109 Creating a Compliance Function

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Prior to joining Mitsubishi, Ms. Costa spent eight years as a litigator in the New York offices of Cleary Gottlieb Steen & Hamilton, and clerked for the Honorable Pierre N. Leval, United States District Judge for the Southern District of New York.

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James A. Hatcher is senior vice president-legal and regulatory affairs for Cox Communications located in Atlanta. He is responsible for Cox's legal and regulatory affairs, including state regulatory matters, government relations, and general legal matters. He also serves as the company's chief compliance officer.

Mr. Hatcher joined Cox Cable Communications as corporate legal counsel. Before that, he served as secretary and general counsel for Cox Communications' parent company, Cox Enterprises, Inc. when he was named vice president and general counsel for Cox Communications, Inc. and senior vice president. Prior to joining Cox, Mr. Hatcher was in private law practice in Macon, Georgia.

He is past chairman of the corporate counsel section of the State Bar of Georgia. He served as a director for ACC's Georgia Chapter, chairman of the corporate counsel section of the Atlanta Bar Association, and was a director of the diversity committee of the State Bar Association of Georgia.

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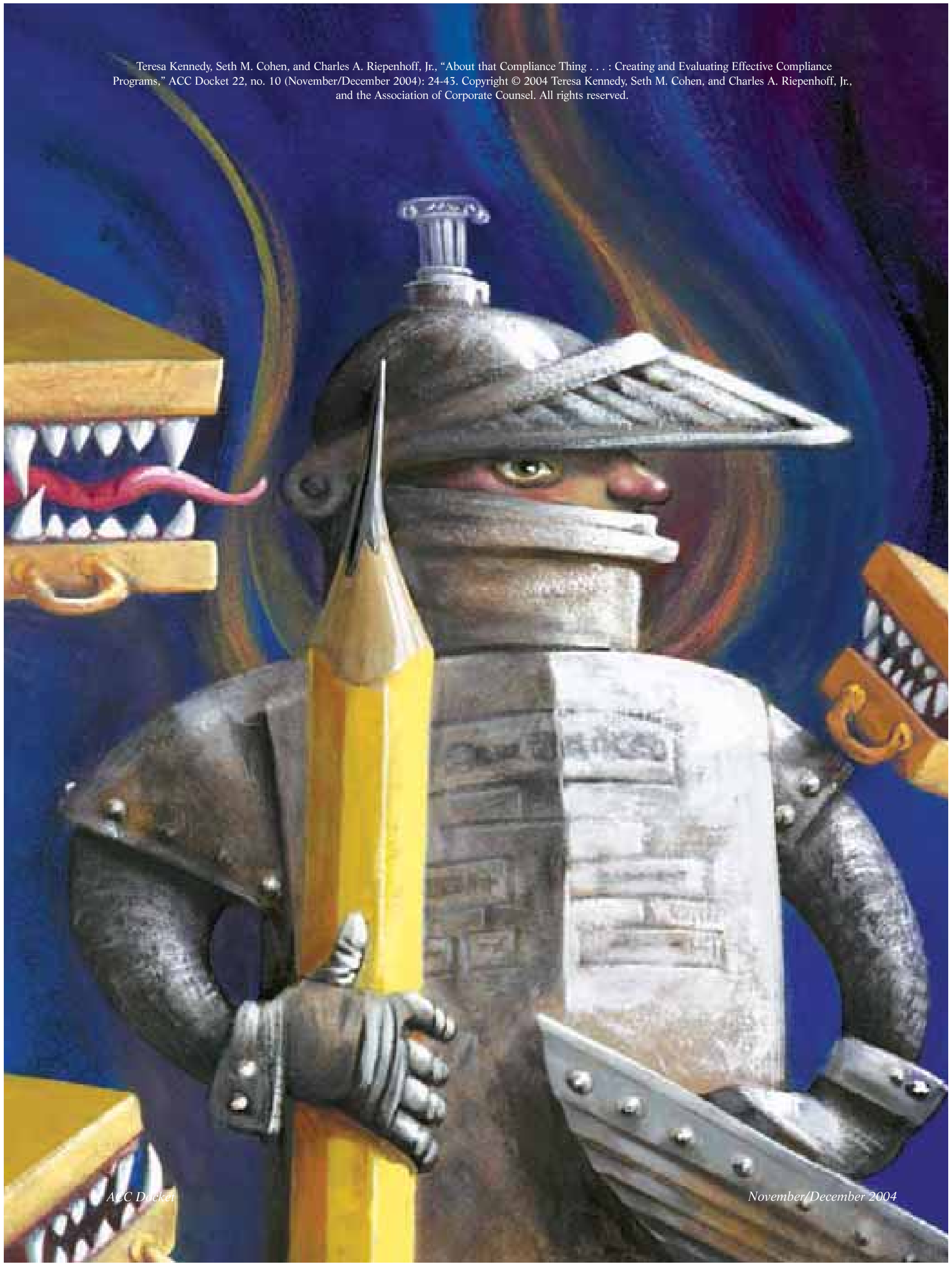

Creating and Evaluating Effective Compliance Programs

about that compliance thing

“We’re covered, right?”

The words tumble from the mouths of your CEO and CFO after hearing that a “hot line” report involving allegations of financial wrongdoing may subject the company to review by the SEC. As their chairs swivel in your direction, gazes affixed, you ponder myriad questions about to come your way in rapid-fire succession. “Did we get our compliance program right? What about all of these new laws and regulations that I have read about? Does our program meet all current requirements? How do we measure up? We’re covered, right?”

by teresa t. kennedy, seth m. cohen, and charles a. riepenhoff, jr.

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In a changing business environment with an evolving vocabulary (the emphasis on corporate governance has a short history, Sarbanes-Oxley even less), creation of an effective compliance program is an increasingly complex process. This task often requires analysis and integration of multiple statutes and regulations, convergence of many business drivers, implementation of training and education for both leaders and employees, and the creation, implementation, and testing of processes and methods. The process demands strong leadership and support, continual diligence, understanding of corporate culture, and creative thinking. The end result, however, may be worth the effort, with benefits such as:

- increased employee satisfaction and awareness,
- renewed (or strengthened) customer loyalty,
- a finer balance of risks and controls improving business performance, and
- enhanced standing in the marketplace.

The ultimate win/win is a compliance function that adds value to the company’s business operations while fulfilling legal and regulatory obligations.

Many dynamics are involved in creating an effective compliance program. First, we’ll briefly review the reasons for compliance, considerations impacting placement of the compliance function, and varying approaches to creating a program. Then, we’ll discuss the critical importance of measuring your program’s effectiveness, and explore some tools to measure effectiveness and to tailor that measurement process for particular companies and stages of compliance.

