404 Best of ACCA Chapters Establishing & Managing a Compliance Program

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Faculty Biographies

Michel P. Cloes

Michel Cloes is the Paris-based European general counsel for Dana Corporation, a $13 billion tier-one automotive parts supplier based in Toledo, OH.

Mr. Cloes has a wide range of legal experience in Europe, Asia, and the United States where he worked for approximately 10 years. Prior to joining Dana, he was European counsel for the Denver-based Gates Corporation. Prior to that, he was in private legal practice in Los Angeles where he also worked for EuroDisneyland Corporation.

Mr. Cloes is a member of the California Bar and the Los Angeles County Bar Associations. He is a former member of the Brussels Bar. He is the founding president of the Global Corporate Counsel Association - Europe, ACCA's European Chapter, and is a member of ACCA's Board of Directors. He is coauthor with Prof. Ralph Folsom *of European Union Business Law*.

Mr. Cloes holds a JD from the Faculty of Law at Liège State University, Belgium and an LLM from the University of San Diego School of Law.

Steven P. Reynolds

Steven P. Reynolds supports the Sensors and Controls business of TI, which is headquartered in Attleboro, MA. S&C is a $1 billion annual revenue global supplier of various technology products to primarily industrial and commercial markets.

Mr. Reynolds has worked with TI's law department for over 10 years, holding positions also in Dallas and Villeneuve Loubet, France. Prior to TI, he worked at the law firm of Jackson & Walker and IBM Corporation.

He is currently the president of ACCA's Northeast chapter and a frequent author and conference speaker/panelist.

Mr. Reynolds is a graduate of Georgetown University and the Rutgers University School of Law.

Christopher J. Supple

Christopher J. Supple is the chairman of Holland & Knight's public law and litigation departments, principally in the areas of government investigations, corporate compliance, litigation, white-collar defense, government relations, and government contracts.

Mr. Supple's litigation and government experience includes 15 years as a civil and criminal litigator and as a government regulator and policy maker. Before joining Holland & Knight, Mr. Supple served in the administrations of former Massachusetts Governors William Weld and Paul Cellucci, first as legal counsel and then as chief secretary. Prior to that, Mr. Supple served for five years as a federal prosecutor with the U.S. Justice Department, and before that as a litigator at Hale and Dorr,

and as a federal law clerk. Mr. Supple's responsibilities in the Massachusetts Governor's office included judicial selection, executive branch-judicial branch relations, state government personnel and hiring, and gubernatorial appointments to the several hundred state boards and commissions.

Mr. Supple continues his public service as one of five members of the Board of Directors of the Boston Redevelopment Authority. He has served as faculty for the Suffolk University School of Law for several years, teaching a course in Federal Criminal Prosecution.

Mr. Supple earned his bachelor's degree from Holy Cross College, and his law degree, with honors, from Duke University School of Law, where he served as law review editor.

William A. Wise

William A. Wise is corporate counsel for Analog Devices, Inc., where he is responsible for both general and patent law matters as well as being the company's corporate compliance officer. Analog Devices, Inc. is a world leader in the design, manufacture, and marketing of high performance analog, mixed signal, and digital signal processing (DSP) integrated circuits (ICs) used in signal processing applications with direct sales offices in 19 countries.

Mr. Wise is an adjunct faculty member at Boston College where he instructs on contract law to undergraduates. He was the originator of a course on the legal aspects of international law at Suffolk University Law School. He is active in both programs enhancing the educational opportunities of young people and pro bono efforts in the Boston area. He founded and continues to supervise over 60 attorneys actively engaged in pro bono mediation services to two district courts in Massachusetts.

Mr. Wise chairs the Corporate Counsel Committee of the Boston Bar Association and is a member of ACCA's Board of Directors as well as the board of ACCA's Northeast Chapter. The ABA's Section of Litigation awarded Mr. Wise its 2002 Pro Bono Recognition Award.

Mr. Wise is a graduate of Northeastern University and Suffolk University Law School.

COMPLIANCE TRAINING: HAS THE INTERNET RAISED THE BAR?

By Joseph E. Murphy
Partner, Compliance Systems Legal Group and
Co-Founder, Integrity Interactive Corporation

I. Compliance Training: How much can they possibly expect of you?

If you have done compliance training, you know the realities of this difficult task. There are all the decisions on what type of training to do, how to put it together, what subjects to cover and how to make it interesting. And you usually need to convince people that the training is necessary. But after all that difficult work of creating and selling the program, there is still the gargantuan task of "rolling out the program." How do you reach everyone, how do you do it in a way that has some impact, and how do you prove that you have actually done it?

The reality of "rolling out" these programs is that the "rolling" is rarely down a gently sloping hill. Often it is more like the story of Sisyphus, with the endless task of rolling a rock up a steep hill, only to have it roll back down near the end. For some of us, it seems that rock sometimes rolls right over us.

No matter how good your intent, it has been difficult to do a training program that reaches everyone in the way we know should be done. For example, there are always the employees who never seem to have time to get to the training, or are at crucial customer meetings. Then there are the ones who show up only in body and not in spirit. Whether their eyes are open or closed, they manage to sleep through the important messages. And even if you impose martial law, get everyone to attend, and attach electrodes to their eyelids, you know that the very next day after your last training class the sales department will hire a new crop of recruits who will have missed the training. Of course, management "agreed" to include your message in new-employee orientation training, but who knows how good that will be.

If you use live training you also run into all the unpredictable events that make life exciting – like the class where one participant feels the urgent need for everyone there to focus on his or her burning issue, to the exclusion of your prepared coverage.

You know your training has to deal with the realities of business and human behavior. Can you really make a major difference by one presentation on your subject every three years? Will a lecture on the law reach

employees? And how do you choose whom will actually do the training? Subject matter experts are key in difficult areas like antitrust and foreign corruption, but do they know how to teach effectively? Do you rely instead on Human Resources people with real training expertise? And if they know how to train, do they know the specialized subject?

Some training experts will tell you that employees respond best to messages from their direct supervisors, so perhaps you try the "cascade" method. Cascading by managers is a wonderful concept, until it bumps into reality. That reality bursts through when you talk with employees who have had "training" by their direct supervisors on difficult subjects, and you begin to find out how creatively supervisors cover the tough topics in their ad lib sessions. Then, too, there are the busy managers who simply tell their work groups "you already know this stuff, it's just common sense," or "I'm sure you all read the material, are there any questions?"

This is not an exhaustive coverage of the difficulties in doing training, but just enough to raise the question: What can the world expect of you in your training program? In the past, not even the strongest compliance programs could have done much better than this. Certainly an "effective" compliance program, as that term is used in the compliance world, cannot require that the program be a perfect one.

So perhaps you start by asking, "what can the government – regulators, prosecutors, judges – expect of our compliance training?" The likely starting point here is the Sentencing Guidelines. They require us to be "diligent" and "effective," and at least as good as "industry practice," in all aspects of our compliance programs. With regard to communications, these need to be "practical." Other agencies have generally taken a similar approach.

What about our other publics – customers, suppliers, neighbors, stockholders – what do they expect? Fundamentally, they expect your employees to know and follow the rules. And above all, what do our employees expect? Here we hit a changing reality. They now live in the fast-paced and dynamic Internet age. In the past they may have expected the compliance training to be just something they had to endure. But more and more they expect any training to be as engrossing as the productions they see in the electronic media. They also want it to be practical and to be accessible when they can grab a few minutes to look at it.

II. What has the Internet done to these expectations?

In the past we were able to take comfort in the belief that we were doing our best and as much as anyone could do. If we were diligent and had strong management support, then we believed we were having as much impact as any reasonable person could expect. The world is now changing that belief. The impact of the Internet may make untenable even the small

amount of comfort we had in this area. Because of the Internet, things that were not possible even a few years ago are now reality. Information is available instantly, just when employees need it. What does this mean for the standard for training?

The Internet makes obsolete the problem of missing people in your training sessions. This new medium shifts the balance of power when you have to deal with those who miss the training - the ill, the busy and the agile. No matter what the excuse, the training is always there, 24 hours a day, seven days a week. It has made training excuse-proof. As for those previously elusive new employees, they can now be trained as soon as you want them trained. All employees can be tracked and covered by Internet-based systems, and all of them can be given the training whenever you want it done.

Similarly, the standard for record keeping is changing. In the past, even if you were diligent in requiring sign-ins for training, there was still the task of finding the records, establishing the date, remembering that a particular employee went through a name change because of a marriage, etc. With the Internet, record keeping disappears as an issue. Training is now covered by automatic, secure record keeping systems.

What about actually reaching the employees and getting them to take notice? There is no longer an excuse for expert trainers who are boring, or exciting trainers who deliver the wrong message. Good Internet training breaks away from the dry delivery of colorless information, which experienced trainers know is deadly. The Internet can deliver the compliance message using drama and multimedia. Even if video does not yet travel well along the network and is not viable for Internet-based training, trainers have found that the combination of effective graphics, interesting text, and dramatic audio, has at least as much impact as video.

How do you know if employees understood the material? In the past there was little that was done to determine this. Now, in a well-designed Internet-based system you will know that every employee who took the training successfully answered questions that required understanding of the rules. A good system will not let employees just skim through and slide by with wrong answers. After all, unlike college tests, companies cannot afford to have employees thinking that even 10% of criminal conduct is acceptable. With a compliance-oriented online training system, you will have a record that each employee tested to 100% in order to complete the training.

The Internet also offers economies and efficiencies of scale and technology. The same training can now cover hundreds of thousands of employees around the world, with relatively minor incremental costs. The courses offer companies the security that comes with providing training in the difficult and dangerous compliance areas, like antitrust and harassment, knowing that the course materials have met the test of the marketplace and

have been seen by legal experts in these areas. Yet, even with this enormous scale, the materials can be customized so that your employees are greeted with a home page that has your company's name and messages and links to your compliance materials.

