NAVEX GLOBAL®
The Ethics and Compliance Experts

TOP TEN ETHICS & COMPLIANCE PREDICTIONS AND RECOMMENDATIONS FOR 2016

By NAVEX Global's Advisory Services Team

Once again it's time for our annual review of trends and events that will impact your ethics and compliance program in the year ahead.

To help with our predictions and recommendations, we've talked with industry experts, our colleagues at NAVEX Global, and ethics and compliance professionals from our more than 12,500 client organizations. Based on their input, we've selected the Top Ten challenges and opportunities for 2016.

01 The Rise of the Millennial Mindset

Millennials—those born between 1975 and 1995—currently make up almost half of the workforce, and it is estimated that they will comprise fully 75% by 2025. While it may be several years before they hold the reins of power in organizations, their influence is already being felt. In part, this is because many older employees have adopted a "millennial state of mind," and this mindset is already shifting employee attitudes about workplace issues. (To see how "millennial" your mindset is, visit the Pew Research Center online and take their "How Millennial Are You?" quiz.) Some of the changes that can be traced to the millennial mindset include:

- Increasing skepticism that business will do the right thing when faced with a tough decision[1],

- Far more emphasis on the importance of an organization's social responsibility[2] and environmental impact, and

- Changed expectations about how an organization should train and how we learn and acquire information.

It's important to keep in mind that these shifts in attitude do not just apply to those who are chronologically millennials, but rather reflect a broader change as our workplaces and cultures change and adapt to a new generation of employees.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Plan for change.** Consider how your workplace will shift in the next 5-10 years and start innovating now. Stay on top of how employees prefer to acquire knowledge, and try to incorporate those methods into your E&C program. This may necessitate significant changes in the structure and presentation of your Code, including moving to an on-line Code that includes interactive features and links to policies, training material, and more.

2. **Assess learning styles for your organization.** Now is the time to review the various ways your organization delivers ethics and compliance education. Develop training in formats that best meet the learning styles of your employees. This may mean adapting video content, delivering information via

[1 and 2] Bentley PreparedU Project: An In-depth Look at Millennial Preparedness for Today's Workforce

mobile devices or harnessing the power of social and collaborative learning. It may even mean exploring the feasibility of integrating gaming elements into your on-line training. Hour-long sessions will likely be replaced by shorter quick-hitting modules.

3. **Don't jump to conclusions.** It is important that we sort through some of the more alarming statistics that may not be what they seem. For example, several early studies (from 2008 to 2010) suggested that millennials are more likely to cheat, cross ethical lines, and believe that "the ends justify the means." (For example see ERC Report, "Millennials, Gen X and Baby Boomers: Who's Working at Your Company and What Do They Think About Ethics?," 2009) But other more recent studies (see have reasonably argued that such beliefs change over time as young people leave the academic environment, move into more structured and rule-based environments, and gain experience and maturity.

4. **Expect to be surprised.** Not only should we not jump to conclusions about millennials, we should expect to be surprised. According to a recent study by Bentley University, millennials are becoming more discerning about social media use in the workplace and may not be finished reshaping our attitudes and expectations:

> "Despite the impression that Millennials are so totally obsessed with using social media, even in the workplace, a study conducted by Bentley University found that more than half of [Millennial] workers prefer face-to-face interactions with their office colleagues over other (i.e., digitally driven) modes of work communications. Further, 66% of Millennial workers surveyed recommended that employers put greater limits on social media usage in the workplace."

02 Transitioning to a More Global Center of Gravity for Ethics and Compliance

Today, many ethics and compliance professsionals, no matter where we're located, find it to be important to keep up-to-date on the latest news from the European Union courts, the U.K.'s Serious Fraud Office, and international organizations, including the United Nations, the International Standards Organization (ISO), and the Organisation for Economic Co-operation and Development (OECD). It wasn't always so. While we may run the risk of being called U.S.-centric, it wasn't too long ago that E&C regulatory initiatives and best practices were centered on the U.S. Even a cursory study of business history will bear this out:

- The start of the ethics and compliance officer movement occurred in the mid-1980s with the Defense Industry Initiative;

- The 1991 promulgation of the Federal Sentencing Guidelines for Organizations (FSGO), with its model for establishing an "effective compliance program" and its "stick and carrot" approach, was the first wake up call for companies in all industries and set off the creation of many of today's E&C programs;

- The rapid growth through the 1990s of the position of Ethics Officer in response to the FSGO and the subsequent sharing of best practices through the creation of conferences, forums and associations;

- The proliferation of regulatory and industry-specific guidance on how to create an E&C program, especially in healthcare and for U.S. government contractors;

- And the headline-grabbing scandals which, throughout this period, all seemed to involve U.S.-based companies.

Of course, there were non-U.S. organizations that championed ethics and compliance during this early period as well, most notably in the U.K., Australia, Israel, South Africa, Japan and the Netherlands. There were also international initiatives, including those led by Reverend Leon Sullivan, Transparency International, and The U.N. Global Compact. But until ethics and compliance scandals began to implicate non-U.S. headquartered companies, the influence of these initiatives was limited, and the engine generating E&C momentum was largely based in the U.S.

All that changed when we crossed into the new millennium. If we look back over the last fifteen years, it is has been increasingly likely that ethics and compliance scandals occur in Rio de Janeiro or Wolfsburg, Germany rather than Houston or New York. It is interesting to speculate whether this trend is attributable to the increased interconnectedness of global business, the advance of the rule of law (especially as it pertains to combating bribery and corruption), or the scrutiny that comes from the never blinking eye of business and social media.

