Practical Advice from a Former Chief Compliance Officer

How to Build, Grow, and Measure a Corporate Compliance Program

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The
Real
Deal

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and Securities Professionals

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Why Have a [Good] Compliance Program?

1. It's the right thing to do

2. Engaged employees and ethical companies are proven to be more effective and efficient workers
   - Publishing Code of Conduct correlated to higher financial performance
   - Implementing compliance training correlated to higher financial performance
   - *Institute of Business Ethics Studies (2003 and 2006)*

3. SOX requirements (public companies)
   - Code of Ethics, Whistleblower Hotline, Internal Controls

4. It's cheaper in the long run…

Compliance in the News…

- Volkswagen, Emissions Scandal ($30 billion)

- 2008 Financial Crisis, Fraud ($60 billion across 6 banks)

- ZTE, Trade Sanctions ($1.19 billion)

- Google, EU Antitrust ($2.7 billion)

- Western Union, Money Laundering ($586 million)

- Deutsche Bank, Money Laundering ($630 million)

- Swiss Life Insurance, Off-shore Tax Shelters (Sept. 2017)

"White Collar Crime" Is Different

- Usually, don't wake up and decide to commit white collar crime

- Often done "for the benefit of company"

- Highly successful people under high stress/pressure

"Incrementalism"

"Relativism"

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"Your Honor, my client pleads not guilty by reason of cultural relativism."

Keith Packer, British Airways

- Executive VP

- Convicted of U.S. antitrust violations for conduct of his team, that he allowed to go forward

- Lost his job, and served 8 months in U.S. prison

"It's very easy to yawn your way through another meeting about the firm's policies on fraud prevention and the whistleblowing process. It's a lot harder to tell your family you're leaving them to go to jail and that you will always have a criminal record. Take a moment to think about it."

When Employees Do Bad Things:

- It will be very expensive
    - Investigation Costs (Walmart's $865 million investigation)
    - Business Disruption
    - Litigation Costs (civil suits, securities, shareholders, qui tams)
    - Reputational Damage

- DOJ will determine whether the company is charged criminally, asking was crime "**because of**" or "**in spite of**" the compliance program?
    - Criminal Conviction
    - Fines/Penalties
   - Monitorship

Compliance: Deal Due Diligence

- Can be a sticking point (especially in cross-border deals)

- SEC is taking action against companies that do not perform adequate compliance due diligence

- Lawyers have been accused of malpractice for not conducting full due diligence

- Reps and warranty litigation

- Post-deal mitigation of identified risks

Compliance Risk Landscape

- Financial Reporting/Insider Trading

- Fraud

- Bribery/Corruption

- Antitrust (price fixing, bid rigging, market allocation)

- Employment/Labor

- Trade/Cross-Border

- Money Laundering

- Industry-Specific Regulations (environmental, safety, mining, food, etc.)