Another of the great challenges in training has been figuring out whom to train, and then having a method for reaching them. But in the age of the Internet, this, too, has become easy. For example, an assessment tool now exists to help review the types of positions in a company and help assess which ones are at risk. This system can provide the compliance professional with a supportable number on how many employees need the training. Once the list of those needing training is assembled, the Internet is again the tool to make sure the task is completed, and that the at-risk employees are trained. The experienced compliance professional will recognize that not having such a system and relying on voluntary training – even with the convenience of the Internet - is a dangerous bet against the odds. Training needs to be mandatory for the at-risk employees.

How do you then reach those needing training? The Internet allows the use of a database and integrated e-mail system to bring them in. E-mail notification and reminders, combined with rigorous tracking, help bring under control what was previously beyond the reach of compliance programs.

And what about the common lament, of how difficult it is to keep the message fresh, and in front of employees? Again the Internet can be used to offer refreshers, reminders, and just-in-time-learning. A robust Internet-based training resource will offer tools and materials, along with the training, that are available 24 hours per day, seven days a week. For employees, what they need is always there, when they need it, and where they can find it – just a few clicks away. And relying on the Internet, as opposed to internal Intranet systems, allows the compliance program to take off without getting caught up and delayed in the company IT department's overloaded schedule.

Once an employee has had the training the system can then reach that employee by e-mail with important follow-ups, changes in the law, and updates. Refresher training can be provided through the same system, so that the message is continued.

III. The indispensable role of the compliance professional

So the Internet gives us good news and bad news with the same message. Things that could not be done before are suddenly very doable. That means that a training effort that might have been considered diligent just a year or two ago will start to look like a less-than-diligent effort when seen by an outside judge or our own media-savvy employees.

That raises a final question. What does this mean for our compliance professionals? In this author's view, the role of the compliance professional

cannot be replaced. First, with respect to the effectiveness of the training, we need to recognize that there are different tiers of risk, and that the highest-risk groups still require effective live trainers. What Internet-based training does is establish a solid base level for all those at risk, and limits the intensive training to those who really need it. The senior executives and others at high risk still need the back and forth sessions with the compliance experts.

The Internet will also not diminish the value of having compliance professionals talking to the field and to the highest risk employees. By doing this, they perform the essential task of emphasizing key points for those who need it most, and showing the flag of the compliance program throughout the company. It is also necessary for the compliance professionals to find out what is happening "out there."

In the end, the combination of the Internet and the compliance professional will stand companies in the strongest possible position. The compliance professional, when called upon as witness for the defense, will be able to say:

> "Yes, we have trained all our at risk employees, effectively and in a practical manner. Your honor, let me demonstrate to you the no-nonsense message that each of these employees received, and the full training that they completed."

And because of the efficiencies of the Internet, our witness will go on to say:

> "Your honor, let me also show you all of the other, effective, best practice steps we were able to take in our compliance program, because we no longer have to devote most of our time to training and tracking thousands of employees all over the world!"

Yes, the Internet has raised the bar for compliance training. But it has also made it possible for compliance professionals to achieve the objectives that have so long eluded us.

For more information, Joe Murphy can be reached at jemurphy@cslg.com or (856) 429-5355.

Compliance Systems Legal Group

Development of "Best Practices" Compliance Program

Phase 1

A. Risk/liability assessment and inventory.

1. To extent possible, structure assessment and inventory so that it is protected by applicable privileges.
2. Work with Company subject-matter experts to assess risk areas, liability inventory and "misconduct" history (if any).
3. Interview key Company personnel (e.g., executives and managers)
4. Assess Company "agent" risk areas.
5. Assess risks in any joint ventures, acquisitions.
6. Analyze applicable industry practice.

B. Analyze existing "compliance" elements: e.g., infrastructure, policies, codes, controls, procedures and systems.

C. Prepare assessment and inventory report, including plan and recommendations for enhancement, design and implementation of compliance program.

1. To extent possible, build on and use what already exists at Company.

2. Take appropriate steps to address any immediate or outstanding issues.

3. Report is evidence of "due diligence" in the assessment and design of the compliance program.

Phase 2

A. Prepare compliance management and oversight infrastructure.

1. Board of directors resolution(s).
2. Meet with/explain to officers, Board, and/or Board committee.
3. Selection, training, installation of compliance officer (an existing senior officer).

4. Selection, training, installation of compliance manager (e.g., assistant compliance officer).
5. Prepare company compliance policy to implement board resolution and empower compliance officer.
6. Creation of interdepartmental compliance committee; select and explain to members.
7. Establish regular, detailed reporting system to the Board audit committee (or another appropriate committee) and senior management; draft model report outline.
8. Provide advice on formal misconduct reporting system (e.g., hotline).

B. Prepare draft code of conduct.

1. Utilize risk/liability assessment and inventory, and analysis of compliance elements.
2. Conduct employee focus groups to obtain input.
3. Analysis of any employee surveys/inputs.
4. Prepare draft code of conduct sections.
5. Prepare letter from CEO/President to employees.

C. Business unit participation.

1. Set groundwork for business unit buy-in and participation.
2. Establish compliance liaisons in each unit.

D. Establish compliance documentation.

1. Begin keeping records of all compliance efforts in central location; provide advice on establishing appropriate files.

E. Initial internal publicity

1. Newsletter/E-mail article(s) announcing program to employees.

<u>Phase 3</u>

A. Ethics and Compliance Training/Communications Program.

1. Develop code of conduct training (e.g., custom video, classroom style, computer-based interactive training, generic videos, or combination).

2. Work with Company subject matter experts to develop appropriate policies and training for individual risk areas.

3. Develop methods to keep compliance training "fresh": e.g., Company newsletter column, separate internal "compliance" publication, E-mail.

4. Develop enhanced training for management level employees: emphasize "special" responsibilities.

B. Auditing and Monitoring.

1. Analyze internal audit function, legal department and compliance inputs.

2. Provide compliance training for internal audit.

3. Review and, as necessary, develop auditing and monitoring procedures by subject matter area and department.

4. Develop follow-up system for compliance audit findings.

C. Internal Reporting System/Hotline.

1. Advice on setting up internal systems versus contracting out the system.

2. If an internal "hotline", provide training, as necessary, for hotline operators.

3. Publicize hotline and "non-retribution" policy to employees and, as necessary, agents.

D. Investigation and Response System.

1. Inventory and assessment of existing investigatory capabilities (e.g., security, auditing, legal).

2. Analyze and, as necessary, revise internal investigation standards and procedures.

3. Provide necessary training.

4. "Whistleblower" protection and procedures.

5. Implement system for reporting to Board of directors and/or Board

committee.

6. Implement system for monitoring investigations.

7. Develop policy and procedure to consider voluntary disclosure in appropriate cases.

E. Discipline and Incentive System.

1. Analyze and, as necessary, revise existing policies.

2. Review actual "on the ground" practice.

3. Establish appropriate disciplinary standards and monitoring and review procedure.

4. Publicize disciplinary standards and system.

5. Integrate compliance issues and code of conduct into employee objectives, evaluations and assessments.

F. Employee hiring/screening/delegation.

1. Analyze (with HR input) existing system, and revise as necessary.

2. Establish system for periodic reviews to ensure appropriate hiring, retention and promotion (avoid anyone "likely to break the law").

3. Establish system to review appropriate debarment and exclusion lists, and for conducting "due diligence" checks.

G. Training/guidance for agents.

1. Work with Company subject matter experts to identify what is in place.

2. Review contract language in high-risk areas.

3. Develop agent training and communication program, as necessary.

4. Provide agents with hotline information/vendor letters.

Phase 4

A. Utilize information technology systems.

1. Code of conduct and other compliance materials on-line.

2. Use of E-mail for compliance information distribution.

3. Computerized tracking systems for compliance requirements; e.g., training.

4. Consider use of computer-based training, intranet or internet training.

B. Institute focused compliance audits.

1. Conduct prototype audit.

2. Coordinate with Company legal department and subject matter experts.

C. Job-integrated compliance training: Integrate compliance training into regular employment training and material.

D. Measure employees' perceptions and effectiveness of compliance program: surveys, focus groups, tests.

E. Include compliance risk assessment and management in business plans, acquisitions, new ventures and joint ventures.

F. Develop compliance contingency/crisis response plan.

G. Develop comprehensive records creation, management, retention, and disposition system.

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COMPLIANCE "RISK AREA" INVENTORY

The following is an expansive list of "risk areas" that a given company may face. A detailed examination of the company's operations will permit customization of the risk area list to the company's business operations and compliance history.

Accounting Fraud
- Financial Statements
- Embezzlement
- Books and records/off-books accounts

Antitrust/Competition law
- Sherman Act section 1, collusive conduct (e.g., price-fixing, market allocation)
- Unfair practices/business torts (e.g., disparagement, inducing breach of contract, theft of trade secrets)
- Monopolization
- Robinson-Patman price discrimination
- Pre-merger notifications
- Clayton Act section 8
- Interlocking Directorates

Conflicts of Interest
- Gifts and gratuities
- Entertainment
- Ownership interests
- Employment, consulting or board of director service

Consent Decrees

Consumer Protection/advertising/marketing/product promotion
- Fraud and abuse

Customs
- Customs payments
- Bribes/kickbacks
- Representations to Customs Officials

Defamation and privacy
- Defamation and libel
- Rights to privacy

Document Management/Retention
- Retention of documents during investigations, litigation
- FDA/other regulatory record-keeping requirements

Electronic Resources
- Computer Security
- Internet/Intranet/Email
- Year 2000 Compliance

Employment Discrimination/Labor
- ADA
- NLRA/union organizing
- ERISA
- FMLA
- EEO/Discrimination
- WARN
- Substance abuse
- Diversity
- Immigration (I-9's), work status

Environmental
- TOSCA/asbestos
- HAZMAT (shipping hazardous materials)
- RCRA/hazardous materials disposal
- Clean Air
- Clean Water
- Local Right to Know
- Underground tanks
- MSDS

FDA regulation
- GMP
- Medical Device Laws
- Adverse event reporting

Government Contracting
- Bid rigging
- Anti-kickback Act
- Fraud
- Hiring government employees

