Universal Conduct
An Ethics and Compliance Benchmarking Survey
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Universal Conduct
An Ethics and Compliance Benchmarking Survey
By Ronald E. Berenbeim

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His work has appeared in *Across the Board, Business and Society Review, Directorship and Nieman Reports*. His speeches have been published in *Vital Speeches and Executive Speeches*. Mr. Berenbeim wrote the codes of conduct section for the text *Compliance Programs and the Corporate Sentencing Guidelines* (1993).

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Key Findings

Over the last 20 years, The Conference Board has undertaken four studies examining corporate ethics programs and practices. The most recent of these documents the efforts of 225 companies to design, implement and monitor their compliance and risk assessment programs for effectiveness. Jointly conducted with Corpedia, Inc. in late 2005, the survey examines current practices and provides a point of comparison to what is known about ethics programs from earlier surveys conducted in 1986-1987, and in 1991 and 1998, after Federal Sentencing Guidelines became effective. Key topics in this assessment include:

Compliance program cost and structure

Though the survey’s findings regarding median staff size were roughly comparable to those reported by 1998 survey participants, it is difficult to make direct comparisons with regard to resource commitment. Inflation adjustment and mastery of the compliance learning curve that may have contributed to greater efficiencies in program administration could mean that today’s programs are able to use comparable resources to significantly greater effect.

The current survey sampled 225 companies—nearly twice the 124 surveyed in 1998. Thus, the 2005 survey may be more broadly representative of the diversity of company practices and policies than the 1998 survey. For example, the size of the 2005 sample frame also allows for a breakdown by industry, which the 1998 survey did not. These latter data point to two conclusions:

1. Pharmaceutical companies have higher median costs ($250,000-$499,000) and financial services company programs have a lower median cost ($50,000) than the figure for all the other industry groups ($150,000-$249,000); and

2. Some companies are spending a great deal more on compliance programs than any earlier survey participants did on their compliance efforts (e.g., three companies said that they spent more than $10,000,000). It is, of course, also possible that this later survey’s larger sample size has a much more diverse view as to what constitutes compliance program expense.

Perhaps the most striking evidence of the increasing importance of ethics and compliance programs to companies is the increase in the percentage of company boards that provide oversight of one kind or another.

In the four surveys some kind of documented board involvement rose from 21 percent in 1987 to 96 percent in 2005. To put it another way, 79 percent of the survey participant boards in 1987 had no contact with their company’s ethics program and in 2005 only 4 percent of the participating company boards met this description. And if more boards are involved, high-level executives or at least persons with access to the board are likely to have responsibility for the program.

Enterprise training and communication

Most of the 2005 sample participants trained employees in their companies’ codes of conduct. Nearly two-thirds or 70 percent of respondents reported training more than 90 percent of their workforce in the code of conduct. This figure is little changed from 78 percent who reported training in code of conduct in 1998. Ethics training of some kind, possibly in response to the Revised 2004 Sentencing Guidelines provision that mandates ethics training throughout the company (including the board of directors), is now standard practice.
Strictly speaking, the Guidelines are not requirements but compliance with them can enable a company to obtain a substantially reduced sentence for improper conduct. Company adherence to the Guidelines may even result in a governmental decision not to prosecute.

Nonetheless, beginning with the initial 1991 promulgation, the Guidelines have had a very significant impact on training. In the 1987 pre-Federal Sentencing Guidelines report only 44 percent of the survey participants said that their company had some kind of ethics training program. Among 2005 survey respondents some kind of ethics training is now almost universal (92 percent) and considerably higher than the 1998 universal training figure of 79 percent.

Another sign of changing times is that more than one-third of the companies (34 percent) conduct more than 90 percent of their training through eLearning programs. In 1998 that question was not asked.

Risk Assessments
Of the surveyed companies, 70 percent have responded to the Revised 2004 Guidelines mandate that risk assessment be a critical component of an effective compliance and ethics program. Publicly traded companies are more likely (77 percent) than their privately held counterparts (54 percent) to engage in this practice. Seventy-eight percent of the companies that conduct risk assessments prioritize risk from both a probability of occurrence as well as severity of impact. A little more than half (54 percent) of these companies quantify risk.

Among the companies that analyze general risk to ethics and compliance program effectiveness, an assessment of internal policies and practices (95 percent) is a nearly universal subject. The next two most frequent risk assessment exercises involve employee understanding of ethics and compliance systems (77 percent) and anonymous reporting systems (75 percent).

Specific risk areas are analyzed in two ways: (1) probability of occurrence, and (2) potential severity of occurrence. A breach with respect to protection of confidential information was regarded as the most likely risk to occur while general financial statement and earnings manipulation was regarded as the most severe hazard. As failure to protect confidential information also placed third on the severity list, this problem could be the most serious challenge with respect to the possibility of causing severe damage.

Hotlines
The vast majority of 2005 study participants (91 percent) maintain an anonymous reporting system whereby employees can report observed misconduct (of course, the informants can also identify themselves). The prevalence of hotlines is, perhaps, the most significant change since 1998 when the figure was only 52 percent.

In contrast with the 1998 survey, The Conference Board has also documented an increase in so-called whistleblowing systems outside the United States. For example, a 2004 Conference Board survey found that 63 percent of UK and 58 percent of Japanese companies had whistleblowing systems—possibly due to laws protecting or encouraging whistleblowing (UK) or similar pending legislation to that effect (Japan).
Effective Compliance Systems

New Challenges and Opportunities

On November 1, 2004, revisions to the 1991 Organizational Sentencing Guidelines further promoted the institutionalized partnership role between companies and law enforcement agencies by enhancing the critical importance of “effective compliance and ethics program[s]” to prevent and deter corporate criminal conduct.

