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Best Practices for Compliance Reporting to the Board of Directors

- Amy Hutchens, Watermark Risk Management International, LLC
- Jennifer MacDougall, Jack in the Box Inc.
- William Gould, Holland & Knight LLP



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ACC Association of
Corporate Counsel

Compliance Reporting to the Board – Today's Topics

- WHY to Report
- WHAT to Report
- HOW to Report
- Questions Your Directors Might Ask



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WHY Report to the Board

From John Park to Forrest Labs,
Federal Criminal Prosecution as a
Super-regulator on Corporate Conduct.



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"Where the facts and law allow, the Justice Department will pursue individuals responsible for illegal conduct just as vigorously as we pursue corporations," said Tony West, Assistant Attorney General for the Civil Division of the Department of Justice.

"There is a difference between legal advocacy based on the facts and distorting the facts to cover up the truth," said Carmen Ortiz, U.S. Attorney for the District of Massachusetts.

- www.justice.gov/opa/pr/2010/November/10-civ-1266.html
(November 9, 2010)



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"The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."

- Supreme Court of the United States. *United States v. Park*



WHY Report to the Board

Compliance Programs and the Federal Sentencing Guidelines

- In many heavily regulated industries they are mandatory.
- They are good **business** and offer a competitive advantage.
- Communication is critical: hotline, compliance officer authority, protection of whistleblowers, et cetera.
- The Board **must** be informed – **and** exercise reasonable oversight.
- November 1, 2010 Sentencing Guideline changes.
- Prison.



WHY Report to the Board

What is Secret/Privileged?

- “det’d that he has been discussing WBSR at GSK-sponsored events & using off label info-”
- “What is risk to Co. w/ respect to the rel. w/ [Dr. P.]
 - Is he someone we have invested a great deal of \$ in, liking what he says; providing him opps for \$”
- “Govt might say: FDA: off-label – Co. liked it/ condoned it as evid’d by proliferation of prez. OIG: payment to [Dr. P] at issue -- pay to Rx?”



WHY Report to the Board Cases

- United States v. Stevens. Is it a fair fight? Is it a fight that we want?
 - Arthur Anderson “won.”
- Government contractors, the Boeing Cases.
- Not much goes to court, so who decides?
 - Prosecutors in the Boardroom.



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WHY Report to the Board

- Personal liability. Caremark litigation.
- DOJ looking for people to prosecute.



WHY Report to the Board

In his keynote address at the WMACCA 2011 Annual Meeting, Assistant Attorney General Lanny Breuer noted that we are in an "era of heightened enforcement" of statutes such as the FCPA and others involving financial fraud, and that "if we find credible evidence of criminal conduct – by corporate executives or the lawyers and accountants who advise them – we will not hesitate to charge it."



WHY Report to the Board

The toolbox: False Claims Act Gets its Own Slide.

- Qui Tam Relators, The Informant!
 - In re Amgen, Inc., EDNY, 2011.
- “Civil”ization of criminal law.
- Amendments in FERA (May 2009) and PPACA (March 2010).
- FCA used in conjunction with applicable criminal laws: misbranding, false statements, obstruction, import/export violations, and others.



WHY Report to the Board

Other government tools

- AKS, as criminal violation or through FCA.
- FCPA.
- Other federal criminal laws.
- State Attorneys General.
- HHS, OIG, Purdue Pharma, Forrest Labs, and other debarment/exclusion.



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We don't give our criminals much punishment, but we sure give 'em plenty of publicity. - Will Rogers

The United States is a nation of laws: badly written and randomly enforced. - Frank Zappa



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WHAT to Report to the Board

4 Core Areas



WHAT to Report to the Board

4 Core Areas = “**SCARF**”

- **Structure**
- **Culture**
- **Areas of Risk**
- **Forecast**



WHAT to Report to the Board

Structure

- Compliance & Ethics Program Structure
 - ✓ GOAL: Each of the Board members can describe the structure of the program if asked
 - ✓ Who oversees the operations of the program?
 - ✓ What is in the Code? Standards? Procedures?
 - ✓ What types of training are being required? Is the effectiveness of training being measured?
 - ✓ How are complaints being received?
 - ✓ Who is conducting investigations and acting on results?
 - ✓ What corporate resources are being devoted to the program? How much money is allocated to the program?



