

CORPORATE COMPLIANCE PRINCIPLES

National Center for Preventive Law

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To

Louis M. Brown

1909-1996

"The Father of Preventive Law"

With deep appreciation for
your having started it all.

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--from Declaration of Principles jointly adopted
by Committee of American Bar Association and
Committee of Publishers and Associations

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HERE'S THE SITUATION

Internal misconduct raises important threats to companies today. Jail sentences and large fines are increasingly common for corporate personnel involved in serious offenses. Even corporate managers who were not directly involved in criminal conduct may face jail or fines for offenses committed by persons under their control. Criminal or civil offenses can produce enormous corporate fines that undercut corporate vitality and competitiveness. Probation sentences and increased regulatory oversight following an offense can restrict management control over future corporate activities. The disruption which accompanies a major investigation of a company by public officials can be very costly. Civil damage recoveries in the aftermath of an offense can add significant further liabilities. And, perhaps most importantly, the reputational loss suffered by a company due to an offense may be difficult or impossible to repair.

Carefully planned and implemented compliance programs can reduce these risks by preventing illegal conduct and mitigating or eliminating punishments and liabilities for those offenses which still occur. Achieving and maintaining compliance can also produce other positive results. These include: increasing consumer and shareholder confidence, reducing the costs of doing business, improving relationships with investment bankers, commercial lenders and the stock and bond brokerage community, boosting management and employee morale, increasing profits, and cutting legal and administrative costs. The problem confronting most businesses now is not whether to adopt a compliance program, but rather how to establish and maintain such a program.

The NCPL's Corporate Compliance Principles provide guidance for designing and implementing compliance programs. The Principles describe the common denominators of successful compliance programs -- i.e., principles of legal risk reduction which compliance programs must follow to be effective. Beyond these essential principles, this document offers considerations and examples to aid businesses -- large and small -- in constructing their own programs.

Our focus is on compliance results and not the particular procedures, tools or organizational structures a given firm should use to achieve those results. These Principles will guide managers in selecting the appropriate compliance program features for their own firms. By applying the compliance principles described here and carefully assessing the associated compliance considerations and examples, corporate managers can formulate and operate compliance programs that are both effective and demonstrably sound.

PREFACE

The Corporate Compliance Principles in this volume constitute design guidelines for creating corporate compliance programs. A compliance program encompasses the set of operational methods that a company uses to ensure its activities adhere to legal requirements and broader company values. Designing effective compliance programs is an important corporate concern for two reasons. First, public harm and corporate injuries potentially resulting from corporate offenses and deviations from company values justify careful management of offense and misconduct risks. Second, under a number of recently developed legal standards -- most notably the Federal Sentencing Guidelines for Organizations -- firms with generally effective compliance programs can often significantly reduce or eliminate penalties for offenses that occur despite these programs.

To serve these ends, firms must operate -- and be able to demonstrate that they operate -- effective compliance programs. What are the features of such programs? While some rudimentary tests are contained in the Sentencing Guidelines and other legal standards, these tests provide little concrete direction on how to create effective programs. The enclosed Compliance Principles seek to provide this direction.

These Principles are the product of a two year study of compliance practices and programs. Recognizing the gap in present compliance program standards, in 1994 the National Center for Preventive Law assembled a Compliance Principles Commission comprised of legal and compliance professionals from corporations, law firms, consulting firms, and universities. The goal of the Commission was to create a set of compliance program guidelines that could be used to construct and evaluate compliance programs in organizations of all types and sizes.

The resulting Principles include three content levels. The primary content is a set of compliance principles that describe essential features of effective compliance programs. These principles are clarified through a series of considerations to be used by compliance program designers and evaluators in implementing the principles. Finally, the considerations are supplemented by numerous implementation examples showing how each consideration relates to a specific design problem and solution. Principles, considerations, and examples were developed for each of the four major topics addressed by the Compliance Principles: Establishing Compliance Programs, Structure and Control of Compliance Programs, Communications and Training, and Responses to Violations.

This format reflects the Commission's understanding of the widely-differing compliance needs, circumstances and capabilities of different organizations. In light of this, the Commission sought not to create minimum program requirements at the level of program operating features, but rather concrete principles and suggestions for the design and operation of compliance programs. These principles and suggestions should provide valuable guidance to parties concerned about compliance programs, including corporate managers, compliance program specialists, inside and outside counsel, and others such as trade organizations who advise companies about compliance programs. Although our primary focus is on corporate compliance programs, the compliance principles and suggestions described here will be relevant to other types of organizations, including partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

The scope and detail of these Principles reflect the diverse backgrounds of the Commission members listed below. While their affiliations attest to the extensive collective experience of the Commission members, the organizational affiliations of Commission members are listed below solely for identification purposes and do not indicate the endorsement of these Principles by the listed organizations.

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NATIONAL CENTER FOR PREVENTIVE LAW

INTRODUCTION TO THE CORPORATE COMPLIANCE PRINCIPLES

THE VALUE OF CORPORATE PREVENTIVE LAW

Corporations serve both the public interest and the private interests of their owners, managers and employees when they operate in compliance with the expectations and dictates of the law. The Federal Sentencing Guidelines for Organizations, for example, recognize the public significance of corporate compliance in their metering of criminal penalties to accord with a corporation's efforts to "prevent and detect" violations. The occasions for civil liability that accompany compliance failures in, for just one example, managing the workplace can represent substantial risks to the corporation's economic welfare -- and, as we are reminded by the American Law Institute's new Principles of Corporate Governance, risks to management as well.

Social expectations about corporate behavior abound. Many individual companies and industry associations have responded, with programs such as the "Defense Industry Initiative," the Chemical Manufacturers Association's program of "Responsible Care," and innumerable private codes of ethics and systems for Good Manufacturing Practices. The market too has created incentives for appropriate behavior, with the popularization of private standards such as ISO 9000 and 14000.

Unlike these private codes, whose enforcement is often voluntary, legal obligations present particular hazards and opportunities. Yet violations and compliance failures are seldom obvious before they happen. When a middle-level executive violates the antitrust laws, or a shop supervisor permits an act of workplace discrimination, there has almost always been a less visible antecedent. It may have been an artifact of the corporations' internal culture; or simply the manager's ignorance of what is the right thing to do. Unlike the defense of violations that have become legal actions, avoiding the occurrence of future violations calls for preventive techniques. Prevention and litigation are very different things. Litigation calls on the lawyer to work with the court. Prevention calls on the lawyer and the manager to work with each other.

THE NATIONAL CENTER FOR PREVENTIVE LAW

The National Center for Preventive Law (NCPL) is uniquely positioned to sponsor the Corporate Compliance Principles. The Center is a not-for-profit organization dedicated to the development and implementation of Preventive Law in a broad variety of fields, from the present corporate guidelines to law education for high school students and legal services programs for the low- and middle-income elderly. The common themes in all of the Center's activities are simply that unnecessary legal risks and disruption

are contrary to both the public and the private interests; and that they may most often be avoided.

The Center began its series of national corporate preventive law seminars in 1986, emphasizing even at that relatively early date the advantages of a systematic approach to compliance. Many corporations were interested and active in compliance then, but for many more the subject was underscored by the promulgation, in 1991, of the Federal Sentencing Guidelines for Organizations, which offer substantial benefits to companies who have exercised due diligence to incorporate compliance systems into their management. The Center focused its corporate seminars on the federal guidelines in 1991 and for a few years following. Many hundreds of companies participated in those seminars through their general counsel. Many others benefitted from the participation of members of private law firms. It was from NCPL's experience with those seminars that these Principles grew.

THE NCPL CORPORATE COMPLIANCE PROJECT

Corporate compliance is not achieved by assembling lists of Thou Shalts and Thou Shalt Nots. The federal sentencing guidelines themselves are not a collection of crisp requisites, but rather a set of broad standards that define in an open-textured and non-directive way what counts as due diligence in the implementation of a system to "prevent and detect violations of the law." The most appropriate inquiry for management and legal counsel is therefore not "What do we have to do?" but rather "What works?" The NCPL's Compliance Principles are in that very important sense not a code or a standard, but an exchange of information and experience among companies and people working in the field.

The format is in three parts:

Principles of compliance, 20 in number, that state the major elements of successful compliance programs.

Considerations associated with each of the Principles, comprising questions and options to be thought about as each Principle is put into effect.

Examples explaining the Considerations in further detail and offering a selection of concrete descriptions of how some companies have put each of the major Principles into place.

The product is not meant to establish standards or minimums or even "best practices." A Consideration is just that -- a policy or activity which a corporation should consider, and decide to act on or not as its own circumstances require. The Examples describe just some of the innumerable ways in which the Considerations may be put into action.

Nothing in them should be taken to reduce the flexibility each corporation must have to address its own needs and potential for legal compliance. The Principles too are prescriptive only in the special sense that they, taken together, describe the essential features of corporate compliance programs.

The scope of the work is intentionally smaller than the entire universe of corporate preventive law. The Commission had before it as it developed its text the Federal Sentencing Guidelines for Organizations, the ALI Standards of Corporate Governance, and related regulatory programs such as those of the U.S. Department of Justice, the SEC and the EPA. The particulars of those most immediately significant codes will appear to dominate this text. The value of the text, however, may be far broader. NCPL believes that the principles of legal compliance for civil liability are not very different from those that help prevent regulatory violations or criminal behavior. Thus, the techniques of prevention, detection and response may make as effective a contribution in avoiding, for example, civil liability from sexual harassment in the workplace, as they are in preventing violations of statutory or regulatory positive law.

THE NCPL CORPORATE COMPLIANCE PRINCIPLES COMMISSION

The majority of the effort that produced this work came from the individual members of the Corporate Compliance Principles Commission, operating in four subcommittees chaired by Kirk Jordan, Joseph Murphy, John Voorhees and co-chairs Philip Sellinger and Herbert Zinn. Richard Gruner chaired the Drafting Committee and undertook overall responsibility for the project during its crucial second and final year. The NCPL is very grateful to these committee chairs, to each member of the Commission, and to the many corporations and firms who supported these individuals' participation. Many others, too numerous to name, assisted with their comments and criticisms and advice. Thanks go, too, to two corporations without whose financial support the project could not have been accomplished -- the Coors Brewing Company and U.S. West, Inc.

Although each member of the Commission is affiliated with some firm or corporation, in an old and fine tradition of the bar each was willing to "check his client at the door" while the work and the debates went on. The product is a blend of their efforts. No formal votes were ever taken; no dissents were recorded. Thus, by subscribing to the draft, no member of the group does so on behalf of his or her company or clients; and none, we suspect, agrees with every line.

The members of the Commission and the Trustees and officers of the National Center for Preventive Law sincerely hope their product will be useful.

Edward A. Dauer
September 9, 1996

COMPLIANCE PRINCIPLES

INTRODUCTION

This section describes principles for constructing effective compliance programs. The section begins with a one page summary of those principles. In the remainder of the section, each of the principles is described in more detail along with related considerations that firms may wish to address in applying the principles. For easy comparison, each principle is described on a particular page with its related considerations laid out on a facing page. This format both defines the major issues in designing compliance programs (corresponding to the principles) and establishes checklists of means to address those issues (in the considerations).

Section V of this volume (beginning on page 44) contains implementation examples describing concrete steps companies can use to implement the compliance principles described here.

Adherence to the compliance principles described here will help companies establish and operate effective compliance programs. By effective compliance programs, we mean business practices that are generally successful in ensuring compliance with legal standards and company values. However, such programs have limitations which should not be forgotten in applying the compliance principles articulated here. First, compliance programs, no matter how comprehensive and well-run, cannot prevent or correct every violation of law or company values. Second, compliance programs may initially uncover more violations than were previously detected, thus creating a short-term artifact of apparent poor compliance. Third, given rapid shifts in legal standards and corporate operations, corporate managers may fail to predict new legal issues and adopt compliance program elements for resolving these issues. Fourth, even the best designed compliance programs will have little impact if they are not supported by persons at all levels of company hierarchies.

NCPL CORPORATE COMPLIANCE PRINCIPLES

Despite these limitations, the case for using compliance programs to further the long-term interests of companies is compelling. Expectations about corporate compliance efforts -- expectations on the part of prosecutors, regulators, sentencing courts, shareholders, customers, and the public at large -- are rising. Compliance programs are the means to meet these expectations effectively and efficiently. Such programs are mechanisms for detecting and resolving compliance problems through established managerial methods.

The compliance principles presented here identify many good managerial practices for ensuring compliance. By using these principles as suggestions for their own compliance program designs, corporate managers should be well on the way to operating effective compliance programs that realize substantial corporate benefits.

NCPL CORPORATE COMPLIANCE PRINCIPLES

COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

- Manage Compliance
- Contain Risks
- Respond to Change
- State Compliance Policy
- Endorse at Top Levels
- Create Compliance Accountability
- Ensure Program Fairness

STRUCTURE AND CONTROL

- Maintain High-Level Oversight
- Assign Individual Responsibility
- Delegate Authority Responsibly
- Enforce Internally
- Reward Success

COMMUNICATIONS AND TRAINING

- Communicate Standards
- Match Training to Tasks
- Tailor Training to Audience
- Define Communication Responsibilities

RESPONSES TO VIOLATIONS

- Respond Proactively
- Gather Compliance Information
- Consider Offense Reporting
- Evaluate Program Effectiveness

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 1: Manage Compliance

Organizations should pursue compliance through the creation and maintenance of an effective compliance program.

Implementation Examples: Pages 44-54

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 1: Manage Compliance

Factors to Consider:

- (a) Creating a program that reflects, incorporates and is integrated with the organization's culture, ethos and corporate objectives.
- (b) Designing a program that is tailored and fine-tuned with specific regard to the size, form, complexity and history of the organization.
- (c) Reviewing program needs based upon an organization's history of violations (if any), the risks of future violations inherent in the operations of the organization, industry standards and regulatory regimes, federal sentencing commission standards, management standards regarding essential components of compliance systems, and empirical studies of the effectiveness of compliance practices.
- (d) Directing organization members toward compliance through compliance codes, operating standards, codes of ethics, and other corporate policy and philosophy statements.
- (e) Setting forth program definitions and operating practices in writing and disseminating program descriptions through manuals and other appropriate media.
- (f) Documenting specific steps taken in the implementation and operation of a compliance program.
- (g) Including systematic record making and document retention practices in organizational operations that will aid in monitoring organizational compliance and in demonstrating the completion of compliance procedures.

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 2: Contain Risks

An effective compliance program is designed to prevent, detect and respond to legal risks and to promote compliance with the law.

Implementation Examples: Pages 55-58

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 2: Contain Risks

Factors to Consider:

- (a) Identifying liability-causing conduct based on industry or organizational experience, as well as the occasions for such conduct.
- (b) Identifying non-obvious and incipient misconduct that tends to promote illegal actions.
- (c) Structuring compliance practices to be effective, while still enhancing an organization's business, assets and goodwill and preserving its legal privileges and rights.

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 3: Respond to Change

An effective compliance program is a dynamic process that is designed to be flexible and modified, when appropriate, to reflect changing conditions.

Implementation Examples: Pages 59-61

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 3: Respond to Change

Factors to Consider:

- (a) Addressing the differing compliance problems and needs of dissimilar operating units.
- (b) Providing for continuous operation of a compliance program and incorporating it into the daily activities of the organization.
- (c) Including mechanisms within a compliance program that promote program changes in response to new business activities or other organizational changes.
- (d) Recognizing that organization members or other firms may develop new methods to achieve compliance and providing mechanisms for identifying and evaluating those new methods.

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 4: State Compliance Policy

An effective compliance program states that it is the organization's policy to comply with all applicable laws.

Implementation Examples: Pages 62-68

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 4: State Compliance Policy

Factors to Consider:

- (a) Evaluating alternative methods that the organization can use to effectively state its policies regarding compliance.
- (b) Stating the organization's compliance goals and methods for achieving those goals in a clear and straightforward manner.
- (c) Making descriptions of compliance policies and practices readily available to all personnel who are subject to them.
- (d) Stating, wherever appropriate, that certain areas of law are interrelated such that violations in one area of law may result in legal obligations in a separate area.

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 5: Endorse at Top Levels

The highest governing authority within an organization should endorse the organization's compliance program.

Implementation Examples: Pages 69-72

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 5: Endorse at Top Levels

Factors to Consider:

- (a) Choosing carefully the mode or modes by which a governing body or individual endorses the organization's compliance policies and compliance program.
- (b) Providing for continuing, active participation of the organization's senior executives in promoting and overseeing a compliance program.

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 6: Create Compliance Accountability

An effective compliance program establishes accountability for compliance throughout the organization.

Implementation Examples: Pages 73-75

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 6: Create Compliance Accountability

Factors to Consider:

- (a) Establishing mechanisms that hold all organizational directors, officers, employees and agents accountable for compliance in the course of activities that they initiate or oversee.
- (b) Designing a program with input from knowledgeable individuals about likely gaps in compliance accountability.

NCPL CORPORATE COMPLIANCE PRINCIPLES

ESTABLISHING COMPLIANCE PROGRAMS

Principle 7: Ensure Program Fairness

An effective compliance program is designed to operate fairly and equitably.

Implementation Examples: Pages 75-79

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 7: Ensure Program Fairness

Factors to Consider:

- (a) Incorporating practices in a compliance program that treat all employees fairly and consistently.
- (b) Providing mechanisms that guard against retaliation for raising compliance issues.

NCPL CORPORATE COMPLIANCE PRINCIPLES

STRUCTURE AND CONTROL

Principle 8: Maintain High-Level Oversight

Specific high-level personnel in an organization are responsible for the administration and oversight of the compliance program.

Implementation Examples: Pages 79-91

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 8: Maintain High-Level Oversight

Factors to Consider:

- (a) Having an organizational compliance officer take "ownership" of the compliance function in the sense of having overall responsibility for initiating, coordinating and reviewing organizational compliance efforts.
- (b) Considering whether the designation of one person with primary responsibility for management of compliance practices will lead others in the organization to conclude that compliance is only the compliance officer's job.
- (c) Insuring that the top organizational executive with responsibility for a compliance program has the degree of clout necessary to make the program effective.
- (d) Determining the compliance officer's proper level of authority and access to the organization's governance authorities in order to ensure both that the officer is able to exert effective control over compliance-related matters and that compliance management is perceived as an important activity by other organization members.
- (e) Selecting a compliance officer with personal characteristics that will make the individual effective in leading and promoting organizational compliance efforts.
- (f) Determining what functions, if any, the compliance officer should perform besides management and oversight of compliance activities.
- (g) Making sure that a compliance officer has or can draw upon the types of expertise that are necessary to operate the compliance program effectively.
- (h) Identifying resources, support and infrastructure needed by the compliance officer and others to pursue compliance effectively.

NCPL CORPORATE COMPLIANCE PRINCIPLES

STRUCTURE AND CONTROL

Principle 9: Assign Individual Responsibility

A compliance program has the support of senior management of the organization. Each officer, manager and employee is responsible for supporting and complying with the compliance program's standards and procedures.

Implementation Examples: Pages 92-97

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 9: Assign Individual Responsibility

Factors to Consider:

- (a) Having participation in and support for the program throughout the organization and not limited to the compliance officer.
- (b) Considering the consistency of the incentive, appraisal and recognition systems used within the organization with the idea that compliance is a widespread responsibility.
- (c) Examining the variety of ways senior management can send the message that it considers a specific compliance behavior or objective to be high priority.
- (d) Determining the degree to which the monitoring of subordinates' compliance or ethical practices is part of day-to-day management.
- (e) Determining the compliance roles of organizational agents and further participants in the organization's business activities other than employees.
- (f) Examining the express and implied messages that managers give to employees about meeting the organization's compliance goals.

NCPL CORPORATE COMPLIANCE PRINCIPLES

STRUCTURE AND CONTROL

Principle 10: Delegate Authority Responsibly

The organization exercises due diligence to prevent the delegation of substantial discretionary authority to persons having a propensity to engage in illegal activities.

Implementation Examples: Pages 97-102

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 10: Delegate Authority Responsibly

Factors to Consider:

- (a) Exercising caution in employing anyone who is under indictment, convicted, or listed as debarred, suspended or otherwise ineligible for federal programs, except where such employment is approved by a senior executive and the reasons for the employment are recorded in writing.
- (b) Carrying out this policy through reasonable inquiries into the status of any potential employee or consultant.
- (c) Suspending indicted employees or consultants from involvement in company activities until their cases are resolved.
- (d) Suspending employees or consultants who are involved in debarment proceedings from further company activities until the debarments are resolved.
- (e) Discharging any employee who is convicted or debarred based on job-related conduct.
- (f) Exercising care in hiring processes to investigate and consider evidence of past misconduct that is relevant to the position being sought.
- (g) Exercising care in promotions and internal transfers to consider an individual employees' past job performance and internal reputation concerning compliance and the employee's adherence to the organization's compliance program.
- (h) Identifying positions that may provide opportunities for violations or act as breeding grounds for violations and more carefully screening candidates for those positions with respect to compliance backgrounds and support.
- (i) Addressing the risk of discriminatory personnel practices and invasions of privacy when the propensity of individuals to engage in illegal actions is considered in making personnel decisions.

NCPL CORPORATE COMPLIANCE PRINCIPLES

STRUCTURE AND CONTROL

Principle 11: Enforce Internally

The organization takes reasonable steps to achieve compliance with its standards and the law.

Implementation Examples: Pages 102-113

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 11: Enforce Internally

Factors to Consider:

- (a) Using evaluative and reporting systems to determine the effectiveness of compliance efforts and to deter and detect violations.
- (b) Reviewing and auditing employee conduct and corporate operations to provide measures of how the company is doing in its efforts to comply with the law and its own standards.
- (c) Using different compliance review methods for different purposes and in different business environments.
- (d) Pursuing self-monitoring and regular reporting in key aspects of business performance related to compliance.
- (e) Using evaluative techniques to measure both the degree of substantive compliance, and how well the compliance processes are being implemented.
- (f) Evaluating the desirable frequency and scope of such reviews.
- (g) Assessing the independence and reliability of persons who perform compliance evaluations.
- (h) Determining whether compliance reviews should be done by persons inside or outside an organization or organizational unit.
- (i) Devising channels of communication between those who are performing compliance studies or audits and those who need the results to act on the findings.
- (j) Establishing systems to assure follow-ups to negative investigation or audit findings.
- (k) Using real-time monitoring of conduct as a technique to achieve compliance.
- (l) Having a means for employees and agents to report violations of the standards.
- (m) Providing protection against retaliation for those who report misconduct.
- (n) Taking steps to assure that employees and agents know how to reach systems for reporting offenses and other misconduct.
- (o) Including compliance issues in due diligence studies preceding mergers and acquisitions and in planning for new business activities.

NCPL CORPORATE COMPLIANCE PRINCIPLES

- (p) Determining the degree of confidentiality and legal privilege protection that are appropriate for self-evaluative compliance activities.

STRUCTURE AND CONTROL

Principle 12: Reward Success

Incentives and disincentives are significant tools in promoting compliance.

Implementation Examples: Pages 113-114

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 12: Reward Success

Factors to Consider:

- (a) Identifying policies and practices that will link favorable employment treatment, including increased compensation and advancement, to individuals' furtherance of organizational compliance.
- (b) Informing persons throughout an organization that the organization's policy is to allocate incentives and disincentives (including compensation rewards and discipline) in accordance with individuals' pursuit of compliance.
- (c) Communicating the views of organization leaders that incentives and disincentives provided for compliance performance are appropriate.
- (d) Insuring that rewards and discipline are applied in accordance with relative levels of compliance effort.

NCPL CORPORATE COMPLIANCE PRINCIPLES

COMMUNICATION AND TRAINING

Principle 13: Communicate Standards

The organization's compliance program has a communications component, the objectives of which are to make employees and other agents aware of applicable standards of conduct and to promote compliance.

Implementation Examples: Pages 115-118

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 13: Communicate Standards

Factors to Consider:

- (a) Separately developing the communications component of the organization's compliance program.
- (b) Identifying the appropriate organizational personnel to include in the design and implementation of the communications program.
- (c) Specifying the instructional activities that should be included in the communications component of the organization's compliance program.
- (d) Structuring the communications program to provide feedback and evaluative information.
- (e) Documenting the steps taken in, and the results of, the organization's communications program.

NCPL CORPORATE COMPLIANCE PRINCIPLES

COMMUNICATIONS AND TRAINING

Principle 14: Match Training to Tasks

An effective compliance program communicates appropriate compliance information and motivation to the organization's employees and other agents.

Implementation Examples: Pages 118-122

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 14: Match Training to Tasks

Factors to Consider

- (a) Providing information and skills needed to deal with the compliance issues and risks that each employee may encounter.
- (b) Describing to affected employees and agents an organization's internal processes for compliance.
- (c) Describing to employees and other agents the legal requirements and company values that govern organizational activities and the behaviors that are necessary to meet applicable legal requirements, corporate conduct codes, and ethical standards.
- (d) Convincing employees and other agents of the need for compliance with legal requirements, conduct codes, and ethical standards.

NCPL CORPORATE COMPLIANCE PRINCIPLES

COMMUNICATIONS AND TRAINING

Principle 15: Tailor Training to Audience

An effective communications program is designed to reach the intended audience.