The issuance of the 1991 Organizational Sentencing Guidelines was the culmination of a process that began with the passage of a 1984 law that created the United States Sentencing Commission. The Commission’s charter was to make sentences for violations of Federal crimes more uniform and, to some extent, harsher. Due to the Federal Sentencing leniency that corporations had historically enjoyed (in the early 1980s, the average corporate fine was approximately $10,000), the pursuit of the mandate empowered the Commission to bestow upon corporations a good deal of unwelcome attention.

In 1988 and 1989 companies responded to initial sentencing Guidelines by seeking a lowering of maximum fines and greater incentives for self-enforcement. The first of these objectives was achieved to a small degree and the second became a key principle in the 1991 Guidelines. In sum, under the 1991 Guidelines, if the company had “an effective program to deter violations of law” in place prior to the violation, it could reduce or possibly avoid altogether potential multimillion dollar fines.¹ The Conference Board ethics program data collected during the last 20 years affirms that companies have responded to the Guidelines’ incentive by establishing ethics programs that meet Guidelines standards. [See “The Seven Elements of an Effective Compliance Program”]

While the elements of an “effective compliance program” are set forth in the Guidelines, the ultimate determination of a program’s fulfillment of the Guidelines’ mandate will be the policies, processes, and resources individual companies commit to giving the Guidelines full force and effect within their own companies and how these efforts compare to those of their peers.

Early doubts about the Guidelines’ importance have since been dispelled, having survived a strong constitutional challenge in the courts. In United States v. Booker, the Supreme Court preserved the Guidelines in January 2005 but in an advisory rather than the earlier mandatory status.

Still, indications are that judges will continue to rely heavily on the Guidelines.² Booker’s recipe of heavy judicial reliance leavened by discretion arguably provides even greater potential incentives for companies to develop effective compliance and ethics programs. Moreover, in addition to being a factor in the potential mitigation by a governmental agency or court of a corporate criminal sentence, the Guidelines can now be a critical consideration in whether a prosecutor brings a criminal charge in the first place.³


² See for example, an opinion issued subsequent to Booker by Paul Cassell, a Nevada judge appointed by President George W. Bush: “In all future sentencing the court will give heavy weight to the Guidelines in determining an appropriate sentence . . . The court will only depart from those Guidelines in unusual cases for clearly identifiable and persuasive reasons.” Jeffrey Rosen, “Breyer Review,” The New Republic, January 31, 2005, pp. 10-13.

The revisions incorporate changes recommended by an Ad Hoc Advisory Group of in-house compliance professionals, academics and former federal law enforcement officers. Empanelled in February 2002, the group’s mission was to review the 1991 Guidelines with a focus on the “seven elements” of an effective compliance program and how they could be strengthened and improved (see box). Congress approved the Commission’s proposed changes to the sentencing Guidelines for organizations, and they became effective November 1, 2004.

In terms of additional resources needed and potential organizational impact, risk assessment is perhaps the most important of the newly mandated compliance program elements. Despite the significant changes that risk assessment may require, the Guidelines offer no direction regarding its key elements. Absent language in the Guidelines, there is a need first for a common understanding of what risk assessment is. On this point there is some prior agreement. The consensus view is that risk assessment is “A process . . . to identify potential events that may affect the entity and manage risk to be within its risk appetite (emphasis supplied), to provide reasonable assurance regarding the achievement of entity objectives.”

The Seven Elements of an Effective Compliance Program

The 1991 Organizational Sentencing Guidelines specify these seven components of a comprehensive compliance program:

1. Develop compliance standards and procedures tailored to the company’s business needs.
2. Designate high-level personnel to oversee compliance.
3. Avoid delegating substantial discretionary authority to employees with a propensity for illegal conduct.
4. Educate employees in the company’s standards and procedures through publications and training.
5. Design a compliance system that includes auditing and monitoring procedures and mechanisms that encourage employees to report potential violations.
6. Enforce standards through appropriate and consistent discipline.
7. Report all violations and take appropriate steps to improve the program.


Companies are spending a great deal more on compliance programs than any earlier survey participants did on their compliance efforts (e.g., three companies said that they spent more than $10,000,000). It is, of course, possible that the later survey’s larger sample size has a much more diverse view as to what constitutes compliance program expense.

Overall, the median full-time employee and budget allocations for the 2005 participants were comparable to the 1998 figures. The majority of 2005 participants (58 percent) said that their company’s compliance and ethics programs have less than three full-time equivalents (FTEs) dedicated to carrying out the compliance and ethics function. Almost one out of every three companies has only one person (or less) dedicated to the compliance and ethics function.

There was, however, a very significant difference in the number of employees and budget size for high-end 2005 programs compared to those of 1998 efforts. Three percent of the recent group said that 21 to 30 full-time employee equivalents were dedicated to compliance or ethics program activities, and an additional 9 percent said that the staff size for these programs was 11 to 20.

The change in program budgets for the high-end companies was even more dramatic. In 1998 only three companies said that they spent more than $2 million. In the 2005 survey, 4 percent (nine companies) said that their cost exceeded $10 million and 23 percent spent more than $1 million.

