Risks and Protections for Compliance and Ethics Professionals

By Joseph E. Murphy, JD, CCEP

A publication of the
SCCE White Paper Series
April, 2009

Society of Corporate Compliance and Ethics
6500 Barrie Road, Suite 250
Minneapolis, MN 55435
Risks and Protections for Compliance and Ethics Professionals

By Joseph E. Murphy, JD, CCEP

Contents

Pitfalls and downsides of compliance work......................................................... 3
   Introduction: Not Every Day Can Be a Sunny Day
   The Legal Risks
   The Business Pitfalls
   The Personal and Social Downsides
   Conclusion

Protections for compliance people ................................................................. 16
   What Protections Are Available for Compliance People?
   Going in with your eyes open
   Employment contract
   Severance packages/golden parachutes
   Indemnification by the company
   Insurance
   Board of directors’ resolution
   Full access to high-level positions in the company
   Educating the audit committee about compliance
   Company commitment to compliance ethical/professional standards
   Position description
   Ability to network/keep up outside career options and contacts
   Laws against retaliation
   Access to/ability to retain counsel
   Your personal lawyer

---

1 Joseph E Murphy, JD, CCEP, is Director of Public Policy for the Society of Corporate Compliance and Ethics and author of 501 Ideas for Your Compliance and Ethics Program (SCCE; 2008) and Building a Career in Compliance and Ethics (SCCE, 2007). In addition, Murphy is of counsel to the law firm Compliance Systems Legal Group; co-founder of Integrity Interactive Corp., and Editor of ethikos.
Other Aspects of Protection

Protection in general

The other half of the equation—checks on your power

The Employment Contract

Checklist for employment contract

Appendix 1......................................................................................................................... 34

Questions to Ask before Accepting an In-House Compliance and Ethics Job Offer
Pitfalls and Downsides of Compliance Work

Introduction: Not Every Day Can Be a Sunny Day
For those of us in the compliance and ethics field there are many positives in this line of work. We have found good career prospects in an interesting, dynamic field. We have been drawn to it because of the special benefits of doing this kind of work—spending our time trying to do the right thing and guiding businesses to follow the law and act ethically.

But even a field that we believe in so strongly has its negatives. This paper explores these pitfalls and downsides. They have been divided into three categories: the legal risks of compliance and ethics work, the business downsides, and the negative personal and social aspects. The discussion here highlights the nature of these risks, but is not intended to be comprehensive; the nature of the risks can vary by company, industry, legal jurisdiction and other factors. After that review, this paper offers advice on how to protect yourself in the compliance field. The positives of ethics and compliance work far outweigh the negatives, but you should go into this field with your eyes open.

The Legal Risks
The purpose of an ethics and compliance program is, of course, to prevent and detect misconduct and to promote ethical business practices. But even though the purpose is a positive one, this does not mean you and your company are thereby rendered invulnerable to legal trouble. To the uninitiated it can come as an unpleasant surprise, but companies and individuals can get into trouble even when trying to do the right thing. The very steps that are necessary for an effective program can, if not performed with good legal advice, result in litigation and possibly unlawful conduct. The reality is that compliance is an area that is closely connected with litigation risks.

Those familiar with the legal system are aware of the concept of discovery in civil litigation, and of the government’s investigatory powers in civil and criminal enforcement cases. Adversaries in litigation have the right to access a company’s people and records in order to discover all the relevant facts. In practice this discovery and other production of information for adversaries can be a massive and grueling experience for those involved.

In most areas of the business world, smart employees and managers do what they can to avoid litigation and legal risks. In compliance and ethics, however, part of our job is identifying and

---

2 The field of compliance and ethics is broadly defined to cover the steps taken by organizations to prevent and detect misconduct.
3 See Murphy, “Examining the Legal and Business Risks of Compliance Programs,” 13 ethikos 1 (Jan/Feb. 2000).
dealing with exactly those very risks. Thus, the nature of our jobs does, in effect, deliberately put us in harm’s way from a litigation perspective.

One of the worst cases that illustrates this area of risk was an employment discrimination case brought against the Lucky Stores grocery chain. In the Lucky Stores case the plaintiffs sought the records of the company’s anti-discrimination training in order to use it against the company. This training, which had been intended to prevent discrimination, did not just rely on simple lectures—the type that so often bore adults. Instead, the trainers used innovative techniques to have the employee students participate in the process. The trainers required participants to surface in the training sessions examples of discriminatory statements that they had experienced in the workplace. The technique apparently worked, because the employees felt free to raise and discuss what they heard.

Unfortunately for Lucky Stores and for compliance trainers everywhere, the plaintiffs’ lawyers decided this would provide good ammunition to use against the company. Of course, it is a lawyer’s job to represent his or her client’s interests and seek every legal advantage in litigation. But the judge in this case apparently gave no thought to the dangerous impact of allowing these compliance materials to be thrown back against the company. Rather than require the plaintiffs’ lawyers to do their own work in making out a case, she allowed them to piggy-back on the company’s own compliance work. In fact, to make matters much worse, the judge cited the language from these classes in ruling that the company should even be subject to punitive damages. In the judge’s written opinion she also noted, without any comment, that the company’s lawyers had shut down this training. This case, of course, deals with risk to the company, not the individual compliance person responsible for the training. But the compliance person who causes the company to be sued or to lose in litigation is likely to feel the repercussions in his or her treatment by the company.

What is the lesson for compliance people? Clearly the Lucky Stores trainers were doing their jobs—using techniques designed to have an impact. But in the compliance area it is necessary to work closely with legal counsel who understand both the needs of effective compliance programs and the risks of litigation. While it is certainly wrong for companies to avoid effective techniques based on litigation paranoia, compliance people need to know how to minimize those risks. (In this circumstance at Lucky Stores, a practical compromise might have been to prevent note taking while still using an interactive technique. Note taking probably improves employees’ learning, but it also vastly increases the legal risks.) Among other steps, there may be occasions when the use of privilege is appropriate.

The risks highlighted in the Lucky Stores case show how good compliance activities can be exploited in litigation. But there is another, even more discouraging risk—the risk that the

compliance activities themselves will actually result in violations of the law. A few examples will illustrate. A compliance manager might easily conclude that the company’s code of conduct is a valuable document for all employees, and that they should all be bound by its terms. Yet this apparently simple proposition can trigger serious legal consequences.

In the U.S., imposing a code of conduct on employees who are represented by a labor union, without first negotiating with the union, can be an unfair labor practice under the National Labor Relations Act. In a case involving American Electric Power, the National Labor Relations Board chastised the company for implementing its code of conduct among bargaining unit employees. Compliance people must also be alert to the terms of any union contract, to determine that the compliance program steps do not run afoul of those commitments. It is also possible that any codes, employee manuals, disciplinary manuals, and other such documents can be interpreted as binding obligations against the company. Again, there may not be any direct liability for a compliance and ethics person who pushed adoption of a code. But if the code itself causes trouble for the company, the proponent of the code may suffer a career black eye.

Similarly, outside of the U.S., compliance people need to understand the limits set by national labor laws. For example, in Germany, management may have to negotiate its plans with the works councils.

