

BUSINESS COMPLIANCE

Governance – Compliance – Ethics

02/2014

EDITOR-IN-CHIEF:
ANTHONY SMITH-MEYER

COMPLIANCE CHALLENGE

**MICHAEL KUBICIEL
AND CORNELIA SPÖRL**

**THE EU ANTI-CORRUPTION REPORT:
A NEW BENCHMARK IN THE FIGHT
AGAINST CORRUPTION**

FOCAL POINT

**ESTHER PIETERSE
AND SVEN BIERMANN**

**EMPLOYEES FACING CORRUPTION:
THE INFLUENCING FACTORS
OF DECISION-MAKING**

THE EFFECTIVE PRACTITIONER

GEERT DELRUE
**CYBERLAUNDERING:
CRIMINAL MONEY SURFING
ON THE INTERNET**

COMPLIANCE BASICS

SHARON WARD
**CHANGING PRIORITIES AND
UNINTENDED CONSEQUENCES**

OVER THE HORIZON

SYLVIE BLEKER AND DICK HORTENSIUS
**ISO 19600: THE DEVELOPMENT
OF A GLOBAL STANDARD
ON COMPLIANCE MANAGEMENT**

THE LECTERN

**PRIYANKA JAYASHANKAR,
RUPAL PATEL AND ARVIND ASHTA**
**RE-IMAGINING FIDUCIARY
RESPONSIBILITY: AN ANALYSIS OF
SUSTAINABLE FORMS OF CAPITALISM**

SPEAKERS CORNER

DONNA BOEHME
THE ROGUE EMPLOYEE STRIKES AGAIN

**Baltzer
Science
Publishers**



**ERICH
SCHMIDT
VERLAG**

SPEAKERS CORNER

THE ROGUE EMPLOYEE STRIKES AGAIN

by Donna Boehme*



■ Accidents do happen. Despite best intentions, diligence and verification procedures, things go wrong. In corporate life, this may end with harmless product recall with some damage to the firm's reputation, or in tragedy as recently admitted by GM's CEO, Mary Barra, while announcing the recall of 1.6 million cars.¹ At the time, GM lost 5% of their stock value at a stroke as the firm faces the possibility of fines, such as the \$1.2 billion deferred prosecution agreement paid by Toyota in March of this year in the USA. Mary Barra has been praised for her acceptance of corporate failure in the case, but how common is candor when corporates face the unexpected loss or failure of its processes. When the finger pointing starts, it seems the company "Rogue" takes much of the blame. Donna Boehme investigates the apparent presence of roguish behaviour within our corporate walls, and where these elements might originate from.

"We deeply regret that – despite the industry-leading compliance measures we have put in place – before 2009, some Credit Suisse private bankers appear to have violated U.S. law ... The evidence showed that some Swiss-based private bankers went to great lengths to disguise their bad conduct from Credit Suisse executive management."

– CREDIT SUISSE CEO, TESTIFYING BEFORE A US SENATE SUBCOMMITTEE
ON FEBRUARY 26, 2014²

* Donna Boehme is Principal of Compliance Strategists LLC.

1 <http://www.cbsnews.com/news/toyota-payment-could-be-glimpse-into-gms-future/>

2 Reuters, February 26, 2014.

<http://www.reuters.com/article/2014/02/26/us-creditsuisse-dougan-idUSBREA1P0W720140226>

SPEAKERS CORNER THE ROGUE EMPLOYEE STRIKES AGAIN

Ah, the big, bad Rogue Employee. You know the one. There you are, a world-class company minding your own business, when a Rogue Employee (or “small group” thereof) comes along and [pick as appropriate] makes unauthorized trades/bribes some foreign officials/facilitates tax evasion/[insert other crime here]. Don’t we just hate when that happens?

The script is so predictable I am seriously wondering if the in-house public relations “Wizards of Smart” conduct concurrent sessions at their professional conferences entitled: “Press Release Talking Points-Best Practices for Throwing the Rogue Employee Under the Bus”. Here’s my version of the typical CEO response, “The Rogue Employee and Dogs Who Eat Homework”:

Why a Rogue?