Not surprisingly, smaller companies usually spend less than their larger counterparts. In organizations that have between 250 and 999 employees, the largest group of respondents (37 percent), spend less than $50,000 each on their ethics and compliance programs. For organizations that have between 10,000 and 24,999 employees, 30 percent spend between $1 million and $4.99 million annually on their compliance and ethics program. However, 25 percent spend less than $50,000. In the 25,000 to 49,999 employee group, 30 percent spend between $250,000 and $499,999 annually on their compliance and ethics program.
Compliance Program Leadership Structure

Designation of high-level personnel to oversee compliance is the second of the seven elements that the 1991 Guidelines identified as an essential component of an effective compliance program. Lisa M. Kuca, a member of the ad hoc advisory group that formulated the 2004 Revisions to the Sentencing Guidelines explained in practical terms how the 2004 revisions increase the director and senior management roles in ethics program monitoring:

- Governing authority must be knowledgeable about and exercise reasonable oversight of the program
- High-level personnel responsible for ensuring program effectiveness (e.g., CEO, audit/compliance committee)
- Senior-level compliance officer responsible for day-to-day operations, has access to the board of directors, adequate resources and credibility
- Directors exercise independent review
- Directors are sufficiently informed to exercise independent judgment

As noted, the survey gives a mixed picture of the degree to which companies thus far have responded to these conditions. Although the 2005 survey’s median figure for people and money dedicated to the program is roughly the same as that which participants reported in the 1998 survey, an appreciable number of programs have significantly larger staffs and budgets than any documented in 1998.

With regard to a governing authority with program knowledge and day-to-day authority, 60 percent of the participating organizations do have a chief compliance officer. More than one-third of the programs (38 percent) are headed by the company’s general counsel. Although this “dual-role” is more prevalent in smaller-sized organizations, it is not uncommon in larger organizations.

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Most of the survey participants entrust high-level personnel (C-Suite) with responsibility for program effectiveness. Nearly one-third of the program heads (31 percent) report to the CEO. A slightly larger percentage of chief legal officers (37 percent) exercise this oversight, and, in 10 percent of the participating companies, the chief financial officer exercises this role.

Regardless of whether the company is publicly or privately held, program head access to the board of directors is now nearly universal and contrasts markedly with the findings of any kind of board involvement that was documented in the 1987 (21 percent), 1991 (41 percent) and 1998 (78 percent) surveys. Not only are boards more likely to have some involvement in the company’s ethics program, director contact with the program—particularly in the case of publicly held companies is also fairly frequent—at quarterly (39 percent) or even monthly (11 percent) intervals.

It is a rare compliance or ethics program head who does not have at least some contact with the board. Only 5 percent of the persons at publicly traded companies who have daily operational responsibility for compliance and ethics do not communicate directly with the board of directors.

Questions do remain, however, as to the degree to which boards are sufficiently informed on compliance concepts and issues to chart the program’s future course. Fifty-eight percent of surveyed organizations do not train the board of directors in compliance consistent with the Federal Sentencing Guidelines training criteria. Of the organizations that do train, 31 percent train for less than an hour annually.
Research has shown that an important gap persists between the number of those who believe in board training and the number who actually participate. Although 77 percent of the ethics or compliance program respondents in a 2004 Conference Board survey said that board members should be trained in ethics or compliance issues, only 39 percent of them said that their directors have actually been trained on ethics/compliance issues arising from board service.

Less information is available about program content. In addition to an understanding of the board’s role in company compliance programs (e.g., employee training programs), it is known that survey respondents believe the following issues should be discussed:

• Fiduciary duties
• Personal liability
• Stock exchange regulations
• Insider trading
• Business secrets

It is noteworthy that “accounting literacy” was not mentioned.

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6 Ibid.
7 See Berenbeim and Kaplan, Ethics Programs (a 2004 Ethics Officers Association survey obtained similar results, 42 percent); and W. Michael Hoffman, Dawn-Marie Driscoll, and Mark Rowe, “Effective Ethics Education of the Board,” Ethikos, January/February 2005, Vol. 18, No. 4, p. 2.
The importance of company programs to educate employees in the company’s standards and procedures through publications and training has been underscored by the 2004 revision’s mandate for compliance and ethics training at all levels within the organization. Yet board discussion of ethics issues among sampled companies remains fairly limited. In addition, the prevalence of code of conduct training programs among the 2005 survey participants is roughly the same as it was in the 1998 survey, around 77 percent for publicly traded companies.

For organizations that have code of conduct training, 34 percent of organizations surveyed for the 2005 report deliver more than 90 percent of training through eLearning, while 23 percent deliver no training through eLearning. (This question was not asked in 1998.)

Formal and Mandatory Training Topics Beyond Code of Conduct

The three most common 2005 formal and mandatory training topics were employment law related topics: Sexual harassment (71 percent), workplace harassment (60 percent), and ethical sales (59 percent).

The 1998 and 1991 surveys did not address the specific subjects of training programs. Instead, they asked about the areas cited in the company’s ethics code. The areas most commonly cited in 1991 were focused on the employment contract (worker safety and privacy), ethical business practices (marketing) and social responsibility (environmental). In 1998 the concentration was on employee honesty—four subjects (bribery, conflict of interest, receiving gifts, and security of proprietary information) were addressed by more than 90 percent of the codes. Arguably, in 2005, the Foreign Corrupt Practices Act (FCPA) training covers much of this material, but it is not one of the more common training subjects.9

Indeed, in 2005, while 71 percent of survey respondents have operations outside of the United States, 32 percent had a formal and mandatory training program in the FCPA.

