

White Paper

The role of Senior Management in a compliance regime

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The role of Senior Management in a compliance regime

Getting senior management involved in your compliance program is one of the critical factors to ensure effectiveness. But what are some of the things that senior management must do to assist a Foreign Corrupt Practices Act (FCPA) or UK Bribery Act compliance function? Further, what are some of the things that a company can do to help foster a culture of compliance in the senior management ranks? This White Paper will explore some of the issues surrounding the engagement of senior management in the compliance function.

Drawing from Paula Broadwell's biography of General David Petraeus, entitled "**All In: The Education of General David Petraeus**" I believe that there are four tasks which senior management can assist the compliance function with. They are:

1. Senior management must get the big idea that compliance is the right thing to do business;
2. Senior management must then communicate that idea down through the ranks;
3. Senior management must oversee the implementation of those compliance ideas; and
4. Senior management must capture best practices and lessons in compliance and cycle them back through the system to help refine further improvement.

So how can your senior management use these four tasks to move towards a best practices compliance program?

Get the big ideas right

The Big Idea here is that compliance is good business. One only needs to look at the current debate to amend the FCPA to understand that it can be simple. At the House Judiciary Committee hearing last June, Department of Justice (DOJ) representative Greg Andres said it is quite easy to avoid FCPA liability; simply do not engage in bribery. That is certainly a big idea and one that senior management can lead the way. Senior management can clearly articulate that compliance is not just another thing the Company needs to comply with and as the compliance professional you should meet with senior management to educate them on the FCPA. Give examples of recent judgments against companies that include hefty fines and jail time for some executives.

Communicate the big ideas

Once senior management is committed to a big idea, such as the company will not engage in bribery or other forms of corruption to do business, they must communicate this message. Here a variety of forms of communications can be used; email, video messages, presenting at annual sales and leadership conferences, or any other medium. As the compliance officer, you are only limited by your imagination on how to communicate this idea. One style of leadership which is important is that senior management has to facilitate having the right compliance team but even with the right personnel in place, there must still be an emphasis on leadership. Compliance should be frequently discussed in all regular meetings of senior staff. This is important because it makes a difference, because through discussion of these compliance topics, it will reinforce a culture of compliance and what is expected of each senior manager. Another way senior management can assist the compliance function is to facilitate ownership of compliance throughout the organization. For senior management, this means that not only are you in charge but you own it as well. It is important to establish and make clear that ownership is required to make sure things get done.

A prime example of this type of leadership is shown by GE. The company sets the tone for ethics and compliance and then communicates that commitment throughout its organization. Obviously it all starts at the top and GE is a prime example of this strength. Moreover, GE's senior management meets annually at a conference where one of the frequent

topics is ethics and compliance and the need for integrity in GE. Following this meeting of the GE senior management, they then cascade down this commitment to middle management and emphasize the reputational risk to GE should there be a violation of the FCPA or other anti-corruption statute by the company. The middle managers then further cascade this message down so that it goes through the whole company at regular intervals.

Oversee implementation of the big ideas

Senior management must take an active involvement in any program implementation or significant enhancement. This does not mean that senior management could or even should be down into the details of compliance program implementation or enhancement. However, it does mean that senior management needs to stay abreast of progress and assist, if required, to untangle strategic bottlenecks within the company.

Capture best practices and lessons and cycle back

This fourth task is one that has clearly been discussed by Lanny Breuer and other DOJ representatives at compliance conferences over the past 2+ years. In any minimum best practices compliance program, there should be an annual assessment. The lessons learned from this annual assessment should be cycled back through your compliance program to allow continual refinement of the big idea that your company will not engage in corruption or bribery to obtain business.

One thing that GE will not tolerate is a senior manager who fails to take ethics and compliance seriously. This extends to senior managers who were unaware of compliance issues in their units. GE withdrew people from leadership positions when they were not aware there was a compliance problem. GE demands that its senior management is not only aware of compliance in their units, but they must ask the tough questions if faced with an uncertain compliance situation.

Senior Management role in oversight

There have been two instances where senior management has been identified as having a specific oversight role in compliance. The first was found in January, 2005, in the Monsanto Company Deferred Prosecution Agreement (DPA) for violating the FCPA. In Appendix B to the DPA, Monsanto agreed to, among other things, “the establishment and maintenance of a committee to supervise the review of (l) the retention of any agent, consultant, or other representative for purposes of business development or lobbying in a foreign jurisdiction”, or an Oversight Committee.

