OPEN AIR BLOG

I had thought that with the amount of bile I've spewed on these case studies, my supply must be low. I've found, reading case study #10, that I actually have plenty left.

The case study purports to discuss what we call in the US "tone at the top," but which in the UK they call "Top-level commitment." Here, we have a similar buzz phrase that's recently come into fashion, "Commitment from the Top," which is more similar. I'm not personally a fan of either phrase, nor of the concept.

Let's digress for a moment into what I call "optical controls." Optical controls look good, but don't do much. Most contract provisions are optical. Any written certification (maybe there's one certification that's not; Tom identified it on our videocast: a Sarbanes-Oxley-type certification to be signed by senior management). There's a place for optical controls. At times, they are actually important, so don't neglect them.

But I think tone from the top is optical. That's not to say it's optional. You need visible tone from the top. You need senior management to talk about anti-corruption, ethics, honesty, integrity, etc.

First, we need to define tone at the top. Once, back in 2009, I was on a panel about tone at the top. I wrote a definition that got the highest praise possible: it was quoted by Alexandra Wrage. If you've read more than two articles on mine, you know I'm a huge fan of Alexandra, and of TRACE. Every company I've worked in, I've either gotten us to join, or convinced us to renew membership. Anyway, what I said was

Tone at the top is a visible willingness by senior management to let values drive decisions, to prioritize those values above other factors—including financial results—and to expect all others in the organization to do the same.

If you're going to do tone at the top right, you need more than just words, you need senior management to act. There's a hierarchy of actions. At the top is publicly praising someone who lost a deal because he refused to pay a bribe. Less, but just as key, would be to change a unit's sales targets. In fact, I would probably advocate the latter as a first measure because it directly impacts the line staff.

In general, in fact, I'm much more a fan of tone from the bottom, but we'll get to that in a minute.

As always, the Guidance lays out a series of optional controls for our small to medium size manufacturer:

- Making of a clear statement disseminated to its staff and key business partners of its commitment to carry out business fairly, honestly and openly, referencing its key bribery prevention procedures and involvement in a sectoral anti-corruption initiative.
- Establishing a code of conduct that includes anti-bribery provisions and making it accessible to staff and third parties on its web site.
- Considering an internal launch of a code of conduct, with a message of commitment from senior leaders.
- Senior management emphasizing among its workforce and other associated persons the importance of understanding and applying the code of conduct and the consequences of breaching policy
- Identifying someone at a senior level to be the point-person for queries and bribery-related issues

Of all the lists of all 10 case studies I've reviewed, this list might be the worst.

Seriously, spending three of five bullets to discuss three aspects of the same control—and an incredibly weak control, at that—is worse than useless. It's counterproductive. And even worse than counterproductive, it gives a false sense of security. Let me be clear, and you should take this to heart: no code of conduct ever actually changed someone's behavior. Sorry, all you Code writers out there. This is not to say that you shouldn't have a code. You should. And I'm not suggesting that you don't train on it, or that you don't have an internal launch, or even that senior management shouldn't emphasize…or whatever it says to do. But a code of conduct isn't a control, it's window dressing. Important window dressing, but that's it.

The last point is as obvious as it is optical. And often done badly. Seriously, if you're going to implement an optical control, at least make it good optics. How many times have I seen a random officer, like the CIO, report to the CEO, but the Chief Compliance Officer report to the General Counsel? At least now in the US, with the recent revisions to the Sentencing Guidelines, we now know that the CCO has to independently report out to the Board of Directors. Most CCOs I'm aware of do that on a periodic basis, most frequently quarterly.

The first point is also optics. It's also, in my opinion, almost impossible. Have you ever seen a clear statement by senior management on anything? And on ethics? Really? The statements I've heard all talk about ethics as if it were one factor to consider while making a deal. Make the deal, but remember to be ethical. That's not how we talk about ethics outside of the business world. In every other context, ethical behavior is the underpinning of proper action. But when it comes to business, it's one factor among many.

So how should companies show proper tone from the top?

Let me give you my suggestions:

1. Concentrate on the bottom, not the top. Rather, let's properly define "the top." The job of a compliance officer is to change behaviour. When a line worker has a problem, he or she doesn't go to the CEO. So having the CEO "have an open door to all employees to answer questions," (this or something similar is on virtually all CEO videos I've seen) doesn't help. Who do people go to? Their supervisor. If you can hit front-line supervisors, that's how you change behavior.
2. Connect with employees on their terms. That is, let them know that their bonus or other compensation won't be affected by ethical behavior. An FCPA compliance officer has to run interference for the business. It might be his or her most important job, in fact. The best tone at the top would be for a leader to alter a sales target because a big loss from refusing to pay a bribe. In fact, you wouldn't even need to advertise it; believe me, your employees will know.
3. Observe the formalities. You need a Chief Compliance Officer. That person should report—or at least have access to—the Board of Directors. You need a code of conduct, you need a video from the CEO, you need publicized compliance successes, and if you want to get fancy, compliance failures. You need these things because optics matter.
4. Treat tone like diligence, it's not a one-time thing. Tone at the top is ethics over time. You can't just have the CEO do a video and be done. You need to emphasize and reemphasize, with the message coming from all levels in many formats. Email, live, written, etc. Hit your riskiest employees from every direction. Have informal chats.
5. Ask the question. There is one question that senior leaders can ask that's the best question in the whole world. The best question. If you have one "ask" when you talk with senior leaders, this should be it. What's the question? Here you go: "what does compliance think about that?" If senior leaders start asking it, then their direct reports will start soliciting

compliance's opinion before meeting with the senior leader. It gets compliance included in the process, any process, in a constructive way. It's the perfect force multiplier. It's the perfect question. Have your senior leaders ask it, often.

6. Do your best to keep your messaging consistent. I've said this before, in the training case study critique, but consistent messaging is also a leadership function, and thus a tone from the top issue. The best indicator of ethical behavior is when employees feel free to report misconduct without fear of reprisal. You can't afford to have one employee sending one message by their conduct and another employee sending another message.

So there you go. And only one more left. After that, I'll write my own guidance, and publish it, chapter by chapter.