

Implementing Compliance Programs in a Consensus Culture

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Growth of “Mandatory” Compliance Requirements

Since the publication of the US Federal Sentencing Guidelines in 1991, there has been a growing belief that compliance programs for public companies are “mandatory.” Boards of Directors, Audit Committees, regulators and shareholder activist groups have been making it clear that management is charged with the adoption and maintenance of adequate compliance systems and controls.

This clarity of purpose around compliance gained momentum following the tragic incident in the US on September 11, 2001. Since that time there has been added awareness in the US of the globalization of the nation’s economy and growing concern about protection of borders and sensitive technology. This has given rise to increased regulation of people and data, not only in the US but around the world. There has also been an insistence by an expanding number of governments that rules of economic fairness be adopted and enforced, and hence, a mounting emphasis on efforts to combat corruption and to mandate further transparency and disclosure of business tactics. This sensitivity has been heightened with respect to emerging markets such as the so-called BRIC countries (Brazil, Russia, India and China).

As a result, compliance projects and programs are needed for every public company in such areas as data protection and privacy, trade compliance, Codes of Conduct and anti-corruption –in addition to required overarching programs such as Sarbanes-Oxley and other regulatory regimens for particular industries such as financial services and healthcare. While some of these compliance requirements like export/import regulations and the US Foreign Corrupt Practices Act have been in existence for decades, more recent legislation and emphasis on enforcement by regulators has put an increased premium on installing a program *before* a problem occurs. However, the fact that compliance may be seen today as a necessary element for every public company does not make it easy to implement.

Unfortunately, building support for the compliance program, and maintaining it after implementation, may take a high degree of attention and persistence. This is especially true because of a contemporary leadership and management style, called “consensus management,” that makes this task even more difficult. It is the purpose of this article to discuss the challenges arising from consensus management, and to suggest a thoughtful approach to address and overcome these challenges when implementing compliance initiatives. A methodology incorporating the following five steps will best enable the building and maintaining of that consensus and support: (1) Assessment, (2) Planning, (3) Implementation, (4) Audit and Measurement, and (5) Organizational Change Management. Each of these steps plays an important part in the overall effort.

Accountability for Adequate Compliance Programs

A company's general counsel and compliance officer are often among those held accountable when a compliance problem occurs. If adequate efforts were not made to anticipate the problem by installing an appropriate program, then the regulators and perhaps even the Board of Directors will aim their criticism directly at these individuals. I have been in Board rooms when questions are directed squarely at the general counsel as to the problems that have arisen while other members of executive management in the room sit by and quietly observe. At times the compliance efforts that are suddenly expected are the very ones for which budgets could not be found previously or executive support could not be mustered. It may have been the lack of sufficient support at or near the top of the organization that helped create this uncomfortable situation.

Even with the full support of the CEO, it can be difficult to implement a so-called "mandatory" program because of the culture of the organization. This can be particularly true where the compliance efforts are prophylactic, as opposed to remediating a problem that has actually occurred. The general counsel or compliance officer may incorrectly assume that since the program is mandatory, there is no need for careful planning and consideration of the company's culture prior to moving swiftly to implement the program. This urge to leap to implementation can come in part from putting too much emphasis on the recognition that budgets for such efforts are typically constrained.

Compliance Programs Need Broad Support

Today it is hugely important to the well-being of the company, not to mention the job security of the general counsel and the compliance officer, that the efforts to design and implement the compliance program are done in a way to capture both executive support and that of other important constituencies within the organization. The Board, the Audit Committee and the internal audit leadership should be enlisted from the beginning to create the business case that will attract and maintain that support. Creating a program that can be implemented "on time" and "on budget" may seem to be a crucial element for the job security of both the general counsel and the compliance team. However, building support for the program as part of a thoughtful planning process is fundamental to their success in the long run.

Consensus management has made creating and maintaining the necessary support more difficult. The natural outcome of this management style on the company and its employees is a "consensus culture," which defines the way that individuals in the company influence each other and interrelate.

Emergence of Consensus Management and Culture

A consensus culture is characterized by true "group think." It requires buy-in by the entire team to create a valid decision for the organization. The lack of a sufficient ingredient of authoritarian leadership in a culture creates a potential problem for anyone creating new processes, because any organizational style without some amount of definitive leadership and direction is bound to experience some false starts and failures along the way.

