# Compliance & Ethics Professional®

November 2015

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org


## Meet Pyter Stradioto

**Compliance Director at Samsung**

**São Paulo, Brazil**

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# 2016 SCCE Events

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October 7 • New York, NY
November 4 • Dallas, TX
November 18 • Seattle, WA - ***NEW***
December 9 • Philadelphia, PA - ***NEW***

by Roy Snell, CHC, CCEP-F

# There is "good money" and there is "problematic money"

*Please don't hesitate to call me about anything any time.*
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SCCE and HCCA make an effort to tie our revenue to our mission. This revenue can come from memberships, publications, certifications, conferences, etc. But some associations have a material amount of their revenue coming from vendors or other business relationships, so they have a tendency to focus on those outside relationships. We love our vendors—but we want to love them because they are a part of our professional community, not because of the revenue they provide.


Snell

Many vendors have hired the best and brightest from our profession, so they have a lot to contribute and they have solutions for our members' problems. But we take relatively small amounts of money from vendors—for ads, logos on bags, booths, etc.—because we do not want any one arrangement to be too big to walk away from. We occasionally get asked to do something that is not in the best interest of our membership, and we need to be able to walk away. Money can make that difficult.

Some believe that AARP has lost their way because of their insurance products, that the revenue affects their decision-making. *The Washington Examiner* reported:

> But the conflicts of interest are clear. The House Ways & Means Committee issued a report in 2011 studying 'AARP The Insurance Company.' They found that the board of directors for AARP Insurance Plan was entirely drawn from AARP's board. The Ways & Means report also quoted Marilyn Moon, a former AARP executive, saying: *'The new arrangements with insurance companies create a tremendous number of potential conflicts for AARP, which is a powerhouse...AARP will not be perceived as a truly independent advocate on Medicare if it's making hefty profits by selling insurance products that provide Medicare coverage.'* *(www.washingtonexaminer.com/article/2561985)*

AARP adamantly believes the money doesn't affect their decision-making. But even if they can overcome the conflict of interest, leadership's valuable time has been spent defending their position and managing the revenue—time that could have been spent on members.

We are occasionally encouraged to provide products—including insurance products—for our profession. But if we did, and it became a material amount of money, we may start to focus on the vendor, product, and revenue instead of our members. And this could happen even if it "fit our mission" of helping our members.

So it's not a question of, "Does the product relate to our members or mission?" It's a question of, "Could the revenue create a conflict of interest?" It may be a very legitimate business opportunity, and these deals may easily pass through the "legal legitimacy" filter—but not the "conflict of interest" filter.

Anything that can cause you to lose focus on the "typical member" should be feared. ✳

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“See beyond the cultural differences.”

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# ARTICLES




**Compliance & Ethics Professional® (C&EP)** (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.




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# Compliance & Ethics Professional®





VOLUME 12, ISSUE 11

## Impact of Volkswagon emissions scandal continues to grow

Shortly after the U.S. Environmental Protection Agency (EPA) ordered a recall of 500,000 diesel Volkswagon vehicles in September, the global automaker admitted that some 11 million diesel vehicles were equipped with software that helped them cheat emissions tests worldwide. At press time, countries around the world were launching their own investigations and analysts were predicting the scandal may prove fatal to the car company. As reported by the *BBC*: "One German newspaper has called it the 'most expensive act of stupidity in the history of the car industry.' Stupid because manipulating pollution data to boost sales can only be seen as a slap in the face to customers who paid a premium for what they thought was a greener car. And expensive because €14bn (£10bn; $15.6bn) was wiped off VW's value within hours of the stock market opening on Monday morning. Since the company owned up, its shares have plummeted more than 30% in two days." For more information, see: *http://bit.ly/VWscandalimpact*

## New FBI boss in Chicago a public corruption veteran

The Chicago FBI office welcomed Michael Anderson last month to head up the branch. As their new special agent in charge, Anderson comes especially well-prepared to target public corruption. As reported by the *Chicago Tribune*: "The new boss of the Chicago FBI has not only investigated his fair share of public corruption but also has literally written the agency's book on it. In 2003, while supervising investigations into public corruption and government fraud for the Washington field office, Michael Anderson rewrote the bureau's Public Corruption Field Guide, the operations manual for running a corruption probe. In his climb up the ranks, the 20-year FBI veteran has led investigations into super-lobbyist Jack Abramoff, former New Orleans Mayor Ray Nagin and government fraud surrounding that city's reconstruction after Hurricane Katrina." For more information, visit: *http://bit.ly/chicago-trib*

## China graft watchdog urges bank regulator "leave no stone unturned"

China's crackdown on corruption appears to be moving full-steam ahead. As reported by Reuters, "China's banking regulators must 'leave no stone unturned' rooting out illegal activity, the ruling Communist Party's anti-graft watchdog said on Thursday, intensifying a campaign against graft launched by President Xi Jinping. Dozens of senior officials have been investigated or jailed since Xi took over the party's leadership in late 2012 and the presidency in 2013.

"'In the past half year Huarong, Great Wall, Dongfang, Xinda, four other asset management companies, and China Merchants Bank have all been investigated, and concrete results achieved,' the party's Central Commission for Discipline Inspection said. It went on to urge China Banking Regulatory Commission officials to increase their vigilance." For more information, see: *http://bit.ly/Chinaantigraft*

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# Regulatory

## DOJ memo intensifies pursuit of criminal corporate executives

The U.S. Department of Justice (DOJ) recently announced its intention to pursue corrupt corporate executives. As covered in a recent *New York Times* article: "The Justice Department wants the message to go out that federal prosecutors will be taking aim at executives over their role in corporate misconduct by issuing a memo that requires companies to identify every wrongdoer within the organization, regardless of rank, or be considered uncooperative. Like a parent stamping a foot at a recalcitrant teenager, Sally Q. Yates, the deputy attorney general, told the *The New York Times* in an interview, 'We mean it when we say, "You have got to cough up the individuals."'

"To make clear that employees need to be thrown under the proverbial bus, Ms. Yates's memorandum states that to receive 'any cooperation credit'—with the word 'any' underlined—a company must disclose 'all relevant facts about individual misconduct.'" For more details, see: *http://bit.ly/NYTDOJmemo*

## SEC removes credit-rating references from money fund rules

The U.S. Securities and Exchange Commission (SEC) further reduced the power of credit-rating agencies recently with its new rules on money market funds. As reported by *Reuters*, "U.S. securities regulators adopted rules on Wednesday that strip out references to credit ratings from their rule book governing money market funds, as part of an ongoing effort to reduce the industry's reliance on credit-rating agencies since the financial crisis. The final rule by the Securities and Exchange Commission was required under the 2010 Dodd-Frank Wall Street reform law. The law requires U.S. market regulators to strip out anything in their rules that references ratings and come up with alternatives, after the country's three major credit-raters helped fuel the 2007-2009 crisis by giving overly positive ratings to loans that were backed by toxic subprime mortgages." For more information, see: *http://bit.ly/SECcreditrating*

## Report calls for stricter regulations in "on-demand economy"

Internet -up companies such as Uber and Airbnb tout their "on-demand economy" business models for the benefits they provider to their independent contractors. A new report suggests that standard labor laws need an upgrade to protect these new versions of employer-employee relationships. As reported by *Staffing Industry Analysts*, "The National Employment Law Project called for protecting the rights of 'on-demand' workers at online staffing and services firms such as Uber, Task Rabbit or online staffing firms such as Wonolo. The organization made its case in a new report last week. NELP's report argued many workers in the on-demand, or gig, economy are employees and not independent contractors as claimed by the firms.

"'At its core, their business is to dispatch workers who provide services to consumers and businesses,' the report said. 'The use of online platforms to broker work should not insulate businesses from employer status, nor do the artificial labels these businesses attach to their workers define the employment relationship.'" For more details, see: *http://bit.ly/staffinganalysts*

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# Utilities & Energy

## Compliance & Ethics Conference

February 21—24, 2016 | Houston, Texas | Westin Oaks

Questions: katie.burk@corporatecompliance.org

The utilities and energy industries are highly regulated. Compliance topics can be specific and focused on areas that are not necessarily addressed at the all-industry level.

Take advantage of the opportunity to discuss specific content areas in more detail, and enjoy a forum for sharing and exchanging ideas with others facing the same regulations.

*Learn more and register at* ***www.corporatecompliance.org/utilities***

# SCCE *conference news*

## 2016 Utilities & Energy Ethics and Compliance conference

**February 21 – 24, 2016 | Houston, TX**

Planning for the 2016 Utilities & Energy Ethics and Compliance conference is under way. We were so impressed with the number and quality of submissions from potential speakers. Attendees can expect great sessions and expert speakers in 2016. Topics on the agenda include evaluating corporate culture, trends in compliance, cybersecurity, regulatory views and what is next, and more—all geared towards compliance professionals in the utilities and energy industries. At the conference, we will hear from experts as they give an inside look into their company's compliance program through detailed case studies. You will learn from those who have been in the trenches with issues similar to the ones you are facing and find practical answers to your questions.

Register now to reserve your place at the 2016 Utilities & Energy Ethics and Compliance conference. Learn more and register at *www.corporatecompliance.org/utilities*

### Add value for colleagues: Be an SCCE*net* Guest Commentator

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# SCCE *website news*

*Contact Tracey Page at +1 952 405 7936 or email her at tracey.page@corporatecompliance.org with any questions about SCCE's website.*

## Top pages last month

Membership | Home Page | Job Board | My Account | Academies

**Number of website visits last month**

**43,110**

### Speak at our conferences

Be part of making our conferences up to date and relevant to the industry. Become a speaker. Selected speakers will not only help the Compliance community, but they will also earn CEUs toward their certification and the fee for the conference they are participating in will be waived.

We are currently accepting proposals for web conferences and the 2016 Annual Compliance & Ethics Institute until November 16. Go to *http://www.corporatecompliance.org/Events/CallforSpeakers* to learn more about speaking at one of our events or to submit a proposal. You can also hear advice from past speakers on our Expert Videos page located here: *http://www.corporatecompliance.org/Resources/SCCEResources/ExpertVideos*

### Video of the Month

**How do you best assess a target company's compliance and ethics program?**


**Lisa A. Gross,** Ethics Analysis Senior Manager, Lockheed Martin, discusses what to look at to have a clear understanding of how a target company will affect your business. See this video and others on mergers and acquisition compliance at: *http://bit.ly/sccevotm-11*

## Get Connected

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# SCCE *social media news*

*Contact Stephanie Gallagher at +1 952 567 6212 or email her at stephanie.gallagher@corporatecompliance.org with any questions about social media.*

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## Facebook — *www.facebook.com/scce*

We're on Facebook. Like our page for compliance news and networking. Here's a recent post:

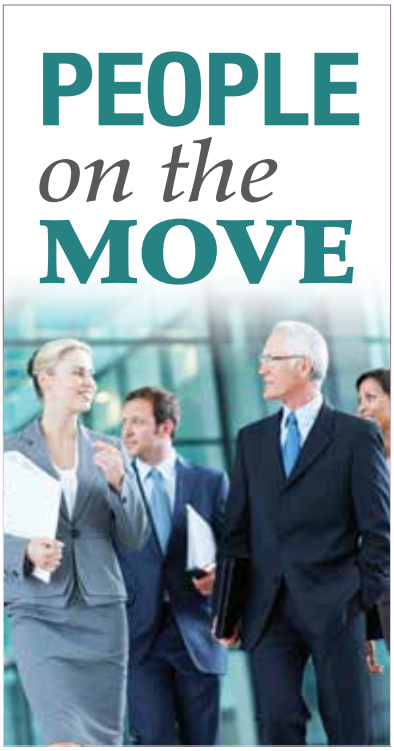

## Pinterest — *www.pinterest.com/thescce*

Check out our boards for FCPA, Compliance, Ethics Blog, Compliance Videos, Privacy, Corporate Compliance & Ethics Week, The Lighter Side, and map-boards for our major conferences (highlighting local restaurants, sights, and things to do in each of our conference cities).


**Find the latest SCCE*net* updates online ▶** www.corporatecompliance.org/sccenet

▶ CHS Inc., the nation's leading farmer-owned cooperative and a global energy, grains, and foods business, announced that **John "Jack" Lenzi** has joined the company as Vice President, Corporate Compliance in St. Paul, MN.

▶ Marsh McLennan in New York City, a $13 billion conglomerate with large insurance and consulting businesses, has promoted Chief Compliance Officer **Scott Gilbert** to be the company's new Chief Information Officer.




▶ OncoSec Medical Incorporated in San Diego, a company developing DNA-based intratumoral cancer immunotherapies, promoted **Sheela Mohan-Peterson**, JD, MS, to Chief Legal and Compliance Officer. In this role, she will continue to lead the company's intellectual property portfolio and global legal strategy.

▶ itBit, a financial services company in New York, announced the appointments of **Daniel "Danny" Alter** as the company's new General Counsel and Chief Compliance Officer, and **Kim Petry** as Chief Financial Officer.

## 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@corporatecomplaince.org*

by Donna Boehme

# In Compliance 2.0, mandate is king!

Whenever I evaluate a compliance program, I ask the chief compliance officer (CCO) to describe their job. Often, the response I receive sounds like a task list or job description, rather than a clear picture of a role with a defined mandate as the (i) architect of the compliance program; (ii) subject matter expert of compliance, ethics, and organizational culture; and (iii) developer and overseer of the team needed to build and implement an effective Compliance program that finds, fixes, and prevents misconduct while reinforcing a culture of ethical leadership.

Boehme

Now, any list of common traits of effective leaders always includes some variation of "has a clear vision of the task ahead and the ability to communicate that to team members." To this end, I can think of no domain on the corporate landscape that requires a clear, unifying mandate more than that of Compliance. Not only is the profession relatively new and mysterious to casual observers, there is also no shortage of misinformation and misconceptions about the role created and promoted by bystanders with little or no subject matter expertise (and often a strong self-interest in how the role is defined).[1]

So into that vacuum marches the CCO, whose first order of business should be clarifying and communicating their mandate to the organization. Make no mistake, in the realm of Compliance 2.0,[2] mandate is king! Compliance 2.0 is based upon the CCO as an independent voice in the C-suite,[3] with unfiltered access to the Board—a critical part of the checks and balances of the organization's governance structure.

Such independence and empowerment depends on a carefully defined mandate that is sufficiently broad and clear to the organization.[4] Having the Board endorse the Compliance mandate through a board resolution is ideal. The CCO can then go about the task of meeting with their counterparts in Legal, Audit, HR, and the businesses to ensure this mandate is clearly communicated and understood, along with every person's role in the compliance program. And, as I've written, it is vital that the CCO get the entire Compliance team on board with this mandate, even if that requires a Compliance 101 "boot camp" for the team.[5] Because, dear #EthiTweeps, a correct, universally understood, independent mandate is Step One to Compliance 2.0! Mandate is king! ✳

1. Boehme, Donna: "On Compliance, Read This, Not the Bloviators." *Corporate Counsel*; July 29, 2015. Available at: http://bit.ly/1JsfGA1
2. Boehme, Donna: "3 Nails in the Coffin of 'Compliance 1.0.'" *Corporate Counsel*; March 17, 2015. Available at: http://bit.ly/1CzM3bC
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4. Boehme, Donna: "Five essential features of the Chief Ethics and Compliance Officer position." *Compliance Today*; December 2012. Available at http://bit.ly/1GRZ3w6
5. Boehme, Donna: "Building the Ship While Sailing: Developing Teams at the CEI." *Compliance & Ethics Professional;* March 2015. Available at: http://bit.ly/1AXxI9K

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an interview by

# Meet Pyter Stradioto

**Pyter Stradioto** (p.stradioto@samsung.com) was interviewed in August of 2015 by **Adam Turteltaub** (adam.turteltaub@corporatecompliance.org), Vice President Membership Development for SCCE/HCCA.

**AT:** While you obviously had to redirect some of your thinking for the new role, what were some of the practices in Internal Audit that you brought to your Compliance role, and that compliance programs could learn from?

**PS:** Auditing allows you to recognize the entire functioning of an organization, processes, systems, standards, and controls. While playing the auditor role, you have to identify the major risks, understand how to test the policies and procedures, as well as how to design workflows to correct and avoid deviations. The Audit background helps the compliance officer to overcome one of the major obstacles to the effectiveness—the art to transform the laws and regulations into internal processes, procedures, and controls.

**AT:** What led you to pursue the role? I think it's notable that you made the

switch not directly, but after going to business school.

