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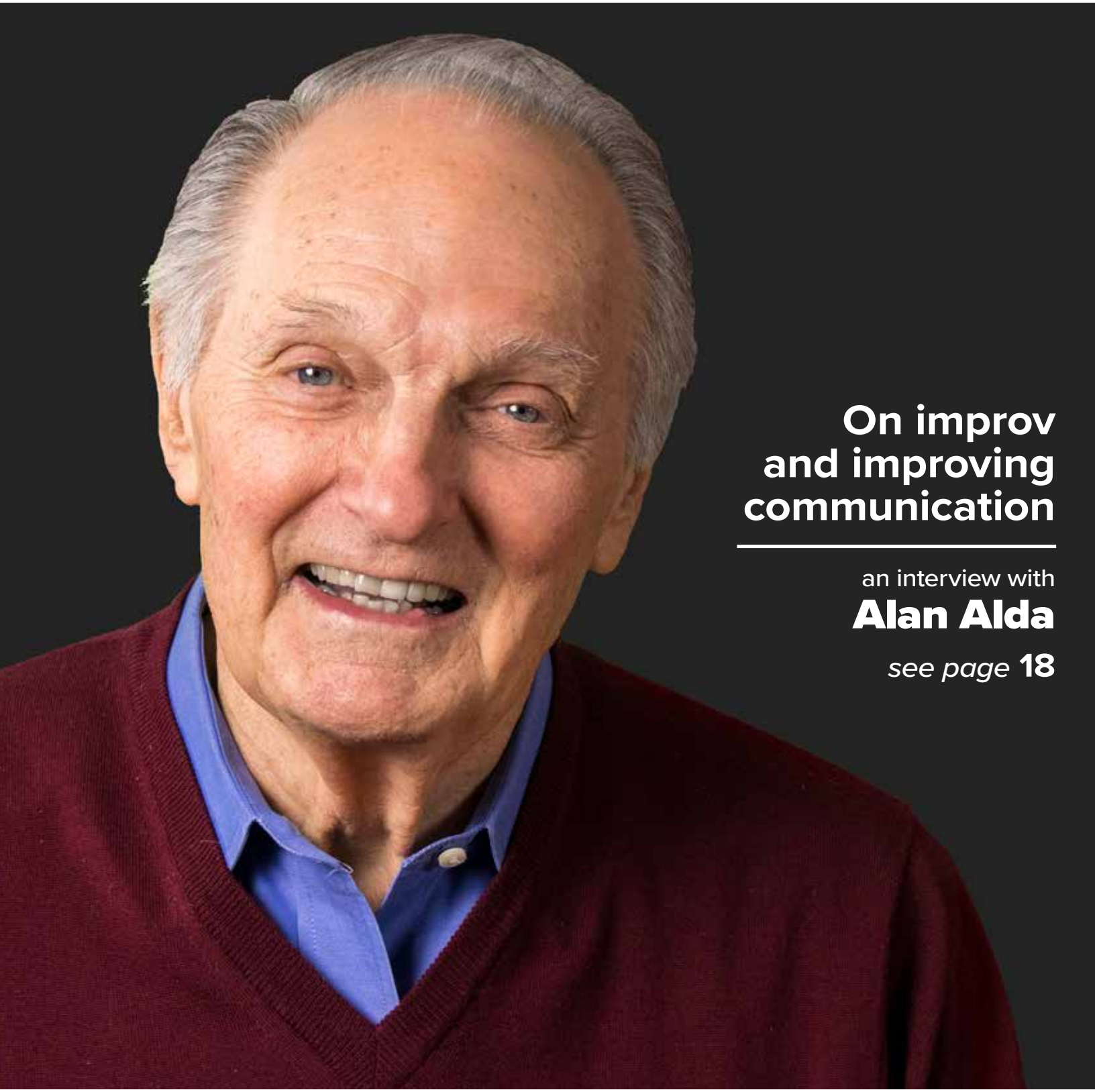
A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

MARCH 2018



On improv and improving communication

an interview with
Alan Alda

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by Gerry Zack, CCEP, CFE, CIA

AI for compliance monitoring?

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Bring up artificial intelligence (AI) and most people think of science fiction books and movies. But AI is here today, whether we like it or not. Criminals are using it (quite successfully), so why shouldn't we?


Zack

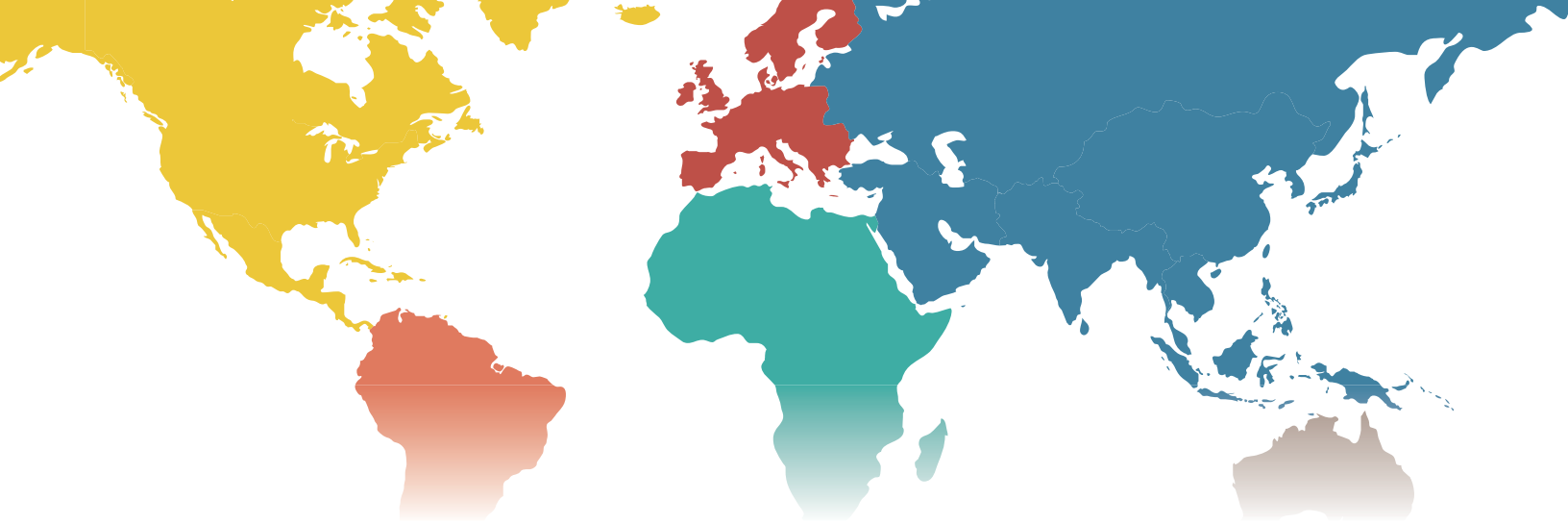
And it's not nearly as far-fetched of an idea for the Compliance and Ethics profession as it might at first sound.

Simply put, AI is "technology that emulates human performance typically by learning," according to technology research firm Gartner. The result is improvement in data analytics from both a speed and accuracy standpoint, pointing us in the direction of improper behavior.

Having personally been involved in several investigations in which AI was used as part of our analysis of communications, activities, and transactions, I've seen how valuable it can be. In a simple example, AI can be used to "learn" normal communication styles, enabling us to pick up on signs of deception, corruption, or other compliance issues by identifying changes in the tone or patterns of communication. When used in this manner, AI actually bears a resemblance to the norming (calibrating) phase used in conducting investigative interviews—observing how an interviewee behaves when responding to easy, non-stressful questions before proceeding to the more important questions, so that we can better identify signs of deception. But with AI, it is more sophisticated and applies to nonverbal communications and data.

The most obvious application to compliance monitoring might be to emails, purchase order descriptions, contract terms, and other unstructured data that often leaves clues in connection with bribery and other corruption violations. Many of these clues go far beyond what a "key word search" might detect. AI can identify differences in the tone of communications that indicate something's up.

Now for the best part. Up until the not-too-distant past, AI was the exclusive domain of programmers, writing custom-built scripts and algorithms for specific applications. The normal user couldn't do it. You needed a programmer on staff. In recent years, however, several off-the-shelf AI software tools have been unveiled that anyone can use, creating a whole new world of possibilities, if you want to boldly go where no compliance officer has gone before. ✳



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Questions? katie.burk@coporatecompliance.org

SCCE™

by Roy Snell, CHC, CCEP-F

Fake news: Compliance officer liability

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My first advice about compliance officer liability is to talk to a lawyer with extensive experience in that area of law. I am not that guy. I just want to address one issue related to this subject that is being misrepresented. I want to talk about the difference between compliance officers who run compliance programs and do not make legal attestations to the government vs. compliance officers who do not run a compliance program and make legal attestations to the government. There are compliance officers, particularly in banking, who do not run compliance programs and submit legal attestations to the government assuring that something happened that was required by law to happen. Occasionally, they get fined for making a legal attestation that is materially wrong. It is much like the person who signs the tax forms. They make legal attestations to the government that the tax filing is accurate, and their work should be reviewed by a compliance officer. The compliance officer who makes an attestation to the government per a regulation should have their work reviewed by a compliance officer who is running a compliance program, because they are a risk to the company.


Snell

Some people are saying that compliance officers who run compliance programs and do not make attestations to the government have the same personal liability as a compliance officer who doesn't run a compliance program and makes legal attestations to the government. These are two totally different jobs with the same name and totally different liability. People write articles to compliance officers who run compliance programs and say, "You have huge personal liability." They then back up their story by giving an example of a person who did something that, by definition, is not and never should be part of the job of a compliance officer who runs a compliance program.

Compliance officers who run compliance programs have personal liability and should be covered by directors and officers liability insurance and should get legal advice. However, the only legal attestation I have ever heard of a compliance officer making is attesting that their company complied with a corporate integrity agreement, and I would wager that 99.9% of all compliance officers have never had to do that. Legal attestations are a part of operations that a compliance officer should be reviewing, *not doing*! It is a risk area that should be covered by an independent compliance officer. If you see anyone telling compliance officers that they have the same personal liability as people who regularly make legal attestations to the government, please comment and tell them what our job is. ✳

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Compliance & Ethics Professional is printed with 100% soy-based, water-soluable inks on recycled paper, which includes 10% post-consumer waste. The remaining fiber comes from responsibly managed forests. The energy used to produce the paper is generated with Green-e® certified renewable energy. Certifications for the paper include Forest Stewardship Council (FSC), Sustainable Forestry Initiative (SFI), and Programme for the Endorsement of Forest Certification (PEFC).

> The best message in the world is useless if it doesn't make it into the other person's head.

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ARTICLES

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Compliance & Ethics PROFESSIONAL

VOLUME 15, ISSUE 3

Germany threatens sanctions for Facebook's data practices

Facebook's data-mining practices have caught the attention of Germany's Federal Cartel Office, which has warned that the social media giant will face sanctions should it not fix what are seen as violations of users' privacy. Facebook's business model relies on collecting user data from not just its own pages but also subsidiary services like WhatsApp and Instagram in order to sell personalized ads. Cartel Office President Andreas Mundt has said that Facebook's practices amount to an abuse of its market power. In a recent interview by daily newspaper *Rheinische Post*, Mundt stated that users are "not sufficiently informed about the kind and extent of the data collection and therefore cannot effectively agree to it." Analysts view the involvement of the Cartel Office rather than data protection laws as significant, because it will allow Germany to bring tougher sanctions if Facebook does not comply.

TI: Global effectiveness in fighting money laundering remains low

The anti-corruption organization Transparency International (TI) says a recent global assessment of 43 countries' anti-money laundering efforts puts their average effectiveness at 32%. At root, this means that most countries fail to prevent criminals from stealing money or from getting away with it. Overall, just seven countries score above 50%—the United States, Spain, Italy, Switzerland, Australia, Portugal, and Sweden. But even these relative high scorers are below 70% effectiveness. TI has established a "Global Effective-O-Meter" to track changes in anti-money laundering efforts. The ratings are calculated by the Financial Action Task Force (FATF), a global nonprofit that works to fight money laundering. The assessment is conducted on the basis of 11 immediate outcomes, which represent key goals that an effective anti-money laundering system should achieve. These include principles such as 1) money laundering and terrorist-financing risks within the country are understood and used to combat money laundering; 2) the country contributes to international cooperation to deliver information that facilitates action against criminals and their assets; and 3) supervisors appropriately supervise, monitor, and regulate financial institutions for compliance. For more information, view TI's Effective-O-Meter page: http://bit.ly/2n5kJ7g.

Fate of SEC administrative law judges to be decided by high court

The US Supreme Court agreed in January to hear a case that challenges the constitutionality of the use of administrative law judges by the Securities and Exchange Commission (SEC). The case, *Raymond J. Lucia and Raymond J. Lucia Companies Inc. vs. Securities and Exchange Commission*, will rest upon whether or not SEC administrative law judges (ALJs) are officers or "inferior officers" of the US and not simply agency employees. Under the Constitution, officers must be appointed by the president or the head of a federal agency or a court. The SEC initially argued that ALJs are only employees because their decisions are not final and still subject to SEC review. But in November, the solicitor general announced that the government would no longer defend the constitutionality of the SEC's ALJ hiring process. In response, the SEC reversed course and agreed that ALJs are, in fact, inferior officers of the US and then took steps to ratify its current ALJs. The Supreme Court's decision is expected to resolve a split between the D.C. Circuit, which ruled that ALJs are not government officers, and the Tenth and Fifth Circuits, which ruled in separate cases that ALJs are government officers. ✳

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Regulatory

Top Court agrees to reconsider collection of sales taxes for internet commerce

Most states have long complained that they lose billions of dollars in annual sales tax revenues to online shopping, and they have been unsuccessful in pushing Congress to create a fix on the federal level. However, they may finally get what they want when the Supreme Court decides the upcoming case *South Dakota v. Wayfair, Inc.* The case challenges the federal government's power in regulating interstate commerce, which includes the ability to collect sales tax. As a result of a 1992 Supreme Court case, *Quill Corp v. North Dakota*, states were told they could not demand sales tax from companies whose sales occurred in the state but who had no physical presence in the state. But the Quill case occurred in the era of catalog merchants, and the court was concerned that requiring retailers to collect taxes in multiple states would be unduly burdensome and could stifle interstate commerce. Today, technology has significantly reduced retailers' costs of complying with multiple states' tax laws. Now South Dakota, which has no state income tax and relies on sales and use taxes for revenue, is arguing that it be allowed to collect its tax from large online retailers. As supporting state attorneys general have written in documents submitted to the court, the greater concern should be, "States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike." The court is scheduled to hear the case in April.

SEC says crypto-based funds not ready for regulation

Investor protection issues top the list of barriers to establishing bitcoin exchange-traded funds, US regulators say. The US Securities and Exchange Commission (SEC) released a staff letter in January that makes the case that companies offering cryptocurrency-based investment products are not yet able to comply with SEC regulations. The SEC in its letter says it has questions concerning how funds holding substantial amounts of cryptocurrencies and related products would satisfy the requirements of the Investment Company Act of 1940 and its rules. For instance, determining the valuation of cryptocurrency portfolios at the end of each day would be hampered by the volatility of the market and the nature of blockchain transactions. Likewise, determining liquidity and custody would be problematic. The agency asked the sponsors who filed registration statements to withdraw them until its numerous questions can be satisfactorily addressed. For more information, see the letter: *http://bit.ly/2DEPqu0*.

Hong Kong to tighten regulations for auditors of listed firms

Recent scandals involving questionable accounting in Hong Kong companies have spurred the territory's Financial Reporting Council (FRC) to seek stricter regulatory control over auditors. The FRC has been working with lawmakers on legislation that will give it more power to investigate and discipline auditors of listed companies. It will also extend its regulatory scope to the oversight of standards and ethics within the auditing industry. The effort reflects the region's broader move toward more government oversight. FRC Chairman John Poon said the new rules were needed to bring Hong Kong's regulation of auditors in line with those of commercial centers such as New York and London. ✳

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SCCE *conference news*

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By registering as an attendee for the Higher Education Compliance Conference, you'll gain complimentary access to HCCA's Research Compliance Conference. The parallel schedule gives you the freedom to attend sessions at either conference—two for the price of one.

At the conclusion of the conference, the Certified Compliance & Ethics Professional (CCEP)® exam will be administered. Attendees of the conference have the opportunity to earn sufficient continuing education units to meet the requirement for taking the certification exam. ✳

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SCCE *website news*

Contact Tracey Page at +1 952.405.7936 or email her at tracey.page@corporatecompliance.org with any questions about SCCE's website.

Top pages last month

About Membership | Home Page | Utilities & Energy Compliance & Ethics Conference | Job Board | Why Join?

Number of website visits last month

108,852

Best of Blog

For those who have yet to visit our blog, it contains articles and podcasts from industry leaders in Compliance. With the Best of Blog newsletter, we give you the best articles and podcasts from the past month, delivered to your inbox.

This email is currently delivered to all our contacts on the current email list, but if you prefer to get ahead of the game and see the stories as they are posted, check out The Compliance & Ethics Blog at *complianceandethics.org*.

Video of the Month

What should you do before rolling out a global compliance and ethics program?

Sally March discusses why it is important to consult local staff before implementing a compliance program in another country. See this video and others on Compliance in Europe at: *bit.ly/scce-votm-2018-03*.

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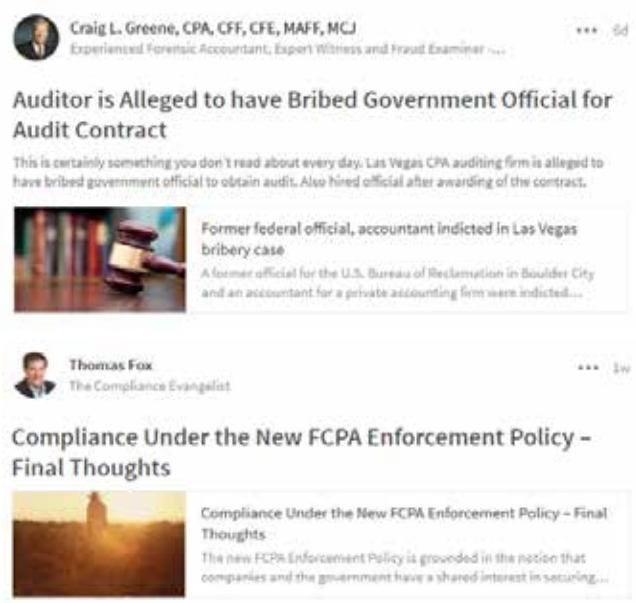

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SCCE *blog highlights*

Contact Doug Stupca at +1 952.567.6212 or email him at doug.stupca@corporatecompliance.org with any questions about SCCE's blog.

Two years ago, I lost the first ethics and compliance officer I ever knew. I called her Mom.

*By **Jodi L. O'Neill, CCEP,** Deputy Compliance Officer – Indiana Public Retirement System (INPRS)*

She didn't bear a formal title like Deputy Compliance Officer or have an office in a high rise. She didn't get paid to teach me morals and values. But what she did will last long after any job or title. She rooted in me "do the right thing, even when it's hard to do" and "at the end of the day you have to be able to look at yourself in the mirror."