Health Care Fraud

Intellectual Property
- Software Infringement

- Copyright infringement
- Patent infringement
- Document copying
- Theft/Misuse of Proprietary Information
- Trademark use/infringement
- Trade Secrets

Interaction with the Government/Investigations

International
- FCPA and foreign bribery laws
- Export control
- Antiboycott Act
- US Boycotts
- Espionage and national security laws
- Compliance with Foreign Laws

Medical and scientific practices
- Research ethics

Political Contributions/activities/bribery/lobbying
- PAC's
- Federal and state lobbying regulations

Press and Third Party Requests for Information

Product/Service Safety
- Recall procedures
- Crisis and Emergency Response

Purchasing
- Kickbacks, Bribery and Improper Payments
- Suppliers' practices (overseas workers' treatment)

Securities
- Section 16
- Insider trading
- Employee stock plans
- Public disclosure, including Year 2000 computer status

Service of Legal Documents

Sexual Harassment

- Taxes
  - Sales and use taxes
  - Employee withholding/independent contractors
  - Escheat
- Wages and hours/FLSA
  - Hours of work
  - Minimum wage
  - Overtime
  - Child labor
- Workplace Safety and Health
  - OSHA
  - State law
- Workplace Violence and Security
  - Negligent hiring/background checks
  - Weapons in the workplace
  - Safety in assignments

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COMPLIANCE PROGRAM BINDER

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Standards and Procedures
- Guiding Principles/Values Statement(s)/Mission Statement
- Code(s) of Conduct/Ethics
- Business Conduct Policies and Procedures
- Other Compliance Standards and Procedures

Program Oversight and Infrastructure
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- Reports to the Board
- Reports to the Audit Committee
- Compliance Officer
  - Position Description
- Assistant Compliance Officer
  - Position Description
- Compliance Program Management Committee(s)
  - List of Committee Members
  - Committee Agendas and Minutes
- Group Company/Field/Division Compliance Infrastructure
  - List of Liaisons
  - Responsibilities
  - Status Reports

Delegation of Authority/Hiring Practices
- Screening of New Hires
- Review of Debarment/Exclusion Lists
- Due Diligence for Agents
- Other checks and balances for hiring, retention and promotions

Training and Written Communications
- Letter from President/CEO
- Newsletters
- Other Company Publications
- Code of Conduct Training
  - Training Program (Current Coverage)
  - Guide(s) for Supervisors/Managers

- Record of Distribution
- Code Acknowledgments from Employees
- Training Attendance Records
- Coverage of New Employees
- E-mail/Intranet Compliance Messages
- Compliance Officer Presentations
- Guidelines for Consultants
- Subject Area Training and Written Materials (Including Manuals)

Audits, Monitoring and Other Assessments
- Internal Auditing
  - Existing Audit Programs
- Compliance Audit Plan
- Compliance Procedures Manual
- Legal Department
  - Compliance Audit and Monitoring Functions
- Employee Surveys/Focus Groups
- Seminar Feedback
  - Compliance Training Feedback Form(s)
- Compliance Monitoring

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- Publicity (e.g., referring to Helpline)
  - Posters, Letter from President/CEO
  - References in Code of Conduct
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- Helpline Procedures and Report Records

Discipline, Rewards and Incentives
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- Commendation Letters/Awards

Responses to Violations
- Investigations - Standards, Guidelines, Forms
- Upjohn Letter
- Crisis Response Plan

Industry Practice
- Industry and Regional Compliance Practices Meetings
  - Participants
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- Compliance Symposia and Seminars

- Relations with Vendors, Agents and Consultants
  - Publication of Company Policies
  - Communications to Vendors, Agents, and Consultants
  - Contract Provisions

Compliance Systems Legal Group

SAMPLE BOARD RESOLUTION ADOPTING COMPLIANCE PROGRAM

WHEREAS, this Corporation has, from its beginning, been committed to integrity and responsible conduct, and to service to its community; and

WHEREAS, this Corporation is committed to conduct itself with the highest integrity and in compliance with all laws, and to help its members to understand the requirements of those laws which apply to the Corporation; and

WHEREAS, the Corporation has been assessing and enhancing its efforts to ensure adherence to these principles, and wishes to consolidate these efforts into one program;

NOW, THEREFORE, BE IT RESOLVED, that this Board hereby endorses those efforts and adopts as the highest policy of this Corporation, in the United States and abroad, a diligent ethics and compliance program (the Compliance Program), under the direction of a Compliance Officer to be elected by this Board; and

BE IT FURTHER RESOLVED, that it is the policy of the Corporation to be a good citizen corporation, to cooperate in [valid and reasonable] government investigations of wrongdoing, to make appropriate voluntary self-disclosures of violations of law, as determined by the Compliance Officer with the advice of the General Counsel and appropriate management personnel, and to remedy any harm caused by such wrongdoing; and

BE IT FURTHER RESOLVED, that the Board hereby delegates to the Audit Committee of this Board responsibility for oversight of the Compliance Program including participation in the annual evaluation of, and setting of compensation and incentives for, the Compliance Officer, and the Audit Committee shall give a detailed, annual report to the Board on the progress of the Compliance Program and plans for its future activities; and

BE IT FURTHER RESOLVED, that _____ is hereby elected as the Compliance Officer for this Corporation, to serve in that position until a successor is elected by this Board. The Compliance Officer shall have the authority and responsibility to take all appropriate steps deemed reasonably

necessary for the enhancement, consolidation, implementation and operation of the Compliance Program, including:

1. Working with all members of the Corporation to establish a program that is diligent, meets or exceeds industry practice, fosters the highest ethical standards, is effective in preventing and detecting violations of law, and meets or exceeds government standards including those set forth in the United States Sentencing Commission's Organizational Sentencing Guidelines;

2. Delegating to others in the Corporation responsibility for assisting in enhancing, consolidating, and implementing the Compliance Program;

3. Providing a detailed report on the Compliance Program at each meeting of the Audit Committee, including topics such as training, discipline, development of standards and procedures, compliance auditing and monitoring, changes in compliance program personnel, reports of misconduct received through the reporting system, the handling of conflicts of interest, and any government investigations that may involve the Corporation; and

4. Informing the Chairman of the Audit Committee of any allegations of misconduct involving any senior official of the Corporation, prior to the disposition of any such allegation, and any instance in which a recommendation of the Compliance Officer has been rejected or not followed; and

BE IT FURTHER RESOLVED, that all actions previously taken by any officer or director of the Corporation prior to the date of these resolutions in connection with the actions contemplated by these resolutions are hereby ratified, confirmed and approved in all respects; and

BE IT FURTHER RESOLVED, that the ongoing success of the Compliance Program, and the Corporation's commitment to integrity and ethical conduct, is the personal responsibility of each manager and employee of the Corporation, and no other objective shall have a higher priority.

Integrity Interactive Corporation:
Sample Training Curricula and Assessment Questionnaire

A. Sample First Year Compliance Training Curricula

These sample first year course curricula should be adjusted based on the specific company circumstances and the answers to the risk assessment questions in section B.

A. Management employees:
1. Antitrust – Contact with Competitors
2. Gifts and Conflicts of Interest
3. E-Compliance
4. Insider Trading
5. Intellectual Property

B. Sales and marketing employees:
1. Antitrust – Contact with Competitors
2. Gifts and Conflicts of Interest
3. E-Compliance
4. Intellectual Property

C. Sales/marketing employees with business in European Union:
1. Sales and Marketing Course Curricula (B)
2. and EU Competition Law

D. Sales/marketing employees with sales to "foreign officials":
1. Sales and Marketing Course Curricula (B)
2. And FCPA

E. Management employees who supervise sales/marketing employees with EU business:
1. Management Employee Course Curricula (A)
2. And EU Competition Law

F. Management employees who supervise sales employees with sales to "foreign officials":
1. Management Employee Course Curricula (A)
2. And FCPA

G. Procurement/Contracting employees:
1. Gifts and Conflicts of Interest
2. E-Compliance
3. Intellectual Property
4. Insider Trading

Note: Add Antitrust to this curriculum if the procurement/contracting employees have any contact with competitors.

H. Research, Engineering & Development

1. Gifts and Conflicts of Interest
2. E-Compliance

3. Intellectual Property
4. Insider Trading

Notes for all employee groups:

1. If the Company sells products subject to export controls or sells products in the Middle East or Israel, add Export Controls/Anti-Boycott to the applicable course curriculum.

2. Add Mutual Respect course to the employee's curriculum if it has not been covered within the last 12 months.

B. Risk Assessment Questions by Compliance Topic

For each target employee group (e.g., management, sales), ask the questions listed below. A "yes" answer to any question in a given compliance risk area indicates that the compliance training curriculum for the target group probably should include the indicated course.

Antitrust – Contact with Competitors

1. Does the employee have any contact with competitors; e.g., trade shows or association meetings; industry associations; sales calls?

2. Does the employee work with/sell to any suppliers/vendors/partners who are also competitors?

3. Does the employee attend trade shows or association meetings?

4. Did the employee previously work for a competitor?

5. Does the employee have any pricing authority or discretion?

6. Does the employee have authority to determine in which markets or geographic areas he/she sells/markets?

7. Does the employee have authority to determine which customers/prospects he/she sells/markets to?

8. Does the employee help to set production levels, volume or supply of Company products/services?

9. Is the employee involved in the bid or procurement process?

10. Is the employee involved in structuring/negotiating mergers/acquisitions or business relationships with competitors or potential competitors?

11. Does the employee manage or supervise any employees in the above groups?

Gifts and Conflicts of Interest

1. Does the employee work/interact with suppliers/vendors?

2. Does the employee sell/market the Company's products/services?

3. Does the employee have discretion/input as to which suppliers/vendors the Company will use?

4. Is the employee involved in structuring/negotiating mergers/acquisitions or business relationships with Company suppliers/vendors/partners?

5. Does the employee have the opportunity to invest substantially (personally) in a Company competitor or interact with a Company competitor?

