



**Tuesday, May 23**  
**11:00 am–12:30 pm**

## **702 Structuring a Corporate Compliance Function**

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# *Structuring a Corporate Compliance Function*

## A PANEL DISCUSSION

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*ACC 4th Annual Corporate Counsel University  
May 2006*

## Structuring a Corporate Compliance Function

### I. Corporate Compliance Programs

#### a. The Complexity of Corporate Compliance Laws

Corporate compliance issues are complex. Scores of laws at the state and federal level regulate financial transactions, employment practices, product safety, environmental safety, antitrust, intellectual property, and a number of other compliance areas. In addition to prohibiting certain types of conduct and business methods, they also forbid retaliation against individuals who try to complain of unlawful practices internally.

Providing managers and employees with the details of these numerous laws and regulations may not be effective in preventing them from committing violations. As corporate history has shown, the violations continue, often becoming synonymous with the offenders themselves— Enron, Arthur Andersen, Texaco, WorldCom, Global Crossing, Mitsubishi. Merely being aware of the law did not prevent the problems experienced by these organizations.

What is often not considered in these instances is that in virtually every case, the disgraced organization had a vision and value statement that, if it had been followed, could have prevented the conduct from occurring in the first place, or at the very least, continuing. Second, almost universally, someone within the organization tried to raise awareness of the problem so it could be addressed before catastrophe ensued. The devastation becomes all the more unfathomable in light of the fact that the organization had one or more chances to ward off disaster and yet it squandered the opportunity to do so. To those who have lost their jobs or pensions, or who have seen their investments disappear, it must seem like a Greek tragedy when they read of complaints that were ignored or superficially investigated and the individuals whose careers were harmed simply for raising the concerns in the first place.

How do organizations prevent these disasters and make certain that employees understand their legal responsibilities and the corporation's commitment to finding out about problems and correcting them? On one hand, it seems overwhelmingly complex with all of the laws and business systems in place to set standards of

behavior which cross the vast lines of corporate compliance. It is nearly impossible to communicate every form of improper conduct which may cause a business problem; no one could remember such a list. As an example, the following is a summary of some of the major federal laws, many with complex provisions, which govern business and employment practices:

### Antitrust

- The Sherman Act: prohibiting contracts in restraint of trade
- The Clayton Act: prohibiting monopolies and attempts to monopolize with regard to tying contracts, mergers and acquisitions, etc.
- The Robinson-Patman Price Discrimination Act: prohibiting discrimination in price and promotional allowances
- The Hart-Scott-Rodino Act: requires pre-merger notifications to the Federal Trade Commission and the Justice Department

### Employment

- Title VII of the Civil Rights Act of 1964: prohibiting discrimination in employment based on sex, race, religion, national origin, or color
- Age Discrimination in Employment Act: prohibiting discrimination in employment based on age
- Americans with Disabilities Act: prohibiting discrimination based on disability
- Family and Medical Leave Act: requiring up to 12 weeks of unpaid leave for personal or family medical reasons
- Equal Pay Act: requiring equal pay for equal work regardless of gender
- Fair Labor Standards Act: addressing the appropriate payment of wages and overtime
- National Labor Relations Act: governing relations between management and labor unions
- Occupational Safety and Health Act: providing safety guidelines in the workplace
- Immigration Reform and Control Act: addressing the immigration status of employees
- Uniformed Services Employment and Reemployment Rights Act of 1994: providing for military leave

### Environmental

- Clean Air Act: regulating air emissions
- Clean Water Act: establishing regulations for the discharge of pollutants into U.S. waters
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA): regulating hazardous wastes and establishing a trust fund for cleanup
- Emergency Planning and Community Right to Know Act: developing a plan for community safety from chemical hazards
- Resource Conservation and Recovery Act: authorizes the Environmental Protection Agency to control hazardous waste generation, transportation, treatment, storage and disposal
- Toxic Substance Control Act: authorizes the EPA to track industrial chemical produces or imported into the U.S.

### Intellectual Property

- Economic Espionage Act of 1996: imposing criminal penalties on individuals or organizations that steal or attempt to steal other's trade secrets.

### Securities Laws

- Securities Act of 1933: requiring disclosures be made to investors about securities offered for public sale
- Securities Exchange Act of 1934: creating the Securities and Exchange Commission and providing it with disciplinary powers to regulate conduct in the market
- Public Utility Holding Company Act of 1935: requiring reporting by electric utility and gas companies
- Trust Indenture Act of 1939: regulating the issuance of debt securities
- Investment Company Act of 1940: regulating the organization of companies
- Investment Advisers Act of 1940: regulating investment advisors

Does anyone really think that managers can master these laws with any where near the same degree of competence they are expected to demonstrate in the core functions of their jobs? Likewise, the United States Department of Labor's website lists these provisions which prohibit retaliation against individuals for complaining of arguably illegal practices: the Clean Air Act (Employee Protection Provisions); the Comprehensive Environmental Response, Compensation and Liability Act (Employee Protection Provisions); the Energy Reorganization Act of 1974 (Employee Protection Provisions); the Occupational Safety and Health Act of 1970; the Safe Drinking Water Act (Employee Protection Provisions); the Solid Waste Disposal Act (Employee Protection Provisions); the Toxic Substance Control Act (Employee Protection Provisions); the Federal Water Pollution Control Act (Employee Protection Provisions); and the Regulations Governing Procedures for Handling of Discrimination Complaints Under Federal Employee Protection Statutes. Further, other statutes prohibit retaliation to protect employees for raising other kinds of concerns.

Furthermore, regulatory laws are not often only extremely complex but often ambiguous – many organizations employ specialized counsel to deal with separate segments of the same statutes or types of regulation. For example, an employer may use one lawyer for ADA advice and defense and another for counsel on harassment claims though both issues involve employment law in general and civil rights in particular. It is just not realistic to think that individual managers can be taught to recognize the nuances of not one but many applicable laws to avoid legal and related pitfalls. On the other hand, instruction on legal issues is important – it

communicates the significance of legal conduct, it may be required under some laws, such instruction can reduce damages where violations can occur and can help reduce penalties under applicable criminal sentencing guidelines.