She was the first person to teach me to understand the facts, tell the truth, don't steal, and put my best foot forward. I remember her going back into a store to return money to a clerk who had given her too much. She could have kept it, but she didn't. Even though it was "legal" to keep it, it wasn't "right." Ethics vs. compliance.

When Mom asked me to do something, I had better do it. On her time frame—not mine. My time frame was when I felt like it. Many times I would "forget" before I "felt like it." Which landed me in hot water. When Mom told me to stop doing something, I had better stop. I learned to be compliant to her instructions. There was never corporal punishment. But there was consistent punishment for non-compliance.

Growing up, times were tight. As a factory worker, she struggled through layoffs. She'd work several part-time jobs to provide for us. All of them together didn't equal full-time pay. Others made an easy buck doing less than ethical things and had more stuff than we did. But for her, reputation and morals always trumped stuff.

Work hard. Do the right thing. Follow the rules. Let your conscience be your guide.

A communicator by trade, I take information people need to know and create something that makes them pause and think. Maybe that's why I made the leap from communication/public relations to ethics and compliance. Even though it's legal, is it ethical? Can I couple my passion as a communicator with my core of ethics and compliance and help others go further?

I sadly sit here thinking about the second anniversary of her death wishing I had more time with her. I fondly think of everything Mom stood for and wish she could read this article. It would make her laugh. And cry. And feel proud knowing her life mattered. Choosing to do the right thing even when it was hard. Always being able to look in the mirror. I will never look in the mirror and be ashamed of what I see. And it's because of her.

Thank you, Mom. You were my first, and best, ethics and compliance teacher. ✳

*For more compliance news and insights, visit **The Compliance & Ethics Blog** at complianceandethics.org, and don't forget to subscribe to the daily digest at http://bit.ly/SCCEBlogSubscribe*

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PEOPLE *on the* MOVE

▶ **Kellye Gordon** has been promoted to Vice President, Ethics and Compliance, at VF Corporation in Greensboro, NC.

▶ **David Glockner**, former director of the SEC's Chicago office, joined Citadel as its Chief Compliance Officer in Chicago, IL.

▶ California-based Rich Uncles, LLC, announced the appointment of **John H. Davis** as its new Chief Financial Officer and **Jean Ho** as its new Chief Operating Officer and Chief Compliance Officer.

▶ The Board of Restile Ceramics, in Andhra Pradesh, appointed **Rekha Singh** as its Company Secretary and Compliance Officer.

▶ Malta-based BNF Bank announced the appointments of **Adrian Coppini** as Chief Operating Officer and **Maruska Buttiġieġ Gili** as Chief Risk Officer.

▶ **Ms. Payal** has been appointed as Company Secretary and Compliance Officer for Stellar Capital Services Ltd in Delhi, India.

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If you've received a promotion, award, or degree; accepted a new position; or added a new staff member to your Compliance department, please let us know. It's a great way to keep the Compliance community up to date. Send your updates to:

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Hear from your peers

Bailey Naples, CCEP
Director of Risk Management and Corporate Compliance
Berkshire Farm Center & Services for Youth
Canaan, NY, USA

1) Why did you decide to get certified?

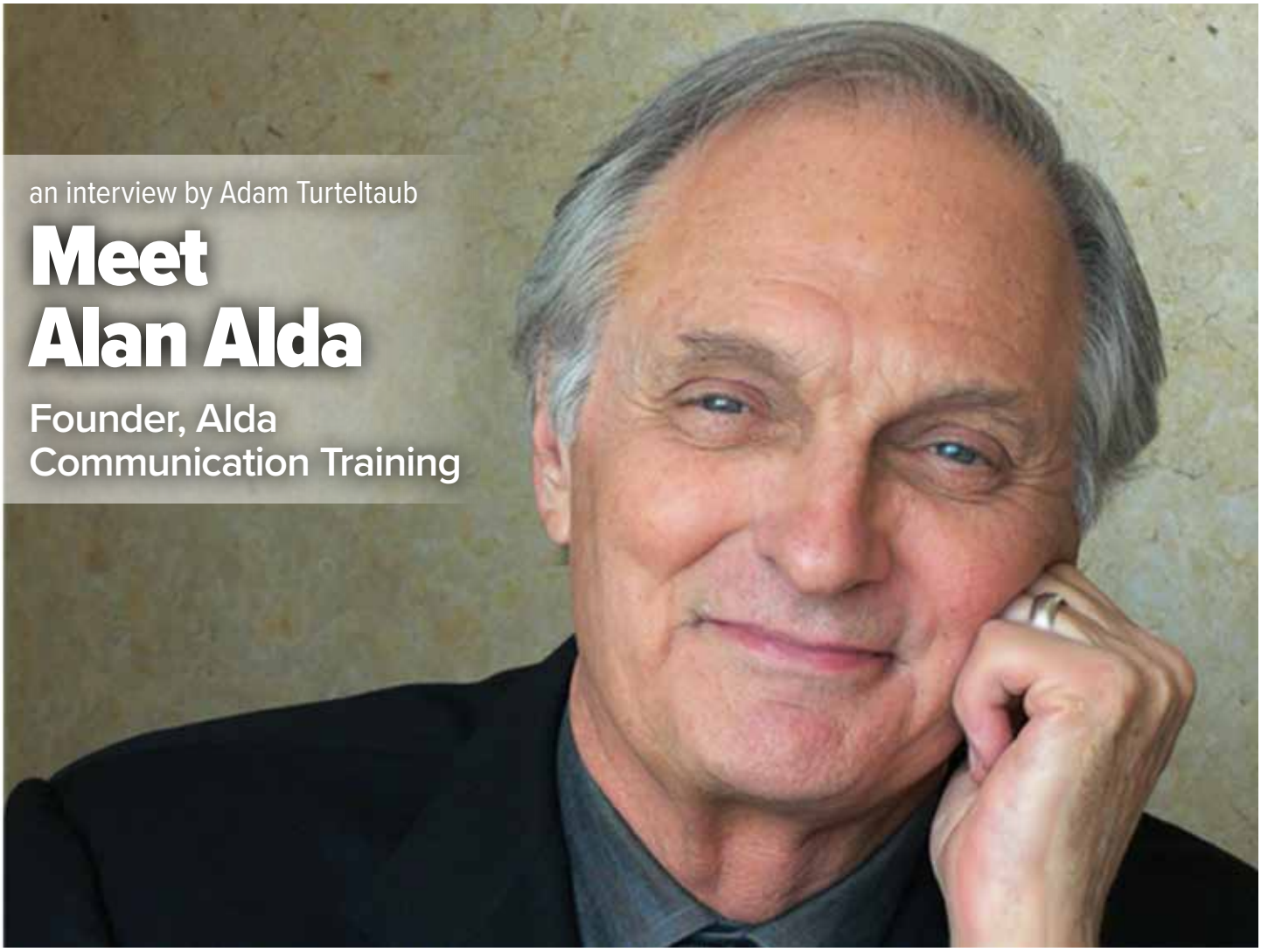
The reason I decided to become certified was because I wanted to show dedication to my field. With my previous experience as an auditor, people would keep assuming that I would eventually look for a position in the Finance department or in Internal Audit. Obtaining my Certified Compliance & Ethics Professional® certification let people know I was dedicated to Compliance and Ethics.

2) How do you feel your certification has helped you?

My certification has been a confidence booster and has given me the credentials in conversations. Experience means a lot, but when you are trying to gain the trust of a new team, having the proper certifications goes a long way.

3) Would you recommend that your peers get certified?

I would *highly* recommend that anyone who is sincere about pursuing their career in Compliance should obtain their certification. It has been invaluable.



an interview by Adam Turteltaub

Meet Alan Alda

Founder, Alda Communication Training

This interview with **Alan Alda** (workshops@aldacommunication.com; website: http://www.aldacommunicationtraining.com) was conducted by **Adam Turteltaub** (adam.turteltaub@corporatecompliance.org), Vice President of Strategic Initiatives & International Programs, Society of Corporate Compliance and Ethics & Health Care Compliance Association.

I've had the pleasure of knowing Alan Alda almost as long as I can remember. He and my father worked together in the early 1960s, and our families have been friends ever since.

Always thoughtful and inquisitive, his passions and curiosity have led him to star on the stage, on TV, and in film; write and direct; host documentaries; and even author three books. His latest is The New York Times *bestseller,* If I Understood You, Would I Have This Look on My Face?, *published by Random House.*

AT: First, let me tell you how much I enjoyed your book. I think your focus on improving communications is so very important for our members, since their job is about getting others to do the right thing, and that's really a communications challenge.

I'm going to begin and end this interview with questions about stories, since you argue very passionately about the importance of stories for communication. And, in fact, I'm going to start with a story you may not remember.

You were doing a play in Los Angeles, and Rhea (my wife) and I came one night. Afterwards, we went back stage to thank you for the tickets and to tell you how much we enjoyed it. I remember asking you if it was hard to do the same play night after night.

You replied that it was different every night because the audience was always different.

It was something I had never thought of, and I felt both humbled and educated. It was something that I kept thinking about as I was reading your book. To me the central message is that even theater is a discussion, and that we need to think about not just what we're saying, but what the other person's reaction will be.

AA: Thanks so much, Adam. I'm really glad you enjoyed the book. Thank you for that story, too. I thought it was going to end with the response I often give to that question: It's different every time, like dancing. If someone says, "Would you like to dance," you don't say, "No, thanks, I've done that."

AT: Where did your drive to improve business communications come from?

AA: I realized one day how important communicating with clarity can be when a dentist was holding a scalpel a few inches from my face and was about to cut into my gum. He was getting ready to do a surgical procedure that he had invented and was clearly proud of. He paused long enough to say one inscrutable thing: "Now there will be some tethering." I had no idea what he was saying. I asked him what he meant by "tethering," but his answer was just to bark at me, "Tethering! Tethering!" I was too cowed by his surgical gown to tell him to put the knife down and explain what he was about to do, which he went ahead and did. He severed the little tissue that goes between the upper lip and the gum. This resulted in a smile that looked more like a sneer. I found this out a couple of weeks later when I was playing a scene in a movie. I had to smile in the scene, and the harder I tried to smile, the more I sneered. One good outcome was I could now play a whole new range of villains.

Something else that came out of it was that eventually I would realize that every workplace depends much more on clear communication than we usually think it does. We know what we mean, and we assume the other person does, too. When we're wrong, it can mean hurt feelings, lack of cooperation, and in this case, a smile-ectomy.

AT: I really like the point you make in the book that "not being truly engaged with the people we're trying to communicate with… is the grit in the gears of daily life." Why do you think we hold back? Is it because we're distracted, busy, afraid of the intimacy, too focused on what *we* want to say and not what *they* have to say, or some combination of all of that and more?

AA: Most of us think of good communication as saying what we have to say using the best possible choice of words. What perfectly expresses my point of view? I think what we forget is that the best message in the world is useless if it doesn't make it into the other person's head and if it doesn't stick there for a while. If we're not engaged with the other person so fully that we're practically reading their mind, then we're not in a position to know if we're reaching them. There are all kinds of things happening on a person's face when we talk to them. If we learn to read those clues, we have a good estimate of what's going on in their mind. That's why my book is called *If I Understood You, Would I Have This Look on My Face?* Understanding what the other person is going through is too often overlooked in communicating.

AT: How do we increase our willingness to engage? And how do you let people know you're really there with them and not just going through the motions or talking *at* them?

AA: We have to practice. And we have to be genuinely interested in the other person. For instance, we hear a lot of tips about *active listening*—letting the other person know you

heard what they said. But just repeating what another person has said in a mechanical way can be annoying. The underlying connection with the other person has to be authentic. It can start simply with *deciding* to pay attention to what they're thinking and feeling. The more we do it, the better it feels, and the more likely we are to do it the next time.

It sounds simple, but it's not easy. Sometimes we can fall into a mechanical version of paying attention. It's not staring at another person; it's observing and responding to them. It can feel really good.

AT: Let me play devil's advocate here for a moment. You write a lot about relating, which is very important; it's part of the glue that binds us as families and a society. But, is it always important? If you have to tell someone something where there's no wiggle room ("You have to do this," or "You can't do that.") is relating really necessary?

AA: Giving orders in the military is the only place I can think of where you can tell somebody to do something, and they'd better do it or they'll get shot. But even there, you often have to inspire people to do what you want them to do. ("Once more unto the breach, dear friends…")

In business, let's say in a situation where there's a serious ethical problem, it seems to me you have to be firm about the policy, but that doesn't mean you can forget about what they're going through as they listen to you. What if their eyes are telling you they have no intention of changing their behavior? A little relating would pick that up. Relating isn't always warm and fuzzy. It's mainly being very observant.

And in addition, connecting to the other person can be useful even in a tough situation like this. My guess is that there will be less likelihood of the behavior happening again if you can reach the person at the intersection of your shared values.

AT: You're a fan of using improvisation, and by that, I don't mean just winging it, but using specific improvisational techniques. That's a bit of a surprise. Most of us would be tempted to double down on formal, classical preparation when we need to communicate with others. What do you think improv brings to communication?

You have to be firm about the policy, but that doesn't mean you can forget about what they're going through.

AA: It brings in the contribution of the other person. It's helpful to think of that person as our communication *partner*, not the target of our pronouncements.

AT: You talk about relating to people and also of empathy and how improv brings that out. Are relating and empathy one and the same, or do you see them as different?

AA: The way I use the term, empathy is being aware of the other person's feelings. Relating, for me, is a way of gathering all the information you can from body language, tone of voice, even syntax to get a good estimate of what's really going on in someone's head.

AT: One of the things you write about is making people want to know what you have to say. How do you make that happen when

people may really not want to hear what you have to say? Few people go into a compliance training session wanting to know what the law says they can or can't do, especially the can't part. It's a permanent barrier between the workforce and the compliance team. Sometimes it's low, and sometimes it's high, but it gets in the way of people wanting to hear from the compliance and ethics team.

AA: I'm not a compliance officer, so I'm leery of stepping in where I don't belong. But I have had times in my life when I've had to make it clear to a business partner, or even a child, that there's certain behavior we just can't do. Seeing it from their point of view before laying down the law seemed to help the medicine go down. I don't know if it will make people line up at the door of the compliance team in order to hear even more things they can't do, but it might make them dread it less.

AT: One of the concepts you talk about that really resonated for me in an uncomfortable way is starting too far in or not too far—basically, giving more information than the person needs or not enough. I think we all go into conversations thinking the person knows a certain amount already, but we've all been in situations where we found we were wrong. How do you calibrate and adjust effectively mid-conversation?

AA: Two things. It doesn't hurt to ask questions to make sure they're with you. And it really is not insulting their intelligence to be clear and basic. Sometimes people think they understand something, because they've decided what it *probably* means. As long as we imply that there's no judgement about their not knowing, we can just frankly keep making sure they're up to speed with us. I think it's part of treating the other person as a partner.

AT: You talk about the "sound of certainty." Basically, when people are very decisive in a response, it tends to diminish the other person and cut off conversation. How do you avoid that when your job is being the person who *does* have the definitive answer? In Compliance there are often very strict rules. You want the person to understand that there's no wiggle room, but you also need them to feel comfortable coming forward in the future.

AA: This is a great challenge. The "sound of certainly" thing is really a tone of voice along with an attitude of "I don't want to hear any more from you on this subject." That tends to cut off listening. But, on the other hand, there *are* some basic truths, like the idea that if you step off of a 50-story building, you're not going to last long. You can declare that gravity exists in a punishing tone, or as a kind of service. Still, gravity is a law you can't wiggle out of. Knowing how the other person feels doesn't mean you can't be firm. On the contrary, it might make the firmness land better.

AT: Let me go back to improv for a bit. A lot of readers are going to say, "No way I'm signing up for an improv class." Actually I'm saying the same thing. What should they (and I) do?

AA: Here's what I do (because I can't get to an improv class regularly—and they're *not scary*). I practice during the day with strangers and people I know. I get out of the cloud of thoughts I'm in and see if I've actually noticed the color of the other person's eyes. Suddenly, I really see them. Just today, I was delayed for five minutes at a security desk in a fancy building. For some reason, I wasn't on the list of people permitted to enter. It could have been frustrating. But I looked at the guard's face and actually noticed her eyes. I realized she had a happy, pleasant face. After that moment, we were working together on the problem and the time passed without stress.

AT: One of the challenges I see for compliance people is that so much of what they communicate is about requirements. No one likes being told the rules, and sometimes they may be counterintuitive. Most laws make sense—you shouldn't pay bribes or rip off the government—but there can be a resistance when you see your competitors doing it with seeming impunity. Also, there are times when the regulations may be counterintuitive or annoying.

When you're the one who has to say, "It doesn't matter what they do; we act this way," it can be hard to connect with people. You can just tell them stories about others who broke the rule and the awful things that happened, but that can get old quickly. How do you build a connection, especially a personal one, when you're trying to get people to understand something that can be a bit technical and mechanical?

I reminded him that corruption hurts us all, and how much better it is not to poison the reservoir we all drink from.

AA: I sort of know how this feels. I have a friend who was high up in the executive team of a huge company. He once said, "I really wish we could give people bribes in some of these countries, the way everybody else does. We're getting killed." I didn't have to point out how wrong or illegal it was—he knew. But I really wanted him to not *want* so much to pay bribes. It wasn't easy. The more I reminded him that corruption hurts us all, and how much better it is not to poison the reservoir we all drink from, the more forlorn he looked—just hungering to slip somebody a hunk of change. Maybe I just should have let him know I understood his impulse. Maybe sharing with him his feeling that it didn't seem fair would have helped him accept the reality. On the other hand, you have a really tough job.

AT: Finally, let's finish where we began with your discussion about stories and how central they are to our sense of the world and our ability to learn. I admit I'm in complete agreement with you. I do a presentation where I underscore that we remember stories more than facts or rules, which is why, I think, most religions don't give you a bunch of rules to follow, but instead have stories that the rules come out of. But, I wonder if part of the resistance we have to what others tell us is that we're caught up in the stories inside our own heads. We build a narrative about how things are supposed to go and who we are. Then, when something differs from that or something goes wrong, we get put into an unfamiliar situation, or a compliance officer says, "No, you can't do that," and we have an irrational reaction because our story is being challenged. How does a good communicator overcome the resistance to changing our internal narrative?

AA: You suggest an interesting ideal that everyone has an internal story that they believe and that they don't like to veer from. Could be. If they do, I doubt if we have much of a chance of reaching them with *our* story until we know what *their* story is. Again—and always—listening. Relating.

AT: Thank you, Alan for sharing your insights with us. ✳

by Sally March

#MeToo

Sally March *(sjmarch10@gmail.com) is Director, Drummond March & Co, in London, UK.*

Are we witnessing a sea change in attitudes toward close encounters of the wrong kind in the workplace? The very public resignations of senior politicians, business executives, and powerful men in the media have sparked a great debate.