Implementation Examples: Pages 122-124

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 15: Tailor Training to Audience

Factors to Consider:

- (a) Ensuring that a compliance communications program is understandable, accessible and practical.
- (b) Evaluating the effectiveness of various communications techniques and methods.
- (c) Considering the occasions on which to administer the communications program.

NCPL CORPORATE COMPLIANCE PRINCIPLES

COMMUNICATIONS AND TRAINING

Principle 16: Define Communication Responsibilities

All levels of management are responsible for the operation of an organization's compliance communications program.

Implementation Examples: Pages 125-126

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 16: Define Communication Responsibilities

Factors to Consider:

- (a) Determining the role of senior management in an organization's compliance communications program.
- (b) Determining the role of a compliance officer and further compliance staff members in an organization's compliance communications program.
- (c) Determining the roles of supervisors and middle level managers in an organization's compliance communications program.
- (d) Integrating a compliance communications program with other communications programs and organizational operations.

NCPL CORPORATE COMPLIANCE PRINCIPLES

RESPONSES TO VIOLATIONS

Principle 17: Respond Proactively

An effective compliance program is proactive in its approach to dealing with incidents of noncompliance.

Implementation Examples: Pages 126-131

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 17: Respond Proactively

Factors to Consider:

- (a) Measuring proactivity in terms of promptness and decisiveness.
- (b) Responding to indicators of problems.
- (c) Keeping abreast of regulatory changes and industry experience.
- (d) Identifying and responding to actual or suspected violations.
- (e) Developing special procedures for gathering evidence of misconduct by personnel with substantial discretionary authority.

NCPL CORPORATE COMPLIANCE PRINCIPLES

RESPONSES TO VIOLATIONS

Principle 18: Gather Compliance Information

An effective compliance program possesses or has access to investigatory, evaluative and reporting resources and utilizes those resources to monitor compliance.

Implementation Examples: Pages 131-137

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 18: Gather Compliance Information

Factors to Consider:

- (a) Determining who will conduct compliance investigations in advance of occasions for such investigations.
- (b) Assuring that compliance investigations are undertaken by persons with adequate expertise to identify breaches of legal requirements and compliance program standards.
- (c) Making certain that further investigations and responses are undertaken following the detection of possible misconduct.
- (d) Assuring the adequacy of resources available to investigators.
- (e) Insuring the independence of compliance investigators from line managers whose activities or organizations are being scrutinized.
- (f) Developing record-keeping capabilities and resources to aid in identifying compliance problems and in monitoring responses.
- (g) Assuring preparedness for compliance investigations and responses.
- (h) Assuring appropriate scope and methodologies in the completion of compliance investigations and responses.
- (i) Defining reporting systems within a company that will provide indications that compliance investigations are needed.
- (j) Assuring accuracy and reliability of information gathered in compliance investigations.
- (k) Conducting investigations in a manner that is likely to preserve the attorney-client and work product privileges.

NCPL CORPORATE COMPLIANCE PRINCIPLES

RESPONSES TO VIOLATIONS

Principle 19: Consider Offense Reporting

An effective compliance program addresses the occasions for external reporting of violations of the law.

Implementation Examples: Pages 137-144

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 19: Consider Offense Reporting

Factors to Consider:

- (a) Assuring that self-reporting by an organization will comply with mandatory reporting requirements.
- (b) Weighing the advantages of voluntary self-reporting of misconduct under Federal Sentencing Guidelines for Organizations, government voluntary disclosure programs and other legal standards.
- (c) Designating decision-making responsibility and authority for determining when and how to self-report detected misconduct.
- (d) Determining the appropriate scope of disclosures when a decision is made to self-report detected misconduct.
- (e) Addressing potential conflicts between an organization and its agents or employees where the organization chooses to report detected misconduct.
- (f) Waiving or preserving legal privileges in the course of disclosing information to public officials.
- (g) Considering whether self-reporting will be accompanied by an organizational acceptance of responsibility for disclosed violations.
- (h) Deciding whether to cooperate with external investigations by public authorities.
- (I) Remediating harm from detected misconduct.
- (j) Identifying the scope and ramifications of an organization's vicarious responsibility for detected misconduct.

NCPL CORPORATE COMPLIANCE PRINCIPLES

RESPONSES TO VIOLATIONS

Principle 20: Evaluate Program Effectiveness

An effective compliance program utilizes incidents of --noncompliance to evaluate its own effectiveness, to correct deficiencies and to effect improvements.

Implementation Examples: Pages 145-147

NCPL CORPORATE COMPLIANCE PRINCIPLES

Principle 20: Evaluate Program Effectiveness

Factors to Consider:

- (a) Disciplining and retraining responsible employees.
- (b) Identifying root causes of misconduct, including weaknesses in detection practices.
- (c) Using external reviewers to evaluate incidents of misconduct and related compliance program weaknesses.
- (d) Assuring prompt and effective follow-up measures.

IMPLEMENTATION EXAMPLES

INTRODUCTION

This section contains comments and implementation examples illustrating a number of potentially useful compliance program elements and design approaches. Collectively, these materials suggest means to relate the general compliance principles and considerations described in the first part of this volume to concrete compliance program design choices. These comments and examples by no means exhaust the available options and the compliance methods described here may not be essential for the operation of an effective compliance program in a given organization. Hence, these comments and examples are offered only as suggestions of useful compliance techniques and not as mandatory standards. Compliance program personnel may find these techniques useful for adoption in the forms described here, as the basis for slightly modified techniques more appropriate to their particular organizations, or as the inspiration for analogous techniques aimed at addressing the same compliance issues and risks.

ESTABLISHING COMPLIANCE PROGRAMS

PRINCIPLE 1: MANAGE COMPLIANCE

Organizations should pursue compliance through the creation and maintenance of an effective compliance program.

Factors to Consider:

- (a) **Creating a program that reflects, incorporates and is integrated with the organization's culture, value system and corporate objectives.**

Comments:

1. A compliance program should typically reflect the attitudes of an organization's members. In larger organizations, it may be necessary to solicit the views of a representative sample of employees.

Example a: One large corporation requested that representatives of each major business unit provide their own description of the organization's culture as a prelude to the formulation of the company's compliance program.

2. A successful compliance program will often be integrated into the daily business of a company. To that end, compliance requirements can be established as a matter of company policy. This can be undertaken in a way that will make compliance a part of the company's value system. Programs in

support of the company policy can be established and where appropriate, goals and objectives that support the policy can be developed and accountability for performance established.

3. The values of an organization can be reflected in its compliance program. To do so, a firm may wish to translate its values into specific performance goals.

Example b: One organization set a goal of no significant environmental deficiencies and held operating management accountable for reaching this objective.

4. To ensure understanding of the relationship between company culture and compliance activities, firms may publish materials explaining this relationship. These materials will be most useful if they match the current compliance concerns of the firms involved.

Example c: One organization that had published its statement of culture and values several years before instituted a practice of regularly refining the statement to accommodate changes in the organization.

5. A compliance program will often be most effective if it is grounded in the sponsoring organization's culture. In a decentralized organization, it may be desirable for the organization to identify the unique cultural features of each unit which has operational authority.

Example d: In one decentralized conglomerate's program, subsidiary presidents had authority to tailor their particular program to the distinct character of their operating units.

6. Organizational objectives can often usefully be evaluated for consistency with a compliance program's overall direction. Where corporate objectives are at odds with compliance program characteristics, the corporate objectives and the compliance program should usually be reconsidered and revised so as to achieve consistency.

Example e: In one conglomerate, senior management made a total reevaluation of its short- and long-term objectives in light of its new compliance program. Those objectives found to be inconsistent with the company's compliance program were closely reexamined in an effort to identify the source of the inherent conflicts. The conflicts identified were resolved so that all the objectives could be pursued without fear of intervention by governmental authorities.

7. For a compliance program to be effective it will often need to reflect the essence of the program's sponsor, rather than just the sponsor's superficial support. In adopting a program it is important to start off by articulating the sponsor's culture.

Example f: In one complex organization that decided to develop a compliance program, senior management, after developing a sense of how important identification of its culture was to the organization's long-term success, sequestered itself for the sole purpose of creating a core value statement. After considerable debate and numerous revisions a statement was created that satisfied nearly everyone. All corporate activity -- including the company's compliance program -- is now evaluated for consistency with the statement.

8. Creating an effective compliance program often requires input from members of the organization. For large organizations, the Board of Directors or senior management may authorize a committee of members of the organization to canvass representative individuals from various units and divisions to describe the organization's culture, character and value system in order to incorporate those basic features into the compliance program.

9. Many small companies have no obvious, formalized culture or value systems. Beginning a corporate compliance program is an excellent time for the owners or managers to take time to articulate what the company's culture and value system is or should be. They can then develop a compliance system that compliments and supports the company's culture and values.

(b) Designing a program that is tailored and fine-tuned with specific regard to the size, form, complexity and history of the organization.

Comments:

1. It is often useful for a company to design a compliance program with the history of the adopting organization in mind. In this regard, an organization should be particularly sensitive to its compliance experience.

Example a: One company that had several past compliance failures adopted a program which made clear that future compliance failures would be met with severe sanctions including dismissal.

2. To be successful, compliance programs will often need to be matched to the size of an organization. As businesses get larger, decision making is typically more diffused throughout company organizations.

Example b: To deal with widely distributed decision making that affected compliance, one large organization determined that it was necessary to adopt a highly formalized compliance program.

3. A successful compliance program should be tailored to the needs of the business. Compliance programs that are out of proportion to a company's risks of noncompliance will waste company resources.

Example c: In the worker safety area, a risk assessment of operating activities might be completed to identify high risk operations. These operations would then be addressed with the greatest attention and detail in a compliance program. Lower risk operations could be addressed with less comprehensive direction and monitoring.

4. Different types of organizations will have different program needs. Compliance programs may be most effective where they are designed based on detailed knowledge of firm operations.

Example d: In one organization, a select group of experienced employees was commissioned to draw up a description of the organization which became the basis of the program development discussions.

5. A compliance program will often need to be designed with the operating structure of an organization in mind. Within an organization a program can be tailored to each operating level.

Example e: In one multi-layered organization multiple forms of a program were developed to serve the needs of the different levels of employee sophistication.

6. One aspect of company culture that must often be taken into account to develop an effective compliance program is the extent to which an organization is managed on a centralized basis.

Example f: One company that determined it preferred to operate in a highly adaptive manner opted for a decentralized compliance program which would likewise be highly adaptive.

- (c) **Reviewing program needs based upon an organization's history of violations (if any), the risks of future violations inherent in the operations of the organization, industry standards and regulatory regimes, federal sentencing commission standards, management standards regarding essential components of compliance systems, and empirical studies of the effectiveness of compliance practices.**

Comments:

1. A compliance program can be tailored to address particular areas of the law that are relevant to the organization's operations. The following is a list of the most common areas of law that are typically found in compliance programs:

- Antitrust and Other Fair Trade Laws
- Government Procurement and Contracting
- Political Contributions/Lobbying
- Protection of Company Assets
- Accurate Books and Records
- Securities/Insider Trading
- Money Laundering and Other Currency Transactions
- Environmental Issues
- Labor Relations and Employment Discrimination
- Sexual Harassment
- Intellectual Property
- Substance Abuse
- Product Liability
- Consumer Protection/Consumer Fraud
- Workplace Safety (including Occupational Health)
- Conflicts of Interest/Gifts
- Commercial Bribery
- Regulatory Issues (FCC, DOD, etc.)
- International Issues (FCPA)
- Consent Decree Compliance

2. A compliance program should be focused on areas of legal compliance that an organization most frequently confronts. A listing of recently encountered legal risks and problems will be useful in ensuring that a complete set of corresponding compliance program elements is adopted.

Example a: Companies that operate within a broad regulatory framework -- such as regulations enforced by the Food and Drug Administration -- can begin their risk assessment by examining their own and other like companies' histories of violations and citations. Many companies also conduct "litigation audits" as a starting point for assessing their legal risks.

Example b: One company conducted a thorough self-evaluative audit of the legal risk inherent in its past operations to determine its proper compliance focus. While self-audits are often very useful in targeting future compliance efforts in continuing operations, these audits may not be privileged and can be subject to disclosure in criminal or civil proceedings. See also Consideration 18(k).

3. A compliance program should adapt to an organization's changing needs. The sponsoring organization should have a process in place to continually reassess the program's currency and relevance.

Example c: One company linked its compliance professionals to its government affairs office so that persons responsible for compliance were kept informed of pending statutory and regulatory changes.

4. While relying on the internal personnel of an organization for the design of a compliance program may be the best way to ensure that compliance program elements are compatible with corporate operations, an organization should consider the use of outside experts in specific subject areas for assessments of the sufficiency of the program specifics tentatively selected by the organization. The use of outside experts in compliance systems can also help assure that all of the essential components of compliance systems are included.

Example d: In order to identify the relevant laws that should be the focus of its program, one company surveyed knowledgeable individuals across the organization and supplemented the results with lists obtained from other industry sources.

Example e: One organization asked its principal outside attorney to review its listing of anticipated compliance problems and then benchmarked its program with a peer group.

5. Other businesses with similar compliance problems can be another useful outside resource. An organization can benchmark its program with those of its peer group. Peer group comparisons can help assure that the organization's compliance program adequately addresses industry standards.

6. Compliance programs can define how corporate resources will be used to meet existing regulatory requirements.

Example f: One company completed a thorough survey of regulatory requirements before designing its program in order to have in mind the special regulatory demands that had to be designed into the program.

7. Small companies may need to employ an attorney with experience in business compliance with regulatory laws to determine potential legal issues and problems relevant to the company. Another source of information as to areas which create legal danger may be trade associations.

Example g: One trade association assisted its members in identifying likely compliance issues by compiling a composite listing of compliance problems from all its members.

(d) Directing organization members toward compliance through compliance codes, operating standards, codes of ethics, and other corporate policy and philosophy statements.

Comments:

1. There are three general approaches to compliance code formats: (1) compliance codes that provide specific statements giving guidance and prohibiting certain kinds of conduct; (2) corporate commitments to constituencies, values and objectives; and (3) enunciations of the company or CEO's ways of doing business. These codes and philosophy statements identify important objectives and goals that every member of the organization should strive to achieve in the day-to-day operations and management of the company. A sample code of conduct for a small company is included in Appendix A of this text.

2. The scope of compliance policy materials delivered to particular operating personnel (as well as the means for their delivery) should be tailored to ensure that necessary policy information is transmitted without overloading employees or diluting key policy messages.

Example a: One company developed a compliance program with multiple communications channels which were designed to provide different levels of program detail according to the operational needs of

each particular audience.

3. It is usually desirable for requirements of a compliance program to be consistent with existing company policies. Such policies typically identify important organizational objectives and goals. To ensure consistency, a compliance program can specifically incorporate portions of existing policies.

Example b: One company incorporated its existing code of ethics, vision statement and corporate guidelines as well as existing compliance activities as part of its overall compliance program.

4. A compliance program should normally be consistent with corporate policies at all levels of an organization. Each level of an organization can be surveyed to determine what its practice and policies are and whether those policies need to be modified so that they are consistent with the compliance program.

5. Compliance programs should also be consistent with existing organizational practices. To be effective, a program must be accepted by all employees as a source of direction in completing existing activities. Many organizations require their employees to participate in the development of programs and, once adopted, certify in writing annually that they have read, understood and will comply with the programs.

6. Small companies with little or no written policies, company codes of ethics, compliance codes or other statements may direct compliance by means of a letter to employees from the CEO stating the CEO's requirements that employees comply with the laws and any future memorandums concerning company compliance.

(e) Setting forth program definitions and operating practices in writing and disseminating program descriptions through manuals and other appropriate media.

Comments:

1. Companies that create compliance programs generally do so in writing. A written compliance policy is an important step in establishing that a company is serious about its compliance efforts. Compliance program materials disseminated to a workforce will typically outline the acceptable behavior of employees and state the company's expectation that every employee will follow the guidelines established therein.

2. Compliance programs are made available to some or all employees, depending on the compliance needs of the organization.

Example a: Some companies set "triggers" for distribution of program materials to individuals, e.g., upon becoming an employee, upon attaining a specified level within a company, or upon transfer to a specified function.

Example b: Certain companies consider their compliance manuals to be public documents and accordingly publish portions of their program manuals upon request.

3. Compliance program descriptions should be made available in an effective manner. Program descriptions should be clear and concise, with contents and terms that are understandable to the various users of the program documents.

Example c: One organization had its program documents reviewed by its communications department and an external communications expert to determine that its multi-level program description was expressed in language that was understandable by the target audience for each level of the program.

4. Information about a compliance program should be disseminated in such a manner as to enhance the program's likelihood of success. Employees can only be expected to comply with a program if they are aware of it and understand the program's contents and how it applies to the organization.

Example d: One company provided copies of its entire program description to all managers, summaries of the program description to all employees and portions of the program manual to the public upon request. All employees were tested on the basic content of the program.

5. Compliance programs can be presented to employees through many media other than written documentation.

Example e: One company provided live presentations on particularly important aspects of its program and made video tape copies of the presentations available for persons in remote locations.

6. The form of presentation of a compliance program can help indicate that the compliance program is to be taken seriously. To encourage this, compliance program descriptions can be combined and disseminated with other important corporate policies.

Example f: One organization included its compliance program description in its personnel manual. The manual contained cross references and featured material that ensured the program was given prominence.

7. Small companies that do not use employee manuals or other formal writings to employees may communicate the operating practices and program description by use of more informal letters and memorandums from the CEO or an outside lawyer employed to audit and develop guidelines, or disseminate the information in a series of group meetings conducted by a manager or attorney.

(f) Documenting specific steps taken in the implementation and operation of a compliance program.

Comments:

1. A written report of how a compliance program was implemented can be very useful. Such a record can help an organization defend the program's effectiveness and tailor it in the future.

Example a: One company created a written record of the rationale for each important design aspect of the firm's program.

2. A written record of how a program has been operated can demonstrate that the program's effectiveness was being monitored. A written record of monitoring can be convincing evidence of a program's implementation.

Example b: One company had employees confirm in writing that they had received a copy of the company's program description. The employees were also required to pass a test on the program's contents as a condition of continuing employment.

3. The owner or manager of a small business that does not have a written, formalized compliance program can write and retain a memorandum once each quarter (or other administratively convenient time period) stating the actions taken to achieve compliance with the law, such as meetings with attorneys, discussions with employees concerning legal compliance, changes in firm policies and practices, and seminars and training attended by employees concerning issues such as OSHA, ERISA or environmental rules.

(g) Including systematic record making and document retention practices in organizational operations that will aid in monitoring organizational compliance and in demonstrating the completion of compliance procedures.

Comments:

1. Over-retention of documents may add to storage and litigation costs without aiding compliance efforts. An effective compliance program will typically include document retention policies and related procedures that spell out how the company involved will retain what is required by law in each of its operations areas. A document retention system can begin with a statement of the company's policy regarding records retention and the steps that should be followed by employees and management to assure compliance. Training employees how to create documents in the first instance and how to retain documents are two essential components of a compliance program.

2. It is also important to memorialize a company's records retention practices regarding compliance documents.

Example a: One company created a detailed report of all the records retention obligations employees needed to address and required yearly certification from all operational units that these obligations were being met.

PRINCIPLE 2: CONTAIN RISKS

An effective compliance program is designed to prevent, detect and respond to legal risks and to promote compliance with the law.

Factors to Consider:

- (a) Identifying liability-causing conduct based on industry or organizational experience, as well as the occasions for such conduct.**

Comments:

1. In creating a compliance program, an organization will often wish to thoroughly examine its liability risk profile. To accomplish this profiling, it may be useful to examine the risk experience of the organization's industry.

Example a: One company had its attorney use all available sources to prepare a thorough report on compliance problems that the company's industry had experienced.

2. To complete its liability risk profile, a company may also wish to assess its own past compliance history.

Example b: One company assigned an in-house attorney to conduct both a search of the company's files and a compliance audit to determine compliance risks that the company had faced. While the involvement of an attorney may help preserve the attorney-client privilege, to the extent that such studies are viewed as management tools or are disclosed to public agencies to demonstrate compliance diligence, these audits can be subject to disclosure in civil and criminal cases. See also Consideration 18(k).

3. To conduct a comprehensive review of existing files for documents that demonstrate the risk of violations, companies can review litigation records, civil complaints, SEC disclosure documents, board of directors' minutes, prior investigative records, insurance policies, risk management documents, accountant's or internal auditor's work papers, interviews of key personnel, employee questionnaires, etc. The inventory should be documented so that a company can establish how it achieved compliance and should never be considered as fully completed because compliance is dynamic.

4. A compliance program can include a plan to inventory company records in reverse chronological order to a specified cut-off date in order to determine areas of foreseeable risk and to otherwise plan compliance efforts

that address the needs of the organization.

5. Any survey of liability-causing conduct should take into consideration predicted future events. For such a survey to be useful it must take into account changes occurring in the company and the industry in which the company operates.

Example c: One company established a practice of having an in-house attorney conduct annual interviews with senior management to identify new compliance risks to the organization arising from such changes.

6. Each organization employs its own particular techniques for conducting its operations. A compliance program can attempt to identify the occasions for liability-causing conduct that are likely to arise given an organization's operating practices.

Example d: One company identified generic liability-causing conduct and then identified specific examples drawn from its own business practices as to how such conduct could turn into a compliance problem. Both the generic risks and the company's specific compliance issues were emphasized in compliance program presentations to employees.

7. For larger corporations, in-house or outside attorneys can create a file of examples of potential liability-causing conduct as illustrations of specific activity or behavior that the organization's employees must avoid. For instance, particular reported cases can be collected and summarized. Whenever practical, these examples should be distributed to employees with helpful instructions written in a clear and concise manner describing how to avoid liability-causing conduct.

8. For smaller companies (i.e., less than 100 employees) discussions at staff meetings (based on written presentation materials reviewed by a company attorney) can identify liability-causing conduct and how to avoid situations in which the companies will be held accountable for the misconduct of employees.

9. After litigation concludes, many companies conduct "post-mortems" to evaluate the circumstances leading to the litigation and possible improvements in operations and procedures to avoid recurrence of similar problems.

(b) Identifying non-obvious and incipient misconduct that tends to promote illegal actions.

Comments:

1. Non-obvious and incipient misconduct generally is difficult to prevent and detect given its nature. Steps that may be taken to prevent occurrence can include employee training that will identify the potential source of problems before noncompliance is allowed to occur. Employees need to be educated regarding misconduct-prone circumstances that may arise.

2. To be effective, a compliance program should identify business conduct that is likely to result in a compliance problem. Certain non-obvious situations may present particular difficulties.

Example a: One company commissioned one of its attorneys to identify all reporting and disclosure obligations that the company was required to comply with and then present a training program to employees explaining these rules.

3. Incipient misconduct should ideally be identified before it develops into a violation of compliance standards.

Example b: One company commissioned an in-house attorney to interview all employees periodically to determine whether they were engaging in conduct that was likely to lead to serious compliance program violations. The practicality of conducting personal interviews of all employees is limited by the need for direct contact between a lawyer and individual employees, suggesting that this approach will be most suitable for small businesses or departments.

4. Small companies may discover non-obvious and incipient misconduct by obtaining information from other companies in the same field of business, contacting trade associations, or using the services of an attorney who specializes in corporate compliance activities.

(c) Structuring compliance practices to be effective, while still enhancing an organization's business, assets and goodwill and preserving its legal privileges and rights.

Comments:

1. Compliance activities can protect an organization's assets and goodwill. Such assets and goodwill may have been developed over the years through the hard work of the organization's employees and be difficult or impossible to replace.

Example a: One company's compliance program explained explicitly how compliance efforts were designed to protect and preserve the organization's hard-won goodwill. This explanation was used to convince employees to accept the program.

2. Compliance programs must be effective, yet not have any unnecessary adverse impact on the companies operating the programs. Compliance activities should be conducted with an eye to preserving a company's legal privileges. See also Consideration 18(k).

Example b: To promote this end, one company required that its attorneys conduct all compliance investigations and maintain all resulting findings in strict confidence.

3. In order to ensure preservation of appropriate legal privileges, key employees of an organization often need to be trained regarding the basic legal privileges that can apply and how to preserve them. Records of incidents need to be created and handled in such a manner that does not waive the privilege. Employees typically need training on how to appropriately label confidential and privileged documents. See also Consideration 18(k).

PRINCIPLE 3: RESPOND TO CHANGE

An effective compliance program is a dynamic process that is designed to be flexible and modified, when appropriate, to reflect changing conditions.

Factors to Consider:

- (a) Addressing the differing compliance problems and needs of dissimilar operating units.**

Comments:

1. Compliance programs will often be most useful if they are tailored to fit each organization's unique compliance situation. The same is true regarding operating units within an organization. Each different operating unit of an organization may need its own program.

Example a: One conglomerate required each of its operating units to design its own program beginning with only a central set of principles.

2. Compliance programs may also be tailored to fit an organization's legal environment. An organization with global operations must confront a host of different and potentially conflicting compliance requirements.

Example b: One international organization adopted a core of global standards, but permitted local management to modify portions of their program to take into account local needs. Such modifications required the approval of the company's General Counsel.

3. It will often be desirable for a compliance program to be sufficiently flexible to adapt to change. An organization adopting a compliance program can adopt systematic practices that help it remain conscious of internal and external changes that impact its program.

Example c: One organization required that its compliance program manager be notified of all significant developments in company operations and gave him unlimited access to company attorneys and senior management in order to detect and respond to new legal issues.