9 The high level of 1998 company interest in bribery and related issues may have been due to the OECD Anti-Bribery Convention, which was initialed by 35 countries in 1997.
Other 2005 findings reflect a surprising lack of concern about recent legislative and regulatory developments. Although 72 percent of all survey respondents are subject to the Sarbanes-Oxley Act, only a quarter or so have formal and mandatory training programs in either “Sarbanes-Oxley” or “Financial Integrity.” In contrast, 28 percent of the sample have formal and mandatory Health Insurance Portability and Accountability Act (HIPAA) training programs, even though only 2 percent of respondents cited healthcare and related services as their primary business.

Finally, possibly due to the high perceived risk of information protection and security (see section Top Five Specific Risk Areas Weighted by Probability of Occurrence), one subject has been cited as a key concern in all three surveys. In 2005, 49 percent of the participating companies said that they had formal and mandatory employee training programs in “Confidential Information Protection/Information Security.” This topic was a key company concern in 1991 (58 percent) and 1998 (92 percent). Although, the percentage of companies citing information protection and security as a key issue dropped considerably between 1998 and 2005, it remains one of the top four issues.
The vast majority (91 percent) of companies responding to the 2005 survey maintain an anonymous reporting system whereby employees can report misconduct.\(^\text{10}\) This prevalence considerably exceeds the 1998 survey finding of 52 percent. In the earlier study, many companies reported serious difficulties with hotlines in Europe. In fact, one participant said the company had been unable to generate any meaningful employee usage there. Respondents attributed this dislike to the legacy of governmental and occupation forces’ use of informers. Still, since 1998, outside the United States whistleblowing system prevalence has increased.\(^\text{11}\)

In 2004, a Conference Board survey found that 63 percent of U.K. boards and 58 percent of Japanese boards were engaged in reviewing company whistleblowing procedures. This board activity may have been due to legislation protecting or encouraging whistleblowing (in the United Kingdom) or pending legislation to that effect (in Japan).

Despite increased interest in whistleblowing hotlines in some countries, such policies are met with resistance in others. In May and June 2005 the French data protection authority Commission Nationale de l’Informatique et des Libertés (CNIL) and the German Labor Court invalidated certain hotlines established by U.S. multinationals pursuant to the Sarbanes-Oxley Act (2002) and other compliance standards such as the Organizational Sentencing Guidelines.\(^\text{12}\)

The French concern was that false statements or indiscriminate dissemination of reported conduct (whether true or false) presented greater risk than any benefits that could result from such a system. In a letter to then SEC Chair William H. Donaldson, CNIL Chair Alex Turk said, “The Commission notes the possibility of carrying out an ‘integrity warning’ in an anonymous manner could only increase the risk of a slanderous denunciation . . . .”\(^\text{13}\)

The CNIL subsequently clarified its reservations in a 2005 guideline document in which it stated that it had “no objections in principle to such schemes” subject to certain conditions, including limiting the scope of the whistleblowing program, specifying the categories of personnel who may be affected, restricting handling of anonymous reports to avoid slandering employees named, and notifying the named person promptly.

The German decision rested on the failure of the companies to enter into appropriate consultation with its works council. (In Germany, organizations with five or more non-executive-level employees must establish independently or in concert with other employers a works council to deal with matters of concern to the organization or its employees.) The decision noted that other compliance program initiatives also required works council consent (e.g., gift policies, personal relations restrictions such as dating and nepotism policies, and drug testing).\(^\text{14}\)

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\(^{10}\) Reporting systems that guarantee anonymity have been the rule rather than the exception for some time. Even in 1998 when the question was asked whether or not the reporting systems required callers to identify themselves, only two survey participants said that their program had such a condition. Berenbeim, *Global Corporate Ethics Practices – a Developing Consensus*, (1998)


\(^{13}\) Alex Turk, letter to William H. Donaldson, June 29, 2005 (Translated from the French)

\(^{14}\) DiSanto and Hengensbaug
The unhappy memory of World War II informants notwithstanding, the French and German efforts to resolve these current conflicts contradict the view stated by some participants in the 1998 report that there is deep Western European resistance per se to employee hotlines. Nonetheless, there may still be significant variations among countries in the percentage of employees that believe that they can report misconduct without fear of retribution. Patricia J. Harned, president of the Ethics Resource Center, notes that according to a recent survey conducted by the organization, 71 percent of U.S. employees said that they were able to report infractions without fear of retribution. Three countries/regions with very different cultures, Hong Kong (74), Mexico (73) and Canada (72) had slightly higher percentages, while three others—Germany, Japan, and France—often cited as places where employees would be unlikely to use the system, reported slightly (Germany—68 percent) to significantly lower (Japan and France—49 percent) percentages.

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Corporate Strategies for Effective Global Whistleblowing Systems*

**Involve international management**—Senior international managers can be skeptical of efforts to promote open communications for cultural reasons and from fear of losing control or receiving false allegations. . . If left out of the development process they may become an obstacle. . .

**Clarify what constitutes wrongdoing**—It can vary by culture or reason. Terry Moorehead Dworkin, Professor of Business Law at Indiana University, cautions that, “People will not become whistleblowers if they do not consider the observed activity wrongful.”

**Establish and communicate whistleblowing policies and procedures**—Employees should receive information about the company’s confidentiality and whistleblower protection in writing and they should be offered training to clarify when, why and how to report misconduct.

**Tailor the message to the culture**—Tailor communications about whistleblowing procedures to the cultures in which the company operates, clarifying company standards with explanations that local employees can understand.

**Facilitate the reporting process**—Employees are more apt to raise concerns in a safe environment where they feel it is acceptable to disclose misconduct. . . Demonstrating that retaliation will not be tolerated can facilitate the reporting process.

**Provide local or regional resources**—International employees often feel disconnected from employee headquarters, both geographically and culturally. . . Companies can provide ‘regional business practice advisors,’ [to be] a communications liaison between local employees and corporate headquarters.

