Best Practices and Practical Tips for Your Compliance & Ethics Program

Association of Corporate Counsel, Northeast Chapter

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Section 1- Introduction

Our Speakers

**Introductions:**
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**Presenter:**
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**Agenda**

**Section 1:** Introduction

**Section 2:** Aligning Your Compliance & Ethics Program with the U.S. Federal Sentencing Guidelines for Organizations

**Section 3:** The Roles of the General Counsel and the Legal Department in the Compliance and Ethics Program

**Section 4:** Measuring the Effectiveness of the Compliance and Ethics Program

**Questions**
Section 1:

*Introduction*
Polling Question #1

How would you best define your organization’s specific industry sector?

A. Government/Public Sector
B. Health Care/Pharmaceuticals/Life Science
C. Manufacturing/Engineering
D. Financial Services/Insurance
E. Retail/Consumer Goods
F. Technology
G. Energy, Utilities & Mining
H. Other
Polling Question #2

What is the size of your organization?

A. Less than 500 employees
B. 500 to 1,000 employees
C. 1,001 to 5,000 employees
D. Over 5,000 employees
E. Don't know
Polling Question #3

How much time do you spend on compliance or ethics-related activities?

A. Less than 10% of your time
B. Between 10-25% of your time
C. Between 25-50% of your time
D. Between 50-75% of your time
E. More than 75% of your time
### Why Focus on Compliance & Ethics for this Webinar?

- Subject of increasing legal and regulatory scrutiny

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1977</td>
<td>FCPA</td>
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<tr>
<td>1985</td>
<td>Defense industry scandal</td>
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<td>1991</td>
<td>Adoption of FSGs</td>
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<tr>
<td>1996</td>
<td>Caremark case</td>
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<tr>
<td>1999</td>
<td>DOJ Charging Memo (Holder)</td>
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<td>2002</td>
<td>Sarbanes-Oxley Act of 2002</td>
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<tr>
<td>2003</td>
<td>DOJ Charging Memo (Thompson)</td>
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<tr>
<td>2004</td>
<td>FSGs Amended</td>
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<td>2005</td>
<td>Booker &amp; Fanfan decisions</td>
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<tr>
<td>2006</td>
<td>DOJ Charging Memo (McNulty)</td>
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<td>2008</td>
<td>Stone v. Ritter</td>
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<td>2010</td>
<td>DOJ Charging Memo (Filip)</td>
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<td></td>
<td>UK Bribery Act</td>
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<td>FSGs Amended</td>
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<td>Dodd-Frank Act</td>
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Why Focus on Compliance & Ethics for this Webinar? (Continued)

- Area of increasing responsibility and visibility

1. Board of Directors
   - Overall Accountability
   - Active Engagement
   - Regularly Informed
   - Values-Driven

2. Senior Management
   - Program Oversight
   - Tone at the Top
   - Strategic Planning
   - Risk-Focused

3. Chief Compliance Officer
   - Day-to-day Responsibility
   - Partnership with Business
   - Regular Interaction with Board
   - Voice of the Program
Why Focus on Compliance & Ethics for this Webinar? (Continued)

- Area that often dovetails with Legal

Note: This is a representation of the way responsibility is allocated at a small sample of companies. It is not necessarily a recommendation of how that responsibility should be allocated.
What Influences a Compliance & Ethics Program?

- Corporate Culture

- Laws and Regulations
  - Widely applicable (e.g., SOX, FAR, FCPA, UK Bribery Act)
  - Specialized (e.g., PPACA, HIPAA, EU Data Privacy)

- Federal Guidance
  - U.S. Department of Justice Charging Memoranda
  - Corporate Integrity Agreements
  - Deferred/Non-Prosecution Agreements

- U.S. Federal Sentencing Guidelines for Organizations
Section 2:

Aligning Your Compliance & Ethics Program with the U.S. Federal Sentencing Guidelines for Organizations
How familiar are you with the U.S. Federal Sentencing Guidelines for Organizations?

A. Very familiar
B. Somewhat familiar
C. Not very familiar
D. Never heard of them
Polling Question #5

Does your organization consider the Federal Sentencing Guidelines for Organizations in either the operation or assessment of its compliance and ethics program?

A. Yes, all the time
B. Sometimes
C. Not often
D. No, never
E. I have no clue
Overview of the U.S. Federal Sentencing Guidelines for Organizations (FSGs)

• Provide guidance on the sentencing of organizations convicted of federal crimes.

