

*International Compliance and Ethics —
Coordination and Maximization*



INTERNATIONAL COMPLIANCE AND ETHICS: COORDINATION AND MAXIMIZATION

International compliance and ethics continue to be crucial components of good corporate governance. With U.S. regulators increasingly focusing upon the conduct of U.S. companies overseas, a corporation doing business globally has no excuse for being weak on international corporate compliance. In-house counsel, compliance officers, and risk managers are responsible for implementing and maintaining appropriate compliance policies and procedures and inculcating an ethics-based business culture throughout their company, from the top of the corporate ladder to the bottom — from headquarters to the most remote outposts of the company around the globe.

John Landis, a partner with Foley & Lardner LLP, moderated “International Corporate Compliance and Ethics: Coordination and Maximization,” a breakout session of Foley’s sixth annual National Directors Institute held on March 8, 2007 in Chicago, Illinois. Mr. Landis was joined by a distinguished panel, including Walker Allen, vice president, secretary and general counsel of Elementis Worldwide Inc.; Deidra Gold, executive vice president and general counsel for Wolters Kluwer North America; Bobbie Gregg, vice-president and global chief compliance officer for Aon Corporation; Paul Liebenson, assistant general counsel – Transactions, International and Compliance of Tellabs, Inc.; Luis F. Machado, associate general counsel – corporate and assistant secretary of The Wm. Wrigley Jr. Company; and Luis Ortega, senior manager – Forensic and Investigative Services at Deloitte Financial Advisory Services LLP.

Leadership Across Borders: Developing an International “Tone at the Top”

While the term “tone at the top” may have been overused (or misused) over the past five years, the U.S. government, regulators, and investors continue to look for, and expect, proper leadership in all areas of corporate governance, including compliance and ethics at home and abroad. As such, boards of directors and senior management of multi-national companies must continue to develop the proper “tone at the top” and facilitate its dissemination to the far reaches of the company. Many companies, such as Aon and Wrigley, with over one hundred offices or facilities worldwide, often struggle with how the “tone” can most effectively be transmitted to countries from Azerbaijan to Zambia.

“Tone at the top” is the most critical element of an effective compliance program because it goes to the core of the company culture. Enron, for example, had a great code of business conduct, but the company ultimately failed because the organization’s culture was not one that fostered, rewarded, or insisted upon compliance and ethical business behavior. Ethical business behavior can only be implemented in an organization and integrated into the way a company does business — across the globe — by having an effective “tone at the top.”

One of the great challenges for multi-national organizations, is establishing a tone that involves more than the board of directors and senior management, but every employee within the organization. For example, if a company has call centers, the managers of the centers need to set the tone at that location. Even if an organization has a history of strong values, it still can be challenging to ensure that the tone and message cascade through all offices at all levels. In other words, the message must be disseminated throughout the company, and then must be reinforced through employees’ words, actions, and in the



performance measurement process. Within the Aon Corporation, ethics is considered to be one of the essential attributes of global leadership. This translates into a requirement that business conduct be incorporated into performance expectations. Aon has a global compliance leadership council with representatives from each location around the world who provide feedback on how the message of compliance and ethics is perceived in different cultures. These representatives truly believe in and understand the message, and are responsible for reinforcing it within their locations.

A key compliance challenge is creating an international corporate culture that tolerates and encourages employees to come forward and report improper conduct. Companies utilize various tactics to foster this climate. Regardless of how it is achieved, greater transparency within a company can be helpful in developing the desired culture. It also is important to foster a culture that takes compliance seriously and truly integrates it into the business.

One service that Deloitte provides to its clients is an evaluation of whether the “tone at the top” is filtering down to employees. Consultants investigate the success of compliance message delivery by, among other measures, interviewing employees at the local level about compliance and ethics, their perceptions of the CEO and senior management, and the training they have received regarding the message.

The Federal Sentencing Guidelines and Active Board Oversight

Companies also must grapple with the active board oversight element set forth in the Federal Sentencing Guidelines.

Strategies

In its approach, the board of directors at Tellabs has established a Business Conduct and Ethics Committee. Tellabs’ Audit Committee is responsible for its oversight, which is rigorous and well-documented. The Business Conduct and Ethics Committee (composed of the CEO and his staff) is charged with addressing and tackling ethics and compliance issues and to escalate them when appropriate.

Another example is the U.S. ethics and compliance program at Elementis, which is listed in the United Kingdom but has most of its operations in the United States. The program requires detailed reports for the Audit Committee twice a year, and it constantly is improved and enhanced as determinations are made about what is appropriate for a company of its size and unique structure.

Benchmarks

Many feel that the Guidelines do not provided criteria specific enough to allow for a benchmark. In the current corporate environment, boards appear to be more focused on compliance, which most feel is a positive development as long as they do not overshadow other pertinent business issues and critical decisions.

In most companies, the board will review a compliance program and then delegate it to a compliance committee that includes the CEO and a group of senior managers. The committee will implement the compliance program and provide regular reports to the board on the progress of the program, and will raise any issues that arise through



whistleblower hotlines or similar mechanisms established by the human resources or legal department. The committee will report to the board at least twice a year — more often if necessary — and the updates will be included in the minutes. If clear evidence of the board's involvement is present, then the oversight process should be sufficient pursuant to the Guidelines.

The only “right” answer to the benchmark question is, “It depends.” A company has many risks, and the board needs help to identify and focus on those risks. While the issue should be given proper attention, the board should not become involved with detailed reports on individual whistleblower calls (80 percent or so of which are employee complaints). A process must be put into place that will change with the company — a quality that is especially important if the company is undergoing rapid growth and change.

