Chapter 6

International Corporate Compliance

Carole Basri
President, The Corporate Lawyering Group, LLC

Rebecca Walker
Kaplan & Walker LLP

§ 6:1 Introduction
§ 6:2 Why Implement an International Compliance Program?
  § 6:2.1 Global Economic Incentives
  § 6:2.2 United States Laws with International Applicability
  § 6:2.3 Other Countries’ Laws Encouraging Compliance
  § 6:2.4 Nongovernmental Organizations
§ 6:3 How to Develop an International Compliance Program Using the Sentencing Guidelines
  § 6:3.1 Components of an Effective Compliance Program
    [A] Standards and Procedures
    [B] Responsible Individuals
    [C] Exclusion of Certain Persons
    [D] Communication of Standards and Procedures, Including Training
    [E] Auditing, Monitoring, and Reporting
    [F] Incentives and Penalties
    [G] Response to Wrongdoing
  § 6:3.2 Periodic Risk Assessment
  § 6:3.3 Relevance of Size of Organization
  § 6:3.4 Changes in the Sentencing Guidelines
§ 6:1 Introduction

Compliance programs are multi-dimensional governance systems utilized by many organizations that are designed to detect and prevent violations of law and other misconduct by employees and other agents and to promote ethical business cultures. One of the primary goals of compliance programs is to control for the risk of legal and regulatory violations. In other words, companies adopt compliance programs, in part, to attempt to minimize the risk to the organization of an employee or other agent violating law, regulation, or company policy.

Beginning in the mid 1970s, it became increasingly common for companies to adopt programs to attempt to prevent and detect certain types of legal violations, such as violations of the antitrust or anti-bribery laws. In 1991, with the promulgation of the United States Sentencing Guidelines for Organizations (the “Sentencing Guidelines”), the U.S. government offered companies an important incentive to implement broad-based programs to prevent and detect violations of law. The Sentencing Guidelines achieved this by making the existence of an effective compliance program a potentially significant factor in determining the penalty assessed against an organization for corporate crimes. In addition, the Sentencing Guidelines tended to increase the penalties to which organizations would be subject, thus making the mitigating effect of a compliance program even more valuable. Formal compliance programs became an important part of the corporate landscape in the United States in the 1990s. And, partially as a result of the many corporate debacles of the past

---

2. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5[f].
3. Id.
few years, compliance programs continue to be important to organizations.\footnote{This is evidenced by legislation and regulations that include compliance requirements. For example, section 406 of the Sarbanes-Oxley Act requires companies to disclose in periodic reports whether or not they have adopted a code of ethics for senior financial officers, and if not, why not. Pub. L. No. 170-204, § 406, 116 Stat. 745, 789 (2002) (codified at 15 U.S.C. § 7264). In addition, corporate governance rules promulgated by the New York Stock Exchange and the Nasdaq in 2003 require listed companies to adopt and disclose codes of business conduct and ethics applicable to all directors, officers and employees. NYSE Rule 303A.10; Nasdaq Rule 4350[n].}

The increasing utilization of compliance programs is not limited to the United States. Many U.S. corporations are disseminating their compliance programs on a global scale, and compliance programs are being adopted by an ever-increasing number of non-U.S. organizations and fostered by other countries and multilateral organizations. This chapter explores some of the reasons behind the growth of international compliance programs and provides some practical guidance on how companies can effectively implement international compliance programs, while avoiding some common pitfalls.

§ 6:2 Why Implement an International Compliance Program?

There are numerous reasons for companies to consider implementing international compliance programs or expanding their domestic programs to locations abroad, including

\begin{enumerate}
\item the globalization of the world’s economy;
\item the increasing importance of U.S. laws applied outside the United States;
\item the laws of other countries; and
\item the availability of guidance from nongovernmental organizations that support corporate compliance efforts.
\end{enumerate}

§ 6:2.1 Global Economic Incentives

A rapidly changing global economy has created ample incentive for many companies to consider the development of international compliance programs.\footnote{For example, the World Trade Organization (WTO), the International Monetary Fund (IMF), the U.N. Convention on Anti-Corruption (UNCAC),...} The growth in the number and size of multinational corporations creates a corresponding need for those corporations to be
cognizant of the laws and regulations of a variety of local and national governments. In addition, the speed with which information can be communicated around the world creates significant reputational (as well as legal) risk to those organizations that do business in multiple jurisdictions. In today’s world, it is almost impossible to confine the fallout from a violation of law or regulation; information can and often does spread everywhere, instantaneously. Many organizations that had previously focused their compliance efforts on their U.S. holdings are now compelled to extend those programs on a global basis, given that a violation anywhere in the world can result in significant reputational harm worldwide, and potential enforcement actions from a variety of governments.

Shareholder activists have also increased pressure on multinational corporations to implement international compliance programs in recent years. In the past, shareholder resolutions were typically proposed by nonprofits or other groups holding a small share of company stock for the sole purpose of gaining access to shareholder meetings. Today, more and more large institutional investors and socially conscious mutual funds with significant financial backing are making shareholder demands about corporate social responsibility issues—many of which carry important implications for companies’ compliance programs.

§ 6:2.2 United States Laws with International Applicability

Another factor creating an incentive for companies to implement international compliance programs is the importance of many U.S. laws with applicability to conduct occurring outside the United States. A compelling example is the enormous fines that have been levied by the United States against several non-U.S. corporations for antitrust violations based on conduct that largely occurred outside of the United States. These fines amply demonstrate the applicability of certain U.S. laws to conduct occurring outside our borders.


8. In 1999, the United States obtained a criminal fine of $500 million [the largest criminal fine in U.S. history] against the Swiss pharmaceutical
Another U.S. law with an intentionally international focus, the Foreign Corrupt Practices Act (FCPA), has created significant incentives for companies to adopt global compliance efforts in the area of antibribery. The FCPA proscribes the bribery of foreign officials by U.S. citizens and organizations and certain others and also requires companies to maintain books and records that accurately reflect transactions and dispositions of assets and systems of internal accounting controls. In addition to prohibiting the payment of direct bribes to foreign officials, the FCPA also makes it unlawful for a company to make a payment to a third party while knowing that all or a portion of the payment will be used to bribe a foreign official. Under the statute, a company is deemed to have the requisite knowledge if the company “is aware” that misconduct exists or is “substantially certain” to occur or “has a firm belief that such circumstance exists or that such result is substantially certain to occur.” In other words, U.S. companies can be held liable for the conduct of non-U.S. third parties (agents) if the company has some knowledge that its funds—paid to the third party, not a foreign official—will likely be used to bribe the government official.

To help decrease the risk of liability for violations of the FCPA, many companies have implemented anti-bribery compliance programs. FCPA compliance programs often include extensive written policies, training, due diligence requirements for hiring consultants and other agents, audits of the company’s and its agents’ books and records, the designation of an employee to oversee the organization’s compliance efforts, and internal communications.

