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Solving Compliance and Ethics Training Issues Online

By Kirk S. Jordan & Steven A. Lauer

Corporate ethics and compliance could be the hottest topic in the business world today, and it is the focus of virtually every investor, board member, and corporate executive. In today's business environment, not having a comprehensive program in place that includes a strong code of ethics is the corporate equivalent of wearing a scarlet letter. The United States Government, in an effort to avoid the same kind of fallout that begat Enron, has also increased the amount of scrutiny it places on corporate compliance.

Statistics show that corporate America is taking preventive measures to ensure that they are not the next Enron. A recent survey by Corporate Counsel magazine stated that 53 percent of Fortune 500 law departments have decided to supply compliance training programs to employees online, up from approximately 25 percent in 2003, a year in which corporate allegations and scandals were everywhere.

General Counsel and ethics officers all across corporate America have one word on their collective minds — "effective", as in "How effective is my company's ethics and compliance program at this very minute?" Given the flurry of federal investigations and ensuing scandals, an effective ethics and compliance program is not only a primary goal of every corporate attorney and ethics professional, it also has become increasingly important to shareholders and customers alike.

The Securities and Exchange Commission and, even more significantly, the U.S. Sentencing Commission have made it clear that companies that have

established an effective and comprehensive ethics and compliance program will be viewed favorably in the eyes of regulators and federal prosecutors.

THE GOVERNMENT TALKS

Government has refused to sit idly as corporate scandals have eroded investor confidence and led to a negative impact on the economy. The current state of affairs began to take shape in 2002 when Congress enacted the Sarbanes-Oxley Act. Sarbanes primarily focused on financial accounting and reporting practices, while also requiring public companies to disclose whether they had enacted a code of ethics for chief executives and other specified corporate executive positions.

More recently, the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines was convened by the U.S. Sentencing Commission in 2003 to review the standards for an effective program. On October 7, 2003, the Group issued a 130-page report filled with recommendations for amending the Guidelines, which were first instituted in 1991.

It is important to note that, while organizations are not legally required to comply with the Organizational Sentencing Guidelines, the Guidelines do serve as a benchmark for acceptable behavior in the eyes of federal prosecutors and regulators. Simply put, a company that fails to institute the recommended guidelines may not thereby violate the law, but if that company is found guilty of a wrongdoing, its failure to comply could result in a much harsher penalty. As such, many companies have

treated the Guidelines as the blueprint for their ethics and compliance program.

Sarbanes-Oxley and the new amendments to the Organizational Sentencing Guidelines have created a renewed focus on doing business with integrity. The need for a strong code of ethics has gained new attention. When the Guidelines were passed in 1991, most companies did in fact go ahead and develop a code of business conduct for employees. This is thought to have established the foundation of the modern corporate ethics and compliance movement. However, very little was ever done with the code other than to drop it on employees' desks and from time to time ask them to sign an acknowledgement that they had received and read the information. Now more than a decade later, companies are starting to ask important questions about efficient communication and training documentation.

The latest proposed amendments to the Guidelines go into effect on November 1, 2004, (barring intervention by Congress) and will greatly impact all public companies as they state that in order for a compliance program to be effective, companies will be required to not only develop and disclose a code of ethics, as stated in Sarbanes-Oxley, but also deliver compliance training to all employees, management and board members. This is a substantial change from the existing Guidelines, which do not require employee and board training.

Furthermore, the training must cover the company's standard operating procedures, the compliance and ethics program, and be

appropriate to individual employees' roles and responsibilities.

WHAT A COMPANY CAN DO

Companies are constantly wrestling with the issue of effectiveness. Since what may be effective for one company is not effective for another, there seems to be no tried and true formula. Though many companies have established programs and identified compliance or ethics officers, the concern over what a program may or may not be lacking is still very valid.

In evaluating what makes a compliance program effective, it is not enough to merely look at how well the program's elements match up against applicable laws. One can argue that by simply ensuring that a company meets the basic requirements of law, the compliance program is working and is effective. However, that point of view may be short-sighted in that by only meeting the basic legal requirements, a company may not be fully embracing the concept of true ethical business practices. A company needs to ask questions that more accurately measure effectiveness.

Questions such as, how does the compliance program go above and beyond the basic requirements? Does it challenge employees to operate with corporate integrity?

An effective compliance program is comprehensive and gives company lawyers the opportunity to change and adapt it in order to comply with evolving standards that are set by the government or by specific industries.

A company often needs to move quickly to meet the expectations of regulatory agencies. Having a program that is inherently more complete requires far less scrambling when requirements change, and will absorb fewer resources to adapt.

If regulations become more demanding, a comprehensive program, in theory, will already be equipped to satisfy the new standards without as much new development.