Compliance as a Goal

Companies often wonder whether compliance should be part of the goal-setting process for the CEO. Many companies, like Aon Corporation, include compliance within the stated goals for its CEO as a best practice. The issue is more than simply legal compliance — it involves reputation and marketplace risk, and compliance is an essential part of a CEO's wider risk management goals.

Other companies take the stance that compliance goals should take place in the early stages of the program, but that a good program, once it is operating and if it is effective, should establish a culture in which doing business ethically is ingrained into doing one's job, everyday. Compliance is a task that is ongoing, built into the day to day operation of the business.

“Best Practices” for Effectively Surmounting Communications Hurdles

Language and culture differences can be a challenge for international companies as they set the “tone at the top,” and work toward implementing effective compliance programs. Companies are living entities, and different countries pose different challenges and risk environments. Regardless of the strategies for doing so, however, it is important to have a grasp of the language when dealing with non-Anglophone countries, and to be knowledgeable and sensitive to their cultures.

In Mexico, for example, punctuality is not as valued as it is in other places. Additionally, in other countries around the world, the perception of fraud varies; however, it does follow similar patterns regardless of the location.

Wrigley is one example of a company with many language and cultural differences within its operations. In a richly diverse environment, the company recognizes that it is not only important to transmit a message correctly, but to follow-up and ensure that it is understood clearly. In this regard, Wrigley strives to keep things simple. William Wrigley, Jr., the company's founder, established this basic principle: “If we cannot do business by fair and square means, we cannot do business at all.”

While attorneys often tend to find complications and grey areas when exploring compliance programs, from a business perspective, good ethics is good business because it simplifies tough business decisions. If, in the course of making business decisions, one



stops and considers what the right thing to do is, then the message of compliance has effectively been received.

Often, international firms will engage employees around the world in order to understand how the message can be simplified. The “fair and square” message, for example, would not translate effectively in Malaysia. For example, when Aon created an FCPA awareness piece, they circulated it to colleagues around the globe for feedback. One response they received was a suggestion to avoid using the term “foreign” — which, as anyone familiar with the FCPA knows, is prolific in the language of the statute. Aon decided to revise its compliance policy to state the full name of the FCPA only once, and from that point use only the initials, and to refer to government officials, without using the term “foreign.” By consulting with employees across cultures, they learned that the term can be perceived as disrespectful in that it implies that ethical problems exist only in countries other than the United States. A culturally-sensitive and respectful message undoubtedly leads to a more effectively received message.

Addressing the “Damn Yankee” Problem

Often, in the course of establishing compliance and ethics programs, international companies deal with the perception of U.S. operations as “ugly American” or, more affectionately, “damn yankees.” Avoiding this perception can be a real challenge, and when compliance or business development programs are introduced from the United States, non-U.S. employees may view any mandates as “U.S. conspiracies.” One strategy for avoiding this situation is to engage in a true dialogue and exchange with coworkers across the globe. The compliance is the same as any other business concept in that it needs to be “sold” to one’s international colleagues and business units, and that it is best accomplished when communication is genuine and two-way.

Additionally, when companies understand that the Federal Sentencing Guidelines and other U.S. regulations are part of their board’s fiduciary duty to protect the company, its share price, and its employees, and realize the benefits that come from that compliance, the terms are more readily accepted.

In the end, compliance and ethics are not optional. While local education and sensitivity are crucial, the message must be straightforward and clear: employees who wish to work at a U.S. company must behave a certain way.

Current Substantive Issues Creating New and Ongoing Challenges: Joint Ventures and Business Partners

When discussing key risk-related issues to consider when entering business arrangements such as joint ventures with individuals or entities in another country, two words to keep in mind are “due diligence.”

The Deputy Chief of the Fraud Section of the Department of Justice recently stated at a conference that his (and the DOJ’s) priorities were (1) increased enforcement for anti-bribery, (2) the importance of having an effective compliance program as a mitigating factor, and (3) increased focus on mergers and acquisition activities. The third element is particularly important because a company can be liable for the actions of its business partners. In particular, a company can be vicariously liable for the actions of



intermediaries, and in the case of a joint venture or an acquisition, the company takes ownership of the problem.

Due diligence is absolutely crucial with regard to an international acquisition target. Aside from the normal due diligence checklist, it is necessary to add export and FCPA issues to the review. For example, Tellabs was involved in a major acquisition of an advanced fiber communications company, and the target company was performing certain calculations differently from Tellabs. While the target company's calculation method made sense in terms of their business model, it was not appropriate for Tellabs. Once the target company was acquired, Tellabs changed the practice and made the proper disclosures.

With respect to third party intermediaries, a company must (1) identify the legitimate business reason for the relationship, (2) substantiate the qualifications of the prospective partner to deliver, and (3) evaluate the reputation of the prospective partner for ethical business conduct. All of these steps should be well-documented because they may be assessed afterwards.

Appropriate due diligence depends upon the circumstances, the risk profile of a prospective partner, the location of the prospective partner (some countries should immediately raise red flags), and the level of familiarity the company has with the prospective partner.



For More Information

For more information on this session or the sixth annual National Directors Institute, visit Foley.com/ndi2007 or contact the panelists directly.

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Save the date! The 7th Annual National Directors Institute will be held on March 6, 2008 in Chicago. Learn more at Foley.com/ndi.