

CRACKING THE CODE – A FEW KEY CONSIDERATIONS FOR DEVELOPING CODES OF CONDUCT

Posted on June 30, 2021

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Codes of Conduct (“**Code**”) are an important tool for companies to mitigate legal and reputational risk by promoting ethical and responsible conduct of their employees. Aside from serving as a marketing tool to demonstrate good governance to external stakeholders, Codes also offer an opportunity to define a company’s mission, its values and core principles concerning the conduct of its business.

The need for a Code and other policies and procedures within a company is becoming increasingly apparent as regulatory authorities are imposing stricter compliance requirements to foster responsible business conduct by companies operating at home and abroad. Companies are also ramping up their Environmental, Social and Governance (“**ESG**”) initiatives as this area becomes ever more relevant for investors in a post-pandemic world. For example, the recent announcements by the Government of Canada^[1] regarding human rights abuses in the Xinjiang Region of China are indicative of the mounting pressures imposed on companies to operate in a responsible manner that takes into account supply chain risk resulting from forced labour.

In this bulletin, we touch on a few key considerations that should be considered when drafting Codes, and why companies may need to go beyond Codes to ensure a robust governance framework.

i. Drafting recommendations

There is no “one size fits all” approach for Codes. All Codes have to be tailored to the size, business operations and regulatory risk profile of a company. As such, it is important to ask oneself the following questions before drafting Codes:

- What is the company’s mission and values?
- What legal and regulatory risks is the company exposed to?
- What potential breaches of law and regulation could occur as part of everyday business operation?
- What has gone wrong in the past?

The topics that need to be addressed in the Codes are determined by the answers to these questions. Once the author is ready to put pen to paper, he or she must consider a fundamental maxim for drafting the Codes,

which is to use simple language that explains in a clear and concise manner what is expected of an employee. Authors of Codes should steer clear of legal jargon and confusing formulations to avoid unnecessary ambiguity among their readership. Aside from being clear and concise, the guiding principles for the drafting of Codes should sometimes be “less is more” to be as convincing and effective in achieving the Codes’ ultimate purpose.

The drafting process should involve a multi-disciplinary team that can comment and contribute based on their respective areas of expertise. It has also become standard practice for companies to add a foreword from the CEO or another high-ranking executive to set the “tone from the top” in terms of ethical conduct. Demonstrating “buy in” from higher-ranking officers plays an important role in cementing core values in a company’s culture.

A further important part of drafting Codes is to use examples to illustrate everyday situations that could give rise to unethical conduct. This provides employees with the necessary tools to react in accordance with Codes if ever faced with a similar situation. A compliance resource should be assigned to provide clarity on any ambiguity and to provide guidance when an employee is faced with an ethical quandary.

Lastly, Codes should also be a living document that is updated regularly to reflect changes to a company’s regulatory environment.

ii. Which Topics should be addressed in the Codes?

There is a large variety of topics that can be addressed in a company’s Codes. The selection of these topics tend to be driven by the company’s industry and regulatory environment. However, there are more general themes that should be addressed by any organization, irrespective of industry. These include, but are not limited to, diversity and inclusion, workplace harassment, conflicts of interest, confidentiality, recordkeeping, outside employment, personal use of computer systems, dealing with media and political activities.

Beyond these general topics, every company will need to address issues that are specific to its circumstances. For example, public companies will need to consider implications of insider trading, whereas companies that frequently bid on contracts with government entities will need to lay a particular focus on anti-corruption. Companies that export to high-risk jurisdictions will need to ensure that employees are aware of sanctions and export control restrictions. Anti-money laundering and anti-terrorism laws are of particular relevance to companies navigating the financial services industry.

As mentioned, there is no “one size fits all” approach for Codes. Companies may want to consider reaching to external counsel if they are unsure about the scope and breadth of a Code or any other policy document.

iii. The Importance of a Whistleblower Program

It bears noting that whistleblower programs have become an important tool in a company's governance to uncover wrongdoings and to avoid an employee from reporting reprehensible acts through other channels. These programs also create a process whereby employees can come forward in good faith with any concerns without the threat of retaliation. This sends a message not only to employees, but also to external stakeholders, that the company takes ethical conduct and compliance issues seriously. In terms of implementation, most companies set up a whistleblowing hotline or website where employees can report their concerns.

iv. Codes of Conduct in Public Procurement

Codes also play an important role in the public procurement process under the auspices of Public Works and Government Services Canada ("PWGSC"). The Codes for procurement is a policy set out by the Government of Canada that provides all those involved in the procurement process with guideposts for ethical conduct. Certain provisions of this Code impose compliance requirements on vendors, such as related to anti-corruption and fraud or anti-competitive behaviour. If companies have not instituted a Code for bidding on government contracts, it would be prudent to put one in place before being contracts are awarded.

v. McMillan's International Trade Group can help Implement Codes or Improve your Existing Code

Codes lay the foundation of a company's core mission and values. On top of this foundation, companies will need to consider building a governance framework of policies and procedures that are more specific to risks they encounter. When operating internationally or engaging in international trade, for example, policies and procedures related to export controls, sanctions, customs and other trade related issues are essential to navigate the regulatory minefield, which is international trade law.

Whether your company needs a Chevrolet or a Cadillac as a Code, McMillan's International Trade Group has the expertise to assist drafting of Codes and more specialized policies and procedures that are tailored to the organization's values and risk profile. We also review and comment on existing Codes to ensure that your organization's Codes mitigate current regulatory risks.

[1] [Canada announces new measures to address human rights abuses in Xinjiang, China](#), Global Affairs Canada, January 12, 2021.

by [Peter Jarosz](#), Chris Scheitterlein

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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