



Tuesday, October 2, 2012

9:00 AM - 10:30 AM

**1104 – Beginning and Growing Your
Compliance Program: From Birth to the
Toddler Years**

Scott Brown

General Counsel and Secretary

Stroz Friedberg

Laurel Burke

Associate General Counsel - Compliance

Regal Beloit Corporation

Kevin Mann

Vice President & Associate General Counsel

The ServiceMaster Company

Faculty Biographies

Scott Brown

Scott Brown joined Stroz Friedberg as its general counsel. Based in the company's Boston office, Mr. Brown is responsible for the worldwide legal affairs of Stroz Friedberg and its subsidiaries and the leader of our global legal team.

Before joining Stroz Friedberg, Mr. Brown led the intellectual property and technology group in the Boston office of Skadden, Arps, Slate, Meagher & Flom LLP. He has been based in Boston since 2004, and before that practiced law in Skadden's New York office. In addition, Mr. Brown has practiced extensively in Europe. While with Skadden, Scott's principal areas of focus were U.S. and cross-border mergers and acquisitions, securities offerings, commercial contracts, and counseling and litigation involving copyrights, trademarks, patents, trade secrets, the rights of publicity and privacy and data security. During his long tenure at Skadden, he worked with a broad spectrum of U.S. and international clients, from growth-stage companies to some of the world's largest corporations, as well as private equity firms and investment banks.

Mr. Brown is an author and frequent speaker and lecturer on such topics as intellectual property and technology protection, mergers and acquisitions, and litigation.

Mr. Brown graduated cum laude from Trinity College and with honors from the University of Connecticut School of Law.

Laurel Burke

As the associate general counsel - compliance for Regal Beloit Corporation, a leading international manufacturer of electrical and mechanical motion control components, Laurel Burke leads the compliance and ethics efforts for their 25,000+ employees in more than 20 countries. Working in company headquarters in Beloit, WI, Ms. Burke enjoys building the compliance and ethics program, providing guidance about best practices and meeting employees across the globe.

Before joining Regal, she was with a Fortune 500 telecommunications company for over eleven years. In addition to gaining network experience, she advised various business units regarding compliance, regulatory, policy, and commercial contract matters.

She is a member of the Colorado Bar Association, and the ACC Wisconsin Chapter. Ms. Burke currently serves on the board of Family Services of Northern Illinois and Southern Wisconsin helping to address legal questions and increase awareness about the organization's many valuable programs.

Ms. Burke earned an honors BS and a BA from St Louis and is a graduate of the University of Denver College of Law. She became a Certified Compliance and Ethics Professional (CCEP) through the Society of Corporate Compliance and Ethics.

Kevin Mann

Kevin Mann joined ServiceMaster in Memphis, TN, to design and implement an enterprise wide ethics and business conduct program focused on driving value by removing distractions in the work place. He is responsible for all aspect of the ethics program including all investigations, compliance policy, organizational accountability and reporting to the board of directors.

Mr. Mann previously implemented an ethics program for Lennox International, Dallas, TX. Prior to Lennox, he worked for Degussa International (now Evonik), a specialty chemical company as deputy chief compliance officer and associate general counsel, responsible for designing and implementing Degussa's compliance program while managing the law department's environmental, health, safety and regulatory functions in addition to commercial counseling. Prior to corporate life, he served as a prosecutor in Phoenix, AZ and also served as chief of the environmental crimes and OSHA unit under then attorney general Janet Napolitano.

He is active with the ACC's Compliance and Ethics Committee and the ACC Tennessee Chapter, serving on the board of directors.

Mr. Mann received his BS in chemistry and biology prior to attending law school, receiving his JD from the University of San Diego.


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Beginning and Growing your Compliance Program

From Birth to the Toddler Years

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Welcome


- Introductions
 - Scott Brown
Chief Legal Officer & Corporate Secretary
Stroz Friedberg
 - Laurel Burke
Associate General Counsel - Compliance
Regal Beloit Corporation
 - Kevin Mann
Vice President & Associate General Counsel
The ServiceMaster Company

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Overview

- Why have a compliance program
- Assessing Compliance Risk and Culture
- Guidelines for compliance programs
- Establishing compliance oversight, governance and leadership
- Education, training and promotion of responsible conduct
- Reporting and corrective action

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Why have a compliance program?

- Risk Minimization
 - Financial risks
 - Operational risks
 - Health and safety risks
 - Reputational risks

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Why have a compliance program?


- Better image, improved relationships, greater trust
 - Board Members
 - Community
 - Markets
 - Regulators

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Why have a compliance program?