Another example of a U.S. law with a broad multinational reach is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act). Among other things, this law requires financial
institutions to establish compliance programs aimed at ensuring adherence to federal anti-money laundering laws. The types of organizations that are subject to the law include not just typical financial institutions, such as banks and broker-dealers, but also organizations such as casinos, insurance companies, and even car and other vehicle dealerships.\footnote{31 U.S.C. § 5312(a)(2) (2003).} Under the Act, anti-money laundering compliance programs must include internal policies, procedures, and controls; a compliance officer; ongoing employee training programs; and independent audit functions to test the program.\footnote{31 U.S.C. § 5318(h)(1) (2003).}

Elements of compliance and ethics programs are also included in corporate governance rules promulgated by self-regulatory organizations. Corporate governance rules adopted by the New York Stock Exchange and the Nasdaq in 2003 require listed companies to adopt and disclose codes of business conduct and ethics applicable to all directors, officers, and employees, wherever located.\footnote{NYSE Rule 303A.10; Nadsaq Rule 4350[n].} This has prompted many listed companies that had not already done so to extend their codes and other elements of their compliance programs outside the United States. The New York Stock Exchange also requires audit committee charters to provide that the committee’s purpose is to assist board oversight of a company’s compliance with legal and regulatory requirements.\footnote{NYSE Rule 303A.07[b][1][A].}

The Sarbanes-Oxley Act of 2002\footnote{Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).} also resulted in the extension of certain components of compliance programs outside the United States. Section 301 of Sarbanes-Oxley requires the national securities exchanges and associations to prohibit the listing of securities of any company if the audit committee has not established procedures for (1) the receipt, retention, and treatment of complaints regarding accounting, internal accounting controls, or auditing matters and (2) the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.\footnote{Pub. L. No. 170-204, § 301, 116 Stat. 745, 789 (2002) (codified at 15 U.S.C. § 78j-1).} The required reporting procedures are not limited to residents of the United States; they must be available to employees [and others] wherever located.\footnote{The applicability of reporting procedures requirements to non-U.S. employees resulted in a conflict with European Union data protection laws, which is discussed below.} Thus, many U.S. corporations that previously did not extend reporting procedures to employees and others located outside the United States are now required to do so.

\footnotetext[16]{NYSE Rule 303A.10; Nadsaq Rule 4350[n].}
\footnotetext[17]{NYSE Rule 303A.07[b][1][A].}
\footnotetext[20]{The applicability of reporting procedures requirements to non-U.S. employees resulted in a conflict with European Union data protection laws, which is discussed below.
Additional U.S. laws and regulations that are important to consider in the development of an international compliance program include the Export Administration Act,\textsuperscript{21} Export Administration Regulations (including export licensing and antiboycott regulations),\textsuperscript{22} the Arms Export Control Act,\textsuperscript{23} the Trading with the Enemy Act,\textsuperscript{24} the International Emergency Economic Powers Act,\textsuperscript{25} Foreign Assets Control Regulations,\textsuperscript{26} and federal immigration laws.\textsuperscript{27}

\section*{\textbf{	extsection{6:2.3} Other Countries' Laws Encouraging Compliance}}

The United States is not the only country that has developed incentives for organizations to implement compliance programs. Indeed, companies are under increasing pressure to implement compliance programs from a variety of sources. The U.K. Bribery Act, enacted in 2010, is similar to the FCPA. The Bribery Act applies extraterritorially to bribery of foreign officials as well as to commercial bribery.

The Act creates strict liability against organizations for failing to prevent bribery,\textsuperscript{27.1} but also establishes an affirmative defense for organizations that establish “adequate procedures” to prevent bribery prior to the offense.\textsuperscript{27.2} The Act requires the Ministry of Justice to publish guidance regarding what constitutes “adequate procedures.”\textsuperscript{27.3} This Guidance, promulgated in March of 2011, lists the following six principles as adequate procedures for anti-bribery compliance programs:

1. Proportionate procedures: A commercial organization’s procedures to prevent bribery should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization’s activities. Such procedures should also be clear, practical, accessible, effectively implemented and enforced.

\textsuperscript{21} 50 U.S.C. App. § 2401 et seq.
\textsuperscript{22} 15 C.F.R. § 730.1 et seq.
\textsuperscript{23} 22 U.S.C. § 2778 et seq.
\textsuperscript{24} 50 U.S.C. App. § 1 et seq.
\textsuperscript{25} 50 U.S.C. App. § 1701 et seq.
\textsuperscript{26} 31 C.F.R. pt. 500 et seq.
\textsuperscript{27} For a discussion of the U.S. laws that companies should consider in the development of global compliance programs, see Giovanna M. Cinelli, \textit{International Compliance Issues, in CORPORATE COMPLIANCE INSTITUTE 2006}, at 765, 768 (PLI Corp. Law & Prac. Course Handbook, Series No. 1536, 2006).
\textsuperscript{27.2} Id. § 7(2).
\textsuperscript{27.3} Id. § 9.
2. Top-level commitment: The top-level management of the organization (which may be a board of directors, the owners or any other equivalent body) should be committed to preventing bribery by persons associated with the organization. They should also foster a culture within the organization in which bribery is never acceptable.

3. Risk Assessment: The organization should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.

4. Due diligence: The organization should apply proportionate and risk-based due diligence procedures on persons who perform or will perform services for or on behalf of the organization in order to mitigate bribery risks.

5. Communication (including training): The organization should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training.

6. Monitoring and review: The organization should monitor and review anti-bribery procedures and make improvements where necessary.\footnote{The Adequate Procedures guidance contains many similarities to the Sentencing Guidelines’ definition of an effective compliance and ethics program, including its focus on risk assessment, top-level oversight and commitment, communications and training, and monitoring and review.}

Other incentives to implement compliance programs include the European Union Competition Commission’s consideration of compliance programs in assessing penalties for anticompetitive conduct by corporations.\footnote{In addition, the European Union’s policies on competition and data privacy have required many U.S. organizations doing...}


business in Europe or with Europeans to adopt extensive policies and procedures to ensure compliance with local law.\textsuperscript{29}

In addition, England’s Office of Fair Trade has promulgated guidance on implementing effective competition law compliance programs,\textsuperscript{29.1} as has France’s competition authority.\textsuperscript{29.2}

The increasing importance of EU law and policy has not only created additional incentives for compliance programs, however. It has also required U.S. organizations to adapt their programs to the laws and cultural norms of other countries. This was demonstrated by two decisions of the French data protection agency, the National Commission for Data Protection and the Liberties (CNIL), regarding employee helplines. In May 2005, the CNIL issued two rulings finding that the reporting procedures proposed by an affiliate of McDonald’s Corporation and an affiliate of Exide Technologies violated the French Data Protection Act.\textsuperscript{30} These decisions created uncertainty for U.S. corporations doing business in France, given the apparent conflict between the CNIL’s decisions and the requirements of section 301 of the Sarbanes-Oxley Act. As discussed above, section 301 requires the national securities exchanges and associations to prohibit the listing of securities of any company where the audit committee of the company has not established procedures for the receipt, retention, and treatment of complaints received by the company regarding accounting,

\begin{itemize}
\item \textsuperscript{29.1} Office of Fair Trading, \textit{How Your Business Can Achieve Compliance with Competition Law} [June 2011], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf. The Office of Fair Trading suggests that compliance programs include the following five components: (1) commitment to compliance from top-level management; (2) identifying key competition law risks faced by the business; (3) risk assessment, or working out how serious the identified risks are, and in particular assessing which employees are in high risk areas; (4) risk mitigation, which includes establishing appropriate policies, procedures, and training; and (5) reviewing the above steps regularly to ensure that the business has an effective compliance culture.
\item \textsuperscript{29.2} Gonenc Gurkaynak and Derya Durlu, \textit{Harmonizing the Shield to Corporate Liability: A Comparative Approach to the Legal Foundations of Corporate Compliance Programs from Criminal Law, Employment Law, and Competition Law Perspectives}, 47 Int’l L. 99, 120 (Summer 2013).
\item \textsuperscript{30} CNIL Decisions 2005/110 [May 26, 2005], regarding McDonald’s France, and 2005/11 [May 26, 2005], regarding Compagnie Européenne d’Accumulateurs (CEAC).
\end{itemize}
internal accounting controls, or auditing matters, and the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.\textsuperscript{31}