Consider the recent instance of Marissa Mayer, the new CEO of Yahoo. She caused a directive to be issued to the Yahoo workforce summarily ending the work-from-home alternative that had been chosen by numerous Yahoo employees. Ms. Mayer summoned them all back to the physical office space provided by the company. No more working from home. While this directive received push-back from many sectors of the business community primarily for not being fair to working moms nor in the directional trend affecting the US workforce as a whole, it was also challenged by many as being out-of-sync with the leadership style being evidenced by other CEOs. It was just too authoritarian. It did not involve the Yahoo team in crafting a solution for the problem the CEO had identified.

According to this concept of consensus, everyone in the organization who is affected by a decision—every stakeholder—has the right not only to be heard, but to be part of the solution. And in today's consensus organization, every such stakeholder carries with him a potential veto of the proposed solution, even if that solution is acceptable to the rest of the team.

Challenges of Consensus Management and Culture

Does consensus mean unanimity? Some dictionary definitions might suggest this. Unanimity is a difficult standard under any circumstances. In some consensus organizations—whether they be families or companies—unanimity is indeed required, particularly where little authoritarian leadership is exhibited.

Here are some examples that illustrate a few of the symptoms and challenges stemming from the existence of a consensus culture in an organization.

One might hear of strategies such as “expose rather than impose.” This is a symptom of consensus culture. The leader takes a position that he or she does not impose in a dictatorial way but rather exposes the group to suggestions which the group is required to process and agree upon. If agreement is not reached, the subject of the discussion may simply be abandoned. Under these rules of engagement, it is often difficult for a group to emerge from a single meeting with a clear decision. This “downward empowerment” of the team by the nominal leader thrusts upon it a need to function exceedingly well and in a collaborative way.

Introducing new people to the team can be a significant challenge. New players can easily believe that they have been charged with moving forward some strategy or program that is being mandated by their superiors. The new players can fail without careful handholding and shepherding. I have seen a number of them make presentations to meetings of senior team members where their proposals have been given a lukewarm reception, thereby crushing their spirits. They did not realize that while they may have expertise in a given area, they have not been given *carte blanche* to impose their thoughts or proposals on the team. They have to “expose not impose.” Many of them do not comprehend this principle, and are not able to work under these cultural rules.

The use of outside consultants to create a company strategy may prove to be similarly problematic in this culture. I have seen and heard of instances where the recommendations of outside consultants were given short shrift by some of the company leadership team, in large part because that team had not been involved deeply enough in developing the strategies and proposals being suggested by the consultants.

A Case of Consensus Culture

Here is an actual case in point where a consensus culture proved to be challenging. Some years ago I was in charge of the human resources (HR) organization within my company. I made two proposals for changes in the HR organization to the executive body of the company and sought approval of the proposals. Both proposals received unanimous support. Since I was aware of the consensus style being created at that time in the company, I requested another meeting with that same executive body but with the addition of several individuals at the next level down in the organization.

The second meeting lasted only a few minutes. At the outset, two of the new attendees objected to my proposals. Nobody in the room acknowledged that the proposals had already been approved by the executive body that was supposed to be the decision-making group. I mistakenly thought that a meeting where these next-level-down executives heard their bosses back my proposals would go a long way toward aligning everyone in full support.

What actually happened was that the new attendees intervened to destroy the previous consensus for the proposals. These new attendees had been empowered through the silence of the executive body, including most specifically their bosses, to veto my proposals.

What did this experience indicate to me about the process of building a consensus in this kind of company culture? First, I learned that unless all of the team members were participating in the process of creating consensus, no group decision or consensus could be relied upon as being valid or final.

Second, I learned that any meeting of a decision-making group should be preceded by individual discussions with each of the affected parties. Following that frustrating experience, I would work diligently to identify all of those interested or affected, and would prepare a plan to gain a true consensus before proceeding with any proposal or project.

Building a Consensus

Creating consensus and support is an art, and takes skill and leadership. It is a necessary skill in a company with consensus management or some semblance of it. It is required even for projects, like compliance initiatives, that seem to be “mandatory.”

Building a consensus has been described as “essentially mediation of a conflict.” * It is “not a process for determining whose ideas are best but searching together for the best solution for the group.”** The group we are talking about is comprised of “stakeholders.” These are individuals or collections of people who are affected by or have a significant interest in the outcome of the decision or the project. Stakeholders include those working on a project or whose jobs are impacted by the project. However, the concept of stakeholder goes much further and includes those who are somewhat removed from the scene such as the Board of Directors, some or all customers and suppliers, or even government regulatory bodies.

