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RILEY SAFER
HOLMES & CANCELILA LLP
rshc

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riskandcompliance@financierworldwide.com
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PERSPECTIVES

DE-RISKING EXECUTIVES FROM PERSONAL LIABILITY FOR COMPLIANCE FAILURES

BY **DAVID H. RESNICOFF**

> RILEY SAFER HOLMES & CANCELIA LLP

Corporate executives have never been at higher personal risk due to compliance failures within their organisations. This includes risk of job loss, reputation and career damage, compensation claw back, and, most significantly, civil and even criminal liability. Boards and executive teams are quick to dismiss otherwise highly-performing executives who preside over business units in which misconduct – real or suspected – has occurred. Political institutions howl for personal accountability in the face of corporate scandal. And now more than ever, prosecutors are focused hard on bringing cases against individuals.

To this end, in 2015, the US Department of Justice's (DOJ) 'Yates Memorandum' sharpened existing DOJ policy by directing criminal and civil prosecutors to focus from the beginning of each case on identifying and prosecuting executives responsible for and involved in corporate misconduct. Companies are not eligible for "cooperation" credit unless they investigate and turn over to prosecutors all information in their possession concerning individuals involved in alleged misconduct. So even as companies defend themselves – defences which are typically predicated on the argument that no violation has been committed – they are incentivised to investigate and turn over information on their own executives in order to cut favourable deals for

conduct they may not consider to be unlawful. And then, to resolve a matter with a corporate defendant, DOJ prosecutors must have a written plan to either bring cases against involved executives, or justify in writing why they are not bringing charges against individuals.

At the same time, in the nearly two decades since the compliance disasters of Enron, WorldCom and Tyco accelerated the corporate compliance revolution, boards, general counsels and compliance officers have focused on building corporate compliance programmes. To various degrees they have built compliance programmes to minimise the risk of systemic misconduct and to build a record of their corporate bona fides should the wheels come off, as they often do. But even where a company has an elite compliance programme, that same programme may not be a defence to an individual executive should there be a question of misconduct within their business.

So what of executives individually? What, if anything, is being done to minimise the personal risk to them of compliance failures? Who, if anyone, is taking steps to insulate them from the perils of an aggressive prosecution? In most cases, the answer to these questions is clear: nothing and no one.

Of course, nothing will insulate executives from liability in cases of wilful misconduct or deliberate

ignorance of egregious violations. But in close cases involving alleged violations of either complex regulatory regimes, or conversely, legal regimes with little regulatory guidance, the good news is that there are rather simple, concrete steps individual



executives can take to build a personal record demonstrating their efforts to run their businesses in a lawful way.

When embedded in their day-to-day operations, and memorialised, these activities can support powerful arguments against prosecution in close cases and will likely go far towards protecting executives' careers, reputations, assets and even freedom. To this end, below are a few suggestions for the proactive executive who believes that the best defence is often a good offense.

Know your business model and its risks. Take time to understand your business model and your regulatory responsibilities. This includes your product characteristics, regulatory profile, channels to market and sales model. Identify and evaluate regulatory touches and enforcement risks. Ask about risk reduction and remediation efforts and obtain satisfactory answers. Institute standing, periodic reviews, consisting of risk self-identification and outside legal review. When necessary, adjust the business model, or build systemic safeguards, that minimise the risk of misconduct.

Promote an open culture. Create an environment in which employees feel secure they can ask hard questions and raise concerns about business issues as well as compliance. Ensure there is zero fear of retaliation or penalty for raising issues. This increases

the probability of catching issues before they become systemic problems and rooting out ongoing concerns. The correlation of serious compliance failures to businesses with closed environments and a fear of retaliation is exceedingly high.

Promote a culture of compliance. Take affirmative steps to promote a culture of compliance within

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your organisation. Try visibly promoting the existing corporate compliance programme or create periodic, 'home-baked' communications setting expectations and promoting discussions of compliance issues. For example: (i) put a compliance discussion on the agenda of every staff meeting; (ii) task team members to present on compliance challenges they have faced and resolved; (iii) invite a compliance presentation by in-house counsel or compliance; (iv) task subordinate management with doing the same with their teams; and (v) publicise compliance challenges and their resolution as they arise.

Incentivise employees to drive compliance. Ensure decisions on employee evaluation, compensation and promotion consider and reward employees who perform their compliance responsibilities well. Penalise employees who do not. At the end of the day, employees typically respond to economic incentives and these tools are often overlooked.

Empower legal and compliance. Visibly support and empower your legal and compliance professionals. Make sure they are 'at the table' to spot issues and have a valued voice. Take a lawyer to lunch and ask them about their perception of risk.

Seek guidance and take it. Very few people wind up indicted, let alone convicted, who make an effort to bring the right resources to the table to identify risks and solve difficult problems and then accept the advice. Find strength – and cover – in numbers and expertise.

Training. Promote and facilitate training of employees on risks and mitigation strategies. Ensure everyone is operating with the same baseline knowledge. Make it clear you have completed your training and reference key principles in the course of your activities.

Field allegations of misconduct cleanly. When allegations of misconduct arise, ensure they are evaluated and investigated proportionately by an independent and competent in-house or outside resource. Not every allegation warrants a global investigation. But do what is necessary to resolve the complaint, address root cause and take disciplinary

steps. Is the allegation corroborated? Is it systemic? Can you justify decisions on the scope and resources devoted to it in light of the seriousness of the allegations and existing evidence? If there is an issue, is discipline proportionate, and has root cause been identified and remediated? Nothing encourages prosecutors to pursue a case like an insufficient or botched internal investigation.

Monitor, audit, evaluate and mitigate. Invite and demand a review of your business. Demonstrate the courage to withstand scrutiny and the perseverance to mitigate. Also, implement a continuous improvement loop.

Memorialise. Create an annual plan of compliance activities, and keep a record of accomplishments and ad hoc efforts. Put it in a notebook, make a copy and put it in a safe place for a rainy day. It would be too much to expect most executives to implement all suggestions at once. But the chances are that executives who implement even a few of them, and keep a record of their earnest efforts to run a compliant business, will sleep better. Not only will the risk of a serious compliance failure be lower, but should the government come calling, they will have an impressive and rather unique story to tell. **RC**



David H. Resnicoff

Partner

Riley Safer Holmes & Cancila LLP

T: +1 (312) 471 8785

E: dresnicoff@rshc-law.com