Conducting investigations is another potentially risky area. In the U.S., federal and state laws may place limits on investigative techniques. For example, use of aggressive investigative techniques such as recording conversations can result in a tort known as “intrusion on seclusion.” Outsourcing to others who may use practices like “pretexing” can result in serious reputational damage and even criminal charges. With the growth of legal protections in the privacy area, investigators must consult carefully with legal counsel whenever they move into an unfamiliar jurisdiction.

Any compliance person asked to undertake compliance work outside of his or her home country should do so with a large dose of humility and willingness to learn. Any such work should start with a briefing on the new legal environment in which the person will be working. The impact of privacy laws provides a striking example, particularly for Americans. Americans sometimes mistakenly believe the U.S. is the most regulated or legally restrictive jurisdiction, when in fact, in some legal areas the risks in the U.S. are less than elsewhere. In France, for example, the approach to implementing the EU’s directive on privacy has taken a bizarre turn. The French privacy authority, the CNIL, initially concluded that having hotlines

---

in France was a violation of French privacy law because the receipt of information about a potential violator was the accumulation and processing of data about that person. Thus, one of the most fundamental and universal of compliance steps—the helpline—appeared to be illegal in France, causing a company that was only trying to do the right thing to be characterized as if it were indifferent to the requirements of French privacy law! In response to the implications of its initial pronouncements the CNIL backpedaled, but still imposed burdensome restrictions on helpline operations.\(^8\) (Ironically, another enforcement authority in France, the French Competition Council, saw things very differently, making a reporting system part of the settlement of a cartel case.\(^9\)) Again, as with other types of litigation risks, the solution is not to be paranoid or to give up on effective compliance techniques. Rather, compliance people need legal counsel who understand the compliance mission and can help devise safe but effective techniques for each jurisdiction. In the future, compliance and ethics people also need to be more active on the political and legal fronts, to avoid such ill-advised steps as the CNIL misapplication of privacy law, or the U.S. NLRB’s poor understanding of codes of conduct.

Other bases for potential civil liability for a company’s compliance and ethics activities include wrongful discharge and discrimination claims based on discipline for compliance violations. There can be obstruction of justice charges if a company’s own internal investigation appears to be covering up evidence of violations, and other charges if witness interviews appear to be an effort to intimidate the witnesses.

Having one’s compliance materials used against the company is certainly embarrassing and not a career enhancing move. Getting the company sued is an even more perilous course. But perhaps nothing could be more chilling than the prospect of facing direct, individual liability for one’s actions as a compliance person. These liability risks could fall into two categories—criminal and civil.

On the criminal side, the record to date appears at least superficially comforting. Government criminal cases against compliance people have involved straightforward allegations of traditional forms of illegal conduct—insider trading by compliance people in the securities industry and violations regarding highly-regulated medical devices.\(^10\) But this may be more a matter of the young age of the compliance field, rather then a reason for comfort. The risks are there, and the probability is that as the field grows in numbers, cases will arise.

---


\(^9\) See “Two Major Rental Laundry Firms Will Pay Fines, Create Alarm System,” 93 Antitrust and Trade Reg. Report (BNA) 93 (July 20, 2007)

\(^10\) United States v. Caputo, No. 03 CR 0126 (ND Ill; Oct. 16, 2006).
In considering criminal risks it is important to understand your company’s relationship with you if you face criminal charges. Companies may indemnify employees and advance their defense costs. But if the employee is found guilty, the company and employee typically part ways at that point. The employee may face not only government-imposed penalties, but may also be obligated to repay the company the defense costs that were advanced.

One of the most likely areas of criminal risk relates to the conduct of a compliance person who is confronted with evidence of misconduct, typically in an investigation. The government may believe that the compliance person improperly coached interviewees in an investigation, or aided in disposing of essential evidence. How a matter is investigated, how it is reported, and what is done with the evidence are all matters that can lead to personal jeopardy.

The risks of civil liability may be less perilous, and the employer is much more likely to absorb the burden of defending the employee. One early example of the risks appeared in a case involving EF Hutton. In that case, in response to allegations of misconduct, the company brought in the prominent outside lawyer, former Attorney General Griffin Bell, to conduct the investigation. At the end of the process, the company announced the conclusion that responsibility for the wrongdoing fell on the shoulders of employees. This led to an expensive defamation case brought against Griffin Bell; even winning such suits, as Bell eventually did, can be an expensive and grueling experience.

In a more recent case, the former legal counsel and compliance official at Tenet Healthcare Corp. was sued for damages under the False Claims Act for allegedly false certification of the company’s compliance reports to the HHS Office of Inspector General. Compliance professionals involved in dealings with the government, including certifications under consent decrees and corporate integrity agreements, need to exercise a great deal of care and diligence to avoid liability.

Again, as is true for other types of legal risks, the first step in avoiding individual liability is to be sure you have a good company lawyer who understands your mission and the legal risks; the second step is to be close to that lawyer, keep him or her informed, and seek and follow the lawyer’s advice.

The Business Pitfalls

---


While the legal risks are the most dramatic of the negative aspects of the field, the problems that arise in the business environment are much more common. One of these is the risk of alienating important people in the organization. This can happen in any of the interactions with management. Often in a business, the leaders are accustomed to a certain degree of deference. Even when they encourage employees to express their opinions, ultimately it is the senior managers who must make the decisions. But compliance people live by standards that can be at odds with these expectations of deference; this fact is especially important when considering that, at least in the Enron era cases, it has been the powerful, senior people most often involved in the serious violations.\textsuperscript{13} Deference to the leadership led to unmitigated compliance disasters in those cases. Moreover, the compliance person has a duty to the company; if that duty conflicts with management’s interests, the compliance person must persist in championing the company’s interests and in resisting wrongdoing even if it involves the highest officers.\textsuperscript{14}

This difference in perspective becomes particularly acute in the course of an investigation, when senior managers are either the targets of an allegation, or are fact witnesses. The interview process can be an unsettling experience for the business leader. Here is the head of a company or a department, having to sit patiently while some subordinate asks him or her questions. While the process does not take on the aggressiveness of a police interrogation, it is also not conducted with the deferential tone that managers usually expect. For example, if in response to questions the senior person says, “This is ridiculous, I didn’t break any rules,” she may well expect this simple statement will resolve the matter and the interview will end. But a compliance professional will persist and, when appropriate, point out any inconsistencies created by the senior manager’s answers. While intellectually the senior manager may understand why there is an investigation, there may nevertheless be strong resentment in being treated “this way.” Resentment may reach both the interviewer for his or her “overbearing” approach, and the compliance program’s managers for their poor judgment in allowing this “inquisition” to proceed. Even interviewees who are completely blameless and those who have had prior experience with investigations still do not like being subject to the process. It is probably natural to lash out at those who are the ones responsible for the investigation process.

If a compliance program is well designed, it will either allow or require compliance people to escalate certain matters, including reporting to the CEO and the board. This is done to protect the authority of the compliance program, and to protect the board and senior management from allegations of negligence and failure to oversee the program. If this escalation

\textsuperscript{13} See Report to the President, Corporate Fraud Task Force 2008 iii (“These [fraud conviction] figures include convictions of more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers”).

arrangement is well known among managers it will ideally never have to be used. This process can be seen in the analogous field of internal audit; managers typically do not resist or challenge the internal auditors because they know that escalation will inevitably follow. A similar understanding about the results of resistance or retaliation targeted toward compliance personnel—that this conduct will automatically lead to escalation to senior management and the board—could have the same deterrent effect. But if this escalation system is not understood and the compliance people do have to escalate, they will likely be strongly resented by those who were circumvented by this step.