**PS:** Back in 2007, the mindset for Ethics and Compliance functions was mainly a task for the Legal department. After interviewing some lawyers, the company decided to hire me from this perspective of audit and business background, especially looking at investigations and due diligence tasks. This background gave me the opportunity to combine and overcome one of the major obstacles for the compliance people—understanding the environment. I could "translate" the legal requirements into particular business processes. In the short time I've been with the company, I've learned one of the first lessons in Compliance, which is, "To be effective, you need to put on the shoes of others, understand their needs, pressures, challenges, and even daily dilemmas to comply with all requirements."

**AT:** Back in 2007 when you started in Compliance, there weren't a lot of compliance officers by today's standards, even in the U.S. What was the state of the profession in Brazil? Who could you turn to for advice?

**PS:** In 2007, we really could count on fingers the number of compliance officers in Brazil. However, in the past few years, we have seen a major increase of companies developing compliance programs, especially after the new Brazilian Companies Clean Act. Another important factor is that companies now understand better this new function, requiring professionals who have experience in law, audit, communication and human resources.

**AT:** AES prided itself on making its compliance program a company-wide one, but allowing each region to also take unique steps to make the program their own. How important is it, in your experience, for compliance programs to be customized by region?

**PS:** There is no doubt that customization shall be considered to obtain effectiveness. Each region has its own specific risks and needs. The customization allows you to identify the local trend, combine local culture, and develop better solutions to prevent violations.

> U.S. and Brazil have several differences which come from its foundation, origin, beliefs, history, political development, society, organization, and others.

**AT:** What are the key differences between compliance needs in the U.S. vs. in Brazil?

**PS:** The U.S. and Brazil have several differences which come from their foundations, origins, beliefs, history, political development, society, organization, and others. In a country like the U.S., it seems easier sometimes to tell people do the right thing and follow the rules, but in Brazil it is necessary to work in principles and values, to break the beliefs where some level of violation was the only way to survive in business.

**AT:** As you pointed out when we began discussions about this interview, you've sort of toured the world of Compliance. You worked for a US company, then a European one, followed by a Brazilian company, and

now you're at an Asian one. Let's follow that story around the world. When you moved to a European company, what did you find different in their approach to compliance?

**PS:** In my experience, US companies tend to be more law enforcement oriented, nominating an internal department to oversight others, clearly sending a message like "Step out of this line and you might be in trouble." On the other side, the European companies tend to go a little calmer and spend extra time to understand the need for a new requirement. However, they let the leaders take care of the entire commitment instead of one single department. Both sides have their strengths and weaknesses, and I believe I am able now to combine the best of both into my day.

**AT:** What do you think are some of the lessons other companies from other countries could learn?

**PS:** There is no compliance program off-the-shelf; you have to tailor your own platform. Understand your company's culture and risks attached. Educate your leaders to the needs and benefits of a compliance culture, and how it is important to have one. Use the best of all programs to create your own approach, and try to find the balance between awareness and enforcement. At the end of the day, it is necessary to understand that some people will always adopt the spirit of the law, but others will need the enforcement of the rules.

**AT:** You've just started working for an Asian company. Are you seeing any differences in management style and the approach to compliance?

**PS:** Family style, loyalty, teamwork, cooperation, and respect are always present in Asian management style. Acting globally, the Asian companies print their way and are influenced by the environment where they operate. In this sense, I see the Asian companies understanding the compliance programs and inputting their process oriented way to make it effective.

Prior to any implementation, listen to the employees, leaders, providers, clients, and the other stakeholders about who this company is, its values, principles, history, and understand the real culture.

**AT:** What should compliance officers expect when working for a Korean company?

**PS:** Considering my short experience at Samsung, I believe that a Korean company brings to its environment some elements of the country's history. The scenario considers highly educated professionals, hard workers committed to achieve results, and a great sense of respect for their leaders. It is important as well to have an open mind to accept a certain level of hierarchy and be patient to understand and be understood. The words of a good experience in a Korean company are trust, respect, serenity, and teamwork.

**AT:** Having worked in all these places, what do you see as the common ingredients for running a successful compliance program?

**PS:** Really listen to what others have to say before you start. Prior to any implementation, listen to the employees, leaders, providers, clients, and the other stakeholders about who

this company is, its values, principles, and history, and understand the real culture. Walk around and get out of your office. Be involved on the strategy level. Put yourself in the shoes of your CEO and the employees exposed to the risks, like a salesman pressured by goals, and show you can talk their language and listen to them. Be efficient evaluating the real risks, and demonstrate to leaders what makes sense for them to be preventive. Do not try to implement an off-the-shelf compliance program; it will not work. Instead, all programs must be tailored to each specific business, market, country, and culture. The enforcement works for a certain time, but awareness and understanding make the difference. When leaders buy the idea, compliance is not enforced, but it is required and desired by the company. Face the conflict to be a real compliance officer and change an environment. This is not a job, you have to believe that principles and values are for real; you have to live it. Be the role model, the truth of your behavior generates trust and allows you to be listened to and contribute to a high culture of compliance.

Always work for the good of all. See beyond the cultural differences,look for the human essence and you will make an impact on the organization.

Always work for the good of all. See beyond the cultural differences, look for the human essence and you will make an impact on the organization. Compliance is not about only complying with the law, but creating a culture of integrity that helps your company to be sustainable and admired by the customers, employees, and all stakeholders.

**AT:** Thank you, Pyter, for sharing your experiences with us. ✳


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by Jennifer Kugler

# The danger within: Addressing the internal risks of privacy failures

Close your eyes and answer this question: What's the one corporate risk that has piqued the interest of CFOs, board members, soccer moms, and gamers alike?

If you answered cybersecurity, you are right. With thanks to a few high-profile hacks in the last year, cybersecurity and data privacy have found their way out of the server farms and onto the front pages of business journals and pop culture magazines. More importantly, the related issues have landed front and center with many boards of directors. In fact, almost two-thirds of board members at public companies plan to spend more time and focus on IT risks in the future.

Kugler

Most of this attention has focused on cyberattacks. But those who have experienced one or many know that *privacy* failures are also very painful and expensive. Setting aside the direct cost of managing the initial response, there are other, indirect costs that lurk in the background. These hidden costs include big ticket items like lost business, ongoing regulatory compliance, management resources, and business distraction.

Because of this, companies have focused their privacy risk management on stronger firewalls and security controls. But CEB analysis suggests that the main points of privacy weakness are internal, not external. And they most often occur not because of intentional and malicious hackers, but unintentionally – through weak processes and employee error.

CEB research indicates that a third of companies lack policies and procedures that clearly explain privacy requirements. This is made worse by the fact that 60% of companies have no clear information governance structure, making it much more difficult to identify who owns what issues or sub-issues. But the company is not solely to blame. Many employees tell us they engage in risky behavior. In some companies, as many as 4 out of 10 employees admit to engaging in insecure behavior.

To fix these pitfalls, companies need to strengthen their current processes with integrated privacy guidance and build guidance into existing business workflows so that employees can quickly and efficiently find what they need. Additionally, companies need to maintain focused effort on privacy messaging throughout the year. Annual training is simply not enough, especially as privacy regulations change. Companies need to create a structured and targeted approach to reinforce the more formal annual training. Posters, videos, and privacy program giveaways: All of these and more will help keep the privacy lessons top of mind for employees.

Focusing on internal dangers as well as those caused by hackers and other outsiders will go a long way toward equipping companies to manage growing privacy risks. ✳

***Jennifer Kugler*** *(kuglerj@cebglobal.com) is an Principal Executive Advisor at CEB in Arlington, VA*

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## *corporatecompliance.org/regionals*

by Steven Priest

# The General Counsel as Chief Compliance Officer

*An interview with **Phillip Rudolph**, Executive Vice President and Chief Legal and Risk Officer, Jack in the Box.*

**Steve Priest:** Phil, I'm spending time near pig farmers from Iowa, and I still don't see the conflict between the role of General Counsel (GC) and Chief Compliance Officer (CCO) that Sen. Grassley so famously described years ago. As head of Legal *and* Compliance for Jack in the Box, how do you minimize conflicts?

Priest

**Phillip Rudolph:** Conflicts are certainly possible, particularly if you've got the wrong person in the GC/CCO role. However, if the GC/CCO has a strong grasp of who the company's critical stakeholders are and a good ethical compass, I don't think the challenge is great.

**Steve:** We were talking about compliance, and you used the phrase "ethical compass."

**Phil:** Frankly, in my organization, "ethics" is a far more fundamental part of my role than is "compliance." We're really not too heavily regulated, and any compliance issues tend to conflate with legal ones. Importantly, our employees seem comfortable coming to me with ethics issues, because I believe they view my role as helping the company identify, manage, and mitigate risks, in whatever way such risks might manifest themselves.

**Steve:** And you work hard to be accessible.

**Phil:** I've tried to "break down the walls" not simply between my Legal and Ethics roles, but also between my "scary" Legal/Ethics organization and the remainder of the company, by demystifying (and destigmatizing) who I am and who my department is. One of the ways I do this is through regular ethics communications, in which I designate myself "the Ethics Geek" and communicate about some topical ethics issue from the news (I'm never at a loss for material).

I work hard to make these communications entertaining. This seems appreciated – so much so that folks I pass in the hallways often seek assurance that I will continue to fill their in-boxes with my substance-filled attempts at humor (or humor-filled attempts at substance). And make no mistake, while I dress these tomes up in pretty costumes, the substance is there and the message is delivered: Ethics is important in everything we do at Jack in the Box and Qdoba.

**Steve:** I think Mary Poppins was right: A spoonful of sugar—and humor—helps the compliance medicine go down. And by so doing, you build credibility and accessibility for you and your departments. Thanks for the inspiration, Phil. ✳

***Steve Priest*** *(Steve@Integrityll.com) is President of Integrity Insight International.* www *www.Integrityll.com*

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by Gregory Gray, Esq., CHC, CCEP

# Compliance during a government shutdown

» Divided government, coupled with partisanship and an unwillingness to compromise, can create an environment that ultimately leads to deadlock and total or partial government shutdowns.

» The executive branch has inherent authority to maintain functions that are essential to the safety of human life or the protection of property.

» The failure to include Compliance as a critical function ignores the fact that even during a shutdown, much of government is still in operation.

» When a shutdown ends, the compliance professional needs to use business continuity and risk assessment processes to determine where reviews need to occur.

» When otherwise good people feel they've been treated unfairly, they may use that perceived unfair treatment to justify doing bad things.

Divided government seems to be the rule rather than the exception. At the federal level, the U.S. Congress and the Presidency have been controlled by the same party for only six of the past 20 years (2003-2007 and 2009-2011). In my home state of Minnesota, one-party control of both the governorship and the state legislature has occurred for only four of the past 20 years (2011-2015).

Gray

Although some believe there is value in the different perspectives and checks-and-balances offered in divided government, when coupled with partisanship and unwillingness to compromise, it can create an environment that ultimately leads to deadlock and total or partial government shutdowns.

In 2011, Minnesota had its longest total state government shutdown. In the summer of 2015, Minnesota came within a couple weeks of a partial government shutdown of our state Agriculture, Education, and Jobs and Training departments. Both experiences raise questions. For those of us who are compliance professionals in government, what role should we be play to support system and program integrity during a shutdown? What unique ethical obligations are created by a government shutdown? And finally, what are our obligations after the shutdown ends?

## Why do government shutdowns happen?

A government shutdown occurs when the Legislative branch (at the state level) or the Congress (at the federal level) fail to appropriate the funds necessary for the normal operation of the government. There can be partial shutdowns when specific agencies or activities are not funded, and there can be full shutdowns when none of the major functions are funded. However, irrespective of whether we are discussing a state or federal shutdown, the Executive branch has

inherent authority to maintain functions that are essential to "the safety of human life or the protection of property."[1] In Minnesota, the court has defined the phrase "critical core functions of government"[2] as existing within the Executive branch's authority to fund, even in the absence of legislative approval of specific funding bills.

The federal government has the ability to operate with budget deficits. Attorney General Benjamin Civiletti issued legal opinions in 1980 and 1981, which for the first time interpreted the Antideficiency Act as requiring the shutdown of the government, in whole or in part, if funds were not appropriated by Congress. Before Mr. Civiletti's opinions, the federal government continued to operate, even in the event of "funding gaps."

Attorney General Benjamin Civiletti issued legal opinions in 1980 and 1981, which for the first time interpreted the Antideficiency Act as requiring the shutdown of the government, in whole or in part, if funds were not appropriated by Congress.

Most state constitutions require that the state budget be balanced annually. As a result, one might expect that state shutdowns would be more prevalent than those at the federal level. However, even with the additional budget flexibility of deficit spending, there have been more federal government shutdowns than state shutdowns. I was able to document only 10 state shutdowns, but technically there have been 18 federal government shutdowns since 1976.

As noted earlier, the determination of critical core functions is the responsibility of the Executive branch with oversight by the courts. In 2011, when Minnesota suffered its longest and most expansive shutdown, the Minnesota Supreme Court appointed a Special Master to take testimony from the Executive branch, the public, service providers, and other affected parties on whether certain functions were critical. In analyzing whether a particular function was critical, Minnesota's Special Master allowed the governor significant discretion. None of the functions the governor initially listed as critical were eliminated by the Special Master and, as the shutdown wore on, the governor added functions to the list, as did the Special Master.

At the federal level, Congress or others with standing could contest the Executive branch's designation of whether a function falls within the definition of essential. However, I could find no evidence of a successful challenge to a president's designation of a function as being within the "essential to the protection of life or property" definition. Whether at the state of federal level, the Executive branch has primary control over who works—and who doesn't—during a shutdown, and those decisions are routinely accepted and often expanded as the shutdown goes on.

### Is Compliance a critical service?

When it comes to deciding what is critical and when we look at the goal of protecting life or property, Compliance often doesn't come to the minds of those making the decisions. Think about it. If Compliance is responsible for program integrity, and those

programs are not operating because the government is shutdown, is there really a need for them? Unfortunately, this mindset is shortsighted. In its analysis of the 2013 federal government shutdown, the Office of Management and Budget (OMB) specifically cited "Program Integrity Activities" as one of the budgetary costs of the shutdown. The analysis specifically noted the halting of IRS enforcement activities and reviews of Social Security eligibility as areas of concern.[3] Furthermore, the failure to include Compliance as a critical function ignores the fact that even during a shutdown, much of the government is still in operation. Those operations take place without many of the typical controls in place (e.g., reconciliations, redundancy controls, etc.), which creates an even greater opportunity for mistakes or fraud than when the government is operating at full capacity. In Minnesota, the state's Office of Management and Budget estimated that 80% of state spending continued during the state's most recent shutdown, and although I couldn't find a similar figure relating to federal spending during a shutdown, *Business Insider* magazine estimated 80% of federal workers continued working during the most recent federal shutdown.[4]

## What can the Compliance professional do?

At the front end of the process, the compliance professional needs to take the following steps.

**1. Be at the table, working with decision makers on what constitutes a critical service.**
A strong argument can be made that there is a significant risk to both property and lives in environments where internal controls are not in place or are not fully functioning. Because the Executive branch is the entity initially charged with determining critical functions, and because courts tend to give the Executive deference on these determinations, making the argument early for the inclusion of Compliance as a critical function is important.

**2. Look beyond the Compliance Office**
In addition to working to make sure compliance professionals are deemed critical, the Compliance area needs to be forceful in fighting to have those non-compliance employees, who have important control responsibilities, designated as critical. Knowing which employees have important control responsibilities requires some advance planning. Often the risk assessment process noted below will identify some; more often the names will come from a variety of sources, including Internal Audit, external reviews, and the personal experience of compliance professionals.

**3. Have a strong business continuity culture and related continuity planning that is informed by risk assessment.**
The weaknesses in the control environment will be exacerbated during a shutdown. By having already identified the key areas of risk and by having prioritized those areas, you are in a much better position to monitor those areas with the limited resources you will have available. Minnesota agencies, well in advance of any shutdown, required risk assessments and business continuity planning as a normal part of agency operation. Among the values of business continuity planning is the identification of lines of authority in organizational structures operating with reduced staff. When a shutdown seemed likely, Minnesota agencies were better prepared than they otherwise would have been, and

they used their business continuity plans and risk analyses as the starting point in the process of determining what functions were critical.