In response to this issue, in November 2005, the CNIL issued Guidelines for the Implementation of Whistleblowing Schemes.\textsuperscript{32} In these Guidelines, the CNIL makes clear that it “has no objection in principle” to whistleblower systems; however, to the extent that they require the processing of personal data, they are subject to the French Data Protection Act.\textsuperscript{33} And, to the extent that they are carried out in an automated form, they are subject to the Data Protection Act’s requirement of prior authorization.

Other EU countries have also created rules restricting the implementation of corporate hotlines. “Over a dozen European jurisdictions interpret their local domestic data protection laws (either by regulation or at least by data agency pronouncement) specifically to rein in employer hotlines.”\textsuperscript{33.1} In addition, the European Article 29 Working Party issued an opinion on the application of EU data protection rules to internal whistleblowing schemes, recommending that all EU countries adopt restrictions on hotlines. “Broadly speaking, Europeans see hotlines as threatening privacy rights of denounced targets and witnesses when hotlines are not ‘proportionate’ to other report channels in European workplaces.”\textsuperscript{33.2} Those companies seeking to implement helplines in Europe thus must ensure that their helplines are compliant with local rules governing these processes.

Compliance incentives and guidance are not limited to the European Union and the United States.

Australia has also been fertile territory for the development of compliance program incentives. For example, effective compliance programs can constitute a defense to allegations of violations of certain

\begin{itemize}
\item \textsuperscript{33} For a discussion of whistleblower hotlines under European laws, see Donald C. Dowling, Jr., Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze, 42 Int’l Law. 1 (2008).
\item \textsuperscript{33.1} Donald C. Dowling, Jr., How to Launch and Operate a Legally-Compliant International Workplace Report Channel, Rom. 45 Int’l Law. 903, 921 (Winter 2011).
\item \textsuperscript{33.2} Id.
\end{itemize}
provisions of Australia’s Trade Practices Act.\textsuperscript{34} In addition, in determining the liability of corporations for criminal conduct, Australia’s criminal code requires consideration of the “corporate culture” and, specifically, whether a corporation has a corporate culture that encourages or tolerates the commission of a crime. The criminal law defines corporate culture as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.”\textsuperscript{35} In other words, the corporate culture is defined, in part, by the organization’s “policies and rules,” which are important components of the organization’s compliance program. Further, this emphasis on corporate culture in Australian criminal law parallels the U.S. emphasis on “organizational culture” that encourages ethical conduct and the sentencing guidelines.\textsuperscript{36}

The Canadian Competition Bureau has also issued guidance for competition law compliance programs.\textsuperscript{36.1} This guidance includes five principal elements, which include \{1\} senior management involvement and support; \{2\} policies and procedures; \{3\} training and education; \{4\} monitoring, auditing, and reporting mechanisms; and \{5\} consistent disciplinary procedures and incentives.

\section*{§ 6:2.4 Nongovernmental Organizations}

In addition to government incentives and guidance for companies to develop compliance programs, nongovernmental organizations have promulgated significant guidance in recent years on the development of global compliance programs. Over 100 sets of international standards have been promulgated by associations such as the United Nations, the International Labor Organization, and the Organisation for Economic Cooperation and Development (OECD).

The OECD promulgated its Guidelines for Multinational Enterprises in 1976 and revised them in 2000. The guidelines set forth voluntary principles and standards that are addressed by governments to multinational enterprises that operate in or from the signatory countries.\textsuperscript{37} They provide guidance on a broad range of issues, including recommendations that enterprises

\begin{itemize}
\item \textsuperscript{34} See Brent Fisse, \textit{Corporate Compliance Programmes: The Trade Practices Act and Beyond}, \textsc{Australian Bus. L. Rev.} 357 [Dec. 1989].
\item \textsuperscript{35} Australia Criminal Code Act, 1995, c.2 Div. 12.3 [6].
\item \textsuperscript{36} U.S. Sentencing Guidelines Manual § 8B2.1.b.
\item \textsuperscript{36.1} The guidance can be found at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html#s4.0.
\end{itemize}
Contribute to economic, social, and environmental progress with a view to achieving sustainable development;

Respect human rights;

Encourage human capital formation;

Support and uphold good corporate governance principles and develop and apply good corporate governance practices;

Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programs;

Refrain from retaliation for reports of suspected wrongdoing;

Encourage business partners, including suppliers and contractors, to apply principles of corporate conduct compatible with the Guidelines;

Engage in timely, regular, reliable, and relevant disclosure of financial information;

Not discriminate and contribute to the abolition of forced and child labor; and

Combat bribery.

The OECD has also promulgated guidance regarding anti-bribery compliance programs, in its Good Practice Guidance on Internal Controls, Ethics and Compliance.37.1 This guidance is based on and draws significantly from the U.S. Sentencing Guidelines’ framework for an effective compliance and ethics program. The Good Practice Guidance provides that companies should consider the following good practices for an effective anti-bribery compliance program:

1. Strong, explicit, and visible support and commitment from senior management;

2. A clearly articulated and visible corporate policy prohibiting bribery;

3. Making clear that compliance with the law and related compliance measures is the duty of individuals at all levels of the company;

4. Placing oversight of the program with one or more senior corporate officers who have an adequate level of autonomy

37.1. This guidance can be found at http://www.corporatecompliance.org/Resources/View/ArticleId/727/Good-Practice-Guidance-on-Internal-Controls-Ethics-and-Compliance.aspx.
from management, resources, and authority, and providing this person(s) with the authority to report matters directly to independent monitoring bodies such as the audit committee of the board of directors;

5. Appropriate policies and procedures;

6. Extending compliance measures to third parties such as agents and other intermediaries, as possible;

7. A system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for foreign bribery or hiding such bribery;

8. Periodic communication and documented training for all levels of the company as well as, where appropriate, for subsidiaries;

9. Appropriate measures to encourage and provide positive support for the observance of the compliance program at all levels of the company;

10. Appropriate disciplinary procedures to address violations of law and the company’s related policies and procedures;

11. Effective measures for:

   i. providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company’s compliance program, including when they need urgent advice on difficult situations in foreign jurisdictions;

   ii. internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, to report suspected violations of law, professional standards, or ethics; and

   iii. undertaking appropriate action in response to such reports;

12. Periodic reviews of the program, designed to evaluate and improve the program’s effectiveness, taking into account relevant developments in the field and evolving international and industry standards.