6. Does the employee's family fit into any of these categories?

7. Does the employee manage or supervise any employees in the above groups?

E-Compliance

1. Does the employee use email or have access to the Corporate Intranet or the Internet?

2. Does the employee manage or supervise any employees in the above groups?

Mutual Respect

1. Note: All Company employees present some risk in this area, and should have appropriate training; e.g., Integrity Interactive's web-based course or a live training session delivered by the Company.

Foreign Corrupt Practices Act

1. Does the employee sell or market to, or otherwise do business with, "foreign officials"? (Note: this group includes, for example: employees of a state owned business; political candidates or party officials; officials of international businesses, such as the UN; and government consultants)

2. Does the employee sell or market to, or otherwise do business with, foreign governments, or any agency, instrumentality or division of a foreign government?

3. Does the employee review, hire or otherwise work with any Company "agents" who may do business with foreign officials or governments?

4. Does the employee manage, supervise or review/approve expenses/disbursements for any employees in the above groups?

5. Is the employee responsible for the preparation or accuracy of financial records that include information derived from the sales or other business activities of employees in the above groups?

Insider Trading

1. Is the employee an officer or director of the Company?

2. Does the employee have access to, or does the employee come into contact with, any "material, nonpublic information" about the Company or a Company vendor, supplier, customer or other business partner?

   Note: "Material, non-public information" includes, for example, knowledge about: an acquisition or merger; company financial information; expansion or curtailment of operations; government investigations or litigation; changes in key personnel.

3. Does the employee manage or supervise any employees in the above groups?

Intellectual Property

1. Does the employee work with or have access to Company confidential information? For example, this includes: trade secrets, customer lists or information, business or marketing plans, product plans.

2. Does the employee have access to or work with other companies' confidential (proprietary) or protected information? (e.g., copyrighted, trademarked or patented).

3. Does the employee have access to the Internet as part of his/her work?

4. Does the employee use or work with Company trademarks or copyrighted materials?

5. Does the employee work on any ideas, processes, inventions or other material that the Company may seek to patent?

6. Does the employee manage or supervise any employees in the above groups?

Export Controls and Anti-Boycott Course

1. Does the company (or any of its domestic or foreign subsidiaries/affiliates) manufacture, produce, sell or market products (including software) or technical information that may be subject to export controls, restrictions or licensing requirements?

   a. If the answer to question 1 is yes, then ask: does the employee in any way "touch" these products or technical information?

   b. If the answer to question 1 is yes, then ask: Does the employee have an email account or access to the Internet?

2. Is the employee involved in the export of any Company products or technical information?

3. Does the employee do business with, or otherwise have business contact with, any foreign nationals?

4. Does the employee travel outside of the United States on business?

5. Does the employee conduct any business in the Middle East or with Israel?

6. Does the employee supervise or manage any employees in the above groups?

European Union Competition Law

1. Does the employee conduct business for the Company in any of the EU countries?

2. Does the employee have any contact with competitors doing business in any EU countries?

3. Does the employee travel to any EU countries on business?

4. Does the Company do any business in any EU country? If the answer is yes, does the employee have any pricing authority or discretion?

5. Does the employee have any discretion/authority with respect to determining where the Company will sell its products/services or do business?

6. Is the employee involved in structuring/negotiating mergers/acquisitions or business relationships with competitors or potential competitors?

7. Does the employee supervise or manage any employees in the above groups?

Integrity Interactive Corporation

Sample Enrollment Email – Antitrust

TO: Carl Nelson
SUBJECT: Required – Web-Based Antitrust Training
FROM: Richard Anderson, President of Sample Corporation

Dear Carl:

Since Sample Corporation was founded, we have been committed to doing business and competing in the marketplace with integrity, and in full compliance with all applicable laws. To help all of our employees stay on the right side of the law, we have developed Sample Corporation's Compliance and Business Ethics program. This program provides you with resources to help you make the right decision when you're faced with a legal or ethical issue in the course of your work at Sample Corporation.

Today I am pleased to introduce a new Web-based compliance training program as an important part of Sample's ongoing Compliance and Business Ethics Program. Your first training course focuses on the antitrust laws – and the very real dangers you face anytime you have contact with our competitors.

Why antitrust? Enforcement in the antitrust area is at an all time high. In recent antitrust cases, companies have paid hundred of millions of dollars in fines and their reputations have been seriously damaged. Employees charged with antitrust crimes must hire lawyers, often face huge fines and legal bills, and may even go to prison as convicted felons.

This is clearly a very serious matter for all of us. The web-based antitrust course you're about to take will show you how to stay on the right side of these laws – while continuing to compete aggressively in the marketplace.

Thank you for doing your part to strengthen Sample Corporation's commitment to doing business with integrity!

Richard Anderson
President, Sample Corporation

TO TAKE THE ANTITRUST COURSE:

1) Take the text version of the course if your system does not have sound. If you use the audio version we recommend that you first check your computer by using the system check feature by clicking here: [system link check]

2) Next, click on this link: http://www.integrity-interactive.net/demo/logon/logon.asp and when you get to the login screen, enter your USERID: SCNels095.

FOR HELP: Send an Email to support@integrityatwork.net

Integrity Interactive Corporation

Sample Compliance Alert™ – Antitrust

TO: Carl Nelson
SUBJECT: Antitrust in the Real World: Sales Executive Receives 3 Years in Prison
FROM: Jonathan Ross, General Counsel, Sample Corporation

Dear Carl:

Recently, you took a web-based compliance training course on the antitrust laws. As Sample Corporation's General Counsel, I thank you for doing your part to maintain our commitment to doing business with integrity.

As you learned in the antitrust course, the consequences of violating the antitrust laws are very severe – especially when it comes to illegal agreements with competitors. But, as they say in the course, "does this happen in the real world?" Yes, it actually does happen in the real world. A recent case in point involves Michael Andreas, formerly a top sales executive at Archer Daniels Midland Company, ADM.

In 1999, Mr. Andreas was convicted of a felony, agreeing with ADM competitors to allocate markets, and fix the price of one of ADM's worldwide products. In addition to being fined $350,000 and owing hundreds of thousands to his lawyers, Mr. Andreas was sentenced to 24-months in federal prison.

Mr. Andreas appealed his conviction, but instead of reducing the sentence as Mr. Andreas urged, a Federal Appeals Court recently increased his sentence from 24 months to the statutory maximum, 36 months in prison. And, because there is no parole in the federal criminal system, Mr. Andreas is likely to serve virtually his entire 36-month sentence.

If you have any questions about the antitrust risks you face, I encourage you to contact Dan Robinson, Sample Corporation's in-house antitrust lawyer (Dan can be reached at extension 5678, or via email at DRobinson@sample.com). I also encourage you to return to the antitrust course – especially if you have any contact with the competition – for example, at a trade show or trade association meeting. We're counting on you to remember the basic dos and don'ts, and to stay on the right side of the antitrust laws.

Jonathan Ross
General Counsel, Sample Corporation

TO RETURN TO THE ANTITRUST COURSE:

Click on this link: http://www.integrity-interactive.net/demo/logon/logon.asp and when you get to the login screen, enter your USERID: SCNels095.

FOR HELP: Send an Email to support@integrityatwork.net

integrity interactive

COMPLETION REPORT

Company: Sample Corporation COURSE: at0001 (Antitrust)

	Name	ID	Group	Location	Level	Department	Complete Date
	Doe, John	SMP100	1	Denver	1	Sales	
√	**Drew, Jane**	SMP121	1	Denver	2	IT	4/23/01
√	**Frederick, Glen**	SMP104	1	Denver	2	Customer Srvc	4/23/01
	George, Peter	SMP113	1	Denver	3	IT	
√	**Nelson, Carl**	SMP122	1	Denver	1	IT	4/23/01
	Peterson, Richard	SMP102	1	Denver	2	Customer Srvc	
√	**Peterson, Mary**	SMP115	1	Denver	2	Sales	5/8/01
√	**Truman, Samuel**	SMP118	1	Denver	2	Sales	4/23/01
√	**Woodrow, James**	SMP119	1	Denver	2	IT	4/23/01

Total Complete 6 of 9

COMPLIANCE PROGRAMS: THE SENTENCING GUIDELINES AND BEYOND

Steven P. Reynolds
ACCA National Conference
October 22, 2002
Washington DC

SENTENCING GUIDELINES MINIMUM REQUIREMENTS

- Clearly established compliance standards
- Assigning overall responsibility to oversee compliance to high-level executives
- Exercising due care not to delegate responsibility to employees who have the propensity to engage in illegal conduct
- Taking reasonable steps to communicate standards and procedures effectively to all employees

SENTENCING GUIDELINES MINIMUM REQUIREMENTS

- Taking reasonable steps to achieve compliance with standards
- Consistent enforcement of standards through appropriate disciplinary mechanisms
- Taking reasonable steps when an offense occurs to respond and to prevent future violations

AGENCY STATEMENTS ON DISQUALIFICATIONS

- Since the Sentencing Guidelines set forth the minimum standards, DOJ has commented on situations where a company might be disqualified from arguing that their compliance program was sufficient. These are:
- Senior management participate or condone the illegal conduct
- Paper programs

KOLASKY'S JULY 12th COMMENTS

- In a speech on July 12, 2002, William Kolasky, deputy assistant Attorney General, Antitrust Division, US Department of Justice provided DOJ's view fleshing out items 4 – 7 of the Sentencing Guidelines Minimum Requirements

ITEM 4 (COMMUNICATE)

- Clear statement of company's commitment to compliance
- List of practical dos and don'ts
- Active training program, including in-person training by knowledgeable counsel
- Can be supplemented by video or Internet training
- Should be as practical as possible, including company case studies
- Include education on consequences of violations for company and employees

ITEM 5 (REASONABLE STEPS)

- Training is necessary but not sufficient
- Requires a proactive law department – attending meetings, regularly visiting facilities, and known to and respected by employees.
- Have and publicize a reporting system (confidential and free from retaliation)
- Regular antitrust audits – paper and interviews of employees

ITEM 6 (ENFORCEMENT)

- Consistent application of disciplinary procedures
- Discipline chiefs, not just Indians

ITEM 7 (RESPOND)

- Immediate investigation
- Report promptly to agency

STRATEGIES FOR COMPLIANCE

- Start by reviewing your existing program. Kolasky argues that many large, publicly traded companies have become sloppy about antitrust compliance.
- Needs assessment, organizational commitment, and resources

COMMUNICATIONS STRATEGIES

- Broad principles and basic dos and don’ts to all, tailored messages and more detailed information to those who need it.
- Match the audience/job to the risks that they face and tailor communications
- Use a wide range of communications vehicles and keep it practical and interesting

AUDIT AND REPORTING STRATEGIES

- Kolasky advises that companies should conduct regular antitrust audits and establish reporting systems.
- Focus on high risk jobs and “red flag” areas of involvement
- Employee interviews can be more useful then simply a paper audit

CONTROL STRATEGIES

- Neither the Sentencing Guidelines or Kolasky talk of control strategies, but companies need to consider internal control mechanisms to reduce risk. The problem with such controls is that they reduce business flexibility and speed.