How, then, can managers be expected to understand scores of complex laws and apply them daily in the midst of all of their other responsibilities if that is what is needed to ward off disaster? And how can organizations provide appropriate instruction and communication to achieve the legally recognized benefits mentioned above. The answer is that we cannot expect business people to become legal experts and the good news is that it's not necessary anyway.

Instead, organizations need to define what's important in business in clear specific terms and values that everyone can understand. Virtually every business has sacrosanct rules about what it does and how it operates that everyone understands and is expected to extrapolate into daily business behavior. These messages are simple, uncluttered and not lost in the noise of legal jargon.

#### b. Elements of an Effective Compliance Program

A number of recent legal developments have made it imperative for organizations to have an effective compliance program that includes clear policies and procedures, communication and training about corporate standards and policies at all levels of the organization:

#### The Federal Sentencing Guidelines and Effective Compliance Programs

The Federal Sentencing Guidelines are used to determine the penalties for all criminal activity covered by federal law. Since 1991, in addition to individual penalties, they have included penalties for organizations that engage in criminal activity. Penalties for organizations can include fines, probation, restitution, the issuance of public notices of conviction, and exposure to forfeiture statutes, and can be imposed on an organization if an employee commits a criminal act that is apparently within the scope of his or her employment, even if the act is contrary to organizational policy or instructions. The organizational sentencing guidelines, along with the individual sentencing guidelines which provide individual penalties (e.g., prison time,

finer) for many white collar crimes, provide incentive for both individuals and organizations to act ethically and legally in carrying out their businesses.

In addition, the Sentencing Guidelines provide an action plan to help organizations to limit or avoid liability. An organization can mitigate or reduce its liability by demonstrating that it has an effective compliance program in place. The mandate of an effective compliance program was strengthened by amendments adopted by the Federal Sentencing Commission that went into effect on November 1, 2004. The amendments to the Sentencing Guidelines enhance the role of organizational leadership in ensuring that the compliance program is valued, supported, periodically reviewed, and operates as intended. The compliance program must include effective communication to all levels of the organization of appropriate standards and procedures that govern conduct in the workplace. Furthermore, the defense created by an effective compliance program is not available if high level organizational officials are involved in the wrongdoing.

The Sentencing Commission indicates that an effective compliance program has two overall elements: (1) the prevention and detection of criminal activity; and (2) a corporate culture that encourages ethical conduct and compliance. The Commission uses phrases like “due diligence” to describe the level of effort it requires with regard to the implementation and enforcement of the compliance program, and it has laid out a number of specific steps for organizations to take to help them achieve these objectives. They include:

- establishing standards and procedures related to corporate compliance and ethics;
- ensuring knowledge and oversight of the program by the organization’s governing body;
- making the existence and implementation of the program the responsibility of high-level organizational officials;
- delegating day-to-day operational responsibilities to specific individuals who are given adequate resources to carry out the program, authority and access to appropriate leaders in the organization;
- avoiding including individuals who have committed inappropriate or illegal actions in the group with substantial authority to implement the program;

- taking reasonable steps to communicate periodically to all levels of the organization, including training programs and disseminating information outlining roles and responsibilities;
- taking reasonable steps to ensure the program is followed (monitoring and auditing);
- measuring and evaluating the effectiveness of the program periodically;
- publicizing a reporting system for concerns about illegal activity that allows for anonymity;
- protecting employees from retaliation for filing complaints or concerns;
- reinforcing the program through incentives to comply and disciplinary action for non-compliance with the law or the program; and
- taking reasonable steps to address any criminal conduct that comes to light.

In early 2005, the United States Supreme Court decided the companion cases of U.S. v. Booker and U.S. v. Fanfan, No. 04-104 and 04-105, 2005 LEXIS 628 (January 12, 2005). In its decision, the Court held that Federal Sentencing Guidelines were advisory and not mandatory for judges who are considering sentencing. However, this ruling likely will not impact the consideration in the courts of whether or not an organization has an effective compliance program. Nothing in the opinion calls into question the value of an effective compliance program as an element of an organization's potential defense to criminal charges and penalties, and it has not been interpreted that way by the lower courts at this point. Most likely, courts will continue to look to the Guidelines as a standard of fairness in sentencing and will still be influenced by the factors (including effective communication of standards of conduct and the other aspects of an effective compliance program) addressed in the Guidelines as a means to minimize liability.

In addition, whether or not the Federal Sentencing Guidelines are applied, the existence of an effective compliance program is (and will likely continue to be) an important factor used by many federal agencies, including the Department of Justice and the Securities and Exchange Commission, in determining whether or not to charge organizations with misconduct committed by their employees. The value of compliance programs



is also still reflected in the code of conduct and communication requirements of the Sarbanes-Oxley Act of 2002, and of NASDAQ and the New York Stock Exchange.

### The Sarbanes-Oxley Act of 2002

On July 30, 2002, the President signed into law the Sarbanes-Oxley Act of 2002, also known as the Corporate Fraud and Accountability Act. The law established new guidelines for all public companies with regard to corporate governance and accountability. The act addressed both internal and external controls on corporate activity, including:

- establishing of a board to set auditing standards;
- creating internal and external auditing committees;
- requiring that CEOs and CFOs personally certify financial reports, and take personal responsibility for fraud or other misrepresentations in corporate filings;
- requiring that corporate attorneys report misconduct to the CEO, chief legal officer or other appropriate individual within the organization;
- holding all involved corporate employees responsible for the destruction of documents; and
- providing significant protections for corporate whistleblowers by prohibiting employers and their agents from taking adverse employment action (including discharge, demotion, suspension, threats, harassment, or other discrimination in the terms and conditions of employment) against them.

The Sarbanes-Oxley Act requires organizations to have and communicate a Code of Ethics for senior financial officers within the organization.