WHAT DRIVES COMPLIANCE?

Multiple business drivers converge to guide a company’s creation of its compliance program. The forces range from the formal (legislative, regulatory, enforcement activity) to those less easily categorized (reputation, shareholder activism).

Within the formal context, numerous statutes, regulations, and entities now create a complex framework for compliance programming. The “gold standard” of these formal rules is the U.S. Sentencing Commission’s organizational sentencing guidelines, promulgated in November 1991. The Commission’s seven key criteria include:

- high-level personnel assigned to the compliance function,
- written standards and procedures,
- due care in delegating discretionary authority,
- effective communication of program standards to all levels of employees
- monitoring, auditing and reporting,
- consistent enforcement and discipline, and
- response and prevention.

Revisions to the criteria, expected at press time to take effect Nov. 1, 2004 (unless Congress disapproves in the intervening period), include:

- Requiring both active promotion of an organizational culture committed to compliance, and a board of directors and organizational leadership that is well-informed about the compliance program's content, procedures, and efficiency;

- Compliance program training and communications that are educational, motivational, and sufficient;
- Monitoring, ongoing evaluation, and adherence to controls and program requirements;
- Well-publicized mechanisms to report violations, encouragement to report violations, and assurance that such reports are confidential and will be processed without repercussion;
- Disciplinary action for program violations and program modification to prevent similar future violations; and
- Ongoing risk assessments with new implicit independence.

WHILE ENTITIES MUST EXAMINE RELEVANT LAWS AND REGULATIONS TO FASHION A COMPLIANCE PROGRAM, THEY MUST ALSO IMBUE THEIR ORGANIZATIONS WITH A CULTURE OF INTEGRITY AND ETHICAL BUSINESS CONDUCT.

A wave of corporate scandals added weight and volume to pre-existing compliance forces affecting corporate business, and ultimately resulted in the Sarbanes-Oxley Act of 2002. Related Securities and Exchange Commission (SEC) rulemaking, the Public Company Accounting Oversight Board's (PCAOB) internal and proposed auditing standards, and the New York Stock Exchange (NYSE) listing standard requirements quickly followed. In less than two years, compliance-related guidance had evolved from one large encyclopedia volume to an entire library floor.

BUILDING THE BETTER MOUSETRAP: COMPLIANCE MODELS AND CONSIDERATIONS

Compliance is more than just a function of conformity with laws and regulations. While entities must examine relevant laws and regulations to fashion a compliance program, they must also imbue their organizations with a culture of integrity and ethical business conduct. This process begins at the top and must be reinforced by the top. Leadership must communicate a set of values, act under those principles, continuously emphasize adherence to these values, and enforce disciplinary action on those who violate them. Management must commit sufficient resources to this effort, otherwise, the tone emanating from the highest levels will ring decidedly hollow.

Where to Begin: Sizing Up Your Company

Development of an effective compliance program begins with a critical assessment of the entity's organizational structure. For example, are there multiple lines of responsibility? Are numerous functions bundled among key executives? Is the company centralized (with a corporate office dictating policies and practices) or decentralized (with significant autonomy residing in field offices)? Answers to these questions help to form a decision on placement of the compliance function. For example, companies with multiple lines of responsibility and/or executives with bundled functions may wish to consider sewing together the compliance function in a "council" or committee style approach, which is described below. Organizations with primarily decentralized operations most often require aspects of multiple models, with compliance officers interwoven among business units and strong coordination from the core of the company. Keep in mind, however, that guidance from the U.S. Department of Health and Human Services' Office of the Inspector General (OIG) indicates that it is "not advisable for the compliance function to be subordinate to ... the general counsel or controller or similar financial officer."[1]

Ultimately, the decision on positioning is left to each organization. However, three key criteria should be considered in making this decision: independence of the compliance office, delegation of appropriate authority to the compliance officer, and adequacy of resources provided to the compliance function by organizational leadership.

Practically, creation of a compliance function may play out in a variety of ways, as illustrated by three models in "Three Paths to Compliance," p. 32.

The bottom line is that each company should place the compliance function in an area that is most likely to be effective within the particular (continued on page 32)

THREE PATHS TO COMPLIANCE

	THE CONTROLLER MODEL	THE COUNCIL MODEL	THE LAW DEPARTMENT MODEL
What It Is:	• An independent compliance office with direct reporting lines to the board of directors and/or audit committee • Uses a network of compliance officers integrated with their business units, but reporting directly to the corporate compliance officer • Similar in concept to financial controllers who are integrated into the unit but report up to the CFO	• The compliance function is placed in the legal department and chaired by the company's general counsel or chief compliance officer • Council members represent key functional areas: accounting, human resources, operations, training, public affairs, and information technology	• Placing the compliance function within the law department or CLO's office
Upsides:	• In-depth knowledge and practical insights gained by the individual's working daily within a business unit	• Leveraging of knowledgeable, existing personnel while spreading out the heavy burden of creating an effective compliance function	• Leverages existing personnel • Avoids the expense of an entirely new department • Utilizes in-house knowledge • Relieves compliance pressure on stretched attorney resources
Downsides:	• Isolating factors such as company leadership's failure to integrate the chief compliance officer into strategic decision-making and other key leadership structures, like management committees; • Failure to emphasize, company-wide, the existence and importance of the compliance function; and • The compliance office's lack of adequate funding	• No single individual "loses sleep" over compliance, which can result in council members erroneously assuming that others are addressing compliance issues	• Attorneys handle compliance issues off the side of their desk while trying to keep pace with a full-time business practice

Three Paths to Compliance Cont'd

	The Controller Model	The Council Model	The Law Dept. Model
Keys to Success:	• Don't allow these obstacles to impair effectiveness of the compliance function	• Continuous communication and strong coordination	• Clear guidance from the organization's policies and procedures, supported by sufficient training of a designated compliance representative
Typically Used By:	• Larger, Fortune 500 organizations	• Entities of varying size and focus, including those with decentralized operations, or multiple lines of responsibility	• Smaller companies

continued from page 28

entity. Whether you apply the controller model, council model, or law department model, your company must address key components of compliance programs (as identified by regulators) within the context of your own unique business and culture. This process begins with an assessment of significant legal, financial, and business risks facing the organization.

One practice employed by several companies is to conduct an inventory of risk, categorizing all levels of business, legal, and regulatory risk facing the organization. This assessment can be coordinated by the compliance function, interviewing senior management and subject matter experts in legal, finance, information technology, procurement, and similar groups. Also, independent professionals can drive the risk assessment process or supplement these and other efforts by an internal compliance group. Structuring of the risk assessment function, like placement of the compliance function, will depend largely on factors such as the size, organizational style, culture, and resources of each organization. Regardless of the approach used, the requirements are clear: your organization must have a well-documented and thorough assessment of risks on which to base the internal controls aspect of your compliance program.