Building a consensus for a change, such as a compliance initiative, needs a leader or facilitator, or maybe even a group of facilitators. The process for building the consensus moves through various possible steps like these: (1) identification of the stakeholders and stakeholder groups, (2) creation of a straw-man proposal for consideration by the stakeholders, (3) iterative evaluation of the proposal, (4) identification of alternatives to some or all of the proposal’s elements, (5) mediation among the stakeholders as to which elements to modify and which alternatives to select, and (6) finalization and publication of the proposal in its ultimate form.

As one might suspect, the expertise of the leader/facilitator for this process is crucial to its success, and unless the finalization and publication process is completed properly and collaboratively, the consensus call easily fall apart. This is why the consensus management approach without a touch of authoritarian leadership makes decision-making and acceptance by the entire team so elusive.

A Lesson Learned

Several years after my learning experience with my HR proposals, I found myself living in Europe on assignment for my company. My mission was to build consensus and support for the implementation of a shared services program. The point of this program was to organize a single back office organization to include functions such as administrative services, information technology infrastructure, financial services and other similar operations that would service multiple business units.

A few of the European stakeholders had misgivings about this program and attempted to block its progress. I tried numerous methods to build support, but nothing seemed to

work. I solicited the help of my boss but was told to continue to build trust and support by “using my influence.”

After the use of consultants failed and I had exhausted a number of other avenues, I found one technique that worked really well. I had been visiting other European-based companies that had successfully implemented a shared services program. So I assembled several panel presentations with key European players from these other companies serving as the expert panelists. With this encouragement from their fellow Europeans, the stakeholders with whom I was interacting began to understand and accept a number of the elements of the program.

I learned that consensus building often needs innovative approaches. I also came to understand that, like compliance initiatives, my project would fail in the long run unless I was able to build the necessary consensus and support.

Designing and Implementing Compliance Projects in a Consensus Culture

In a consensus culture, the individuals responsible for implementing new compliance initiatives—usually the general counsel and the compliance officer — must be skilled in facilitating and building the needed consensus of the organization. Accordingly, the methodology they use for introducing those initiatives must clearly address this critical requirement. A five-step approach provides a process for sufficient thought and discussion to create and maintain this consensus.

Many companies, faced with strained budgets or time constraints, are inclined to go directly to the Implementation step without adequately addressing Assessment and Planning. This is sometimes caused by a myopic focus on *what* needs to be implemented instead of *how* it needs to be implemented. The *how* of implementation includes careful attention to building and maintaining the support of all the stakeholders.

External lawyers are experts at formulating memoranda prescribing *what* needs to be accomplished for a company’s compliance efforts, but they often do not know enough about the company’s culture and inner workings to help the general counsel or compliance officer formulate a plan for *how* to achieve it. Other consultants, such as software firms, may be intent on delivering a solution but they may not devote sufficient time to understanding the company’s culture and the potential impediments.

Nevertheless, by following the five steps and paying attention to *how* the compliance project is created and implemented, the general counsel and compliance professional will increase their likelihood for a successful outcome, and with the full support of the organization.

Step One: Assessment

The initial Assessment step is probably the most overlooked and yet is critical to the success of a compliance project, no matter what the company culture. It is particularly essential in a consensus culture, or in an environment where senior management may not give full authoritarian support to the project, or where there are indications that a number of stakeholders may not be enthusiastic supporters. The early involvement of the CEO and the Board of Directors or Audit Committee in this Assessment phase may be crucial. Often the initiative cannot proceed in any case without their buy-in.

During the Assessment step, the key stakeholders are identified, and a straw-man draft of the business case and preliminary scope for the project is developed and shared with significant stakeholders and/or representatives from significant stakeholder groups. This is the critical beginning of building the consensus in support of the business case and project scope.

Development of the business case sufficient for consensus building most usually involves creating a soft but plausible return on investment for the project. I have seen numerous cases where the successful implementation of a compliance project can actually create savings or additional revenues. It is always prudent to try to create a business case that includes positive outcomes for the company extending beyond the typical avoidance of fines or criminal penalties.

For example, a project to strengthen trade compliance processes can go a long way toward creating company expertise that will serve well in attracting new business opportunities. A contract management project will not only address risk management and anti-corruption elements but may also give needed visibility to the business to capture sales opportunities more quickly and to monitor profit leaks. A vibrant post-acquisition integration project may help clarify needed communication with newly acquired employees and may increase their productivity more quickly.

At the completion of the Assessment step, the general counsel and the compliance officer should have high-level answers to two of their most critical questions pertinent to the building of support for the project: (1) What does the preliminary budget look like for this compliance project, and (2) what resources will most likely be needed for its implementation? The budget question is always asked, but the resource question is also of utmost importance. Employees in the legal or compliance department all have “day jobs”, and the use of those resources and other internal resources for any new compliance initiative must be carefully evaluated. With these questions answered and the business case developed, the support of the Board and senior management will hopefully be secure. Now the thorough Planning can begin.

