

# Designing a Global Business Governance Council System

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## The Laundry List: Betting on a Legal to Business alignment via governance and compliance

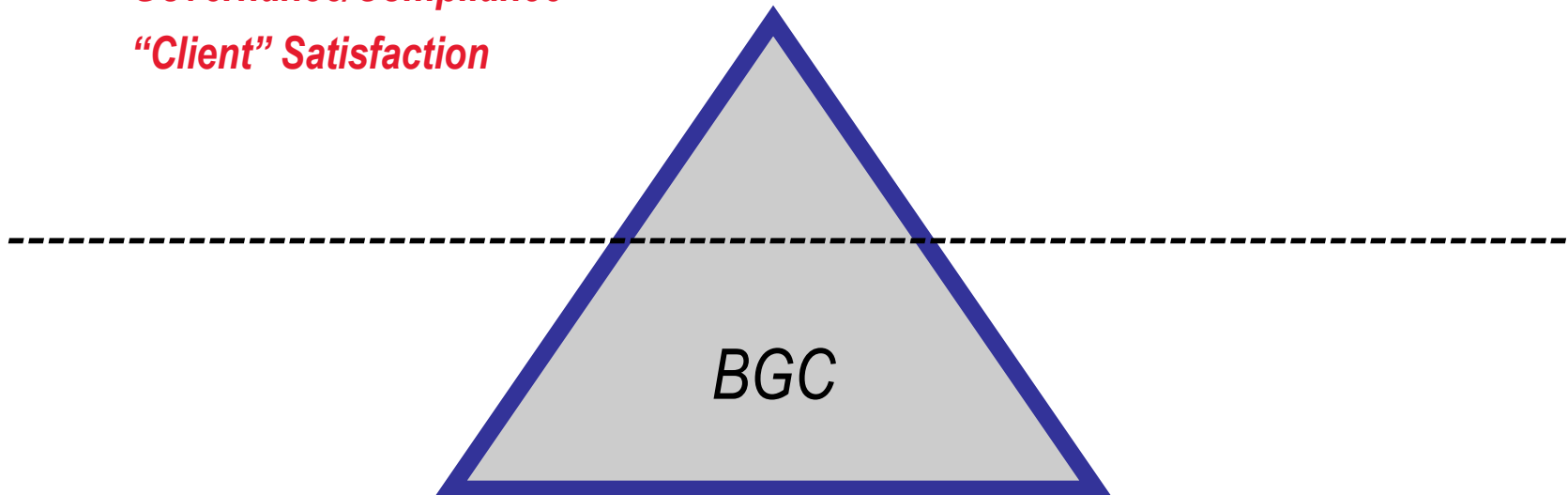
- **Ensure an Adequate Ethics, Fiduciary & Compliance Program is in Place**
- Identify and Assess **Risk** and **Risk Management** Programs
- (Re)-Design a **Crisis Management** Program
- Conduct Oversight of Outside Counsel and Control of Legal Costs
- Manage **Litigation**
- Develop and Maintain **Corporate Governance** and Disclosures best practices
- Review the Corporation's **Contracting Practices** and 'rules of engagement'
- Keep Informed of the Requirements of a Multi-Jurisdictional Practice, ensure ongoing training of legal staff and internal clients
- Update / Establish A **Record Retention** Policy

# The Legal Function & Business Imperatives

*Coverage*

*Governance/Compliance*

*“Client” Satisfaction*



*Internal Resources  
&  
Headcount*

*Operating Expense (incl. outside fees,  
fines & business losses)*

## The Next Steps

- Design a governance structure that supports the success of the criteria.
- Identifying criteria to integrate the legal department into the business via a governance structure .
- Define the new roles in the structure and clarify the points of interface among the stakeholders
- Rolling out the governance structure (working through the details)

# Design of the Business Governance Council

- Purpose
- Criteria
- Structure
- Members and Participants
- Scope and Responsibilities
- Process

## **Purpose of the Business Governance Council (“BGC”) System**

- Implementing a form of “Integrity Management System” to ensure consistent and systematic compliance with your Company’s policies and legal requirements in order to ensure a uniformly high quality of performance, results, and decisions
- Align responsibility and accountability with the existing management structure
- Provide common and consistent venues to address a range of governance and compliance issues such as Corruption, Grey Market, Conflicts of Interest, Export, Deal Approval Policy, Fraud etc.
- BGC Charter

# Identifying the Criteria

## Setting up governance structure from a legal perspective:

- Financial reporting: Management is not properly enforcing that key Corporate Policies and Procedures
- Corruption: incidents and policy updates/concerns (Partner & Reseller DD)
- Conflict of Interest: waiver requests and conflicts, segregation of duties
- Deal Management: violations, policy changes and clarifications
- Channel/Grey Market: trademark, infringement cases, competition
- Export/Customs: deal-specific or audit action items
- Data Privacy
- Other: violations of Company policies (e.g. Employee/client Gifts, Confidentiality), Internal Audit action items, implementation of new programs and policies, cross-border tax and revenue issues

