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“Proven Self-Governance”: The In-House Counsel’s Role in Overseeing & Assessing Effective Corporate Compliance

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Overview of Topics to Discuss

- Key Indicators of an Effective Environmental Corporate Compliance Program
- In-House Counsel as Liaison to Compliance Team
- Methods of Documenting Self-Governance
- “Know Thyself” The Importance of Periodic Reviews:
 - Risk Assessments
 - Compliance Assessments
 - Role of In-House Counsel

Benefits of Presenting Dual Perspectives

- Pete Anderson
 - Former Federal Prosecutor
 - Compliance Counselor
 - Business Crimes Defense Attorney
- Garry Rice
 - In-House Counsel for Duke Energy for 27 years
 - Oversees Environmental Compliance Function

Fundamentals re: Compliance

- No compliance program is perfect and none can prevent all accidents or bad acts.
- Regulators & Prosecutors have broad discretion re: investigations and charging (who? / what? / etc);
- Key Question: How To Influence That Discretion ?

Goal: Understand & Influence Regulatory/ Prosecutorial Discretion

- Demonstrate “Good Corporate Citizenship”
- Avoid Being Perceived by Government As a “Bad Actor”
- Government “Perception” is Reality

A Brief Overview of Recent Trends

- “Old School”
 - Reactive to Crises
 - Government as Outsiders Looking In
 - Inefficiencies
 - Overly Adversarial
 - Closed Playbooks

A Brief Overview of Recent Trends

- Newer Model
 - Proactive/Preventive
 - Mutual Transparency
 - Self-Governance

Self-Governance

- Standards
- Procedures
- Documentation
- Conclusions
- Follow-up

Benefits of Self-Governance

The Antidote to Broad Prosecutorial Discretion

If the government perceives a company's own efforts to regulate are sufficient, there is no need to turn on the governmental "machine" and impose any extra deterrent or punishment.

Key Indicators of Effectiveness

- Variety of Sources:
 - United States Sentencing Guidelines (Chapter 8)
 - COSO (Committee of Sponsoring Organizations of the Treadway Commission)
 - » Private Sector Thought Leadership Group
 - OECD (Organization for Economic Cooperation & Development)
 - » International Economic Organization
 - DOJ Policies
 - FCPA Guidance
 - Deferred Prosecution Agreements

Key Indicators of Effectiveness

- The “Big 7” Criteria from Chapter 8 of Sentencing Guidelines
 - Written Standards, Policies & Procedures
Codes of Conduct
 - Centralized & High Level Oversight
 - Screening & Background Checks
 - Education & Training
 - Monitoring/Auditing
 - Enforcement & Discipline
 - Response & Continued Improvements

Key Indicators of Effectiveness

- Next Generation “Add-Ons”
 - Hotlines
 - Voluntary Reporting / Self-Disclosures
 - Cooperation & Credible Internal Investigations
 - Incentives/Disciplinary Measures
 - Due Diligence (Pre & Post Acquisition; 3rd Parties)
 - Remediation
 - Compliance Assessments
 - Risk Assessments

In-House Counsel as Liaison to Compliance Team

- General Overview of Options for Interplay Between Legal & Compliance
- Different Roles/Functions - Implement v. Advise?
- Lines of Reporting (both to Chief Legal Officer)?
- Privilege – Big Trap for the Unwary In-house Lawyer?
 - See Next Slide

Debunking the Privilege Myth



In-House Counsel as Liaison to Compliance Team

- Topics to Address?
 - Which Issues “Belong” to Legal vs. Compliance?
 - Does this change? Why?
 - When should Legal get involved?
 - Audits (Planned)
 - Complaints (Ad hoc / Unplanned)

In-House Counsel as Liaison to Compliance Team

- Duke Energy's Approach for Interaction & Oversight
 - Drafting & Reviewing Standards / Manual
 - Advice re:
 - High Level Oversight
 - Audits & Monitoring (Programmatic and Ad Hoc)
 - Reporting
 - Risk Assessment

Methods of Documenting Self-Governance

- Everyone Claims to Be a “Good Corporate Citizen”
- Regulator/Prosecutor Cynicism
- How to Prove “Good Faith”?

Measuring “Organizational Culture?”