March

We applaud the courage of the women and men who are speaking out and saying, "Enough is enough." At the same time, there is a feeling that a pendulum is swinging, and no one knows how far it will swing or where it will fly when it swings back, as these things inevitably do.

The common denominator in most cases is abuse of power. Recipients of unwelcome advances or suggestive comments feel they can't speak up because the man has power directly or indirectly over their employment. This isn't limited to corporate bosses or the casting couch of Hollywood. Tech entrepreneurs who need funding from private equity firms, journalists or political activists who depend on access to politicians, and lawyers who want the opportunity to work with the senior partners and C-suite clients all recognize the imbalance of power in these relationships.

Some people are complaining that there is a big difference between sexual assault and suggestive banter. Yes, there is. And women have a right to complain about both. In fact, "banter" doesn't just mean good-humoured personal remarks; the first definition in the dictionary is "humorous ridicule." A female personality on the BBC responded to the men on her panel (and they were all men) who complained that the allegations from Parliament were not "high-level crimes." "It doesn't have to be high-level for women to feel under siege in somewhere like the House of Commons. Actually, for women, if you're constantly being harassed, even in a small way, that builds up and wears you down."

Most workplaces now have a code of conduct that says, "We treat one another with respect." What does this mean in practice? One person's flirtation is another person's unwelcome attention. We could be draconian, ban all personal comments, and limit contact to handshakes. But we are social animals, and no one wants to inhibit inoffensive socializing that makes the hours we spend at work more pleasant. Here are two ideas that might be helpful: (1) For managers and supervisors, don't flirt with anyone who isn't in a higher position than yours; and (2) As the polite English would say, always preface a personal remark with, "May I say?" If your comment is not welcome, it invites the recipient to say, "No, you may not." ✳

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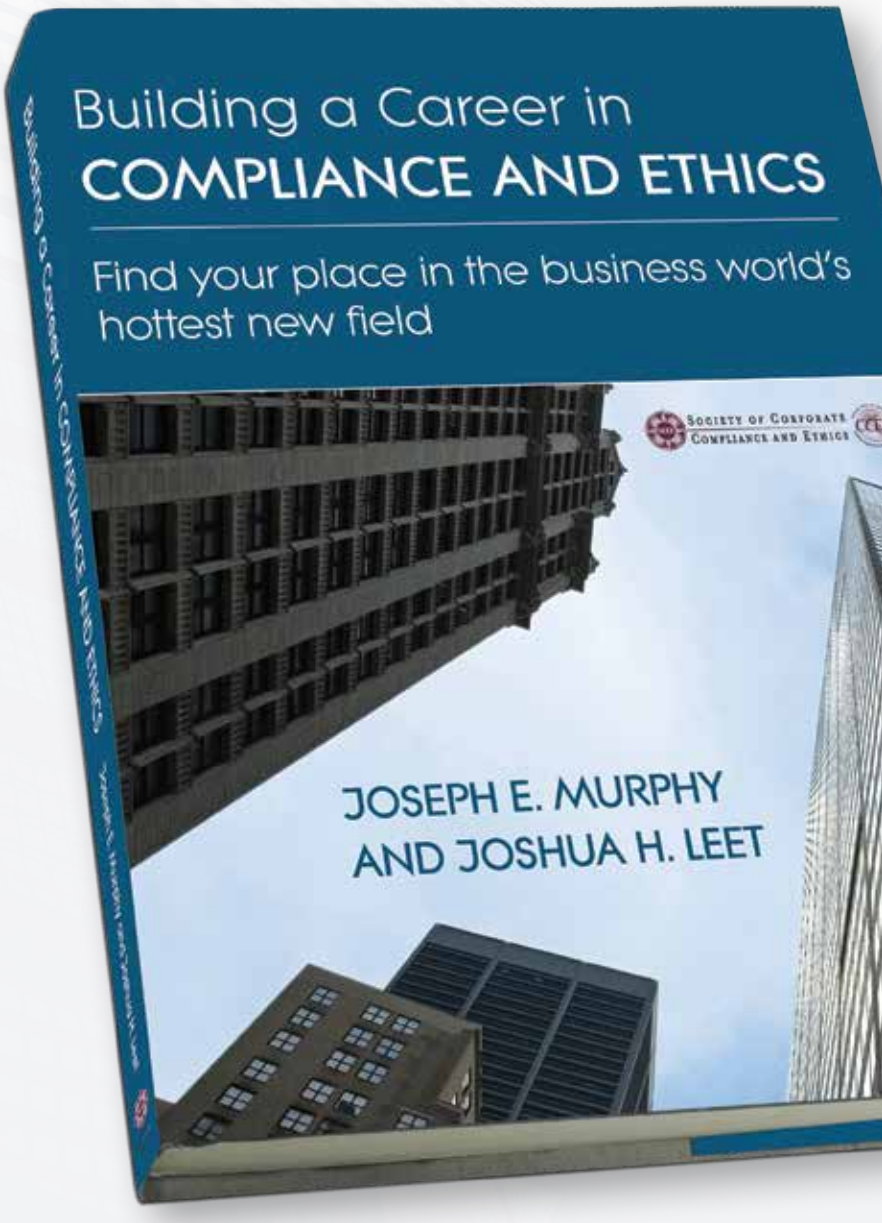

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Partner, Kaplan & Walker LLP, a compliance law firm; former program director of the Conference Board's Business Ethics Conference

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by Ann Straw

Lost in translation: The difficulties of implementing a global compliance program

» Language, culture, and legal structure are key elements when implementing a comprehensive compliance program globally.
» "Comprehensive" and "global" should not necessarily be interpreted to mean "uniform" across different countries.
» There is a significant risk of miscommunication when a policy is too long or too wordy.
» Leave room in policies for the company to change direction as markets and conditions change.
» Don't assume one size fits all for compliance on a global scale.

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I am the U.S. General Counsel of a multinational conglomerate (VCNA) operating in North America, South America, Europe, Asia, and Africa. VCNA's businesses cover a spectrum of industries, including mining, transportation, construction, pulp and paper, food products, insurance, and banking. VCNA is headquartered in Sao Paulo, Brazil, where economic and political strife have caused a high degree of marketplace chaos for the past several years. In the midst of this chaos, the company has maintained a fantastic equilibrium—free from scandal or corruption charges. But obviously the company is being hurt by the economic fallout that has resulted from multiple ongoing investigations into corruption at many levels of government and commerce in Brazil.


Straw

In the midst of this tumult, and in large measure as a result of it, the company has focused significant effort on developing a comprehensive global compliance program over the past few years. As in many corporations, the compliance program is being developed by a Compliance department that reports directly to the company's chief financial officer. The global Compliance department also works closely with the Internal Audit department and the Legal department for the company. Currently there are policies and associated procedures in various stages of being finalized that cover a variety of topics, including:

- Anticorruption
- Antitrust and Competition Law
- Code of Conduct
- Contracts
- Gifts and Entertainment
- Signing Authority
- Social Media
- Travel and Expenses

Challenges with implementing a global compliance program

However, there are problems with trying to implement a coherent compliance program that is either comprehensive or global—language, culture, and legal structure, to name a few.

Language

The issue of language is, for lawyers, one we assume we can tackle, and fix. We go at the problem of reviewing various drafts of the policies coming from the company's global Compliance department with vigorous redline in an effort to correct misuse of words, concepts, and legal principles. But in the end, there is still a wide gap between the words in the policy and the comprehension of the employees tasked with adherence to that policy. There is also a wide gap between the words in the policy and the ability of the Legal department to implement the policy, given the differing cultural mores in each country where we operate. There is a wide gap between the words in the policy and the ability of the Human Resources department to discipline fairly for failure to adhere to the policy, given the legal structure of each country. And finally there is a wide gap in the legal impact of the policy on the company as a whole, as well as the employees and executives in the various countries where the policy is being implemented.

One recent policy was circulated for review by the Legal departments in each of the global regions (North America, South America, and Europe/Asia/Africa). The resulting comments that were returned to the Compliance department in Brazil were impossible to reconcile. What is a "public" company in one country has an entirely different meaning in another. Who is considered a "government official" or an "agent" of the company is entirely different from country to country, as are the concepts of "family" and "bribe" as opposed to "gift." All of these distinctions result in a wide divergence of understanding and ability to implement the policy. And most important, the distinctions result in varying legal impacts from country to country.

Who is considered a "government official" or an "agent" of the company is entirely different from country to country, as are the concepts of "family" and "bribe" as opposed to "gift."

Culture

It is commonly understood that there is a cultural divide in the way employees and executives in various countries view gift giving. In many of the countries where my company operates, giving gifts is an essential element of the relationship building that leads to successful business operations. Forbidding gift-giving may prevent new business relationships from forming, and it may also break down long-standing relationships. Attempting to circumvent this problem by allowing executives and employees who operate in those countries to give a gift—but only if it has "nominal" value—can have disastrous effects as well, particularly in those cultures where a nominal gift is an insult to the receiving party. Plus, to then define the

nominal value with a fixed dollar/reals/euro amount—as if there were a global marketplace from city to city, let alone from country to country—may be a path to disaster for the Legal, Human Resources, Compliance, and Internal Audit departments of the company.

Legal structure

The legal foundation at the heart of each of the countries where my company operates is inherently different. Even between the United States and Canada there are distinctions that continue to surprise and perplex those of us operating in North America. And on a global scale, the distinctions are enormous.

One example glaringly brought this issue to everyone's awareness recently. The Compliance department of the company developed a global compliance "dashboard" for implementation by all the business units. The idea of the dashboard was for each business unit to self-audit, identify, and then self-report any issues regarding compliance with laws, regulations, and policies and procedures on the dashboard for all to see. The dashboard would, in a perfect world, have become a way to ingrain the culture of compliance by forcing employees of each business unit to think hard about every aspect of the operation and then report those aspects that are not in compliance, whether by a long shot or just by a small margin of error.

The idea arose out of the global Compliance department in Brazil, where the legal system values and even rewards self-reporting, even if there is no corrective measure yet put into place. In North America, the Legal department went into overdrive in an effort to convince the global Compliance department to stop the dashboard from being implemented. We spent hours on conference calls and GoToMeetings advising that in the North American legal structure, to have a compliance issue identified but neither corrected nor even budgeted for correction would be a road map straight to summary judgment for eager plaintiffs' lawyers. We advised that if the dashboard was going to be implemented, it had to simultaneously require specific corrective measures that were being implemented, as well as the budget and timeline for implementation of those measures. Eventually the dashboard plan was scrapped, but not without a lot of consternation among the company's global legal team.

Takeaways

Over the course of almost four years of effort to implement a comprehensive global compliance program, several truths seem to have emerged. I note that these truths, while exceedingly apparent to me, are not universally accepted within the company. But little by little, there appears to be a willingness to consider the following:

- **"Comprehensive" and "global" do not necessarily have to mean uniform.** There is room for country variation in a comprehensive global compliance program, and the variation, if allowed thoughtfully, will lead to a stronger, more consistent, and enforceable program.
- **More words are not always helpful.** There is a significant risk of miscommunicating when a policy is excessively wordy and the translation of those words is not wholly accurate, or more to the point, accurate translation isn't available even with the best effort. Keep it simple; let the concepts govern the behavior rather than trying to write out every rule, every exception to the rules, and every scenario that depicts application of the rules.
- **Be careful of dollar/euro/reals limits that are spelled out in a compliance policy.** These are the types of provisions that quickly become outdated based on economic changes that move far faster than

the corporate bureaucracy of a Compliance department, despite attention to annual review and revision of each policy.

- **Leave room for change of direction.** Don't box your company in! There is value in creating a compliance policy that can truly be a living document, one that ages well and supports the type of interpretation that allows for differing concepts of "family," "public official," "entertainment," "supervision," and all the other concepts that populate compliance policies. These are concepts that change with the times over the life of a company.

Conclusion

As the world shrinks, with all the wonderful impact that has had for the good of mankind, it also becomes apparent there are still differences among us that need to be respected and taken into consideration for a company to function smoothly in the world. We have all experienced the dreadful embarrassment or discomfort that arises when we misinterpret an event, a comment, or a gesture. The good intentions of even the most perfectly worded policy can get lost in translation when we attempt to use a one-size-fits-all approach to compliance. ✳

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by Erica Salmon Byrne

An update on "Culture matters"

Erica Salmon Byrne *(erica.salmonbyrne@ethisphere.com) is the Executive Vice President of The Ethisphere Institute.* @esalmonbyrne

Over a year ago, I wrote a column for this magazine talking about the importance of a strong corporate culture to all aspects of a company's business (titled "Culture matters"). Since that time, events in the corporate arena have only reinforced the lesson that, as I noted then, we have learned, re-learned, and will likely learn again. Regulators around the globe are increasingly calling on organizations to examine their culture, most recently the NY Federal Reserve, which wisely called it "culture capital." There continues to be multiple examples of organizations with formal systems that say one thing and cultures that promote another. When those kinds of alignment gaps are allowed to persist, you eventually have a failure of one variety or another: ethics, quality, safety, or a combination of all three.

Salmon Byrne

The advantages of a strong ethical culture are manifold. Studies repeatedly show that businesses with strong ethical cultures outperform those without; there are a variety of reasons for that. Companies with stronger cultures tend to have employees who are more engaged and committed. Turnover tends to be lower and productivity higher. Customers and investors increasingly seek companies whom they believe behave ethically. Employees at organizations with strong cultures feel less pressure to compromise company standards to achieve company goals. And if they do observe misconduct, they are more likely to feel comfortable reporting it. Bottom line: A company is better protected from the risks of misconduct when its culture is ethically strong.

Companies with stronger cultures tend to have employees who are more engaged and committed.

And the best way to know what the culture is across your organization is to measure. Ask your employees if they are willing to raise their hands when they see something and, if yes, who they will tell. If no, why not? Do they believe the rules are the same for everyone? Do they have faith in the organization's commitment to non-retaliation? The results may—as they have for many of the companies we've worked with—surprise you.

Measures work for several reasons. First, they focus attention on what is being measured. Provide employees with metrics that tell them whether they are succeeding, and they will try to move those metrics. Second, they signal the firm's priorities. What matters to the organization? Metrics (or lack thereof) tell employees—especially newer employees—what the company really cares about. So if you have not measured your culture capital lately, why not? ✳

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by Robert Bond

It's not too late to comply with GDPR!

» The EU General Data Protection Regulation (GDPR) impacts most businesses from 25 May 2018, even corporations that have no EU affiliates but still target citizens in the EU.

» GDPR imposes strict processing obligations on controllers and processors of personal data.

» Personal data covers much more than Personally Identifiable Information.

» Individuals will have enhanced rights over their personal data, such as rights of access, erasure, and rectification as well as data portability and the right to object to profiling.

» Failure to comply with GDPR may lead to increased scrutiny and fines, and aggrieved individuals will have rights to compensation.

Robert Bond *(robert.bond@bristows.com) is Partner & Notary Public at Bristows LLP in London, United Kingdom.*

The EU General Data Protection Regulation (GDPR) comes into force on 25 May 2018, and it will have a significant impact upon Legal and Compliance.

Because GDPR is a regulation, it will be instantly binding on each EU member state from 25 May 2018 whether or not those member states have implemented variations to their local data protection laws.

Bond

Many member states are already making changes to their data protection laws to mirror GDPR, and since they have certain derogations that allow them to make local changes, we will be faced with the need to review each member state's approach to certain aspects of GDPR.

Applicability

What is certain is that GDPR will apply to controllers and processors that have subsidiaries or affiliates in the EU. A controller is a business that makes decisions in relation to personal data, whereas a processor is a third party that carries out processing on behalf of the controller.

GDPR has an extra territorial nature in that it applies to any controller or processor that is not located in the EU but has processing activities related to either the offering of goods or services to data subjects in the EU, irrespective of whether a payment is required or not—or where the processing activities relate to the monitoring of the behaviour of EU citizens so far as that behaviour takes place within the EU.

Many businesses will be caught by GDPR whether or not they have entities in the EU. If controllers or processors outside the EU are caught by GDPR, and if they process large volumes of sensitive data, or if such processing could result in a risk to the rights and freedoms of individuals, then they will have to designate in writing a representative who must be established in a member state where the data subjects whose data are being processed are located. When processing of EU citizens' personal data takes place in several member states, the representative will need to be appointed in the member state where most

of the EU citizens are located whose data is being processed.

The role of the representative is to sit between the controller or processor and the relevant supervisory authority and/or data subjects. The representative will need to respond to investigations or communications from the relevant supervisory authority and/or from data subjects and need to have in place a suitable contract to define roles and responsibilities. The designation of a representative does not affect the primary responsibility and liability of the controller or processor under GDPR.

Data protection principles

GDPR lays out eight data protection principles, which are similar to those under current law. These principles are that personal data must be:

- Processed fairly, lawfully, and in a transparent manner;
- Collected for specified, explicit, and legitimate purposes and not further processed in a way incompatible with those;
- Adequate, relevant, and limited to what is necessary in relation to the purposes for which personal data is processed;
- Accurate and, where necessary, kept up to date;
- Kept in the form which permits identification of data subjects for no longer than is necessary;
- In accordance with data subjects rights;
- In a way that ensures appropriate security of the personal data;
- Not transferred to a third country or to an international organisation if the provisions of GDPR are not complied with.

Lawful grounds for processing

GDPR indicates that where consent is necessary, it must be indicated in a number of ways, including affirmative action, and must be distinguishable for other matters and provided in an intelligible and easily accessible form using clear and plain language. Moreover, the data subject must be as easily able to withdraw consent as give it.

The data subject must be as easily able to withdraw consent as give it.

Notwithstanding that consent remains a very high standard under GDPR, there is more flexibility to rely on legitimate interests as a lawful ground to process personal data provided that there is a relevant and appropriate connection between the controller and the data subject.

In order to establish lawful grounds for processing, it will be necessary for businesses to have regularly available privacy notices that are concise, transparent, intelligible, and easily accessible. This will mean revisiting existing privacy notices to ensure that they meet this new standard.

Data subject rights

GDPR gives individuals a range of rights, some of which are new, and businesses will need to understand these rights and how to effectively respond to them. The rights are:

- The right of information to be communicated to data subjects in a way in which the data subjects can fully

understand how their personal data is being processed.

- The right of access to enable a data subject, upon request, to receive within 30 days clear information about what data is being processed about them.
- The right of rectification to require controllers and processors to correct inaccuracies in relation to personal data that they are processing.
- The right of erasure (aka, right to be forgotten) whereby an individual can request that their data is erased if it is not in the public interest to retain it.
- The right to restrict processing in certain circumstances.
- The right of data portability whereby data subjects can request their personal data to be transferred from a controller to another controller.
- The right to object, which may be applied to the use of personal data for direct marketing or the profiling of an individual by using their personal data.
- The right to understand the methodology used in relation to automated decision making (i.e., profiling).

These rights are not absolute, and indeed, where personal data is not collected with consent nor as a result of a contract, then some of the rights, such as erasure and data portability, do not necessarily apply.

Failure to comply with data subject rights is an offence under GDPR and can lead to investigations and significant fines, and therefore they need to be appropriately managed.