DEPARTMENT OF JUSTICE

Antitrust Compliance Programs:
The Government Perspective

Address by

William J. Kolasky(1)
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before
Before the Corporate Compliance 2002 Conference
Practising Law Institute (PLI)
San Francisco, CA

July 12, 2002

Good morning. I want to thank Joe Murphy, Herb Zinn, and the Practicing Law Institute for giving me this opportunity to share with you the Antitrust Division's perspective on the critical importance antitrust compliance programs play in deterring antitrust crimes. I worked on my first internal investigation 25 years ago for a company based here in San Francisco, so it's a particular joy to be back here again talking about this important subject today.

The need for effective corporate compliance programs has never been more evident. It seems that almost every day we read of another case of flagrant disregard of the law by the top executives of yet another large and previously well respected company. These nearly daily disclosures of widespread accounting fraud, self-dealing, and just plain greed threaten to undermine confidence in our financial markets and jeopardize our economic recovery. Given my responsibilities for our relations with other antitrust authorities worldwide, I also fear that these disclosures will undermine our credibility abroad, weakening our ability to serve as a model for the rest of the world, and providing ammunition for those who do not share our commitment to free markets and economic democracy.

During the time I've been at the Antitrust Division, as I've visited our field offices which do the bulk of our criminal enforcement, one consistent theme I've heard is that the companies we investigate rarely have effective antitrust compliance programs. Our staffs tell me they have been surprised at how sloppy many large, publicly traded companies have become about antitrust compliance. It appears that as companies have down-sized their legal and auditing staffs, and turned their attention more and more to deal-making, one of the first places they cut is antitrust (and, I suspect, other) compliance. And we've all now seen the results. It's time for in-house counsel to return to practicing preventive law.

My task today is to talk about how to design a compliance program to prevent and detect antitrust crimes. David and Phil will discuss the role compliance programs can play in preventing environmental crimes and fraud. But in focusing only on criminal misconduct, I do not want us to lose sight of the equally important role compliance programs can play in preventing civil antitrust offenses. As all of you know, violations of the antitrust laws, be they civil or criminal, can expose your companies and clients to hundreds of millions, if not billions, of dollars in treble damage liability. A well-designed compliance program can reduce the risk of this civil exposure as well.

I want to begin by telling you a little bit about our criminal antitrust enforcement program and the important role our leniency program plays in it. Second, I want to share with you some of the common characteristics of the cartels we've prosecuted. Third, I will describe the essential elements of an effective antitrust compliance program. Finally, I will identify some of the common red flags you should be looking for as you counsel your clients and conduct antitrust audits.

I. The Antitrust Division's Criminal Enforcement Program

As I've said in other speeches,(2) investigating and prosecuting hard core cartels has always been, and remains, our number one enforcement priority. Cartels -- whether in the form of price fixing, output restrictions, bid rigging, or market division -- raise prices and restrict supply, enriching producers at consumers' expense and acting as a drag on the entire economy. In our view, these are crimes, pure and simple, and those who perpetrate them are criminals who belong in jail.

As commerce has become more global, so too have cartels. Over the last five years, we have successfully prosecuted sixteen major multinational cartels in industries as diverse as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over $55 billion in commerce worldwide and resulted in mark-ups as high as 100 percent in some cases. We have collected nearly $2 billion in fines and sentenced some 20 senior corporate executives to jail terms of more than one year, the maximum sentence being ten years. In the last few years, the European Union has joined our battle against cartels with a vengeance. Last year alone, the European Commission imposed fines in the aggregate of 1.9 billion Euros on some 40 companies for engaging in illegal multinational cartels.

Our expanded corporate leniency program has been the key to our uncovering and successfully prosecuting these cartels.(3) This program offers any company that comes forward and blows the whistle on a cartel in which it has been participating, and which then cooperates fully with our investigation, complete amnesty from prosecution, so long as it meets the conditions set forth in the program.(4) Amnesty is automatic if the company comes forward before we have opened an investigation, but may still be available if the company is the first to agree to cooperate in an ongoing investigation. A grant of amnesty protects not only the company, but also all of its directors, officers, and employees who also agree to cooperate.

Since the current version of this program was put in place in 1993, it has been instrumental in most of the major cartel cases we have prosecuted. In the last several years, we have received an average of one amnesty application per month. So successful has our program been that many other jurisdictions around the world, including the European Union, are now copying it.

It should be obvious that our amnesty program substantially increases the importance of having an effective antitrust compliance program that is designed to prevent antitrust violations and to detect them quickly when they occur. The existence of the amnesty program dramatically increases the likelihood that the cartel will be detected and punished. Only a company with an effective antitrust compliance program can hope to be in a position to be the first company in the door.

II. Common Characteristics of Multinational Cartels

Designing an effective antitrust compliance program requires knowing what it is you are trying to prevent. What I want to talk about next, therefore, are the common characteristics of the multinational cartels we've prosecuted. I'm hopeful that this will assist you in counseling your clients about what conduct to avoid and in designing an effective program for assuring they do not engage in unlawful cartel activity.

A. Brazen Nature of Cartels

The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. The members of those cartels showed utter contempt for antitrust enforcement. The cartels invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection. The conspirators openly discussed, and even joked about, the criminal nature of their agreements; they discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they went to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world, creating false "covers" -- *i.e.* facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- "No notes leave the room."

B. Involvement of Senior Executives

The second most startling characteristic of these cartels is that they typically involve the most senior executives at the firms involved -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy.

These executives are not only disdainful of their customers and of the law, but also show equal contempt for their own company's rules -- rules adopted to protect the company and them from criminal conduct. They will, therefore, go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity.

A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company's general counsel to enforce the company's antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particulary true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. Some cartel members go so far as to try to keep their cartel activity secret from all U.S.-based employees, even those responsible for carrying out their instructions as to the firm's output and prices. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas.

D. Using Trade Associations As Cover

International cartels frequently use trade associations as a means of providing "cover" for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting. Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel's so-called "masters," *i.e.*, the senior decision-makers for the cartel members, held a series of secret, conspiratorial, "unofficial" meetings in conjunction with the official meetings of ECAMA, a legitimate industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a "combination of cover and convenience" for the citric acid cartel. As he explained it, ECAMA provided "cover" because it gave the citric acid conspirators "good cause" to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an "unofficial capacity" for illegal purposes, during the time period set aside for the industry association gathering.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an

annual "budget" for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

G. Audits And The Use Of Scoresheets

Most cartels develop a "scoresheet" to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the "auditor." The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm's monthly sales, year-to-date sales, and annual "budget" or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line.

H. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

I. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term "over budget" and "under budget" in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for "compensation."

J. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Excess capacity in the

hands of leading firms can be a particularly effective tool for punishing cheating and thereby enforcing collusive agreements. In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. In another case where competitors bought from one another, the cartel member with the extra capacity threatened to not sell to a competitor who was undercutting the cartel.

K. The Structure of Cartels

We have found that cartels can involve a surprisingly large number of firms. The number of participants in several of the cartels we prosecuted were surprisingly high. Five or six members were not uncommon and occasionally we have uncovered cartels with 10 or more members. This appears to be due in part at least to fringe players in the market feeling they will profit more by going along with the cartel than by trying to take share away from the larger firms by undercutting their prices. Nevertheless, industry concentration does matter. As economic theory predicts, the industries in which we have detected cartels are usually highly concentrated with the largest firms acting as ringleaders and the fringe players following along. In one case, there was evidence that the industry had attempted unsuccessfully to coordinate prices for several years before the cartel finally got off the ground after the industry consolidated down to approximately six players.

We have also found that a single cartel will often involve multiple forms of agreement. Just as George Stigler observed,(5) cartels can take many forms, with the choice of form being determined in part at least by balancing the comparative cost of reaching and enforcing the collusive agreement against the risk of detection. The vitamin cartel, for example, included price-fixing, bid-rigging, customer and territorial allocations, and coordinated total sales.

These cartels also tended to be more durable than is sometimes thought. After the ADM plea, the Wall Street Journal stated "If colluders push prices too high, defectors and new entrants will set things right." Our experience has shown that this is not the case. Several of the cartels we prosecuted had been in existence for over ten years, including one (sorbates) that lasted 17 years, from 1979 to 1996.

We also found that while product homogeneity and high entry barriers may facilitate cartel behavior, they are not essential to it. While the products in our cartel cases tend to be fungible, there are sometimes exceptions. One case we prosecuted involved bid rigging on school bus bodies. School bus bodies have many options, but the conspirators were able to work out a formula that incorporated the options and trade-in value to determine a price at or below which the designated winning bidder was supposed to bid. Similarly, while most of our cartel cases involve industries in which entry tends to be difficult, there are notable exceptions, such as in the Division's many bid-rigging cases in the road building industry. The road building industry, at least at the time of the conspiracies, was not difficult to enter, yet the Division turned up numerous cartels.

