

## Podcast Season 2- Episode 3

**Derrick Kyle:** Welcome to the Torres Talks Trade Podcast. My name is Derrick Kyle, a Senior Associate at Torres Trade Law, and I'll be your host today. My first hosting gig of the second season or the winter season, so really excited to get this kicked off. My guest today is Mr. Eric Hinton. Thank you for joining us today, Eric.

**Eric Hinton:** You're welcome. Thank you for having me.

**Derrick Kyle:** Eric is the founding Director of the Robert B. Rowling Center for Business Law and Leadership at SMU Dedman School of Law, my alma mater. In addition to directing the Rowling Center, he teaches International Business Law, European Union Law, and Ethics and Compliance Law at SMU Dedman School of Law and the Loyola Chicago University Corboy School of Law. With 25 years of experience in international business law matters, he has worked as a global law and compliance executive in a Fortune 100 company, a private equity backed technology company, and was the first Chief Ethics and Compliance Officer for one of the largest franchisers in the world. Eric is also the founder and past chair of the North Texas Ethics and Compliance Council, past Chair of the American Bar Association Export Controls and Economic Sanctions Committee, and currently serves as chair of the International Law Committee of the State Bar of Texas.

Very excited about our conversation today. We're going to be talking about the role of ethics and compliance programs in international businesses. And before I talk anymore about that, I'm just going to start off Eric and ask you to please describe your background and what led you to your current position.

**Eric Hinton:** Yeah. Thank you, first of all, Derrick, and we're honored to have you as our alum, as well as others at the firm. And I commend the Torres Law firm for taking on topics like this. So, thank you. I'm also, gratified to see international trade lawyers practicing from here in Dallas, which is I think an important addition to the bar.

So, the question I think was how did I get to where I was? And let me say first of all, so I am the director of the Robert B. Rowling Center for Business Law Leadership, as well as teaching certain courses in key topics like international trade, international business, as well as of compliance.

And I like to say that I'm a practitioner who happens to direct the center and teach a little bit. So, when I come at these topics, I really look at them for a practitioner side and that's one of the main objectives for the Rowling Center generally, but also for me in the way that I structure my classes to teach students. So how did I get here? Well, I'm actually from a ranch out in the west and we didn't have a whole lot of international business going on there, so probably part of it was just my desire to, I loved it there, but it was the desire to explore the world beyond my part of the United States. And so, very early on I decided I wanted to do something global and probably within the law. I studied political science and international relations, and then had a wonderful opportunity kind of at the last minute to study European integration at the University of Limerick in Ireland. And I received a fellowship from the European Commission to do that. And I think that piqued my interest in international affairs generally and gave me some background in international law and business.

And then I went on and did my Juris Doctor here in the United States. And then similarly, and actually by design, I got a fellowship to then pursue graduate studies in law with an LLM at the University of Leiden in the Netherlands studying EU law. And, so much of that was foundational, I think, in having a career in international business law. I then went to work at a law firm doing international trade work and that's my first exposure really to the topic somewhat that we're talking about today. And I would say, at that time, ethics and compliance as a discipline was still a little bit in its infancy and certainly hadn't developed to the degree that it has now.

So, I grew up in international trade. I became in-house counsel for Caterpillar which was a wonderful experience. And during that time, which was almost 10 years, I wore a number of hats including trade counsel. I got the chance to be a general counsel for a division in Brussels, Belgium for four years.

**Derrick Kyle:** Wow.

**Eric Hinton:** So that gave me the chance to really do whatever comes through the door in a pretty challenging area and also in an oil and gas services related job. So, that really added to the intrigue there. Then came back to the United States and worked within Caterpillar, then relocated here to Dallas. I had some wonderful opportunities. My most recent in-house experience was as the inaugural Chief Ethics and Compliance officer of the 7-Eleven Corporation.

And then I had the opportunity to come to SMU and take on a very different and challenging role in creating the Rowling Center and giving it a forum and bring

it to what it is now, which I think is one of the foremost centers for business law leadership in Texas certainly, but also United States.

**Derrick Kyle:** Excellent, very interesting. And one thing I noticed throughout the bio and then your description there, you mentioned compliance and ethics as a real role in business. It's been around, but you were the first Chief Ethics and Compliance Officer. There were other inaugural things related to ethics and compliance. So, it really is clear that this is an area that's really developing. I don't want to say it's in its infancy anymore but it's gaining a lot more exposure than it had been in the past it seems.