Once significant risks have been identified, each company must perform a complex balancing act. First, each organization must find a balance between controls that manage individualized risk areas (e.g., financial reporting fraud, bribery, antitrust, environmental, employment issues) and controls that manage entity-wide risks (e.g., core values, the "tone at the top," pressure to meet unrealistic targets, willingness to be forthcoming about bad news, etc.) Second, accepting that some risk is inherent to business operations, organizations must quantify the likelihood and severity of potential risks, balanced against the expense (in both hard and soft costs) of reducing those risks. In considering risk, organizations may want to evaluate a variety of factors, including:

- potential disruptions to company operations;
- risk that problems will be identified and require remedial action;
- failure to account for risks that have not been identified or codified;
- increased risk of *qui tam* or other suits;
- unlawful discharge suits by employees disgruntled by discipline or termination; and dilution of company resources.

Third, entities must counterbalance these risk factors against potential rewards of building an effective compliance program. These rewards flow both internally and externally, and may include improved operational efficiencies, employee awareness, and higher morale.

The creation of policies and procedures that exemplify your company's Code of Conduct is an integral part of risk assessment and management. Companies draw on two primary constructs for the approach that best suits their organization—values-based and rules-based approaches.

A values-based compliance system stresses awareness of key organizational principles. Employees are individually accountable for conformance to these values, a feature of the concept of self-governance. Focusing on values highlights prevention and is aimed at promoting and developing employee reasoning and decision-making skills. For example, a code of conduct may offer core principles supported by a limited number of codified policies or protocols, making it incumbent upon each employee to decide what is appropriate under a broader array of guidelines. Some codes include an "ethics test," encouraging employees to question themselves about a decision before taking action. Even if a values-based code is adopted, discipline for failing to adhere to organizational standards must be present and applied in a consistent manner for the system to be successful, and to be an effective part of your compliance program.

UNDERLYING THE RULES-BASED APPROACH IS THE GENERAL DETERRENCE OF ILLEGAL CONDUCT THROUGH THE EMPHASIS ON PUNISHMENT AND AVOIDANCE.

In contrast, rules-based policies stress adherence to company policies and rules—the proverbial "do's" and "don't's." Companies adopting this style create greater numbers of written policies, often utilizing prescriptive language. Rule-based policies are well-suited to certain business and corporate cultures. For example, businesses that must comply with stringent environmental regulations use tightly worded protocols and must rigorously monitor compliance. Underlying the rules-based approach is the general deterrence of illegal conduct through the emphasis on punishment and avoidance. However, the fact that the company has a policy prohibiting particular conduct is not sufficient, standing alone, to shield a corporation from prosecution.[2] Also, companies adopting a rules-based system should beware of creating policies with little or no flexibility. Otherwise, you can set yourself up for noncompliance when employees' actions comply with the spirit, but not the letter, of these policies.

Individual organizational needs and company culture are critical watchwords in selecting policies based on rules, values, or both. Selection of specific elements from each approach requires careful consideration of other factors. For example, some companies have used primarily rules-based approaches for generations and yet, in the age of whistleblowers and the like, have been recently saddled with numerous disciplinary problems and even government investigations. Faced with these threats, many organizations (including others who have not previously had strong compliance networks) are gingerly moving towards an emphasis of high-level principles. It is these formerly "troubled" companies that will provide the most interesting test case—with success likely riding on the shape of the fleshed-out compliance program buttressing these values, market and regulatory conditions, and, perhaps most significantly, the willingness of management and boards of directors to support—both in words and resources—this initiative.

EVALUATING YOUR PROGRAM

Effectiveness: capability, clout, efficacy, power, punch, success, use, validity, and weight.[3]

These synonyms provide a window into the assessment an effective compliance program. For example:

Capability. Is your compliance program able to recognize and handle a wide-range of issues, allegations or even violations of company codes or policies? What is the range of compliance resources available to your employees?

Clout, Power, Punch. Does management support the compliance program with adequate resources? Are the goals, successes, and failures attributed to the program communicated throughout the entity?

Use, Success. Do employees utilize compliance-related resources? Which ones and how often?

Validity. Does your compliance program meet the requirements suggested by the federal sentencing guidelines?

Efficacy, Weight. Does your compliance program actually influence employee behavior? How do you know?

If your company regularly asks and receives answers to these questions, you may know compliance program is effective. Further, you may be able to demonstrate this effectiveness to a third party, such as a government investigative agency. In essence, "We're covered" is just another synonym for effectiveness.

COUNTING ANGELS ON THE HEAD OF A PIN?

Choosing the method by which a compliance program should be evaluated is as crucial as deciding where to place the compliance function, how to prioritize risk, and what approach to use in crafting policies and protocols. The measurement approach suggested here is a combination of three distinct components: program design, program implementation, and program impact.

REAL-LIFE IMPLEMENTATION: COX COMMUNICATIONS

Here are some of the ways Atlanta-based Cox Communications integrates its "Code of Excellence" and associated compliance program into business operations:

- Customized on-line training for all employees, highlighting the Code, key compliance resources, and the Company's Ethics Line.
- Targeted training aimed at educating certain groups of employees on significant legal and regulatory obligations impacting their job responsibilities.
- An ethics intranet site offering a "one stop shop" for the Code, related policies, compliance news and resources.
- Trial scenarios in which employees are challenged to apply the Code to realistic business situations.
- Regular communications about ethics and compliance issues, branded with the Code's "Seal of Excellence" logo.
- Embedding the Seal of Excellence logo within various department's intranet sites, reminding employees of relevant compliance and ethical obligations.
- Talking points for use by managers in their team meetings, focusing on key Code principles and their application in daily business.

These actions (and others) help to heighten awareness and make Code principles relevant to employees.

Design

You need a baseline to assess a compliance program's design. Begin with a review of procedural documentation and interviews of key personnel, a process similar to documenting internal controls found in Sarbanes-Oxley. Be sure to include the critical components of:

- codes of conduct (with related policies and procedures),
- communication and training on compliance-related issues,
- reporting, investigative, and disciplinary protocols (including hotline operation), and
- management oversight.