The nature of these risks is illustrated by a case reported in the *Wall Street Journal* involving the manager of the compliance helpline at DaimlerChrysler. As reported in the *Journal*, the manager became alarmed that cases were not being investigated, and that the security department was attempting to determine the identities of callers to the confidential company helpline. The helpline manager complained internally about these practices. According to the news report, although the manager had been previously promoted and described in prior reviews as having strong business skills, she was terminated in December 2003, right before Christmas, for “insubordinate behavior.” Her belongings were searched and she was escorted from the building. The company has come under intense scrutiny for serious allegations of corporate misconduct, but nevertheless, even in that environment has not taken steps to reconcile the concerns of the helpline manager.

Another corporate political risk that is inherent in compliance is the issue of turf wars. It is the nature of an effective compliance program that it depends on participation and cooperation by all other departments and business units. It also involves functions that touch on the traditional terrain of other departments. If the program is well designed, if all the other players are believers in the program, and if the compliance program management is very adroit at bringing others into the process, the result can be a highly effective program. But this high degree of interdependence and the need to work with so many others in the company can also lead to turf battles. For example, to the lawyers, compliance can be seen as invading their distinct area of legal rules and interpretations; to HR, compliance can be seen as interfering with areas like discipline, training, incentives and the employee exit process; to internal audit, compliance may appear to be second guessing the audit process and their work. This reaction can lead to internal political warfare that hurts the compliance program and makes life difficult for the compliance professional.

What can make any company political dispute even worse is that compliance people are often not able to compromise. Whereas much of the successful operation of any organization depends on people making compromises so that they can work together, compliance demands difficult exceptions to this norm. Being a “team player” may be acceptable for many purposes.

---

But taking that approach does not work when it comes to exempting one key person from being interviewed in a serious investigation, or agreeing that the company will stop certain improper billing but compromising on the issue of returning money that was already improperly received. Indeed, the latter example is one that did make the newspapers, putting one compliance professional in an uncomfortable light. While others compromise, you as a compliance professional often cannot. This can make you appear to be inflexible, unrealistic, uncompromising, and a host of other unflattering descriptions.

While senior management may be fully behind you at the start, if they hear a steady drumbeat of complaints (“not a team player;” “doesn’t have good judgment;” “is pushing this beyond what the job is supposed to be”), there is a serious risk that they will be influenced by this static.

In addition to this risk of alienating powerful managers, there are other aspects of the compliance job that can be a source of frustration. Perhaps first among these is the absence of management support for the program. This can lead to the senior people saying the right things in the code, but not following through in their actions. While the other political missteps may lead to turf battles, if management does not really support the program it may mean you have lost the war before any battle is even fought. The absence of management support will mean not getting the resources you need to get the job done. It will also mean that employees throughout the company will not support your efforts. Without question, one of the greatest frustrations in the compliance world is dealing with managers who “just don’t get it.” Avoiding this trap is one of the reasons for using the “Questions to ask before accepting an in-house compliance and ethics job offer,” (See Appendix 1).

Related to the absence of management support is the failure of a company to provide the needed resources. While it is true that companies cannot provide unlimited resources, and that there are things more important than dollars in a compliance program, it is also the fact that some resources are essential in any organization to accomplish a task that is this important and complex. One way to be relatively sure that resources will be forthcoming is to join a company that has just experienced a compliance meltdown. As the saying goes, there is nothing that makes a person quite as religious as a near-death experience. But these same companies may cool down after the attention has faded, after the event has passed and those associated with the misconduct have been ousted.

The risks to the compliance staff in a company that does not support the program and fails to provide the resources can be substantial. For example, a company might sign on for a helpline that is initially well publicized. But if the staffing and resources for conducting investigations are not provided, this defect can result in a disaster for the company and the compliance staff. Once employees and others come forth to use a helpline, but find that their concerns are not being addressed, it may be just a short step to calling the government and the press. In any
activity it can be quite demoralizing to be given the responsibility for getting results, but not
given the necessary resources. Compliance people can find themselves begging other
departments for their help on important matters like investigations and training.

Aside from the deep frustration that comes from this general failure of management to support
the program, there are a number of other pitfalls in the business environment. One common
pitfall is delay—being told to wait in implementing an important compliance program step for
any one of a variety of reasons. Inexperienced compliance people need to be especially alert to
this phenomenon. It may seem there is always a reason to wait—some major company event,
downsizing, the next deal, a turnover at officer level—the reasons can be endless. But you as a
compliance person need to understand that change in business is constant. In fact, change itself
frequently is the source of additional compliance risks and concerns. The savvy compliance
person needs to know how to convert these offered excuses into reasons for moving forward
even more quickly.

Even those managers who generally support the program may still be the cause of another
basis for frustration—the failure to follow up. The compliance person may get assurance from
managers that certain steps will be taken, only to find out months or even years later that none
of these promises were kept. This may not be a matter of malice or obstinacy—the right intent
may have been there, but other factors just seemed to get in the way. For example, business
unit leaders may have been told to appoint a compliance person for their unit, but some may
just not have had the time to get this done. Or they may have appointed someone in the past,
but not replaced the person when he or she retired. A compliance investigation may end in a
decision to discipline a wrongdoer, but management never works up the nerve to actually
confront the wrongdoer, or fails to impose the full punishment. A compliance audit may result
in findings and agreements by management to implement fixes, but six months later nothing
has happened. These failures of implementation can be much more than frustrating—they can
create serious legal risk for the company if something bad happens later. Effective compliance
managers know the importance of following up with management, and of never assuming that
all promised actions will actually be done.

Sometimes the source of frustration can be open defiance by one person or group, but if
management supports the program this may be easy to fix. Much more frustrating are those
who seem to be constantly placing obstacles in the way of the compliance program. Often
these are people who sincerely believe what they are saying; the impediments may be the
views of professionals based on their own experiences and sense of the company’s culture. For
example, lawyers may tell a compliance manager that certain things just “cannot” be done.
This could happen in a company that wants to use truly effective communications techniques,
and therefore elects to follow the examples set by DuPont16 (and earlier by Bell Atlantic17) of

publicizing disciplinary cases. Lawyers may say it cannot be done because of the liability risks. HR professionals may warn that it “cannot be done in our culture.” If the compliance person is not well-versed in the field and aware of the successful history of using this technique at other companies, the program may well be stymied.

Another example of common obstacles placed in front of compliance people is the warning that headquarters staff must not take up the time of people in the field because they are already too busy or will resent staff’s interference. Yet the experience of compliance people who know how to conduct practical and engaging training is that field people are likely to complain about not getting the support they need, and not being told what the rules are supposed to be. The need to deal with these types of obstacles is one of the key reasons why it is so important for compliance people to have resources in legal, HR, internal audit and other key organizations who can help address these sometimes well-meaning but misinformed objectors.

