

Compliance & Ethics *Professional*

March/April
2012



A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

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by Roy Snell

What does your compliance officer know that you, the CEO...don't?

This is not to imply that compliance officers are smarter than anyone else. It's just that compliance officers have a unique seat in your house. Your other advisors might have a predilection for finding things that "make your day." The compliance and ethics officer has been asked to prevent, find, and fix problems that may not "make your day." Dealing with the problems when they are small is, of course, preferable. However, dealing with problems even when they are small can be stressful. Your other advisors may not know how important it is to deal with the issue early.



Snell

They may not always tell you what you need to know.

It's not that your compliance officer doesn't want you to smile. In fact, I am sure they live for those moments. We published the first-ever compliance professional stress survey report just yesterday. About 60% of compliance professionals have awakened in the middle of the night and/or wanted to quit in the last twelve months, all due to job-related stress. And it's pretty clear from the results that the CEO's support and interest in what they know affects their stress level. So asking them what

they know might just help on two fronts. You will be more aware of current issues, and you might help their stress level by being involved.

They know about more problems because they are looking. They know about more problems because employees trust them or believe they might do something about the problem. As a CEO myself, I know I have to work at drawing things out of some of my advisors. Some advisors are reluctant to tell you bad news. If you want to know where ethical or regulatory trouble lurks, there is no one else in your organization with more information than your compliance officer.

Most of all, they know which problems won't go away or get better with age. They know the price you pay when your advisors suggest you choose to deny and defend or look the other way. They know the benefits of preventing, finding, and fixing problems. They know the damage that legal and ethical problems can cause. No one cares more about this. No one knows more about preventing, finding, and fixing problems than the compliance officer. What do they know that you don't know? They know just what you are paying them to know. *

Contact **Roy Snell** at roy.snell@corporatecompliance.org



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Compliance & Ethics Professional

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Compliance & Ethics Professional (CEP) (ISSN 1523-8466) is published by the Society of Corporate Compliance and Ethics (SCCE), 6500 Barrie Road, Suite 250, Minneapolis, MN 55435. Subscriptions are free to members. Periodicals postage-paid at Minneapolis, MN 55435. Postmaster: Send address changes to *Compliance & Ethics Professional Magazine*, 6500 Barrie Road, Suite 250, Minneapolis, MN 55435. Copyright © 2012 Society of Corporate Compliance and Ethics. All rights reserved. Printed in the USA. Except where specifically encouraged, no part of this publication may be reproduced, in any form or by any means, without prior written consent from SCCE. For subscription information and advertising rates, call +1 952 933 4977 or 888 277 4977. Send press releases to SCCE CEP Press Releases, 6500 Barrie Road, Suite 250, Minneapolis, MN 55435. Opinions expressed are those of the writers and not of this publication or SCCE. Mention of products and services does not constitute endorsement. Neither SCCE nor CEP is engaged in rendering legal or other professional services. If such assistance is needed, readers should consult professional counsel or other professional advisors for specific legal or ethical questions.

VOLUME 9, ISSUE 2

Almost half of US workers have observed misconduct

The Ethics Resource Center announced in January the results of its National Business Ethics Survey. In its January 5 press release, it stated “Over the past two years, 45 percent of U.S. employees observed a violation of the law or ethics standards at their places of employment. Reporting of

this wrongdoing was at an all-time high—65 percent—but so too was retaliation against employees who blew the whistle: more than one in five employees who reported misconduct they saw experienced some form of retaliation in return.” To download the complete survey results, visit www.ethics.org/nbes *

OECD criticizes corruption enforcement in three nations

The Organization for Economic Development’s Working Group on Bribery released three reports in January to chastise three nations for poor corruption enforcement. The international group urged Japan, Italy, and Switzerland to do more to implement the OECD’s Convention of Combating Bribery of

Foreign Public Officials, an agreement that all three countries had previously signed. The group asserted that Japan and Switzerland each had only completed two prosecutions since signing the convention, and Italy had only sanctioned three companies and nine individuals, after bringing 60 defendants to trial. *

“Over the past two years, 45 percent of U.S. employees observed a violation of the law or ethics standards at their places of employment...more than one in five employees who reported misconduct they saw experienced some form of retaliation in return.”

Ex-SEC official fined for taking job with alleged Ponzi schemer

The complex fraud case of Robert Allen Stanford is far from resolution, but one segment of the case has concluded. The Justice Department reported in January that a former Securities and Exchange Commission official has agreed to pay a \$50,000 fine for working with the alleged Ponzi schemer after allegedly taking part in SEC decisions not to investigate him.

Spencer C. Barasch, a lawyer who was head of enforcement in the SEC’s Fort Worth regional office, left the SEC in 2005 and went on to briefly represent Stanford in an agency probe. According to the SEC’s Inspector General, that was after Barasch had been involved in SEC decisions not to pursue warnings about Stanford. Barasch has denied any allegations of wrongdoing, the Justice Department has reported. However, under a civil settlement, he agreed to pay the maximum fine for a violation of the statute. *

Read the latest news online ► www.corporatecompliance.org/news

SEC changes policy on admission of guilt

The US Securities and Exchange Commission announced a fundamental policy shift in January regarding its practice of allowing defendants to settle fraud charges with only a fine payment. In a January 6 announcement, Securities and Exchange Commission Enforcement Director Robert Khuzami stated that

corporations and individuals will no longer be able to assert that they “neither admit nor deny” civil fraud charges, if they have also admitted to or were convicted of a criminal violation in a parallel criminal case. The policy will also apply to defendants who enter deferred prosecution agreements with criminal authorities. *

UK fraud increases 50 percent to \$3.25B

An analysis of publicly reported cases of fraud in the United Kingdom reveals that it rose to £2.1 billion (\$3.25 billion) in 2011, a 50 percent increase over 2010. The 2011 FraudTrack report, produced by the accounting firm BDO LLP, based its analysis on cases of fraud of more than £50,000 in publicly available

reports, including the UK’s national, regional, and local press.

Tax fraud, which accounts for 36 percent of the total, was significantly higher than other forms. Employee fraud accounted for 10 percent, management fraud for 5 percent, and corruption for less than 1 percent.” *

Regulators approve Dodd-Frank investor protections

The Commodity Futures Trading Commission approved in January new rules designed to rein in banks and their derivatives trading efforts. The new regulations include requirements that customer funds must be stored in separate accounts from an institutions’ own collateral. The rule targets brokerage firms and derivative clearing organizations. “Segregation of customer funds is the core foundation of customer protection in the commodity futures and swaps markets,” said agency Chairman Gary Gensler. The change occurred shortly after the collapse of MF Global, in which \$1.2 billion in customer money disappeared, and nearly a third has still not been located. *

Thank you!

Has someone done something great for you, for the compliance profession, or for SCCE? If you would like to give recognition by submitting a public “Thank You,” please send it to liz.hergert@corporatecompliance.org. Entries should be 50 words or fewer.



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SCCE *conference* NEWS

National conferences

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www.complianceethicsinstitute.org

Higher Education Compliance Conference, June 3–6, Austin, Texas: Make sure to register before Wednesday, April 25 to save \$250.

www.highereducationcompliance.org

Academies

Academies address methods for implementing and managing compliance programs based on the Seven Element Approach. Courses will address subject matter in each of these areas and better prepare interested parties for the CCEP exam. The Academy is designed for participants with a general knowledge of compliance concepts and anyone working in a compliance function.

www.corporatecompliance.org/academies

Regional conferences

SCCE's regional conferences are one-day programs designed to provide the hot topics and practical information that compliance professionals need to create and maintain compliance programs in a variety of industries. The 2012 regional conferences include:

- ▶ Chicago, April 27
- ▶ New York, May 18
- ▶ Anchorage, June 15
- ▶ San Francisco, June 22
- ▶ Atlanta, October 12
- ▶ Houston, Nov 2

www.corporatecompliance.org/regional



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Thank you!

“Thank you to all the SCCE staff, but especially the meeting planners for their continued hard work and dedication to delivering the best compliance and ethics programs available anywhere!”

—Art Weiss

Find the latest conference information online ▶ www.corporatecompliance.org/events

SCCE *website* NEWS

Contact Tracey Page at 952-405-7936 or email her at tracey.page@corporatecompliance.org with any questions about SCCE's website.

Corporate Compliance and Ethics Week

May 6–12 marks the 8th annual Corporate Compliance and Ethics Week! This is a great time for your office to set up a new compliance



training program, raise awareness, and thank employees for their dedication to compliance and ethics. SCCE has a complimentary web conference and downloadable posters, and you can also purchase products online and get great

ideas to educate your office on compliance and ethics. For more information visit:

www.corporatecompliance.org/candeweek

Using incentives in your compliance and ethics program

A new addition to SCCE's resource center is Joe Murphy's paper on using incentives in your compliance and ethics program. It provides a road map for organizations that understand, yet struggle with, adequate control of incentives. To download a free copy, check out the Issues & Answer's section under the Resources tab.

www.hcca-info.org/incentives

Third-party essentials

Do you know the risks posed by your agents and contractors? *Third Party Essentials: A Reputation/Liability Checkup When Using Third Parties Globally*, written by Marjorie W. Doyle, is now available for download on SCCE's website. This complimentary booklet includes a checklist to test the health of your organization's third-party controls.

www.corporatecompliance.org/compliancebasics

Web conferences

Several web conferences covering many different topics are coming up soon. You can register online for upcoming live webinars. Can't make the time commitment? Past web conferences can be viewed instantly by streaming the recorded session to your computer. It's a great way to earn 1.2 CEUs towards your certifications and catch up on the latest compliance issues.

www.corporatecompliance.org/webconferences

Viewing your CEUs online

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www.corporatecompliance.org

SCCE's stress survey results now available

A new survey sponsored jointly by SCCE and the Health Care Compliance Association reveals that the stress levels for compliance and ethics professionals are very high. Overall, 58% of survey respondents reported that they often wake up during the middle of the night worrying about job-related stress and 60% report having considered leaving their job in the last 12 months due to job-related stress. Download a complimentary PDF of the survey results from SCCE's website.

www.corporatecompliance.org/surveys



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SCCE^{net} NEWS

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 - Competition Law and Antitrust Network
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 - Compliance Risk Management
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 - European Compliance and Ethics
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 - Higher Education Forum
 - Investment Management Forum
 - SCCE Compliance Academies
 - Social Media Compliance
 - Social Responsibility Forum
 - Utilities and Energy Network

Popular discussions

- **2011 National Business Ethics Survey:**
<http://corporatecompliance.org/NBES>
- **Handbook vs. Policies vs. Code:**
<http://corporatecompliance.org/HPC>

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► **Scott Killingsworth** has joined the Board of Governors of the Center for Ethics and Corporate Responsibility at Georgia State University. A unit of the J. Mack Robinson College of Business at Georgia State University, the Center integrates the best insights of scholars and business people to develop strategies for addressing the complex ethical challenges faced by organizations. Formerly the Southern Institute for Business and Professional Ethics, the Center was established in 1993 and became a part of the Robinson College in 2007.

► **Chris DePippo** has been appointed Vice President, Chief Ethics and Compliance Officer at CSC, a leading global IT services company in Falls Church, Virginia. DePippo will report to the Audit Committee of the CSC Board of Directors and, for administrative purposes, to William Deckelman, the company's Vice President, General Counsel. Michael W. Laphen, CSC Chairman, President and CEO said, "The Board of Directors and our executive management have been very impressed with his passion and capabilities in the disciplines of ethics and compliance, and we are confident he will provide extraordinary

leadership as we continue to strengthen our commitment to building and maintaining a culture of integrity throughout CSC." DePippo joined CSC in 2008 and holds an undergraduate degree from Cornell University and an MBA from George Washington University.



► The Board of Directors of Eli Lilly and Company has elected **Katherine Baicker**, PhD as a new member, effective December 12, 2011. Baicker is Professor of Health Economics in the Department of Health Policy and Management at the Harvard School of Public Health. She is also a Research Associate at the National Bureau of Economic Research and an elected member of the Institute of Medicine. As a member of Lilly's board,

Professor Baicker will serve on the Public Policy and Compliance committee. She will serve under interim election and will stand for election by Lilly shareholders at the company's annual meeting in April 2012.

► DCG, a leading provider of corporate services, has made two new appointments to strengthen its real estate and compliance teams. **Andrew McNulty** has been appointed Senior Manager in DCG Real Estate. Andrew is a member of the Royal Institution of Chartered Surveyors and is also a director on a number of Jersey companies with exposure to commercial real estate in the UK. **Paul Martlew** has been appointed Compliance Manager. His role includes monitoring and reporting on internal procedures and regulation across DCG's three business units, Corporate Services and Capital Markets, Real Estate, and Fund Services, as well as internal audit for DCG's Luxembourg office. Paul joined DCG in 2009 as assistant compliance manager and has over 8 years' experience in compliance, including the prevention of money laundering and combating the financing of terrorism. Paul holds the International Diploma in Compliance and

the International Diploma in Anti-Money Laundering. He is a Fellow of the International Compliance Association and a Member of the Jersey Compliance Officers Association.

► **Maggie Wetzell** has been appointed Vice President of Contracts and Compliance at Oasis Systems in Lexington, Massachusetts, a leader in Information Technology, Systems Engineering, Enterprise Applications, and Program Management Services to the Department of Defense. Maggie will be responsible for supporting all aspects of new proposal generation, including contracts, sub-contracts and pricing, as well as post award contract compliance. She is a retired senior executive, GS-15 with 38 years of experience in Contracting and Program Management with the Department of the Air Force and 7 years of Program Management/Contracting in the private sector.

Received a promotion? Have a new hire in your department? ►

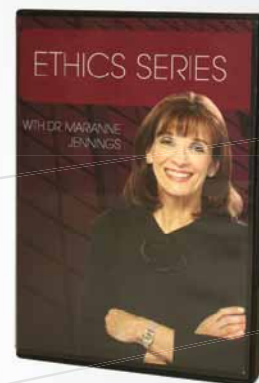
If you've received a promotion, award, or degree; accepted a new position; or added a new staff member to your Compliance department, please let us know. It's a great way to keep the compliance community up-to-date. Send your updates to liz.hergert@corporatecompliance.org.

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- **"Ethical Leadership: Tone at All Levels"** explores how employees can handle the tension between increasing an organization's bottom line and protecting its good reputation. (20 min.)



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SOCIETY OF CORPORATE
COMPLIANCE AND ETHICS



PICTURED FROM RIGHT TO LEFT

David C. Humphreys

President and CEO

Art Weiss

*Chief Compliance
and Ethics Officer*

Robert Bradley

*Vice President and
General Counsel*



an interview by Art Weiss

Meet David C. Humphreys and Robert Bradley

AW: David, please tell us a bit about TAMKO and yourself.

DCH: At the age of 69, my grandfather E.L. Craig started TAMKO in 1944 with a single roofing line, housed in a former street-car barn in Joplin, Missouri. Eight years later, he suffered a stroke and my grandmother took over the leadership of the company. Later, my mother managed the company until she left to raise her family, so that my father became president in 1960. He led the company's growth for the next 33 years, until his death in 1993. I succeeded him the next year. My

mother continues today to serve as Chairman of the Board.

Over the course of TAMKO's 68 years, we have continued to grow both in the number of manufacturing facilities and in our product lines. In addition to asphalt roofing products, such as shingles and rolls, we also produce waterproofing, window and door wraps, composite decking and railing systems, and cements and coatings. In addition, we are very vertically integrated as we manufacture a number of our raw materials, such as recycled felt paper, polyester and fiberglass mats, and

fiberglass fibers, and we process our own asphalt and ground limestone.

My professional background is as both a trial defense and corporate tax lawyer. Complex regulatory and statutory construction was part of that career. Understanding that there need to be clearly defined black-and-white boundaries, but recognizing that there are shades of gray, is important in being successful in attaining compliance. Our “between the hash marks” compliance metaphor reflects the need for clearly defined boundaries in order for employees without legal training to succeed at real world compliance, as we want to stay in the center of the field where the lights are bright and the rules are most clear, and away from the sidelines where the visibility is not as good and the opportunity for bias on the part of regulatory referees is more likely to find us out of bounds.

Taking on the top job at TAMKO was a very real change in responsibility and necessitated an adjustment in my risk tolerance. As a lawyer, I had been programmed to avoid all risk possible. In the world of business, risk is part of the daily challenge and I had to learn to accept some risk of failure. And as “the client” instead of the lawyer, I had to learn to live with some risk. Compliance is one aspect of risk that must be managed.

AW: TAMKO believes in a free market economy, continuous improvement, Six Sigma, and follows the Deming principles. How do these principles mesh with compliance?

DCH: If you look at compliance from the total quality management perspective—we’ll call it a Deming or Six Sigma perspective (because Six Sigma is an extrapolation of

“As a lawyer, I had been programmed to avoid all risk possible. In the world of business, risk is part of the daily challenge and I had to learn to accept some risk of failure.”

Deming with enhanced tools and people with high-level skill sets)—you will understand that all processes are subject to variation from at least five different sources, including people, and that it is critical as to what that variation is, how wide it is, and where it comes from. Then you have to learn how to figure out how to minimize the variation.

So in the context of compliance, we also focus on people and our processes. For example, in the environmental compliance, variation can come from machines from normal wear and tear, from breakdown, from defects in the machines themselves, or in the manner in

which they are operated, installed, or maintained. As such, environmental control equipment can fail or even just quit working as the result of a power outage. We try to avoid those failures by understanding our process that affect environmental equipment and try to add backstops to our processes

to avoid failures. When those failures happen, environmental noncompliance can be avoided despite equipment failure. If the environmental controls fail, production automatically shuts down, which maintains compliance. As we have come to map out and understand our processes better, we can now see the possibility of implementing failsafe controls.