The design analysis continues with a comparison, aka gap analysis, of the program against legal and regulatory requirements and the company's own standards. Specific elements of a compliance program should be measured against explicit requirements. For example, NYSE listing requirements obligate a company to adopt and disclose a code of conduct for all officers, directors, and employees. The code must address, at a minimum: conflicts of interest; corporate opportunities; confidentiality; fair dealing; protection and proper use of company assets; compliance with laws; and encouraging the reporting of any illegal or unethical behavior. For this phase of the gap analysis, the evaluator should view specific elements of a compliance program through the lens the NYSE listing requirements, plus any other applicable laws and regulations.

Legal and regulatory requirements provide minimum standards for a compliance program. Practices in the organization's own industry provide another perspective. For example, a pharmaceutical company may look to its peers/competitors for guidance as to how to design compliance around sales and manufacturing practices, such as those pertaining to off-label promotion or current good manufacturing practices. Industry associations offer a useful resource for competing companies wishing to develop acceptable practices to address industry-wide compliance issues.

Alternatively, a more rigorous gap analysis evaluates all or part of a compliance program against leading-edge practices. These models go well beyond the minimums, integrating flexible approaches that anticipate changing regulatory climates. For example, ethics and code of conduct training can be administered in any number of

(continued on page 40)

From this point on . . .
Explore information related to this topic.

ACC DOCKET ARTICLES:

- "Global Counsel best practice indicators: Legal Risk and Compliance," *Global Counsel Magazine*, available on ACCA Online℠ at *www.acca.com/protected/gc.php?key=20030917_25876.*
- Benjamin W. Heineman, Jr., "Corporate Social Responsibility: Back To Basics," *ACCA Docket* 21, no. 1 (January 2003), available on ACCA Online℠ at www.acca.com/protected/pubs/docket/jf03/social1.php.
- Benjamin W. Heineman, Jr., "GE: Governance Changes that Contribute to a Culture of Compliance," *ACCA Docket* 21, no. 5 (May 2003): 20-39, available on ACCA Online℠ at *www.acca.com/protected/pubs/docket/mj03/ge1.php.*
- William B. Lytton & Winthrop M. Swenson, "The Effective Answer to Corporate Misconduct: Public Sector Encouragement of Private Sector Compliance Programs," *ACCA Docket* 20, no. 10 (2002): 42-57, available on ACCA Online℠ at *www.acca.com/protected/pubs/docket/nd02/misconduct1.php.*
- James A. Nortz, "Business Ethics: Put Some Life Into Your Program" *ACC Docket* 22, no. 2 (February 2004): 56-69, available on ACCA Online℠ at *www.acca.com/protected/pubs/docket/feb04/life.pdf.*
- Broc Romanek, Linda L. Griggs, and Sandra Leung, "New Compliance Challenges Under the Sarbanes-Oxley Act of 2002," *ACCA Docket* 20, no. 10 (Nov./Dec. 2002): 22-41, available on ACCA Online℠ at *www.acca.com/protected/pubs/docket/nd02/sarbanes1.php.*
- Gretchen A. Winter and David J. Simon, "Code Blue, Code Blue: Breathing Life into Your Company's Code of Conduct," *ACCA Docket* 20, no. 10 (Nov./Dec. 2002): 72-89, available on ACCA Online℠ at *www.acca.com/protected/pubs/docket/nd02/codeblue1.php.*

PRACTICE PROFILES:

- *Leading Practices in Providing In-House Legal Support for Corporate Governance Initiatives: What Companies Around The World Are Doing*, available on ACCA Online℠ at *www.acca.com/protected/article/governance/lead_global.pdf.*
- *Leading Practices In Codes Of Business Conduct And Ethics*, available on ACCA Online℠ at *www.acca.com/protected/article/ethics/lead_ethics.pdf.*

SAMPLE CODES OF CONDUCT:

- **Anonymous Code Post Enron:** *www.acca.com/protected/forms/conduct/code.pdf*
- **Olin Corporation:** *www.acca.com/protected/forms/conduct/olinstandards.pdf*
- **GE:** *www.ge.com/files/usa/en/commitment/social/integrity/downloads/english.pdf*
- **NEC Corporation:** *www.acca.com/protected/policy/conduct/nec.pdf*
- **Intelsat:** *www.acca.com/protected/policy/conduct/intelsat.pdf*

INFOPAK:

- Corporate Compliance InfoPAK℠ 2004, available on ACCA Online℠ at *www.acca.com/infopaks/compliance.html.* Sponsored by WeComply, an ACC Alliance partner.

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(continued from page 36) ways, from live training to web-based programs. One leading practice is the provision of on-line training about the company's code of conduct utilizing games or role-playing to capture employee attention and imagination. This broad-brush compliance training can be further enhanced by "targeted training," an emerging best practice in the compliance area. With targeting training, job functions most at risk for violations of the company's code and/or applicable legal and regulatory obligations are identified. Then, online or instructor-led training is developed covering those particular issues.

Many organizations offer opportunities to benchmark your compliance efforts against those of other companies. ACC offers extensive resources on compliance programs and practices (*see* p. 38), as do other national groups such as Ethics Officers Association. Don't forget to look locally. For example, Atlanta's ACE Group is a voluntary association of compliance professionals who regularly meet to discuss best practices in the ethics and compliance area. Compliance professionals undertake a week-long study of best practices among leading companies as part of Bentley College's course, Managing Ethics in Organizations.

Implementation

To determine if basic compliance steps have actually been implemented, an assessment should include a deep look into specific program components. Key areas (some of which are explored below) include hotline cases, investigations, disciplinary decisions, awareness efforts, training records, compliance audits, and information provided to the board or its committees.

Hotlines are the point-of-entry for employees who seek advice or report concerns. But how many people actually call the hotline? Is it publicized? How? Do callers feel that their concerns are actually heard? Or, does the caller feel that his or her issue disappears into the proverbial black hole? To guard against these perceptions, some companies have adopted guidelines requiring that hotline callers receive an acknowledgment within 48 hours of their call, and that investigations be closed within 30 days.

Other areas of analysis include protocols for the upward flow of information from hotline reports. Are alleged violations of company codes and policies triaged to quickly elevate and respond to critical flashpoints? Are hotline reports channeled to the appropriate person or group for investigation and resolution? Issues such as financial statement fraud should immediately be brought to the attention of appropriate senior management; minor allegations, such as employee theft below certain thresholds, should be handled at lower levels and reported through customary channels.

Disciplinary action should be applied consistently, without regard to title or tenure. For example, a sampling of employee records should reveal notes or letters regarding suspensions or imposition of probation in response to violations of company codes or policies. One illustration of a red flag is when these letters appear in the files of lower level or field workers, and not in those of middle and upper management. This may be an indication of discriminatory activity within the disciplinary context. Of course, the punishment should always fit the "crime," so the type of violation should be considered when evaluating disciplinary protocols.