**Review policies and establish performance measures**—Companies should regularly review their whistleblowing policies and procedures to ensure their effectiveness. . . Companies should also establish performance measures for their whistleblowing initiatives, and where possible, benchmark the effectiveness of their initiatives against those of peer organizations or industry standards. . .

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Reporting Systems: Has Sarbanes-Oxley Made a Difference?

Whistleblowing systems (at least in the United States) were common before the 2002 Sarbanes-Oxley Act, and survey responses suggest that its passage has had little impact on the prevalence of such programs. While anonymous reporting systems are required for organizations subject to the Sarbanes-Oxley Act, the survey found that 9 percent of the responding companies in this category had yet to institute them. Moreover, 78 percent of the companies that were not covered by the act still have such reporting systems in place. Perhaps these companies are taking advantage of the affirmative defense available under the Federal Sentencing Guidelines, whose criteria for an “effective compliance and ethics program” includes anonymous reporting systems.

Form of Hotlines

Where such anonymous reporting systems are in place, a majority (65 percent) of organizations make available both telephonic and email-based systems to employees. However, 32 percent of organizations do not provide an email-based option to employees. These figures are the same for global companies and those that operate exclusively within the U.S. domestic market.

In terms of how organizations staff such anonymous reporting systems, 31 percent of all organizations handle their systems internally, 44 percent outsource their systems to a third party, and 25 percent have a blend of both insider-and outsider-operated systems. The number of employees is not a predictor of which hotline method the company will use.

Although the 1998 report did not seek information on hotline system outsourcing, it did suggest that outsourcing can be an effective way to adapt the program to the local concerns: “Relying on trusted local institutions such as works councils was also cited as an effective alternative strategy for obtaining many of a hotline’s beneficial results.”

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**Chart 12**

**Anonymous reporting systems**

Do you have an anonymous reporting system through which employees can report misconduct or raise concerns about illegal behavior or code violations?

<table>
<thead>
<tr>
<th>91%</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>No</td>
</tr>
</tbody>
</table>

**Chart 13**

**Anonymous reporting system**

(Organizations not subject to Sarbanes-Oxley)

Do you have an anonymous reporting system through which employees can report misconduct or raise concerns about illegal behavior or code violations?

<table>
<thead>
<tr>
<th>78%</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>No</td>
</tr>
</tbody>
</table>

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More than two-thirds of organizations do not have an ethics guidance line where employees can seek advice. Yet company ethics specialists have long believed that it is preferable to have more employees seeking advice and fewer people reporting behavior that such advice might have averted.

For example, while the 1998 study did not distinguish between ethics program hotline and advice lines, the participants measured the success of the former by the degree to which they had evolved to the latter. Opportunities for successful company intervention in what was described as the “consultative” stage can achieve more cost effective outcomes and they signal growing employee sensitivity to ethics issues.

A good example is Tenet Healthcare, which, during the period 1996-1998, broke its ethics action line calls into three categories: (1) complaints, (2) consultation, and (3) informational. The percentage of complaint calls declined from 74 to 55 percent and the consultation inquiries increased from 19 to 34 percent—a development that Tenet management found to be a “positive sign of employee buy-in.”

Employee Hotline Utilization

Sixty-three percent of the 2005 respondents have fewer than 50 reports to their anonymous hotlines filed annually. Again, offering the advice option may be a critical element in hotline success. The 1998 study indicates that even the appearance that the program is for advice as well as whistleblowing can significantly increase employee utilization. It cites a “recent” Ethical Leadership Group survey that found an employee usage rate of 5 per 1,000 employees (roughly comparable to the 2005 survey) for hotlines and 23 per 1,000 employees for helplines.

The caseloads for 2005 survey participants are roughly comparable to those found in the 1998 surveys. For example, commenting on the International Monetary Fund’s reporting system caseload, Joan Elise Dubinsky, the fund’s ethics officer wrote: “A general rule of thumb for ethics officers is that we can expect between 2.5 and 3.0 contacts (of all kinds) per 100 staff members per year.”

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17 The higher of these two figures is considered by ethics practitioners to be a minimally acceptable rate of employee utilization. “Many senior ethics officers agree that a utilization figure of 2 percent to 7 percent is a reasonable confirmation of employee awareness and acceptance.” Berenbeim, Global Corporate Ethics Practices (1998), pp. 39-40.

Assessing the effectiveness of the IMF’s reporting system, Dubinsky noted “a clear trend in terms of the ratio of advisory matters to allegations requiring investigation.” Continued success would depend on the increasing positive variance between the requests for advice and the inquiries that required internal investigations. “When staff are comfortable in requesting advice before acting and where the advice that is provided can be relied upon,” Dubinsky concluded, “we see a reduction in the number and complexity of matters that require investigation.” (See chart 16)19

Whether utilization is high or low, the key question is how likely are employees to report observed misconduct and whether the institutionalization of compliance systems has contributed over time to their willingness to do so. The answer, according to The National Business Ethics Survey, a 2005 U.S. national household canvas of 3,015 employees, is that 55 percent of employees are likely to report misconduct compared to 65 percent of employees surveyed in 2003.20

While the survey report offered no reasons for the decline since 2003, it did shed light on why nearly half of these respondents did not report observed misconduct. Many feared retaliation (46 percent) and might have been more inclined to do so had they felt assured of anonymity (39 percent). Nearly a quarter of the non-reporters (24 percent) didn’t blow the whistle because they thought “someone else would.” Senior managers (77 percent), middle managers (67 percent) and first line supervisors (56 percent) were more likely than non-management employees (48 percent) to report infractions. And not surprisingly, “senior managers had more faith in the system.”21

**Chart 17**

### Number of cases

Approximately how many such cases does your organization handle annually?