It’s the same thing in terms of personal compliance: Understanding the existence of variation in human behavior led us to rethink how we manage issues, like avoidance of sexual harassment. We now see training as providing bright-line boundaries as to what behavior is not acceptable. Knowing that people are variable, we accept that training alone is not sufficient, because there are too many opportunities for miscommunications

between the trainer and the trainee; trainees don't understand all of what they are hearing and they certainly don't retain all they hear. And, whatever they did learn will erode over time. More training helps, but it never gets you to 100% understanding. That tells you a couple of things: One is that training has to be very simple in providing very bright lines for people, so they don't have to make judgment calls, so they know what's good and what's bad. I think the other is to provide all sorts of mitigation mechanisms, so that bad behavior, if it happens, is reported quickly and handled quickly. You have to expect and trust people to do what they should do, but when they fail, you need to act quickly to mitigate the failure.

AW: What does it mean to place people into a state of self-control and how does that benefit compliance?

DCH: The state of self-control means knowing what you're doing and what you're supposed to do. The training really does that; it puts people in a state of self-control. But again, I think there would need to be very bright lines given. You can't expect to train people to all be experts. We don't want our employees playing outside the hash marks, near nebulous boundaries that may turn out to be shifting around. So, to me, self-control comes through training continuous improvement by example of the failures.

AW: How would you describe TAMKO's culture to someone outside the company?

DCH: I would say our culture is one where people feel that they're given the responsibility to do their jobs, the freedom to do their jobs, and they're held accountable for that. But, I think in large part, if I had to say, it's a cultural trust where we trust people to do their jobs and they trust us to take care of them in return. And it's also one where we expect people to take the initiative to come to work, get their jobs done well, and perform as well as they're expected to, or better. It's not

a culture where people who need prodding or people who feel entitled do well. It's very much a culture where the expectations are high for performance.

AW: TAMKO is privately held, and doesn't do business in foreign countries. TAMKO is not subject to many of the government regulations and laws that others are, and yet you decided to have a compliance officer. What drove that decision?

"You have to expect and trust people to do what they should do, but when they fail, you need to act quickly to mitigate the failure."

DCH: It had nothing to do with being a potential target or not. I think it had everything to do with having an additional resource to focus on compliance, as contrasted with the Legal department, which has a whole other range of responsibilities. So, focusing on compliance is a broad spectrum in itself, but I think it's a better way to attack. I think it's a better way to make compliance an important aspect of how we do business, separate in its own right, separate from the Legal department. And even though we're relatively small and we're privately held (so we don't have SEC reporting obligations or FCPA issues to deal with since we don't operate in foreign countries), still the risks of non-compliance in a variety of areas we do operate in are significant, not in terms of how many laws or regulations we may be subject to, but just because the severity of the penalties for non-compliance have an even larger proportional effect on a smaller firm. If we do an outstanding job in environmental compliance and employment law-related compliance, and I think we do, then the risks that we do face are minimized.

AW: TAMKO has a saying, “100% compliance, 100% of the time.” That’s more than just a goal or a slogan, isn’t it?

DCH: That’s the minimum, so yeah. I mean, if we’re going to have compliance, we need to be compliant. You can’t be partially compliant.

AW: Can you explain the concept of operating “between the hash marks?”

DCH: As I mentioned before, the concept of operating between the hash marks is a football metaphor based on the fact that if you play between the hash marks, that’s where the lights are the brightest. Not only the referees, but everyone in the stands can see where you are, and you know where you are as a team. The closer you get to the sidelines outside the hash marks, the closer you come to the boundaries. And in football, if you step on the line, you’re out of bounds. In the world of compliance, if you step on the line, you may have severe penalties.

The other thing is that, in the business world, you can be running down the field on a breakaway for great success (a touchdown in football), but then find that, retroactively, the boundaries have been moved. Where you thought you’d been doing a great job, you’ve been out of bounds the past 60 yards. And so, operating in a world where the boundaries can move against you, it’s much safer to stay in the middle of the field.

In addition, in the world of business and regulatory compliance, you’re operating in a world where the referees have a vested interest, in effect, a bias toward seeing you step out of bounds. It’s probably best to play where the lights are brightest and where everyone else can see where you are, so that if the referee calls you out of bounds, it will ultimately be overturned as a bad call, because everyone can see that you were right in the middle of the field.

AW: Can you explain TAMKO’s Rule of Basic Honesty?

DCH: The Rule of Basic Honesty is what it says. We expect people to be honest in the

normal context of what honesty means, which is: You tell the truth, you don’t lie; you come forward when you see something that’s wrong. I would say it can be summed up as: You do the right thing. Bob, can you add to that?

RB: It means, along with complying with both the letter and spirit of the law, it forms the backbone of all our policies. It means more than simply telling the truth. It includes doing your job the way it should be done, not taking short cuts that may save time but do not produce the right result. It means that every TAMKO employee has the right to rely on every other employee to do their jobs. It means our customers and vendors can rely on us.

“The Rule of Basic Honesty is what it says. We expect people to be honest in the normal context of what honesty means, which is: You tell the truth, you don’t lie; you come forward when you see something that’s wrong.”

AW: Bob, even though TAMKO has independent Compliance and Legal functions, we work together almost daily.

RB: That’s true. Many of TAMKO’s policies were in place before we had a Chief Compliance and Ethics Officer. Since you came on board, many of TAMKO’s policies have gone through revisions to clarify the message and remove the “legalese.” The Legal department has primary responsibility for investigating potential policy violations, but we work with Compliance to apply our policies to the facts and recommend responses.

AW: David, you mentioned coming forward in your discussion of the Rule of Basic Honesty. The Federal Sentencing Guidelines require an anonymous system for reporting

violations of law. Do you remember what you told me when we first talked about creating what most people call a “hotline”?

DCH: I recall that I was not excited about it, because I saw people using it as a place to complain anonymously about whatever is bugging them that day, rather than for any valuable purpose.

AW: Your direction was to design a system where employees could report violations of TAMKO policy or culture, through the ability to anonymously offer feedback to senior management through questions, comments, concerns, or requests for guidance, in addition to having the required mechanism to report suspected violations of law. The vendor we chose used the name Silent Whistle.

DCH: Yeah, I really did not like the term. It sounded like a whistleblowing system, and I really didn't see that that was the right way to approach any of these issues, if you want compliance. You'll have people complaining, but they won't give you ideas or suggestions, so the fact that we changed it into the TAMKO Employee Feedback System turned it away from an “us against them” concept, a whistleblower concept, and into a way to give both negative and positive feedback, which I think is important.

AW: In the three years that we've had our formal feedback system, we've received over 300 entries; 87% are from employees asking a question, seeking guidance, offering a suggestion, or giving an opinion. Our vendor's data shows that, among all of its clients, 75% of all entries are reports of violations. We have the exact opposite side of the universe for that. What does that tell you about TAMKO employees and their willingness to offer feedback?

DCH: We're special. Seriously!

RB: You know, I think it's important to note in those statistics the portion of TAMKO employees who aren't reporting a violation

of law. We have not received a single report of an employee violating any law or regulation. Instead, they are reporting violations of TAMKO's own policies, which keep our conduct between the hash marks, and keep us from getting to a violation of law.

DCH: I think what it tells us is that we have, for the most part, a group of people who believe in doing the right thing, who accept our Rule of Basic Honesty, and that there are very limited instances of behavior that may be non-compliant. And as a result of that, I think that's why we don't have a lot of reports of non-compliance or any illegal activity.

AW: On another note that speaks to TAMKO's culture and philosophy, TAMKO recently came to the aid of employees and the community, because you felt it was the right thing to do. Can you talk about the April and May tornados and what drove TAMKO's decision to go above and beyond?

DCH: When the Tuscaloosa (Alabama) tornado hit, I think we had five people who had homes affected, and a lot of people who had cars that were damaged or destroyed. And so that caused me to think about what can we do to help these people, because I'm sure they're sitting there—although they may have insurance—they're in a period of time in their lives where they don't have the insurance proceeds, they don't have a place to live, and they probably don't have a lot of money in the bank. I wouldn't be surprised if many live from paycheck to paycheck, so it seemed like they probably needed some assistance.

And then when the tornado hit Joplin, it brought that thinking home even more, because we had, I think, another 20–25 people who lost homes and some who lost cars. It was really a function of just trying to help people who were in a situation that had to be very difficult. They lost a place to live, probably had no place to live, and lost not only their house,

but everything in it. I don't know what I'd do if I lost everything and found myself doing without. I guess our impulse was to try to help folks get through the period of time while their insurance was being sorted out, and to help them (to some extent) cover the loss on their deductible for their house and for their car, because those are large out-of-pockets for the average person, which are usually very difficult to absorb. So we thought we'd at least try to help on that front, in terms of helping our employees. So I think, at the end of the day, we helped our employees and if they had immediate family who lost houses, we tried to help them as well.

In terms of contributions to the community, TAMKO as a company has given to the Red Cross, and I have personally to the Salvation Army and some other groups. We did that to some extent in Tuscaloosa, but on a much larger scale here in Joplin, because it's our hometown and because we felt that immediately after the storm, it was important to immediately make some contributions and set an example for others in the area to do the same. I think when TAMKO gave a million dollars to the Red Cross, I think it set a very high bar locally, which was met by at least one other local company and a couple of national companies that had a presence. I think that it at least led the way for a significant amount of contributions.

AW: What's the most important thing that you look for when you hire somebody to join TAMKO?

DCH: I didn't know what that was until a few years ago, when I was getting ready to hire a chief financial officer and I brought in a search firm to help. We spent a day and a half talking about the position and, at the end of the day, the representative said, "I know what you're looking for." I said, "Really? What's that?" And he said, "You're looking for someone you can trust." That probably sums up

what I look for in people I hire myself or for the company. I look for someone I can trust, which basically means I'm looking for someone who is honest, who is humble, and whom I can depend on.

AW: We also hear about the concept of "getting the right person on the bus." What does that mean?

DCH: It means hiring people you can trust, number one. You can hire talented people that you can't trust, and then you have a bunch of people with a lot of talent, but you end up not knowing whether you can get anything done. Hiring attitude over talent is extremely important. You get the right people, the right attitudes, presumably with the right skills, and you get them to the right place where they can make a difference.

"Hiring attitude over talent is extremely important. You get the right people, the right attitudes, presumably with the right skills, and you get them to the right place where they can make a difference."

AW: What advice would you have for other CEOs as they attempt to build a compliant and ethical culture in their organizations?"

DCH: Understand that any compliance failure puts the organization at significant risk (financial, operational, and reputation) such that 100% compliance, 100% of the time requires an appreciation of that risk and leadership from the top to establish a compliant and ethical culture.

AW: Thank you, gentlemen. *

Art Weiss is Chief Compliance and Ethics Officer for TAMKO Building Products in Joplin, MO. He may be reached at art_weiss@tamko.com.

SCCE *welcomes* NEW MEMBERS

ALABAMA

- ▶ Susan Cotten, Health Information Designs, LLC
- ▶ Deborah Key, Southern Nuclear
- ▶ Barbara A. Stephens, Poarch Creek Indians

ARIZONA

- ▶ Jennifer McAleer, Northern Arizona Regional Behavioral Health Authority
- ▶ James Rough, Navigant Consulting, Inc
- ▶ Shirley Stang, DMB Associates, Inc

ARKANSAS

- ▶ Patricia C. Calderon, Tyson Foods, Inc

CALIFORNIA

- ▶ Robert Bragaw, Liquidity Services, Inc
- ▶ Otto Sanchez Cocino, MAAC
- ▶ Glenda Estioko, Asian Americans for Community Involvement (AACI)
- ▶ Patrick Hamblin, Gemological Institute of America
- ▶ Jeff Hecht, The Word & Brown Companies
- ▶ Kelly Hoevelkamp, Allergan
- ▶ Megan Janis, PG&E
- ▶ Janie Mah, Cisco Systems
- ▶ Avi Moscowitz, Corinthian Colleges, Inc
- ▶ Diana Olin, Adobe Systems Incorporated
- ▶ Annemarie O'Shea
- ▶ Sammy Pen, Unity Care Group Inc
- ▶ John Segal, Northrop Grumman Corporation

COLORADO

- ▶ Kristin Zompa, Gartner Inc

FLORIDA

- ▶ Karen Clapsaddle, Lockheed Martin
- ▶ Salem Flores Alatorre, Sr., SFA
- ▶ Laura M. Paredes, Ingram Micro Inc
- ▶ Nancy Stephenson, The Nemours Foundation
- ▶ Teresa Wong, Physicians United Plan

GEORGIA

- ▶ Jeffery Davis, Southern Company
- ▶ Blair Marks, Lockheed Martin
- ▶ Elaine Neely, Kaplan Higher Education
- ▶ Mark Snyderman, Laureate Education, Inc

ILLINOIS

- ▶ Garin Bergman, IDEX Corporation
- ▶ Rolf Christiansen, Jr, Caesar's Entertainment, Inc
- ▶ Kirk Dobbins, CVS Caremark
- ▶ Ann Kafer, GROWMARK
- ▶ Tracie Wilcox, Fidelis SeniorCare

INDIANA

- ▶ Lori Cochrane
- ▶ Sherry Davis, Eli Lilly & Company
- ▶ Joel Gibbons, National FFA Organization
- ▶ Jeffery Maxwell, Eli Lilly and Co

IOWA

- ▶ Karen Steggerda, Brighton Consulting Group

KANSAS

- ▶ Margaret Voorhees

KENTUCKY

- ▶ Susan Reinach-Lannan, RecoverCare LLC

MARYLAND

- ▶ Jessica Hoffman, Lockheed Martin
- ▶ Leo Mackay, Jr, Lockheed Martin
- ▶ James D. Massey, MedImmune, LLC
- ▶ Laurin Mathson, Lockheed Martin
- ▶ Rielle Miller Gabriel, Lockheed Martin
- ▶ Mike Mulleavey, Lockheed Martin
- ▶ Julia Pallozzi-Ruhm, US Government
- ▶ Mark Shaffer, Barnes Group Inc
- ▶ Michaela Wheeler, Aerotek

MASSACHUSETTS

- ▶ Patricia Moks, PricewaterhouseCoopers LLP

MICHIGAN

- ▶ Earl Blackburn III, Terumo Cardiovascular Systems
- ▶ Frederick Hoffman, NHBP Gaming Commission
- ▶ Rick Hrivnak, Auto Club Group
- ▶ Rochelle J. Hunter, Johnson Controls, Inc
- ▶ Cris Mattoon, The Auto Club Group

MINNESOTA

- ▶ Mary E. Gale, William Mitchell College of Law
- ▶ Cheryl Hayne, 3M
- ▶ Kathleen Panciera, William Mitchell College of Law
- ▶ Michelle D. Rovang Burke, University of St Thomas, Veritas Institute
- ▶ JoAnn Thompson, Otter Tail Power Company

MISSOURI

- ▶ Gregory Billhartz, Ralcorp Holdings, Inc
- ▶ Kent Swagler, Bi-State Development Agency (d/b/a Metro St Louis)

NEW JERSEY

- ▶ Meghan Davis, Johnson & Johnson
- ▶ Dean Forbes, Johnson & Johnson
- ▶ Thomas Hardin, Johnson & Johnson
- ▶ Deborah Lake, Johnson & Johnson
- ▶ Chris Matteson, Johnson & Johnson
- ▶ Sheila O'Rourke, Caldwell College
- ▶ Chris Petersen, Johnson & Johnson
- ▶ Iskah C. Singh, Unilever United States, Inc
- ▶ Nancy Waltermire, Aveta

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- ▶ Brandt Graham, URENCO, USA
- ▶ Perry Robinson, URENCO, USA

NEW YORK

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- ▶ Ann M. Florkowski, ACE Group Holdings
- ▶ Paul M. Holstein, FBI
- ▶ Emile Kattan, DZ BANK AG
- ▶ Josh Leicht, FJL Associates, LLC
- ▶ Tara Mancinelli, Lockheed Martin
- ▶ Susan McCormack, Long Island Center for Independent Living, Inc
- ▶ Ana Taras, William F. Ryan Community Health Center
- ▶ Sonya Tennell, MetroPlus Health Plan. Inc
- ▶ Melinda Ward, Rochester Institute of Technology

NORTH CAROLINA

- ▶ Heather Adams, Family Dollar
- ▶ Michael LeClair, Alliance One International

OREGON

- ▶ Edward Boehmer, Acumed LLC
- ▶ Eva Kripalani, Eva Kripalani Legal and Consulting Services

PENNSYLVANIA

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- ▶ Scott Caulfield, Capital Principles, LLC
- ▶ Tom Cornely, Johnson & Johnson
- ▶ Rob McBryde, GSI Commerce
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- ▶ Donna Champ, Bechtel National, Inc
- ▶ Kim Davenport
- ▶ Sharleen Robinson, Chattanooga Goodwill Industries, Inc

TEXAS

- ▶ Edwin Buckingham, III, Solvay North America, LLC
- ▶ Alexandria Falls, CPS Energy
- ▶ Patricia MacGibbon, Dresser, Inc
- ▶ Robert Vander Lugt, Northrop Grumman Corp

UTAH

- ▶ Anthony Joy, Ausenco

VIRGINIA

- ▶ Eva Bishop, Raytheon Company
- ▶ Thomas Donovan, Northrop Grumman Corp
- ▶ Alison Jameson, Department of Justice
- ▶ Beth Mersch, Northrop Grumman Corp
- ▶ Rebecca Osowski, Morgan, Lewis & Bockius LLP

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- ▶ Jasbinder Dhoot, JSJ Consulting
- ▶ Phillip Downes
- ▶ Don Ellis, Northshore Utility District
- ▶ Evelyn Hager, Seattle City Light
- ▶ Jane Maring, Costco Wholesale Corp
- ▶ Dan Shea, Microsoft

WISCONSIN

- ▶ Veronica W. Robinson, Milwaukee County

WASHINGTON, DC

- ▶ Joy Dorsey, Pepco Holdings, Inc
- ▶ Steven Lawrence, Williams Lea
- ▶ Sarah Sims, AARP Services

PUERTO RICO

- ▶ Manuel Sevilla, Sr., Johnson & Johnson

AUSTRALIA

- ▶ Neville Tiffen, Rio Tinto Limited

BARBADOS

- ▶ Mark Taitt, Caribbean Development Bank

BRAZIL

- ▶ Fabio Moreno, Sr., Alexandre De Moraes Law Firm

CANADA

- ▶ Jakub Ficner, I-Sight

MALAYSIA

- ▶ Kanakaraja Muthusamy, AR

by Cynthia Scavelli, Esq., CCEP

Recipe for a Compliance Day in 2012

- » **Reach out to SCCE and other compliance professionals for valuable ideas.**
- » **Events should reflect your company's culture and stay on budget.**
- » **Contact different company departments for their expertise and suggestions.**
- » **Initiate a Planning Committee early. Things always take longer than you think!**
- » **Plan a simple event for your first year. You can always add more later.**
- » **Engage your employees with fun contests and creative prizes.**

At FIS™, the world's largest provider of banking and payments technology, we put our Compliance Day "recipe" together to promote ethical behavior through education and awareness. Our first Compliance Day—Spotlight on Ethics—was held in August 2011. The goal was to encourage internal reporting of ethical issues and raise awareness of the FIS ethics hotline/website as a tool for reporting potential ethics violations. We chose to put the spotlight on ethics because honesty and ethical behavior are integral parts of our corporate culture and the foundation of our company's five Guiding Principles.