The scope of this Oversight Committee is not fleshed out in the DPA. However, it is suggested that a company should incorporate both a pre-execution function and a post-execution management function to oversee the full relationship with a Foreign Business Partner. While this oversight would most necessarily focus on FCPA compliance, there should also be a commercial component to this function.

The Monsanto DPA provides guidance on the make-up of an Oversight Committee by stating “The majority of the committee shall be comprised of persons who are not subordinate to the most senior officer of the department or unit responsible for the relevant transaction” so this would indicate that senior management should be involved in the Oversight Committee. It would also indicate that more than one department should be represented on the Oversight Committee. This would include senior management from the Accounting (or Finance) Department, Compliance & Legal Departments and Business Unit Operations.

The Oversight Committee should review all documents relating the full panoply of a Foreign Business Partner's relationship with a US company. This would begin with a review of any initial requests to engage a new Foreign Business Partner. The information presented to the Oversight Committee would include the Business Unit's request to engage the Foreign Business Partner, the costs and benefits. The next step would be to review the due diligence and all background investigative materials on the prospective Foreign Business Partner.

The Oversight Committee should receive copies of, and approve, all due diligence and background investigative materials before a contract is executed with a proposed Foreign Business Partner. Particular attention should be paid to the form of the contract. If there are deviations from the company's standard form of agreement, with regard to the FCPA compliance issues, there should be a full explanation by the Foreign Business Partner or Business Unit. The Oversight Committee should determine if the company is taking on any unwarranted FCPA compliance risk if non-standard FCPA compliance terms and conditions are used.

After the commercial relationship has begun the Oversight Committee should monitor this relationship on no less than an annual basis. (We still disagree with our colleague Howard Sklar on audits.) This annual audit should include a review of remedial due diligence investigations on the Foreign Business Partner with at least a minimum of a Level One Due Diligence and higher levels of Due Diligence based upon an appropriate risk rating. There should be an evaluation of any new or supplemental risk associated with any negative information discovered from a review of financial audit reports on the Foreign Business Partner. All FCPA compliance training should be reviewed and certifications confirmed. The Oversight Committee should review reports regarding any material breach of the contract including any breach of the requirements of the Company Code of Ethics and Compliance. As with all things FCPA the three most important words here are Document, Document and Document. If you cannot produce documentary evidence to the DOJ of your annual review and its findings, it is of no use to your company.

In addition to the above remedial review, the Oversight Committee should review all payments requested by the Foreign Business Partner to assure such payments are within the company guidelines and warranted by the contractual relationship with the Foreign Business Partner. Lastly, the Oversight Committee should review any request to provide the Foreign Business Partner any type of non-monetary compensation and, as appropriate, approve such requests.

The oversight of Foreign Business Partners is one of the key tools that a company can use to prevent and detect any violation of its own Code of Ethics and Compliance and the FCPA. The proper structure of the Oversight Committee and its full engagement with all aspects of a company's relationship with a Foreign Business Partner is one of the areas that the DOJ will look for in a successful FCPA compliance program.

The second is found in the settlement of a shareholder action against Halliburton. In the settlement of this litigation Halliburton agreed to implement a Management Compliance Committee to evaluate, on a regular basis, and improve, if deemed appropriate, the company's FCPA compliance program. This Management Compliance Committee was also given the responsibility of reviewing any potential or "significant violations" of the FCPA and report to the Board on the investigations and any remedial efforts that were employed.

Each level of management and employees has a role in any corporate compliance program. Senior management is uniquely positioned to not only lead a company's compliance effort but also be engaged in specific oversight roles. This ability to fulfill dual capacities can strength and broaden a company's compliance regime.

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Client-focused, innovative attorney, with expertise in contracts, corporate law, international law, compliance, and small business affairs for major Fortune 500 corporations, such as Halliburton, Smith and Wesson, Exxon, Tesoro, and Texaco, as well as small and solo business owners. Thomas built an international reputation as the “Nuts and Bolts” compliance expert. He successfully managed legal involvement in cases using social media and blogging to educate the public. He is noted for providing superior and the most responsive legal services for the greatest value. He is a resourceful negotiator, with high integrity and good judgment who can provide direction and credible legal expertise.

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