In the event that Compliance is not designated a critical service, and if time permits, the Compliance area needs to speak to senior officials in the areas that will continue operations. Directors and managers must realize that they will be under an increased burden to monitor process integrity in the absence of some of the key control personnel. Compliance may want to discuss areas of particular concern, such as data access controls, billing, payroll, and other payment functions. It should also be made clear that there will be a more thorough review of key functions by the Compliance area when the shutdown concludes.

In advance of the 2011 shutdown in Minnesota, the Office of Management and Budget sent out a letter to all agency heads, which reminded them of their responsibility to maintain a "high commitment to strong internal controls."

In advance of the 2011 shutdown in Minnesota, the Office of Management and Budget sent out a letter to all agency heads, which reminded them of their responsibility to maintain a "high commitment to strong internal controls." The letter specifically noted that agencies would be required to prepare a schedule for the retroactive examination of a sample of the work product developed during the period in which normal controls were not in place. The letter served as both a reminder and a warning. Sometimes the knowledge of an after-the-fact review is enough to keep individuals from the temptation of exploiting weakened controls.

### After the shutdown

Upon the conclusion of a shutdown, the compliance professional needs to use business continuity and risk assessment processes to determine where reviews need to occur for the shutdown time period and to develop "after" action plans for the future.

Following the shutdown in 2011, my agency began a business inventory analysis that identified all the functions the agency performs, listing the impact on people served, the related system, human capital and vendor dependencies, and the priority for recovery of the function measured by life-safety. We'll be updating that inventory again next year. We've integrated our risk assessment and business continuity activities so that those professionals are learning from one another and developing synergy on improving current business processes and in planning for potential future interruptions like shutdowns. Key business continuity professionals within program areas are also being tagged to be front-and-center on routine, program risk assessments. They have the knowledge about identifying and mitigating risks during normal activity, so they might also be able to identify and mitigate risks in a shutdown situation.

### Expect a changed environment and ethical vulnerabilities

In psychological literature, there is a concept called "self-justification" whereby an individual encounters what is referred

to as a "cognitive dissonance" or a situation in which a person's behavior is inconsistent with their beliefs. In such a situation, that person tends to justify their behavior and deny any negative feedback associated with the behavior. In other words, we offset the guilt we might otherwise feel for doing something wrong by rationalizing a reason the behavior was appropriate. The concept of self-justification has significance with regard to a government shutdown: When otherwise good people feel they've been treated unfairly, they may use that perceived unfair treatment to justify doing bad things.

Government shutdowns are traumatic events. Some employees keep their jobs and continue to get paid while others are laid off. Many of the workers who continued to work feel the stress of doing more work or different work than they're most familiar with. For example, in Minnesota, there were areas where only a portion of a department was deemed critical. The individuals deemed critical, in doing the work expected of the entire department, had to handle specific functions that ordinarily would have been done by others. Upon a return from the shutdown, some employees expressed anger and sometimes jealousy of their colleagues who continued to get paid. The anger of employees is sometimes heightened by the actions of legislative leaders. In Minnesota, there have been occasions where those laid off were given compensation for their time after the shutdown concluded. This is looked upon as paid vacation by those who had to work; whereas on other occasions, laid off employees were not compensated, leading them to feel that government leaders are unappreciative of their financial circumstances. Regardless of the action of legislative or Congressional leaders, it is important that compliance professionals are aware of the possible consequences of disgruntled employees.

Although employee morale is not normally the responsibility of the Compliance Office, I do believe that compliance professionals can be advocates for actions that reduce potential anger. Strategies may be as simple as enhanced communication between senior management and rank-and-file employees. Communications should be interactive and allow all employees to honestly express their concerns. On a broader level, employee appreciation days are another way where management can express its support for employees and work to rebuild trust. Finally, the organization should consider surveying employees to monitor employee morale. Such surveys should be ongoing efforts and not simply tied to shutdowns.

## In closing

As long as we continue to have divided government, shutdowns will continue to be possibilities or even probabilities. However, advance planning can reduce the organization's exposure to waste and fraud. The tools I've discussed are ones most compliance professionals are already familiar with. Making sure you have thought through how you will use those tools is the key to being well prepared. ✳


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3. Office of Management and Budget: "Impacts and Costs of the October 2013 Federal Government Shutdown" November 2013. Available at http://bit.ly/white-house-omb
4. Josh Barro: "Even With the Government Shutdown, 80% of Federal Employees Will Keep Working" *Business Insider*, Oct. 1, 2013. Available at http://bit.ly/gov-shutdown-fed


***Gregory Gray*** *(gregory.gray@state.mn.us) is Chief Compliance Officer at the Minnesota Department of Human Services in St. Paul, MN.*

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by Alberto Arteaga-Escalante and Pedro Palacios-Rhode

# Compliance in Latin America

» Compliance regulations applicable to multinational companies are applicable to their affiliates operating in Latin American jurisdictions.

» Implementation of a compliance program designed for the parent company may prove difficult for affiliates operating in Latin American countries due to cultural differences, among other factors.

» The regulations of compliance programs may need to be adapted ("tropicalized") for each country in the region, including a review of local legal standards, common practices, and idiosyncrasies.

» Sometimes this adaptation might require for the same requirements to be portrayed in a manner that regional employees may relate to more easily.

» Adapting the compliance program to local realities (e.g., legal, cultural) can produce an effective development of the regulations contained in the compliance program.

Although compliance regulations are a relatively new concept in Latin America, they are steadily cropping up in some jurisdictions, Brazil being a notable example. In fact, even jurisdictions that have not yet developed local laws or requirements have some monitoring, because the compliance regulations applicable to U.S.- and European-based multinational entities extend to their Latin American affiliates. When supplemented by the growing corporate awareness that compliance is not only a legal mandate but also a good business practice, especially in lowering risks and risk-related costs, the result is a widespread implementation of compliance standards across the region.

Arteaga-Escalante

Palacios-Rhode

This implementation, however, has proved to be difficult. In some instances, companies with operations in the region have clearly fallen short in their efforts to represent an "effective" compliance program, even though American or European multinationals have mandated that their compliance programs must apply to their affiliates. In some cases, these mandates have included appointing compliance officers, establishing policies and procedures, and informing their employees in the region. Still, full implementation has represented a challenge.

> …the compliance regulations applicable to U.S.- and European-based multinational entities extend to their Latin American affiliates.

## Adaptation

The principles for structuring and maintaining an effective corporate compliance and ethics program have been broadly

developed in the U.S. and Europe, but these legislations are prepared pursuant to specific legal parameters—and the particular idiosyncrasies—of these jurisdictions. Therefore, the same principles are not necessarily applicable "out of the box" to Latin American countries that require certain adaptations and interpretations (commonly referred to as "tropicalization") in order for these programs to be truly accepted.

Given the challenges of today's world, multinational companies face the need for an even greater commitment to compliance regulations. Every element included in their programs must be adapted and shaped to the prevailing juridical, cultural, and social frameworks of each country where they operate. This is particularly important in those countries that show significant socio-cultural and legal differences in key areas, such as the level of tolerance for corruption, influence peddling, sexual harassment, or gender discrimination, as is the case in some Latin American countries. Therefore, there is a "balance" that must be sought for compliance programs to be acceptable (and therefore "effective") within each country in the region, and also fulfill all the standards required under the parent company's regulations.

For this reason, a straightforward application of the parent company's code of conduct, policies, and procedures might be possible from a general standpoint, but the results tend to be less than desired. An integration process intended to adapt the requirements (even if it merely portrays the same requirements in a manner that regional employees would understand more easily) may produce substantial improvements in the local application of compliance programs, resulting in a significant increase in their effectiveness.

As a consequence, the implementation of compliance programs in Latin America not only encompasses the adoption and distribution of a company's code of conduct and corresponding policies, but also requires an effective integration to the local culture so these new policies are not viewed as foreign requirements, but as an essential part of the local corporate conduct.

Indeed, the implementation process is not a fixed one. It is live and continuously adapting, drawing not only from the company´s corporate culture, but also from the local culture where the subsidiaries operate.

To achieve this goal, the implementation of a compliance program will require a wide adaptation process. This includes finding elements in the local corporate culture that relate to the new compliance principles. For example, Latin American employees can see some of the concepts and the scope of anti-sexual harassment policies as a foreign concept that contradicts the easy-going nature of Latino people in their at-work interactions. If this policy is restated to refer to an employee's right to feel secure at work, the likelihood that employees will comply with the policy is increased.

Indeed, the implementation process is not a fixed one. It is live and continuously adapting, drawing not only from the company´s corporate culture, but also from the local culture where the subsidiaries operate.

New programs must also be adapted to the local laws that differ from the laws where the parent company operates. For example, if the local laws do not provide clear concepts regarding certain conduct, such as price rigging arrangements, the implementation of antitrust policies can be ineffective, unless the policy can be related to conduct prohibited under local laws. Integration in this case will require a careful analysis of local laws and a corresponding alignment of company policies.

## Conclusion

Only adapting the program to local realities (e.g., legal, cultural), can produce an effective integration between foreign standards and regional standards. By no means are we implying that multinationals should relax—or give-up—compliance standards for their affiliates operating in Latin America, but the necessity to adapt and fully understand local cultures, practices, and laws is a must if an effective compliance program is the ultimate corporate goal. ✳

***Alberto Arteaga-Escalante*** *(aae@apo-abogados.com) and Pedro Palacios-Rhode (pjp@etikasolutions.com) are Principals at Etika Solutions in Miami.*

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- Information on new laws, regulations, and rules affecting international compliance and ethics governance

by Lutz von Peter, MBA MCMI CCEP-I

# The obligation to "get it right"

» The decision "breach/no breach" is only the beginning of an ethics inquiry.
» Was the employee prepared for this sort of ethical dilemma?
» Did he/she make the necessary moral effort to "get it right?
» If, in spite of the above, he "gets it wrong," this is a risk the firm should take on itself.
» Employees should be asked to document decisions that have ethical conflict potential.

Practitioners working on ethics programs will confirm that it is a satisfying, an exciting field full of promise: working for the Good and helping others to be good. Some practitioners develop preacher-like qualities in their work, and I saw on business cards titles such as "Ethics Evangelist" or similar with a strong religious connotation. Yes, Ethics can become the secular equivalent of religion. Whether that is good or bad is for others to decide, as long as they make people think about ethical behaviour.


von Peter

But working on ethics, speaking or writing on ethics is heady stuff. There are so many lighthouse examples, so many inspirational people and tales out there that can be cited, emulated, followed.

Where things feel slightly less comfortable is when your role is not that of a rule maker or an evangelist, but an ethics worker at the corporate coal face; there, where things happen, were it gets dark, grimy, different shades of grey.

## A hypothetical case

Let us imagine you are a case worker in the HR department, the second-level advisor on the anonymous telephone helpline or a little wheel in the machinery of Internal Audit. Let us imagine you are charged with separating facts from fantasy in a specific case and then to assess if a breach of ethical rules has happened. When a law was breached, you are lucky, because any breach of law usually is an ethical problem. Let us assume we do not have a clean breach of law, but one of those difficult situations: The more you look at what you identified as facts, the more you realise that you have a situation. You are not yet sure if this is a crisis for the company, but you know for sure that you have a problem.

…your role is not that of a rule maker or an evangelist, but an ethics worker at the corporate coal face; there, where things happen, were it gets dark, grimy, different shades of grey.

All of a sudden, the high-level, principles-based approach of Ethics loses a good part of its lustre and sparkle. The binary choice of good/bad, ethical/unethical looks woefully inadequate to capture the richess of a corporate environment and its pitfalls.

Where five minutes before, you would have wholeheartedly agreed that high-level ethical principles are the way forward, you all of a sudden look back with melancholy. Back to the good old times of descriptive lists of dos and don'ts. Where you could leaf through pages and pages of dont's until you found the don't you were looking for and then sum up your case.

But, at the end of the day, due to the nature of ethics, it will always remain a yes/no decision. There is no such thing as "a bit ethical," or "a little less ethical," or "just ethical enough." Where there is a rule, the rule stands or it has been breached.

The unease of the caseworker comes from the instinctive realisation that the vast field of business should be reduced to a simple answer, which is either Yes or No. And this, even though the environment is full of shades, gradings, and small but decisive differences. No matter how much guidance there is, in the end the case worker has to take the plunge. He/she alone has to decide if it is a Yes or a No, ethical or unethical, breach or not, with all the ensuing consequences. The burden cannot be taken from the case handler's shoulders, because the company requires the employee to do "the right thing." And the case handler has to make a judgement on whether or not the employee has done what he/she should.

So the crux is that life's diversity and richness is reduced to a binary: Is it Yes or is it No? The consequences can be dire: warnings, cautions, dismissals, court cases for and against the dismissal, media attention, and maybe even the attention of regulators.

The consequences can be dire: warnings, cautions, dismissals, court cases for and against the dismissal, media attention, and maybe even the attention of regulators.

One can understand the caseworker whose gut feeling tells him that this is not good. He might refer it to a superior. Let the buck stop there. But the superior will have exactly the same dilemma, maybe just more experience or maybe a thicker skin. Or the understanding that with a larger number of cases, he will get a greater number right than wrong. But the basic dilemma remains. Nevertheless, the decision has to be taken.

Or does it?

Yes, the decision "breach/no breach" has to be made. But it should be possible to take the edge considerably off this decision by giving a different meaning to what companies expect from their employees when they say: "get it right"; and, at the end of the day, by a different way of looking at who is to blame if things go wrong. This approach will also serve to structure not only the argument for or against a fault committed by the employee, but also the investigation that leads up to it.

The process will require some re-thinking from employers in relation to what it means to "get it right." It will also create a fairer environment for the employee who is subject to the Ethics Rules. And it will help the case worker to take the plunge.

Superhuman efforts are normally not the contractual duty of an employee. "The impossible is done immediately, miracles take a bit longer." is a fun postcard often seen in offices, but it is hardly ever meant seriously. There are very few jobs where not reaching a specific goal is punished by dismissal or termination. In the great majority of jobs,

what is required is "best effort," "reasonable effort," or something similar.

In Sales, targets are given and if you consistently miss them, you will face dismissal. But the target framework is always based on an agreement about what is achievable. Maybe there is a stretch target or even super stretch, but then extra commission is paid. This is very clearly laid out in the employment contract and it is one of the main duties, most often with a financial incentive, when targets are achieved. If you have a bad month or two, your boss will take you aside for a serious discussion, but you will only be expected to reach targets that are reachable. It is similar in nearly all domains of business. Everywhere, except in ethics. There you have to get it right 100% and all the time. And again, I would like to steer you away from the obvious cases to the ones that typically happen: shades of grey, not entirely good or entirely bad.

When we look at ethical breaches, we usually have the benefit of hindsight: we look at the facts, we know the outcome and decide whether this outcome is ethical or unethical.

## Hindsight

When we look at ethical breaches, we usually have the benefit of hindsight: we look at the facts, we know the outcome and decide whether this outcome is ethical or unethical. The judgement ex-post gives us the false certainty to see patterns develop and to combine them into a more or less clear picture. And with the better knowledge of hindsight, we say to the employee: "You should have gotten that right; you should have seen that coming."

For someone who is actually going through the situation that leads to an ethical breach, things might be much less clear. At the time of acting, the final breach has not yet been committed and is only one of many possible outcomes. The situation at the moment of acting is often not as clearly right-or-wrong as it may look after the fact. And therefore, to say with the wisdom of hindsight, "You should have gotten that right" may actually be quite unfair and may go far beyond what can be expected of an employee.

No employee is in a business situation where he is exposed to ethical dilemmas for his private amusement. He is there on company business and would probably in his private life not even get close to such a situation. And in spite of his best effort and sufficient preparation by the firm, he still may get it wrong. The Ethics and Compliance theory has it that an ethically well-prepared and equipped, intelligent, and willing employee will get it right. But there will always remain the residual risk that he will not. This is company business and not private business. In any other domain where an employee gets it accidentally wrong, the firm takes the blame for it. Therefore, like in any other domain where he gets it accidentally wrong, the firm should cover him and accept the blame for itself.

The term "pflichtgemässes Ermessen" (i.e., the dutiful application of discretion) exists in German administrative law. In clearly defined fields, citizens can only expect from a civil servant that he/she makes a decision, but not what the outcome of the decision will be. The law leaves a certain leeway to the civil servant within which he/she is free to decide.

The decision, this application of discretion, can only be attacked under two angles:

- The civil servant did not know he/she had room for discretion, because he/she thought there was only one possible, only one legal answer; or
- The civil servant used arguments to come to a decision that "obviously" were irrelevant for the decision. The emphasis is on what was perceived as "obvious."