BOARD INVOLVEMENT

In January 2003, a Department of Justice

memo from deputy attorney general Larry Thompson to U.S. attorneys showed that the DOJ would be looking closely at how involved a company's board of directors was in the compliance process. "In evaluating compliance programs," Thompson wrote, "prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct." Thompson went on to say that prosecutors should be asking the following questions:

- Does the board exercise independent review of proposed corporate actions, or do they ratify officers' recommendations without question?
- Is the board given sufficient information to enable the exercise of independent judgment?
- Is there internal auditing at a level that ensures independence and accuracy?
- Has an information and reporting program been established that provides management and the board with timely and accurate information that allows them to reach an informed decision regarding the company's compliance with the law?

Provided these questions have been answered satisfactorily, and a solid ethics and compliance structure that involves the board is in place, caretakers of the ethics and compliance program can turn their sights to how well the program resonates with employees.

TRAINING ALTERNATIVES

An ethics and compliance program is intended to affect the way employees do business by promoting ethical behavior. So while training will be required by the new guidelines, it is important to ensure that the training reaches employees in the most effective way possible.

Companies have a handful of delivery options and in some cases it is appropriate for organizations and corporate legal departments to implement more than one. Some of the different options are: 1) face-to-face, 2) teleconference, 3) "librarian" check out method, and 4) online training.

For many years, the standard for compli-

ance training was the face-to-face method. This required corporate lawyers to travel to the company's operations and train large numbers of select employees. While this is inefficient due to factors such as travel and time away from the office, there is sometimes a need for this more personal style.

Certain segments of employees, particularly senior executives, may benefit more from face-to-face interaction with an attorney. Companies also have the option of outsourcing this type of training to law firms that are equipped to provide the level of expertise that fits with the compliance program's requirements, although at expensive law firm rates.

Whether the company outsources training or not, live training is an inefficient means of ensuring that employees who receive this training actually understand the content. The size of a company can further compound the problem, as it is simply impractical for a company that has thousands of employees all around the world to try and meet the effectiveness requirements through face-to-face training.

A teleconference eliminates much of the travel-related difficulties involved in face-to-face training but it fails to correct all the inadequacies of such training and it introduces other challenges. Teleconferencing requires access to appropriate facilities with the necessary equipment (unless all participants dial in independently from their respective locations).

To the extent that the participants (including the trainers) are dispersed across various time zones, selection of a single time for the program might inconvenience at least some of them. Interaction with the program on the part of the trainees can prove limited when teleconferencing is the method of choice.

The trainers may be unable to monitor how well or even whether the employees for whom the training is provided are in fact engaged in the process and not simply calling in but otherwise ignoring the material.

A company that opts for the "librarian" check out method of training is only able to confirm when those materials were checked out and later returned. Whether the employees actually use those materials and,

if they do, how well they use them may escape its notice and ability to monitor. This can undermine the company's ability later to demonstrate how well it delivered that training to its employees.

TURN TO THE WEB

As evidenced by the Corporate Counsel magazine survey, Web-based ethics and compliance training is steadily becoming the standard, as few can question its ability to deliver content to a broad audience regardless of geographic limitations or language barriers. Web-based training programs are technically dynamic and can be updated with a click of a mouse and this ensures that the trainees are working from current materials. It also is nearly ubiquitous, meaning that it can go anywhere; wherever an employee can connect to the Internet, he or she can receive training.

Plus, Web-based training is unbiased; it doesn't care about the trainee's rank or reason. Clearly in the past year, companies are getting the point that Web-based training gives them the ability to meet the requirement to deliver effective training to all employees.

As a mechanism for the delivery of training, the Internet offers other advantages to compliance-training professionals:

- Web-based delivery of training enables the company to deliver specific courses and materials to individuals, in as granular a format as desired.
- The constraints of schedules, and particularly of multiple schedules, are virtually eliminated from the process.
- The material delivered to employees is perfectly consistent and not subject to the vagaries of individual trainers' abilities, attention, alertness, focus and other factors.
- The company can easily provide the trainees access to related material while they proceed through the course.

Implementing a Web-based compliance training program is not without its challenges, as there are technical, integration, and risk-assessment issues that need to be addressed. If done right, employees will feel

engaged in the training process and the content will resonate.

With Web-based training, ethics and compliance content and all associated communications can be delivered directly to the employee's computer, enabling them to take the training without having to physically leave behind their work. The model fits well with the guidelines' effectiveness requirement in that it allows the compliance program to be communicated in a way that covers the company's standards, procedures, and other aspects of the compliance and ethics program. It is sensitive to the individual roles and responsibilities of employees.