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 50 cases</td>
<td>63%</td>
</tr>
<tr>
<td>50-99 cases</td>
<td>11%</td>
</tr>
<tr>
<td>100-249 cases</td>
<td>12%</td>
</tr>
<tr>
<td>250-499 cases</td>
<td>6%</td>
</tr>
<tr>
<td>500-749 cases</td>
<td>2%</td>
</tr>
<tr>
<td>750 to 999 cases</td>
<td>2%</td>
</tr>
<tr>
<td>1,000 to 1,499 cases</td>
<td>1%</td>
</tr>
<tr>
<td>1,500 to 2,000 cases</td>
<td>1%</td>
</tr>
<tr>
<td>More than 2,000 cases</td>
<td>2%</td>
</tr>
</tbody>
</table>

19 Ibid.

The revised Guidelines mandate risk assessment as a critical component of compliance and ethics programs but offer no direction regarding its key elements. However, the consensus view is that risk assessment is “A process . . . to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.” (emphasis added)

What processes are needed to weigh different kinds of risk and order priorities based on the company’s objectives and its risk appetite? According to Lisa Kuca, director of corporate compliance, Holland & Knight, and a member of the ad hoc advisory group, an effective risk analysis program takes steps to:

• Identify potential areas of exposure;
• Develop and implement a risk assessment plan throughout the company; and
• Make periodic adjustments based on the results of an ongoing review process.

The initial effort to identify potential risk areas includes:

• Determining the likelihood of misconduct based on the nature of the organization’s business;
• Analyzing relevant current regulatory and enforcement initiatives;
• Identifying all risks, not just legal and regulatory; and
• A history of the organization’s prior conduct.

The ongoing review process involves:

• Independent monitoring of whistleblowing or help-line information systems;
• Issuing risk-assessment reports;
• Benchmarking for future activities; and
• Modifying programs based on experience.

Besides complying for legal reasons, companies see internal benefits from conducting periodic risk assessments. Marcia Narine, vice-president, deputy general counsel global compliance, labor and employment, Ryder System, Inc. says that risk assessments can protect the value of the company by providing an early warning process for: (1) detecting compliance and ethics threats, and (2) allowing companies to correct problems before they are discovered by regulators, investors, potential acquirers/buyers, the media or potential plaintiffs. Other benefits include enabling a company to review and revise the ethics and compliance policies, initiatives, and training that require attention; providing a method of prioritizing compliance risks and strengthening existing controls; and improving the decision-making process by providing managers with critical information on compliance risks and mitigating strategies.


Prevalence of Risk Assessments
A majority (70 percent) of all organizations conduct periodic risk assessments, regardless of organizational size or headquarter-location. However, publicly traded organizations are more likely than private organizations (54 percent) to conduct a periodic risk assessment (77 percent).

Risk Assessment Methodologies
Companies use various combinations of methodologies to determine individual risks and the enterprise’s degree of tolerance for them. Identifying the particular areas of exposure is the first step, which can be extremely complicated. For example, it is estimated that an individual company could have as many as 200 distinct risk categories and that anti-trust alone may have 25 such hazards.25 Risks may also be specific to the organization, its industry, or of a systemic nature.

Of the companies that conduct risk assessments, 78 percent prioritize risk from both probability of occurrence as well as severity of impact. Regardless of entity size, location or whether it is publicly traded or private, this percentage does not vary significantly.

Fifty-four percent of the survey participants quantify and prioritize individual risks using a formula that weighs both impact and likelihood. Publicly traded companies in the United States are more likely than foreign or private organizations to engage in this exercise (60 percent).

Focus on Ethics and Compliance Program Effectiveness

Ethics and compliance risk assessment tends to focus on hazards that will impair ethics and compliance program effectiveness. In this regard, the three most commonly surveyed general risk areas examined were: Internal Policies and Processes (95 percent); Employee Awareness and Understanding of Compliance and Ethics Issues (77 percent); and Anonymous Reporting System (75 percent).

The data suggest that ethics program risk tends to be defined narrowly in terms of policies, structure, and communication. Behavioral threats are not as high on the radar screen. For example, while having “proper incentives and disciplines” consistent with promoting ethical conduct (and preventing criminal misconduct) are part of Federal Sentencing Guidelines, less than half of organizations’ risk assessments take “Employee Intent and/or Incentives” (37 percent) or “Disciplinary Systems as a Prevention Tool” (45 percent) into account.

The two most popular methodologies used in conducting risk assessment are: “Interviews of Leadership and Employees” (78 percent), and “Internal Document Review (e.g. litigation, audit and hotline reports)” (81 percent).

Less than one in four organizations used focus groups (23 percent) as part of the risk assessment process.