- What an Organization SAYS?
 - Written Materials?
 - Code of Conduct / Plan & Procedures
- What an Organization DOES?
 - Measures/Documents/Monitors/Records
 - Invests
 - Incentives – Punishments & Rewards

Duke Energy's Tips on Documentation

- Assume no Privilege
- Comply with Records Retention
- Educate Corporate In-House Clients
- Compliance Track Record/Paper Trail

“Know Thyself”

- The Importance of Periodic:
 - Risk Assessments
 - Compliance Assessments
- In-House or Outside Counsel?
 - Designing an on-going process
 - Advantages
 - Proper Tailoring

Risk Assessments

- Definition – a tool that identifies & ranks relevant risks
 - Likelihood?
 - Nature & Seriousness of Consequences?
- Purpose – to inform the client of all relevant risks, not even primarily compliance risks
 - Invariably subjective
 - Effort to make objective
- Heightened Priority in Recent Years

Risk Assessments

- Sentencing Guidelines – 8B2.1(c):
“The organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each of the components of an effective compliance and ethics program to reduce the risk of criminal conduct identified through this process.
- Role of In-House Counsel & Compliance in this process?
- Privilege for Risk Assessments?

Compliance Assessments

- Definition – a tool that identifies limited non-compliances
- Purpose – to inform the client of significant, programmatic non-compliance situations so they can be corrected and eliminated
 - Facility-based
 - Program-based

Compliance Assessments

Make You Better Prepared:

- Why Important?
- What is the Process?
- How to Conduct or Oversee an Assessment
- How to Respond to Issues That May Arise
- Use of Counsel?
 - Advantages of In-House & Outside Assistance?

US Department of Justice (DOJ) Recent Comments

“We call on businesses to . . . re-evaluate their compliance programs.”

- AG Eric Holder, 5/31/10

“Periodic reviews and re-evaluations to test and ensure program effectiveness are one of the things the Criminal Division cares about.”

- Deputy AG Breuer, 5/26/10

US Department of Justice (DOJ) Recent Comments

Following discovery of an offense, a company should:

“Act appropriately to prevent similar criminal conduct, including assessing the [E&C] program and making modifications necessary to ensure the program is effective.”

USSG Assessment Expectations

“The organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization’s [C&E] program.”

“Periodic reviews to ensure that your program is effective is critical.”

USSG Vice Chair, Ruben Castillo – 9/09

OECD Anti-Bribery Good Practice Guidance

Companies should conduct “periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting . . . **foreign bribery** . . .or . . .

[PCA: insert crime/risk here !!]

Types of Compliance Assessments

- Self-Assessment v. External Assessment
- Structure/Design v. Implementation
- Facility v. Program
- Scope:
 - Full Program
 - Specific Substantive Issues/Areas

Types of Compliance Assessments

- Cultural Assessments
- Training Effectiveness
- Hotline Utilization
- Discipline Protocols/Uniformity

Self-Assessments

- Types
- Importance
- Frequency

External Assessments

- Advantages – objectivity/privilege?
- Types
- Steps in Process
- RFP/Qualifications
- Budget
- Frequency
- Typical Questionnaires/Surveys/Info. Requests

Process for Reviewing Effectiveness

- ID & Assess Compliance Risk Areas
- Review Company Program re: Those Risks
- **Document** Standards, Policies & Procedures
- **Communicate** Standards, Policies & Procedures

3 Measures for Assessments

Structure – Policies & procedures;
staffing; resources.

Process – Performance measures

Outcome – Observable/Measurable
Results.

- Continual Review & Improvements / Evolution -- “Work In Progress”

Most Simple 2-Step Inquiry for Compliance Effectiveness

Big Picture:

Does it work?

Does it achieve what it is intended to do?

Most Simple 2-Step Inquiry for Compliance Effectiveness

- Step 1: Set Performance Expectations
 - Do We Have Sufficient Evidence to Demonstrate Compliance with Each Element/Criteria?
- Step 2: Report Ongoing Performance
 - We Are Compliant and Captured Appropriate Evidence to Demonstrate Compliance

Two Key Objectives in the Assessment Process

Goal 1: Conclusions/Findings

- With Adequate Support / Documentation

Goal 2: Process / Methodology

- Gives “Outsiders” the Ability to Review and Reach Their Own Conclusions
- Transparency

Concluding Thoughts re: Role of In-House Counsel as Liaison to Corporate Compliance

- **Generally?**
- **Duke Energy?**

Thanks

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