The United Nations’ Global Compact is another important example of guidance provided to multinational corporations regarding their
compliance efforts. The Global Compact is a voluntary code with which multinational organizations can agree to comply. Signatory companies promise

1. To support and respect the protection of human rights;
2. Not to be complicit in human rights abuses;
3. To uphold freedom of association and the effective recognition of the right to collective bargaining;
4. To uphold the elimination of forced, compulsory, and child labor;
5. To uphold the elimination of discrimination in employment and occupation;
6. To support a precautionary approach to environmental challenge;
7. To undertake initiatives to promote greater environmental responsibility;
8. To encourage the development and diffusion of environmentally friendly technologies; and
9. To work against all forms of corruption.\(^{38}\)

Organizations that adhere to the Global Compact are expected to publish in their annual or similar corporate reports (for example, sustainability reports) a description of the ways in which they support the Global Compact.

There are also a large number of industry and self-regulatory initiatives that support and provide guidance for compliance programs.\(^ {39} \) An important example is the Global Sullivan Principles, which, among other things, require signatory companies to promise to

1. Promote equal opportunity for all employees at all levels of the company without regard for color, race, gender, age, ethnicity, or religious beliefs;

---

Operate without unacceptable worker treatment such as child labor, physical punishment, female abuse, involuntary servitude, or other forms of abuse;

Respect freedom of association;

Compensate employees to meet basic needs;

Provide employees with an opportunity to improve skills;

Provide a safe and healthy workplace;

Promote fair competition;

Not offer or accept bribes;

Work with governments and communities where located to improve the quality of life; and

Develop and implement policies, procedures, training, and internal reporting structures to ensure implementation.

Companies that sign on to the Global Sullivan Principles also promise to develop and implement company policies, procedures, training, and internal reporting structures to ensure their implementation.

There are myriad additional such guidelines, including country-specific guidelines to govern those multinationals that invest or have locations in specific countries, industry-specific guidelines, and guidelines dedicated to particular legal areas, such as child labor.

§ 6:3 How to Develop an International Compliance Program Using the Sentencing Guidelines

While a global compliance program can be more complicated than a program that covers only domestic issues, the basic framework of the two types of programs is typically the same. Thus, companies can utilize the framework created by the United States Sentencing Guidelines for Organizations in the creation of their global compliance programs. The Sentencing Guidelines’ definition is important because it is the definition used by many other government agencies in creating their own compliance incentives, and also because it is the framework around which many companies organize their compliance efforts. It has, in the years since the Sentencing Guidelines were first


(Basri, Rel. #9, 11/14) 6–15
promulgated, become the preeminent definition of an “effective” compliance program.

§ 6:3.1 Components of an Effective Compliance Program

Under the Sentencing Guidelines’ definition, to have “an effective compliance and ethics program,” an organization must [1] exercise due diligence to prevent and detect criminal conduct and [2] otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.43 The Sentencing Guidelines provide that meeting these two conditions requires, at a minimum, the following seven factors.

[A] Standards and Procedures

Organizations must establish standards and procedures to prevent and detect criminal conduct. This requires organizations to draft written policies and procedures to guide employees and, as appropriate, other agents. These include, for example, codes of conduct, reporting procedures, and policies that govern particular areas of the law, such as antitrust and antibribery policies.44 Commentary to the Sentencing Guidelines provides that “standards and procedures” means standards of conduct and internal controls45 that are reasonably capable of reducing the likelihood of criminal conduct.46 In other words, companies should adopt the policies and processes that might prove most effective in preventing illegalities.

42. [Reserved.]
44. Policies and procedures should generally include standards of conduct; risk areas based on industry and legal subject areas; a mission statement; a letter from the president or CEO; a code of conduct or code of ethics; an employee handbook; and the corporate compliance program guidelines. The corporate compliance program guidelines institutionalize the compliance office.
45. These corporate internal controls dovetail with the standards set up by various national accounting boards, such as the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in the United States, the Criteria of Control Board (COCO) in Canada, and Cadbury Commission in the United Kingdom.
[B] Responsible Individuals

The Sentencing Guidelines require oversight of the program by both the board of directors and high-level management:

(1) The board of directors or other governing authority must be knowledgeable about the content and operation of the compliance and ethics program and exercise reasonable oversight with respect to its implementation and effectiveness.\(^{47}\)

(2) High-level personnel must ensure that the company has an effective compliance program.

(3) Specific individuals within high-level personnel must be assigned overall responsibility for the program.

(4) Specific individuals must be delegated day-to-day operational responsibility for the program. These individuals must report periodically to high-level personnel and, as appropriate, to the board or a board committee on the program’s effectiveness. They also must have adequate resources, appropriate authority, and direct access to the board or a board committee.

The Sentencing Guidelines also provide that the organization should designate someone within high-level personnel and other specific individuals within the organization to be responsible for implementing the program. In essence, the board must take responsibility for oversight of the compliance program\(^{48}\) and top management should take a leadership role in fostering the compliance program.

---

47. This requirement dovetails with the New York Stock Exchange rule requiring audit committees to assist board oversight of a company’s compliance with legal and regulatory requirements. NYSE Rule 303A.07[b][i][A].

48. \textit{In re Caremark Int'l, Inc. Derivative Litig.}, 698 A.2d 959 [Del. Ch. 1996]. The court in \textit{Caremark} stated that a director’s obligations include a duty to attempt to assure that a corporate information and reporting system exists and that failure to do so may, under some circumstances, render a director liable for losses caused by non-compliance with applicable law. The court further stated that, in order to fulfill their obligation to remain reasonably informed about the corporation, directors are required to “assur[e] themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation’s compliance with law and its business performance.” \textit{Id.} at 970. \textit{See Jeffrey M. Kaplan, A Greater Focus on Corporate Boards, ETHIKOS} 1 [May/June 2001], (“Many believe that the Enron board’s failure to oversee senior management ethics issues lay at the heart of the company’s fall.”).
The chief compliance officer should coordinate the activities of individuals responsible for compliance at subsidiaries. The compliance officer should have direct access to the CEO and board of directors and sufficient funding and staffing. The compliance officer’s responsibilities include overseeing and monitoring the implementation of the compliance program; reporting on a regular basis to the CEO and compliance committee; periodically revising the program in light of new developments; developing, coordinating, and participating in a multifaceted educational and training program that focuses on the elements of the compliance program; auditing, monitoring, and assessing the compliance program; independently investigating and acting on matters related to compliance, including the flexibility to design and coordinate internal investigations; and developing policies and programs that encourage managers and employees to report suspected fraud and other improprieties without fear of retaliation.