- (Possibly) reduced fines and penalties
- Greater efficiency and improved outcomes
 - Better trained workforce, better morale
 - Elimination of uncertainty and confusion about roles and responsibilities
 - Better quality research, operations
 - Identifying and addressing problems early
 - Reducing likelihood of government audits & investigations

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Assessing Compliance Risk and Culture


- Size (employees, total assets)
- Industry/industry practices
- Regulatory environment
- Geographic range of operations
- Potential areas of significant risk/liability

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Assessing Compliance Risk and Culture


- Risk Identification
 - Identify risk areas
 - Identify specific risks within these areas
- Risk evaluation
 - Probability
 - likelihood of a particular outcome actually happening (including the frequency with which the outcome may arise)
 - Impact
 - effect or result of a particular outcome actually happening

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Assessing Compliance Risk and Culture


- Leading indicators
 - Assessment of training effectiveness
 - Culture (willingness to report concerns)
 - Hotline trend reports
 - Well-understood standard operating procedures
 - Clear and understood delegations

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Assessing Compliance Risk and Culture

- Lagging indicators
 - Individual hotline reports
 - Audit findings
 - Fines, lawsuits, sanctions, etc.

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Sample Survey Questions

I have experienced or observed significant misconduct (violation of law, workplace rules, or significant policy) in my unit/department within the last twelve months?

Yes No

If Yes, if the misconduct was not known by responsible officials, did you or someone else report it to responsible officials or the company's confidential reporting service?

Yes, I reported it Yes, others reported it No, it was not reported Don't know

If Yes, do you believe responsible officials took appropriate corrective action?

Yes No Don't Know

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Sample Survey Questions


	Strongly Disagree	Disagree to Some Extent	Uncertain	Agree to Some Extent	Strongly Agree
I know where to report violations of law or policy (such as a confidential reporting line.)	1	2	3	4	5
I believe I would be protected from retaliation if I report a suspected violation.	1	2	3	4	5
Leadership demonstrates integrity and ethical behavior.	1	2	3	4	5

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Guidelines for compliance programs


- 7 core elements
 - Adequate compliance standards and procedures;
 - Effective compliance oversight;
 - Careful delegation and due care in hiring/screening employees;
 - Effective training and education for roles and responsibilities;
 - Monitoring, auditing, and hot lines;
 - Enforcement for violations; and
 - Corrective action

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Establishing compliance oversight

- Issues
 - How do you provide compliance information to leadership?
 - How do you provide compliance assurance to leadership?
 - How do you do this without micromanaging?
 - How do you institutionalize this in the most effective/least burdensome way?

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Establishing compliance oversight


- Where should responsibility for compliance lie?
 - VP for Audit and Compliance?
 - How are the roles different?
 - General Counsel?
 - If not, what is the role of counsel?
 - Risk Management?
 - Isn't this more than insurance and traditional risk management?
 - Stand Alone Compliance Officer?
 - How does this function interact with others?

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Education and Training


- Communication of standards, roles and responsibilities to employees
- Methods/means to motivate employees to comply
- Compliance education/awareness program for senior leadership

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Education and Training


- Methods of communication
 - Seminars, presentations and discussions
 - Newsletters
 - Online training modules
- Content
 - Home grown or purchased/licensed?
 - General versus company specific
 - Job relatedness

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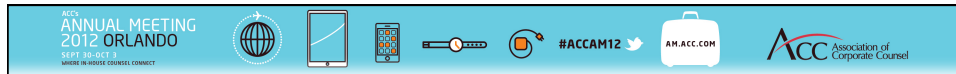
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Education and Training

- Tracking and record keeping
 - Central vs. local
- Employee motivation and morale
 - Bonuses/rewards for completion of voluntary certification
 - Awards & recognition
 - Negative reinforcement (fair and consistent discipline)
 - Cooperation and support of managers

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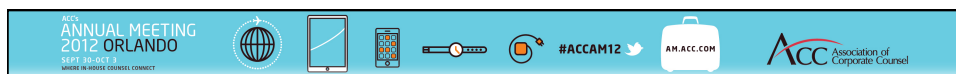
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Reporting and corrective action

- Encourage reporting of noncompliance (code of conduct, hotline, whistleblower & non-retaliation policies, training)
- Have clear policies and procedures regarding required reporting to regulatory agencies and other third parties
- Establish and follow (escalating) sanction policies
- Establish and follow procedures for communications with managers/supervisors about noncompliance.

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Reporting and corrective action


- Why have a reporting mechanism?
 - Tips to management are the leading method for detecting fraud
 - Anonymous hotlines are a key defense against management override of internal controls

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Reporting and corrective action


- Hotline Considerations
 - In-house or outside vendor?
 - Voicemail issues
 - What areas or departments will be covered?
 - Available 24/7?
 - Ease of Use
 - Method of follow-up communications

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Reporting and corrective action

- Responding to reports of improper conduct
 - Role of internal audit
 - Coordination with others

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Reporting and corrective action

- Reporting to the board
 - Why to report
 - What to report
 - How to report
 - Questions you may be asked

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Quick Review

- Why have a compliance program
- Assessing Compliance Risk and Culture
- Guidelines for compliance programs
- Establishing compliance oversight, governance and leadership
- Education, training and promotion of responsible conduct
- Reporting and corrective action

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Application of Federal Sentencing Guidelines to _____

§ 8B2.1. Effective Compliance and Ethics Program (commentary to federal sentencing guidelines)

A compliance and ethics program must be designed, implemented, and enforced to effectively prevent and detect criminal conduct.

An organization’s compliance and ethics program is effective if it:

1. exercises due diligence to prevent and detect criminal conduct; and
2. **otherwise promotes an organizational culture** that encourages ethical conduct and a commitment to compliance with the law.