- Privacy

- Economic Espionage

Trade Secret Theft Is Rapidly Increasing

- Known federal cases of trade secret theft doubled between 1995 and 2004 and will double again by this year.
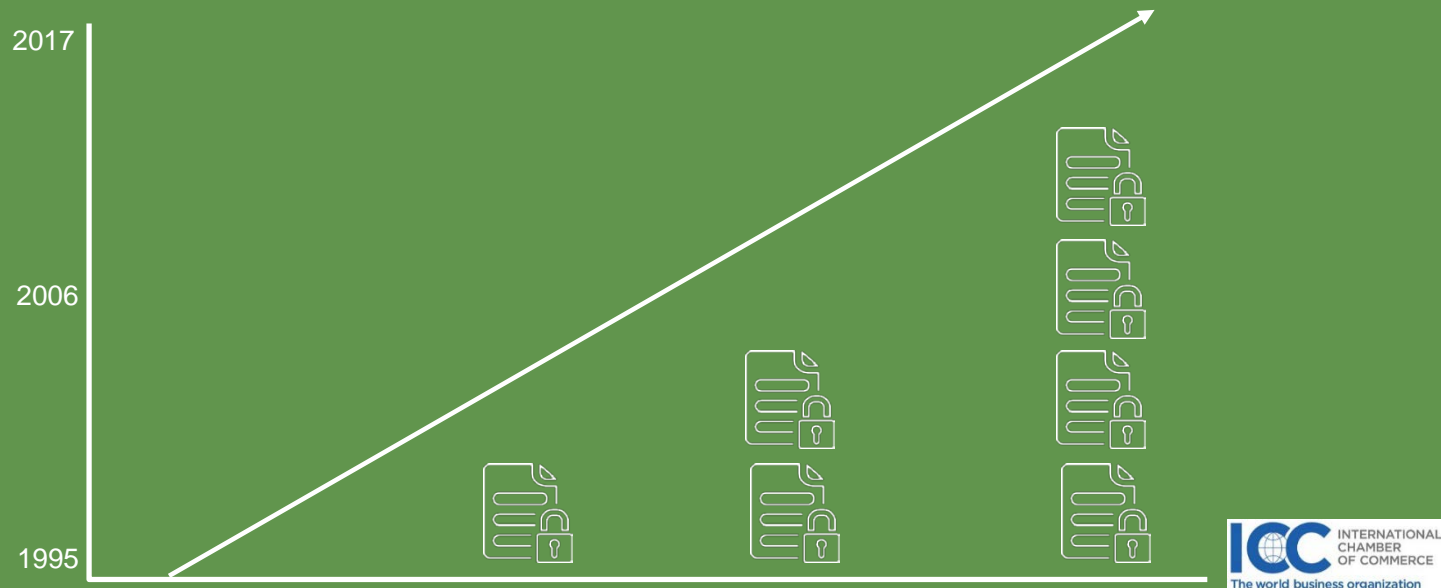
Now That We Know, What Do We Do?

Guidance on "Effective" Compliance

- Federal Sentencing Guidelines (DOJ)

- United States Attorney's Manual (DOJ)

- *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("FCPA Guide") (DOJ/SEC, 2012)

- Good Practice Guidance on Internal Controls, Ethics, and Compliance (OECD, 2012)

- Anti-Corruption Ethics and Compliance Handbook for Business (OECD, 2013)

- Evaluation of Corporate Compliance Programs (DOJ, 2017)

- HHS OIG Guidance (health care)

# Guidance on "Effective" Compliance

- General Principles:

  1. Exercise **due diligence** to prevent and detect criminal conduct;

  2. Promote an **organizational culture** that encourages ethical conduct and a commitment to compliance with the law;

  3. Reasonably design, implement, and enforce so that the program is **generally effective** in preventing and detecting criminal conduct.