[C] Exclusion of Certain Persons

The company must use reasonable efforts not to include within “substantial authority personnel” anyone who the company knew, or should have known through the exercise of due diligence, had engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program. This means reasonable efforts should be undertaken not to include in the compliance program persons of questionable integrity. Background searches should be conducted on all officers and employees involved in compliance administration and coordination. Most companies conduct such background checks only at the time of hiring, promotion, or a positive change in the condition of employment.

[D] Communication of Standards and Procedures, Including Training

A company must take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to directors, officers, employees, and, as appropriate, agents, by conducting effective training programs and otherwise disseminating information appropriate to each person’s roles and responsibilities. While some topics—like the importance of reporting suspected misconduct—should be communicated to all employees, the specific contents of compliance training, and which employees should be trained on which topics, should be developed in light of the results of the organization’s risk assessment. Effective training of standards and procedures may include the following areas: code of conduct; competition and antitrust; conflicts of interest; emails; employment; environmental; export
controls; false and deceptive advertising; Foreign Corrupt Practices Act and OECD antibribery guidelines; fraudulent financial reporting; gifts and gratuities; government contracting; insider trading; intellectual property; lobbying, political contributions, and other political activities; new business “alliances”; procurement of goods and services; records management; protection security and wiretapping; data privacy; sexual harassment; subcontractors and contract labor; tax; workplace safety; and USA PATRIOT Act.\textsuperscript{49} Training should be at the time of hiring as well as regularly scheduled at least once or twice a year as necessary.

This component of an effective compliance program includes both formal training regarding legal requirements [such as through live training, video, computer-based training, etc.] and other, less formal means of communicating the company’s compliance message. Informal means of compliance communications can include, for example, requesting that supervisors issue periodic compliance messages, posting occasional compliance messages on the company’s intranet site, or including compliance articles in the company’s newsletters.

For practical reasons, many companies are now utilizing web-based training modules for formal compliance training of large numbers of employees. This can be especially useful in the international environment, where computer-based training companies can facilitate consistent training for a large number of employees across multiple countries and in multiple languages. Such technology also helps companies track which employees have completed particular types of compliance training. Some of the largest companies in this area include Corpedia, LRN, and Integrity Interactive. However, wherever possible, train-the-trainer programs, which feature cascading training, are preferable to the use of only computer-based training and should be used for small groups of fifteen to twenty people per session. These sessions promote culture change and discussions on ethical issues among peer groups.

\[E\] Auditing, Monitoring, and Reporting

An effective compliance program must include auditing, monitoring, and reporting procedures. Specifically, the company must take reasonable steps

\begin{enumerate}
\item to ensure that the compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
\end{enumerate}

(2) to evaluate, periodically, the effectiveness of the organization’s compliance and ethics program; and

(3) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

Practically, auditing, monitoring, and reporting require that an anonymous helpline or hotline to be set up for all employees. There should be translation services immediately available [within sixty to ninety seconds], global “800” numbers, call-back case numbers for anonymous follow-up calls, tracking systems for complaints on a monthly and quarterly basis, risk priority protocols, and individualized scripts and greetings for subsidiaries with different names than the parent company. Organizations that provide these services globally include Ethicspoint, Alertline, and the Network. Further, cultural consideration should be given to an appropriate name for an international company helpline or hotline.50

“Alignment” is critical to having a compliance program that can be audited and monitored.51 In order to properly audit the compliance program, all of the policies and procedures, the employee handbooks, and the code of conduct should align with each other as to language and content. Then, the auditing standards should be set up to align with those components. Otherwise, the compliance program will not be able to measure whether the conduct aspired to under the code of

50. See Andrew W. Singer, UPS Translates and Transports an Ethics Code Overseas, ETHIKOS 2 [May/June 2001]. UPS focus groups noted that the use of the name “Conduct-line” for the company hotline met with resistance in Asia where members of the focus group noted that reporting on a fellow employee is “not something we would do... that would be like taking someone’s life.” Similarly in Germany, there was resistance to the name “Conduct-line” since it seemed to encourage reporting on neighbors. Thus, the “Conduct-line” was renamed the “Helpline” to make employees feel more comfortable. Further, it should be noted that helplines are often met with resistance outside of the United States because of cultural differences. See Lori Martens & Amber Crowell, Whistleblowing: A Global Perspective (Part I), ETHIKOS 6 [May/June 2001] (describing “cultural and other factors that discourage international employees from reporting misconduct,” including the feeling that it would be disloyal to report fellow employees; logistical problems; and fear of retribution for exposing corruption).

51. Alignment means making sure that the same terms and definitions are used in all documents on the same issue. For example, if the code of conduct discusses gifts and gratuities, then the policies and procedures and employee handbooks discussing gifts and gratuities should use the same definitions and guidelines for accepting or rejecting them.
conduct has, in fact, been fostered through the policies and procedures as well as the employee handbook.

Measurement is an important component of compliance. The purpose for auditing and monitoring is to determine if the best practices set forth in the code of conduct are being adhered to by employees. Creating metrics to determine the penetration level of the compliance program is critical. The Open Compliance and Ethics Group (OCEG) standards are an example of metrics to determine the effectiveness of a corporate compliance program. Further, a key auditing step is an exit interview with employees as to the reasons for their departure and their adherence to the code of conduct and policies and procedures, including the employee handbook. Departing employees are a good source of auditing information on practices of other employees as well as weaknesses in the company’s culture.

[F] Incentives and Penalties

The compliance and ethics program must be promoted and enforced consistently throughout the organization through (1) appropriate incentives to perform in accordance with the program and (2) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct. Providing incentives to perform might include incorporating questions regarding awareness of and adherence to compliance and ethics policies in employee performance evaluations. These performance standards should be distributed to all new and existing employees, a strategy first successfully undertaken in the 1980s by American Express. Another example of incentives is the creation of formal “rewards” for ethical business conduct, such as awards, letters of praise, or other recognition of outstanding conduct by employees or management.

[G] Response to Wrongdoing

After criminal conduct has been detected, the organization must take reasonable steps to respond appropriately to the conduct and to prevent further similar conduct, including making necessary modifications to the compliance and ethics program. This includes detecting, investigating, and appropriately responding to criminal violations.

52. The aforementioned best practice of including adherence to the compliance program as a criterion in the personnel evaluation shows the company’s commitment to compliance. It is a cost-effective strategy since it does not entail additional compensation to employees but uses additional job performance criteria for determining future compensation.


(Basri, Rel. #9, 11/14) 6–21
Therefore, protocols and procedures for opening and conducting internal investigations should be created and applied. A coordinated effort between the compliance department, the general counsel’s office, the human resources department, and outside counsel should be undertaken to develop uniform procedures and protocols for such internal investigations.\(^{54}\) Also, this process should be coordinated with the crisis management strategy.\(^{55}\) Further, in an international crisis it is critical to understand the role of attorney-client privilege of in-house counsel since it may not be applicable in most civil code jurisdictions and in the European Union.\(^{56}\)

This element of a compliance program also requires that, when misconduct is detected, an organization take appropriate steps to prevent similar misconduct in the future, including making necessary modifications to the compliance and ethics program. This could include, for example, developing new or revising existing policies, developing new audit protocols, or requiring employees to undergo new or revised training.

