

Risk Management for Compliance Officers



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CASE STUDY: ROCHESTER DRUG CO-OP

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Rochester Drug Cooperative

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- Company, former CEO, and former chief compliance officer charged for unlawful distribution of oxycodone and fentanyl and conspiring to defraud DEA.
- CEO and compliance officer plead guilty to one count of conspiracy to unlawfully distribute controlled substances, one count of conspiracy to defraud the US, and one count of willfully failing to file suspicious order reports with DEA.
- Compliance officer faces *mandatory minimum of 10 years* in prison, up to life.

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Rochester Drug Cooperative

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- Allegations against former compliance officer included:
 - **Ignoring red flags**, included suspicious ordering patterns by pharmacies, high % of cash orders, etc.
 - **Failing to report** “unexplained large spikes in opioid orders”
 - **Failing to implement adequate due diligence program** to prevent diversion
 - **Failing to implement adequate on-boarding procedures** for new pharmacy customers

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Rochester Drug Cooperative

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- **Inadequate funding** for compliance department
- Compliance officer with **no prior experience or training** in compliance
- “Culture of Non-Compliance”
- Lack of independence

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OTHER RECENT CASES OF COMPLIANCE OFFICER TROUBLE

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Miami-Juken ¹

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- **Former CEO and Former Chief Compliance Officer charged**
 - Continued to distribute millions of pills to rural Appalachia pharmacies even after being advised by the DEA of their responsibilities as the wholesaler to ensure drugs were not being diverted and to report suspicious orders
 - Distributed 2.3 million oxycodone pills and 2.6 hydrocodone pills to a pharmacy in a town of approx. 1,394 people
 - Distributed 2.2 million pills to a pharmacy that had been cut off by other wholesalers (2012 through 2014)
 - Distributed 3.7 million hydrocodone pills to a pharmacy in a rural West Virginia town of 400 people (2008 through 2011)

¹ DOJ Press Release, July 18, 2019, *Pharmaceutical Distributor & Executives, Pharmacists Charged with Unlawfully Distributing Painkillers*

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MoneyGram

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- **May 4, 2017, DOJ civil settlement with the former Chief Compliance Officer of MoneyGram**
 - \$250,000 civil penalty, and
 - three-year injunction “banning him from performing a compliance function for any money transmitter.”

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MoneyGram

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- MoneyGram’s Chief Compliance Officer “admitted, acknowledged and accepted responsibility for. . .
 - 1) failing to terminate specific MoneyGram outlets after being presented with information that strongly indicated the outlets were complicit in consumer fraud schemes,
 - 2) failing to implement a policy for terminating outlets that presented a high risk of fraud, and
 - 3) structuring MoneyGram’s AML [anti-money laundering] program such that information that MoneyGram’s Fraud Department had aggregated about outlets, including the number of reports of consumer fraud that particular outlets had accumulated over specific time periods, was not generally provided to the MoneyGram analysts who were responsible for filing SARs [suspicious activity reports].

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 84500 / October 29, 2018

Admin. Proc. File No. 3-17909

In the Matter of the Application of
THADDEUS J. NORTH
For Review of Disciplinary Action Taken by
FINRA

OPINION OF THE COMMISSION

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- Chief Compliance Officer for Southridge Financial Group, LLC
- Written supervisory procedures made him responsible for
 - maintaining, reviewing and (where necessary) modifying company’s written procedures
 - monitoring electronic communications, and
 - reporting within 10 days Southridge’s association with any person subject to a “statutory disqualification”

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In the Matter of Thaddeus D. North

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- North failed to establish and maintain supervisory policies (implemented an off-the-shelf electronic communication review policy without filling in the blank re: sample size to review and otherwise right-sizing the policies to the firm)
- North failed to reasonably review electronic communications (reviewed emails only 6 times, for only 13 of 26 relevant months)
- Violated FIRNA, NASD and MSRB rules by failing to report Southridge’s association with a statutorily disqualified person.
- FIRNA imposed both a two-month and one-month concurrent suspension from supervisory capacities, fined North \$40,000 and ordered North to pay hearing and appeal costs