Scavelli

Another selection consideration, in the age of the new Dodd-Frank Wall Street Reform and Consumer Protection Act, was the benefit to the company of making our internal reporting mechanisms more visible to employees. FIS's online Compliance Day enabled us to satisfy our employees' hunger for awareness regarding the company's Code of Business Conduct and Ethics, other policies, and ethical dilemmas (such as conflict of interest), as well as the tools used to report misconduct. The positive feedback we received from our annual

Ethics Awareness Survey in December 2011 confirmed our goal was achieved.

Ingredients—Ideas from SCCE

SCCE's website¹ gave us the inspiration and resources to put together our first Compliance Day. The website provides a tutorial Web conference, awareness ideas, promotional posters, and articles from other companies documenting their various compliance celebrations. As a relatively new member, I found SCCE's Compliance and Ethics Academy was also a valuable resource, providing relevant training classes on topics and material which enhanced our vision of Compliance Day. Attending the Academy was especially beneficial because of the opportunity to meet other compliance professionals and swap "recipes." One ingredient for our recipe came from a fellow attendee who suggested an electronic scavenger hunt. This activity was challenging, educational, and a lot of fun for the employees. Details concerning this activity will be discussed later on.

Know the shopping budget—Get creative

Each year, Corporate Compliance & Ethics Week is celebrated in May. Because FIS's annual client conference is also in May, we

chose to hold our compliance event in August so that we could draw upon internal FIS resources, such as Marketing, Professional Development Training, and Corporate Communications. We knew that our large and geographically dispersed employee base made it difficult to host an onsite event. Instead, we decided to have an online celebration. Our initial rollout was targeted to U.S. employees and featured our inaugural FIS Corporate Compliance “Walk the Talk” newsletter and new online ethics awareness training. FIS’s international locations are scheduled to have their own Compliance Days throughout 2012 with the appropriate customization and translations.

To garner attention and excitement surrounding the upcoming day, we announced an essay contest with a prize. Employees were encouraged to submit an essay, in 500 words or less, on what compliance and ethics means to them and describe how adherence to these concepts influences the day-to-day decisions they encounter on the job. The top three winners won a coveted (and “budget low-cal” item)—an extra vacation day. The first place essay winner was featured in our newsletter. Utilizing our budget low-cal approach, we tried to keep costs to a minimum and relied on internal resources to promote and host the event.

We advertised the event through an e-mail blast and a customized electronic banner on the FIS Intranet. The banner, featuring an eye-catching animation, was created free of charge by our Marketing department and conspicuously posted where most employees would see it during the weeks leading up to the day. We also mentioned the event in other online

communications. Our Marketing department also assisted with the format, branding, and customization of our newsletter. Fortunately, our customized new ethics awareness training was done in-house by our subsidiary, FIS Compliance Solutions,² which kept costs down as well. In keeping with our theme of a spotlight, the main expense was green (FIS’s main brand color) mini-flashlight prizes imprinted with the FIS Ethics website address.

Event recipe

Combine department input and add a dash of your company’s culture.

When trying to create an event that aligns with your company’s culture, you need to ask some insightful questions. Are you an informal or formal company? What issues are important to your business and why? Who is

your audience? What time of the year is best for an event of this nature? What is your budget? What is your company’s culture and communications tone?

By using your company’s departmental

resources, you will be able to spice up your Compliance Day. By combining input from different internal resources and the answers to the above questions, you can create your perfect signature dish using the following quick recipe:

1. Start a Planning Committee with executive support to achieve the best collaboration possible. As we learned, tone from the top is very important for success.
2. Stir in representatives from Marketing, Professional Development Training, Human Resources (HR), Legal, Information Security, Risk, Internal Audit, and management. Every area has a different perspective and can be helpful in serving

“When trying to create an event that aligns with your company’s culture, you need to ask some insightful questions.”

up your creation. The FIS Marketing team assisted with the customization and layout of the newsletter, editing, and online advertising, and, together with HR, offered valuable insight into past successes (and failures) in organizing and conducting company-wide events. FIS's Information Security team contributed an article about the importance of data security and how to report a security incident.

3. Combine the expertise of these groups to suggest topics, write content for the ethics awareness training, and be part of the pilot group to provide feedback on the training.

Our signature dish—FIS Compliance Day 2011: Spotlight on Ethics

Several months prior to the event, we planned an initiative to have employees renew their acknowledgement of the Code of Business Conduct and Ethics. By doing so, employees refreshed their understanding of the company's ethics expectations and were primed to be receptive to our message about Compliance Day. We then mentioned the upcoming event in an Ethics Essentials article featured in our quarterly HR newsletter. Three weeks prior to the online event, we sent out a communication announcing the essay contest and explaining that Compliance Day would feature brand new ethics awareness training. We also sent an inaugural FIS Corporate Compliance "Walk the Talk" newsletter.

On the actual Compliance Day, we sent out an electronic communication with a link to our newsletter and the online training link through FIS Compliance Solutions. Our training topics included:

- ▶ Conflict of interest
- ▶ Gift policy
- ▶ Fair dealing
- ▶ Compliance with laws
- ▶ Handling confidential information
- ▶ Security awareness
- ▶ Security incident reporting
- ▶ Privacy
- ▶ Open door policy
- ▶ Reporting to our ethics hotline/website

Mini-quizzes after each topic assisted employees in staying focused on the training. At the end of the training, each employee had to pass an eight-question test and print their completion certificate. FIS Compliance Solutions' training platform enabled us to keep track of the completion rate of employees for auditing purposes and gave us the ability to send out reminders.

"Many employees came forward with suggested topics for future articles and ways to improve awareness of our compliance program...We hoped that Compliance Day would open new lines of communication and were pleased that is what it did."

The newsletter featured an introduction with the purpose of the event, a Compliance Quick Reference section, the winning essay, an article about the importance of data security and how to report a security incident, the ethical quote of the day, an electronic scavenger hunt, and "Compliance Talk." The Compliance Quick Reference section provided an overview of company's expectation of its employees. Each subsequent newsletter will have this section with different information and will eventually be combined for concise employee guidance on multiple issues. The electronic scavenger hunt asked employees questions about FIS policies and directed them to use our Intranet to find the answers. This fun exercise was not only educational, but it drove employees to our Intranet to find the policies

and become more savvy about the location of items housed on the Intranet. "Compliance Talk" featured a Q&A-style format in which our Chief Compliance Officer (CCO) answered frequently asked ethics-related questions and provided additional information about how to report suspected misconduct.

Many employees came forward with suggested topics for future articles and ways to improve awareness of our compliance program. Employees who participated in the electronic scavenger hunt or essay contest, proactively made suggestions, or were the first to complete the training were awarded a mini-flashlight as a prize with a special note from our CCO thanking them for their participation. We hoped that Compliance Day would open new lines of communication and were pleased that is what it did.

Think to the future...What's next on your menu?

Corporate Compliance & Ethics Week for 2012 is scheduled for May 6–12. Now that you have a basic recipe, your Compliance and Ethics department can capitalize on this by serving up a different theme and message each year. At FIS, we are already planning Compliance Day 2012: Spotlight on Privacy.

Bon appetite! *

1. SCCE's website, www.corporatecompliance.org, Resources section: Corporate Compliance and Ethics Week.
2. FIS Compliance Solutions is FIS's regulatory compliance software and consulting services arm that serves U.S. financial institutions. It provides risk assessment software, e-learning, instructor-led training, advisory services, regulatory reporting solutions, compliance tools and expert consulting services. For more information, please call 866-355-5150 or email compliance.solutions@fisglobal.com.

Cynthia Scavelli is the Corporate Compliance & Ethics Counsel at the FIS headquarters in Jacksonville, Florida. She is responsible for ethics hotline investigations, FCPA third-party due diligence, and global anti-bribery training, and she monitors legislative/regulatory changes for selected business units. Cynthia may be contacted at cynthia.scavelli@fisglobal.com.

Don't forget to earn your CCEP CEUs for this issue

Complete the *Compliance & Ethics Professional* CEU quiz for the articles below from this issue:

- ▶ **Nuts & bolts for boards: What ethics oversight really means** by Frank J. Navran (page 44)
- ▶ **Computers and copyrights: A continuing source of avoidable liability** by Thomas W. Kirby (page 59)
- ▶ **Is your ethics and compliance training really preparing your employees?** by Charles Ruthford (page 63)

To complete the quiz:

Visit www.corporatecompliance.org/quiz, then select a quiz, fill in your contact information, and answer the questions. The online quiz is self-scoring and you will see your results immediately.

You may also fax or mail the completed quiz to CCB:

FAX: +1 952 988 0146

MAIL: Compliance Certification Board
6500 Barrie Road, Suite 250
Minneapolis, MN 55435, United States

Questions? Call CCB at +1 952 933 4977 or 888 277 4977.

To receive one (1) CEU for successfully completing the quiz, you must answer at least three questions correctly. Quizzes received after the expiration date indicated on the quiz will not be accepted. Each quiz is valid for 12 months, starting with the month of issue. Only the first attempt at each quiz will be accepted.

by Donna Boehme

Machiavelli and the 2011 Person of the Year

"There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things."

(Niccolo Machiavelli, 1532)

Everything old is new again. Machiavelli may have been the first to observe the perilous nature of the chief compliance officer job (in my book, it's right up there with coal miner and deep sea fisherman), but nearly five centuries later, former federal prosecu-



Boehme

tor Michael Volkov has echoed those early observations by naming the CCO the 2011 "Person of the Year."¹ CCOs are the "unsung heroes," says Volkov, noting "there are institutional forces which hold them back from achieving their mission." To which we can almost hear beaten but yet unbowed CCO's everywhere responding "THANK YOU!"

In many respects, 2011 has been a "perfect storm" for compliance. Commentators have cited unprecedented levels of enforcement and new regulation, the controversial Dodd-Frank whistleblower regime, the Volcker rule and financial reform, UK Bribery Act, record-breaking FCPA and *qui tam* settlements, the rise of social power, and the entry of Generation Y into the workforce. 2011 also marked the twentieth anniversary of the Federal Sentencing Guidelines, prompting the Ethics Resource Center to assemble

a committee to offer recommendations to policymakers. Support for the role of the empowered CCO should be at the very top of the ERC agenda, because the unspoken truth we must shout from the rooftops is that, all too often, CCOs are positioned for failure.² According to a new SCCE/HCCA survey, 58% of compliance professionals surveyed felt isolated and in an adversarial position, and 60% considered leaving their jobs in the last year due to stress.³ What the Person of the Year really needs to be successful is empowerment, direct unfiltered reporting to the board, adequate autonomy from management, and sufficient resources. Earth to Boards: Try *that* for "tone from the top."

Volkov also predicts that the CCO will be elevated to C-suite status within the next five years. This would be fast work, given Machiavelli's "institutional forces" undermining the CCO mission. Will 2012 yield better compliance? Only to the extent boards, government, and policymakers create levers of empowerment to position the Person of the Year for success instead of failure. *

1. Michael Volkov: "The Person of the Year – The Chief Compliance Officer." Corruption, Crime & Compliance online, December 15, 2011. Available at <http://corruptioncrimereform.com/2011/12/the-person-of-the-year-the-chief-compliance-officer.html>
2. See RAND Symposium Report "Perspectives of Chief Compliance and Ethics Officers on the Prevention and Detection of Corporate Misdeeds." Available at http://www.rand.org/pubs/conf_proceedings/CF258.html
3. HCCA and SCCE: "Stress, Compliance, and Ethics" survey, January 2012. Available at http://www.corporatecompliance.org/staticcontent/StressSurvey_report.pdf

Send comments to Donna Boehme at dboehme@compliancestrategists.com.



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— Assistant U.S. Attorney General Lanny Breuer,
Prepared Remarks to Compliance Week 2010: 5th Annual Conference

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by Steve McGraw

GRC focus: Keep your employees close and your auditors closer

- » With regulatory attention continuing to focus on GRC results, corporations need to focus on ensuring compliance is up to par.
- » Corporations need to show employees that all internally reported issues will be taken seriously.
- » Sharing compliance self-assessments and mitigation programs with auditors can help corporations establish a strong reputation.
- » GRC should be viewed as increasingly beneficial, especially when preparing for mergers and acquisitions.
- » GRC systems can provide information to show trend lines and correlations to address root-cause issues before regulators ask.

As we continue through 2012, the focus of regulatory bodies continues to be firmly focused on Governance, Risk and Compliance (GRC) results. Corporations and their boards of directors need to pay increasing attention to reducing compliance threats. This task often falls on the shoulders of the compliance officer, along with the need to ensure that compliance programs adhere to the most current versions of ever-changing laws and regulations.



McGraw

What many corporations have learned already is that the best way to protect a company's interests is to ensure that compliance is up to par internally, before the regulators come calling. This said, there are a few areas that corporations should pay very close attention to as we move through the year.

Bounty hunter threats are increasing

Personal greed has long been the primary motivator behind fraud and abuse, and regulators are now increasingly using a variety of greed-oriented rewards to help identify and prosecute offenders. The Securities and Exchange Commission (SEC) and Commodities

Futures Trading Commission (CFTC) now have formal whistleblower bounty hunter programs, using a percentage of the sanctions as rewards. As these and similar programs begin to hit their strides, compliance officers and their boards of directors will face increasing threats to their internal compliance programs and, ultimately, their institutional brands.

Corporations also need to show their employees that the Compliance department will follow up on issues that are reported internally. For example, a corporation can remove identifying facts from the reported claims, then post them on in-house blogs to show employees examples of what is being reported and that each claim is being taken seriously.

Demonstrating compliance effectiveness is critical

Historically, regulators have been satisfied with companies that have implemented compliance programs, but now they want proof that the programs are actually working. More regulatory authorities will begin to require a process that distills data and demonstrates the overall effectiveness of a company's compliance program.

As an offshoot of this growing requirement, progressive corporations are taking steps to “keep their friends close and their auditors closer.” By proactively sharing their compliance self-assessments and mitigation programs with auditors, companies can establish a strong reputation with their auditors and regulators and use that reputation to minimize the likelihood and impact of potential compliance breakdowns and whistleblower allegations.

Growing importance of the “G” in GRC

Boards are more sophisticated than ever before, and many are demanding processes and tools to facilitate and streamline their oversight responsibilities. For example, many board members are now using iPads and related portal products to review enterprise risk management (ERM) programs in much more timely detail to better monitor a broad range of risk indicators. They are also taking a more active role in confirming management’s assertions on the company’s ethics and regulatory compliance posture.

Viewing GRC as strategic tool can have other benefits for a company, especially when it comes to mergers and acquisitions. When being scrutinized by regulators before a merger or acquisition, demonstrating that an effective compliance program is in place can make the regulators more comfortable. An effective compliance program can also make a company more attractive to a likely acquirer, thus putting the company a step ahead of competitors.

“For example, a corporation can remove identifying facts from the reported claims, then post them on in-house blogs to show employees examples of what is being reported and that each claim is being taken seriously.”

The rise of analytics

GRC systems collect enormous amounts of data. From the board down, GRC users need to see trend lines and correlations to identify and address root-cause issues before auditors come calling. As examples, the additional insight corporations can glean by linking training programs to the types of issues received via a whistleblower hotline, or mining various systems to determine how to change audit plans for the next cycle, can be highly valuable.