\textbf{§ 6:3.2 Periodic Risk Assessment}

The Sentencing Guidelines further provide that, in implementing the seven components of an effective compliance and ethics program, the organization must periodically assess the risk of criminal conduct and take appropriate steps to design, implement, or modify each of the seven components so as to reduce the risks of criminal conduct identified through this process.\(^{57}\) The commentary to the Sentencing Guidelines also provides guidance on how organizations should conduct the periodic risk assessment.\(^{58}\) Specifically, the Sentencing Guidelines provide that organizations shall periodically assess the risk that criminal conduct will occur, including assessing the following:

1. The nature and seriousness of the criminal conduct;
2. The likelihood that certain criminal conduct could occur because of the nature of the organization’s business; and

---

54. See chapter 9 for a complete discussion on international internal investigations.
55. See chapter 8 for a complete discussion on crisis management.
56. See chapter 2 for a complete discussion on international attorney-client privilege.
57. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(c).
58. Further, a risk assessment, including best practices and gaps, should be undertaken by the compliance department. The result of this assessment should be incorporated into the compliance program at least annually.
The prior history of the organization, which may indicate
types of criminal conduct that the organization must take
actions to prevent and detect.\textsuperscript{59}

\textbf{§ 6:3.3 Relevance of Size of Organization}

The Sentencing Guidelines’ commentary provides that, in general,
the formality and scope of actions that an organization must take to
meet the requirements of the Sentencing Guidelines, including the
necessary features of the organization’s standards and procedures,
depend on the size of the organization.\textsuperscript{60} Thus, a large organization
is expected to devote more formal operations and greater resources to
meeting the requirements of the Sentencing Guidelines than is a small
organization.\textsuperscript{61}

In addition, large organizations are expected to encourage small
organizations (especially those that have or wish to have a business
relationship with the large organization) to implement effective
compliance and ethics programs.\textsuperscript{62} This includes subcontractors,
suppliers, and agents, who should be required to follow the code
of conduct or have a similar code of conduct. For purposes of social
responsibility, subcontractors should have effective compliance and
ethics programs to avoid substandard working conditions, such as
found in the \textit{Nike} and \textit{Kathy Lee Gifford} cases.\textsuperscript{63}

\textbf{§ 6:3.4 Changes in the Sentencing Guidelines}

After the November 1, 2004, amendments to the Sentencing
Guidelines, which required a culture of ethics and risk assessment
to support the underlying structure of the corporate compliance
program, the Guidelines were further revised on November 1, 2010.

In the 2010 revision, section 8B2.1(b)(7) of the Guidelines was
amended to provide that organizations should, as noted in the
Commentary, “remedy the harm resulting from the criminal con-
duct,” including providing restitution to identifiable victims, self-
reporting, and cooperation with authorities. The Commentary also
states that, under subsection (b)(7), the organization should act to
prevent further similar criminal conduct by assessing and making
modifications to its compliance and ethics program to “ensure the
program is effective,” including the “use of an outside professional

\textsuperscript{59} U.S. SENTENCING GUIDELINES MANUAL § 8B2.1[b], cmt. 6[A].
\textsuperscript{60} Id. § 8B2.1[b], cmt. 2[C][i].
\textsuperscript{61} Id. § 8B2.1[b], cmt. 2[C][ii].
\textsuperscript{62} Id. § 8B2.1[b], cmt. 2[C][iii].
\textsuperscript{63} See chapter 7 for a complete discussion of international corporate social
responsibility.
adviser to ensure adequate assessment and implementation of any modifications." Also, section 8C2.5(f)(3)(C) of the Guidelines states that organizations can gain credit in the culpability scoring process even if a high-level executive is involved in the offense, where four factors are present:

(1) The person or persons with operational responsibility for the compliance and ethics program have “direct reporting obligations to the governing authority or an appropriate subgroup,” such as an audit committee;

(2) The compliance program must have detected the offense before anyone outside the organization discovered it or “before such discovery was reasonably likely”;

(3) The company “promptly reported the offense to appropriate governmental authorities”; and

(4) No one “with operational responsibility for the ethics and compliance program participated in, condoned, or was willfully ignorant of the offense.”

The Guidelines also state that the individuals having operational responsibility for the compliance program must have “express authority to communicate personally to the governing authority or appropriate subgroup thereof [A] promptly on any matter involving criminal conduct or potential criminal conduct, and [B] no less than annually on the implementation and effectiveness of the compliance and ethics program.” Finally, litigation management requires an understanding of the attorney-client privilege, the new federal discovery rules, and how to appropriately advise the board on pending litigation.

§ 6:4 Other Frameworks for a Compliance Program

Other government agencies have also issued guidance to corporations on how to implement effective compliance programs. One important example is a memorandum issued by the U.S. Department of Justice (referred to as the Thompson Memorandum, after its author, Deputy Attorney General Larry Thompson) in January 2003, revising the Holder Memorandum issued in 1999. It sets forth numerous factors that federal prosecutors should consider in determining whether to charge a corporation for a crime, including the “existence and adequacy of the corporation’s compliance program.”

64. This is one of a number of factors that prosecutors are instructed to consider, including such things as the nature and seriousness of the offense.
In assessing the adequacy of a compliance program, prosecutors are instructed to consider

(1) whether the compliance program is merely a “paper program” or is designed and implemented in an effective manner;

(2) whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts; and

(3) whether the corporation’s employees are adequately informed about the compliance program and are convinced of the company’s commitment to it.65

The Thompson Memorandum also advises corporations on the importance of basing their programs on a risk assessment. “Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business.”66 Prosecutors are also instructed to consider whether the corporation has established corporate governance mechanisms that can effectively prevent and detect misconduct. In this regard, prosecutors should consider

(1) whether directors exercise independent review over corporate actions;

(2) whether directors are provided with information sufficient to enable the exercise of independent judgment;

(3) whether internal audit functions are conducted at a level sufficient to ensure their independence and accuracy; and

(4) whether directors have established an effective information and reporting system.67

and the risk of harm to the public; the pervasiveness of wrongdoing within the corporation; the corporation’s history of similar misconduct; collateral consequences, including harm to shareholders and employees; the adequacy of prosecution of individuals and civil remedies; and the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation, including the waiver of the attorney-client privilege and work product protection. United States Department of Justice, Memorandum Regarding Principles of Federal Prosecution of Business Organizations at IIA [Jan. 20, 2003], available at www.usdoj.gov/dag/citf/business_organizations.pdf (hereinafter “Thompson Memorandum”).

65. Thompson Memorandum at VII[B].
66. Id.
67. Id.
However, in *United States v. Stein*\(^{67.1}\) (the KPMG case), Judge Kaplan criticized the Thompson Memorandum, noting that “absent the Thompson Memorandum and the actions of the U.S. Attorney’s Office, KPMG would have paid the legal fees and expenses of all its partners and employees prior to and after indictment, without regard to cost.”\(^{68}\) In this case, in order to show cooperation with the U.S. Attorney’s Office, KPMG had, in 2004, ended its long-standing practice of paying former KPMG employees’ legal bills—helping to avoid an indictment of the firm itself.