### Industry Standards

Industry standards, including guidelines issued by NASDAQ and the New York Stock Exchange, reinforce the requirements of the law by requiring organizations that are listed on the stock exchanges to adopt and disclose codes of business conduct and ethics for directors, officers and employees. The standards recommend that codes of conduct and business ethics include provisions addressing the following:

- Conflicts of interest
- Corporate opportunities
- Confidentiality of organizational and customer information
- Fair dealing with customers, suppliers, competitors, and employees
- Protection and proper use of company assets, including theft, carelessness, and waste
- Compliance with laws, rules, and regulations, including insider trading laws
- Encouraging the reporting of any illegal or unethical behavior

## II. Changing Behaviors to Build an Ethical Culture

According to Sam Buell, a member of the Justice Department's Enron Task Force, "The best inoculation against being crippled by a crisis in your business is to build a culture of openness, honesty and responsibility within your own ranks." "Ashcroft Warns Executives about Corporate Cover-Up Consequences," The Atlanta Journal-Constitution, September 28, 2002. To do so, leaders will have to take a hard look at their organization's culture and how business operates in their organizations. What messages are being sent, not just through words but through actions? What is acceptable behavior in our organization? How do managers and leaders respond to concerns? Is it in a manner that punishes or rewards employees for speaking up about problems?

Without a fundamental change in the way people in the organization – and in particular, its leaders – behave, companies cannot build a legal, ethical culture, regardless of the sorts of issues that they face. Effective leadership is the single most important element in building a culture of honesty and integrity. As Noel Tichy, professor of organizational management at the University of Michigan's business school, has pointed out, "Ultimately, you've got to have leadership at the top who (a) have integrity, and (b) teach it." "Ethics Hotlines Heating Up At Corporations," NEPA News, September 25, 2002.

Of the many similarities between recent high profile cases, one of the most telling is leader behavior. These companies may have had policies and values statements decrying illegal or unethical conduct, but the actions of senior leadership contradicted those statements and sent a message to employees about what the real

standards and expectations were. Enron, Worldcom, Texaco – the names have become almost synonymous with over-the-top violations, and in all of them, management led the way to high-profile scandal. Enron required new employees to sign a code of conduct statement before joining the firm, yet its Board suspended the ethics code twice to allow off-the-books partnerships that would financially benefit a company executive. According to Dick Thornburgh, a former U.S. attorney general examining the WorldCom fraud, “When ... actual earnings faltered, their top management resorted to a smorgasbord of manipulation to falsely inflate ... earnings.” “Report Slams Culture at WorldCom,” USA Today, November 5, 2002. Texaco offered wide-reaching diversity training, yet high-level company executives were caught on audiotape making racially derogatory comments. These leaders’ actions all but nullified codes of conduct and values statements that spoke of integrity, honesty, and fairness.

Leaders set the example for everyone else in the organization to follow. When management cuts corners, employees see it as acceptable business practice. On the other hand, leaders who demonstrate that the values of integrity and honesty are important to them – by living those values themselves and taking prompt, appropriate action when others’ behavior contradicts those values – set a powerful example.

In addition to ensuring their own behavior embodies the organization’s values, leaders also need to verbalize the message effectively to their employees. Managers and employees are often the front line to clients, vendors, and shareholders. If they do not fulfill their responsibilities through ethical, legal behavior, the business will suffer – through the loss of customers, diminishing of shareholder confidence, and/or lost sales or revenue. As a result, they need to understand not only what their responsibilities are but how their actions are tied to the bottom line.

### III. **Effective Compliance Training Initiatives**

Once the organization's leadership has become aligned, education and training are required to effectively communicate the requirements of corporate compliance and ethics as a uniform vision throughout an organization — they give meaning to mission statements, policies, corporate values, codes of conduct and ethics, and other communication devices. Implementing a comprehensive learning and education solution is vital.

Even when they recognize the need for training, however, many organizations make the mistake of deciding simply that they will meet that need by just delivering something— anything. But they may end up implementing a program that either does not engage and reach its audience, is not comprehensive enough, does not meet the needs of their workplace climate, or in some other way fails to deliver the results.

In essence, though, many organizations determine what training they will use without ever even considering what they are trying to accomplish. Many employers say their mission is to provide an inclusive workplace that welcomes diversity, is characterized by professional standards of behavior, and does not tolerate discriminatory and harassing conduct. Of course by realizing these objectives, they will also be increasing the legality of their operations and reducing the risk of litigation and penalties. Very few leaders say their mission is to guard against and prevent lawsuits; yet many choose learning programs that focus on legal obligations, the requirements of the law, and the avoidance of claims rather than their stated mission: to build a diverse, productive, and civil workplace.

Providing information on legal issues is important, but it is not the same as providing specific standards on workplace conduct. The common mistake many organizations make is that they use training as a strategic part of their plan, when in fact, training is a tactic. The organization's vision is the strategy; training should be a tactical component of that overall strategy.

Similarly, organizations may say that training on workplace standards and corporate citizenship is vital and is, in fact, just as important to the business as achieving sales goals and producing flawless products.

However, when they look at learning solutions, they focus not on what will work the best and deliver their desired results; instead they try to find the cheapest solution or the one that involves the least time away from work.

If these are the goals, rather than providing training, companies would be better served designing something quickly and inexpensively and then simply communicating the message by e-mail alone. This would certainly minimize training costs and reduce time away from the job. Reaching decisions this way is comparable to an architect determining that a sturdy, well-built, long-lasting structure is needed, and then choosing the cheapest materials and throwing it together as quickly as possible using unskilled labor. Again, the tactical plan must support the strategy.

In the last few years, there has been an explosion of interest in e-learning as a new training delivery system. The rationales companies use for implementing e-learning are generally that it seems cheaper than classroom training (a questionable premise when all setup, administration, and equipment costs are considered), it can reach people at their desktops, and students can use it anytime they want without the confines of traditional classroom scheduling. All of these rationales may be correct; however, what should be the most important consideration—whether the training will generate the outcomes that meet your objectives—is frequently forgotten in the haste to embrace the logistical attractions of e-learning.

