

# 403 Implementing Compliance Programs for the Small Law Department

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Sol Glasner is vice president, general counsel, and corporate secretary of the MITRE Corporation in McLean, Virginia. He oversees a varied in-house practice emphasizing intellectual property, technology transfer, government procurement, computer law, and employment law. He is also the primary liaison to the board of trustees, responsible for the coordination of trustee meetings and all official corporate records.

Prior to joining MITRE, Mr. Glasner served as house counsel to Computer Sciences Corporation (CSC). There he was assistant general counsel, responsible for the legal affairs of CSC's Consulting Group, headquartered in Cambridge, Massachusetts.

Mr. Glasner is active in industry and professional groups. He served for six years as treasurer of ACCA's Washington Metropolitan Area Chapter. He has also served on the board of the DC Computer Law Forum and the board of governors of the Virginia Bar Corporate Counsel Section. He has written and lectured widely on export control and technology law issues.

Mr. Glasner received his masters degree in international affairs from Columbia University and his law degree from Georgetown University Law Center.

### Hanna Hasl-Kelchner

Hanna Hasl-Kelchner is an adjunct professor of business administration at the Duke University Fuqua School of Business and has taught in all of the executive MBA and the MBA programs.

She began her legal career in Washington, DC's revolving door, first in private practice as an associate and then as attorney advisor in the Office of General at the U.S. International Trade Commission. She then moved in-house, first with Alloy Tool & Mold Manufacturing Corporation and its subsidiary IML Technology, Inc., and later as senior attorney and then associate general counsel at Degussa Corporation. More recently, Ms. Hasl-Kelchner served as assistant general counsel at Reichhold, Inc., a subsidiary of Tokyo based Dainippon Ink and Chemicals, where she engaged in diverse domestic and international transactional work, including mergers, acquisitions, joint ventures, and other strategic alliances, plus litigation management, and preventive law counseling.

Ms. Hasl-Kelchner received an AB from Duke University, an MBA from Cornell University, and a JD from Rutgers University School of Law—Camden where she also won awards for Best Oralist and Best Brief at the Regional Jessup International Moot Court Competition.

**Paul J. Laskow**

Paul J. Laskow is vice president and general counsel of AAA Mid-Atlantic Insurance Group, a regional personal lines property and casualty insurer with home offices in Philadelphia. His responsibilities include regulatory compliance, government affairs, oversight of the staff counsel department, and certain operational areas such as the company serving the residual auto insurance market in New Jersey.

Prior to joining AAA Mid-Atlantic, Mr. Laskow worked in the international law department of CIGNA Corporation in Philadelphia. His primary responsibility at CIGNA was overseeing legal affairs and local counsel in numerous jurisdictions in Asia and, thereafter, in Europe. Mr. Laskow has also served as vice president and general counsel of the Insurance Federation of Pennsylvania in Philadelphia, chief counsel of the Pennsylvania Insurance Department in Harrisburg, PA, and assistant U.S. attorney for the Eastern District of Pennsylvania in Philadelphia.

Mr. Laskow received a BA from St. Joseph's University, a M.Sc. from the London School of Economics, and a JD from the Dickinson School of Law of Pennsylvania State University.

**Drew McKay**

Drew McKay has more than 30 years of private sector and federal government experience. He currently serves as executive vice president and deputy general counsel of Decision Strategies/Fairfax International, LLC (DSFX).

Prior to joining DSFX, Mr. McKay was the executive vice president, general counsel, and secretary of The Fairfax Group, Ltd., one of the two firms that merged to form DSFX. Immediately prior to joining Fairfax, Mr. McKay was as an assistant U.S. attorney for the District of Columbia. He was appointed to a variety of senior staff positions in the U.S. Congress over an eight-year period, including the post of staff director and general counsel of a joint committee. Mr. McKay served as the first assistant staff director for disclosure and compliance at the Federal Election Commission, created in response to the Watergate events. Mr. McKay also administered the first public financing of a presidential election in 1976. Previously, Mr. McKay was the chief administrative officer for the revised federal election laws governing all U.S. House of Representatives campaigns in 1972 and 1974. In addition to his federal government experience, Mr. McKay worked for a European corporation in new business development.