The Rogue Employee defense is convenient because it instantly identifies a culprit, or culprits (who can then be fired with extreme prejudice), and absolves “management” of any wrongdoing. The not-so-subtle subtext being: “Dear Regulators, Prosecutors and Investors, please move on, nothing to see here.” What is even more worrisome however, are the Boards and CEOs who believe their own press releases and who also “move on”, failing to ask more introspective questions such as “What were the flaws in our compliance programs that allowed this misconduct to occur undetected?” or “What is it about our culture that enabled this conduct?” Perhaps some in senior management just don’t want to know the inconvenient answers to those basic

“We regret that the actions of a single rogue employee, Mr. BadGuy, were contrary to the values of this company. Our long-established principles of integrity, honesty, truth, motherhood, and apple pie have been offended by the scandalous acts of Mr. BadGuy. We condemn the actions of Mr. BadGuy. Mr. BadGuy has left the building.”³

3 Quotation from my column in Corporate Counsel, May 3, 2013. bit.ly/1exn80O

SPEAKERS CORNER THE ROGUE EMPLOYEE STRIKES AGAIN

The Rogue Employee defense is convenient because it instantly identifies a culprit, or culprits, and absolves “management” of any wrongdoing

questions? Enter “stage left” the spectre of willful blindness and failing governance!

In her paper “Rotten Apple or Rotting Barrel”, Massachusetts Institute of Technology, Head of Anthropology, Professor Susan Silbey challenges the idea that corporate misconduct is the result of “some few weak, uninformed, or misguided individuals making poor choices” and instead argues that the spotlight should be firmly on “a system, a set of practices, ideals, and constraints that support misconduct.”⁴

This is not news to experienced chief compliance officers who understand that the “rogue employee” defense is only rarely a legitimate claim. Here’s my short definition:

The Rogue in Vogue

We need to look no further than the original “rogue employee,” Nick Leeson, the former Barings trader who literally brought down one of the world’s oldest merchant banks (as in, it helped fund the Napoleonic Wars), with a series of disastrous and “unauthorized” trades. Although Leeson’s own website now touts him as “The Original Rogue Trader,”⁵ an investigation by the British government found that the bank’s collapse was “a consequence of a failure of management and other internal controls of the most basic kind.” Corporate culture was evidently another problem at Barings. According to the report, several employees had tried to warn their bosses about Leeson’s activities, but they were ignored.

The rogue employee commits a bad act that is (i) contrary to a credible “culture of integrity,” (ii) in contravention of an effective (and well-implemented) compliance and ethics program, and (iii) there was nothing the company could have reasonably done to stop or detect the act.

4 http://web.mit.edu/anthropology/pdf/articles/silbey/silbey_Ethics_Education_Comments2.pdf

5 <http://www.nickleeson.com>

SPEAKERS CORNER THE ROGUE EMPLOYEE STRIKES AGAIN

Morgan Stanley (is) a powerful teaching moment for Boards and C-Suites on the value of investing in effective compliance programmes and culture

So much for a culture of transparency, accountability and speaking up.

Since Barings, a long parade of well-known companies have jumped on the Rogue Employee bandwagon in times of trouble. These include: Wal-Mart, Barclays, SAC Capital, UBS, Societe Generale,⁶ JP Morgan, Pfizer, NewsCorp and GlaxoSmithKline. And neither is the government sector above blaming their bad acts on rogue public servants (*cough*, US Internal Revenue Service⁷, *cough*). Clearly, the rogue is in vogue.

Do Rogues Exist?

Where management fails to implement a credible and effective compliance program, as well as promote a culture that discourages misconduct and encourages employees to speak up (and managers to listen), then it doesn't earn the right to claim the corporate equivalent of "the dog ate my homework." Management is accountable in those circumstances, and should bear the blame in

equal measure to the individual employees who actually carried out the bad acts.