E-learning, as an element of an overall training implementation, can have many tactical advantages and practicalities, but it is not a training strategy in and of itself. Choosing e-learning or any other learning device or tool for its logistical benefits without considering the quality of the learning experience and whether it can help lead to those outcomes driving the instruction is like buying a drill because of its latest enhancements and sleek design when the job actually requires a wrench. To avoid falling into this trap, organizations should ask these simple questions before they decide on any learning content and delivery system:

- What are the reasons we are delivering this instruction? What do we hope to accomplish when we have completed the delivery?

- Are the content and delivery method we are choosing going to serve the objectives we have defined as the rationale for the training?

“Good business leaders create a vision, articulate the vision, passionately own the vision, and relentlessly drive it to completion.” — John Welch

#### a. Implementation Planning

There are many issues that merit consideration when planning to implement compliance training in your organization. An implementation strategy should be designed to a) meet your business goals; b) demonstrate your commitment to the initiative; c) align behavior with organizational policies; and d) produce measurable results. The most effective implementations consider training as one element in the process rather than a finite, “one-shot” experience. The following outline identifies possible issues you may need to consider and some suggestions for addressing them. It also identifies who in the organization may play a role in each step of the process.

#### 1. Link to Business Goals and Objectives

- Define standards and expectations that support the organization’s mission, vision, and values.
- Identify needs and performance gaps.
- Define a clear set of implementation objectives.
- Gain agreement from executives on who should be trained.
- Identify a senior management champion and use his/her influence as needed.
- Set a baseline for measurement.

Key people: Top-level executives, business-unit-level executives

#### 2. Communication Strategy

An effective communication plan requires a variety of methods and delivery mechanisms for communicating the messages based on available channels within the organization and those methods that will reach the widest audience. The communication plan should have specific phases for introduction of message, consistent repetition in a variety of ways, and reinforcement. In essence, this is the “marketing plan” for institutionalizing long-term cultural and behavioral standards and expectations.

## Communication Plan Components

a. Developing content – Messages should be linked to organizational values, policies, and related initiatives.

Specific messages may include:

- Senior management commitment
- Performance standards/expectations
- Who will facilitate training
- Follow-up activities
- Organizational training objectives
- Course content/agenda
- Training logistics

b. Identifying delivery methods – A variety of delivery channels should be used, taking into account existing channels (e.g., newsletters, website, etc.), internal capabilities, and audience accessibility (e.g., access to e-mail) as well as other potential options for getting messages out.

c. Establishing a communications calendar – A timeline or internal project plan with specific events, milestones, and delivery methods is necessary to ensure consistency, repetition, and reinforcement without dilution of message. Specifically, the timeline should indicate:

- Who communicates to which audience
- What the message is for each audience
- What delivery methods should be used to communicate the message
- When the messages should be communicated (intervals and frequency)

Key people: Human Resource specialists, instructional designers, training department

### 3. Develop Course and Materials

- Identify learning objectives for each audience (i.e., executives, managers, employees, etc.)
- Determine appropriate learning methods for each group.
- Finalize course content, matching objectives with identified needs.
- Develop materials and audio-visual components.
- Develop leave-behinds, job aids.

Key people: Instructional designers, vendor partners

### 4. Develop Course Roll-Out Strategy

- Create training agendas identifying content for executives, course participants, and other employees.
- Identify delivery methods for each group (i.e., instructor-led, online, in-house certified instructors).
- Gain agreement on the timing of training for each group and create a training schedule.

- If using internal instructors, gain agreement on who will facilitate the training. Include criteria for selection and performance expectations.
- Develop a system for tracking participant attendance.

Key people: Training managers, business-unit-level executives

#### 5. Trainer Preparation

- Provide materials to trainer, meet to review the materials.
- Provide samples of key organizational policies, internal communication pieces used to communicate about the training initiative, organizational charts, and other key business information.
- Share key information on the link to business goals and objectives, company commitment for training and support for facilitators, agenda.

Key people: Training manager, training department

#### 6. Follow-up/Ongoing Reinforcement

- Create objectives and a strategy for measuring course retention, effectiveness, and return on investment.
- Integrate key course skills into the performance management system and cultural assessment.
- Continue on-going communication strategy and include follow-up activities, progress reports, etc.

Key people: Training manager, measurement specialists, instructional designers

The following is a list of barriers that could make the implementation process more challenging:

- Failure to link the implementation to strategic business goals, customer needs, and/or continuous

improvement: It is difficult to create a sense of ownership for applying key principles when participants do not understand how course concepts are linked to the business and its overall success.

- Unclear implementation objectives: When an organization fails to clarify and/or clearly communicate what the objectives for implementing training are, trainers may become frustrated because they cannot articulate the company's commitment, which is a critical component for achieving participant buy-in. Participants who do not fully understand why the organization chose to provide the training may consider it irrelevant and assume it is just another "flavor of the month" program.

- Unclear implementation roles and responsibilities: It is difficult for just one champion within an organization to sustain an effective implementation and long-term results. The most successful and lasting implementations result from partnerships established at multiple levels within a company and a clear understanding of the roles and responsibilities of each partner.

- Non-supportive climate: A non-supportive climate can manifest itself in several ways including:



- Lack of reinforcement after the training: Without regular reinforcement, initiatives lose momentum, participants' skills become less sharp, and the perceived importance of the program diminishes.
- Lack of trainer support: Trainer support, including adequate time to effectively prepare for and facilitate courses, allocation of appropriate resources, and regular performance feedback, are crucial for maintaining the quality of the training.
- Poor participant preparation: Without an effective communication strategy that emphasizes executive commitment and links the training to broader business objectives, participants will not be fully prepared for the training, making it difficult for overall learning outcomes to be achieved.

b. Training Delivery Methods: A Comparison

According to a job impact study published by Thomson Learning in 2003 indicated that, in analyzing various learning methods, blended learning resulted in a 153-163% increase in performance, while e-learning alone resulted in only a 99% increase in performance. Thomson Job Impact Study – Final results. The Next Generation of Corporate Learning: Achieving the Right Blend, NetG, Inc., 2003. The following analysis outlined the benefits and disadvantages of a variety of communication methods.

