Does your compliance program support both corporate agility and stability?

By Melanie Brown

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Orgagility, corporate agility, and strategic flexibility: These somewhat synonymous terms can be defined by the ability of an organization to renew itself, adapt, change quickly,[1] and gain competitive advantage in a rapidly changing, ambiguous, and turbulent environment. If your compliance program is constructed effectively, it intertwines within the company structure, processes, and people; and, in doing so, your program benefits organizational agility and provides much needed corporate stability.

Don't worry; this article is not another COVID-19 analysis. A company and compliance program have to be agile to survive a pandemic, but they also have to survive foreseeable and unforeseeable swings in events like strategic actions, asset deployment, and investment strategies.[2]

Let's say you have a well-designed and effective compliance program in place. Congratulations! Your program considers the eight principles of an effective compliance and ethics program promulgated by the US Federal Sentencing Guidelines,[3] the Department of Justice's *Evaluation of Corporate Compliance Programs*,[4] not to mention the Organisation for Economic Co-operation and Development's *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.[5] But the ability to change course quickly and decisively in response to changes in environment not only requires organizations to naturally adapt, but also for the compliance program to do the same.

So is your compliance program agile enough for the environment that you are in?

The concept of organizational agility can be traced way back to 1989, when Jack Welch, then CEO of General Electric Inc., discussed organizational focus on "speed, agility and simplicity."[6] Since then, the concept of organizational agility has grown exponentially. The literature is prolific, and discussions among organizational theorists/behaviorist are significant, but what we don't hear about often is the importance of a compliance program to the agility of organizations. When it comes to organizational agility, a compliance program must *anticipate, adapt, and act*.[7]

Anticipate

"Effective compliance programs play a critical role in preventing misconduct," said Assistant Attorney General Brian A. Benczkowski.[8] To do so, a compliance program has to operate in harmony with other departments in an organization, and that means the program has to be embedded within the corporate structure. Put simply, the lack of compliance playing a key role in the company structure, processes, and human resources will inevitably result in slow decision-making, conflicting priorities, and silo-based information, inhibiting fast and forward thinking while mitigating risk, which are essential for agility. This is one method where an effective compliance

program can support changing environments and remain the backbone of the organization.

By incorporating compliance in these three areas, a company will have clear insight into its operations and strategy. This is important because when the unforeseeable happens, compliance will be ready to anticipate the organization's risk-driven needs. Compliance personnel need to ensure their compliance program continuously adapts to fit the company's needs and risk profile; this is one of the quintessential elements to advance organizational agility and a thriving compliance program. This is also where a well-designed quantitative/qualitative risk assessment, based on the right metrics, is able to anticipate and measure the needs of the organization through turbulent waters.

Adapt

The work is not done at the end of the risk assessment. Compliance personnel will have to review their internal controls, policies, procedures, and processes to ensure that the disruption does not have a negative impact on the organization's internal controls. Through processes that allow for both top-to-bottom communication and feedback, this can minimize the risk of misalignment during turbulent times. During the disruption, compliance personnel will have to assess and decide: Do the current policies, procedures, and processes still help businesses effectively mitigate risks and prevent criminal misconduct?

The June 2020 Department of Justice update to the *Evaluation of Corporate Compliance Programs* requires an examination of the company's processes for updating existing policies and procedures, in addition to implementing new policies and procedures. These updates should be made in accordance with the company's periodic risk assessments and be based on learned lessons.[9]

An effective and well-designed compliance program has to be fluid (i.e., it flows and adjusts to the changing corporate climate). This requires the program to be updated and revised over time. When evaluating a company's updates and revisions to its compliance program, Department of Justice prosecutors are to inquire whether the company's periodic review is limited to a "snapshot in time" or based on "continuous access to operational data and information across functions."[10] This goes a long way to ensure that the compliance program actually works in practice. Not only that, but Department of Justice prosecutors may reward efforts to promote improvement and sustainability of the compliance program.[11]

Act

A company's culture must provide ample space for flexibility. This calls for leadership transparency, open communication, and synergy among the business units and all employees. During a disrupting event, every employee plays a role in the corporation's survival, and this includes complying with the policies, procedures, and processes described above. To make this happen, senior management has to persistently encourage employees to take an active role in cultivating and sustaining meaningful change and collaborating internally and externally.

Agility means stability

For any moment, but especially during a disruption, already having effective processes in place allows organizations to deploy valuable internal resources to achieve higher agility. Various hallmarks of a well-designed compliance program (e.g., risk assessment, company policies and procedures, and training and communications) can help the organization be more agile and ultimately survive turbulent times.

Takeaways

- A well-designed and effective compliance program intertwined within the company can benefit organizational agility and stability.

- Organizations naturally adapt to their environments in order to survive; so can your agile compliance program.

- When it comes to organizational agility, a compliance program has to anticipate, adapt, and act.

- A well-designed risk assessment, based on the right metrics, will be able to anticipate and measure the needs of the organization through turbulent waters.

- A fluid and effective compliance program can be a *profit* center, especially during rapidly changing and ambiguous times.

1 Wouter Aghina and Aaron De Smet, "The keys to organizational agility," interview, McKinsey & Company, December 1, 2015, https://mck.co/3307wf7.

2 "Organizational Agility: Historic Origins and Evolution," *Organizational Agility: What It Is, What It Is Not, And Why It Matters*, 1989, 7, https://bit.ly/3h24l50.

3 USSG § 8B2.1 (U.S. Sentencing Comm'n 2018).

4 U.S. Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* (Updated June 2020), http://bit.ly/2Z2Dp8R.

5 Organisation for Economic Co-operation and Development, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, adopted February 18, 2010, http://bit.ly/2Re74v4.

6 *Organizational Agility*, 4.

7 Kevin Oaks, "The 3 A's of Organizational Agility," Human Resource Executive, July 31, 2018, https://bit.ly/2RuosOr.

8 Department of Justice, "Criminal Division Announces Publication of Guidance on Evaluation Corporate Compliance Programs," news release, April 30, 2019, http://bit.ly/2TeeHkm.

9 U.S. Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs*, 3 and 4.

10 Gary DiBianco, et al., "Key Takeaways from Updated DOJ Corporate Compliance Evaluation Guidance," Skadden, Arps, Slate, Meagher & Flom LLP, June 15, 2020, https://bit.ly/3h7LEwU.

11 U.S. Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs*, 15.