• Intended to achieve two key objectives in sentencing organizations:
  1. Just Punishment: Ensuring that the punishment corresponds to the degree of blameworthiness of the offender; and
  2. Deterrence: Offering incentives for organizations to detect and prevent crime.

• Organizations can mitigate potential fines by as much as 95% by demonstrating that they have “effective” compliance and ethics programs.

• FSGs outline eight (8) key elements of an “effective” compliance and ethics program.
### Eight Key Elements of an “Effective” Compliance and Ethics Program*

<table>
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<tr>
<th>Key Element</th>
<th>Guideline Overview</th>
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<tr>
<td>1. Standards and Procedures</td>
<td>• The organization must establish “standards and procedures to prevent and detect criminal conduct.”</td>
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</table>
| 2. Oversight and Accountability     | • The organization should define roles, responsibilities and reporting lines for compliance and ethics personnel.  
• Governing authority (i.e., Board of Directors) is accountable for the program.                                                                                                                                                                                                                   |
| 3. Due Diligence in Hiring/Promoting | • The organization should make efforts not to hire/promote any individuals who the organization knew, or should have known through due diligence, had engaged in illegal activities or other conduct inconsistent with the compliance and ethics program.                                                                                     |
| 4. Training and Communication      | • The organization should communicate standards and procedures and other aspects of the compliance and ethics program by conducting effective training programs and otherwise disseminating information appropriate to roles and responsibilities.                                                                                         |
| 5. Monitoring, Auditing and Reporting | • The organization monitors and audits to detect criminal conduct; periodically evaluating the effectiveness of the program.  
• Establish a reporting system for employees to “report or seek guidance” on issues.                                                                                                                                                                                                                   |
| 6. Incentives and Discipline        | • The organization must promote and enforce its program consistently and through appropriate incentives and disciplinary measures.                                                                                                                                                                                                                     |
| 7. Response and Prevention         | • The organization takes reasonable steps to respond appropriately to the criminal conduct and to prevent further similar conduct after criminal conduct has occurred                                                                                                                                                                                         |
| 8. Risk Assessment                 | • The organization must periodically assess the risk of criminal conduct as part of design, implementation, and modification of the Compliance & Integrity Program.                                                                                                                                                                                                 |

*United States Sentencing Guidelines for Organizations, USSC §8B2.1
Section 3:

The Roles of the General Counsel and the Legal Department in the Compliance and Ethics Program
Polling Question #6

Does your organization have a Chief Compliance Officer/Head of Compliance?

A. Of course!
B. Nope
C. Wait, what’s a Chief Compliance Officer?
Polling Question #7

Is the individual with responsibility for your organization’s compliance and ethics program a lawyer?

A. Absolutely
B. No way
C. I haven’t the faintest idea
Combining Compliance and Ethics with the Legal Department

• Embedding the Compliance and Ethics function within Legal remains a very common configuration

• Increasing legal, regulatory and public scrutiny of compliance risks drives close coordination between Compliance and Ethics and Legal

• Embedding Compliance and Ethics within the Legal may serve to better protect attorney-client privilege

• Compliance and Ethics reporting into the General Counsel and/or a senior member of the Legal is quite common, due to perceived similarities in job responsibilities and disciplines
Separating Compliance and Ethics from the Legal Department

• Recent guidance has led many organizations to reconsider their reporting structures and to move Compliance and Ethics out of Legal and into a stand-alone role.

• Perceived conflict between the roles played by the Legal (i.e., protector of the company) and Compliance and Ethics (i.e., issue spotter).

• Society of Corporate Compliance and Ethics Survey from 2013 found that 88% of respondents do not think that Compliance and Ethics should report to the General Counsel.

• Organizations taking steps to provide Compliance and Ethics function with greater independence and access to Board of Directors (or subcommittee of the Board).
Separating Compliance and Ethics from the Legal Department (Continued)

In what area of your organization is the Chief Compliance Officer/Head of Compliance based?

36% Compliance (Separate Function)
36% Legal
8% Internal Audit/Business Assurance
7% Risk
3% Human Resources

Based on the results of PwC's 2013 State of Compliance Survey (630 respondents)
Polling Question #8

To whom does the Chief Compliance Officer or its equivalent primarily report in your organization?

