;
2. The company’s leader must be personally committed and willing to take action on the values;
3. A company’s systems and structures must support its guiding principles;
4. A company’s values must be integrated into normal channels of management decision-making and reflected in the company’s critical decisions; and
5. Managers must be empowered to make ethically sound decisions on a day-to-day basis.

David Lawler, writing in his book, *Frequently Asked Questions in Anti-Bribery and Corruption*, boiled it down as follows: “Whatever the size, structure or market of a commercial organization, top-level management’s commitment to bribery prevention is likely to include communication of the organization’s anti-bribery stance and appropriate degree of involvement in developing bribery prevention procedures.” Lawler went on to provide a short list of points that he suggests senior management follow in order to communicate the tone of the company and its attitude toward anti-corruption, as follows:

- Reject a “do as I say, not as I do” mentality;
- Don’t just “talk-the-talk” but “walk-the-walk” of compliance;
- Oversee creation of a written statement of a zero tolerance towards bribery and corruption;
- Appoint and fully resource, with money and headcount, a chief compliance officer (CCO);
- Oversee the development of a code of conduct and a written compliance program implementing it;
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- Ensure there are compliance metrics on all key business reports;
- Provide leadership to middle managers to facilitate filtering of the zero
tolerance message down throughout the organization;
- Don’t just have a whistleblowing, reporting, or speak up channel, but
celebrate it;
- Keep talking about doing the right thing; and
- Make sure that you are seen providing your CCO with access to you and
to the board of directors.

Coming at it from a different perspective, author Martin Biegelman provides
some concrete examples in his book, entitled Building a World Class
Compliance Program – Best Practices and Strategies for Success. He begins
the chapter discussed here with the statement “The road to compliance starts at
the top.” There is probably no dispute that a company takes on the tone of its
top management. Biegelman cites a list used by Joe Murphy regarding actions
a CEO can take to demonstrate the requisite tone from the “captain’s chair” of
any business. The list is as follows:

1. Keep a copy of the constitution on your desk: Have a dog-eared copy of
your company’s code of conduct on your desktop and be seen using it.
2. Clout: Make sure your compliance department has authority, influence,
and budget within the company. Have your chief compliance officer report
directly to the board of directors.
3. Make them accountable: At senior executive meetings, have each
participant report on what they have done to further the compliance
function in their business unit.
4. Sticks and carrots: Have both sanctions for violation of company
compliance and ethics policies and incentives for doing business in a
compliant manner.
5. Don’t do as I say, do as I do: Turn down an expensive dinner or trip
offered by a vendor. Pass on a gift that you may have received. Turn down
a transaction based upon ethical considerations.
6. Be a student: Be seen at intra-company compliance training. Take a
one- or two-day course or attend a compliance conference outside your
organization.
7. Award compliance: You should recognize outstanding compliance efforts
with companywide announcements and awards.
8. The board: Recruit a nationally known compliance expert to sit on your company’s board and chair the audit or compliance committee.
9. Independent review: Obtain an independent, outside review of your company’s compliance program and report the results to the board’s audit committee.
10. Vendors: Mandate that all vendors in your supply chain embrace compliance and ethics as a business model. If not, pass on doing business with them.
11. Network: Talk to others in your industry and your peers about how to improve your company’s compliance efforts.

Many companies struggle to come up with some type of metric which can be used by upper management regarding compliance and communication of a company’s compliance values. One technique might be to require the CEO to post company-wide emails or other communications once a quarter on some compliance-related topic. The CEO would also be required to email their senior management a minimum of once per quarter on a compliance-related topic. One can cascade this down through the company as far as is practicable. Reminders can be set for each communication so that all personnel know when it is time to send out the message. If these communications are made in a timely manner, this metric has been met.

In the middle
However, a company must have more than simply a good “tone at the top”; it must move the message down through the organization, from senior management to middle management, and into its lower ranks. This means that one of the tasks of any company, including its compliance organization, is to get middle management to respect the stated ethics and values of a company, because if they do so, this will be communicated down through the organization.

Adam Bryant explored this in a New York Times interview with Victoria Ransom, the CEO of Wildfire, a company which provides social media marketing software. Ransom spoke about the role of senior management in communicating ethical values, saying, “Another lesson I’ve learned as the company grows is that you’re only as good as the leaders you have underneath you. And that was sometimes a painful lesson. You might think that because you’re projecting our values, then the rest of the company is experiencing the values.” These senior managers communicate what the
company’s ethics and values are to middle management. So while tone at the top is certainly important in setting a standard, Ransom came to appreciate that it must move downward through the entire organization. Bryant wrote that Ransom came to realize “that the direct supervisors become the most important influence on people in the company. Therefore, a big part of leading becomes your ability to pick and guide the right people.”

Ransom said that, when the company was young and small, they tried to codify their company values, but they did not get far in the process “because it felt forced”. As the company grew, she realized that their values needed to be formalized and stated for a couple of reasons. The first was because they wanted to make it clear what was expected of everyone and “particularly because you want the new people who are also hiring to really know the values”. Another important reason was that they had to terminate “a few people because they didn’t live up to the values. If we’re going to be doing that, it’s really important to be clear about what the values are. I think that some of the biggest ways we showed that we lived up to our values were when we made tough decisions about people, especially when it was a high performer who somehow really violated our values, and we took action.” These actions to terminate had a very profound effect on the workforce. Ransom said that “it made employees feel like, ‘Yeah, this company actually puts its money where its mouth is.’”