Mr. McKay is active in a number of professional associations, including ACCA, where he has served as chair of the Litigation Committee, a member of the board of directors of the ACCA Foundation, and member of the board of directors and president of the the Washington Metropolitan Area Chapter.

Mr. McKay holds a BA from Oakland University, a JD from the Washington College of Law at The American University, and also completed graduate studies at Princeton Theological Seminary.



**MARKETING COMPLIANCE:**  
***"Getting to Yes"***  
by  
**Hanna Hasl-Kelchner**

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***MARKETING:***

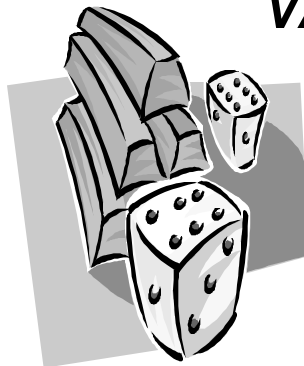
- systematic art of persuasion
- applied to a *target audience*
- purpose of *joint problem solving*

## **COMPLIANCE:**

***A business issue  
with significant legal  
implications***



## **CREATING THE VALUE PROPOSITION**



- **conduct risk assessment**
- **prioritize risks**
- **forge links between  
law and business**

## ***FORGE LINKS THAT:***

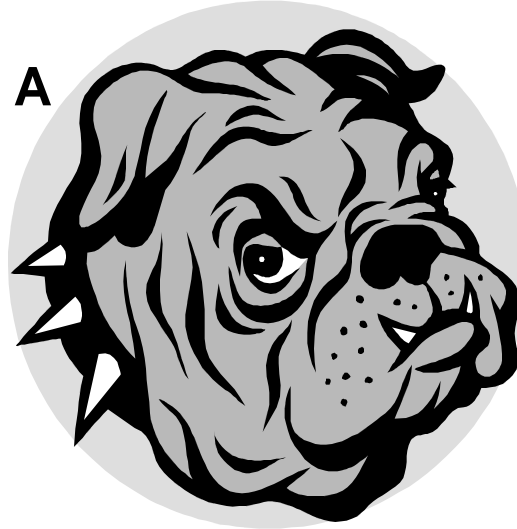


- save money
- institutionalize integrity
- leverage competitive advantage
- complement existing initiatives
- facilitate effective globalization

## ***COMPLIANCE IS A CHANGE PROGRAM***



**"PUTTING  
LIPSTICK ON A  
BULLDOG"**



***LOOK FOR JOINT  
PROBLEM SOLVING  
OPPORTUNITES***



## **Implementing Compliance Programs for Small Law Departments--Getting Started**

Paul Laskow  
(plaskow@midatlantic.aaa.com)  
ACCA Annual Meeting 2001

### **Begin with the Organizational Guidelines of the U.S. Sentencing Commission**

*BNA/ACCA Prevention of Corporate Liability*, called the adoption of the Guidelines for Sentencing of Organizations in 1991 a watershed because the guidelines declared "for the first time ... a legally recognized definition of what a compliance program should be." It argued that the Federal Sentencing Guidelines moved companies beyond subject matter or industry specific compliance to a more comprehensive approach.



## United States Sentencing Commission Home Page at "USSC.GOV"

- n Select "Organizational Guidelines and Compliance"
- n Select "Chapter Eight-Sentencing of Organizations"
- n Click on "Section 8A1.2 Applications Instructions -- Organizations"
- n Scroll Down to "Commentary-- Application Notes"

## "Effective" Program Defined

Commentary note (k): *An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:*

## Other Materials of Interest at USSC.GOV: Organizational Guidelines Bibliography

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## More Materials at "USSC.Gov" Organizational Guidelines Questions and Answers -- An example:

Q: Will organizations be able to mitigate their fine merely by showing that they had a compliance program "on paper?"

A: No. The Commission has specified in the guidelines criteria for what experts agree is a demanding and generally effective compliance program. Unless these criteria are met, an organization cannot qualify for the mitigation credit assigned to this factor. For example, an organization that did not vigorously seek to enforce its program through auditing and monitoring procedures, or that did not carefully design the program to anticipate the kinds of crimes likely to occur, would fail to meet the guidelines' test. In addition, the Commission has made a policy judgment that if high-level personnel are involved in an offense or if the organization learned of the offense and failed to report it to authorities, the organization cannot receive credit for this mitigating factor.