To show the organization is exercising that due diligence and promoting that type of culture, a compliance and ethics program needs to have at least the pieces described below.

Guideline language	Narrative Description	Practical Application: what organization does
(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.	Requires: 1) a tailored approach in implementing a system to verify legal standards, extending the Code of Conduct to beyond mere legal requirements; 2) all population / employee groups are aware of and understand fundamental compliance and ethics program and values in addition to Code of Conduct; and 3) addresses identified risks.	<ol style="list-style-type: none"> 1) Adopt Code of Conduct with ethics/values of organization – review/refresh/revise periodically (1, 3,5 year schedule) 2) By (date) identify other key components and company policies that are part of the program including prohibiting retaliation. 3) By (date) implement any policies or components that are part of the program but not yet in place. 4) Provide regular training to all employees about Code and program (how often). Obtain annual certification/acknowledgement from each employee by (date). 5) Perform compliance risk assessment within organization by (date) to ensure Code and program addresses all areas of identified risk.
2) (A) The organization’s Board of Directors shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.	Requires the Board: 1) know and understand both what it is and how the compliance and ethics program operates; 2) receive frequent reports on operation / strategy of program; 3) complete regular training.	<p>Board is required to complete all ethics and compliance program related training delivered to employees online.</p> <p>Board receives readout from _____ at (each) board meeting with hotline metrics, critical investigations, training and plans for improving program.</p>

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Guideline language	Narrative Description	Practical Application: what organization does
(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.	Must appoint a Chief Ethics / Compliance Officer (CECO) with overall responsibility for program. This appointment must be a "high-level" individual. Organizational leadership is responsible for the effectiveness of the program.	
(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program.	If "high-level" appointee (CECO) does not have operational responsibility for program, an individual must be appointed with "day-to-day" responsibility.	
Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the Board of Directors, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program.	Individual with the "day-to-day" operational responsibilities needs to provide regular reports/readouts to the CECOs, executive staff or directly to the Board about the program.	
To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the Board of Directors or an appropriate subgroup of the Board of Directors.	Program office needs sufficient budget, authority and cooperation of BU groups to implement program. Person with day to day responsibility for the program needs the ability to go directly to the Board with concerns/reports received. Compliance program needs a seat at the table where organization policy and strategy are developed.	
(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.	Initial background checks and references regarding fraud, illegal or unethical behavior are a minimum. Evaluate employee performance and scope of responsibility regularly to reduce the possibility of bad behavior as a result of too many job requirements	

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Guideline language	Narrative Description	Practical Application: what organization does
(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.	Ethics and compliance training throughout the organization is a requirement – explicitly including periodic training of executive staff, senior management and the Board of Directors. Other forms of communication on ethics and effective leadership are also required. (i.e. motivating employees to comply). Visible modeling and behavior by management is most effective communication tool.	
(B) The individuals referred to in subdivision (A) are the members of the Board of Directors, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.	Specified training of senior organizational leaders and directors, employees, and certain 3 rd parties	
(5) The organization shall take reasonable steps—		
A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;	Requires a thorough audit system for compliance	
(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and	Requires periodic evaluation on the effectiveness of the company compliance program	
(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.	Requires a confidential reporting mechanism for all ethical / compliance issues (not merely criminal conduct) and options to seek guidance or get questions addressed, without fear of retaliation. Also requires the system be publicized to all employees.	

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<p>(6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through</p>	<p>Requires discipline be consistent for violations of the Code and related policies in the program - low level employees receive the same discipline as higher level employees for similar misconduct.</p>	
<p>(A) appropriate incentives to perform in accordance with the compliance and ethics program; and</p>	<p>Requires visible support and integration by operational units including measurement of management through performance incentives; completing requirements of the ethics and compliance program is a part of successful performance review</p>	
<p>(B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.</p>	<p>Investigations are performed when reports are made, and disciplinary action taken is consistent for misconduct</p>	
<p>(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.</p>	<p>Track and trend reports of misconduct evaluating issues and outcomes for opportunities to improve the overall compliance and ethics program.</p>	
<p>(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.</p>	<p>Requires periodic compliance risk assessments throughout operational units and evaluation of resulting recommendations with changes for continuous improvement</p>	

Sample

Compliance Program

The goal of the Compliance Program for _____ ("the Company") is to avoid regulatory agency enforcement action, civil penalties or criminal sanctions by implementing a program that trains and emphasizes the professional proficiency of our employees.

Every executive, manager, and employee is responsible and accountable for performing his or her function in compliance with applicable laws and regulations.

The Board of Directors is responsible for:

- Evaluating the risk of noncompliance
- Approving and Supporting the Compliance Program, and
- Overseeing the performance of the program to reduce risk.

Managers and Employees are responsible for:

- Conducting daily business in compliance with the laws and regulations
- Understanding the regulatory requirements of their job description, and
- Identifying issues to remediate weaknesses and prevent violations.

The Compliance Department is responsible for:

- Coordinating audits and examinations in connection with laws and regulations
- Acting in an advisory capacity on company policies, procedures, and laws and regulations,
- Coordinating the monitoring of transactions, and
- Communicating with the Board, Executives, Managers and Employees to ensure awareness, understanding, implementation of and adherence to the Compliance Program.