The relationship between controllers and processors

GDPR stipulates that the controller must ensure that where it used a processor, that processor will comply with GDPR, and in order to ensure this, not only must due diligence be carried out on the processor, but there must be an appropriate contract between the controller and the processor.

The data processing agreement must ensure that the processor:

- Has adequate information security,
- Must not use subprocessors without consent of the controller,
- Must cooperate with the relevant supervisory authority,
- Must report data breaches to the controller without undue delay,
- Must appoint a data protection officer where GDPR requires,
- Must keep records of processing activities,
- Must comply with EU data transfer rules, and
- Must help the controller to comply with data subject rights and must be directly liable for non-compliance.

Although processors have direct liability in many cases under GDPR, responsibility for compliance still rests with the controller.

Although processors have direct liability in many cases under GDPR, responsibility for compliance still rests with the controller, which must be able to demonstrate that the use of a processor was carried out after appropriate due diligence and with appropriate contractual controls. As so many controllers use third-party vendors for a range of services, there is an urgent necessity to review contractual relationships with those third-party members, because responsibility takes immediate effect on 25 May 2018.

International data transfers

GDPR stipulates a number of mechanisms that may be relied upon in order to safely transfer data from the EU to other jurisdictions. Currently one of the mechanisms that had been used—Safe Harbor, a mechanism for EU to US data transfers—was struck down by a European court decision more than a year ago, and yet there are many corporations that still reference Safe Harbor in their privacy policy, which is clearly a misrepresentation. The replacement for Safe Harbor is the EU-US Privacy Shield, which is similar to Safe Harbor in that it is principle-based and is subject to the oversight of the Federal Trade Commission. Privacy Shield does not favour US businesses that are outside the regulation of the FTC (banking and insurance, for example). Another solution is standard contractual clauses approved by the European Commission, which many international businesses rely upon, because data does not always go from the EU to the US but goes in many directions in multinational corporations.

Notwithstanding that Privacy Shield is an approved mechanism and standard contractual clauses are also approved, both of these are under review by the European Commission, and it may well be that we will see some further guidance in advance of May 2018.

Data transfers are also permissible if they are from EU member states to other jurisdictions that are deemed "approved" by the European Commission. These approved countries tend to have laws that are very similar to those of the EU or in relation to data protection, and thus these countries include Argentina, Israel, Canada, and a number of UK dependencies. However, recently the European Commission has said that they are reviewing the counties that have been deemed "adequate," and so there is considerable uncertainty as to the future for international transfers.

In addition to the above, a growing number of multinationals are relying upon Binding Corporate Rules (BCRs) as a mechanism for data transfers but, more particularly, are providing a publicly available documented approach to data protection compliance in general. GDPR indicates that BCRs are very much an approved international data transfer mechanism, and an increasing number of multinationals are moving toward this as a solution.

> Many corporations... still reference Safe Harbor in their privacy policy, which is clearly a misrepresentation.

Over and above these previously mentioned data transfer solutions, GDPR also introduces codes of conduct and seals, which are mechanisms that can be approved by the supervisory authorities to ensure data protection rights when data is transferred internationally. Although GDPR describes these new mechanisms, not many member states have yet provided guidance as to how codes of conduct or seals can be approved/granted. This is an area of development that is worth watching.

Protecting the privacy of data subjects

The GDPR is serious about protecting the privacy of individuals, both when the data is at rest and when it is in motion.

Data breaches
GDPR introduces mandatory data breach notification obligations where the breach may cause a data subject serious harm. The requirement is to notify the relevant supervisory authority within 72 hours of becoming aware of the breach. If the breach occurs in the hands of the processor, then controllers will need to ensure that that processor promptly notifies the controller when it becomes aware of the breach so that notification can be dealt with appropriately. In addition to notifying the regulators where there is a breach data, subjects need to be notified without undue delay where there may be a risk of serious harm. GDPR has introduced a quasi-class action where data subjects can show they have suffered "emotional distress" as a result of a data incident, and then they are able to sue for compensation, and we are beginning to see an increase already in such litigation. For example, the UK courts recently confirmed that a food retailer would have to compensate members of staff whose personal data had been maliciously posted online by a disgruntled employee.

Data Protection Impact Assessments
It is a mandatory requirement of GDPR that Data Protection Impact Assessments (DPIA) are used where a controller uses technology and/or processes personal data in a way that might impact the data protection rights and expectations of individuals. DPIA are a very good risk management tool that enables a controller to identify privacy risks and demonstrate accountability and transparency. Examples of projects that may require a DPIA include:

- A new IT system for storing and accessing personal data
- Using existing personal data for an unexpected purpose
- Acquiring a new database of personal data
- Carrying out corporate restructuring
- Monitoring in the work place

Data protection by default/design
GDPR mandates that data protection by default or design is a process that needs to be implemented so that when new technology is used, the controller ensures that the protection of data rights of individuals is embedded into the design rather than retrofitted afterwards. The controller needs to have regard to the state of the art and the costs of implementation and take account of the nature, scope, complexity, and purposes of processing when implementing privacy by default. As technology continues to outpace the law, so controllers will need to ensure that privacy by default is embedded into the procurement processes and in any technology contracts.

Data protection officer
GDPR requires the appointment of a data protection officer (DPO) for controllers and processors who:

- Are public authorities or public bodies,
- Carry out activities involving regular and systematic monitoring of individuals, and
- Process special categories of personal data.

Many businesses will be caught by the requirement to appoint a DPO but may well already have such a function provided for in their operations. Although the role of the DPO is well understood by large corporations, GDPR may cause much smaller businesses to have to face the prospect of appointing a DPO.

Where a DPO is required, they have to be chosen for their professional qualities, and GDPR indicates that they must have expert knowledge of data protection laws and practices, including technical and organisational measures and procedures, mastery of technical requirements for privacy

by design, and data security and industry-specific knowledge.

The DPO is both the internal policeman as well as the internal whistleblower, and they must be independent and have the ability to report directly to the highest level of management. This does mean that the DPO must not perform a role in the business that might conflict with his or her duties. These duties include:

- Raising data protection awareness,
- Monitoring implementation and applicability of policies and procedures,
- Monitoring implementation and applicability of GDPR,
- Ensuring mandatory documentation is maintained,
- Monitoring record-keeping notifications and communications of data breaches,
- Monitoring Data Protection Impact Assessments,
- Managing responses to enquires from data protection authorities, and
- Coordinating on employment-related issues for GDPR with employee representatives.

It should also be noted that the data protection officer will be a protected employee and cannot be dismissed for carrying out his/her duties.

Sanctions

Finally, GDPR creates increased sanctions for non-compliance, with two levels of fines, namely:

- Up to the greater of 2% of annual worldwide turnover of the proceeding financial year or €10,000,000 for failing to manage internal record keeping and failure to use suitable data processing agreements, as well as the failure to appoint data protection officers where necessary, and also failure to implement data protection by default and failure to use data protection impact assessments.
- Up to the greater of 4% of annual worldwide turnover of the proceeding financial year or €20,000,000 for failure to comply with data protection principles, including failure to prevent data breaches as well as failure to comply with conditions for consent, managing data subject rights, and failure to have in place suitable solutions for international data transfers.

If you suspect that you need to comply in some way with GDPR, then doing nothing is not an option.

For many businesses, either of these sanctions will be of financial significance, but combining these with the risk of class actions as well as the reputational and brand damage that can occur from an incident mean that complying with GDPR is very much a C-suite issue.

Looking ahead

If you suspect that you need to comply in some way with GDPR, then doing nothing is not an option. Starting the journey and putting in place a plan is a good risk management approach, even though at this late stage it may be difficult to be 100% compliant by 25 May 2018. ✳

by Thomas R. Fox

Hats off to the DOJ on new FCPA Corporate Enforcement Policy

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In late November, the Department of Justice (DOJ) announced a new policy regarding Foreign Corrupt Practices Act (FCPA) enforcement: the FCPA Corporate Enforcement Policy. It was the result of the DOJ review from the expiration of the one-year FCPA Pilot Program in April 2017. It not only assessed the Pilot Program, but made changes that make this new policy even more effective than the Pilot Program. In addition to the enforcement aspects of increasing the discount available to companies that met the requirements of the Pilot Program from a 50% to 100% discount, the DOJ made the presumption that companies would receive a full declination as the default response to meeting the prescripts of the new policy.

Fox

As a part of its review of the Pilot Program, the DOJ brought forward language on the expectation of a best practices compliance program. There was language brought forward from both the Pilot Program and the 2017 Evaluation of Corporate Compliance Programs (Evaluation). Each of these additions builds upon the 10 Hallmarks of an Effective Compliance Program incorporated through reference into the new Enforcement Policy.

These new additions to a best practices compliance program elevate both the corporate compliance function and the position of the CCO in an organization. The DOJ made clear there must be compliance expertise on the board, which signals that companies should now have a compliance program subject-matter expert on their board of directors. Compliance department budgets will also need to be commensurately increased. Now there is also the requirement for not only a root cause analysis, but also looping the information obtained during the root cause analysis back into the remediation phase of any corporate compliance program.

Finally, the DOJ has brought everyone into the fight against bribery and corruption. Someone as thoughtful as former U.S. Deputy Attorney General George J. Terwilliger III, writing in the FCPA Blog, said, "The new policy is grounded in the notion that companies and the government have a shared interest in securing the rule of law, which in this context includes global commercial markets freed from the influence and corrosive effects of corruption." When you can couple such a policy under the rule of law, it is quite an achievement. It is this final concept that makes this new policy truly unique. Hats off to the DOJ for it. ✳

by Robin Singh, MS (Law), MBA, MS IT, CCEP-I, CFE, LPEC

Dodd-Frank and the repercussions of dismantling it

» As regulators pile on regulations, the overall balance between cost and benefit shifts from one end to another.

» Pre-2008, policymakers were faced with the choice of either bailing out large institutions or letting them go under, with serious consequences for financial stability.

» Dodd-Frank provided a response to the calamity of Lehman Brothers, where the top executives walked off with millions and shareholders were left penniless.

» Dodd-Frank has leveled the playing field between two contrasts: municipal bonds and the tycoons of Wall Street.

» There is a danger that re-opening the bill will result in gutting some of the key provisions.

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The financial system is meant to help the common man and businesses invest, save, manage, and diversify risks. This system is widespread with conflicts of interest and reckless practices, as seen in the recent subprime crisis.

Singh

In the end, the upper management of the banking industry is fairly invisible and unaccountable; however, it is the common man who faces the brunt of losing their savings. Every economic downturn needs a hero, and in came U.S. Senator Christopher J. Dodd and U.S. Representative Barney Frank to save the day and establish an ambitious overhaul of the financial system.

The incoming White House administration has indicated its intention to dismantle a key aspect of Barack Obama's legacy: the Dodd-Frank Act. This article examines various facets of Dodd-Frank and what would happen if it was to be repealed.

1. What is Dodd-Frank?

Dodd-Frank, more appropriately referred to as the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act), is key legislation passed during the Obama administration in 2010. It was legislation that was devised to serve as a preventive measure against financial crisis scenarios similar to the one that occurred in 2008.

2. Why was it set up?

The provisions listed in the Act are spread across 2,000+ pages and are mainly focused on eliminating risk in the American financial system. The Act was enforced through the establishment of various agencies that were responsible for monitoring the multiple components that make up the Act. This also placed the same agencies in a position to monitor the American banking system as a whole.

One of the major agencies set up under the Dodd-Frank Act is the Financial Stability Oversight Council (FSOC), which primarily oversees major financial firms whose financial status and size can have a negative effect on the economy. FSOC identifies risks to the financial industry (e.g., banks, hedge funds, and insurance companies).

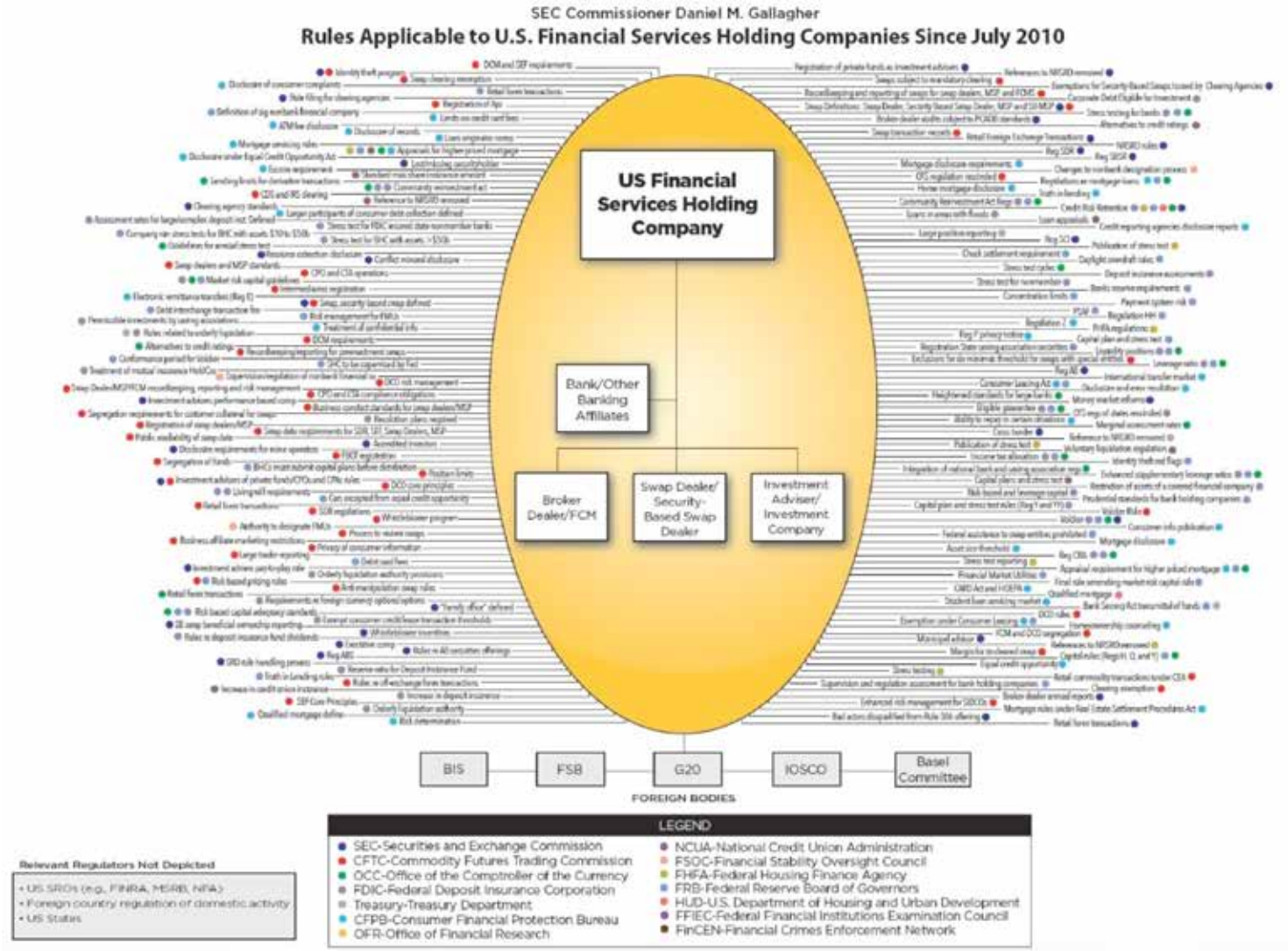
Another major agency is the Consumer Financial Protection Bureau (CFPB), which monitors predatory mortgage lending

and educates consumers on mortgage terms and conditions with the objective of helping them make smarter decisions. In addition, the agency also oversees credit and debit cards, consumer lending, and consumer complaints. Other key components include:

- **Capital/liquidity requirements:** New standards were established by the Federal Reserve concerning the type and amount of capital that financial institutions would have to protect from exposures.
- **The Volcker Rule:** Named after Paul Volcker, who was the Federal Reserve chairman under President Jimmy Carter. The rule stops commercial banks from engaging in proprietary trading and speculative activities. To be more specific, hedge and private equity fund investments are more controlled.
- **The Securities and Exchange Commission and the Commodity Futures Trading Commission:** The rule gives these agencies greater control over the regulation of over-the-counter derivatives trading.

Dodd-Frank is so vast that corporations argue that regulatory burden has hampered their business growth. Figure 1, made by SEC Commissioner Daniel M. Gallagher, puts a high-level perspective on the reach of Dodd-Frank.

Figure 1: Regulations imposed on financial firms since the Dodd-Frank Act in 2010



3. What were the effects of Dodd-Frank?

Like all legislative actions, Dodd-Frank has its fair share of pros and cons.

Some of the key pros include the creation of the CFPB, more transparency in the monitoring of derivatives, higher prudential standards for capital and otherwise, restrictions against clear losses with regard to Federal Reserve emergency lending authority, and the Federal Deposit Insurance Corporation's (FDIC) full dependence on Congress to provide temporary liquidity guarantees.

On the other hand, the more controversial aspects of the Act include the Lincoln Amendment, the Volcker Rule, regulatory consolidation, and the high level of autonomy granted to the FSOC and the Office of Financial Research (OFR).

On the whole, it would be safe to say that Dodd-Frank has been successful in lending financial stability. However, much is still left wanting. Although the financial sector seems safer, there are still doubts about how long this safety will last.

Overregulation is a key feature of the Act. However, uncertainty still exists as to whether these regulations are in favour of maintaining a balance or aiding complete restriction. After all, too much restriction can also cause economic dislocation and disaster.

Additionally, much of the overt regulation has not affected the entities that were supposed to be the primary targets. For example, risky transactions are still a problem. The Volker Rule component of the Act was set up to prevent proprietary trading and regulate the relationship between banks and hedge/private funds. Ironically, the U.S.'s largest banks still have strong relationships with hedge and private equity clients. Such funds use large banks for leverage and to increase profits. In addition, they also pay these banks massive fees in return for the benefits they gain. Banks are simply using smarter tactics to bypass the regulations and go unnoticed.

4. Why is the Trump administration keen on dismantling it? Is it simply revenge politics, or is there a deeper reason?

The average person might be content to see the Trump administration's move to alter Dodd-Frank as a political response. However, that's the kind of stuff TV dramas are made of. Some think it is highly unlikely that the Trump administration simply wants to undo everything that the Obama administration achieved. The truth at the end of the day is that the Trump administration has, from day one, been in favour of eliminating legislation that interferes with business. Being a businessman and also a Republican, it shouldn't come as a surprise that Trump is all for deregulation.

Trump believes that Dodd-Frank has only led bankers to function with greater difficulty and that there needs to be new policies that further economic growth rather than stifle it. He called the Act a disaster—an opinion that Republicans have held for a long time.

5. What will potentially happen if it is repealed?

Well, there are two sides to this argument. Some have called Trump's plan "reckless." After all, we are looking at the possible repeal of an act that was established to prevent another financial crisis—an act that has been fairly successful with regard to that particular objective.