In a similar category with the objectors are those who insist on acting as filters. These are senior people who feel they should act as a filter between the compliance people and senior management and/or the board. They place themselves between you and the key decision-makers—those who have the most need to know what is actually happening in the compliance program. The author of this paper can still hear the frustration in the voice of a compliance officer in one company who ultimately left her company because she could never get her message about the unsatisfactory state of the compliance effort past her boss, the general counsel, up to the board. This frustration is most likely to occur when the compliance officer is placed too far down in the organization to have an effective voice and get the job done. But it can happen to any compliance person who has an important message about the program, but is denied access to the decision-makers.

Compliance work has its own intrinsic rewards—spending one’s time to ensure a company does the right thing is certainly a morally satisfying task. However, it is also true that compliance and ethics is a field where it is often not possible to measure one’s results directly. How can a compliance person prove that he or she was responsible for some bad thing not happening? A sales person can show the results of a successful sales call; a line manager can show increases in production or decreases in costs. But in compliance it is difficult to prove what bad things you prevented from happening. Compliance and ethics is not a profit center, and will not appear to be making the same contributions to the bottom line that others are making. There can thus be frustration from not being recognized for producing results. If senior management fully and visibly supports the program, it helps offset the absence of provable results. But it will still remain true that compliance and ethics programs are inherently difficult to measure and evaluate.

---

Compliance and ethics is a field where there are many true believers—those who are dedicated to the field and truly want to find the most effective methods to prevent misconduct. But, as in any field, there are also frustrations in dealing with some of the professionals in compliance and ethics. One of these is the Chicken Little group—including those who are petrified of what might happen in litigation as a result of things the compliance program is doing. While compliance people need sensitivity about the litigation risks, they nevertheless must hold to the belief that the best long-term protection is to have the most effective program possible. But there are others—often lawyers—who will place avoiding litigation risks above all other concerns. There are also the Chicken Little compliance people who may see every allegation of a misstep as the end of the world. They may see the slightest infraction—e.g., a small office football pool—as the equivalent of a major felony. It can be a difficult concept for them to grasp, that while compliance and ethics people must not compromise on fundamental issues of right and wrong, there must be balance in assessing the risks and responsibilities.

On the opposite side from lawyers are the philosophers and ideologues who get caught up in what they see as a great and noble debate between ethics and compliance. They see the management steps laid out in the Sentencing Guidelines as some form of imposed legal standards that must be minimized, and prefer more “meaningful” tasks like putting employees through mind-numbing ethics exercises. One risk here is in having to spend endless hours debating matters that rate with the debate in the land of the Lilliputians of Gulliver’s Travels about which end is the proper end for breaking eggs. Compliance and ethics is not about great intellectual conundrums; it is the practical application of management principles to prevent and detect misconduct in companies and other large organizations. To a practical person there are few things more frustrating than getting pulled into these types of academic debates. There is also a risk of having resources drained off from the difficult work of compliance into company “social responsibility” initiatives. This strategy is sometimes described as “moving past” basic compliance into something better, such as values and social responsibility. The issue here is not that companies should avoid community work; indeed, helping communities is certainly a good thing, especially if it is something more than PR. But what is missed is that these efforts are very different from compliance and ethics. Companies make a serious, and potentially fatal mistake if they think that ethics and compliance work is easy, or that it can ever be completed. Preventing and detecting crime and other misconduct is one of the most challenging efforts in human society. If attention and resources are distracted from this important task, the effectiveness of the compliance and ethics program will suffer.

The Personal and Social Downsides
Beyond the legal risks and the challenges of the corporate environment, there can be some personal challenges for those doing compliance and ethics work. It is accurate to describe this field as a dynamic one, but this is the positive way of saying that there is constant change and uncertainty. For those who like certainty and stability, this is a difficult way of life.
Compliance and ethics is not a check-the-box exercise. There is not a simple formula that is guaranteed to work. Nor is there one fixed set of risks in this work. The challenge of preventing misconduct is never finished, so what is needed is never a settled matter. If you like certainty, this is not a good field for you.

Compliance people work in a world of risk and potential liability. Even in a company where management fully supports the program and there are no government enforcement proceedings pending, there is still likely to be some conflict and resistance. This is not a relaxed profession.

In this field, and especially in a large company, there can be a steady diet of problems, complainers, and misconduct. While the overwhelming majority of people in a company will be good and honest workers, you will be dealing with the minority that are not. Just dealing with disciplinary matters can be draining. You are called upon to decide if someone’s career may be ruined, or if bonus money that an employee was expecting will now be denied. Of course, experienced compliance people can use techniques to minimize the tension inherent in the disciplinary process. For example, using a systematic approach in disciplinary cases can reduce the emotional element.\(^1\)

The end result of tension and job frustrations can be burnout. This is one of the reasons it is so important for compliance people to master the methods discussed later in this paper for protecting oneself and networking with peers in the compliance and ethics field.

Finally, there is the risk of isolation. If the communications about the compliance program have not been effective, you may find that people just do not understand what it is you do. You may be viewed by senior management as a troublemaker, and by employees as a troublesome nuisance. You may end up the lone force fighting the good fight on behalf of what you believe is right. This can put you at odds with others in the company, so that you feel isolated from the rest of the corporate team. If you have just kept to yourself in the company and not reached outside, that isolation can lead you to see yourself as vulnerable and alone.

Compliance people must never let themselves be isolated. Internally this starts with having the right reporting and compliance infrastructure. The compliance person needs to bring others into the process. But at least as important is the need to network with others outside. Compliance people absolutely need to join the compliance and ethics groups and organizations. This is the antidote to isolation, and a key to being a fully effective compliance person. In difficult times, that understanding voice at the other end of the line—the one who knows exactly what you are experiencing and can give you the encouragement and support you need—can be exactly what you need to stay the course, keep your own mental health, and

\(^1\) See Murphy, “Taking a Disciplined Approach to Discipline: Enforcing Compliance Standards,” 13 \textit{ethikos} 4 (Mar/Apr 2000).
help your company avoid getting itself into trouble. The development of the SCCE social networking site has greatly facilitated this networking process. While no online networking can be as good as live interaction in a compliance and ethics conference, the social network offers the advantage of making interaction with peers immediate.  

**Conclusion**

For the right kind of person, there is nothing that compares to the field of ethics and compliance. And for most people in the field, their experiences have probably been positive. But anyone who considers this line of work should understand the reality of life in the corporate workplace. Being exposed to these risks will help you in considering how best to strengthen your position, and will be especially important in equipping you to deal with the risks while pursuing a rewarding career in compliance and ethics.

---

Protections for Compliance People

What Protections Are Available for Compliance People?
In this section we explore how you can protect yourself as a compliance person in-house. For compliance people, doing this work in-house can be quite difficult and challenging. You are expected to stand up to the strongest and highest levels in the company, even when they are determined to have their way in some misadventure. Picture yourself nose to nose with an Andy Fastow or Jeff Skilling at Enron. This is the acid test of a compliance program—can it stand up to those with the most power in an organization who are accustomed to having things their own way. In addition to the internal career risks in dealing with powerful managers, there are also significant legal risks in this line of work. In particular, you may be dealing with internal investigations, litigation, and various government agencies and enforcement authorities. Each of these situations comes with its own set of risks. The compliance person needs to think about how they will deal with these.