WHAT to Report to the Board

Structure – Less Mature Programs

- GOAL: Major structural improvements
 - Are there charter documents in place to formally establish a program?
 - Do the documents formally assign compliance duties to an individual? Update job descriptions and performance evaluations to reflect responsibility
 - Board should review Code of Conduct; benchmark against competitors on quality, best practices
 - Is it time yet for an independent compliance officer?
 - A mere paper program is not sufficient, but it takes a lot of paper to show that you don't have a paper program



WHAT to Report to the Board

Structure – More Mature Programs

- GOAL: Minor refinements to structural elements
 - Is it time for an independent compliance officer?
 - If so, where will the CECO sit in the organization?
 - Closely examine the reporting structure for the CECO
 - How is training being conducted? Is it effective or is it time to re-examine the approach to training?
 - Further develop FSG Chapter 8 elements
 - Improve the integration of compliance and operations
 - Is it an appropriate time to grow the corporate commitment to ethics into corporate social responsibility or sustainability efforts? If so, how will that fit into the structure of the existing program?



WHAT to Report to the Board

Culture

- Tone at the Top – absolutely critical
- From Executive Management
 - ✓ What have the employees heard from the top on compliance and ethics this reporting period? FSG “Periodic Communications”
- From the Board
 - ✓ What message might the Board want to send on corporate ethics and compliance this period?
 - ✓ Next report: how was the Board’s message delivered and how was it received?



WHAT to Report to the Board

Culture

- Surveying culture – “finger on the pulse”
 - Has the organization’s ethical culture been measured?
 - Is it time to survey or re-survey?
 - Results: the Board must be informed of the results and involved in approving action plans to improve or maintain an ethical corporate culture
 - Perfect time to discuss any major investigations and whether or not they arose from a cultural problem
 - Discuss M&A activity impact on collective culture



WHAT to Report to the Board

Measuring Culture

- Broad C&E survey
 - All employees or sampling
 - Vendor or internal
 - Advantage: identify trends, problem areas, bright spots
- Interviews
- Targeted around specific activities (M&A, training initiatives)
- Partnering (Internal Audit, HR engagement survey)



WHAT to Report to the Board

Areas of Risk

- Risk Assessment – your Board needs to know if it is working to identify emerging risks?
 - What is the current risk assessment process? (also Structure)
 - How effective is the risk assessment process? Is it stale?
- Recent industry misconduct trends
- New legislation that increases compliance risks
- New operations that pose substantive compliance risks
- Enforcement trends – what wasn't a high priority risk before may become one depending on agency focus (wage and hour, bribery, whistleblowing, retaliation, False Claims Act)



WHAT to Report to the Board

Areas of Risk

- Whistleblowing and Investigations – let the Board know if there are risk trends emerging from these areas
- ERM – bring risks beyond legal compliance to your Board: business continuity planning, disaster/crisis response
- Management and Mitigation – let the Board know how the company plans to manage and mitigate risk trends
 - Policies
 - Training
 - Periodic Communications
 - Procedures
 - Third party assistance



WHAT to Report to the Board

Forecast

- 3 previous Core Areas = Board knowledge of where the program is now
- Where does the program need to grow? Always have a strategic plan for the program
- Set maturity goals for the program and seek Board approval and buy-in for the resources you need to accomplish the goals
- Ex: Code of Conduct – improvement/translation; Learning Management System implementation; changes to policy, procedures, processes; compliance management software; cultural changes (“Core Values Contact,” “Toolbox Talks”)



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HOW to Report to the Board

Hot Buttons & Hot Spots
Themes, Metrics, Visuals



HOW to Report to the Board

Engaging Your Board

- Customize to address your board
 - Individual backgrounds, hot buttons
- Avoid over-reliance on describing activities (“paper program”)
 - Connect initiatives, training etc. to specific areas of risk need and/or measurements of results
 - On Risk, think big picture, anticipate future risk areas/hot spots
- Use real examples
- Dive deep into company-specific (critical risk areas, significant investigations, etc.)



HOW to Report to the Board

Key Metrics

- Which matter to your company? (Know why you're reporting)
- Helpline Metrics
 - Call/report trends (QOQ, YOY)
 - Number of help line calls by subject type, business unit, location
 - Average time required to resolve help line calls
 - % of anonymous vs. non-anonymous calls
 - Substantiation rate or % of investigations opened

For context, compare to general/industry benchmarks



HOW to Report to the Board

Key Metrics (cont'd)

- Violation Detection
 - # compliance failures detected (internally and externally)
 - \$ loss incurred/averted because of misconduct detection
 - # compliance failures detected (by audits, help line calls)
- Violation Response and Prevention
 - Disposition statistics (terminations, disciplinary actions, policy changes, etc.)
 - Average cycle time to investigate/close/remediate identified deficiencies



