Beyond the Law: Business Ethics & the Compliance Officer

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Setting the Stage

• Federal Sentencing Guidelines (FSG), Chapter 8 sets out the basic structure of a compliance program

• Sec. 8B2.1: “Effective Compliance and Ethics Program”

• What does “and Ethics” mean in this context?
The FSG

• “To have an effective compliance and ethics program...an organization shall...otherwise promote and organizational culture that encourages ethical conduct and a commitment to compliance with the law.” (emphasis added)

• The FSG goes on to set out the 7 classic “elements” of a compliance program

• What does “encourages ethical conduct” mean?

Compliance vs Ethics

• Stepping back for a moment, we should ask, “what is compliance?”

• This is harder to answer than it seems

• Compliance is
  • “conforming an act to a standard”
  • “meeting specific standards”
  • “act in accordance with a command”
What is Compliance?

- Three sources of compliance:
  1. Law
  2. Policy
  3. Ethics

What is the role of each of these?

- **Law**: statutes, regulations, agency guidelines
- **Policy**: the organization’s choices for “operationalizing” the law – choosing Path 1 or Path 2 when the law allows it
- **Ethics**: fills in the gaps with law and policy are silent
What is Ethics?

• At base...ethics is doing the right thing

• But...what is the right thing?

• This has filled thousands of books over millennia!

• Ethics in compliance programs is sometimes goes by the name of “business ethics”

• Before looking at concrete activities, let’s look at ethical frameworks.

Ethical Frameworks

• Decisions are made in the context of some framework (whether or not a person knows or appreciates the framework...and sometimes a mix)

• 3 generally recognized ethical frameworks:

  1. Consequentialism (Utilitarianism)
  2. Deontological
  3. Virtue Ethics

• Which framework do you use?
• Which framework should an organization use?
Ethical Frameworks

• 3 generally recognized ethical frameworks:
  1. Consequentialism (Utilitarianism)
  2. Deontological
  3. Virtue Ethics

“Business ethics” usually utilizes a form of “virtue ethics.”

Consequentialist Ethics

• “The ends justify the means”

• An action is “right” based on whether the consequence is good.

• Most common variation: utilitarianism
  • The right action is whatever is best for the greatest number of people

• Representative thinkers:
  • John Stuart Mill, Jeremy Bentham, Peter Singer
Deontological Ethics

• Command theory of ethics

• Duty oriented with no exceptions; absolutist

• The consequence of the action does not inform whether the act is right

• Example: “Always tell the truth.”

• Representative thinkers:
  • Immanuel Kant

Virtue Ethics

• The right action is what develops excellence in character

• A virtue is a “good habit” (a “vice” is a bad habit)

• “Happiness” is the goal – as in meaningful satisfaction (not happiness as pleasure or a good feeling)

• Not subjective, but normative – but highly dependent on the facts
  • The standards used are the virtues, and the question “what would a virtuous person do?”

• Representative thinkers:
  • Aristotle, Thomas Aquinas, Elizabeth Anscombe
What are the virtues?

• Aristotle, *Nicomachean Ethics*

1. **Prudence**
   • Balanced judgement
   • Caution and balance of risk

2. **Justice**
   • Giving every person his or her due
   • Right relations

3. **Temperance**
   • Self-respect
   • Simplicity
   • Humility

4. **Fortitude**
   • Courage
   • Magnanimity

Some contemporary versions

• Integrity

• Transparency

• Honesty

• Fairness
Back to Compliance Programs...

• Ethics is the most under-developed aspect of compliance

• It is an amorphous area that many people are uncomfortable dealing with

• But isn’t ethics something a person expects from...
  • Their supervisor
  • Their employer organization
  • Companies acting in the marketplace

Back to Compliance Programs...

• Currently there are four ways compliance programs attempt to “encourage ethical conduct”

  • Code of Conduct – setting out broad principles and commitments
  • Tone at the Top – showcase difficult decisions made by leadership/managers in order to model character to the workforce
  • Hotline – promote a hotline that not only reports potential non-compliance but also can serve as an ethics consult
  • Non-retaliation Policies – prohibits retaliation against workforce for raising compliance and ethics concerns
Examples

- University of Michigan Health System:
  - “We are committed to treating all persons with care, dignity and respect.” (emphasis added)

- What does this mean?
  - “Keeping patient information confidential”
  - “Providing the ideal work environment with respectful interactions with our co-workers”
  - “Following the highest ethical standards in any research activities involving humans animals”
  - “Providing compassionate, high-quality care to our patients, without discrimination and while respecting their dignity, values and beliefs”
  - “Honoring patients’ right to participate and make decisions about their care”
  - “Encouraging our patients to express their concerns and complaints so we can address them”
  - “Ensuring that access to care, treatment and services is not compromised when patients share their concerns or complaints”

Concrete Actions

- Compliance program ethics statements can look like platitudes, but sometimes so can laws

- “Principles” are generally abstract and then they are applied to specific facts and circumstances

- Ethics always occurs in concrete actions

- Compliance programs cannot anticipate all actions but they can educate and try to prepare
Concrete Actions

• Some compliance program activities:
  • Ethics simulations
  • Ethics consults
  • Root causes analysis to determine if there are ethical breakdowns
  • Incorporate ethical points into policies and education

Conclusions

• Ethics is an expected component of a compliance program

• But, it is under-developed as a component and the government agencies are still thinking through what their expectations are

• ....a work in progress.