

# FINAL TRANSCRIPT

**Thomson StreetEvents<sup>SM</sup>**

## **\*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance**

Event Date/Time: Sep. 08. 2005 / 1:00PM ET

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

## CORPORATE PARTICIPANTS

### David Simon

*WeComply - President and Founder*

### Elise Kirban

*Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

### Mark Biros

*Proskauer Rose - Managing Partner*

## PRESENTATION

### David Simon - WeComply - President and Founder

Hello and welcome to this Association of Corporate Counsel webcast on Effective Compliance and Ethics Programs Guidelines for Implementation and Maintenance. My name is David Simon and I'll be moderating this program. I'm the founder and president of WeComply the leading provider of customizable online compliance training. WeComply has been an alliance partner of the ACC for more than 4 years.

Joining me today are attorneys Elise Kirban and Mark Biros. Elise is Vice President, Deputy General Counsel and Chief Ethics and Compliance Officer at Symbol Technologies in New York where she's responsible for a wide range of compliance issues. Before joining Symbol in 2004, Elise worked in the legal department of International Paper on anti-trust and other compliance issues. Prior to that, she did stints in private practice in Washington, D.C. and Atlanta. Elise is active in the ABAs anti-trust section.

Mark Biros is the managing partner of the Washington, D.C. office of Proskauer Rose and the co-founder of the firm's criminal defense and corporate investigations group. Before joining Proskauer, Mark worked in Washington for many years as a federal prosecutor and investigative attorney focusing on complex international and domestic criminal investigations.

Mark now represents individuals and corporations in complex civil and criminal litigation matters, in areas of healthcare, government contracts, environmental compliance. And he's also represented clients charged with bribery, money laundering, FCPA violations and various other federal and state crimes. We welcome your questions and comments today which you may submit by email to webcast at [wecomply.com](mailto:wecomply.com), that's webcast at [wecomply.com](http://wecomply.com).

So Mark let me start off by asking you to describe in general terms the framework that in-house counsel should use in designing a compliance program? From your experience in this area what's the Department of Justice looking for in a company's compliance program?

### Mark Biros - Proskauer Rose - Managing Partner

The Department of Justice is looking primarily for a non-cookie cutter approach to compliance and a program which adapts to the culture and size of a particular organization focusing on what that organization may be its particular risks in the area of compliance. The whole concept of compliance programs and plans has evolved since the mid-60s when the Delaware Chancery Court decided (indiscernible), a case in which it found that the board of directors of corporations have an obligation to have in place a program to detect, investigate and remediate alleged criminal conduct.

And then subsequently as the law evolved the United States sentencing guidelines promulgated by the sentencing commission and implemented by the Department of Justice and the courts, have integrated portions of program suggestions in their various guidelines. And at present in November 2004 the sentencing guideline commission suggested modifications to the guidelines in which it set forth several detailed suggestions as to what it considered to be an effective compliance program.

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

These detailed suggestions and Elise and I can talk about them in a little bit, really are the portions of the program that the Department of Justice looks for when it tries to analyze and evaluate a corporation's compliance and what we'll call culture of compliance. Elise anything you've got anything you want to add?

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Yes. I think the critical thing with the sentencing guidelines is really a good guide and you look at the factors that Mark was talking about and as he said we'll get into a little bit more of that detail as we go forward in the program, but they really are the things I think an in-house counsel should look at when they're designing a program and tailoring it to the needs of their company.

---

**David Simon** - *WeComply - President and Founder*

So how concerned should we be with the sentencing guidelines now that the Booker decision from the United States Supreme Court has invalidated the guidelines as a mandatory thing for companies to adhere to?

---

**Mark Biros** - *Proskauer Rose - Managing Partner*

Well we should still be extraordinarily concerned about them because one, the Department of Justice has not given up on the application of those guidelines and still urges courts to follow them and the courts are reluctant to deviate from those guidelines, because even individual trial judges understand that by sentencing within the guidelines there's a certain amount of protection they have from being reversed in the Court of Appeals that's number one.

But more importantly to businesses and organizations is the guidelines and in particular those which relate to effective compliance program are factors that the Department of Justice takes in deciding whether to charge criminally an organization and in deed Deputy Attorney General Andrew Comey issued a letter to all the prosecutors in late January a copy of which is attached to one of the publications that we posted here in the footnote telling them that they need to continue to consult with the guidelines and follow the guidelines, both in the sentencing arena as well as the charging decision and that's really the critical factor.

Many times you are going to be sitting or your attorney's going to be sitting across the table from some prosecutor who's making a decision about whether to charge and that's really a much more critical decision to address than what the sentence is going to be a some later point. Elise?

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Well Booker really doesn't change my approach at all and I frankly doubt it would change the approach of any other in-house counsel. While it does state the court's can give the guidelines in a mandatory manner like Mark I still expect that they'll be used as guidelines and they reflect an articulation of what the government viewed as significant. So, even if they're not mandatory they provide guidance on what the government expects to see in a compliance program what the government thinks rises to the level of an effective program and frankly a lot of the criteria make a lot of sense.

Issues like tone to the top, incorporating ethics into your program. Making sure you have a way to evaluate strengths and weakness of your program all make a lot of sense just from an implementation perspective and knowing that and knowing that the government feels they're important I can't imagine anyone really disregarding their existence.