**Eric Hinton:** That's true. Well, that's for sure. And kind of aside from just the trade area for a moment, back when I got out of law school, you had these various compliance areas and it was mostly the lawyers that cared about it. You had the collapse of Enron. And the development of Sarbanes-Oxley and the revision of the sentencing guidelines around the early 2000's and that gave a huge amount of impetus to ethics and compliance as a legal discipline, as well as structurally within companies, as to how to establish ethics and compliance offices, and even the role of ethics and compliance officer. And so, I think I had the advantage of being in a regulatory compliance area to begin with and then got to sort of ride the wave to ethics and compliance as an actual job and discipline. It's interesting. I teach a class in ethics and compliance to SMU Dedman Law students and I try to take them through some of the history, which seems like ancient history to a lot of students these days because, interestingly, they haven't heard of Enron or maybe weren't even born when that happened. But in the terms of the law, that is a relatively short period of time and back in the day you had very few companies that really had thought about this. And now I would say pretty much every major company has or should have some sort of structured ethics and compliance program and a governance structure to go along with that in order to maximize and create an effective program.

**Derrick Kyle:** To take a step back for our listeners, I do want to ask, and you are a professor, you teach on this, so what do these broader concepts, especially of ethics and also of compliance, what do those mean for a business? That's part one, what do these mean for a business? And then part two, which I am curious about, is how are these concepts different? Between ethics and compliance – are they always taken together, or can we differentiate the two of them?

**Eric Hinton:** Well, it was funny you asked that because I remember when I was early in the practice of law, there was an article, that posited the following: it said, did compliance kill ethics? And I think the concern there and maybe this shows that ethics as a discipline and compliance as a discipline were quite

different and really hadn't come together yet. But the idea was that by focusing on compliance, which is often the case with lawyers and compliance including trade professionals, you somehow get away from what the ethics of an organization is. And in some ways ethics might be a proxy for culture. But if you only focus on compliance, you might get away from that. I think the opposite could be true too, which would be that if you focus only on ethics, nobody knows what the roles are, nobody knows what the controls are and what things you actually do to comply with the law.

My view is that it's two sides of the same coin. You need both, and you'll see in the various guidances from the U.S. government, that they agree with that too in principle. And so, an organization has to decide what their ethical position is. And often that's through a code of conduct and needs to be represented by tone at the top with their leadership and also needs to be compliant, which really is the floor. It's really the minimum you should do. But includes policies and procedures and investigations and also remediation for things that might go wrong. And I guess that's the other side of the coin. So, in an effective program, you want to address both. And I think if you don't, it's to your peril. For instance, you could have the very best compliance program, but if you don't have the cultural and ethical backbone to support that, it's really not going to help you and vice versa.

**Derrick Kyle:** Interesting. And so we're talking about ethics and compliance in a broader sense, but what does this mean for a company? What is the importance for this company of creating an effective ethics and compliance program?

**Eric Hinton:** So that's a great question, and in my opinion, minimally every organization and every company needs to have some sort of ethics and compliance program. And there are a number of guidances out there that tell you what that should look like. Again, as a bare minimum, right? But there are lots of advantages to having one. Some are obvious, maybe others are less obvious. First of all, I think it helps your company do the right thing and fundamentally that's the reason why we want to have an ethical and compliant organization is because we want to do the right thing. Now does that mean that that's the only reason? No, there are other reasons to protect your company from risk of litigation, from risk of enforcement, to protect the reputation, to meet the obligations of your regulatory requirements, or of your board of directors, or maybe your external auditors.

There are so many reasons why you need to have an effective program. But I think fundamentally those are the primary reasons why you would have that. As

I like to say to my students, “Which of you wants to buy the product that came from the unethical company?” And nobody does, right? And there's so many – unfortunately – examples out there right now of companies that did the wrong thing and, as a result, had products that were faulty, or shareholders or investors or just regular consumers who have lost a lot of money and been injured by some sort of wrongdoing by an organization.

**Derrick Kyle:** And this is a bit of a side conversation, but we've been seeing it a lot more. You mentioned investors, and this goes to the whole ESG angle, which I am thinking in the past few years has probably come up a lot more, I would expect, in ethics and compliance circles because that does seem to be more of an investor movement that we didn't hear about as much even five or six years ago.

