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Effective codes of conduct: Sending a powerful message

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For today's business leaders, creating and maintaining a strong code of conduct is an essential response to growing compliance pressures. A well-crafted code stands as a statement of organizational values and offers a guidebook for employee behavior that aligns with these values. More than that, an effective code of conduct helps an organization define itself—how it operates and integrates core values into business operations and how it relates to important stakeholders.

The impact of such a code can be wide-ranging. It demonstrates to employees an organizational commitment to the promotion of values and ethics. Customers prefer businesses that consistently behave in a compliant manner. And the existence of an unbending code tends to reassure investors and creditors.

In FY 2011, the U.S. Department of Justice (DOJ) recovered more than $5.6 billion in criminal and civil fraud cases, including an unprecedented $2.8 billion that was recovered under the whistleblower provisions of the False Claims Act. These figures are the highest in the history of the DOJ and further underscore the need for organizations to design, implement, and consistently update their corporate codes of conduct to avoid scrutiny by the government as it seeks to identify, investigate, and prosecute allegations of wrongdoing. In this time of heightened corporate regulation and government enforcement, an expression of principles sends a powerful message that an organization intends to operate within a culture of compliance and that it will police itself and its employees to achieve that standard. In assessing the best methods for instilling these principles, on paper and in spirit, executives should take a number of considerations to heart.

Designing the code

First, keep the audience in mind. Codes of conduct have the most impact if they are effectively communicated to all members of the organization. Codes should be written clearly, in simple and concise language (i.e., devoid of "legalese") that can be easily understood by employees at each level of the organization. Codes should be tailored to an organization's industry, culture, and corporate values.

Although it's wise for an organization to enlist outside counsel to participate in the drafting process, it is equally important to engage employees so that core elements (e.g., industry, culture, corporate values) are reflected appropriately. Additionally, it can be worthwhile to consult key stakeholders (e.g., customers, clients, and local community or industry groups that interact with the organization) on what should be included. Taking the time to get this input may reveal what external constituencies regard as key obligations, and will help to ensure that the code is developed to include the full range of applicable issues.

Second, make the obligations personal. Ideally, a code should be

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developed specifically so that each employee feels a personal obligation to comply with it. Consider what elements would make it specific to the organization, and how they would differentiate it from those developed by other organizations in the industry.

The code should begin with a declaration of the organization's mission and values, and an introductory statement from senior management that establishes and reinforces the code's importance and the organizational commitment to it.

Certain topics should be addressed (e.g., confidentiality, conflicts of interest, discrimination and harassment, fraud, privacy and security of organizational information), but consider covering other topics more specific to the organization. These would include compliance with specific industry laws and regulations, as well as organizational culture and corporate values, to ensure the code responds to all necessary risk areas and captures noteworthy differences across various departments and divisions.

Third, use questions to highlight important concepts. A Q&A format allows employees to explore certain concepts and address specific situations that they are likely to encounter in their daily professional pursuits. Questions can be incorporated throughout the code, followed by corresponding answers that explore and develop the relevant concepts.

Providing information in this format not only will make it more concrete, it will make its guiding principles easier to understand and remember. Further, the specific examples used can be carried through to subsequent employee training programs, to serve as constant reminders of appropriate behaviors as well as the consequences associated with any violations.

Obtaining buy-in from the organization's board of directors and senior management is the fourth step needed to build the best possible code. It is important to establish a commitment to ethical conduct at all levels of an organization. When the code is developed, it should be announced to the entire company and posted immediately to the organization's website.

It should be clear that all levels of the organization, including the organization's board of directors and senior management, will be governed by it and held to all of its standards, and that appropriate discipline will result at all levels for failure to comply. Setting an example at the top of the organization will encourage compliance throughout the organization.

Finally, use the code to create an organizational compliance roadmap. Beyond its direct organizational application, a code of conduct also can be used to lay the foundation for larger compliance efforts. Many organizations have implemented corporate compliance programs using the elements outlined in the Federal Sentencing Guidelines for Organizations.

Regulatory guidance

Those in the health care industry, for example, also look to guidance developed by the U.S. Department of Health and Human Services' Office of Inspector General (OIG), which provides valuable tools that organizations can use to formulate and implement corporate compliance programs that are both comprehensive and operational. Efforts to develop a corporate code of conduct should take these guidelines into consideration and the code should reflect these principles.

The Federal Sentencing Guidelines say that to have an "effective compliance and ethics program," an organization must exercise due diligence to prevent and detect criminal conduct, and to otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

The guidelines highlight seven elements used to prove that an organization has adopted a program to promote compliance. They form the framework for the OIG's compliance program guidances, which suggest that, at a minimum, comprehensive compliance programs should include the following:

- Written policies, procedures, and standards of conduct;
- Designation of a compliance officer and a compliance committee;
- Effective training and education;
- Effective lines of communication;
- Well-publicized disciplinary guidelines for enforcing standards;
- Internal auditing and monitoring processes; and
- Prompt responses and corrective action to detected offenses.

Internal reporting

Entities should also recognize that effective codes of conduct can be used as a mechanism for promoting internal reporting of compliance concerns. For affected organizations, the burdens of the Dodd-Frank Wall Street Reform and Consumer Protection Act have highlighted the role of the Compliance department. Under the SEC's whistleblower rules, adopted in May 2011 as part of the Dodd-Frank Act, whistleblowers are not required to report perceived misconduct internally before going to the SEC.

However, the intention behind these rules was to encourage internal reporting by employees, because they can potentially be a prime resource for detecting potential organizational misconduct and fraud. This notion of the "employee whistleblower" has, in turn, presented many companies (whether subject to Dodd-Frank or otherwise) with a renewed opportunity to consider whether, and how, to encourage and maximize the chance that employees will report internally when they have concerns about potential compliance violations within the organization.

Organizations should consider opportunities to enhance internal whistleblowing systems, as well as the potential advantages and disadvantages of implementing internal whistleblower awards to sustain and encourage internal reporting. Discussion and debate regarding the SEC's final rules will likely continue, as organizations work to incorporate internal whistleblowing policies, mechanisms, and incentives. But, as organizations examine and promote a corporate code of conduct, the concept of internal whistleblowing should not be forgotten.

Conclusion

A code of conduct doesn't merely set a roadmap for compliance efforts. It demonstrates an intention to operate within the confines of relevant laws, accepted industry standards, and ethical principles—especially under the glare of increasing governmental scrutiny of business conduct. Organizations should take seriously the task of developing an effective corporate code of conduct that will resonate throughout the organization and with the public at large. ■

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