Distribution of Reading Material

<b>Benefits</b>	<b>Disadvantages</b>
Easy	Must be read to be effective
Quick	No opportunity to ensure understanding
Ability to reach wide audience	
Low cost	

Classroom Learning

<b>Benefits</b>	<b>Disadvantages</b>
Opportunity to explain difficult or complex concepts	Cost (instructor and materials)
Immediate interaction	Time
Ability to assess knowledge and understanding	Travel
<i>Outside expert trainer</i> Can provide alternative perspectives Can be subject matter expert who only does this type of training Can be insulated from organizational politics	<i>Outside expert trainer</i> Knowledge of organization-specific issues, standards and policies is limited Can be costly May have scheduling or logistical challenges
<i>Inside trainer</i> Can share expertise on organizational policies and standards from within the organization Understanding of organizational dynamics and issues Cost effective Fewer scheduling or logistical challenges	<i>Inside trainer</i> May be unwilling to raise sensitive issues Message may not be taken as seriously because it is raised by an insider May not have same level of expertise in the subject matter as an outside trainer

On-line Learning (CD-ROM, Intranet or Internet delivery)

<b>Benefits</b>	<b>Disadvantages</b>
Convenience (conducted at participant's own desktop and at their own pace)	Unclear whether the message is reaching each participant
Ability to communicate information in an interactive way	Lack of live interaction; inability to ask questions or participate in discussion
Ability to reach a wide and dispersed audience with a consistent message	Technical Challenges
Ability to track and measure results	If not well-designed, can be boring and linear

Webcasts

<b>Benefits</b>	<b>Disadvantages</b>
Live instructor and participants encourage discussion and participation	Not very effective for training very large groups at one time
Convenience (conducted at the participant's own desktop)	Difficult to maintain participants' attention for more than 2 hours

Ability to reach a wide and dispersed audience with a consistent message	Can be hard to gauge participants' comprehension of/attention to key concepts
Cost effective and can be implemented quickly and easily	
Sessions can be archived and accessed at any time	

#### IV. Assessing the Effectiveness of the Compliance Program

The Federal Sentencing Guidelines require that effective compliance programs be periodically reviewed and evaluated for effectiveness. There are a host of metrics that the organization can use to determine whether its compliance program is meeting its objectives. Before attempting to measure effectiveness, the organization must identify its objectives for the compliance program. Once those objectives have been identified, the organization can begin to measure effectiveness against the objectives. Here are some steps to consider:

- **Identify your objectives (expected outcomes) for implementing the compliance program.** Find out what is driving implementation of the compliance program and make sure you are focusing the program around these specifics. Work with key stakeholders to establish objectives. Try to make sure these objectives are in line with the company's vision, mission statement, and desired culture. It is best to start with a few specific, measurable outcomes that, if achieved, would signify a successful implementation. Objectives can involve bottom-line figures or have a behavior focus. Examples include:
  - Reduce litigation involving charges of harassment/discrimination by *X%*
  - Increase employee awareness of EEO-related policies and procedures
  - Improve communication between managers and employees
  - Increase manager effectiveness in investigating and documenting workplace events
- **Assess what common practices you currently use within your company to support the program.** Knowing what your employees are familiar with is important when constructing a measurement strategy. You may want to look at your company's existing method(s) of:
  - Training employees (e.g., stand-up v. online training)
  - Testing employees (e.g., True/False v. multiple choice)
  - Communicating with one another (e.g., e-mail, newsletters, meetings, memos)
  - Obtaining feedback (e.g., evaluations/surveys, focus groups, interviews)
  - Tracking improvements/changes in key performance/bottom-line areas based on training and other interventions (e.g., accounting, HR, management)
- **Identify potential barriers to effectiveness.** In order to have a successful outcome, it is important to anticipate possible obstacles that could prevent the program from having the intended impact. Questions you may want to consider:
  - Do all stakeholders support the program's implementation? Is their commitment to its success being communicated to employees?
  - Do we have a plan on how to roll out communications and training in a timely manner?

- Are there other company-wide initiatives that may overshadow or diminish the intended message of this program?
  - Have the necessary individuals/departments been informed about the desire to measure outcomes? Will they serve as a “sounding board” for development and evolution of the measurement strategy?
- **Develop an action plan for implementing concepts and/or principles learned in training that is part of the program.** At the end of the course, the facilitator can work with participants to identify ways to transfer the training back to the workplace. Managers of participants may also be able to assist with the action plan. It is often helpful to include specific expected outcomes and target dates for each action item developed.
  - **Review the initial action plan.** If participants create action plans, you can have them revisit them periodically to determine whether the outcomes are being achieved by the agreed upon target dates. If some desired outcomes are not being achieved, discuss why (e.g., additional resources).
  - **Collect and share “success stories.”** Follow up on training initiatives and other communications to determine how the knowledge is being used back on the job. The gatherer of this information can then share these “success stories” with other participants, which may help them identify ways to use course principles in their work.
  - **Ask employees about the usefulness of training and other communications.** Though you may ask participants in the initial after-class evaluation (“smile sheet”) to rate the usefulness of the content of any particular class that is part of the training element of the program, they may not know until they have had a chance to use the information back on the job whether it is useful. You may send out a short survey asking participants to indicate what percentage of the training is directly related to their job, or you may have more in depth conversations with them to obtain feedback.
  - **Identify gaps in knowledge, skills, and/or abilities.** Usually participants walk away from training having either gained knowledge or improved skills or abilities in one or more areas. Training can also be helpful in identifying for participants other aspects of performance needing improvement. Work with employees to help identify these gaps and how these needs can be addressed. You can also use assessments to identify what areas participants still need to work on.
  - **Ask employees about effectiveness.** Employees are the best gauge as to whether the company’s objectives are being met (e.g., changed behavior, culture, work environment, etc.). There are several ways to gather this information: employee opinion surveys, 360° feedback surveys (respondents should remain confidential to allow for candid feedback), and focus group discussions.