**Eric Hinton:** That's a great point. I'm still a little uncertain what ESG even means. And I think therein lies the detail, right? There are a number of targets that you've seen in the past, they had different names, like Corporate Social Responsibility or Sustainability. Now we hear the word ESG or the term ESG.

But I think it really depends on who's talking about it and on some level what the objectives are of the parties that are trying to put it into play. There are a number of institutional investors that are asking for ESG to be present in a number of environments. The business round table is put forward some thoughts and guidance as to who they think the proper stakeholders are for a corporation. So, there's a fair amount of dialogue out there as to what this should look like. What does that mean for compliance? Well, in my opinion, I don't think ESG and compliance is the same thing and I do think that that's going to sort of flesh itself out over time. And I certainly would love to research and think about that more.

That being said though, at least the G – “governance” – and maybe the S – “social” – have a pretty significant tie-in with ethics and compliance. Now they're not the same but I can see overlap there. The E, probably to a certain extent, yes, when it comes to environmental programs, but that one probably is a little less obvious to me. But definitely the G, which is for governance, fits right into the nature of your organization and how you govern it in a way that's compliant with the law and with the values of the organization. So, stay tuned on that one.

**Derrick Kyle:** Yeah, right. I mean, it's a buzzword. We hear it a lot. It is a topic that even we get asked about because it ties into everything. But I do appreciate the statement, they're not the same thing. And so, I think we're going to, as this

conversation goes on, get more into what the ethics and compliance side really looks like. Which leads to my next question, which is kind of basic, similar to the last one as far as creating an effective one. But if we're laying out for a business, say someone's been in a vacuum, they don't know anything about these ethics and compliance programs? This is a two-part question, I'll preview the second part, but the first part, what does a standard compliance program look like? So just base compliance program for a company. And then afterwards we're we will go into part two, which is what happens once we move that into the international sphere. So, by previewing that second part maybe you can talk us through the steps and any differences between standard compliance program and then the difference once that business goes international.

**Eric Hinton:** So that's a great question, and I would first say that I don't think there's such thing as a standard program. And the reason why, and this is born out in the various guidances from the U.S. government, is that it needs to be tailored to the business itself. So, depending on your footprint and we'll get to the international part in a minute. Depending on the type of products or services that you offer and the level of risk and also regulation that goes with it, the number of employees you have, the types of employees, the size of the organization, all those things go into what type of program you have. It needs to be tailored to the correct factors that you're looking at. That being said, the U.S. government and other agencies and other parties, I would say around the world have clarified what the essential ingredients or elements should be of a program. I like to call them in my class the building blocks of an effective program. And this is really what you need to have programmatically at a global level for your organization. I draw those primarily from the U.S. sentencing guidelines. Which is one of the oldest guidance's that we have. Interesting, it was written for the benefit of federal judges, district court judges, and mitigating penalties.

The reality though, is that they mostly get used by ethics and compliance professionals in designing programs, at least in my opinion. Those have been refined further by a number of guidances, including from OFAC, which I think is relevant to your audience. Also, from the Department of Justice, which is probably in many ways the most helpful guidance that we have. You see others that are, I think, are indicative and helpful from the SEC and DOJ around anti-corruption. Also, some international standards, including from the Serious Fraud Office in the UK, as it relates to anti-corruption. As well as COSO 2013, which is a different kind of standard that can tell you what elements you need to have.

But what are those elements basically? Well, the way I break them down or the building blocks as I call them is, what is your board oversight? So, how does the

governing authority, as the sentencing guidelines say, view the program, become involved with the program, and oversee its effectiveness and enforcement, as well as its resourcing? The next one is what I called responsibility. So, who, separate from the board, within the organization is responsible for overseeing compliance? It doesn't mean they're responsible for compliance with the law. It means they oversee the program to make sure that things that need to occur within the organization are happening. You then have your risk assessment. And this is one of the common denominators across all of those guidances that I mentioned. And when I teach my students and when I've implemented programs, that's the one that I handle first is assessing the risks within the relative risk areas of compliance or overall, for the organization. You need to have policies and procedures and controls. You need to provide training and communications around those policies and procedures and controls and the organization's code of conduct generally. You also need to offer incentives for those that do the right thing and comply with the various policies and procedures, controls, code of conduct. As well as a way to effectively investigate and discipline those employees that do not. It's also important to screen employees, and this is more at the programmatic level, to make sure you're hiring those people that are prone to do the right thing and then, through their employment with the company, use mechanisms to assess and reward them and promote them based on their conduct. One of the things we learned from Enron, and this is really manifest in the sentencing guidelines, is that many of the wrongdoers that basically brought the company down were known to have committed unethical or potentially criminal acts really early in their careers, but nobody checked them on them. And because they were high producers or maybe because they were effective in moving themselves forward and advancing with the organization, those things were kind of put to the side and the company might have looked the other way. So that's important.