The citizen cannot request a specific outcome, just that the civil servant uses his/her discretion properly. This approach applied to ethics cases and the problem discussed above could help enormously.

## An alternative approach

What if we did not say,"You have to get it right!", but said instead, "We give you tools, and you have to make your best effort to get it right"? Where is the difference between the two?

The difference is as small as it is fundamental. In the first case, it is very simple: Get it right, or get it wrong. Thinking from the result, from the outcome, "This is not what we wanted to happen. Something went wrong; someone made a mistake, because this is unethical. Someone needs to be blamed. The employee, for example." End of story.

In the second case, you also have to make the statement, "Yes, the employee got it wrong," but the further question is, "But was he/she equipped and did he/she give his/her best effort?" And this is where the investigation should really start. It should be around the following questions: Was the employee trained to see that there could be an ethical dilemma? And even more importantly, Did the employee make the moral effort to make the right decision, and nevertheless got it wrong?

If the employee was well equipped (i.e., should have seen the ethical problem) and inspite of the best effort, she still did not see that she did wrong, what then? The traditional answer is: "Tough luck. We told you to be ethical."

What if we did not say,"You have to get it right!", but said instead, "We give you tools, and you have to make your best effort to get it right"?

With the alternative approach, it is not quite that simple. The investigator now has to find out if the person made a sufficiently big moral effort to do the right thing. Most of the time this will be an evidence problem, and investigators might cringe at the thought of having to find out what the person in question thought, pondered, and reflected on before taking the odious action.

In most cases, this evidence problem will not be solvable, because it will be nearly impossible to reconstruct the reflections of an employee, in particular when the investigation takes place years after the facts. An employer can, however, in exchange for the promise of greater fairness in ethical cases, oblige its employees to document their reflections in situations where problems might arise later on, a sort of a "dilemma repository." Such documentation could be extremely powerful in revealing motives for actions, in documenting errors of perception, blind spots, etc. Moreover, it could protect the reflections of the acting person against the biais in memory that comes from the fact that an action ended with an ethical investigation.

It goes without saying that many people in business would hesitate to set up such a repository of difficult decisions. What hinders HR or the state prosecutor from having a look at that repository? All the borderline business decisions of a company, neatly registered in one place, with all reflections and musings about them. What would be better than just going through the registry, filtering out the dodgy business, and prosecuting them for it—a prosecutor's dream.

The immediatley available solution is to ask the employees to write down their reflections, but hide them somewhere where no one finds them. This is probably better than nothing.

A better solution would be to create a technical system that essentially has to satisfy three criteria:

- It needs to be extremely secure and only accessible by the relevant person.
- It needs to be able to time-stamp documents to avoid having documents changed when investigations are expected.
- It needs to be privileged information that only the relevant person is allowed access. In many countries, there might be no legal way to protect such a repository from the interest of prosecutors or the employer.

In spite of the technical and legal problems that need to be managed, such a system would give investigators in an ethcial case a realistic possibility to access the files, if the employee has done his/her duty to ethically assess a situation before acting.

## Conclusion

Many companies will not want to go to such length to allow their employees to exonerate themselves, even though an ethical breach took place. And it looks much better in front of TV cameras and microphones, when after a scandal the company can confirm that they made the culprit redundant. It is a much better story than having to explain in front of the media what was described in this article as an alternative way of doing things.

But a good company is about people, about fairness towards all stakeholders. That includes employees. ✳

***Lutz von Peter*** *(lutz.vonpeter@web.de) was the Regulatory Manager Europe, Middle East and Africa of the Royal Institution of Chartered Surveyors and in this function regulates 10,000 members of the professional body in all domains of real estate in Europe (except UK and Ireland), the Middle East, and Africa.*

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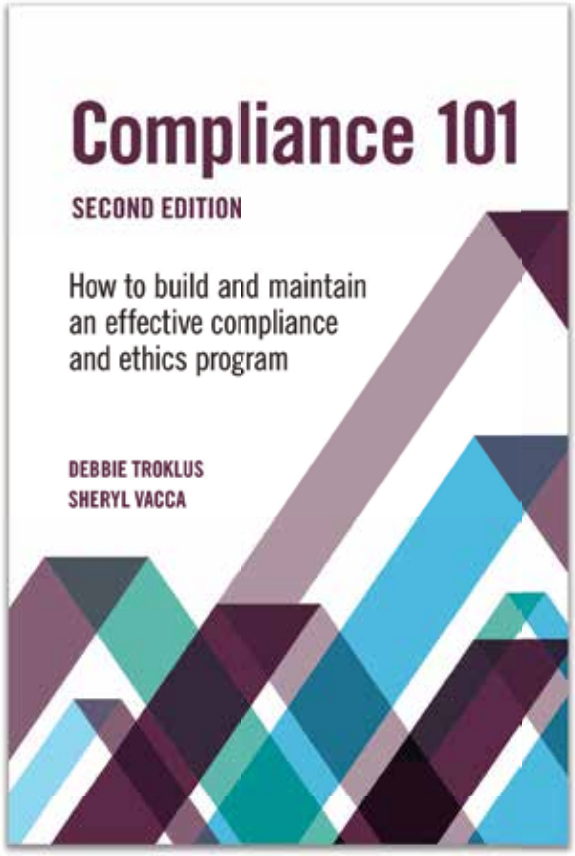


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by Meric Craig Bloch, CCEP-F, CFE, PCI, LPI

# Inside or outside? How to decide

Your success depends on effective workplace investigations. A good investigation identifies areas of unacceptable business risk, shows the true facts regarding alleged misconduct, and reinforces the value of your program.

Bloch

When an investigation is warranted, who should conduct the inquiry? You have a choice—an investigation carried out by someone inside the organization or an investigation conducted by an outside investigator.

Your bullpen of investigators includes your colleagues in HR, Corporate Security, Compliance, Internal Audit, and Legal. The benefits of keeping the investigation in-house may include perceived cost savings, investigators with inside knowledge about how the organization operates, and co-worker investigators who promote an "I-am-a-company-employee-just-like-you" message.

But not every investigation should be kept in-house. It may be better to retain an outside investigator when:

- Misconduct is alleged against multiple employees.
- The reporter has retained a lawyer or made a legal claim.
- There is a likelihood that the investigation's integrity will later be challenged.
- A senior manager or executive is implicated in the report.
- The organization lacks resources or staff with the necessary skills to conduct the investigation.
- The alleged misconduct may be criminal or otherwise violate the law.

In these situations, there are advantages to choosing an outside investigator. Consider these factors:

- **It may save you time**. Does your staff have other duties that compete for their attention, leaving the investigation unaddressed? An outside investigator may have the resources you need to complete the investigation timely.
- **It may save you stress**. Does your team know how to investigate a report like this? An outside investigator may have the specific expertise you need.
- **It may give you a "defensible position" for later use**. Could the matter wind up in court after the investigation is done? Choose an outside investigator who understands that you will need to show you responded to the report reasonably and appropriately.
- **It may help you navigate choppy waters.** Is there something sensitive about the report that tells you to handle it differently? Referring it an outside investigator may add neutrality and independence when you need it most.
- **It may preserve the attorney-client privilege**. Do you need the investigation to be conducted under privilege? If so, an outside investigator may be a good choice.
- **It may give you a better result**. An outside investigator may have expert interviewing skills to get to the bottom of the matter, including the ability to ask the "tough" questions. They may have the experience, training and credentials you need, including the ability to write an effective report.

Your investigation must be conducted efficiently, thoroughly and with discretion to give the organization a basis for confident decision-making. The choice of investigator is key. Make that decision wisely. ✳

***Meric Craig Bloch*** *(mbloch@wintercompliance.com) is Principal of Winter Compliance LLC. He has conducted over 400 workplace investigations of fraud and serious workplace misconduct, and is an author and a frequent public speaker on the workplace investigations process.* *@fraudinvestig8r*

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by Maria Hernandez

# Spanish Criminal Code Reform 2015: Corporate compliance programs

» The criminal liability of legal entities was introduced in the Spanish legal system in 2010. The reform left uncertainty about the elements and efficiency of a compliance program.

» The 2015 Reform provides companies with an exemption from criminal liability if they have effectively implemented a compliance program that meets the requirements of the new Code.

» The 2015 Reform establishes the elements that the compliance program should incorporate to serve as means of corporate defense from certain crimes committed by its directors or employees.

» The 2015 Reform closely follows the structure of Italian Legislative decree 231/2001 and widens, in many cases, the traditional scope of US-based compliance programs.

» Multinationals operating in Spain with already robust compliance programs should ensure local risk assessment of their operations is made and their corporate global program is adapted to the Spanish requirements.

On March 30, 2015, the Spanish Parliament passed the long awaited Organic Law 1/2015, which amends the Spanish Criminal Code, and came into effect on July 1. Among its provisions, the new Code incorporates a significant incentive for companies to adopt and effectively implement a compliance program that meets the requirements established by the law.

Hernandez

The previous Criminal Code Reform in 2010 introduced into the Spanish legislation the possibility for companies to be held criminally liable for acts committed by their directors or employees. However, it left some uncertainty regarding the value of having a compliance program as an effective corporate defense, and also as to the elements that any such compliance program should incorporate.

The 2015 Reform now brings certainty to these questions by establishing that the effective adoption and implementation of a compliance program can serve as an exonerating or attenuating factor when a company is subject to criminal liability for crimes committed by its directors or employees. In particular, the Code differentiates between (1) crimes committed in the benefit of the company by its legal representatives or by those with authorized decision-making authority (typically the senior management); and (2) crimes committed in the benefit of the company by individuals under the management of others ("subordinated individuals"), if the commission of the offence was possible due to the a lack of surveillance and control by the management.

## Requirements of the law

In the first case, the new Code allows to exempt companies from criminal liability under the following requirements:

- The board of directors has, prior to the perpetration of the crime, adopted and implemented an organizational, management, and control model (the model) suitable to prevent offenses of the type committed.
- The supervision of the model is entrusted to a supervisory body with independent powers of initiative and control. The Code accepts that in small and medium-size companies, the board of directors may accomplish this function directly.
- The individual authors of the crime committed the offense while intentionally and fraudulently eluding the model.
- The supervisory body has not neglected its duties of supervision and control.

If the crime is committed by a subordinated individual, the company will have to prove that it had effectively implemented an organizational and management model suitable to prevent offenses of the same type as the one committed, prior to the commission of the offense.

The model must incorporate the following:

- Risk assessment to identify the activities within the company that may represent a risk;
- Policies, procedures, and controls to prevent, mitigate, and/or sanction any criminal risks detected;
- Financial management system to prevent the commission of the crimes identified;
- Obligation to report any potential risks or non-compliant activities to the compliance officer/committee (i.e., need to implement whistleblowing channels); and
- Disciplinary system to sanction any violation of the management model.
- Periodic verification and changes to the model if significant violations are discovered, or if there are significant changes in the organization, control structure, or activities of the corporation.

Needless to say, training is key to the effectiveness of the model, even if the Code has not explicitly included it as one of the core elements.

## The Italian precedent

The new reform clearly follows what has been incorporated in the legislation of many other jurisdictions around the world, and it is also contained in international treaties to which Spain has adhered.

In particular, there is a significant parallelism with the provisions of Italian Legislative Decree 231/2001 in the fact that the model that it contemplates could serve as affirmative defense in case of commission of crimes of very diverse nature—not focusing exclusively on bribery and/or corporate fraud. The Spanish criminal code contemplates this model as a preventive tool (and an affirmative defense instrument) for a defined number of crimes (*numerous clausus* in Latin) susceptible of generating the criminal liability of the legal entities.

These offenses somehow take into consideration the different areas of activity that a company may operate in and the risks that can be originated (i.e., a nuclear facility will have areas of risk that a financial institution may not necessarily face). The crimes included in the *numerus clausus* are therefore not only of what is typically known as of "corporate" nature (e.g., fraud, corruption, influence peddling; swindling, money laundering, punishable insolvency, IP and IT damages), but also:

- offences against the rights of aliens;
- crimes concerning organization of the territory and town planning, protection of the historic heritage and the environment;

- crimes against natural resources and the environment;
- crimes relating to nuclear energy and ionizing radiations;
- offenses of risk caused by explosives, and other such agents;
- offences against public health, drug trafficking;
- crimes relating to terrorism, criminal organizations and groups;
- forgery of credit and debit cards and travellers cheques;
- crimes relating to corruption in international commercial transactions;
- trafficking of human organs, trafficking of human beings, prostitution and corruption of minors;
- crimes of discovery and revelations of secret information;
- swindling, punishable insolvency, IP and IT damages;
- crimes relating to the market and consumers; and
- crimes against the tax regulations and Social Security.

## Conclusion

Companies should therefore carefully identify through a tailored risk assessment any activities of their local subsidiaries where the crimes listed by the Code could be committed and adopt a compliance program (model) tailored to prevent the same. In multinational companies with well-established corporate compliance programs, the mere translation into local language of the program will, therefore, not be sufficient to comply with the requirements established by the new criminal code – although there will be a clear benefit of having it, particularly if it is the reflection of the existence of a true culture of compliance within the organization. ✳

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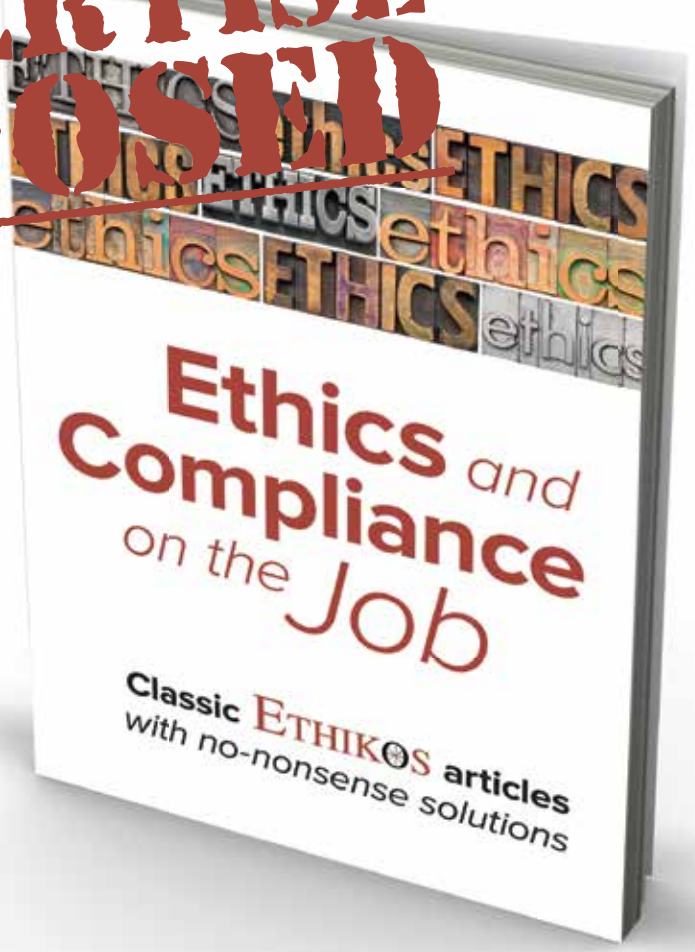


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by Ian Gee and Ruth Steinholtz, JD

# The Alchemy of Ethics, Part 2: Ethical drivers

» Ethical drivers are a way of understanding why some individuals and teams are ethically compliant and why others are not.
» If you can identify the drivers at play in an individual, team, or the wider organisation, you can design more effective interventions to drive change.
» Attitudes are the expression of the interaction of personal values, beliefs, and feelings.
» Some employees may need help building their skills, so they can make choices based on reality, rather than choices driven by anxiety.
» Do a stakeholder analysis and identify key influencers who can help you carry the message into the group and bring about change.

*The first part of this article was published in our October 2015 issue.*

In the first part of this article, we explored the opportunities that working with organization development (OD) practitioners can give you. In this article, we explore one of the ways in which you might work together to deliver value to you organization.


Gee


Steinholtz

Through our discussions and ongoing exploration, we developed the idea of "ethical drivers" as a way of understanding why some individuals and teams are ethically compliant and why others are not. Once you have started to think about and analyse your organization in this way, it gives you a choice of tailored and focused interventions to bring about change.