As is the case with constructing initial training evaluations, make sure the information you request from employees is related to the initial objectives and outcomes you identified. If you are developing a tool to obtain this information, it is a good idea to pilot it with a small audience to obtain feedback (e.g., clarity, difficulty level, and usefulness of the questions) on the survey.

- **Focus on a few specific desired outcomes.** Look to the objectives for the program to identify clear and measurable outcomes. It is best not to get too detailed in trying to measure the impact of the compliance program. Leave statistics as intangible numbers if it would be hard to make the information credible. In other words, do not try to manipulate the numbers.

- **Compare performance indicators to baseline numbers.** If your company has collected information related to the projected outcomes prior to the implementation of the compliance program, use this information as a baseline of comparison. Examples of data/information you may track that relate to a compliance program are:
  - Frequency of use of ethics hotlines or other avenues for reporting concerns
  - Number of ethics complaints
  - Number of charges or other litigation filed
  - Litigation costs related to areas covered by training delivered in the training and communication components of the program

## V. Conclusion

“A corporate culture is what determines how people behave when they are not being watched.” Jay W. Lorsch and Tom Tierney, Aligning the Stars: Organizing Professionals to Win, April 2002. An organization’s culture hinges on the reactions of individuals within that organization, and the organization as a whole, to inappropriate or unethical behavior in the workplace. What we can expect and must require is that individuals be guided by a clear set of simple principles that are easily followed and taken seriously by everyone at all levels in the organization. Once these principles are communicated regularly, modeled by senior executives, and treated as elements of corporate citizenship, organizations will be well on their way to creating an ethical, legal workplace culture, and to having an effective compliance program.

# COMPLIANCE WEEK

The leading resource on corporate compliance and governance for U.S. public companies.

## How To Designate A CCO, Establish Compliance Office

By Heather Badami — November 2, 2004

Corporate compliance programs are receiving renewed attention as an essential component of good corporate governance. Companies are finding that an off-the-shelf code of conduct and internal financial controls are insufficient to protect against an increasing variety of legal risks. The careful design and implementation of a comprehensive compliance program can manage these risks, prevent illegal and unethical conduct, and mitigate or eliminate punishments and liabilities when such conduct does take place.

The starting point for an effective compliance program is a compliance officer.

The importance of the compliance officer has been recently highlighted by SEC Commissioner Cynthia Glassman, who recommends that all companies have an officer with “ownership” of corporate compliance and ethics issues and corporate responsibility under Sarbanes-Oxley. The U.S. Sentencing Commission similarly requires someone in “high-level personnel” to have overall responsibility for a company’s compliance program in order for the company to have the benefit of reduced fines under the amended sentencing guidelines that take effect on Nov. 1. Companies in some specialized industries, such as mutual funds, are now required by regulation to have a chief compliance officer.

While there is no single approach to designating the compliance officer—the nature and function of the position will depend on the size, operations and control structure of a particular business—the following should be considered by any company assigning responsibility for the compliance process.

### Duties And Responsibilities

The basic mission of the compliance officer is to reduce the risk of illegal, unethical or improper conduct within the company. While compliance issues may already be addressed on a department-by-department basis, coordination by a designated officer can enhance the efficiency and effectiveness of a company’s overall compliance efforts.

The compliance officer should be responsible for the design, implementation, enforcement, and monitoring of a comprehensive compliance program. Specific duties of the compliance officer typically include to:

- Identify and prioritize potential areas of compliance vulnerability and risk of illegal, unethical or improper conduct;
- Develop policies, procedures and guidelines designed to avoid or minimize the company’s particular risks;
- Design and execute the education and training of employees with regard to their roles in the company’s compliance process;
- Manage the day-to-day implementation of the company’s compliance program;
- Respond to suspected misconduct and, where appropriate, recommend disciplinary or corrective action;

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- Perform periodic audits of the compliance program to detect violations and identify areas needing improvement; and
- Report regularly to the board of directors and senior management on the operation and progress of the company's compliance efforts.

These specific duties are sometimes set forth in a written document, which has the advantage of establishing the accountability of the officer (see box above, right). Care must be taken, however, to avoid unnecessary detail that might result in noncompliance. Failure of the compliance officer to perform his or her duties could significantly disadvantage the company in defending a criminal proceeding or civil litigation.

### **Filling The Position**

The compliance officer should be a high-level position, reporting directly to the board of directors or its designated committee. Companies typically take one of three approaches to fill the position of compliance officer: create a new position, add to an existing position, or form a committee.

- **Creating A New Position**

Many large companies choose to create a new, full-time position, filled by an experienced outsider to be responsible solely for the company's compliance program. This approach offers the benefits of clearly establishing responsibility for compliance matters and lending credibility to compliance as a stand-alone function. In addition, limiting the compliance officer's obligations to compliance eliminates conflicting demands on that person's time and resources.

There are, however, some downsides to creating a special position. For an outsider, the potentially steep learning curve in understanding the company's business operations and compliance needs may prove time-consuming and expensive, if even possible. Further, creating a new position that will necessarily intrude upon the scope and power of other existing positions may present political difficulties within the company.

- **Adding To An Existing Position**

For some companies, the role of compliance officer is more appropriately filled by an existing senior level employee who is knowledgeable about the variety of matters implicated in the company's compliance program. The person often identified for this position is the in-house general counsel. This appears to be an obvious choice given the need for a compliance officer to ensure legal standards are addressed by the company's compliance program. To retain the protections of attorney-client privilege and attorney work product, however, the general counsel would need to be careful in separating the two responsibilities. Moreover, the additional responsibility of supervising the compliance program may place an unreasonable demand on a general counsel whose existing duties are likely substantial.

Other common choices from existing employees include the internal auditor, corporate governance officer, risk officer or ethics officer. Consideration of any of these options should be made in the context of the person's existing duties and time restraints.