## Structure: Business Governance Council System

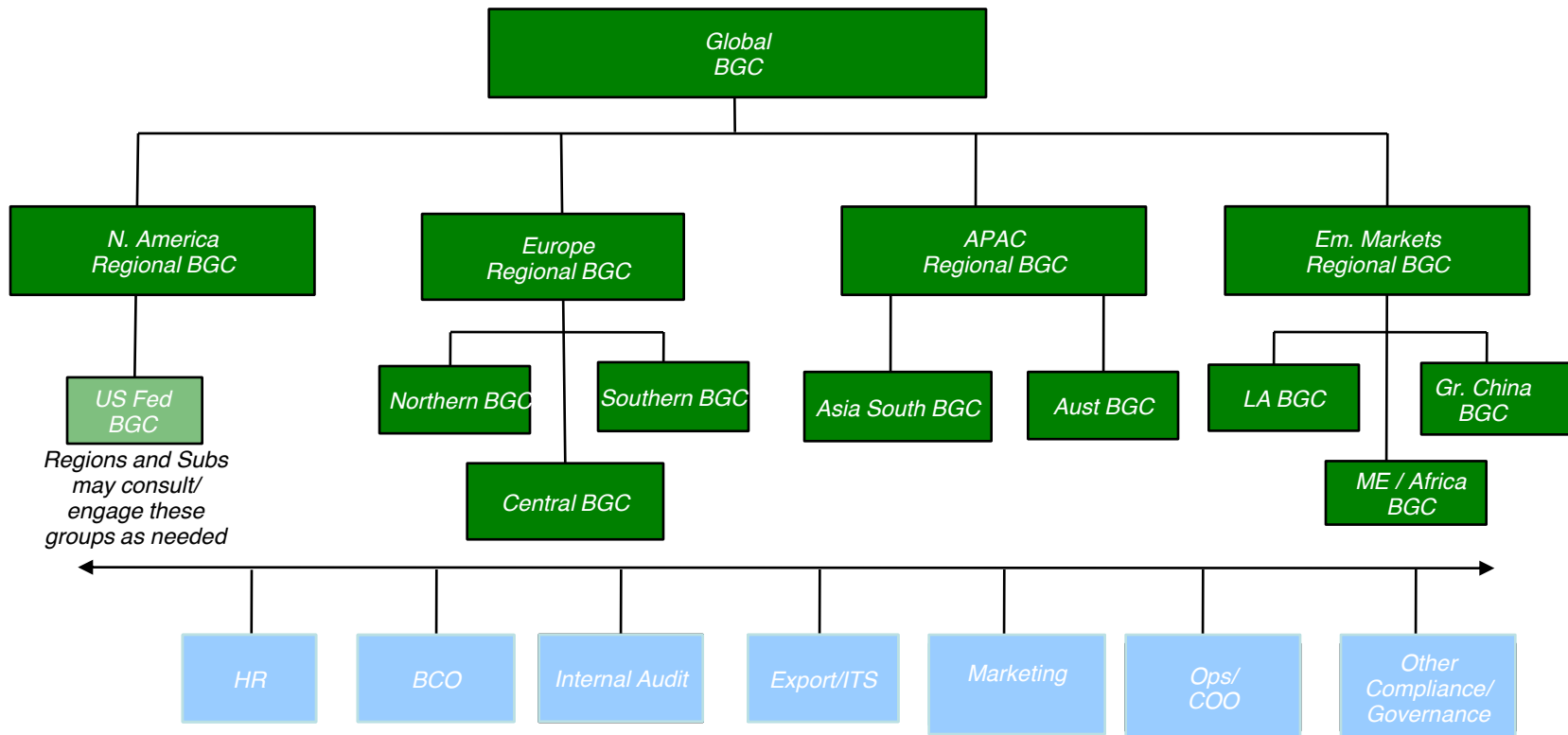
- One Business Governance Council per ‘Geographically Established Market’ or Subsidiary (“GEM”)
  - LOBs participate in GEM and Regional BGCs
  - US Fed BGC can be created to better address issues unique to US federal government business
- One Business Governance Council per Region
- One Global Business Governance Council
- Functional and investigative organizations such as BCO, Internal Audit, HR, ITS, Corporate Security, Marketing and other Compliance/Governance groups within your Company can participate



# The Stakeholders

- Member of the Management Board ( CEO, EVP, etc)
- CFO / Finance Director
- HR
- Operations (COO, GAO, etc.)
- Legal (GC, Div Counsel)
- Market Integrity

# STRUCTURE: BUSINESS GOVERNANCE COUNCIL SYSTEM



# BGC Scope: Types of Issues Covered

- **Regulatory matters**, such as:
  - Corruption
  - Fair Competition
  - Export
  - Customs
  - Privacy
- **Commercial governance**, such as:
  - Sale/Deal approval violations and side letters
  - Channels Compliance
  - Grey/Service Abusers/Counterfeit/2ndary market
- **Matters motivated by personal gain**, such as:
  - Fraud
  - Conflict of Interest
    - ★ Requests for COI waiver
    - ★ Undisclosed COI allegation
- **Other:**
  - Audit open action items owned by Sales
  - New Business Conduct (“BCO”) Policies, Processes
  - Misc. issues (e.g. IP)