As you understand what compliance work is about, the risks that could affect you become fairly clear. But why should the company care about this? Why would management cooperate in protecting the compliance officer and his or her staff? The first answer relates to recruiting. The more sophisticated compliance people become, the more these questions will be part of the equation in making employment choices. Fully empowering and protecting the compliance person will be a plus in obtaining the best personnel. But there are reasons beyond this recruiting advantage.

Any company that is seriously committed to compliance and ethics should want to be sure the compliance officer and staff are empowered. Empowerment is indispensable for the compliance program itself to be effective. In fact, there is empirical evidence that the clout of the compliance staff is more important for achieving results than is the size of the staff. If, instead, the compliance people live in dread of alienating anyone in the company, there is little if any chance that they will be effective in keeping the company out of trouble. In establishing its program, a company needs to design a system that will work in the worst case scenario, rather than just the best case, which is often the status in the beginning of the program when the commitment may be highest.

Providing the levels of protection discussed in this chapter also shows that the company is confident enough of itself that it would give the compliance staff a high level of autonomy. The compliance program is much more credible as a form of self-policing if the compliance people have the power and security to execute their jobs. That empowerment can also help if the company ever has to present its program to skeptical prosecutors or regulatory authorities.

One important caution belongs with this discussion of protection techniques. You do not want to come across as a prima donna who is better than everyone else as you approach the difficult educational task here explaining the peculiar nature of the compliance function. People in the company and on the board need to understand the purpose of these protections.

**Going in with your eyes open.** The first and probably most evident form of protection is to go into the job with your eyes open. You need to fully understand how deep management’s and the board’s commitment is to the compliance program. You want to know exactly what your job will be and what authority you will have. You also want to know what protections are being offered as an opening point. In the words of Professor Paul Fiorelli, “During the interview process, you really should try to find out how committed the organization is to doing things the right way, as opposed to just checking the box.”

We have included in Appendix 1 a list of questions to ask in these circumstances.

When you are told something about your job and the protections that are to be provided, be sure these are real commitments. Whatever you are told, it is best to get these promises in writing and from the top of the company.

**Employment contract.** One of the highest levels of protection may be the employment contract. While these are considered appropriate in many circumstances outside of the U.S., in the U.S. they are still relatively rare and reserved for key people. If you have the necessary leverage, it is worth trying to negotiate one of these. But until there is a considerable shift in American managers’ approach to employment contracts, it is likely to remain the exception rather than the rule.

Developing a compliance contract can be a considerable exercise, worthy of a great deal of attention. It can, in fact, lay the groundwork for any of the other protections covered in this chapter. We have covered in more detail the nature of these contracts and the points to cover in parts C and D of this section.

**Severance packages/golden parachutes.** Any discussion of security and protection has to take money into consideration. One of the favored protections, at least for senior executives, is the severance package or golden parachute. A strong severance package would provide that the company will give you a substantial payment if you are forced out of the company earlier than anticipated. Depending on the amount, this has the advantage of providing a degree of financial security, giving you enough money to cover your needs until you can find a new position. Presumably, this makes it easier for you to say “no” to misconduct at any level of the business, if you know you have a fallback position. A severance package may be easier to negotiate with management than an employment contract, because it is less unusual and the

---

21 Interview with Professor Paul Fiorelli.
only commitment the company has to make is a financial one. As one compliance officer observed, compliance officers deserve substantial severance pay because of the inherent difficulties of the job. “In fact, a compliance officer should have a generous severance package in that role, because the compliance officer is really someone whose job is to bring bad news to the attention of management. That’s a difficult job, and to do it effectively, the compliance officer can not be worried about whether he or she is going to be able to feed his or her family or make the next mortgage payment.”

On the negative side, a severance arrangement does not show the same high degree of commitment to the compliance program that an employment contract does. It also does not have the same positive appearance as a contract. Viewed from a cynical perspective, an adversary could argue that the company is just putting a price tag on its level of commitment. It may not appear to give the compliance person the same degree of commitment to stand and fight. A skeptic could claim a severance arrangement does just the opposite—it gives the compliance person an incentive to bail out. One other consideration on the negative side is the risk that the severance package will only be given to the chief compliance officer, but not the rest of the staff. The fact that the top person can leave on a financially favorable basis may not benefit the compliance staff, and could arguably send the message that they are more vulnerable than the compliance officer.

**Indemnification by the company.** Because the job of compliance people involves deliberately getting into the line of fire in matters of misconduct, there is always the risk of being caught up in litigation and government investigations. Compliance people should know whether and to what extent the company stands behind them. Specifically they should know if the company provides indemnification against claims and expenses in litigation, and who is covered by that protection. Indemnification is a commitment by the company to cover the legal expenses for certain members of the corporate family if they face legal action.

Unlike employment contracts, which are an unusual form of protection in the U.S., indemnification is a customary protection for board members and officers. But a compliance officer should specifically ask about this benefit and examine what coverage is provided. It is, unfortunately, not unusual for a compliance person to have the title of “officer,” but not legally have that status. You need to know specifically whether you are included. As for the rest of the staff, the company may just provide a general statement that it will stand behind them. Where possible, it is better if this can be provided in writing, in a binding form.

There is one major flaw in indemnification—it is only as strong as the company standing behind it. If the company goes into bankruptcy, those who were depending on indemnification can find themselves exposed. It is worth remembering the impact on the board and officers at

---

Enron and WorldCom. It probably never occurred to any of them that the companies that indemnified them would suddenly turn out to be insolvent, and the indemnifications dependent on a bankrupt company.

**Insurance.** If confidence as a compliance person is reinforced by a sense of security, and indemnification may be too closely tied to the financial well-being of the employer, what is the alternative? The use of outside insurance can provide an important backup; this is usually in the form of directors and officers (“D&O”) insurance.

In D&O insurance, protection is provided by an outside company and thus has the advantage of not being tied to the company’s finances. But you may want to get outside advice to be sure you are covered, and that the coverage is sufficient.

The first question to ask is, “Are you actually covered?” Do not assume that you are covered, and do not just take someone’s word for it. Even if you do verify that you are covered, keep in mind that there are many types of policies and ranges of coverage. Just being told there is D&O coverage does not tell you what you need to know. You should have someone familiar with insurance examine the policy and the coverage. One starting point is an eye-opening article on coverage issues in this area, written by Copeland in the *Journal of Insurance, Risk & Public Risk Management.*

Even if the coverage is stellar and you are clearly included, you should also understand that, depending on the contract, the insurance company may deny coverage if there was fraud in obtaining it. For example, if senior management knew of misconduct and did not reveal it when applying for the insurance, the insurance company may have a basis for denying coverage. It is best to have non-rescindable coverage, and to have severability (so that one manager’s misconduct does not undercut the others’ coverage under the policy). Also consider that, as the expense of insurance premiums increases, your employer might choose to drop the coverage or severely limit it. You thus need to require that the company and insurance carrier notify you of any changes, cancellation or non-renewal.

**Board of directors’ resolution.** Protection for compliance professionals should not be thought of only in simply legal terms. Certainly, having a contract, indemnification, severance and insurance coverage are important precautions. But you want to avoid ever having to rely on these ultimate tools. The better protection is to be sure that the company fully supports the compliance program and is committed to making it a success. One fundamental step in this direction is to have a strong board of directors’ resolution endorsing the compliance program.

---

As part of this effort, the board should also be on record as the one controlling selection of the compliance officer.