---

**David Simon** - *WeComply - President and Founder*

So, Elise what aspects of the sentencing guidelines would you consider particularly important in regards to compliance?

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Obviously each of the factors carries weight but I firmly believe that unless you have the proper what I would call tone at the top at your organization with respect to the compliance program that you're going to have a really difficult time making your program meaningful to the employees in the company. You'll still train people. You'll still get reports through your hotlines et cetera not that the people will all of a sudden be acting unlawfully or unethically all the time if you don't have the right "tone at the top".

I just believe - I firmly believe that the vast majority of people really do want to do the right thing at the right time and they just need to be equipped with the resources and the information to buy them in their day to day activities but if you don't have the right "tone at the top" people at lower levels in the organization might very well make the wrong choices when they're operating in for example a gray area where it's a little less clear but if you have your senior management who are consistently communicating the importance of ethical and compliant behavior and an intolerance for behavior that's inconsistent with law and ethical behavior you're much more likely to find that people will always stay on the right side of that you know, black, white, gray line when faced with competing business pressures and frankly that's really where you can always find someone making the wrong decisions and watching what senior management is actually doing when they face those hard decisions is also going to be meaningful so that senior management is actually walking the walk and not just talking the talk and there'll be a powerful message to employees about what's expected of them. So that's what I think is probably the most important. I'd be curious Mark as to what you think.

**Mark Biros** - *Proskauer Rose - Managing Partner*

I could not echo more strongly your view about "tone at the top" and how important and critical it is that that tone create within an organization what I refer to as a culture of compliance an indeed much of that what you're talking about in that sentiment is embodied in the sentencing guideline factors that have recently been promulgated in November because one of the things that the guidelines counsel is to make sure a high level person in the organization and they defined what that high level person what the characteristics that person should have has the overall responsibility for compliance and the ethics program.

So in other words, what the guidelines realize and many of these guidelines were the result of commentary by businesses is that it's important to have high level commitment and indeed one other factor the guidelines set forth is that the organizations governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and exercise reasonable oversight with respect to it and this is right along the lines that you're talking about Elise and echoes your sentiments that this is what has to be done in organizations in order to ensure "tone at the top" and compliance.

And then of course some follow through and period communication to everyone within the organization the guidelines talk about as you did is critical to making sure people understand that it's not just hollow words uttered by senior management. It is something to be taken seriously in your everyday operations.

**David Simon** - *WeComply - President and Founder*

So Mark, along those lines. What are some concrete suggestions for a company to ensure that its compliance program is more than just a check the box kind of program?

**Mark Biros** - *Proskauer Rose - Managing Partner*

The most important thing and I'm sure Elise will jump in is periodic communication to everyone in the staff as to the importance of compliance and what the issues are in terms of compliance number one and training. There has to be a program consistent with the size of the organization and the nature of the issues so that you're not burdening people too much with training as to

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

how to address certain types of issues that come up in the ordinary course of business life and I'm sure Elise is involved in that kind of training constantly and she has a better sense of the details of that. We do it from an outside point of view - from an outside law firm point of view but really the critical people who have the most impact on the culture are the in-house attorneys who are right there every day. Elise.

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Yes, I agree with that and not just attorneys sometimes. You need to leverage other people in your organization who have expertise in areas whether it's environmental or trade compliance or other areas where there might actually be a lot of expertise. Again, an idea of whether it's check the box I think as Mark stated it really all does boil down to again the "tone at the top". I mean does senior management care about the program? Is this something that they actually spend time thinking about?

Do they think about their goals and objectives? Do they communicate how important it is consistently and we like to talk about my consistency at my company, but it shouldn't just be something that's oh once a year kind of thing. It should be imbedded in the communications that senior management has with employees you know as they're talking about business operations so that it's seen as part of day to day course of business.

Some CEOs really get it. Others may not embrace it. Not so they'd be hostile to it but it may not be as much in their fabric. For those who get it it's a lot easier obviously to make the program become vital and alive because employees will see how that message is communicated and interwoven in day to day business decisions - day to day business communications.

There are also - you take other initiatives to raise awareness just below senior management for example doing a risk assessment and actually meeting with business unit heads and functional unit heads to identify potential risks to them achieving their objectives many of which are compliance risks and you can do that as part of the business planning cycle which also help imbed it again into the process of this is how we do business. We look at compliance as we're looking at our business planning as we're looking at our budgeting so we can figure out if we need resources and this is part business.

This is how we do business here. It's important as any other factor in achieving our objective and then as they get to see how risks - unethical or unlawful behavior can impact their business whether it's having products stopped at your border because there's customs problems or interrupting a product launch because of environmental concerns it can really - they'll really appreciate that. So you can take it to the business people that way and then sometimes you'll actually have people try to incorporate compliance into performance evaluations which can be really effective tool.

We also though - even in that area it can become kind of a pro forma check the box if you just always - and all you have to do is right and meets sort of these expectations next to a criteria or a factor of demonstrates ethical behavior. So again, it really is kind of imbedding it into the process I think that makes it something that people really know is part of the fabric of business not just something that's discrete and separate.

---

**Mark Biros** - *Proskauer Rose - Managing Partner*

Elise can I ask you a question?

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Sure.