To help us with our exploration, we drew on the work of Eric Berne, the founder of Transactional Analysis.[1,2] He and his colleagues developed the idea that we all operate from a set of common drivers that motivate us and drive us towards or away from actions. So our question was: What drives people's behaviour, both towards and away from being ethical and doing the right thing?

## Attitude, behaviour and skill

We believe that we can categorise the drivers we have uncovered in relation to ethical behaviour as attitude, behaviour, and skill. By *attitude* we mean the interaction of personal values, beliefs, and feelings; by *skill* we mean ability, access to information, knowledge, and resilience; and by *behaviour* we mean actions driven by the expectations of the organisation's culture and the external environment.

## Identifying drivers

If you can identify the drivers at play in any individual, team, or the wider organisation, then it makes designing and tailoring interventions—and therefore bringing about change—much easier. It also costs a lot less

than traditional, plain vanilla, "sheep dip" style training. But how do you identify the drivers? The process is both intuitive as well as structured. On the intuitive front, once you are familiar with the drivers, you will recognise them in terms of what you hear people say and what you see people do. On the more structured front, all organisations are full of data, so for instance, you can identify drivers by analysing engagement surveys or values assessments, looking at performance management discussions, seeing what people are saying in exit interviews, and analysing the results of investigations or risk assessments, etc.

When looking to identify the driver's underpinning behaviours, we use the following headings to help us understand them, recognise them, and then decide what to do:

- **What you experience**—What have you found in the data? What are you seeing and hearing?
- **The evidence**—What is the proof or verification of what you are experiencing?
- **The underlying driver**—What is it that supports and encourages what you are seeing and experiencing or what you found in the data?
- **The relationship of the driver to ethics and compliance**—What do people do in terms of ethics and compliance when the driver is in operation?
- **Possible interventions**—What can you do to bring about change?

## The three drivers

Let's explore the three drivers in more detail.

### Attitude

Attitudes are the expression of the interaction of personal values, beliefs, and feelings. If attitude is the primary driver at play, in terms of unethical behaviour, then you are likely to hear people saying things like:

- "I know best."
- "What's the least we have to do and how do we get away with things that are not necessary?"
- "I am simply doing what I (we) have always done around here."
- "It's not me; it's my job."
- "It's someone else's responsibility."

The relationship to ethics of people or teams driven by attitudes is one of choice and has nothing to do with the organisation's needs, requirements, or mandates. They are self-oriented, and you will often experience them as being aggressive or passive/aggressive if challenged. They will spend time reassuring each other that they are doing the right thing.

The evidence you will see is an absence of overall behavioural compliance, with people making selective choices based on personal needs, desires, and/or "What will the boss notice?" In terms of interventions, it is worth exploring what we in OD call normative re-education, which is looking at a balance between reward and punishment, probably best expressed in terms of bonuses. This is about clearly linking actions with consequences.

Another way of doing this is to use simulations as a way of getting people to understand the outcomes and impact of their actions or non-actions, both in terms of the wider organisation and of themselves in relations to this. It is also important to make sure that the tone at the top is being heard loud and clear. Ultimately you may have to manage some of them out of the organisation, if they won't change. This in turn will send a message to others who are attitude driven in terms of their relationship to values and ethical behaviour.

### Skills

The skills driver is about knowledge and the ability to put things into practice. If skill is the primary driver at play, in terms

of non-compliance, then you are likely to experience people as being confused about what is expected of them. They don't really understand what being ethical or complying is, in the context of the work they do. People generally don't like to admit what they don't know. We as humans don't like to look foolish and, rather remarkably, would sooner get things wrong than admit we don't know! You are likely to hear people saying the following:

- "What does 'being fully compliant' mean in practice?"
- "How do I comply?"
- "What do I need to do?"
- "What does ethics mean to my job and me?"
- "Who can help me?"

They can often also be overwhelmed, and you will see them running from one issue to another. "Too many meetings and not enough time to do the work!" It's not that they don't want to be ethical; it's just that they don't know *how* to be.

Their relationship to ethics is one where they will make ethical choices that they think won't reflect their ignorance, and often they will become stressed and anxious about their lack of skills. The more anxious people feel, the more likely they are to get things wrong. The interventions here are more obvious than those involving attitude. It's about training and helping people prioritise, helping them to manage risk, and make better choices based upon knowledge. It's about building people's confidence in their skills, so they can make choices based on reality and not driven by anxiety. It may also be about reorganising the way people work and making structural changes.

**Behaviour**

Behaviour is the expression of the organisation's culture through actions. If behaviour is the primary driver at play, in terms of non-compliance, then you are likely to hear people saying things that make you believe that they know best. They are on the ground and know what needs to be done to make the numbers. You will hear things like:

- "We know best and say what happens 'round here."
- "This is rubbish and HQ codswallop."
- "We are too important to the organisation. If we ignore it, it will go away!"
- "We decide what we need to do, not them."

The kinds of interventions here are based on co-creation, working with them to enable them to fit the ethics and compliance agenda around their tasks and targets. Create the program with them, so they feel they own it. You can also find ways of linking ethics and compliance to personal success—such things as promotions, bonuses, and other forms of rewards, again linking an action or lack of it to consequences can also help. People with true behavioural issues may also need interventions from outside the group, coming under the spotlight of senior leaders. It can also be useful to do a stakeholder analysis and identify key influencers who can help you carry the message into the group and bring about change.

## Conclusion

We hope that in this article we have helped you see how by building a new relationship with OD practitioners you can add a new dimension to your work as an ethics and compliance professional. In doing so we also hope we have encouraged you to make new friends and find the workplace less of a lonely one! ✳


1. Eric Berne: *Games People Play: The Psychology of Human Relationships*, Grove Press, 1964.
2. Taibi Kahler: *Transactional Analysis Revisited*. Human Development Publications, Little Rock, Arkansas, November 1978.



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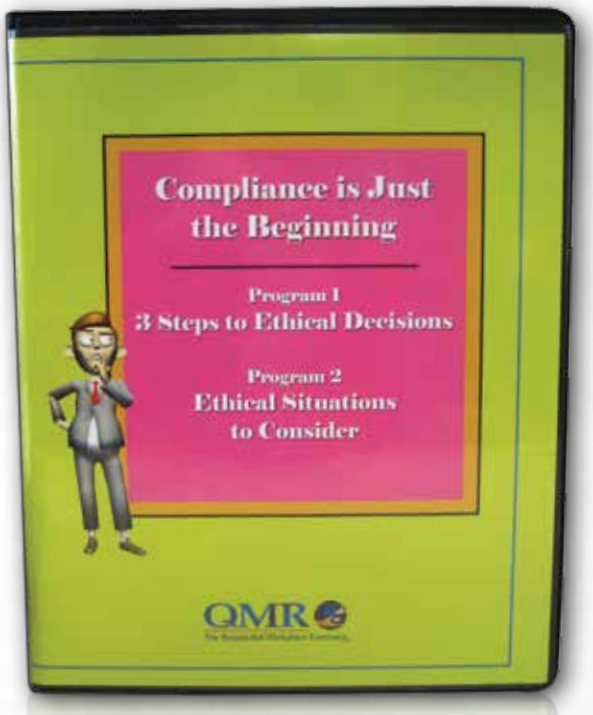


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by Robert E. Connolly and Barbara T. Sicalides

# Avoiding antitrust pitfalls: Even when you didn't do anything wrong!

» A poorly worded email or statement can cause serious trouble.
» Publicly complaining about pricing may be interpreted as an invitation to collude.
» Dominant companies need to be even more sensitive to appearing anti-competitive.
» Always document the pro-competitive benefits of market actions.
» If a "bad" document is created, and there is litigation, do not destroy it.

*This article is based on a presentation given by the authors at the SCCE's Annual Compliance and Ethics Institute in Las Vegas, "CEOs Say the Darndest Things…"*

You might already be thinking: "Is this another article about why an antitrust compliance program is very important? Really? People in our company are ethical and would not do anything to violate the laws." But when you were a kid (or maybe even just last week) did you ever get accused of something you didn't do? That can also happen in the antitrust world. The "accusation" is called a treble-damage antitrust lawsuit, or worse, an indictment.


Connolly


Sicalides

Even when a company (and its executives) may be blameless, antitrust lawsuits are sometimes brought because an executive made a statement, or wrote a memo or email, that made it *seem* like there was a violation. An ill-advised statement can be the "smoke" that invites a "Where there is smoke, there is fire" lawsuit. In other words, CEOs and salespeople can say the darndest things that may draw an antitrust lawsuit. In this article, we will give some examples of comments that invited antitrust troubles. We will also discuss how to assess risk in this area and educate employees about how certain words can be misinterpreted and invite trouble.

## Antitrust concerns

There are three primary areas of antitrust concern: cartels, abuse of dominance (i.e., monopoly), and mergers. A brief summary of the law may be helpful. Section 1 of the Sherman Antitrust Act[1] states: "Every contract, combination… or conspiracy in restraint of trade or commerce… is declared to be illegal." This prohibition is limited to "unreasonable" restraints. Price fixing, bid rigging, and other collusion on price among competitors has been held to be per se unreasonable. Price fixing is the prime "evil" under the antitrust laws. In the United States, and in a growing number of jurisdictions around the world, price fixing is punishable

by jail sentences for individuals and large fines for corporations.

**Practice Tip**: When executives know they are on shaky ground, they sometimes write, "Do Not Forward—Delete After Reading!" This document often is not deleted from every place it may exist. Prosecutors are ecstatic when they find it.

Section 2 of the Sherman Act prohibits "monopolization, attempted monopolization, and conspiracy to monopolize interstate commerce or trade." This section regulates unilateral actions of firms with market strength/market share. In other countries, this is typically referred to as "abuse of dominance," which is a more descriptive term. Basically, a firm with market power may abuse their dominance if they engage in certain business practices that would go unchallenged if done by a small firm. These "abuses" may include tying arrangements, bundling products, volume discounts, etc. Finally, the government can challenge mergers if the result of the merger is deemed to give the resulting firm too much market power. We'll take a look at some trouble spots in each of these areas.

When executives know they are on shaky ground, they sometimes write, "Do Not Forward—Delete After Reading!" This document often is not deleted from every place it may exist. Prosecutors are ecstatic when they find it.

**Cartels**

At a June trade association meeting, multiple airline executives spoke publicly about their plans to be "disciplined" in their approach to pricing and adding extra flights on popular routes. These ill-advised statements quickly drew an Antitrust Division investigation, which was followed in nanoseconds by private, class-action, treble-damage price-fixing cases. Over 74 class-action lawsuits have now been filed. The airline executives might have slipped by unnoticed with their similar statements, except they spoke at a time when ticket prices seemed sky-high while the price of fuel was nosediving.

A *Reuters* story outlined what the airline executives should have known:

> This (probe) should not be a surprise to the airlines," said one antitrust expert who asked not to be identified to protect business relationships. "The word 'discipline' is a no no. It's one of the words you don't use. It's like 101 in compliance."[2]

Discipline in this context is a "bad word" because the discipline only works if competitors are all disciplined. For example, if one firm raises prices and others don't, it will likely have to withdraw the price increase. It is, of course, possible that the executives had been counseled against making such statements and simply didn't follow this sound advice.[3]

Another example of an ill-advised statement comes from Australia where the necessary "discipline" was expressed more explicitly. The CEO of Fortesque Metals declared at a business dinner: "I'm absolutely happy to cap my production right now. All of us should cap our production now and we'll find the iron ore price will go straight back

up to $70, $80, $90…. Let's cap our production right here and start acting like grown-ups."[4]

**Practice Tip:** It is not illegal to raise prices or cut output unilaterally (i.e., a decision a company makes on its own). Perhaps this CEO thought he was just stating what his company would do in response to changed market conditions. But public statements like this can be viewed as an invitation to competitors to do the same thing ("I'll go up if you will.") and an agreement can be inferred. Even when there is no agreement, an "invitation to collude" has been prosecuted as an attempt to fix prices, rig bids, or violate the FTC's unfair competition act.[5]

Here is one last example of an executive who never received, or clearly forgot, antitrust compliance training. Steve Jobs didn't do Apple any favors when he was interviewed after making the keynote talk at the introduction of the iBookstore. In the video a reporter asks Jobs:

**Q:** "Why anyone would pay $14.99 for the same eBook they can buy for $9.99 from Amazon?"

**Jobs:** "Well, that won't be the case."

**Q:** (Reporter tries to clarify) "Meaning you won't be $14.99, or they won't be $9.99?"

**Jobs:** "The prices will be the same."[6]

Apple was sued by the Department of Justice, found liable, fined, and is now under a court-ordered antitrust compliance program.

**Practice Tip:** Apple has gone to court several times complaining about the heavy-handed nature and cost of the court imposed compliance monitor. It would have been much cheaper to have had a robust compliance program.

**Practice Tip**: When issuing a price increase, memos should *not* be written such as, "We are going up 5%, but so will all of our competitors." That may be true—and simply an observation of parallel pricing in a concentrated market. But, better to explain why prices are going up: "We have seen a sharp increase in our raw material costs so we are going up 5%. Our competitors face the same increase, so it is likely they will have to do something similar."

**Abuse of dominance**

In America's free market economy, it is a legitimate goal of every company to dominate, or even monopolize, their market by offering the best product, with the best service, at the lowest prices. Our legal system encourages this: "[The] drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind competition."[7]

The free market, however, is also premised on competition being open and fair. When a company becomes dominant, its actions may be considered an abuse of dominance or an attempt to monopolize if actions are taken, not to benefit consumers, but to harm competitors. A company with a dominant market share needs to counsel executives on how to document actions to show that they were engaging in pro-competitive actions. Memos like the one below, which found its way to a Supreme Court case, are not helpful: "Put [him] out of business. Do whatever it takes. Squish him like a bug."[8]

**Practice Tip**: It is not possible to give a precise definition of what amount of market share makes a company "dominant." Over 30% of the market may qualify, but not always. A host of market conditions go into this analysis.

**Practice Tip**: Always document the pro-competitive reasons for company actions in the marketplace. Justifications that are

documented in real time are more persuasive to demonstrate how actions benefitted customers than rationalizations offered at trial (or to the government).

Below are other excerpts from documents produced in litigation that were used against the company that wrote them:

- "Let's make sure that [competitor] stays marginalized."
- "Competition in our industry just doesn't really work. Monopoly benefits everyone."
- "We have most of the key assets and dominate even our closest competitor"
- "We pride ourselves on the fences that we have built around our customers. It's why we dominate the southeast."

**Practice Tip**: Sometimes statements are unfairly taken out of context. Or they look bad, but they can be explained. Better to explain how an action is for the benefit of consumers when writing a document than years later in litigation.

**Mergers**

Another area where poorly written documents can come back to haunt a firm is in the area of mergers. When companies are considering a merger, the deal has to be "sold" to investors, boards of directors, senior executives, etc. There is a temptation to "puff" and overstate that the combined company will be able to dominate the market and raise prices. At the risk of being repetitive, memos should explain specifically how the merger would benefit consumers: efficiencies that lower prices, broader geographic coverage, etc. If a company better serves its customers, it will gain more market share, but explain how that is going to happen.

A few examples of ill-advised comments:

- 'The combined firm will be a "900 pound gorilla."'
  – CFO of buyer
  *In re Chicago Bridge & Iron*
- "We are by far the 'big dog' of the industry."
  – Executive of the buyer after the completed acquisition
  *In re Chicago Bridge & Iron*
- "We can talk about this but I don't think we want anything in writing."
  – Internal memo of buyer
  *St. Luke's Medical Group*

In one recent merger challenged by the Department of Justice, the main evidence in the case came from memos written by executives of Bazaarvoice,[9] explaining the rational for the merger:

- "tak[e] out [Bazaarvoice's] only competitor, who ... suppress[ed] [Bazaarvoice] price points by as much as 15%";
- "[e]liminate [Bazaarvoice's] primary competitor" and "reduc[e] comparative pricing pressure"; and
- "block entry by competitors" and "ensure [Bazaarvoice's] retail business [was] protected from direct competition and premature price erosion."

At trial, company executives testified that these comments were taken out of context or written by people who didn't really understand the economics of the merger. But, it was too late. The judge credited the memos and found the merger illegal.

## Risk assessment

If budgets were unlimited, compliance training would be a regular, repetitive, companywide event. But, practically speaking, risk assessment always plays a role as to where compliance dollars are spent. Here are a few factors to consider when lobbying for competition/antitrust compliance training dollars.