Making your compliance program relevant to employees is key to avoiding the existence of a mere paper program. This aspect of implementation involves on-going awareness efforts clearly tying compliance to daily business.

Board oversight is another critical avenue for analyzing program implementation. A typical opening question: has the board established appropriate committees with clearly defined roles in compliance program oversight? Examining reports provided to the board and its committees provides detail as to the nature and frequency of information given. For example, if allegations of repeated employee embezzlement at a foreign subsidiary are brought to the attention of the board or audit committee, references to follow-up or corrective action should appear in subsequent agendas, discussion notes or reports, or be addressed in oral communications. (This analysis may therefore require interviews of board and/or audit committee chairs and other members.)

Program Impact

Perhaps the most difficult task in assessing a compliance program's effectiveness is determining the extent to which compliance efforts actually impact employee behavior and organizational activity.

In helping clients to evaluate the effectiveness of

their compliance programs, KPMG Forensic has found employee surveys can add an insightful dimension to the process. Compliance-related questions may be added to existing surveys (such as employee opinion surveys, key employee talent reviews, and 360° management assessments). Some companies, who believed that they had a wide-ranging and effective compliance function, surveyed their employees and got surprising results. They found their compliance programs lacked clout—resources were underutilized, and misconduct was underreported.

Merely administering a survey can also have a positive impact. Involving employees shows that staff opinions count, and highlight that management is paying attention to its compliance program. In addition, the survey itself may increase awareness ("if they ask about it, it must matter") and create momentum for improvements in compliance-related areas. A word of caution, however: Employees will provide reliable information only if they are confident that the information they divulge will not later be used against them. An anonymous questionnaire, handled by an external firm and with results presented in a targeted but general fashion, can alleviate these concerns.[4]

A less costly alternative is use of focus groups. Focus groups are typically small with commonalities among the participants to ease the flow of conversation. While a wide range of information may be gathered in a short time span, focus groups are based on a sample that is not randomly selected nor representative of a target population, so results cannot be treated statistically.[5] For assessing compliance program effectiveness, however, holding a number of these groups across operating units and levels may provide management with in-depth qualitative feedback on how the organization is handling compliance.

A more traditional approach is reliance on audit and monitoring procedures. How key risk areas are prioritized is a critical component of such reviews. Some factors underlying this type of scoring include organizational trends (for example, have certain audit areas been repeatedly targeted for additional procedures due to negative findings), changes in the business, resource allocation issues, and regulatory developments that may trigger new hazards. Once key risk areas have been established, organizations can design an audit program for compliance-related areas. For example, for banks and other financial institutions, the challenges presented by the USA Patriot Act for anti-money laundering compliance is an increasingly weighty concern. An audit-based approach would test the controls that document and identify customers and transactions. Further, continuous monitoring is necessary to pinpoint inadequacies in a compliance program.

Perhaps the best measure of program effectiveness is changes in employee behavior. Requests for advice or guidance on a company's code and policies indicates that employees are reading and thinking about these guidelines. Many companies track advice requests, and consider an upward trend to be evidence that awareness efforts are successful. Similarly, self-reporting of possible or actual code violations is an important measurement. Organizations may find that training results in an uptick in reports by employees who realize that they have inadvertently violated the code or an underlying policy. Last, a decline in the number of code or policy violations reported by co-workers may indicate that the employee population is aware of and is applying the principles of the code of conduct.

Unfortunately, many organizations are struggling with low rates of acknowledgment of their codes of conduct, poor attendance at ethics training, and limited hotline usage. Capturing real-time information in these and other areas can provide management with a window on effectiveness. Entities can supplement this data with trend analyses over time and statistically valid sampling techniques. For example, Cox Communications utilizes an automated tracking and reporting system to monitor its all-employee ethics training and Code of Excellence affirmations. The program, which includes automated invitations to participate in training and reminders of deadlines, enables the company's compliance officer to obtain real-time statistics on course completion. These training reports can be "sliced and diced" to depict data by employee level, geographic location, and department.

Finally, external or third parties can be a valuable source of information on compliance program effectiveness. Organizations can call upon customers, suppliers, creditors and other business partners to provide feedback on critical compliance issues that may have surfaced during the course of a business relationship. Methods of acquiring this data vary from the above-mentioned surveys to interviews with key customers, project personnel, or external managers. Entities must be careful, however, not to blur the line between reporting violations by these sources via existing communications infrastructures, such as a hotline or web site, and providing constructive feedback on programs, policies or protocols. Clearly differentiated protocols, such as a formalized annual external review (with built-in procedures for commencing investigations, where appropriate) can help organizations avoid this peril.

Tailoring the Measurement Process

Blind adherence to the three-tiered approach described above risks inefficiency and other inadequate program evaluation. As with other components of an effective program, each company must build a platform for assessment based upon its own culture, structure, concerns and resources. For example, a small organization, with only one location and a limited number of employees, could utilize smaller sampling techniques in all areas, perhaps using a town hall or other modified focus group format to evaluate employee perceptions. Alternatively, the views of a focus group can be gathered through an on-line survey process or webinar.

An organization lacking the resources to perform the entire three-tiered approach should start with some basic concepts: identification of risks, examination of current practices for gaps to risks identified, and assessment of compliance with policies and procedures. The organization should then utilize these building blocks to engineer a complete measurement process that will eventually mirror the approach described above.

COMPLIANCE DONE—FOR NOW

"We're covered, right?"

Creating, measuring, and maintaining an effective compliance program is by no means a guarantee that wrongdoing will not occur. The existence of such a program may, however, create enhanced employee participation as well as provide vital defenses to both the company and its leaders.

Success in creating and maintaining an effective program requires attention to the many business drivers and other regulatory issues at play, sensitivity to your own corporate culture and operating environment, and buy-in at the highest levels of management and throughout the company. Creating a compliance infrastructure is only a start; employees must feel comfortable (both within their own environment and as users of available resources). With the program's principles and requirements, only then can an organization reap the rewards that may flow from both inside and outside of company walls; one might call this concept "obtaining value from values."

Finally, both creativity and flexibility are necessary to respond to changing legal and regulatory expectations. Compliance is evolving, as evidenced by revisions to the organizational sentencing guidelines, new industry standards, and the like. You may be covered today. Tomorrow, you may need to revisit your answer.

NOTES

1. United States Department of Health and Human Services, Office of the Inspector General, Federal Register, February 23, 1998, Vol. 63, No 35, p. 8993, n. 35.
2. *See* United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983).
3. Thesaurus, at www.thesaurus.com.
4. Palmer Morrel-Samuels, *Getting the Truth into Workplace Surveys*, 80 HARV. BUS. REV. 111 (2002).
5. American Statistical Association, Section of Survey Research Methods, *What are Focus Groups?* (1997), p. 11, available at *www.amstat/org/sections/srms/brochures/focusgroups.pdf*.