Compliance Program Goals

Compliance State Versus Running a Business

Effective compliance

Running a lean/efficient business
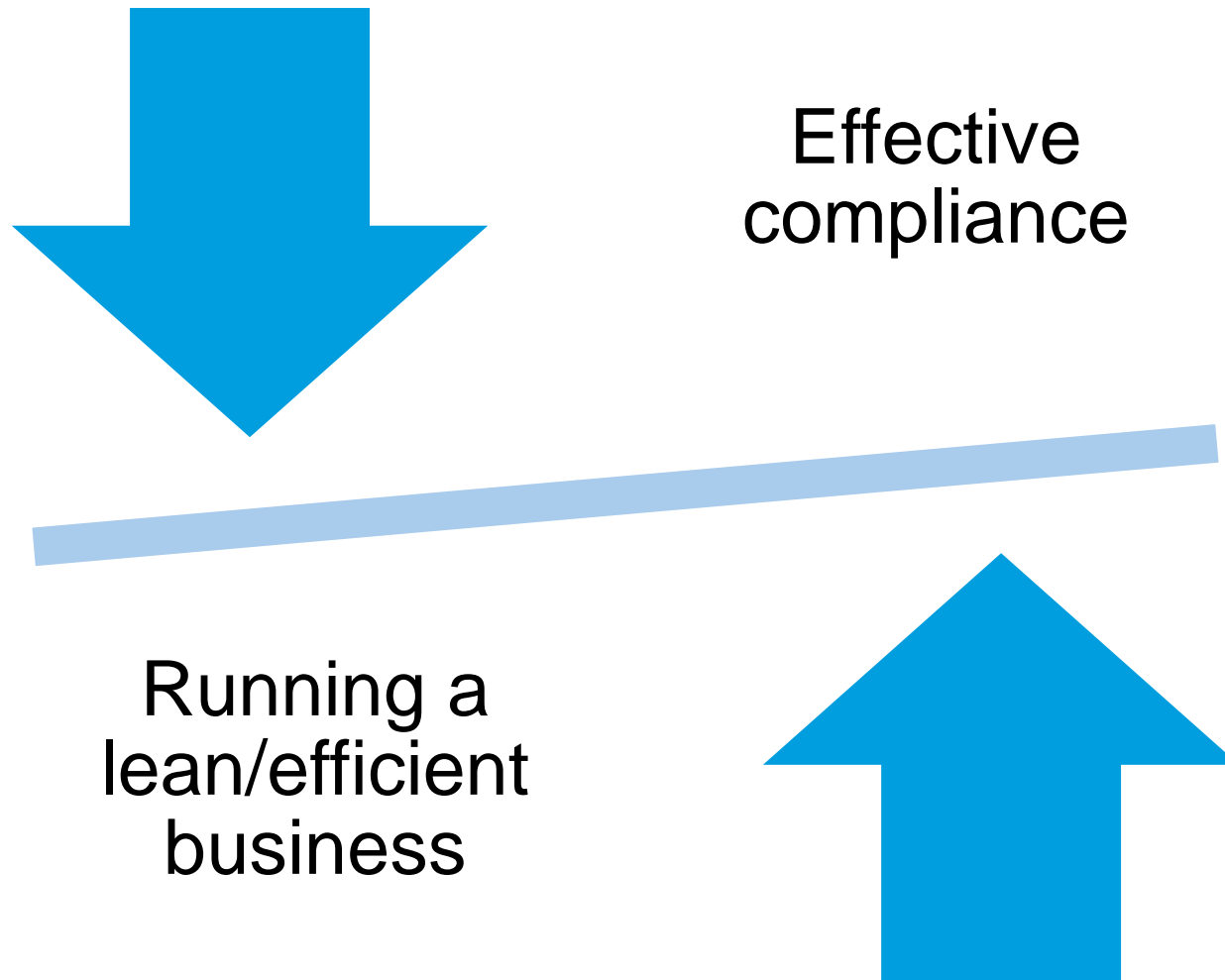
Compliance Awareness

- 53% of companies believe compliance budgets will increase in 2018*

- More and more companies are separating CCO role from GC**

- CCO compensation growth is outstripping other executive positions***

- CCOs are being held accountable for gross failures of programs
  - Moneygram CCO ordered to pay $250,000 personal fine and barred for 3 years
  - Banamex CCO ordered to pay $70,000 personal fine and given lifetime ban

Thomson Reuters, Cost of Compliance 2017: Are Budgets Reaching Their Peak?

**SCCE, Why Chief Compliance Officers Are More Important Than Ever*

***The chief compliance officer's paycheck is the fastest growing in the C-suite*

No Easy Answers…

- Law Departments respond to regulatory compliance issues in an ad hoc, one-off manner

  - Not much thought given to approaching compliance holistically

- Compliance can get very expensive **if it is not baked into the business**.

  - Better quality and lower costs if incorporated into day-to-day business

  - E.g., if Managers give compliance talks, much cheaper than admin overhead of having a "compliance officer" do it

No Easy Answers…

- Few firms offer practical advice on program building

    - Advice is typically abstract – "screen all high-risk third parties"

    - Few offer holistic advice outside of one or two particular areas (typically anti-corruption/antitrust)

No Easy Answers…

- Harder to make the "business case"

  - Compliance is viewed as "soft" or "squishy" because harder to quantify and measure risks/costs

  - Starting point as "necessary evil" or "keep us out of jail"

- Not clear how much is "good enough"

- Solutions are cross-functional, meaning GC/CCO can't do it alone

A Cross-Functional Problem To Solve

Executives

Legal & "Compliance"