A good resolution will put the company on record at the highest level and will fully empower the compliance officer. Doing this at board level makes it clear that the program covers everyone in the company—senior managers and board members alike. It is best if the resolution is specific on key points, so there can be no question about the compliance officer’s direction and authority.

One of the most important protections at this level is for the resolution to require the board’s prior approval for the compliance officer’s removal, or for any negative changes in working conditions. This step removes the risk of having a senior officer attempt to preempt the compliance officer by removing him or her. Along these same lines, it is also beneficial if the board is the one who determines such critical issues as the pay, advancement, bonus, and working conditions of the compliance officer. At the next level, the compliance officer would then be delegated responsibility to do the same for all those subordinate to him or her in the compliance structure.

Among other elements to include in the resolution is a strict requirement that all allegations about senior managers must be reported to the board before any decision about the allegations is made. There could also be a requirement for similar reporting of any threats of retaliation against the compliance staff.

In establishing these arrangements the board should designate a committee of independent directors with oversight responsibility for the program. It is especially the independent members who have the strongest motive to make sure things are done the right way. As outsiders they have not participated in the internal management decisions, and, at least in a publicly traded company, may face liability for not exercising diligence in overseeing the company. 24 Whether it is a committee or a full board, however, it is essential that directors have the knowledge and resources to carry out this oversight responsibility. For example, if board members have no expertise or experience in determining the compliance officer’s pay and other work conditions, then they may need separate access to compensation expertise.

**Full access to high-level positions in the company.** Continuing to focus on the practical, less ultimate protections, it is important for the compliance person to have the ability to reach the most important leaders in a company. This helps protect you, for example, from what others might say when you are not there. Compliance people engage in conduct that is not always popular—investigations, audits, discipline—and this can result in alienating powerful people.

---

in the organization. Among other things, having easy access to the key leaders allows you to brief them in advance, so they will be prepared for these types of complaints.

The compliance officer and staff should have access to all managers and employees. But it is especially important that there be a good reception among certain critical leaders. Among the most important are the general counsel and the CEO. Also essential is access to the audit committee, or the independent board committee with oversight for the compliance program (referred to here as the audit committee).

Having the trust and support of senior management and the board is usually your most important protection. They are the ones who will deflect misguided criticism and attempts to undermine the compliance program’s efforts.

**Educating the audit committee about compliance.** While the support of management is crucial on a day to day basis, in the long term you need the backing of the audit committee. They may be your only recourse if there is an allegation about the most senior managers, or if senior management ignores your advice and plans to proceed with an improper course.

While there is certainly a greater awareness among board members about the importance of compliance programs than was true in the past, you should not just assume that this awareness is there, or that the audit committee will fully understand what you are doing and why. One of the most important steps you can take to protect yourself, therefore, is to ensure that the audit committee has a full understanding of this area. It is a serious mistake to wait until a crisis emerges to start this educational process.

In addition, you may be able to enhance the ability of the audit committee to assist you by helping them obtain appropriate outside assistance. For a publicly-traded company, if the audit committee uses the power provided under section 301 of the Sarbanes Oxley Act\(^\text{25}\) and obtains its own outside consultants or lawyers familiar with compliance programs, then it may be better equipped to support you when a test of strength occurs. You may also increase your degree of protection if you can get the board to add to the audit committee someone who is serving as a compliance officer at another company.\(^\text{26}\) This step can offer very valuable protection and a good resource for the company, as long as the committee recruits someone who is a true devotee to the field of compliance.

**Company commitment to professional ethical standards for compliance and ethics professionals.** One of the promising developments in compliance and ethics is the emergence

\(^{25}\) Sarbanes Oxley Act of 2002, section 301.

of ethical conduct standards for professionals in this field. \(^{27}\) SCCE’s Code of Professional Ethics is quite strong and specific about a compliance professional’s standards of conduct. However, one limitation of this code is that, unlike comparable standards for such licensed professionals as lawyers and physicians, there is no governmental imprimatur on the SCCE code.

If a company steps forward, however, and endorses these standards for its own compliance professionals, this accomplishes two positive results. The first is that the company shows that it is very serious about its commitment to compliance. The second is that the company helps empower the compliance professionals to live up to a high standard of conduct.

There are several ways a company can officially accept these standards. One is to include them by reference in employment contracts with compliance professionals. In that way the standards become legally binding on the company and the professional. An alternative is to place this commitment in other official documents of the company. For example, it can be made part of the board of directors’ resolution endorsing the compliance and ethics program, and included in the position descriptions of the compliance staff. Ethical standards that are strong and specific help clear the path for the compliance staff to act objectively and with a commitment to the compliance mission.

It is also advisable to make sure that the principal officers and board members understand the impact of these ethical standards. The SCCE code’s standards were written to answer difficult questions for compliance and ethics professionals, and they make it clear that a professional cannot accept or participate in misconduct and is compelled to act to prevent harm. Because of these directives, there can be great value in having the company endorse these tough standards and in having senior leaders understand the implications of doing so.

**Position description.** It is typical for companies to have position descriptions covering positions like the senior compliance roles. You should very carefully examine your job description and be sure it conforms to the reality you were promised in accepting a compliance position. A well-written position description will help communicate to management what your job is. This, in turn, helps avoid those unpleasant surprises that can occur when managers realize compliance is not just about codes and training sessions, but has the potential to intrude on other parts of the business. The clearer this documentation is in communicating this perspective, the better for all involved.

**Ability to network/keep up on outside career options and contacts.** In addition to the company documentation and other internal steps, it is also crucial to look to the outside

---

compliance community for increased security. There are a number of organizations that offer opportunities for networking, from national membership groups to local and industry practices groups. In addition to conferences and webinars, the SCCE also makes available an online networking forum, its social networking site, that facilitates such networking from one’s laptop.

Being in compliance groups and taking advantage of every opportunity to network helps keep you informed of trends and opportunities in the field. This connection will improve your sense of security, knowing that there are alternatives out there and knowing how to make the necessary contacts.

There may also be an element of security in being very visible publicly. This effort may make the company and other managers at least a bit more reluctant to remove you in retaliation for you doing your job. You do not want to overestimate the deterrence value of this visibility—companies are notorious for ignoring the public impact of engaging in questionable conduct. However, it is better to have that visibility and at least have the public impact be a factor for management to consider. The absolute, no exceptions advice for any compliance person is never let yourself be isolated. Being connected and having a network gives a sense of security that helps any compliance person to be stronger.

Laws against retaliation. Because compliance people are involved in issues relating to ethics and compliance, including allegations regarding violations of law, it is fair to ask whether a compliance person can expect to benefit from laws protecting whistleblowers. The starting point to answering this question is to consider the status of whistleblower protection in the U.S. As a first observation, there is no single, universal U.S. law protecting all kinds of whistleblowers. Perhaps the closest is the provision of the Sarbanes-Oxley Act that makes it a crime to retaliate against those who report violations of federal law to the government; however, it does not protect internal reporting. There is also a separate provision that provides civil remedies for retaliation against whistleblowers, including those who report violations internally. However, this law only applies to certain types of offenses and only for publicly-traded companies.

Information on the SCCE is available at http://www.corporatecompliance.org//AM/Template.cfm?Section=Home; see also Murphy & Leet, Building a Career in Compliance and Ethics 176-77 (SCCE; 2007) for a list of other organizations.