- **Forming A Committee**

In lieu of a single compliance officer, the position may be filled by a committee of officers or employees. This is an attractive alternative for international companies with complex operating structures. A committee including representatives from across the company and across the globe may be more practicable for these companies than a single, centralized compliance officer.

As with any committee, however, the effectiveness of the committee could be reduced by communication problems, inability of the members to agree, and lack of clear accountability. Scheduling frequent meetings and designating a leader may reduce these potential problems, but raise their own issues—repeated meetings, for example, could overload persons performing other functions within the company. And

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designating a leader could create a hybrid approach to those described above; namely, a single person responsible for compliance, but now with a potentially confusing committee structure imposed as well.

### **Inherent Characteristics**

Choosing an individual to serve as compliance officer will vary with the nature of the company, but certain characteristics will be imperative in any compliance officer—integrity, leadership and knowledge.

The compliance officer should be a person whose integrity is beyond reproach. Without demonstrating the values implicit in the company's standards of conduct, the compliance officer cannot earn the trust and respect of the persons reporting to the office. The compliance responsibility will not be credible if assigned to an individual likely to engage in misconduct. Accordingly, as a starting point, the company should conduct a background check and check references on any potential compliance officer, whether or not the individual is being promoted from within the company.

Leadership is an important quality for any officer, and is essential for the compliance officer. As a new position, the compliance officer faces the particular challenge of instilling compliance as a key objective throughout the company. The compliance officer must have the skills and personality to coordinate and lead compliance efforts among all functions and levels within the company. The ability to manage interrelationships—board committees, senior management, general counsel, internal auditors, human resources, operational divisions and subsidiaries—will be critical to the success of the compliance officer.

The compliance officer must also be knowledgeable as to the laws, regulations and standards that govern the particular company and its industry. Experience in finance, administration or human resources is a plus, but not necessary for a compliance officer. More important is an understanding of and sensitivity to the compliance risks unique to the company, which requires an intimate knowledge of the company's operations.

### **Day-To-Day Responsibility**

The responsibility of the compliance officer is supervisory in nature. Establishing and operating a compliance program on a day-to-day basis will take additional time and resources. The compliance officer should have authority over other individuals who can contribute to and support the compliance function. These individuals can be part of a designated compliance office staff, but more often will be existing employees who also perform other functions in the company. Appointing representatives from other company groups will not only keep costs down, but will support a company-wide infrastructure of compliance.

These representatives might include individuals from finance, legal, human resources, corporate communications, risk management, internal audit, ethics, operating unit management, and any other functional groups in the company that already have a hand in compliance matters. These persons should report to the compliance officer on matters relating to compliance management, while continuing to act in their existing capacities. To reduce the increased demands on the persons in these positions, they should serve in the relatively limited capacity of advising the compliance officer and assisting in the implementation of the compliance program as it relates to their area of expertise.

### **Relationship With The Board**

In order to perform his or her duties, the compliance officer must be given sufficient authority from and access to the board of directors and senior management. "Top down" endorsement and consistent support of the compliance function will be critical to promoting compliance throughout the company. The board of directors should provide the compliance officer with direct authority to exert control over the entire compliance process, from program design to enforcement. Lines of reporting should be established such that the board of directors and senior management are available to the compliance officer as necessary to ensure timely and candid responses to potential problems.

Notwithstanding this delegation of authority, the board of directors will remain ultimately responsible for overseeing the company's compliance program, as has been emphasized by the *Caremark* decision in Delaware and recent amendments to the federal sentencing guidelines. The directors are not expected to become compliance experts, but they should be meaningfully involved in the company's compliance process.

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Some companies involve the entire board in all compliance issues, some refer compliance issues to an established committee, and some form a new compliance committee. Compliance oversight responsibility may be a natural extension of the duties of an existing board committee.

Under New York Stock Exchange listing requirements, for example, the audit committee is responsible for assisting board oversight of the company's "compliance with legal and regulatory requirements." Given all of the existing responsibilities of the audit committee, however, adding responsibility for oversight of the entire compliance process might represent too significant an additional burden. To alleviate that burden, some NYSE companies are confining the oversight responsibility of the audit committee to corporate, securities, tax and financial matters, and assigning responsibility for other matters to a newly formed compliance committee of the board. Whether the full board or a committee receives communications regarding compliance matters, the content and frequency of the communications should be established. At a minimum, the board of directors should receive periodic reports from the compliance officer on the operation and progress of the company's compliance efforts. Some boards choose to receive these reports annually, while others do so quarterly or more often if particular compliance issues merit additional attention. These reports should provide the board with a sense of whether the compliance office is successful in performing its duties and if not, the reasons why not.

### **A Careful First Step**

A compliance officer is only the first step in creating an effective corporate compliance program. But it may be the most critical step.

The compliance officer bears a substantial responsibility. The board of directors will rely on the compliance officer in exercising its fiduciary duty of oversight. The chief executive officer will rely on the compliance officer to fully carry out the corporate responsibility mandate of the Sarbanes-Oxley Act. Senior managers will rely on the compliance officer to substantiate their compliance procedures. Regulators will rely on the compliance officer for communications about the company's compliance. And shareholders will rely on the compliance officer to protect their interests.

Designating the compliance officer with thoughtful attention to a company's particular characteristics and needs will enable the success of any compliance program.

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The column solely reflects the views of its author, and should not be regarded as legal advice. It is for general information and discussion only, and is not a full analysis of the matters presented.

## Sample Position Description

### Chief Compliance Officer

#### Summary

The Chief Compliance Officer oversees the Corporate Compliance Program. The position is responsible for establishing standards and procedures to reduce illegal, unethical and improper conduct, for ensuring these standards are communicated and institutionalized throughout the Company, and for monitoring the Company's compliance with these standards and procedures.

The Chief Compliance Officer serves the CEO and Board of Directors by reporting on the Company's compliance efforts and providing guidance on compliance matters. The Chief Compliance Officer, together with the Compliance Committee (or other committee) of the Board, is authorized to implement all necessary actions to create an effective compliance program.

