Chapter 6

International Corporate Compliance

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§ 6:1 Introduction

Compliance programs are formal systems of policies and procedures adopted by corporations and other organizations that are designed to detect and prevent violations of law 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 few years, compliance programs are experiencing renewed importance.

3. Id.
5. This is evidence by recent legislation and regulations that include compliance requirements. For example, section 406 of the Sarbanes-Oxley Act
The increasing popularity 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

(1) the globalization of the world’s economy;
(2) the increasing importance of U.S. laws applied outside the United States;
(3) the laws of other countries; and
(4) the availability of guidance from nongovernmental organizations that support corporate compliance efforts.

§ 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. The growth in the number and size of multinational corporations creates a corresponding need for those corporations to be


6. For example, the World Trade Organization (WTO), the International Monetary Fund (IMF), the U.N. Convention on Anti-Corruption (UNCAC), and the Organisation for Economic Cooperation and Development (OECD) antibribery guidelines all deal with how to curb business corruption. In fact, Transparency International (TI) has even created a corruption index to compare the level of business corruption on a country-by-country basis.
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.7

§ 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.8 These fines amply demonstrate the applicability of certain
U.S. laws to conduct occurring outside our borders.

7. Lance Compa & Tashia Hinchliffe-Darricarrere, Enforcing International
Labor Rights Through Corporate Codes of Conduct, 33 COLUM. J. TRANS-
nat’l L. 663, 675 (1995). See chapter 7 for a complete discussion of
international corporate social responsibility.

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
company F. Hoffman La Roche in relation to an international conspiracy
to fix the price of vitamins. In October 2005, the United States obtained a
fine of $300 million for antitrust violations against Korean manufacturer
Samsung Electronics Company, Ltd.
Another U.S. law with an intentionally international focus, the Foreign Corrupt Practices Act (FCPA),9 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.10 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.”11 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 compliance policies and procedures. 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, and internal communications.12

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).13 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

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10. 15 U.S.C. § 78dd-[a][3].
dealerships. 14 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. 15

Elements of compliance and ethics programs are also included in recent 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. 16 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. 17

The Sarbanes-Oxley Act of 2002 18 has 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. 19 The required reporting procedures are not limited to residents of the United States; they must be available to employees (and others) wherever located. 20 Thus, many U.S. corporations that previously did not extend reporting procedures to employees and others abroad are now required to do so.

Additional U.S. laws and regulations that are important to consider in the development of an international compliance program include the Export Administration Act, 21 Export Administration Regulations (including export licensing and antiboycott regulations), 22 the Arms

16. NYSE Rule 303A.10; Nadsaq Rule 4350[n].
17. NYSE Rule 303A.07[b][i][A].
20. The applicability of reporting procedures requirements to non-U.S. employees resulted in a conflict with French data protection laws, which is discussed below.
21. 50 U.S.C. App. § 2401 et seq.
22. 15 C.F.R. § 730.1 et seq.
Export Control Act,23 the Trading with the Enemy Act,24 the International Emergency Economic Powers Act,25 Foreign Assets Control Regulations,26 and federal immigration laws.27

§ 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 European Union Competition Commission, for example, has considered compliance programs in assessing penalties for anticompetitive conduct by corporations.28 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.29

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.30 These decisions created uncertainty for U.S. corporations doing business in France, given the apparent conflict

24. 50 U.S.C. App. § 1 et seq.
25. 50 U.S.C. App. § 1701 et seq.
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, 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. Those companies that seek to implement “helplines” in France are thus forced to grapple with governing French law.