The compliance landscape is changing for many regulated industries. It’s critical that internal teams keep on top of changes in regulations and maintain their company’s compliance and ethics programs, because waiting until the regulators show up can often be too late. *

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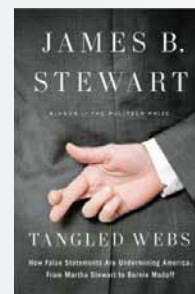
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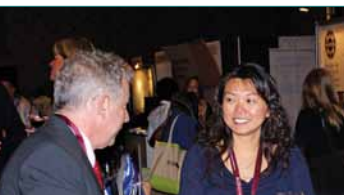
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by Art Weiss, JD, CCEP

The consequences of Enron

You can't be around compliance professionals much without hearing certain buzz phrases—things like “tone at the top” and “ethical culture.” One of my favorite compliance phrases is “ethical culture.” I talk about it all the time at my company and at SCCE



Weiss

gatherings. I may even mumble it in my sleep. Just in case the Department of Justice has bugged my bedroom, I want them to know I'm ethical.

But I think I insulted someone's Dad recently when I used the phrase during a presentation. We were talking about the Federal Sentencing

Guidelines, what prosecutors look for when making charging decisions, codes of conduct, hotlines...you know—compliance stuff. The buzz phrases were flying back and forth, and out of my mouth came a true story from when I was hired to be my company's first Chief Compliance Officer. (We added “Ethics” to my function later, after some compliance professional I heard speak at an SCCE program starting using the word in what seemed like every other sentence.)

I told the group that when I first became a compliance officer, I looked on eBay for some Enron stuff for my office. I thought it would be funny for the compliance guy...well, you get it. I told of finding a copy of Enron's code of conduct on eBay. The seller stated that this particular copy of Enron's code was “Good As New...Never Been Opened!”

I use this example when speaking about things like not having a check-the-box compliance program and having meaningful policies. I went on to say that Enron's code was actually quite comprehensive. The problem was that no one ever opened it. This gets laughs every time. It got laughs this time, too.

“I told of finding a copy of Enron's code of conduct on eBay. The seller stated that this particular copy of Enron's code was ‘Good As New...Never Been Opened!’”

Later I read a note from an attendee whose father worked for Enron. The attendee liked my presentation, but pointed out that not everyone at Enron was unethical. I can't imagine the personal and professional suffering that this attendee's family endured. This illustrated to me the effect that a few culturally challenged individuals, let loose in an environment of looking the other way, can have on not just a company and its shareholders, but its employees and their families. Ethical culture is real. If it fails, it has far-reaching results and consequences that we need to keep in mind.

No more Enron stories. Anyone have a copy of the WorldCom code? *

Art Weiss is Chief Compliance and Ethics Officer at TAMKO Building products in Joplin, MO. He may be contacted at art_weiss@tamko.com.

by Michele Abely, CCEP

Compliance in a casino world

- » Operate in a good faith manner and in the best interest of the company and its customers.
- » Do the research to find the best answers and solutions.
- » Document all decisions in a memo including the research done, the findings, and the outcome.
- » Ensure all related procedures are written and/or updated regarding any decisions.
- » Communicate decisions clearly and ensure that outcomes are executed consistently.

Three years ago I stepped into the role of Casino Compliance Manager.

I had spent the prior nine years at the Mohegan Sun Casino in Uncasville, Connecticut working in Finance and Marketing. These departments' functions translate to many different industries. There are responsibilities and programs I oversee in Casino Compliance that would be familiar to most compliance professionals (e.g., instituting and maintaining an employee hotline, Title 31 and anti-money laundering programs, record retention, policy and procedure management, etc.), but this was in addition to what really was a whole new world—The Indian Gaming Regulatory Act (IGRA), National Indian Gaming Commission (NIGC), Minimum Internal Control Standards (MICS), Class III gaming, State Compact, Tribal Gaming Commission, Title 25, tribal sovereignty and more. It is not uncommon to hit uncharted territory in the realm of compliance in a casino world.



Abely

Indian gaming and legislation background

Per the National Indian Gaming Commission website, The Indian Gaming Regulatory Act (IGRA) was enacted by the United States Congress on October 17, 1988, to regulate the conduct of gaming on Indian lands. IGRA's purpose is to provide a statutory basis for the

operation of gaming by tribes to promote tribal economic development, self-sufficiency, and strong tribal governments. IGRA established the National Indian Gaming Commission (NIGC). The primary mission of the NIGC is to regulate gaming activities on Indian lands for the purposes of shielding Indian tribes from organized crime and other corrupting influences, ensuring that Indian tribes are the primary beneficiaries of gaming revenues, and assuring that gaming is conducted fairly and honestly by both operators and players.

In 1999, NIGC instituted the Minimum Internal Control Standards (MICS). In 2006, a federal appeals court decision determined that NIGC had exceeded its authority in issuing Class III MICS. (Class III refers to casino-style gaming or games of chance such as blackjack, craps, roulette, or slots). However, many tribal casinos continue to use the Class III MICS as a regulatory benchmark, some because of requirements in their tribal/state compacts or gaming ordinances and others by choice. As the Casino Compliance Manager, I ensure adherence to the MICS. The MICS provide a guideline of rules necessary to run the gaming operation, but they are somewhat generic. As a result, Mohegan Sun has established Standards of Operation of Management (SOMs) which are property-specific policies that must align to the MICS. My Casino Compliance department is the gatekeeper of those SOMs and ensures they support the MICS.

Role of compliance manager in a casino world

As a Casino Compliance Manager who oversees a Compliance department, I must be familiar with the laws that govern the casino operation and understand what gaming regulators require. Many times it can be a world of chaos where we are confronted with trying to accommodate many layers of regulations. I frequently have to review if a particular activity, game, or promotion is done properly under federal law. Yes? Okay, then what about state law? Yes? Okay, then what about the MICS, the Tribal State Compact, the Tribal Ordinance, and company policy? A lot of checking and double checking is done to see that all the rules are followed and all the regulations are satisfied.

Communication skills to work successfully with gaming regulators, inspectors, and the operation are imperative, because I act as the liaison between the operation management and the regulators. I must be able to coordinate compliance across various departments, manage each department's different internal controls, and ensure that they are kept up to date and in line with the many regulations. My Casino Compliance department investigates compliance issues, ensuring that any problems with gaming compliance are rectified as quickly as possible. We also oversee the rules of all casino promotions and contests to ensure the integrity of each one.

It's not a perfect casino world

As a new Compliance Manager, I frequently referred to SCCE documentation and literature. Once I realized how useful and relevant the information was, I became a member of SCCE and then earned my CCEP to establish credibility in this field. The one area I have trouble finding information on is specific casino-related topics in relation to compliance. The following three come to the forefront on a regular basis.

"I frequently have to review if a particular activity, game, or promotion is done properly under federal law. Yes? Okay, then what about state law? Yes? Okay, then what about the MICS, the Tribal State Compact, the Tribal Ordinance, and company policy?"

Bank Secrecy Act (BSA), Title 31.

Casinos are considered financial institutions. Certifications, programs, seminars, and webinars in anti-money laundering are often focused on the banking industry. The best source for casino compliance managers is directly from the Financial Crimes Enforcement Network (FinCEN) and the IRS. Networking with others in the industry is another good resource.

In a casino, the scenarios that arise for suspicious activity reporting are not common outside of the gaming industry and, therefore, become a gray area when looking for comparisons and points of reference. Issues such as patrons switching seats when hitting a jackpot or redeeming chips at several different locations are not identified in anti-money laundering sources.

Another challenge involves the many positions in the casino that require training in the BSA. As Compliance Manager, I am responsible for seeing that 86 different positions are being trained on how to recognize and report money laundering. This is a daunting task, because it is not a one-size-fits-all program. Each position needs to know varying degrees of information. Extended training sessions with too much information are costly in terms of the employees' time, and employees tend to lose interest when the training is too lengthy or inapplicable to them.

“Similar to tax law dilemmas, the legal requirements of record storage for casino generated records are not clearly defined in any guide or resource.”

Additionally, the many positions and the fluctuating schedules for a 24-hour operation present many hurdles. Many people do not have access to a company computer needed in order to complete the computer-based training. For example, table games dealers account for more than 1,500 people, working varying shifts over the course of a 24-hour span, who have no assigned work station. As Casino Compliance Manager, I must apply some ingenuity to accomplish all of the training.

Prizes and promotions

Casinos are in the business of entertainment and customer loyalty. As a result, many programs offered include prizes through giveaways, slot and table game tournaments, and other games. Tax laws regarding the issuance of prizes for these types of promotions do not always provide a clear interpretation. Yes, prizes are taxable, but what about winnings from Bad Beat Poker hands or tournaments with entry fees versus tournaments without entry fees? Do we have to report the winnings and if so, do we have to withhold taxes? Many times the determination depends on if the proceeds are more than 300 times the amount wagered. A lot of careful calculation and clearly documented research is required.

Record storage

Similar to tax law dilemmas, the legal requirements of record storage for casino generated records are not clearly defined in any guide or resource. How long do you save non-value chip logs, chip rotation logs, or E-Bonus Free

Slot Play records? The information for this is not readily available in the Federal Code of Regulations or any CPA guide. Frequently, it is up to interpretation and assessments of these types of records in comparison to ones with definitive storage periods. Sometimes it is like trying to fit a square peg into a round hole. Does it fit? If not, make it fit.

Over time, I have developed an approach to navigate these murky waters. The key to managing the uncertainties and gray areas that are encountered in this casino world is first and foremost:

1. Operate in a good faith manner and in the best interest of the company and its customers.
2. Do the research to find the best answers and solutions through industry contacts, interviews of casino employees in the departments involved, and through Internet searches.
3. Document all decisions in a memo that includes the research done, the findings, and the outcome. This is distributed to all key stakeholders for agreement and approval. This preserves the thought process for future compliance managers, so they do not need to wonder why something is done a particular way. (I often wondered why and how many processes came into existence, but had no answers or anything to refer to.) The memo also provides any regulators or auditors with support and understanding of our processes.
4. Ensure all related procedures are written and/or updated regarding any decisions.
5. Communicate decisions clearly. Once enacted, it is important to ensure that the outcomes are executed consistently.

When this is complete, it is time to move on to the next compliance issue.

Michele Abely is a Compliance Manager for Mohegan Tribal Government in Uncasville, Connecticut. She may be reached at mabely@moheganmail.com.

by Meric Craig Bloch, CCEP, CFE, PCI, LPI

Does your boss listen to you?

Business leaders don't always see the benefits of a robust investigation to running a business. This is unfortunate, but not surprising. An investigation's scope and findings are not often made relevant to the world in which business people operate. One way for



Bloch

you to achieve relevance is to understand how business people think.

Compliance professionals are business advisors. Of course, business advisors cannot be effective if business leaders are not listening, so it will never be enough to conduct an investigation and just report the facts.

An investigator must consider how to capture the attention of the decision-makers.

The need to be relevant is a constant challenge for any business advisor. Jim Lukaszewski tackles the issue and offers some guidance in his book *Why Should the Boss Listen to You?* Lukaszewski describes how leaders think and operate, and why this is important to the trusted advisor. At the core of his book, he presents a seven discipline approach to becoming a strategic trusted advisor:

1. **Be trustworthy:** Trust is the first discipline and the foundation for a relationship between advisor and leader or boss.
2. **Become a verbal visionary:** The leader's greatest skill is verbal skill, and the leader's advisor must also have powerful verbal skills.
3. **Develop a management perspective:** To be a management advisor is to be able to talk more about the boss's goals and

objectives than about whatever your staff function happens to be.

4. **Think strategically:** One of the great realities of management is that the leader's job is always about tomorrow, and almost never about yesterday.
5. **Be a window to tomorrow:** Understand and use the power of patterns. A sophisticated advisor is one who can forecast tomorrow with some level of accuracy.
6. **Advise constructively:** Giving advice starts where the boss is and where he/she has to go (where the advisor is or has been).
7. **Show the boss how to use advice:** If you want to see your recommendations come alive, teach the boss how to accept and use advice.

Who doesn't want to be noticed? Who doesn't want to be part of the decision-making process? The key is to look at the questions, issues, opportunities, and problems from the boss' perspective first.

Every compliance issue is, ultimately, a business issue. Whatever your compliance role, you are working hard to improve the organization by reducing unacceptable business risks. Ensuring that your contribution is relevant and incorporated in decision-making will showcase your value to the organization.

But only if your boss will listen to you. *

Meric Craig Bloch is the Compliance Officer for the North American divisions of Adecco SA, a Fortune Global 500 company with over 8,000 employees and \$6 billion in annual revenue in North America. He has conducted more than 300 workplace investigations of fraud and serious workplace misconduct. He is an author and a frequent public speaker on the workplace investigations process. Follow Meric on Twitter @fraudinvestig8r.

by Emil Moschella

DOJ review: FBI's Integrity and Compliance Program

- » The FBI implemented a corporate-style compliance program to allow for the early detection of internal control weaknesses.
- » The DOJ OIG reported that the FBI's program has been beneficial to its efforts to monitor and enhance compliance.
- » The DOJ OIG suggested that other agencies may wish to consider implementing a similar kind of program.
- » Remedial legislation, policies, and processes are inadequate.
- » An integrated compliance and ethics program in government agencies is important.

In March 2007, the Department of Justice (DOJ) Office of Inspector General (OIG) issued a highly critical report regarding the Federal Bureau of Investigation's (FBI) implementation of a statutorily authorized investigative tool called "National Security Letters" (NSLs). These are demand letters provided to telephone companies, financial institutions, Internet service providers, and consumer credit agencies for "transactional," as opposed to "content," information. The DOJ OIG found, among other things:



Moschella

- ▶ that faulty recordkeeping understated the total number of NSLs issued by about 20% less than the number that had been reported to Congress.
- ▶ failure to self-report non-compliance to the President's Intelligence Oversight Board, as required by Section 4 of Executive Order 12334. This section requires: "Inspectors General and General Counsel of the Intelligence Community shall, to the extent permitted by law, report to the Board concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential directive."

The OIG report resulted in Congressional Oversight Committee hearings,¹ and

numerous press editorials critical of the FBI and calling for change.²

Of course, the FBI moved quickly to fix the problems identified by the OIG. In addition, and without prompting from the DOJ OIG, the FBI notified the OIG that it would put in place a corporate-style compliance program that would allow for the early detection of internal control weaknesses that could lead to non-compliant activity in the future. The private sector generally adapts the process suggested by Federal Sentencing Guidelines for Organizations (FSGO),³ and similarly, the FSOG formed the basis for the FBI effort, together with corporate best practices. The FBI effort was, and continues to be, a pioneering experiment in managing the government's duty to comply with the law and an example of a functionally integrated compliance and ethics program.

The DOJ's review

OIG, as part of its responsibility to follow-up with the FBI on the NSL fixes, reviewed the FBI's Integrity and Compliance program (ICP). Since there was no law, rule, or other mandate requiring the FBI to internally adapt the corporate-style compliance programs, and no model for it in government, it was a first of its kind in terms of FBI implementation and the OIG review. The questions for the DOJ OIG: Is it a worthwhile effort? Is it working?

The report makes suggestions for improvement in the FBI program; however, the answer to the broader question is a resounding “yes.” The DOJ OIG report states:

The ICP’s identification, analysis, and mitigation of legal compliance risks FBI-wide and at the program level before they develop into problems has the potential to significantly reduce legal compliance risk in FBI operations.

Note to other agencies: Consider implementing a similar compliance program.

The report goes on to observe:

We believe that the concept of the FBI’s OIC [Office of Integrity and Compliance] program has been beneficial to its efforts to monitor and enhance compliance with legal requirements, and that other agencies may wish to consider implementing a similar kind of program.⁴

For many compliance practitioners, the gratuitous observation by the DOJ OIG harkens back to a similar dictum, which occurred approximately fifteen years ago in the Delaware Chancery Court.⁵ There, Chancellor Allen, in reviewing the settlement of a shareholder derivative suit, suggested that in order to avoid personal liability in the future, a corporate director’s duty of care includes overseeing the implementation of a corporate compliance plan. The Court drew on the FSGO and stated that: “The Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.”

The combined effect of criminal penalty mitigation and the suggestion of director personal liability avoidance provided a powerful

“Government administrators should take note of the DOJ OIG advice as a first step in enhancing the public’s trust in its governing and integrate the corporate compliance methodology into existing ethics programs.”

incentive for corporations to have in place integrated corporate compliance and ethics programs. Public agencies and public officials do not face the same liability risks as private sector organizations and directors. However, the erosion of trust in our public institutions is a greater risk to us as a nation than the personal liability of corporate directors. Government administrators should take note of the DOJ OIG advice as a first step in enhancing the public’s trust in its governing and integrate the corporate compliance methodology into existing ethics programs.

An example out of the headlines

The FBI is not the only government agency that has fallen short in meeting baseline expectations of compliance with the law. The Rutgers Center for Government Compliance and Ethics produced a “white paper” which outlined examples of governmental non-compliance.⁶ One example discussed there continues to be in the news and provides a timely example of an agency that could benefit from the adoption of a corporate-style compliance program.

Upper Big Branch Mine tragedy

The headline in the *Washington Post* of December 7, 2011, was: “Owner of W.Va. Coal Mine Agrees to Pay \$209 Million Penalty for Fatal Explosion.” The explosion occurred on

April 5, 2010 and claimed the lives of 29 of the 31 men working at this site. The article reports that The Mine Safety and Health Administration (MSHA) issued a report that puts the full blame for the horrific accident at the Upper Big Branch Mine on PCC/Massey, the mine owner-operators. Clearly, the report makes a strong case for culpability and the report details gross negligence in the company's inspection process.