Do Rogue Employees exist? Yes, but they are rare, and as noted in the examples above, almost never at the heart of the big corporate scandals where they are publicly named, blamed and shamed. Often cited is the US Department of Justice's decision not to prosecute Morgan Stanley in an instance where an employee used the firm's anti-bribery training (which he had taken seven times, with 35 reminders) as a roadmap on how to evade detection.⁸ Although the case has been criticized by one anti-corruption commentator as "a conveniently timed public relations campaign,"⁹ I prefer to classify Morgan Stanley as a powerful teaching moment for Boards and C-Suites on the value of investing in effective compliance programmes and culture. Chief compliance officers need all the help and public statements of support government and its agencies can muster.

6 <http://www.cbsnews.com/news/societe-generale-rogue-trader-fined-7-billion>

7 <http://cnsnews.com/news/article/irs-career-employee-deeply-offended-washington-officials-blamed-cincinnati-rogue-agents>

8 <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>

9 <http://www.fcpaprofessor.com/rogue-employees-do-exist-2>

SPEAKERS CORNER THE ROGUE EMPLOYEE STRIKES AGAIN

A Credit Suisse employee group has demanded an apology from the bank for “vilifying” that small group of ‘rogue bankers’

The Credit Suisse Narrative Crumbles

Now back to Credit Suisse, which has characterized its “executive management” as unsuspecting victims of a “small group” of Swiss-based bankers-gone-wild.

At the same time, details are emerging on a series of juicy “cloak and dagger” subterfuges worthy of a Jason Bourne film: fake visas, shell companies, remote-controlled elevators, secret codes, gold bars, even \$250K stuffed in a client’s pantyhose (can diamonds in a toothpaste tube be far behind?). According to media reports, a “small group” of bankers also somehow managed to set up a secret Zurich airport office so wealthy US clients could meet surreptitiously with their bankers before rushing to the ski slopes.¹⁰

It’s pretty hard to imagine any credible system of compliance and internal controls that would fail to detect such an elaborate, institutionalized system of tax evasion reminiscent of scenes from “The Wolf of Wall Street”, involving

22,000 accounts worth approximately \$13.5Bn; but that is exactly what the CEO of the bank has asked the US Senate subcommittee and regulators to believe. And the plot thickens. A Credit Suisse employee group has demanded an apology from the bank for “vilifying” that small group of ‘rogue bankers.’ Tax evasion, they say, was an established part of the business strategy- as with many other Swiss banks.¹¹

The jury may still be out on what Credit Suisse’s “executive management” knew but, unhappily for them, the focus will likely be on what internal controls and compliance programs were in place, rather than on whether an actual or virtual paper trail can be drawn to the CEO and his top team. Indeed the very lack of an effective and informative compliance reporting mechanism may prove their undoing.