## **"Due Diligence" --Starting with the Second Element the CCO**

*"Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures."*

## **Corporate Compliance Officer**

- A. The Corporate Compliance Officer ("CCO") shall have overall responsibility (1) to oversee compliance with the Standards of Conduct set forth in the Associates Handbook and with the compliance procedures established pursuant to compliance program, (2) to ensure the proper functioning of the compliance program.
- B. The CCO shall confer generally with the senior officers of the Organization and the Audit Committee of the Board of Directors ("Board") about matters relating to the compliance program, including all matters that, under the compliance program, the CCO is required to report to the Audit Committee.

## CCO Position Description Continued

C. The CCO shall monitor developments relating to compliance with applicable laws, regulations, and standards of conduct and shall from time to time distribute to particular employees or groups of employees memoranda, news articles, or other informational materials that explain compliance requirements, report changes in requirements or industry standards, highlight the importance of compliance or are otherwise relevant to their compliance responsibilities.

## CCO Position Description Continued

D. The CCO shall review on a continuing basis the Organization's internal procedures for preventing the violations of the law and shall create a compendium of such procedures including:

1. procedures for review of all products, promotional and marketing material and fulfillment activity;
2. procedures for obtaining opinions of counsel on proposed activities that may raise questions under the antitrust laws or other laws of general application to the business of the Organization;
3. procedures for review of regulatory schemes of particular application to the business of the Organization;
4. procedures for timely preparation and submission of filings required by state and Federal agencies;
5. internal and external audit programs

## CCO Position Description Concluded

- E. The CCO shall ensure that all reports of misconduct or suspected misconduct relating to the operations or practices of the Organization are promptly, thoroughly, and properly investigated according to the procedures of the compliance program.
- F. The CCO shall discharge any other responsibilities assigned under the compliance program
- G. The CCO shall take such other actions as are necessary and appropriate to implement and improve the compliance program.

## Delegation of Authority

*"The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities."*

## **Corporate Administration Manual 605-6 Delegation of Authority**

Authority may not be delegated to persons who may have a propensity to abuse that authority or otherwise engage in illegal activities. A person who has been convicted of a crime of dishonest or breach of trust may be denied employment by the Organization. Whether a person has a propensity to abuse trust or otherwise engage in illegal activity must be considered at the time that the person is hired, transferred to a new position or promoted to a new position.

## **Pre-employment Background Checks**

### **Minimum due diligence:**

- A. Convictions
  - 1. period of search
  - 2. jurisdictions searched
  - 3. relevant offenses
- B. Education
- C. Employment History
- D. Current Employees

## **Other Elements of Due Diligence Standards of Conduct**

*"The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct."*

## **Developing Standards of Conduct**

- A. Perform a Risk Assessment
  - 1. Each department identifies significant business activity.
  - 2. Legal department suggests legal exposures, e.g., commercial bribery, embezzlement or theft.
  - 3. Internal Audit suggests risk of noncompliance, i.e., high medium or low.
- B. Match policies and procedures to exposures & risk.
- C. State in Plain and Accessible Language

## Example of Risk Assessment

### Corporate Compliance Risk Assessment Form      **Claims Counsel Function**

- |                       |   |
|-----------------------|---|
| 1. Business activity: | Evaluate and make recommendations on claims.                |
| Exposure:             | Mail, wire, insurance fraud, commercial bribery, antitrust. |
| Risk:                 | Moderate.   |
| 2. Business activity: | Direct the payment of benefit vendors.                      |
| Exposure:             | Commercial bribery, mail and wire fraud, antitrust.         |
| Risk:                 | Low.  |
| 3. Business activity: | Defend claims.  |
| Exposure:             | Commercial bribery, mail and wire fraud.                    |
| Risk:                 | Moderate.   |
| 4. Business activity: | Pursue subrogation.   |
| Exposure:             | Commercial bribery and embezzlement.                        |
| Risk:                 | Moderate.   |
| 5. Business activity: | Purchase law office support services.                       |
| Exposure:             | Mail and wire fraud.  |
| Risk:                 | Low.  |

## Example: Communications Standard

AAA Mid-Atlantic communications systems, including telephone, voice-mail, email, Intranet and Internet, are to be used exclusively for conducting the business of the Organization, except for reasonable personal use. The communications systems and any record of the communications are the business property and records of the Organization. The records of communications will be retrieved, reviewed, copied for business purposes and retained according to the record retention policy of the business unit originating the communication. Records of communications will be made available in civil, administrative and other legal proceedings as required by law. Communications and the records of communications are subject to the other Standards of Conduct including Confidentiality, Harassment, Privacy and Copyright.



