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WHITEPAPER

Understanding Your Personal Responsibility and Liability as CCO

Compliance Officer Personal Responsibility & Liability

Amid the burgeoning number of global regulations and increasing concern about the rising tide of regulatory scrutiny, Chief Compliance Officers (CCOs) increasingly fear being caught in the crosshairs of regulatory agencies.

While there has always been some unease among CCOs about their personal liability, the issue seems to be heating up despite the fact that only a handful of cases have been brought against CCOs and were mostly in the financial services industry. Nevertheless, recent data suggest CCOs are worried about liability:

» The U.S. Securities and Exchange Commission (SEC) released guidance in 2013 about CCO and Chief Legal Officer (CLO) liability when they are considered to be acting as "supervisors" and fail to "supervise" the individuals that commit violations.

» When CCOs were polled by Thompson Reuters at a summit in 2015, 93% said they expected their personal liability to increase in the next year (64% expected the increase to be significant). In addition, Thompson Reuters' customers ranked the liability of CCOs higher than that of CEOs.

» A 2016 DLA Piper survey found that CCOs in private organizations were much more concerned about liability (89%) than their peers in public companies (74%).

» In 2016, insurance broker Marsh released a new, targeted product that augments directors' and officers' insurance to cover a CCO accused of unintentional conduct that led to an organization's regulatory violation.There are some behaviors that can create risk for compliance officers. These include:

- Not understanding supervisory liability;
- Not ensuring reported issues are appropriately addressed, escalated or documented;
- Not maintaining a robust compliance program;
- Accepting full responsibility for organizational compliance;
- And, of course, contributing to a violation.

The good news is that CCOs can dial down their increased personal risk by taking these key steps.

10 Key Steps for Organizations to Take

1. REALIZE CCO LIABILITY IS NOT LIMITED TO PUBLIC, FINANCIAL SERVICES FIRMS

While enforcement actions have largely occurred in this sector, CCOs in all industries, public or private, should take steps to protect themselves from liability.

2. UNDERSTAND AND MANAGE “SUPERVISORY LIABILITY"

Ensure supervisory policies are written. When misconduct occurs, make sure the company documents which supervisor is responsible for handling it. Committees on which a CCO serves should have documented in their charters that the CCO’s role is only advisory. Escalate serious concerns about legal violations to designated senior management (per escalation policy).

3. MAKE POLICIES, STANDARDS AND THE CODE EASILY ACCESSIBLE

Ensure no one can say “they didn’t know what to do” because they could not find the necessary guidance documents.

4. EDUCATE EMPLOYEES AND OTHERS

Anyone who acts on behalf of the organization (employees, third parties or board members) should be trained or otherwise educated on the standards of workplace conduct, their responsibilities regarding ethics and compliance and the resources provided to ask questions or raise concerns.

5. DEVELOP AND FOLLOW A BOARD-APPROVED ESCALATION POLICY

This is a key step in ramping up protection by taking the decision to escalate out of the CCO’s hands. Such a policy is more than the chain of contacts for your Helpline. It lays out the specific steps a CCO must take if those in “sensitive” roles (such as CEO, board member and executive management) are implicated in an allegation or if an issue surfaces that could have material impact on the organization’s reputation or financials. Escalation should occur within 24-48 hours and should not wait for the completion of an investigation.

6. SCREEN AND MONITOR THOSE THAT CARRY OUT WORK FOR THE ORGANIZATION

It is important to know who is coming through the front door. This is essential for engaging third-party partners such as contractors and distributors and also new hires and promotion candidates. Interviewing for integrity to increase the likelihood of hiring those wired for good conduct is a new trend worth considering.

7. IMPLEMENT A CCO CHARTER WITH DETAILED RESPONSIBILITIES, ACCOUNTABILITIES AND AUTHORITIES

This is more than a routine job description. It is a blueprint for what a CCO should and is empowered to do, including seeking legal advice from outside counsel when needed. Such a charter also helps avoid turf battles by laying down the bright lines between compliance and its sister functions. Charter authorities may include:

- Delegation of matters for investigation
- Ability to retain outside counsel on matters of personal professional risk, in collaboration with General Counsel (GC)
- Ability to access any company document when investigating a relevant compliance matter
- Ability to conduct internal investigation of matters
- Ability to raise issues directly with CEO, chair of board committee or full board committee

8. ENSURE YOU ARE COVERED BY D&O INSURANCE

Don't be afraid to ask if you are covered. Understand the scope of your coverage. And, get the answers in writing.

9. DON'T LIMIT PROGRAM OWNERSHIP TO JUST YOU

Ensure you have executive compliance committees to help deepen understanding of risks through executive-level responsibility. Have a strong network of regional Ethics and Compliance Officers. Ensure risk management is assigned to key subject matter experts including CFO, CTO, GC, HR and E&C.

10. MAKE DOCUMENTATION ROCK SOLID

If it isn't written down, it didn't happen. Meticulous record-keeping of training completions, attestations, policies accessed, case files and all the other documents generated by an effective compliance program are best managed with technology. Document important decisions, outcomes of reports, formal advice, escalations, committee minutes and policy reviews. Ask your compliance committee or other party to review key decisions where appropriate. Cite major decisions in board reports. Create and follow a documentation retention plan for all compliance program documents. Paper files, fraught with vulnerabilities, may be the biggest CCO liability of all.