Whatever the reason, we now find ourselves at a time when regulatory initiatives and best practices are more likely to come from London than the U.S. (the U.S. Department of Justice's Yates Memo being perhaps the one recent exception to the rule). The center of gravity has shifted. Consider the following list of recent regulations, enforcement trends, and initiatives from outside the U.S.:

- The *U.K.'s Modern Slavery Act 2015* – which contains a provision that, with certain exceptions, organizations that do business in the U.K. must produce a statement for each financial year that sets out the steps they're taking to ensure that modern slavery and human trafficking aren't occurring in their organization or in their supply chains.

- The International Standards Organization's (ISO) *Compliance Management System Standard* (ISO 19600) – a detailed and prescriptive guideline for creating, maintaining and documenting an E&C program;

- The European Court of Justice's judgment on Safe Harbors related to privacy of personal information, which invalidated the Safe Harbor Framework , in place since 2002;

- The *Russian Federal Act on Data Protection*, which requires that personal data of Russian citizens be first processed and stored on servers located within the territory of Russia. This is only the latest in a dizzying number of data protection laws from outside the U.S, not only from E.U. countries but also from Argentina, Canada, Costa Rica, Hong Kong, India, Israel, Japan, Malaysia, Mexico, Peru, South Korea, Taiwan and Uruguay;

- And the U.K.'s recently-released Anti-Corruption Plan that highlights efforts to pull together a broad range of resources to fight bribery and corruption, including "government, civil society organisations, law enforcement and other partners."

Many of these developments have broad application and often are replicated in other jurisdictions. So, even if a particular regulation does not apply to your business, it nevertheless is important to pay attention. Here are some recommendations:

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Get help to stay informed.** The legal landscape is changing rapidly and it is important to fully understand the law in the jurisdictions where you operate. To do so, consider creating a mechanism to keep you informed and to help you anticipate, identify, prioritize and react to change. Enlist the help of local legal liaisons to keep you up-to-date. Also be sure to broaden your sources for information and best practices. If you regularly attend one or more E&C conferences, include a conference outside of your home country. If travel costs are an issue, enlist help from your in-country co-workers.

2. **Identify your organization's obligations.** It is not always easy to determine which provisions apply to your organization, but doing so is important. For instance, when setting up your helpline you'll need to know whether any country-specific data privacy regulations apply. Similarly, your code may need to be amended if you fall under the U.K. Modern Slavery Act. Likewise, you should reach out to determine whether anyone in your organization regularly deals with ISO, and, if so, whether any efforts are underway to comply with ISO 19600:2014.

3. **Keep key decision makers up-to-date.** You may be in the best position to regularly update senior leadership on E&C regulatory and best practice developments. Include this information in your regular communications and as part of your risk assessment process. But don't overdo it. Be selective and prioritize developments that are most likely to impact your organization.

4. **Work to overcome biases.** It is common to resist best practices that "aren't created here." Whether the obstacle is personal or institutional, take steps that will open you and your organization to good ideas—no matter where they come from.

5. **Develop targeted communications and training for those impacted by new regulations.** Often the most successful ways to implement such training is to involve local managers or compliance champions— both to ensure cultural resonance and local relevance as well as to demonstrate that these policies are priorities of the business, not just the E&C team.

03 Board Expectations for Ethics & Compliance Oversight Get More Specific, Uniform and Comprehensive

According to the U.S. Sentencing Guidelines for Organizations—and similar provisions found in other guidelines worldwide—an organization's governing body is responsible to "exercise reasonable oversight with respect to the implementation and effectiveness" of an E&C program. This expectation has been around as long as compliance programs, but practical guidance on what boards of directors should do to meet the standard has been incomplete at best—until recently.

In April, 2015, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) released a comprehensive set of guidelines, Practical Guidance for Health Care Governing Boards on Compliance Oversight, to help healthcare boards successfully execute oversight of their E&C programs.

While directed to healthcare boards, the OIG guidance is helpful to boards in any industry or jurisdiction. In fact, similar guidance was also released recently by the Bank of England Prudential Regulation Authority, which could signal the beginning of a global trend. Key takeaways from the new guidance are:

- Boards need to take very specific and *proactive* roles relative to their compliance oversight duties.
- Boards need to gain a better understanding of the adequacy and effectiveness of their organization's E&C programs, set the right expectations, and ask the right questions.

The guidance may be part of the broader trend to hold E&C programs—and boards—to more uniform and comprehensive standards. Regardless of what direction this trend might take, all ethics and compliance officers and boards should use this latest guidance to begin taking appropriate action now.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Use the new guidance to jump-start your board's engagement.** To help leverage the new guidance, NAVEX Global has developed questions for each of the key areas in the guidance. (See our blog article, "Real Guidance (Finally) On the Compliance Oversight Role of Boards".) The document includes 25 practical questions based on the guidance and can be an excellent tool to use at a board retreat or for board training. The document also addresses the board's role in shaping culture.

    Provide the list of questions to your board and/or senior leadership to help them think through their roles and responsibilities related to the E&C program. Offer to work with them to address the questions.