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**Chart 20**
**Does the risk assessment take into account one or more of the following?**
(select all that apply)

<table>
<thead>
<tr>
<th>Risk Area</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal policies, processes</td>
<td>95%</td>
</tr>
<tr>
<td>Employee awareness and understanding</td>
<td>77%</td>
</tr>
<tr>
<td>Anonymous reporting system</td>
<td>76%</td>
</tr>
<tr>
<td>Organizational Culture and “Tone from the Top”</td>
<td>70%</td>
</tr>
<tr>
<td>Unique trends and incidences</td>
<td>69%</td>
</tr>
<tr>
<td>Effective hiring systems and background checks</td>
<td>63%</td>
</tr>
<tr>
<td>SEC / DOJ regulatory enforcement trends</td>
<td>52%</td>
</tr>
<tr>
<td>Vendor compliance</td>
<td>46%</td>
</tr>
<tr>
<td>Disciplinary systems as a prevention tool</td>
<td>45%</td>
</tr>
<tr>
<td>Employee capabilities for jobs with substantial authority</td>
<td>38%</td>
</tr>
<tr>
<td>Employee Intent and/or incentives</td>
<td>37%</td>
</tr>
<tr>
<td>Agent compliance</td>
<td>33%</td>
</tr>
</tbody>
</table>

147 respondents

**Chart 21**
**Which of the following methodologies were used in conducting your risk assessment?**
(select all that apply)

<table>
<thead>
<tr>
<th>Methodology</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal document reviewa</td>
<td>81%</td>
</tr>
<tr>
<td>Interviews of leadership and employees</td>
<td>78%</td>
</tr>
<tr>
<td>Workforce surveys</td>
<td>40%</td>
</tr>
<tr>
<td>External document reviewb</td>
<td>33%</td>
</tr>
<tr>
<td>Focus groups</td>
<td>23%</td>
</tr>
</tbody>
</table>

81 respondents

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*a* Example litigation, audit reports, hotline reports

*b* Example industry newsletters, third-party litigation

144 respondents
Attorney-Client Privilege

Hotlines, reporting, and record keeping are not without risks—the most important of which may be the erosion of the attorney-client privilege in the event of a government investigation or prosecution. Such systems have the potential to document what the company knew and when its management knew it. In the event of criminal proceedings, companies that want to settle a case may be faced with the hard decision of waiving the attorney-client privilege that protects the confidentiality of attorney-client communications and hand over documents.\(^{26}\)

A more subtle erosion of the privilege can arise when a company confronts the kind of “corporate integrity crisis” that may occur as a result of a law enforcement investigation, pending regulatory action or even civil shareholder or customer litigation to cite just a few examples. Under those circumstances, it is becoming increasingly common for the board of directors to retain an independent investigator to conduct an internal investigation. The information compiled by the investigator is potentially damaging to the company and may later be used against the company when a government agency or a civil action plaintiff asks for it during a governmental investigation of the company or in the civil litigation pre-trial discovery phase.

In such circumstances, the company may be confronted with a choice between claiming the privilege and divulging information that will help to establish a relationship of trust with governmental agencies or the civil action plaintiffs. In those kinds of situations, it may be necessary and appropriate to waive attorney-client privileges and to provide access to evidence that might otherwise be privileged and could help adversaries (including the government) to prove claims.\(^{27}\)

In conducting independent investigations the board and company top management need to fully support a process that places the organization’s reputation and survival above the interests of company employees—whomever they may be. Under such circumstances the company must be prepared to divulge information that might ordinarily be entitled to a privilege.

The 2005 survey suggests that companies are mindful of the challenge that maintaining an effective compliance system can pose to the attorney-client relationship. Many in-house corporate counsels believe that particularly the stress of governmental investigations have severely damaged attorney-client privilege protections in recent years. More than a quarter (26 percent) of survey respondents feel that attorney-client privilege is nearly non-existent in the context of a government investigation. Only 16 percent feel that attorney-client privilege in the context of a government investigation remains alive and well.

Opinions on the damage of attorney-client privilege remain largely the same regardless of whether the respondent represented a private or public company.

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Primary Parties to Risk Assessment

More than half or 52 percent of all organizations conduct their risk assessments with in-house personnel, while the remaining 48 percent use an outside advisor in at least part of the process.

For organizations that do conduct employee interviews as part of the risk assessment process, the three most common groups to be interviewed are: Executive Team (69 percent), HQ Functional Department Management (65 percent), and Operational Field Management (57 percent). However, there is a significant drop-off before involving additional lower-level employees in the risk assessment process, with only 36 percent of organizations interviewing any line employees.

Most organizations do not include the board of directors in the risk assessment interview process. Only 13 percent of organizations conducting interviews as part of the risk assessment include the board of directors in the interview pool.

Not surprisingly the top audience for the final risk assessment report is the CEO and executive management team (62 percent). However, only 16 percent of all organizations provide the results of their risk assessment to their outside auditors.
Other Risk Assessment Findings

Form and Distribution of Final Risk Assessment Report
Seventy-five percent of all risk assessments result in a written report, with publicly traded (U.S.) firms somewhat more likely (77 percent) to produce a final written report.

Chart 25
Reporting risk assessment

Did your risk assessment result in a written report?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>%</td>
<td>70</td>
<td>30</td>
</tr>
</tbody>
</table>

Top Five Specific Risk Areas Weighted by Probability of Occurrence
Survey participants ranked the highest specific areas of risk by probability of occurrence of misconduct.

Chart 26
The probability that a violation would occur for an average company in your industry
Scale of 1-10 with 10 being the most likely and 1 being the least likely

- Protection of company’s confidential information: 6
- Conflicts of interest: 5
- Customer privacy and data protection: 5
- EEO/Employment discrimination: 5
- Sexual/Workplace harassment: 5
Top Five Specific Risk Areas Weighted by Impact of Severity

The survey participants ranked the highest areas of risk with regard to the potential severity of the impact that the misconduct would have on the enterprise.