# BGC Council Members and Participants

- **Required Global BGC members:**

- EVP;
- LOB SVPs;
- Partner Sales VP;
- Business Ops VP;
- Legal VP;
- HR VP; and
- Field Finance VP

- **Extended Global BGC participants (as needed for relevant portions of standing agenda):**

- Marketing representatives
- Invited presenters and participants including BCO and IA representatives

- **Required Regional BGC members:**

- Regional SVP;
- Regional LOB VPs;
- Regional Partner Sales VP;
- Regional Business Ops representative;
- Regional Legal representative;
- Regional HR representative; and
- Regional Field Finance representative

- **Extended Regional BGC participants (may be permanent or invited on as needed basis):**

- Marketing representatives
- BCO representative
- Invited presenters and participants

- **Required GEM BGC members:**

- ➔ *GEM VP;*
- ➔ *GEM LOB leads;*
- ➔ *GEM Partner Sales lead;*
- ➔ *GEM Business Ops lead*
- ➔ *GEM Attorney (lead);*
- ➔ *GEM Finance Controller ; and*
- ➔ *GEM HR Lead*

- **Extended GEM BGC Members (may be permanent or invited on as needed basis)**

- ➔ *GEM Export Manager;*
- ➔ *HR Legal*
- ➔ *BCO representative;*
- ➔ *Marketing representative*

# Responsibilities of Global/Regional/GEM BGCs

## Global

- Provide strategic direction
- Provide global support for programs relating to the Standards of Business Conduct
- Review Conflict of Interest Waiver Requests
- Resolve inter-regional escalations
- Review higher risk investigations
- Oversee tracking and completion of Internal Audit open action items
- Review recommended responses/proposed corrective actions with respect to corruption matters, side letters, third party-funded payments and undisclosed conflicts of interest prior to implementation by GEM BGC

## Regional

- Provide Regional support for programs relating to the Standards of Business Conduct
- Resolve intra-regional disputes between GEM BGCs within the Region
- Track and oversee GEM activities and compliance and governance matters
- Develop and oversee implementation of region-wide proactive or reactive responses/corrective actions

## GEM

### → Proactive:

- ★ Create a culture of governance and compliance
- ★ Provide local support for the Standards of Business Conduct programs and other regulatory/policy program implementations

### → Reactive:

- ★ Provide a forum for assisting local management in identifying, facilitating the investigation of, reporting and resolving business conduct and governance issues, in coordination with the BCO and appropriate functional organizations (e.g., HR, Security, Internal Audit, Legal)
- ★ Provide input regarding employee discipline and develop recommended responses/corrective actions other than employee discipline for review and concurrence by the BCO or other appropriate policy owner (and with respect to corruption, side letters, third party-funded payments and undisclosed conflicts of interest, for review and approval by the Global BGC)
- ★ Oversee implementation of responses/corrective actions other than employee discipline after any required review and approval

# Process

- Meetings:
  - GEM and Regional BGCs meet approximately monthly and work from standing governance/compliance agenda
  - Required BGC members should not routinely delegate responsibility to participate in BGC meetings
  - Each GEM and Regional BGC has a designated BCO representative
  - Matters communicated to designated BCO representative via email communication to the GEM BGC alias or during GEM BGC meetings deemed reported to the BCO for purposes of BCO reporting requirements

# Process (cont'd)

## ● Investigations

- ➔ Matters may be reported directly to BCO or reported at GEM or Regional BGC meeting
- ➔ BCO will assign a case number for tracking and reporting purposes
- ➔ Depending on the nature of the investigation, it will be handled by Internal Audit, Security, BCO, Marketing or HR as appropriate. (only certain groups have investigative responsibility)
- ➔ The BGC system is not intended to transfer investigative responsibility to the GEM or Regional BGCs. However, BGC representatives, including the GEM and Regional Attorneys may, coordinate with or provide information and advice to the investigators
- ➔ Need to ensure alignment regarding:
  - ★ Who leads and who participates in an investigation
  - ★ Who gets access to investigation findings
  - ★ Who makes decisions (and about which issues—business issues, corrective actions, disciplinary actions)
  - ★ Coordination of Marketing external/partner investigations and BCO/IA/HR internal compliance responsibilities
  - ★ Coordination of Partner Sales compliance efforts with BCO/IA/HR

## Process (cont'd)

### ● Reports and Updates by Investigative Organizations:

#### → Ongoing investigations:

- ★ BCO representative provides updates regarding existence and general nature of investigation to GEM and Regional BGCs, but may not be able to comment on substantive findings until the investigation is concluded (BGC Charter references)
- ★ BCO provided monthly summary reports to Global BGC and the Regional BGC
- ★ Market Integrity provided quarterly updates to the Regional BGC

