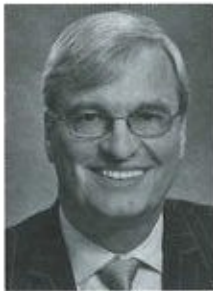


Socrates in the C-suite: The need for Socratic dialogue in corporate compliance

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ABSTRACT

This paper discusses the need for compliance officers to demonstrate that their companies' compliance policies and procedures are operationalised and defensible in the face of audit or regulatory scrutiny. To do so, they must begin by asking questions about each major element of their compliance programmes. To ask questions in the right way, this paper advocates that they use Socratic dialogue: asking a question, using the answer to formulate another question, and systematically continuing the process of questioning and cross-questioning to explore a topic thoroughly. The general structure of compliance-oriented Socratic dialogue should be built around

four questions: (1) 'What are the purpose and intent that the government has stated for this programme requirement?'; (2) 'What, specifically, have we done to satisfy this programme requirement?'; (3) 'How will we prove and document what we have done?'; and (4) 'How do those facts help in demonstrating the effectiveness of our programme?' The paper then uses examples of specific Socratic-dialogue questions with regard to three hallmarks of effective corporate-compliance programmes — 'tone at the top'; sufficiency of compliance resources; and examining risk assessment — to show how such questioning can foster improved corporate compliance. For 'tone from the top,' the questions reflect law enforcement expectations that leaders engage in concrete, specific actions to demonstrate compliance leadership. For adequacy of resources, the questions reflect the need for specific answers about staffing levels, staff expertise and training, and how corporate decisions about resources are made. For risk assessment, the questions reflect the need to have specific information about the company's specific compliance risks, the methodologies it uses for risk assessment, and whether risk-assessment data is timely delivered to the right decision makers. The paper concludes that Socratic dialogue can be not merely useful, but necessary, in seeing that a corporate-compliance programme is well-designed and effective.

Keywords: Socratic dialogue, paper programmes, tone at the top, resources, risk assessment, effectiveness, concrete

INTRODUCTION

In their efforts to find safe passage across the darkling plain¹ of corporate compliance,

compliance officers have no shortage of formal written guidance. A wide variety of published guides — some ranging to a hundred or more pages — by enforcement and non-governmental organisations elaborately state governmental requirements and preferences for compliance programmes.

Some may think that the more written compliance guidance companies have, the better off they are in maintaining credible compliance programmes. In theory, written guidance by enforcement agencies should contribute to better understanding of regulatory expectations, and therefore greater confidence in the compliance programmes that incorporate such guidance. As one scholar has noted, 'For certainty of guidance to exist, addressees must know not just which norm to obey but also the *value* of the norm to be obeyed.'² Anything that helps companies to understand the value of the norms underlying government expectations for corporate compliance, then, would seem to be welcome.

There is, however, a significant danger in this cornucopia of compliance guidance. The lengthier the guidance, the greater the odds that some compliance officers — daunted by the prospect of building compliance programmes that they believe regulators will expect to prevent all violations of the relevant statutes — will simply take the main provisions of that guidance and transplant them, without explanation or elaboration, into written policies or procedures.

That danger is not speculative. After the US Department of Justice, in 2017, published a lengthy list of questions designed to assist federal prosecutors in evaluating corporate compliance programmes,³ Professor Eugene Soltes of the Harvard Business School consulted with company managers and corporate attorneys and found that firms quickly began to appropriate the document as a manual on constructing an effective programme. In particular, managers believed that if they could provide an answer to

each question, they could assure themselves that they were meeting the DOJ's expectations. Even more worrisome, Soltes saw firms selectively picking data to support the notion that their practices were effective, rather than recognising that some were clearly falling short.⁴

Moreover, such an approach is certain to carry little weight with enforcement agencies. The US Department of Justice and the Securities and Exchange Commission (SEC), for example, have roundly disparaged so-called 'paper programs,' in which written corporate statements are belied by actual corporate practices that violate the law.⁵ In contrast, they have consistently stated that organisations should tailor each compliance programme 'to [its] specific needs, risks, and challenges'⁶ and be prepared to show that such programmes are well-designed, applied in good faith, and effective.⁷