Chart 27

The severity of impact in the event employees engaged in criminal misconduct

<table>
<thead>
<tr>
<th>Risk Area</th>
<th>Scale</th>
</tr>
</thead>
<tbody>
<tr>
<td>General financial statements and earnings manipulation</td>
<td>7</td>
</tr>
<tr>
<td>Protection of company’s confidential information</td>
<td>6</td>
</tr>
<tr>
<td>Revenue recognition problems</td>
<td>6</td>
</tr>
<tr>
<td>Accurate tax accounting</td>
<td>6</td>
</tr>
<tr>
<td>Asset or liability recognition problems</td>
<td>6</td>
</tr>
</tbody>
</table>

Scale of 1-10 with 10 being the most likely and 1 being the least likely
The 2005-2006 Conference Board-Corpedia Ethics and Compliance Benchmarking Survey is The Conference Board’s fourth such exercise in 20 years. Viewed in their entirety, these four reports show how company ethics programs have evolved over two decades within the context of company efforts to respond to the changing ethical expectations arising from external pressures and events. The 2005-2006 findings reflect an ongoing development of higher business conduct standards and the need for practices and policies to maintain them.

The Post-Enron Era
As was the case in 1986-1987, the 2005-2006 survey was conducted in the wake of scandals (Enron, WorldCom, Tyco) of sufficient magnitude in this case to provoke a major legislative response with the 2002 Sarbanes-Oxley Act. The 2004 Revised Sentencing Guidelines extended the reach of ethics programs by mandating universal ethics education (including directors), the promotion of an ethical culture throughout the company, and the conducting of operational and reputational risk analyses.

As a consequence of these changes, it now seems likely that every company employee and many a joint venture, supplier, agent, and vendor workers, as well, will be subject to the company’s business conduct principles and in the process be involved to some degree in its business ethics program.

These data confirm that hypothesis. Ninety-six percent of the respondents say that the company’s board is involved in some aspect of the company’s ethics program. That figure has risen steadily since the 1986-1987 finding of 21 percent. With regard to training, 92 percent of the respondents reported some kind of a program, and 70 percent of those who do have training programs, train 91 percent or more of their employees.

Hotlines or whistleblowing systems are also almost universal (91 percent). This figure is considerably higher than the 52 percent reported in 1998-1999.

Evidence also suggests that non-U.S. aversion to whistleblowing systems is diminishing. In 2004, a Conference Board survey found that 63 percent of UK boards and 58 percent of Japanese boards were engaged in reviewing whistleblowing procedures. And they were doing so for good reason. The UK had just enacted legislation protecting or encouraging whistleblowing and there was pending legislation to that effect in Japan. And as this report documents, in France and Germany, countries often cited as having deep-rooted cultural resistance to whistleblowing, there were also signs of qualified acceptance. The French data protection authority, Commission Nationale de l’Informatique et des Libertés (CNIL), said that it had no objection in principle to whistleblowing systems. In Germany the resistance was due to the failure to consult the works council prior to implementation—an institution that itself is something of a conduit for employee complaints.

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Ethics and Compliance Programs
An Evolution

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What’s Next?

The findings of the next report will depend very much on the necessary company response to external events. Will there be scandals that result in new legislation or increased regulatory scrutiny? Will there be major efforts by non-governmental institutions or socially responsible investors to engage the business community to seek consensus on good practice standards in areas such as workplace safety, human rights, and a living wage—particularly in China and India—the two fastest growing economies in the world?

This study documents a strong consensus on what constitutes effective ethics programs and policies—one that builds on the experience of 20 years of trial and error. It also demonstrates the great flexibility of the ethics program model to adapt to different cultural conditions—indeed to be strengthened by the challenge that such adaptation requires. The next report will likely have many stories to tell about how companies have met the challenge of adapting to the requirements of different cultures and, in the process, have emerged with stronger, better programs.
ABOUT THE SURVEY

The Conference Board-Corpedia Compliance Program and Risk Assessment Benchmarking Survey was conducted online and distributed during September and October 2005. The survey was “opt-in” and 225 corporate counsels participated in the survey. A breakdown of participants by industry was as follows:

- Aerospace & Defense: 5%
- Agriculture, Forestry, Fishing & Hunting: 1
- Business Services: 1
- Chemicals: 4
- Computer Hardware, Software & Services: 5
- Construction: 1
- Consumer Products Manufacturing: 3
- Education: 4
- Electronics: 2
- Energy, Oil & Gas: 5
- Env. Services: 2
- Financial Services: 7
- Food Product Manufacturing: 2
- Healthcare Products: Devices & Equipment: 4
- Healthcare Services & Social Assistance: 2
- Industrial Manufacturing: 7
- Insurance: 6
- Leisure: 1
- Media: 1
- Non-Profit: 3
- Other: 2
- Pharmaceuticals: 6
- Professional, Sci. & Technical Services: 4
- Real Estate & Rental & Leasing: 1
- Retail: 2
- Telecom Equipment & Service: 8
- Transportation & Logistics Service: 1
- Utilities: 8
- Wholesale Trade: 2

The percentage of participants representing organizations by size was as follows:

- Less than 50 employees: 4%
- 50-249 employees: 5
- 250-999 employees: 11
- 1,000-4,999 employees: 28
- 5,000-9,999 employees: 13
- 10,000-24,999 employees: 16
- 25,000-49,999 employees: 11
- More than 50,000 employees: 12

More than 70 percent represented organizations with operations outside of the United States.

- Yes: 71%
- No: 29%

Nearly three-quarters represented organizations subject to the Sarbanes-Oxley Act.

- Yes: 72%
- No: 28%

Two-thirds of the participants represented companies which were publicly traded on a U.S. stock exchange (NYSE, NASDAQ, AMEX).

- Yes: 67%
- No: 33%
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Executive Action 70, 2003