Ransom sought to ensure that everyone knew what senior management considered when determining whether employees were “living up to the company culture”. The process started when she and her co-founder spent a weekend writing down what they believed the company’s values were. Then they sat down with the employees in small groups to elicit feedback. Her approach was to look for what they wanted in their employees. They came up with six qualities:

- **Passion:** Do you really have a thirst and appetite for your work?
- **Humility and integrity:** Treat your co-workers with respect and dignity.
- **Courage:** If you have a great idea, tell us, and if you disagree with people in the room, speak up.
- **Curiosity:** Constantly question and learn, not only about the company, but about the industry.
- **Impact:** Are you having an impact at the company?
- **Be outward-looking:** Do good and do right by each other.
Ransom had an equally valuable insight when she talked about senior management and ethical values. She believes that “the best way to undermine a company’s values is to put people in leadership positions who are not adhering to the values. Then it completely starts to fall flat until you take action and move those people out, and then everyone gets faith in the values again. It can be restored so quickly. You just see that people are happier.”

What should the tone in the middle be? Put another way, what should middle management’s role be in the company’s compliance program? This role is critical because the majority of company employees work most directly with middle, rather than top, management; consequently, they will take their cues from how middle management respond to a situation. Moreover, middle management must listen to the concerns of employees. Even if middle management cannot effect a direct change, it is important that employees have an outlet to express their concerns. Therefore your organization should train middle managers to enhance listening skills in the overall context of providing training for what Ransom termed their “manager’s toolkit”. This is particularly true if there is a compliance violation or other incident which requires some form of employee discipline. Ransom believes that most employees think it important that there be “organizational justice” so that people believe they will be treated fairly. Ransom further explained that without organizational justice, employees typically do not understand or accept outcomes, but if there is perceived procedural fairness then an employee is more likely accept a decision that they may not like.

**Tone at the bottom**

Even with a great tone at the top and in the middle, you cannot stop there. One of the greatest challenges for a compliance practitioner is how to affect the ‘tone at the bottom’. In an article in the *MIT Sloan Management Review*, authors Jules Goddard, Julian Birkinshaw and Tony Eccles looked at this issue when they explored the idea that the “often overlooked, critical source of differentiation is [a] company’s beliefs”.²

One of the questions that the authors answer is: how do we tap into this belief system? They recommend a structured manner of obtaining this information. By using these techniques, they believe that companies can rethink their “basic assumption and beliefs” and identify new directions for their organization. The authors listed seven approaches that they have used, and which I believe that the compliance practitioner can usefully employ to not only determine “tone at the
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1. Assemble a group: You need to assemble a group of employees who are familiar with the challenges of doing business in a compliant manner in certain geographic regions. Include both long-time employees and those who are relatively new to the organization. The authors also suggest that if you have any employees who have worked for competitors or for other organizations in your industry you include them as well.

2. Ask questions: You should ask the members of this group to articulate their basic assumptions about your compliance model, the management model, your company's business model, and about the future of the industry in general. Ask them to do this individually and not as a group.

3. Categorize the responses: Now comes the work by the compliance practitioner or compliance team, as the authors believe that these assumptions will usually fall into two groups. The first is assumptions that everyone agrees upon the common beliefs. The second is those assumptions that only a few of the participants will identify – this is what the authors call the “uncommon beliefs”.

4. Develop tests for common beliefs: For those beliefs that are labeled “common” – you should consider how you know these to be true. The authors caution that simply because the group may believe that the company operates in a common industry or that we “do it because it has always been done this way” that does not necessarily make it a “hard fact”. Consider what checks you could perform to verify a common belief. The authors note that the purpose here is to “identify the ‘common nonsense’ beliefs that everyone holds that are not actually hard laws of nature”.

5. Develop tests for uncommon beliefs: Here the authors suggest that you need to consider why some people think that these beliefs are true. What is the information or experience that they have drawn upon? Is there any way for you to test these uncommon beliefs?

6. Reassemble the original group: You should reassemble the original group and have them consider the beliefs that were articulated by them individually in the context of your compliance model, and in the context of how both your company and your industry do business. Lead a discussion that attempts to identify any assumptions or beliefs that “are quite possibly wrong, but worth experimenting with anyway”.

bottom”, but also to make an impact on that tone. They are as follows:
7. List of experiments to perform: The authors believe that the outcome of the first six steps will be “a list of possible experiments [tests] to conduct” to determine the validity of the common and uncommon beliefs. These tests can be accomplished in the regular course of business, through a special project with a special team and separate budget. You should agree on the testing process and review your testing assumptions throughout the process. This process can and should take some time so do not set yourself such a tight time frame that it cannot be fully matured.

I find this list to be a very interesting way for a compliance practitioner to get a “tone at the bottom”. By engaging employees at the level suggested by the authors, I believe you can find out what the employees think about the company compliance program, and use their collective experience to help design a better and more effective program. It is my belief that employees want to do business in an ethical manner. Giving the chance to engage in business the right way, as opposed to cheating, will win the hearts and minds of your employees almost every time. By using the protocol suggested by the authors, you can not only find out the effect of your company’s compliance program on the employees at the bottom but you can affect it as well.

The bottom line is that a company must both “talk the talk” and “walk the walk” of compliance. Donna Boehme says that it is really about the culture of compliance in your organization. Put another way, as Mike Volkov wrote in an article on his blog, Corruption, Crime & Compliance, “Even when a company does all the right things at the senior management level, the real issue is whether or not that culture has embedded itself in middle and lower management. A company’s culture is reflected in the values and beliefs that exist throughout the company.” You must find a way to articulate and then drive the message of ethical values and doing business in compliance with such anti-corruption laws such as the FCPA from the top down, throughout your organization.

References
2. Goddard, J., Barkinshaw, J., and Eccles, T., “Uncommon Sense: How to Turn