

CRITICAL ELEMENTS OF AN EFFECTIVE ETHICS & COMPLIANCE PROGRAM

Recommendations for the US Department of Justice

SEPTEMBER 2018



INTRODUCTION

Corporate ethics and compliance (E&C) programs are playing an increasingly important role in the US Department of Justice's (DOJ's) civil and criminal enforcement policies. This role reflects DOJ's growing recognition that effective E&C programs can benefit companies, their stakeholders, and the public through the prevention, early detection, and resolution of misconduct. DOJ has publicly stated that it is, therefore, actively considering (1) the critical qualities that define an effective E&C program, and (2) available metrics for measuring and assessing those qualities. This white paper provides a summary of the Ethics & Compliance Initiative's (ECI's) research to date and the input of our membership community regarding the critical elements of an effective E&C program. It further addresses the metrics that DOJ can use to assess a company's progress in implementing those elements.

ECI is a nonprofit research and best practice community, with a membership of 450+ organizations that are committed to establishing high quality E&C programs. Together with our members we have devoted several years to studying the elements that characterize the most effective programs, and the ways to measure the success of such elements. These efforts are summarized in the April 2016 publication of ECI's Blue Ribbon Panel, entitled *Principles and Practices of High-Quality Ethics & Compliance Programs* (Blue Ribbon Panel Report). They are further delineated in a companion document that was released in September 2018, *High-Quality Ethics & Compliance Programs: Measurement Framework* (Measurement Framework). The Blue Ribbon Panel Report identified five fundamental principles inherent in high-quality E&C programs, as well as supporting objectives and best practices associated with each principle. The Measurement Framework further outlined stages of maturity for an E&C program, as well as metrics for gauging a company's progress in implementing the principles of a high-quality program (HQP). ECI's work also has been informed by surveys of E&C professionals and a series of other research studies, each of which contributed new insights to our understanding of HQPs.

Both the Blue Ribbon Panel Report and the Measurement Framework identify a number of activities that are considered to be essential if an organization is to have the highest quality E&C program. Yet as we describe in the paper that follows, even a minimum standard program can be effective if it has certain elements in place. It has been ECI's experience that these elements are foundational – and must be present – if an organization is to have an E&C program that is effective, whether it be one that merely satisfies minimum standards, or one that is high quality in nature.

CRITICAL PROGRAM ELEMENTS

- Stated core values – A set of ethical principles that are stated and actively referenced to guide stakeholders' decisions and actions;
- Tone at the top and in the middle — The perceived commitment of senior and mid-level managers and supervisors to E&C;

- A “speak-up” workplace — Readily available and confidential processes to encourage employee reporting of perceived misconduct and for fairly, efficiently, and consistently investigating and resolving such reports;
- Protection against retaliation – Protection of employees who report suspected or observed misconduct from any form of retribution;
- Dynamic risk assessment – Dynamic assessment and clear ownership of the organization’s ethics and compliance risks and mitigation strategies; and,
- Robust training – Regular training of employees at all levels on organizational values and high-risk compliance issues to which they may be exposed.

ECl recognizes that the critical elements identified above may not be the only critical elements of an effective E&C program, and that DOJ may wish to identify additional or different elements and/or to use additional or different models for measuring those elements. As the Blue Ribbon Panel Report stated:

We acknowledge that any high-quality ethics and compliance program must be tailored to the organization and industry in which it exists and that size, complexity and degree of regulation of the industry will drive the design and function of any program. Further, we do not intend to suggest that there is a group of organizations that have implemented every one of the practices described herein or that any organization has achieved such success that it does not have room for improvement. Rather, this document is meant to suggest the features that are common to organizations that have raised the bar for their ethics and compliance programs.

Thus, whatever program elements DOJ designates as the critical elements of an effective E&C program and whatever models DOJ uses to measure those elements, DOJ should take care not to create the impression that it subscribes to a “one size fits all” approach to such programs. Instead, DOJ should assess the effectiveness of E&C programs in a way that is flexible and encourages companies to implement such programs. ECl has learned that incentives are powerful drivers of individual and corporate behavior. Providing specific and concrete benefits to companies that implement effective E&C programs in the form of credits or other changes to DOJ’s enforcement policies – similar to those recently adopted for FCPA enforcement – is the best way to move the regulated community to the next level and obtain the benefits that flow to DOJ, the regulated community, and the public from the widespread adoption of such programs. ECl offers this paper in the hopes of advancing this partnership between DOJ, companies, the E&C community, and the public-at-large.

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OVERVIEW OF ECI

ECI is a best practice community of more than 450 organizations that are committed to creating and sustaining high-quality corporate E&C programs. The Ethics Research Center, ECI's nonprofit research arm, was founded in 1922 and conducts leading, independent E&C research to advance high ethical standards and practices in public and private institutions. ECI's active membership community promotes learning opportunities and engages in the exchange of ideas and sharing of best practices. ECI also certifies E&C practitioners and helps them to develop the necessary tools to achieve E&C excellence in their organizations.

ECI assists organizations in building strong ethical cultures and developing HQPs in line with the five principles of such programs identified by an ECI Blue Ribbon Panel. ECI provides organizations with tools and benchmarking opportunities that enable them to assess the relative strength of their cultures and programs compared to industry standards and best practices. For example, ECI has developed a Program Quality Assessment Tool that enables organizations to benchmark their cultures and E&C programs against HQPs as measured by the Blue Ribbon Panel's five principles.¹

ECI also supports E&C program teams, individual practitioners, academics, and thought leaders with research publications, educational programming, best practice forums, networking, and other idea-exchanging opportunities. Through these mechanisms, ECI brings together members of the E&C community throughout the world to share techniques, research, and new ideas relevant to E&C theory and practice.

¹ ECI's Assessment Tool can be found [here](http://www.ethics.org/resources/self-assessment-tool). PROGRAM QUALITY ASSESSMENT TOOL, ETHICS & COMPLIANCE INITIATIVE, <http://www.ethics.org/resources/self-assessment-tool>.



ECI'S EFFORTS TO DEFINE PROGRAM QUALITY

Over the past several years ECI has conducted research and convened groups of E&C professionals in order to identify and verify the elements of an E&C program that are essential to the successful prevention and detection of misconduct. The following sections highlight some of these efforts.

ECI's Blue Ribbon Panel Report

ECI convened a group of 24 thought leaders in May 2015 and challenged them to identify the qualities that distinguish HQPs from minimal or “check-the-box” programs. This group spent nearly a year reviewing the relevant literature and discussing their views and preliminary findings. These efforts produced a detailed outline and later several draft versions of a full report. A draft report was ultimately released to the public for comment, and comments were accepted from a wide range of interested organizations and individuals. This process resulted in the issuance of the final *Principles and Practices of High Quality Ethics & Compliance Programs* (Blue Ribbon Panel Report) on April 25, 2016.