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

**Mark Biros** - Proskauer Rose - Managing Partner

In your experience do you believe as I tend to think about in the guidelines talk about that examples of enforcement, in other words where you have either appropriate display measures that you're taking against people for non-compliant activity or incentives are given to people for compliant activity really in many ways can speak louder than words?

**Elise Kirban** - Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer

I actually - I do think - I was actually going to talk about that a little bit later and I will talk about that a little bit later but I do think that does speak volumes and people will look - if you try to bring up some other companies experience you can say look at the newspaper and see XYZ company is in trouble. People always say well we wouldn't do that. We're not like that and so it really does help if people can see examples from within their organization that yes it can happen here too.

**Mark Biros** - Proskauer Rose - Managing Partner

And let me add to. In my experience from talking to people on the outside Elise's comment about that happens to other people is a very typical reaction of individuals with whom I deal. All of this - none of us as human beings think of ourselves as bandits, as criminals, as law breakers. We justify our conduct in a host of different ways. Economic necessity, pressure from business, need to get something done and so consequently we don't think of ourselves in those terms and this goes back to the compliance program issue of educating people and training people.

People have to understand that there are thousands of criminal and regulatory provisions out there which impact our everyday business life and unless you have a sense of what those are and that's part of the thing we're going to talk about later about analyzing your risks you know people will not be sensitive to what I call short cut measures.

Often times complications arise because the boss in a hurry turns to somebody and says, get that done. I don't care how you get it done. Common language. Well what happens is that person may turnaround and get it done consistent with I don't care how you get it done and cut a corner or get in a dark gray area or maybe an area where they violate the law and then what happens is when it comes back to the supervisor they say well I didn't mean that and so sensitivity to what the compliance issues are. What the risks are as Elise talks about is really a critical aspect of what you're communicating, what you're enforcing, what incentives you're giving people in terms acting on behalf of your organization.

**David Simon** - WeComply - President and Founder

We come at it from the employee training perspective and we try to give examples in our programs about here's somebody who got in trouble for an anti-trust violation or bribing a foreign official or something like that but invariably we end up pointing to a sea level executive who got in trouble. So what do you say to the rank and file employee who says, look these are not my problems. These are way above me. I don't have to worry about these types of issues.

**Elise Kirban** - Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer

Let me jump in first Mark. I think one of the things that you can say is listen. To the extent you have - lets just say its a sea level person. It impacts the company. It impacts the way customers look at you. It impacts the way vendors look at you. It impacts the way the market looks at you so if you think it doesn't have any impact on you - you're a shareholder or you have options in that company or you have an interest in the viability of that company. Having your name splashed across the New York Times or the Wall Street Journal or the FT is not a good place to be, and it doesn't really matter who it is. It's going to impact the company. You're going to see share prices drop and customers want to do business with companies they feel like they can trust.

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

People want to work for companies that they feel have a culture of compliance. You want to work with people who you respect. So in terms of doing business and retaining the best employees it has an impact. It doesn't matter where it happens in the organization. Everybody has an interest in making sure people do the right thing.

**Mark Biros** - *Proskauer Rose - Managing Partner*

And I try to put it on a personal level when I speak to business groups and clients and I start off in a very stark way and I ask the question. How many of you would volunteer to be a defendant in a criminal case? Answer. No one and there's a reason for that. As Elise says, there are tremendous business complications and employment complications when the criminal process or the regulatory process focuses in on an organization. I can tell you there are significant personal anxiety attacks which occur once the system focuses on an individual at whatever level they are in the organization concerning their particular possible wrongdoing.

The agents are taught how to deal with people and how to talk to them and they know when to stop by their persons house during dinner time to sit down and talk with them about their complications. They are very good at what they do. Their role is not to investigate matters to exonerate people and if you're sitting at your dinner table and involved at whatever level you are and all of a sudden there's a knock on the door and you open the door and there are two agents from the FBI or DEA or when they flash their badge they're not there to help you.

They're there to ask you questions and when I talk to people I say you don't want to be in that situation. So, before you cut a corner. Before you get into that dark gray area or beyond think long and hard about whether you want to be sitting across the table trying to explain your actions under circumstances under which your liberty or freedom may be at stake.

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

As a follow-up to Mark. If the senior manager who's indicted doesn't mean that there hasn't been a lot of people lower down in the food chain who haven't sat across from the U.S. Attorney and had a really long, difficult conversation or two. So, it can still be a very difficult situation for people if they cut corners.

**David Simon** - *WeComply - President and Founder*

Mark, you were a federal prosecutor. How do you use that rank and file employee to get what you're after?

**Mark Biros** - *Proskauer Rose - Managing Partner*

Well what you do is you sit down with them - first of all the agents visit them. The person has some exposure and more often than not if they have some exposure or they have their own question about it the government sits down and says look. I will enter into an agreement with you to give you some consideration either in terms of sentencing or in terms of a charge that we're going to lodge against you if you tell me who higher up in the organization knows about, acquiesced or counseled or promoted or was involved in this activity - this illegal activity and invariably they also ask do you know - if they're focusing on one issue. Do you know of any other illegal activity at the organization?

The goal of the government in its proper form is appropriately unbiased enforcement of the law and that's basically what the goal is. As a practical matter, agents and prosecutors like to prosecute individuals who are as high up in an organization as they can but they don't always start there as Elise said.