The following is a general description of the Compliance Program. The Program consists of the following seven components:

- (1) Compliance Department;
- (2) Compliance Committee;
- (3) Compliance Training Program;
- (4) Compliance Monitoring Program;
- (5) Reporting;
- (6) Remediation and
- (7) Prevention.

Each component is discussed in detail below:

Sample

Compliance Program

1. Compliance Department

[Compliance Name], [Compliance Title], heads the Compliance Department. It is the duty of the [Compliance Title] to give executive direction to the Compliance Program. He reports directly to the [Supervisor's Title], [Supervisor's Name].

The [Compliance Title] ensures [Trainer's Name], the [Trainer's Title], or her designee, trains company personnel and monitors transactions for compliance with laws and regulations. He also assists management in the development and implementation of forms, manual and system controls, policies, and procedures necessary to ensure compliance with these laws and regulations.

The [Compliance Title] also works closely with [Licensor's Name], [Licensor's Title], to ensure the Company obtains and maintains proper licensing for [Licensed Business Lines].

2. Compliance Committee

The purpose of the Compliance Committee is to offer a forum for the discussion and assignment of current compliance issues, in an effort to resolve or minimize exceptions to policies, procedures, laws, and regulations, as well as to fulfill the Company's responsibility to conduct day-to-day business in compliance with laws and regulations. The [Supervisor's Title] chairs the Committee. The [Compliance Title] acts as Secretary and keeps records and minutes of the meetings.

The Compliance Committee is composed of the following members:

[Supervisor's Name] – [Supervisor's Title] (Chair)

[Name] - Chief Financial Officer

[Name] – Chief Risk Officer

[Licensor's Name] – [Licensor's Name]

[Trainer's Name] - [Trainer's Title]

[Compliance Name] – [Compliance Title] (Secretary)

The Committee meets monthly or more frequently if needed. At the meeting, the [Trainer's Title] reports on the results of recent monitoring, compliance training recently completed, and the training schedule for the next month. Also at that meeting, the [Licensor's Title] reports on the status of pending and renewing licenses, as well as the status of exceptions identified from audits and examinations.

The Committee acts upon recommendations for improvement made by the [Compliance Title] affecting the Compliance function and may delegate responsibility for projects involving remediation or prevention of compliance exceptions. The persons assigned to the project(s) then report on the status or resolution of each issue at subsequent Compliance Committee meetings.

Sample

Compliance Program

A few of the laws and regulations with which the Compliance Committee is concerned are:

- A
- B
- C
- D

3. Compliance Training

The Company's training philosophy is founded on the premise that employees will conduct themselves in a correct and professional manner. With this philosophy in mind, it is the Company's responsibility to train employees so that they have a basic knowledge of consumer protection compliance. Due to the technical, complex, and ever-changing nature of these compliance laws and regulations, a comprehensive on-going training program that is varied and convenient and which recognizes proficiency is a necessity. To recognize the different expertise and experience of employees, compliance training has been broken down into two components: (A) Basic Compliance Education for new employees, and (B) Continuing Compliance Education for current employees.

A. Basic Compliance Education

The purpose of the Basic Compliance Program is to make new employees aware that the Company is a part of a regulated industry. The Basic Compliance Program is a portion of the Basic Training required for all new employees, as administered by the Training Department.

B. Continuing Compliance Education

The purpose of Continuing Compliance Education is to reward and recognize employees for achieving and maintaining a professional level of compliance. The goal of the program is for every employee of the Company to achieve compliance certification for his or her job description. Because different jobs have different regulatory requirements and levels of complexity with the laws and regulations, training is tailored to the specific procedures and processes of the job. Each job description includes what is expected to achieve certification. These levels are established and periodically reviewed and updated by the members of the Compliance Committee, who analyze and identify the regulatory requirements for each of the employees.

Under the training program, the [Trainer's Title] tests employees first to determine whether they need additional training on the regulations that apply to their particular job function. If an employee achieves a score of 80% or above, he or she has the necessary experience and knowledge to comply with the laws and regulations, and no further training is necessary. The employee also becomes "compliance certified."

Sample

Compliance Program

If a score is lower than 80%, an employee may obtain training in several ways. Periodically scheduled seminars or class sessions offered by the Compliance Department and/or Training Department and/or Department Manager are available. Such sessions range in length from a half hour to a half-day to all day, depending on the circumstances and complexity of the regulation, but Trainers will make every effort to minimize the interruption of full staffing for customer service purposes.

In addition, materials are available from the Compliance Department for managers and supervisors to train staff for those who wish to conduct their own compliance training. Employees may then be re-tested to determine whether the additional training was successful. If the employee receives a score of 80% or above, the employee is then "compliance certified."

The [Trainer's Title] administers the testing, training, re-testing, and certification portions of the program. All employees receive a "Certificate of Achievement" for successful completion of the program, "compliance certified" is noted in their personnel files, and certification may be considered by supervisors in their evaluations of performance.