(b) Providing for continuous operation of a compliance program and incorporating it into the daily activities of the organization.

Comments:

1. It will often be beneficial for a compliance program to be tied into the day to day work of an organization. To be effective, it is useful for the compliance program to be appreciated by those who are faced with compliance issues.

Example a: One company explained its program by illustrating its intended implementation with concrete examples drawn from the organization's specific work-related activities.

(c) Including mechanisms within a compliance program that promote program changes in response to new business activities or other organizational changes.

Comments:

1. A successful compliance program will usually be adaptive to changes in a company's environment. In particular, a program will often need to change to meet evolving legal requirements and standards.

Example a: One organization required its attorneys to maintain a continuing survey of developments in the law of self-evaluative privilege to ensure that program procedure met changing standards for privilege protections.

2. A compliance program can include components that respond to the changing plans of an organization. This can be accomplished by continuously updating a compliance program to reflect the projected future business activities of a concern.

Example b: To ensure that compliance issues raised by new business operations were addressed, one company required business planners to include compliance program considerations in every business plan.

Example c: In order to identify potential compliance risks raised by new business activities, one firm incorporated a specific compliance risk and vulnerability question in its business development review process.

3. Unplanned changes in company activities can also produce new compliance risks. A compliance program can include procedures to address

the changing compliance needs of an organization, whether those needs result from planned or unplanned changes in company activities.

Example d: One company developed a self-assessment tool to enable each of the organization's business units to continually evaluate and assess their compliance risks.

4. Regular reevaluations of the results being achieved by a compliance program will often provide valuable information. The objective of these reevaluations is to confirm that a compliance program is still adequate to ensure on-going compliance.

Example e: One company instituted a compliance program audit cycle with a report of all findings to the audit committee of the company's board of directors.

5. Small companies with only one or a very few managers should schedule periodic times (such as once each six months) to reevaluate their compliance programs to determine if any changes or additions are appropriate.

(d) Recognizing that organization members or other firms may develop new methods to achieve compliance and providing mechanisms for identifying and evaluating those new methods.

Comments:

1. Organizations will wish to structure and operate their compliance programs to emphasize continuous improvement. Often, systematic reviews of present practices and available alternatives will be desirable to focus management attention on opportunities for improvement. Compliance program descriptions should be viewed as "living documents" subject to ongoing reassessment and improvement.

2. Organizations with a quality program, such as Total Quality Management, may wish to consider integrating their compliance program with the quality program, as both deal with reducing and eliminating defects in relationships with stakeholders such as customers, vendors and regulators. Before doing so, however, an organization may want to first assure itself of the effectiveness of its quality program.

PRINCIPLE 4: STATE COMPLIANCE POLICY

An effective compliance program states that it is the organization's policy to comply with all applicable laws.

Factors to Consider:

- (a) Evaluating alternative methods that the organization can use to effectively state its policies regarding compliance.**

Comments:

1. An effective compliance program is typically backed by company policy. The message that it is the organization's policy to comply with all applicable laws can be communicated in the same way as all other important company policies. One effective method is to have all policy statements written and fully available to all employees. Company policies can also be available for external review when necessary. The policy should clearly state the company's compliance beliefs and how compliance will be maintained. Goals and objectives can be developed for the compliance program and can be communicated in ways other than by company policy. Program goals and objectives can be identified as initiatives and performance communicated at the end of an identified period.

2. Since it is a key guiding principle, a statement that employees must comply with applicable laws is often a useful starting point for employee guidance on compliance and ethics matters. It may be wise to repeat this policy statement in a number of contexts, such as mission statements, corporate credos, statements of objectives, directives and resolutions of the board of directors, compliance policy directives, codes of ethics, and corporate conduct guidelines.

3. Another compliance policy distribution method is to include policy statements as part of broader disclosures to employees of key information.

Example a: A number of companies have included compliance policies and standards in new hire employee packets.

4. Where companies instruct employees to seek out important information from a particular source or archive, compliance policy information can be supplied as part of the information distributed.

Example b: One company posted compliance policies, standards and procedures on an internal network information library readily accessible to all employees.

5. Aside from including compliance policies prominently in management communications, a company may wish to restate those policies in employee manuals, handbooks or contracts in order to establish compliance with the policies as a term of employment. The advantage of this

further use of compliance policies and standards is that it clarifies that failure to comply with the company's compliance standards will be grounds for discipline.

6. Periodic reminders about the importance of compliance and of management's strong interest in this aspect of employee performance can also be valuable.

Example c: One company sought to promote employee commitment to compliance by incorporating a corporate compliance section into its periodic "how goes it" messages directed to all employees.

Example d: Another company used its internal electronic "Employee News" Bulletin Board to post periodic "Did You Know?" notices pertaining to specific corporate compliance goals, policies and standards.

Example e: A third firm included short compliance policy awareness notices in employees' paycheck envelopes.

7. Compliance policies and updates may also be distributed in contexts where other activities draw particular attention to compliance matters.

Example f: One organization relied on its internal audit staff to distribute copies of compliance policies and standards as routine information items provided in the normal course of their audit duties and exit interviews.

8. Policy statements requiring compliance in general can usefully be accompanied by more specific conduct-oriented policies aimed at particular employee tasks. The objective of these more specific policy statements will be to describe legal requirements and related company

policies to convey useful information that will directly affect conduct. This type of guidance is best provided in materials that avoid legal jargon and terms of art and are instead phrased in operational terms familiar to employees.

Example g: As an illustration of such an approach, an employee in the credit or financial function of an exporter could be helped to understand the general policy of the organization toward complying with federal antiboycott laws by being given samples of statements that the organization can accept in letters of credit.

9. The proper scope of compliance directives may depend on the size of an organization and the range of activities it undertakes. In a small firm, compliance policies need only address the range of activities undertaken by the firm. In addition, if the scope of activities being undertaken in a small firm implies that a given type of legal problem will be encountered only infrequently then corresponding policy statements may be more abbreviated than in large concerns where the same problem may be present more frequently.

10. Illustrations of the implications of noncompliance for the organization and the individual can often bring home the importance of compliance. Corporate policy statements on compliance can usefully state penalties and consequences, especially those which involve personal liability. These should be clearly stated in order to have the full impact of noncompliance with law and the compliance program. Some laws forbid organizations from indemnifying individuals for their personal liabilities, and a statement to this effect can be a meaningful contributor to deterrence.

11. Policy statements in compliance programs can be counterproductive if they contain provisions or other commentary that may be misconstrued. One way that policy statements may be harmful in this respect is by oversimplifying legal requirements so as to assert that particular conduct is always legal or illegal when that is not the case. Such policy statements may later be deemed admissions that the specified conduct is illegal. To avoid this impact, policy statements should avoid broad statements that certain actions always constitute violations or suspected violations of law or company policy. Instead, a compliance program can state that not all possible instances of violative conduct are identified in the materials or require that certain activities require legal department approval before proceeding.

12. No policy statement about compliance will provide clear guidance to employees in all situations. One useful solution to possible ambiguity of compliance policy statements is to clearly identify who an employee should contact for further information. A compliance program can identify either an in-house attorney, a compliance officer, or another designated individual whom an employee can contact whenever there is any doubt concerning the terms and provisions of the compliance program.

13. Small businesses with few owners or managers and no inside attorneys may direct employees to speak with a specific manager or owner, or an attorney hired on a retainer if the employee desires further information.

(b) Stating the organization's compliance goals and methods for achieving those goals in a clear and straightforward manner.

Comments:

1. As with other policy directives, compliance policies will be most effective when stated in terms that are both understood by employees and taken as indications of serious concern by top managers. If senior executives merely adopt compliance policy language suggested by an attorney or mimic the language of governing laws, the differences between these policy statements and true expressions of top management concern will be apparent to employees. The result will be that compliance policy statements are not taken seriously.

2. In many areas of compliance, the means to achieve compliance will not be fully known in advance of related corporate operations. The most that will be able to be specified in related compliance program elements is the procedure by which compliance issues will be raised and resolved. These procedures can have two types of objectives: first, to provide employees with all the information necessary to make decisions in the workplace that will result in compliance with all applicable laws and company values and, second, to monitor compliance by employees in making decisions and taking actions.

3. One way to transform a company's general compliance goals into specific actions is to include compliance topics in regular planning discussions.

Example a: One company required senior business managers within discrete corporate business units or divisions to initiate periodic internal messages to their subordinates. The messages described hypothetical or plausible compliance risk scenarios that are germane to their business operations. In addition to providing a regular forum for addressing new or changing compliance problems, this method demonstrated the involvement and commitment of senior management to compliance in business practices.

4. Overlapping legal requirements or the distribution among several employees of operational responsibilities for particular aspects of compliance may make the articulation of compliance policies particularly difficult. In these circumstances, it may be desirable for a firm to have a special management body to resolve apparent conflicts in compliance standards and to ensure that all members of a group pursue compliance.

Example b: A compliance committee or group of compliance program administrators might be held responsible for identifying these types of compliance problems and for overseeing related processes for clarifying compliance duties and for achieving compliance.

5. Managers of a small business may state the firm's compliance goals and methods by periodically mentioning them in meetings with employees and by sending or posting occasional memos to employees.

(c) Making descriptions of compliance policies and practices readily available to all personnel who are subject to them.

Comments:

1. It will sometimes be desirable to tailor the distribution of compliance policy statements to the needs of individual employees. Some policy directives -- such as discussion of the general compliance goals of a corporate employer -- will be useful for all employees. These statements can remind individual employees of their general compliance responsibilities even in the absence of more specific policies on particular areas of compliance.

2. Compliance policies in specific legal areas or addressing particular business practices can be directed to only those employees who are to be governed by the specialized policies. This ensures both that employees are not overwhelmed by meaningless directives and that wasteful distributions do not consume compliance resources.

Example a: Corporate policy statements about price fixing offenses might be sent to all sales employees, but withheld from non-sales clerical staffs. Similarly, environmental compliance policies might be distributed to employees handling chemical materials, but not to sales employees. However, even if they are not needed to guide the sales employees' own actions, company environmental policies might still be needed by sales employees to inform concerned customers about company environmental practices.

3. Compliance policies may sometimes be extended outside a company. Particularly where a company will be held legally responsible for the actions or products of contractors, the firm will wish to exert some control and monitoring concerning the compliance practices of contractors.

Example b: One firm's consulting contracts required that consultants comply with company compliance standards in all regards.

- (d) **Stating, wherever appropriate, that certain areas of law are interrelated such that violations in one area of law may result in legal obligations in a separate area.**

Comments:

1. Compliance programs can convince employees of the importance of compliance by identifying the full range of business risks associated with compliance failures. Often, an organization's civil liability to private claimants is directly related to the organization's compliance with criminal or regulatory standards. For instance, noncompliance with Food and Drug Administration (FDA) regulations could lead to product liability suits. Policy statements on compliance can identify these linkages as a further means to clarify the importance of compliance.

2. Employees will sometimes need to be made aware of the relationships between compliance risks if they are to respond fully to those risks. In order to inform employees about how compliance with particular legal standards can have broader legal implications, one company routinely includes illustrations of potential overlapping or collateral regulatory compliance issues and concerns in its compliance training program.

3. In order to properly inform employees about compliance risks, corporate managers must be aware of these risks themselves. A firm may wish to gather information about related categories of legal risks at every opportunity.

Example a: As part of the services received from outside attorneys employed to assist with the management of a regulatory violation self-disclosure, one company obtained a compliance awareness tool that consisted of a matrix of common regulatory violation risks correlated with potential related violations in other regulatory areas.

4. A firm confronted with a particular compliance problem will typically want to make sure that the full range of other, related compliance issues is addressed. This will often require company personnel to identify the source of the detected misconduct and to consider what other corporate activities might be susceptible to the same type of misconduct.

Example b: To ensure complete attention to related compliance risks, one company inserted identical provisions in both its internal compliance incident reporting procedure and its internal investigation procedure that required the completion of a potential collateral issues and violations assessment in conjunction with noncompliance incident reports and investigations.

PRINCIPLE 5: ENDORSE AT TOP LEVELS

The highest governing authority within the organization endorses the compliance program.

Factors to Consider:

- (a) Choosing carefully the mode or modes by which a governing body or individual endorses the organization's compliance policies and compliance program.**

Comments:

1. A compliance program will usually need to receive visible support from persons at the highest levels of a company. In larger corporations, this endorsement could come from the board of directors; however, it is not uncommon for the CEO to sign policy statements. In smaller companies, a president or owner could sign the policy statements.

2. Senior corporate managers should periodically reaffirm their commitment to compliance. The means to do this in a way that will be appreciated as genuine by individual employees will vary from organization to organization.

Example a: One organization used the technique of an annual compliance commitment certification signed by the chief operating officer and designated senior managers.

Example b: Another firm incorporated a paragraph on compliance assurance in its annual management message from top executives to employees.

3. Top managers typically signify their interest in specific areas of corporate performance by not only describing their interest, but by also monitoring that area of performance. In order to clarify the importance of compliance in the eyes of senior managers, it may be useful to accompany statements of interest by those managers with descriptions of how senior managers will be monitoring subsequent compliance performance by subordinates. This type of policy statement might identify specific mechanisms through which senior management will receive compliance performance information.

4. Another way that top managers can demonstrate their interest and commitment to compliance is to review and approve the specific provisions of a company's compliance program. Such approvals will be desirable at the highest corporate levels.

Example c: One company's Compliance Program Policy was approved and recommended by the presidents of its operating companies and the senior executives of its holding company. It was then approved by its Chairman and CEO and officially endorsed by its Board of Directors. This approval process matched that used for all of that firm's formal company policies.

5. The effectiveness of top management communications regarding the importance of compliance should be an ongoing concern. Firms may decide to conduct studies to determine if employees believe that compliance is a top management priority. Conducting a survey of employee opinions about top management desires for compliance is one way of determining whether top managers are effectively conveying their commitment to compliance.

(b) Providing for continuing, active participation of the organization's senior executives in promoting and overseeing a compliance program.

Comments:

1. The level of authority of persons monitoring compliance performance is a critical choice in operating a compliance program. Often, those persons should be at the highest corporate levels.

Example a: The highest governing authority in a corporate organization is the board of directors. The board may wish to designate a committee of board members with oversight responsibility for management's implementation of compliance programs. Board committees are typically delegated the oversight of specific areas for purposes of working with management, taking actions, reporting to the full board and recommending full board actions.

2. Beyond reviewing and approving the substance of a particular compliance program, corporate board members should consider the management structure that will be used to implement the program. For example, a board may wish to appoint a management committee which will report to the board on the activities undertaken in connection with promoting, monitoring and dealing with violations occurring under the compliance program. The management committee may designate various subcommittees to both communicate the code to the employees and to

monitor performance under the code to ensure that employees are achieving compliance goals and objectives.

3. A company may wish to designate one senior executive who has primary operational responsibility for compliance program results.

Example b: In one company, while the firm's compliance policy was signed by the president of the company, the compliance officer was an Executive Vice President who actively participated in the company's management. The guidelines and policies were reviewed and approved by the management. The Audit Committee of the Board of Directors received briefings from the compliance officer, who was sometimes but not always a member of the Audit Committee, several times each year.

4. In addition to designating a senior executive to oversee compliance matters, a firm may wish to have this individual be one of the company's top in-house attorneys. This ensures that legal expertise is applied to shape the day-to-day operations of the program. However, it may lose certain benefits usually associated with legal representation (e.g., the confidentiality afforded if the attorney-client privilege is successfully asserted -~~see~~ Consideration 18(k)) because the attorney involved is acting as a corporate manager, not a lawyer. On balance, some firms find attorney/managers to be the best choice.

Example c: One company's General Counsel and Senior Vice President was the Compliance Program's Designated Officer. He was responsible for its overall implementation. He met on a regular basis with the company's compliance attorney and Environmental Health Safety (EHS) director (most of the company's compliance issues were in the EHS area) and on an as-needed basis with the compliance attorney when compliance issues arose. He gave a status report to the board of directors annually. The chairs of the Audit and Ethics Committees of the Board of Directors, each an outside director, were briefed on significant compliance issues when they arose and might, if they deemed it appropriate, brief their committees and/or the Board as a whole.

5. Top level operational managers can maintain some continuing involvement in the implementation of compliance programs without being active in these efforts on a day to day basis.

Example d: One approach top level managers can take is to endorse a code of conduct or such other medium of conveying the overall objectives of the organization's compliance efforts, and further directing that detailed guidance effectuating the objectives will be prepared and implemented by management as part of the organization's compliance program. Top managers can periodically assess progress towards these assigned implementation objectives.

6. Once a compliance program is fully developed, means can be included for periodic reviews by senior executives of the performance of this program.

Example e: One possible approach is to use activity reports to provide senior executives with information about the operation of a compliance program. Senior executives could also be provided periodic reports of activities occurring under a compliance program, especially instances of noncompliance and remedial actions taken. A regular reporting feature gives senior executives the opportunity to effect changes at the highest level of program operations.

7. Firms may wish to be particularly careful to scrutinize the scope and effectiveness of senior executives' efforts to promote compliance and oversee compliance programs. Where a senior executive has participated in or knowingly tolerated an offense, a firm will often lose any possible benefit that its compliance program might otherwise have afforded in prosecutorial decisions or sentencing reviews. Hence, efforts to ensure active pursuit of compliance by senior managers ought to be no less than, and preferably greater than, efforts aimed at the employees otherwise involved in the programs.

8. Owners and managers in smaller firms are subject to much more personal observation by employees than is true in large companies, therefore their actions must not only be legal and ethical, but also appear to be legal and ethical. These owners and managers will wish to be sensitive to the appearance of wrongful actions and take care to explain their actions to employees in cases where they may be misinterpreted.

PRINCIPLE 6: CREATE COMPLIANCE ACCOUNTABILITY

An effective compliance program establishes accountability for compliance throughout the organization.

Factors to Consider:

- (a) Establishing mechanisms that hold all organizational directors, officers, employees and agents accountable for compliance in the course of activities that they initiate or oversee.**

Comments:

1. A compliance program can hold individual employees accountable for actions that subject their organization to liability or other legal risk. Accountability can be imposed through formal compliance assessments for individual employees, leading to rewards for performance promoting compliance and corrective action for compliance failures.

2. To ensure that accountability mechanisms apply to all sources of liability and legal risk to a company, the company may wish to extend some aspects of accountability practices outside of its organization. Actions of external corporate agents or independent contractors can create liability for a firm. A business, therefore, has a strong interest in holding those outsiders accountable for compliance. Firms may wish to incorporate provisions in related contracts requiring compliance by agents and contractors acting for the firms and providing for reporting and reviews concerning compliance by these outside parties.

3. A first step in holding employees accountable for compliance performance will often be confirming that the employees have reviewed and understood the compliance policies of their employer. This review may extend to descriptions of each individual's responsibilities for compliance-related tasks. To ensure that this type of review of policy and conduct requirements is completed, employees can be required to acknowledge (via signed statements or other recorded means) that they have reviewed their company's compliance program, understand their responsibilities under it, and agree to comply with the program.

4. Beyond just formal certification of understanding of compliance duties, employees' operational understanding of compliance requirements can also be the focus of accountability reviews.

Example a: One means to determine if employees have sufficient understanding is to conduct tests of their knowledge of necessary reactions to compliance problems. A more elaborate, but potentially more effective, approach is to conduct simulations of conduct raising significant risks of noncompliance and to monitor whether employees undertake the actions necessary for compliance.

5. Managers' expectations that individual employees up and down an employee chain are personally accountable for compliance in their personal activities can be demonstrated periodically as corporate activities are completed.

Example b: One company helped reaffirm that employees were accountable for their own compliance by requiring that all employees execute a Certification of Compliant Business Practice covering their actions for the prior year.

6. Employee perceptions about managers' accountability for compliance can affect compliance by the employees as well. An employee who believes that his or her manager will be held accountable for this type of performance knows that the manager will impose similar accountability on subordinates.

Example c: Surveys of anonymous employee opinions about the accountability of company managers for compliance is one of several methods used by one compliance program vice president in his efforts to assess management accountability for compliance.

(b) Designing a program with input from knowledgeable individuals about likely gaps in compliance accountability.

Comments:

1. The identification of company practices raising risks of compliance accountability gaps sometimes requires a combination of legal and operational expertise. This means that a wide array of parties may be valuable contributors to the development of accountability features of compliance programs. These individuals include managers, employees, company attorneys, and compliance program consultants.

2. Often, the nature of operational activities that give rise to compliance accountability gaps will only be known to employees undertaking those activities. Hence, it will often be desirable to involve such employees in the development and evolution of a compliance program. Involvement of individuals at all relevant levels of conduct whose actions are to be held accountable for compliance results will help assure that the design of the program will be appropriately geared to the realities of the organization.

3. The involvement in compliance program design of employees with day-to-day operating experience can also promote later adherence to the program. Such involvement lessens the chance that the resulting program will meet with resistance. Participation increases the sense of the employees'

ownership of the program and, in the end, will increase accountability of individuals.

4. While the involvement of insiders is essential, sometimes the viewpoints of an outside analyst can help ensure that proper accountability checks are incorporated in compliance systems.

Example a: Seeking to incorporate reality-based standards and mechanisms for change adaptation, one company convened an annual one-day, internal compliance practices forum that featured, among a number of agenda items, a voluntary outside guest speaker to comment on lessons learned from actual compliance violation problems.

PRINCIPLE 7: ENSURE PROGRAM FAIRNESS

An effective compliance program is designed to operate fairly and equitably.

Factors to Consider:

- (a) Incorporating practices in a compliance program that treat all employees fairly and consistently.**

Comments:

1. The fairness of a compliance program will sometimes depend on how the program is applied across multiple components of an organization. Careful program design will result in discrete audiences receiving effective communication of program features so that the meaning and application of the program to those audiences is clear and the chance for ambiguity and confusion, and consequent noncompliance, is minimized. The result should be that each audience has sufficient appropriate information so that it is properly prepared to

implement the program, minimizing the risk that a portion of the audience will not be properly advised and calling into question the fairness of the program.

2. To ensure adequate notice, compliance requirements for which employees will be accountable can be distributed or communicated to them in a timely, effective manner. It is often desirable for the distribution process to be auditable and monitored to ensure that all employees have received information about the compliance program. There can also be a process for monitoring the distribution of a compliance program to new employees.

3. The fairness of a program may also turn on advance notice to employees of key system features, particularly those like disciplinary practices that may adversely affect employees. The enforcement of a compliance program will typically include disciplinary action against employees and this should be clearly understood by employees who are governed by the program. One way to further this end is for the consequences of various violations of compliance program standards, which may include termination for cause, to be clearly communicated in the program materials. Such an approach will both bring home the seriousness of these consequences and minimize the risk that the fairness of the program will be called into question.

4. Procedural fairness in dealing with individuals who are suspected of violating compliance program standards will often be another key concern. Generally, this type of fairness will be addressed by the procedural features of an organization's internal response to suspected violations. Organizations should react to suspected violations of compliance programs with due regard to the interests of employees. Such interests may include confidentiality, an opportunity to be heard, and a chance to be appropriately advised. In addition, the applicability and requirements of grievance procedures defined under union contracts should be considered.

5. The fairness of the treatment of an individual employee in a given case may depend on that employee's understanding of compliance program procedures. Persons who are the focus of an inquiry into possible misconduct may be given special information about investigation procedures and related appeals. Alternatively, these persons may be given access to resources that will allow them to learn more about these procedures.

Example a: To ensure that employees understand this process, one company assigned an "Employee Advocate" who assisted an employee being investigated through the process. This helps ensure consistency and equity in the treatment of employees who are suspected of compliance program violations, to the benefit of both the employees and the perceived and actual integrity of the investigative system. However, such an approach may not be available in environments governed by union contracts. In addition, the person serving as an advocate would need to have sufficient independence from management so as to not be perceived as an agent of management in guiding the employee under scrutiny.

6. The enforcement features of a compliance program may have checks and balances built in to help avoid unreasonable actions on the part of the enforcement personnel.

Example b: Proposed discipline might be required to be reviewed by several levels of higher management to ensure accountability for the actions taken. In addition, a company's Human Resources Department might be consulted to assist with such issues.

7. Perceptions of fairness among those governed by a compliance program can be monitored to ensure that a company does not overlook fairness concerns.

Example c: In order to monitor and sample the fairness and equity of a compliance program, one corporation included a "fair and equitable treatment" question in its internal audit compliance program audit test modules. The results were then provided to the firm's corporate compliance committee.

8. Small businesses in which only one owner or manager is responsible for a compliance program and its enforcement can create an appearance of unfairness because of a lack of checks and balances. This problem may be minimized by using an arbitrator or outside attorney to determine the facts and recommend any disciplinary action when the owner or manager finds it necessary to charge an employee with violation of compliance standards or the law.

(b) Providing mechanisms that guard employees against retaliation for raising compliance issues.

Comments:

1. Retaliation against employees utilizing company hotlines and similar misconduct reporting processes is less likely if the source of misconduct reports remains confidential. Consequently, many compliance programs attempt to protect the confidentiality of whistleblowers' identities where such confidentiality does not preclude the investigation of reported misconduct. The anonymity of individuals reporting suspected violations is maintained in order to encourage communication which might otherwise not occur for any number of reasons, such as retaliation by the organization, retaliation by the subject, or retaliation by fellow employees. Anonymous reporting may, however, be less effective in enabling the organization to investigate suspected violations, because of the lack of specificity of reports and the lack of opportunity to question the reporting employee.