## Standards in Employee Handbook

- n Conflicts of Interest
- n Legal Compliance
- n Dealing with Suppliers
- n Political Activity
- n Political Contributions
- n Integrity of Records
- n Fraud
- n Harassment
- n Antitrust
- n Privacy
- n Confidentiality
- n Communications
- n Equal Employment Opportunity
- n Enforcement of Standards

## Communication of the Compliance Program

*"The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required."*

## Communication Plan for Corporate Compliance Program

### n *What to Communicate*

#### A. Substantive Matters:

1. Examples of what to avoid
2. Frequently Asked Questions

#### B. Procedural Matters

1. How the Standards are monitored & enforced
2. Orientation & Annual Review talking points

### n *How to Communicate*

#### A. Employee Handbook

#### B. Receipt for Handbook

#### C. New Employee Orientation

#### D. Training Courses

#### E. Employee Newsletter

#### F. Annual Performance Review

#### G. Corporate Administration Manual

## Communication Examples

### "Close Calls" to be Avoided" Integrity of Records

Nell is concerned that she is not making her quarterly sales goal because of Edward's failure to mail solicitation materials on time. Confident she will "catch-up" next month, she inflates her sales totals to match historically indicated volume.

Whether or not she does catch-up, the act of misstating, even momentarily the financial position of the company is a violation of the Standard.

### Frequently Asked Questions

Q. Will I be fired if I violate one of the Standards?

A. Disciplinary action will be taken commensurate with the seriousness of the violation under the progressive disciplinary process outlined in the Corporate Administrative Manual. A minor infraction may merit a warning. A serious violation may warrant immediate dismissal.

## Monitoring and Auditing

*The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.*

## Monitoring and Auditing Compliance Program

### **Corporate Compliance Committee**

Oversight responsibility for monitoring and auditing of compliance lies with the Corporate Compliance Committee.

### **Monitoring Corporate Compliance**

Responsibility for monitoring compliance with the Standards lies with managerial and supervisory employees.

### **Auditing Corporate Compliance**

Auditing compliance lies with the Internal Audit Department.

## Enforcement of Standards

*The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.*

## Enforcement Practices & Procedures

- Detection** Violations will not be tolerated at any level. Employees have an affirmative duty to disclose violations or possible violations. Managers and supervisors have responsibility. Internal Audit incorporates Standards into reviews.
- Investigation** Managers and supervisors have primary responsibility. Assistance from HR, Corp. Counsel, Internal Audit.

## Enforcement Practices & Procedures Continued

**Disciplinary Action** Progressive disciplinary policy used. Commensurate with violation. Self-disclosure considered.

**Remedial Action** Manager required to address risk as part of resolution. Corporate Compliance Committee exercises oversight to identify systemic problems.

**Referral and Voluntary Disclosure to Law Enforcement** Chief Compliance Officer makes disclosure of credible evidence of violation of state or Federal law following consultation with counsel and others.

## Unlawful Activity Policy Referrals to Law Enforcement

The following appears in the CAM Policy:

AAA Mid-Atlantic will refer credible evidence of unlawful activity to the appropriate law enforcement agency and cooperate in the prosecution of any crimes charged. However, a manager, in consultation with Human Resources Internal Audit or Corporate Legal, may waive or defer referral to law enforcement where the associate or accused person cooperates with the investigation of the unlawful activity, admits culpability and, in case of monetary loss, makes or agrees to make restitution. The Corporate Legal Department must review any written agreement for restitution.

## Review and Revision of the Program

*"After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses -- including any necessary modifications to its program to prevent and detect violations of law."*

## Review and Revision Plan

**Standards of Conduct** Driven by changes in the law and periodic assessment of risk.

**Implementation of Program** Annual review and report to the Audit Committee on the execution of the Compliance Program.