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 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}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{33} For a comparison of the November and December 2005 CNIL Guidelines, see Appendix 6A at the end of this chapter. For a discussion of whistleblower hotlines under European laws, see Appendix 6B. See also Donald C. Dowling, Jr., Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze, 42 INT’L LAW. 1 (2008).
\item \textsuperscript{34} See Brent Fisse, Corporate Compliance Programmes: The Trade Practices Act and Beyond, AUSTRALIAN BUS. L. REV. 357 [Dec. 1989].
\item \textsuperscript{35} Australia Criminal Code Act, 1995, c.2 Div. 12.3 [6].
\end{enumerate}
\end{footnotesize}
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.\(^\text{36}\)

§ 6:2.4 Nongovernmental Organizations

In addition to government incentives 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.\(^\text{37}\) They provide guidance on a broad range of issues, including recommendations that enterprises

1. Contribute to economic, social, and environmental progress with a view to achieving sustainable development;
2. Respect human rights;
3. Encourage human capital formation;
4. Support and uphold good corporate governance principles and develop and apply good corporate governance practices;
5. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programs;
6. Refrain from retaliation for reports of suspected wrongdoing;
7. Encourage business partners, including suppliers and contractors, to apply principles of corporate conduct compatible with the Guidelines;
8. Engage in timely, regular, reliable, and relevant disclosure of financial information;

§ 6:2.4 INTERNATIONAL CORPORATE PRACTICE

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

(10) Combat bribery.

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;

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

(3) Respect freedom of association;

(4) Compensate employees to meet basic needs;

(5) Provide employees with an opportunity to improve skills;

(6) Provide a safe and healthy workplace;

(7) Promote fair competition;

(8) Not offer or accept bribes;

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

(10) 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.\(^\text{41}\) It has, in the years since the Sentencing Guidelines were first promulgated, become the preeminent definition of an “effective” compliance program.\(^\text{42}\)

\[\text{§ 6:3.1} \quad \text{Components of an Effective Compliance Program}\]

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.\(^\text{43}\) 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.\(^\text{44}\) Commentary to the


\[\text{\textit{The Guidelines’ definition of an effective compliance program was revised last year, incorporating the “more detailed and sophisticated” criteria that have been developed by corporations and governmental and regulatory bodies since the Sentencing Guidelines were originally promulgated in 1991. Executive Summary of the Report of the Ad Hoc Advisory Group on the Organizational Guidelines at 1 (Oct. 7, 2003), available at www.ussc.gov/corp/advgrprrpt/Execsum.pdf. The amendments substantially modify—and make more rigorous—the Guidelines’ definition of an effective compliance program. See United States Sentencing Commission News Release (May 3, 2004), available at www.ussc.gov/PRESS/rel0504.htm. The revisions became effective on November 1, 2004. In particular, the 2004 Revised Guidelines emphasize the need for culture change and a risk assessment based on best practice gaps analysis.}}\]

\[\text{\textit{U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2005).}}\]

\[\text{\textit{Policies and procedures should generally include standards of conduct; risk areas based on industry and legal subject areas; a mission statement; a}}\]
Sentencing Guidelines provides that “standards and procedures” means standards of conduct and internal controls\textsuperscript{45} that are reasonably capable of reducing the likelihood of criminal conduct.\textsuperscript{46} In other words, companies should adopt the policies that might prove most effective in preventing illegalities.

[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.\textsuperscript{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\textsuperscript{48} and top management should take a

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  \item 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.
  \item 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.
  \item U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b), cmt. 1.
  \item 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].
  \item Under the Caremark decision, the board of directors is personally liable for oversight of the corporate compliance program. In re Caremark Int’l, Inc.
\end{itemize}
leadership role in fostering the compliance program by reporting to the chief executive office (CEO) and compliance committee on a regular basis, revising the compliance program to include new developments, and should coordinate educational and training programs that focus on the elements of the compliance program.

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 programs persons of questionable integrity. Background searches should be conducted on all officers and employees involved in compliance administration and coordination. However, such background checks should be undertaken 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

Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). 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.”).
training programs and otherwise disseminating information appropriate to each person’s roles and responsibilities. Effective training of standards and procedures should 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. 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.

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

1. to ensure that the compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
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.  