Cox Communications, Inc.
Building a Compliance Program from A-Z

1. **Project**
   a. **Overview - Passage of the Sarbanes-Oxley Act imposed new obligations on publicly traded companies.**
   b. **"Doing Business Right" (DBR) action plan**
   c. **Sarbanes action item chart**
   d. **Senior Management awareness presentation**

2. **Benchmarking/Research**
   a. **Overview – because Sox is a 'bare bones' statute, attorneys, accountants and ethics professionals worked together to establish standards of compliance.**
   b. **On-site interviews with Atlanta-based companies**
   c. **Telephonic interviews and meetings with industry peers**
   d. **Seminars**
      i. **PriceWaterhouse -Sarbanes-Oxley Section 404 "How –to" Workshop**
      ii. **ACE presentations:**
         1. **Federal Sentencing Guidelines review by the Ad Hoc Advisory Group**
         2. **FTI Consulting, Inc. - Assessing Compliance Program Effectiveness**
         3. **Alston & Bird -New FSS Requirements**
      iii. **PLI web conference- Value Ethics**
      iv. **ACC Lunch - Internal Investigations**
      v. **KPMG -Corporate Fraud and Misconduct**
      vi. **ACC national meetings -sessions on SOx Compliance**
      vii. **King & Spalding - Quarterly Corporate Governance Series**
      viii. **KPMG / Alston & Bird - New Rules for the New Year**

3. **Ethics Line**
   a. **Overview - Sox required that companies provide an anonymous, confidential method for employees to voice concerns about accounting and financial matters. The retention of a third party vendor rapidly emerged as a best practice among Fortune 500 companies.**
   b. **Vendor Selection**
      i. **Interviews**
      ii. **Web Demos**
      iii. **On-site visit to The Network**
   c. **Implementation**
      i. **Drafting of awareness campaign materials – coordinated effort by HR, Public Affairs, Legal and The Network**
      ii. **Selection of incident categories, assignment of investigation and review responsibility by category.**
      iii. **Beta Test – Corporate and three field locations**
      iv. **Coordinated with IT – delivery/retention of incident reports per SOx requirements**
      v. **Feedback call with beta test systems**
      vi. **Company-wide launch**
   d. **The "Speak Up" Campaign**
      i. **Training calls for field HR personnel**
      ii. **Employee email from local management**
      iii. **Ethics Line implementation toolkit**
      iv. **Employee awareness kit sent to home (including brochure, wallet card and letter from CEO)**
      v. **"Speak Up" poster display in common areas of all field and corporate locations**
   e. **Database Management System**
      i. **Flow chart on life cycle of call**
      ii. **Case management system selected and tailored**
   f. **Audit Committee Reports**
      i. **Executive Summary**
      ii. **Ethics Line calls tracking**
      iii. **Incident reports**
      iv. **Reports presented by Chief Compliance Officer**

4. **Senior Financial Code of Ethics**
   a. **Sox required that companies adopt and file a code of ethics applicable to certain officers (or to publicly explain their refusal to do so). Adoption of a narrow code applicable only to covered officers emerged as a best practice.**
   b. **Best practices review**
   c. **Board approval**
   d. **Extranet posting, filing with SEC**

5. **Code of Excellence**
   a. **The NYSE and revised Federal Sentencing Guidelines pointed up the need for a company-wide code of business conduct as the centerpiece of an effective compliance program.**
   b. **Best practice review**
   c. **Seminars**
   d. **Review by:**
      i. **Legal Department subject matter expert attorneys**
      ii. **Finance/accounting**
      iii. **Deloitte & Touche**
   e. **Logo Adopted – Honesty, Integrity, Awareness**
   f. **Awareness Campaign**
      i. **Senior management presentation highlighting key points of Code**
      ii. **Officers review and comment on Code of Excellence**

iii. Email – all employees from Chief Compliance Officer
iv. Education poster theme
v. Company Ethics Intranet site
g. Audit Committee Presentation
h. References to the Code of Excellence by CEO at company meetings

6. "Doing Business Right" Awareness Campaign
a. The Federal Sentencing Guidelines require that employees be aware of the requirements of their company's code of conduct, and that the company promote an ethical environment.
b. Lunch and Learn – SOx presentations
c. Cox ethics policies on company Intranet
d. Employee Opinion Survey – questions regarding ethical culture of company included in the survey
e. Company newsletter

7. Education/Training Initiative
a. To establish an effective compliance program, training and education are expressly required under the Federal Sentencing Guidelines.
b. Education Task Force
i. Cross function team to identify and select "Master Courses" targeted to 'at risk' job functions
c. Excellence 101
i. Course customization
ii. Awareness campaign
iii. Implementation toolkit
1. Automated tracking of course certification
2. Automated reminder emails to truant employees
3. Reporting, tracking for Audit Committee
d. In-house seminars
"DBR" Finance Presentation

8. Dedicated Company Resources
a. The revised federal guidelines require that adequate company resources be dedicated to SOX compliance efforts.
b. Chief Compliance Officer – SVP/General Counsel
c. Ethics and Compliance Council ("ECC")
i. Created to address SOx requirements consistently within the Company
ii. Cross functional team: representatives from Legal, Accounting, Human Resources, Operations and IT
d. Membership in Professional Associations paid by company
i. Ethics Officers Association
ii. Atlanta Compliance and Ethics ("ACE")
e. Director of Corporate Compliance
i. Full-time director level position
ii. Attended Managing Ethics in Organizations ("MEO") course
f. Champions of Excellence – Corporate and field representatives include: General Managers, HR and training leaders

9. "Doing Business Right" (Non 404 Internal Controls)
a. The on-going assessment of significant risks, creation of controls and incorporation of compliance standards into business operations are required by the revised federal guidelines, and by COSO. As a best practice, public companies are extending their financial risk assessment and controls process into operations as well.
b. Focus Areas
i. Independent contractor vs. employee status
ii. Insider trading
iii. Conflicts of interest

10. Risk Assessment
a. On-going risk assessment is expressly listed by the Federal Sentencing Guidelines as part of an effective compliance program.
b. Sample focus areas
i. OFCCP
ii. Privacy Policy
iii. CAN - SPAM
iv. Do Not Call Registry
v. Telephone Consumer Protection Act
vi. Document retention

To: CCI ATL - Mail Users
Subject: It's Your Call – Employee Email

In the coming days, you will be receiving an information packet at your home about *It's Your Call,* a new employee offering from Cox. *It's Your Call* is a new resource for employees to speak up and voice concerns about illegal or unethical activities.