**Review of the Program** Qualitative assessment of the execution of the Compliance Program.

**Revisions to the Program** Timely proposals to change the Program to enhance effectiveness.

**Work Papers** Work papers for the reviews, assessments, redesigns, proposals and replaced elements of the program will be retained to demonstrate good faith and due diligence.

## MARKETING COMPLIANCE: "GETTING TO YES"<sup>1</sup>

by  
Hanna Hasl-Kelchner

Marketing an in-house legal compliance program offers a wonderful opportunity to strengthen the attorney-client relationship by forging links between law and business objectives. Unfortunately, the merits of compliance do not sell themselves and lawyers are often uncomfortable in the role of marketer.

"Marketing" is an emotionally charged term for lawyers. To those of us who cut our teeth on the bar exam when the rules of ethics still barred lawyer advertising, "marketing" connotes something unseemly. For others, it represents aggressive rainmaking techniques, slick presentations, and a reason for moving in-house rather than staying in private practice. Yet, when all the hype and hoopla is stripped away, marketing is nothing more than the systematic art of persuasion applied to a target audience for the purpose of joint problem solving. But how do we begin?

### The Business Factor

All too often a legal compliance program is viewed as a *legal* issue when in reality it is a *business* issue with significant legal implications. Reframing the issue identifies the program as a joint problem and places primary accountability for compliance where it belongs – on the business – not its lawyers. This approach is consistent with the minimum standards for program effectiveness set forth by the Federal Sentencing Guidelines requiring senior management accountability for the program's standards and procedures.<sup>2</sup> This approach also affords counsel a marvelous opportunity to gain a fresh perspective on the role of compliance in the organization.

Take a sharp look at compliance from the business perspective. What is in it for management? Why should they care? If you can identify a management problem or organizational value that compliance helps address or solve, you have a hook. It becomes a point of persuasion. Senior management is more inclined to support compliance if it can be demonstrated that the program makes business sense, as well as legal sense. The goal is to let compliance be part of a solution to *their* problem.

A copy of the Federal Sentencing Guidelines, and promises about sentencing leniency are not enough. After all, most managers do not intentionally test the limits of the law and even those who do are bold enough to believe that they will never be caught committing a crime. Therefore the Sentencing Guidelines by themselves are a weak incentive for compliance in the eyes of management because most managers never expect to need the benefit of the doubt.

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<sup>1</sup> See further Hanna Hasl-Kelchner, *Marketing Compliance: How to Sell Your Company on Protecting Itself*, ACCA DOCKET 18, no.9 (2000): 54-71 and Roger Fisher and William Ury, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*.1983.

<sup>2</sup> U.S.S.G. § 8A1.2 Application Note 3(k).

A better way to surface persuasive hooks is through a legal risk assessment that examines company history and industry factors to identify high-risk areas of operation. A lawyer intimately familiar with the organization and its industry could conduct the assessment informally or, depending on the availability of resources, a more formal legal compliance audit could be conducted. Once completed, the areas identified by the assessment can be quantified to establish the magnitude of the company's financial exposure and the individual risks can then be prioritized. Quantifying compliance makes it tangible and more persuasive to management. It also makes compliance part the solution by tying it to an important business problem: a *bona fide* financial exposure. The legal risk assessment thereby becomes a handy blueprint for marketing a compliance program.

If the risk assessment targets OSHA as an area for improvement, for example, safer work conditions translate into fewer workers' compensation claims and fewer claims translate into improved risk ratings and reduced insurance premiums. Less lost time accidents also means more productivity plus fewer employees increasing their own risk of injury due to the increased workloads created by absent colleagues. Each of these business factors has dollar value associated with it. Find them. Make conservative estimates if you must. Add them up. Ka-ching!

Once you begin to view compliance from the business perspective and focus on common interests, other options for mutual gain will become self-evident. Regulatory compliance, for example, reduces the risk of a regulatory shut down. If a significant portion of production capacity is dedicated to just in time deliveries it means that a regulatory shut down could wreak havoc with the company's cash flow and seriously jeopardize customer relationships. Preserving cash flow has a value. Preserving customer relationships has value, albeit tougher to quantify. Compliance can help solve those problems. It protects the company's competitive advantage with customers by boosting their confidence in the company's ability to maintain a steady supply of product, fostering customer loyalty, and generating good will that can lead to increased sales.