Middle Management

Functional Groups (IT, HR, Supply Chain)
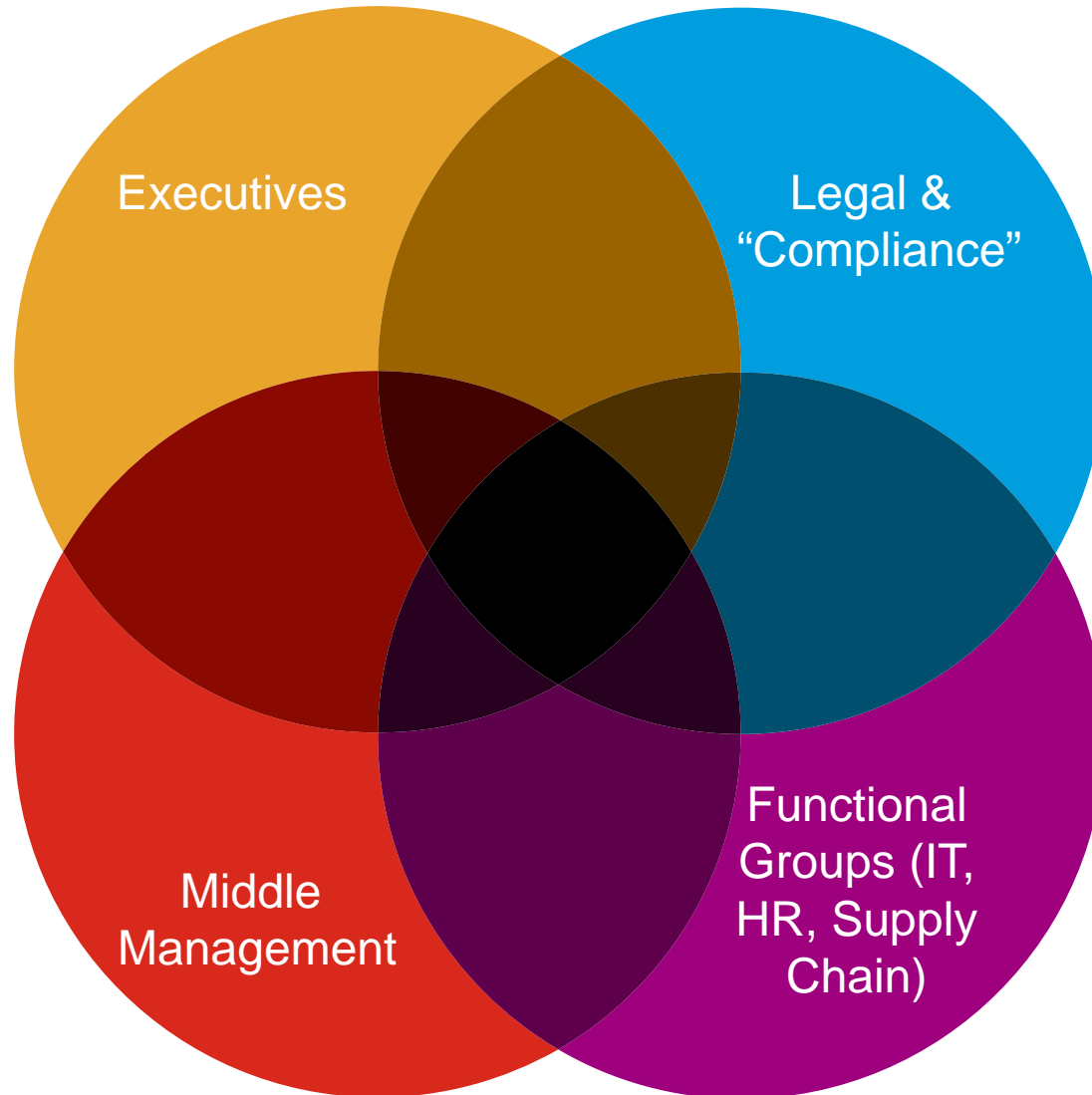
There Remains a Disconnect…

