



## Top 5 Signs Your Legal Team Needs A Compliance & Ethics Professional

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### 1 You have never heard of Chapter 8 of the U.S. Federal Sentencing Guidelines.

***If one of the words in your title or duties is “compliance,” but you have never heard of Chapter 8 of the U.S. Federal Sentencing Guidelines, you might need to engage a compliance and ethics professional.***

As much as our business partners would love it and sometimes expect it, in-house counsel wizardry does not include knowing everything about everything. I vividly remember the day I found out that the standards for corporate compliance and ethics programs were set forth in the U.S. Federal Sentencing Guidelines under the section on sentencing organizations, Chapter 8. To be honest, I was a bit confused. Once I reflected on the fact that the sentencing guidelines are designed to force a court’s consideration of a defendant’s character in either mitigation or aggravation during sentencing, I understood that the only way to assess the “character” of a corporation was to measure its commitment to a compliant and ethical corporate culture, as set forth in detail in Chapter 8.

If you are not familiar with Chapter 8, you will need a resource to help you oversee and manage the program entrusted to you by your board. The fastest way to get up to speed is to consult a trusted peer, yes? That is how most of us survive as in-house counsel because we cannot know everything. If it is reasonably figure-out-able, we try to do that after consulting our peers, ACC resources, and some dusty old CLE outlines (go for the free resources first, amiright?). But what got you here, probably won’t get you there when it comes to compliance programs.

A certified compliance and ethics professional such as a “CCEP,” has the experience, knowledge, and credentials to advise you on what Department of Justice prosecutors expect from your program.<sup>1</sup> Sure, you can get some support from your in-house peers and other resources, however, compliance professionals who have worked with many companies have seen various structures and approaches that have worked in practice and the efforts that failed. Expertise comes with efficiency. The quickest way to the right answer is through the ones who have seen it, done it, fought it, and won it.

## 2 You have just been crowned “Chief Ethics and Compliance Officer,” and you know little to nothing about the company’s compliance and ethics program.

***If you are new to a compliance position but don’t know much or anything about the company’s compliance program, you might need to engage a compliance and ethics professional.***

As a newly hired GC/CECO, you may be learning the document management software, negotiating a contract for a new billing platform, managing your legal staff, and getting to know the business and its leaders, all while getting pinged for advice from across the enterprise. As a newly crowned Compliance Officer, you may still be managing outside counsel, litigation, contract review, and the demands of the business. How will you find time to assess your compliance and ethics program, perform a risk assessment, and determine completion rates for mandatory training?

The key here is to be Real about your bandwidth, the demands on your time and attention, and your level of expertise. With so many competing demands and the fact that the priority is to keep the business flowing, how will you effectively assess the elements of your compliance program?

Engaging a certified compliance and ethics professional to do a comprehensive assessment of your program is not only a Blue Ribbon practice,<sup>2</sup> it is also the best and fastest way for you to understand what is in place, who is running it, if it is effective, and what may be missing, so you can begin to evaluate how you will manage the program and fulfill your duties to report to the board on the health of the program. A quality program assessment should comprehensively evaluate all the required elements of your program against applicable standards, gauge their maturity and effectiveness, and provide recommendations on how to fill gaps and assign resources so you can see the lay of the land to determine how to best manage the program.

## 3 Your company just got in trouble.

***Whether you received notice of an SEC violation, had a visit from local FBI agents, just opened a lovely Notice of Suspension and Debarment from a federal agency, or received a letter from DOJ, this news is a major RUH-ROH for any in-house counsel. Your first instinct may be to call outside counsel, and you are not wrong. However, you also need a compliance professional on your team.***

When interacting with any enforcement agency, your compliance and ethics program is the early focus for the agency, along with the level of your company’s cooperation. By engaging a compliance and ethics professional to immediately assess and document your compliance and ethics program, you better position your company for the chance of an administrative agreement or deferred prosecution agreement instead of the catastrophic alternatives. The right information freely presented to DOJ and a commitment to continue to work with a compliance and ethics professional may even garner a declination.<sup>3</sup>

A compliance professional's assessment can also guide early remediation efforts, offering the government an additional level of comfort that the company is committed to correcting any cultural, process, or control deficiencies that may have contributed to or facilitated the misconduct. The better your company can demonstrate its program is effective, the better results for your company in the aftermath of an incident.

## 4 You acquired a company.

***Congratulations, your company is celebrating its growth after closing on a new acquisition! While you begin to assess how to integrate and support this new business from a legal perspective, you must also consider how to fold that new business into your existing compliance and ethics program. Make no mistake - this is a heavy lift and can easily spiral into chaos!***

Will you push your existing program into the new entity? What does that process and timeline look like? If the newly acquired entity has a strong compliance program, what legacy pieces will you keep and push across the enterprise? What will you retire or sunset and when?

There are other factors to consider in developing your plan. Does the acquired entity include a different business line? Does it do business in a jurisdiction your company was not previously in? Does the new business bring along government contracting obligations? Do you need to revisit your risk assessment? A compliance and ethics professional can design a change management process for unifying two compliance programs and cultures into one.

## 5 Your board has asked you to report on the effectiveness of the compliance and ethics program, but you are not sure what metrics to include.

***If your board of directors wants you to report on the health of the compliance and ethics program, but you are not sure what metrics to share, you need to engage a compliance and ethics professional to help you identify the relevant metrics.***

The standard for corporate compliance and ethics programs is that they are “effective.” A program can be “effective” even if it does not prevent misconduct or fraud from occurring, so how do you know if your program is effective? How can you measure effectiveness?

DOJ guidance demonstrates that prosecutors want to see that you have tracked relevant metrics to support that your program is effective. This includes that you have catalogued and ranked legal risks and used the right data to determine that the elements of the program work in practice to mitigate those risks. Common metrics include the number of hotline calls or reports, number of resulting investigations and days elapsed until closure, culture and exit survey results on willingness to speak up or fear of retaliation. Every program is different, though, so a compliance and ethics professional can help you identify and prepare the data your board needs to meet its duty of care in overseeing the compliance program. Don't go it alone; a compliance and ethics professional has seen many creative ways metrics have been selected and reported to the board to show a program works in practice and has been adapted when needed.

## TAKEAWAYS

DOJ has been very clear that its evaluation of a corporate compliance program can make all the difference in its decision to prosecute, offer a deferred prosecution agreement, or decline to prosecute altogether. In recent years, DOJ has made a concerted effort to publicly announce declinations and give details as to the extent of corporate cooperation and compliance program elements that factored into its prosecution decision.

Engaging a certified compliance and ethics professional can not only position your program to prevent fraud and misconduct, but a robust and effective program has been proven to be a powerful shield if misconduct does occur. Your compliance and ethics program is the only way to put separation between your company and the conduct of a rogue employee. To prove a rogue employee was truly rogue and not part of a delinquent corporate culture, your compliance program must stand up to scrutiny with more than just a code of conduct and some training certificates. When you need an affordable and knowledgeable partner for assessing, developing, and implementing your corporate compliance and ethics program, you need a compliance and ethics professional.

<sup>1</sup> <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl>

<sup>2</sup> Principles and Practices of High-Quality Ethics & Compliance Programs; Ethics and Compliance Initiative, 2016, page 20

<sup>3</sup> <https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-policy/declinations>

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