Step Two: Planning

The appointment of a project manager is vital to the Planning and other project activities that follow. The project manager will be accountable for coordinating the resources and the work that is to be accomplished for the project. Based upon the preliminary scope and the business case, the project manager and the project leadership team will drill down into the specific requirements for the project. They will take pains to ensure that all of the stakeholders have been identified and that the project scope has been fully discussed and accepted.

The iterative development of the project scope is the basis for the consensus and support that is being built. For some compliance projects, the project scope will be debated throughout the Planning step and may be changed significantly in a controlled way as stakeholders raise new concerns for discussion.

A useful tool for managing stakeholders in a consensus culture is the so-called “power and interest grid.” This chart, which is created during the Planning step, displays an x and y axis for plotting each stakeholder’s interest in the project and power to influence (or veto) the project. The amount of power might be plotted on the x axis while the amount of interest might be shown on the y axis. Obviously the stakeholders who appear in the upper right quadrant—those with the highest amount of both power and interest—are those to whom most attention must be paid. This will be crucial information for those on the project team who are developing the communication plan for stakeholders.

Once the project scope has been finalized and a broad consensus for the project can be anticipated, the project manager’s work will turn to scheduling and estimating costs more definitively for the project. This will depend in large part on the availability of internal resources for the project. This must be resolved, and the number of internal and external resources must be fully understood, before the compliance solution can be implemented.

At that point, other necessary planning activities, such as for organizational change management and for control of risks, can occur.

It is only with the Planning activities complete that the project kick-off meeting can occur and Implementation can begin. I will emphasize an important point once again--*In a consensus culture, leaping to the Implementation step without thorough Assessment and Planning is a serious mistake.*

Step Three: Implementation

With resources, schedules and budgets all aligned and with consensus reached, the Implementation step of the project can proceed. The project manager will carefully monitor scope, schedule and costs to ensure that the project objectives are being met. The project leadership team will meet periodically to review the progress and any obstacles that must be overcome or changes that must be incorporated.

During Implementation, any outside resources being used, including lawyers, consultants and software solution providers, must also be carefully managed. This means that the project manager must have a clear understanding of any contracts, arrangements or statements of work that govern the activities of these external parties. These external resources are all considered stakeholders that need attention.

The Implementation step is typically the time when any potential risks identified for the project may actually occur. For this reason, adequate planning for risk responses is essential during the Planning step. If the risk scenario actually occurs, hopefully it will be one for which a risk response has been anticipated, in which case the risk response plan is simply initiated. And ideally, the cost contingency that was forecasted and included in the budget will be sufficient to offset any increase in costs. Adequate planning for the risks that may occur will also anticipate the need to maintain the consensus of the stakeholders while the risk is being addressed.

By paying too little attention to the Assessment and Planning steps, many companies are unable to anticipate problems that may occur during Implementation.

Step Four: Audit and Measurement

No compliance project can be deemed complete until the ongoing Audit and Measurement plan has been finalized and such processes have become a routine part of the compliance program operation. For a consensus organization this is particularly crucial. Since individuals in a consensus culture typically feel empowered to act with a degree of independence, they can easily come to believe that some of the compliance processes are no longer applicable to them or to their teams. This means that the overall compliance process can begin to erode unless a persistent Audit and Measurement function takes place. This needs to be a joint effort by both the legal/compliance team and the internal audit function.

Even the best compliance solution can quickly fall by the wayside without consistent Audit and Measurement based on adequate records that are maintained from the time the project is complete. This could consist of records establishing that compliance training has been delivered and received by the appropriate individuals within the company and with the frequency determined to be appropriate. For other compliance initiatives, the audit might consist of review of records establishing that appropriate approvals had been obtained, that background checks had been done timely and thoroughly or that operational control standards had been met.

In all of these instances, Audit and Measurement requires that appropriate processes be established and records be created to show that the processes have been followed. This will be of utmost importance if and when the general counsel or compliance officer is

sitting with regulators such as the Securities & Exchange Commission or the Department of Justice. These officials are quick to ask about process, audit and measurement.