Legal Departments That Are Below Business Partner Expectations

67%
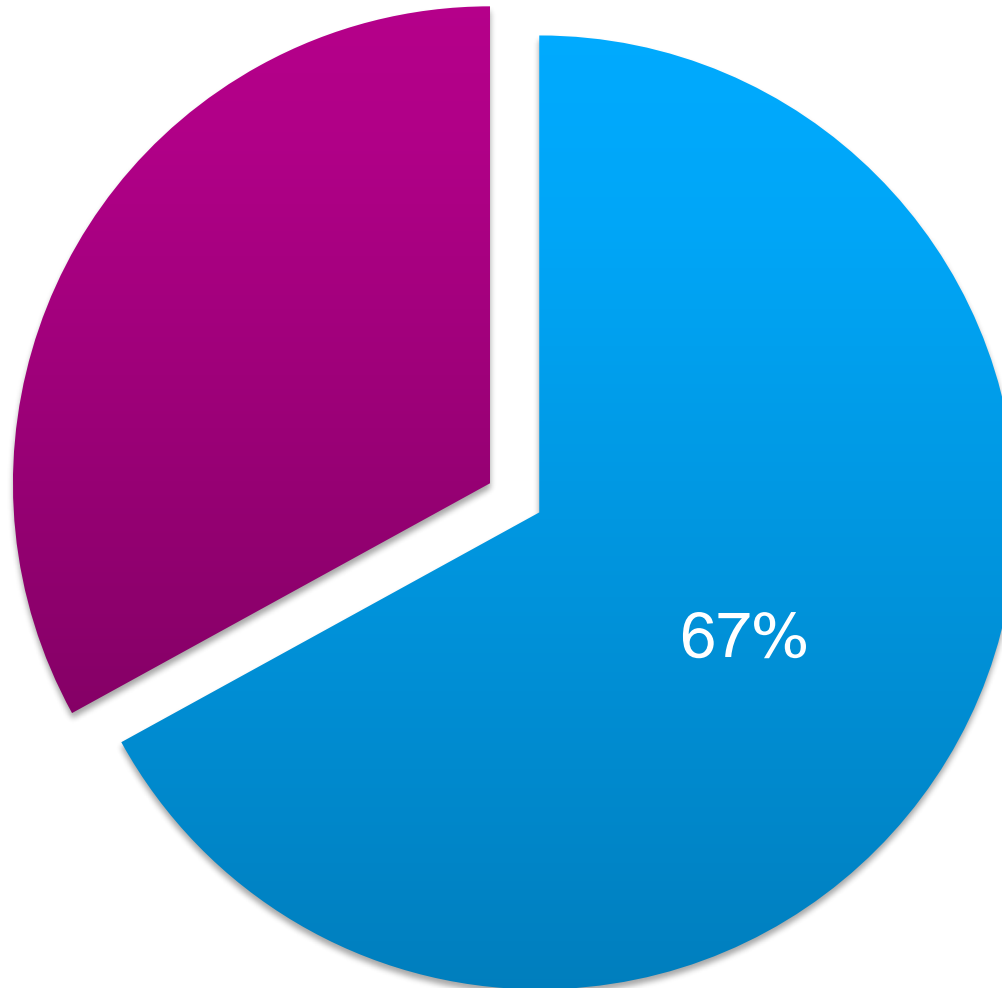
* 2016, CEB/Gartner Study

What Execs Want:
Run Compliance "Like the Business"

- Identify Risks

- Identify Core Competencies to Address Risks

- Develop Key Performance Indices (KPIs) and Metrics

- Prioritization & Strategy

- Cost Justification/Budgeting

- Benchmark

- Framework for Continuous Improvement

Compliance Maturity Model Framework

- Basic framework which can be managed in-house

- Nothing esoteric or too "business-school"

- Lists the core elements of an effective compliance program

- Rates a company against these elements, tailored to industry and size

- Provides step-by-step actions on how to move each element forward, and prioritizes most pressing

- Nothing brilliant:

  - a simple management tool

  - with legal insights/benchmarking incorporated

Compliance Core Competencies

Program Structure

Audit/Monitor Risks

Learning & Development

Create a Culture of Compliance

Oversee Complaints

Essential Elements of a Compliance Program

Program Structure	Audit/Monitor Risks	Learning & Development	Create a Culture of Compliance	Oversee Complaints
Risk Assessment Understood by Global Leadership	Track Regulatory Updates	Training Strategy	Behavioral Incentives	Anonymous Reporting
Executive Leadership Support	Audits	Deliver Online/ In-Person Training	Culture from Top Management	Open Door Reporting
Resource Strategy/ Independence	Build Risk-Specific Mitigation Plans	Training Content	Culture from Middle Management	Investigations
Program Metrics	Metrics/ Reporting of Risks	Self-Help Materials	Ensure Lack of Conflicts of Interest	Non-Retaliation
Policies, Processes, and Codes		Communications	Measure/ Track Culture	Investigation Metrics/Reporting
		Measure Training/ Communications		

What Level of Maturity?