Interestingly, five days prior to the catastrophe, the Department of Labor's (DOL) OIG, through its Office of Audit, issued a report, titled *Journeyman Mine Inspectors [in the MSHA] Do Not Receive Required Periodic Retraining*, as required by the Federal Mine Safety and Health Act of 1977 (Section 505). The report notes that "Journeyman [MSHA] inspectors are required to receive one week of specified retraining each year, or two weeks every other year." In short, the DOL OIG found that MSHA did not comply with the law. Further, the OIG described the effect of this non-compliance as follows:

This increases the possibility that hazardous conditions may not be identified and corrected during inspections which, in turn, could increase the risk of accidents, injuries, fatalities, and adverse health conditions for miners.⁷

Unfortunately, the recent MSHA report does not deal with MSHA's failure. However, the report does allude to the issuance of a further report which will examine MSHA's actions prior to the explosion and during the rescue and recovery operation. The internal review will evaluate the quality of MSHA's enforcement activities, "including any weaknesses, and the adequacy of regulations, policies and procedures." Of course the issuance of regulations, policies and procedures, as well intentioned and needed as they may be, is

"Of course the issuance of regulations, policies and procedures, as well intentioned and needed as they may be, is an inadequate solution without a management commitment to enforce and comply with those rules that goes beyond mere rhetoric."

an inadequate solution without a management commitment to enforce and comply with those rules that goes beyond mere rhetoric.

Let's take a look at an example. H.R. 3697 was introduced on December 16, 2011, about a week after the issuance of the MSHA report. It purports to be a bill requiring improved mine safety practices. Sec. 604 of the bill mandates that the Secretary of Labor require "that each mine inspector conducting inspections under the Federal Mines Safety and Health Act of 1977 receive a full additional week of training, in addition to the training that was provided to or required of such inspectors prior to the date of enactment." Inasmuch as DOL OIG previously found that the MSHA did not comply with the requirements for training journeyman inspectors, what confidence should we have that the DOL, through the MSHA, will comply with this requirement if enacted into law?

The answer is found in the good will and intentions of the leadership and employees of MSHA, which I do not doubt for an instant. The problem of course is that agency executives, both appointed and career, come and go and priorities shift. As a result, these requirements run the risk of simply being prioritized off of the agency's radar screen through the press of business, inadequate funding, etc.

The MSHA should take under consideration the observation of the DOJ Inspector General “to consider implementing a similar kind of [compliance] program.” An internal management program to detect and prevent violations of the law in the future by the MSHA will provide for a systematic approach to identify risks of non-compliant behavior and address those before they are found by an inspector general, Congressional oversight, watchdog group, and, more importantly, before the non-compliance possibly contributes to a tragic outcome.

Conclusion

The DOJ OIG report focused its review on the question of whether the risk of non-compliance will be avoided through the implementation of a corporate-style compliance program. While that is an important consideration, the effect of such a program on overall organizational

ethics, the efficiency of operations by performing a task right the first time, and the enhancement of the overall public trust in government institutions are anticipated but yet to be measured. There is both a strong philosophical and business case to be made on behalf of the notion of implementing corporate-style compliance programs at all levels in the government sector. The DOJ IG report is a welcomed endorsement of that case. *

1. See “Senators Cite F.B.I. Failures as Chief Promises Change” by Scott Shane, *New York Times*, 3/28/07.
2. See “Make the FBI Follow the Law,” *Boston Globe*, 3/13/2007; “Break up the FBI,” *LA Times*, Opinion by John Yoo (former DOJ official), 3/21/2007; “Revise the Patriot (sic) Act,” Editorial, *LA Times*, 3/26/07.
3. See United States Sentencing Guidelines, Chapter 8 et seq., particularly USSG § 8B2.1, for the elements of an effective compliance and ethics program.
4. Available at www.justice.gov/oig/reports/2011/e1201.pdf.
5. In re *Caremark International Inc. derivative litigation*, Court of Chancery of Delaware, Decided: Sept. 25, 1996.
6. Available at http://rcgce.camlaw.rutgers.edu/sites/rcgce.camlaw.rutgers.edu/files/rcgce_whitepaper.pdf
7. Report number 05-10-001-06-001, p. 3.

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by Dan Small and Robert F. Roach

Powerful witness preparation: The most important person

- » The most important person in the room is the one who says nothing: the court reporter.
- » Consider your words carefully—the reporter’s machine is cold, mechanical, and humorless.
- » Words have different meanings: think about *manager*.
- » Avoid using jargon that jurors may not understand or find confusing.
- » If you are not sure what counsel is asking, ask for clarification rather than answering the question.

In this series of articles, lead author and seasoned trial attorney Dan Small sets forth ten, time-tested rules to assist you in the critical task of preparing witnesses. Robert F. Roach assisted Dan in this series by providing additional “in-house” perspective and commentary. The first installment of this series was published in our January/February issue.

Corporate officers and employees communicate all the time: during meetings, telephone calls, presentations, and conferences, to name a few examples. However, even a person who is a skilled communicator in business settings may find testifying under oath challenging. As we explain in Rule 2, it is critical to prepare your witness for the unique experience of answering questions under oath and having the testimony transcribed word-for-word.

Rule 2: Always remember that you are making a record

One of the many unnatural things about being a witness is that often the most important person in the room is the only one who doesn’t say anything: the person making the transcript or taking the notes. A witness cannot “unring the bell.” Once words come out of your mouth, they are committed to the cold written page, under oath. Even humor and

sarcastic remarks read like factual statements in a transcript. Every word is there, for all to see, for all time.

What is the answer?

Time

First, slow down and be precise. Answer each question as if you were dictating the first and only draft of an important document. (*You are!*) Consider each word carefully. This is extremely difficult to do. You cannot dictate a document this important quickly, casually, or “off the cuff.” You need to be fully prepared, and then approach it with the right sense of pace, care, and precision.

Language

Second, be aware of the power of language. When every word is transcribed and under oath, language takes on an extraordinary importance, far beyond normal conversation. Then, when two or more sides are fighting over what those words mean, and each is trying to use them for their own purposes, the problems multiply. We must be aware of, and carefully consider, each word in the question. Most



Small



Roach

language issues come within three interlocking worlds: “English,” jargon, and “legalese.”

“English”

Open any dictionary at random, to any page, and you will see a basic truth: there are very few “simple” words. Most have more than one meaning. In the heat of litigation, those differences can be blown up in degree and significance. If the witness is not 100% clear about how the questioner is using a word, they *cannot* answer the question. If they answer, the questioner will assume their definition is the one in play.

One common tactic is for questioners to try to bully their way through language problems. Consider this exchange:

Q: Who did you report to?

A: Please rephrase the question.

Q: What don’t you understand about my question?

A: I’m not comfortable with “report.” I had consultants and investors, but “report” sounds like I’m in the Army.

Q: You know what the word “report” means, don’t you?

A: Well, yeah.

The witness gave in to a question with the unspoken “you idiot!” at the end. Prepare the witness by explaining that in such circumstances, the issue is not whether you’re too stupid to know what “report” means (which is how the witness may feel); the issue is whether the questioner is too stupid to know that the dictionary has twenty-five different definitions of the word, and you didn’t know which one she meant! Be sure you know, *before* you answer.

Jargon

Every profession, industry, region, and endless other categories, has its own language. We call it jargon. In Webster’s words, jargon is “the technical terminology or characteristic idiom

of a special activity or group.” But like so many other words, jargon has multiple meanings. When Juror #6 hears jargon, it comes across less as impressive technical know-how, and more like Webster’s *next* definition of the word: “obscure and often pretentious language marked by circumlocutions and long words.” Witnesses need to work hard to stay away from jargon, and to recognize when they fall back into it, and stop to explain.

“Jargon interferes with communication in so many ways. Jurors don’t understand it. They don’t like it and often feel it’s condescending. It can make the witness seem cold and distant, talking about human issues in dehumanizing terms.”

Jargon interferes with communication in so many ways. Jurors don’t understand it. They don’t like it and often feel it’s condescending. It can make the witness seem cold and distant, talking about human issues in dehumanizing terms. Lastly, its impact can go far beyond the words themselves: Juror #6 may miss the next several minutes of testimony, because he is still trying to figure out the jargon, and eventually may turn off entirely. Help your witness to understand what kind of jargon he or she speaks, and how to avoid it.

“Legalese”

In every case there are legal standards and concepts that have to be broken down from their confusing language, and explained in clear and simple terms. Counsel must help the witness understand what they are, so

they don't stumble upon them blindly—or get lured into them unsuspectingly. Then witness and counsel must be ready to deal with them during testimony.

The greatest language challenges come when a word exists in the intersection of two or three of these separate circles, when a word has different meanings in English, jargon, and/or legalese. Then, it is particularly important for the witness to be 100% sure which meaning the questioner intended, or he/she cannot answer the question.

One quick example: the seemingly innocuous word “manage” or “manager.” In English it can mean a range of things, from managing a baseball team (the boss), to managing a football team (picking up the towels, etc., the coach is the boss), to managing a checkbook, to managing to escape a dull party. In the jargon of some

businesses and industries, “manager” has a particular meaning—which may or may not mean the real “boss.” In legalese, many state legislatures, in their wisdom, gave the corporate secretary of an LLC the name “manager,” even though such a statutory manager may only be there to sign documents and have little or nothing to do with running the business. Which meaning does the questioner mean?

Remember the most important person: the court reporter. He/she doesn't know what the word means, unless either the questioner or the witness makes it clear. Insist on the discipline of clarity. *

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SOCIETY OF CORPORATE
COMPLIANCE AND ETHICS

by Jeffrey M. Kaplan

Conflicts of interest: Where law and ethics meet

I have long been fascinated by the field of conflicts of interest (COI) and last year even launched a blog devoted entirely to the topic. What lies behind this interest in a subject that most “normal” individuals would find depressing at best?



Kaplan

To begin, COI is an area where, more than any other, law and ethics meet. Indeed, many legal fields with which compliance and ethics (C&E) professionals routinely deal are based entirely on COI ethical principles (as in the case of anti-corruption law) or largely on these principles (as is true for fraud and insider trading law). Additionally, the realm of fiduciary duty can be seen as the legal embodiment of ethical standards, as reflected in Justice Benjamin Cardozo's justly celebrated words that “[a] trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”¹

Studying COIs helps underscore the importance of other areas of knowledge, too, for C&E professionals. One of these is psychology, and particularly, the large number of recent studies showing how seemingly irrational many ethics-related decisions are. Specifically, “behavioral ethics” research has demonstrated the counterintuitive fact that disclosing COIs actually *increases* the likelihood of wrongful behavior. Yet another important area of knowledge for C&E

professionals is economics, and the concept of “moral hazard” (which can be seen as a “cousin” of COIs) helps illuminate the many links between incentives and C&E risks.

“COI is an area where, more than any other, law and ethics meet.”

Finally, proper handling of COIs is essential to a healthy ethical culture which, in turn, can be viewed as “business anthropology” (although this term has other meanings, too). This is because a failure to sufficiently address COIs—the most common C&E problem in many companies—can undermine employees’ sense of “organizational justice,” thereby contributing to an overall erosion of its culture. And, to bring us full circle, increasingly the law recognizes the importance of culture to compliance.

In short, COIs embrace a broad range of knowledge concerning law, psychology, economics, and anthropology that C&E professionals need for their work. In this sense, studying COIs provides an ongoing—and professionally relevant—liberal arts education, which is why I am so fascinated by the field.

(More information about all of the above topics can be found on the Conflict of Interest Blog—www.conflictofinterestblog.com). *

1. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)

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by Frank J. Navran

Nuts & bolts for boards: What ethics oversight really means

- » Total independence is an unattainable goal. The best we can hope for is to continually get closer to that goal.
- » Perhaps the best we can ask of boards is a “good faith effort” toward being as independent as possible.
- » The level of independence on the board informs the culture of the organization, and vice versa.
- » Independence is more attainable when the board aims for a operating culture that values ethics over compliance.
- » You get what you measure, and assessing the effectiveness of the organizational culture requires that one ask different questions and apply different standards than when assessing organizational compliance.

The demands on boards of directors are changing, after a spate of global ethics scandals, updates to the Federal Sentencing Guidelines for Organizations (FSGO), requirements from Sarbanes-Oxley (SOX), and new standards of independence.



Navran

These changes address both the individual conduct of directors and increased responsibilities for boards, including the oversight of organizational ethics and compliance, and the understanding and practice of what is expected and required of decision-makers if they are to meet the organization’s standards for doing what is “right, fair and good.”

To fulfill their new responsibilities in the area of ethical oversight, many board members find themselves directing a set of activities in an area where they have little familiarity. These activities include seeking specific information from Ethics and Compliance offices, interpreting that information, engaging independent ethics assessors, and knowing what to look for in an independent ethics assessment. As a result, many board members can experience a sense of exposure, uncertain if they are effectively meeting the requirements associated with oversight of organizational ethics.

This article explores the current level of understanding as to what ethics oversight entails and highlights areas of emerging consensus and differences of opinion.

Independence

Let’s begin with a discussion of the basic issue—independence. Both regulation and public opinion are advocating greater “independence” among board members. This is commonly understood as having two meanings:

1. Reducing the number of “executive” board members (i.e., members of the board who are also active members of the executive leadership of the organization itself), and
2. Reducing the conflicts of interest board members might experience in the exercise of their board duties and responsibilities.

Independence is a “term of art” that typically is used to indicate a freedom from conflicts of interest. Conflicts of interest refer to the real or perceived tension that decision-makers experience between what is in the best interest of the organization on whose behalf they are making the decisions, and the interests of the decision-makers themselves.

In the first instance (reducing the number of “executive” board members), the concern is that the board has responsibilities to hire,

evaluate, compensate, and sometimes fire the CEO. Does a CEO's presence on the board (or worse, a position as chairman of that body) conflict with the board's obligations to act on behalf of the organization's stakeholders, investors, and others? Does the CEO's presence on the board compromise the board's integrity or, equally legitimate, create an appearance of a compromise to the reasonable observer?

Independence is a special case of applying the principle of fairness. If I am to be fair in the exercise of my duties and obligations, then I ought not be influenced by the impact of my actions on my personal wants or needs. I ought to be able to make decisions as a board member independent of concern for WIIFM (What's In It For Me?).

Can independence be absolute?

Can I ever make a decision without considering what will happen to me as a result of that decision? In a word, no! Every business decision any board member makes is conflicted, because it is subject to the external influence of potential personal loss or gain. If I am a board member and choose to do X—anything at all—and my sole basis for choosing X is that I truly believe it to be the very best thing to do for the company, am I free from conflict or the appearances of conflict?

Perhaps not. If it is good for the company and I am board member, doesn't that improve the odds that it is good for me too? If the decision makes the company more profitable, safer, more efficient, better respected, or more successful by any measure, then I may be recognized as having contributed to that success. I get to keep my board position. I continue to deserve and earn the respect of my peers. I am acknowledged as having contributed. My shares increase in value. All of these outcomes accrue to me and all of them are of value to me, thus I gain from my decision.

Sanford Krolick suggested in his book *Ethical Decision Making Style*¹ that there are four sets of criteria that are considered every time any member of an organization at any level (up to and including members of the board) considers a business action or makes a business decision. To paraphrase Krolick:

- ▶ **Pragmatic considerations:** What are the business consequences of this action or decision?
- ▶ **Altruistic considerations:** What impact will this action or decision have on others or my relationship with them?
- ▶ **Idealistic considerations:** What is the right thing to do, as defined by the values and principles that apply to this situation?
- ▶ **Individualistic considerations:** What will happen to me as a consequence of this action or decision?

If we focus on the individualistic, we may argue that it is difficult (perhaps impossible) to consider any decision as wholly independent. The argument states that in every decision, the person acting experiences some individual consequences. Even a wholly unselfish act of doing for others may leave a residue of satisfaction, joy, or comfort in the person committing the act, or may result in others noting the action and finding it admirable or praiseworthy. A similar claim could be made that there is an individualistic element in any act of idealism or pragmatism. No matter what we do, there is a personal consequence and there may be a personal benefit, even if wholly "internal" to the decision-maker.

If this is an accurate description of human psychology, and I believe it is, then we cannot escape the reality that every action and decision has the potential for personal impact. Therefore, absolute independence (e.g., 100% altruism, pragmatism, and/or idealism untainted by individualism) is a myth.

What do we really mean by independence?

If we agree that absolute independence is unattainable, then what are we left with as an ideal? Perhaps we can merely hope that the preponderance of the influence will be for the greater good and that we will consciously work to recognize and minimize the influence of the individualistic considerations as we make our decisions.

We agree that boards of directors need to address the concern about the lack of independence of their members. If absolute independence is unattainable, what should we demand of our boards? I suggest the best we can ask is “good faith.”

Is good faith the most we ought to aspire to? It is enough that the decision-maker merely subordinates the individualistic considerations (What’s in it for me?) to the pragmatic (What is best for the company?), the altruistic (What is best for the company’s stakeholders, share owners, employees, customers, suppliers, etc.?) and idealistic (What is the right thing to do according to the applicable values and principles?). Given the inability to ensure absolute absence of conflicted interests within a board, I suggest that good faith may truly be the best we can expect. Appropriate board structures and the nurturing of an ethical culture within the organization and the board can reinforce good faith.

Board ethics structures

How might the board structure itself regarding organizational and board ethics responsibilities?

- ▶ Who should be on the ethics committee?
- ▶ What should that committee do?
- ▶ Who oversees the ethics committee?
- ▶ Where does the ethics committee go when they have a question?

These questions do not lend themselves to pat answers. Rather they present opportunities for the board to engage in thoughtful reflection

as to how *this* board might best address its ethics oversight obligations. In those deliberations, there are several things the board might consider.

What can directors do to ensure an ethical organizational culture?

Perhaps the most powerful tool available to boards is an independent ethics assessment. What is an ethics assessment? What are the options, and what are the advantages and disadvantages of those options?