However, there are those who believe the Dodd-Frank Act does stifle growth. They cite how bank stocks surged with Trump's signing of an executive order to review financial regulations as evidence of how much the market desperately needs a new lease on life. It would make sense to balance the Act out and see the provisions that would be a hindrance in the path of success rather than repealing the whole act. Acts get amended all the time, and it is understandable. For instance:

- The Volcker Rule, which protects depositors from having their money used

for proprietary trading, is believed to have prevented banks from generating any profit; however, if you ask the big banks, they have already come around this hurdle because of the 57 exceptions.

- The calamity of Lehman Brothers, where top executives walked off with millions of dollars while the shareholders were left penniless—and with assets so large that it took 5+ years to liquidate the company. What would happen if one was to dismantle the FDIC and the executive-compensation element of the Act? This would have repercussions beyond imagination if a calamity like Enron or Lehman were to repeat itself.
- The Fed can no longer make emergency loans to specific non-bank institutions and is subject to a congressional report. This could pose a significant hurdle if an event was to take place, because in the event of a crisis, authorities must act quickly to restore investors' confidence.
- The Jefferson County, Alabama case, which went into a risky business deal with J.P. Morgan, ended up nearing bankruptcy, because the county wanted to finance some improvements through several bond offerings. Dodd-Frank leveled the playing field by introducing the Municipal Advisor Rule for finance staff of municipal entities. Repealing this provision could create another Jefferson County fiasco.

I understand this sentence might cause tremors, but the new Administration can go a step toward positively improving the control of some of the elements of Dodd-Frank. For instance, FSOC (a committee comprising various regulators) lacks authority to force regulators to coordinate and issue joint rules. During the financial crisis, this was a problem. States could manage insurance houses individually but didn't know what was happening globally, which led to the big payout to AIG. If such a committee at the country level can see problems and devise solutions, it could provide direction to small regulators.

- Anat Admati, Professor of Finance and Economics at Stanford, agrees with this sentiment. She calls the Act "overly complex" and states its implementation as being "inadequate." She believes that the Act only aids in the continued existence of a system that suffers from inefficiency.

Other experts state that the Act is extremely complex, which isn't helpful in dealing with a regulatory structure that suffers from the same problem. It's only adding complexity upon complexity. So, it becomes obvious at this stage that there are those who expect new amendments.

6. Why economists and analysts support Dodd-Frank

Although most analysts and economists agree that scrapping Dodd-Frank would lead to more economic growth, they believe that consumers need to be protected. After all, it's consumers who are the pulse of the market.

The 2008 financial crisis was purely caused by predatory lending practices, something that Dodd-Frank fights against. It shifts accountability onto federal regulators and limits the investment made by banks. Its sole purpose is to protect the consumer from profit-driven interests, which is and should be the priority.

Analysts and economists who support Dodd-Frank believe that reforms, if any, should be executed with the consumer in mind, and until then, the Dodd-Frank Act is all we have. Scrapping it would be a moral and ethical failure. ✳

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2. Kent Faulk: "Former J.P. Morgan bankers to pay JeffCo $326K to settle $8.2 million bribery lawsuit" *Real-Time News from Birmingham*; December 1, 2015. Available at http://bit.ly/2mwWVcZ.
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by Robert Bond

Impact of Brexit on international data transfer mechanisms

Robert Bond *(robert.bond@bristows.com) is Partner & Notary Public at Bristows LLP in London, United Kingdom.*

In relation to personal data, there are a number of mechanisms available to allow the transfer of such data from the European Union (EU) to countries outside the EU (Third Countries) under the European Data Protection Directive (95/46 EC) and member state laws.

Bond

The EU General Data Protection Regulation (2016/679) (GDPR), which goes into effect 25 May 2018, simplifies the mechanisms available to protect the rights of individuals in relation to international data transfers.

Although express consent is one mechanism that enables the transfer of data from the EU to Third Countries, there are other mechanisms that adduce the protection of the rights of individuals in relation to their personal data, including that the Third Country is "approved" by the European Commission, the parties have entered into EU-approved standard contractual clauses, and there are approved Binding Corporate Rules (BCR) in place. In addition, for transfers from the EU to the USA, as well as from Switzerland to the USA, there is the Privacy Shield framework.

Multinational organisations are used to addressing the sharing of personal data between group organisations and third-party processors or controllers. The withdrawal of the United Kingdom from the EU (Brexit), however, raises concerns about the position of the UK post-Brexit and whether or not it will be deemed an "adequate" country for the purposes of data sharing or will be deemed a Third Country.

During the second half of 2017, a number of statements were made by the European Commission regarding data transfer mechanisms that are causing concern, namely that Privacy Shield is under review, that Third Countries that have been deemed "adequate" are also under review, and that the standard contractual clauses are the subject of a review in the European Court of Justice as a result of the case brought by Max Schrems against Facebook. On a positive note, during 2017, new guidelines were published around the approval mechanism for BCR in anticipation of GDPR.

On 9 January 2018, the European Commission published a "notice to stakeholders" confirming that from 30 March 2019, when the UK withdraws from the EU, the UK will become a Third Country in that it will not be a member of the EU. The obvious consequence of such a position is that any existing data transfer mechanisms, such as use of the standard contractual clauses or model clauses, will not be applicable since their language defines the UK as a member of the EU and a "data exporter," whereas after the withdrawal date, the UK will be not data exporter but rather a "data importer."

Existing data sharing agreements will now need to be reviewed, because it is unlikely that the UK will be deemed an "adequate" country prior to the withdrawal date.

For international organisations, it is worth stepping back and reviewing current mechanisms in place for international data transfers and any actions necessary to anticipate the consequences of Brexit in light of the above European Commission notice. ✳

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by Eike Bicker and Marcus Reischl

German Federal Court of Justice treats compliance management systems as mitigating factor

» German Federal Court of Justice held that the quality and efficiency of a compliance management system has to be taken into account as a mitigating factor when calculating a fine and/or a profit disgorgement against the company.

» The legal situation in Germany is drawing closer to the U.S. and the UK.

» Wherever compliance management systems serve to prevent breaches of the law, the implementation of such a system shall be taken into account in setting the fine.

» Antitrust authorities in Germany and other European countries are still reluctant to accept the investments in compliance systems as a mitigating factor.

» The ruling provides a great incentive to implement effective compliance programs.

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With its decision of 9 May 2017, the German Federal Court of Justice, the highest criminal court in Germany, commented for the first time on the significance of compliance management systems. In corruption cases at least, the German Federal Court treats compliance management systems as a mitigating factor when calculating corporate fines. Given repeated past discussions about the role of compliance management systems in reducing liability and fines, the German Federal Court's indication is warmly welcomed among practitioners.

Bicker

Reischl

The case

The defendant was a managerial employee of a German defence company. In 2001, the company sold 24 self-propelled howitzers to Greece for €188 million. To do this, it engaged the services of two sales agents, whose activities were coordinated by the defendant.

Sales agent B was hired specifically for this arms deal on a commission basis of 3%. According to the Court's findings, the arms deal was based on a bribery agreement between the defence company and the Greek minister of defence; sales agent B had personal access to this minister. The commission agreement was concluded to provide the funds required for the bribery agreement.

In 2002, sales agent B issued an invoice for a €1.85 million commission. The defendant, together with his superior, approved the invoice for payment. The invoice was paid and declared in the tax return of the defence company as ordinary business expenses for 2002. The defendant left the company in 2004. After his departure, further payments were made to the sales agents and were treated as business expenses.

The defence company employed another sales agent (P), a personal friend of the defendant, in Greece for the arms deal; this sales agent forwarded bribery payments from commission payments to the deputy armament director in Greece. In addition, between 2002 and 2004, the defendant received kick-back payments in excess of €657,000—paid into his Swiss bank account—from sales agent P. The defendant concealed these payments from the German tax authorities.

Although it could not be established that the defendant definitely knew that sales agent P was involved in bribery, P did start to tell the defendant that the deputy armament director in Greece was demanding part of P's commission. The defendant "stopped" P in mid-sentence, however, by saying that he didn't want to hear about it and that it only concerned P.

In the past, most German authorities have considered the efficiency of a compliance program as a mitigating factor when calculating a corporate fine or profit disgorgements.

Decision of the Federal Court of Justice

The Court of First Instance, the Regional Court of Munich, had sentenced the defendant to a total of 11 months in prison for having aided and abetted multiple instances of tax evasion. Any acts of bribery were barred under German criminal law. The Regional Court of Munich imposed a fine of €175,000 on the defence company for failing to prevent bribery payments as required under German law. Corporations in Germany are not criminally liable. However, German public prosecutors or German courts may impose fines and profit disgorgements against a German corporation for failing to prevent acts of bribery or corruption by (former) employees or management.

The defendant, the defence company, and the public prosecutor filed appeals on points of law against the Regional Court's judgment.

With its decision on 9 May 2017, the German Federal Court of Justice set aside the fine imposed on the defence company because its calculation violated the law. The Court stated that the quality and efficiency of a compliance management system has to be taken into account as a mitigating factor when calculating a fine and/or a profit disgorgement against the defence company. The Court held: "When calculating the fine, it is important to what extent the company fulfilled its obligation to prevent violations of the law within the company's sphere and set up an efficient compliance management system, which must be geared towards avoiding violations."

Practical consequences for compliance

In the past, most German authorities have considered the efficiency of a compliance program as a mitigating factor when calculating a corporate fine or profit disgorgements. Further, some authorities have deducted the costs incurred in connection with optimising the system from the amount of a corporate fine.

Nevertheless, the German Federal Court's ruling brings new clarity and has long been anticipated by compliance practitioners. The Court's decision is a step in the right direction. With it, the legal situation in Germany is drawing closer to the U.S. and the UK.

Moreover, one hopes that the decision of the German Federal Court is applicable beyond anti-corruption/tax-related circumstances. In particular, in antitrust matters, the German Federal Cartel Office (Bundeskartellamt) has been reluctant to accept the investments in compliance systems as a mitigating factor. However, the reasoning of the German Federal Court of Justice is rather general: Wherever compliance management systems serve to prevent breaches of the law, the implementation of such a system shall be taken into account in setting the fine.

It remains unclear what requirements a compliance management system—notwithstanding isolated deficiencies—must meet in order to be regarded as efficient, thus justifying a reduction in the fine.

Other legal systems are already much clearer on this issue. For example, the U.S. Sentencing Guidelines lay down specific requirements to be met by a compliance program in order for it to be regarded as an "effective compliance and ethics program." Another example can be found in the instructive guidelines for the assessment of corporate compliance programs by the DOJ's Fraud Section on 8 February 2017.

German compliance practitioners will continue to look to these standards, among other things, for guidance in future. It should, however, be borne in mind that the assessment of a compliance management system's efficiency depends to a large extent on the company's individual risk profile. Further assistance can be obtained from international standards (e.g., ISO 19600 Compliance, ISO 31000 Risk Management, ISO 37001 Anti-Bribery Management Systems), although these are likely to be insufficient to satisfy the requirements of German law.

It is also worth noting that the German Federal Court of Justice has not only recognised the existence of an effective compliance management system *at the time of the violation* as a mitigating factor when calculating the fine, but also the company's efforts to optimise an existing system *after* a violation has been exposed. Once a violation has been uncovered within a company, be it through internal efforts or an investigation by the authorities, the management of a German company has a fundamental duty under German corporate law to carry out an in-depth internal investigation, to analyse the causes of the violation, and to adjust the compliance management system accordingly so as to prevent similar violations in the future. If the members of management fail to take these measures, they may be held personally liable. Moreover, such self-cleansing measures are important in terms of procurement law and could help a company avoid being excluded from participation in public procurement contracts as a result of a criminal offence (section 125, Act Against Restraints of Competition).

These reactive measures are also relevant when it comes to calculating the fine and, moreover, make it possible to reduce the fine.

The German Federal Court of Justice's decision now means that these reactive measures are also relevant when it comes to calculating the fine and, moreover, make it possible to reduce the fine. The ruling provides a great incentive to implement effective compliance programs. ✳

1. The Federal Court of Justice: 1 StR 265/16, May, 9, 2017. Available at http://bit.ly/2r6TzSt.
2. Ibid

by Kristy Grant-Hart

UK and Europe: The three biggest questions this year

» Uncertainty in the UK after the Brexit vote has people concerned about staffing in their compliance programs and in their companies.

» The new European General Data Protection Act threatens large penalties, but for whom and when? Those are big questions.

» The UK Modern Slavery Act has highlighted the problem of slavery and human trafficking in supply chains, but hasn't provided much guidance on how deep into the supply chain businesses need to go.

» Finding and eradicating modern slavery within a supply chain can be challenged by contractual obligations, lack of audit rights, and data privacy concerns.

» There are more questions than answers right now in Europe with respect to Brexit, the GDPR, and the Modern Slavery Act.

Kristy Grant-Hart (KristyGH@SparkCompliance.com) is CEO of Spark Compliance Consulting in London, United Kingdom. www.ComplianceKristy.com, @KristyGrantHart

There are three big questions on everyone's mind here in the UK and Europe this year. The answer to each may strongly affect the profitability and success of every company, as well as the future of the compliance function.

Grant-Hart

Question 1: What happens after Brexit?

The exiting of Britain from the European Union (EU) is going to be a multi-year process. The news in London focuses on the changing positions and negotiations between the UK and EU, but companies are concerned only with how the outcome will affect them.

One of the biggest concerns affecting UK and EU companies revolves around the immigration status and ability to work for its non-native employees. London in particular is full of EU citizens who currently have the right to work in the UK without any visa status. Likewise, many Brits are transferred into Europe by their companies each year. Many employers are concerned that their highly qualified and experienced team members (including compliance professionals) may have difficulty working within the UK after Brexit, and many Brits who have moved abroad to work in places like Paris or Madrid may find themselves without the automatic right to work within the EU.

This uncertainty is unlikely to be resolved soon, but it's on everyone's mind.

The exiting of Britain from the European Union (EU) is going to be a multi-year process.

Question 2: What happens after GDPR comes into force?

The European General Data Protection Regulation (GDPR) comes into force on

May 25, 2018. This law increases penalties for non-compliance significantly—up to 4% of global annual turnover for the most egregious offenses.

One looming question is how aggressively will GDPR be enforced? Traditionally, data protection regulators have had much less power to sanction than anti-bribery enforcers like the UK Serious Fraud Office. Will the new legislation create a hotbed of immediate prosecutions? Or will the enforcement start small, allowing companies more leeway in their implementation of new procedures?

Compliance professionals know that an ounce of prevention is worth a pound of cure, but the changes required for many companies, with respect to their data management and marketing practices, make some loath to begin readiness reviews. The enforcement community's response to GDPR's arrival will answer many of the questions currently on the minds of Europeans and Brits.

Question 3: Am I doing enough to protect myself from allegations of modern slavery?

The UK's Modern Slavery Act has been in force for a couple of years. It requires any commercial organization doing business within the UK with an annual global turnover of £36 million or more to provide a statement linked from the front page of its website stating what, if anything, it is doing to prevent modern slavery and human trafficking within its business and supply chain.

One of the challenges of Modern Slavery Act compliance is that the Act does not specify how far down the supply chain a company needs to go in order to be compliant. Does a company simply need to look at its own activities? Or does it need to scrutinize the activities of its main suppliers? What about the sub-suppliers to its suppliers?

Contracts, data privacy requirements, lack of audit rights, and practicality all come into play for companies trying to ensure modern slavery and human rights abuses are eradicated from their supply chain. The questions of how far a company needs to go to protect itself from the taint of association with modern slavery or human trafficking is one at the forefront of compliance professionals' minds here in the UK.

Compliance professionals know that an ounce of prevention is worth a pound of cure, but the changes required for many companies, with respect to their data management and marketing practices, make some loath to begin readiness reviews.

The ultimate question

All of these questions lead to the biggest question: What happens next? It's hard to know for sure, of course, but my educated guess is that further enforcement is coming, data privacy rights will continue to clash with due diligence requirements, and the world's regulators will work more and more closely together such that borders become more transparent.

As for the ultimate question, "How do I best protect the company from risk?" finding the answer to that question is the top priority of every compliance professional, both in Europe and the rest of the world. ✳

by Art Weiss, JD, CCEP-F, CCEP-I

Whose boundary lines are they anyway?

Art Weiss *(art_weiss@tamko.com) is Chief Compliance and Ethics Officer at TAMKO Building Products in Joplin, MO.*

If you were to walk down the halls or sit in on a meeting in my organization, you would be sure to hear someone speak of "keeping it between the hash marks." This is a metaphor coined many years ago by our president and CEO. He compares doing business to a football game. If you are the running back running down the sidelines with the football under your arm, you may accidentally step out of bounds. Worse yet, a referee may accuse you of stepping out of bounds. Either way, the play is dead. In football, that may result in your team's failure to reach its objective (a touchdown). In business, where the referees are often the government, it may lead to a much more costly result.

Weiss

Like the running back who stays between the hash marks, that area in the center of a football field where the lights are the brightest and the chance of stepping out of bounds the smallest, we try to keep our conduct between the hash marks. Although we need to know where the boundary lines are, we don't want to see how close we can get to them without stepping over.

I've had employees ask me a question about whether it is acceptable to do something and, before I could formulate my answer, say, "Never mind, that's not between the hash marks." This is the safest place to be, although there's never any guarantee. We teach our employees that if they are not quite comfortable with a choice they are about to make, they should stop long enough to think about why they aren't comfortable. Are they subconsciously seeking a way to make themselves comfortable with something they know down deep is not right?

As compliance professionals, we need to help our organization not only to be aware of the rules, but also to be aware of the possible rules that could be asserted against us. Too often, employees, and even management, may make choices that they know down deep are not the correct ones, but they somehow find a way to rationalize their choice by telling themselves that "Everyone does it," or "No one will care."

Try as you might, there may be a creative "referee" or a foe or competitor that may try to claim you're out of bounds based on their own agenda rather than the competitive game you are playing. They may accuse you of playing a different game with different rules and different boundaries. You may actually find yourself called out of bounds and facing risks you didn't anticipate. They may even try to redefine the game you thought you were playing.

Bottom line: Beware of revisionist rules imposed by those who stand to gain by having you fail, and don't push the boundaries of the rules you know. Keep your conduct between the hash marks. ✳

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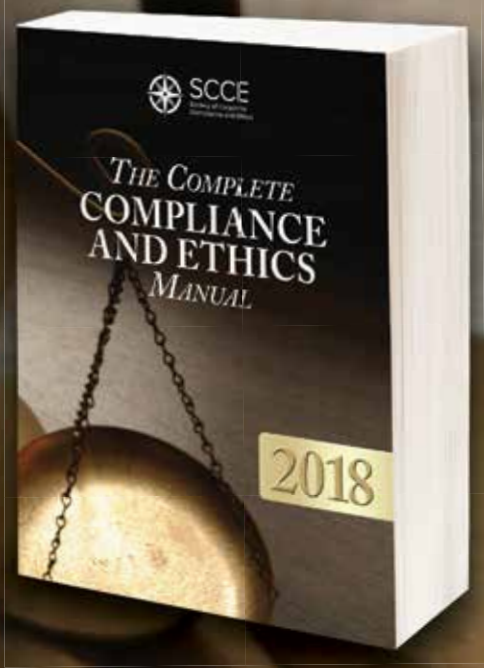

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by Mark Lanterman

The components of strong cybersecurity plans, Part 4: Technical vulnerability scanning

» Maturity assessments lay the groundwork for cybersecurity programs and allow management to establish desired improvement in comparison to current capabilities.