For example, in 2017, Banamex USA (BUSA) admitted, in a non-prosecution agreement (NPA) with the Department of Justice, 'to criminal violations by willfully failing to maintain an effective anti-money laundering (AML) compliance program with appropriate policies, procedures, and controls to guard against money laundering and willfully failing to file Suspicious Activity Reports (SARs).'⁸ According to the agreed statement of facts in the case, BUSA had an AML compliance programme, but from 2007 to 2012, processed more than 30m remittance transactions to Mexico with a total value of more than US\$8.8bn 'with virtually no investigation for suspicious activity. BUSA employed a limited and manual transaction monitoring system, running only two scenarios to identify suspicious activity on these millions of transactions. These two scenarios produced paper reports that were intended to be reviewed by hand by the two employees primarily assigned to perform [Bank Secrecy Act (BSA)] functions of the bank, in addition to significant, time-consuming non-BSA responsibilities.'⁹

As a result, BUSA was required to forfeit US\$97.44m as part of the NPA.

The challenge for compliance officers, then, is not whether to produce written policies and procedures that simply parrot compliance-guide language, but how to enable their companies to demonstrate that those policies and procedures are operationalised and defensible in the face of audit or regulatory scrutiny.¹⁰ To meet that challenge, compliance officers (and their supervisors) must start by asking questions about each major element of their compliance programmes. But what kinds of questions, how to ask them and who should ask them?

SOCRATIC DIALOGUE AS A CONSTRUCTIVE EXERCISE

The answer to each of those questions lies in the concept of Socratic dialogue. At its most basic level, Socratic dialogue, as Socrates himself practised it, simply involves asking a question, using the answer to formulate another question, and systematically continuing the process of questioning and cross-questioning to explore a topic thoroughly.¹¹ Although Socrates intended his method to facilitate his exploration of philosophical and moral issues, Socratic questioning is now a familiar technique in fields as diverse as law, education and psychotherapy,¹² and its worth has been recognised in business ethics and compliance.¹³

To be clear, Socratic dialogue is meant to be a constructive exercise. It is not — as some people may think, based on films or television programmes — a means of demonstrating the questioner's intellectual superiority, or criticising or humiliating the person being questioned. Nor is it an approach that only lawyers are capable of conducting.

What a compliance professional needs to do to conduct a Socratic dialogue in the workplace is to ask questions systematically, patiently and persistently about the topics in question. By doing so, the questioner

not only obtains information useful for her immediate purposes, but assists the questioned persons in understanding why the questions need to be asked, what facts they do not know or cannot immediately prove, what assumptions may underlie their understanding of the facts and why their answers matter. But the questioner also must listen carefully to each answer, to ensure that he or she identifies any facts or issues that require followup questions, if the Socratic dialogue is to be systematic and thorough.

While specific questions may differ for various elements of a corporate compliance programme, the general structure of a compliance-oriented Socratic dialogue for each element should be built around four essential questions:

- (1) *'What are the purpose and intent that the government has stated for this programme requirement?'* Because enforcement and regulatory authorities' compliance requirements can range from highly general to highly specific, it is important for compliance officers and other executives to define those authorities' requirements, including the purpose and intent of each requirement, as specifically as they can.¹⁴
- (2) *'What, specifically, have we done to satisfy this programme requirement?'* A superficial or temporising answer to this question will provide strong indication that the programme element is more paper than real. Questioners need to seek detailed and specific answers that reflect real action and implementation of that elements.
- (3) *'How will we prove and document what we have done?'* The first part of this question is of critical importance. If a responsible corporate employee states something as fact, but cannot prove it other than from memory or hearsay, that alone should indicate a compliance programme deficiency. Even if employees have a factual answer, the second part of this question underscores the need for the company to be prepared to

demonstrate — with documentation well beyond generic corporate policies — that it can prove each of the facts in that answer.

- (4) *'How do those facts help in demonstrating the effectiveness of our programme?'* The Justice Department and the SEC have made clear that in evaluating a corporate compliance programme, they expect companies to answer three basic questions: 'Is the company's compliance program well designed? Is it being applied in good faith? Does it work?'¹⁵ A company must therefore be prepared to prove the effectiveness, not just the existence, of each element of its compliance programme.