L. Large, sophisticated buyers can still be victims.

In merger analysis, some assume that large purchasers in the market will provide sufficient discipline to prevent cartels. Our experience shows to the contrary that many successful cartels sell to large, sophisticated buyers. In the lysine cartel, the buyers included Tysons Foods and Con Agra; in citric acid, the buyers included Coca-Cola and Procter & Gamble; and in graphite electrodes, the victims included every major steel producer in the world. It is particularly ironic that one of the largest victims of the vitamins cartel had itself been one of the perpetrators of the citric acid cartel.

M. Cartel members include large, publicly traded companies

Our cases have turned up hard-core cartel activity top management at some of the world's largest corporations and most respected corporations including Christies/Sotheby's, ADM, Hoffmann-La Roche, BASF, ABB, and a host of others. We have repeatedly found that even the largest companies have become sloppy about their antitrust compliance programs and that they are not doing all they should to educate managers about the risks at which they put themselves and their companies by engaging in cartel activity.

N. Cartel participants tend to be recidivists

Finally, we have found that cartel participants tend to be recidivists. The most notorious example is Hoffmann-La Roche, which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel. Another example was a domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons did likewise after they took over the reins of the businesses in the 1990s.

III. Designing an Effective Compliance Program

Now that you know what an illegal cartel looks like, let's talk about how to design an antitrust compliance program that can deter cartel activity by your company's executives.

A. The goals of a successful compliance program

A sound antitrust compliance program should have two principal objectives: prevention and detection. From our perspective, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to escape punishment for them. This should be true for the company as well. A corporate compliance program generally will not protect the company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company's first objective in its compliance program should be to prevent wrongdoing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. But, equally important, it will enable it to nip the

wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.

A well-designed compliance program may also, in some circumstances, help your company qualify for sentence mitigation under the sentencing guidelines. I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of *respondeat superior*. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program. Finally, a strong compliance program may help your company avoid suspension and debarment, so long as the company takes aggressive steps to discipline the wrongdoers, make the victims whole, and assure that future violations do not occur.

B. Minimum requirements for an effective compliance program

The sentencing guidelines set forth seven minimum requirements that a compliance program must satisfy in order to qualify for sentence mitigation.(6) These are:

* Clearly established compliance standards;

* Assigning overall responsibility to oversee compliance to high-level executives within the company;
* Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;
* Taking reasonable steps to communicate standards and procedures effectively to all employees;
* Taking reasonable steps to achieve compliance with standards;

* Consistent enforcement of standards through appropriate disciplinary mechanisms; and
* Taking reasonable steps when an offense occurs to respond and to present future violations.

It's important to stress that these are minimum requirements. To be truly effective, a compliance program must be customized to fit the firm's business, organization, personnel, and culture. The first three requirements are reasonably self-explanatory. I want, therefore, to focus my attention on the last four requirements.

a. Effective communication. Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by a set of practical do's

and don'ts written in plain English so that every employee can understand them. A policy statement is, however, only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee. You could, for example, tell your employees that in the last several years, the Division has sentenced more than 20 senior executives to serve one year or more of jail time for antitrust crimes. One of these executives, who compounded his antitrust offenses with bribery and money laundering, is now serving a ten-year sentence. And, as Alfred Taubman recently learned, an executive's stature in the community and record of community service will not save him or her from prison. You might also tell your employees about the magnitude of the criminal fines and treble damage violators have had to pay. Hoffman LaRoche alone has paid more than $1 billion in fines and damages for its involvement in the vitamins price-fixing conspiracy.

b. Steps to achieve compliance. While training is important, it is not sufficient to assure compliance with the antitrust laws. To achieve that goal, a company must have a proactive law department that is dedicated to practicing preventive law. It is critical that the company's lawyers regularly attend management meetings and regularly visit the company's facilities so that employees know whom to call if they have a question or a problem. It is also critical that the lawyers win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces. A company also needs to have in place and to publicize a reporting system so that employees know to whom to report possible misconduct. Many companies establish ombudsmen and hot lines for this purpose, while others require their employees to report possible wrongdoing to the law department. Whatever system is in place should assure employees seeking to report misconduct confidentiality and protection from retaliation. Finally, a company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files (especially e-mails) of employees with competitive decision-making authority or sales and marketing responsibilities. It is important also to interview employees about their business and their contacts with competitors.

c. Enforcement of standards through appropriate discipline. It is absolutely critical that the company establish a record of consistently disciplining employees who disregard the company's antitrust compliance policy or who fail to report misconduct by others. In so doing, it is equally critical that the company discipline the chiefs, not just the Indians. The company should discipline senior managers who failed adequately to supervise or who created a climate of disrespect for antitrust principles in their organizations, even if they did not have actual knowledge of the particular wrongdoing.

d. Reasonable steps to respond to violations. When the worst happens and you discover that your company has committed a possible antitrust crime, it is also critical that the company respond promptly and energetically. This includes initiating an immediate investigation and reporting promptly to the agency. Remember: qualifying for amnesty can sometimes become a race with the first company in the door receiving the most lenient treatment. In addition to disciplining the employees responsible, the company should also take steps to make restitution to its customers, either through settling the inevitable treble damage actions or through commercial

arrangements directly with the customers. The company should also re-examine its compliance program in order to learn from its mistakes and should make whatever modifications are necessary to assure that future violations do not occur.

As important these steps are, nothing is more important than senior management commitment and leadership. A culture of competition must begin at the very top of the company. Respect for the law is a necessary, but not sufficient, condition. Senior management must value competition and must be vocal in making that commitment known to employees. In the cases we prosecute, we find almost invariably that in companies that violate the antitrust laws, the tone of disrespect for the law and for competition permeated the entire company, usually starting at the very top. Look at some of the people we have prosecuted: Alfred Taubman, the chairman and principal shareholder of Sotheby's; Mick Andreas, son of the long-time chairman and CEO, Dwayne Andreas, who was himself being groomed to take over the reins. In fact, ADM is a particularly good illustration of the kind of corporate culture that breeds antitrust crimes. It was a culture that believed, as one senior executive put it, that, "Our competitors are our friends. Our customers are the enemy." Both in representing defendants in criminal investigations in private practice and now as a prosecutor, this is exactly the attitude I've found in almost every company that commits antitrust crimes. And it's an attitude that can be changed only if the company's senior officers and directors all believe in the value of competition and communicate to their employees.

In addition to strong, positive leadership, it is important also that a company have sound incentive structures in place. There should be strong negative incentives against violating the antitrust laws and strong positive incentives for reporting and deterring violations. But companies should also have incentives that reward tough competition, not collusion. You want your sale force, for example, to have an incentive to sell more, not less at a higher price.

IV. Important Red Flags

In counseling your clients and in conducting antitrust audits, there are any number of common red flags to look for. Here are five.

Trade association activity. Look to see whether the positions of attendees at trade association meetings match the ostensible purpose of the meeting. Look for a pattern of meetings outside the United States. Look at whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data. Look to see whether meetings are attended by counsel and whether there is an agenda for the meetings and a record of what was discussed.

Sales transactions between your company and its competitors, particularly around the end of the year. While there are many legitimate reasons for competitors to buy from one another, such transactions can be used to "true up" a market allocation scheme.

Data on market shares. Look at your company's market shares to see if they are more stable than you would expect in a competitive market. Market shares that are stable over a long period of time are a strong indicator of collusion.(7)

Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves. When conducting audits, therefore, talk not only to the executives, but to their assistants.

Sudden, unexplained price increases and copies of competitor price announcements in your company's files. If you find any, look at the fax footprints or the cover e-mail to see where they came from.

V. Conclusion

The stakes have never been higher. An effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private treble damage actions in the United States; damage actions in other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. And if a violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. I hope my remarks today will serve their intended purpose of persuading you when you get back to your companies to make it your first priority to assure that your compliance program is up to the task.

FOOTNOTES

1. Deputy Assistant Attorney General for International Enforcement. The material in this paper draws heavily from materials developed and prepared by James M. Griffin, the Deputy Assistant Attorney General for Criminal Antitrust Enforcement, who in turn drew on materials prepared by his predecessor, Gary R. Spratling. I particularly want to thank Rebecca Meiklejohn of our New York Field Office for being the first to alert me to the neglect of corporate compliance the Division has found in several of its investigations and Donna Peel of our Chicago Field Office for contributing several of the common characteristics of multinational cartels. The views expressed in this article reflect those of the author and not necessarily those of the Division and the author accepts full responsibility for any errors.

2. *See, e.g., U.S. and EU Competition Policy: Cartels, Mergers, and Beyond*, An Address Before the Council for the United States and Italy Bi-Annual Conference, New York, N.Y., January 25, 2002, at http://www.usdoj.gov/atr/public/speeches/9848.htm.

3. U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy, at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.

4. The six conditions for obtaining automatic leniency are: (1) At the time the corporation comes forward, the Division has not received information about the illegal activity from any other source; (2) The corporation, upon its discovery of the illegal activity, takes prompt and effective actions to terminate its part in the activity; (3) The corporation reports the wrongdoing with candor and completeness and provides full cooperation to the division throughout the investigation; (4) The confession of wrongdoing is truly a corporate act; (5) Where possible, the corporation makes restitution to the injured parties; and (6) The corporation did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity. If condition one is not met, but the others are, the company may still qualify if (1) it is the first corporation to come forward, and (2) the Division at that point does not yet have evidence likely to result in a sustainable conviction against the firm.

5. *See* Stigler, George J., "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72, pp. 44-61 (1964).

6. U.S. Sentencing Guidelines, Chapter 8 (effective Nov. 1, 1991).

7. *See, e.g.,* U.S. International Trade Commission, *Report to the President on Global Steel Trade: Structural Problems and Future Solutions* 65-84 (July 2000)(citing stable market shares in Japanese steel industry as evidence that the industry is cartelized).

One Size Does Not Fit All

- Environmental laws typically prosecuted criminally and against the statutory directors.
- Most EU countries require a Work's Council - - and, many enterprises are required to have Pan-Euro Work's Council.
- EU Competition law holds dear the "free movement" of Goods & Services within Europe.

But -There Are Many Common Themes

- Price fixing is generally illegal everywhere.
- Same sort of liability is likely to attach with termination of employees.