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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, few helpline calls are usually generated 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).
“Alignment” is critical to having a compliance program that can be audited and monitored. 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 conduct has, in fact, been fostered through the policies and procedures as well as the employee handbook. Measurement is the cutting edge 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,

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.

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.
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 reporting criminal violations. 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. Also, this process should be coordinated with the crisis management strategy. 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.

**§ 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. The commentary to the Sentencing Guidelines also provides guidance on how organizations should conduct the periodic risk assessment. Specifically, the Sentencing Guidelines provide that organizations shall periodically assess the risk that criminal conduct will occur, including assessing the following:

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53. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) [2005].
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.
(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
(3) The prior history of the organization, which may indicate types of criminal conduct that the organization must take actions to prevent and detect.  

§ 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.  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.  

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. 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 Nike and Kathy Lee Gifford cases.

§ 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

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60. Id. § 8B2.1[b], cmt. 2[C][i].  
61. Id. § 8B2.1[b], cmt. 2[C][ii].  
62. Id. § 8B2.1[b], cmt. 2[C][iii].  
63. See chapter 7 for a complete discussion of international corporate social responsibility.
whether to charge a corporation for a crime, including the “existence and adequacy of the corporation’s compliance program.”\footnote{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 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/cftf/business_organizations.pdf (hereinafter “Thompson Memorandum”).}

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.\footnote{Thompson Memorandum at VII(B).}

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.”\footnote{Id.} 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

\footnote{Id.}
whether directors have established an effective information and reporting system.\footnote{Jonathan Stempel, \textit{Judge Faults US for Pressuring KPMG Over Fees}, \textit{BOSTON GLOBE}, available at www.boston.com/business/articles/2006/06/27/judge_faults_us_for_pressuring_kpmg_over_fees/ (June 27, 2006) [67].}

However, in the \textit{KPMG} case in 2006, 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.”\footnote{U.S. Department of Justice, Memorandum Regarding Principles of Federal Prosecution of Business Organizations [Dec. 2006], available at www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [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.

Finally, in December, 2006, the McNulty Memorandum\footnote{\textit{Id.} at 2. [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.\footnote{\textit{Id.} at 4. [68.3]} 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.\footnote{\textit{Id.} [68].}

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:

\begin{enumerate}
\item The nature and seriousness of the offense, including the risk of harm to the public;
\item The pervasiveness of wrongdoing throughout the corporation, including the complicity of management;
\item The corporation’s history of similar conduct;
\end{enumerate}
(4) The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;

(5) The existence and adequacy of the corporation’s preexisting compliance program;

(6) The corporation’s remedial actions, including any efforts to implement an effective compliance program or to improve an existing one;

(7) Collateral consequences, including disproportionate harm to shareholders, pension holders and innocent employees, and the impact on the public;

(8) The adequacy of the prosecution of individuals; and

(9) The adequacy of civil or regulatory enforcement actions.68.4

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;

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

(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.\(^{68.6}\)

Other guidance has emanated from the Securities and Exchange Commission,\(^{69}\) the Department of Health and Human Services,\(^{70}\) the Environmental Protection Agency,\(^{71}\) the Treasury Department,\(^{72}\) and even judicial decisions.\(^{73}\) Also, deferred prosecution agreements\(^ {74}\) in a number of recent cases\(^ {75}\) provide guidance on what provisions should be instituted in an “effective” compliance program.

\(^{68.6}\) \textit{Id.} at VII.B.


\(^{74}\) Rebecca Walker, \textit{What Is Corporate Compliance?}, in \textsc{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.

§ 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 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.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.77

§ 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

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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 (of the law) is individualized—that is, tailored to the specific GE subsidiary in a particular country. By its nature, the letter of the law is more detailed and extensive, creating a detailed localized code of conduct.

77. These complexities include appropriate translations, logistics of auditing, and remote training requirements. 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. Id.
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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 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

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?
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 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.