Ethics assessments are perhaps the most accessible means of entry into the ethics consulting arena for those who wish to offer ethics-related services to their clientele. This is especially true for accounting firms that may see an ethics assessment as a natural extension of a financial audit, because many times ethical irregularities are unearthed when conducting a routine audit of a client’s books. This interest in ethics assessments is peaking in light of recent changes to the Federal Sentencing Guidelines for Organizations and the continuing impact of Sarbanes-Oxley.

The least comprehensive ethics assessment is the compliance assessment. This is the process whereby the assessor determines the degree to which one’s ethics program meets the standards set forth in applicable law, regulation, and policy, and the degree to which organizational and individual behavior satisfies the requirements of that program.

Toward the middle of the spectrum, cultural assessments explore how employees and other stakeholders perceive the standards and behavior of the organization. They assess the priorities and ethical effectiveness of individuals, groups, and units as well as the organization as a whole.

The other extreme of the assessment continuum is the systems assessment. In this process, one assesses compliance and culture as part of a bigger whole; the degree to



which the ethical principles, guidelines, and processes of the organization are integrated within the organizational system.

There are innumerable variations in between the two extremes, and each type of assessment is progressively more complex and offers the client a set of data which is more comprehensive. There is nothing wrong with any of them. Each serves a different purpose.

What *is* wrong is when clients' needs are not served because they have received the wrong assessment for their desired outcomes. If, for example, the client organization has an existing program to prevent and detect ethics violations and merely wishes to ensure that the program satisfies the requirements specified in the current iteration of Federal Sentencing Guidelines for ethics violations, then a compliance assessment is an appropriate response.

If the client suspects intentional or unintentional wrongdoing and wants to understand why it is occurring, then a cultural or systems assessment may be a better choice.

One limitation of the compliance-oriented approach is the difficulty managers may have recognizing themselves in the findings and accepting responsibility. Compliance assessments are narrowly focused and represent a high degree of vulnerability to anyone identified as "out of compliance." Thus, many leaders go to great lengths to distance themselves from these types of findings. Interestingly, an organization's first response to negative findings is often punitive and

highly individualized. Leaders may find that they have removed the specific actor, but have done little to alter the forces which motivated the undesirable act.

Going beyond compliance

If the organization wants to address the root causes of unethical behavior, then a systems assessment may be the more effective alternative. For some, a compliance assessment may be all that they know to ask for. These managers may not appreciate what else might be accomplished through a culture- or systems-focused ethics assessment. Their assessor, especially if that service provider is a legal or financial professional, also may not know what to offer, or have the wherewithal to provide a more comprehensive and/or appropriate ethics assessment alternative.

There are two traditional ways to go beyond a check on organizational and individual compliance: the cultural assessment and the systems assessment.

Cultural assessments have been used extensively by management consultants over the years. They assess perceptions and identify issues relating to how specific groups of stakeholders view targeted aspects of an organization, such as leader effectiveness, decision-making, and change management. Their inherent limitation is that they, like the compliance assessment, do not identify underlying causes.

Several years ago, some management consulting firms that had become involved in ethics management, including Navran Associates, saw the value of applying "systems" methodology to ethics questions (e.g., employee perceptions of leader integrity, the effectiveness of ethics policies, confidence in ethics systems, and the effectiveness of employee hotlines in informing and changing behaviors) as a supplement to compliance assessments.

Systems assessments uncovered whole new sets of data, very different from that available through compliance assessments. Managers, accustomed to other culture assessments, were comfortable with the way the data were presented and understood their responsibility for addressing the issues raised. These data were often viewed as less threatening than the findings of compliance assessments. They often pointed to widespread patterns of behavior within the organization and raised broader issues of how the cause of the behavior might be identified and altered to change future results. Thus, systems-oriented ethics assessments were more likely to produce the desired change over the long run.

Where other assessments were often limited and narrowly focused, systems assessments viewed the organization as a whole and examined the interconnectedness of the ethics issues within that system, and between that system and critical elements of the environment within which it operates. Systems-based ethics assessments, at a minimum, typically examine the relationships within and between these thirteen components:

- ▶ **Mission**—the perceived purpose of the organization. What is its reason for being?
- ▶ **Vision**—the perceived ultimate future state of the organization. What will the world look like if the organization successfully fulfills its purpose?
- ▶ **Values**—the underlying principles and the operating definition of what is right, fair, and good as it applies to this organization.
- ▶ **Environment**—the ethical alignment between the organization and stakeholders existing outside the organization: customers, suppliers, competitors, unions, regulators—every external entity that has a stake in the organization or effects its operations.
- ▶ **Resources**—how tangible and intangible resources enable or limit the organization's ability to pursue its mission within its pre-defined ethical boundaries.
- ▶ **History**—how the organization's history shapes or limits its ability to operate, per its stated values, in the pursuit of its goals.
- ▶ **Strategic goals**—the ethical issues associated with setting and attaining strategic goals and how congruent those goals are with the organization's vision and values.
- ▶ **Strategic plans**—how the organization goes about attaining its strategic goals and the ethics issues raised by those plans.
- ▶ **Task definition**—how the organization defines its work and the ethical implications of both preparing employees to do the work and the inherent rewards they derive from doing it.
- ▶ **Formal systems**—any ethical issues inherent in conformance to the formal organizational systems, such as policies, procedures, rules, and regulations.
- ▶ **Informal systems**—any ethical issues inherent in conformance to the informal, especially leader-based or peer group-based systems.
- ▶ **Individuals**—the values and principles motivating individuals within the workforce and how well those values match the stated values of the organization.
- ▶ **Feedback**—how the organization learns from its experience and the impact of learning (or not learning) on the ethical growth and maturity of the organization and its employees.

As we examine traditional rules-oriented assessments and more systemic ethics-focused assessments, we can note some significant differences.

TABLE 1: Differences between traditional assessments and ethics assessments.

Assessment Characteristic	Traditional (Regulatory) Assessment	Ethics Assessment
Objectives	Compliance with required standards	Compliance status as well as insights into values/principles-based culture and norms.
Assessor qualifications	Qualified assessor with content expertise (e.g., laws, rules, regulations)	Qualified assessor with content expertise and supplemental “process” expertise (e.g. OD*, OE*, Change Management)
Assessment approach	Checklist of items that correspond to regulatory requirements	Checklist of items as well as open-ended questions that investigate context and how that context was created/maintained
Assessment observations	Non-compliance observations (i.e., deficiencies)	Noncompliance issues as well as OD/OE observations of “ethics” process effectiveness, employee perceptions, and related concerns
Follow-up requirements	Ensure corrective actions are taken to address identified deficiencies	Ensure corrective actions are taken to address identified deficiencies, as well as collaboration to ensure that the client knows how to address the noncompliance observations (e.g., assistance in drafting RFPs* if external assistance is being sought, because bad RFPs lead to bad projects)

**OD=Organizational Development; OE=Organizational Effectiveness; RFP=Request for Proposal*

It should also be noted that not all “ethics assessments” are created equal. There is a continuum of sorts between a minimal ethics assessment and a truly comprehensive ethics assessment. The following table illustrates what some of those differences might look like. It is not a question of the more comprehensive one being inherently “better.” Rather, the operating question is, “What level of detail best fit the needs of the organization?” with “fit” being very much a “systems” concept.

TABLE 2: Differences between types of ethics assessments

Less comprehensive ethics assessment	More comprehensive ethics assessment
The goal is typically to gain insight into the ethical status quo and gauge potential support for or resistance to any contemplated change.	The goal is to provide a defensible evaluation of the organization's current effectiveness in meeting certain previously agreed-to ethics and compliance standards, as well as the presence of certain observable structural elements, their perceived effectiveness, and their impact on the organizations continuing development.
The questions being addressed are typically defined, at least in part, by the leadership of the organization, and can be used to simply paint a picture of the current state, provide baseline data useful in creating a new ethics initiative, or assess progress of an existing initiative.	The questions being answered are both standardized (e.g., presence and impact of the various components of an “effective” program as defined within the FSGO), supplemented with organization-specific questions regarding ethics systems effectiveness and utility.
The methodologies would characteristically include key person interviews, focus groups, some form of employee/stakeholder survey, and a review of organizational documents.	The methodologies are the same as in an assessment (key person interviews, focus groups, some form of employee/stakeholder survey, and a review of organizational documents). Both the depth and breadth of the components are greater.
The criteria are adapted to the goals of the organization (e.g., compliance with external standards and perhaps a narrow focus on one element of an organization's current ethical culture).	The criteria against which the organization is measured far exceed compliance issues. One example is inclusion of questions related to standardized instruments (e.g., ERC's NBES*) that explore attitudes regarding elements of the ethical culture.
The output is a written report of findings, conclusions, and recommendations supplemented with an executive briefing.	The output is a written report of findings, conclusions, and recommendations supplemented with an executive briefing.
The recommendations , with rare exceptions, are non-binding.	The recommendations , with rare exceptions, are at least somewhat binding. Rejection of a finding would be for cause, not just managerial prerogative. Organizations would need a defensible justification for ignoring the findings and/or recommendations.

**ERC's NBES = Ethics Resource Center's National Business Ethics Survey*

Possible oversight roles for an ethics committee

If we assume that there is an effective ethics management function within the organization, then the Ethics Committee of the Board would have oversight responsibility to ensure compliance with the organization's standards and procedures. Some oversight roles might be:

1. Contribute to the continuing definition of the organization's ethics and compliance standards and procedures.
2. Oversee responsibility for overall compliance with those standards and procedures.
3. Oversee the use of due care in delegating discretionary responsibility.
4. Oversee communication of the organization's ethics and compliance standards and procedures, ensuring the effectiveness of that communication.
5. Monitor and oversee the regular assessment of the impact of the ethics and compliance function on the organization's ethical culture.
6. Oversee enforcement, including the assurance that standards are uniformly applied and discipline is uniformly utilized.
7. Take the steps necessary to ensure that the organization learns from its experiences.
8. Ensure that the above are regularly assessed by an "independent" assessor.

But an ethics committee, whether operating at the board level or as an operational committee reporting to the board, can do much more. The committee can be charged to ensure that the organization exceeds the requirements for an effective ethics management process. For each of the above arenas of responsibility, there may be several specific roles.

Contribute to the continuing definition of the organization's ethics and compliance standards and procedures.

- Determine which areas of operation require standards and procedures.

- Review existing standards and procedures for completeness and utility.
- Use information gleaned from employee and member reporting and clarification processes (e.g., employee hotlines, independent ethics audits) to stimulate standards and procedures revisions.
- Review employee and member survey data to determine where revisions to organizational standards and procedures are called for.
- Assign responsible functions the task of redefining the organization's position via a new or revised set of standards and procedures.
- Recommend methods for more effectively communicating standards and procedures to ensure they are understood and accepted by employees and others.
- Recommend the management behavior(s) needed to reinforce the standards and procedures.

Assume oversight responsibility for overall compliance with those ethics and compliance standards and procedures.

- Take the position that the committee is the responsible authority for ethics compliance in its area of jurisdiction.
- Be the final voice concerning interpretations regarding the organization's ethics and compliance standards and procedures.
- Make recommendations on improving the existing compliance mechanisms.
- Oversee the use of due care in delegating discretionary responsibility.

Oversee the use of due care in delegating discretionary responsibility.

- Define how the organization will balance the rights of the individual applicant/employee/member and the organization's need to avoid increasing the risk of a

future violation that comes with placing a known or suspected violator in a position of discretionary responsibility.

- ▶ Oversee the background investigations of applicants/employees/members who are being considered for positions of discretionary responsibility.

Communicate the organization's standards and procedures, ensuring the effectiveness of that communication.

- ▶ Determine the mechanisms for communicating the organization's ethical standards and procedures.
- ▶ Develop and distribute appropriate documents and/or underwrite training, to ensure that all employees know and understand the standards and procedures.
- ▶ Develop mechanisms, such as needs analyses, to identify employees' or members' areas of concern or confusion.
- ▶ Coordinate policies to ensure that the messages contained in them are not in conflict with one another.
- ▶ Recognizing that communication is two-way, determine mechanisms for soliciting stakeholder input into how standards and procedures are defined and enforced.
- ▶ Develop certification mechanisms to ensure that the organization has evidence that each employee has received the appropriate information and understands the standards and procedures they describe.
- ▶ Create mechanisms (such as ombudsman offices or employee hotlines) to facilitate employees receiving "safe" guidance and/or policy interpretation and to ensure each employee's access to a "safe" mechanism for reporting suspected wrongdoing.
- ▶ Determine what training is necessary for optimum compliance levels with the published standards and procedures.



Monitor and assess compliance.

- ▶ Develop the internal control mechanisms necessary to demonstrate individual and organizational compliance with the published standards and procedures.
- ▶ Develop mechanisms to demonstrate the effectiveness and reliability of the internal controls.
- ▶ Develop mechanisms to assess the compliance-related risks associated with the organization's strategic and operational goals, objectives, and plans.
- ▶ Develop mechanisms to ensure that formalized measurements and rewards do not motivate noncompliance with the organization's standards and procedures.
- ▶ Develop and support whatever additional reporting mechanisms are deemed necessary to effectively monitor and assess compliance with the organization's standards and procedures.

Oversee enforcement, including the assurance that discipline is uniformly applied.

- ▶ Develop mechanisms to ensure consistent disciplinary responses for essentially similar violations (i.e., ensure that there are not different standards applied for different employees based on position, performance, function, etc.).

- Ensure that disciplinary provisions exist for both those who violate the standards and procedures and those who knowingly ignore such violations.

Take the steps necessary to ensure that the organization learns from its experiences.

- Develop the mechanisms necessary to identify why misunderstandings and/or violations occur and to ensure that the lessons learned are systematically applied to reduce the probability that similar questions/actions would recur.
- Follow-up on recommendations made to improve compliance mechanisms.

Other roles and responsibilities

The use of ethics committees for executive and/or administrative oversight of the various ethics effectiveness and ethics management processes is widespread but, in some cases, the ethics committee is also being required to perform functions that are at odds with the areas of responsibility shown above.

Ethics committees rightly serve an executive oversight and leadership role. That role should not be compromised by having the committee responsible for the investigation of alleged wrongdoing or the definition of specific disciplinary responses in individual cases. This confuses the issue. Responsibility for oversight should be free from the prejudices associated with operations. The ethics committee should be the advocate for effective ethics management processes, nothing more. It best represents the organization's and employees' interests by ensuring that the ethics management systems are effective and meet the requirements of applicable law and guidelines.

It would be inappropriate for an ethics committee to be involved in fact finding and/or discipline regarding alleged or proven ethics violations. That role puts them in the

“Ethics management processes work best when employees/members believe that those processes are neutral, and the fairness and impartiality in the process is not compromised.”

position of being the facilitators of policy, the investigators of specific circumstances, and the dispensers of punishment.

The biggest concern is not the committee employees' or members' ability to handle the multiplicity of functions. Rather, it is the impact that such a multiplicity may have on the perceptions of employees or members who might shy away from using available ethics resources because of a perceived conflict of interest between the roles of executive oversight, policy interpretation, advocacy for the employee or member, and advocacy for the organization.

Ethics management processes work best when employees/members believe that those processes are neutral, and the fairness and impartiality in the process is not compromised. Active participation in the day-to-day management and implementation of ethics processes takes the ethics committee out of the role of overseer and makes them the managers of the ethics functions. This is akin to having the comptroller also be the auditor. There is too great a potential for independence and impartiality to be sacrificed for it to be endorsed as a preferred practice.

Although the ideal may be to distance the ethics committee from day-to-day operations, that may not be feasible. If the ethics committee is to provide oversight and operational management, that becomes a strong argument

for regular ethics effectiveness assessments from an independent third party. Assessments come in all shapes and sizes. The closer the ethics committee is to daily operations, the more comprehensive the independent assessment should be.

In summary, ethics committees can meet the requirements of the Federal Sentencing Guidelines for high-level responsibility for effective ethics oversight. They can serve a multitude of roles and responsibilities, but special care must be taken when those roles include the day-to-day operation of the ethics management processes. Such care will ensure employee/member confidence in the organization's commitment to independence and impartiality in decision making.

Conclusion

Not every ethics assessment should be a systems assessment. There is a time and place for compliance and culture assessments, but we should never forget that organizations are complex systems made up of interconnected parts and are themselves part of larger, more complex systems, industries, and society. Often, to understand systems requires a systemic approach.

When the issue is change—fundamental and ethically consistent change—the systems assessment provides the decision-makers and change leaders with the breadth and depth of information needed to make that change happen and endure. The systems assessment is the tool for today, when organizations are undergoing fundamental change in what they do and how they do it, but are choosing to hold on to their core values, principles, and ethics, and where the ultimate goal is the more ethical organization.

As more and more vendors get into this field, it may be useful to the reader to recognize that not every assessment measures the same things or provides the same value to

those who read its results. An effective assessment ought to define:

1. What data ought the Ethics office/function be required to provide to the board?
2. What do those data mean? (e.g., How many calls to the ethics line is a “good” number?)
 - a. Where possible, current practices will be identified and critiqued.
 - b. Available options, including emerging “best practices” (where such exist) will be discussed.
 - c. An approach will be described that guides board members in the determination of how best to address their specific ethics oversight issues and needs.
 - d. Based on this presentation, it is expected that board members can be increasingly confident that they will meet mandated requirements for ethics oversight. Furthermore, they can be assured that they are reducing their personal exposure while contributing to the realization of higher levels of organizational ethics.