2. **Reassess your current board training.** While using the new guidance as a framework for a board retreat or training may be the ideal, for many it may be more practical to take small steps to improve existing board training. With this in mind, here are five steps to consider:

    a. If your board receives only a briefing on your company's E&C activities or if they only participate in the same training as all employees, make the case that neither approach is sufficient since neither one addresses unique board-related risk areas or the board's unique E&C responsibilities.

b. Add a discussion of E&C risk areas that pertain specifically to board members to your board training. This may include: conflicts of interest (both personal and organizational), insider trading, government and media relations, gifts and entertainment, the consequence of unintended influence, and the importance of tone at the top.

c. In addition to exploring specific risk areas, also create opportunities for board members to discuss their unique E&C responsibilities, including: setting the tone at the top, oversight of senior leadership, and managing board-related ethics and compliance violations. Help them to understand how to interpret E&C data and trends and what questions they should be asking senior leadership about the organization's commitment to ethics.

d. Develop a plan for how to "credit" board members for training they receive on other boards on which they sit. Also encourage them to share best practices from other organizations.

e. Consider utilizing the specific expertise of board members and involve them in creating or facilitating board training.

3. **Make the most of the report to the board.** Whether or not you get your own E&C section, a page, or just a paragraph in the legal or audit tab of the board report, the report can be your best chance to tell your story. Unfortunately, most of us compete for space and prestige with other functional departments such as legal, finance, operations and sales. Here are some tips to make the most of the limited space and time you're allotted:

   » **Don't assume too much.** While you may be familiar with the latest government standard or trend in E&C, don't assume the same level of expertise among your board members. They may think they know all there is to know about ethics, but that doesn't make it so. The best approach is to tread lightly and work with a trusted senior leader who can help you assess how much background information is needed—and how best to deliver it.

   » **Don't let the tail wag the dog.** It is often said that "you can only change what you can measure." Nevertheless, we need to guard against the impulse to focus too much attention on data. This impulse is especially strong with respect to helpline data, which is readily available and offers so many data points.

   But remember: if your board report is dominated by hotline/helpline data, the natural conclusion that the board will draw is that E&C is only about the helpline. While helplines are a critical element of an effective program, we know that the data represents only a fraction of all reports that are raised, and helpline calls are certainly not illustrative of overall employee concerns or behavior. Nor do they accurately reflect your organization's culture. As a result, be sure to provide detailed information on aspects of your E&C program beyond the helpline.

   » **Avoid the data dump.** While functions such as finance, sales and marketing often present data-rich reports to the boards, the temptation is to try and match them. The difference is that these functions have a long history of collecting and analyzing data and the board members are comfortable looking for trends or gaps. However, comparatively speaking, ethics and compliance is new to the table. Don't use data as a crutch. Dumping every possible data point into your board report does not make your compliance department look better.

   Data should be used to tee up or support the "why" and "how" of your overall effectiveness. Tell the board what the data means to you, what it should mean to them, and how you are using the data to move toward your strategic goals and vision. Still feel like you absolutely must share all data you can generate? That's what an appendix is for. Your biggest news for the board shouldn't be about how many people completed required training.

04 Politics Invades the Workplace

In the U.S., the 2016 election now dominates the news, social media, and many employee conversations. And for global companies, it's always election season somewhere. So now is a good time for ethics and compliance officers to address the potential risks, challenges and volatility that can arise when business and politics mix.

Not only do politics create a unique set of compliance problems ranging from campaign financing regulations, quid pro quo deals and the misuse of company resources, we also need to be prepared for the inevitable collision of political points of view that can undermine teamwork and tranquility among our employees. These conversations can and sometimes do lead to policy violations involving inappropriate or discriminatory behaviors.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Review your code of conduct and policies to make sure they're clear and up-to-date about political contributions, political activity and campaign financing.** These issues are complex and can vary from one jurisdiction to another. It is a good idea to email employees, especially senior managers, to remind them of the rules and to encourage them to ask questions if they're in doubt. This is especially important if you're a government contractor or if your company or industry is active in lobbying efforts.

2. **Lookout for shareholder resolutions expanding political spending disclosures.** In the U.S. and elsewhere, a variety of laws already require some disclosure of corporate political spending. But over the last few years shareholder activists have been pushing for additional transparency, especially concerning contributions to trade associations and social welfare groups or political parties. In an election year, the push for more transparency is likely to increase.

   While it's unlikely that you will be directly involved in monitoring or responding to shareholder resolutions, as the ethics and compliance officer you need to ensure that someone is addressing the potential risk. You need to be aware of the potential consequences if additional disclosures are made. For example, disclosure can have a significant impact on some employee opinions of the company and its leadership, and in extreme cases can lead to consumer actions and even boycotts of your business. Also watch for an uptick in helpline reports and investigations related to the disclosures.

3. **Be clear about limits on using company resources for political activities.** Most managers have no problem making the easy calls. It's not okay for an employee to use company equipment to make copies of campaign flyers. It's not okay to send emails to customers urging them to support a particular candidate. But what about some of the more nuanced issues? For example, do you allow candidates to hold a rally at your facilitiy—or take a tour with media in tow? Do you make exceptions if the rally focuses on particular issues—like healthcare, energy or defense—that are directly related to your business? It's best to get ahead of these issues in advance with well-thought-out processes, and to be prepared through communications and targeted training.

