

HALLMARK I

Top Management, Through the Organization and the Board

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A. Leadership's Conduct at the Top

Under the Evaluation of Corporate Compliance Programs, Prong 2, it states:

2. Senior and Middle Management

Conduct at the Top – How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How does the company monitor its senior leadership's behavior? How has senior leadership modelled proper behavior to subordinates?

This requirement is more than simply the ubiquitous 'tone-at-the-top' as it focuses on the conduct of senior management. The Justice Department wants to see a company's senior leadership actually *doing* compliance. The DOJ asks if company leadership has through their words and *concrete actions* brought the right message of doing business ethically and in compliance to a company. How does senior management *model* its behavior on a company's values and finally how is such conduct monitored in an organization?

How can senior management operationalize compliance going forward? One of the best places to start is the article from the Harvard Business Review by Professor Lynn Paine entitled, "[Managing for Organizational Integrity](#)". Five factors, derived from the article, can be used guideposts to not only to set the right tone from senior management on doing business ethically and in compliance but also lay the ground for senior management to model appropriate behavior and then have it monitored by the company going forward.

1. The guiding values of a company must make sense and be clearly communicated by senior management in a variety of settings, to the entire company workforce.
2. The company's leader must be personally committed and willing to take action on the values. This means that management must not simply 'overlook' the transgressions of top producers.
3. A company's systems and structures must support its guiding principles and these internal systems and structures cannot be over-ridden by senior management without both justification and Board approval.
4. A company's values must be integrated into normal channels of management decision-making and reflected in the company's critical decisions. Sometime a company must turn down business if there are too many red flags present or by engaging in such behavior the company's value and ethics will be violated.
5. Managers must be empowered to make ethically sound decisions on a day-to-day basis. This means senior management must fully support and back-up such decisions.

David Lawler, in his book, [Frequently Asked Questions in Anti-Bribery and Corruption](#) boiled it down as follows "Whatever the size, structure or market of a commercial organization, top-level management's commitment to bribery prevention is likely to include communication of the organization's anti-bribery stance and appropriate degree of involvement in developing bribery

prevention procedures.” Lawler went on to provide a short list of points that he suggests senior management engage in to communicate the type of tone to follow an anti-corruption regime.” I had a CEO of a client, who after I described his role in operationalizing his company’s compliance program observed the following, “You want me to be the ambassador for compliance.” I immediately averred in the affirmative. The following is a list of things that a CEO can do as an ‘Ambassador of Compliance’ to fully model the conduct that senior management must show.

- Reject a ‘do as I say, not as I do’ mentality;
- Not just ‘talk-the-talk’ but ‘walk-the-walk’ of compliance;
- Oversee creation of a written statement of a zero tolerance towards bribery and corruption;
- Appoint and fully resource, with money and headcount, a Chief Compliance Officer;
- Oversee the development of a Code of Conduct and written compliance program implementing it;
- Ensure there are compliance metrics on all key business reports;
- Provide leadership to middle managers to facilitate filtering of the zero-tolerance message down throughout the organization;
- Not only have a whistleblowing, reporting or speak up channel but celebrate it;
- Keep talking about doing the right thing;
- Make sure that you are seen providing your Chief Compliance Officer with access to yourself and the Board of Directors.

Coming at it from a different perspective, author Martin Biegelman provides some concrete examples in his book entitled, “[*Building a World Class Compliance Program – Best Practices and Strategies for Success*](#)”. Biegelman begins the chapter discussed in this posting with the statement “The road to compliance starts at the top.” There is probably no dispute that a company takes on the tone of its top management. Inspired by a list from Joe Murphy of actions that a CEO can demonstrate to set the requisite tone from the Captain’s Chair of any business, you can do some of the following.

1. **Keep a copy of the Code on your Desk.** Have a dog-eared copy of your company’s Code of Conduct on your desktop and be seen using it.
2. **Give Your CCO Real Authority.** Make sure your compliance department has authority, influence and budget within the company. Have your Chief Compliance Officer (CCO) report directly to the Board of Directors.
3. **Hold them Accountable.** At Senior Executive meetings, have each participant report on what they have done to further the compliance function in their business unit.
4. **Reward and Punish.** Have both sanctions for violation of company compliance policies and incentives for doing business in a compliant manner.
5. **Walk the Walk.** Turn down an expensive dinner or trip offered by a vendor. Pass on a gift that you may have received. Turn down a transaction based upon ethical considerations.
6. **Be a Compliance Student.** Be seen at intra-company compliance training. Take a one or two-day course or attend a compliance conference outside your organization.

7. **Recognize Compliance at Your Company.** You should recognize outstanding compliance efforts with companywide announcements and awards.
8. **Enshrine Compliance at the Board.** Recruit a nationally known compliance expert to sit on your company's Board and chair the compliance committee.
9. **Independent Review.** Obtain an independent, outside review of your company's compliance program and report the results to the Board's Compliance Committee.
10. **Push Compliance into Your Supply Chain.** Mandate that all vendors in your Supply Chain embrace compliance and ethics as a business model. If not, pass on doing business with them.
11. **Create an Executive Network for Compliance.** Talk to other CEOs and senior executives in your industry on how to improve your company's compliance efforts.