And then finally, and this is key to any effective program, is the ability to monitor your program, to audit its effectiveness, and then ultimately, to modify the program when you find issues that come up that are challenging or maybe even have had to be reported to a government authority. One of the way that they address it in the OFAC guidance is looking for the root cause and then addressing that. And I think that's an important way to look at it. At a minimum, this is what you would need to have in your program.

Now, the various guidances that I mentioned, in particular, the DOJ guidance have added some additional elements that I would also recommend any organization implement. One is, what is your approach around the use of third parties? So, in the export area, what is it when it comes to your freight forwarders or your customs brokers? What are these other parties that could provide a risk of transshipment to an embargo destination? Or maybe transship

some sort of controlled item that shouldn't be exported in the way that it's being exported? So, what's your third-party due diligence and oversight process? Also related in some ways to that would be what is your strategy around mergers and acquisitions? So, when you bring on a target company, if you're the buyer and you're buying assets or certainly entities, that you understand, number one, what it is you're buying, and that's priced into the nature of your deal. But also, that once that entity's been acquired and is being integrated into the compliance system of the company, that you address any challenges or problems that might have arisen or become clear through the due diligence or the acquisition process.

**Derrick Kyle:** Okay, a lot to unpack there. A couple of follow ups I wanted to ask about. We often hear, in developing compliance programs or in talking to people, there is the disciplinary aspect, right? You can 'up to and including termination' if you don't flag something of concern. Well, what we don't talk about as much, and you mentioned, are incentives. Is that incentivizing compliance in the form of promotion, or more responsibility? Is there ever, and is it even ethical to tie that to increased bonuses or salary? What does the incentivization look like in a compliance program?

**Eric Hinton:** That's a good question and I can tell you that I think in some ways this is one of the more difficult aspects of a program to implement. And a lot of my peers and people that are in the ethics and compliance roles struggle with this one. Some companies do actually offer some sort of incentive or reward or at least recognition for people that are willing to go over and above or at least at a minimum comply with the law and do the right thing when it comes to the program. I think what's challenging though is to know who those people are. It also can provide sometimes some challenges in that you don't want to incentivize people to do the wrong thing so that they get rewarded for the right thing. I think in the process of advancement, so certainly you would want to have some sort of ethics and compliance dimension when you're evaluating employees for their annual review for performance, and definitely when you want to think of promoting them, especially to positions of trust or a seniority within the organization. So that seems pretty clear.

There's some discussion recently coming, especially out of the DOJ, about this particular topic and I direct our listeners to the Monaco memo, which came from Deputy Attorney General Lisa Monaco recently. It's very hot off the press, but it talks quite a bit about what incentives should look like or basically what incentives might you take away, including the "clawback" of certain compensation when people do the wrong thing. Now, what that looks like in

practice, I think we'll have to see over time, but it's definitely a point of discussion.

Can you discuss the potential differences between structuring an ethics and compliance program between a large corporation as compared to a relatively small company? What are going to be the differences? There are obviously resource differences. How does that look different implementing one of these programs between different sizes of companies?

**Eric Hinton:** For instance, in my class, we use a great hypothetical, that has a company that's relatively small. It's sort of just past the startup phase, but it is going to go public and has big dreams as far as where it wants to go, and also is expanding globally. In that case, it's a challenging position to be in, which some of your clients might be in because, if they're thinking about international trade issues, by definition they are global, which adds to the complexity and also regulatory and compliance risk that the enterprise might face.