4. **Reinforce role-specific policies—particularly with senior executives.** Do you make exceptions to your code of conduct or policies if your CEO or a senior executive is a big supporter of a particular political candidate or cause? What if a senior executive hosts a fund raiser at their home and encourages peers and subordinates to attend? Does it matter if the event is off site and after hours? What constitutes inappropriate pressure? What happens to those who decline? How would you respond to a complaint from an employee who feels he is experiencing retaliation by his boss after they discussed their political preferences? And is there anything you can or should do if your CEO or a senior executive chooses to publicly support a controversial candidate? Experience has shown that such leader-driven partisan support can have a significant impact on employee morale and recruiting—and can do long-term damage to your brand and reputation.

5. **Be prepared to make the hard decisions.** No matter the strength of your code of conduct or policies, odds are that you will face challenges and unexpected situations that may require you to take an unpopular stand. In those cases, your corporate culture, guided by your code of conduct and policies, should help guide your decisions. For example, most companies prohibit employees, without clearance, from speaking on behalf of the company and publicly endorsing a candidate. But what do you do if a sales associate insists it's her right to wear a candidate's button when visiting customers? In this case, clarifying for her that wearing the button while representing the company is a violation of policies may be an unpopular stance, but it is one that you must take.

   And, while no action is necessary yet, recent debates over free speech on college campuses have begun to turn to a re-examination of academia's codes of conduct regarding provisions that broadly prohibit "offensive speech" or that seem to equate types of political speech with harassment or bullying. It's only a matter of time before someone questions similar provisions in corporate codes of conduct.

6. **Guard against political discussions that become derogatory and offensive.** While most employers allow employees to discuss politics at work, recent world events and the stances of political candidates throughout the world significantly increase the risk that employees will move from appropriate discussions into comments about race, religion and national origin that may violate your policies against harassment, discrimination and respectful treatment of others. Communicate now with your employees about the standards of behavior that you expect, and train managers how to handle situations in which employees' discussion have crossed the line. Remember, this is not just about enforcing policies, but can have a real impact on productivity, morale and employee retention.

05 The Wide World of Sports Scandals, and How They Impact Our E&C Discussions

If 2016 is anything like last year, we can count on the world of sports to provide a variety of fodder for ethics and compliance discussions. Sports scandals now rival political and business ethics scandals as the principal vehicle for public discussions of ethics. It's interesting to note however that relatively few of the recent sports-related scandals actually involve actions on the field or in the arena. While questionable on-the-field activity certainly occurs, much more attention has been paid to behavior off the field:

- Bribery and corruption by sports governing bodies – most notably the Fédération Internationale de Football Association (FIFA) and the International Association of Athletics Federation (IAAF);

- Sports-specific rules violations including allegations of doping in cycling and international track and field, the use of otherwise legal performance enhancing drugs that are banned by sports authorities, and U.S. college teams that violated a myriad of regulations governing the recruiting and academic qualifications of athletes;

- Personal transgressions including domestic violence, off-the field recreational drug use, and other destructive behavior by star athletes;

- Hooliganism, violence and racist taunts by fans; and

- Renewed attention to head injuries and possible exploitation of athletes especially in contact sports including boxing, football, American football, rugby and hockey.

KEY STEPS FOR ORGANIZATIONS TO TAKE

At first it may be hard to see what impact—if any—sports scandals have on our work as E&C professionals. But on closer examination there are several reasons why we should pay attention and steps we can take:

1. **In your E&C training and case studies, replace Ken Lay with Sepp Blatter.** Your employees are now more likely to be receptive to a compliance training case study that references FIFA's Sepp Blatter than one about Enron's Ken Lay. This is particularly true for your international locations where employees

who may have previously thought that U.S.-centric training was not applicable to them. In our recent international engagements, we've seen that employees are appalled by what has happened in their beloved sport.

Recent sports-related case studies are also especially fertile ground for bringing home the importance of culture. For example, FIFA's culture of corruption and bribe-taking stretches back 24 years and through two generations of soccer officials. FIFA's plight can be seen as a cautionary tale for all organizations. Small acts of self-dealing and enrichment, unchecked, grow into larger and more pervasive actions. Ultimately, a culture of fraud and corruption becomes entrenched.

Beyond cases studies and scandals, sports can also serve as a source of inspiration and provides examples of teamwork and the importance of preparation and focus.

2. **Don't plan any major U.S. initiatives for March or any meetings June 14-July 15, 2018.** No matter what industry you're in, or where in the world you're located, sports already affect your business. Sponsorships and charitable events may result in conflicts of interest, sporting events are a major source of gift and entertainment violations and participation in fantasy sports consumes your IT bandwidth (and may violate your policies against gambling at work). Like it or not, sports is already an E&C issue for you. And it is estimated that every March, Americans spend nearly 700 million hours watching the college basketball championship games—many of which are during work hours—resulting in annual losses of $1.9 billion due to distracted and unproductive workers. Fortunately for productivity, the World Cup only happens once every four years.

06 Working With HR – Time to Try Again

It's been said that no corporate function has the opportunity to contact more employees more often than Human Resources. Recruiting, hiring, on-boarding, performance reviews, promotions, investigations, discipline, reorganizations, terminations and exit interviews—this is the life cycle of employment and HR is there at every major milestone. In addition, HR is often the primary channel for reporting E&C concerns. It is a source for advice and employee assistance, a developer and deliverer of training, the keeper of surveys and the author of key policies.