#### → Completed investigations:

- ★ Written investigation reports provided to EVP and limited number of other executives
- ★ Full report with names will be distributed on a “need to know” basis to the core members of relevant GEM or Regional BGC, typically through the GEM or Regional Attorney (BGC Charter reference)
- ★ Copy of report summary w/o names provided for distribution to entire BGC
- ★ HR representative will provide employee disciplinary recommendation to relevant GEM or LOB VP/Regional SVP



## Process (cont'd)

### • Corrective Actions/Decisions:

- ➔ GEM BGC provides input on employee discipline and develops and implements a recommendation on matters other than employee discipline with input from the BCO or other legal/compliance/regulatory “owner.”
- ➔ After the GEM BGC reviews the matter, the HR representatives meet with the GEM, LOB or Regional VP, who makes the employee disciplinary decision, which is then implemented by the line manager of the employee.
  - ★ For governance and compliance matters, the GEM, LOB or Regional VP represents Line Management, NOT the immediate line manager of the affected employee
  - ★ HR/BCO provide input; Line Management decides
- ➔ Matters involving FCPA violations, side letters, third party-funded payments and undisclosed conflicts of interest must be reviewed by the Global BGC.
- ➔ Corrective actions in other cases do NOT need to be reviewed routinely by the Regional or Global BGC cases.
- ➔ Stakeholders may escalate to the Regional or Global BGC in the event of disagreement regarding the appropriate corrective action.

## **Confidentiality/Privacy**

- Irrespective of the scope of attorney-client privilege, governance and compliance matters are sensitive and should be kept confidential
- All documents should be marked in accordance with the Company's classification policy
- Distribution and communication should be limited to those who need to know
  - Note: In some cases, this may require that the BGC agenda be rearranged so that discussion of a particular matter is limited to the core BGC members
- BGC minutes and communications should include factual information relevant for the intended audience and purpose but avoid speculation or editorial comment

## Confidentiality/Privacy (cont'd)

- Written and verbal communications, including BCO updates and BGC meetings, should limit the identification of specific employees by name, particularly when an investigation is still pending and the allegations have not been proven
  - However, this does not mean that the a GEM or Regional BGC cannot receive any updates whatsoever until the investigation is concluded—it is a question of balancing business interests and the employee's privacy interests and ensuring that discussions are appropriately limited
- If BCO or an investigative organization has a concern that someone on a GEM or Regional BGC is involved, which is a rare corner case, BCO should report that concern to the Global BGC and work with the EVP to determine who can receive the information.(the BGC Charter should be referred to specifically)

## **Attorney-Client Privilege**

- GEM and Regional Attorneys will take the minutes for the BGC meetings and maintain BGC documentation in order to maximize attorney-client privilege to the extent that it applies
- GEM and Regional Attorneys should:
  - Understand the scope and limitations of the attorney-client privilege
  - Mark documents appropriately to designate that they are “Company confidential” and “attorney-client privileged” (where applicable)
  - Limit distribution by posting minutes to a secure access website/wiki rather than circulating via email

# The Legal Group's Charter

- Support profitable growth with manageable risks
- **Fulfill fiduciary responsibilities**
- Business partnering
- Support GEM implementation of the Company's strategies, business models, partner programs and initiatives
- Support Legal and Compliance initiatives
- Field execution arm of the Legal & Compliance groups, e.g. Subsidiary management, regulatory investigations/litigation/dawn raid management, etc.

**The BGC system and process is owned by the business, NOT by Legal but lawyers play a key role**

# Roles and Responsibilities

- **GEM Attorneys:**

- Run the GEM BGCs, take minutes, coordinate with the Regional Legal Director regarding training, initiatives, communications etc.
- Should proactively report trends and concerns in their GEM to the Regional Legal Director
- (Note: In some GEMs, there are country level BGC's and the responsible attorney would have a role similar to the GEM Attorney; however this is not required)

- **Non GEM Attorneys:**

- Must support the overall fiduciary responsibilities of Legal even if no direct role in BGC process
- Concerns about how to respond to a particular situation should be discussed immediately with the GEM Attorney and/or the Regional Legal Director

- **Marketing:**

- Coordination with other investigative/compliance organizations
- Coordination with GEM/Regional partner organizations
- Reporting to BGCs
- Challenge: Alignment of roles, responsibilities and hand-offs between multiple groups with potentially overlapping charters and differing perspectives and processes

# **General Counsel's Guide to Developing and Implementing a Compliance and Ethics Program**

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## Evolution of Compliance Programs

- Trace their roots to the defense industry in the 1980s
- Organizational Sentencing Guidelines (OSGs) adopted by the USSC in 1991.
  - “Mitigating factors” relating to compliance
  - Criminal fines for employee conduct may be mitigated by as much as 95%, by demonstrating an effective compliance program.
- 2006 EU Fining Guidelines for Antitrust Cases.
- Numerous agency compliance regulations adopt mitigation factors.



## **Corporate Compliance Mandates**

- Companies are subject to both general and industry specific regulatory compliance requirements depending on their industry.
- Regulatory agencies scrutinize the effectiveness of a violator's compliance program in determining appropriate sanctions.
- Investors, corporate “watchdogs,” NGOs and other third party stakeholders place a premium on compliance as a component of public trust.