The Blue Ribbon Panel Report identified five fundamental principles inherent in HQPs that can be scaled to apply in any setting, large or small, regardless of the level of industry regulation. These fundamental principles are:

- **STRATEGY:** Ethics and compliance is central to business strategy;
- **RISK MANAGEMENT:** Ethics and compliance risks are identified, owned, managed and mitigated;
- **CULTURE:** Leaders at all levels across the organization build and sustain a culture of integrity;
- **SPEAKING UP:** The organization encourages, protects and values the reporting of concerns and suspected wrongdoing; and
- **ACCOUNTABILITY:** The organization takes action and holds itself accountable when wrongdoing occurs.

The Blue Ribbon Panel Report also identified 27 supporting objectives associated with each of the five fundamental HQP principles identified above. For example, the Report associated the following supporting objectives with the HQP principle that “[e]thics and compliance is central to business strategy”:

- Supporting Objective 1:* The E&C program is designed to integrate with business objectives.
- Supporting Objective 2:* E&C is given the resources and access needed to ensure both proper integration with operations and an independent voice to leaders.
- Supporting Objective 3:* E&C personnel are consistent participants in key strategic discussions.
- Supporting Objective 4:* The organization continuously improves the impact of its E&C program through leadership, innovation and continuous feedback loops.
- Supporting Objective 5:* The board of directors is knowledgeable about the impact of the E&C program and actively monitors its implementation across the business.
- Supporting Objective 6:* The organization shares its learning externally in order to positively influence other organizations toward responsible practices and a commitment to integrity.

Finally, the Blue Ribbon Panel Report identified several best practices for implementing the HQP principles and supporting objectives defined in the Report.

Blue Ribbon Panel member and former Deputy U.S. Attorney General Larry Thompson summarized the Panel's Report in testimony before the Subcommittee on the Constitution and Civil Justice of the House Judiciary Committee on April 28, 2016. Mr. Thompson, who currently serves as ECI's Chairman, stated that:

The Final Report . . . identifie[s] the primary functions of high quality ethics and compliance programs, the fundamental principles of high quality programs, supporting objectives for each of the fundamental principles, and concrete, leading practices for each of the supporting objectives.

Although they might vary by context, the primary purpose of high quality ethics and compliance programs is largely the same across the board. These programs reduce the risk of wrongdoing; increase the likelihood that wrongdoing will be discovered and brought to the attention of management; increase the likelihood of an appropriate response to the wrongdoing; and maintain integrity in the company's performance and reputation.

When compliance programs are effectively implemented, they accomplish their purpose. Based on the research we reviewed, misconduct has been shown to be reduced by as much as 66 percent in organizations with effective programs, and reporting of wrongdoing to management increases by 88 percent. These are critical findings that speak to what I believe all parties to this dialogue would consider common ground. To be effective, ethics and compliance programs should encourage reporting of misconduct; protect those who identify wrongdoing (whistleblowers); and facilitate timely responses that remediate misconduct in the event it is reported.

Effective programs, however, must consist of more than simply a set of guidelines or lists of items to check off; in addition, they must be supported through leadership commitment and quality implementation. We also determined that “high quality” ethics and compliance programs are ones that are operating well beyond a minimum framework for compliance. These programs not only meet the legal minimums, but also integrate thinking about ethics and compliance into the everyday operation of an organization. These high quality programs result in assessment of risk mitigation, and prioritize the creation of a culture where concerns can be raised. Accountability – both internally and externally – is another hallmark of these high quality programs. And, finally, these programs implement dynamic anti-fraud strategies that are continually documented, objectively measured, evaluated, and improved.

ECI’s January 2018 Survey of Members

In order to respond to informal inquiries by DOJ regarding the critical elements of effective E&C programs, ECI conducted a survey of its members in January 2018. Those surveyed included E&C professionals in large, small, and medium-sized businesses across a wide variety of industries.

Among the questions in the survey was, “*What E&C objectives are the most important in evaluating the effectiveness of another organization’s E&C program?*”

Respondents indicated as follows:



The January 2018 survey also asked respondents questions relating to the role of DOJ enforcement policies in shaping their organization’s E&C program.

45 percent of respondents stated that they referred to DOJ enforcement-related data when providing E&C updates or training to their leadership. However, 91 percent of respondents reported that they did not receive such information directly from DOJ sources such as written policy memoranda or declination statements. Rather, these respondents reported that they obtained their information regarding DOJ enforcement policies from secondary sources such as trade publications, news media, and law firm alerts.

ECI's Global Business Ethics Survey (GBES)

Since 1994 ECI has conducted a longitudinal, cross-sectional study of workplace conduct from the employee's perspective. Initially called the *National Business Ethics Survey™*, which measured U.S. workplaces, the survey was expanded and combined with the *Global Business Ethics Survey™* (GBES) to form a single world-wide employee survey under the GBES banner. The 2018 GBES, which was conducted at the end of 2017, provides the global benchmark of the current state of ethics and compliance in business world-wide.² ECI now issues reports with findings on a quarterly basis.

GBES Q1 Report

ECI issued its first quarterly report on the 2018 GBES data on March 19, 2018. This report, which analyzed only responses from employees located in the United States, contained several positive findings. First, employees reported perceiving less misconduct than they did in the 2013 GBES. In fact, the rate of personally observed misconduct declined from 51 percent in the 2013 GBES to 47 percent in the 2018 GBES. Second, the 2018 GBES showed that more employees are reporting misconduct than ever before. The rate of reported misconduct was 69 percent in the 2018 GBES, versus 64 percent in the 2013 GBES and 60 percent in the 2007 GBES.

ECI's Q1 report also contained what it called "bad news." First, employees reported experiencing more pressure to compromise standards than ever before. Sixteen percent of those surveyed reported such pressure, up from 13 percent in 2013, a 23 percent increase. Second, the percentage of employees who reported experiencing retaliation for reporting misconduct increased from 22 percent in 2013 to 44 percent in 2018 – a 100 percent increase. Furthermore, the 2018 GBES data also showed that the number of employees who believed that their organization had a "strong" ethical culture increased only slightly from 2013 to 2017 (18 percent to 21 percent), and actually declined from the levels reached in 2009 (24 percent).

... roughly 40 percent of the employees surveyed believed that their company had a weak or weak-leaning ethical culture.

In fact, roughly 40 percent of the employees surveyed believed that their company had a weak or weak-leaning ethical culture.

This last fact is particularly significant because the GBES data shows that the single biggest influence on employee conduct is culture. In organizations with strong ethical cultures that are centered on a core set of ethical values, wrongdoing is significantly reduced. However, employees in organizations with weak ethical cultures are three times more likely to say they experienced pressure to compromise standards, three times more likely to say they observed misconduct, 41 percent less likely to report observed misconduct, and 27 percent more likely to say they experienced retaliation after reporting misconduct. ECI's Q1 report noted

² To date the survey involves employees in 18 countries around the world.

that the continued presence of organizations with weak or weak-leaning ethical cultures was a cause for concern, particularly when coupled with the improvement in market conditions:

Historic GBES studies indicate workplace conduct tends to change with market conditions. This trend continues in 2017. In study periods when the market experienced a downturn, our research showed fewer employees felt pressure to compromise standards. Results of this update show that as the market improves the pressure to compromise increases.

