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EFFECTIVE COMPLIANCE

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EFFECTIVE COMPLIANCE PROGRAMS FOR HIGHER RISK MARKETS.

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What separates effective from template compliance programs lies in the organization's core.

Dealing with compliance has become ineludible for most companies in fairly regulated markets, from ethics codes to ethics champions, it has moved on from trend to norm. Compliance investigations have fueled a process that has shaped up into an organized system of policies, guidelines, standards. Navigating the system now requires consultants, officers, attorneys and coaches, but deep inside, the basic principles that boasted this movement are still what matter, so it is crucial to continue to use the right metrics to measure results and avoid getting lost in the system.

Compliance has been driven by criminal investigations and issues arising from such investigations. We anticipate that we will soon enough move on to focus on analyzing root causes common to many of leading investigation cases. Lessons continue to be learned from complicated bidding processes, excessive legislation, poor supervision of government officials, disproportionate governmental powers, flawed electoral process based on private campaign funding, to name a few. Nevertheless, none of these origins provide either a moral or legal justification to what has been called “non-compliant behavior”, inexcusably for now, we need to concentrate on the avoidance of the enhanced risk that such behavior represents.

We have moved from discussing the structure of compliance programs to questioning their effectivity. In the following lines we will briefly discuss the issues that separate an effective program from a standardized one.

Risk Analysis. Needless to say, no risk can be mitigated without a proper analysis based on the nature of the business, past company culture and specific industry circumstances. Any effective program must deal not only with historical challenges but should be continually looking forward into systemic mutations. By using Root Cause Analysis, permissive use of offshore jurisdictions, contracts and accounts with discretional movements, while still a priority item for now, may bring us closer to question unjustifiable one-sided business relationships, strategic employment or facilitated business opportunities; this evidences that continuous risk analysis is necessary.

Genuine Commitment. Much has been said for "tone at the top", but a real commitment requires indubitable behavior, in some cases reflected in controls and directives, but formal legal commitment may be necessary including the adoption of Board and Shareholder decisions. It is not uncommon to find that a compliance directive has been sent by a board who has not itself taken any compliance training or is unsure of the reach of its own directives. Compliance often creates a business constraint that requires resilience and business acumen to overcome. No effective program will stand a chance without a strong and genuine commitment from top management.

independence. This may be one of the biggest challenges at hand. The only way of ensuring independence is by having a self-sustainable top to bottom system that companies may not be initially prepared to put in place. Not only does Independence require self-sufficiency of funds, but there should be autonomy in its hiring process and self-sustainability in its existence. This may require an analysis on its own; perhaps this may evolve into qualified external functions. By any light, we can be certain that complex situations will arise, what is easier to ascertain is that lack of independence on the other hand will be more evident and put to the test.

Clear and Consistent Rules. Compliance policies not only need to be effectively communicated but easily understood, suitable, pertinent and should act consistently with the culture of the organization. Adopting generic policies not only makes them ineffective but

also creates confusion and lack of commitment to the system. The compliance program requires that norms, policies and guidelines are organized to enhance the corporate culture and not to hamper it. The end purpose should be to increase the sentiment of participation, cooperation and collaboration among groups rather than create an inquisitive and distrustful climate which is not an uncommon unwanted side effect.

Training. Plenty has been said about the importance of training. The discussion has shifted to the effectiveness in training and how the company measures such effectiveness. The cost of training can be substantial. When such training needs to be focused on the specific risks and using the appropriate tone for the audience, this can be substantial. Fortunately, technology helps reaching wider audiences, but such audiences need to be also tested on knowledge and potential response reactions. Reassuring that there is a clear procedure and accessible channel for reporting any finding is key to measuring effectiveness.

Handling of Non-conformity. Maintaining confidentiality in any finding, and handling investigations by well-trained, objective, independent professionals while at the same time keeping management well informed, is key to an effective system. Self-disclosure is crucial for leniency agreements in most jurisdictions that recognize them, so having a clear channel of communication and knowing when to seek expertise in communication, legal and internal reaction is vital in a well-managed crisis. The Compliance System should incentivize the appropriate and effective handling of a non-conformity event. Secrecy is not the same as confidentiality, it is important to maintain the latter and avoid the former which is in itself a potential risk of creating a larger unwarranted event.

Controls. Controls are a product of risk analysis and should be designed to be measured against the risk they are trying to mitigate. Again, superficial or imported controls only create confusion and discredit the system, and excessive controls may hamper the operation of the system and the company.

Third Party Risk Management. Managing third party compliance is an evolving challenge. It has moved from simpler know your vendor policies to more elaborate vendor management processes. It is necessary to set boundaries for the services to be provided, be transparent in the fee allocation and implement reasonable performance incentives. Companies should set, within the means of

their operations, key metrics to indicate when a Third Party has the potential to create a risk event and provide with sufficient controls to prevent them. Special care should be put into Due Diligence performed in the acquisition of a new business as this is the root of many Compliance Investigations. Many legislations lack appropriate remedies for liabilities arising for non-compliant behavior. Lack of a solid and effective compliance program in the target company should send a clear signal for enhanced compliance due diligence; any offer should take into account any potential risk detected in the due diligence process.

Aligned Incentives. Making a case for a rogue player requires not only evidence of appropriate training and controls but also that the compliance system will be effectively tested for positive or negative incentives, substantially responsible for the non-compliant behavior. This includes not only a thorough revision of its compensation and rewards mechanisms, but a consistent history on how the company has disciplined past events and whether there has been a culture of praise or tolerance for excessive risk taking and whether this has been directly or indirectly rewarded either through promotions, economic or non-economic rewards or non-tangible rewards such as praise, special benefits or treatment.

History of Responsiveness. How the system stands up to potential situations is definitively a key measure of effectiveness; it should determine whether it sets the right alarms and responses from the appropriate people.

Effective compliance programs are now subject to being tested on how well they stand up to these tests. Setting up a less than effective program not only has an implementation cost but also carries hidden costs of misjudging real business risks that may be enhanced by mislead employees misjudging perceived risks.

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