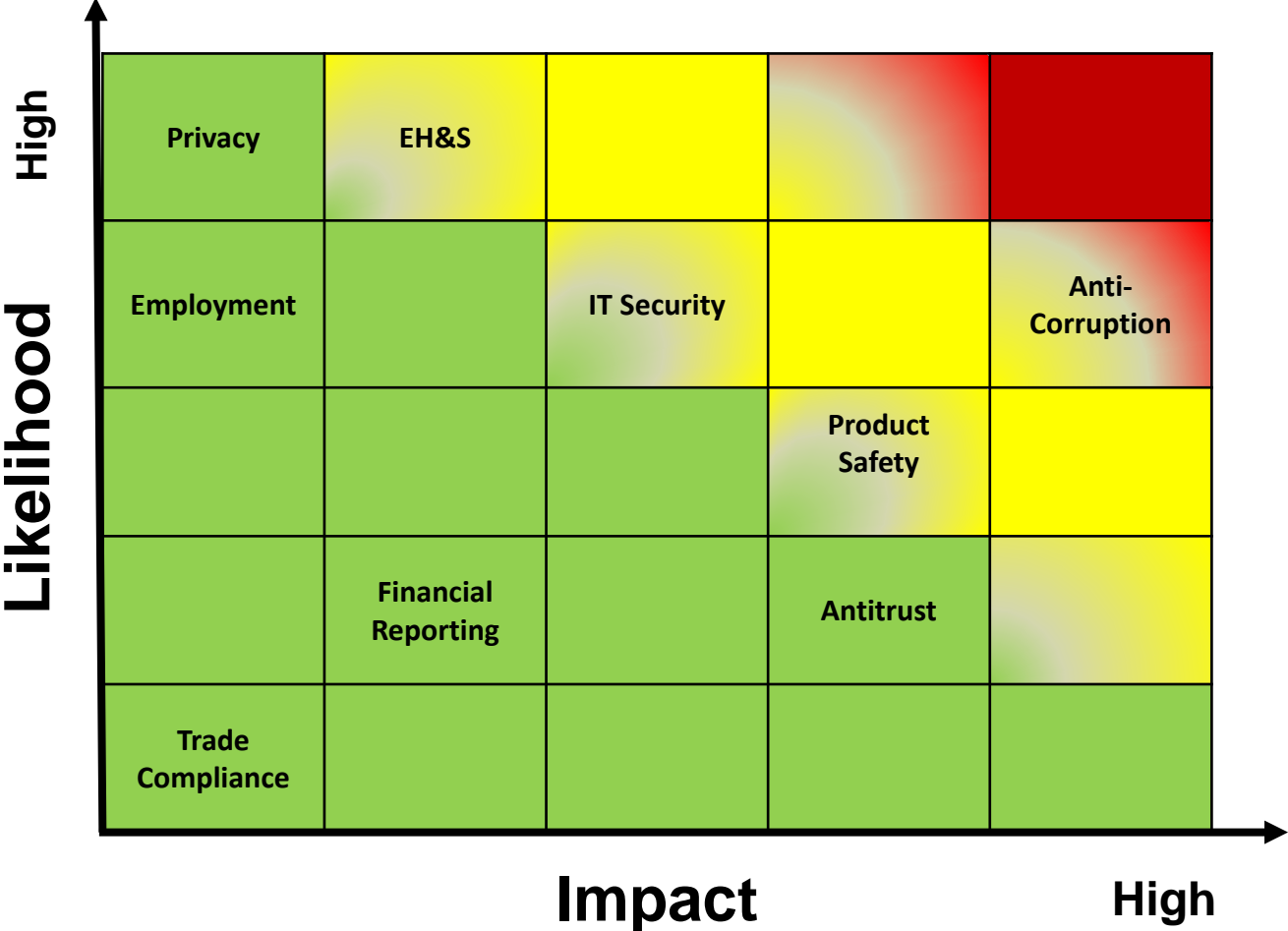| Program Structure	Level 1	Level 2	Level 3	Level 4	Level 5
• Policies/Processes/ Code	• No Code of Conduct • No policies • No processes • No Company "Values"	• Legal-centric Code of Conduct published centrally in English • Ad Hoc Policies covering all identified risks, with minimal input from functional groups • Company "Values" identified • All new hires sign acknowledgement of code/policies • Ad hoc internal processes for some compliance processes	• Employee-centric Code published centrally (internal/external) in all languages • Policies cover all risks, published centrally in English • Policies incorporate input from business leads • Employees annually re-certify adherence to code/policies • Written process documentation for key compliance processes	• Code reviewed and updated regularly (no longer than 5 years), and policies updated regularly (no longer than 3 years) • Policies centralized and translated into all languages • Polices are owned by business heads, in addition to legal/compliance • Knowledge tested as part of acknowledgements • Process documentation incorporated into Policies	• Code reviewed and updated regularly (no longer than 3 years), and policies updated regularly (no longer than annually) • Code is interactive/graphic, includes real company examples • Integrated policy management system (version control, linked to cases/training/acknowledgements/resources)
Maturity 2017			**Current State** X————	**Desired State** ————X	