These findings are troubling, because increases in pressure have shown to precede a weakening of ethical cultures. As that happens, as already shown in this report, conduct worsens. After nearly a quarter of a century studying employee perspectives of ethics in the workplace, ECI has shown that companies can curb the negative impact of external forces, such as the economy, by taking steps to strengthen their cultures. Yet, this report indicates the state of ethical cultures across the country remain unchanged. Unless organizations take action, it is our view that trouble may be ahead.

ECI's Q1 report warned leaders of organizations with little to no E&C programs that "the time is now to make ethics and compliance a priority." The report urged such leaders to:

- Implement an E&C program;
- Develop a statement of values and promote the values throughout the organization; and
- Set performance goals for senior leaders and managers to visibly support the values of the organization and to reinforce the importance of employee reporting.

Finally, the report cautioned organizations with an E&C program in place against taking their achievements for granted. The report noted that when organizations undergo transition, or when circumstances around the company change, misconduct arises and cultures erode, and E&C programs "are often slow to adjust to new realities." The report urged the leaders of such organizations to:

- Regularly ask their employees about the pressure they feel and reinforce to them that performance without integrity is not acceptable;
- Raise the bar for their E&C program;
- Reinforce the importance of culture among managers; and
- Assess the organization's culture and provide additional support to areas of business where employees perceive it to be weak.

GBES Q2 Report

ECI released its second quarterly report on the 2018 GBES results on June 28, 2018.³ This report focused on the impact that an E&C program has on the workplace and the statistical return on investment for E&C programs defined as HQPs.

The June 2018 report found that the GBES data showed that improving the *quality* of certain factors of an E&C program, at any stage of the program implementation continuum, has a positive impact on the organization. The report also found that in organizations that have incorporated elements of HQPs, the prevalence of favorable E&C program outcomes increases exponentially. For example, the GBES data showed that in those organizations in which “Top Management Encourages Speaking-Up Even With Bad News” is not an element of the organization’s E&C program, only 1 percent of respondents reported observing favorable E&C program outcomes.⁴ In those organizations in which the same element was part of the organization’s E&C program, however, respondents were 14 times more likely to observe favorable E&C outcomes. In fact, in all instances of comparison between E&C programs that incorporate specific elements of an HQP and those that do not, the GBES data shows that the impact of the specific HQP elements on favorable E&C outcomes is greater when the element is part of the organization’s E&C program than it is when the element is not part of the organization’s program. The backdrop for the June 2018 report was the fact that, for many years, the *de facto* standard for an effective E&C program was a “bare minimum” standard — compliance with the law. Accordingly, iterations of the GBES prior to 2018 had considered an organization’s E&C program to be effective when its workers acknowledged the presence of key elements that comply with regulatory standards. However, the report noted that some organizations were going beyond the minimum standard and implementing HQPs. The 2018 GBES, therefore, not only asked employees questions about the presence of an E&C program in their organization; it also asked them questions indicative of the quality of that program. These questions were designed to elicit information about the relationship of perceived elements of HQPs on favorable E&C outcomes.

...when an organization implemented an HQP, 93 percent of employees were willing to report misconduct, and 94 percent of those employees were satisfied with the organization’s response.

The June 2018 report found that when an organization implemented a minimum E&C program, 79 percent of employees were willing to report misconduct. Of the 79 percent of employees who reported, 74 percent were satisfied with the organization’s response. In contrast, when an organization implemented an HQP, 93 percent of employees were willing to report misconduct, and 94 percent of those employees were satisfied

³ ECI intends to issue a third report on the GBES data in September 2018 and a fourth report on that data in November 2018.

⁴ The GBES survey measured the presence of 17 favorable ethics outcomes related to the presence of specific elements of an HQP. These favorable ethics outcomes included, among others, those relating to employee compliance with and understanding of E&C rules and core values, fair and appropriate responses to reported misconduct, and employee comfort with raising concerns without fear of retaliation.

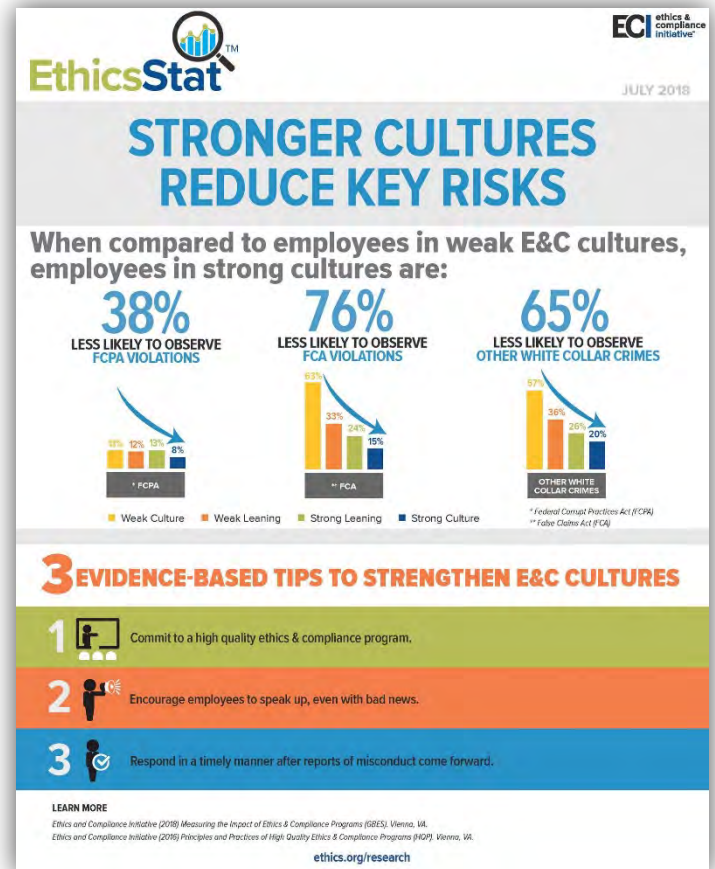
with the organization’s response. Thus, because HQPs significantly outperform minimum standard E&C programs, the report recommended that organizations should strive for HQPs to provide tangible benefits and increase the strength of the organization’s ethical culture.

ECI’s EthicsStat

As a follow-on to its Q2 GBES report, ECI released an issue in its EthicsStat series; an infographic summarizing an additional data point from the GBES dataset. On July 27, 2018 the EthicsStat reported on the reduction of key compliance risks when an organization has established a strong ethical culture. Specifically, employees in organizations with strong ethical cultures are:

- 76% less likely to observe violations of the False Claims Act;
- 38% less likely to observe violations of the Foreign Corrupt Practices Act
- 65% less likely to observe other activities that would constitute white collar/economic crimes.