4. Monitoring

The purpose of monitoring is:

- To identify training needs
- To find problems early
- To correct problems promptly, at a minimal cost, and
- To report findings to Executive Management on the effectiveness of the Compliance Program.

The Risk Department conducts monitoring on an annual, quarterly, or monthly basis, as determined jointly with the Compliance Department. This separate Compliance Monitoring Program sets forth the schedule for monitoring, as well as the sampling formula.

The Monitoring Program is distinguished from the Quality Assurance function by the fact that the purpose of Quality Assurance is to perform a daily review of all transactions booked, while the Monitoring Program looks at a statistically valid sample on a much less frequent basis.

Similarly, the Monitoring Program is distinguished from any Internal or External Audit function by the fact that the purpose of auditing is to identify the effectiveness of controls, audits occur much less frequently, and audits normally cover a more limited number of transactions.

5. Reporting

The purpose of reporting is:

- To make executive management aware of compliance performance as it has been identified in monitoring, audits, and examinations

Sample

Compliance Program

- To recommend an action plan for the remediation and prevention of identified weaknesses through such means as:
 - Additional training
 - The development of preventative tools and measures such as job aids, and
 - The re-assignment of responsibilities, as necessary; and
- To summarize training that has recently been or will soon be conducted.

With assistance from the Compliance Committee, the [Compliance Title] reports on the compliance performance and activities on a regular basis to the Board of Directors and Executive Management.

6. Remediation

When monitoring, audits, or examinations detect prior serious violations of law or regulation, the Company must act in the form of remediation. Remediation is the correction of identified instances where reimbursement or other compensation is due the Company's customer.

In certain "high risk" situations involving a pattern or practice of violations, the regulations, examiners, or Company policy may require retroactive correction in the form of a complete portfolio or file review followed by correction of the identified problems. Examples of such situations include:

- Providing inadequate notices, or none at all
- Not reporting properly
- Exceptions beyond the tolerance level

The person or persons creating the exception, to reinforce their responsibility to conduct transactions in compliance with applicable laws and regulations, ideally perform remediation, with assistance from the Compliance Department and Risk Department as necessary.

7. Prevention

The purpose of prevention is to reduce the risk of exceptions to laws, regulations and procedures. Prevention involves an in-depth risk analysis and/or portfolio review to identify where the Company may need additional controls. The Company works to prevent exceptions through training, the implementation of procedures detailing the employees' duties and responsibilities as it relates to his or her job responsibilities, and through the implementation of adequate manual and system controls.

Compliance Certificate

Executive Officers, Key Personnel and Sales Persons

I understand that as an employee of XXX, Inc. it is my obligation to act in a manner that promotes the best interests of the Company and to avoid conflicts of interest when making decisions and taking action on behalf of the Company.

Prior to completing this Certification, I have familiarized myself with the latest versions of XXX's Policies pertinent to my job (available online and in the XXX Employee Manual), and I acknowledge that I have attended compliance training sessions, at which important explanations of XXX's Policies are communicated and which provide guidance on other Ethics and Compliance issues.

I hereby confirm the following to be true and correct to the best of my knowledge, except as specifically noted in the space indicated below:

1. I do not know of or suspect any unreported wrongdoing by any member of the XXX Board, any XXX executive, XXX employee or other person acting on behalf of XXX (i.e., export control, antitrust, a bribe, theft, financial misstatement, fraudulent act, or act in violation of XXX's intellectual property parameters or government obligations).
2. I understand that XXX relies upon its employees, including me, to report any potential or actual third party claims and disputes to XXX's Legal Department, so that XXX can take appropriate action. I am not currently aware of any unreported third party claims or disputes.
3. I know that generally only members of the executive team and persons specifically designated by the executive may sign documents that bind XXX, according to XXX's initial approval and signature authority policy. If I believe I have signed any document that potentially binds XXX, I will bring the circumstances to the attention of XXX's Legal Department or to XXX's Chief Financial Officer immediately.
4. I know that intellectual property that I create during and as part of my employment at XXX will be assigned to XXX subject to the terms of the Employee Proprietary Information and Inventions Agreement. I have not taken, used or disclosed to third parties any XXX intellectual property, or any intellectual property provided to XXX by others, that is or may be confidential or proprietary to XXX.
5. I know that XXX relies on me to report circumstances that I believe may raise legal or ethical issues, or may violate XXX's Code of Conduct, the Employee Handbook or XXX Business Policies. I will report circumstances that might raise such issues to my manager, to the General Counsel or Human Resources Manager. At the time of submitting this Certification, I have reported all violations that I know about or suspect. If I am uncertain about whether something is reportable, I know that I can discuss the situation

confidentially with my manager, XXX's General Counsel or the Human Resources Manager.

- 6. I am not employed by any other person, I am not engaged in any other business outside of my employment with XXX, and I do not provide services to any person outside of my employment with XXX in the agricultural field (other than to a non-profit organization provided no XXX information is disclosed or used).
- 7. I have not received or accepted personal gifts or entertainment from competitors, customers, suppliers, or potential suppliers, in excess of a nominal value (\$100) and have not given or promised to give personal gifts or entertainment to competitors, customers, suppliers, or potential suppliers, in excess of a nominal value (\$100);
- 8. I do not have a direct or indirect financial interest in or relationship with a competitor, customer, or supplier, other than ownership of less than one percent (1%) of the publicly traded stock of a corporation;
- 9. I have not used or taken Company property or labor for personal use, except as specifically approved by an Executive Officer of XXX;
- 10. I do not have an intimate relationship with a subordinate employee of the Company or with an employee of a competitor, supplier, or customer.