Another area a CEO can forcefully engage an entire company through is a powerful video message about doing business the right way and in compliance. A great example was a CenterPoint Energy video put out in 2015 after the Volkswagen (VW) emissions-testing scandal became public. The video featured Scott Prochazka, CenterPoint Energy President and Chief Executive Officer (CEO). He used the VW scandal to proactively address culture and values at the company and used the entire scenario as an opportunity to promote integrity in the workplace. But more than simply a one-time video, the company followed up with an additional resource, entitled "Manager's Toolkit – "What does Integrity mean to you?"", which managers used to facilitate discussions and ongoing communications with employees around the company's ethics and compliance programs. Finally, as noted by Amy Lilly, Director, Corporate Ethics and Compliance at CenterPoint Energy, the cost for the video was quite reasonable as it was produced internally.

Three Key Takeaways

1. Senior management must actually do compliance; walk-the-walk, not simply talk-the-talk.
2. Use your CEO to talk about current events and how those ethical failures are lessons to be learned for your organization.
3. CEO as Compliance Ambassador.

B. Moving Compliance Tone Down Through an Organization

The Evaluation of Corporate Compliance Programs makes clear, a company must have more than simply at good 'Tone-at-the-Top'; it must move down through the organization from senior management down to middle management and into its lower ranks. This means that one of the tasks is to get middle management to respect the stated ethics and values of a company, because if they do so, this will be communicated down through the organization.

Mike Volkov said in an article entitled, "[*Mood in the Middle Versus Tone at the Top*](#)" that "Even when a company does all the right things at the senior management level, the real issue is whether or not that culture has embedded itself in middle and lower management. A company's culture is reflected in the values and beliefs that exist throughout the company." To fully operationalize your compliance program, you must find a way to articulate and then drive the message of ethical values and doing business in compliance with such anti-corruption laws such as the FCPA from the top down, throughout your organization.

What should the tone in the middle be? What should middle management's role be in the company's compliance program? This role is critical because the majority of company employees work most directly with middle, rather than top management and consequently, they will take their cues from how middle management will respond to a situation. Perhaps most importantly, middle management must listen to the concerns of employees. Even if middle management cannot affect a direct change, it is important that employees need to have an outlet to express their concerns. Your organization should train middle managers to enhance listening skills in the overall context of providing training for their 'Manager's Toolkit'. This can be particularly true if there is a compliance violation or other incident which requires some form of employee discipline. Most employees think it important that there be organizational justice so that people believe they will be treated fairly. For if there is organization justice, it engenders perceived procedural fairness which makes it more likely an employee will be willing accept a decision that they may not like or disagree with end result.

Even with a great Tone-At-the-Top and in the middle, you cannot stop. One of the greatest challenges of a compliance practitioner is how to affect the 'tone at the bottom'. One of the things you can do is assemble a compliance focus group to find out how business is done in the field and if it differs from what your company expects from an ethical and compliance perspective. Begin by assembling a group of employees who are familiar with the challenges of doing business in a compliant manner in certain geographic regions to discuss the challenges of doing business ethically and in compliance. Ask them questions about their understanding of your compliance regime. Then categorize the answers into the theory and practice of compliance in your company. From this then test what is real in theory and in practice. You can check and see which employees are promoted more regularly; those who do business ethically and in compliance or those who meet their sales quotas every quarter. After you have internally tested, reassemble the original group and have them consider the beliefs that were articulated by them individually in the context of your how your compliance model tested. Lead a discussion that attempts to identify any what is different in practice and in theory and then how you can move from theory to practice to operationalizing compliance. Finally, and in the feedback step, test how to more fully operationalize your compliance regime. These tests can be accomplished in the regular course of business or through a special project with a special team and separate budget.

By engaging employees at this level, you can find out not only what the employees think about the company compliance program but use their collective experience to help design a better and more effective compliance program. Employees want to do business in an ethical manner. Given the chance to engage in business the right way, as opposed to cheating; will win the hearts and minds of your employees almost all the time. By using the protocol suggested by the authors you can not only find out the *effect* of your company's compliance program on the employees at the bottom but you can *affect* them as well.

Employees often look to their direct supervisor to determine what the tone of an organization is and will be going forward. Many employees of a large, multi-national organization may never have direct contact with the CEO or even senior management. By moving the values of compliance through an organization into the middle, you will be in a much better position to inculcate these values and operationalizing compliance with them.

Three Key Takeaways

1. Tone at the top- direct supervisors become the most important influence on people in the company.
2. Give your middle managers a Tool Kit around compliance so they can fully operationalize compliance.
3. Organizational justice is a further way to help operationalize compliance.