What they do is they find the lowest level person who is culpable and then they sit down with them and they strike a bargain where that person gives testimony against others and then they continue to "work their way up the ladder," and if you look at the Enron, WorldCom situation and even the Scrutti (ph) case the number of lower level people who pled guilty and testified

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

against the higher ups in all those cases is extraordinarily high and that's basically how the government builds their case and it's important to understand that for the purpose of compliance that no human being really wants to be in that position where they're sitting across the table from you threatening you with incarceration.

**David Simon** - *WeComply - President and Founder*

So lets shift gears. We'll come back to what happens when you unearth a serious compliance violation but we talked a little bit about identifying risk areas. What do you do Elise to decide what your greatest risk areas are and once you identify those how do you mitigate those risks?

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Well there's a lot of data points. One of the first place is you want to look if you have a help line or a hot line you see what kind of issues are being raised and reported and not just don't look at them necessarily discreetly look for patterns. Are there issues being raised in the same business units with consistency over time indicating perhaps some problems with the same kind of issue and it's happening everywhere in the company. Are there geographic patterns indicating that your message isn't being communicated consistently across the company? Are there some pockets where things just aren't seeming to take hold or in an international company are there cultural differences or misunderstandings that are impeding the effectiveness of your program?

So look for geographic patterns. Look for patterns within business units because there can be leadership issues that you need to address. As I mentioned before, risk assessments are a really effective tool for highlighting potential compliance or ethical risks. So you go to your - the heads of your business units and the heads of your functional units and you say tell me what you think your top several risks are to achieving your objectives. They may give you some things that are compliance related.

They may give you some things that aren't and then you can kind of - you have a list of the things that you know - you as a company need to comply with and you can walk through with them. Well what about this and what about this issue and what would the impact of something going wrong here be on you so that's a good way to start to measure risks and identify gaps and then flatly forget the paper. Read the Wall Street Journal. They will give you insight into the kind of conduct that's getting attention by law enforcement regulators and sometimes in a very forward looking way you've seen things going on in financial services an issue for example that people thought were kind of just the way you do business you know we've been doing it for a long way and all of a sudden people are saying, no, no, no we're not accepting that behavior anymore.

So think about what kind of issues are coming up with regularity. You can see oh there's a lot more enforcement of FCPA - Foreign Corrupt Practices Act than there use to be. We're seeing a lot more enforcement in that. In that area where you need to redouble your efforts to make sure if there is such an enforcement you're ready for it. So those are the kind of things I would look for.

In terms of mitigating that will greatly vary with the nature of the risk. Is the issue one of training? Is it simply that people don't understand the rules and even if that's what it is there an issue that that awareness is across the board a problem or is it a very localized issue? Depending on the answer you may want to address the training issue differently. If it's a localized issue there's a particular business unit or division or geographic location that seems to be consistently kind of missing the mark on it maybe you need to do some intensive in-person training to identify what the basic miscomprehension is that exists.

If it's more of a general lack of awareness across the company then you may need a broader training resource - you know online training, webcasts or make available other resources, online manuals, or different kind of resources people can have. If the risk isn't really an awareness issue but the need to meet a new legislative requirement - statutory requirement that's coming around you need to figure out how to develop a process for complying with the laws. Building new processes into your systems - into your company to address that new compliance risk and it may also require budget resources then you try and plan for that and



Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

again that's one of the benefits we're trying to imbed risk assessment into your business planning process and your budgeting process because if you have things that you need risks you need to mitigate and there are resources associated with that mitigation you can plan for that which is a lot easier to get the money upfront later on.

And then incorporating an audit process is a good way to mitigate risk because people will be on alert that their behavior is subject to audit and that knowing someone is watching can really keep people in line especially those who might not be motivated naturally just to do the right things for the right reasons. Mark.

---

**Mark Biros** - *Proskauer Rose - Managing Partner*

What I do when I talk to people I try to do it in a conceptual way because obviously the in-house lawyer is more in tune with the vagueries of the issue of risk that they have so I sit down and I say look. There are various laws. Some very general, some very specific that may affect your business and depending on your business those laws may be environmental. Everybody has a financial reporting obligation - legal obligation but there may be licensing issues et cetera.

So sit down and make sure you understand what the law is both the general and the specific that affects your business and then analyze the relationships that your business has in this concept. One, it has relationship with competitors either in the trade association context or in dealing in various meetings and so those kinds of relationships pose risks. Then it deals with customers. Obviously, hopefully the more of those you have the more successful the business and so you sit down and say okay what are the kinds of legal issues that are going to arise if I don't deal properly with my customers.

Then you deal with vendors because most companies are buying things from various vendors in order to do business and operate properly. So the question you sit back and say okay. What are my complications that may be there in my relationship with the vendors and then lastly I'd say the government - the government generally. This may be regulatory issue. It may be administrative issue but sit down and say okay what are my relationships with the government and how would inappropriate interaction with the government raise complications for me and then you can do internal reviews as well as Elise talks about it.

Are there particular pockets within the organization which seem to be doing quite well and those which are not and then once you identify the risks conceptually based on relationship then you can hone in as Elise does very quickly on what are the specifics that I need to look at that have historically arisen in this relationship so that I can plan to address them in the future number one and then number two, what potential other activity occurs elsewhere which may be the kind of thing which could happen in my relationship lets say with the vendor. In other words look at other businesses as Elise says. You look at other businesses and see what complications they ran into and you sit back and say oh well we could have that potential with our vendors.