# Corporate Compliance Mandates

Most compliance regulations and guidelines prescribe elements of an effective compliance program:

- Written policies and procedures
- Designated compliance officer and compliance committee
- Effective training and education
- Effective lines of communication and reporting structure
- Internal monitoring and auditing
- Well-publicized disciplinary guidelines
- Quick response and appropriate corrective action in the event of a compliance incident

# Compliance and Ethics “Best Practices”

The incentive to adopt “best practices” is two-fold:

- Proactive Restructuring - Assure shareholders and the public that a comprehensive compliance and ethics program is in place to ensure the highest legal and ethical standards.
- Imposition by Regulators - Results from inquiry by regulatory authority, which imposes upon the corporation a “best practices” compliance and ethics program.

## **One Size Does Not Fit All**

- A compliance program should be tailored to the culture and individual needs of the company.
- There are, however, general characteristics that every compliance program should exhibit.

## **Key Characteristic: Board Ratified**

- *In re Caremark* requires the board to implement adequate information and reporting systems to ensure that the board receives timely, relevant information so that it can make informed decisions.
- The compliance program is a valuable *Caremark* reporting system that should be understood and endorsed by the board.

## **Key Characteristic: Multidisciplinary**

- Compliance must be tailored to the individual company's operations and ensure that it covers all operational activities:
  - Pharmaceutical
  - Environmental
  - Competition
  - Government Contracting
  - Corporate Governance & Securities
  - Human Resources
  - International Operations
  - Government Relations
  - Privacy
  - Taxation
  - Safety
- Compliance should cut across all functions:
  - For example, Legal, Audit, HR, Security, and Ethics

## Key Characteristic: Integrated

All compliance functions and subjects should be integrated into a single framework with clear points of accountability to ensure that senior management and the board have up-to-date, accurate information.

- Must promote effective communication with all levels of employees.
- Must demonstrate a commitment to compliance with all laws.
- Must promote an organizational culture that encourages ethical conduct.

## **Key Characteristic: Training and Education**

- Provide compliance training and education:
  - Members of the Board of Directors
  - Senior Management
  - Employees
  - Agents/Consultants
- Document the programs and participation.



## **Key Characteristic: Designated CCO**

The compliance program should have a single point of accountability in a designated Chief Compliance Officer, preferably the general counsel or another senior member of the legal department.

## **Key Characteristic: Monitoring Function**

There must be ongoing, systematic, and coordinated monitoring to:

- ensure the program is being followed
- evaluate the overall effectiveness of the compliance system and make changes as necessary
- ensure reporting of potential or actual violations of law without fear of reprisal

## **Key Characteristic: Enforcement**

There must be consistent enforcement of compliance standards including disciplinary mechanisms.

- Establish a well-defined and clearly communicated disciplinary system
- Establish and communicate investigation procedures
- Respond appropriately to violations

## **Key Characteristic: Identification of Risk**

Implement a robust compliance risk assessment process to identify compliance risks, focusing on the nature and seriousness of violations and the likelihood of occurrence.

- Prioritize implementation of the compliance plan based on the risk assessments
- Take steps to prevent and detect violations of substantial risks
- Enhance the training program to address the identified risks

## **Key Characteristic: Evaluation and Modification**

- Regularly reassess and modify if appropriate.
- When a violation of law occurs, take reasonable steps to:
  - prevent future violations
  - install additional controls and/or modify the compliance program, as necessary

## **Additional Tips for an Effective Program**

Delegation of Authority □ Senior management is responsible for compliance efforts and the board of directors is responsible for overseeing such efforts.

- Exercise due care in delegating substantial discretionary authority.
- Take reasonable efforts to exclude from management, and positions with substantial authority, individuals whom the organization knew, or should have known through the exercise of due diligence, have a history of engaging in conduct inconsistent with an effective compliance program.

Incentives □ Provide meaningful compliance incentives in personnel evaluation and succession planning process and consistently enforce discipline for compliance violations.

Resources □ Allocate adequate resources and staffing for the compliance program to be effective. Periodically review the adequacy of these resources and staffing.