This is why, twenty-four years ago, The U.S. Sentencing Guidelines for Organizations emphasized the importance of the HR function in creating and maintaining an effective compliance program. The 2004 revisions to the Guidelines went further. By emphasizing the importance of organizational culture, the revised Guidelines gave even greater prominence to the importance of HR.

In spite of the inescapable logic that HR must be a key player in E&C, progress towards cooperation has been uneven at best. Although there are best practice examples, in too many organizations coordination between the HR and E&C function is strained by duplication of efforts and inefficiencies, fear that confidential employee information will not remain confidential and turf battles (perhaps most clearly demonstrated by "who should receive HR reports for investigation" and tensions around the periodic all-employee surveys). Given the benefits that can result from cooperation, it is well worth the effort of any ethics and compliance officer to look for more ways to work with HR.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **First things first.** Hopefully the first item on your list isn't something like "bury the hatchet." But if it is, then this needs to be your first priority. A good place to start is to cooperate on a project where agreement is likely. For example, an update of your code of conduct or working together on a philanthropic or community engagement initiative. And work on the personal relationship by scheduling routine coffee or lunch dates with the head of HR.

2. **Build trust.** If there is a lack of trust between E&C and HR—for example, if there are accusations that confidential information is too often leaked—first look at your own behaviors to determine if you are sending signals that reinforce this fear. Ask a trusted colleague to give you input on the matter and work on changing any necessary personal conduct. If necessary, encourage your HR colleagues to do the same.

3. **Recruiting and onboarding.** As an ethics and compliance officer, you may be surprised at what is and is not said about E&C during recruiting and on-boarding. But remember, if you're dissatisfied with the content or delivery of the E&C message, rather than criticize, a more constructive approach will be to volunteer resources to help improve the material and the process—and then to help deliver the message.

4. **Get on the same page with communications and training.** Working with your HR colleagues to coordinate a communications and training plan may be the single most important step to improve E&C relations with HR. Work together, and with other stakeholder departments such as Learning & Development, to develop a two to three-year plan that takes into consideration the risks, roles and responsibilities of various employee groups. Determine accountabilities and, if possible, identify training topics where E&C and HR can jointly present or work as a team to develop content.

5. **Track all the channels used by your employees for reporting.** Capturing reports through a variety of intake methods can encourage more reporters to come forward and provide a more complete picture of risks in your organization. Our 2015 Ethics & Compliance Hotline Benchmark Report indicates that just over 50% of reports typically come through a combination of the E&C helpline and web submissions, but an almost equal amount come through other methods including E&C office walk-ins, email, direct mail, fax and manager submissions). Unfortunately this data does not capture—and most organizations don't know—the full extent of contacts received by HR. Creation of a unified intake system that not only captures reports through all channels but uses a consistent methodology for categorizing and managing the contacts is the ultimate goal.

6. **Work with HR to incorporate E&C standards into performance management processes.** For many companies with mature E&C programs, the final step in full implementation is to identify key performance indicators (KPIs) for E&C and to make them part of the performance management planning and review process so that employees understand that management takes "walking the talk" seriously.

7. **Ensure consistent discipline.** The E&C Office usually only has an advisory or tangential role to play in employee discipline. But employee opinion about discipline, especially whether or not it is consistent, is a critical element that shapes organizational culture. For this reason, E&C has a responsibility to work with HR and others to ensure that discipline is consistent and documented.

8. **Get over it.** It has been over 25 years now. We have to get over the turf battles and recognize that both HR and E&C are working for organizations where both groups are accountable for dealing with employee concerns—receiving them, responding to them, investigating them, recommending consistent discipline and communicating about them. It is time to work together as partners rather than adversaries. Regulators investigating wrongdoing will have little sympathy for internal turf battles. Frankly, senior leadership is tired of it, too. Credibility of both departments is diminished when we can't get along.

There are many other opportunities for working with HR and improving E&C efficiencies, including making the most of exit interviews to mine for E&C weaknesses and problem areas. The key takeaway for the coming year is to determine where opportunities for progress and cooperation exist in your organization, and to get busy building bridges.

07 Renewed Focus On Boosting Whistleblower Rights and Squashing Retaliation

No list of ethics and compliance trends and issues could be complete without addressing the latest developments pertaining to whistleblowers and retaliation. This year we note two legal developments that bear watching.

The U.S. Occupational Safety and Health Administration (OSHA) recently released draft guidelines designed to help organizations design effective programs to protect whistleblower rights. (For more, see our blog article, "Achieving Greater Whistleblower Protection: New OSHA Best Practices for Whistleblower Compliance Programs" from November 11, 2015.) After a comment period, some or all of the guidelines may become formal OSHA standards for whistleblower protection.

The guidelines begin with themes that will be familiar to any ethics and compliance office: the importance of leadership's commitment to E&C and the need to build and maintain a "speak up culture." The guidelines, however, then go on to discuss three additional recommendations:

- **Implement a retaliation response system.** An effective retaliation response system should include an independent complaint review process and an independent reporting line that can reach the employer's board or oversight body, if necessary.
- **Conduct anti-retaliation compliance training.** Employers should provide training to senior leadership and managers on what constitutes protected activity and what is retaliation so that everyone understands their role when an issue is raised.
- **Monitoring and independent auditing.** Accountability systems that reward management for low reported numbers of claims (in the safety area, for example) can prevent issues which could help organizational integrity, performance or safety from being addressed. Incentives should instead reward behavior which supports employees' right to come forward with concerns.

