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Does your company have a compliance and ethics “constitution”?

Companies' compliance and ethics (C&E) programs are often seen as internal legal systems, and thus the lessons of what makes legal systems successful are worth considering in the C&E context. There are, indeed, many of these—including, perhaps

most obviously, the importance of justice to sustaining a legal regime.

Almost as self-evident is the importance of a constitution as a foundation for a system of laws. Certainly the U.S. Constitution—which James Madison rightly called a “miracle”—has been the most important foundation for the rule of law in

this country. Similarly, Great Britain's constitution has contributed mightily to that country's strong commitment over the centuries to the rule of law. The latter is often called an “unwritten” constitution, even though much of it is codified in various documents, such as statutes and court rulings. Although this approach has certainly worked well for that country, in the realm of C&E I think having a single governance document which takes precedence over all others (as the U.S. Constitution does in our system) will often be most useful, because it can help facilitate decision-making by busy executives who may have little patience for reviewing multiple source materials.

A C&E program charter can serve as such a constitution. It typically begins with a statement—hopefully a strong one—of the company's commitment to conducting its

affairs in a law abiding and ethical manner. It will also often have a “scope” section, which addresses, at least in a general way, the application of the program to joint ventures and other outlying parts of a company.

A C&E program charter can serve as such a [compliance and ethics] constitution.

The gut of a program charter should, in my view, have two somewhat overlapping and reasonably detailed sections. The first spells out what the different major elements of the program (e.g., risk assessment, training, monitoring, investigations) are. The second addresses responsibilities for the program by functions (e.g., program-related duties, not only of the chief ethics and compliance officer (CECO), but also the general counsel, head of HR, business leaders, and other key players).

Still, for some companies the other (“British”) approach might be preferable. For those, the “constitution” can be found in a combination of documents: key minutes of Audit committee meetings; the charter of any management C&E committee; the position description of the CECO; similar documents for regional C&E committees or officers; and policies on handling C&E reports, conducting investigations, and imposing discipline. *

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