The EthicsStat⁵ further explained that, as reported in the Q2 GBES report, organizations with an HQP are significantly more likely to have the strong ethical cultures that reduce these risks.



⁵ EthicsStats are produced monthly and are available at www.ethics.org/knowledge-center/ethicsstat/

ECI'S Measurement Framework for HQPS

Several of ECI's members voluntarily organized a working group in June 2017 to develop a set of metrics that could be used by all organizations — big or small, for-profit or non-profit — to measure their E&C programs against the HQP principles described in the Blue Ribbon Panel Report. This working group developed a "Measurement Framework" for each of the five fundamental HQP principles identified in the report. A copy of the Measurement Framework can be found accompanying this paper.

The Framework described the growth of an E&C program through five levels of maturity towards each of the five principles of an HQP:

UNDERDEVELOPED: A new E&C program or an existing one that has not progressed far in embedding HQP elements.

ADAPTING: An E&C program that has a few HQP elements, but still lacks many important attributes.

DEFINING: An E&C program that contains a number of HQP elements reflecting some important attributes, but with room to further mature.

MANAGING: An E&C program that can be considered effective or good, but not an HQP.

OPTIMIZING: An E&C program that contains the majority of, if not all, HQP elements.

The working group populated the "Optimizing" level of the Measurement Framework for each principle with all of the supporting objectives associated with that principle in the Blue Ribbon Panel Report. The working group then populated each of the remaining levels in the Framework with additional corresponding supporting objectives. The resulting document constitutes a chart of the stages of maturity from "Underdeveloped" to "Optimizing" for each of the five HQP principles identified in the Blue Ribbon Panel Report. The Framework developed by the working group also included four categories of guidance for evaluating an E&C program against each fundamental HQP principle: (1) "What to Measure/Review"; (2) "Questions to Consider"; (3) "Potential Sources of Information"; and (4) "HQP Leading Practices."

The working group presented its Framework to a peer group of ECI members on July 12, 2018. The final report will be publicly in September 2018.

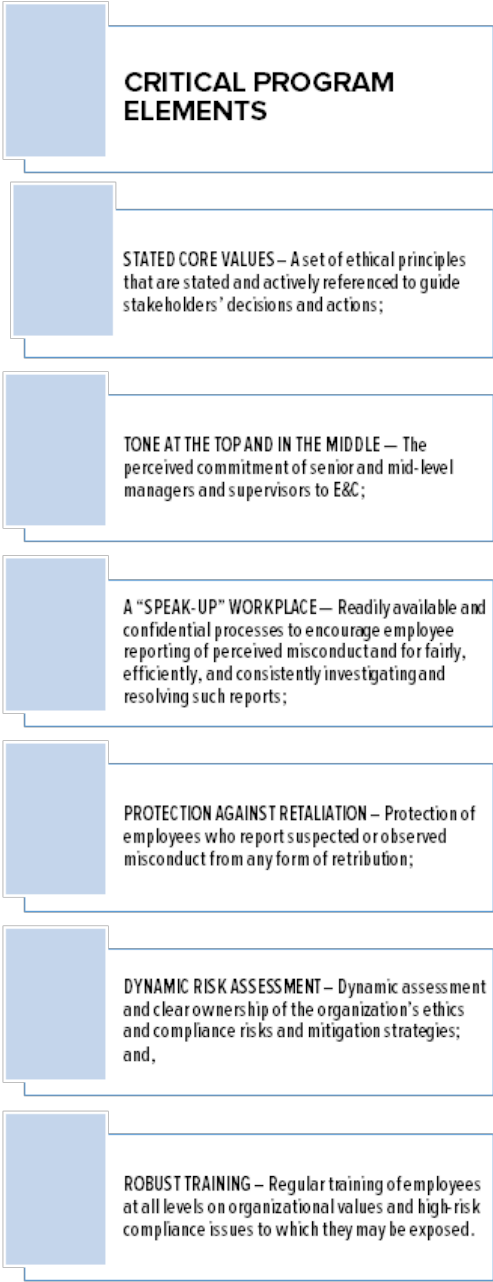
SIX CRITICAL ELEMENTS OF AN EFFECTIVE CORPORATE E&C PROGRAM

The research studies and working group reports discussed in the previous section make the case for an organization’s continued investment in a high-quality program. The impact is substantial, and the more an organization grows and matures its program, the more positive the effect. As outlined in the Blue Ribbon Panel Report and its accompanying Measurement Framework, there are a number of elements that are necessary for an E&C effort to become an HQP. Nevertheless, ECI’s research has also shown that even a minimum standard program can be effective in preventing and detecting misconduct. In order to do so, six elements must be present. The breadth and impact of these elements increase, if the program grows and matures into an HQP.

1. Stated Core Values

At best, compliance rules are a reflection of violations that have occurred, and, although they are useful in telling employees what they *should not* do, they are generally unable to help employees identify the activities that they should engage in. An organization’s formal statement of core ethical values provides guidance to help employees to do the right thing, even in instances that are either unclear or not covered by written rules.

The Blue Ribbon Panel Report noted that core values should be ethical in nature, and they should be communicated frequently to all employees. The effort begins with a statement that defines the values that are indicative of the way the company wants to conduct its business, or the manner in which it expects employees to treat one another. Members of ECI’s community have further noted that as a point of emphasis, the values statement should serve as a cover document for any other standards of conduct, and make it clear that the values are a way of conducting oneself above and beyond literal compliance with the standards and other rules. Once identified, the values should be made visible to employees and be regularly



referenced and reinforced by management on a regular basis. HQPs also build skills in employees at all levels on how to act in alignment with the organization's values, even in times of stress.

In its 2009 GBES report, ECI demonstrated that an additional benefit of a values statement is that it is strongly linked to the growth of an ethical culture, which in turn, is correlated to a reduction of misconduct, increased reporting when wrongdoing occurs, and a reduction in the number of employees who feel pressure to cut corners in order to perform their jobs. In its forthcoming Q3 GBES report, ECI will demonstrate that having a strong commitment to stated core values is linked to employee willingness to report suspected misconduct. At present, 56% of employees work in organizations with a strong commitment to their core values. Another 38% of employees work in organizations with a moderate commitment, and 6% are employed in organizations with a weak commitment to their core values.

2. Tone at the Top and Tone in the Middle

The results from the Q1 GBES survey and the January 2018 survey of ECI members both confirm that tone at the top and at the middle management level are fundamental components of an organization's ethical culture and essential to the effectiveness of its E&C program. When asked to identify the most important elements they would look for in assessing the effectiveness of another organization's E&C program, a majority of respondents in the January 2018 survey – 53 percent – identified tone at the top as the most important element. The next highest group – 47 percent – identified management support throughout the organization as the most important element they would look for in assessing the effectiveness of an E&C program. Thus, 100 percent of the January 2018 respondents identified tone at the top and/or tone in the middle as the most important element of an effective E&C program.