So what I try to do is give the - my colleague in-house a conceptual framework to understand the risks with knowledge and what the legal implications are and then they can take advantage as Elise does with the specifics of the business and the ability to sit down with the business people and really, really roll up their sleeves and make the real serious contribution to the day to day compliance which they have to do.

---

**David Simon** - *WeComply - President and Founder*

So Mark, do you as an outside lawyer do you get involved in the mitigation side of things are do you find you're mostly in a risk assessment?

---

**Mark Biros** - *Proskauer Rose - Managing Partner*

I don't know. The mitigation constantly comes up because more often than not my involvement in compliance issues and this part hopefully will talk a little bit more later is once there's been a problem identified and counseled - the in-house counsel

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

decides to do an investigation and decides to involve outside counsel in that investigation then you get to the whole question of how you mitigate the risk. You find out what the actual complication is and then you also sit down and talk to people about how to mitigate the risk.

I mean yes, there are lots of what I call conceptual general ideas that you can take as Elise has talked about training - further training specific training. Publications and distribution - more significant distribution of material to individual employees and then there are changes in business processes as Elise has talked about. If there's a new obligation you've got to devise a process to address the issue or if there's an issue which arises that historically has been a complication then you may have to sit down with the business person and say okay this is what we need to do to modify the business practice and process to help mitigate the risk here.

---

**David Simon** - *WeComply - President and Founder*

So lets say you've assessed your risk and you've put in place as best you can what you believe to be an effective compliance program. How do you - and say you've finished that and you've tied it up in a neat bow last year and now a year has elapsed and what are you going to do now to ensure that you have a program that's continually reevaluated and maintained as effective in the eyes of the law? Do you have any thoughts on that Elise?

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Well again, I think a large part of it goes back to the communication is that you don't want to have a rollout of a huge compliance program and there's lots of bells and whistles and balloons and aren't we wonderful and then it just kind of disappears. There's no more messaging about it. People don't see it considered as we go forward in the business. It's just something that's kind of out there and there's a compliance officer out there. They're not very involved in business decisions or processes. They're out there doing very abstract things. So I think again having tone at the top is so important in that - my consistency of the managing is important that it's part of business and I also think that you need to communicate that you have is a program not a series of discrete initiatives but something that is a program that is a part of the way you do business. It's coordinated. It's comprehensive and it's got acceptance by senior management and if people see that there's something that resources are actually being put into they'll understand that senior management finds it credible and they'll continue to do that.

In terms of keeping it vital you've got to keep evaluating every year your risks going back to the business people and updating the assessment and then functionally there's a way - this won't work for every company but in some companies depending on a structure it may make sense to have someone in the various business units or functional units be a compliance person for that business unit because it makes them an advocate for you and there in there everyday with the business and they can be supporters who really make sure that the compliance is part and partial of everyday business.

So you're basically placing compliance on the same level as other business issues by placing - by having someone in the business who has some responsibility for kind of teeing issues up and rolling them up to the compliance function if it's a corporate function so that's at least one way to think about doing it.

---

**David Simon** - *WeComply - President and Founder*

What do you advise your clients Mark in terms reviewing your compliance programs periodically to make sure they're as well as they can and should?

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

**Mark Biros** - *Proskauer Rose - Managing Partner*

I'm going to address that but I want to follow-up with something that Elise said which is really, really critical to everyone because often times in-house counsel has difficulty - may have difficulty in sitting down and discussing the senior management commitment of resources and authority et cetera and as Elise noted that is absolutely important and critical because actions speak louder than words. The sentencing guidelines require in evaluating whether a program is effective that the individual responsible will be given adequate resources and appropriate authority and direct access to the governing authority or an appropriate subgroup with the governing authority.

So in other words, it is absolutely important that actions speak louder than words. That we have the tone at the top but that the person who is responsible for it can demonstrate to the employees not just through training and communication but through enforcement and follow-up efforts as Elise has talked about that the program is vital and it's alive. It is not just the situation where you put a little poster up on the front door and you say do good today. That's well and fine but the point is the program has to have meat and substance to it.

Now the real critical issue is and the guidelines again sort of mandate this even though there are still guidelines is that the organization has to take reasonable steps to publicize the system, to make sure that the organization's compliance program is being followed and that it is effective and what that means is - because most programs, well run programs have documented entries for the allegations that come in to the compliance officer so that there's a log book of what kind of issues have come in you should be able to go to that log book and sit down and say okay, last year there were 205 allegations which made their way to the compliance officer.

What are the next steps - what did the compliance officer do whether it's the number one compliance officer or whether Elise points out is that compliance officer delegated in a particular business group. How is that issue handled? What was the effect? What efforts were made to identify further the complication or issue when investigative efforts were made and then was there a problem found? How was it addressed? Not just by the compliance officer but it's to the extent that the compliance officer has rendered a recommendation to the business unit as to handle something you take that next step and say okay how was that handled? Was the recommendation of the compliance officer followed by the business unit and indeed the guidelines as of November 2004 require the governing authority and high level personnel to make sure that the program that they have in place actually works and so there's a requirement for follow-up efforts and from monitoring and evaluating the effectiveness of the program so that you just don't have what is called a "paper program."