So How Does One Approach Compliance From Global Perspective

First: Decide on Company Standards:
- Enviromental, Health & Safety
- Certain HR Policies

Next: Deal with Compliance by Discipline:
- Antitrust/Competition
- Employment/Labor
- Securities

Etc.

Let's Focus On One Area: Antitrust

- 1977
  - U.S. was the only active antitrust regime
- 2001
  - By some counts, 80 competition law regimes
- Competition law is a global phenomenon

Can Uniformity Be Achieved?

- By and large, certain key points are addressed by all competition law regimes
  - Horizontal issues
    - Price-fixing
    - Dangers of contacts with competitors
    - Division of markets
  - Vertical issue
    - Resale price maintenance

European Competition Law: Basic Principles

- The European competition law prohibits:
  - Price-fixing
  - Allocating markets or customers with other competitors
  - Restricting trade among Member States

What Varies

- Enforcement mechanisms and penalties
  - Criminal versus civil
- Attitude toward compliance
  - Bureaucratic regulation versus corruption of the market place
- Vertical issues
  - Dealer terminations
- Market dominance issues

Developing the Program: Drafting the Policies

- The old model: send a letter off to Brussels with a request for a policy.
- The new model
  - Draft the policy yourself
  - Run it by outside counsel as a check

Developing the Program

- Much material is:
  - On the web
  - In English
    - http://europa.eu.int/comm/competition/
    - http://strategis.ic.gc.ca/SSG/ct01250e.html
    - http://www.accc.gov.au/
    - http://www.oft.gov.uk/html/comp-act/index.html
- Again, the key principles are uniform
- Other resources
  - *Global Competition Review*

Maintaining the Program: Education

- Get the word out
- Company intranet site
- Newsletter
- Emails
- Web-based training

The Most Powerful Educational Tool: On-Site Visits

- Reference local laws
- Emphasize local prosecutions and trans-national prosecutions
- Use local languages

Cumprimento da Lei de Concorrência Brasileira

- A lei de concorrência brasileira proíbe:
  - A fixação de preços
  - A alocação de mercados ou clientes com outros um determinado fornecedor
  - Acordos entre concorrentes para não vender a um concorrentes
  - Acordos entre concorrentes para não comprar de determinado cliente
  - Fixação do preço de revenda (ou manutenção do preço de revenda)
  - Abuso de uma posição dominante no mercado
    - A questão de distribuidores exclusivos

Creating a Global Message

- Competition law is not only the concern of American executives living in America
- Competition law compliance should be everyone's concern

The Importance Of Competition Law Compliance

- US$750 million fine against Swiss and German vitamin producers (Hoffman-La Roche and BASF)
  - Companies engaged in price-fixing and customer allocation scheme worldwide
  - Under settlement, 6 Swiss and German executives must come to United States for four-month prison term
- $341.5M in fines imposed by Italian competition agency, Autorità Garante, against auto insurers for price-fixing

On-Site Visits: Additional Benefits

- Developing relationships
- Sending a message

Follow-Up Is Critical

- Audits
- Repeat visits
- Emails
- BWT - Beware
  - Attorney-Client privilege not uniform around the globe.
    - Specific problem in Europe.

CORPORATE COMPLIANCE PROGRAMS – CONVINCING THE GOVERNMENT THAT YOU HAVE THEM, AND GETTING THE APPROPRIATE CREDIT

Christopher J. Supple, Chairman, Public Law Department,
Holland & Knight LLP, Boston, MA

I. U.S. Sentencing Guidelines – Chapter 8, "Sentencing of Organizations"

- enacted 1991, gave rise to emphasis on "corporate compliance", stating "[c]ulpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct …" (emphasis supplied)

- gives companies a break at sentencing "[i]f the offense occurred despite an effective program to prevent and detect violations of law";

- then defines "an effective program to prevent and detect violations of law" as hinging on whether the company exercised "due diligence", which involves a 7-part inquiry:

1. A set of compliance standards and procedures.

2. The appointment of high-level personnel to oversee compliance with the standards.

3. Assurances that discretionary authority will not be delegated to anyone who is likely to act illegally.

4. The adoption of systems for communicating the standards and procedures.

5. The adoption of systems for monitoring, auditing, and reporting criminal misconduct, including reporting by employees without fear of retribution.

6. Consistent enforcement of the standards through discipline.

Chris Supple spent the decade of the 1990s as a government prosecutor, regulator and policy maker, serving from 1990-1995 as a Trial Attorney in the Criminal Division of the U.S. Department of Justice, and from 1995-2000 as Legal Counsel and Chief Secretary in the administrations of Massachusetts Governors William F. Weld and Paul Cellucci. He joined Holland Knight in 2002.

7. A history of appropriate responses to identified offenses, including preventive action as needed.

- these are the "7 hallmarks" of an effective corporate compliance program, to which I'll add an 8th: getting the government to believe that you actually had these 7 hallmarks in place.

II. The Decision Whether, What, and Who to Charge

- prosecutors have complete discretion in deciding whether to bring charges or not, and that discretion is virtually unreviewable.

- in general, criminal liability is appropriate in instances of intentional violation; generally is not appropriate in instances where well-intentioned and reasonable efforts were made to achieve compliance.

- **one would think**, therefore, at least theoretically, that if a corporate defendant were able to convince a court at sentencing that it merited a reduction in sentencing for having had an effective compliance program - - a 7 point program that a court could find by a preponderance of the evidence was "an effective program to prevent and detect violations of law" - - it might also have been able to convince the prosecutor that criminal charges were not appropriate.

- in fact, if a corporation had a compliance program in place that was sufficient to merit a Guidelines reduction at sentencing **one would think** that the government agency charged with regulating that company could and should have been persuaded not to refer the matter for criminal prosecution in the first place, but rather to treat the matter as a civil violation.

III. U.S. Department of Justice Guidelines on Charging Corporate Entities with Crime:

- guidelines are joint responsibility of DOJ Criminal Division ("Main Justice") and USAOs; natural and constant tension here, use it for your advantage rather than vice-versa.

- *respondent superior* : means targeted conduct must have been 1) within the scope of the employee's duties, and 2) intended to benefit the company (but not exclusively so).

- a central question for prosecutor in making charging decision: was the conduct "PERVASIVE," or was it limited to "ROGUES"? - - "There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation" (emphasis supplied).

- cites several agencies (e.g. SEC, EPA) that have "formal voluntary disclosure programs in which self-reporting … may qualify the corporation for amnesty or reduced sanctions."

- "The Department encourages such corporate self-policing … However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct … Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporation management is not adequately enforcing its program".

- "The fundamental questions any prosecutor should ask [in deciding whether and what to charge] are: 'Is the corporation's compliance program well designed?' and 'does the corporation's compliance program work?'"

    - sufficient audit staff?

    - employees adequately informed?

    - corporation committed to it?

- "Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation."

- "Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is therefore appropriate to require the corporation … to implement a compliance program or to reform an existing one."

    -this can, in practice, be quite onerous.

- charging guidelines instruct prosecutors to consider 8 factors in deciding whether and what to charge, including:

    -"The existence and adequacy of the corporation's compliance program" (Section II.A.5); and

    -"The corporation's timely and voluntary disclosure of wrongdoing, and its willingness to cooperate in the investigation … including … the waiver of the corporate attorney-client and work product privileges" (Section II.A.4).

        Q: ARE THEY KIDDING? A: No.

        - AAG Robinson's letter to ACCA Chair Mater says these DOJ Principles re: waiver of attorney-client privilege are nothing new

but rather simply "explicate the long-standing practice of the Department …"

IV. Attached Materials:

1. Selected relevant excerpts from Chapter 8 of the U.S. Sentencing Guidelines.

2. U.S. Sentencing Guidelines Commission Web-Site and Bibliographical Guide to further materials on Chapter 8.

3. Linda Kuca **of H&K Consulting**, David F. Axelrod and Kevin R. Conners, "The Sentencing Guidelines for Organizations: Writing on a Clean Slate". – **Mechanical application – walks you through it nicely.**

4. Organization Chart of the U.S. Department of Justice.

5. Organization Chart of the Criminal Division of the U.S. Department of Justice.

6. June 16, 2000 Memo of the U.S. Deputy Attorney General to All U.S. Attorneys re: "Bringing Criminal Charges Against Corporations".

7. Organization Chart of Executive Branch of Massachusetts State Government.

8. Organization Chart of Executive Branch of the U.S. Government.

9. Sample federal corporate plea agreement.

10. May 12, 2000 letter of ACCA Chair Maud Mater to U.S. Deputy Attorney General Eric Holder.

11. June 30, 2000 letter of U.S. Assistant Attorney General James K. Robinson to ACCA Chair Maud Mater.

12. Richard Ben Cramer, What it Takes, Chapter entitled "To Know".

New Age Company, Inc.
COMPLIANCE ISSUES

- **NON-FINANCIAL REPORTING OBLIGATIONS - SEC**
- **ETHICAL GUIDELINES**
- **LAW**
- **SUPPORT**
- **RECOMMENDATION**

NON FINANCIAL REPORTING OBLIGATIONS

- **FORM 10K ANNUAL REPORT**
- **DESCRIPTION OF BUSINESS, COMPETITIVE CONDITIONS, ENVIRONMENTAL COMPLIANCE, EXPORT SALES.**

ETHICAL GUIDELINES

- **ETHICAL GUIDELINES BOOK; REVISED.**
- **BUSINESS PRACTICE SURVEY.**
- **GUIDELINES FOR TRADING IN COMPANY STOCK.**
- **ACCESS TO LEGAL DEPARTMENT.**

LAW - CODE OF FEDERAL REGULATIONS ("CFR")

- **8 CFR ALIENS & NATIONALITY**
  - **Immigration Regulations**
- **15 CFR COMMERCE & FOREIGN TRADE**
  - **Export Regulations**
  - **Antitrust Compliance**
  - **Foreign Corrupt Practices Act**

LAW - CODE OF FEDERAL REGULATIONS ("CFR")