In September 2015, in a two-to-one decision, (Berman v. Neo@Ogilvy LLC), a U.S. federal court agreed with the U.S. Securities and Exchange Commission's (SEC) interpretation of "whistleblower." The court decided that an individual's internal company complaint was sufficient for the individual to be covered by whistleblower protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Other courts had ruled that in order to be entitled to Dodd-Frank protection the complaint needed to be filed with the SEC. The case may be appealed to the U.S. Supreme Court. If the ruling stands, it would signal a dramatic widening of whistleblower protections.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Review and comment on the new OSHA guidelines.** Ethics and compliance officers should review the draft OSHA guidelines and consider submitting public comments (here).

   In addition, organizations should take steps to be prepared for the likelihood that the guidelines will be finalized in the coming year. Acting now will help you stay ahead of the curve and avoid liability in the future. With this in mind, we recommend the following steps.

2. **Implement a retaliation response system.** Such a system should include the following elements:

   » A publicized system with multiple avenues for reporting retaliation, including the helpline. Too often, organizations do not make it clear that the helpline is not just for initial reports but is also a resource to report subsequent retaliation.

   » In addition to the helpline, consider creating a separate channel for those who need to report retaliation pertaining to high-stakes issues, such as those implicating senior leadership.

   » To help build trust in the process, include information in your communications and training that explains how investigations are conducted, and take steps to ensure that investigations not only are independent but are *perceived* by employees as being truly independent.

> » An independent process should be created to review any proposed discipline to a whistleblower to ensure that the discipline is warranted and cannot be perceived as retaliatory. And, when a formal complaint of retaliation has been filed, an objective, independent assessment should be conducted.

> » Consider appointing someone as a resource for employees who have raised a concern and who may be more susceptible to retaliation. This resource would be available to support the employee during the investigation process and after.

3. **Develop anti-retaliation training.** This training should be targeted to all managers and others who have a role to play in the incident reporting and investigation process. The training should cover these topics:

> » What constitutes retaliation—including common but less overt behaviors such as peer pressure, ostracizing, mocking and exclusion from meetings. (You should also consider adding this component of the training to communications and training for all employees.)

> » An update on relevant laws, rights of employees, risks and the consequences of not responding appropriately.

> » How to respond to a report of an issue without engaging in or appearing to engage in retaliation.

> » Skills for defusing, problem solving and stopping retaliation in a work group.

> » Information on the organization's anti-retaliation system.

08 Getting Serious About Anti-Bribery and Corruption Efforts and Third-Party Risk Management

By now, most organizations understand the importance of identifying and addressing any exposure they have to violations of anti-corruption and bribery (ABC) laws. Much attention has been given to recent cases, and to enforcement of the U.S. Foreign Corrupt Practices Act (FCPA) and the U.K.'s Bribery Act. In a recent speech by Ben Morgan, Joint Head of the U.K. Serious Fraud Office Bribery and Corruption Unit, he urged companies to voluntarily come forward now with any information they have about past corrupt practices—or face the full force of his office later. This certainly underscores the need to make this issue a priority.

For those who may still think that concerns about ABC risks are exaggerated, consider the findings of the 2015 KPMG survey on the topic. Its findings, based on a survey of 659 risk managers, include several key points:

- Compared with a KPMG survey four years ago, there was a sharp increase in the proportion of respondents who say they are highly challenged by the issue of ABC.

- As companies continue to globalize, management of third parties poses the greatest challenge in executing ABC programs.

- Despite the difficulty of monitoring their business dealings with third parties, more than one third of respondents do not formally identify high-risk third parties. More than half of those respondents with right-to-audit clauses over third parties have not exercised the right.

- ABC considerations are accorded too low a priority by companies preparing to acquire, or merge with, other corporations across borders.

- Respondents complain they lack the resources to manage ABC risk.

- A top-down risk assessment would help companies set priorities, but executives admit that an ABC risk assessment is one of their companies' top challenges.

These findings demonstrate the critical need for companies to identify and address ABC risks and the roles third parties play in these risks. It is often daunting or overwhelming for companies to develop and undertake a program, yet doing nothing is not an acceptable defense.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Conduct a robust corporate risk assessment.** Your risk assessment should not only identify key risk areas, but also cite plans to mitigate or reduce the risks to acceptable levels. The process should involve document reviews, surveys and interviews with subject matter experts and compliance stakeholders to evaluate the likelihood, magnitude and mitigating controls of various risks.

2. **Review your ABC mitigation plan for completeness.** The mitigation steps that you develop based on your risk assessment should be organized into an efficient ABC program. This is not separate from your overall E&C program, but is a plan that describes how various E&C controls and resources are being deployed to address the ABC risks.

   In 2012 the U.S. Department of Justice and U.S. Securities and Exchange Commission published a useful tool to evaluate the completeness of your ABC efforts. It can be found at: A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA Guide).

3. **Identify and address your company's third-party risks.** This is often the most challenging step to take. There are often hundreds or even thousands of third parties considered or engaged by companies for both routine and episodic roles. Though challenging, an ABC mitigation plan isn't complete unless it tackles third-party exposure. The FCPA Guide suggests that every compliance program should address the following guiding principles:

   » As part of risk-based due diligence, understand the qualifications and associates of the organization's third parties. Scrutiny should increase as "red flags" surface.

   » Companies should understand the business rationale for including a third party in the transaction.