» A security assessment helps establish security governance by providing an independent check on information technology staff, increased awareness of security risks and threats, prioritization of IT spending for the purposes of risk mitigation.

» A security audit focuses on the completeness, design, implementation, and efficacy of internal security controls.

» Vulnerability scanning is an ongoing process in an organization that is both offensive and defensive depending on its use.

» Ultimately, a penetration test is only a fraction of developing a strong cybersecurity plan. However, these tests are frequently needed for compliance with regulations that set the minimum requirements for cybersecurity programs.

Mark Lanterman *(mlanterman@compforensics.com) is Chief Technology Officer at Computer Forensic Services Inc. in Minnetonka, MN.*

Part 3 of this article appeared in the January 2018 issue of **Compliance & Ethics Professional.**

Lanterman

As discussed in my previous three articles, strong security programs comprise both defensive and offensive measures. Maturity assessments, security assessments, security auditing, and technical vulnerability scanning are all defensive measures. However, since vulnerability scanners are often used by cybercriminals in an effort to find and exploit vulnerabilities, technical vulnerability scanning is both offensive and defensive.

A vulnerability scan is a security activity in which tools scan a particular device in order to identify flaws in operating systems and applications, misconfigured settings, and insecure ports and services. Vulnerability scanning is unique, because it is not an overall component of security programs, such as maturity assessments, security risk assessment, or security auditing. Rather, it is a technique that is leveraged by the other components. Security risk assessments use vulnerability scans to identify technical vulnerabilities in organizational assets. Automated scans identify the risk impact of the vulnerability on the asset as critical, high, medium, and low so that critical vulnerabilities can be mitigated on critical assets first.

Security audits look at vulnerability scanning from two perspectives: One as a control and one as a method of testing. Vulnerability scanning should be routine, because any one scan is only indicative of security strength for that moment in time. Security auditors also use vulnerability scans to independently test for the existence of certain vulnerabilities, to confirm certain

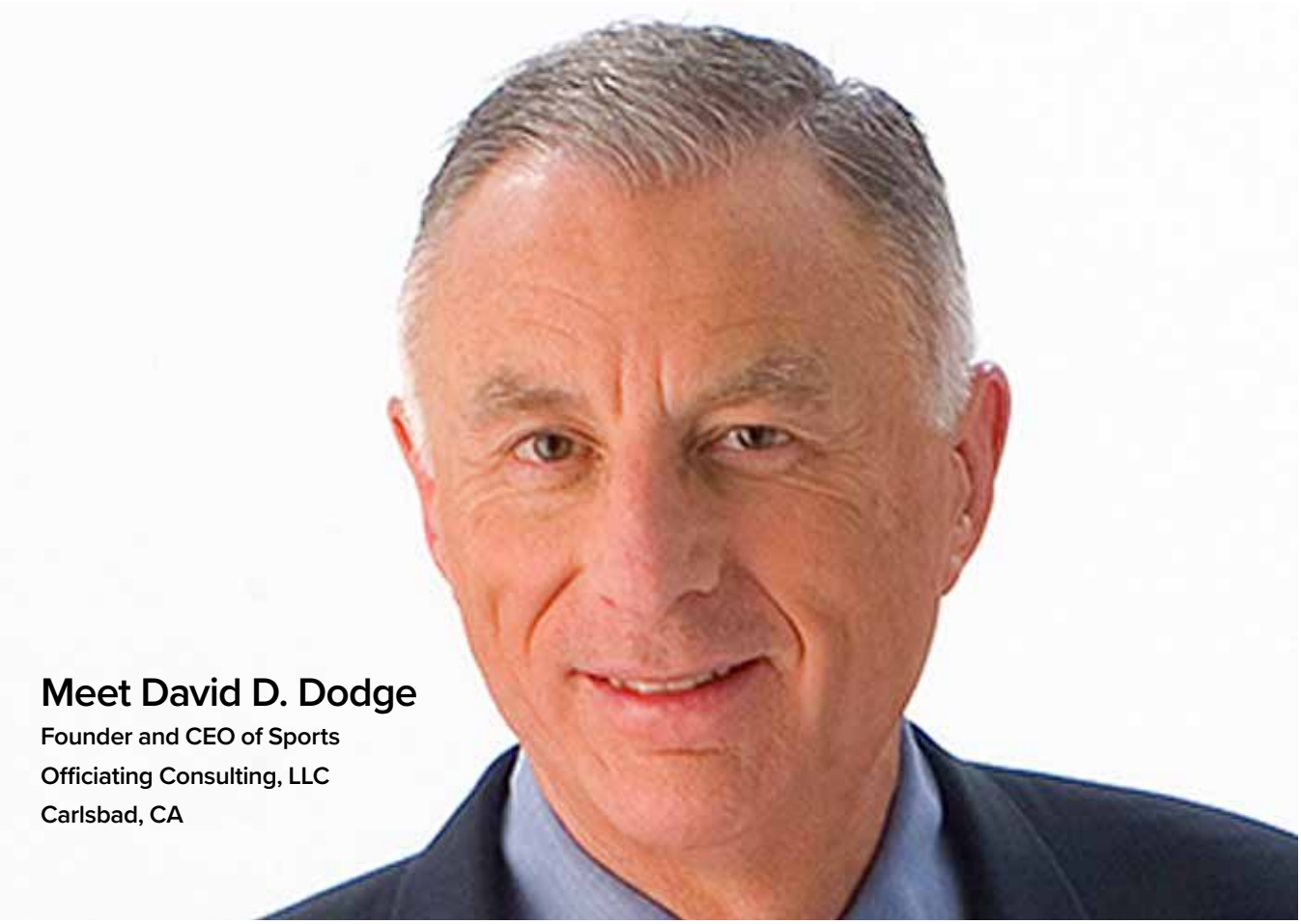
configuration settings, or to remediate testing. Finally, vulnerability scanning is a key technique for penetration testers to identify the weaknesses that they wish to exploit.

Routine vulnerability is an easy, cost-efficient, and important control to manage vulnerabilities. Instead of a cyber criminal finding the vulnerabilities, organizations should implement the necessary tools to find these vulnerabilities first and remedy them. The Center for Internet Security (CIS) Critical Security Controls rank vulnerability scans as the fourth most critical control.

Vulnerability scanning is an ongoing process that is both offensive and defensive depending on its use. In the context of strong security protocols, it should be used offensively to establish strong penetration test results, and defensively to identify and manage technical vulnerabilities before an outside perpetrator exploits them. By establishing baselines, identifying risks and threats, determining the strength of internal controls, and testing for vulnerabilities in technical infrastructure, an organization is well-equipped to develop sound plans for avoiding vulnerabilities and defensively acting against threats.

The fifth and final article of this series will describe the process and use of penetration testing as a component of a strong cybersecurity plan. The most requested security activity, penetration testing offers the most valuable results when conducted in relation to the other components and techniques. ✳

1. CIS Controls: Download the First Five CIS Controls Guide. Available at http://bit.ly/2DplvDK



An interview by Moby Salahuddin

Meet David D. Dodge

David D. Dodge *(david@sprtsoc.com) was interviewed in November 2017 by* ***Moby Salahuddin*** *(msalahuddin@sc.rr.com), a writer in Columbia, South Carolina.*

David D. Dodge is the former President and CEO of a risk management firm serving hospitals and health systems in South Carolina; the founder and CEO of Sports Officiating Consulting, LLC; and a board member at the National Association of Sports Officials.

MS: In your numerous postings on The Compliance & Ethics Blog maintained by the Society of Corporate Compliance and Ethics (SCCE), and as a board member at the National Association of Sports Officials, you have repeatedly called for sports organizations to adopt formal compliance programs. You are probably among the very few people in the country who have been pushing for such a change. How did you get interested in this issue?

DD: My interest in promoting compliance programs in sports organizations dates to my years officiating college basketball games and my work as CEO of a risk management firm serving hospitals in South Carolina. In my close involvement with sports, albeit on a part-time basis, I occasionally observed incidents of wrongdoing and heard about other transgressions involving recruiting violations, harassment of athletes, conflict of interest, etc.

It gradually became clear to me that sports organizations are headed towards a big fall, because hardly any of them—high school associations, college sports programs, sports under the United States Olympic Committee (USOC) umbrella, professional leagues—have

a formal compliance program in place that can receive reports of wrongdoing and respond effectively.

Like many sports fans, I too have followed the scandals that have plagued sports at all levels: the Donaghy mess about an NBA referee involved in betting on professional basketball games, the sexual-abuse scandals at USA Gymnastics and some other USOC sports, hacking of a competitor's database by an executive of a major league baseball team, and the recent college basketball scandal involving alleged improper payments to families of recruits.

In most of these instances, and in so many others, one can't help but conclude much of the tragic wrongdoing could probably have been prevented if an effective compliance program had been in place.

MS: How did your experience as CEO of a risk management firm serving hospitals shape your perspective?

DD: I observed firsthand how hospitals have benefited from compliance programs focused on prevention, detection, and correction. The hospital industry began implementing these initiatives nearly 25 years ago. Today, they are very much a part of the culture at almost all hospitals and health systems in the country, much as compliance programs are an integral part of the financial services sector and other industries.

Moreover, we had an effective compliance program at the company where I worked, and as the CEO, I developed a clear understanding of and appreciation for the benefits of such a program.

MS: Most casual observers and sports fans assume sports organizations have some sort of a compliance program or at least a designated official keeping a close eye. Is that not the case?

DD: In many respects, the sports industry in the U.S. is not as regulated as you might expect, and certainly not in comparison to healthcare, financial services, and the defense industry. In those sectors, the government expects and demands that organizations have effective compliance programs in place.

Also, compliance programs are common in many businesses and industries because they are good for business. But in sports, an industry that is still maturing, comprehensive preventive programs have yet to gain a foothold. Even at the nation's major universities, where compliance programs are common, such initiatives often seem to stop at the door of the athletic departments, which tend to focus on NCAA rules and regulations.

MS: Last year, the United Kingdom's Football Association set up a hotline to receive reports from victims of sex abuse in soccer programs. Media reports indicate the association received more than 1,000 calls, some of them relating to abuse in rugby, gymnastics, tennis, swimming, and golf. Would a similar initiative work in US sports?

DD: A hotline is a very important and necessary part of a compliance program, but it alone is not sufficient. I think sports administrators who think they can cut corners by just installing a hotline would quickly run into all sorts of difficulties. Who will answer the hotline, a department within the organization or an outside party? How would they guarantee anonymity? Who would receive reports of wrongdoing? Who would investigate them? How would the organization assure employees, its board of directors, and outside parties that reports of wrongdoing are investigated and not swept under the rug?

Also, I think it bears emphasizing that in sports, as elsewhere, not all issues are as clear as black and white. Employees, board members, athletes, officials, and

even top management need training on at least an annual basis to understand what is permissible behavior and what isn't; regulations and societal expectations keep changing, sometimes in an unexpected direction.

Besides, each sports organization should have an appreciation of where its vulnerabilities lie—for instance, some college programs get into trouble because of overzealous boosters. A risk assessment—which is another component of an effective compliance program—would alert coaches and staff and athletes how accepting seemingly innocuous gifts could land them in trouble.

MS: What are the barriers to developing compliance programs in sports? By now it should be obvious sports are as troubled as most other sectors in our society.

DD: I think the mind-set appears to be that most of the wrongdoing in sports is not preventable, because it is merely the result of individual misbehavior. Very few sports leaders have firsthand experience or close familiarity with compliance programs, so they are reluctant to embrace a foreign concept. They can't quite see why they need to go through all that expense and trouble.

Another barrier is that sports leaders are protective of their turf; they don't want an outside party or organization telling them what to adopt and how to implement it. In one of my blogs last year, I floated the idea of a central or a shared compliance program for all sports under the United States Olympic Committee umbrella. The reaction I received was that such a program would not work, because each sport could do a better job of developing a program specific to its unique needs.

MS: Perhaps the recent revelation by *The Washington Post* that, over the past three decades, nearly 300 coaches and officials associated with U.S. Olympic sports have been accused of sexual misconduct might change some minds. Since this report comes on the heels of a major scandal in college basketball, it might have more impact.

Let's assume a coach or an athletic department head wants to adopt a compliance program. What should be the first steps?

Very few sports leaders have firsthand experience or close familiarity with compliance programs, so they are reluctant to embrace a foreign concept.

DD: Here we truly have some good news, because there are plenty of resources and an abundance of compliance professionals who can be of help. Of course, one excellent resource is SCCE. A very basic first step for sports administrators might be to familiarize themselves with *Compliance 101, Second Edition*, published by the SCCE.

Another useful resource is the *ULTIMATE Hotline Resource Manual* by Richard Kusserow and Carrie Kusserow of Strategic Management Services, LLC. This guide includes templates for policies, procedures, notices, forms, and numerous best-practice tips.

Since sports are among the very few activities that bring us together, I am sure sports organizations will have the best wishes of fans everywhere as they embark on adopting much-needed reforms.

MS: Thank you, David, for sharing your experiences with us. ✳

by Duncan McCampbell

Preventing corruption in multinational corporations: A very different game, Part 3

» Multinational companies (MNCs) must take a different approach to compliance when they are operating outside of their headquarters country.

» MNCs under-resource and under-emphasize both domestic and foreign compliance functions for a variety of reasons.

» U.S. laws prohibiting foreign corrupt practices place western MNCs at particular compliance risk.

» The approaches currently used to prevent foreign corruption are of dubious value.

» A new, more culturally engaged approach to foreign corruption prevention is required.

Duncan McCampbell *(duncan.mccampbell@metrostate.edu) is Assistant Professor of International Business and Law, MBA Program Director at Metropolitan State University in Minneapolis, MN.*

Part 2 of this article appeared in the February 2018 issue of **Compliance & Ethics Professional.**

A new, identity-based approach to foreign compliance

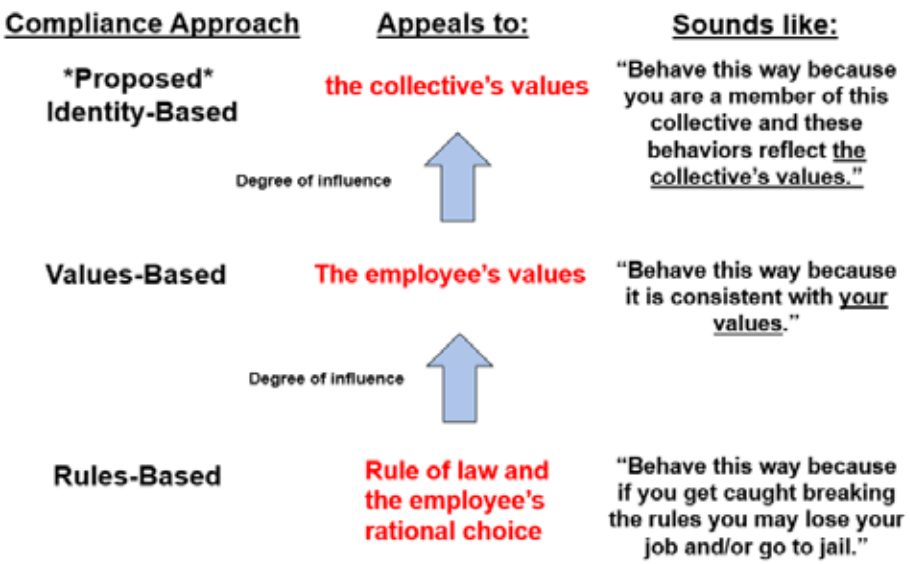
Last month we reviewed some of the reasons why the corporate function of Compliance is challenging in countries that have different cultures and well-known problems with corruption. The key to anti-corruption compliance in any country or culture is behavior modification. Compliance professionals seek to influence the thinking and behavior of company employees, bending them away from thinking and courses of action that could result in liability for the company. But how you go about influencing an individualist (largely Western countries) and collectivist (the East and much of Latin America and Africa) is very different.

McCampbell

Collectivists are influenced—some say defined or even formed—by relationships among their in-group, their collective. Contrast this idea of collective norm-setting with individualistic cultures, where "interpersonal relations are less important, [so] the ethical compliance is sought through formal structures, and regulations are often respected." Individualists, like the label implies, are less influenced by groups and other individuals, preferring to define themselves and model their behavior according to their *own* desires and judgment. No doubt, this statement sounds comfortable and familiar to any American compliance professional.

So both of the current western approaches to compliance—the rational and values-based approaches—focus the attention of behavior modification on the individual choices and values of the individual employee. The rules-based approach appeals to the individualist's instinctual respect for formal structures and the rule of law. The values-based approach appeals to the individualist's desire to make their own value choices (see table 1). These methods work, but mostly in places dominated by individualists—where corruption isn't a major problem. Could it be possible that a new approach is needed for modifying the behavior of collectivists?

Table 1: Comparison of approaches to appeal to individuals



Because the collectivist's identity is formed in and through the relationships of the collective, the most impactful method for influencing that employee is through the collective. The values you want the collectivist employee to internalize aren't some abstract legal concepts. You aren't asking them to form their own individual attitudes and values toward corruption. You are presenting them the opportunity to internalize the values of the collective. Thus, your collectivist compliance effort is entirely built around the following process:

- Clear and unambiguous expressions of the collective's (the employee's in-group) views on corruption;
- In messages stated by a leader of the employee's collective (not some imported lawyer); and, crucially,
- Continuous, visible, reinforcing behavior by the company's senior leaders in conformance with the stated values.

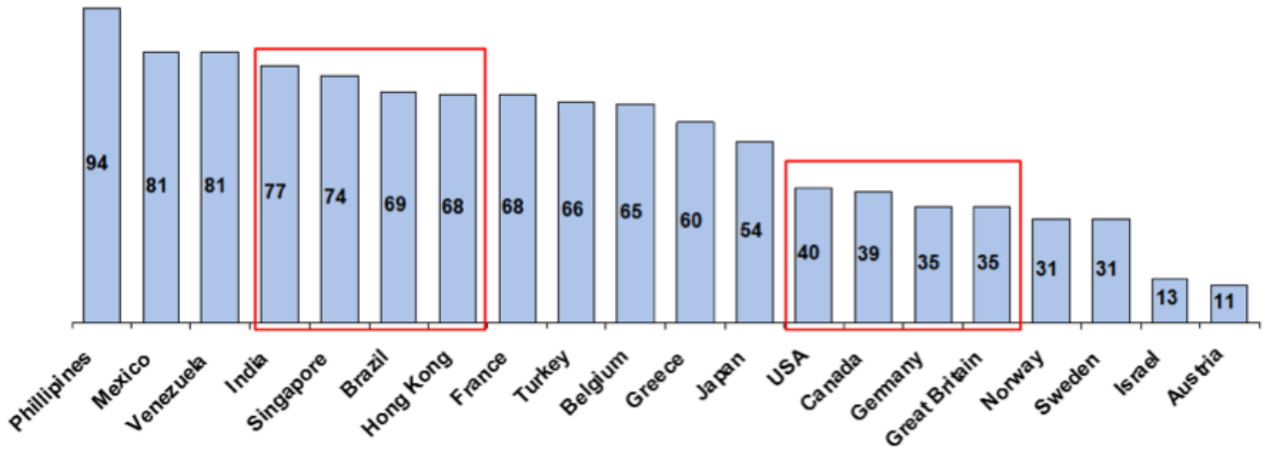
The first two points are relatively simple and easy to achieve. The last point is the toughest one in a collectivist culture, because collectivists tend to also be high in the second of Hofstede's dimensions: power/distance.