# Timeline of a Compliance Program

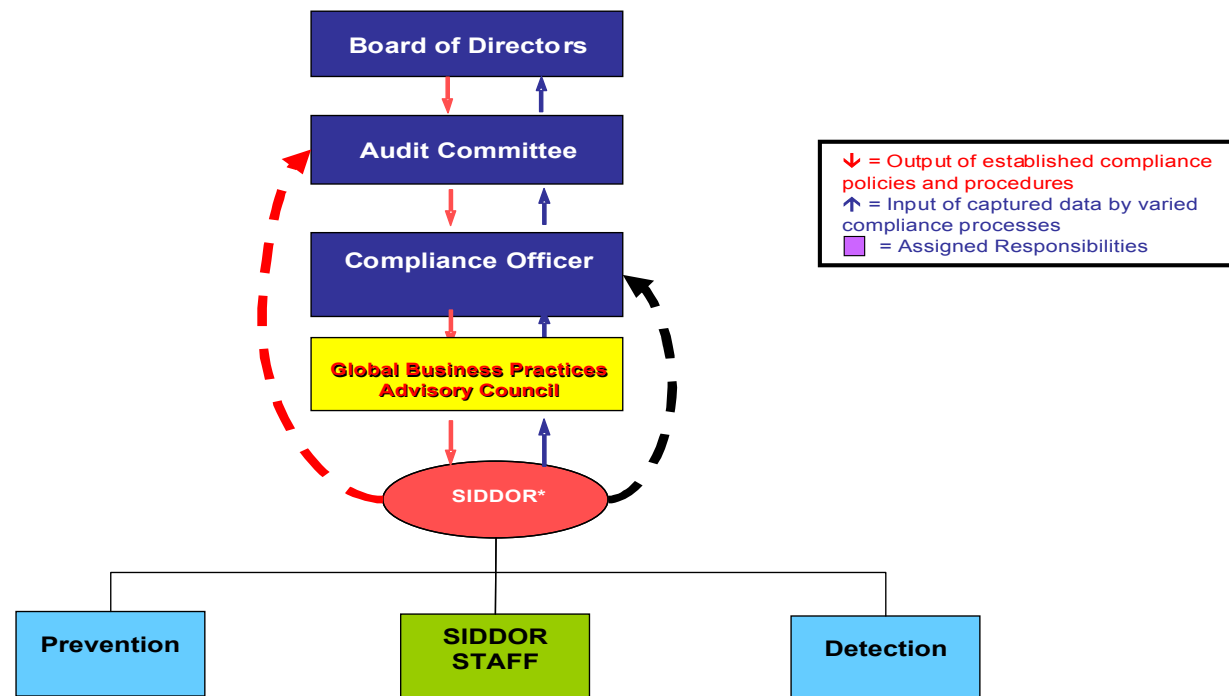
- 1<sup>st</sup>  Working with the board and senior management, assess and prioritize compliance risks at all levels of the organization
- 2<sup>nd</sup>  Develop a compliance program that satisfies regulatory requirements and dedicates appropriate resources and staffing to monitor and address the company's compliance risks
- 3<sup>rd</sup>  After the board approves the compliance program, senior management implements the program.
- 4<sup>th</sup>  Establish a training program designed to mitigate risk by receiving input on targeted risks and then working with HR, legal and business units to train the targeted employees on the targeted risks
- 5<sup>th</sup>  Monitor and review the program's effectiveness and make changes as necessary

## **Model Structure**

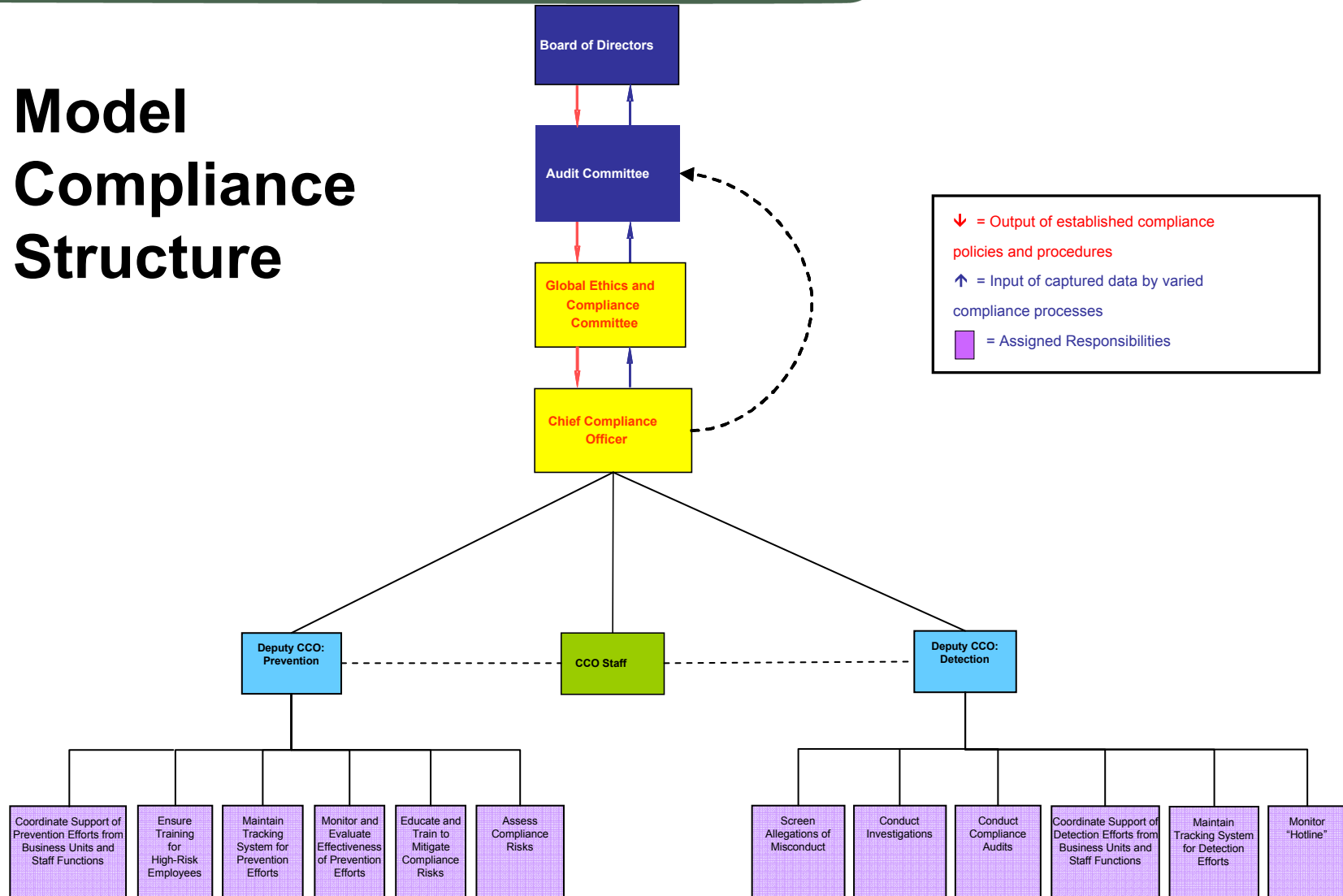
Based on these core principles and foundations common to “best practices” compliance programs, we present a model compliance program, which companies can modify to fit their own unique culture and operations.

