SO THEY WANT YOU TO START A COMPLIANCE PROGRAM
By Joseph E. Murphy

You have been asked to start or revamp a compliance program. Maybe it was an officer or a board member afraid of personal liability for not having a program; maybe a senior officer read that this is insurance against fines, punitive damages and an outraged public; or maybe it's the price you have to pay to settle government enforcement charges. But what is a compliance program, and what do you need to do?

What is a "compliance program"? A compliance program is a management commitment to play by the rules. But it is not just words; it must be backed up with solid, ongoing management and organizational steps to prevent, detect and correct wrongdoing. The most commonly used standard is in the US Federal Sentencing Guidelines for Organizations (the "Guidelines") which guide federal judges in the American legal system in sentencing companies and other organizations for federal crimes. The Guidelines define the elements of an "effective compliance and ethics program." Other governments and self-regulatory organizations around the world have also been recognizing that the implementation of a compliance program is a step any responsible management should take (see http://www.corporatecompliance.org/international/index.htm., the SCCE web site compiling compliance program guidance and standards from governments and stock exchanges around the world).

How do I go about starting one, and can I afford it? There is much work required for an effective compliance program, and only the highlights can be covered here. However, creating an effective compliance program does not take a fortune or a team of lawyers. There are a number of resources available for help: there are several books, including Kaplan, Murphy & Swenson, Compliance Programs and the Corporate Sentencing Guidelines (Thomson/West)(the author has an interest in this book); periodicals, including ethikos (www.ethikosjournal.com); and organizations for networking, including the Society of Corporate Compliance & Ethics (www.corporatecompliance.org). The first step is recognizing that you do not have to reinvent things; your program should be customized for your company, but you can adapt tools that already exist in your company or are readily available elsewhere. When it makes sense to obtain special expertise, you may get that on a cost-effective basis outside.

What will work best varies by company. Smaller companies generally will need less formality. The amount of effort also depends on your industry, the risks in your business, and your company's compliance history.

Commitment, not money, is the key for a program's success, but there are times when money will flow into compliance. After violations occur, companies hemorrhage money to investigate what went wrong and to repair the damage. This can be avoided by taking the smart management steps that constitute a compliance program.

What does an effective compliance program need? The Guidelines, issued in 1991 and revised in 2004, list seven "minimum" steps that are frequently cited by commentators. These standards are a necessary starting point, but they are only part of the story. Their meaning is being fleshed out by practice in enforcement agencies and in various industries. The following are steps that belong in any compliance program.

Due diligence, culture and ethics. The Guidelines require due diligence, although many lists of compliance steps overlook it. It is the keystone. If you just follow formal steps but do not put your heart into it, your program will not be diligent and will not work. The program must also "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." In short, this cannot be skin deep or just a paper program; there must be a real commitment to doing the right thing throughout the company.

Risk assessment. Before starting a program, it makes sense to examine the risks your business faces by conducting a compliance risk inventory and assessment. What troubles have hit other companies in your industry? Where has your own company had close calls? Some areas of the law cover almost all companies (e.g., employment discrimination, sexual harassment, occupational health, antitrust and competition law, copyright infringement). Others are more specialized (e.g., pharmaceuticals, aviation, utility regulation). Still others seem specialized, but contain traps for the unwary (e.g., money laundering, overseas bribery, international trade controls). If your company is global you need to include information on the legal standards in all the countries where you operate. You should assess both the probability of a violation occurring and its impact, so you can then determine how to prioritize your approach.

Standards and procedures. Of the Guidelines seven steps, having standards and procedures is first on the list. The basic standard should be more than "commit no crime;" companies should seek to act with integrity. Companies typically start with codes of conduct, which are useful, but do little in themselves if they are mere words. You also need to examine what, if anything, you do to give such compliance and ethics policies life. What management steps can you take to make the code and policies relevant to everyday life in the business? Also consider what types of controls will help reduce the risk of violations. For example, do you divide key control functions among different people, so one person may act as a check on another?