Exceptions:

Employee name: _____

Signature: _____

Dated: _____

Wearing Two Hats— In-house Counsel and Compliance Officer

BY AMY E. HUTCHENS

Imagine this all-too-familiar scenario: You have arrived at your dream in-house counsel job with a simple title of general counsel, or something to that effect. You are well positioned to defend the company and advise on a full spectrum of legal issues, ranging from labor and employment law, to data security and contracts. It is your other title — chief compliance officer — that you may not have given much thought to until a colleague struts into your office with a request to draft the corporate Code of Conduct — otherwise known as the “not-so-legal-legal-document-that-no-one-really-knows-how-to-draft.” This raises the question: What is the role of chief compliance officer really all about for an in-house attorney?

There is no question that compliance is a top priority for in house counsel. (See ACC Board Chair Al Gonzalez-Pita’s “Chair’s Message” in the January/February 2011 issue of *ACC Docket*.) Many in-house counsel wear “two hats,” common parlance for fulfilling two roles at the same time. Wearing the hats of both counsel and compliance officer can be challenging and rewarding at best, and can become a nightmare at worst. The complexity of fulfilling two roles is directly related to what those roles demand in a particular business, and what may be required by laws and regulation. Moreover, each role demands dramatically different skill sets. For some counsel, they may not see themselves wearing two hats as much as having two titles, and for others, they may easily switch between roles, depending on the needs of the business. Another critical factor in the balancing game is how one wears the two hats: At the same time? Wear one hat, then the other? Or, is it a fluctuating and dynamic blend of each hat, depending on circumstances?

But let’s get real for a moment: In today’s business environment, is it realistic to expect a great GC to operate as a great compliance officer? Are the inherent conflicts reconcilable? Is executive management deprived of a valuable perspective when the roles are combined?

The challenges of unification

Over the past decade, several cases highlight the challenges faced by organizations that had unified the roles of counsel and compliance officer.

Tenet Healthcare

In 2003, the Senate Finance Committee began an investigation into Tenet Healthcare's corporate governance practices with respect to its federal healthcare programs. Tenet had a long history of fraud, including upcoding, overbilling, duplicate billing, kickbacks, providing medically unnecessary services, misrepresenting services and falsifying medical records. In 1994, a Tenet employee, Christi Sulzbach, signed a Corporate Integrity Agreement on behalf of Tenet with the Office of Inspector General of the US Department of Health and Human Services, and was subsequently promoted to chief compliance officer and general counsel. Widespread fraud continued for nearly a decade.

In September 2003, the then chairman of the Senate Finance Committee, Sen. Chuck Grassley, wrote a letter to Tenet. He blasted Ms. Sulzbach for her dual roles. "Apparently, neither Tenet nor Ms. Sulzbach saw any conflict in her wearing two hats as Tenet's general counsel and chief compliance officer. As general counsel, Ms. Sulzbach zealously defended Tenet against claims of ethical and legal non-compliance, e.g., the April 2001 qui tam suit, while as chief compliance officer, she supposedly ensured compliance by Tenet's officers, directors and employees. It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement."¹ Ms. Sulzbach left Tenet shortly after, citing outside pressure.²

WellCare

In 2007, WellCare followed suit. Thaddeus Bereday served as WellCare's general counsel and chief compliance officer. Some 200 federal investigators descended upon WellCare in response to allegations of fraud, leading to the ouster of several corporate executives, including Mr. Bereday. When new corporate leadership assumed their roles, the general counsel and chief compliance officer became independent positions.³

These cases highlight how a combined general counsel/compliance officer role can deteriorate. Even so, the Department of Health and Human Services OIG stopped short of requiring the roles to be separate, and instead, recommended independence because:



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"Free standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institute's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief hospital financial officer (where the size and structure of the hospital makes this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program." Department of Health and Human Services, OIG Compliance program Guidance for Hospitals, Federal Register, Vol 63, No. 35, Feb. 23, 1998, 8987, at 8993, fn 35.

Compare this language with the standard language being used by OIG in recent Corporate Integrity Agreements (CIA), which have been entered between providers and the OIG. Most CIAs dictate the role and position of the compliance officer in the organization. The standard language being used by the OIG is:

"The Compliance Officer shall be a member of senior management of [Provider], shall make periodic (at least quarterly) reports regarding

compliance matters directly to the Board of Directors of [Provider], and shall be authorized to report on such matters to the Board of Directors at any time. **The Compliance Officer shall not be or be subordinate to the General Counsel or Chief Financial Officer.**"⁴ [Emphasis Added]

This guidance represents the opinion of one government agency that compliance programs are more effective when the general counsel does not function as the compliance officer, and when the compliance officer is seated at a high level in the organization. Where the earlier language clearly contemplates that it may not be an option for some organizations, and it makes room for a combined role, albeit with diminished checks and balances, the CIA language makes it quite clear that there is no room for a combined role. However, if there is substantial involvement by a compliance committee at the management level, this may mitigate the effect of the limited perspective of a dual-hatted counsel.⁵

More recently, this trend of separation has included a third element of a compliance committee. In many cases, it may be advisable to have both a chief compliance officer and a compliance committee. Some recently proposed OCC Orders directed at major banks, and the proposed Settlement Agreements involving banks, government agencies and certain states attorneys general, show a pattern that points toward a separation of the roles and the creation of committees to oversee compliance.