HOW to Report to the Board

Form of presentation

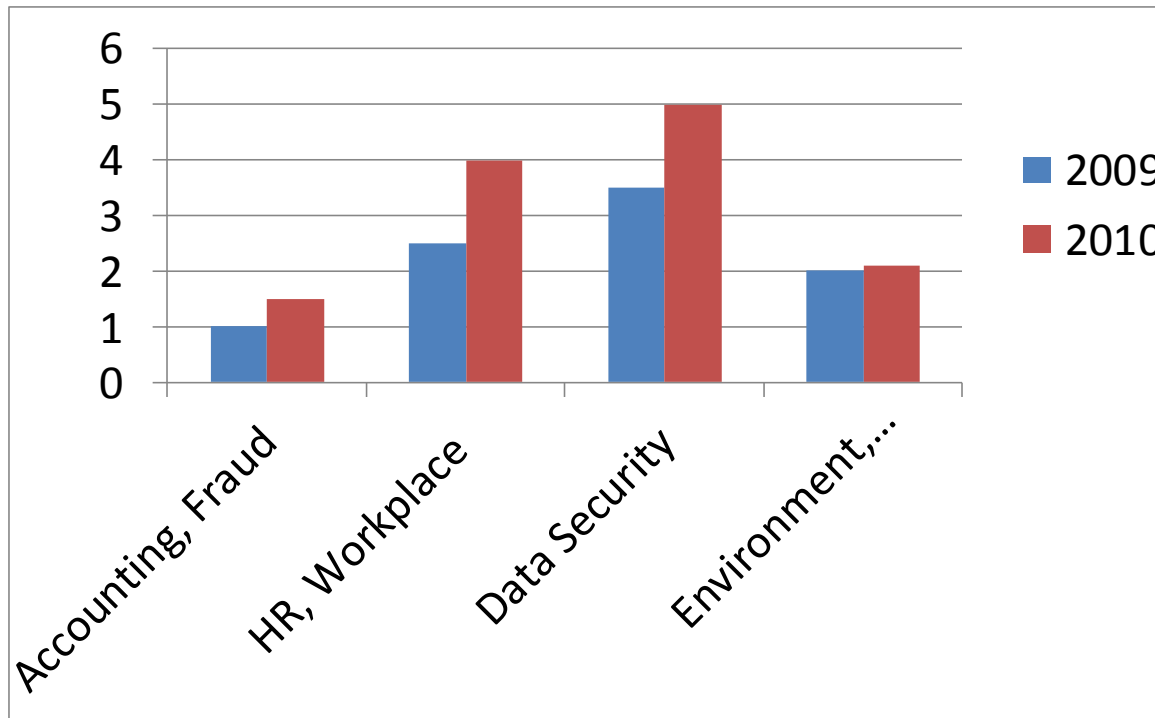
- Annual vs more often?
 - Consider different focus for each quarter (SCARF?)
- Graphic presentation
 - Bar graphs (distribution and periodic trends)
 - Diagrams or maps (risks, structure)
- Dashboards



HOW to Report to the Board

Reported Allegations, by Category Type

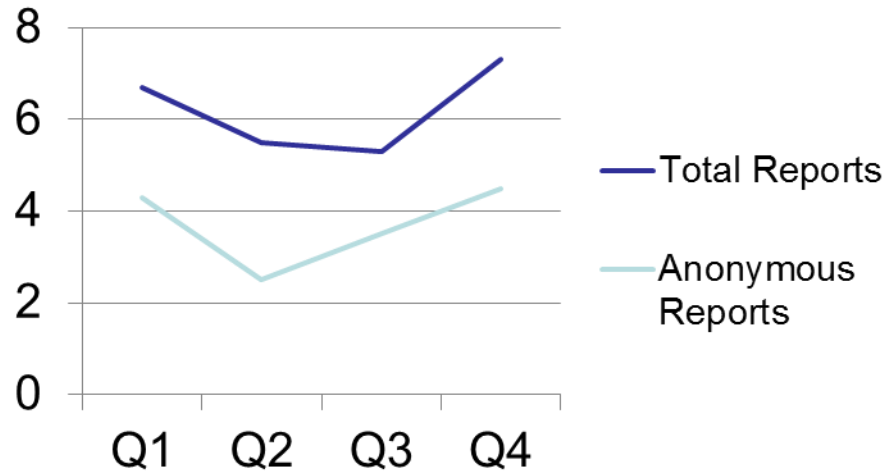
(per 1,000 employees)