**Price fixing**
In the United States, executives (usually very senior executives) can go to jail. This alone makes compliance training a high priority. Even a company with very small market share can be in a cartel, but cartels are more likely found in concentrated industries with homogenous products. Another note: foreign companies, or foreign subsidiaries of US companies, generally are more in need of compliance training. They may operate in a culture where cooperation between competitors is more accepted and there is less awareness that price fixing is a serious crime in the United States.

**Dominance**
As name implies, some market power is needed, but it is hard to define precisely how much. Industry leaders need to be more aware of potential dominance problems.

**Mergers**
The government (DOJ, FTC, or even a state) can challenge a merger of any size if it will result "undue concentration." Mergers of a certain size need to be reported to the government before the transaction is done. But the government can challenge smaller "non-reportable" mergers even after consummation. A smaller company that has not trained its employees in antitrust compliance should do so when it is even contemplating a transaction, preferably before the first merger-related documents are written.

**Practice Tip:** If it becomes known that a bad document has been written, the document should not be destroyed if there is litigation or a government investigation. Copies of it exist somewhere—even if just in someone else's memory. It can be true that "the cover-up is worse than the crime." And, it may be a crime to destroy documents—even if it is determined that no antitrust violation had occurred.

## Conclusion

Regular antitrust training is important, especially for key executives. In-person training is best, incorporating some of the above examples and other "war stories" to drive the message home (and keep the audience awake). Video programs can serve as refreshers. Spot check refreshers may be triggered by certain events: a criminal investigation in a related product market that hits too close to home, a letter from a customer/competitor warning of antitrust action, or a possible merger. Another tool may be occasional document audits or an occasional check of the files for "hot" documents. As with any compliance program, the need to raise antitrust awareness can be accomplished in many ways, but always starts with "buy-in" from the top. After all, it is CEOs who often "say the darndest things." ✳

1. Sherman Antitrust Act of 1890 (15 U.S.C. §§ 1-7) and amended by the Clayton Act in 1914 (15 U.S.C. § 12-27). Available at http://bit.ly/sherman-antitrust
2. Diane Bartz: "Airlines' undisciplined talk may have led to antitrust probe" *Reuters*, July 2, 2015. Available at http://bit.ly/reuters-airlines
3. See http://bit.ly/cartel-capers-airline
4. See http://bit.ly/ceos-say
5. Federal Trade Commission press release: FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute. August 13, 2015. Available at http://bit.ly/ftc-act
6. Steven Tweedie: "Judge In Apple Price-Fixing Trial Used This Video Of Steve Jobs Chatting With Walt Mossberg To Prove Apple's Guilt." July 11, 2013. The video and more is available at http://bit.ly/apple-price-fixing
7. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989).
8. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).*
9. Department of Justice, Office of Public Affairs: Justice Department Files Antitrust Lawsuit Against Bazaarvoice Inc. Regarding the Company's Acquisition of PowerReviews Inc. January 10, 2013. Available at http://bit.ly/anti-trust-bazaarvoice

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by Jeffrey M. Kaplan

# Compliance certifications and the law

Certifications play various, and quite different, roles in C&E programs. In many companies, individual employees execute certifications regarding compliance with Sarbanes-Oxley requirements, code of conduct standards, and C&E policies—such as anti-corruption or antitrust. In my view, certifications of this kind can be invaluable as a way of focusing the minds of employees on the need not only to be personally compliant, but also to be alert to problems that may exist around them.

Kaplan

Such certifications can also help a company defend against an enforcement action. In an important and well-known investigation in 2012, part of the reason the government declined to prosecute Morgan Stanley for an employee's FCPA violations is that the individual wrongdoer had executed compliance certifications which deceived the firm.[1]

But it needs to be emphasized that part of the reason that this type of certification can be helpful to a company as a matter of law is because a false certification can be hurtful to the individual involved as a matter of law. That is, it has "teeth"—the prospect of regulatory/securities or criminal liability—and so it is fair for a company to rely on it.

A quite different type of certification is when third parties self-certify compliance to their customer. These sorts of certifications can be beneficial as well—particularly in the FCPA realm.

Note, however, that since they generally do not have a securities (or other regulatory) law enforcement mechanism behind them (unlike Sarbanes-Oxley certifications), they are unlikely to be seen as providing as much of a defense to a company as do employee certifications. However, such a certification could give rise to contractual liability, and so should be entitled to some weight as a legal matter (i.e., they do have "teeth"—just not strong ones).

Certifications play various, and quite different, roles in C&E programs.

Finally, some companies have their own programs' efficacy certified by third-party organizations that specialize in C&E matters. As best I can tell, there is no prospect of any legal accountability arising from certifications of this sort (i.e., no "teeth" of any kind) and the view of one former prosecutor about their utility in an investigation may be instructive here: "The Department of Justice and any regulatory agency would quickly brush that fact aside and put in the trash heap of irrelevant comments and 'facts.'"[2] ✷

1. This aspect of the case was described in a speech in 2014 by Marshall Miller, a senior Justice official, which is available at http://bit.ly/marshall-miller
2. Michael Volkov: "You Cannot Buy an Ethical Corporate Culture, Corruption, Crime and Compliance." August 16, 2015. Available at http://bit.ly/volkov-blog-culture

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by Pamela Passman

# Cyber theft, critical information, and third parties: Reducing risks, protecting assets

» Compliance professionals can take a proactive role in ensuring that processes are in place to mitigate the cyber theft risks.

» A company's critical business information is particularly vulnerable to insiders, including third-party consultants, suppliers, vendors, and others.

» To help to reduce risks, it's important to integrate the protection of corporate information into compliance risk assessments, codes of conduct, monitoring, and oversight.

» Aligning teams, asking key questions, and investing in people, processes, and technology can be instrumental to protecting a company's valuable corporate information and assets.

» Compliance professionals bring an important cross-organization, strategic, and governance-focused perspective that can be valuable to mitigating cyber risks.

At the height of the 2013 Christmas buying season, 40 million Target customers received an unwelcome holiday surprise when they discovered their credit card details had been stolen. This incident—the costs, liabilities, and legal ramifications are still playing out—brought together two top risk areas for companies: cybersecurity and third-party management. The breach was linked to a hack of a third-party's network credentials.

Passman

Cyber theft is not an issue that is going away. Indeed, according to the latest PwC State of Compliance 2015 Survey,[1] respondents (i.e., compliance officers) put data security at the top of the list of risks for the coming five years. Also high on the list was supplier/vendor/third-party compliance risks.

For compliance teams, the issues of cyber risks and loss of intellectual property and other corporate assets are increasingly on the agenda. Cyber governance now is included in many companies' definitions of compliance. Compliance teams also are well positioned to be involved, given that they already work across all levels of an organization and understand what it takes to implement business processes to meet compliance requirements.

## Understanding the threats

When it comes to using cyber means to steal corporate assets, who poses the greatest threat? Hacks by foreign intelligence services tend to grab the headlines; however, insiders pose the top risks to companies. In many cases, vulnerabilities can be the result of unintentional mistakes or sloppiness, poor password controls, and the like. In other instances, the acts can be intentional, with malicious insiders trading access, data, or information for financial or personal gain.

It's important to note that insiders can include current and former employees, contractors or consultants, and other third parties, such as supply chain or business partners. In short, insiders include anyone who has had authorized access to an organization's network or other critical business information.

In the Target case, the breach was linked back to a heating, ventilation, and air conditioning (HVAC) contractor who had access to the Target network exclusively for electronic billing, contract submission, and project management. Hackers sent malware-embedded emails to the HVAC firm's employees in a classic phishing attack and gained access to the network after an employee likely clicked on a link.[2]

In another example, a Japanese educational services provider, Benesse, suffered a breach of personal data for some 22.6 million customers. The suspect is a systems engineer contractor who allegedly loaded the data onto his smartphone, then sold it.[3]

In both cases, system gaps resulted in compromises. Mitigating these types of risks requires a concerted effort among compliance teams, other internal business leaders, and third parties. If employees and third parties, such as contractors, vendors, or supply chain partners, are not vigilant about protecting business critical information, gaps will be exploited by bad actors.

In the Target case, the breach was linked back to a heating, ventilation, and air conditioning (HVAC) contractor who had access to the Target network exclusively for electronic billing, contract submission, and project management.

## Assessing and managing third party risks

How should the compliance professional use governance and compliance expertise to help ensure that third partners that have access to a corporate network and/or business critical information are not exposing the company to the risk of data loss? Two areas on which to focus include (1) the due diligence phase of bringing on a new vendor or partner; and (2) during the monitoring of existing vendors and partners.

For example, does a supply chain company or vendor have robust physical and IT security systems in place? Do employees and consultants understand their role in protecting confidential information, including avoiding phishing scams and other attempts at accessing networks?

Engagements with third parties should also cover:

- Confidentiality and security requirements;
- Requirements to include cybersecurity best practices in subcontractor and other third-party contracts;
- Reporting, insurance, rapid response plans, and other requirements in case of a breach; and
- Requirements to conduct training, monitoring, and corrective actions, and to maintain records related to cybersecurity compliance.

Once these and other issues are addressed, risks can then be evaluated based on what information a third party may have access to and the damage that could be caused in the event that information is misappropriated. It can also influence the levels and types of monitoring required.

An annual risk assessment can also guide the elements of the broader program, including levels of training, components of reporting, monitoring, and areas requiring further investigation.

## Aligning teams, providing oversight

The IT team leads information security and the management of technology to secure critical business information, such as trade secrets. However when cyber breaches occur, many times a contributing factor stems from the lack of management of the people and processes that support the application of technology. In this scenario, the Compliance function can play an important oversight role and also help to align business teams. For example, with regard to addressing third-party risks, it may be appropriate to bring together the supply chain or vendor management teams with the IT, risk, and legal teams to:

- Evaluate to see if procedures are routinely followed,
- Determine if contractual obligations are being met,
- Identify high-risk areas and weaknesses,
- Verify that non-compliance/corrective actions are achieved,
- Identify deficiencies within the system, and
- Seek rapid response and improvement over time.

In regard to technology, there should be special attention paid to access controls, monitoring, management of external entry points, and back-up and recovery processes. Many companies rely on standards such as ISO 27001 to provide the framework for an IT system. However, it's important to note that it is possible to comply formally with ISO 27001 and still have inadequate security in the IT system to protect a company's critical business information, if data protection and risk management have not been included among the objectives of the IT system.

## Conclusion

Compliance professionals play an important and unique role in a company by working across business groups and bringing a global and strategic perspective to meeting regulatory requirements. Proactively integrating the protection of critical business information into compliance offers the opportunity to align teams, put systems in place, and mitigate the daunting risks of cyber theft and third parties. ✳

1. PwC: State of Compliance 2015: Moving beyond the baseline. Available at http://bit.ly/pwc-survey2
2. Brian Krebs: "Target Hackers Broke In Via HVAC Company" *KrebsonSecurity* blog, February 14, 2014. Available at http://bit.ly/krebs-hackers
3. Fred Donovan: "Benesse breach affects 22.6M customers, sets record in Japan" *FierceITSecurity* blog, July 24, 2014. Available at http://bit.ly/fierce-nesse-breach

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by Judith W. Spain, JD, CCEP; and M. Tina Davis

# Academic probation: Could UNC's sanctions happen at your university?

» Effective compliance programs must have institutional inspirational leadership.
» Compliance officers must forge strong working relationships with academic administrators, particularly the Registrar.
» Insulation from pressure to non-report academic integrity violations is critical.
» Living in a culture of athletic invincibility creates inherent conflict with academic integrity compliance programs.
» Reputational effect of NCAA sanctions and accreditation probation should cause a board of trustees to institute a review of the institution's academic integrity compliance initiative.

Imagine the dinner conversation between a high school graduate and her parents about the anticipated college move-in day to University of North Carolina (UNC) at Chapel Hill. The graduate is worrying about who will be her roommate and will she make friends, while her parents are wondering why they are sending their daughter to a school that has just been reprimanded for failure to maintain academic integrity.


Spain


Davis

And what if this high school graduate was being courted as a prospective athlete? How will this scandal impact her? Will there still be a scholarship available? Will playing time be impacted? Why not sign with another institution and not one under a gray cloud of possible impending sanctions?

Not a good scenario for UNC's enrollment management office. That office is seriously hoping that no one read the newspaper about the June 11, 2015 decision by the Southern Association of Colleges and Schools' Commission on Colleges (SACSCOC) to place UNC on a year-long probationary period—the harshest sanction before revocation of accreditation.[1] With investigations detailing the workings of the "paper class" scheme involving more than 3,100 students taking classes without faculty involvement, required attendance, or legitimate coursework obligations, SACSCOC has stated that UNC violated 18 standards, including control on athletics, faculty governance, and academic integrity. Additionally, according to the May 20, 2015 letter from the NCAA, UNC is facing NCAA penalties for possible NCAA violations.

According to UNC administration, this practice has been halted since 2011, and the university has implemented more than 70 reforms and initiatives to ensure and enhance academic integrity. UNC pledges to continue to monitor the effectiveness of

those measures and, wherever needed, put additional safeguards in place. But UNC got to that position unwillingly, after much denial, and after significant venom heaved at those who brought this long tradition of academic integrity violations to light.

### The role of Compliance

At this point in time, the post-secondary, higher education Board of Trustees should all be asking the same question: Can this happen at our institution? Answer: Yes. Can this be prevented? Yes, but only with an effective compliance program and an institutional culture of compliance coupled with a strong reporting mindset.

Obviously, designing an effective compliance program, implementing a culture of compliance, and working toward preventing this reputational slur against your university should be the goals of a compliance officer. But, how does a staff compliance officer invade the fortress of the academic side of the institution and ask hard questions to determine if a situation similar to UNC's academic integrity lapse is occurring (or could occur)? The simple answer: The compliance officer has to build a good working relationship with the academic administrators, particularly the Registrar and academic advisors, including athletic academic advisors. And, most importantly, those professionals must be insulated from what can be enormous pressure brought to bear if eligibility and, hence, the playing time of a star athlete is threatened.

As in every effective compliance program, the first step is identification of the risk universe and then the periodic assessment of the risks. In the Academic Integrity field, the identification of the university policies, accreditation standards, NCAA standards, and other applicable state or federal standards would create your starting point. Once you have identified all the applicable laws and policies, then designing a systematic method of assessing these laws and policies is your next step.

In the Academic Integrity field, the identification of the university policies, accreditation standards, NCAA standards, and other applicable state or federal standards would create your starting point.

It is during this assessment process that you would determine the likelihood of non-compliance with the policy or law, how frequently this non-compliance could occur, and the impact of non-compliance on your university in terms of operational risk, financial risk, reputational risk, legal risk, and any other impact risk factors that your university deems important.

When determining the extent of the risk of each of these factors, using statistics and trends provides valuable data. For example, every semester (or whatever you decide is your period of assessment) you would look at the following indicators.

**Independent study**

All independent study courses should be reviewed to determine if there are (1) an unexpected, larger number of independent study sections are being created; and/or (2) an unexpected larger number of students

taking independent study courses. Does the data point to a disproportionate number of individualized classes being in a single department and/or being supervised by one individual? What percentage of the class(es) are student-athletes? Finally, at the end of the semester, you would compare grades of the student-athletes to non–student-athletes in these specific independent study classes.

**Grade point averages**

Grades of an individual student-athlete or sport-specific student-athletes can be compared to overall grade point averages (GPAs) of non–student-athletes to determine if a trend of a significant increase in the overall GPA of student-athletes is occurring.

**Class enrollment trends**

Trends for which classes are traditionally being taken by student-athletes could provide clues to the word-of-mouth "easy class." Find sections where, semester after semester, a significant number of athletes are enrolled, then do a grade analysis of the class/section or instructor. However, any trend with this data could just indicate an easy instructor, with athlete advisors pairing their athletes with that instructor. There will always be easy teachers and tough teachers or classes that may be more rigorous than others. There will always be students trolling Rate-My-Prof.com and social networks looking for these instructors and classes, and some of these students may be athletes. These are not the issues that worry compliance professionals. They are the norm, almost a time-honored tradition.

**Declared majors**

Trends of the majors that are being declared by student-athletes could indicate that student-athletes are being encouraged to pursue certain majors. Of course, the follow-up question, if this trend is appearing, is why? Is it an easy major? Do the required courses for that major fit better with student-athlete practice and game schedules? Is impermissible additional assistance being provided to students in the courses for that major compared to other major courses? Or is there another reason?