2. A number of methods may be used to maintain the confidentiality of whistleblower identities.

Example a: In one highly protective compliance program, numerous steps were taken to ensure that the identity of employees asking questions or raising concerns were safeguarded to every extent possible. Employees could also raise concerns anonymously. Telephones used for the company hotline were not equipped with trace features, answering machines for recorded reports or questions were locked away, and access to these machines and other hotline records was closely constrained. Retained records were limited to those that were required to assure responsiveness. Only records that were scrubbed of names and other identifying marks were provided to company auditors who reviewed the effectiveness of the hotline program. Any external communications regarding investigations were controlled by company attorneys.

3. Careful monitoring of corporate responses to perceived violations of compliance program standards can also help deter retaliation against whistleblowers. Hence, many firms include as part of their compliance programs processes to monitor the response and any corrective actions taken with respect to reports of noncompliance with the organizations' compliance programs. This sort of monitoring should provide accountability for those dealing with instances of noncompliance which will help to ensure that retaliatory actions are not taken against employees reporting instances of noncompliance. Further, this type of monitoring process should help to ensure that corrective actions are taken to prevent instances of

noncompliance from recurring and to ensure that the response taken was the appropriate response due to the nature of the noncompliance. See also Considerations 17(d), 18(c), (f) & (g).

4. Some companies complete a further check on the success of their anti-retaliation practices by making a follow-up contact with a whistleblower to see if there has been any retaliation.

5. Providing an assurance of confidentiality may be particularly difficult in small firms where the owner or manager who is the compliance officer personally knows employees. Even anonymous "hotlines" may not be effective because employees fear the owner or manager will recognize their voices. To overcome this problem, the owner or manager can repeatedly state his or her desire to receive tips and complaints with a guarantee of no retaliation, and should provide multiple methods of whistleblowing, including hotlines, mail, and suggestion boxes.

STRUCTURE AND CONTROL

PRINCIPLE 8: MAINTAIN HIGH-LEVEL OVERSIGHT

Specific high-level personnel in an organization are responsible for the administration and oversight of the compliance program.

Factors to Consider:

- (a) Having an organizational compliance officer take "ownership" of the compliance function in the sense of having overall responsibility for initiating, coordinating and reviewing organizational compliance efforts.**

Comments:

1. If management responsibility for the program is too diffused among all managers, there is a risk that no one manager will take on the role of advocating ethical and compliance-oriented policies and conduct.

Example a: One method to make it more likely that the compliance officer will take "ownership" of the compliance program is to link the compliance officer's job performance to incentives. A compliance officer's performance evaluations might include an examination of the officer's compliance activities, and the officer may be required periodically to sign a written assurance of compliance.

2. Specific personnel within the organization should have overall responsibility for managing and overseeing the overall compliance program. In some organizations, it may be desirable to give specific compliance functions to more than one individual.

Example b: One organization followed both a "single" person approach and a "multiple" person approach. The organization had a full time "Compliance Officer"; however, that person did not perform the compliance function alone. A variety of constituencies in the organization also played major roles, including, for example, management, auditors, security, the Ethics Department, and various company attorneys.

Example c: The Compliance Officer in one company had a group of subordinates with the group members holding responsibility for day-to-day management of different components of the company's compliance program.

3. A compliance program should generally be viewed as an important management system by both those in charge of the program and those who are subject to the program. Absent clear responsibility and accountability for the operation of a compliance program, completion of compliance tasks and monitoring will take second place to other day-to-day management and operating tasks. Consequently, it is important to designate a party who is operationally responsible for a company's compliance program, much in the same way that a firm would designate a manager to be responsible for product quality or workplace safety. It may be useful for the form and substance of this designation to mirror other assignments of important management tasks within the same organization. Thus, a useful test for the sufficiency of compliance program responsibility will often be whether the level and scope of responsibility and managerial clout would be deemed sufficient if other critical functions like product quality or worker safety were involved.

- (b) Considering whether the designation of one person with primary responsibility for management of compliance practices will lead others in the organization to conclude that compliance is only the compliance officer's job.**

Comments:

1. It is normally valuable for a company to pursue a balance between having one person or group take "ownership" of the program and having widespread accountability for compliance among all employees.

Example a: One company pursued the goal of widespread accountability by conducting audits of managers and supervisors with detailed, specific questions about the individuals' discussion of corporate policy and ethics with subordinates, reporting of wrongdoing, and observing any unethical or illegal actions.

2. It will often be useful for a compliance manager to have responsibility for aggressively developing, implementing and overseeing compliance programs. All other managers, if not all employees, can be charged with performing their normal duties in a fashion supportive of compliance. Company managers, if not all employees, can be made aware that part of their performance evaluations will depend upon how well they participate in and support their organization's compliance program, and can be constantly reminded and educated concerning their compliance duties.

3. There is a balance between delegating the practices and procedures of a compliance program to others throughout the organization, and having the central, high-level authority required for administration of an effective program. It must be made clear to all managers and employees that the program is administered by a specific, top-level manager with full authority who reports directly to the company's Board of Directors or Chief Executive Officer.

- (c) **Insuring that the top organizational executive with responsibility for a compliance program has the degree of clout necessary to make the program effective.**

Comments:

1. It will typically be useful for a compliance program manager to have the power and prestige necessary to obtain the attention of other managers. In many companies, this will require that the compliance manager be designated as a Vice-President or Executive Vice-President, and that other managers understand that the compliance manager has direct access to the CEO and Board of Directors.

Example a: The compliance officer of one company was the executive vice president. That person received periodic updates on the status of compliance from the manager of corporate compliance and each manager of various compliance sections, such as Environmental Affairs, Risk Management, Security, Compliance Administration Activities, etc.

Example b: One company designated a compliance officer below the senior officer level, while involving several senior level officers in the compliance effort.

2. Sometimes the CEO is the only person with sufficient clout to oversee compliance activities.

Example c: A company with 125 employees whose CEO/owner usually conducted "important" business himself found that delegating compliance activities to one of four other managers caused employees to believe the company was not serious about its compliance program. Only when the CEO took personal responsibility was the program effective.

3. Evidence of a CEO's lack of strong commitment toward a compliance program may destroy a compliance program manager's clout.

Example d: When a business professor surveyed the managers and supervisors in a large international company, she found that each manager and supervisor was constantly aware of worker safety issues and strived to meet the company safety goals, but seldom followed the company's official equal employment policies. The difference in attitude and compliance resulted from the CEO's personal interests and activities. As a former medic in the Army and active Red Cross volunteer, he conveyed a sense of interest and urgency concerning

safety issues. However, he did not express personal interest in equal employment issues.

4. In order for the person in charge of a compliance program to have sufficient managerial authority to make the program effective, the compliance program manager will often need to compel operating managers to disclose information about their present and anticipated activities and to challenge those activities where they appear to be unlawful or to involve unjustified legal risks.

Example e: In order to raise those types of issues, it will often be desirable for a compliance program manager to occupy a managerial post at a superior level to the managers of the operations governed by the program.

Example f: Alternatively, the compliance program manager should report to an executive who is a superior of the operations governed by the program. In the latter type of arrangement, in order for the compliance program manager to perform his job properly, it will be critical for the manager to have the ear and confidence of her superior.

5. A publicly traded company may have the person responsible for the compliance program report to an independent committee of the Board of Directors to give the compliance program manager added clout and independence. This may be done by a board resolution that creates a formal record of the program's status. The board committee can also require periodic reports on the program's progress.

- (d) **Determining the compliance officer's proper level of authority and access to the organization's governance authorities in order to ensure both that the officer is able to exert effective control over compliance-related matters and that compliance management is perceived as an important activity by other organization members.**

Comments:

1. Specifying that a compliance manager will report to the highest authority in a company can enhance the individual's authority. Reporting to the highest authority in a corporation will be critical in the event that noncompliance becomes the subject of internal investigation or self-reporting to public officials.

Example a: Clarifying a compliance manager's authority can be accomplished by having the compliance manager reports directly to a

company's Chief Executive Officer, Board of Directors or a Board Committee.

Example b: Another approach used by some companies is to appoint the compliance officer to the organization's executive board.

2. A compliance officer's access to top corporate officials can determine the effectiveness of that officer. Where she has regular access to top operating officials, a compliance officer can be more effective in obtaining cooperation with compliance studies and in pursuing changes in corporate operations when compliance problems are detected. Furthermore, through regular interactions with top officials, compliance officers can establish useful business relationships with key business leaders. Such relationships can be critical in ensuring a rapid, smooth, and effective response once a serious incident of corporate misconduct is detected.

3. Smaller companies without a General Counsel's office should consider any high-level staff officer, a comptroller, or a personnel manager, who reports directly to the CEO as overseer of the compliance program.

(e) Selecting a compliance officer with personal characteristics that will make the individual effective in leading and promoting organizational compliance efforts.

Comments:

1. A compliance manager's reputation for integrity, ability to forge relationships of trust, and personal credibility are of paramount importance to a successful compliance program.

Example a: Companies that will add compliance responsibilities to the pre-existing responsibilities of a manager might choose a top-level manager who is trusted and admired by other managers and employees. Other companies appointing a full-time compliance manager might do the same when appointing a current manager to the new position of compliance manager.

Example b: Companies hiring a compliance manager from the outside should engage in an extensive background check to ensure the individual has the qualities of integrity, credibility, and trust.

2. A compliance manager's ability and reputation for following through on commitments is also important. A good compliance manager will generally need to be willing and able to act upon employee complaints, and to act in cases when possible wrongdoing is suspected.

Example c: A university disability rights compliance officer became ineffective when students and employees learned that suggestions and complaints rarely resulted in any investigation or other action.

3. A compliance manager will generally need the ability and authority to make unpopular decisions. Enforcing compliance guidelines may involve negative action against powerful, higher-level managers, and may involve orders to stop ingrained and profitable activities.

Example d: If a compliance manager learns, for instance, that salespersons are spending large sums of money to "wine and dine" military purchasing agents, taking action to curtail the practice may be resisted not only because the practice is successful in obtaining contracts, but also because the current Vice-President of Sales considers any suggested changes as a personal assault on his or her honor or business ethics. The compliance manager must, however, have the ability to take action if the program is to be successful.

4. The personal characteristics of a good compliance program manager mirror the desirable characteristics of a good manager of any corporate activity. Desirable characteristics include the ability to set goals, translate those into specific program activities, motivate subordinates and others who must undertake compliance tasks, monitor progress in program activities, and make corrections where program goals are not being attained. A firm may wish to ensure that its compliance program manager has those capabilities by choosing an experienced manager who has demonstrated such qualities in connection with management of other corporate functions.

5. Past involvement in or toleration of illegal activities or breaches of the company's compliance program should normally disqualify an individual from a subsequent role as the manager of the company's compliance program. Persons who are subject to the program will not take it seriously if they believe that the person in charge does not value compliance and demonstrate that interest in his or her own conduct.

6. The reputation of a compliance program manager may be

particularly critical in certain functions. For example, if an organization uses a hotline answered by its compliance manager, the reputation and integrity of the manager may be a deciding factor in the success of the hotline.

(f) Determining what functions, if any, the compliance officer should perform besides management and oversight of compliance activities.

Comments:

1. Limiting a manager to compliance activities allows the person to devote his or her primary attention to this task. If the individual has other duties, such as a Financial Vice-President or corporate attorney, the person's other duties may involve specific activities with deadlines to meet, causing procrastination in acting on compliance issues. However, steps may be needed to avoid having a full-time compliance officer marginalized and excluded from the real power in an organization.

Example a: Companies frequently make the error of assigning compliance program responsibility to a manager who is already overburdened with other tasks. One solution to this problem is to appoint a high-level compliance officer with substantial management clout and other duties beyond overseeing compliance, and to provide that official with a full-time assistant to aid with compliance matters.

2. Adding compliance duties to the pre-existing functional duties of a manager may result in giving the individual more power, resources, and inclusion in the real decision-making executive meetings.

Example b: Some organizations have designated their chief financial officer as the compliance manager because this person has control over the finances, and often manages the auditing and security functions of the organization.

3. Smaller organizations that cannot afford to have a full-time compliance manager may assign compliance duties to a current manager or officer. To effectively conduct the compliance program, it may be useful for the company to specify the amount or percentage of time the manager will spend on compliance activities, the percentage of any performance evaluation that will depend on his or her compliance activities, and the compliance activities' budget and staff assistants, even if part-time, that the manager will have available.

4. If a compliance manager has other responsibilities, an organization may need to take appropriate actions to prevent a conflict of interest.

Example c: If a financial vice-president is appointed to be the compliance manager, the organization should consider whether another manager should oversee compliance in the finance department.

5. A firm may wish to give its compliance program manager further duties because the additional duties mesh well with activities necessary to operate a compliance program. The manager's additional tasks may be ones that can be efficiently carried out in conjunction with compliance program activities.

Example d: A firm may wish to assign responsibilities for compliance programs to the company's comptroller if compliance monitoring of the firm can be efficiently performed by inside auditors in conjunction with traditional financial auditing.

6. Compliance tasks may also be usefully linked to other duties where the purpose of the linkage is to place a party with substantial management authority and status in charge of compliance activities.

Example e: Some organizations have designated their Chief Financial Officer as their compliance program manager. This choice establishes the compliance program manager as a person with substantial institutional clout who can react effectively to compliance problems.

(g) Making sure that a compliance officer has or can draw upon the types of expertise that are necessary to operate the compliance program effectively.

Comments:

1. Various types of expertise may be useful in overseeing compliance programs. Often a company's goals in operating a compliance program will dictate the type of expertise in a compliance manager that will best suit the company's needs.

Example a: Some companies have appointed attorneys as compliance managers because the basic thrust of the Federal Sentencing Guidelines for Organizations is on legal compliance.

Example b: Other companies have used accountants because of their experience in conducting audits.

Example c: Still other companies have chosen in-house managers with lengthy in-house experience because these managers know how the company really operates. In-house managers also know how to achieve effective corporate change.

Example d: A few companies have hired experienced managers from outside their corporations in order to inject new ideas into a compliance program.

2. A specific area of education or expertise does not ensure that one is an effective compliance manager.

Example e: A mid-sized manufacturing firm transferred an attorney from the legal counsel's office to be the corporation's major compliance manager. The results were disastrous. The attorney wrote a compliance manual that, while legally correct, was totally impractical. As a result, managers and supervisors ignored the compliance rules.

3. It will be desirable for the party in charge of a compliance program to be well informed concerning the business operations covered by the program, sources of information about those operations for purposes of compliance monitoring, legal requirements that those operations must meet, and means to instruct and motivate employees to take actions needed to meet the relevant requirements. A compliance manager need not be an expert in all these aspects of a compliance program if the manager has access to others with the necessary expertise. A compliance manager may

benefit from direct access to company attorneys, auditors, environmental engineers, health and safety personnel, experts in communication (video production, graphic design, etc.), and other specialists with expertise bearing on compliance issues.

Example f: A mid-sized service company promoted a long-time administrative assistant to the CEO to the position of Vice President of Ethics and Legal Compliance. The manager had experience in how to get things done within the company, a reputation as being close to the CEO, and good organizational and communications skills -- including experience in developing and disseminating corporate policies. She was given strong support in areas beyond her expertise such as determining legal requirements.

4. An important consideration in choosing a compliance manager may be operational expertise regarding management and the company's separate facilities or divisions. Adopting compliance standards may be effectively accomplished by a compliance manager hired from without the company, but implementing the standards requires knowledge of how the company operates. If an outside compliance manager is hired, companies should consider assigning an assistant compliance manager who is familiar with the company's procedures.

5. In some instances, the need for legal expertise on the part of a compliance manager may indicate that a corporate or division attorney is the proper party to oversee a compliance program. Selecting an attorney for this post helps ensure that the full range and complexity of governing legal requirements are taken into account in defining and operating a compliance program. In addition, an attorney can often ensure that corporate compliance is assessed in terms of how a company would fair in a court or administrative proceeding.

6. Despite the advantages just mentioned, there are several reasons why an attorney may not be the best type of compliance program manager. First, an attorney may lack the managerial skills to conduct compliance program activities. Second, an attorney (either inside or outside counsel) may lack sufficient respect by operating managers and employees to make a compliance program work. Third, by crossing the line into management, an attorney and her firm may forfeit attorney-client privilege protections that might otherwise have applied to communications with counsel and related evaluations. A

better choice may be to construct a compliance program to involve attorneys -- but not be managed by those attorneys -- and thereby maintain the attorney-client privilege.

(h) Identifying resources, support and infrastructure needed by the compliance officer and others to pursue compliance effectively.

Comments:

1. Every position within the company that has people reporting to it or has responsibility for contracting with vendors or hiring independent contractors could have as one of its duties the prevention and detection of conduct which violates the company's standards and procedures regarding compliance with the laws that are most pertinent to the position's business purpose. That could create an infrastructure that leads all the way up to the president and a network for dialogue among people with compliance-related duties all the way to the chief compliance officer. Ultimately, that is a sharing of responsibility for compliance among all supervisory and/or purchasing personnel of the company.

2. The resources -- expertise, program ideas, auditing methods, etc. -- necessary for successful compliance program operations may be available in-house, or from outside sources. An organization should consider surveying its present management for individuals who have any knowledge of programs conducted by other companies, journal articles and books concerning business ethics, corporate compliance with the Federal Sentencing Guidelines for Organizations, or other relevant knowledge or experience. Outside expertise can include attorneys and consulting firms specializing in compliance programs, professional books on compliance and non-financial auditing, the National Center for Preventive Law, and past and current issues of its journal -- the Preventive Law Reporter.

3. Smaller companies without in-house attorneys or auditing staff may consider engaging a private attorney to develop, or assist in developing, a compliance program. The outside attorney might also be used to periodically update the program or conduct compliance audits. However, it is important to find an attorney who specializes in corporate compliance programs and audits. Many attorneys do not have the expertise, nor a preventive law approach, to giving advice about compliance systems.

4. An adequate budget and staff, commensurate with the size and activities of the organization, often is vital to an effective program. It may be useful to include compliance program expenses as a line item in company budgets, thereby ensuring that sufficient resources for compliance activities are considered and allocated each year. Appointment of a compliance manager without any resources to allow the manager to effectively carry out the compliance program may be seen by judges as an effort to mislead the court. That can have a worse effect on criminal sentencing than having no program at all.

5. Some functions of the compliance manager or staff may be accomplished by using existing organizational policies, practices and procedures. For instance, communications to employees can be accomplished by using the same resources the organization uses for communicating with managers and employees on other matters. The decision whether or not to use outside services will often depend on the availability of existing personnel who can add compliance activities to their existing workloads.

6. The effectiveness of a compliance program manager will sometimes turn on the resources that he or she can bring to bear on compliance reviews and responses to compliance problems. To the extent that resource needs can be anticipated, these resources and their availability to the compliance program manager should be planned out in advance. Consequently, a company may want to plan for resources to be applied to monitoring and reacting to foreseeable types of offenses in the corporation. The tools and skills needed may be available in-house, or it may be necessary to obtain them outside the company.

7. Companies may use committees either for the compliance officer function or to support the compliance officer. These can bring together the expertise and resources of important departments, such as legal, auditing, security and personnel.

8. One way that a company can ensure that adequate resources are allocated to compliance program activities is to include a line item for such activities in corporate budgets. In addition to regularizing the provision for compliance activities, this approach can encourage periodic attention to changing compliance program needs as successive budgets are formatted.

PRINCIPLE 9: ASSIGN INDIVIDUAL RESPONSIBILITY

A compliance program has the support of senior management of the organization. Each officer, manager and employee is responsible for supporting and complying with the compliance program's standards and procedures.

Factors to Consider:

- (a) Having participation in and support for the program throughout the organization and not limited to the compliance officer.**

Comments:

1. Participation throughout an organization means attention to compliance in operational practices at every management level. In the midst of other performance pressures that are typical of middle management environments, corporate managers at middle levels in corporate hierarchies may only address compliance concerns and translate them into operational directions to their subordinates if the managers know that these compliance-oriented activities will be monitored by higher level management.

Example a: To encourage company-wide compliance, one large corporation conducted audits of management performance in which each manager was specifically asked to produce his or her copy of basic company policies and to explain how the manager informed employees of the policies.

2. To maximize the effectiveness of a compliance program, corporate managers will often need to remember that compliance, like other aspects of corporate performance, is ultimately a responsibility, in part, of corporate line managers who control day-to-day business operations. The essential objectives of a compliance program include ensuring that line managers give attention to compliance matters in their oversight of corporate operations and that compliance efforts are integrated with other day-to-day management practices and procedures. Hence, a company may wish to specify in its compliance conduct code that each corporate manager and employee is responsible for compliance in corporate activities under that individual's control. Periodic compliance reviews of actions by individual employees and managers should be based on this same concept of individual responsibility.

- (b) **Considering the consistency of the incentive, appraisal and recognition systems used within the organization with the idea that compliance is a widespread responsibility.**

Comments:

1. Certain types of employee incentive schemes can increase the likelihood of offenses by corporate employees. For example, a system providing for large bonuses or compensation increases for the attainment of sales or production quotas can encourage illegal actions to meet the quotas. Such incentives are particularly strong where the quotas needed to obtain significant rewards are extremely difficult or impossible to attain through legitimate means. That may be the case because the incentives were unreasonable from the outset or because a company did not reduce them when surrounding conditions and opportunities for attainment of the quotas changed. In general, the stronger the performance-based incentives are for a position, the more substantial the controls and monitoring of improper means of performance should be.

Example a: To reduce the possibility that performance-based incentives may promote illegal actions, firms may wish to review their performance-based incentive schemes to determine if assigned quotas are ones that can be obtained through diligent, but lawful effort.

Example b: In addition, where an employee has attained unusually high levels of performance, a firm may wish to review the methods whereby the employee accomplished this atypical productivity.

2. Performance-based incentive schemes can play a positive role in compliance where positive compensation or advancement rewards are tied to the completion of compliance-related tasks. Rewards for excellence in compliance activities (to the extent that such excellence can be measured) will be particularly effective in encouraging increased compliance efforts.

- (c) **Examining the variety of ways senior management can send the message that it considers a specific compliance behavior or objective to be high priority.**

Comments:

1. Employees are aware of the manner in which managers treat matters that the managers believe are important. If managers regard compliance matters as unimportant, employees may come to believe that compliance may be overlooked in a crunch. Therefore, a company should compare its treatment of compliance issues to its handling of other critical performance issues.

2. As part of sending the message to employees that compliance is a high priority, organizations may want to assess whether employees are receiving and understanding the message.

Example a: Some companies have surveyed their employees to assess employees' beliefs about management's attitudes towards compliance. Such surveys can be useful in determining whether employees find a compliance program to be credible, and whether employees are inclined to pursue compliance as a critical concern of their superiors. The surveys also can ascertain whether employees understand the legal requirements affecting their jobs and the operational steps necessary to satisfy those requirements.

- (d) **Determining the degree to which the monitoring of subordinates' compliance or ethical practices is part of day-to-day management.**

Comments:

1. Compliance is ultimately an operational feature of corporate business operations. An effective compliance program will ensure that compliance considerations are addressed in connection with everyday business activities. In order to ensure that this is the case, a firm may wish to determine if its compliance efforts meet following tests:

- (i) Performance demands imposed by the system are well understood and generally met by corporate employees;
- (ii) The performance required by the system is effective in satisfying legal requirements; and

- (iii) The system fosters an operational emphasis on preventing legal offenses rather than just on detecting offenses after the fact.

(e) Determining the compliance roles of organizational agents and further participants in the organization's business activities other than employees.

Comments:

1. In some contexts, corporations are responsible for compliance by their outside agents and contractors. In order to determine what actions of agents and contractors may lead to corporate liability, firms may wish to assess the legal requirements that govern the activities of their agents and contractors (particularly strict liability standards) and identify the mechanisms necessary to determine if agents and contractors are meeting those requirements.

Example a: Where a firm is subject to strict liability for false or inaccurate product labeling and the firm enters into subcontracts providing for the labeling of its products by another concern, the contracting party can monitor and review the labeling activities of the subcontractor. That degree of concern over that specific aspect of the subcontractor's activities will be advisable since the contracting party will be liable for the subcontractor's mistakes. Ethical considerations and public opinion regarding the proper scope of corporate responsibility for supplier actions may justify broader controls over supplier conduct than just those necessary to prevent liability.

Example b: One company sent a copy of its Code of Ethics to its active vendors with a letter from the company's Compliance Officer explaining what the firm expect of its vendors and what the vendors could expect from the company. The firm also sent the vendors a copy of the corporate compliance staffs' phone numbers so the vendors could report any inappropriate behavior.

2. Another way that concerns can become liable for illegal activities by their subcontractors is through instructions by a contracting firm that effectively call for or authorize illegal activities in carrying out a subcontract. Firms should be particularly attentive to instructions to agents that might be interpreted as authorizations to violate laws. Firms should also avoid tolerating known violations by subcontractors in the course of work under a company contract. Such toleration could be interpreted as ratification of the illegal conduct, resulting in the contracting firm being deemed to have approved subsequent misconduct of the same sort.