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

This is a follow-up to that. The compliance officer should have access to the Board of Directors. I mean it may not be a direct report but they should have a strong relationship there and to the extent there is some resistance by management it's the obligation of the compliance officer the board understands what is going on.

---

**Mark Biros** - *Proskauer Rose - Managing Partner*

I mean that's true. Like I said I mentioned a little while ago In Re Care Mart which is a Delaware Chancery court case in 1996 and that was a situation where in a securities settlement where the court there discusses the obligations of a board of directors and they talked about the fact the board of directors has as part of its obligation the obligation to institute a program to identify, detect and address alleged improper conduct and as Elise says, direct access to the governing authority is critical to that and the new sentencing guidelines from November and I can quote it says:

"the individual with operational responsibilities shall be given adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority," consistent with what Elise said but there has

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

to be that kind of direct access to the governing authority or the audit committee of the board of it's a subgroup or something like that. Her point is very well taken.

---

**David Simon** - *WeComply - President and Founder*

So lets talk about what happens when you've used your best efforts to put in place a good program but a compliance issue arises nonetheless? So Elise how do you go about deciding whether it's a critical issue or not and whether it's something you can handle internally or need to refer to outside counsel for investigation?

---

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Well my very first question is is the company exposed to liability? It's an issue that impacts the company's exposure as opposed to impacting an individual and if so is that liability criminal or civil? If it's criminal you immediately know you've got a serious issue on your hands and there are obviously levels of criminal fines and criminal penalties but once it's criminal you know you've got to figure out how to deal with it quickly.

If it's civil obviously it can still be quite a significant issue depending on the nature of the client's issue but that's like your very first cut. If the issue isn't an issue where the company's exposed that perhaps maybe includes harm to the company for example embezzlement by an employee it may not appear to be critical but then you still have to look past that and say well okay how did that happen? Is it an internal controls problem that I need to fix? A lot of what you do see when you're in this job ends up being more of an HR related issue a management leadership kind of issue and a lot of those things can very well be handled through human resources departments or a combination of coaching and disciplinary action depending on the severity of the issue but even here even if it's an HR issue it doesn't seem to be critical you start looking for patterns because something that may start out as a discrete issue could blossom into something bigger if people aren't paying attention.

With respect to whether I'd go internal or external if there's criminal activity you're best served by going outside to someone with significant white collar experience. You will very rarely have within an in-house legal department the resources or expertise to conduct a proper in-house investigation into those kinds of matters.

Similarly if the issue deals with senior management you're likely going to have to format the investigation to an outside firm in order to preserve just even the appearance of independence. You could have DC who's completely strong and certainly wouldn't take any guff and conduct a very independent investigation but there's still going to be an appearance issue. If lets say it someone at the DCs level or above - and then when you go outside you've got to make sure you pick a firm that sufficiently independent that doesn't have such close links to the management that they can't conduct an independent investigation.

With issues of a civil nature you know it may be possible to do some of it in-house if there's sufficient expertise and resources and it's not a huge vast issue but if there's going to be significant depositions, document productions and things like that there are very few again very few in-house legal departments who can manage that kind of process. You may be able to conduct the initial investigation internally but you're probably going to end up having to go outside to have someone help you and if you're going to deal with outside regulators you are probably most often best served by getting outside lawyers who can navigate the agencies and the regulatory bodies and who are well versed in the relevant area.

Internal investigations like embezzlement or things like that - ethical lapses can obviously be handled better in-house and you can usually leverage the resources in the company which is your internal audit and your human resources department. So those are generally kind of how you would cut it I think.

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

**David Simon** - *WeComply - President and Founder*

I know you have some thoughts on that Mark.

**Mark Biros** - *Proskauer Rose - Managing Partner*

Well I echo with what Elise says and let me just explain to you one other thing. The fact that you may and if you handle it inside because you have the expertise and you have the time and it's a matter which is subject to those comments which Elise made is more appropriate for in-house focus of attention than that's fine but if you do go outside keep in mind that you remain - the general counsel remains a critical partner in that legal team and it's important that when you're dealing with outside counsel that you have a good relationship with them and that you in a sense have a significant role in the investigation even though you may not be doing the day to day activity and the reason for that is because you more than even the outside counsel unless they're standardized counsel you understand the business and so you're going to be able to better put in the context certain activity that maybe outside counsel doesn't.

I mean I always find my strongest ally when I do these things. Is he good rock solid DC who understands the business. Knows how to get things done. Wants the independence but is going to roll up her sleeves and - so to speak and get involved in it. So echo what Elise says because understands it from the in-house. From my perspective I count on that because the insight that you have and that GCs have helps be bring to bear my viewpoints about what kind of conduct is involved but if it's really going to be an issue - if it's a human resource issue yes you could probably handle it with an HR. If you see it as an administrative sanctioned be it by some federal or state agency then subject to Elise's good point which is, do you have the expertise in-house to navigate that agency you may be able to do that inside as well provided you have that expertise.

In the straight civil context where you're going to be sued for breach of contract or possibly wrongful termination and you've got to do an investigation and it's a manageable piece of litigation and as Elise says you would probably do that and you have the expertise you could do that in -house. If it's going to be a significant piece of litigation both in terms of risk to the company's financials or a number of depositions and document production and you don't have the expertise then you need to go outside.