ECI's first report on the 2018 GBES also confirms the importance of an organization's culture (as reflected in perceived tone at the top and tone in the middle) as the "single biggest influence on employee conduct." That report found that employees in organizations with cultures they regard as "strong" were far less likely to say that they had experienced pressure to compromise standards or had observed misconduct, far more likely to report misconduct if they observed it, and far less likely to have experienced retaliation for reported misconduct, than were employees in organizations whose culture those employees regard as weak.

These survey results are not surprising. ECI's Blue Ribbon Panel Report identified "[l]eaders at all levels across the organization build and sustain a culture of integrity" as one of the five fundamental principles of an HQP. Tone at the top and tone in the middle is also reflected in other fundamental principles identified in the Blue Ribbon Panel Report, including "[e]thics and compliance is central to business strategy." DOJ itself has acknowledged the central role that an organization's culture of integrity and compliance plays in determining whether a company has an effective E&C program. For example, Deputy Attorney General Rosenstein stated in his March 2, 2018 speech to the American Bar Association's [ABA National Institute on White Collar Crime](#) that "[w]hen something goes wrong, the greatest consideration should be given to companies that do not just adopt compliance programs, but incorporate them into the corporate culture."

3. A Speak-Up Workplace

The third critical element of an effective E&C program is that the company encourages a Speak-Up Workplace by establishing readily available and confidential processes for employees to report perceived misconduct and fair and efficient processes for the investigation and resolution of such reports. As noted by the ECI Blue Ribbon Panel, perhaps the greatest E&C risk to an organization is an environment where employees are unwilling or unable to make management aware of their suspicions or knowledge of misconduct. Fear or reluctance to report not only impedes the flow of information that leads to detecting misconduct; it chills employees' motivation and confidence to take action in support of the organization's integrity.⁶

In order to mitigate this condition, the ECI Blue Ribbon Panel Report observed that leaders must create an environment of openness where employees are encouraged, prepared and empowered to raise concerns. Leaders must also be trained and prepared to respond appropriately if/when employees do come forward.

Like tone at the top and in the middle, processes for reporting and investigating perceived misconduct reflect an organization's culture of ethics and compliance. Such processes are also consistent with the Blue Ribbon Panel fundamental principles that "[t]he organization encourages, protects and values the reporting of concerns and suspected wrongdoing" and that "[t]he organization takes action and holds itself accountable when wrongdoing occurs."

The importance of processes for employees to report observed wrongdoing and for companies to investigate those reports is supported by the ECI survey results. The rate of employee reporting of perceived misconduct is one of the benchmark measures in the Q1 GBES report; an increase in the reporting rate is considered "good news" for the effectiveness of E&C programs. Furthermore, the rate of reporting of observed misconduct is higher (and is expected to be higher) in organizations with ethical cultures regarded as "strong" as opposed to those organizations with ethical cultures regarded as weak. In addition, the survey that ECI conducted in January 2018 ranked "Consistent, Efficient & Fair Internal Investigations" as among the most important elements that the respondents would look for in assessing the effectiveness of another organization's E&C program.

4. Protection Against Retaliation

The fourth critical element of an effective E&C program is protection of employees against retaliation for reporting misconduct. This element supports and reflects the critical elements of Tone at the Top and Tone in the Middle and a Speak-Up Workplace discussed above. It also reflects fundamental principles identified in the Blue Ribbon Panel Report such as "[t]he organization encourages, protects and values the reporting of concerns and suspected wrongdoing" and "[t]he organization takes action and holds itself [rather than the whistleblower] accountable when wrongdoing occurs." As the report states:

⁶ See pp. 26-33 of Ethics Resource Center (2013). *National Business Ethics Survey 2013*[®]. Arlington, VA: Ethics Resource Center. Also Ethics Resource Center (2012). *Inside the Mind of the Whistleblower*. Arlington, VA: Ethics Resource Center.

Leaders in HQPs also take very seriously any claims of retaliation against employees who report wrongdoing.⁷ Leaders are helped in their effort to live up to this standard by departments that support the infrastructure; including vigilant human resources, E&C, and legal functions. In addition to sending consistent and meaningful messaging to employees about the organization’s stance against retaliation, HQPs institute efforts to monitor the well-being and success of employees who come forward to report suspected wrongdoing. Organizations with HQPs take careful steps to investigate potential retaliatory behaviors against those individuals. HQPs ensure that frank discussions of the consequences of retaliation are integrated into every investigative interview and that instances of retaliation or intimidation during the investigative process are promptly reviewed and appropriate follow-up action is taken. Whenever retaliation is substantiated, it is considered to be an act of misconduct unto itself; HQPs therefore require a commitment to follow-through and consequences for retaliators.

The importance of protection against retaliation is supported by the January 2018 survey of ECI members and the Q1 GBES report, both of which underscore that protection against retaliation is an integral part of a strong culture of ethics and compliance. The Q1 GBES report found that employees in ethical cultures perceived to be weak were 41 percent less likely to report misconduct, but 27 percent more likely to say that they experienced retaliation after reporting misconduct. In fact, actively and visibly protecting employees who report observed misconduct against retaliation may be one of the quickest and most effective ways of improving the culture of an organization whose culture its employees view as weak. Previous GBES reports linked retaliation with lower employee engagement, less intent to stay with an organization, and greater incidents of observed misconduct that went unreported.

5. Dynamic Risk Assessment

This critical element is an amalgamation of two of the fundamental principles identified in the Blue Ribbon Panel Report — the principle that “[e]thics and compliance risks are identified, owned, managed and mitigated,” and the principle that “[t]he organization takes action and holds itself accountable when wrongdoing occurs.”

Regarding the principle that ethics and compliance risks should be identified, owned, managed, and mitigated, the Blue Ribbon Panel Report states as follows:

Risk assessments are the foundation upon which HQPs are built. Every organization has a unique risk profile based on industry, history, maturity, marketplace and more. In HQPs,

⁷ Fear of retaliation remains a consistent barrier to reporting. In 2013, 56 percent of those who chose not to report misconduct cited fear or knowledge of retaliation as the reason for their silence. See pp. 27 of Ethics Resource Center (2013). *National Business Ethics Survey 2013*[®]. Arlington, VA: Ethics Resource Center.

the E&C program is recognized as a key component of the enterprise risk management effort, providing management and the board with critical information that can help to avoid severe business disruption and loss. E&C — in collaboration with many other functions and operations is well-integrated into the organization's risk assessment practices and procedures. This integration ensures that risk owners are clearly identified, resources are targeted to the most significant risks and controls, and prevention activities align with changes in the risk profile of the organization.

An important characteristic of HQPs is that responsibility for risk is shared across the organization, as leaders assume ownership for the ongoing identification and mitigation of risks that are relevant to their areas. To support the effort, the E&C program is attuned to the most serious risks as they change over time. Risk assessment is an ongoing process which serves as a critical early warning system for current and emerging issues. Moreover, both the ethics and compliance program and current state of the organization from an E&C perspective are evaluated as risk areas. Accordingly, compliance performance, strength or weakness of organizational culture, employee willingness or fear to report and other key E&C areas are evaluated as potential risks to the organization.