3. The CEO or other top officer of a smaller company without written codes of ethics or compliance standards can write letters to outside agents and contractors expressing the requirement that all laws and regulatory rules be followed. The letter can add a listing of important rules and regulations affecting the business.

(f) Examining the express and implied messages that managers give to employees about meeting the organization's compliance goals.

Comments:

1. Since compliance is a responsibility of corporate employees, corporate managers should generally give compliance policies, instructions, and problems the same sorts of attention that those managers give other important operational topics. Thus, in the day-to-day operation of the corporation, line managers, including the executive and operating officers at all levels, can usefully direct their attention, through the management mechanisms utilized throughout the organization (e.g., objective setting, progress reports, operating performance reviews, departmental meetings), to measuring, maintaining and improving the organization's compliance.

2. If an organization wants compliance to be perceived by employees as being important, compliance monitoring and review will generally need to be a regular activity.

Example a: Line managers might routinely review the compliance status of operations under their control through evaluations of any compliance monitoring and auditing reports addressing the relevant operations, or through direct review of those operations if compliance reports are not available.

3. Annual appraisals of a manager's performance may call for an evaluation of substantive compliance, e.g., did the person participate in or tolerate any misconduct? Annual appraisals may also measure a manager's performance on the procedures of a compliance program, e.g., did the manager obtain training for the staff, create an atmosphere of open communication, provide a role model, raise ethical and compliance questions, and work with the legal department?

4. Smaller companies and others that do not conduct formal performance appraisals should ensure that managers and employees know they are responsible for legal compliance by orally reminding individuals and explaining that compliance is a factor in determining raises and promotions. This should also be done when notifying individuals of a pay change or promotion.

PRINCIPLE 10: DELEGATE AUTHORITY RESPONSIBLY

The organization exercises due diligence to prevent the delegation of substantial discretionary authority to persons having a propensity to engage in illegal activities.

Factors to Consider:

- (a) Exercising caution in employing anyone who is under indictment, convicted, or listed as debarred, suspended or otherwise ineligible for federal programs, except where such employment is approved by a senior executive and the reasons for the employment are recorded in writing.**

Comments:

1. A company policy of not knowingly employing anyone indicted or convicted of a crime may run afoul of laws of certain jurisdictions, the intent of which is to remove senseless discrimination against the employment of persons previously accused or convicted of one or more criminal offenses. Consider such practices, therefore, on a case-by-case basis. A better practice may be to treat a past indictment or conviction as the basis for further investigation to determine if the circumstances leading to the indictment or conviction bear on job qualifications.

- (b) Carrying out this policy through reasonable inquiries into the status of any potential employee or consultant.**

Comments:

1. Some companies may perform compliance-related background checks on candidates for most or all positions. Even if a person is hired into a position without discretionary authority, this approach helps deal with the possibility that the person will subsequently be promoted or transferred into such a position.

2. Organizations may wish to consider and limit the sources that will be checked in determining the compliance propensities of individuals, the questions that will be asked and the period of time that background checks should cover. They may also wish to consider how to evaluate information about past compliance problems of hiring candidates and what mechanisms to institute to ensure that serious compliance issues that come to the attention of corporate personnel in connection with hiring candidates are not overlooked.

3. Reasonable inquiry into an employee's law compliance background may include requesting certain information on employment application forms.

Example a: One organization, requested an applicant to state whether or not he or she had been convicted of a crime (misdemeanor or felony) within a specified time period and, if the candidate responded affirmatively, to describe the nature, location and date of the conviction and related conduct.

4. Information that is supplied by candidates on employment applications and which may be subject to verification include criminal, employment and education records. The search extends, at a minimum, to sources covering the applicant's county of work and residence, and is broadened on the basis of the level and type of position being filled. Fingerprinting, not permissible in all jurisdictions, is another option employed selectively, due either to the prescriptions of a regulatory body or to the type of industry/type of work being performed.

5. Access to law compliance information acquired from employment applicants can be limited on a "need to know" basis. For example, such access might be provided only to a hiring manager, the company's senior human resources specialists, and the company's compliance officer. When criminal activity is present in a report, candidates may be disqualified, providing this is not held to be discriminatory under applicable statutes. Candidates will also be disqualified if the activity was not listed on the employment application, using that lack of disclosure as the reason for disqualification.

6. The relevance (or lack of) a conviction and the type of discretionary authority has bearing on the decision to disqualify candidates or terminate employees.

7. Employees can be required, during their tenure, to inform their employer of any convictions (felony or misdemeanor), government debarments, or professional disqualifications related to their positions, with terminations being one likely outcome, dependent on the relevance of the event to the individuals' job responsibilities.

8. All employees, full-time permanent and part-time, are screened by one company for drug usage. Background checks are made with previous employers and school attendance.

- (c) Suspending indicted employees, agents, or consultants from involvement in company activities until their cases are resolved.**
- (d) Suspending employees or consultants who are involved in debarment proceedings from further company activities until the debarments are resolved.**
- (e) Discharging any employee who is convicted or debarred based on job-related conduct.**
- (f) Exercising care in hiring processes to investigate and consider evidence of past misconduct that is relevant to the position being sought.**
- (g) Exercising care in promotions and internal transfers to consider an individual employee's past job performance and internal reputation concerning compliance and the employee's adherence to the organization's compliance program.**

Comments:

1. Where a present employee has demonstrated a lack of due care towards compliance (through such actions as violations of laws, breaches of company compliance program requirements, or indicated willingness to engage in such violations or breaches), this information should be considered in any subsequent promotion and transfer decisions. In most instances, unless there is clear evidence to believe that the prior unacceptable conduct will not continue, these types of prior failures to promote compliance may justify the dismissal of the employee or disqualify the individual from promotions or transfers into positions of greater corporate authority.

2. Background checks on employees promoted or internally transferred into positions capable of exercising substantial discretionary authority may be particularly important components of compliance programs. These checks are possible means to respond to the requirement of the Federal Sentencing Guidelines for Organizations that, as part of an effective compliance program, corporations include steps to exclude from substantial authority personnel those individuals with a "propensity" toward engaging in illegal activities. For these purposes, substantial authority personnel are those individuals:

"who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest." Federal Sentencing Guidelines for Organizations § 8A1.2 (Application Note 3(c)).

While a "propensity" to engage in illegal activities is not defined in the Guidelines, we take this to mean a clear, demonstrated likelihood of future illegal conduct based on conduct or compliance-related statements of the candidate. A likelihood of illegal conduct may be present where a candidate evidences a willingness to engage in or tolerate illegal actions.

3. There are various procedures that organizations can employ to consider compliance-related information in hiring decisions. However, disqualification of individuals for employment based on past criminal convictions will typically only be desirable where there is a direct relationship between the offenses and the employment being sought.

Example a: An employment application can request permission to obtain a consumer report on the applicant. Other sources of compliance-related information might also be checked with the applicant's permission. Access to derogatory information can be limited to a "need to know" basis to protect the privacy of individuals.

- (h) Identifying positions that may provide opportunities for violations or act as breeding grounds for violations and more carefully screening candidates for those positions with respect to compliance backgrounds and support.**

Comments:

1. Certain types of organizational positions may entail especially high risks of illegal conduct. Such positions are characterized by broad, unreviewed discretion over corporate activities, control of extensive corporate resources, oversight of highly regulated corporate activities, responsibility for corporate tasks with extreme public risks, or some combination of these factors. Firms may wish to identify such positions to ensure that parties who are put into those settings are carefully screened for past compliance problems. Identifying these positions will also allow firms to consider whether special compliance monitoring or reviews should apply to the positions to reduce risks of undetected offenses.

2. Given that these individuals have opportunities to initiate or tolerate violations of particularly broad scope and significance, a firm may wish to give particular attention to identify persons in positions with substantial discretionary authority, as opposed to more broadly identifying any or all positions posing opportunities for violations. Although many rank and file positions pose the opportunity to commit violations of law (for example, anyone in an asset custodial role,) they do not necessarily possess "substantial discretionary authority." Consequently, asking each unit in an organization to identify those positions containing substantial discretionary authority and using the results to determine which applicants should be scrutinized through compliance background screening policy is one way of giving special attention to the characteristics of persons who will hold substantial discretionary authority while recognizing that logistical limitations may preclude the use of such investigations in all cases.

- (i) Addressing the risk of discriminatory personnel practices and invasions of privacy when the propensity of individuals to engage in illegal actions is considered in making personnel decisions.**

Comments:

1. As described above, Federal Sentencing Guidelines for Organizations require that an effective compliance program include steps to identify persons with a "propensity" to engage in illegal conduct and to exclude such individuals from positions possessing substantial discretionary authority. See Federal Sentencing Guidelines for Organizations § 8A1.2 (Application Notes 3(c) & 3(k)(3)). Identifying persons with a "propensity" to

engage in illegal conduct may entail differing assessments by different corporate managers who must make the determination. The possibility that these evaluations might be made in a discriminatory fashion can be minimized in two ways. First, firms can identify the types of evidence of past compliance problems that managers should consider in determining whether a given individual should be disqualified from advancement due to a "propensity" to disregard law compliance. Second, firms can establish review procedures whereby evaluations that a party should not advance for this reason are reviewed both for consistency with other similar evaluations and for substantive soundness.

PRINCIPLE 11: ENFORCE INTERNALLY

The organization takes reasonable steps to achieve compliance with its standards and the law.

Factors to Consider:

- (a) **Using evaluative and reporting systems to determine the effectiveness of compliance efforts and to deter and detect violations.**

Comments:

1. Obtaining feedback on how a compliance program is doing is often an important step in making the program effective. Evaluative techniques include auditing, monitoring, self-assessments, and any other system to measure results and to understand what is happening in the organization.

2. Corporate compliance evaluation mechanisms can take many forms. In a small firm, compliance evaluations may entail little more than regular attention by line managers to compliance matters in the course of day-to-day managerial oversight of subordinates. Such a compliance inspection process for a small firm may rely on management personnel, operations personnel or others to assume compliance support responsibilities in addition to their routine duties. Such a compliance program will have less sophisticated systems for establishing compliance procedures, auditing and tracking compliance issues, training employees and carrying out the other programmatic components of their compliance effort than in a large firm.

Example a: In a very small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business.

3. At an opposite extreme, more extensive and systematic compliance monitoring and evaluation methods may be appropriate in larger organizations. Extensive compliance monitoring will be justified where compliance risks are frequently encountered or where past experience suggests that a high level of monitoring is necessary to deter or detect illegal conduct.

4. Whatever compliance evaluation mechanisms an organization adopts, it will need to support those mechanisms with sufficient authority, personnel and other resources. Assessments of these features should accompany the establishment of any compliance monitoring program. Reassessments of the sufficiency of these types of support should be part of the corporate follow-up to any incident of corporate crime. A particularly thorough review will be warranted in cases where an offense was not initially detected through internal processes but instead surfaced through public disclosure.

(b) Reviewing and auditing employee conduct and corporate operations to provide measures of how the company is doing in its efforts to comply with the law and its own standards.

Comments:

1. Compliance auditing and monitoring measures may deter ethical and legal misconduct in the same way that financial audits may deter financial misconduct. Thus, organizations may incorporate compliance reviews into existing financial audits, utilizing the audit skills and professional standards of financial auditors.

2. A variety of compliance monitoring and auditing techniques may be valuable, particularly in large concerns. The following methods can be useful:

- (i) Auditing (with appropriate independence from line management) and inspection (including random, and, when necessary, surprise audits and inspections) of a company's operations and related compliance measures to assess, in detail, their compliance with all applicable legal requirements and the organization's internal policies, standards and procedures, as well as internal investigations and implementation of appropriate, follow-up counter- measures with respect to all significant incidents of noncompliance;
- (ii) Continuous on-site monitoring, by specifically trained compliance personnel and by other means, of high-risk operations and law compliance practices that are either subject to significant regulation, or where the nature or history of such operations or facilities suggests a significant potential for noncompliance;
- (iii) Internal reporting (e.g., hotlines), without fear of retribution, of potential noncompliance to those responsible for investigating and correcting such incidents;
- (iv) Tracking the status of responses to identified compliance issues to enable expeditious, effective and documented resolution of compliance issues by line management; and
- (v) Redundant, independent checks on the status of compliance, particularly in those operations, facilities or processes where the organization knows, or has reason to believe, that employees or agents may have, in the past, concealed noncompliance through falsification or other means, and in those operations, facilities or processes where the organization reasonably believes such potential exists.

3. Some companies use a multi-tiered system of reviews. For example, they allow managers or business units to do self-assessments. This serves an educational purpose and informs managers on how they are doing in a reviewed area. A headquarters group, separate from the unit under review, can then perform a separate review. Thereafter, external reviewers, such as outside law or accounting firms, may do a review of the reviewers to examine their independence and thoroughness.

4. Companies may wish to perform compliance program reviews modeled on litigation discovery processes. This type of assessment would include evaluations of the types of compliance-related documents being created and retained in a corporate operating unit and on interviews with

employees having knowledge of compliance-related activities. The advantage of this type of review is that it focuses on the selective view of company compliance practices that would appear in court rather than on the somewhat different or more complete picture of compliance practices held by operating personnel based on their personal knowledge of actual compliance activities not reflected in documents or oral testimony likely to be presented in court. The objective of these reviews is not to create a false image of a compliance program, but to avoid record keeping and other practices that will inadvertently leave behind a false image of compliance program activities.

(c) Using different compliance review methods for different purposes and in different business environments.

Comments:

1. Audits may be designed to perform different purposes. If the intent is to ferret out willful misconduct, then an unannounced audit may be preferred. If the audit is intended to measure the effectiveness of the compliance program, such as whether employees have been trained and whether the training is effective, then surprise may serve no purpose. The benefits and detriments of surprise audits need to be considered. Surprise audits can be disruptive and subversive of employee morale.

2. Methods for monitoring law compliance can be evaluated for both their accuracy and deterrent value. Preannounced audits will detect and prevent unintentional misconduct and generally entail less disruption of operations than unannounced audits. However, parties who intend to commit offenses in corporate environments may be capable of concealing offenses from preannounced audits. Hence, at least some unannounced audits will be useful to detect manipulations of announced audits. Furthermore, the threat of unannounced audits will have an ongoing deterrent effect since individual employees will be concerned that misconduct may be disclosed through an upcoming audit.

(d) Pursuing self-monitoring and regular reporting in key aspects of business performance related to compliance.

Comments:

1. Self-monitoring may serve as a training device as well as a check and a deterrent in cases where reportable performance measures bear directly on compliance levels. Such reports may be minimally intrusive, yet have a positive impact.

Example a: Workplace injury reports are instances of contemporaneous reports on legally significant events completed in the normal course of corporate operations.

2. While it may be subject to manipulation due to inaccurate reporting, monitoring of performance related to compliance can reveal certain types of compliance problems or situations justifying further scrutiny. This type of monitoring serves as a checking device where reportable performance bears directly on compliance levels.

(e) Using evaluative techniques to measure both the degree of substantive compliance, and how well the compliance processes are being implemented.

Comments:

1. Organizations can evaluate compliance with the law and the organization's code of conduct, as well as the organization's effectiveness in implementing compliance assurance processes. For example, an environmental audit could check a facility's emission level, and the integrity of the monitoring processes in place.

2. Studies to verify the performance of compliance systems may focus on both compliance program operations and results. Reviews of program operations can focus on methods used to select corporate operations for inspection, information gathering techniques used by program personnel, evaluations of whether program personnel are applying all relevant criteria in assessing compliance, reviews of responses to identified compliance deficiencies, and analyses of program record keeping. Studies examining program results should assess whether a company is successfully preventing offenses and, if not, why not. Additional studies may focus on the quality of program reports.

3. The quality of compliance program monitoring can also be evaluated. For example, corporate activities previously assessed by program personnel may be restudied to determine if program records present an accurate picture of compliance in those activities. Where a more thorough follow-up assessment identifies compliance deficiencies that were not revealed in a normal compliance inspection, inspection procedures or personnel may need to be changed.

4. The results of independent verification studies of compliance program operations can be evaluated for patterns. These verification studies are aimed at assessing the adequacy of overall compliance program activities -- effectively, "checking the checkers." The need for further compliance program activities and the nature of those activities can be systematically determined from compliance patterns found in system verification studies. In addition to determining the sufficiency of planned compliance program activities, verification studies can also ensure that compliance program personnel are neither coopted by those persons whose work they assess nor lax in carrying out their compliance monitoring functions.

(f) Evaluating the desirable frequency and scope of such reviews.

Comments:

1. Plans for reviews of compliance program performance will typically address which units will be reviewed, how often and how large a sample. For some purposes, it may be desirable for an external reviewer to assess all compliance-related activity of a particular sort. However, where compliance problems are less likely or less serious if present, it may be sufficient to rely on occasional self-checking of compliance results by operating personnel. Organizations in highly-regulated industries with high volumes of transactions, e.g., banks or brokerage firms, may find it impossible to monitor all transactions, and thus choose to sample transactions on a random basis.

2. The results of a particular review may indicate whether more or less frequent and extensive reviews should take place in the future. In general, good compliance results will justify modest compliance reviews in the next round of assessments, while poor results will justify increased assessments in the next round. Patterns of poor results can also justify a long-term increase of scrutiny. If reviews in a particular unit repeatedly find problems, that would indicate that more frequent reviews or monitoring for a significant period would probably be desirable for that unit.

3. The adequacy of information gathering concerning corporate law compliance can be evaluated in terms of information reliability, breadth and rapidity of information access, methods of information review and update and

other factors affecting the management of compliance-related information.

(g) Assessing the independence and reliability of persons who perform compliance evaluations.

Comments:

1. In situations where credibility is foremost, such as reviews after there has been a criminal conviction, an organization might consider using an "independent private sector inspector general." This can include legal, auditing, investigative and risk management functions.

(h) Determining whether compliance reviews should be done by persons inside or outside an organization or organizational unit.

Comments:

1. An organization can consider the merits of using outside rather than inside personnel to conduct compliance audits. Some organizations "blend" the two methods.

Example a: Even if a work unit conducts self-reviews, some companies use outsiders to serve as a check on the internal evaluators. Cross-audits, conducted by those within the organization but from a different work unit or facility, may help to address this issue. In this type of audit, the reviewers are familiar with the subject area, but relatively independent of the personnel and organizational unit being reviewed.

(i) Devising channels of communication between those who are performing compliance studies or audits and those who need the results to act on the findings.

Comments:

1. The results of compliance inspections are typically recorded in reports for use by corporate managers in evaluating compliance levels, formulating responses to compliance deficiencies, and monitoring the operation of the compliance system. These reports may describe the corporate practices or activities examined, the compliance standards applied, the analyses performed, and the levels of compliance found. While these reports will entail some corporate dangers insofar as they may be discoverable in subsequent litigation, often the creation and retention of such reports is essential in recognizing and correcting law compliance problems, particularly in firms with changing personnel or widespread operations

overseen by numerous managers. Once there are findings, the organization needs to assure that violations and weaknesses are known by those in a position to act. These may include a formalized report process that makes such reporting an automatic step.

(j) Establishing systems to assure follow-ups to negative investigation or audit findings.

Comments:

1. A record indicating that an organization was aware of deficiencies or violations and did not take appropriate action may indicate that the company did not take compliance seriously and was willing to tolerate known or likely compliance problems. To avoid this result, an organization should consider ensuring that corrective actions are taken as regular part of the follow up to findings of noncompliance or potential compliance problems.

2. Part of the follow up to adverse compliance findings should be an increased level of compliance monitoring for the business unit involved and for other business units undertaking similar activities. This sort of additional monitoring will be particularly justified where the revelation of a compliance problem demonstrates a possible weakness in a company's compliance monitoring practices -- e.g., where the revelation occurred not through regular company monitoring, but rather through extraordinary mechanisms like whistleblower reports or external investigations by public authorities.

(k) Using real-time monitoring of conduct as a technique to achieve compliance.

Comments:

1. In areas where compliance is particularly important (e.g., toxic waste handling procedures with significant public health implications) or particularly difficult (e.g., company activities that have previously involved offenses), companies may wish to conduct real-time monitoring of compliance results. This will entail assessments of whether recently completed corporate activities meet applicable legal and compliance program requirements. All results of a particular type or a carefully selected sample of those results might be given this scrutiny. The objectives of this type of monitoring are to mitigate any harmful effects of past noncompliance and to prevent repetition of the same type of misconduct.

2. In critical compliance settings, reasonable compliance efforts may also include extra preventive measures such as attention to the step by step actions necessary to achieve or promote law compliance. Rather than

conducting an annual audit to determine whether the company's activities over the past year were in compliance with applicable laws, a company with a preventive approach monitors factors affecting whether employees are likely to commit violations.

Example a: This type of monitoring is sometimes undertaken by questioning employees about the company's compliance standards and their perceptions of ethical and law compliance problems in frequently encountered work situations.

(l) Having a means for employees and agents to report violations of the standards.

Comments:

1. As a supplement to periodic compliance inspections, a firm can maintain mechanisms for receiving and investigating employee tips about misconduct by fellow employees. Investigations triggered by these tips can be highly efficient and effective ways to focus corporate resources on the detection and elimination of offenses. In addition, if reports by whistleblowers are not investigated, firm managers may be found to have engaged in a pattern of reckless toleration of the type of misconduct involved.

2. If a company is serious about obtaining reports of internal misconduct from its employees, management will structure its mechanisms for receiving such reports to maximize employee confidence in the integrity and effectiveness of those mechanisms and to minimize employee deterrence due to concerns over retaliation. As with other types of reporting, different concerns have identified various sorts of procedures and practices that best facilitate the flow of compliance violation reports. Means utilized for reporting compliance violations include hotlines, direct reports to management, announced "open door" policies, letter boxes and email addresses.

3. In smaller companies where the compliance officer personally knows employees (and possibly their voices) anonymous reporting avenues should include written notes in suggestion boxes, receipt of mailed letters, and unsigned email.

(m) Providing protection against retaliation for those who report misconduct.

Comments:

1. Because members of any organization will generally be reluctant to

report on their fellow members, and those who do report will often feel vulnerable, avoiding retaliation (and the fear of retaliation on the part of persons with unreported information on compliance problems) is one of the most difficult tasks in any compliance program. For this purpose, anonymous calls may be permitted, to minimize the risk of such retaliation.

2. Organizations may adopt and publicize strong policies to protect those who report violations. Retaliation may be treated as severe misconduct, subject to strict discipline.

3. Sometimes the risk of retaliation may be tied to continuing relationships in the workplace. Organizations may consider transfers of reporting persons or others to prevent subtle retaliation from occurring.

4. To emphasize employee protection against retaliation, a written compliance program and communications to employees may add the following in bold type: "No employee shall be retaliated or discriminated against for using the procedures contained in this policy [or program]. Violation of this rule is considered extreme misconduct, subjecting a supervisor, manager or employee to possible immediate discharge."

5. Some companies give callers a case number so they can later call to determine the status of their case without revealing their identity. Internal reports about the case are identified by that number so that names do not have to be used. Information about such calls is made available only on a need-to-know basis.

(n) Taking steps to assure that employees and agents know how to reach systems for reporting offenses and other misconduct.

Comments:

1. Employees can be reminded of the compliance program and the reporting system through a number of means. These include: (a) prominent coverage of reporting systems in a company's code of conduct, (b) discussion in training sessions, (c) emphasis in letters from top management, (d) references in the organization's internal publications, and (e) descriptions in posters.

2. In order to encourage use of the reporting systems, organizations may take steps to give them a positive tone. Some organizations refer to hotlines as "Helplines" or "Advice Lines" for this reason.

(o) Including compliance issues in due diligence studies preceding mergers and acquisitions and in planning for new business activities.

Comments:

1. Rather than wait until new business ventures are already operating, managers may elect to address compliance issues in the planning stage. Similarly, in order to avoid buying into compliance problems, these may be specifically addressed as part of due diligence reviews of acquisition targets. The latter should include assessments of the target's compliance program.

(p) Determining the degree of confidentiality and legal privilege protection that are appropriate for self-evaluative compliance activities.

Comments:

1. Managers may find that the effectiveness of the program, and the ability to continue a rigorous program, depend on the ability to preserve the confidentiality of evaluative and reporting activities, and to prevent their being used against the organization. The risk of having compliance materials used against the organization can serve as a deterrent to rigorous compliance efforts. Managers may want to take steps to maximize protections at the beginning of compliance activities. These protections include (a) attorney-client privilege; (b) work product protection; (c) environmental audit privilege; (d) medical peer review protection; (e) ombudsman privilege; and (f) self-evaluative privilege. See also Consideration 18(k).

2. Even when efforts are taken to protect compliance activities, those activities must be tempered by the risk of losing protection. For example, a

voluntary self-disclosure to the government may be held by courts to waive privilege protection.

PRINCIPLE 12: REWARD SUCCESS

Incentives and disincentives are significant tools in promoting compliance.

Factors to Consider:

- (a) Identifying policies and practices that will link favorable employment treatment, including increased compensation and advancement, to individuals' furtherance of organizational compliance.**

Comments:

1. Unless employee rewards are linked to support of a compliance program, behavior disregarding or opposing compliance will often be common in an organization. It is important to link the demonstration of conduct supporting a compliance program with positive treatment for the employees involved. Including compliance performance as a category in annual performance reviews reinforces the importance of the issue in the organization. Also, the development of progressive levels of counseling and discipline for those individuals who fail to support a program will often create strong reasons not to overlook compliance concerns.

