

CORPORATE COUNSEL

Volkswagen Emissions Cheating Scandal— Another Compliance 1.0 Train Wreck

Donna Boehme, Corporate Counsel – October 6, 2015

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As careful observers of the compliance field may have noted, the profession has spent more than a decade working to define itself. This has meant dispelling a number of persistent and dangerous myths that gave rise to a legacy Compliance 1.0 model (Compliance as a captive arm of Legal), which itself can be found at the roots of many of the big compliance train wrecks that litter the corporate landscape. It's not too hard to understand the flawed reasoning that created Compliance 1.0 in the early days of the evolving profession:

- “If it involves legal risks, it must be a subset of Legal”; which then led to
- “Any general counsel or senior lawyer is qualified to be the chief compliance officer (CCO) and manage Compliance”; and then
- “Why wouldn't we appoint a big-name ex-prosecutor, ex-regulator or ex-law firm partner as CCO to impress our regulators, stakeholders and the financial press? This is too easy!”

And now we can add Volkswagen to the growing list of Compliance 1.0 train wrecks in the headlines. The German auto giant has been reeling from a scandal of monumental proportions after admitting that it had been using a “defeat software” to help its diesel cars pass emissions testing in the U.S. and Europe. VW has lost nearly a third of its share price and seen the resignation of a longtime CEO as the scandal rocks the global auto industry and German business establishment. Amid investigations estimated to take months, it has been reported that a company engineer and Bosch, a supplier, both tried to warn management that use of the software was illegal. In less than a week, the scandal has battered the reputation of “German engineering,” a brand synonymous with performance and reliability that the German auto industry has guarded closely for decades.

So what went wrong here? As noted by Mike Scher of the FCPA blog, Compliance 2.0 is finally a “no-brainer.” Unfortunately for Volkswagen, its attempt at Compliance 2.0 didn't quite make the grade, and merely qualified as another unfortunate case of Compliance 1.0. A modern Compliance 2.0

program would have ensured that the two internal whistleblower complaints would have been taken seriously and even escalated to the governing body. In a 2011 announcement, the company gamely announced the appointment of a “Group Chief Compliance Officer” reporting to the chairman of the board. The announcement noted with fanfare:

“Volkswagen’s good name is our most valuable asset. There can be no compromises as far as complying with our code of conduct is concerned. Volkswagen is adopting an innovative approach by bringing together Governance, Risk and Compliance in a single department.”

For Compliance 2.0 watchers, the positioning of the new CCO and overall compliance function seems to pass the Compliance 2.0 “empowered and independent” test with flying colors. So what’s missing? Just a little detail called “subject matter expertise.” As Scher observed: “Compliance failures happen when you build and run a big, complex company without a first-class compliance system.”

As I routinely note, compliance is not a subset of Legal. It is an entirely different subject matter expertise with a different mandate, different core competencies and different practices. Expecting a senior lawyer with no actual CCO subject matter expertise or experience to be able to step into a large multinational CCO role successfully is what I have called “DIY Compliance,” or about as dangerous as DIY brain surgery performed by your pediatrician. In 2011, the new VW CCO, Dr. Frank Fabian, was described as a former law firm partner who had been hired by VW to head its labor law department.

So let’s add one more variable to our definition of a modern Compliance 2.0 program: subject matter expertise and a track record of successfully designing and managing a first-class compliance program. And here’s a pro tip: a law degree and a fancy law CV is nowhere close to Compliance subject matter expertise. Having coached many CCOs, the role is more than just the head of the Compliance function. The CCO is also the Compliance subject matter expert who must bring to the organization and its program all the know-how and subject matter expertise needed to design, build and manage a first-rate compliance program to support a culture of ethical leadership. Usually, the CCO is called on to build a team of subject matter experts and to coach others in the organization who may be part of the businesses, Legal, HR, Audit, Safety, or other functions—with a role supporting the compliance program.

Meanwhile, Martin Mueller, VW’s new CEO, has now promised a large-scale “culture shift” and enhanced governance structure. Another pro tip: better get a subject matter expert and Compliance 2.0!

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