The concept of dynamic assessment of changing risks also flows from the HQP principle of accountability. Regarding accountability, the Blue Ribbon Panel Report states that the E&C program should be “accountable for continuous improvement — ensuring that the resources and support provided to leaders and employees are a reflection of the emerging priorities, activities and risk of the organization.” This concept includes “root cause analysis,” which is necessary to identify the systemic or process failures that allowed the misconduct to occur. Robust root cause analysis permits the organization to identify the process improvements (and other enhancements) that must be made to the E&C program in order to enable it to prevent or detect similar misconduct in the future.

6. Robust Training

The sixth and final critical element of an effective E&C program is regular training on organizational values and the high-risk compliance issues to which employees may be exposed. Twenty-five percent of E&C professionals responding to ECI’s January 2018 survey of members identified this as one of the most important elements they would look for, if they were asked to assess the effectiveness of another organization’s E&C program. The significance of regular training on values and high-risk compliance issues is also reflected in several of the supporting objectives and leading practices for the principles of an HQP identified in the Blue Ribbon Panel Report. In fact, the element of training is referenced as supporting several principles in the Report. For example, the Report identifies training as one of the ways to encourage, protect and value the reporting of concerns and suspected wrongdoing:

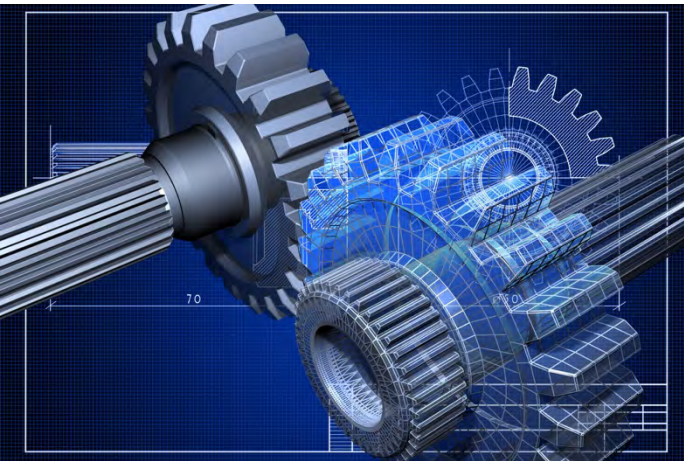
Supporting Objective 5: The organization has proactive processes in place to prevent retaliation; including awareness *training* for leaders; monitoring of employee reporters; and demonstrated consequences for violations. (Emphasis added.)

Likewise, the Report identifies “[t]he board receives periodic E&C *training* tailored to their responsibilities as board members and any special issues of relevance” as one of the leading practices supporting the fundamental principle that ethics and compliance is central to business strategy. (Emphasis added.)

In another research report entitled, *Ethics & Compliance Training: What Gets Results*, ECI found that 67% of employees surveyed said that they feel they need E&C training “a great deal,” “a lot,” or “a moderate amount.” The report also concluded that some methods of training have a greater impact than others. Manager-led discussions of case studies about ethics issues, for example, were considered to be more effective than internet-based training on specific compliance topics.⁸

Finally, the Blue Ribbon Panel Report included training in two of the leading practices supporting the fundamental principle that “[e]thics and compliance risks are identified, owned, managed and mitigated.” Specifically, “[c]ontinuous learning on E&C topics is required of employees based on their role and risk exposure; such *training* is continuously evaluated for effectiveness and relevance” and “[t]he organization actively works to make *training* and guidance relevant to the user in a timely and current fashion.” (Emphasis added).

⁸ Ethics & Compliance Initiative (2017). *Ethics & Compliance Training: What Gets Results*. Available at: www.ethics.org.



MEASURING AN ORGANIZATION'S IMPLEMENTATION OF THE SIX CRITICAL ELEMENTS

Several tools exist for measuring the progress of a particular company in implementing the six elements that are critical to an effective E&C program. One such tool is the ECI HQP Measurement Framework, and to that end, the following section highlights some of the metrics and other suggestions that are provided in that report. The list is meant to be illustrative, and not exhaustive. For more metrics, please see the Measurement Framework⁹.

1. Measuring Stated Core Values

What to Measure/Review:

- Core values statement;
- The extent to which leaders are engaged to promote organizational values and enforce a culture of ethics and compliance;
- Employee feedback regarding trust in leadership, fear of retaliation for reporting, and the alignment of conduct with measured stated core values;
- Support and resources provided to leaders to connect values with daily business operations.

Questions to Consider:

- Do our stated core values articulate our commitment to integrity?
- To what extent do our core values help employees determine “what the right thing is to do” when they make decisions?

⁹ The Measurement Framework is available for review and download at www.ethics.org/HQP.

Potential Sources of Information:

- Core values statement;
- Leadership participation in ethics training program/code of conduct training;
- Employee survey – employees’ perspective on core values and leaders’ ethical conduct;
- Leadership communications and materials to employees and contractors;
- Communications, activities, etc., reflecting leadership support of organizational values.

2. Measuring Tone at the Top and Tone in the Middle

What to Measure/Review:

- Resources (staff and funding) allocated to E&C program (dedicated and non-dedicated);
- Governance documents around E&C program (e.g., Code of Conduct and related policies, Board access, E&C Committee charter, escalation procedures, etc.);
- Level of E&C integration into the organization’s business operations;
- Level of E&C program review and continuous improvement cycle;
- The extent to which leaders personally demonstrate a commitment to ethics and compliance;
- The extent to which leaders are engaged to promote and enforce a culture of ethics and compliance;
- Employee feedback regarding trust in leadership and fear of retaliation for reporting;
- Leadership performance reviews include an evaluation component for relevant areas;
- Support and resources provided to leaders to connect values with daily business operations.

Questions to Consider:

- Does E&C have a formal charter?
- Does E&C have a seat at the table? (i.e. substantially integrated into business decision making?)

- Is E&C involved in strategic and crisis management decisions for the organization?
- Does the Board meet regularly with the E&C officer, including in private session?
- Is the E&C program continuously improved through leadership and feedback loops?
- Is there an ethics committee or is ethics and compliance a standing agenda on leadership meetings?
- Who sets the tone and is responsible for company's ethical culture?
- Does senior leadership link good ethics with good business when making internal and external presentations about the company?
- Do employees fear retaliation for speaking up when they observe misconduct?
- Is there consistent organizational justice (i.e., similar discipline regardless of subject's position)?
- Are leaders at all levels of the organization evaluated on promoting an ethical work culture?

Potential Sources of Information:

- Organizational chart;
- E&C charter or remit;
- Governance documents around E&C program (e.g. committee charters);
- Escalation procedures;
- Ethics and compliance training materials;
- Formalized ethics and compliance plans to address gaps or continuously improve the E&C program;
- Ethics and compliance policies and procedures;
- Leadership participation in ethics training program/Code of Conduct training;
- Employee survey - employees' perspective on leaders' ethical conduct and concerns about reporting misconduct;
- Leadership communications and materials to workforce;

- Performance evaluation criteria for leaders;
- Materials relating to E&C program support for leaders;
- Communications, activities, etc. reflecting leadership support of a culture of integrity.