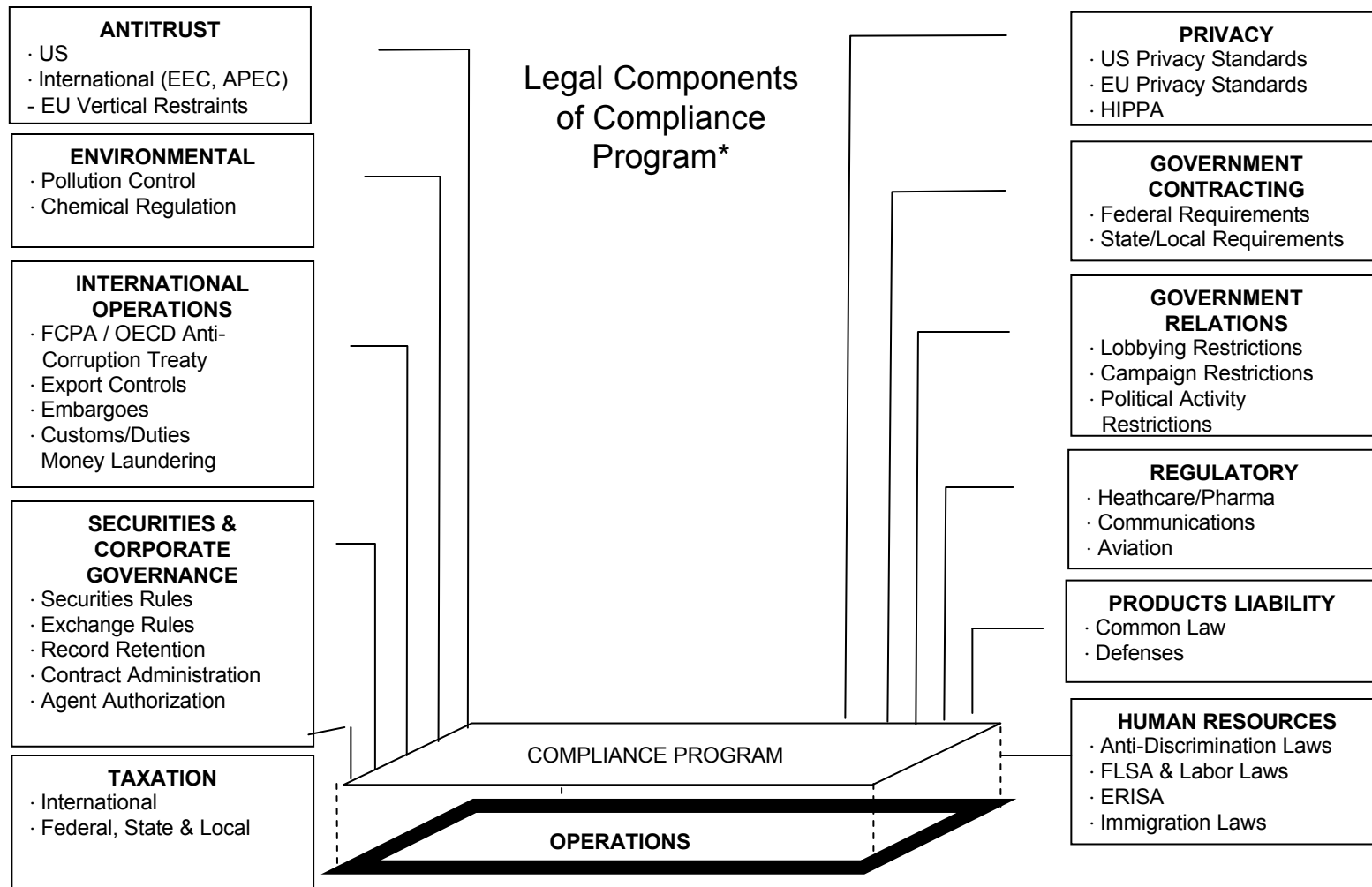


# Model Compliance Structure



# Model Compliance Structure





\* To be effective, the compliance program must be tailored to the Company's operations and its specific legal and compliance risks.