Further, in December, 2006, the McNulty Memorandum\(^{68.1}\) (named after Deputy Attorney General Paul J. McNulty) revised the Holder and Thompson memorandums. The McNulty memo begins with an explanation that corporations and other organizations can be held liable for the criminal acts of their directors, employees, and agents. Before a corporation will be found liable for the misconduct of its agents, the government must show that the agent’s conduct was within the scope of her duties and was intended, at least in part, to benefit the corporation.\(^{68.2}\) The memo states that, in determining whether to charge a corporation for criminal misconduct, prosecutors should consider all of the same factors that they would consider in determining whether to charge individuals, including the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative and other consequences of conviction, and the adequacy of noncriminal approaches.\(^{68.3}\)

In addition, because of the special nature of corporations and other organizations, prosecutors should also consider the following when determining whether to charge an organization:

1. The nature and seriousness of the offense, including the risk of harm to the public;
2. The pervasiveness of wrongdoing throughout the corporation, including the complicity of management;
3. The corporation’s history of similar conduct;
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;

---

68.2. *Id.* at 2.
68.3. *Id.* at 4.
The McNulty memo thus requires federal prosecutors to consider both whether the company had an adequate preexisting compliance program, and whether, after the alleged misconduct, the corporation implemented or took measures to improve its compliance program. The memorandum also provides guidance to prosecutors as to how to assess the adequacy of compliance programs. Prosecutors are instructed to consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct, such as whether directors exercise independent review, whether directors are provided with information sufficient to enable the exercise of independent judgment, whether internal audit functions are conducted at a level sufficient to ensure their independence and accuracy, and whether directors have established an information and reporting system reasonably designed to provide management and the board of directors with timely and accurate information regarding compliance. 68.5

Prosecutors are also directed to determine:

(i) whether a corporation’s compliance program is merely a “paper program” or whether it was designed and implemented in an effective manner;

(ii) whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts;

(iii) whether the corporation’s employees are adequately informed about the compliance program and are convinced of the corporation’s commitment to it; and

68.4. Id.
68.5. Id.
(iv) whether the program is designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business. 68.6

As a result, in December 2006, the Justice Department purported to moderate the Thompson Memorandum’s approach to pressuring companies regarding payment of employee legal expenses. Further, it required prosecutors to seek approval from senior officials in Washington before requesting from a company the results of internal investigations or the advice received from company counsel.

This position was further moderated on August 28, 2008, in the Filip Memorandum 68.7 (prepared by Mark R. Filip, Deputy Attorney General): The Department of Justice would no longer consider whether a corporation waived the attorney-client privilege or work product protection in determining whether the corporation has cooperated with the government’s investigation under the corporate charging guidelines. Prosecutors were no longer permitted to request a waiver of the attorney-client privilege.

However, one of the factors that the Department of Justice will still consider in determining whether to prosecute or investigate a corporation involves cooperation—“the corporation’s timely and voluntary disclosure of wrongdoing and its cooperation with the government’s investigation.” 68.8 Therefore, be aware of the need to create and keep logs on cooperation with the U.S. Attorney’s offices to show your willingness to assist them where possible. (Generally, U.S. Attorneys keep such logs of their interactions with corporate defendants.)

Additional guidance on effective compliance programs was promulgated by the Department of Justice (DOJ) and the Securities and Exchange Commission (“SEC”) in November 2012. The DOJ and SEC released a joint document providing extensive guidance on compliance programs—the Resource Guide (the “Resource Guide”) to the Foreign Corrupt Practices Act (the “FCPA”). 68.9 While the Resource Guide is directed specifically at FCPA compliance, it contains a significant amount of more general compliance program information.

68.6. Id. at VII.B.
The Resource Guide’s discussion of compliance programs begins with an examination of the importance of risk assessment, recommending that compliance programs “be tailored to an organization’s specific needs, risks, and challenges.” The Resource Guide contains an extensive discussion of compliance policies and codes of conduct, emphasizing the importance of having clear and accessible policies and of periodic revision. The Resource Guide also discusses the importance of providing policies in the local language.

The Resource Guide includes a fairly extensive discussion of compliance training, emphasizing the importance of presenting training information “in a manner appropriate for the targeted audience, including providing training and training materials in the local language.” The Guide also provides that companies should consider providing role-based training appropriate to sales personnel and accounting personnel, which could include hypotheticals or situations similar to those such employees might actually encounter.

The Resource Guide also discusses compliance incentives in some detail:

“DOJ and SEC recognize that positive incentives can also drive compliant behavior. These incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company’s compliance program, and rewards for ethics and compliance leadership. Some organizations, for example, have made adherence to compliance a significant metric for management’s bonuses so that compliance becomes an integral part of management’s everyday concern. Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and internal audit staff. Others have made working in the company’s compliance organization a way to advance an employee’s career.”

The Resource Guide discusses the importance of helplines and other reporting procedures, providing that “An effective compliance program should include a mechanism for an organization’s employees and others to report suspected or actual misconduct or violations of the company’s policies on a confidential basis and without fear of retaliation.” The Resource Guide also discusses the importance of both disciplinary procedures and consistency and fairness in discipline for violations of applicable law and company policies. Interestingly, the Resource Guide endorses the practice of publicizing disciplinary decisions. “Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect demonstrating that unethical and unlawful actions have swift and sure consequences.” In addition, the Resource Guide discusses the importance of using “lessons learned” from violations to update the compliance program and of periodic review and revision of a program.
Other guidance has emanated from the Securities and Exchange Commission,\(^\text{69}\) the Department of Health and Human Services,\(^\text{70}\) the Environmental Protection Agency,\(^\text{71}\) the Treasury Department,\(^\text{72}\) and even judicial decisions.\(^\text{73}\) Also, deferred prosecution agreements\(^\text{74}\) in a number of recent cases\(^\text{75}\) provide guidance on what provisions should be instituted in an “effective” compliance program.

§ 6:5 Tailoring the Compliance Program to Individual Countries

When implementing a global compliance effort, not every policy, procedure, training program, or internal compliance audit need be applied to every country in the same manner. Instead, the concept of globalization of a compliance program refers to the implementation of

---


74. Rebecca Walker, What Is Corporate Compliance?, in CORPORATE COMPLIANCE INSTITUTE 2006, at 15, 39 [PLI Corp. Law & Prac. Course Handbook, Series No. 1536, 2006]. A deferred prosecution agreement occurs when a corporation is indicted and the prosecutor withholds prosecution and agrees to withdraw charges if the agreement is successfully completed. The corporation agrees to cooperate with the government and implement reforms. Cooperation provisions typically include document disclosure; identifying and producing witnesses; conducting investigations; payment of penalties and restitution; changes in company practices, including the adoption or enhancement of a compliance program; and appointment of a monitor.

at least some components of a compliance program in more than one country. Companies would be well-served to utilize a risk assessment to determine which elements of the compliance program to apply to which categories of employees in which countries of operation. Those areas of the law that present the greatest risk to an organization in a particular country are those that typically should be addressed by the compliance program.\footnote{76}

While the general structure of a compliance program articulated by the Sentencing Guidelines is appropriate for any type of compliance program, including a global program, there are certain complexities that can arise from globalization of a compliance program of which companies should be aware.\footnote{77}

\textbf{§ 6:6 Practical Steps}

Practically, rolling out an “effective” international compliance program should be done in five phases, as shown in Figure 6-1.