- (b) Informing persons throughout an organization that the organization's policy is to allocate incentives and disincentives (including compensation rewards and discipline) in accordance with individuals' pursuit of compliance.**

Comments:

1. It is frequently desirable to recognize an individual's support of the compliance program in an organization.

Example a: An employee might be recognized for the detection and termination of practices that would otherwise have led to a violation. This must be done with extreme care so as not to violate privacy rights of others who were involved in the improper conduct. A thorough discussion with an attorney sensitive to these issues prior to any published or spoken communication regarding disciplinary matters or investigations is essential.

- (c) Communicating the views of organization leaders that incentives and disincentives provided for compliance performance are appropriate.**

Comments:

1. Senior staff members should generally respond promptly and consistently to indicate their support for discipline and rewards administered under compliance program standards. If employees sense a division among managers regarding support of the program or a hesitation to act upon information regarding a violation, the credibility of the program and senior management are compromised.

(d) Insuring that rewards and discipline are applied in accordance with relative levels of compliance effort.

Comments:

1. Organizations may want to develop a variety of ways to encourage behavior that is supportive of compliance programs. Program-related goals and objectives may be used as part of the annual goal setting and performance management process. Periodic awards for supporting ethical behavior in an organization may be given by the organization's president or senior management. Visible recognition of behavior supporting the compliance program will demonstrate to organization members that such actions are noticed and rewarded.

2. Smaller organizations and divisions of larger corporations which choose an "employee of the month" or operate a similar program may wish to choose employees based partially on their compliance program activities. The choice of an employee for this type of award based primarily on compliance activities (and the publicity given this choice) can send a message to all employees that compliance success is valued and recognized in the company.

COMMUNICATIONS AND TRAINING

PRINCIPLE 13: COMMUNICATE STANDARDS

The organization's compliance program has a communications component, the objectives of which are to make employees and other agents aware of applicable standards of conduct and to promote compliance.

Factors to Consider:

- (a) Separately developing the communications component of the organization's compliance program.**

Comments:

1. An organization's compliance communications program can be operated as a discrete part of an overall compliance program. In some organizations it will be desirable for the training staff to develop materials and programs aimed at compliance topics or to include those topics in existing training programs aimed at broader subjects. The sufficiency of alternative training practices in adequately informing employees about compliance requirements and related company policies can often be assessed independently of other aspects of compliance program performance. Hence, because compliance training may primarily involve training specialists rather than line managers and employees and because the success of this type of training can be assessed separately from overall compliance performance, it may be desirable to administer and evaluate the compliance training function as a separate component of a broader compliance program. In general, the formality of the communications component of a compliance program will increase with the size of an organization.

2. A compliance training program may address a variety of topics related to legal requirements, company values, and means to consider these in company business decisions and actions.

Example a: Topics that are typically featured in compliance-oriented training programs include communicating compliance policies and instructions to subordinates, ethical decision making and legal aspects of employees' jobs.

3. A common symbolic theme such as a logo may be used to identify various separate items as part of a single compliance-oriented communications program.

- (b) Identifying the appropriate organizational personnel to include in the**

design and implementation of the communications program.

Comments:

1. In the design and development of a communications program, organizations may want to divide tasks among the training and legal departments so that a comprehensive program which reflects both the behavioral and legal aspects of the training is designed. The training department will have the responsibility for developing the learning objectives and delivery system (e.g., lecture, written and video materials) while the legal department will provide the technical input identifying compliance issues and the target audiences for each legal area of concern.

2. In smaller organizations, where no internal training or legal departments exist, the human resources department may work with outside experts (including attorneys) to achieve the same objectives. However, highly technical areas such as OSHA and EPA will likely require the involvement of both technical experts and lawyers.

3. Similarly, in companies which do not have separate training staffs or human resources departments that include training as part of their responsibilities, line managers of the companies may wish to use external consultants that specialize in compliance training to design the training features of the companies' compliance programs.

(c) Specifying the instructional activities that should be included in the communications component of the organization's compliance program.

Comments:

1. Training programs can be designed by individuals knowledgeable in adult learning. Well designed programs which provide meaningful learning experiences will enhance the educational process. A program which combines a variety of media -- for example, a program that includes a lecture, written materials and a video -- will provide the attendees with attention-stimulating information.

2. The inclusion of senior management in the training process will emphasize to the attendees the importance of the compliance program. Senior managers may appear in course videos, personally introduce the program or teach the sessions.

3. If managers are to teach compliance training classes, a "train-the-trainer" class for those managers may be a desirable means to review adult learning concepts and refine the managers' classroom training techniques.

4. A review of a newly developed program and a pilot run with a variety of managers and non-managers can assist the course developers in making edits to the program prior to the introduction of the course/materials to an entire organization.

(d) Structuring the communications program to provide feedback and evaluative information.

Comments:

1. Attendees' opinions regarding the effectiveness of training classes can be helpful in modifying the training to better meet the needs of future class members.

Example a: Formal course evaluations can be included at the end of every training session. They can include an evaluation of the instructor's teaching effectiveness as well as a section which evaluates the attendees' knowledge of the material presented. These evaluations can be completed anonymously.

Example b: Another technique is to use pre- and post-class tests with the attendees. These tests can gauge the differences in employee knowledge achieved through completing a class.

Example c: Employee opinion surveys can also be administered to evaluate the general awareness of the employees about a compliance program and their attitudes toward it.

(e) Documenting the steps taken in, and the results of, the organization's communications program.

Comments:

1. Formal documentation of training attended and materials received is useful in establishing the scope of compliance training.

Example a: All employees attending training classes can be required to sign their name to an attendance sheet which lists the employee's name, class title, date, time, instructor and course agenda.

Example b: Employees and agents receiving materials such as codes of conduct and other written communications can be required to sign a form stating that they have received and read the materials presented. Copies of these signature sheets can be kept in a company's human resources department. If an employee requests a copy, an additional copy of the confirmation form can be given to the employee for his or her personal files.

Example c: One company uses "bubble sheets" to record employees' affirmation of understanding and acceptance of the company's code of conduct. These bubble sheets are scanned into a computer database allowing quick retrieval of the recorded information.

2. Documentation of training sessions completed and results achieved is legally required in some contexts. Where it is discretionary, this type of documentation should be undertaken with the understanding that the resulting records will be subject to disclosure in criminal or civil proceedings.

3. Employers may also want to keep records of compliance successes as reflected in government citations and workplace accident data and share information about the successes regularly with employees.

PRINCIPLE 14: MATCH TRAINING TO TASKS

An effective compliance program communicates appropriate compliance information and motivation to the organization's employees and other agents.

Factors to Consider:

- (a) **Providing information and skills needed to deal with the compliance issues and risks that each employee may encounter.**

Comments:

1. Some companies develop a legal risk analysis to help them tailor their compliance communications program. This involves determining the types of business activities in which the organization engages, evaluating and prioritizing the type of legal risk encountered during these activities, and developing an appropriate communications program.

2. Most organizations find that different parts of an organization have

different legal risk exposures and understanding of related compliance requirements. Firms can usefully tailor their communications programs accordingly.

Example a: Compliance training programs can be developed in a modular format that varies the training provided based on an employee's job level and function.

Example b: An organization may want to develop separate seminars for senior level staff, supervisors and managers and non-managerial employees noting the varying levels of responsibility each has in carrying out their duties under the program.

3. Additionally, specific training may be needed for persons undertaking particular job functions. The types of training needed in a particular function will be dictated by the legal standards directed toward that function and the potential sources of liability in carrying out that function.

Example a: Sales personnel may need specific training concerning foreign laws if the company sells its products in international markets.

Example b: Factory personnel may need specific training in OSHA requirements.

Example c: Individuals with responsibility for supervising others may benefit from training in coaching and counseling employees on resolving ethical dilemmas.

4. Consistent success of a compliance program in preventing, detecting, and reporting illegal or questionable business conduct requires clear and explicit support of management from top to bottom. A special effort should be made to communicate to all persons in management or supervisory positions the importance of compliance and the consequences of failure.

Example d: One way to do this is to have a company's top executive, General Counsel, or someone else clearly designated to speak for top management, brief all managers and supervisors on the company's policies on business conduct, the sensitive compliance issues faced in the industry of which the company is a part, an overview of the Federal Sentencing Guidelines for Organizations, and one or two "war stories" involving serious corporate misconduct drawn from areas in which the company faces significant exposure. These anecdotes should portray accurately the consequences of misconduct for the company, management, employees, shareholders and others negatively

affected. These briefings can also include an open discussion of what the company should do to improve compliance.

(b) Describing to affected employees and agents an organization's internal processes for compliance.

Comments:

1. Communicating the requirements of a compliance program is a continuing process. New employees informed of a compliance program when first hired may not remember it more than a few months unless their knowledge is continuously reinforced. Accordingly, many companies include descriptions of their compliance programs as part of regularly offered training programs or regularly circulated written materials.

2. A company may wish to inform outside parties with which it conducts business of the company's compliance expectations.

Example a: A company may want to consider requiring specific compliance results in agreements or contracts with agents and vendors.

Example b: As a part of its comprehensive compliance program, the company may require that its agents and vendors certify in writing that they have compliance programs in place. This certification can be included in the written contracts that the company negotiates and may also be a part of a vendor certification process.

3. Information about compliance processes can include descriptions of how employees can best further these processes. This type of information will encompass more than just descriptions of conduct required under a compliance program. It will extend further to discussions of actions by employees (e.g., asking questions, seeking out compliance information, and reporting possible risks of noncompliance) that will best promote compliance within a company.

(c) Describing to employees and other agents the legal requirements and company values that govern organizational activities and the behaviors that are necessary to meet applicable legal requirements, corporate conduct codes, and ethical standards.

Comments:

1. A company may post notices in prominent, accessible places stating one or more of the following:

- (i) The organization's commitment to compliance-applicable laws, regulations and standards of conduct;
- (ii) The organization's designation of the compliance officer (or designee) to receive any reports of impropriety or misconduct about the organization's operations or practices of which any employee or agent may have knowledge. The misconduct may be committed by an employee or agent of the organization, of another organization, or of a governmental agency;
- (iii) The availability of the compliance officer (or designee) for consultation with any employee or agent about the application of any law, regulation or standard of conduct to the compliance program;
- (iv) The compliance officer (or the compliance office) will ensure that all appropriate employees or agents attend applicable compliance training session(s), report why any employees or agents did not attend, and take measures to ensure they do so promptly;
- (v) No employee or agent will suffer any penalty or retribution for good faith reporting of any suspected misconduct or impropriety;
- (vi) Reports of misconduct or impropriety may be made anonymously or directly to a governmental agency; and
- (vii) The organization will investigate all reports. Any employee or agent found to have engaged in misconduct will receive prompt and appropriate discipline, up to and including dismissal or refusal to retain.

2. Specific modules developed for particular job functions and employee levels will provide the attendees at training sessions with the compliance skills necessary to perform their jobs without complicating the training with unnecessary information.

Example a: All employees may attend a general introductory session and then break out into separate groups by job level or function for more detailed information.

3. Smaller companies that do little internal training of employees may send employees to seminars on compliance with legal and regulatory rules. A record should be compiled and retained indicating the subject matter of the

seminars and the extent of employee attendance.

- (d) **Convincing employees and other agents of the need for compliance with legal requirements, conduct codes, and ethical standards.**

PRINCIPLE 15: TAILOR TRAINING TO AUDIENCE

An effective communications program is designed to reach the intended audience.

Factors to Consider:

- (a) **Ensuring that a compliance communications program is understandable, accessible and practical.**

Comments:

1. While compliance programs sometimes focus on complex legal issues, related training programs should be designed in "plain English" to enhance understanding and learning at all levels.

Example a: A trial or pilot program of training can be conducted to assess course material readability and the viability of the various training techniques used.

Example b: When the program must be translated into other languages the use of a communications/culture expert for that language will assist the organization in assuring that the translation reflects the intended message.

Example c: Customization of purchased programs can be considered to help training materials and practices more accurately reflect a particular organization's unique needs.

(b) Evaluating the effectiveness of various communications techniques and methods.

Comments:

1. Some companies use multiple delivery vehicles to design communications appropriate to the organization's audience. It may be difficult to develop a single method to reach all employees and cover all information. Delivery vehicles can include:

- Written communications
- Handbooks, manuals, and other reference sources
- Presentations, lectures, or classroom training
- Case discussions
- Broadcast programs
- Video or audio tapes
- Interactive software
- Games, simulations, and role playing
- Roundtables and focus groups
- Experiential training

2. Adult learners respond well to a variety of training media. Providing employees with written materials as well as lectures, computer-based learning and videos will assist with the variety of individual learning styles often found in groups of adult learners. It is important to provide the adult learner with activities which will allow him or her to discuss the material presented with other participants.

3. Employees and managers can be provided with a catalogue that includes a listing of available materials and training materials related to compliance topics.

4. The use of a well developed course evaluation will allow the organization to assess the effectiveness of each media and make adjustments as necessary to the program.

(c) Considering the occasions on which to administer the communications program.

Comments:

1. Compliance matters can be addressed on a variety of occasions in corporate environments.

Example a: New employee orientation is used by some companies to present compliance communications training. Newsletters also provide an opportunity to focus on a specific issue or topic addressed in the compliance program.

Example b: Some companies may want to provide supervisors with materials to hold monthly meetings during which they review with their department a specific compliance issue. These meetings and the attendees can be documented in the human resources files.

Example c: A company may also want to promulgate letters from the CEO on compliance topics as part of the communications program.

Example d: One company observed a noticeable difference in the effectiveness of employee training on significant and complicated issues in situations where the training was delivered late in the business day by speech alone as compared to situations when the training was conducted at a special designated time, was interactive and utilized re-creations of real life situations.

2. Some companies require all (or virtually all) employees to participate in a legal compliance training session once a year. Such a program may require annual training sessions for all employees whose job functions or responsibilities involve compliance with laws, regulations or standards of conduct applicable to the operations or practices of the organization.

3. A compliance training program should be integrated into all the regularly conducted activities of an organization.

Example e: One organization set a goal that 15 minutes of every training program should be devoted to one or more compliance topics.

PRINCIPLE 16: DEFINE COMMUNICATION RESPONSIBILITIES

All levels of management are responsible for the operation of an organization's law compliance communications program.

Factors to Consider:

- (a) Determining the role of senior management in an organization's compliance communications program.**

Comments:

1. The support of senior management, in both word and action, will set the overall tone for the communications program. Senior management can appear in training videos, teach classes or provide an introductory letter to be included with training materials. Senior management can also give attention to the program by including corporate compliance as a topic in staff meetings. Continued communication of the compliance message to the organization emphasizes that compliance is a permanent foundation of the business.

- (b) Determining the role of a compliance officer and further compliance staff members in an organization's compliance communications program.**

Comments:

1. Many companies have their chief compliance officer play an integral role in the design of compliance training materials. He or she should be a visible part of the training team, either in person or on video. The compliance officer should be available to employees. He or she should be included in performance review meetings and give presentations on the status of the program to senior management.

- (c) Determining the roles of supervisors and middle level managers in an organization's compliance communications program.**

Comments:

1. An employee's supervisor or manager can provide daily support for an organization's compliance communications program.

Example a: A supervisor can make the program a topic of staff meetings and be available to discuss compliance issues with individual employees.

Example b: Monthly compliance roundtable discussions with employees and managers can also be effective in eliciting compliance concerns and bringing about their resolution.

(d) Integrating a compliance communications program with other communications programs and organizational operations.

Comments:

1. Some companies integrate their compliance communications program with other organizational communications programs.

Example a: Articles in existing employee newsletters, discussions in regularly established staff meetings and assessments in performance reviews will serve to focus attention on compliance issues within the daily operations of the organization.

2. Smaller companies without their own newsletter may use outside attorneys to periodically write a newsletter on compliance issues for distribution to employees. Many larger law firms already publish such newsletters, often on specific topics such as employment law, environmental law, or government contracting.

RESPONSES TO VIOLATIONS

PRINCIPLE 17: RESPOND PROACTIVELY

An effective compliance program is proactive in its approach to dealing with incidents of noncompliance.

Factors to Consider:

(a) Measuring proactivity in terms of promptness and decisiveness.

Comments:

1. A proactive compliance program, capable of responding promptly and decisively, has in place processes and remedies to mitigate or eliminate misconduct or noncompliance and the future risk of recurrence.

2. The status of an employee alleged to have engaged in improper

activity should be promptly addressed. Consideration should be given to relieving that individual of his or her duties while also giving appropriate regard to the employee's rights and the corporation's duties under evolving concepts of employment law.

3. A proactive compliance program, capable of responding promptly, generally involves reviewing documents and interviewing witnesses as soon as allegations of misconduct come to the attention of the corporation's managers.

(b) Responding to indicators of problems.

Comments:

1. A first step in ensuring that a corporation responds to a violation of legal or compliance program standards is to bring the violation to the attention of firm managers. A compliance program may include several alternative methods of reporting possible violations.

Example a: Employees may be encouraged to go to their immediate supervisor. If they feel uncomfortable doing that, they may be encouraged to go to their supervisor's manager or to another member of their direct chain of management.

Example b: Another method of raising issues is through a special complaint office.

2. To ensure that reported incidents are not simply ignored, a procedure can be established for responding to reports of compliance problems. A procedure of this sort can ensure that responses to compliance problems are automatic and consistent. Such a procedure can also assist in protecting both corporate legal privileges and the anonymity and other interests of whistleblowers. This type of procedure may also help establish the company's commitment to correcting compliance problems should the effectiveness of its compliance programs be subjected to outside scrutiny.

3. To assess the consistency of its responses and to detect patterns of noncompliance, an organization may wish to use a database to track incidents of noncompliance. In this manner, the organization can track the type of incidents occurring and target those areas for employee education. Further, the tracking of such incidents can indicate larger problems occurring within the organization or focus the organization on the area in which such violations are occurring. The database may also include a response for an automatic follow-up to ensure that all incidents are investigated and that any corrective actions which should be taken or considered are, in fact, taken.

Again, the use of the database can provide evidence to outside reviewers that compliance program activities are monitored and that corrective actions are taken where appropriate.

4. A party providing information about misconduct by a fellow employee can also assist in monitoring company responses to the reported misconduct. The individual supplying this information can monitor the completion of corporate responses if the individual is given information about the progress of such responses.

Example a: In one firm, if a complaint was filed with the corporate concerns program and the complainant provided his or her name, the individual was kept informed of the status of the investigation and the final resolution. If the caller wanted to remain anonymous but still wanted to know the status of the case, he or she was assigned a fictitious name or ID number and asked to call back at a given time.

5. Some firms have successfully used crisis management techniques to ensure proper responses to incidents of noncompliance.

Example b: The challenge of responding effectively to compliance incidents caused the formation by one company of a standing Incident Management Team. This team was delegated the responsibility for devising a specific incident management plan, customized to be responsive to the known facts, no later than 24 hours after an initial incident report.

6. Firms can also utilize feedback reports in response to detected misconduct to help ensure that the response is complete and comprehensive.

Example c: Among the elements of one compliance incident management plan was a requirement that the responsible compliance officer confirm in writing the successful completion of all corrective action measures to the organization's senior compliance manager.

7. Systematic compliance monitoring practices can also incorporate features that help ensure a proper response to detected misconduct.

Example d: In order to promote the timely identification of and prudent response to compliance incidents, one company directed its Audit Managers to report to its law department, within 24 hours of discovery, known or suspected compliance violations detected in the normal course of audit activities.

8. Readily available internal data, routine correspondence from external sources, or other types of information maintained in the ordinary course of business may indicate the existence of compliance weaknesses. Accordingly, a program may include a methodology for evaluating such information, identifying patterns that are suggestive of problems, and initiating further inquiry if appropriate.

Example e: A pattern of customer complaints received might warrant further inquiry into a particular sales person, security or branch office.

(c) Keeping abreast of regulatory changes and industry experience.

Comments:

1. Tracking of compliance trends in an organization's industry and related industries can be furthered through a formal mechanism to ensure timely receipt of information. Some industries have formed compliance practice forums for industry participants to meet on a regular basis and to exchange experiences on compliance activities. Companies share information on the compliance risks they address and on instances of misconduct in their industry.

2. An effective compliance program can supplement the internal experience of the organization's own managers and officials with that of others in its industry or field. In addition to traditional means of information exchange such as seminars, articles in industry publications, trade groups, and the like, compliance managers can pursue other sources of information such as networking with counterparts at similar organizations and at regulatory agencies. While such networking has advantages, care does need to be taken to preserve the confidentiality of information as required by law and prudent management.

(d) Identifying and responding to actual or suspected violations.

Comments:

1. Useful corrective actions following a detected instance of illegal conduct may include:

- (i) Assessments of the conduct and related corporate activities to determine the extent of the illegal activities and their causes;
- (ii) Analyses of surrounding corporate activities to determine whether causes of the conduct are continuing or peculiar to the offense at hand;
- (iii) Introduction of changes in operating practices or procedures that will make a recurrence of the same misconduct less likely;
- (iv) Assignments of responsibility for the implementation and continuation of these changes;
- (v) Introduction of improved information gathering practices to make earlier detection of similar misconduct more likely; and
- (vi) Special short-term monitoring of the effectiveness of newly instituted corrective actions to confirm that they are sufficient to prevent further similar offenses.

2. It is often useful to designate a specific individual with responsibility for identifying and responding to actual or suspected violations.

Example a: In one company, the General Counsel is given this responsibility and is required to report to the company's CEO within 12 working days of initial receipt of information in all cases involving misconduct.

3. To identify and respond to violations, it is important to heighten the awareness and commitment of managers and supervisors to compliance. One way to accomplish this is by involving managers and

supervisors directly in corrective actions when misconduct has occurred. Some firms require those delegated responsibility for fixing problems to report at a specified time to a compliance manager or top executive on the remedy and how well it's working.

4. Managers and supervisors can be encouraged to actively identify and respond to actual or suspected violations by making this behavior an explicit performance goal. Rewards can be considered not only for the absence of violations but also for leadership behavior and activities which explicitly promote commitment to compliance.

- (e) **Developing special procedures for gathering evidence of misconduct by personnel with substantial discretionary authority.**

PRINCIPLE 18: GATHER COMPLIANCE INFORMATION

An effective compliance program possesses or has access to investigatory, evaluative and reporting resources and utilizes those resources to monitor compliance.

Factors to Consider:

- (a) **Determining who will conduct compliance investigations in advance of occasions for such investigations.**

Comments:

1. While the resources needed to achieve compliance will vary from organization to organization, an investigative capability for looking into the existence, scope, and sources of misconduct will typically be a necessary component of an effective compliance program. This capability may be implemented through a variety of types of investigators. In selecting these investigators, it will generally be unwise to leave investigation of significant compliance issues solely to managers of the organization's regular activities. These managers may lack the objectivity, skills, or incentive to conduct a proper investigation.

Example a: A large organization may support full-time compliance investigation personnel. These investigators will, over time, be able to accumulate useful experience and information about both the compliance risks faced by an organization and the internal sources of compliance-related performance information.

- (b) Assuring that compliance investigations are undertaken by persons with adequate expertise to identify breaches of legal requirements and compliance program standards.**

Comments:

1. An effective compliance program may designate a specific individual with relevant expertise to carry out compliance investigations.

Example a: Many companies designate their General Counsel to perform investigations of potential compliance problems. The legal training of these individuals often assists them in identifying proper avenues for investigation. The use of inside or outside attorneys for investigations of misconduct may also mean that the corporation can invoke the attorney-client or work product privileges to shield investigation results from later disclosure.

Example b: In a small organization, outside attorneys and investigators with special expertise may be retained as necessary to complete compliance investigations.

- (c) Making certain that further investigations and responses are undertaken following the detection of possible misconduct.**

Comments:

1. In order for an investigation to proceed quickly and efficiently, it may be necessary for an organization's top executives to describe to key employees the existence of the investigation and its importance.

- (d) Assuring the adequacy of resources available to investigators.**

Comments:

1. A compliance program can specify explicit standards defining the circumstances in which specialized investigative resources will be employed to address compliance issues. Such resources may include both inside and outside personnel that will be marshaled depending on the kinds of skills needed for a particular investigation and the number of individuals required to complete the work in a timely way.

2. An authorizing letter from a company's Chief Executive Officer to investigators may assist in the dedication of resources needed for an internal investigation.

(e) Insuring the independence of compliance investigators from line managers whose activities or organizations are being scrutinized.

Comments:

1. An independent investigation requires that investigative resources be under the control of an individual or group that is free of influence from those persons who may be investigated. In circumstances where high-level personnel are alleged to have acted improperly and real independence is virtually impossible in view of the role of the alleged perpetrator, the person in charge of compliance must have the authority to call on outside resources and to delegate the investigation to outside resources. This type of outside attention will sometimes be necessary to ensure the independence necessary for a compliance program to be effective.

2. The results of a compliance audit or investigation must be assured a clear path to senior management that is not subject to diversion or delay by those who are subject to the audit or investigation. Some companies implement strict procedures for the manner in which regular audit reports are to be prepared, develop general guidelines for reports regarding investigations of specific wrongdoing, and make specific plans for distributing those results to responsible senior management. Procedures of this sort can ensure that audit findings and investigation results are not forgotten and simply relegated to the "file," but instead are dealt with promptly and decisively by responsible senior management.