I will relate here a very simple story about Audit and Measurement. When I was a junior in-house lawyer many years ago, my boss, the general counsel, charged me with drafting terms and conditions for both sales quotation forms and for purchase orders. I dutifully crafted these documents, obtained approvals from the various businesses to which they pertained and coordinated with the company's employee who had responsibility for having these documents printed. He and I conferred about the proper placement of these terms and conditions on the back side of the appropriate documents. When they had been set up for printing, he sent me proofs and I approved them.

A couple of years later, a lawsuit arose that was brought by one of the company's customers. For the transaction in question, the company had used the printed sales quotation form with which I was now so familiar. I was pleased to think that defending this lawsuit would be made easier since my terms and conditions appeared on the back of the forms. I requested that all of the relevant documents be sent to me. To my dismay, there were no terms and conditions on the back of the forms. What had happened to my precious terms and conditions?

I immediately called the person in charge of the printing, the same one with whom I had coordinated a couple of years earlier. "What happened to the terms and conditions?", I asked him. "Oh," he responded, "I thought you wanted them to be printed only that one time. I did not include them on any subsequent reprints of the forms."

Audit and Measurement must be continuous, particularly in a consensus culture. It is the only way one can be sure that the process continues to be followed by everyone involved.

Step Five: Organizational Change Management

Organizational Change Management actually occurs continually from the initial Assessment step until the project has been fully implemented. In a consensus culture, it is especially important to be aware that change management may be required even following the close of the project itself to ensure that the processes adopted as part of the project continue to be observed by all of the stakeholders. Those stakeholders may change over time as new employees join the team, and it will be necessary to ensure that they properly observe the compliance solution as it has been implemented.

Change management of human beings addresses elements such as each person's motivation and desire to accept the solution being implemented. The "what's-in-it-for-me" factor plays a part for all of us when we are asked to accept change. Change is not easy, and in many instances change fails because the group being asked to accept it simply refuses. In a consensus culture this is problematic because of the significant amount of influence one person's refusal may have on the entire group and the entire project. These social factors emanating from the veto of one person or a small group can have disastrous consequences. Thus, the general counsel or compliance officer can never rest easy, and Audit and Measurement becomes hugely important to alert both of them to potential issues.

Another factor important to the acceptance of change is the knowledge and ability of stakeholders to understand the change. Perhaps the group does not understand the process that has been delineated or how the automation for the solution works. So a few might challenge the entire basis for the project simply because they cannot cope with some aspect of the process or the automation. This is a reason for proceeding cautiously with the solution, and for including training and communication as an important part of the project.

Indeed, an appropriate and effective training program must be part of the strategy for creating consensus. Training can serve dual purposes—creating knowledge and ability while focusing on motivation and desire at the same time. Change will be accepted much more readily when the stakeholders are motivated to do so. What's in it for each of them? If that question is answered sufficiently and is communicated clearly, the compliance solution has a much greater probability of gaining acceptance and support.

Summary and Conclusion

Consensus management has emerged as a predominant leadership and management style in recent times for many companies. The consensus culture that results from this management style emboldens employees with a perceived right to be part of the decision-making process for matters that affect them. This includes the imposition of compliance solutions that may be mandated by law or regulation.

The general counsel and compliance officer need to keep this consensus phenomenon clearly in mind when designing and implementing compliance projects and programs. They are usually accountable for creating an adequate compliance program. Building a consensus of stakeholders with respect to any compliance initiative requires expertise and persistence.

Company leaders should be focused on *how* to design and implement compliance projects as well as *what* to do. Many companies wrongly leap directly to the Implementation of compliance projects without first spending adequate time and thought on the Assessment and Planning steps. During these two initial steps the key roles for the project, namely, the project leadership team, including the project manager, will be designated. Significant work will be focused on building a consensus among the stakeholders, and the business case, scope, schedule and budget for the project will be prepared. Resources and risks will also be analyzed and stakeholder management and communication plans will be prepared. Plans for auditing the solution after completion will also be considered and developed.

The Organizational Change Management step for compliance projects is crucial in creating and maintaining the consensus among stakeholders that is needed for a successful project outcome. However, no compliance solution can withstand the test of time without adequate and consistent Audit and Measurement.

Armed with this knowledge about consensus cultures, and understanding how to apply the steps and processes described in this article, the general counsel and compliance officer can be more confident that the compliance solution they choose will be effectively implemented and accepted by their company and the stakeholders.

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Avnet is one of the largest distributors of electronic components, including connectors and semiconductors, technology solutions, computer products and embedded technology. Black Belt Compliance is a consulting firm focused on coaching and assisting leadership teams in public companies in connection with implementation of compliance programs.

**See Consensus Building, Conflict Research Consortium, University of Colorado, 1998.*

***Id.*