In conducting a high-level compliance risk assessment during Phase I, you should first form a committee to interview key officers and employees. The committee should be composed of at least the chief executive officer or the president, the general counsel, the compliance or ethics officer, the chief financial officer, the human resources director, and the internal audit director. The committee should report to the audit committee of the board of directors or directly to the board of directors. The committee should interview key officers and employees of the company and all subsidiaries, including all those officers mentioned above as well as the directors of business development, sales, and marketing, the outside counsel, the environmental health and safety officer, and others.

Using information from the interviews, prepare a risk assessment report on the best practices and gaps. It should include information relating to the key risk areas; the standards and procedures in place in

\footnote{76. An example of this process is the GE Code of Conduct, which has two parts: “the spirit” and “the letter.” The spirit is the overall global code of conduct for all GE employees, which covers all issues broadly. The letter \text{[of the law]} is individualized—that is, tailored to the specific GE subsidiary in a particular country. By its nature, the letter \text{[of the law]} is more detailed and extensive, creating a detailed localized code of conduct.}

\footnote{77. These complexities include appropriate translations, logistics of auditing, and remote training requirements. \textit{See Andrew W. Singer, UPS Translates and Transports an Ethics Code Overseas}, ETHIKOS 1 [May/June 2001]. UPS tried to avoid an “American-centric” code for its overseas businesses using twenty-five focus groups around the world. Also, UPS customized translations including separate Portuguese translations for Brazil and Portugal and separate French translations for France and Quebec, Canada. \textit{Id}.}
<table>
<thead>
<tr>
<th>Phase I</th>
<th>High-Level Compliance Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>High-Level Review</td>
</tr>
<tr>
<td></td>
<td>Inventory Documents</td>
</tr>
<tr>
<td></td>
<td>Interviews</td>
</tr>
<tr>
<td></td>
<td>Risk Assessment</td>
</tr>
<tr>
<td></td>
<td>Best Practices and Gaps Analysis</td>
</tr>
<tr>
<td></td>
<td>Work Plan</td>
</tr>
<tr>
<td></td>
<td>Senior Management</td>
</tr>
<tr>
<td></td>
<td>Board of Directors</td>
</tr>
<tr>
<td></td>
<td>Meeting</td>
</tr>
<tr>
<td></td>
<td>Inventory of Documents</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase II</th>
<th>Develop an Overall Corporate Compliance Blueprint</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Code of Conduct or Code of Ethics</td>
</tr>
<tr>
<td></td>
<td>Corporate Compliance Program</td>
</tr>
<tr>
<td></td>
<td>Guidelines</td>
</tr>
<tr>
<td></td>
<td>Helpline or Hotline</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase III</th>
<th>Evaluate and Develop Policies in Substantive Areas</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Competition and Antitrust</td>
</tr>
<tr>
<td></td>
<td>Email</td>
</tr>
<tr>
<td></td>
<td>Employment</td>
</tr>
<tr>
<td></td>
<td>Environmental</td>
</tr>
<tr>
<td></td>
<td>OECD Antibribery Guidelines</td>
</tr>
<tr>
<td></td>
<td>Corruption Act</td>
</tr>
<tr>
<td></td>
<td>Intellectual Property</td>
</tr>
<tr>
<td></td>
<td>Data Protection</td>
</tr>
<tr>
<td></td>
<td>Securities</td>
</tr>
<tr>
<td></td>
<td>Other Risk Areas</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase IV</th>
<th>Communication, Training, and Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Introduce Code of Conduct and Program</td>
</tr>
<tr>
<td></td>
<td>Ongoing Communication Plan</td>
</tr>
<tr>
<td></td>
<td>Including the Helpline or Hotline</td>
</tr>
<tr>
<td></td>
<td>Training Plan</td>
</tr>
<tr>
<td></td>
<td>Material/Videos</td>
</tr>
<tr>
<td></td>
<td>Training Schedule</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Phase V</th>
<th>Continual Refining of the Program, Self-Assessment, Monitoring, and Reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Internal Controls</td>
</tr>
<tr>
<td></td>
<td>Internal Audit</td>
</tr>
<tr>
<td></td>
<td>Incentive System</td>
</tr>
<tr>
<td></td>
<td>Publicize Reported Results</td>
</tr>
</tbody>
</table>

**Figure 6-1**

Compliance Program Rollout
these risk areas; areas with successfully limited risk; areas that could be improved to reduce risk; risks in key areas such as antitrust, environmental, employment, intellectual property, and securities; and the company culture toward corporate compliance and limiting risk. Then present the risk assessment report to senior management and the board of directors, as well as to the officers of all subsidiaries who were interviewed. This should build acceptance for the program and the code of conduct or code of ethics. Simultaneously, create a work plan that includes a timetable, an action plan, and an inventory of documents including all available policies, procedures, and employee handbooks. Finally, get a status report on the document management system, since this may need to be updated simultaneously with the introduction of the corporate compliance program.

In Phase II, look at other codes of conduct. Use the committee and focus groups to develop a code of conduct and compliance program guidelines and then customize them to your company culture to make them suitable for all employees. Be sure that the code of conduct is user friendly, and create a mission statement and a letter from the CEO to accompany it. Also, develop a helpline or hotline for anonymous reporting by the employees.

Phase III evaluates and develops the policies and procedures in substantive areas. Inventory the policies and procedures already in place (for example, internal controls for competition and antitrust, sexual harassment policy, environmental policy) and align the policies and procedures, code of conduct, and employee handbook. Where gaps exist, develop policies and procedures from the report on best practices and gaps, and if necessary borrow best practices from subsidiaries or from sources outside the organization.

Communication, training, and implementation are the key areas of Phase IV. At this point, introduce a code of conduct and program, as well as an ongoing communications plan, including the helpline or hotline; a training plan; training materials such as videotapes and e-learning; and a training schedule.

In Phase V, you should provide for continual refinement, self-assessment, monitoring, and reporting. At this point, you should

---

78. See Jeffrey M. Kaplan, Five Questions for Risk Analysis, ETHIKOS 4 (May/June 2001). Using a systematic approach, Kaplan has developed five general questions (and numerous sub-questions) that should be asked about any company:

1. What are the company’s products and services?
2. Who creates [or otherwise deals with] the goods and services?
3. Who are the customers?
4. How does the company get business?
5. How does the company get paid?

(Basri, Rel. #9, 11/14)
have management controls, an internal audit system, internal controls, an incentive system, and a mechanism to publicize reported results. An effective corporate compliance program becomes an early warning system for risk control through a risk assessment process, monitoring, reporting (that is, hotline), and training sessions.

Finally, make your compliance rollout memorable. Provide mementos (tombstones, plastic cubes, Post-it notes, etc.), screensavers, calendars, intranet sites, and formal announcements and invitations to compliance events. Remember that this is a marketing campaign, the compliance program is a product, and your audience is your employees.