The power/distance dimension

Getting a collectivist employee to "drink the anti-corruption Kool-Aid" and internalize corporate anti-corruption doctrine is potentially easier in a collectivist culture than an individualist culture. You see, while an individualist is resistant to external influences, a collectivist is dependent upon, and deeply influenced by, an external entity: their in-group. An anti-corruption initiative communicating the values of that group across the employee's "family" yields transformative results that would surprise stubbornly independent Western individualists.

But there is another important dimension. Societies divide rather clearly along a line measuring a culture's relative comfort or discomfort with inequality and the relative distance between powerful people and the employees over whom they have authority. Many of the countries that were identified as collectivist in the prior article are seen as high power/distance cultures, including the highly collectivist cultures of Hong Kong, Singapore, and the Philippines.

Table 2: Power/Distance Index (PDI) Values by Country



Employees in high power/distance countries expect inequality, rigid corporate hierarchies, and different rules for the rulers and the ruled. There is an interesting correlation between Hofstede's Power Distance Index and the Individualism Index. Individualist cultures value individual initiative and achievement. But to an individualist, inequality—the inevitable consequence of a culture that values and rewards individual achievement—should be minimized, especially when it comes to factors out of the control of the individual (e.g., ascribed status, race, social class).

Countries that are predominantly collectivist tend to have high power/distance indexes, whereas countries that scored high on the individualism index all have low power/distance indexes. When one examines the main characteristics of the power/distance dimension, it is easy to see why.

Both collectivist and high power/distance cultures tend to produce companies with stratified and hierarchical authority structures. Employees are comforted by knowing their place in the hierarchy, who their boss is, and thus who they need to please by their job performance. The West's fondness for fuzzy or matrixed corporate management structures are not shared in the collectivist East.

The eyes of the employee are turned upward toward the people in authority. Potentially troublesome for the compliance effort, people in high power/distance cultures tend to see the boss as someone different from them, made of a different clay. So if the boss keeps a mistress in a suburban villa, drinks too much, cooks the books, or engages in corrupt acts with government officials, the employees aren't disappointed in the way they might be in a Western, individualist culture. After all, in many countries, those are the sorts of things that bosses do.

This cultural fact is the hedgerow over which an identity-based compliance program could stumble. Everyone is watching the big boss and taking their behavioral cues. When I was living in Beijing and commuting home to the U.S. every few weeks, I would often return to China late on a Sunday night. Jet-lagged, I would be wide awake very early on Monday morning. With nothing else to do, I'd go into the office. On one of those mornings, a

Table 3: Contrasts between low and high power/distance concepts

Low PDI	High PDI
Inequality in society should be minimized.	There should be an order of inequality in this world in which everyone has her/his rightful place; high and low are protected by this order.
All should be interdependent.	A few should be interdependent; most should be dependent.
Subordinates are people like me.	Superiors consider subordinates as being of a different kind.
The use of power should be legitimate and is subject to the judgment between good and evil.	Power is a basic fact of society which antedates good or evil. Its legitimacy is irrelevant.
Powerful people should try to look less powerful than they are.	Powerful people should try to look as powerful as possible.

member of my technology staff was pulling an all-nighter to address a server issue. He saw me arriving early and told other Chinese workers. Soon my more ambitious employees were arriving bleary-eyed at the office at 5:00 AM—believing they were modeling the behavior that their leader would admire and reward. I had to send out a staff memo to explain the reason for my early arrivals to allow my people to sleep.

Here is the point. In collectivist cultures (which is generally where corruption risk is highest), companies actually have an influencing opportunity that is not available to them in individualist cultures: to directly and deeply shape employee values, behavior—even their identities. But the flip side of that opportunity is that most collectivist cultures are also high power/distance cultures. If the head of the collective (the family) does not exhibit the compliance behavior that the company is trying to model for local employees, then all the training, the policies, and the brave statements of company values will be useless. The compliance effort will fail.

The notion of shared values and company loyalty may nowadays seem quaint in Western, individualist societies, where an employee's strong sense of personal identity with the company has, sadly, gone the way of blue suits and red ties at IBM. Now, a big company's relationship with its employees is largely episodic, transactional and, though it may span years, lacks a sense of mutual commitment and permanence. And this is why American companies have had no choice but to adopt values-based compliance programs in the U.S. These employees are, quite justifiably, deeply cynical about corporate codes of ethics. The only option

for the U.S. Compliance professional is to position correct behavior either in terms of the law or in terms of the employee's *own values*.

Contrast this with the Eastern collectivist, who embraces (so much more than the Westerner) the norm-creating, order-producing, mutually supporting principle of the family—the employee's in-group. In Beijing we ran the company like a family. What is the most fundamental characteristic of family? It is permanent membership. Though employees rarely left us, sometimes they went elsewhere for better opportunities. These people were always welcomed back, like members of our family, to our mid-autumn and spring festival celebrations. This had a profound impact on employees. It inspired deep commitment and in-group loyalty that Western business leaders can only dream about.

Your company's foreign compliance program

The minds of corporate compliance and human resource professionals are hardwired to promulgate globally consistent codes of ethics and compliance policies. Although there is a strong case for globally consistent *procedures* that a company uses to implement its compliance programs, the policies themselves must be adapted to foreign legal and regulatory requirements and arise from local culture.

Distance and language both diminish and complicate foreign compliance initiatives. Studies have found a huge disconnect between anti-corruption plans that are conceived in the U.S. and the actual implementation of those plans in foreign venues where bribery is most likely to occur. Oddly, companies generally perform less, not more, monitoring of their overseas operations than at home. Although almost every large American corporation has a code of ethics and even a global compliance plan, a recent survey found that a mere 52% of them have multilingual versions of these resources available. Only 19% of these companies rated their codes of ethics and compliance plans as "extremely effective."

Oddly, companies generally perform less, not more, monitoring of their overseas operations than at home.

The global corporate compliance group, McCampbell Global, LLC, has designed an anti-corruption and corporate compliance approach specifically for the high-risk, collectivist employee in the Western company's overseas offices. It has several unique features that have been proven effective at encouraging compliance and combatting corrupt behavior outside the U.S. Here are a few of the highlights:

- All corporate compliance policies are written and "owned" by the local business and stated exclusively in the local language. This process is best conducted collectively by the company's local employees. Global corporate policies promulgated by HR and compliance

professionals in the company's headquarters are not ignored, but they are seen as supplemental to the local policies.

- All anti-corruption and compliance training is conducted by people who employees would consider to be members of their "in-group," whether it's the local country manager or the local head of HR. Foreign lawyers, HR, and compliance professionals are not present during the local employee training.
- Local country managers and other senior leaders are given separate anti-corruption and compliance training that stresses the importance of modeling correct behavior to employees. Senior managers who cannot embrace the importance of compliance are replaced.
- Anti-corruption cadres are appointed from employees in each functional area (e.g., sales/marketing, technology, manufacturing) to monitor compliance risks, to periodically report compliance challenges encountered, and to take active measures to prevent failures of compliance.

Conclusion

Because the key to anti-corruption compliance in any country or culture is behavior modification, compliance professionals should use all the cultural tools at their disposal to influence the thinking and behavior of employees in faraway places. Companies adopting the above anti-corruption and compliance approach have been shown to substantially decrease incidents of non-compliance with legal standards and company policies. ✳

1. Hamid Yeganeh: "Culture and corruption: A concurrent application of Hofstede's, Schwartz's and Inglehart's frameworks," *International Journal of Development Issues*, 2014;13(1):2–24. Available at http://bit.ly/2mj3DDk.
2. Hofstede Insights: The 6 dimensions of national culture. Available at http://bit.ly/2kgmrVf.

by Daniel Coney, CCEP, CFE, CFCS

The perils of investigative report writing, Part 1

» Investigative results have real consequences, some of which can reach epic proportions in the lives of real people.

» A "just the facts" approach has evolved into a customer expectation that investigative reports draw objective, substantiated conclusions and root cause analyses.

» No one standard exists for investigative report writing.

» The NFL's Deflategate report, otherwise known as the Wells Report, presents opportunities to learn about the pitfalls in using this new approach.

» The aftermath of the Wells Report offers us at least four lessons learned: Objectiveness, overreliance on experts, being complete, and expecting your work to be scrutinized.

Daniel Coney *(Danconey@comcast.net) has been a law enforcement professional for nearly 33 years, with the last 25 years being both an agent and supervisor in four different Office of Inspector General organizations.*
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Rare is the occasion that a public spectacle results in a compliance-oriented investigative report for the world to read. Most investigative efforts are shrouded in confidentiality, with limited public exposure. The National Football League's (NFL) "Deflategate" controversy is a golden opportunity for compliance professionals to evaluate how that very public investigative report can inform us… and teach us.

Coney

Background

Admittedly, though an NFL football fan, I found Deflategate rather uninteresting and did not follow it much. For those who may know little about this topic, allow me a short discourse to set the stage. The NFL reports about $13 billion in annual revenues. It is the largest professional sports league in the world, and as a corporate entity, it has a market cap that surpasses companies such as Netflix, United Airlines, Time Warner Cable, and CBS television. One of the storied teams that make up the NFL is the New England Patriots—a team that has won five championships since 2002 and been to the Big Game 10 times since 1986, more than any other team. The last eight Super Bowls were quarterbacked by Tom Brady, who some would argue is the best quarterback in NFL history.

[The NFL] has a market cap that surpasses companies such as Netflix, United Airlines, Time Warner Cable, and CBS television.

During the course of the 2014/2015 season, the Patriots advanced to the Conference championship game, the winner of which moves on to the Super Bowl. That game, against the Indianapolis Colts, was played on a cold, rainy day in Massachusetts. The rules of the game dictate that game footballs must be inflated to between 12½ and 13½ pounds per square inch of air pressure. Shortly before

halftime of the game, the Colts intercepted a Tom Brady pass and thus had possession of one of the game footballs in play by the Patriots. The Colts sideline measured the air pressure after feeling that the ball was "soft," discovering a pressure reading below the 12½-psi mark. This resulted in an unusual step for the NFL to measure game balls during halftime. According to this measurement process, all of the Patriot's footballs were below league minimums, but the Colts balls were all within the required parameters. Thus, Deflategate was born, and Tom Brady was branded a cheater.

Just in case you think compliance investigations don't matter much, consider this: Deflategate cost the NFL at least $14.7 million, including the $2.5 million it paid for the Wells Report. The union that represents NFL players spent $7.1 million. It cost the Patriots at least $750,000 in legal expenses. Beyond that, the NFL levied harsh punishments against both Brady and the Patriots team. The team lost two major draft picks (a big deal in football, worth an indeterminable amount of money) and levied a monster fine of $1 million, the largest in NFL history.

Brady's four-game suspension had muted financial consequences because of some fancy footwork by the NFL quarterback. By appealing the initial suspension decision for a season, he was able to restructure his contract in the offseason. Because his base salary was $8 million before the restructuring, Brady would have lost $2.1 million in game checks for the four-game suspension. After restructuring, his base salary was a mere $1 million, so the suspension personally cost him around $235,000. We can assume he likely spent at least that much on his own attorneys. No one can quantify the damage to the reputation of those involved (including the NFL), what endorsements it might have cost, and how over the course of history people will "asterisk" the accomplishments. The takeaway ought to be that investigative results have real consequences, some of which can reach epic proportions in the lives of real people. Investigations, and how they are reported, matter.

Limitations and disclosures

First, I am a Broncos fan. I live in the Denver area, think John Elway was one of the best quarterbacks of all time, and believe the sunrises are orange and blue because God is a Broncos fan. All jesting aside, my point is I have no allegiance to either the Patriots or Tom Brady.

Neither do I picture the NFL through rose-colored glasses. They are a business first, with personalities that no doubt have agendas. They chose to carry out compliance activities in this instance by hiring outside counsel to conduct the investigation, which was led by Theodore V. Wells, Jr., a partner in a law firm. Mr. Wells has an impeccable résumé, including a couple of Harvard degrees, an impressive clerkship, and a list of successful legal defenses for names we would all recognize. The law firm itself lists a plethora of practice areas. Notable in both Mr. Wells' and the firm's list of many specialty areas is the lack of a compliance background, though they do list "internal investigations." All of the eight people on Mr. Wells' team have similar Ivy League educations and substantial credentials as litigators, but not as compliance professionals. Perhaps this is obvious, but bearing the moniker of attorney does not make one a professional investigator or compliance expert any more than having a motor vehicle license qualifies one to race an Indy car. Although I do not know if the Wells Report intended to meet any particular standards that are recognized in the compliance or investigative world,

I nevertheless offer some key standards to consider in this article.

A new frontier

The Wells Report is different, but not surprising. It is an example of a quiet foundational shift that has occurred in investigative report writing. This change is best expressed on two strata: a distinction in the audience of the report and whether conclusions are made in the report.

I recall my frustration as a young agent when I would recount all the facts derived from an investigation, but the decision maker wouldn't "get it." The law enforcement standard has long been that an investigator is forbidden from adding opinion, drawing conclusions, or inserting personal or impartial monologue. Countless times, technical issues or convoluted fraud schemes were beyond the comprehension of readers of the report, but I was powerless to help them connect the dots. Although prosecutors were savvy enough to understand those nuances, administrative decision makers often were not—nor did they want to be. Where the criminal burden of proof fell short, we had to rely on the C-suite to take appropriate disciplinary action against the offending employee—something that frequently did not happen.

This left Inspectors General (IG) in the unenviable position of trying to explain to Congress how investigative and audit findings were regularly ignored. Over time, I think this dynamic (and probably others) resulted in an environment that demanded accountability by the management of these agencies. It is now common to see distinctions made between a report written for a prosecutor and one aimed at an administrative resolution.

An IG investigation frequently has end users that include management officials, political appointees, licensing boards, suspension and debarment officials, administrative law judges, members of Congress and their staffers, the president's staff, ethics offices, watchdog groups, and the public. In fact, over time, the primary customer has become this diverse group. Although traditional law enforcement organizations such as the FBI are strictly criminal investigators, the IGs have far greater authority to holistically review and investigate, and that means criminal, civil, and administrative resolutions are all on the table. IGs are further expected to make recommendations designed to promote economy, efficiency, and effectiveness—and prevent and detect fraud and abuse—in agency programs and operations.

It is now common to see distinctions made between a report written for a prosecutor and one aimed at an administrative resolution.

Thus, in these "non-judicial" style reports, the drive has been to demonstrate impact and accountability, and to do that, more and more the expectation is for an investigative report to contain clear, actionable conclusions and recommendations. This quickly evolved into a customer expectation that report writers draw objective, substantiated conclusions and root cause analyses as part of a comprehensive compliance package.

Let me give that some time to sink in. For some of you, your mind is currently in revolt, because what I am talking about is inconsistent with the way it has always been done. I'm here to tell you this is a new frontier. These so-called non-judicial reports are here to stay, and the more I see it and deal with it as a manager, I can see how and why it is supposed to work. But there are pitfalls, as illustrated in the Wells Report. Therein lies the title for my piece. It is a practice fraught with perils.

Standards

As with any good investigative report, there must be a rule, a law, or a standard that compares an action to that measure. There is no one-stop shop for investigative report–writing excellence. Arguably, there are universally recognized principles, but no one body promulgates an agreed-upon standard. *The Complete Compliance and Ethics Manual 2016*, published by the Society of Corporate Compliance and Ethics (SCCE), has a chapter that generally addresses investigative report writing without establishing any standards. However, the SCCE consistently teaches that compliance efforts are intended to provide information to management for them to make informed decisions. It is not the role of the compliance officer to make those decisions or conclusions on behalf of management.

For some, a manual published by the Association of Certified Fraud Examiners (ACFE) is useful. ACFE's guiding principle is the "judicial proceeding standard," which asks, "Would I be able to defend this report in a judicial proceeding?" Though indicating the majority of investigative reports will never get to a judicial authority, ACFE espouses the better-safe-than-sorry approach to assuming a report will need to withstand judicial scrutiny. Already you no doubt see the juxtaposition between that concept and the non-judicial style report.

Nevertheless, ACFE's standard makes room for the new breed of report. The ACFE manual says:

> …no conclusions or opinions should be released *until [the investigator] has accumulated sufficient evidence to meet the preponderance of the evidence burden of proof* (or established that doing so is not feasible), thoroughly addressed, analyzed, and documented that all probable alternative explanations have been considered and excluded as likely explanations that would affect his conclusions or opinions, [and] accumulated sufficient evidence to identify all material matters which, if omitted, could cause a distortion of the facts. (emphasis added)

The question then becomes an application of determining when evidence is sufficient to make conclusions. The ACFE manual goes on to say elsewhere, "only convey objective facts (i.e., unbiased evidence that is not influenced by personal feelings, interpretations, or prejudice); do not editorialize or opine on guilt or innocence."

With respect to expert reports, ACFE counsels:

> In the context of expert reports, the purpose of such reports is not to 'win' cases…The fraud examiner may be an advocate for the credibility and reliability of the expert conclusions and opinions and the related supportive basis in reporting or testifying; however, he must not become, or even appear to become, an advocate for one party or the other.

The ACFE Code of Professional Ethics says the investigator should reveal all material matters discovered during an investigation that, if omitted, could cause a distortion of the facts. Notable is the comment:

> …the fraud examiner should be careful not to include any statement or opinion as to the integrity or veracity of any witness even if the fraud examiner is convinced that the witness is being untruthful. Truthfulness, or lack thereof, can be demonstrated through conflicting statements by the witness or suspect.

The CFE manual contrasts conclusions based on *observations* of the evidence with opinions, which call for an *interpretation* of the facts. The investigator is to be "very circumspect about drawing conclusions" and attend to whether an expert witness has employed intellectual rigor in adequately accounting for alternative explanations. Overall, ACFE's standards are consistent with the idea that one can draw supportable conclusions in a report, so long as they can be defended in a judicial proceeding.

The Inspector General community subscribes to standards of the statutorily established Council of the Inspectors General on Integrity and Efficiency (CIGIE), which "develop[s] policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General." CIGIE publishes quality standards that in my opinion are one of the best benchmarks that a compliance-oriented function could look to for report writing and investigation standards, precisely because they address issues that are near and dear to the compliance profession, such as independence.