# Global Ethics and Compliance Committee

- Members
  - Co-chaired by General Counsel and CEO
  - President
  - Other senior officers from staff and operations
  
- Functions
  1. Monitor compliance with the Code of Conduct and Program policies and procedures;
  2. Develop and approve enhancements to Program as necessary;
  3. Review significant internal and operational controls designed to mitigate compliance risks;
  4. Ensure adequate systems for audit and investigation of Program violations, including maintaining a database of benchmark metrics;
  5. Conduct reviews of effectiveness of Company units charged with managing the Company's compliance with regulatory and legal requirements;
  6. Act on recommendations from the Chief Compliance Officer ("CCO") such as adopting policies, identifying and prioritizing risks, and implementing strategies for mitigating them;
  7. Monitor the ongoing performance and effectiveness of the Program; and
  8. Ensure that discipline for compliance violations is consistently enforced.
  
- The Committee will initially meet as frequently as necessary to oversee implementation of the Program, and thereafter will meet at least quarterly.
  
- The Committee will provide regular updates to the Audit Committee.

# Chief Compliance Officer

- Primary Goal of the Chief Compliance Officer
  - Avoid and minimize legal, ethical and compliance risks
- Functions of Chief Compliance Officer:
  - Design, execute and supervise a program to identify, prioritize and elevate legal and ethical risks.
  - Accountable for the work of the Deputy CCO-Prevention (Education, Training) and Deputy CCO-Detection (Investigations, Hotlines).
  - Ensure periodic compliance surveys, including senior executives and management.
  - Develop compliance policies and detection procedures.
  - Monitor the performance of the Program on a continuing basis (periodic audits and improvements).
  - Work with the Global Ethics and Compliance Committee and CEO to keep the Code of Conduct current and relevant.
- To assure ownership by the business units, it is recommended that the initial CCO be a “high-potential” employee recruited from the business sector.
- The CCO will report directly to the Global Ethics and Compliance Committee, with dotted-line accountability to the Audit Committee.
- The CCO will administratively report to the CEO.
- The CCO will provide regular updates on the Program to the Audit Committee and Global Ethics and Compliance Committee.

## Deputy CCO - Prevention

- Coordinate support for prevention efforts from business units and staff functions.
- Assess compliance risks.
- Design and implement education and training programs, including:
  - (i) those tailored to target compliance risks for different employees groups,
  - (ii) providing introductory training for new employees, and
  - (iii) providing ongoing training for all employees and directors.
- Maintain tracking system to monitor prevention efforts.
- Continuously monitor and periodically evaluate the effectiveness of prevention efforts.

## **Deputy CCO - Detection**

- Coordinate support for detection efforts from business units and staff functions.
- Conduct compliance risk assessments.
- Screen reported allegations of misconduct.
- Conduct investigations into alleged misconduct.
- Conduct compliance audits, focusing in areas determined to be high-risk.
- Maintain and monitor use of the Company's "hotline."
- Maintain a tracking system to monitor the Company's detection efforts.

## **Benefits of Third-Party Compliance Review**

- Provides a written assessment of compliance.
- Ensures appropriate systems in place.
- Gives comfort to directors.



## 2010 Sentencing Guideline Amendments

- The USSC has sent amendments to the Sentencing Guidelines to Congress, which will likely become effective November 1, 2010.
- The most significant changes include allowing companies to receive a reduction in sentencing, even where executive management or members of the Board are involved in wrongdoing, if:
  - (i) the person(s) with operational responsibility for compliance reports directly to the Board or one of its committees;\*
  - (ii) the compliance program was the first to discover the offense and
  - (iii) the company promptly reports the criminal conduct to the appropriate authorities; and
  - (iv) no individual with operational responsibility for compliance participated in, condoned or was willfully ignorant of the offense.

\*Express authority to communicate personally to the governing authority

## 2010 Sentencing Guideline Amendments

- An individual has “direct reporting obligations” to the Governing Authority if she or he has “express authority to communicate personally to the governing authority or appropriate subgroup thereof (Audit Committee)”
  - (A) promptly on any matter involving criminal conduct or potential criminal conduct, and
  - (B) no less than annually on the implementation and effectiveness of the Compliance and Ethics Program
- Therefore, ensure individual with operational responsibility:
  - (A) Updates Board or Audit Committee annually
  - (B) Has written board policy that gives individual authority to report any actual or potential crimes to Board or Audit Committee in individual’s discretion
    - In practice, most likely only infractions involving high-level individuals would be directly reported, but reporting discretion should be broad
    - If reporting to Audit Committee, Audit Committee charter should make clear that authority on these matters has been delegated to Audit Committee