TRAINING PROGRAM CRITERIA

Whether or not the ethics and compliance training program is Web-based, there are ways to evaluate a program's effectiveness. While it may be impractical for a company to meet each of these criteria fully and completely, they can be used as a guide for the continual improvement of a compliance-training program.

- Relevancy — Does the training encompass overall compliance and ethics awareness as well as specific risk areas that are presented by the company's industry, employees, and employees' functions?

- Consistency — The training should provide a consistent level of quality for each subject it covers.

- Accuracy — Ensure that the training program is reviewed and updated on a regular basis to remain current with new laws and regulations.

- Ongoing — Ethics and compliance training should be delivered to employees on a continual basis.

- Enterprise wide — Employees at all levels, areas and business units to receive some kind of training specific to their risk and job function.

- Retained and understood — It is not enough just to deliver the training without assuring that it is retained. Employees must understand the concepts and level of detail. They should be able to go back and review materials as frequently as necessary.

- Integrated — Training is just one component of an effective ethics and compliance program. All communication with employees should be consistent in its messaging, and reflect the principles of the overall program.

- Motivational — It is difficult to motivate employees when the content they are receiving can be dense and academic at times. Therefore the training should be appropriate to their level of understanding, and should clearly communicate the ramifications of improper behavior.

- Convincing — As training is often the most visible aspect of the ethics and compliance program, the training must be meaningful and credible to third parties like investigators, courts, the investment community, prospective board members and customers. Document and retain records of employee training.

The last point, "Convincing," is often overlooked. Providing a comprehensive record that the company has met its applicable requirements in full is a crucial element of a company's ability to defend itself in the event of an investigation and one of the major advantages of a Web-based program. Every company can assure that its record-keeping procedures satisfy both external and internal requirements.

A strong auditing function not only will go a long way towards ensuring legal compliance; it will also play a key role in any dealing with government agencies. If a company can demonstrate to the government that its auditing is thorough, reliable, and credible in identifying areas of noncompliance, the company stands a far greater chance that the authorities will accept its accounts and representations during the course of an investigation.

HAVE A RECORD AND RESPONSE

The recent amendments to the Sentencing Guidelines have also emphasized the need for compliance reporting and monitoring. It is necessary for law departments to have a record of their ethics and compliance training to ensure that the program is being followed.

Moreover, a company must be able to

detect its own violations, and respond to them. Internal reporting systems must exist that allow employees an opportunity to seek guidance if they feel they have witnessed a problem. The Guidelines call for a reporting system that “may include mechanisms that allow for anonymity and confidentiality,” so that employees can report issues without fear of retaliation.

The Web-based reporting tool allows for employee confidentiality and anonymity. It also constitutes an efficient mechanism to properly receive and respond to issues.

Web-based reporting hotlines make it easy for employees to raise questions or concerns that may come to them during the training program or otherwise. Web-based hotline solutions available today can direct the employees' questions to the appropriate in-house lawyer or other expert within the company.

Most importantly, these Web-based reporting services can include a management module for handling employee questions and reports. The module allows employees to push questions up the chain of command to the board or audit committee.

These reports serve as an auditable record of how a company has managed compliance questions and reports, including reports to the Board's audit committee.

Corporate America is moving toward the development of best practices for ethics and compliance programs. Corporate executives and boards are concerned with finding solutions that protect not only themselves and their customers, but also their brands and reputations.

When designing an ethics and compliance program, be sure to treat the process as a management function as well as a legal one. The Sentencing Guidelines, Sarbanes-Oxley, and the countless other listing and agency requirements are not simply legal checklists; they incorporate fundamental management principles and emphasize the need to reach people in a practical manner while holding them accountable.

The Internet can help you implement a program that promotes a standard by which all employees receive ethics and compliance training. The road to get there may not be short, but it provides protection your company needs.

Kirk S. Jordan is vice president of Integrity Research, a new group created by Integrity Interactive to develop best practices and service solutions in corporate ethics and compliance. Integrity Interactive delivers Web-based compliance services, covering more than 215 corporate ethics and compliance topics, to the world's most successful companies. Kirk is a widely recognized authority on corporate compliance. Kirk can be reached at kjordan@i2c.com.

Steven A. Lauer is director of Integrity Research, the research arm of Integrity Interactive. He has long worked with leading corporate law departments on managing their legal service. Steven is formerly Assistant General Counsel of The Prudential Insurance Company. He has also been an in-house counsel at three other real estate organizations, deputy editor and publisher of The Metropolitan Corporate Counsel, and a consultant and attorney in private practice. He is a faculty member of the Law Partnering Institute and a member of Law Partnering Advocates. Steven can be reached at slauer@i2c.com

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