   » Companies should undertake some form of ongoing monitoring of third party relationships.

   » The company should inform the third party of the company's compliance program and commitment to ethical and lawful business practices.

4. **Create or update written policies and procedures to address these risks—particularly the highest risks.** The best practice is to utilize policy management software to assist in this process. A centralized database should be easily accessible to users, regularly updated, and confirm and track applicable policy updates, training and investigations.

There is no need to boil the ocean—but you must turn on the stove. You can't ignore third-party challenges because they seem insurmountable. The best way to address many of these concerns is to devise a plan to implement changes in demonstrable stages—and determine how technology can help you create significantly stronger third-party due diligence and risk assessment programs, while making them more efficient and defensible.

09 Cynicism, Fatigue and Compliance Pushback—A Problem We Can No Longer Ignore

You may have already seen the signs of employee cynicism, fatigue or compliance pushback at your organization. Its presence is often indicated by little things. Over the years, some of these signs have become so common we've given them names:

- **The silent elevator.** The all-too common experience of ethics and compliance officers when they enter a room, or an elevator, and conversation stops.

- **The eye roll.** The expression we've seen from employees during live training or focus groups that says: "here we go again," "they've got to be kidding," or "I'm missing work for this?"

- **The snicker or harrumph.** Similar to the eye roll, this is a quick and barely audible reaction by employees as they listen to leaders deliver what are perceived to be insincere messages about ethics and values.

Sometimes we describe the phenomenon as survey, training or compliance fatigue. And it's not just line employees who exhibit it. It is just as likely to be leaders who lack engagement and seem to be going through the motions when it comes to E&C.

The anecdotal evidence of compliance pushback is now supported by surveys. In NAVEX Global's Ethics and Compliance Training Survey, thirty-seven percent of respondents thought employee cynicism was the top threat to the effectiveness of their E&C training programs.

Over the years, NAVEX Global's Advisory Services team has seen evidence of this attitude—even in companies with mature E&C programs. We've led more than 1,300 in-person focus groups with employees at all levels, in many countries and from every industry, and we've heard candid comments about what employees really think about leadership, training, codes and surveys.

Ethics and compliance officers have most often recognized the consequences of compliance pushback with respect to training and communications, but it also impacts other E&C initiatives. For example, while we usually ascribe low helpline call volume to employee belief that "nothing will get done" or a fear of retaliation, we've also heard evidence that suggests it may be in part be a reaction to E&C efforts that have gone too far or lost perspective. As one employee noted: "No, I'm not worried about retaliation…I don't call [the helpline] because so many of these rules are just 'gotchas.' I'm not going to get all involved and get someone fired over a [expletive] gift basket."

While it's safe to say that these sentiments are not held by a majority of employees, they do reflect the views of a significant minority. Left unchecked, they can erode even your best efforts.

KEY STEPS FOR ORGANIZATIONS TO TAKE

1. **Don't assume "it can't happen here."** Remember that one element of this corrosive attitude is that it fosters disengagement. Some employees who are cynical will tell you so, but others would rather just go along and try to minimize interaction with your office. For this reason, it's easy to underestimate the depth of the problem. Long term, the best solution to get a true assessment of your organizational culture is to first build credibility and trust. Only then are you likely to gain the needed access and insights. But in the short term, you'll need to rely on colleagues who may be in a better position than you are to take the true pulse of your organization.

2. **Focus on leadership at all levels.** Often leaders do not realize the impact their behavior can have on shaping organizational culture. An offhand remark or a dismissive attitude can speak volumes and can supply justification to employees who are already inclined to push back. On the other hand, active participation and engagement by managers helps demonstrate the organization's commitment to E&C. Helping managers to understand the influence they exert and to avoid sending the wrong message is a good first step.

   But sometimes the problem is deeper than just inadvertent statements. In the NAVEX Global 2015 training survey, thirty-four percent said mid-managers do not display desired compliance behavior, which employees take as permission to do the same things. Holding managers consistently accountable requires support from the top, and is a key element in setting the right tone.

   Also, be aware of who you employ to deliver the E&C message. While your options and leverage may be limited, be aware that if your message is delivered by a senior leader or manager who is known to be "ethically challenged," you are throwing gasoline on the fire of cynicism. Do what you can to select spokespersons who are credible.

3. **Start with the most egregious sources that fuel cynicism and compliance pushback.** Our experience has shown that there are four common sources contributing to the problem:

   » **Insincerity.** Employees can spot insincerity a mile away. As noted above, you need to pay attention to who is delivering your E&C message. But just as important, watch out for content that is too far removed from reality. If your organization has had compliance lapses, it's best to address them in a frank and honest way. Value statements are a common way to express foundational principles, but they must be grounded in your organization's actual culture and should be articulated and developed from the ground up.

   » **Wasting employees' time.** Nothing frustrates employees more than training, emails, surveys and meetings that are not relevant to their work, start late, or are perceived to be unnecessary. In the coming year, if you do nothing else to address cynicism, vow to be more respectful of employees' valuable time. Develop a multiyear E&C communications and training plan that will help you target your training and communications to specific roles and responsibilities—and don't be afraid of using your red pen. Edit your training and communications. Short and simple is best.

   » **Inconsistency.** Employees often believe that rules are inconsistently applied. You need to make it a priority to demonstrate consistent discipline. Don't worry too much about the limitations of publishing or announcing personnel decisions. If top producers and leaders are disciplined for ethics transgressions in the same ways that others would be, word will get around.