The 2017 Department of Justice's corporate compliance questions, generally called the Evaluation, identified 11 key topics for assessing the effectiveness of corporate compliance programmes: (1) analysis and remediation of underlying misconduct; (2) senior and middle management; (3) autonomy and resources; (4) policies and procedures; (5) risk assessment; (6) training and communications; (7) confidential reporting and investigation; (8) incentives and disciplinary measures; (9) continuous improvement, periodic testing, and review; (10) third party management; and (11) mergers and acquisitions. For the sake of concision, this paper will use three of those topics as examples of how compliance officers need to use Socratic dialogue in their oversight and evaluation of compliance programmes.

SOCRATIC DIALOGUE ON 'TONE AT THE TOP'

To show how Socratic dialogue can play a meaningful role in corporate compliance, the best place to start is at the top. It is a commonplace, in multiple areas of corporate compliance, that senior executives must establish a 'tone at the top' in order to establish a 'culture of compliance' within their company. Because law enforcement officials

have repeated the 'tone at the top' admonition with some frequency,¹⁶ some senior executives may have the impression that if they issue written statements and policies that repeat the 'tone from the top' mantra and vigorously proclaim their companies' opposition to law violation and commitment to compliant behaviour, that will satisfy enforcers' expectations.

That is not the case. Enforcement officials for some time have been stressing, in public and private statements, that 'tone at the top' 'has to be matched by concrete conduct on the ground and in the field.'¹⁷ Moreover, the Department of Justice's Evaluation reinforces that view with a series of pointed questions that makes clear that law enforcement's expectations for compliance programmes have expanded beyond generic 'tone' to specific action:

How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How does the company monitor its senior leadership's behavior? How has senior leadership modelled proper behavior to subordinates?¹⁸

Some senior executives may find such questions dismaying. Chief compliance officers should welcome them, as a basis for a Socratic dialogue with senior management. After showing a group of senior executives those questions from the Evaluation, compliance officers can ask questions such as the following:

- 'If regulators were to ask us, "In the last year, what concrete actions has any senior executive in this company — at C-level or EVP-level — taken to demonstrate their specific actions in leading compliance?", what would we tell them? What were those

actions, when did they take place, and who was the audience for those actions? And how did we follow up from those?’

- ‘Has there been any time in the last year when any of you have been in a meeting and heard a superior, a peer or a subordinate at work say something that was critical or dismissive of our corporate compliance requirements or our compliance team, and remained silent? If so, did any of you do anything after that to correct the record or communicate to others your support for compliant behavior in our company?’
- ‘Have you ever been in compliance training and walked out because you were too busy to stay for the full training session? Are you aware of any of your subordinates who walked out, or skipped required online compliance training, because they were “too busy”? If so, did you communicate them afterwards about their walking out or skipping the training? If not, why?’
- ‘Do we have a systematic process in place to keep track of and document our senior leaders’ specific actions to model their commitment to compliance? If so, who is responsible for that process? Is that information available to those who are responding to regulators when they request information about our compliance activities?’

SOCRATIC DIALOGUE ON COMPLIANCE RESOURCES

A second topic where Socratic dialogue can serve a constructive purpose for compliance is the extent to which compliance professionals have sufficient resources, expertise, and training to do their jobs effectively. The Evaluation poses a variety of questions that focus squarely on those issues:

How have decisions been made about the allocation of personnel and resources for the compliance and relevant control functions in light of the company’s risk profile? Have there been times when requests for

resources by the compliance and relevant control functions have been denied? If so, how have those decisions been made?

Have the compliance and control personnel had the appropriate experience and qualifications for their roles and responsibilities?¹⁹

What training have employees in relevant control functions received? ...What analysis has the company undertaken to determine who should be trained and on what subjects?²⁰

Compliance officers — assuming that they have appropriate autonomy and authority to ask such questions and expect responsive answers — can also use Socratic dialogue to explore these questions in greater detail with senior and mid-level management:

- ‘How many people do we have assigned to each of our compliance functions, on a full- or part-time basis? Do we have separate data for each of those functions? Have we assigned someone to track those data, and update them periodically? Are those data being made available in the budget cycle to enable better cross-comparison of our compliance functions?’
- ‘For those managers and employees in each of those compliance functions, can we show, with specific documentation, what relevant background and experience they had before coming to their current positions? What were our criteria for relevant background and experience? Were those determinations made consistently on the basis of those criteria? If not, can we explain why? How have we documented those actions and decisions?’
- ‘What training have our employees in the various compliance functions received to sustain or expand their knowledge and expertise? How have we gone about determining who should be trained, on what

subjects, and how frequently? How have those decisions worked out? Can we show that, over the long term, people are getting the right training and getting it frequently enough to equip them to do their jobs effectively? How? And how do we know that that training is useful to them? Can we show when that information was actually put to use on specific compliance questions?