C. The Board and Operationalizing Compliance

What is the role of a company's Board of Director as laid out in the *Evaluation of Corporate Compliance Programs*? In an area of inquiry entitled, "Oversight" the DOJ asked three basic questions. Under Prong 2, Senior and Middle Management, the Evaluation posed three questions directed at the Board, **Oversight** – *What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?*

In the new FCPA Corporate Enforcement Policy, it supplements the above with the following requirement for a Board of Directors in a best practices compliance program, asking what is "the availability of compliance expertise to the board"? I believe this is more than simply a reporting requirement, or that the CCO has a direct line to the Board. I believe this is a separate requirement for compliance expertise on the Board. I have long argued that there should be a compliance professional on a Board of Directors. You name any of the most recent corporate scandals; Wells Fargo, Uber Technologies, Volkswagen, Equifax and there was no compliance expertise on the Board. Clearly the better practice is for companies to have a seasoned compliance professional on the Board. I would also add the DOJ may soon expect there be a Compliance Committee separate and apart from the Audit Committee.

At a general level, these inquiries several structural components for a Board around compliance. They include defining the Board's role so there is a mutual understanding between the Board, CEO and senior management of the Board's responsibilities around compliance. The Board must work to foster a culture of compliance risk management, so all stakeholders should understand the compliance risks involved and manage such risks accordingly. The Board must incorporate compliance risk management directly into a strategy by overseeing the design and implementation of compliance risk evaluation and analysis. The Board should help to define the company's appetite for compliance risk so all stakeholders need to understand the company's appetite or lack thereof for compliance risk. The Board must oversee the execution of the compliance risk management process by maintaining an approach that is continually monitored and had continuing accountability. Finally, the Board must demand benchmarking through compliance systems which allow for evaluation and modifying the compliance risk management process for compliance as more information becomes available or facts or assumptions change.

All of these factors can be easily adapted to compliance risk management oversight. Initially it must be important that the Board receive direct access to such information on a company's policies

on this issue. The Board must have quarterly reports from a company's Chief Compliance Officer to either the Audit Committee or the Compliance Committee. Your Board should create a Compliance Committee as the Audit Committee may more appropriately deal with financial audit issues. A Compliance Committee can devote itself exclusively to non-financial compliance, such as compliance. The Board's oversight role should be to receive such regular reports on the structure of the company's compliance program, its actions and self-evaluations. From this information, the Board can give oversight to any modifications to managing risk that should be implemented.

In addition to the requirement that a Board of Directors have a Compliance Committee, a Board should also have a compliance subject matter expert as a member. [Mike Volkov](#) looked at it from both a practical and business perspective stating, "I have witnessed firsthand that companies that have a board member with compliance expertise usually have a more aggressive and effective compliance program. In this situation, a Chief Compliance Officer has to answer to the board for the company's compliance program, while receiving the resources and support to accomplish compliance tasks." [Roy Snell](#) considered it through the prism of the compliance profession and noted, "the government is looking for is not generic compliance expertise. They are looking for compliance program management expertise.

There are some specific areas of inquiry by a Board of Directors around the compliance. I have adapted 20 questions which reflect the oversight role of directors. These are questions which the Board should ask of both senior management and the Board itself. The questions are not intended to be an exact checklist, but rather a way to provide insight and stimulate discussion on the topic of compliance. The questions provide directors with a basis for critically assessing the answers they get and digging deeper as necessary.

The comments summarize the most current thinking on the issues and the practices of leading organizations. Although the questions apply to most medium to large organizations, the answers will vary according to the size, complexity and sophistication of each individual organization.

Part I: Understanding the Role and Value of the Board Compliance Committee

1. What are the Board Compliance Committee's responsibilities and what value does it bring to the board?
2. How can the Board Compliance Committee assist the board to enhance its relationship with management?
3. What is the role of the Board Compliance Committee?

Part II: Building an Effective Board Compliance Committee

4. What skill sets does the Board Compliance Committee require?
5. Who should sit on the Board Compliance Committee?
6. Who should chair the Board Compliance Committee?

Part III: Directed to the Board of Directors

7. What is the Board Compliance Committee's role in building an effective compliance program within the company?
8. How can a Board Compliance Committee assess potential members and senior leaders of the company's compliance program?

9. How long should directors serve on the Board Compliance Committee?
10. How can the Board Compliance Committee assist in Board succession issues?

Part IV: Enhancing the Board's Compliance Performance Effectiveness

11. How can the Board Compliance Committee assist in director development?
12. How can the Board Compliance Committee help the board chair sharpen the board's overall performance focus?
13. What is the Board Compliance Committee's role in board evaluation and feedback?
14. What should the Board Compliance Committee do if a director is not performing or not interacting effectively with other directors?
15. Should the Board Compliance Committee have a role in chair succession?
16. How can the Board Compliance Committee help the board keep its mandates, policies and practices up-to-date?

Part V: Merging Roles of the Compliance Committees

17. How can the Board Compliance Committee enhance the board's relationship with institutional shareholders and other stakeholders?
18. What is the Board Compliance Committee's role in CCO succession?
19. What role can the Board Compliance Committee play in preparing for a crisis, such as the discovery of a sign of a significant compliance violation?
20. How can the Board Compliance Committee help the board in deciding CCO pay, bonus and resources made available to the corporate compliance function?

Three Key Takeaways

1. The DOJ Evaluation of Corporate Compliance Program requires active Board of Director engagement around compliance.
2. Board communication on compliance is a two-way street; both in bound and out bound.
3. Has the Board built an effective Board Compliance Committee?