3. An independent check on compliance investigations can sometimes be implemented through a review process.

Example a: One organization implemented a two-step audit with supervisors conducting periodic compliance audits which the company's audit function regularly reviewed to identify compliance deficiencies. Absent the involvement of an attorney, such self-evaluative studies may be discoverable in civil and criminal cases.

Example b: One organization routinely conducts "assurance audits" designed to evaluate the effectiveness of compliance investigations and other compliance management systems.

(f) Developing record-keeping capabilities and resources to aid in identifying compliance problems and in monitoring responses.

Comments:

1. Record keeping capabilities are particularly important in tracking allegations of improper conduct and actions taken to correct such conduct. Computer programs can be utilized to keep information on compliance investigations and responses to problems. Useful information that can be recorded includes the name, social security number, office extension, and address of the individual reporting misconduct, an identification number for the allegations of impropriety, a description of the nature of the allegations, the date of any response, the employees assigned to address the allegations, the date such assignment was acknowledged, whether the matter is active, on hold, or closed, the promised completion date, any action taken to resolve the allegations, any response of the employee to the action, and the date the file was closed.

2. Documentation of compliance audits can be created by having an auditor complete an audit checklist and through preparation and maintenance of audit findings reports.

3. Many companies have formal records retention policies designed to ensure that records that may become relevant to compliance issues will be maintained in an orderly and non-discretionary manner. In general, compliance records should be retained as long as they are legally required to be kept or are likely to contain relevant, useful information for the subsequent management of compliance efforts. For particular categories of documents, the likelihood that they contain information that is relevant to future compliance management depends on whether they contained information that related to compliance when the documents were created and whether, due to changes in company practices or legal requirements, that information remains relevant or useful in addressing current compliance problems.

Example a: A company could require that certain types of documents never be destroyed, while allowing other categories of compliance program records to be disposed of at the end of a specified retention period.

4. Record retention policies should be followed, and should not be changed, during the course of any external investigation. Destruction of documents outside the normal course of a records retention policy, or changing the policy to permit destruction of records that might otherwise be preserved, could be viewed as obstruction of justice or spoliation of evidence.

5. Likewise, records pertaining to an event at issue should not be destroyed during the pendency of any judicial proceeding or criminal investigation. Regular destruction practices should be reviewed at the outset of an external investigation to ensure that records required to be retained are not subject to normal destruction processes.

6. Files containing reports of violations should contain reports of any corrective actions.

(g) Assuring preparedness for compliance investigations and responses.

Comments:

1. One way to increase preparedness for compliance investigations is by running practice drills to assure that a compliance program's capabilities are in keeping with changing needs of the organization for effective investigations and offense reporting. These drills would involve undertaking a mock investigation and response development.

(h) Assuring appropriate scope and methodologies in the completion of compliance investigations and responses.

Comments:

1. When conducting interviews, interviewers should advise the employees being questioned that any attorneys involved in the interviews represent the company rather than the employees personally. Interviewees should further be advised that decisions to waive privileges and to disclose materials gathered during the course of an internal investigation will be the prerogative of the company rather than of any individual employee.

2. Proper means for conducting compliance investigations may be defined, at least in part, by union agreements or other contractual terms of employment. Standard operating procedures for compliance investigations should be designed to be consistent with these sorts of agreements or contractual terms where applicable.

Example a: Collective bargaining agreements may require that union representatives be present during investigatory interviews.

Example b: Employee handbooks may set forth procedures regarding investigatory interviews.

- (i) Defining reporting systems within a company that will provide indications that compliance investigations are needed.**
- (j) Assuring accuracy and reliability of information gathered in compliance investigations.**
- (k) Conducting investigations in a manner that is likely to preserve the attorney-client and work product privileges.**

Comments:

1. Although other standards may apply in some states, in most jurisdictions attorney-client privilege applies to corporate communications when: 1) a communication to an attorney is made by a corporate employee for the purpose of securing legal advice, 2) the employee making the communication did so at the direction of this corporate superior, 3) the superior made the request so that the corporation could secure legal advice, 4) the subject matter of the communication was within the scope of the employee's corporate duties, and 5) the communication was not disseminated beyond those persons who, because of the corporate structure, needed to know its contents. While these circumstances will generally be sufficient to establish the privilege, not all of these may be necessary for the attorney-client privilege to be recognized. The work product privilege can also apply in corporate contexts where counsel gathers information or conducts legal analyses in contemplation of litigation.

2. In conducting a compliance investigation, companies generally attempt to establish the attorney-client and work product privileges, thus preserving their option in the future to either invoke the privileges or to waive the privileges and make disclosures to the government. In order to establish the attorney-client and work product privileges, companies generally consider taking some or all of the following steps: 1) stamping each document generated in an investigation conducted by an attorney (or under the

supervision of an attorney) "Privileged and Confidential: Attorney's Work Product", 2) requesting formal authorization to conduct an internal investigation, 3) having corporate management formally authorize the internal investigation, 4) having an attorney conduct or coordinate the investigation, 5) maintaining a separate file for the investigation, 6) having management formally direct employees to cooperate in corporate counsel's investigation, 7) considering the distinction between opinion and ordinary work product in conducting employee interviews, 8) referencing the elements of the privileges in any report summarizing the results of the investigation, and 9) creating a confidential relationship with any consultant or investigator hired to assist in the investigation.

PRINCIPLE 19: CONSIDER OFFENSE REPORTING

An effective compliance program addresses the need for external reporting of violations of the law.

Factors to Consider:

- (a) **Assuring that self-reporting by an organization will comply with mandatory reporting requirements.**

Comments:

1. Compliance with mandatory reporting requirements is an essential ingredient of any compliance system. Compliance with such mandatory reporting requirements requires knowledge of those requirements. Hence, persons charged with ensuring compliance with reporting requirements should be particularly well versed in those requirements and should be the designated recipients of information pertaining to company activities that may trigger reporting obligations.

2. Because many mandatory reporting requirements have short periods in which reports must be made (such as at the earliest possible opportunity), individuals having responsibility for specific corporate activities are often given the responsibility to make related reports. In such cases, compliance programs sometimes establish procedures to ensure that information is transmitted in a timely manner to the person charged with reporting responsibilities. Sometimes the information is

provided simultaneously to the company's general counsel or such individuals will consult with their company's legal department if questions arise, but these individuals have the authority to make reports on their own.

3. If the reporting function is reposed in the legal department, individuals who may lack knowledge of reporting requirements may transfer information to the legal department slowly, leading to extended delays in reporting and corresponding violations of statutes requiring prompt reporting. Steps should be taken to ensure that time periods for reporting are satisfied.

(b) Weighing the advantages of voluntary self-reporting of misconduct under Federal Sentencing Guidelines for Organizations, government voluntary disclosure programs and other legal standards.

Comments:

1. Federal Sentencing Guidelines for Organizations do not impose any obligation to report violations of law. Rather, the Sentencing Guidelines encourage voluntary reporting by providing significant mitigation of penalties for companies that voluntarily report. Companies choosing not to report voluntarily cannot avail themselves of the penalty mitigation provisions set forth in the Sentencing Guidelines, although they may still obtain the other benefits of a properly implemented and enforced compliance program --e.g., reducing or eliminating future violations of law, minimizing civil exposures, and appealing to prosecutorial discretion notwithstanding the failure to report.

2. When companies uncover violations of law not required to be reported, they generally evaluate whether or not to report such violations based on the unique facts of each individual case. Companies generally carefully consider, in addition to the penalty mitigation provisions of the Sentencing Guidelines, the following factors: a) the likely consequences of voluntary disclosure (including potential impacts on criminal prosecutions, jail penalties, civil liability, debarment under government programs, corporate stigma, and later business opportunities); b) the propensities and track record of the governmental or regulatory body or individual to whom disclosure would be made; c) potential options in determining to which governmental or regulatory body to disclose; d) the potential for disclosure to boost public confidence in the company's products or services; e) whether the public would expect disclosure of the type of violation or conduct uncovered and lose confidence in the company's products or services if the violation or conduct surfaced independently; f) whether the company is "public," having independent members of the Board of Directors who may perceive greater obligations to disclose than otherwise exist; g) the potential to disclose to a civil -- not criminal -- authority and the likelihood of referral to criminal authorities; h) the likely response of governmental or regulatory authorities if

they uncovered the violation in the absence of voluntary disclosure; i) the expectations of company personnel; and (j) the likelihood of the independent discovery of the violations by governmental authorities. Even when a company determines not to make voluntary disclosure, it should carefully consider its responsibilities concerning remediating the harm from violations and abating any continuing violations. See also Consideration 19(i) (Comments 1-4).

Example a: A recent EPA policy, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations 60 Fed. Reg. 66706 (December 18, 1995), provides that if a company uncovers a violation using either environmental auditing or a compliance program and promptly and voluntarily discloses the violation to the government, it may reduce and perhaps eliminate gravity-based civil and criminal penalties for the violation.

Example b: Many states have legislation treating an environmental audit as privileged as long as the company takes reasonable and prompt steps to correct detected violations of environmental laws and to notify the government of those violations. Factors in Decision on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violators, U.S. Attorneys Manual, 5-11.104A, should be consulted in connection with the voluntary disclosure of environmental violations.

(c) Designating decision-making responsibility and authority for determining when and how to self-report detected misconduct.

Comments:

1. Companies may designate different people to be responsible for reporting different types of violations as required by law. For instance, company health and safety personnel may be appropriate to report accidents as required by OSHA. Company environment personnel may be appropriate to report environmental discharges.

(d) Determining the appropriate scope of disclosures when a decision is made to self-report detected misconduct.

Comments:

1. Once a decision to disclose is made, a decision must be made as to what to disclose and whether to seek protection from disclosure for information withheld.

Example a: A company uncovering a violation during the course of an audit may decide to disclose the violation by itself or the entire audit report. Even if they choose to disclose the entire audit report, company managers might choose to withhold the underlying interview memoranda or other documents generated during the course of the audit.

Example b: Some companies seek to condition disclosure on a representation that the governmental authority involved will not disclose the information to third parties absent a court order. Others condition disclosure on an agreement that the governmental authority will not seek disclosure of any additional information that might otherwise be privileged.

(e) Addressing potential conflicts between an organization and its agents or employees where the organization chooses to report detected misconduct.

Comments:

1. Conflicts of interest between an organization and its agents or employees can exist when the testimony of one may implicate the other.

2. A conflict of interest may also exist if an individual having knowledge of wrongdoing by the company is represented by the same lawyer as the company. Under these circumstances, if an employee is a target of an investigation, the lawyer's obligation to the corporation may be at odds with his or her obligation to the individual employee. Accordingly, such representation is generally prohibited. Under these circumstances, some companies advise employees that they have the right to obtain independent counsel.

3. Corporations sometimes indemnify an employee for the cost of separate counsel to represent the employee. Corporations may wish to consult an attorney prior to agreeing to indemnify an employee for the cost of his or her attorney to ensure that the proposed indemnification is consistent

with applicable corporation laws and with any indemnification provisions contained in the charter or bylaws of the company involved.

(f) Waiving or preserving legal privileges in the course of disclosing information to public officials.

Comments:

1. Where information is required to be disclosed to public authorities under mandatory reporting provisions, the public authorities frequently insist that the attorney-client privilege does not protect against such disclosure.

2. In circumstances where disclosure is not required, a corporation has the ability to decide to disclose information about violations (probably waiving privileges that might otherwise apply to that information) or not to disclose (potentially preserving the privileges). Many companies designate their General Counsel as the individual making such decisions because such individuals generally have the best understanding of legal requirements regarding disclosures and the consequences of waiving any applicable privileges.

(g) Considering whether self-reporting will be accompanied by an organizational acceptance of responsibility for disclosed violations.

Comments:

1. Federal Sentencing Guidelines for Organizations provide that entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility warranting penalty mitigation. The Sentencing Guidelines provide that admission of guilt after putting the government to its burden of proof at trial is generally not a sufficient acceptance of responsibility but that an organization may go to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to the organization's conduct) without losing the benefits of penalty mitigation.

(h) Deciding whether to cooperate with external investigations by public authorities.

Comments:

1. Federal Sentencing Guidelines for Organizations provide that penalty mitigation requires cooperation which must be both timely and thorough. According to the Guidelines, to be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the corporation should disclose all pertinent information known in order to permit law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.

2. A company deciding not to cooperate with external investigations should ensure that its conduct during the course of the investigations does not amount to obstruction of justice. See also Consideration 19(e) (Comments 1-3).

Example a: A company not cooperating with an external investigation advises its employees that they may, but are not obligated to, speak to external investigators and that, if they choose to, the company will then make the services of the company's attorney available to them. The company does not advise its employees not to cooperate with the external investigators and if employees do cooperate, it tells them to tell the truth.

Example b: Prosecutorial authorities sometimes request that companies not disclose an ongoing investigation to company employees or to third parties. Such nondisclosure may be an important feature of the cooperation sought from the company.

(i) Remediating harm from detected misconduct.

Comments:

1. Compliance programs are designed in part to protect companies from liability. One related activity to be considered in a compliance program is remediating any harm from past offenses. Companies that are unwilling to commit the resources necessary to remediate harm uncovered through compliance investigations should consider whether the investigation itself ought to be conducted.

Example a: Some companies have instituted procedural requirements under which proposals to address remediation of harm are required

within 10-15 days of uncovering any violation.

Example b: Uncovering harm in an investigation and failing to correct it may be viewed by prosecutors and agency officials as evidence of a company's willful disregard of law, failure to take responsibility for the past misconduct of company employees, or failure of the company to treat its compliance program seriously.

2. Another activity to be considered in a compliance program is correcting any ongoing violations. The failure to correct an ongoing violation may itself constitute an independent violation.

Example a: A company discovers that groundwater beneath its site has been contaminated from an off-site source for which the company is not responsible. To the extent that the company concludes that reporting statutes do not require disclosure, it should still consider whether the contamination constitutes a threat to public health and, if so, whether the failure to report could subject it to civil toxic tort liability or is otherwise contrary to the company's obligations as a good corporate citizen.

3. While companies should seriously consider promptly correcting any violations or harm uncovered, circumstances may exist where there are practical limits on a company's ability to take corrective action. In such cases, the company should make a good faith effort to address the problems as promptly as is reasonably practicable.

Example a: A small business uncovers a series of environmental violations of varying degrees of seriousness. Its resources do not permit it promptly to address each violation. The company establishes a three-year timetable to address all the violations and established a budget for this activity. By spreading the cost over three years, the annual expenditures on corrective action are substantial in view of the company's annual revenues but do not seriously impact the company's annual bottom-line.

4. Even if a company does not have the financial resources to take all possible corrective actions, compliance programs that include reasonable corrective measures can realize substantial corporate benefits by reducing the scope or frequency of noncompliance.

(j) Identifying the scope and ramifications of an organization's vicarious responsibility for detected misconduct.

Comments:

1. Under federal laws and those of most states, corporations are liable for offenses committed by employees who are acting within the scope of their job duties and for corporate gain. Affirmative support for an offense by corporate executives or managers generally is not required to establish corporate liability.

2. However, corporate self-reporting to public officials of offenses detected through a compliance program can significantly reduce the instances and severity of corporate liability. Even when an offense is committed within an individual's scope of employment and for corporate gain, prosecutors have the discretion to decide not to bring charges against the corporation involved based on the corporation's cooperation in the detection and investigation of the offense and assistance with the prosecution of the individuals who committed the offense.

3. In assessing whether or not a corporation is likely to be prosecuted for the actions of its employees, another critical factor to consider is the strength of the company's compliance program. For example, the former U.S. Attorney for the District of New Jersey has indicated that whether a corporation had made a "reasonable effort" to avoid criminal activity would be a "strong factor" in determining whether or not to seek an indictment against a corporation.

4. Under some state laws, an organization's vicarious liability for offenses by employees will also include an inquiry as to whether a violation was authorized or tolerated by high-ranking officers of the organization and the level of knowledge the organization's officers and directors had about the offense prior to its commission.

PRINCIPLE 20: EVALUATE PROGRAM EFFECTIVENESS

An effective compliance program utilizes incidents of noncompliance to evaluate its own effectiveness, to correct deficiencies and to effect improvements.

Factors to Consider:

(a) Disciplining and retraining responsible employees.

Comments:

1. In order to deter later misconduct, individuals who are found to have been responsible for misconduct or noncompliance should generally be disciplined. To set the stage for effective discipline, compliance programs should include policies that specify that violators will be subject to discipline as well as the range of sanctions that are available. If a company has collective bargaining agreements or other formal standards for discipline procedures already in place, discipline pursuant to a compliance program needs to be carefully coordinated with the separate discipline standards.

2. For breaches of compliance program standards amounting to less than an offense (e.g., failures to take actions aimed at reducing the likelihood of offenses without participation in or support of any actual offenses), a sufficient response may entail modest discipline coupled with retraining aimed at ensuring that the employees do not repeat the same mistakes. Increased training and monitoring will be particularly appropriate when ignorance of legal or compliance program requirements was a significant factor in an employee's misconduct.

3. Sometimes, incidents of misconduct may reveal widespread gaps in employees' knowledge or observance of compliance program requirements, thereby signaling the need to retrain whole groups of employees.

4. Since all training has a limited period of retention, refresher training programs are often prudent. The detection of an offense may justify an increased frequency of refresher training.

(b) Identifying root causes of misconduct, including weaknesses in detection practices.

Comments:

1. In order to learn from a detected incident of misconduct and avoid future instances of similar misconduct, companies will often find it valuable to identify root causes of compliance problems. Root-cause analysis looks beyond superficial symptoms to underlying factors contributing to or causing shortcomings or failures in the system. Root-cause analysis asks why something occurred and what could have been done to have prevented it from happening in the first place.

Example a: A bribery scheme may raise pertinent questions about corporate activities leading to the offense such as the hiring practices applicable to the offender.

2. Assessments of weaknesses in offense detection practices that allowed an offense to remain undetected can include evaluations of the knowledge and conduct of superiors and coworkers of the person who engaged in the misconduct to see why the misconduct went unreported.

(c) Using external reviewers to evaluate incidents of misconduct and related compliance program weaknesses.

Comments:

1. In evaluating an incident of misconduct, it is sometimes highly useful to engage an external reviewer to analyze the incident and identify possible weaknesses in a compliance program that may have contributed to the incident. The external reviewer may be someone from an area within the company entirely unrelated to that in which the incident occurred. The external reviewer may also be someone from outside the company. Advantages of outside reviewers may include special expertise or perceived objectivity. Disadvantages may include company privacy questions or distrust and lack of full cooperation with the reviewer by employees important to uncovering the facts.

2. External reviewers may be able to advise on steps other companies have taken in similar situations or make recommendations which would not be palatable from inside sources. A company's independent auditors may have greater expertise concerning appropriate

remedial measures than do company personnel in matters involving weaknesses in or deviations from the system of internal controls or recordkeeping.

(d) Assuring prompt and effective follow-up measures.

Comments:

1. When an incident of misconduct evidences weakness in a compliance program, effective corrective measures help provide counter-evidence of the future soundness of the program. Effective corrective measures should be based on an accurate analysis and diagnosis of the factors contributing to a specific problem, a clear description of the proposed remedy, and a statement of how the proposed remedy will actually help correct the weakness. Effective measures should also include a timetable for implementation and an enumeration of the steps to be used to evaluate the adequacy of the correction.

2. Company practices can ensure that a compliance program is reexamined and the need for modification of the program is carefully considered following a compliance breakdown.

Example a: One company required its compliance officer to provide the board of directors with a written assessment of every compliance failure and recommendations for program changes.

3. A compliance program can help ensure positive changes in an organization's culture following a compliance failure.

Example b: One company held discussions of compliance risks and employees' compliance concerns to "clear the air" after a serious compliance problem led to major personnel changes. These sessions were held in part because the nature of the compliance problems leading to the changes had not been fully disclosed. While the misconduct of the individuals involved was not described, the sessions were aimed at overcoming the reluctance of employees to raise compliance issues and to share information. The meetings were led by trained facilitators, who worked closely with a company lawyer in documenting concerns, developing responses for management consideration, and implementing responsive actions.

NCPL CORPORATE COMPLIANCE PRINCIPLES

APPENDIX A

SAMPLE CODE OF CONDUCT

Prepared by Karl Groskaufmanis
Fried, Frank, Harris, Shriver & Jacobson

INTRODUCTION

The core precept of a compliance program is that it sets an organization's standard of conduct. The basic building block for most compliance programs is a code of conduct disseminated throughout the organization. Such a code of conduct will not constitute a complete compliance program of itself--a compliance program should also include additional features that comply with the compliance principles described elsewhere in this volume.

There can be no "universal" code of conduct. Each organization must adapt its statement of compliance standards to its environment and the compliance concerns confronted by that organization. In determining the range of compliance issues that a code of conduct will address, corporate managers may wish to review the applicability to their company of the types of compliance concerns listed in Consideration 1(d) (Comment 1) of these Principles. Furthermore, while this sample code is primarily addressed to law compliance and liability avoidance, corporate managers may wish to consider a broader focus for a code of conduct -- e.g., extending such a code to compliance with specified company values or ethical standards.

There are, however, certain fundamental compliance code provisions that are relevant to most organizations. The NCPL Compliance Principles Commission believes that a short statement of these provisions may be particularly useful to smaller companies and organizations that have evolved to the point where a formal compliance program must be developed. To aide such efforts, the following code of conduct addresses, as a model, some of the key code provisions that a small company may wish to adopt as part of a broader compliance program.

The publication of this sample code in conjunction with the NCPL Compliance Principles should not be taken as legal advice as to the sufficiency of this code for a particular company. Company managers may wish to seek advice from an attorney regarding both the range of compliance issues to be addressed in a code of conduct and the compliance methods specified there. For further information on compliance

codes and their functions in compliance programs, see Karl A. Groskaufmanis, Corporate Compliance Programs as a Mitigating Factor in Corporate Sentencing Guidelines: Compliance and Mitigation § 5.08 (Jed S. Rakoff, Linda R. Blumkin, Richard A. Sauber eds. 1996).

XYZ CORPORATION

CODE OF CONDUCT

INTRODUCTION

Each employee contributes to the care and maintenance of our most important asset — our reputation for integrity. Each employee must help preserve that asset.

Our reputation for integrity is the cornerstone of the public's faith and trust in our company; it is what provides us an opportunity to serve our customers. A single employee's misconduct can do much to damage a hard-earned reputation. This code is presented to assist you in guiding your conduct to enhance the reputation of our company. This code supersedes all previous codes and policy statements.

Employees should understand that this code is drafted broadly. In that respect, it is our company's intent to exceed the minimum requirements of the law and industry practice. The following sections identify conduct which is never acceptable and will always be considered outside the scope of your employment.

The company intends to enforce the provisions of this code vigorously. Violations could lead to sanctions, including dismissal, as well as, in some cases, civil and criminal liability.

No corporate code can cover every possible question of business practice. When in doubt — ask before you act.

Upholding the code is the responsibility of every employee. All managers are held accountable for code enforcement in their divisions. [The Administrator] is the corporate officer who will administer the company's overall compliance program. Any failure to adhere to the standards outlined in this code may be reported directly to him without fear of retribution.

Inevitably, the code addresses questions that escape easy definition. There will be times when you are unsure about how the code applies. In such cases, you should feel free to contact [the Administrator].

CONFLICTS OF INTEREST

Avoid any situation in which your personal interests conflict with those of the company.

Each employee owes a duty of loyalty to the company. For that reason, all employees must exercise great care any time their personal interests conflict with those of the company. The following sections review several common problems. The list is not exhaustive. The general principle, however, is simple: exercise great care any time there might be even the appearance that you acted for reasons other than to benefit the company.

Relations with Suppliers

Employees purchasing goods or services on behalf of the company must exercise great care to preserve their independence.

Employees who deal with the company's suppliers are placed in a special position of trust. This position requires you to exercise caution in dealing with suppliers. As a general rule, no employee should ever receive a payment or anything of value in exchange for a purchasing decision. The company recognizes an exception for token gifts (such as a calendar) of nominal value (less than \$100). If you are in doubt about the policy's application, [the Administrator] should be consulted.

Outside Employment

Your first obligation rests with the company.

The company requires the full attention of its employees. In general, this level of attention makes it impractical for employees to pursue extensive employment outside the company. Moreover, outside employment also could lead to a conflict of interest for the employee. Consequently, any outside employment must be approved in advance by [the Administrator].

Corporate Boards

Any employee invited to join a corporate board of directors must obtain the approval of [the Administrator].

The director of a corporation has access to sensitive information and charts the

course of the corporation. When a company employee is invited to play that role for an outside organization, the company must take safeguards to shield both the company and the employee from even the appearance of impropriety. For that purpose, [the Administrator's] approval is required before any employee can accept a director's position at another company.

Corporate Opportunities

Do not divert for personal gain any business opportunity from which the company may profit unless the company validly decides to forego the opportunity.

An employee's duty of loyalty to the company is violated if the employee personally profits from a business opportunity which rightfully belongs to the company. This problem arises when an employee has an interest in an entity which offers a product or service which could be offered by the company, or when an employee directly offers such a product or service.

LEGAL COMPLIANCE

Antitrust

The Company is committed to vigorous competition in the marketplace.