   » **Lack of transparency.** When employees see E&C in action, they understand that their organization takes E&C seriously. This may be as simple as thanking employees for reporting issues and letting them know the investigation is closed, or—the most transparent option—publishing summaries of E&C issues and their resolutions. (See our blog article "[That Really Happened? Using Sanitized Cases to Make Ethics & Compliance Concepts Real](#)")

4. **Long-term: Reposition the E&C office as a strategic risk management ally, not just the people who say no.** One of the underlying sources of compliance pushback is the opinion that E&C officers and the E&C office are not aligned with the organization's business goals but are instead a "necessary evil," a "CYA" function, or the people who say no. Rebranding your office as a positive contributor to the business and a key part of the management team is a long term goal, but moving in that direction will pay immediate dividends. Begin with small steps. For example, meet with key managers and ask them how your office can help them meet their goals and solicit their suggestions on ways to collaborate and improve efficiency and effectiveness. Focus discussions on risk identification and management strategy. Talk less about the U.S. Sentencing Guidelines and more about operational effectiveness.

The growth of cynicism is not entirely within our power to control. Employee cynicism and the resulting compliance pushback is part of a much broader public frustration on many fronts. In particular, we may be seeing signs that public support for business ethics is slipping. Thirty years have passed since the creation of the first E&C programs and many doubt that there has been much progress.

In the coming year, as a profession we need to pay more attention to the public sentiment and ensure their support of what we do. Those of you who are members of ethics and compliance member associations should consider encouraging associations to do more outreach to publications and media beyond those that typically serve our industry.

10 Expanding the Scope of E&C: Is This the Year for Pushing Boundaries and Increasing Authority?

In recent years, questions have been raised—both in the industry and by employees and leadership teams in organizations—about whether the scope of our E&C programs has become too narrowly focused. Cyber security, sustainability, marketing, advertising, philanthropy, human rights, and community engagement are all high-profile areas with clear ethics and compliance components that are too often viewed as being beyond our job descriptions. And yet ethics and compliance lapses in these areas can have significant ramifications for our organizations.

Fundamentally, one of the key goals of any E&C program should be to protect the organization's reputation. Seen in this light, our tendency to focus on a short-list of risk areas (gifts and entertainment, conflicts of interest, harassment and anti-corruption) seems woefully inadequate to address the broad range of ethical challenges our organizations now face. We also undermine our credibility when our priorities don't align with the business ethics issues that are top-of-mind of the public and our employees.

Expanding our authority and responsibilities into these and other areas is a long-term goal beyond 2016, and the advantages need to be carefully weighed against the risks—including turf battles and adding more to our to-do lists without a commensurate increase in budget and resources. But in the short-term, it is certainly a good idea to look for opportunities to push the boundaries of our programs and our reach.

KEY STEPS FOR ORGANIZATIONS TO TAKE

Begin by looking for areas that may be just beyond your purview but where a strong case can be made for your involvement. For example:

1. **Start with the organization's risk assessments.** If your organization has taken the time and resources to conduct an ethics, compliance and reputational risk assessment, and/or a full enterprise risk assessment, it has already highlighted the areas of most concern to leaders and subject matter experts. Understand what these are and find ways to use your established systems and processes to help the organization address the broader risk profile where appropriate.

2. **Pay attention to advertising, marketing and your values.** Be proactive and look for opportunities to discuss the extent to which your organization's values are taken into consideration when advertising and marketing campaigns are designed. In one company we know of, the disconnect between marketing and ethics was so stark that the organization found itself surprised by an unexpected firestorm of criticism from their own employees, as well as a threatened consumer boycott. At the heart of the crisis was an ad campaign that many viewed as sexist and contrary to the company's stated position on respect and gender issues.

3. **Ask questions about who owns key risks areas.** Other risk areas that lie just outside of most ethics officers comfort zone but can have compliance and reputational repercussions include: cyber security, mergers and acquisitions, expansion into countries with high levels of corruption, product development, and customer privacy. At the very least, it's important for you to determine if someone in your organization is on top of these risk areas and confirm that related E&C issues have been identified and addressed.

4. **Find common ground.** Many organizations have a separate, dedicated resource addressing corporate social responsibility, sustainability and human rights. There is much common ground here and it is in everyone's best interest to coordinate efforts. Begin with the clearest areas of overlap: if your E&C program emphasizes respect, diversity and equal opportunities, this can dovetail nicely with your commitment to human rights. Similarly, your E&C standards pertaining to civic engagement and conflicts of interest likely overlap with broader issues pertaining to community engagement and philanthropy.

CONCLUSION

At NAVEX Global, we rely on the insights we gain from research and ongoing discussions with our 12,500 clients—the largest ethics and compliance community in the world. Throughout the year, we will continue to provide thought leadership, facilitate open dialog, and encourage the sharing of best practices to grow and strengthen the ethics and compliance function. Our experience demonstrates that the best insight and the most valuable advice comes from working with clients to solve their day-to-day challenges.

In the year ahead, we encourage you to join the conversation. Give us your feedback to this white paper. Subscribe to our blog, Ethics & Compliance Matters™. Participate in our webinars. Visit with us at conferences. Join our email and newsletter lists. And let us know what you see as emerging trends and challenges—and how we can help.

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Learn more about the NAVEX Global Advisory Services team here.

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