This document and the recommendations it presents are but a beginning to building board member confidence, reducing a board's sense of exposure, and providing individual board members with the confidence that they are meeting the requirements associated with the oversight of organizational ethics. It represents a start of what is truly needed for boards to effectively fulfill their fiduciary and legal obligations regarding organizational ethics by providing a conceptual framework and a shared vocabulary necessary for ongoing dialog. *

1. Sanford Krolick: *Ethical Decision-Making Style, Survey and Interpretative Notes*. 1987, Addison Wesley. ISBN 0-201-16412-4

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by Charles Thomas

Multinationals and due diligence: What are the red flags?

- » Failure to comply with regulations like FCPA can cost companies millions.
- » Due diligence processes help companies avoid risk and make informed decisions.
- » Due diligence is about building trust and strong relationships.
- » As companies implement due diligence processes, they will encounter “red flags.”
- » It's important to examine red flags carefully—they may be false positives.

Due diligence is supposed to inspire trust in the business relationships that companies rely on. And yet, nearly half of companies with due diligence programs in place also report they lack confidence in the process, according to Dow Jones' State of Anti-Corruption Compliance Survey 2011.¹ That's no way to do business—not in a global economy where international operations represent both opportunity and risk.



Thomas

The UK Bribery Act, which came into effect in July 2011, adds a new layer of complexity to an already confusing minefield of regulation and jurisdiction. Failure to comply with it or with the US Foreign Corrupt Practices Act (FCPA) could cost companies millions of dollars and could even land senior executives in jail. On the reverse side, proper due diligence allows a company to avoid risk. According to the Dow Jones survey, more than half of companies have delayed or avoided working with global business partners because of concerns about corruption.

Due diligence and the prevention of bribery

Due diligence is a term used for a number of concepts involving the investigation of a person or

entity prior to the signing of a contract or a specific act. Due diligence programs should be more than just impressions formed in internal conference rooms. Due diligence should be a dedicated process that allows companies to make decisions based upon reliable, actionable information.

The Bribery Act Guidance issued by the UK Ministry of Justice in 2011 outlines six key principles² that companies need to refer to when undertaking procedures to prevent bribery, both within their organization and by the people who operate on their behalf. In brief, the principles are:

- **Proportionality.** Companies need to assess the bribery risks they face and the size of their business. This will help to influence what steps are taken, including in the field of due diligence.
- **Top-level commitment.** Companies need to show through their actions that they will not tolerate infractions of any kind.
- **Risk assessment.** Any company that is at risk from corruption needs to research the markets it operates in and the people involved with the company.
- **Due diligence.** This includes any investigation covering agents, employees, partners, or others associated with a deal.

- **Communication.** Companies need to explain policies and procedures to staff and others.
- **Monitoring and review.** Policies, procedures, assessments, and due diligence should be kept up to date and checked on periodically.

Red flags

As companies implement their due diligence processes, they'll likely encounter one or more "red flags" that might divert their attention or even impede their progress. Below are some of the common issues and suggested techniques to address them.

- **Too much information on the Web.** Consider adapting your search parameters, getting a team involved, or contracting the research to a firm with specialist research capabilities.
- **Too many people with the same name.** Again, adapt the search strategy, get extra identifiers, or use a professional firm. A database that allows for name variations is also very useful.
- **No results.** There are a few possible options here: (1) The person has left a very low public profile and there are no negative issues relating to him/her; (2) The individual has altered or concealed his/her identity; and (3) You have incorrect details. Ask the individual under examination to confirm personal and business information. It could be a major red flag if search results don't produce anything of value.
- **Similar name with a red flag.** If the name is common, this may or may not indicate a problem. Consult with an expert to check the identifiers you have in place.
- **The subject is on a sanctions list, or has committed a crime, or there are allegations of a crime.** A red flag might be a big issue or it might be an error—a false

"It's important to take away that, on further examination, these red flags may turn out to be false positives. Reports may relate to another person, for example."

positive. Have the result reviewed and consider further checks.

- **The subject has a long, complex history.** A high-profile individual or firm may have many red flags, some of which can be explained by media errors or politics. If you want to proceed, you will almost certainly have to use a higher level of due diligence and possibly make some difficult judgment calls.
- **The subject has no significant problems, but has a history with colleagues/partners.** Often, a subject will claim (or a public record will indicate) that an individual or firm was linked to someone who encountered an issue, but held no blame. This will probably require more in-depth investigation and assessment. Dealing with red flags requires discretion, diplomacy, legal compliance, and business sense.

It's important to take away that, on further examination, these red flags may turn out to be false positives. Reports may relate to another person, for example. In other cases, results will be correct, but the information can be set aside for further investigation, if necessary. For example, if the subject was the client of a financial institution that had fraud problems, but there is no suggestion the subject was anything but a victim.

Last, sometimes the evidence may be strong enough to justify ending the

relationship or not proceeding with the transaction. These decisions should be weighed carefully and supported with detailed facts.

Conclusion

Conducting due diligence is an investment, but it is an important one. Even when there are legacy relationships with agents, vendors, clients, and staff members, it is necessary to ensure that these individuals are assessed for risk. Due diligence has to be renewed at intervals, perhaps every year, depending on the individual or situation at large.

Using due diligence isn't necessarily about finding "bad" people; it is about building trust and stronger relationships with the right companies and individuals. Facts should be examined in a critical light with supporting evidence, and all parties involved should be open to this vital procedure. *

Charles Thomas is Executive Director of Due Diligence for Dow Jones Risk & Compliance Solutions. He can be reached at charles.thomas@dowjones.com.

1. Dow Jones State of Anti-Corruption Compliance Survey 2011. Available at www.dowjones.com/riskandcompliance/15605_AC_Survey_eBook_v6.pdf
2. Ministry of Justice: The Bribery Act 2010 Guidance. April 3, 2011. Available at www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf

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Hear from your peers

Gayle L. Macias, MBA, CCEP, CGMS, Senior Director, Corporate Compliance, Office of Accountability, Compliance and Ethics (ACE), Audit & Risk Management/SST

1) Why did you decide to get certified?

Nearly two years ago, our board and senior leadership decided to develop a formal corporate compliance program and asked if I had any interest in assisting in the design and implementation phase for a 6 to 18 month "secondment." I was asked to consider the assignment, given my background in the Legal department supporting government grant compliance. Our VP of Audit and Risk Management Services recommended the SCCE CCEP as a way to gather the information and skills necessary to be successful. The organization supported me in the certification process in November 2009, and as they say, the rest is history! Within the first 6 months of the secondment, I was "hooked" and when the actual position was posted, I applied. I am currently the Senior Director of The Office of Accountability, Compliance, and Ethics for World Vision, Inc.

2) Has obtaining the CCEP certification helped you? If so, in what ways?

Yes, very much so. The materials, information (e.g. *The Complete Compliance and Ethics Manual*, books, and other resources) as well as the excellent instruction provided at the Academy have assisted me in the customization of a corporate compliance and ethics program for my organization. Certification shows a true commitment to the profession and a way to embrace a specific body of knowledge. In addition, the CCEP certification provides a way of showing a level of expertise and respect from colleagues, as well as other professionals in the profession. In addition, in order to retain certification, professional development is a must—it keeps you up to date and knowledgeable by meeting the biannual CPE requirements.

3) Would you recommend that your peers get certified?

Certainly! I don't know how anyone can design, develop, implement, and keep such a program current and relevant without a strong foundation and network of other professionals to draw from. In today's world, professional certification is a valuable asset, both for the individual, as well as their organization!

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Certified Compliance & Ethics Professional

by Thomas W. Kirby

Computers and copyrights: A continuing source of avoidable liability

- » When employees share copyrighted materials, employers can take a huge hit—sometimes millions of dollars for something as simple as passing around an electronic newsletter to a few colleagues.
- » Not all copyright cases settle.
- » Under the “statutory damages” provision of the Copyright Act, a court is not limited by actual damages, but may award up to \$150,000 in statutory damages for each work the defendant has willfully infringed.
- » Courts are not shy about using the power of imposing statutory damages.
- » Relatively simple best practices can greatly diminish your exposure.

Kindergarten teaches us to share, and computers make sharing quick and easy. But when employees share copyrighted materials, employers can take a huge hit—sometimes millions of dollars for something as simple as passing around an electronic newsletter to a few colleagues. Let me give a few examples from my recent experience representing electronic newsletter publishers. The names are confidential (at least in part because of the embarrassment that can be caused by companies’ violations of the law and of the rights of others), but here are the basic facts:



Kirby

- Specialized lawyers in a national firm got impatient passing along a single paper copy of a newsletter and began forwarding the electronic version simultaneously to the group. The firm settled quickly for well over a million dollars.
- The founder of a modest family business started grooming his two adult children to take over. As part of their education, he began emailing them copies of his industry

newsletter. The firm settled for almost half a million dollars.

- A communications executive began forwarding an electronic newsletter to other senior executives. The firm settled for a million dollars.
- Employees in a large real estate firm found several newsletters useful and began forwarding them to colleagues. The firm settled for almost two million dollars.
- The manager of a small consumer sales division forwarded a specialty newsletter to the presidents of the division and the parent company to help them understand how the field was developing. After paying an estimated million dollars in defense costs to its lawyers, the company also paid a \$500,000 settlement. Of course not all copyright cases settle.

Legg Mason¹ elected to litigate in defense of the activities of research employees who had posted a subscription to Lowry’s Financial Reports on the firm Intranet and otherwise passed it around. Legg Mason claimed my client’s actual losses were tiny, but the jury awarded nearly \$20 million in statutory damages.

“It is important to remember that each issue of a publication is a separate work entitled to a separate award of statutory damages.”

My practice mainly involves representing electronic newsletters, but a wide variety of works can give rise to serious copyright liability. For example, in one recent case an insurance broker was found to have secretly copied a rival's business materials to make a series of successful business proposals. Instead of statutory damages, the plaintiff demanded the profits earned by this infringement, plus interest covering the decades before the infringement was discovered. Tens of millions of dollars were awarded.

Another case involved copies of instructions and advertising for storm windows. The infringers were former authorized distributors. Their failure to make a defense resulted in a default that was held to establish willful infringement. The court held that two registered works had been infringed and awarded \$31,000 per work in statutory damages.

These numbers are high because of a special remedy in the law to implement the strong public policy in support of copyright compliance. Under the “statutory damages” provision of the Copyright Act, a court is not limited by actual damages, but may award up to \$150,000 in statutory damages for each work the defendant has willfully infringed. For non-willful infringement, the law identifies a range of statutory damages, depending on the circumstances, of up to \$30,000 per work (with a floor of \$750 per work in most circumstances).

In addition, a winning plaintiff may also be awarded its legal fees in bringing the case. The public policy underlying statutory

damages reflects the reality that it is extremely difficult for a plaintiff to see copyright infringements in most cases, because they happen behind closed doors; thus, when an infringement is discovered (sometimes by accident, sometimes through whistleblowers, and sometimes in other ways), through this serious remedy the law wants to ensure that copyright holders do not lose the incentive provided by copyright to create and distribute new works merely because of infringers' secrecy.

Courts are not shy about using the power of imposing statutory damages. I recently did a simple computer search for 2008–2011 cases reporting copyright statutory damages awarded by juries. I found about a dozen such cases, involving all sorts of copyrighted works. In two cases the juries had awarded the maximum of \$150,000 per work, and in a third the jury had awarded \$140,000. The average across the dozen cases was about \$75,000 per work. Willfulness was found in almost all cases. The lowest award was \$15,000 per work, and that was in unusual circumstances where the employer could not have known that an independent contractor had been infringing.

The news recently has focused on recording industry lawsuits against two individuals who were alleged to have posted thousands of songs for others to copy through peer-to-peer software; for purposes of keeping the trials manageable, each case focused on only 20–30 songs. One infringer was a single mom; the other was a college student. The songs they posted for free download were on sale over the Internet for under \$1 each. One case was tried three times, the other once. In each trial, the juries awarded tens of thousands of dollars in statutory damages per song. The trial judges have held that, for individuals acting for personal pleasure completely outside any business context, the awards should be reduced to \$2,250 per song. For employers, the

important message is the size of the awards juries are willing to make, even against defendants of limited means.

In one of the file sharing cases (*Sony Entertainment et al v. Tenenbaum*),² the U.S. Court of Appeals just issued its opinion. The court reinstated the large jury award, holding that the trial judge should not have rushed to make a constitutional ruling (that the damages awards were unconstitutionally large) without first using its common law power to issue a “remititur,” an order allowing a plaintiff to choose between a reduced award and a new trial on damages. The opinion is lengthy, but key points for business and other institutional infringers include:

- ▶ The right of copyright owners to demand that a jury set statutory damages is reaffirmed.
- ▶ Because statutory damages are intended to deter and punish as well as to compensate, it is error for a judge to tell the jury that the total amount of a statutory damages award needs in any way to be related to the amount of actual damage (such as lost profits) suffered by the copyright holder.
- ▶ Presumably because of the different public policies underlying copyright law, Supreme Court precedents limiting punitive damages seem not to apply to statutory damages. (The court avoided a direct ruling, but made its views pretty clear).

Individual infringers may take some consolation from the possibility of a remittitur. But that remedy offers little solace for businesses and other institutions, because no modern U.S. court has ever granted a remittitur to such an infringer. Indeed, in the *Legg Mason* case mentioned above, the trial court declined to reduce a \$20 million award for copying a financial newsletter.

It is important to remember that each issue of a publication is a separate work entitled to a

separate award of statutory damages. Thus, a business whose employees have been forwarding or otherwise infringing a daily newsletter for a year faces a worst-case liability of almost \$40 million. For infringement of a weekly, the exposure is nearly \$8 million. So multi-million dollar settlements often make sense.

Your business doesn’t have to accept such risks. Relatively simple best practices can greatly diminish your exposure. I discussed those best practices in an article I wrote in 2007,³ and the advice I give there still holds. Meaningful employee education, periodic polling of employees about copying, realistic evaluation of subscription needs, and taking out an appropriate license from Copyright Clearance Center, all taken together, will work. But effective protection requires someone to take charge, whether it is corporate counsel, an information professional, or an alert executive. So long as employers’ heads remain planted in the sand, unpleasant surprises will arrive from behind.

I represent publishers in addressing infringements. But, those publishers much prefer to make their livings from selling subscriptions to the publications they create, and they actively warn against infringement and encourage me to do likewise. However, as technology has made copying easier, they have been increasingly victimized, and they are not going to take it anymore. Employers who provide computer systems to their employees and reap the benefits of those wonderful devices must effectively prevent employee infringement and obtain proper licenses, or accept the consequences. *

1. *Lowry Reports Inc. v. Legg Mason et al.* 271 F.Supp.2d 737 (2003) United States District Court, D. Maryland, Northern Division. July 10, 2003.
2. See *Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010).
3. Thomas W. Kirby: “Managing Copyright Liability in the Computer Age.” Copyright Clearance Center, *Inside Counsel*, November 16, 2007. Available at www.copyright.com/media/pdfs/article-inside-counsel-thomas-kirby.pdf

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Compliance **360**[°]

by Charles Ruthford

Is your ethics and compliance training really preparing your employees?

- » Our current web-based ethics and compliance training may leave us unprepared for people having to deal with risks.
- » We cannot assume that people under stress will first consider a rational, step-by-step process to deal with a risk.
- » When facing a difficult situation that has personal consequences, the human mind bases its choices on intuition and emotion rather than rational reasoning.
- » Interactive, collaborative, transformative, management-led learning activities can influence values, intuition, behaviors, decision-making, and ultimately bottom-line performance.
- » Leadership and involvement by front-line managers is crucial to the success of training and change activities.

I have good news and bad news. First let me give you the good news: Over the past few decades, the technology for online web-based training has evolved significantly. Today's courses are readily available, scalable, efficient, and reasonably good at conveying information.



Ruthford

The bad news? Online training doesn't typically prepare people to react properly when faced with an ethics challenge or compliance risk. In this article, I will show why online training comes up short. I also will describe how interactive, collaborative, transformative, management-led learning activities can prepare people for those difficult situations.

History

When we developed ethics and compliance training in the early 1980s, we used a fairly simple approach. We explained the rules and expectations, and made the consequences for misconduct clear. We provided the learner with tools such as an ethical decision-making model that, if applied correctly, would

lead people to the proper decision. And we directed them to their management or an ethics hotline for advice and help.

These courses were designed and built by skilled training developers. They used state-of-the-art processes and were delivered by experienced trainers. We started in the classroom and, over the years, transitioned to the present-day web-based delivery. The premise for our design approach was simple: Because people want to avoid the pain that could result from a misstep, they would recognize the issue, pause before acting, and then go through an objective, step-by-step decision-making process. They then would respond appropriately to the questionable situation, and the sun would rise over our untarnished reputation yet another day.

Making choices

Our previous assumptions about how people react under stress—and how this affects their ethical decision-making—may not be correct. Nobel Laureate Professor Daniel Kahneman shows that people facing difficult situations react quickly. Their split-second choices

are controlled by intuition and emotion rather than objectivity. Professor Kahneman describes two systems present in the mind in his 2011 book *Thinking Fast and Slow*.¹ System 1 operates automatically and quickly, with little or no effort. There is no sense of voluntary control. Examples of automatic activities associated with System 1 might include locating the source of a sudden sound, completing the phrase “bread and ...,” or detecting hostility in a voice. System 1 continuously assesses the environment around us. It creates heuristics, or “rules,” based on our observations, experiences, beliefs, and intuition. System 1 wants to know how everything is going. If a threat or risk is present, System 1 reacts quickly, first, and takes control.

“If people react quickly and depend on intuition and emotion rather than cognition in making their choices, is it possible to influence those choices? I believe the answer is yes.”

System 2 allocates attention to the mental activities that demand it. System 2 operates when you look for a particular person in a crowd, tell someone your phone number, park your car in a narrow space, or compare two products for overall value. System 2 would rationally handle a six-step ethics decision-making process.