Essential Elements of a Compliance Program

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Program Metrics	Metrics/Reporting of Risks	Self-Help Materials	Ensure Lack of Conflicts of Interest	Non-Retaliation
Policies, Processes, and Codes		Communications	Measure/Track Culture	Investigation Metrics/Reporting
		Measure Training/Communications		

Risk Assessment Maturity

Program Structure	Level 1	Level 2	Level 3	Level 4	Level 5
• Risk Assessment Understood by Global Leadership	• No formal risk assessment	• Risks informally assessed based on limited, subjective views of Legal/Compliance (e.g., Top 5 risks) • Risks communicated to AC/Senior Mgt periodically	• Formal risk assessment completed yearly by Compliance/legal • Inputs include industry trends, historical internal data (hotline/audit/etc)	• Annual risk survey of key stakeholders • Stakeholder perception tracked via annual risk Heat-Map • Mgt and employee focus groups on risks • Annual presentation • Assessment includes efficacy of mitigation on Maturity Model	• Heat Map includes external benchmark data • Regular assessment of risks by external firm
Maturity 2017			Current State X_____	Desired State _____X	

Compliance "Heat Map" Assessment

Build Risk-Specific Mitigation Plans

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Risk-Specific Mitigation

Corruption Risk	Trade Secret Theft Risk	Int'l Trade Risks	Antitrust Risk	Privacy Risk
Policies	Identification	Policies	Policies	Policies
Third Parties	Protection	Third Party Screening	Training	Vendor Relationships
M&A	Theft Detection	Contract Terms	Resources	Identification of PII
Routine Gov. Interaction	Theft Response	M&A	M&A	Cross-Border
Records/Internal Controls	Third-Party Trade Secrets	Licensing	Joint Conduct	Breach Response
Metrics		Audits	Monopolization	Training
		Training	Trade Practices	
			Incentives	
			Audits	

Benefits of the Maturity Model

- Measures where your program is today

- Prioritizes your risks

- **Incrementally** prioritizes risk mitigation

- Data for board/exec presentation (budgeting)

  - Provides metrics/KPIs

  - Identifies roadmap/strategy

- Internal management tool

  - Continuous improvement over time

- If something bad ever happens, this is playbook for explaining how you tailored your program

Winston's Approach

- Engaged by client for a fixed fee

- Assessment conducted on core elements and selected risks

- Winston then gets client input, and creates:

  - Tailored risk heat map

  - Tailored maturity model

  - Overview memo with top priority actions

  - Board/management presentation (if requested)

- Company can then take ownership of maturity and actions, or may hire Winston to assist moving selected actions forward

Upcoming Real Deal Webinar

Mark Your Calendar!

December 14 – Delaware Law Developments/Recent Judicial Decisions Affecting M&A Transactions and Corporate Governance—Part 2

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Steve brings a unique set of experiences to his clients, having honed his investigation skills as a federal prosecutor, demonstrated his courtroom expertise in over ten federal jury trials, and having developed a pragmatic problem-solving approach in his role as Chief Compliance Officer and senior litigation counsel to a Fortune 500 company.

Thank You

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