HOW to Report to the Board

2010 Rate of Anonymous Reports
(per 1,000 employees)





HOW to Report to the Board

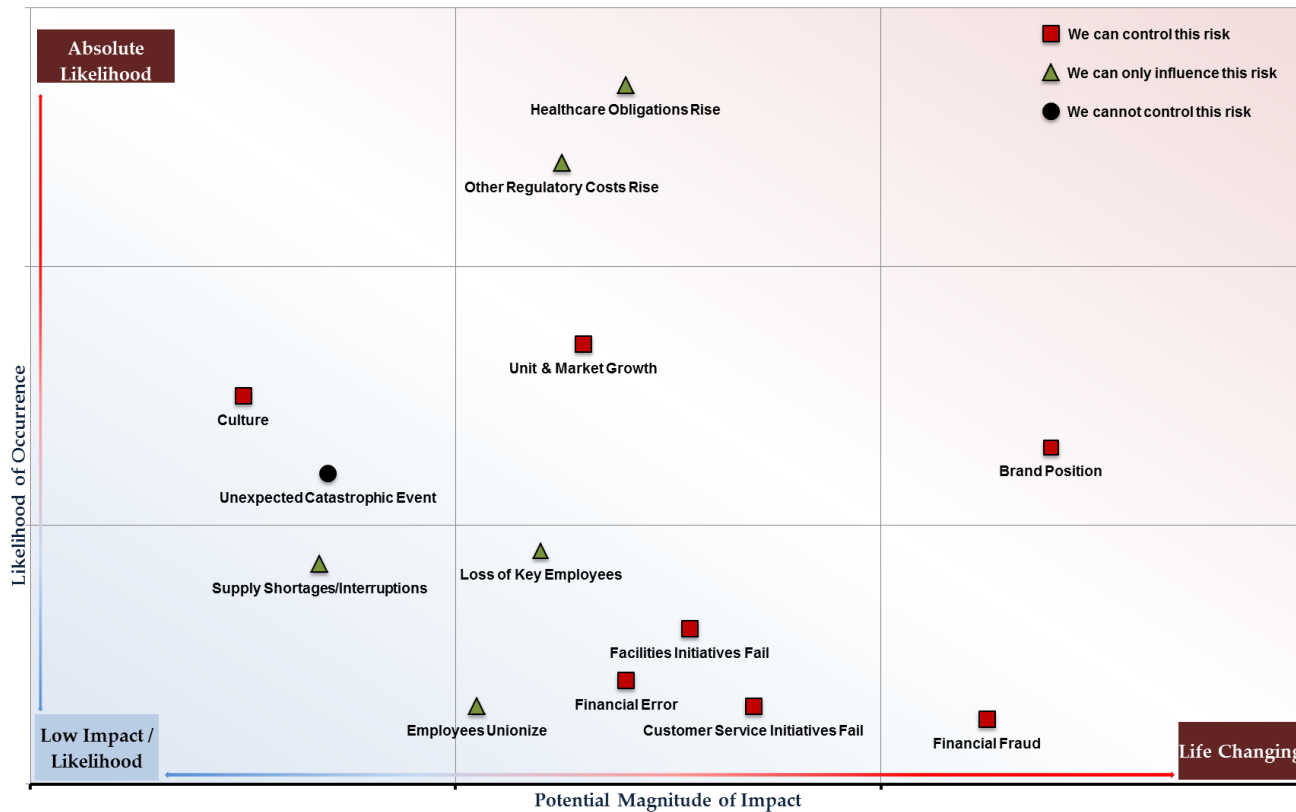
Risk Assessment – Legal (Sample Government Contractor)

Risk Universe	Identified Risks	Severity Score	Likelihood Score	Impact
Ethics/OCI Violations	Government investigations including costs and potential penalties; bid protests; suspension/debarment; damage to reputation	5		
Personal Conflicts of Interest	Government investigations, costs and potential penalties; bid protests; suspension/ debarment; loss of contracts	4		
Bribery, Gratuity and Kickback Violaions	Government investigations, costs and potential penalties; suspension/debarment, non-compliance with FAR reporting obligations; damage to reputation	5		
Procurement Integrity Act	Potential government investigations with related costs and penalties; suspension/debarment; loss of contracts; damage to reputation	4		
Anti-Lobbying Act	Potential government audits and investigations; loss of contracts, penalties and fines; suspension/debarment; damage to reputation	4		
Civil False Claims Act	Government investigations, costs and potential penalties; suspension/debarment; loss of contracts; damage to reputation	5		
Mandatory Reporting Requirements under the FAR	Suspension/debarment; government initiated investigations with costs and potential penalties loss of future contracts; damage to reputation	5		
Loss of Non-Profit Status		5		



HOW to Report to the Board

Risk Matrix





HOW to Report to the Board

Dashboards

- Multiple outside vendors offer various technology tools
- Can provide comprehensive view of all compliance initiatives, certifications, status on remedial actions, etc.
- Can integrate with and incorporate data from multiple systems, tools
- Track compliance with specific training
- Identify trends, problem areas



Questions Your Directors May Ask

- How does the Board know (how does company measure) the cultural integrity of the organization?
- How do our Helpline calls compare to industry benchmarks?
- Where there any ethical violations involving fraud or financial integrity, or officers or others with significant responsibility?
- How did detected violations surface?
- What did management do in response to the violation (and risk of similar, future ones, if relevant)?
- What is management doing to address company's biggest risks in the C&E area?

*****Why should I care about this?*****