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In the Matter of Thaddeus D. North

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“While matters involving the determination of CCO liability are facts and circumstances specific, there are matter types where determinations of individual liability generally are straightforward. For example, absent unusual mitigating circumstances, when a CCO engages in wrongdoing, attempts to cover up wrongdoing, crosses a clearly established line, *or fails meaningfully to implement compliance programs, policies, and procedures for which he or she has direct responsibility*, we would expect liability to attach. In contrast, disciplinary action against individuals generally should not be based on an isolated circumstance where a CCO, using good faith judgment makes a decision, after reasonable inquiry, that with hindsight, proves to be problematic. When the facts and circumstances of matters fall outside these relatively clear examples of where liability should or should not attach, liability determinations will require matter-specific analysis and informed judgment.”

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LESSONS LEARNED

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Lesson Learned: Importance of Independence and Funding

- RDC teaches us importance of a well-funded and independent compliance department and compliance officer.
- Important that compliance officer remains “independent in terms of monitoring and assuring the outcomes of the advice given.” Compliance officer must “maintain a level of independence from management control.” (Deloitte)

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Lesson Learned: Importance of Independence and Funding

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- In 2017, HCCA and HHS-OIG reiterate importance of independence. Company must “demonstrate independence and objectivity in all aspects of its compliance program” and “maintain an independent reporting structure to the governing body.”
- HCCA and HHS-OIG recommend that a company interview a compliance officer “to see if they feel that they have independence” and verify that the compliance officer “has the independent authority to retain outside counsel.”

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Lesson Learned: the Compliance Officer Role

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Before You Accept the CCO Position

- Don't dive into the deep end until you are ready
- Conduct your own due diligence before you agree to take the role
- Be cautious about responsibility if you will not have authority
- Know what responsibilities the job description and company policies assign to you
- Direct access (when needed) to the governing authority
- Negotiate executive severance as part of your package

After You Are in the CCO Position

- Get training (or get help) in areas where your training and experience may not be adequate
- Do the job – know what the job description and policies assign to you, understand what regulators and other third parties may expect of you
- Don't bless things that shouldn't be blessed
- Don't participate in stupid, unethical stuff
- Kenny Rogers - the hills we die on
- Documentation

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**UPDATED DOJ COMPLIANCE
PROGRAM EVALUATION
GUIDANCE**

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DOJ's Compliance Guidance

- In April 2019, DOJ's Criminal Division announces publication of guidance on evaluating corporate compliance program
- Lists certain factors that every company should consider when ensuring an effective compliance program, and helpful questions to ask along the way

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DOJ's Compliance Guidance

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- Continuous improvement, periodic testing, and review:
 - “One hallmark of an effective compliance program is its **capacity to improve and evolve.**”
 - Includes conducting **internal audits, control testing, evolving updates, and a culture of compliance.**

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DOJ's Compliance Guidance

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- Continuous improvement, periodic testing, and review:
 - Questions to ask:
 - ✦ Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance?
 - ✦ What steps has the company taken in response to its measurements of the compliance culture?

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DOJ's Compliance Guidance

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- Investigation of Misconduct
 - Companies should have “a well-functioning and appropriately funded mechanism for the **timely and thorough investigations** of any allegations or suspicions of misconduct by the company, its employees, or agents.”
 - Includes a **properly scoped investigation by qualified personnel** as well as a **proper response** to the investigative findings.

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DOJ's Compliance Guidance

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- Investigation of Misconduct
 - Question to ask:
 - ✦ Have investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisors and managers?

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DOJ's Compliance Guidance

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- Analysis and remediation of any underlying misconduct
 - Final hallmark of effective compliance program is extent to which a company is able to conduct a **thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.**
 - Includes analyses of root causes, prior weaknesses, payment systems (how the misconduct was funded), vendor management, prior indications, remediation, and accountability.

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QUESTIONS?

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