As expected, there are a number of similarities between CIGIE's Quality Standards for Investigations (QSI) and ACFE's guidance. The QSIs are built around general standards concerning qualifications of investigators, independence, and due professional care. Those are supplemented by qualitative standards that include planning, execution, reporting, and managing investigative information. The reporting standard simply states, "Reports (oral and written) must thoroughly address all relevant aspects of the investigation and be accurate, clear, complete, concise, logically organized, timely, and objective." Further clarification points out the importance of impartiality in the report—that is, there is no appearance of bias. Statements in the report must be supported by evidence, and perhaps unique to investigative standards, the QSI calls for systemic weaknesses or management problems that undergird any violation to be reported to the organization's management.

Reports (oral and written) must thoroughly address all relevant aspects of the investigation and be accurate, clear, complete, concise, logically organized, timely, and objective.

The challenge of the newer reporting expectations, in which the report makes clearer conclusions in a non-judicial context,

is to balance these quality standards with customer expectations. It is evident that the standards mentioned above strain to keep pace with the change, but the new style still meets the standards.

The Wells Report is truly an exceptional opportunity to compare it to these standards, learn what pitfalls we might avoid, and maybe even establish a few best practices. Since I edit and approve investigative reports for a living, and have been involved with hundreds of such reports from the mundane to the high profile, I offer some observations that might help.

Lesson #1: The critical nature of objectiveness

Based on more than 60 witness interviews; reviewing video evidence; analysis of electronic text messages, phone logs, and emails; consulting weather, temperature, and other available data sources; and obtaining expert scientific analysis, the Wells Report said:

> …it is more probable than not that New England Patriots personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules. In particular, we have concluded that it is more probable than not that Jim McNally (the Officials Locker Room attendant for the Patriots) and John Jastremski (an equipment assistant for the Patriots) participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee. Based on the evidence, it also is our view that it is more probable than not that Tom Brady (the quarterback of the Patriots) was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.

This is a breathtakingly unequivocal statement. I have seen such bold statements about a condition or event taking place, but few times is attribution made about a person's intent. The conclusion is written to meet a "preponderance of the evidence" standard, which is often explained as the 51% rule—if the evidence tends to ever so slightly tip the scales toward one outcome, then the standard has been met.

Typically, investigative reports convey facts, supported by evidence, that allow the reader of the report (a decision maker of some kind) to draw the conclusion that the preponderance burden has been met. An investigator may conclude that various pieces of evidence together are relevant to report in a way that makes those connections obvious, but making a conclusion on guilt is another thing entirely. These are treacherous waters to navigate and maintain that you, as an investigator, have remained objective and unbiased. I know because I've seen it: When you are a hammer, everything looks like a nail. It is human nature that once we believe one narrative, all evidence appears to point in that direction, and it is very easy to ignore evidence that is inconsistent with our narrative.

The conclusions about deliberation and general awareness of improper acts cited in this one paragraph of the Wells Report are stunning. As a regular writer and editor of such reports, I expected such a strong statement to be supported by overwhelming evidence at multiple levels. Instead, a lackluster collection of circumstances was the only offering. My observations concerning objectiveness includes that the Wells Report:

- made a "conclusion" of some kind at least 29 times;
- judged that it was "more probable than not" that something was true or false at least 13 times;

- stated "we believe" 37 different times in making some judgment or conclusion about a set of circumstances, with a consistent bias toward a view of guilt;
- assessed a set of facts using the terminology "in our view" four times, for instance, "…in our view, a contrary conclusion requires the acceptance of an implausible number of communications and events as benign coincidences," and all of them infer nefarious intent;
- contended nine times that something is "implausible" in their estimation;
- admitted that they accepted "uncertain information" and assumptions as the "mostly likely" circumstance at a given point in making their conclusions;
- assumed that an uptick in the frequency of Brady's text and voice contact with Jastremski and McNally, after it was known the NFL was investigating, was evidence of knowledge of some scheme to deflate footballs;
- read meaning into text messages between Brady, McNally, and Jastremski;
- inexplicably assigned bad motives for otherwise innocuous events, including:
  - that Brady was a proponent of a rule change 10 years earlier that allowed teams to inflate balls to their quarterback's preference;
  - that Brady happened to ask Jastremski into a space he had never previously been invited into;
  - that a superstar with a superstar model wife didn't turn his private cell phone over for inspection;
  - describing Brady as having "complained angrily" about the inflation level of the ball during a game in 2014, ascribing a value to a feeling that they had no ability to divine;
- on several occasions gave credence to one person's statement over a contradicting statement by another without any stated basis or corroborating evidence.

The first lesson we can learn is to stay in our lane. We cannot let a client's pre-determined desire for a particular outcome, nor our own prejudices, bias the independent, objective truth we discover. Nor can we write in such a way that it gives the appearance we are biased by how we report or what conclusions we make. There are times when evidence allows you to make a conclusion. For instance, if there is documentary and physical evidence, together with a confession and corroborating statements, then the investigator is safe to state a reasonable finding. But where weak, inconclusive, or circumstantial evidence is all there is, it is not the investigator's job to conclude whether the evidence meets a particular burden of proof. Otherwise objective investigations are ruined by reports that overstep boundaries.

I'll leave you wanting more. Next month we'll conclude with the last three lessons we can learn from the Wells Report. ✳

The opinions in this article are the author's and do not necessarily represent the position of any government agency.

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by Kristy Grant-Hart

If you have more than three priorities, you don't have any

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Famous author and business consultant Jim Collins says, "If you have more than three priorities, you don't have any." Three? That's it? Yes, three.

If you struggle to properly prioritize projects and tasks, take heart—you're not alone. Many people find prioritization extremely difficult, because everything seems to be due yesterday and seems to have equal levels of importance. Sometimes it feels like your only option is to respond to the latest email you've received or call back the last person who has made a request, because stopping to prioritize would simply be a waste of time—and time is the last thing you have!

Grant-Hart

When everything is a priority, nothing is. Stephen Covey reminds us that the trick is not to prioritize your schedule, but instead to schedule your priorities. Here are three ways to get this done.

Ask what must be done now

To do our best and most efficient work, we must systematically look through our to-do list and projects, then ruthlessly decide what *must* get done. By ignoring the distractions and keeping focus on what must be completed, you'll be much more effective and much more likely to complete the tasks you've chosen to prioritize.

What if a new priority comes up that must be dealt with immediately? No problem. Before you take on the new priority, demote one of the others that you were working on so you continue to only have three.

Focus on quick wins

Is there something on your list that won't take a long time but will have a big impact when it is finished? Great! Prioritize that item. If you're the bottleneck on a project or approval process, prioritize the tasks required to get that process flowing again. You'll make your coworkers happy, and you'll be pleased with the feeling of accomplishment. Accomplishment builds enthusiasm and your faith in yourself.

Limit yourself to three key priorities

If you've looked at your to-do list and scheduled eight priorities, you'll find that you still don't know what to work on first. Your energy will be scattered, and you won't be able to finish the most important work.

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- Allan Fyfe, Scottish Power

by Joe Murphy, CCEP, CCEP-I

Evaluating your program: A misunderstood key to compliance program success

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In 2004, the U.S. Sentencing Commission amended the compliance program standards to make one of its most important improvements: It required companies to "evaluate periodically the effectiveness" of their programs. Other standard setters have followed. Sadly, I still see commentators mistakenly confusing this with auditing and monitoring or ignoring it completely. But evaluation is the key to having a program that works.

Murphy

Lack of this element has been a fatal flaw in the fight against harassment, for example. Companies have been misreading two Supreme Court cases, thinking that all they need is a policy that meets the legal standard, some training (in California just 2 hours every 2 years), a helpline, and jumping into action when someone calls. Of course, the training is often seen as punishment and sometimes even hurts the effort. But no one seems to care, because they see no need to evaluate its effectiveness.

The Supreme Court did not issue a checklist. It called for "reasonable" efforts. In my view, no effort can be reasonable if you do not evaluate whether it works.

Sometimes people dodge the difficult evaluation work by issuing surveys, maybe once a year—a nice step, but limited in value. It provides a data point, nothing more.

Even if you had the perfect survey questions (and there is no such thing), and an employee base that only told the truth, and you had truly amazing survey results, is that enough measurement? Suppose an incredible 80% gave consistently positive answers to the survey: They trust the helpline, believe management is honest, and have witnessed no unreported misconduct—everything you could want. But keep in mind, even in a case with these excellent results, you still have 20% giving negative answers. Consider also that statistics suggest that 3%–5% of any group may be sociopaths who have no sense of right and wrong. So if you have 10,000 employees, you have 2,000 who have not given positive responses and hundreds who may be sociopaths. You still need to measure how well your control systems are working to address this group.

Measurement is essential. It cannot be covered by mere box ticking, even a survey box. Measurement needs to be ongoing and address all the risks, all the compliance program functions, and all the parts of the business (prioritized by the risk assessment). Look at each compliance tool: Is it functioning correctly? Does it have the impact it is supposed to have? Policies no one reads or believes, training that puts people to sleep, and helplines that no one calls are a waste of time. If you are not evaluating these things, you are wasting people's time, ignoring basic management principles, and failing to meet compliance program standards. ✳

Takeaways

March 2018

Compliance & Ethics PROFESSIONAL

Tear out this page and keep for reference, or share with a colleague. Visit www.corporatecompliance.org for more information.

Lost in translation: The difficulties of implementing a global compliance program

Ann Straw (page 25)

- Language, culture, and legal structure are key elements when implementing a comprehensive compliance program globally.
- "Comprehensive" and "global" should not necessarily be interpreted to mean "uniform" across different countries.
- There is a significant risk of miscommunication when a policy is too long or too wordy.
- Leave room in policies for the company to change direction as markets and conditions change.
- Don't assume one size fits all for compliance on a global scale.

It's not too late to comply with GDPR!

Robert Bond (page 31)

- The EU General Data Protection Regulation (GDPR) impacts most businesses from 25 May 2018, even corporations that have no EU affiliates but still target citizens in the EU.
- GDPR imposes strict processing obligations on controllers and processors of personal data.
- Personal data covers much more than Personally Identifiable Information.
- Individuals will have enhanced rights over their personal data, such as rights of access, erasure, and rectification as well as data portability and the right to object to profiling.
- Failure to comply with GDPR may lead to increased scrutiny and fines, and aggrieved individuals will have rights to compensation.

Dodd-Frank and the repurcussions of dismantling it

Robin Singh (page 38)

- As regulators pile on regulations, the overall balance between cost and benefit shifts from one end to another.
- Pre-2008, policymakers were faced with the choice of either bailing out large institutions or letting them go under, with serious consequences for financial stability.
- Dodd-Frank provided a response to the calamity of Lehman Brothers, where the top executives walked off with millions and shareholders were left penniless.
- Dodd-Frank has leveled the playing field between two contrasts: municipal bonds and the tycoons of Wall Street.
- There is a danger that re-opening the bill will result in gutting some of the key provisions.

German Federal Court of Justice treats compliance management systems as mitigating factor

Eike Bicker and Marcus Reischl (page 45)

- German Federal Court of Justice held that the quality and efficiency of a compliance management system has to be taken into account as a mitigating factor when calculating a fine and/or a profit disgorgement against the company.
- The legal situation in Germany is drawing closer to the U.S. and the UK.
- Wherever compliance management systems serve to prevent breaches of the law, the implementation of such a system shall be taken into account in setting the fine.
- Antitrust authorities in Germany and other European countries are still reluctant to accept the investments in compliance systems as a mitigating factor.
- The ruling provides a great incentive to implement effective compliance programs.

UK and Europe: The three biggest questions this year

Kristy Grant-Hart (page 48)

- Uncertainty in the UK after the Brexit vote has people concerned about staffing in their compliance programs and in their companies.
- The new European General Data Protection Act threatens large penalties, but for whom and when? Those are big questions.
- The UK Modern Slavery Act has highlighted the problem of slavery and human trafficking in supply chains, but hasn't provided much guidance on how deep into the supply chain businesses need to go.
- Finding and eradicating modern slavery within a supply chain can be challenged by contractual obligations, lack of audit rights, and data privacy concerns.
- There are more questions than answers right now in Europe with respect to Brexit, the GDPR, and the Modern Slavery Act.

The components of strong cybersecurity plans, Part 4: Technical vulnerability scanning

Mark Lanterman (page 52)

- Maturity assessments lay the groundwork for cybersecurity programs and allow management to establish desired improvement in comparison to current capabilities.
- A security assessment helps establish security governance by providing an independent check on information technology staff, increased awareness of security risks and threats, and prioritization of IT spending for the purposes of risk mitigation.
- A security audit focuses on the completeness, design, implementation, and efficacy of internal security controls.
- Vulnerability scanning is an ongoing process in an organization that is both offensive and defensive depending on its use.
- Ultimately, a penetration test is only a fraction of developing a strong cybersecurity plan. However, these tests are frequently needed for compliance with regulations that set the minimum requirements for cybersecurity programs.

Preventing corruption in multinational corporations: A very different game, Part 3

Duncan McCampbell (page 57)

- Multinational companies (MNCs) must take a different approach to compliance when they are operating outside of their headquarters country.
- MNCs under-resource and under-emphasize both domestic and foreign compliance functions for a variety of reasons.
- U.S. laws prohibiting foreign corrupt practices place western MNCs at particular compliance risk.
- The approaches currently used to prevent foreign corruption are of dubious value.
- A new, more culturally engaged approach to foreign corruption prevention is required.

The perils of investigative report writing, Part 1

Daniel Coney (page 63)

- Investigative results have real consequences, some of which can reach epic proportions in the lives of real people.
- A "just the facts" approach has evolved into a customer expectation that investigative reports draw objective, substantiated conclusions and root cause analyses.
- No one standard exists for investigative report writing.
- The NFL's Deflategate report, otherwise known as the Wells Report, presents opportunities to learn about the pitfalls in using this new approach.
- The aftermath of the Wells Report offers us at least four lessons learned: Objectiveness, overreliance on experts, being complete, and expecting your work to be scrutinized.

SCCE upcoming events

March 2018

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
25	26	27	28	1	2 REGIONAL CONFERENCE Minneapolis, MN	3
4	5 WEB CONFERENCE: *How Corporate Culture Impacts Compliance—And What to do About it!* Basic Compliance & Ethics Academy® New York, NY	6	7 WEB CONFERENCE: *ISO 37001 Management Systems Essentials: Getting the Vitals Right*	8 WEB CONFERENCE: *Corporate Integrity Agreement Developments–Understanding the Government's Expectations* CCEP Exam	9 REGIONAL CONFERENCE New York, NY	10
11	12	13	14	15	16	17
18	19	20	21 WEB CONFERENCE: *Those Skills They Never Told You a Compliance Officer Needs to Have*	22	23 REGIONAL CONFERENCE Boston, MA	24
25 European Compliance & Ethics Institute Frankfurt, Germany	26	27	28 WEB CONFERENCE: *Form I-9: Mistakes Big or Small—Avoid Them All* CCEP-I Exam	29	30	31

April 2018

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3 WEB CONFERENCE: *Are You Ready for GDPR?*	4	5	6	7
8	9 Basic Compliance & Ethics Academy® Chicago, IL	10 WEB CONFERENCE: *Improving Your Ethical Culture*	11	12 CCEP Exam	13 REGIONAL CONFERENCE Scottsdale, AZ	14
15	16	17	18	19	20	21
22	23 International Basic Compliance & Ethics Academy® Amsterdam, Netherlands	24	25	26 CCEP-I Exam	27 REGIONAL CONFERENCE Tampa, FL	28
29	30	1	2	3	4	5

2018

European Compliance & Ethics Institute
25–28 March | Frankfurt, Germany

Higher Education Compliance Conference
June 3–6 | Austin, TX

Internal Investigations Compliance Conference
June 7–8 | Orlando, FL

Board Audit Committee Compliance Conference
September 24–25 | Scottsdale, AZ

Basic Compliance & Ethics Academies
April 9–12 | Chicago, IL
June 11–14 | Scottsdale, AZ
August 6–9 | Washington DC
September 10–13 | Las Vegas, NV
October 1–4 | Dallas, TX
November 12–15 | San Diego, CA

INTERNATIONAL Basic Compliance & Ethics Academies
23–26 April | Amsterdam, Netherlands
9–12 July | Singapore
20–23 August | São Paulo, Brazil
24–27 September | Madrid, Spain

Regional Compliance & Ethics Conferences
March 9 | New York, NY
March 23 | Boston, MA
April 13 | Scottsdale, AZ
April 27 | Tampa, FL NEW
May 4 | Chicago, IL
May 18 | San Francisco, CA
June 8 | Atlanta, GA
June 21–22 | Anchorage, AK
August 17 | Columbus, OH NEW

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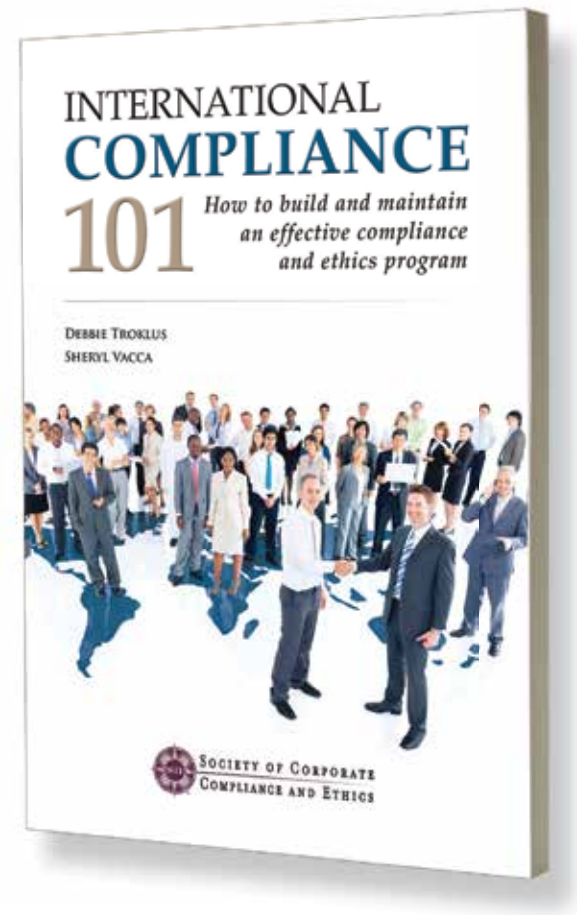
corporatecompliance.org/events

International Compliance 101



Globalize Your Compliance Program

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Internal Investigations Compliance Conference

JUNE 7–8, 2018 | ORLANDO, FL

corporatecompliance.org/investigations

Questions? Email lizza.catalano@corporatecompliance.org

- Two days of focused training on conducting compliance-related internal investigations
- Led by two experienced compliance professionals, Meric Bloch and Al Gagne
- For compliance professionals charged with conducting investigations or those supervising them
- Understand and assess the initial allegation of wrongdoing
- Create an investigation plan
- Discuss the steps: gathering evidence, conducting interviews, conclusions and root-cause analysis, and writing your report

Meric Bloch, JD, CFE, CCEP-F
Corporate Director, Investigations
Shriners Hospitals for Children

Albert G. Gagne, CCEP
Former Director, Ethics & Compliance, Textron Systems Corporation (retired)