Leading Practices:

- Strategic goals for the organization include goals related to E&C;
- Senior leaders articulate the ways E&C relates to their operational areas;
- E&C is represented in strategic teams including the executive or management committee, enterprise risk committee, disclosure committee, etc.;
- E&C leaders are visible and prominent, sending a strong message that compliance and ethical conduct are high priorities for the organization;
- E&C leaders participate in high-level strategic discussions and are frequently asked to offer input to ensure decision-making aligned with values;
- Leaders make time for “town hall” give-and-take sessions during which E&C issues are addressed;
- Senior leaders probe for new insights and improvements by asking hard questions of E&C leaders, risk owners, and others accountable for E&C performance;
- The organization seeks feedback from employees on leaders’ behavior as well as E&C program tools and resources;
- Board leaders and members seek and are provided comprehensive information about the organization’s E&C program;
- The Board maintains a relationship with E&C through regular contact with the E&C leader and his/her team;
- Leaders at all levels, including managers and supervisors, model integrity by talking about the importance of ethical conduct and referencing organizational values as a framework for their decisions, exemplifying the conduct they expect of their employees, and holding subordinates accountable for ethical behavior;
- Leaders’ behaviors are a significant consideration in employment and promotion decisions;
- No “waivers” of integrity standards are given to more senior personnel;

- E&C performance affects compensation, advancement, and retention of all employees;
- In everyday activities, leaders act and speak in alignment with the organization's values;
- Leaders are knowledgeable about and assume responsibility for their role as ethical leaders in the organization;
- Employee feedback is sought regarding leaders' efforts to build and sustain a strong ethical culture;
- Senior managers directly communicate values and standards to employees at all company business gatherings;
- For all employees, expectations are set and performance is judged on employees' actions in alignment with organizational values, not merely technical rule compliance.

3. Measuring a Speak-Up Workplace

What to Measure/Review:

- Organizational commitment to reporting and resolution of employee concerns/suspected wrongdoing;
- Employee perception that their concerns are solicited and heard;
- Employee awareness of available avenues to report concerns;
- Employee use of reporting channels;
- Leadership response to reported misconduct;
- Use of case information/periodic assessments to measure effectiveness of reporting and resolution;
- Investigations of misconduct are timely, neutral, thorough, competent, and consistent;
- Employees who commit misconduct are treated/disciplined consistently across the organization;
- The organization shares aggregate outcomes of misconduct cases with employees in some way.

Questions to Consider:

- Does ethics and compliance training and communications effectively support a “Speak-Up” culture?
- Does leadership promote a “Speak-Up” culture?
- Does the organization provide a broad and varied number of reporting avenues?
- Is the organization’s policy clear about its standard for tracking and resolution and sharing of employee concerns after cases are closed?
- Is feedback provided to employees making non-anonymous reporting of misconduct?
- Is there consistency in the investigation and discipline process?
- Are consequences consistent regardless of the level of violator?
- Does any group within the organization have visibility into all investigation outcomes in order to ensure guidelines, policies and procedures were followed correctly?

Potential Sources of Information:

- Organization policies on reporting, tracking, and resolution of employee concerns;
- Ethics and compliance training and communication materials specifically related to “Speaking Up” requirements;
- Results of regular Speak-Up Program Assessments and/or employee surveys;
- Communications and activities supporting and promoting a Speak-Up culture;
- Ethics and compliance metrics and trend reports;
- Investigation metrics to include time to closure of investigation and disciplinary actions taken to ensure consistency;
- Leadership presentations and meeting agendas relating to hotline metrics, trends, and big cases;
- Employee communications around hotline and trends;
- Investigation policies and processes, including escalation triage policy and process;

- Employee survey – employees’ perspective on concerns about reporting misconduct.

Leading Practices:

- Questions from employees are solicited and listened to, and raising difficult issues is expected and recognized as excellent performance;
- Employees are made aware of available resources to support their speaking up. Awareness training addresses making ethical decisions in alignment with shared organizational values, seeking guidance, and the process that takes place when a report is made;
- Leaders’ performance in creating a “Speak-Up” culture is measured and managed;
- Leaders speak regularly about—and formally recognize the value of—raising issues;
- Courage in raising concerns is broadly and publicly recognized and individually rewarded in employee performance reviews;
- The organization seeks to dispel whistleblower stereotypes and expects leaders to responsibly handle reports from employees;
- The organization provides means for employees to anonymously, where permitted by law, and safely report via the phone and the internet, at minimum. When appropriate, these channels include global coverage, including accommodation of those who require translation services;
- Outcomes of reported misconduct and the consequences that resulted in substantiated cases are regularly shared with all employees;
- Thorough, timely, neutral, competent, and consistent investigations are conducted and the organization maximizes learning from every substantiated matter;
- The organization is transparent about how investigations are conducted, including roles and procedures, timing, quality standards, conflict-of-interest protections, training of investigative personnel, confidentiality, and anti-retaliation protections;
- Respectful and proper personal debriefing and closure of the issue with the reporting party, if known, is required in every case;
- E&C ensures that proper consequences result from violations, including convening disciplinary review committees for significant violations;
- Clear policy is in place regarding the escalation and response of significant matters;

- Leaders support responsible, timely disclosure to regulators;
- When appropriate, cases are publicized after closure and follow-up action to deter future misconduct.

4. Measuring Protection Against Retaliation

What to Measure/Review:

- Organizational commitment to non-retaliation of employee concerns/suspected wrongdoing;
- Employee use of reporting channels;
- Leadership response to reported misconduct;
- Use of case management information/periodic assessments to measure effectiveness of non-retaliation policies.

Questions to Consider:

- Are non-anonymous reporters receiving follow-up reports?
- Are there controls with respect to fair treatment of reporters throughout the process?
- Is action being taken against retaliations when evidence of retaliation is discovered?

Potential Sources of Information:

- Organization policies on reporting, tracking, and resolution of employee concerns;
- Ethics and compliance training and communication materials specifically related to non-retaliation requirements;
- Results of regular assessments and employee surveys;
- Communications and activities supporting and promoting a Speak-Up culture, including communications and activities directed against relation against those who speak up.

Leading Practices:

- Employees are aware of the organization's policy on "no retaliation";
- If an employee opts to make a report to government authorities, he/she is protected from all forms of retaliation;

- Discipline is never imposed against an employee for taking action to report an issue;
- Disciplinary processes are regularly reviewed to ensure that actions taken do not involve any retaliation or the appearance of it (e.g., taking into account the past reporting history of the employee reporter), and that any risk that disciplinary actions taken might discourage future reporting is mitigated;
- All leaders are trained to be aware of the organization’s policy on retaliation and the behaviors that may be perceived as retaliation;
- The organization recognizes that employees may not feel comfortable reporting retaliation; therefore, it continues to monitor the long-term success of employees who report suspected violations;
- Investigations of retaliatory behaviors receive special handling and priority to ensure responsiveness and neutrality;
- Substantiated retaliation cases are reviewed by senior management and are reported to the organization and the Board;
- E&C or other appropriate personnel ensure neutrality in investigations through careful oversight and selection of who investigates any matter;
- Metrics are kept on disciplinary consequences of violations and are periodically reviewed for trends and potential inconsistencies by topic, location, and level of employee.