Trends of the majors that are being declared by student-athletes could indicate that student-athletes are being encouraged to pursue certain majors.

Just a comment—there could be a legitimate need for some transfer student-athletes to enter majors with significant free electives and flexibility, because restrictive NCAA academic eligibility rules can create significant obstacles to immediate student-athlete eligibility in tightly proscribed majors. In such situations, student-athletes may be guided toward certain majors, with no irregularity existing.

**Other sources**

Exit interviews of student-athletes and faculty members can reveal certain academic irregularities. Well, this would be the hope. However, would a student-athlete really "give it up" or squeal, if he/she knows that the deal that helped him/her stay eligible may be nixed for teammates? Would they have sufficient sense of outrage to confess and point fingers, knowing one of those fingers is pointing back at the complaining student-athlete?

## Inspirational leadership

So, armed with all of this data and presuming you do see any alarming trend(s), what will happen to that discovery? It is rather mind-boggling to try to figure out why any compliance audit or initiative did not discover these transgressions at UNC. But, is it really surprising? Not really—there was a culture of athletic invincibility and that athletic prowess trumped all other priorities, especially pesky NCAA academic integrity rules. It was clear that the institutional priority was set by athletics and not academics.

But, how can any compliance initiative regulate what is in the minds of the folks committing the academic fraud? By being very practical. It is likely that your institution has policies that state that a professor must hold class regularly, provide instruction on what is stated in the syllabus, have prompt feedback on tests, and timely submit final grades. Focusing upon the practical question of determining compliance with these policies, how can any institution ensure that an individual faculty member will not give a basketball student-athlete an "A" in the class simply because the faculty member is an avid fan? Realistically, it will be difficult, if not impossible, to identify this behavior and prevent it from reoccurring.

> It is rather mind-boggling to try to figure out why any compliance audit or initiative did not discover these transgressions at UNC.

This lack of ethical behavior by the individual faculty member reflects a lack of institutional inspirational leadership and living in a culture of holding athletes up as role models and stars. Remembering that this culture of tolerance for lack of academic integrity at UNC lasted for over a decade, it is only through a robust compliance and ethics program that requires regular reporting of any academic anomalies, coupled with an anonymous mechanism for reporting non-compliance, that this culture can be reversed.

## Conclusion

Ensuring that you have a mechanism for reporting non-compliance that is perceived to be effective and non-retaliatory against the reporting individual is an essential element of your compliance initiative. Protection against the enormous pressure that can be applied at an institution with national championship traditions and high-value television contracts is essential to any effective NCAA academic eligibility compliance initiative.

So, how do you detect an orchestrated subterfuge to circumvent NCAA academic eligibility rules? The bottom line is that it was the lack of an effective compliance program, coupled with the failure of the culture of inspirational leadership to doing the right thing—all the time—that led to these public reprimands and reputational damage. If your university does not want to face the same fate as UNC, it is likely that a conversation with your compliance officer, academic administrators, and athletic administrators is long overdue. ✳

1. Dan Kane and Jane Stancill: "Review agency hits UNC-chapel Hill with probation" *News & Observer*, June 11, 2015. Available at http://bit.ly/unc-probation

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by Art Weiss, JD, CCEP-F, CCEP-I

# A compliance bedtime story

Once upon a time there were three little compliance officers: Larry, Moe, and Curly. No wait, that's a different story. Let's start again.

Once upon a time there were three little compliance officers.

Weiss

The first little compliance officer builds a compliance program out of paper—lots of words with nothing to back them up. No training, no auditing and monitoring, and no risk assessment. His paper compliance program is nothing but a check-the-box program with nothing to support it. His organization's culture has no integrity, no support from senior management, and no structure.

After employees commit fraud and steal from the public, the big bad prosecutor comes along. He huffs and he puffs and he blows the paper compliance program down. (There has long been a difference of opinion here as to whether the compliance officer had hair on his chinny chin chin and whether the big bad prosecutor eats the compliance officer).

The second little compliance officer builds his compliance program out of flimsy policies that don't work, training that's ineffective, and a culture of hiding one's head in the sand. Well, you guessed it. When senior management is caught looking the other way when employees allow third-party partners to run rampant, accept kickbacks from suppliers, and pile lavish gifts upon foreign officials, the big bad prosecutor comes back. He huffs and he puffs and he blows the flimsy compliance program down.

After employees commit fraud and steal from the public, the big bad prosecutor comes along. He huffs and he puffs and he blows the paper compliance program down.

The third little compliance officer builds his compliance program after learning the essential elements of an effective compliance and ethics programs (maybe even attending an SCCE Basic Compliance and Ethics Academy) and getting full support of his board of directors and senior management. He effectively trains all employees based upon the latest risk assessment, does due diligence on third-party partners, and implements a plan to audit and monitor his program regularly. Unlike his poor fellow little compliance officers whose programs lie in ruins, and who are now wearing orange jumpsuits sharing a cell with their CEO, this little compliance officer's employees, from top to bottom, walk the talk of compliance. They have the right culture and all the elements of an effective compliance program are in place.

Dejected, the big bad prosecutor returns to his office and types out a deferred prosecution agreement. Hey, you didn't expect him to just give up did you?

Sleep tight! ✳

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by Frank Sheeder, Esq., CCEP

# DOJ's pursuit of individual liability for corporate misconduct: The Yates Memo

» The DOJ has made it a priority to hold individuals accountable for organizational misdeeds – both civil and criminal.
» The DOJ has sent a message of deterrence to corporate leaders and their governing bodies.
» This policy shift will present a number of challenges for organizations that are trying to do the right thing.
» This development should be communicated to the board and senior leaders.
» Prudent organizations will respond by enhancing their compliance programs.

Cooperation credit is a critical issue for corporations that become embroiled in investigations or enforcement activity. In both the criminal and civil contexts, it is the only way to mitigate the financial impact of corporate wrongdoing. It can mean the difference between surviving a government investigation and staying in business at all. Now, the corporation's very existence could hinge on its ability—and willingness—to turn in its leaders and other personnel.


Sheeder

## Background

The Department of Justice (DOJ) has made many headlines recently with the promulgation of a September 9, 2015 Memorandum from Deputy Attorney General Sally Quillian Yates to all DOJ attorneys (the Yates Memo).[1] The Yates Memo announced a DOJ initiative to hold individuals responsible for corporate misdeeds, both criminal and civil. Although the Yates Memo does not change any laws or tools available to government attorneys, this policy emphasis poses significant challenges for organizations and those who work for them. It is the first major policy pronouncement in this realm under the recently appointed Attorney General.

Cooperation credit is a critical issue for corporations that become embroiled in investigations or enforcement activity.

The Yates Memo is the most recent in a series of DOJ memoranda that began in 1999 with the Holder Memo,[2] which related to bringing criminal charges against corporations. The DOJ's approach evolved with the Thompson Memo[3] (2003), the McNulty Memo[4] (2006), and the Filip Memo[5] (2008). The principles that emerged were placed in the United States Attorney's Manual in the Principles of Federal Prosecution

of Business Organizations.[6] Government attorneys are required to adhere to the policies set forth in those Memos, the United States Attorney's Manual, and now the Yates Memo. These pronouncements also provide insight and guidance for corporations addressing potential organizational wrongdoing, internal investigations, privileges and protections from discovery, dealings with the government, and compliance activities.

Although the DOJ announced the principles in the Yates Memo as if they were new, they do not involve any new laws or tools. Rather, those principles support a broad-based DOJ policy initiative aimed at deterring corporate misconduct by putting individuals at risk of criminal prosecution or civil action. In fact, the Assistant Attorney General for the Criminal Division, Leslie Caldwell, publicly foreshadowed this policy earlier this year: "If you choose to cooperate with us, we expect that you will provide us with those facts, be they good or bad. Importantly, that includes facts about individuals responsible for the misconduct, no matter how high their rank may be."[7] That statement is now official DOJ policy, and the United States Attorney's Manual will be updated to reflect this emphasis.

The Yates Memo was apparently developed in response to issues in the financial services industry, but it is not limited to that sector. The Yates Memo makes no distinctions about particular kinds of entities or activities. Rather, it applies to all of the DOJ's civil and criminal investigation and enforcement efforts. It is also notable that while a DOJ workgroup developed the Yates Memo, the DOJ apparently did not consult the corporate defense bar before promulgating it. This is of concern because, as the DOJ acknowledged in the Yates Memo, "The Department makes these changes recognizing the challenges they may present." In reality, the aggressive policies in the Yates Memo pose many difficulties for organizations that are trying to do the right thing.

Although the DOJ announced the principles in the Yates Memo as if they were new, they do not involve any new laws or tools

## Key steps

The Yates Memo contains six "key steps" that encourage government lawyers "to most effectively pursue the individuals responsible for corporate wrongs." The titles of the key steps are set forth verbatim below, along with a brief discussion of each.

**1. "To be eligible for *any* cooperation credit, corporations must provide to the [DOJ] all relevant facts about the individuals involved in the corporate misconduct."**

This is perhaps the most impactful aspect of the Yates Memo. It is an all-or-nothing prerequisite for a corporation to receive any benefit from cooperating with the DOJ; there is no intermediate position. "Companies cannot pick and choose what facts to disclose." This high threshold, ironically, may discourage corporate cooperation with the DOJ in the first place. If they do cooperate, they will have to seek out facts and theories aimed at establishing individual exposure. The extent of cooperation credit a corporation receives will depend on the timeliness of the cooperation; the diligence, thoroughness, and speed of the internal investigation; the proactive nature of

the cooperation; and all of the other various factors that the DOJ has traditionally applied.

In explaining this element, the DOJ has indicated that its attorneys should not simply wait for a company to deliver information about individual wrongdoers and then merely accept it. Rather, they should proactively investigate individuals at every step of the process—before, during and after any corporate cooperation. They should ensure that the corporation has not downplayed individual responsibility for wrongdoing. Moreover, any corporate settlement agreement should require the corporation to provide information about individuals, with penalties for failing to do so.

**2. "Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation."**
The DOJ reasons that this maximizes its ability to ferret out the full extent of corporate misconduct. Because corporations act only through people, investigating their conduct is the most efficient and effective way to determine the facts and extent of corporate misconduct. Additionally, by focusing on individuals, it can increase the likelihood that lower-level personnel will cooperate against those who are higher in the corporate hierarchy. This also ensures that both corporations and individuals will be charged for wrongdoing.

**3. "Criminal and civil attorneys handling corporate investigations should be in routine communication with one another."**
This also enhances the DOJ's ability to pursue individuals because it allows DOJ attorneys to consider the full array of civil and criminal options available to the government, along with the corresponding remedies. The DOJ's criminal attorneys should notify civil attorneys as early as possible if they see potential criminal liability, and vice versa. Moreover, even if the DOJ could not make a criminal case, it might be able to pursue a civil action.

If the DOJ resolves a matter with a corporation, it must still leave its options open with respect to individual liability.

**4. "Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals."**
If the DOJ resolves a matter with a corporation, it must still leave its options open with respect to individual liability. DOJ attorneys will not be able to decline pursuit of individuals just because a corporation has settled. Any deviations from this policy must be approved at high levels.

**5. "Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized."**
If a DOJ attorney seeks to resolve corporate liability, he/she must include in the written memorandum supporting that resolution a discussion of potential individual liability and the plan for addressing it. Any decisions not to pursue civil claims or criminal charges against individuals who committed corporate misconduct must be approved at high levels.

**6. "Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay."**
The DOJ's civil enforcement efforts are designed to return money to the public fisc, but they are also aimed at holding wrongdoers accountable and at deterring future misconduct. The DOJ says that these twin aims are equally important, even though they may be in tension with each other. The DOJ has now made it clear that an individual's inability to pay, standing alone, is not a justification for not bringing a civil suit.

## Implications for corporations

The Yates Memo has many challenging implications for corporations and their people. A few of the more salient implications include the following.

**Increased risks to corporations**
The DOJ will now require corporations to provide "all relevant facts about the individuals involved in corporate misconduct" in order to "be eligible for *any* cooperation credit." This has two separate implications for corporations. First, they might choose not to cooperate at all under these circumstances, which could lead to enhanced penalties in the event of adverse findings. Second, the government might determine not to give corporations credit for cooperating, on the basis that the cooperation did not go far enough. It seems that if a corporation is to cooperate, it will need to be "all in" and prepared to help the government target the individuals involved in the circumstances in question. The DOJ (or a corporation seeking credit, for that matter) could end up taking too expansive a view of individual involvement in the context of cooperation credit, thereby needlessly putting individuals at risk of criminal or civil liability. Finally, DOJ lawyers could take advantage of the leverage that potential individual liability creates to convince corporate decision-makers to agree to unduly large settlements on behalf of corporations.

The Yates Memo has many challenging implications for corporations and their people.

**Incentives to lower-level personnel**
The DOJ is clearly endeavoring to go after the highest-ranking business leaders when it investigates and resolves instances of corporate wrongdoing. In order to do so, the DOJ has historically given lower-level personnel incentives for providing information about those who are above them on the corporate ladder. Of course, such incentives can have the perverse effect of encouraging cooperating witnesses to stretch the truth or to go to extremes in characterizing high-level involvement or knowledge.

**Reluctance to be forthcoming**
When organizations learn of potential wrongdoing, they routinely conduct internal investigations to identify, prevent and mitigate risks. Often, they decide to cooperate with the government in resolving non-compliance with applicable standards. In doing so, corporations must be able to rely on receiving complete and accurate information from company personnel. The DOJ's emphasis on identifying and pursuing individual responsibility for corporate acts will have a chilling effect on company personnel. They might decide not to

come forward or to fully share information for fear that their employer would turn them into the DOJ. Likewise, corporations may decide not to serve up their personnel (especially senior leaders) to the DOJ, and decide not to cooperate, choosing instead to compel the DOJ to prove its case. Or they may serve up individuals in an effort to buy peace with the DOJ for the corporation. In any event, individuals may (a) have to make decisions about whether to be loyal to the corporation, (b) need to consider quitting their jobs, (c) face termination of their employment, and (d) need to worry about criminal and civil exposure.

**Potential conflicts of interest**

Corporations usually endeavor to conduct internal investigations of potential misconduct efficiently and expediently. At the onset of an investigation, they do not usually secure, pay for, or recommend counsel for individuals, because they do not have enough information pointing toward that need. They use one law firm (or in-house counsel) to conduct the investigation, and if an actual or potential conflict of interest between the corporation and an individual arises, they address the person's need for separate counsel. In light of the Yates Memo, however, corporations will need to assess the potential for conflicts of interest earlier, and err on the side of separate representation for one or more individuals. Of course, this approach also increases costs, decreases efficiencies, and may make it harder for the corporation to get to the facts.

Moreover, corporate decision-makers may now be influenced by the heightened risk of individual liability. Might they sell the company or their colleagues short to protect themselves? To avoid this conundrum, corporations will need to determine at the onset of an investigation whether and how to exclude key stakeholders from the investigative team to ensure that any strategic, defensive, or settlement decisions are made independently and in the corporation's best interests. One can also see how there could be differences in opinion on strategy and defenses between corporate stakeholders and the lawyers, compliance professionals, and others with whom they work on sensitive matters. Such matters should be anticipated, acknowledged, and planned for in advance, to the extent possible.

Corporations' activities and investigations regarding potential misconduct are usually done under the confidential cloak of the attorney-client privilege and the attorney work product doctrine.

**Threats to attorney-client privilege and the attorney work product doctrine**

Corporations' activities and investigations regarding potential misconduct are usually done under the confidential cloak of the attorney-client privilege and the attorney work product doctrine. When corporations decide to turn over the results of their investigative efforts, along with findings and analysis, they can waive these venerable protections. This can expose their confidential efforts to do the right thing and to seek informed legal advice to hostile third parties—even beyond the DOJ. The decision to cooperate and to make such disclosures always requires the balancing

of competing interests. But the Yates Memo accelerates the decision-making process and raises the stakes, because a corporation that is not fully prepared to turn over its investigative work product may not get any cooperation credit at all. This policy seems to be a marked departure from the Filip Memo from August 2008, because it conflicts with its provision that the DOJ should not request the results of an internal investigation.

## What corporations should do

A number of steps should be taken now, in order to hedge against the individual risks and corporate conundrums arising from this focused DOJ policy initiative.

### Communicate and educate

First, the contents and implications of the Yates Memo should be communicated appropriately to corporations' senior leaders and governing boards. Second, they need to know that the DOJ is pursuing individual liability and creating new conditions for cooperation credit. Third, they need to know what they should do to protect the corporation in light of the Yates Memo, especially regarding a renewed focus on the organization's compliance program.