The company's business decisions must reflect our independent judgment. Conduct aimed at limiting competitive forces is inconsistent with that commitment and may violate the antitrust laws. No employee should communicate with competitors regarding current or future prices, pricing policy, sales terms, production levels or any other information that relates to the marketplace in which the company operates.

Improper Payments

Bribery, kickbacks or other improper payments have no place in the company's business.

All employees who come into contact with government officials – domestic and foreign – must maintain the highest professional standards. Never offer anything of value to such officials to obtain a particular result for the company. Bribery of government officials can lead to criminal penalties.

These same standards should govern your contacts with those in the private sector. Entertainment of business prospects must be reasonable and documented carefully. Any questions regarding the application of this policy should be referred to [the Administrator].

Accounting Practices

Each employee must help maintain the integrity of the company's financial records.

No code of conduct can review the extensive accounting requirements which the company must fulfill. To meet these obligations, however, the company must rely on employee truthfulness in accounting practices. Employees may not participate in any misstatement of the company's accounts. At the same time, no circumstances justify the maintenance of "off-the-books" accounts to facilitate questionable or illegal payments.

CONFIDENTIALITY

Corporate Information

One of the company's most important assets is its confidential corporate information. The company's legal obligations and its competitive position often mandate that this information remain confidential.

Confidential corporate information generally falls into two categories. The first category encompasses information intended for internal use only. This information typically relates to the company's operations – customer lists, pricing policies, production techniques or "trade secrets" (confidential information used in the course of business to give the company a competitive advantage). The company endeavors to keep this information confidential indefinitely.

The second category, by contrast, involves confidential corporate information which the company routinely discloses to the investing public. This information often gauges the company's financial performance (e.g., quarterly financial results of the company's operations) or identifies events which have a significant (or "material") impact on the value of the company's securities. As outlined below, premature disclosure of such information may expose the individual involved to onerous civil and criminal penalties.

Confidential corporate information must not be disclosed by employees to anyone outside the company, except for a legitimate business purpose (such as contacts with the company's accountants or its outside lawyers). Even within the company, confidential corporate information should be discussed only with those who have a need to know the

information. An employee's obligation to safeguard confidential corporate information continues even after the employee leaves the company.

Communications with the Public

[The Administrator] speaks for the company.

[The Administrator] is the company's spokesman and arranges for the regular release of the company's financial results. All requests for information – from reporters, securities analysts, shareholders, or the general public – should be referred to [the Administrator]. Releasing any corporate information through other channels is a violation of the code of conduct.

Insider Trading

Never trade securities on the basis of important confidential information acquired at the workplace.

Insider trading is a serious crime. The offense may occur when, for example, a person trades stock while in possession of material, nonpublic information about the company involved. Information is “material” if it would affect the average person's decision whether to buy, sell or hold the stock. It is “nonpublic” if it has not been released to and absorbed by the investing public.

Both the company and all its employees share an interest in avoiding an insider trading investigation. An individual convicted of insider trading may face criminal penalties of up to ten years in prison and/or a \$1,000,000 fine. The investigation could tarnish the company's reputation and may subject the company to additional penalties.

Consequently, company policy forbids insider trading by all employees. Do not trade on the basis of confidential information obtained at the workplace – whether the information relates to the company or some other entity.

Insider trading law is far from clear. An employee legitimately may be unsure how the law applies in a particular instance. Given this uncertainty, all employees are encouraged to contact [the Administrator] with any questions or before any trade involving the company's stock.

WORKPLACE RELATIONS

Discrimination

Discrimination has no place in workplace decisions.

The company is committed to allowing employees to progress based on their talents. No employment decision may be based on, for example, an employee's or employment applicant's race, color, sex, religion, age, national origin, marital status, or disability. Each employee is subject to this standard. [The Administrator] is the officer responsible for enforcement of this policy. If you believe this policy has been violated, contact [him/her] immediately.

Harassment

Harassment of employees will not be tolerated.

The company expects all personnel to follow a simple standard: all employees must be treated with respect. "Harassment" covers a wide spectrum of conduct, *i.e.*, unwelcome sexual advances or racial epithets. This code sets a simple standard and everyone associated with the company must abide by it. Any employee who believes this standard is not being maintained should contact [the Administrator] immediately.

ENFORCEMENT

Violations of the code may lead to serious sanctions, including termination for cause.

The conduct of each employee matters vitally to the company. A misstep by a single employee can cost the company dearly; it undermines all of our reputations. For these reasons, violations of the code may lead to significant penalties, including dismissal.

CERTIFICATION

I certify that I have received, read and understood the [XYZ Corporation] Code of Conduct. I promise to comply with the terms of the code in the future and understand that violation of the code may lead to sanctions, including dismissal.

Signature

Print Name

Date

NCPL CORPORATE COMPLIANCE PRINCIPLES

APPENDIX B

CORPORATE COMPLIANCE BIBLIOGRAPHY

Edited by Lisa M. Horvath

Compiled and annotated by Lorni Fenton, Lisa M. Horvath,
Dawn McKnight, James Miles, Nan Smith-Caldemeyer and Julie Wiley
(Past and Present Editors of the Preventive Law Reporter)

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CHECKLISTS FOR CORPORATE COUNSEL (William A. Hancock ed. 1992).

Contains numerous checklists of compliance issues in areas such as employee relations, OSHA compliance, environmental law, commercial law and conducting audits and investigations.

CORPORATE COMPLIANCE SERIES (1993).

Ten volume set, including individual volumes on OSHA, products liability, records retention programs, ERISA, EEOC, fair hiring and firing, intellectual property, environmental and securities.

CORPORATE COUNSELLOR'S DESKBOOK (Dennis J. Block & Michael A. Epstein eds. 1992).

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CORPORATE COMPLIANCE TECHNIQUES

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This article describes how, by taking a step back, the process of developing and implementing a corporate compliance program can be reduced to a few simple steps.

Adrian Otten & Hannu Wager, *Compliance With TRIPS: the Emerging World View*, 29 Vanderbilt Journal of Transnational Law 391 (May 1996).

TRIPS instituted multilateral standards of protection, rules of enforcement, and World Trade Organization procedures for the settlement of disputes. The minimum standards of protection that each member nation must adopt create a certain uniformity for individuals or firms that participate in intellectual property trade on an international level. This article examines how awareness of the TRIPS Agreement's enforcement procedures can prove valuable guidance for the construction of related compliance programs aimed at the perfection and retention of intellectual property rights.

Harvey L. Pitt & Karl A. Groskaufmanis, *Director's Liability: No Fraud by Hindsight*, 14 The Corporate Board 7 (1993).

As a corporate director, one should be aware of potential litigation, especially multiple claims and shareholder's derivative suits. This article describes numerous "rules of thumb" to guide the responsible director in avoiding liability for improper corporate disclosures and other corporate conduct.

Richard Rocchini & Mark S. Olinsky, *Is Your Legal Compliance Program Merely a Paper Tiger?*, Corporate Legal Times 29 (June 1994).

Distribution of corporate compliance policy statements, appointment of corporate compliance officers and initiation of an employee whistleblower hotline do not necessarily guarantee lower prosecution risks and mitigated sentences. The Federal Sentencing Guidelines for Organizations require not only that the legal compliance message be communicated to employees, but also that the message be understood and followed. Suggestions are offered in this article on selecting persons to train regarding compliance, reinforcing the training, and devising a training program that will ensure a compliance message reaches its targeted audience and sticks.

Howard J. Saks, *Most Major Life Companies are Vigorously Enforcing Compliance Standards With Their Sales Agents*, 23 Estate Planning 40 (Jan. 1996).

Leading insurance companies have begun policing their own sales agents. This increase in self policing follows actions by state regulators to impose significant fines on three major life insurers for misrepresentations made to policy holders regarding their products. Under these new self policing programs, everything from letterhead to sales presentation materials are scrutinized. This article describes why such policing efforts are time consuming, but will result in better customer relations and reduced litigation.

Paul Allen Schott, *FDICIA-Mandated Safety and Soundness Standards Pose Compliance Burdens*, 14 Banking Policy Report 6 (Aug. 21, 1995).

Regulatory agencies responsible for administering the Federal Deposit Insurance Corporation Improvement Act of 1991 have published final guidelines implementing Section 132 of the Act. Section 132 requires that safety and soundness standards be established in three primary areas: operational and managerial, asset valuation, and compensation. Institutions are required by the guidelines to establish their own standards in these areas. This article describes why this approach provides management with flexibility in complying with Section 132, but places the burden of insuring compliance directly upon management.

Kevin M. Smith & John M. Oseth, *The Whistleblowing Era: A Management Perspective*, Employee Relations Law Journal 79 (Sept. 1993).

Monetary incentives and protections under modern state and federal laws encourage employees to act as whistleblowers by disclosing corporate misconduct. This article describes why human resource managers and in-house counsel should develop coherent strategies for operating within this new whistleblower era to reduce the likelihood that misconduct will be reported externally before being brought to the attention of corporate managers. Several recommendations for internal policy, organization and monitoring strategies are offered.

Karla R. Spaulding, *"An Ounce of Prevention is Worth a Pound of Cure" Federal Sentencing Guidelines for Organizations*, 42 Federal Lawyer 35 (Sept. 1995).

Federal Sentencing Guidelines for Organizations provide a scoring system for determining recommended sentences for convicted organizations. This article examines this scoring system and the organizational features that will increase or decrease corporate sentences.

Marc I. Steinberg & John Fletcher, *Compliance Programs for Insider Trading*, 47 Southern Methodist University Law Review 1783 (July/Aug. 1994).

The article reviews compliance programs in three contexts: professional firms, financial intermediaries and publicly-held companies. Specific measures appropriate for each situation are discussed.

Gregory J. Wallance, *Looking the Other Way Can Be a Crime: Is Your Foreign Sales Representative Paying Bribes* in Practising Law Institute, CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 551 (June 1996).

As American companies engage in global operations, compliance practices may clash with cultural practices in foreign countries. This article explains why it is vital that businesses address the risk posed by relying on a foreign sales representative to act as an intermediary between an American company and a foreign customer.

Dan K. Webb, Steven F. Molo & James F. Hurst, *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 Business Lawyer 617 (Apr. 1994).

In the last few years it has become routine for corporations to be held criminally accountable for the illegal acts of their employees. This article discusses why techniques for avoiding criminal liability should be a concern for all businesses and the lawyers representing them. General principles of corporate criminal liability, the indictment process and the Federal Sentencing Guidelines for Organizations as applied to businesses and executives are addressed. Additionally, the creation and implementation of an effective compliance program are discussed

Herbert I. Zinn, *Sticks and Stones May Break Your Bones and Words Can Hurt You, Too*, Preventive Law Reporter, Summer 1995, at 28.

This article explains why compliance programs should encompass a range of identified liability and asset protection risks, not just violations of federal criminal law. Intellectual property claims are examples of liability risks that can be reduced through a carefully developed compliance program. Strategies to deal with copyright compliance risks are outlined.

INTERNAL INVESTIGATIONS AND AUDITS

Roundtable Discussion: The Anatomy of a Corporate Internal Investigation, 8 No. 7 Insights 15 (July 1994).

Increasingly, corporations rely on internal investigations to avoid or limit legal liability. In this article, the Corporation and Securities Law Section Council of the Illinois State Bar Association discusses the goals and advantages of these investigations.

Ilise L. Feitshans, *Through the Looking Glass: The Ethics of Internal Investigations by In-House Counsel* in Practising Law Institute, CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 711 (June 1996).

When conducting internal investigations, corporate counsel must address the often conflicting rights of a corporation and its employees. This article explains these potential conflicts of interest and describes features of the ABA Model Rules of Professional Conduct and in-house codes of ethics that may provide guidance for resolving such conflicts.

Alan W.H. Gourley, *Protecting Corporate Information*, C900 ALI-ABA 93 (Jan. 20, 1994).

Comprehensive compliance programs often produce sensitive information about compliance problems. This article examines doctrines that may protect this information from forced disclosure, including the attorney-client privilege, the work product doctrine, and the self-evaluative privilege. It also addresses some of the possible

impacts of compelled disclosures.

Kenneth N. Hart & Stephen D. Houck, *Skeletons In the Corporate Closet, Part I: In-House Lawyers Sometimes Need To Help a Corporation Investigate Itself*, 1 Business Law Today 4 and 58 (May/June and July/Aug. 1992).

Increasingly, in-house counsel are being asked to conduct internal investigations in a wide range of situations. The first part of this two-part article addresses when to conduct an investigation and the benefits involved. Part two discusses how to conduct a corporate investigation to protect the corporation from liability.

Gray G. Lynch & Douglas M. Fuchs, *Conducting Internal Investigations of Possible Corporate Wrongdoing* in Practising Law Institute, CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 615 (June 1996).

An in-depth treatment of internal investigations, designed to help counsel prepare for difficult issues endemic to in-house audits.

Michael P. Kenny & William R. Mitchelson, Jr., *Corporate Benefits of Properly Conducted Internal Investigations*, 11 Georgia State University Law Review 657 (June 1995).

Though internal investigations offer several distinct advantages they also carry some risks. Fortunately, thoughtfully designed and implemented internal investigation procedures and polices helps to stem these risks. This article describes how a proper investigation can maximize an organization's opportunities to favorably resolve a controversy over internal misconduct while preserving attorney-client and work product privileges.

Joseph E. Murphy & Ilise L. Feitshans, *Protecting the Compliance Audit* in Practising Law Institute, CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 667 (June 1996).

Although compliance audits are key elements of effective compliance programs, they also present risks of increased liability. This comprehensive article describes how a firm can avoid creating new problems in a compliance audit. It includes a case table, bibliography and forms.

Roger C. Spaeder, *The Brave New World of Voluntary Disclosure*, 10 No. 12 Corporate Counsellor 1 (May 1996).

Following a voluntary disclosure, an in-house lawyer may find herself between a rock and a hard place. Recognizing that this is a difficult situation, the author examines how counsel can balance the disparate goals of demonstrating loyalty to the targeted executive and obtaining a favorable resolution to the problem.

Gregory J. Wallance & Jay W. Waks, *Internal Investigation of Suspected Wrongdoing by Corporate Employees* in Practicing Law Institute, CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 649 (June 1996).

This article discusses several key topics related to internal investigations, including: investigative tools, attorney-client privilege, work product privilege and the self-critical privilege. It also discusses decisions about whether legal violations detected in investigations should be disclosed to the government.

Gregory J. Wallance, *Searches and Seizures of Businesses: How Corporate Counsel can Protect Firm Interests and Rights* in Practicing Law Institute, CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 609 (June 1996).

A government investigation can paralyze the unprepared business. This article examines why educating in-house counsel on the proper response to a surprise raid can help to alleviate negative impacts.

BUSINESS ADVANTAGES OF COMPLIANCE

John H. Baker, *Who Wants to Buy Preventive Law?*, Preventive Law Reporter, Fall 1995, at 21.

Marketing preventive law is no different from selling widgets. This article argues that, by examining the nature of their product, preventive lawyers can critically examine their client's reasons for buying or not buying ameliorative services.

Dana Freyer & Joseph E. Murphy, *Obvious Legal Risks -- Hidden Business Rewards*, C110 ALI-ABA 77 (March 2, 1995).

Corporate counsel often have to "sell" management on the benefits of corporate compliance. In addition to substantially reducing fines imposed under the Federal Sentencing Guidelines for Organizations, this article examines the other business advantages of an effective program, including reducing insurance costs and enhancing employee moral.

Charlette A. Geffen, *Public Expectations and Corporate Strategy*, 3 Corporate Environmental Strategy 33 (1996).

External systems to rate corporate performance are an important source of information for both consumers and businesses. This article describes how, by gaining a perspective on public expectations, companies can effectively allocate compliance resources.

Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, Harvard Business Review, Sept./Oct. 1995, at 120.

While innovating to meet regulatory requirements may have significant up front costs, these are often more than offset by an organization's increased ability to compete effectively in dynamic marketplaces that value socially responsible performance. This article assesses some of the business advantages inherent in achieving environmental compliance.

Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, Journal of Economic Perspectives, Fall 1995, at 97.

Traditionally, the relationship between environmental regulation and industrial competitiveness has been regarded as a trade-off between social benefits and private costs. However, this article explains why a competitive advantage may be found in the capacity to innovate and to improve the ways in which a company can meet environmental regulations.

Peg. A. Schoenfelder, *Preventive Law "Marketing Tips" for Corporate Counsel*, Preventive Law Reporter, Fall 1995, at 19.

To assist full implementation of preventive policies, in-house attorneys must be able to discuss not only the legal benefits but also business benefits. This article discusses how in-house attorneys, in promoting compliance programs, can become partners with management in furthering organizational goals.

Lisa A. Whitney, *Marketing to the Corporate Client*, 13 No. 3 ACCA Docket 40 (May/June 1995).

To accomplish the timely use of in-house legal services, management must regard attorneys as part of "the team." This article describes how techniques such as drawing the client into the legal process and keeping an eye on the bottom line assist in this process.

SPECIALIZED COMPLIANCE PROGRAMS

Antitrust

Theodore L. Banks, *Using Technology to Teach Effective Antitrust Compliance*, 9 Antitrust 37 (Summer 1995).

This article examines how antitrust counsel can use new technologies such as computer networks and audio-visual aids to deliver a compliance message in a memorable and painless fashion.

Ann Fingarette Hasse, *Workplan for Developing an Antitrust Compliance Program*, 891 Practising Law Institute/Corporate Law 941 (Jan. 1995).

Practical tips are offered for developing an effective antitrust compliance program. Kirk S. Jordan & Edward O'Correia, *A Model Antitrust Compliance Manual (Part 1 and Part 2)*, 6 and 7 *The Practical Lawyer* 61 and 83 (Sept. 1994 and Oct. 1994).

An antitrust compliance manual, a vital part of an effective antitrust compliance program, must be tailored to each organization. Part one of this article covers the provisions of a model antitrust manual, a summary of antitrust law, relationships with competitors and standards of conduct. Part two discusses price discrimination, monopolization and activity reporting requirements.

Joseph E. Murphy, *Surviving The Antitrust Compliance Audit*, 59 *Antitrust Law Journal* 953 (1991).

Improperly conducted compliance audits provide fuel for litigation. A discussion of the limitations of the attorney work-product, attorney client, and self-evaluative privileges is followed by eighteen useful tips to avoid entrapment while conducting a compliance audit.

Steven P. Reynolds, *Guide from the Trenches: Using Training as a Tool for Antitrust Compliance*, *Preventive Law Reporter*, Spring 1996, at 33.

Continually training clients about changing antitrust laws fosters an environment supporting compliance. This article describes how advances in desktop publishing, videos, and learning styles can be used to relay important compliance information and training.

Steven P. Reynolds, *A Survey of Best Practices, Innovative Communications Techniques for Corporate Antitrust Compliance*, 9 *Antitrust* 33 (Fall 1994).

By examining communications techniques in a wide range of corporate legal departments, counsel can determine the most effective methods for training employees and disseminating information. This article describes a number of these techniques in the context of antitrust compliance training.

George Vetter & Howard A. Merten, *Aftermarket Aftershock: Assessing Kodak's Effect on Business Planning for Parts and Service*, *Preventive Law Reporter*, Spring 1996, at 8.

By tightly controlling parts and service to ensure quality, thus alienating a third-party's ability to get parts or service products, a company can find themselves embroiled in antitrust problems. Examining the Kodak decision, this article describes practical tips a company can use to maintain proper control over parts and service.

Environmental Law

EPA Report Charts Environmental Compliance At Federal Facilities for FY 1993-1994, 4-16-96 West's Legal News 2201, 1996 WL 259899.

The EPA has compiled a chart describing the compliance performance of certain federal facilities. This chart is a valuable tool for identifying potential compliance issues that will be useful to a business or public entity that is performing its own environmental audits. The EPA chart analyzes federal facilities under eight different environmental statutes and is available on the Internet at the following address: <http://www.epa.gov/docs/PressReleases/1996/April/Day-12/pr-636.html>.

Lawrence S. Bacow & Michael Wheeler, *Binding Parties to Agreements in Environmental Disputes*, 2 Villanova Environmental Law Journal 99 (1991).

Negotiation can resolve an environmental dispute swiftly and efficiently. In those cases where a party does not abide by a negotiated agreement, enforcement mechanisms described in this article will be well suited to environmental enforcement needs. These mechanisms include: structured implementation, contingent agreements, monitoring devices, and substituted performance.

Judy Cook & Brenda J. Seith, *Environmental Training: It's the Law*, 3 Journal of Environmental Regulation 141 (Winter 1993/94).

This article explains how an effective employee training program prevents violations and increases awareness of health risks. It also considers why a proactively addressing training will reduce liability if outside agencies are involved.

David R. Erickson & Sarah D. Mathews, *Environmental Compliance Audits: Analysis of Current Law, Policy and Practical Considerations to Best Protect Their Confidentiality*, 63 University of Missouri Kansas City Law Review 491 (Summer 1995).

This article describes why a self-audit is one of the most effective means by which a company can investigate compliance problems and take proactive steps to comply with environmental laws and regulations. The article also explains why the confidentiality of self-audits is not guaranteed and discusses how attorneys and their clients can take measures to increase the likelihood that internal environmental audits remain confidential.

Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 International Lawyer 111 (Spring 1996).

This article explains why the development of a North American environmental enforcement network has created a system more compatible with standard U.S. practices. With the passage of the New Trilateral Enforcement Network, each country now has an obligation to effectively enforce its environmental laws. Companies dealing in trade that has an environmental impact in either Canada, the U.S., or Mexico should

be aware of each countries' environmental regulations.

Daniel L. Goetzler, *Management's Discussion and Analysis and Environmental Disclosure*, Preventive Law Reporter, Summer 1995, at 18.

Management's Discussion and Analysis (MD&A) disclosures require company managers to provide investors with more than a numerical picture of factors affecting a corporation's continued viability. Disclosures must enable an investors to compare a corporation's past and future performance. The MD&A requirements are explained and analyzed in the context of environmental performance.

Barry Goode, Patrick Cavanaugh & Trent Norris, *The Environmental Self-Audit Privilege: A Bibliography*, C110 ALI-ABA 475 (March 2, 1995).

Includes federal agency policies, cases and commentaries.

Thomas A. Hemphill, *Corporate Environmentalism and Self-Regulation: Keeping Enforcement Agencies at Bay*, 3 Journal of Environmental Regulation 145 (Winter 1993/94).

This article argues that corporate environmentalism is an emerging managerial strategy that represents corporate commitment to environmental responsibility and a translation of that commitment into action. The article offers: (1) a model environmental compliance program; (2) business policies, programs and conduct codes; and (3) recommendations for implementing self-regulatory business strategies.

Margaret M. Menicucci, *Environmental Regulation of Health Care Facilities: A Prescription for Compliance*, 47 Southern Methodist University Law Review 537 (Mar./Apr. 1994).

Federal and state regulations regarding hazardous and radioactive medical wastes and worker safety have a significant impact on health care companies. This article describes how a medical waste generator can assess its waste management needs and practices, become knowledgeable about federal and state regulatory requirements, implement employee training programs, have a central location for records and documents and conduct a facility audit and environmental assessment of the property.

Mark C. Posson, *The Risks and Benefits of Outsourcing Environmental Management*, 3 Corporate Environmental Strategy 5 (1996).

This article explains the compliance risks inherent in efforts to outsource environmental management programs.

Robert L. Ringstrom & Paul G. Anderson, *An Environmental Compliance Checklist for Real Estate Practitioners*, 25 Colorado Lawyer 61 (Jan. 1996).

Environmental Site Assessments (ESAs) are valuable mechanisms for assessing a property's environmental condition. This article describes how an ESA, combined

with an environmental property audit, can evaluate the status of compliance with environmental regulations. This evaluation can minimize risks to current property owners by indicating what remedial steps should be taken. For prospective property owners, ESAs and audits can uncover potential sources of liability for hazardous waste cleanups.

John Voorhees, *New EPA Policy: Incentives Promote Audits and Management Systems*, Preventive Law Reporter, Spring 1996, at 4.

This article examines the ways that the EPA's new policy encourages businesses to establish comprehensive environmental auditing and compliance programs. Through audits and internal compliance programs, voluntary and prompt disclosure of a violation (in advance of its detection through an external inspection, investigation, or information request), and remediation within 60 days of discovery of a violation, a company can avoid civil and criminal penalties.

ADDITIONAL RESOURCES

American Corporate Counsel Association

1225 Connecticut, N.W.

Washington, DC 20036

(202) 296-4522

Publishes a monthly newsletter covering issues of interest to in-house counsel.

Corporate Legal Times

3 East Huron Street

Chicago, IL 60611

(312) 654-3500

A national monthly newspaper on managing in-house corporate legal departments.

Corporate Conduct Quarterly

401 Cooper Street

Camden, NJ 08102

(609) 225-6353; FAX (609) 225-6559

A practical guide for corporate ethics and compliance.

Ethics Officer Association

Center for Business Ethics

Bentley College

175 Forest Street

Waltham, MA 02154-4705

(617) 891-2575

National Center for Preventive Law

1900 Olive Street
Denver, CO 80220

(303) 871-6415; FAX (303) 871-6001

Publishes the Preventive Law Reporter and provides reference and educational services concerning compliance issues.

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002
(202) 273-4500; FAX (202) 273-4529

Publishes annual report which contains a comprehensive view of sentencing practices under the Federal Sentencing Guidelines for both individuals and organizations.