- 'I get it that we have to make tough choices every year on who gets how much for their respective functions. But in the last two years, how did we decide who gets how much for the various compliance functions? How did we decide who has enough, not enough, or too much? Did we actually do a cross-comparison across all of our compliance functions, or did we "stovepipe" those decisions?'
- 'If regulators asked, would we find any instances in the last two years in which a specific compliance manager or team asked to maintain or increase their budget, and were refused? If so, what would our explanation be to regulators, especially if the compliance function in question involves high-visibility enforcement areas such as AML, sanctions or anti-corruption? Do we have documentation that would explain our budgetary decisions? Are those decisions ones that we would be prepared to defend today on a risk-based basis?'

APPLYING SOCRATIC DIALOGUE IN CORPORATE COMPLIANCE: EXAMINING RISK ASSESSMENT

A third area where Socratic dialogue can foster improved corporate compliance is risk assessment. The US Foreign Corrupt Practices Act (FCPA) Resource Guide deems risk assessment 'fundamental to developing a strong compliance program' and decries "one-size-fits-all" compliance programs.²¹ At the same time, it offers little concrete guidance about what corporate risk

assessments should look like. The Evaluation, however, asks a number of more direct questions:

What methodology has the company used to identify, analyze, and address the particular risks it faced?²²

What information or metrics has the company collected and used to help detect the type of misconduct in question? How has the information or metrics informed the company's compliance programme?²³

How has the company's risk assessment process accounted for manifested risks?²⁴

How often has the company updated its risk assessments?²⁵

Enforcement agencies cannot meaningfully prescribe *ex ante* the elements of corporate risk assessment methodologies, or the categories of relevant data and metrics, appropriate to particular companies. For that reason, compliance officers play a vital role in ensuring that companies have all necessary compliance-related information for senior management to make such decisions on a risk-based basis, as well as documentation that provides meaningful support for those decisions. To that end, both senior executives and compliance teams should ask a sustained series of questions such as:

- 'What are *our* key compliance risks, not just generic industry risks?²⁶ How have we determined that – by types of industry, by country, by type of transaction, for example? Are the key risks we face today the same risks, with the same weighting, that we faced one and two years ago? How do we know?'
- 'What is our methodology for risk assessment? Do we have a single methodology, or multiple methodologies for different types of compliance risks? What's our rationale for having one, or more than one? How

did we settle on those? If it's one, does that risk-assessment process gather enough relevant information that our various compliance functions need? How do we know that? If it's more than one, why are we doing it that way? Is there a risk-based basis on which we're maintaining different risk assessments for different compliance risks?'

- 'Whatever our methodologies, what are their frames of reference? Are they looking only at historical data indicative of potential compliance risks, or also looking forward to identify current or proposed business activities that could pose potential compliance risks? Whether it's one or both, how are we gathering those data, and how frequently? Will these data serve to identify risks that are already immanent, as well as risks that could become salient? How do we know that? If we don't yet know, how do we propose to find that out? Who will be responsible for that?'
- 'How frequently do we update our compliance risk assessments? On a risk-based basis, are we updating them at different intervals? Are those frequencies enough to capture relevant risk data in a timely way?'
- 'Over the last two years, when we obtained information via our risk assessment process that was indicative of significant compliance concerns, did that information get to decision-makers at the right levels, and get there in a timely way? Do we know whether and how that information was taken into account in that decision-making? Can we show that information made a difference in those decisions? How do we know? How would we document that?'

CONCLUSION

Although this same approach can be applied to still more areas of compliance, these three areas are enough to demonstrate that Socratic dialogue can be not merely useful, but necessary, in seeing that a corporate compliance programme is well-designed and

effective. In some circumstances, Socratic dialogue may be as valuable as data analytics and artificial intelligence in setting or keeping a compliance programme on the right track. If companies take seriously the task of systematically asking themselves challenging questions about the soundness of their compliance programmes, finding and documenting answers for those questions, and implementing meaningful solutions, they stand a far better chance of traversing the darkling plain of compliance successfully.

Author's note

The views are solely those of the author and do not necessarily represent the views of Georgetown University, Wells Fargo, or the Department of Justice or any officer or employee thereof.

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