### Focus on the compliance program

Of course, the best way to prevent and to mitigate corporate and individual risks is to have a robust compliance program. Prudent corporations will respond to the Yates Memo by:

- **Commissioning an independent assessment** of their compliance program to validate whether it has the resources, priorities, and activities necessary to prevent risks in the current environment. The results of such an assessment, which should be done under the attorney-client privilege and the attorney work product protection, can serve as a template for enhancing the compliance program appropriately.
- **Educating the board, senior leadership, and other key stakeholders** on the personal liability implications of the policies in the Yates Memo.
- **Garnering further management and governing board support** for, and awareness of, compliance program activities. They must be highly engaged in processes designed to prevent, identify, and mitigate risks to the organization and its personnel.
- **Ensuring that potential non-compliance is addressed** promptly and appropriately. This includes establishing work plans, deadlines, and assigned accountability for compliance investigations and other key processes.
- **Developing and maintaining evidence** that leaders and key stakeholders are engaged in processes aimed at doing the right thing.

## Conclusion

The message should not be that the sky is falling. Rather, the Yates Memo presents an opportunity for corporations—through their board, leaders, compliance professionals, and counsel—to renew their focus on the compliance program and the many risks it can help to eliminate. ✳


1. Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing. September 9, 2015. Available at http://bit.ly/justice-dag
2. Department of Justice: Eric H. Holder, Jr., Memorandum Re Bringing Criminal Charges Against Corporations. June 16, 1999. Available at http://bit.ly/justice-criminal
3. Department of Justice: Larry D. Thompson, Memorandum Re Principles of Federal Prosecution of Business Organizations. January 20, 2003. Available at http://bit.ly/americanbar-larry
4. Department of Justice: Paul J. McNulty, Memorandum Re Principles of Federal Prosecution of Business Organizations. July 5, 2005. Available at http://bit.ly/justice-mcnulty
5. Department of Justice: Mark Filip, Principles of Federal Prosecution of Business Organizations. August 28, 2008. Available at http://bit.ly/justice-filip
6. Department of Justice: Title 9: Principles of Federal Prosecution of Business Organizations, Chapter 9-28.000. Available at http://bit.ly/justice-corp-charging
7. Attorney General Leslie R. Caldwell: Address at the American Bar Association's 25th Annual National Institute on Health Care Fraud. May 14, 2015. Available at http://bit.ly/assist-ag-caldwell



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by Erica Salmon Byrne

# Why independence matters

The independence of directors is a subject that has received considerable coverage; you will find detailed analyses of how to determine independence in listing standards as well as corporate law. I was prompted to take on this topic by concurrent readings of the coverage of the shareholder lawsuit against Dish Network, which alleges that directors listed as independent in the company's filings have extremely close ties to the CEO and majority shareholder, and *The Emperor's New Clothes*. This is the peril of life as a working parent; your reading material is slightly schizophrenic, and as a result, you see parallels everywhere. Bear with me on this one, if you will.

Salmon Byrne

I'll leave to one side the details of just how close the alleged ties between two of the independent directors and the CEO and his family actually are (although they are dishy, if you'll pardon the pun, and if you haven't read the *New York Times*' piece on it,[1] you should). For those of you who have not read Hans Christian Andersen's fairytale recently, remember that the two swindlers making the emperor's clothes have told him the magic fabric is invisible to fools or those unfit for their office. Naturally, this means that no one—including the emperor himself—can reveal they do not see it, for that would make them a fool. It isn't until the emperor parades himself before his people that a child—one who does not care what the emperor thinks of him—remarks that he has nothing on.

This leads me to the important question here, which is why we have rules requiring independent directors in the first place. The answer can be found in that old parable; someone has to have enough distance from the emperor to point out that he is naked. And it is extremely difficult to do that if your job, your connections, your access to Super Bowl tickets, or anything else you value highly is tied to that emperor thinking highly of you.

The answer can be found in that old parable; someone has to have enough distance from the emperor to point out that he is naked.

Independence matters because shareholders are not in the boardroom. They can't be. So someone has to be there to question the management team and challenge their decisions as needed.

That is why boards making independence determinations are cautioned to broadly consider all relevant facts and circumstances. At the end of the day, directors are seeking to avoid conflicts of interest. And that means that appearances matter. ✳

1. Gretchen Morganson: "Dish Suit Shows Close Ties Between Executive and Board Members" *New York Times*, July 10, 2105. Available at http://bit.ly/ny-times-dish

***Erica Salmon Byrne*** *is a contributing editor at The Compliance and Ethics blog and a regular columnist for Compliance & Ethics Professional.*
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by Joe Murphy, CCEP, CCEP-I

# Those who steal *for* you will also steal *from* you

There was an interesting article in the November/December 2013 issue of *ethikos* about websites used to report bribery: "Kenyan Website the Latest in a New Breed of Electronic Whistleblower Initiatives." One insightful example is about a company employee who posted a note on a public, "tell-all" website admitting that he paid a bribe. His boss gave him $100 cash to bribe an official in city hall to obtain a license. The employee pocketed half the bribe money himself, but got the license issued with the remaining amount! Lesson to remember: Those who steal *for* you will also steal *from* you. When companies pay bribes, they also invite their own employees to steal from them and commit other dishonest acts that hurt the company. The cost of corruption is even greater than companies think it is.

Murphy

Of course, those who deal with corruption also know another, related pattern: For those who pay bribes, word gets around and they can become locked into the cycle of paying bribes, even when bribes were completely unnecessary. In some cases, the intermediary or government official solicits a bribe and then does nothing to help the company. Last I checked, even in corrupt countries, you can't bring a breach-of-contract action when your bribe payment does not work out. Doing corrupt and dishonest things has many costs.

When I see lists of benefits from compliance programs, often this element is not included. When companies are dishonest, it is very likely the employees know. Certainly when an employee is asked to pay a bribe for the company, that employee gets the message. But it can be broader than this. What message do companies think they send to employees and others who work for them when they cheat?

This is not limited to bribery. Any company that engages in trickery or shady practices can expect to pay a price. Consider, for example, companies that engage in deceptive practices in selling to their customers. Do companies think their employees are too stupid to notice? Do they think they are so clever that this passes without anyone seeing the dishonesty in their practices? Then, in their Codes, they brag to their employees about their commitment to the "highest level" of ethics and doing things right. Afterward, in the words from the movie *Casablanca*, they are "shocked, shocked" when an employee steals from them, cheats them, or shows disloyalty to them. Hey, if you bribe people to win business, or even just try to cheat your customers, expect your employees to see what your true values are. Illegal and unethical practices can cost a company in many ways beyond the obvious cost of fines and other penalties. ✳

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

## Compliance during a government shutdown

*Gregory Gray (page 25)*

- Divided government, coupled with partisanship and an unwillingness to compromise, can create an environment that ultimately leads to deadlock and total or partial government shutdowns.
- The executive branch has inherent authority to maintain functions that are essential to the safety of human life or the protection of property.
- The failure to include Compliance as a critical function ignores the fact that even during a shutdown, much of government is still in operation.
- When a shutdown ends, the compliance professional needs to use business continuity and risk assessment processes to determine where reviews need to occur.
- When otherwise good people feel they've been treated unfairly, they may use that perceived unfair treatment to justify doing bad things.

## Compliance in Latin America

*Alberto Arteaga-Escalante and Pedro Palacios-Rhode (page 31)*

- Compliance regulations applicable to multinational companies are applicable to their affiliates operating in Latin American jurisdictions.
- Implementation of a compliance program designed for the parent company may prove difficult for affiliates operating in Latin American countries due to cultural differences, among other factors.
- The regulations of compliance programs may need to be adapted ("tropicalized") for each country in the region, including a review of local legal standards, common practices, and idiosyncrasies.
- Sometimes this adaptation might require for the same requirements to be portrayed in a manner that regional employees may relate to more easily.
- Adapting the compliance program to local realities (e.g., legal, cultural) can produce an effective development of the regulations contained in the compliance program.

## The obligation to "get it right"

*Lutz von Peter (page 35)*

- The decision "breach/no breach" is only the beginning of an ethics inquiry.
- Was the employee prepared for this sort of ethical dilemma?
- Did he/she make the necessary moral effort to "get it right?
- If, in spite of the above, he "gets it wrong," this is a risk the firm should take on itself.
- Employees should be asked to document decisions that have ethical conflict potential.

## Spanish Criminal Code Reform 2015: Corporate compliance programs

*Maria Hernandez (page 45)*

- The criminal liability of legal entities was introduced in the Spanish legal system in 2010. The reform left uncertainty about the elements and efficiency of a compliance program.
- The 2015 Reform provides companies with an exemption from criminal liability if they have effectively implemented a compliance program that meets the requirements of the new Code.
- The 2015 Reform establishes the elements that the compliance program should incorporate to serve as means of corporate defense from certain crimes committed by its directors or employees.
- The 2015 Reform closely follows the structure of Italian Legislative decree 231/2001 and widens, in many cases, the traditional scope of US-based compliance programs.
- Multinationals operating in Spain with already robust compliance programs should ensure local risk assessment of their operations is made and their corporate global program is adapted to the Spanish requirements.

## The Alchemy of Ethics, Part 2: Ethical drivers

*Ian Gee and Ruth Steinholtz (page 49)*

- Ethical drivers are a way of understanding why some individuals and teams are ethically compliant and why others are not.
- If you can identify the drivers at play in an individual, team, or the wider organisation, you can design more effective interventions to drive change.
- Attitudes are the expression of the interaction of personal values, beliefs, and feelings.
- Some employees may need help building their skills, so they can make choices based on reality, rather than choices driven by anxiety.
- Do a stakeholder analysis and identify key influencers who can help you carry the message into the group and bring about change.

## Avoiding antitrust pitfalls: Even when you didn't do anything wrong!

*Robert E. Connolly and Barbara T. Sicalides (page 53)*

- A poorly worded email or statement can cause serious trouble.
- Publicly complaining about pricing may be interpreted as an invitation to collude.
- Dominant companies need to be even more sensitive to appearing anti-competitive.
- Always document the pro-competitive benefits of market actions.
- If a "bad" document is created, and there is litigation, do not destroy it.

## Cyber theft, critical information, and third parties: Reducing risks, protecting assets

*Pamela Passman (page 61)*

- Compliance professionals can take a proactive role in ensuring that processes are in place to mitigate the cyber theft risks.
- A company's critical business information is particularly vulnerable to insiders, including third-party consultants, suppliers, vendors, and others.
- To help to reduce risks, it's important to integrate the protection of corporate information into compliance risk assessments, codes of conduct, monitoring, and oversight.
- Aligning teams, asking key questions, and investing in people, processes, and technology can be instrumental to protecting a company's valuable corporate information and assets.
- Compliance professionals bring an important cross-organization, strategic, and governance-focused perspective that can be valuable to mitigating cyber risks.

## Academic probation: Could UNC's sanctions happen at your university?

*Judith W. Spain, JD; and M. Tina Davis (page 65)*

- Effective compliance programs must have institutional inspirational leadership.
- Compliance officers must forge strong working relationships with academic administrators, particularly the Registrar.
- Insulation from pressure to non-report academic integrity violations is critical.
- Living in a culture of athletic invincibility creates inherent conflict with academic integrity compliance programs.
- Reputational effect of NCAA sanctions and accreditation probation should cause a board of trustees to institute a review of the institution's academic integrity compliance initiative.

## DOJ's pursuit of individual liability for corporate misconduct: The Yates Memo

*Frank Sheeder (page 71)*

- The DOJ has made it a priority to hold individuals accountable for organizational misdeeds – both civil and criminal.
- The DOJ has sent a message of deterrence to corporate leaders and their governing bodies.
- This policy shift will present a number of challenges for organizations that are trying to do the right thing.
- This development should be communicated to the board and senior leaders.
- Prudent organizations will respond by enhancing their compliance programs.

# Upcoming Events

## November 2015

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 8 | 9 NEW Audit & Compliance Committee Conference Scottsdale, AZ | 10 WEB CONFERENCE: Third-Party Risk Management: Reducing the Costs of Third-Party Compliance | 11 | 12 WEB CONFERENCE: How To Build A World-Class Compliance Team and Accomplish Critical Goals in the First 100 Days | 13 Regional Compliance & Ethics Conference Boston, MA | 14 |
| 15 | 16 SOLD OUT Basic Compliance & Ethics Academy® Orlando, FL | 17 | 18 WEB CONFERENCE: Avoiding Costly Mistakes: Lessons Learned from Recent I-9 Enforcement | 19 CCEP™ Exam | 20 | 21 |
| 22 | 23 | 24 | 25 | 26 | 27 | 28 |
| 29 | 30 SOLD OUT Basic Compliance & Ethics Academy® San Diego, CA | 1 | 2 | 3 CCEP™ Exam | 4 | 5 |

## December 2015

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 WEB CONFERENCE: Athletics vs. Academics: UNC'S sanctions at your University? | 4 Regional Compliance & Ethics Conference Dallas, TX | 5 |
| 6 | 7 | 8 WEB CONFERENCE: What you need to know about Supply-Chain Compliance with UK Modern Anti-Slavery Legislation | 9 | 10 | 11 | 12 |
| 13 International Basic Compliance & Ethics Academy® Dubai, UAE | 14 | 15 | 16 CCEP-I® Exam | 17 WEB CONFERENCE: The Real Deal on Form I-9 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 *SCCE Office Closed* Christmas Day | 26 |
| 27 | 28 | 29 | 30 | 31 | 1 | 2 |

## 2015

**Audit & Compliance Committee Conference** NEW
November 9–10 | Scottsdale, AZ

**Regional Compliance & Ethics Conferences**
November 13 | Boston, MA
December 4 | Dallas, TX

**International Basic Compliance & Ethics Academies**
December 13–16 | Dubai, UAE

## 2016

**Utilities & Energy Compliance & Ethics Conference**
February 21–24 | Houston, TX

**Higher Education Compliance Conference**
June 5–8 | Baltimore, MD

**Basic Compliance & Ethics Academies**
February 8–11 | Scottsdale, AZ
March 7–10 | New Orleans, LA
April 25–28 | Boston, MA
June 13–16 | San Francisco, CA
August 8–11 | New York, NY

**International Basic Compliance & Ethics Academies**
May 23–26 | Brussels, Belgium
July 11–14 | Singapore
August 22–25 | São Paulo, Brazil

**Regional Compliance & Ethics Conferences**
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March 11 | Minneapolis, MN
April 8 | Chicago, IL
April 15 | Scottsdale, AZ
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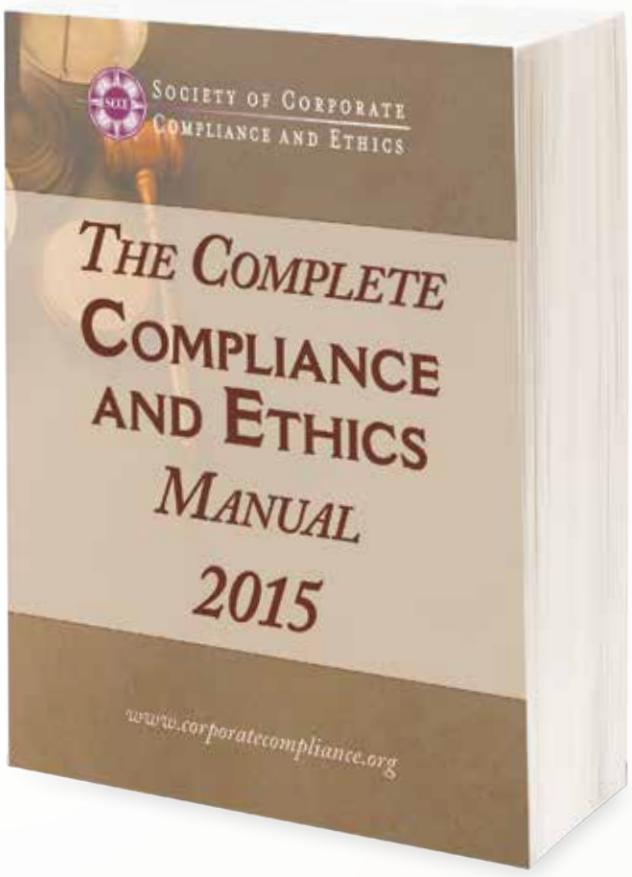


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