- **17 CFR COMMODITY AND SECURITIES EXCHANGE**
  - **Insider Trading Education**
  - **Company Stock Trading Policy**
  - **Officer and Director Trading Compliance**
- **19 CFR CUSTOMS**
  - **Product Classification & Import Regulations**

LAW - CODE OF FEDERAL REGULATIONS ("CFR")

- **29 CFR LABOR**
  - **Wage & Hour Regulations**
  - **Family & Medical Leave Act**
  - **Safety Compliance [OSHA]**
  - **EEOC**
    - **Handicap Access**
    - **Sexual Harassment**
    - **Non-discrimination**

LAW - CODE OF FEDERAL REGULATIONS ("CFR")

- **29 CFR LABOR**
  - **401(K) Reporting Obligations**
- **40 CFR PROTECTION OF ENVIRONMENT**
  - **EPA Regulations**
    - **Air**
    - **Water**
    - **Hazardous Waste**

LAW - CODE OF FEDERAL REGULATIONS ("CFR")

- **47 CFR TELECOMMUNICATION**
  - **Product Compliance**
- **48 CFR FEDERAL ACQUISITION REGULATIONS SYSTEM**
  - **Minority & Women Owned Business Opportunities**
  - **Contract Compliance**

COMPANY COMPLIANCE SUPPORT

- **AUDITS**
  - **ENVIRONMENTAL**
  - **OTHER**
- **TRAINING**
  - **IN-HOUSE**
  - **OUTSIDE LEGAL COUNSEL**
  - **EXPERT COUNSEL**
  - **CONSULTANTS (E&Y, et al)**

COMPLIANCE SUPPORT

- **OVERSIGHT**
  - **MIX OF SPECIAL COUNSEL AND RESPONSIBLE BUSINESS MANAGER**

    (EXAMPLES: DESCRIBE EXAMPLES OF COMPLIANCE ISSUES FOR WHICH SPECIAL ASSISTANCE MAY BE REQUIRED WITH THE PROGRAM)

RECOMMENDATION

> **THE AUDIT COMMITTEE (OR THE BOARD OF DIRECTORS) APPROVES A WRITTEN COMPLIANCE PLAN EACH FISCAL YEAR. THE COMPLIANCE PLAN CONSISTS OF APPROVED AUDITS, TRAINING, AND OTHER NON-FINANCIAL COMPLIANCE ACTIVITIES AS PROPOSED BY THE COMPANY.**

New Age Company, Inc.
Corporate Compliance Program

Topic:	Securities Regulation ; Annual Business Practice Survey Product Classification and Import Regulations
Responsible SMT Member:	Senior VP & CFO
Task(s):	1. Distribute Company Memorandum re: Trading in Company stock to all officers and certain members of the finance community. 2. Distribute Business Practice Survey to all officers (and their direct subordinates) plus a random selection of exempt Company employees, (not less than 75 in number) above grade 11. 3. Establish Corporate Import Policy, including meeting U.S. Customs' Requirements for an Import Compliance Program.
Coordinating Person:	Task #1 and #2 St. Peter, Corporate Legal Counsel; Task #3 M. Howdy, Corporate Auditor
Cost:	NA
Legal:	Internal Counsel / Big Law Firm; Boutique Law Firm re: U.S. Customs matters
Complete by:	Task #1 March 1999 Task #2 June 1999 Task #3 June 1999
Report to Board:	June 1999
Note:	

Compliance Program FY99

New Age Company, Inc.
Corporate Compliance Program

OBJECTIVE:

New Age Company, Inc.'s ("Company") policy is that all business of the Company be conducted in accordance with the highest ethical standards. The Company's Corporate Compliance Program is an annual activity designed to elicit information and / or provide appropriate instruction to employees to insure compliance with the ethical and legal principles contained in the Company's Ethical Guidelines and other Company publications pertaining to the proper conduct of all Company employees. The Program is prepared by Corporate Counsel for review and approval by senior management and the Audit Committee of the Board of Directors. The Corporate Counsel is responsible for implementing the Program and works with appropriate Company Vice Presidents to define the tasks assigned. Coordinating Person(s) are designated by the responsible Company Vice President to accomplish the assigned tasks. The Company Vice President with the direct assistance of Counsel and the Coordinating Person(s) is responsible for the preparation of a summary report to the Board of Directors following the completion date of the assigned tasks.

The following pages describe the the Company's Corporate Compliance Program for fiscal year 1999.

Approved: Approved:

President & CEO Vice President and Chief Financial Officer

Approved:

Chairman Audit Committee Date:

Compliance Program FY99

Subject: Foreign Corrupt Practices Act - Exam - Corporate Compliance Program FY '02

FINANCE CORPORATE COMPLIANCE TASK FY'02

RESPONSIBLE SMT MEMBER:

Part of this year's Corporate Compliance effort is to review with selected members of our finance community the provisions of the Foreign Corrupt Practices Act of 1977, as amended (the "Act"). Our effort is to help educate you about the law so that as managers you are both aware and vigilant about the requirements of the Act. A conscious or negligent disregard of the Act on the part of any manager is no defense for Analog.

Since many of you are located at our facilities in the U.S. and elsewhere it's impractical to meet with you and review the provisions of the Act. The following is a series of questions for you to answer. In answering these questions you will learn about the Act and its requirements of you as Analog. You are encouraged to review the Act and associated commentary by reference to the many sites on the Internet. One such site is:

http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm

Of course you are expected to answer every question correctly. And you can call me for the right answer to any particular question. I will be delighted to help. If you fail to get all the questions correct you will be contacted by counsel who will provide you a further review of the Act and address any issues you may have with respect to Analog's responsibilities under the law.

This is an assigned task for our FY'02 Corporate Compliance Program and you are asked to respond to me by return email by **May 17, 2002**. Simply hit the return email function button and then scroll to the questions recording your answer by deleting the one of the two choices presented so that your answer to the question remains. When answering a multiple choice question then please underscore the correct answer. Please contact me if you have any questions.

So, now read each question carefully and mark the appropriate answer. Thank you.

1. The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

True False

2. The law requires corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

True False

3. The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery

provisions with respect to issuers.

True False

4. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

True False

5. Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is:

A. an "issuer,"

B. a "domestic concern,"

C. a foreign national or business

D. all of the above.

6. An U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

True False

7. U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

True False

8. The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to *obtain* any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

True False

9. The FCPA applies to payments to *any* public official, regardless of rank or position.

True False

10.The business to be obtained or retained does *not* need to be with a foreign government or foreign government instrumentality.

True False

11. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official.

True False

12. Due diligence in selecting a business partner may involve investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates.

True False

13. The U.S. firm should be aware of so-called "red flags," *i.e.*, such as:

A. unusual payment patterns or financial arrangements,

B. a history of corruption in the country,

C. a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA

D. unusually high commissions,

E. lack of transparency in expenses and accounting records,

F. apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered,

G. whether the joint venture partner or representative has been recommended by an official of the potential governmental customer

H. all of the above.

14. There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action."

True False

15. The statute lists the following examples:

A. obtaining permits, licenses, or other official documents;

B. processing governmental papers, such as visas and work orders;

C. providing police protection,

D. mail pick-up and delivery;

E. providing phone service, power and water supply,

F. loading and unloading cargo, or protecting perishable products;

G. scheduling inspections associated with contract performance or transit of goods across country.

H. all of the above

16. If you have a question about whether a payment falls within the exception, you should consult with counsel.

True False

17. The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions:

A. corporations and other business entities are subject to a fine of up to $2,000,000; officers,

B. directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years.

C. the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment.

D. fines imposed on individuals may *not* be paid by their employer or principal.

E. all of the above.

18. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person.

True False

19. A person or firm found guilty of violating the FCPA may be

A. ruled ineligible to receive export licenses;

B. the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA;

C. the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA;

D. a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

E. all of the above.

20. Conduct that violates the antibribery provisions of the FCPA may also give rise to:

A. a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO),

B. to actions under other federal or state laws.

C. all of the above.

21. An action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

True False

22. Here's something you should know. The SEC alleged that IBM (an "issuer") had violated the FCPA's books and records and internal controls provisions by failing to ensure that its wholly owned Argentine subsidiary maintained accurate books and records disclosing corrupt payments that personnel of the subsidiary had allegedly made. In this consent settlement, IBM was held responsible even though it had no knowledge of its subsidiary's inaccurate books or of the subsidiary's allegedly improper payment, and even though the SEC did not allege that its internal controls were inadequate.

23. No person may knowingly falsify any of these books and records and the obligation is to account accurately and fairly for transactions.

True False

24. Issuers, such as Analog Devices are to devise and maintain accounting controls sufficient to provide "reasonable assurances" that the following objectives are met:

A. that transactions are executed in accordance with management's instructions;

B. that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles and to maintain accountability for assets;

C. that access to assets is controlled according to management's instructions; and

D. that records are reconciled with existing assets at reasonable intervals.

E. all of the above.

25. The internal control provisions do not require a fail-safe system, controls must provide reasonable assurances that the specified statutory objectives will be met.

True False

26. It may be difficult to determine whether a payment is lawful under local

law. U.S. companies should:

A. not rely on assurances of a foreign official seeking the payment

B. should consult disinterested and competent local counsel.

C. Seek guidance on issues such as: "(a) the issuance of an advisory opinion by

a foreign government agency; (b) the issuance of regulations by a unit of

local government; and (c) a course of conduct of a foreign government

or government agency indicating that the payment is legal.

D. all of the above.

27. S.E.C rules seek to assure the integrity of the audit process; it is unlawful for corporate officers and directors to make misrepresentations to accountants auditing their companies' books.

True False

28. The accounting provisions apply to all kinds of corporate activity, and the manner in which those activities are reflected in the records of the corporations.

True False

29. The FCPA's books and records provision requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

True False

30. What is covered by the FCPA includes:

A. internal corporate records, such as ledgers and journal entries,

B. records of corporate transactions with third parties, such as agreements with third party vendors, other corporate records and documents relating to the official business of the corporation, including for example, minutes of board meetings and board resolutions.

C. All of the above.