Beyond Sarbanes-Oxley, the protections vary by specific legal area and by state. To know whether you are protected under any specific legislative regime you have to research the law and how it has been interpreted. For example, in Illinois the state supreme court has held that company lawyers may not bring wrongful discharge claims when fired for opposing illegal conduct, because a client—the company—has an absolute right to select and discharge its counsel.32

No matter what the legal regime, the reality of making out a retaliation claim for a compliance person can be difficult. Retaliation can be very subtle, and can occur well after the event at issue, so as to appear to be unconnected to the compliance person’s conduct. Litigation is expensive and time consuming, and suing an employer can mark you as a danger to future employers. If you are a lawyer, you have the additional consideration that you may be ethically barred from disclosing client confidential information, which might otherwise be essential to prove a case of retaliation.

Perhaps the greatest limitation on retaliation claims as a bulwark for compliance people is that often the important issues that can undermine a program will not fit under these laws. For example, if management wants to retaliate against you for requiring training, conducting audits, or otherwise doing your job thoroughly, they will not typically be prevented from doing so under retaliation laws. Rather, these laws apply when an employee has reported misconduct. Things that can undercut you and the compliance program may not fall into that category. If management decides simply to cut your staff, or refuse to let you do your job, that will not usually qualify as retaliation, unless done in connection with reporting or investigating wrongdoing. Retaliation against the compliance officer for doing a good job is not illegal, even though it is very unwise.

**Access to/ability to retain counsel.** In a field so closely connected to the law, having access to good counsel is essential for many reasons, not the least of which is to ensure your own safety and security. You need to have a company lawyer who will understand what the compliance function is, and how it differs from other parts of the company.

Because compliance is still relatively new and is different from other areas of the law, it is best to have at least one company lawyer who is specifically assigned to the compliance program. The lawyer should have a background in compliance so that he or she knows the requirements and pitfalls. This lawyer can help assure that you avoid missteps, and can also help keep relations with the legal department on the most productive level possible. You want to be sure this lawyer remains current in the compliance and ethics field, through such steps as participating in SCCE programs and the SCCE social network, following the compliance and

---

ethics literature, and perhaps achieving Certified Compliance and Ethics Professional (“CCEP”) certification.\(^{33}\)

In addition to in-house counsel, it is also valuable to have the authority to retain outside counsel. This is certainly crucial for investigations, and for advice in any matter where the legal department itself might be implicated or at least have a potential conflict of interest.

**Your personal lawyer.** Any discussion about legal counsel also needs to consider whether compliance people should have their own, outside counsel. It should be noted again that this discussion of different forms of protection is addressing the worst possible case. Most compliance people do not have occasion to need their own counsel, and do not deal with rogue senior executives. On the other hand, it is helpful to be prepared for any contingency, including one where there may be a conflict between the company’s (or at least management’s) interests and your interests as a compliance professional.

Consider one of the worst possible scenarios, where there is a conflict with the senior management and even the board. Despite your best efforts it has not been possible to reach reconciliation. In such circumstances it is essential to remember that any corporate counsel, including a lawyer specifically assigned to the compliance program, only has one client and that is the corporation. If there is a dispute between the company and any employee, including the compliance officer, company counsel is obligated to take the company’s side and represent the company against your personal interests. This same point would also hold true for the company’s outside counsel; you should not turn to the same outside firm that does work for your employer.

In this type of extreme situation, the compliance person may need his or her own personal counsel. The need for personal counsel also holds true at the earliest stage, if you are considering a job offer from a company. Only your own personal counsel can give you an objective assessment of any employment contract or other terms of employment that are offered to you.

In considering retaining your own counsel, keep in mind several other factors. First, you need to be careful with company confidential information. Before revealing any information that might be proprietary to the company, be sure your own counsel works through the legal limitations on such disclosure. This can be particularly troublesome for the compliance person who is also a lawyer and owes a duty of confidentiality to the company as the client.

You also need to consider the company’s reaction to your retaining your own counsel to address a conflict with the company. Although lawyers are certainly commonplace, retaining your own counsel may still be viewed by management as a somewhat hostile act. It may also

\(^{33}\) See [http://www.corporatecompliance.org/Content/NavigationMenu/CCEP/AboutCCEP/default.htm](http://www.corporatecompliance.org/Content/NavigationMenu/CCEP/AboutCCEP/default.htm).

*Society of Corporate Compliance and Ethics  +1 952 4977 or 888 277 4977  [www.corporatecompliance.org](http://www.corporatecompliance.org)*
mean from that point forward all communications will be channeled exclusively through counsel.

If you do retain your own counsel, do not assume that most lawyers will be familiar with what you do as a compliance person. For the most part, law schools do not teach their students about this field, and it is still likely to be the case that even lawyers in practice will not have much, if any, experience with compliance as an employment field. You should assume that you will need to provide at least some background for your lawyer.

Other Aspects of Protection

Protection in general. As a general proposition, you are likely not to need to invoke the most extensive of these protections. The typical company does not go bankrupt from misconduct, or fire the compliance officer because he or she is doing a good job. Every day is not filled with strife with management. But it is also true that good preparation will not only stand you in good stead if a conflict occurs, but even more importantly, good preparation is likely to prevent the worst case scenario from ever happening. You are more likely to approach your job as a compliance professional with confidence if you have taken the time to consider the possible contingencies in advance, before any dispute occurs.

The other half of the equation—checks on your power. One other point that deserves attention is the issue of what happens when the compliance officer and the compliance staff are, in fact, fully empowered. While the purpose of that empowerment is to provide a check on abuse of power by others in the company, the unfortunate reality is, as Lord Acton observed, power does tend to corrupt. If the compliance officer is in a strong position, there needs to be at least some form of check on that power, just in case there is an allegation of abuse. On the other hand, this needs to be established carefully. Any person who is subject to an investigation, and especially an errant senior executive, is likely to feel indignant and to find slights and offenses where none exist. An accused employee may respond to allegations of misconduct by claiming that the investigators and the compliance office were, themselves, the abusers.

The most straightforward precaution is to have an alternative reporting system that reaches the audit committee. The audit committee should then have the authority to use whatever internal resources it considers appropriate, and to retain its own outside counsel to obtain advice and conduct independent investigations. In addition, there could be a system for complaints about compliance professionals that go to the general counsel, as long as the legal department is separate from the compliance office. The chief internal auditor would be another candidate for receiving complaints, again with the caveat that there not be a reporting relationship with the compliance officer. Even in the cases where matters are channeled to other officers, however,
it is always best to have notice also sent to the audit committee, so that they can monitor the situation.

One additional consideration on this point is to be sure the company’s helpline operator knows that complaints about the compliance officer should not go to anyone in the compliance office. The helpline provider could be given the alternative reporting source, as well as instructions not to include any such matters in whatever report or data base is accessible by the compliance office staff.

The Employment Contract 34

Among the various forms of protection available for the compliance officer and other compliance staff, the employment contract has the potential to offer the most specific, customized form of protection. Its coverage is up to the two parties to the contract—the company and the potential employee. This discussion covers the nature of such a contract and what it could cover.