When it comes to potential criminal matters I uniformly tell companies go outside for that because it's very difficult to sit and talk with a person who's a close colleague where you may in your mind as a general counsel think you know this conduct is not hangnaded close. This is a real complication but you work with this person all the time. It's very difficult to sit down with them and say your liberty is at stake and you need to address it in a certain way.

So the real critical point for me is one, consistent with what Elise says because she's got the right framework on how to make these decisions is being able to recognize when something's going to blow up in your face so that you need to go outside and what you can handle inside.

**David Simon** - *WeComply - President and Founder*

So from the prosecutors side of the table how does the prosecutor determine whether or not to charge a crime if the prosecutor thinks that a company has engaged in criminal activity does that mean that the compliance program was ineffective by definition?

**Mark Biros** - *Proskauer Rose - Managing Partner*

Well it obviously didn't work in that particular instance. There's no question about that but we all recognize hopefully and even prosecutors recognize although sometimes I wonder when I sit there that the best program in the world will work and it will work perfectly provided no human beings are involved. You know we make mistakes. So what a prosecutor does when he sits down or she sits down and tries to analyze the situation and she'll say okay how high up in the organization was the culpable conduct engaged?

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

So in other words the CEO, CFO. That means there's a greater likelihood they're be prosecution and criminal sanctions. That's number one.

Number two. How pervasive was the conduct among management at any particular level? The more pervasive it is the more that evidence is what Elise would say would be the absence of the tone at the top and there's culpable conduct.

The next thing they'd look at is what is the - how serious a complication or how serious an injury is it to the particular victim and more often than not in a corporate context unless you're talking about environmental issues where people are actually physically injured the organization is involved in some kind of financial shenanigans which hurt people. So the dollar value of the impact - of the damage and then lastly even if the dollar value per incident is not great, if there are a significant number of victims you know thousands of consumers then of course there's a greater likelihood that the government is going to seek some kind of criminal process sanction but what it's going to do is it's going to sit down and do basically what Elise has talked about and what I've talked about.

They're going to sit down and say okay here are the guidelines. Has this program been created and monitored and implemented appropriately? In other words, are there standards - good ethical standards in place? Are there procedures to detect and identify potential criminal conduct or violations of regulatory? Is there periodic communication? Training as Elise says to remind people that this is not just a paper program, a little symbol that we put on the wall. Has there been an evaluation of the effectiveness of the program periodically?

Again, things that Elise has talked about and we've talked about. Has there been enforcement and do people actually get sanctioned for violating the dictates for the program they look for that and then lastly what does the corporate organization or what does the business do when they do find problems? What kind of follow-up efforts have been undertaken to eradicate, mediate, the type of conduct that's been found.

So there's an overall evaluation of the program and I will tell you now a days they are going to look to these particular guidelines - specific guidelines because most of these conceptually are all there and can you imagine sitting across the table where some prosecutor says you know I'm not going to give you credit. I'm going to charge you because my view is there are inadequate resources been committed to this program. So there a lots of things that go into the determination of effectiveness much of which require the personal touch of individuals like Elise in-house but the guidelines give you some examples.

Keep in mind if you're sitting across from a prosecutor discussing these things obviously the program didn't work in this one instance so you sit down and say look it's a great program and we tried to get rid of the human being - now look we tried to get rid of the human beings in the business but for some reason they wanted to be employed and we kept them and then we kept them and a couple of people made a mistake. They stubbed their toe as the way I refer to it. There are bumps in the road. Human error. Error in judgment. All those good words which we on my side of the table plead to routinely.

---

**David Simon** - *WeComply - President and Founder*

Let me use that as a segway to a question that we got. Lets say you've only got 12 of those human beings working for you and you're the GC of a small company that's in the process of going public. Given the size of your company is a compliance program a requirement now or can you wait until it gets bigger?

---

**Mark Biros** - *Proskauer Rose - Managing Partner*

I guess my answer to that would be to pose a question. Are you absolutely certain that those 12 human beings do the right thing everyday and if your answer to that is yes and you're willing to stake your employment on it and the success of your company hey you won't need a compliance program but the fact of the matter is my suggestion would be develop something. It doesn't have to be as extensive as IBM or Dupont or GE but you have to have something at the early stages of the development

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

of that company to make sure that that tone at the top which Elise mentions is set from the very beginning and keep in mind once you go public then you've got a lot of SEC obligations which can cause stubbing of the toe very frequently.

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

And yes scale is obviously the big issue there. You're not going to have some very elaborate kind of program. It may be more making sure you do training on the right - you know - it's a small company and you're going to know all the issue that you see. I mean you're going to be intimately involved in the business. You're going to know where your legal risks are and you need to make sure that those other 11 people do to.

Frankly, if they don't have that knowledge kind of at the beginning I find that sometimes these small companies is really hard to get them to understand how important it is. There're like oh we were doing great. We went public and we don't have to worry about this stuff. We're doing just fine. We know we're doing and it's just a lack of awareness sometimes can get in your way as you scale a business so I do think it's important to have that communication, a conversation with the other employees and say okay these are the risks I see. These are what we need to do to mitigate them and these are the risks we see as we grow bigger. Especially I think that's something to start thinking about when you're small.