Representatives of from Finance, Legal, Human Resources, Corporate Communications, Risk Management, Internal Audit and each of the Company's operating units, as identified by the Chief Compliance Officer from time to time, shall assist the Chief Compliance Officer in the implementation and administration of the Compliance Program.

#### Duties and Responsibilities

Specific duties and responsibilities of the Chief Compliance Officer include:

##### *Design and Implementation*

- Review the Company's existing compliance policies and procedures to identify potential areas of compliance vulnerability and risk of illegal, unethical or improper conduct.
- Develop, initiate, maintain and revise policies and procedures designed to avoid or minimize the risks identified.
- Develop and periodically review and update the Company's code of conduct to ensure continuing currency and relevance in providing guidance to management and employees.
- Design and execute, working with Human Resources and others as appropriate, education and training programs for employees whose functions or responsibilities involve compliance with laws or standards of conduct, including introductory training for new employees and ongoing training for all employees and directors.
- Supervise day-to-day implementation and operation of the Compliance Program.

##### *Enforcement*

- Establish and provide direction and management of the Compliance Hotline.
- Establish a system for uniform response to alleged violations of rules, regulations, policies, procedures, and the Company's code of conduct.
- Recommend disciplinary or corrective action in response to violations, as appropriate, to senior management.
- Consider modification of Compliance Program policies and procedures to reduce the likelihood that similar violations will occur, and implement changes as necessary.
- Ensure proper reporting of violations to enforcement agencies as appropriate and/or required.

*Monitoring*

- Monitor and coordinate compliance activities of other departments to remain abreast of the status of all compliance activities.
- Identify changes in applicable rules, regulations, standards and related trends that are relevant to the Compliance Program and make necessary modifications to policies and procedures.
- Provide reports on a regular basis and, as directed or requested, keep the Compliance Committee (or other committee) of the Board and senior management informed of the operation and progress of compliance efforts.
- Monitor the performance of the Compliance Program and related activities on a continuing basis and with periodic audits, taking appropriate steps to improve effectiveness of the Program.

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## COMPLIANCE PROGRAM POLICIES “MENU”

The following is a list of some of the principal areas that should be considered when structuring a compliance program:

Accuracy of Reports and Records	International Commerce
Anti-Money Laundering	FCPA
Bribes and Kickbacks	Import/Export
Conflicts of Interest	Economic Sanctions
Consumer Protection	Anti-Boycott
Product Safety	Labor & Employment
Privacy of Records	Discrimination and Harassment
Electronic Communications	Diversity
Protection	Immigration
Corporate Opportunities	WARN Act
Data Security	Workplace Conduct and Safety
Document Retention	Political Contributions
Environmental Protection	PACs
Clean Air	Lobbying
Clean Water	Gifts and Entertainment
CERCLA	Product Quality and Safety
Toxic Substances	Sales and Marketing
External Communications	Price Advertising
Fair Competition and Antitrust	Can-Spam
Restraint of Trade	Telemarketing
Monopolization	Securities Laws
Price Discrimination	Quality of Disclosures
Pre-Merger Notification	Insider Trading
Gifts and Entertainment	404 Internal Controls
Government Contracts	Sarbanes-Oxley Compliance
Intellectual Property	Supplier and Customer Relations
Infringement	Taxes
Trade Secrets	Use of Corporate Assets and Property
Interaction with Public Officials	

Companies in highly-regulated industries, such as the following, will need to consider additional areas of law:

Banking	Healthcare
Communications	Housing
Education	Insurance
Energy	Transportation
Financial Services	Utilities
Food and Drug	

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## Sample Charter – Compliance Committee of the Board of Directors

### Purpose

The Compliance Committee of the Board of Directors is appointed by the Board to oversee the Company's compliance with applicable legal and regulatory requirements, industry standards, and the Company's code of conduct. The responsibility of the Compliance Committee does not include compliance with securities laws and regulations, including the Company's financial reporting and disclosure requirements, which is the responsibility of the Audit Committee.

### Composition

The Committee shall consist of not less than three nor more than five directors to be appointed by the Board of Directors. All members of the Committee shall meet the independence requirements of applicable law and the rules of any exchange on which the Company's securities are listed. The Board of Directors shall appoint a member of the Committee to serve as its chairman, and the chairman shall generally direct the business of the Committee. The Board shall have the authority at any time to change the membership of the Committee and to fill vacancies on the Committee.

### Meetings

The Committee shall meet at least two times each year, and more frequently as necessary to carry out its responsibilities. Meetings may be called by the Chairman of the Committee or the Chief Executive Officer of the Company. The Committee may ask the Chief Executive Officer, Corporate Compliance Officer, General Counsel, and any other member of management or other outside party to attend meetings and provide relevant information. All meetings of the Committee shall be held pursuant to the Bylaws of the Company with regard to notice and waiver thereof, and written minutes of each meeting shall be duly filed in the Company records.

### Authority and Responsibility

In exercising its authority and carrying out its responsibilities, the Committee shall:

- Review and make recommendations to the Board addressing the Company's compliance practices generally.
- With the Chief Compliance Officer, review the Company's Corporate Compliance Program and code of conduct at least annually and make recommendations to the Board with respect to changes.
- Meet regularly with management of the Company to assess the Company's Compliance Program, as well as any specific material compliance issues.
- Confer regularly with the Company's Chief Compliance Officer and General Counsel regarding the Company's Compliance Program, and any specific material compliance issues. It is the intention of the Board and the Committee that such consultations be deemed to constitute communications for the purpose of obtaining legal advice and are therefore privileged attorney-client communications.
- Retain such legal and other experts as the Committee may deem appropriate to assist the Committee in the discharge of its duties.
- Conduct such investigations into matters relating to the Company's legal compliance as the Committee may deem necessary.

- Report Committee actions to the full Board, with such recommendations as the Committee deems appropriate.

### **Annual Review**

The Committee shall evaluate its performance on an annual basis and develop a criterion for such evaluation. In addition, at least annually, this Charter shall be reviewed and reassessed by the Committee, and any proposed changes shall be submitted to the Board of Directors for approval.

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