Compliance also dovetails with existing quality programs that tout "doing things right the first time" and core company values such as ethics. It thereby complements existing management initiatives, institutionalizes integrity and forges links between business and legal objectives for mutual gain. As a result, legal becomes a more integral and valuable part of the business process.

### **The People Factor**

Although crafting value propositions can be a successful strategy for garnering senior management's attention and support, the marketing of compliance cannot stop there. It must also appeal the organizations' heart and soul – its grassroots employees. Experience dictates that the best way to elicit organizational commitment to a compliance program is to start at the top of the organization and have it filter down, since, as a practical matter, employees typically look to company leadership for direction when deciding how seriously to take any new initiative. Thus it is essential for senior management to actively and continuously endorse compliance.



Starting at the top of the organization, however, should not be a substitute for obtaining independent buy-in from rank and file employees. Nor should the requirement of senior level management accountability by the Federal Sentencing Guidelines be interpreted as an invitation for executive fiat. The notion that change comes from the top is a fallacy "driven by ego and a cult of heroic management"<sup>3</sup> according to Henry Mintzberg, professor of management studies at McGill University in Montreal. Indeed, imposing change purely from the top could be disastrous. When management announced the implementation of a compliance hotline at one manufacturing facility in Canada, for example, plant employees walked off the job calling it a "snitch-line." They believed that management did not trust them. Effective communication and credibility had broken down.

A balance must be struck between filtering compliance from the top down and pushing participation from the bottom up if we expect change to flourish. As lawyers we are very aware of the behavioral change compliance is trying to facilitate; we assume it is imperative. Yet in making that assumption, it is easy to forget that for the rest of the organization, compliance is a *change* program and nobody likes change when it is something that is done to us – whether by senior management, by legal, or by anyone else, imperative or not. It is demoralizing. Professor Rosabeth Moss Kanter<sup>4</sup> compares the typical change effort to "putting lipstick on a bulldog." Management sees something that needs fixing, puts something in place that looks good on the surface, checks off a box on their "to do" list and moves on. By the time they are done, nothing is really fixed, only now the bulldog is angry.

Kindling grassroots support and excitement about compliance requires the same kind of commitment to joint problem solving as it did with senior management. It means identifying and clearly communicating how compliance can solve *their* problems.

Take, for example, the experience of Huntsman Chemical Corporation.<sup>5</sup> Certain types of specialized compliance information resided in the environmental, health and safety (EHS) group of Huntsman while process knowledge was retained at the plant level in individual operational units. As a result, the operations staff was unaware of how changes to the production process could create noncompliant permit conditions and, likewise, the EHS staff was unaware of operational issues or future production plans that could affect permit requirements. Both groups were frustrated with each other and compliance was at risk. The corporation addressed this problem by sharing information more broadly, thus initiating a culture change that resulted in more accountability and enhanced compliance. The goal of compliance became part of the solution.

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<sup>3</sup> Nick Morgan, *How to Overcome 'Change Fatigue*, BURNING QUESTIONS 2001: A SPECIAL REPORT FROM HARVARD MANAGEMENT UPDATE, July 2001, at 3.

<sup>4</sup> Id. Professor Kanter is the Ernest L. Arbuckle Professor of Business Administration at the Harvard Business School.

<sup>5</sup> Laura L. Monty, *Creating a Compliance Culture in the Workplace*, 13 PREVENTIVE LAW REPORTER 4, Winter 1994, at 19.

Change that we participate in, endorse or encourage is change driven by ethic. Because it is something we believe in and care about, it is totally different than change imposed by edict. It is energizing rather than demoralizing. We clamor for more; we can never get enough. It is the mother lode of effectiveness that compliance must tap into for lasting change and successful.

Unfortunately, too many compliance programs simply roll out a communications training program based on a legal risk assessment without much input from grassroots employees. Their marketing is essentially an ad campaign with no focus groups. As a result, these companies forego the opportunity of joint problem solving and fail to create the sense of ownership that comes from participating in the development of options for mutual gain. Then they wonder why the initial enthusiasm and momentum generated by the compliance program peters out.

Finding common ground for joint problem solving means identifying root causes and the only way to do that is to get into the trenches and get feedback from the employees who deal with the problems everyday. Is the root cause of noncompliance structural or cultural, as in the Huntsman example? Is it simply a lack of communication or understanding about how the day-to-day activities of grassroots employees create legal exposures for the company that requires better explanations or teaching techniques? Are employees really learning and changing their behavior? Or is the training merely lipstick on a bulldog?