In-house Counsel v. Compliance Officer: Two Attorneys' Views

Akbar Hussain, corporate counsel for Elsevier, and Andrea Barton Reeves, vice president of administration for HARC, Inc., are two of the growing number of attorneys wearing two hats. While both say that the balance act has its challenges, there are certain similarities between the two roles that make the jobs compatible.

"Business enablement and compliance are consistent in that they are grouped within risk management, which is ultimately the value proposition of an effective legal department," says Hussain.

One area of potential conflict is in the timeliness of response. As an attorney with business-unit-level responsibilities (both Elsevier and its parent company have parallel and dedicated compliance departments), Hussain says he and his team are focused on client service, meaning prompt responses to inquiries. But while wearing the hat of compliance officer of first instance, he says he must ask questions that may slow down the process.

Barton Reeves says the roles of in-house counsel and compliance officer are particularly compatible in the healthcare field.



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"Many of the compliance issues we face have serious legal consequences if not properly addressed and monitored," she says.

Both Hussain and Barton Reeves say they work to integrate their roles into a single function, rather than trying to compartmentalize the two jobs.

"My biggest challenge, like every other compliance officer, is keeping up with the plethora of rules and regulations around compliance issues, and getting our staff to adhere to the rules consistently," says Barton Reeves. "My challenge is greater, because I do not have the luxury of focusing solely on compliance. We are making great progress, though. We have found that

education is key in getting our staff to understand how important privacy and compliance is, and doing what they can to help us become more compliant as an organization."

Hussain says another challenge in this dual role is the continuous need to update his skills and knowledge to meet both roles. "There is a need to contextualize the black letter of the law, especially the dynamic state of data privacy laws and regulations, with the practicalities of our business" he said. "I am seeking to achieve a fluency in the issue-spotting nature of this exercise as it arises in a transaction."

The changing legal landscape

In recent years, other regulations have stopped short of requiring separate roles.⁶ The Federal Acquisition Regulation requires "[a]ssignment of responsibility at a sufficiently high level ... to ensure effectiveness of the business ethics awareness and compliance program and internal control system." 48 C.F.R. subpt. 52.203-13(c)(2)(ii)(A)(2006). This echoes the US Federal Sentencing Guidelines requirement: "High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program." US Sentencing Guidelines Manual Section 8B2.1 (b)(2)(A).

Certainly, a GC or CLO would fit the bill as high-level personnel within the corporation, and many general counsel manage effective programs. However, the legal landscape is always changing, and the increasing emphasis on transparency, self-reporting and mandatory disclosure proves problematic for attorneys bound by attorney-client privilege.

Recent legislation and regulations have encouraged corporations to self-report and cooperate with governmental enforcement agencies.⁷ In some circumstances, self-reporting is encouraged by a "carrot" approach, including a possibility of expedited resolution and more leniency for self-reporting.⁸ The carrot approach also encourages the waiver of attorney-client privilege in some circumstances, by offering the possibility of a deferred prosecution agreement or non-prosecution agreement for full disclosure and cooperation.

On the other hand, the "stick" deterrent for failure to disclose may result in harsher penalties, such as debarment from government contracting for failing to follow mandatory disclosure rules 48 C.F.R. subpt. 3.1003(a)(2) (2008), or a higher culpability score under the US Federal Sentencing Guidelines.

This trend is a challenge for dual-hatted in-house counsel. In-house attorneys are obligated by professional responsibility rules regarding attorney-client privilege. Few in-house attorneys will feel comfortable defending an organization against allegations of wrongdoing or non-

ACC Extras on... In-house Counsel and Compliance Officer


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Resource

- *ACC Compliance Portal.* www.acc.com/compliance

Article

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The new GLD button lets you click to copy, print or email a checklist from certain ACC online resources.

compliance, while, at the same time, advising the executive leadership to self-report the same misconduct, particularly when the self-reporting is not mandatory. Former Sen. Grassley may well have smelled the “stench of conflict” in this arrangement, as well. Even for counsel who are familiar with the “up the ladder” reporting requirements of Sarbanes-Oxley, the idea of mandatory reporting, such as is found in the Federal Acquisition Regulation, is enough to make most in-house counsel shudder

Even with client consent, most in-house counsel would prefer to keep issues in-house and not take on the responsibility of reporting to an enforcement agency. Yet, in

many situations, it may be appropriate for a compliance officer to recommend disclosure and full cooperation with governmental authorities. Ultimately, if a dual-hatted counsel remains in a legal role providing legal advice in defense of the company, the corporate leadership may be deprived of a legitimate compliance perspective — one that may prove to be more beneficial to the organization. According to Jose Tabuena’s *The Chief Compliance Officer vs. the General Counsel: Friend or Foe?*, “In difficult situations, a CCO’s perspective about a controversial transaction or event would obviously go unnoticed, if that person was also serving as the GC who happened to agree with executive management.”