Bottom Line

If executive leadership do not evidence a high degree of concern and vigilance

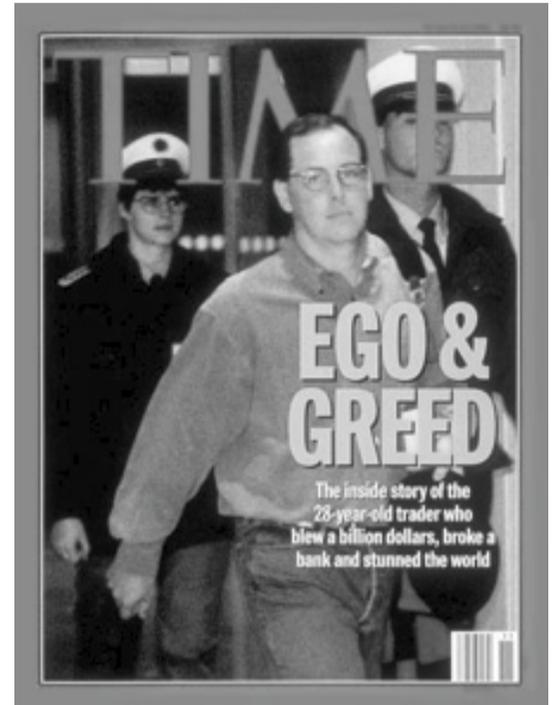
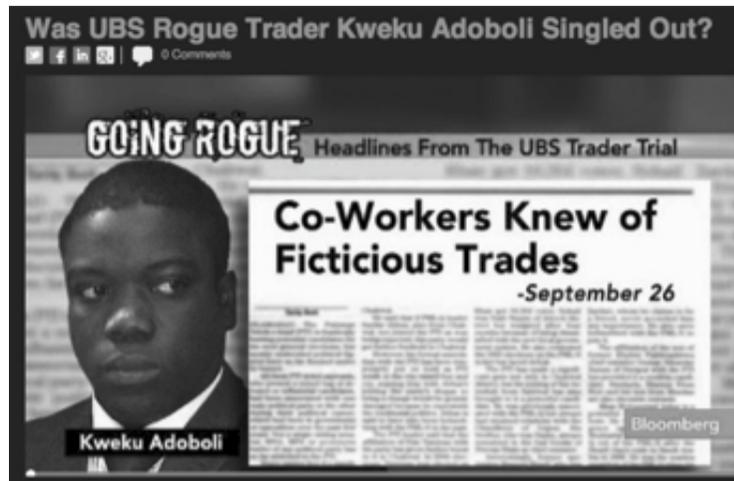
10 The Guardian, February 25, 2014.

<http://www.theguardian.com/business/2014/feb/25/credit-suisse-offshore-tax-senators>

11 Reuters, February 27, 2014.

<http://www.reuters.com/article/2014/02/27/us-creditsuisse-idUSBREA1Q1JJ20140227>

SPEAKERS CORNER THE ROGUE EMPLOYEE STRIKES AGAIN



to create an environment where the employee understands that rogue behavior will not be tolerated, then there can be no excuse when the organisation fails to find, fix and prevent misconduct. Two takeaways:

- Companies that throw around the Rogue Employee defense should be fully capable of defending it, and in so doing to evidence an active influence and ownership over their compliance culture; and
- Boards and C-Suites must enquire more deeply about, and ensure the existence of high quality and relevant reporting on the effectiveness of their firms' compliance programs and evolution of their ethical culture.

That Rogue Employee excuse? It is way past its sell-by date.*

* The author will be speaking on "The Myth of the Rogue Employee- Conversations with Boards and C-Suites" on May 19 in London, at the 2014 SCCE European Compliance and Ethics Institute. www.corporatecompliance.org/Portals/1/PDF/events/Brochures/scce-2014-european-cei-brochure.pdf

Donna C. Boehme is an internationally recognized authority in the field of organisational compliance and ethics with 20+ years experience designing and managing compliance and ethics solutions, within the US and globally. As Principal of Compliance Strategists LLC, she has advised a wide spectrum of private, public, governmental, academic and non-profit entities. She serves on the respective boards of RAND Center of Corporate Ethics and Governance, Rutgers Center for Government Compliance & Ethics and Society of Corporate Compliance & Ethics. Donna is an Emeritus Member and has served on several boards member of the ethics and compliance associations such as The Compliance and Ethics Leadership Council and the Ethics Resource Center. During her extensive career she has held the posts of global compliance and ethics officer for BP plc (London), and BOC Group (now part of Linde Group) establishing new functions and programmes since hailed as best practice by many practitioners. Donna is a regular writer and columnist, and is also an invited guest lecturer at various business and law schools including New York University Stern School of Business. She is named amongst *The Top 100 Thought Leaders for Trustworthy Business 2014* by Trust Across America. Donna was previously in private practice with Fried, Frank, Harris, Shriver & Jacobson in New York and holds a J.D. from New York University School of Law.