Recent ethical transgressions by other corporations have emphasized the need to have strong procedures in place to ensure we maintain the highest levels of integrity. We have always encouraged employees to talk with their manager, HR management representative or local senior management to voice concerns about such activities. We realize that in some situations, it is difficult to report unethical or even illegal activities to management. So to complement our existing policies, there is now a confidential, independent 3rd party resource available 24 hours a day.

Please take the time to review this information when it arrives. You should receive a letter from our President and CEO, an *It's Your Call* brochure and a wallet card with the 800 number for your reference. You will get more information in a department meeting to discuss this new offering and what it means to you in the coming weeks.

Thanks.

Senior Vice President
Human Resources

It's Your Call
Employee FAQs

Q: What is Cox's reason for launching the ethics line? Is there something wrong?

A: We're proud of our high ethical standards and practices at Cox, but recent ethical transgressions by other corporations have emphasized the need to have strong procedures in place to ensure we maintain the highest levels of integrity. In examining existing policies, we realized that there was not an independent resource for employees to voice their concerns. The ethics line will provide another way for employees to speak up about unethical activity at all levels of the company.

Q: When will the line be available for use?

A: The ethics line will go live on October 1st and is available to employees 24 hours a day, seven days a week.

Q: Should I speak to someone at Cox first, before calling the ethics line?

A: That is your choice. We have always encouraged employees to speak to their manager, HR management representative or local senior management if they have concerns. However, if you do not feel comfortable doing so, you can always use the confidential ethics line.

Q: Do I have to give my name?

A: No. You do not have to give your name. The ethics line is totally confidential. Your report will be referred to by an assigned number.

Q: Does the establishment of this line have anything to do with what happened at companies like Enron and WorldCom?

A: Partly. In the wake of many of the scandals of 2002, many companies, including Cox, have taken a hard look at their policies and added new resources for employees to speak up. The ethics line provides another way to report suspected unethical or illegal activity at all levels of the company.

Q: What types of things should I speak up about?

A: You can use the ethics line to speak up about any transgressions you suspect or witness, including: misuse of corporate assets, kickbacks or conflicts of interest, illegal drug activity, accounting or auditing irregularities, harassment, destruction of company records, etc.

Q: What about other things like a mistake on my paycheck, benefits coverage or my work schedule?

A: Those issues should be directed to your manager or HR management representative.

Q: How long will the ethics line be available for employees?

A: The ethics line is now a permanent part of Cox's policies regarding the reporting of unethical or illegal activities. It will be available 24 hours a day, seven days a week.

Q: What happens after I make the call?

A: The interviewer you speak with will relay your report to Cox's Compliance Officer who will initiate an investigation of your report.

Q: Why is it so important for us to report illegal or unethical activities?

A: These kinds of activities negatively affect all of us. Unethical or illegal behavior can lead to lost revenue for the company, fewer opportunities for employees, and at some point, even a loss of jobs. Cox has a long tradition of ethical excellence that we wish to uphold for our employees, customers and communities.

SPEAK UP!

It's Your Call

Our Tradition

Cox has a tradition of high ethical standards and is a well respected company. These standards are reflected in our top-down culture of ethics through:

- **Transparent financial reporting**
- **Open-door policies**
- **Cox's compliance program**
- **Local system policies**

Our Ethics

Business ethics play an important role at Cox because work environments lacking ethics can lead to:

- **Lost revenue**
- **Lost opportunities for growth and advancement**
- **Lost jobs**
- **Tarnished company brand and image**

Our Ethics

Long-standing Cox policies encourage employees to report any unethical or illegal activities to your:

- **Manager**
- **HR Management Representative**
- **Local Senior Management**
- **Compliance Officer**

It's Your Call

It's Your Call is an ethics line intended to encourage employees to speak up if they become aware of unethical or illegal conduct within the workplace.

1-877-XXX-XXXX

The ethics line offers:

- **An independent 3rd party liaison**
- **Toll-free, 24-hour access**
- **Complete confidentiality**

It’s Your Call

What happens when you call?

- **You are greeted by an interviewer to whom you give your report**
- **The interviewer assigns you a report number and asks you to call back in case there is a need for more information**
- **Your report is communicated to Cox’s Compliance Officer to investigate**

Using It’s Your Call

Through the ethics line, you can report:

- **Theft of cash or goods**
- **Use or sale of illegal drugs**
- **Loss of proprietary information**
- **Vandalism or sabotage**
- **Physical abuse or harassment**
- **Conflicts of interest**
- **Safety hazards**
- **Fraudulent claims**
- **Falsifying company records**
- **And other illegal or unethical activities**

Using It's Your Call

Employees should not call the ethics line to report:

- **A mistake on your paycheck**
- **Issues with benefits coverage**
- **Problems with work schedules**
- **Performance review conflicts**
- **Employee conflicts**

These situations should be reported to your manager or local HR Management Representative.

Association of Corporate Counsel

109 Creating a Compliance Function

Donna Costa

James A. Hatcher

David J. Slobodien

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17, 2005
Marriott Wardman Park Hotel

ACC Association of Corporate Counsel

Questions We Hope To Answer . . .

- **Why** does your company need an Ethics and Compliance Program NOW?
- **Where** do you start?
- **What** does an effective program look like?
- **How** can you create a program with limited resources?

ACC Association of Corporate Counsel

Why?

- There is a growing demand from the public and other corporate stakeholders for responsible corporate governance, ethical conduct, and corporate social responsibility.
- There are over 500,000 criminal statutes on the books that affect corporations.
- Government agencies such as the SEC, the NYSE, state attorneys general, and the US Sentencing Commission have indicated the benefits of having an effective ethics and compliance program.
- An effective program will help insulate a company and its officers and employees from criminal penalties and civil damages, will help reduce criminal and civil fines when they are imposed, and will help protect the board of directors from personal liability.

Where?

The Sentencing Guidelines for Organizational Defendants (as revised in November 2004) outlines the seven core requirements of an effective ethics and compliance program:

1. The program should be reasonably designed, implemented and enforced to prevent and detect criminal conduct, and should reflect an "organizational culture" that encourages a commitment to legal and ethical conduct.

2. The Board must be knowledgeable about and oversee the program, top management must ensure effectiveness of the program, and "high level personnel" must have responsibility for the program; compliance function must have sufficient authority and resources to implement an effective program.

3. Due care must be taken not to delegate authority to any individual who the company knew or should have known has engaged in illegal activity or conduct inconsistent with company policy.

Where?