So how do you structure a program? Well, I think number one, you start with the risk assessment, as I said earlier, and any organization, regardless of their size, needs to complete some level of objective, to extent you can, risk assessment to understand where your risks are. That way you're spending your money and your time addressing the risks that are highest to the organization. In other words, you don't want to be spending your precious resources on things that aren't the most risky. So that's the first thing it comes out in other areas. So structurally, how do you want to put together a governance mechanism? Do you have the resources to put together a program with a dedicated ethics and compliance officer? And how do you handle helpers or assistants or resources to that compliance function when you're out in the field and when you're in other countries? And to what extent can you have dedicated resources, or do you need to use borrowed or shared resources, maybe within internal audit, maybe with HR, to oversee your program? It would also include how much you're able to spend on outside counsel and would also determine how much you could utilize audit and monitoring functions to be able to look at the effectiveness of your program.

I mean, a really obvious way would be what sort of anonymous hotline do you set up? That's one of the key things, essential things, for an ethics and compliance program, but it's not necessarily the easiest or least costly thing to do. And so what kind of program do you set up to administer the hotline? How do you address calls that come in? How do you follow up? How do you triage things and ultimately close those out? So those are just some things that come to

the top of my head, but it really has to be right sized for the organization you're dealing with.

**Derrick Kyle:** Great, yeah. And we deal a lot with larger corporations that do have that anonymous hotline. Understandably, that is different to organize that and set that up in a smaller company. So that's just one thing you mentioned that stuck out to me. So, next question. I'm curious about this one. Can you describe what sort of situations or whether there's particular laws or even practices that companies have that you think pose some of the biggest risks to companies in the context of ethics and compliance?

**Eric Hinton:** Yes. I'm going to caveat it with what I said before, which is really, it depends, right? And we know that as lawyers and compliance professionals, but it does depend on the type of organization you are, what your risk profile is, and where you're doing business, and with whom. And even in the trade area, right? Like if you're selling software with encryption versus widgets that are EAR99, right? There's going to be a different kind of program that you put into place. But overall, I think there are some key topics that I'm hearing in seeing that apply across the board. Certainly, most ethics and compliance officers and also members of boards of directors who oversee ethics and compliance programs are worried about data privacy issues. Especially as regulation of personal data proliferates across the world, but even here in the United States. The other one is cybersecurity, which is interesting. And I want our listeners to know that data privacy and cybersecurity are not the same thing. They maybe go hand-in-hand or at least are siblings, but they're definitely not the same topic and you need to address them separately. The challenge, too, with cybersecurity is that there's still quite a bit of emerging law. To say what cybersecurity law is, I think, is different than to say what privacy law is, which is more well-established. So those are two that I hear of. I think you need to always keep track of the bread-and-butter things, too, like conflicts of interest. I mean, it's not quite as exciting as cybersecurity and privacy, but it's a tale as old as time and in many cases, you see things like conflicts of interest coming up. So, you don't want to take your eye off the ball off those. Certainly, as I mentioned before, sexual harassment, hostile work environment, discrimination. Those are always things you need to watch out for.

On the trade side, I think it's sort of the same topics that you're always worried about. So that would be exporting without a license or some sort of transshipment of your goods that happened because you didn't know who your customer was. And I think most of us know what those compliance mechanisms are. Fortunately, the technology has advanced, so we're able to screen third parties a lot better, but you still have to be vigilant and set up a program that,

number one, is effective, but also that you could defend in the case that there were some sort of investigation or enforcement action related to your company's activities.

**Derrick Kyle:** Yeah, I love the last point about making sure if there is an investigation. When we deal with clients and they tell us that they have screening procedures, some are great. They have written procedures and policies. But with some, it's more of ad hoc. They will say, yeah, we did screen, but then maybe they're not keeping appropriate records of the screening and that sort of thing. And that really is why this compliance program can't really be an ad hoc program that's not written down because then where's your evidence? You have to be able to support it.

**Eric Hinton:** Yeah. I talked a lot about the building blocks of an effective program. And when I talk about that what I'm saying is what does the global program look like? But what you need to remember, and this is regardless of the size of your organization, is that while you might have the building blocks in place, you need to have parallel structures or at least a program for every single substantive compliance and legal area that comes within your company. So, trade compliance is an important area and as we know, that can be pretty complex, even in and of itself. That can include products that are controlled by BIS, dual use items. It could cover items that are defense articles. And then you have the sanctions that come into play, right? And all of those are really different and discrete areas, even though we kind of lump them together. And then abstract out onto that international sanctions or international controls, and you have a pretty complex regulatory scheme, and you need to have those structures in place in order to have an effective program. So, for instance, you need to have responsible parties within the organization who understand and have expertise and are overseeing the trade controls program. You need to do training. You have to do a risk assessment. You need to have policies and procedures. At some level, you need to have oversight, fundamentally, by your board of directors to make sure that it is effective.