**Mark Biros** - *Proskauer Rose - Managing Partner*

Let me echo again another great point Elise made. Many of the complications I've come across in my years of doing internal investigations is because a previously private organization has gone public or been purchased by a public company and the people who are use to dealing in a solely - in a private setting are not in tune with the dictates and requirements of a public company and so what Elise says is absolutely critical. At the various early stages a culture of compliance, tone at the top should be instituted.

It doesn't have to be in like I said - like she says. It doesn't have to be in a program where you've got 11 employees all doing work. One general counsel and you go into the CEO and say now I need to hire 4 compliance people. That's not going to work. Tailor it as she says to what your concerns are within a small organization.

**David Simon** - *WeComply - President and Founder*

So in our last few minutes I want to take a step back and come at this from the issue of ethics. We've been using the term compliance for the most part but the amended guidelines have a new focus on ethics. How should these programs change based on this new focus and is there room in corporate America for the golden rule for just doing the right thing? Elise.

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Well when I think about compliance I think of it as doing the right thing for the right reasons or the right thing is to find out the law or regulations. The right reason is making sure you don't get in trouble right? Ethics is beyond that. It's doing the right thing for the right reason or the right thing. It's just behavioral. It's like David what he said you know the golden rule and I think - I do think there's room for it. It basically means you can look at yourself in the mirror when you wake up to go to work everyday and know that you're acting in a way that if your behavior was put in front of any third party neutral observer would be viewed as correct and acceptable behavior and whenever you get to a point I think where you're having qualms about what you're doing or being asked to do if you really aren't sure it's the right thing it's a good indication it won't be.

If you had no doubt the behavior was proper you wouldn't be agonizing over it right? So I think there is room for it. People want to work in an environment where they trust the people they work with. They want to work in an environment where people are respected and treated with dignity and they're doing things to benefit not necessarily their own personal agenda but making

Sep. 08. 2005 / 1:00PM, \*\*ACC - Effective Compliance and Ethics Programs: Guidelines for Implementation and Maintenance

the company successful. So there's definitely room for it. I think it's an imperative. It's harder sometimes I think because it is a little bit more aspirational and you don't have a club that you can wield people and say if you don't do it the company's going to face XYZ, but I think in terms of building a culture where people want to work it's critical.

**David Simon** - *WeComply - President and Founder*

Has it impacted the way you shape your companies compliance and ethics program?

**Elise Kirban** - *Symbol Technologies - VP, Deputy General Counsel and Chief Ethics and Compliance Officer*

Yes to the extent that we talk about that. We talk about we want to go beyond just absolutely what's required by the letter of the law. We want to be more of a leader and be a great place to work. A great company that people want to do business with because they think we behave the right way. I mean customers want that too right? So that's definitely something - and you know obviously it's also a factor to be under (inaudible) guidelines you think about that as well. So there's definitely room for it. You need to be a critical part of it.

**Mark Biros** - *Proskauer Rose - Managing Partner*

Every entity or organization or category of individual with whom a organization deals be it customer, vendor, employees, suppliers, government whatever wants to do business with an honorable company and it's important for companies to have that honorable reputation. Ethics is critical. The short term activity to gratify or add to or augment the bottom line today will renounce to your detriment in the future and so I echo Elise's comments. I couldn't say it any better. It's a critical part of doing business in today's world and always ethics is good business.

**David Simon** - *WeComply - President and Founder*

I think that's a great place to leave it. That's all the time we have. I'd like to thank you both Elise Kirban and Mark Biros very much for your participation. I hope those listening have found this discussion useful and this concludes today's webcast. Thanks very much.

#### DISCLAIMER

Thomson Financial reserves the right to make changes to documents, content, or other information on this web site without obligation to notify any person of such changes.

In the conference calls upon which Event Transcripts are based, companies may make projections or other forward-looking statements regarding a variety of items. Such forward-looking statements are based upon current expectations and involve risks and uncertainties. Actual results may differ materially from those stated in any forward-looking statement based on a number of important factors and risks, which are more specifically identified in the companies' most recent SEC filings. Although the companies may indicate and believe that the assumptions underlying the forward-looking statements are reasonable, any of the assumptions could prove inaccurate or incorrect and, therefore, there can be no assurance that the results contemplated in the forward-looking statements will be realized.

THE INFORMATION CONTAINED IN EVENT TRANSCRIPTS IS A TEXTUAL REPRESENTATION OF THE APPLICABLE COMPANY'S CONFERENCE CALL AND WHILE EFFORTS ARE MADE TO PROVIDE AN ACCURATE TRANSCRIPTION, THERE MAY BE MATERIAL ERRORS, OMISSIONS, OR INACCURACIES IN THE REPORTING OF THE SUBSTANCE OF THE CONFERENCE CALLS. IN NO WAY DOES THOMSON FINANCIAL OR THE APPLICABLE COMPANY ASSUME ANY RESPONSIBILITY FOR ANY INVESTMENT OR OTHER DECISIONS MADE BASED UPON THE INFORMATION PROVIDED ON THIS WEB SITE OR IN ANY EVENT TRANSCRIPT. USERS ARE ADVISED TO REVIEW THE APPLICABLE COMPANY'S CONFERENCE CALL ITSELF AND THE APPLICABLE COMPANY'S SEC FILINGS BEFORE MAKING ANY INVESTMENT OR OTHER DECISIONS.

©2005, Thomson Financial. All Rights Reserved.