The seven core requirements of an effective ethics and compliance program, continued:

4. Codes of conduct and policies must be communicated to all directors and employees.

5. The program must reasonably ensure compliance through monitoring and auditing; the program should be reviewed periodically and revised as appropriate; the program must include a system for reporting suspected violations and seeking guidance (anonymity must be an option).

6. Company policy must be enforced consistently with appropriate incentives and discipline.

7. The company must respond appropriately to misconduct and take reasonable steps to prevent its reoccurrence, including modifications to the program.

Where?

Compliance is not one-size-fits-all. Company code, policies and trainings must be designed to reflect the specific conditions that exist or may exist in your business and workplace.

- What industries is your company in?
- What laws and regulations apply to your company?
- Do you have overseas operations; do you import or export?
- What are the greatest business and legal risks facing your company?
- What functions are performed by your employees?
- Do you use agents, representatives, third party contractors?
- What problems have occurred in the past?
- What cultural factors affect your business and/or your employees?

An ethics and compliance program that imposes unrealistic or unenforceable standards may result in liability beyond that imposed by legal and regulatory requirements.

What?

1. Conduct a Risk Assessment and Draft Appropriate Code and Policies; Your Program Should Reflect Your Individual Business
2. Establish High Level Oversight; Program Should Be Top-Down
3. Use Due Care in Hiring and Place Limitations on Discretionary Authority; Make Ethics a Priority in HR Decisions
4. Communicate Standards and Policies to All Employees & Directors Through Education and Training; Start Where They Are
5. Create a Reporting System; Continually Develop and Monitor the Program, Conducting Periodic Risk Assessments and Periodic Audits of Effectiveness
6. Build in a System for Enforcing Standards and Policies; Use Both Incentives and Discipline
7. Respond Quickly and Appropriately to Risks and Misconduct; Take Steps to Prevent Future Misconduct

Building A Compliance Program From A-Z

Jim Hatcher
Sr. Vice President, Legal & Regulatory Affairs
Cox Communications, Inc.

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Benchmarking/Research

- Interviews with other companies
- Seminars

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Anonymous Phone Line (“Hot Line”)

- Vendor selection
- Implementation
- The “Speak Up” awareness campaign
- Database management system
- Reports to the Audit Committee

Senior Financial Code of Ethics

Code of Excellence (Compliance Policies)

- Best practices review
- Written in plain English
- Logo Adopted – honesty, integrity, awareness
- Awareness campaign
- Presentation to the Audit Committee

"Doing Business Right" Awareness Campaign

- Lunch and learn – SOx presentations
- Ethics policies posted on company Intranet
- Company newsletter
- Letter from CEO to each employee's home
- Posters

Education/Training Initiative

- In-house seminars to targeted audiences
- Education task force
- Excellence 101 – on-line course for all employees

Dedicated Company Resources

- Chief Compliance Officer
  Full time director of corporate compliance
- Ethics and Compliance Council ("ECC")
- Membership in professional associations paid by company
- Champions of Excellence – at each field location

On-going Risk Assessment

Reinvigorating D&B's Compliance Program

David J. Slobodien

VP – Legal, Litigation & Government Relations

D&B's Compliance Program Before Reinvigoration

1993

- Published *Policy on Business Conduct* in 17 languages
- 50,000 employees went through ½ day training
  - Arthur Miller videotape
  - Role playing
- Everyone certified compliance in writing

1998

- *Policy on Business Conduct* refreshed following 2 "spins"
- Obtained certifications from 3200 managers/financial types

D&B's Compliance Program

2002

- Attended PLI seminar
- Hired consultant
- Inventoried policy documents
  - *Policy on Business Conduct*
  - *Associate Handbook*
- Interviewed key players and performed "gap" analysis
  - 18-20 people; ½ - 1½ hours each
  - Market Leaders – Asia Pacific, Latin America, Europe, North America
  - Global Staff Leaders – HR, CEO, Internal Audit, GC
  - Lawyers & HR Leaders
- Redrafted and published *D&B Code of Conduct* in 9 languages on intranet
- Established 1-800# hotline
- Established "compliance" email box
- "Cascaded" training to 3500 employees in Asia Pacific/ Latin America/North America
- Obtained email certifications from all 3500 employees

D&B's Compliance Program (cont'd)

2003

- Released versions 2 and 3 of *D&B Code of Conduct* on intranet
- Included *Code* certification in new hire process
- "Cascaded" training to 1500 employees in Europe
- Obtained email certifications from almost everyone in Europe
- Created "Compliance Awareness Modules"
  - Objective: to raise awareness of issues and to know where to go for help or to report a concern – not to create expertise
  - 10-20 minutes long
  - PowerPoint supported by voiceover narration
  - Delivered *via* D&B University – D&B's online training capability
  - 10-question test - need 80% to get "credit"
  - Released 2 modules in 2003: Insider Trading (600 enrollees) and Intellectual Property (2000 enrollees)

D&B's Compliance Program (cont'd)

2004

- Issued a "Compliance Prescription" to senior management
  - Theme: Every senior leader is a compliance champion – "tone at the top"
  - Responsible for rollout of compliance "awareness" modules and for including compliance theme in quarterly reviews, town hall meetings and roundtables
  - Evaluation at year-end based on quantitative measures (module completion/pass rates) and qualitative measures (enthusiasm, tone, frequency of compliance-related communications)
- Compliance Awareness Module curriculum for the year included:
  - Management Representation Letters
  - Foreign Corrupt Practices Act
  - Identifying, Interviewing & Hiring in the US and Canada
  - Antitrust/Competition Law
  - Record Management
- Integrated annual recertification into quarterly appraisal system
- Began quarterly reporting to Audit Committee
- Created a new compliance web page on the D&B intranet
- Hired a full-time Compliance Leader

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D&B's Compliance Program (cont'd)

<u>2005</u>

- Rolled out a new version of the *Code*
  - Strengthened areas such as data privacy and security, records retention and use of company resources
- Reorganized the *Code* around 4 Cornerstones of Compliance
  - Act with integrity and ethics – use the Code as **our guide** and **ask for help** when in doubt
  - Provide a safe and supportive environment for **our team members**
  - Act in the best interests of **D&B and our shareholders**
  - Conduct business in a fair and honest manner with **our customers, competitors and vendors**
- Adopted a compliance communications plan
  - Hotline awareness posters
  - Additional web-based reporting tool
- Created a Regulatory Alerts Tracking System (RACS)
- Convened a "Protect the Brand Steering Committee"

Learnings

- Post-Enron, all companies are "regulated"
- Culture is as important as process
- Compliance must be part of the business' DNA
- "Tone at the top" is critical
- You can't do it alone – ask for help
- Find clever ways to leverage technology
- Everything always takes longer than expected