Then finally, you just need to monitor your program. Maybe you need to implement software to know your customer, and then you need to modify it based on issues that come up. And you're not going to get a pass just because you're a small organization. And I would say, never would I want to see, either as in-house outside counsel or even teaching a class in compliance, an organization that did not have a written program. In other words, in my opinion, if you don't have a written program, you really don't have a program. And that's certainly not one that you could defend if there was any sort of problem where

you were being investigated or ultimately enforced against or indicted in the worst-case scenario.

**Derrick Kyle:** Yeah, right. Absolutely. And I know there's compliance managers listening, they're like, yes.

**Eric Hinton:** That's good. Exactly. So, definitely engage Torres Law, to help you get your written program in place.

**Derrick Kyle:** Yes, for sure. So, this next question, I find to be an interesting one, and this goes back to what we may be seeing in the news or legal publications. Are you seeing any recent trends in enforcement cases or trade controls or global trade practices that you think companies should particularly be monitoring or be made aware of, if they're not already?

**Eric Hinton:** That's a good question. And as I said, even in the area of trade, it's pretty diverse as to what the risks are and also the regulatory regimes. And I don't practice trade law from day to day anymore, so I'll caveat with that. What I would say, and this is I think clear to everybody, is you definitely need to understand and keep up to date, if this is an area of exposure for you with regard to the Russia sanctions and things that relate to that. And you'll realize too that, more than most sanctions programs, this one's more global. So, you have to look at what's going on in the United States, but also in the EU and other countries. So, that's definitely a dynamic situation and can have pretty significant effects. And I would encourage those that are in-house to become familiar, but also utilize outside counsel to really give some specialist expertise on that. So, that was the first one.

I think it's always important to keep up to date, as I said, on the technology and on the ways that you can screen third parties in order to exercise due diligence and understand where your products are going so that you're not having any sort of liability as relates to that.

From a global perspective, there are a few things that I think are emerging and I mentioned this recent Monaco memo and as I said, it's new, but it still remains to be seen how that plays out. But there's some important elements that relate to that, a couple things I'll throw out. One was the compensation issue. But there's also some other questions that relate to what extent individuals versus entities are going to be prosecuted and held responsible for compliance failures. I think the trend over time has been to go after more individuals and that certainly could be the case within the international trade sector. And also, certainly it would be the case potentially with sanctions and with export control violations.

The other thing that's come out of that memo is, once you settle a case, what does that look like? And to what extent will prior misconduct factor into how the department decides the resolution of your case? And also, whether or not they would appoint a monitor to oversee compliance with any sort of agreements that you would have with the Department of Justice. So I think it's important to remember that, even though trade is a specific regulatory scheme, it ultimately could be subject to enforcement and resolution under the rules that you see that apply through the DOJ. Absolutely.

**Derrick Kyle:** Absolutely. Well, Eric, this has been a very informative and interesting discussion about ethics and compliance. I really appreciate you joining us today. I wanted to ask, is there anything further you'd like to add or anything you'd like to plug that's coming up at the Rowling Center or anything else going on?

**Eric Hinton:** Thanks for that opportunity. Sure, yes. First of all, I included everyone to follow us on social media. The Rowling Center is on LinkedIn, as well as Twitter. You can find out about our current events also with information that we provide or what's going on with the center. I also wanted to plug in, just because I can, a plug for the upcoming Institute for the International Law Section of the State Bar of Texas. It's a full day of CLE on international topics, including some trade topics that will be held at the SMU campus on April 20th. So, if you're able to go out to the state bar page, we'll shortly have information posted on that. It's a great opportunity to learn more about international law and also to network with your state bar of Texas colleagues here in Dallas. So, thank you for that.

**Derrick Kyle:** Great. Again, Eric, thank you so much for joining us today. I really appreciate it.

**Eric Hinton:** It's great. Thank you so much Derrick.