*What is management learning from employees about how to improve the process? The only way to find out is to ask. By soliciting feedback and effectively responding you create a valuable dialogue that helps overcome skepticism and cultivates trust – essential building blocks for "getting to yes."*

## CONCLUSION

Counsel is well served to view compliance marketing like any other change initiative within the organization. The key to substantive improvement requires the creation of a nurturing environment. Seeds will not grow in hard soil. The extra effort needed to plow a change ready environment will enhance a compliance program's effectiveness and lead to lasting cultural changes that detect and deter unacceptable business/legal risks, thereby enabling and enhancing the strategic goals of the organization.

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**SMILE: Five Practical Considerations in Establishing A Corporate Compliance Program****I. SELL**Do's

Seeking and winning Board, CEO and/or COO support.

Keep a running, working file of good and bad case histories:

From your company

From your company's competitors

From the media.

Advocate the benefits of a compliance program.

Seek to develop respect for the program.

Take ownership of the program.

Don'ts

Complain about a lack of support (get it, earn it, find it).

Get stymied at the first institutional roadblock.

Over promise the benefits.

**II. MANAGE**Do's

Enlist support and cooperation of colleagues.

Organize your outside counsel (and perhaps other consultants) to help.

Develop a business plan to implement the compliance program.

What is necessary, what is not.

What resources will be required.

Timeline to implement.

Know or learn the nature and culture of your business (don't underestimate the importance of this step).

Inventory all applicable laws and regulations your company must take into consideration.

Establish how to update this inventory.

What jurisdictions does the company conduct business in? Domestic, as well as foreign, operations?

What are the workforce demographics?

What is the business your company is in: making, selling, buying, distributing products; services; or both?

#### Don'ts

Delegate to someone outside the organization or at too low a level inside the overall responsibility to manage the program.

Rely solely upon your company's past practices and experience to guide you.

Hamstring your business by attempting to impose a compliance program that is inappropriate to your organization (square peg in round hole problem; the business must continue to function).

### III. **INITIATE**

#### Do's

Begin.

Try starting with small steps, portions of the whole business plan.

Seek allies wherever you find them in your organization.

Train, teach individuals and units about the benefits of having a compliance program.

Be flexible.

#### Don'ts

Wait until the program is fully perfected before beginning.

Keep looking for a "canned" program that exactly fits by organization.

Demand compliance (you can't legislate compliance).

#### **IV Lead**

##### Do's

Challenge business units to contribute.

Establish a realistic schedule and monitor work progress regularly.

Get the team together on a regular basis for training and sharing.

Follow-up with all layers of the organization--frequently.

Communicate, over communicate inside the organization.

##### Don'ts

Do it all yourself.

Make it personal.

Try to change the corporate culture overnight.

#### **V. EVALUATE**

##### Do's

Update your knowledge regularly.

Adapt your plan to incorporate your experience and changes to your corporate environment, as well as other companies'.

Make improvements--keep it current.

Learn from others--ask questions.

Rotate leadership roles in the business units: get fresh perspectives, new enthusiasm.

Communicate the results.

##### Don'ts

Resist change.

Avoid your critics, skeptics.

Keep starting over every year, throwing out last year's model.

### **Suggested Readings**

1. John K. Villa, *Corporate Counsel Guidelines* (1999)
2. Jeffrey M. Kaplan et al., *Compliance Programs and the Corporate Sentencing Guidelines* (1997)
3. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *Vand. L. Rev.* 1343 (1999)
4. Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 *Wash. U. L. Q.* 375 (1993)
5. Patrick J. Head, *The Development of Compliance Programs: One Company's Experience*, 18 *J. Intl. L. Bus.* 535 (1998)
6. Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *Law & Soc'y Rev.* 457 (2000)
7. Richard S. Gruner, *The Role of the General Counsel: Perspective: General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 *Emory L.J.* 1113 (1997)
8. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 *Rutgers L. Rev.* 605 (1995)
9. Dr. John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 *Drake J. Agric. L.* 305 (2000)
10. Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 *Ariz. L. Rev.* 407 (1994)
11. H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 *Del. J. Corp. L.* 1 (2001)