5. Measuring Dynamic Risk Assessment

What to Measure/Review:

- The comprehensiveness of the organization’s formal risk assessment and risk mitigation policies and processes and whether they specifically reference ethics and compliance risks;
- The organization’s assignment of responsibilities for risk identification and mitigation;
- The level and quality of E&C participation in the risk assessment and risk management process;
- The degree to which technology and other resources are deployed to manage risk, including third party risk, versus manual management.

Questions to Consider:

- Do ethics and compliance matters flow into the organization’s ERM process?

- How is information about risks shared within the organization, across functions, and among senior management and the Board?
- Is risk management assigned to specific people or ad hoc?
- Are people trained to identify risk?
- Is there a risk committee structure within the organization that meets periodically to evaluate risks?
- What is the impact of risk assessment reports of policy and organization?
- How are high impact risk areas, *e.g.* third party risk, money laundering, etc. assessed, mitigated, and monitored?
- Does the organization conduct root cause analysis on all cases, or a subset of cases?

Sources of Information:

- Copies of past risk assessments and/or ERM documentation;
- Risk heat map or other forms to document the results of the risk assessment;
- Organization's policies for risk assessment and management;
- Organizational chart identifying people with risk management responsibilities;
- Survey responses from employees about risk areas;
- Training records and communication material related to risk areas;
- Interview with key risk management employees, senior management, and board members;
- Guidance provided by E&C relating to risk management strategic plans;
- Materials reflecting the extent to which the organization self-identifies and reports E&C issues and proactively remediates those issues;
- Ethics and compliance metrics and trend reports;
- Leadership presentation and meeting agendas related to hotline metrics, trends, and key cases;
- Employee communications around hotline and trends.

Leading Practices:

- The organization’s risk assessment process is well-defined and includes consideration of risk appetite, risk capacity, risk tolerance, and risk monitoring. This includes identifying and tasking risk owners for every key risk area, including their responsibility for reporting and coordinating mitigation progress (policy, training, operating processes and controls, mitigation, and resolution of issues);
- The organization’s risk assessment process includes broad and deep participation, and processes and deliverables that are integrated into the business calendar throughout the year, not just as a one-time event;
- The E&C program is nimble and adjusts regularly to identified and prioritized risks; results of risk assessments are used to enhance the E&C program and compliance training, and are aligned with compliance root cause analysis, along with feeding into policy changes;
- Leaders ensure that their teams understand the risk assessment process of the organization and the key risks that are relevant to their unit and the organization;
- The organization tracks performance outcomes and metrics on risk identification and mitigation and holds individuals accountable for performance in these areas;
- The organization maintains cross-functional teams in its risk assessment and quarterly disclosure review processes to promote insights and issue-spotting;
- E&C metrics across the organization are reviewed to detect “high risk” areas that may require intervention or further monitoring;
- Policies and the Code of Conduct are maintained, updated to reflect prominent risk areas, and made readily available to employees at every level and location, without exception;
- Each investigation includes a discussion of potential root causes. E&C or other personnel, as appropriate, consider whether the incident could have been avoided and ensure that follow-up action is considered and executed;
- Escalation and crisis management systems are regularly tested via exercises or audits;
- When appropriate, cases are publicized after closure and follow-up action to deter future misconduct.

6. Measuring Robust Training

What to Measure/Review:

- Resources (staff and funding) allocated to the E&C program;
- Relevant policies and procedures;
- Employee awareness of available avenues to report concerns;
- Employee use of reporting channels;
- Use of case management information/periodic assessments to measure effectiveness of reporting, resolutions, and non-retaliation;
- If and how the organization shares aggregate outcomes of misconduct cases with employees.

Potential Sources of Information:

- Training records and communication material related to risk areas;
- Guidance provided by E&C relating to risk management;
- Leadership participation in ethics training programs or Code of Conduct training;
- E&C training and communication materials specifically related to “Speaking Up” requirements.

Leading Practices:

- The organization continuously asks and answers the questions: Does the E&C program make a difference? How? Why?
- The Board receives periodic E&C training tailored to their responsibilities as Board members and any special issues of relevance;
- The organization works actively to make training and guidance relevant to the user in a timely and current fashion;
- The organization’s values, its Code of Conduct, and other procedures are explained to all employees. When needed, they are translated according to language, culture, or other demographics to ensure understanding;

- All Code of Conduct, training, and communications materials begin with a connection to organizational values and then explain various rules within that context. Training also emphasizes seeking guidance, being conscious of acting in alignment with values, and consequences for not doing so;
- Awareness training addresses making ethical decisions in alignment with shared organizational values, seeking guidance, and the process that takes place when a report is made;
- All leaders are trained to be aware of the organization's policy on retaliation and the behaviors that may be perceived as retaliation;
- Employees are trained on proper procedures in cooperating with government inquiries and consequences for noncompliance.



CONCLUSION

Based on several years of research and information gathering from our members, ECI has identified the principles and practices that are indicative of a high quality E&C program. We have also learned through our work that even if an organization has a minimum standard program in place, its efforts can be effective in

preventing and detecting wrongdoing –provided its program incorporates the six critical elements.

Therefore, ECI recommends that DOJ emphasize these six elements in its assessment of an organization’s E&C program. These critical elements—Stated Core Values, Tone at the Top and Tone in the Middle, a Speak-Up Workplace, Retaliation Protection, Dynamic Risk Assessment, and Robust Training—are fundamental to an effective E&C program. However, they should not be viewed as rigid or a one-size-fits-all approach to E&C programs.

The development and maturity of these critical elements may be measured using ECI’s Measurement Framework, which provides guidance on “What to Measure/Review,” “Questions to Consider,” “Potential Sources of Information,” and “Leading Practices.” We invite DOJ to rely on these established metrics in developing its own models to assess the critical elements of an effective program.

These critical elements and the Measurement Framework are instructive for defining and refining DOJ’s view of an effective E&C program, and for measuring such programs effectiveness. This flexible approach to assessing an E&C program encourages companies to implement these programs, which in turn benefits DOJ, the companies, and the public. ECI believes the principles and recommendations identified in this paper will assist regulators and the regulated community alike in their pursuit of E&C excellence.

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ABOUT ECI

The Ethics & Compliance Initiative (ECI) empowers organizations to build and sustain High Quality Ethics & Compliance Programs (HQPs). ECI provides leading ethics and compliance research and best practices, networking opportunities and certification to its membership.