A. Board of Directors/Audit Committee
B. Chief Executive Officer
C. General Counsel/Legal Department
D. Internal Audit
E. Chief Financial Officer
F. Chief Risk Officer
G. Other
H. I don’t know
Section 3- Roles of the General Counsel and the Legal Department in the Compliance and Ethics Program

**Reporting Structures**

To whom does the Chief Compliance Officer or equivalent formally report in your organization?

- Board of Directors: 23%
- General Counsel / Chief Risk Officer: 25%
- Chief Financial Officer: 6%
- Internal Audit: 2%
- Other: 7%
- Chief Executive Officer: 27%

*Based on the results of PwC's 2013 State of Compliance Survey (731 respondents)*
Reporting Structures (Continued)

• Reporting structure of the Chief Compliance Officer can be as important as the roles and responsibilities of the function

• Many organizations have both day-to-day and formal reporting structures for the Chief Compliance Officer.

  • **Day-to-day Oversight**: May often play a supervisory role and meet regularly with the Chief Compliance Officer (e.g., CEO, CFO, General Counsel)

  • **Formal Oversight**: Typically interact less frequently with the Chief Compliance Officer and provide more high-level supervision (e.g., Board of Directors, Audit Committee of the Board)

• As companies consider the optimal reporting structures for their compliance and ethics programs, they need to consider both the formal and day-to-day reporting channels.
Advantages and Disadvantages of Certain Compliance Reporting Structures

- If the Chief Compliance Officer report to the:

  - Board of Directors or a Committee of the Board
  - Chief Executive Officer
  - General Counsel
  - Chief Financial Officer
  - Chief Risk Officer
  - Human Resources
  - Internal Audit
Independence and Integrity

• Regardless of reporting structure, a program’s “effectiveness” hinges on the independence and integrity of the Chief Compliance Officer.

• Where Chief Compliance Officer is, or reports to, General Counsel or Legal Department, important to implement safeguards to minimize filtering of concerns or issues.

• Because Chief Compliance Officer has responsibilities that entail monitoring, and responding to allegations of misconduct by, senior management and staff, independence and the ability to operate free of undue influence is critical.
Section 4:

*Measuring the Effectiveness of the Compliance and Ethics Program*
Why Measure Effectiveness?

• Under the FSGs, organizations must “take reasonable steps...to evaluate periodically the effectiveness of the organization's compliance and ethics program.”

• Regulatory agencies also require the periodic measurement of program effectiveness (e.g., U.S. Department of Health and Humans Services)

• Measuring effectiveness goes hand-in-hand with risk assessment

• Critical to business strategy and planning
How Do You Measure Effectiveness?

- When assessing the effectiveness of a compliance and ethics program, remember there are three areas to measure:

  1. **Design**: Does the program encompass what it should (i.e., FSGs, industry-specific elements, risk-specific elements)?

  2. **Implementation**: Was the program implemented as designed?

  3. **Impact**: Is each element, as designed and implemented, working the way it should?

- It is critical that measurement of effectiveness encapsulate both the overall program, as well as each individual component of the program.

- Measuring effectiveness is both a qualitative and quantitative task—each metric or component measures a different aspect, and each is valuable in its own right.
How Do You Measure Effectiveness? (Continued)

Case Study: Measuring the Effectiveness of an Anti-Bribery Policy

- Apply the three forms of measurement to the organization’s Anti-Bribery Policy:

  1. **Design:** Does it include the relevant information employees need to know? Is it comprehensive, but also comprehensible? Is it targeted to the right audience? Is it engaging? Is it in the appropriate languages?

  2. **Implementation:** Who is actually being trained? Is the training updated as rules, policies, regulations change? Does the company address changing language needs?

  3. **Impact:** Do people understand the training? Do they retain what they've learned? Has their behavior changed as a result?

- Possible qualitative metrics:
  - Audience profiling; delayed assessment results; learner satisfaction survey results; FCPA policy hits/inquiries/reports following training; FCPA violation trends

- Possible quantitative metrics:
  - Course completion rates; test scores/answer analysis
Polling Question #9

What tools does your organization use to measure the effectiveness of its compliance and ethics program?

A. Training and Hotline Data
B. Employee Surveys
C. Risk Assessment and/or Audit Results (Internal/External)
D. Regulatory Findings and/or Exam Results
E. Litigation/Criminal Action/Fines
F. Employee Disclosures
G. Business-Specific Metrics
H. Benchmarking Data
I. Other
Questions and Contact Information

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