As the whistleblowing landscape continues to change, the concerns of self-reporting are being compounded. The Wall Street Reform and Consumer Protection Act (Dodd-Frank) of 2010 provides financial incentives to whistleblowers. Now more than ever, internal compliance programs need to be visible and reliable, and hotlines should not only be functional and effective, but inviting to employees. Though the rules provide that a whistleblower should utilize internal reporting processes first, there is no requirement to do so, and the financial incentive may unfairly tip the scales. From both a compliance and legal angle, the choice is clear — companies want to hear the whistleblowers’ complaints before the government hears them. Again, this poses a challenge to in-house counsel. Among the demands of managing litigation, advising on employment law issues and regulatory compliance concerns, drafting and reviewing contracts, and responding to client needs, in-house counsel will need to ensure “far more nimble and responsive investigative, triage, analytical, and governance capabilities” to ensure effectiveness in compliance program governance.⁹

One immediately apparent issue for whistleblowers is that attorneys often seem intimidating to average employees, particularly employees who do not deal with counsel in their day-to-day operations. A second concern for in-house counsel is that creating a feeling of trust among the corporate employees is paramount to encouraging internal reporting. This requires that in-house counsel be visible and accessible within the organization, getting out of the office and establishing relationships. In larger or more global companies, this is not realistic. There are few in-house counsels who would agree that they have enough time to address the legal needs of an organization, much less be impacting corporate culture. Where the attorney advises on employment law matters, such as discipline and terminations, it is even more difficult to establish a relationship of trust to encourage internal whistleblowing. This is where an in-house counsel must tap into non-legal skills to be the most effective.

A dual-hatted attorney needs more than legal skills

In organizations where there simply aren't the resources for an independent compliance officer, in-house counsel are most frequently the first-choice alternative. However, management of an effective compliance program requires additional skills. The skills required of an in-house counsel are more widely understood than those required of a good compliance officer.


Compliance, as anticipated by the Federal Sentencing Guidelines and other legislation, such as Sarbanes-Oxley, should be a "program" that needs management. Program management, coordination across functions or divisions, and implementation of major initiatives are skills required of a good compliance officer, and not necessarily essential to the in-house practice of law. In larger corporations, the legal department may also be managed like a program; however, in smaller organizations, where it is more common to find dual-hatted attorneys, there may not be enough time or resources for the attorney to effectively manage a compliance program, even with more third-party compliance resources available to give guidance and supplement internal initiatives.

When it is necessary to have in-house counsel function as the compliance officer, it is essential that the attorney have strong interpersonal skills, the ability to listen and discretion.¹⁰ They must be able to be proactive as well as reactive.¹¹ In addition, it is essential that in-house counsel know how to conduct a thorough and proper investigation.

In many circumstances, it is unrealistic to expect a general counsel of a smaller organization to conduct investigations and risk assessments; draft a code of conduct; design, develop and even deliver educational programs for adult learners; and draft policies and procedures — all of which are tasks necessary for a legitimate compliance program. As the saying goes, "It takes a lot of paper to prove you don't have just a paper program." One solution to this challenge is to have the attorney manage these processes internally, but have the work performed by other functions, or even by third-party vendors. According to a recent survey by the Ethics Resource Center, 56 percent of ethics and compliance function respondents report directly to the GC, which means that about half of the respondents perform compliance functions at a level subordinate to the GC. However, even the attorney who maximizes personnel resources will still have to balance the two roles, and will face the challenges of conflicts and the consequences of the silent compliance voice when defaulting to professional responsibility obligations of the legal profession.

There is little doubt that the importance of the corporate compliance officer hat has increased in the past decade, and continues to increase. Dodd-Frank is the most recent challenge for corporate compliance officers, but surely will not be the last. Similarly, the role of in-house counsel is growing. There appears to be more litigation, regulatory enforce-

ment, desire to save on outside counsel costs, and pressure on in-house counsel to be involved in business operations.

Regardless of how an organization or individual decides to wear the two hats, one thing is certain: Corporate regulatory and enforcement authorities have turned on the proverbial "Fasten Seat Belt" sign for both in-house counsel and compliance officers. As the duties for both roles continue to expand, dual-hatted in-house counsel will need to rise to the occasion, either by showing the agility to adjust to the changing demands or by educating executive leadership about the importance of independence, both for the in-house attorney and for the compliance officer. Ladies and gentleman, hold on to your hats. 

Have a comment on this article? Visit ACC's blog at www.inhouseaccess.com/articles/acc-docket.

NOTES

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G. ACC's Compliance Training Portal

The Compliance Training Portal is a resource hub that services ACC members' compliance and ethics training and information needs. Content covers a variety of topics such as antitrust, worker classification and the FCPA. You can also download the free iComply Toolkit iPhone app to conduct compliance and ethics training on the go.

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