Imagine a situation where you don’t meet expectations or keep your promise. What’s your first reaction? If you’re like most people, you probably feel guilt, embarrassment, or shame. How can you face your colleagues, friends, or family? What if they find out that you’re a fraud or haven’t been completely honest? System 1 perceives this as a real

threat and snaps into action. Your mind reacts quickly, intuitively, and maybe even irrationally to avoid exposure. System 1 applies the previously developed heuristics to figure out what to do. If you think the more rational, problem-solving System 2 is going to get any airtime, think again. System 1 has control, and this is when people start looking for shortcuts to avoid embarrassment. This is the time when good people with honest intentions are most likely to have an ethics or compliance lapse.

If people react quickly and depend on intuition and emotion rather than cognition in making their choices, is it possible to influence those choices? I believe the answer is yes. System 1 is influenced by a person’s underlying values, beliefs, and experiences which, in turn, influence behaviors. Can personal values and intuition be influenced? Again, I believe research supports a “yes” answer.

In the book *Influence: The Psychology of Persuasion*,² Dr. Robert Cialdini describes six influencers:

- ▶ **Reciprocity.** If I do something for you, it’s very likely you will return the favor.
- ▶ **Liking.** We want to be like the people around us. Be it a fashion trend, language style, or food choices, we as humans have an innate desire to fit in.
- ▶ **Social norms.** “This is the way things are done around here.”
- ▶ **Commitment and consistency.** These are subtle influencers. If we make a decision or take a particular action, we will expend all kinds of effort and resources to make our choice or direction successful. This happens even when the obvious course of action is to drop the project and cut our losses. To drop the project is to say that our original decision was wrong. The mind has a hard time with “being wrong.” It will make the case that the original decision was the right one and set out to prove it. This also is known as throwing good money after bad.

- **Scarcity and Authority.** The influence of these two is straightforward and obvious. I'm not going to say much more about them because, over the long term, the first four influencers have a far greater effect on behaviors. I'll come back to Cialdini's work in a bit.

Scaling the learning approach

A key step in any training design is to set your achievement goals. The standard I like to use is Donald Kirkpatrick's four-level learning assessment model:³

- **Level 1 is Reaction.** This measures what students thought of the course. They also may recognize when they have encountered an ethics or compliance issue.
- **Level 2 is Learning.** Here the students can tell others, in their own words, about the material presented in the course. Learners "know" the material, but there is no guarantee they would apply it.
- **Level 3 is Behavior.** The students incorporate the concepts of the course into their personal values and intuition. They act in alignment with stated learning objectives. When Level 3 achievers encounter challenging situations, their values, beliefs, and intuition have a chance of guiding their System 1 responses in the proper direction.
- **Level 4 is Performance.** The learners' actions have a measurable effect on the outcomes of the organization. These outcomes could be reduced cost, improved quality, or timelier delivery.

Most of today's ethics and compliance training efforts only achieve Level 1 or Level 2 results. And although we wish all of our courses could lead to Level 3 or Level 4 results, unfortunately, most training budgets and resource allocations for ethics and compliance keep us firmly grounded at Level 1 or Level 2. Basically, the annual training is done, and we can tell the regulators that we are in

compliance. However, if we could achieve at least Level 3 results, we have the potential to significantly reduce organizational risk and associated reputational and cost impacts. Good ethics and compliance habits also become good performance habits.

Here is a choice point. If Level 1 or Level 2 learning and the associated risks are acceptable, then online web-based training is probably your best choice. It's scalable and efficient. However, if you wish to be better prepared and reduce your risks, then a different learning approach is needed.

In the early 2000s, I was involved with a design team that was trying to develop an online learning activity for newly minted first-line managers. Our promotion rate was fairly low, and it took several months to fill a classroom with 24 to 30 managers. Some people had to wait as long as six months to attend their first management class. The lack of knowledge and skills caused by the delay presented unacceptable risks. This wasn't an ethics or compliance course, but the lessons learned are applicable.

The first thing we did was focus on the attributes of highly successful learning experiences. Not surprisingly, interactive, collaborative, and transformative learning activities were more likely to achieve a Kirkpatrick Level 3 or Level 4. When the learner was able to influence the learning outcomes, the activity was even more effective. Yes, people can learn individually; however, the most effective learning occurs when people are learning together in a co-creative fashion.

The resulting hybrid online learning experience was a success. Students participated in the class from their "home" locations around the world. A facilitator convened four 90-minute conference calls with a "pod" of 10 to 15 managers over a 45-day class term. During the conference calls, the facilitator presented topics of interest. Managers were directed to

an online forum for their assignments and worked in three- or four-person study teams to complete them. A portion of each call was reserved for questions and answers. The online forum allowed managers to share ideas and ask questions of their “pod mates.” An online assessment tool identified strengths and weaknesses. A website provided convenient access to resource and reference materials. The facilitator monitored and contributed to the forum. The study schedule was flexible, with the exception of the four calls.

Finally, each participant was required to develop his or her own personal learning plan with a set of learning objectives. The scalable design allowed new classes to start weekly, if needed.

The management training described above was successful because it was interactive, collaborative, and transformative. The course had a leader, and the managers could learn from each other. The managers controlled the learning pace. I’m not saying that all ethics and compliance courses should be as elaborate as this one. We’d be run out of town by senior management. I’m simply using this example to highlight the underlying attributes of the design.

Let’s go back to the first four of Cialdini’s influencers: reciprocity, being like others, meeting the social norms of the group, and commitment and consistency. I think you can see how they meld together with the attributes of the successful management class. This approach can influence values, behaviors, and the all-important intuition.

There is one more piece to this puzzle, and then I’ll pull it all together. T.J. and Sandar Larkin published some groundbreaking findings in their 1994 book *Communicating Change: How to Win Employee Support for New Business Directions*.⁴ The authors found that first-line managers are the most trusted members of leadership. The trust of management is generally low, but employees trust their first-line manager the most. Why is this finding important? Because it tells us that if you

want to change things, first-line managers must be involved, and they need to have a major role. This finding can be applied to ethics and compliance training.

Managers can provide leadership with the deployment of training activities. Tools such as the Internet, company Intranets, and streaming video servers are useful for delivering training materials into the

hands of first-line managers, who need to have an active role. The training must include interactive activities that require participants to talk and solve problems with each other. At the end of an exercise, a manager-led discussion about the results helps crystallize the learning. If the manager’s only role is to get everyone into the room and push the start button for participants to sit and listen, then you are back to traditional web-based information transfer.

To have effective ethics and compliance learning experiences, we need to embrace a new model and approach. Gone are the days where a single employee is interacting with his/her computer. This includes apps on our

“The trust of management is generally low, but employees trust their first-line manager the most. Why is this finding important? Because it tells us that if you want to change things, first-line managers must be involved, and they need to have a major role.”

smartphones. Although the phone is cool, it's still one employee interacting with the online course. We need to be using learning activities where first-line managers gather team members together and lead them through the course-work. In the course, they need to solve real-life scenarios, deal with case studies that are relevant to the employees' organization, and engage in role-playing. This learning approach has been shown to achieve Level 3 behavior change and, in some cases, Level 4 performance improvements. When we achieve Level 3 results, people's intuition is influenced, and their automatic System 1 responses are more likely to be aimed in the desired direction.

The bottom line

We shouldn't be asking, "How inexpensively can we do ethics and compliance training?"

and then checking the box. We should be asking what kind of investment we are willing to make in order to minimize risk and, more important, improve bottom-line performance.

The good habits employees develop in this approach to ethics and compliance translate into better performance in everything they do. People want to be known for good ethics, good compliance, good integrity, and good performance. It's a matter of pride. Let's give them a chance to show us what they can do. *

1. Kahneman, Daniel: *Thinking Fast and Slow*. New York: Farrar, Straus and Giroux, 2011.
2. Cialdini, Robert B: *Influence: The Psychology of Persuasion*. New York: William Morrow and Company, Inc., 1984, 1993.
3. Kirkpatrick, DL, and Kirkpatrick JD: *Evaluating Training Programs (3rd ed.)*. San Francisco: Berrett-Koehler, 2006.
4. Larkin, TJ, and Larkin, Sandar: *Communicating Change: How to Win Employee Support for New Business Directions*. New York: McGraw Hill, Inc., 1994.

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by Joe Murphy, CCEP

Sure, it's ethical, but is it legal?

How many times have you heard “It may be legal, but is it ethical?” or the statement, “We’ve moved beyond ethics to compliance.” But our field is compliance and ethics. Why not just ethics?

Ethics purports to be about values, and to be above merely obeying the law. Sounds good, until you look at history and experi-



Murphy

ence a bit closer. The problem with “values” is that there are quite a few values, and they often conflict. Loyalty is certainly a popular value, but is loyalty to family always good? If you are making a hiring decision, would your values tell you to reward your family out of loyalty and hire your brother for that open position in the company? Loyalty to country is good, but if your country is a fascist dictatorship, is loyalty the right value? We make choices among values all the time.

What is law? Law is society’s assessment of the order of values, based on the community’s experience. So, if your loyalty and honor tell you to do something (e.g., an act of revenge), but the law says otherwise, this sets the priority for your values.

Here is an example: Your long-term friend works for a competitor. The competitor is a disadvantaged business struggling to survive. It is also devoted to saving the environment. You know there is plenty of business available for your company to survive, but you and this one competitor have been shortlisted as the two bidders for a contract. So, out of loyalty, friendship, concern for disadvantaged businesses, and respect for the environment, you call the competitor and agree to let him win. You have certainly been very ethical, with values

prevailing over profit, but you have committed a crime. Why? Because society, in weighing competing values, has decided that competition brings the best value to all of society.

“The problem with ‘values’ is that there are quite a few values, and they often conflict. Loyalty is certainly a popular value, but is loyalty to family always good? If you are making a hiring decision, would your values tell you to reward your family out of loyalty and hire your brother for that open position in the company?”

Another example: People are suffering in a particular dictatorship. In an exercise of compassion and courage, you go there to see for yourself and to see if you can help people. Of course, you need to spend money there to survive. You are certainly following values and being ethical, but you have committed a criminal violation of a U.S. boycott law. Society has decided that limiting this dictatorship is a priority value. Yes, you have been true to your sense of values, but you broke the law.

So before we proclaim the battle to prevent criminal conduct “done,” and decide it is time to “move on to ethics,” remember that in addressing compliance with laws, you have never left the issue of values. *

Joe Murphy is Of Counsel to Compliance Systems Legal Group and Editor-in-Chief of Compliance & Ethics Professional Magazine. He may be contacted at jemurphy@voicenet.com.

Tear out this page and keep for reference, or share with a colleague. Visit www.corporatecompliance.org for more information.

Recipe for a Compliance Day in 2012

Cynthia Scavelli (page 22)

- » Reach out to SCCE and other compliance professionals for valuable ideas.
- » Events should reflect your company's culture and stay on budget.
- » Contact different company departments for their expertise and suggestions.
- » Initiate a Planning Committee early. Things always take longer than you think!
- » Plan a simple event for your first year. You can always add more later.
- » Engage your employees with fun contests and creative prizes.



GRC focus: Keep your employees close and your auditors closer

Steve McGraw (page 28)

- » With regulatory attention continuing to focus on GRC results, corporations need to focus on ensuring compliance is up to par.
- » Corporations need to show employees that all internally reported issues will be taken seriously.
- » Sharing compliance self-assessments and mitigation programs with auditors can help corporations establish a strong reputation.
- » GRC should be viewed as increasingly beneficial, especially when preparing for mergers and acquisitions.
- » GRC systems can provide information to show trend lines and correlations to address root-cause issues before regulators ask.

Compliance in a casino world

Michele Abely (page 32)

- » Operate in a good faith manner and in the best interest of the company and its customers.
- » Do the research to find the best answers and solutions.
- » Document all decisions in a memo including the research done, the findings, and the outcome.
- » Ensure all related procedures are written and/or updated regarding any decisions.
- » Communicate decisions clearly and ensure that outcomes are executed consistently.

DOJ review: FBI's Integrity and Compliance Program

Emil Moschella (page 36)

- » The FBI implemented a corporate-style compliance program to allow for the early detection of internal control weaknesses.
- » The DOJ OIG reported that the FBI's program has been beneficial to its efforts to monitor and enhance compliance.
- » The DOJ OIG suggested that other agencies may wish to consider implementing a similar kind of program.
- » Remedial legislation, policies, and processes are inadequate.
- » An integrated compliance and ethics program in government agencies is important.

Powerful witness preparation: The most important person

Dan Small and Robert F. Roach (page 40)

- » The most important person in the room is the one who says nothing: the court reporter.
- » Consider your words carefully—the reporter's machine is cold, mechanical, and humorless.
- » Words have different meanings: think about *manager*.
- » Avoid using jargon that jurors may not understand or find confusing.
- » If you are not sure what counsel is asking, ask for clarification rather than answering the question.

Nuts & bolts for boards: What ethics oversight really means

Frank J. Navran (page 44)

- » Total independence is an unattainable goal. The best we can hope for is to continually get closer to that goal.
- » Perhaps the best we can ask of boards is a "good faith effort" toward being as independent as possible.
- » The level of independence on the board informs the culture of the organization, and vice versa.
- » Independence is more attainable when the board aims for a operating culture that values ethics over compliance.
- » You get what you measure, and assessing the effectiveness of the organizational culture requires that one ask different questions and apply different standards than when assessing organizational compliance.

Multinationals and due diligence: What are the red flags?

Charles Thomas (page 55)

- » Failure to comply with regulations like FCPA can cost companies millions.
- » Due diligence processes help companies avoid risk and make informed decisions.
- » Due diligence is about building trust and strong relationships.
- » As companies implement due diligence processes, they will encounter "red flags."
- » It's important to examine red flags carefully—they may be false positives.

Computers and copyrights: A continuing source of avoidable liability

Thomas W. Kirby (page 59)

- » When employees share copyrighted materials, employers can take a huge hit—sometimes millions of dollars for something as simple as passing around an electronic newsletter to a few colleagues.
- » Not all copyright cases settle.
- » Under the "statutory damages" provision of the Copyright Act, a court is not limited by actual damages, but may award up to \$150,000 in statutory damages for each work the defendant has willfully infringed.
- » Courts are not shy about using the power of imposing statutory damages.
- » Relatively simple best practices can greatly diminish your exposure.

Is your ethics and compliance training really preparing your employees?

Charles Ruthford (page 63)

- » Our current web-based ethics and compliance training may leave us unprepared for people having to deal with risks.
- » We cannot assume that people under stress will first consider a rational, step-by-step process to deal with a risk.
- » When facing a difficult situation that has personal consequences, the human mind bases its choices on intuition and emotion rather than rational reasoning.
- » Interactive, collaborative, transformative, management-led learning activities can influence values, intuition, behaviors, decision-making, and ultimately bottom-line performance.
- » Leadership and involvement by front-line managers is crucial to the success of training and change activities.

SCCE's 2012 Upcoming Events

Learn more about SCCE's educational opportunities at www.corporatecompliance.org/events

March 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	10
			Purim begins	15	16	17
Daylight Saving Time Begins	12	13	14	15	16	17
18	19	20	21	22	23	24
First Day of Spring		WEB CONFERENCE: How to Use Incentives in Your Compliance and Ethics Program				St. Patrick's Day
25	26	27	28	29	30	31

April 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6	7
Palm Sunday April Fool's Day					Passover begins	
8	9	10	11	12	13	14
Easter			WEB CONFERENCE: Corporate Fraud Investigations			
15	16	17	18	19	20	21
Tax Day	Basic Compliance & Ethics Academy (SOLD OUT) Chicago, IL			CCEP® Exam		
22	23	24	25	26	27	28
					Midwest Regional Conference Chicago, IL	
29	30					

May 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4	5
		May Day				
6	7	8	9	10	11	12
	Basic Compliance & Ethics Academy São Paulo, Brazil	Corporate Compliance & Ethics Week May 6–12, 2012		CCEP® Exam		
13	14	15	16	17	18	19
Mother's Day					Upper Northeast Regional Conference New York, NY	
20	21	22	23	24	25	26
	Basic Compliance & Ethics Academy Brussels, Belgium			CCEP® Exam		
27	28	29	30	31		
	SCCE OFFICE CLOSED Memorial Day					Shavuot begins

Dates and locations are subject to change.

All Upcoming Events

Basic Compliance & Ethics Academies

April 16–19 • Chicago, IL (*SOLD OUT*)
May 7–10 • São Paulo, Brazil
May 21–24 • Brussels, Belgium
June 11–14 • Scottsdale, AZ
July 9–12 • Shanghai, China
August 13–16 • Boston, MA
November 12–15 • Orlando, FL
December 10–13 • San Diego, CA

Regional Conferences

Midwest • April 27 • Chicago, IL
Upper Northeast • May 18 • New York, NY
Alaska • June 15 • Anchorage, AK
West Coast • June 22 • San Francisco, CA
Southeast • October 12 • Atlanta, GA
Southwest • November 2 • Houston, TX

Higher Education Compliance Conference

June 3–6 • Austin, Texas

11th Annual Compliance & Ethics Institute

October 14–17 • Las Vegas, Nevada
Aria in Las Vegas



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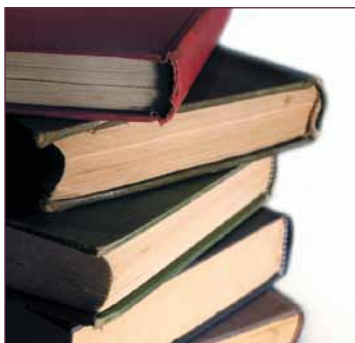
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