Senior personnel in charge. The Guidelines require a senior person or persons to take responsibility for the program. Companies typically have a compliance and/or ethics officer. Again, this is a starting point. The compliance officer must be respected, have the necessary resources, and have real clout. Having the person report to an independent committee of the board helps achieve this goal. But no single person can be the entire compliance program. In addition to a compliance officer, there should be supporting structure, such as a multidepartmental compliance committee. There may also be designated managers and professionals with responsibility for specific risks, such as privacy officers and environmental coordinators. People responsible for the day-to-day work of the compliance program must have the tools, authority and clout to do a difficult job. For more information about the people who do this type of work, the compliance and ethics profession, see Murphy & Leet, Working for Integrity (SCCE: 2006). And at the top of any list, there is the commitment and active support of senior management. If the CEO and the top operating officers walk the talk and support the program, it will have credibility with employees.

Get it out to the field. This one is not in the Guidelines, but it is included in a variation of the Guidelines standards adopted by the US Environmental Protection Agency in January 1996 as a measure of a company's environmental due diligence. There is a real risk that compliance programs will have little influence outside of headquarters. Attention must be dedicated to this concern. One important technique, captured in the environmental compliance standards, is to have managers in the field responsible for their unit's compliance activities. Compliance and ethics needs a presence in every business unit and every department. Remember, too, that each acquisition, joint venture or partnership needs to be included in your compliance work.

Don't hire or promote criminals. The Guidelines require care in who you hire and promote. For this purpose and to avoid claims of negligent hiring, companies conduct background checks on new hires, and review discipline records before promoting someone.

Communicate effectively - train and inform. Almost anyone who thinks of compliance programs thinks of written guides and training sessions. The Guidelines require something better - communications that work. Does your training give practical advice? Do your written materials get read and understood? If training puts your employees to sleep, it wastes your company's money. Use techniques that work, like DuPont's example of publicizing actual disciplinary cases, Singer, "DuPont's Daring Communications Formula," 17 Ethikos 1 (Jan/Feb 2004). Online, multimedia training may prove to be one of the best potential solutions. Be sure to train everyone who can put the company at risk, from the board of directors to the remote sales agent.

Check what is happening. The Guidelines require steps to ensure your program is effective. These include compliance audits and monitoring, and having a system for employees and agents to ask questions and report concerns without retaliation for doing so. Audits need to be effective enough that they can detect even criminal wrongdoing. For audits to be credible, the auditors need some degree of independence. It is important to measure what you are doing. Is the training working? Is the program reaching people? Companies use surveys, focus groups, deep dives and other study techniques to measure the impact of their programs. As for reporting systems, some companies have internal helplines, and others use outside professional services such as Global Compliance Services. Companies are also using online reporting systems.

Consistent discipline and rewards. The Guidelines require a disciplinary system that is consistent and strong enough to deter wrongdoing. Punishment must include those who fail to take reasonable steps to prevent and detect wrongdoing. A compliance program must also provide incentives that encourage compliance. Incentives, evaluations and rewards are key tools for achieving a culture of compliance and ethics. You can find more detailed guidance in a white paper on this topic available on SCCE's web site: See http://www.corporatecompliance.org/resources/documents/DRAFTwhitepaper-BuildingIncentivesCompliance_WOappdx.pdf

Respond to violations. The Guidelines do not require perfection; despite compliance programs there will be violations. Companies must react to those responsibly. For example, they must investigate allegations of wrongdoing, discipline the wrongdoers, stop the violation, and correct the wrongs done. They should also look for the underlying causes of the violations, and improve their preventive steps based on that input. Companies also need to know when and how to go to the government if a problem arises.

Be at least as good as industry practice. No cookie-cutter formula will work for an effective program, and neither will an isolated approach. Under the Guidelines, your program needs to be at least up to industry practice. If everyone else in your industry has a 1-800 helpline, and you do not, you need to explain why what you have works at least as well as what others in the industry have done. Participating in industry practice forums and membership organizations like SCCE, and keeping up with best practices through publications like ethikos are ways to meet this test, and to obtain valuable advice and insight from your peers.

Write it down. The US Environmental Protection Agency's standards require "accurate and complete documentation" of your program. In the words of one expert, Jeffrey Kaplan, "without documentation, the program never happened." Be prepared to prove your program to a skeptical prosecutor.

What do I do when I'm done these steps? A compliance program is not a model ship that is assembled from a box and put on display. The forms and methods of lawbreaking and the areas of compliance risk keep changing and mutating. So, too, a company's compliance program must keep evolving with the industry and the company. When a compliance program stops developing and responding to change, it ceases to be effective.

And what if you do have an effective, state-of-the-art program? Have you considered how you can turn that accomplishment to your company's advantage? A strong program can reap substantial benefits including saving and possibly even making money, but that is for a future article . . .

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