How does an employment contract help? The existence of such a contract can send a very strong signal about the company and its commitment to the compliance program. In most companies such a contract would be an extraordinary sign of importance, because only highly valued employees would receive such special treatment. A well-drafted contract would provide substantial protection for the compliance officer. It could also establish a clear channel to, and relationship with, the board of directors.

Such a contract would send an unmistakable message to those outside the company, such as regulators and enforcement officials who are trying to gauge the company’s level of commitment. Only a company that had confidence in its commitment to doing the right thing would set up a compliance officer with this degree of clout and independence.

An employment contract can help insulate the compliance officer and the compliance staff from intimidation. If other, powerful officers in the corporation are the targets of serious allegations and must be investigated, the protection of the compliance officer and staff will lend much more credibility to any internal investigation, and give the compliance officer more assurance in carrying out his or her duties.

An employment contract can also be used to ensure that the compliance officer has the resources necessary to get the job done. It can provide for the scope and function of the position and its responsibilities, to reduce time wasted in debates about what is and is not within the compliance officer’s jurisdiction.

34 This discussion is adapted from Murphy, “Enhancing the Compliance Officer’s Authority: Preparing An Employment Contract,” 11 ethikos 5 (May/June 1998).
Because compliance officers are drawn from the same pool of humans as the rest of us, with the same strengths and weaknesses, the employment contract probably should also spell out the limits of the compliance officer’s powers as well. Procedures for removal and standards for conduct can be spelled out there.

If the compliance officer is protected, what about other compliance personnel? If the compliance officer has strong protection, and also has control over the status of compliance personnel, it could be argued that this officer’s protection is all that is needed. But staff people can face the same or greater conflicts and tests of strength. And the staff may be made up of more junior members who are counting on transfers and promotions to other departments to advance their careers. An employment contract for those in the key compliance staff positions can have the same benefits noted for the compliance officer.

Is it necessary that every compliance officer, assistant compliance officer, and other compliance staff member have employment contracts? No, there is no law, no specification in the Sentencing Guidelines, and no pronouncements from government agencies on this point. Indeed, it may be that the use of an employment contract is a novelty that is just beginning to be considered. An employment contract for a company’s new compliance officer is not a requirement. But for those companies who want their programs to be state-of-the-art and to utilize best practices, and for those looking for the most effective program elements and the maximum credibility with the outside world, this is a tool that should be on the due diligence list.

Checklist For Employment Contracts
The following is a checklist of items to consider in preparing an employment contract for a compliance officer; with modifications this could be used for an assistant compliance officer or other compliance professional. It may not be necessary or possible to obtain coverage of each of these items in every contract, but they do raise points to be considered in the process of empowering a compliance manager.

1. Commitment to Integrity. The contract could contain a recitation of the company’s commitment to integrity and compliance, and to having a program at least as good as the Sentencing Guidelines and industry practice. It should recite specifically that the company intends the program to be a “best practices” program, if that is the case. The contract should then be construed in light of that level of commitment. Of course, these commitments should also be in other company documents, such as a board resolution and code of conduct, but having them in the contract helps if there is ever an employment dispute under the contract.

2. Authority of the Compliance Officer. The contract would recite that the compliance officer has the full authority necessary to implement an effective ethics and compliance
program that at minimum meets the Sentencing Guidelines standards and industry practice. This gives the compliance officer the power to get the job done.

3. **Changes in Compliance Officer’s status.** Under the contract the compliance officer is not to be reassigned, transferred, demoted, or have additional duties added without the written consent of and prior notice to the audit committee. This decreases the ability of management to interfere with the compliance officer. When the compliance officer leaves the company there should be a mandatory exit interview by the audit committee or that committee’s chair.

4. **Unlimited access.** The compliance officer is to have unlimited access to facilities, records and personnel, and all senior management meetings. As with other provisions of this contract, the authority provided in the contract should also be recited in other company policies and instructions that provide this authority within the company.

5. **Position description.** The contract would contain a description of the position and the job requirements. If there is a board resolution, then this position description will recite that the compliance officer’s job includes ensuring execution of the board’s resolution committing the company to implement the ethics and compliance program.

6. **Compliance officer’s standard of integrity.** The contract may recite that the compliance officer must conduct himself or herself with the highest integrity. The compliance officer is subject to the company’s code of conduct, unless the code imposes a requirement (beyond anything required by law) that would otherwise result in a violation of this agreement or a violation of professional ethical standards applicable to the compliance officer. These standards would include the SCCE Code of Professional Ethics for Compliance and Ethics Professionals.\(^\text{35}\)

7. **Professional standards.** The company accepts and incorporates in this contract by reference the SCCE Code of Professional Ethics for Compliance and Ethics Professionals. The company will not expect, request or require the compliance officer to engage in any conduct, or fail to do anything, that would result in a violation of these standards. The contract could even include as an appendix a copy of the Code of Professional Ethics. Because these standards tend to be empowering for the compliance officer, making them part of the contract can help considerably.

8. **Compliance officer as a senior officer.** The compliance officer’s position is to be a “senior officer,” consistent with the reference to “high-level personnel” in the Sentencing Guidelines.\(^\text{36}\) The contract should specify the title, e.g., Chief Compliance and Ethics Officer, etc. The contract can also recite that the compliance officer is entitled to attend all senior staff

---


\(^{36}\) USSG section 8B2.1 (b)(2)(B).
meetings. Having access to these senior officers is a key part of protecting the compliance officer’s position in the company.

9. **Compliance officer’s line of reporting.** The contract can make clear what the compliance officer’s reporting line is. This is very important, because without this the compliance officer can readily be diminished in stature by being moved down the reporting line away from the most senior officers. The compliance officer is to report to the CEO and to the audit committee (or other committee of outside directors) of the board. The compliance officer is to have unrestricted, unfiltered access to the board committee that oversees the program.

10. **Compensation and benefits.** The compensation, retirement plan and other incentives and benefits are to be commensurate with senior officer status. This is one of the tests of whether you are really a senior officer, or whether your title is just for appearances. If your compensation package is less than other senior officers, then it is likely that you are not really a senior officer. You should try to avoid connection of the incentive standards to activities the compliance office is expected to monitor. For example, it is preferable to tie incentives to long-term stock performance than to annual sales. Given that the compliance officer has a monitoring and policing role, it is better if the incentives do not appear skewed in favor of short-term expediencies.

11. **Vacation.** As with other benefits and compensation, the compliance officer should have the same benefits as other senior officers. You may want to specify this in the contract, in terms of weeks of vacation provided.

12. **Office and facilities.** The status of the office and other facilities including computers and other electronic tools is to be no less than other senior officers. Another delicate issue is the location of the office. This should also be equivalent to that of other senior officers. If senior officers are located near their departments, then the same can apply for the compliance officer. But if all the senior officers are on the twenty-third floor, and you are to be placed on the tenth, this is a subtle signal that you are not really a senior officer. Moreover, there is value in having the compliance person in the immediate vicinity of the other officers, to be available to them for advice, and to be aware of developments at that level of the business. The reality is that it is just easier to ignore someone who is not present.

13. **Annual evaluation.** One way to exercise influence over someone is to be the one who determines that person’s annual evaluation. For the compliance officer to have the freedom to object to conduct at the highest levels in management it is helpful if the evaluation is not performed by those same managers. The contract should specify who is to conduct this evaluation. It is best if the audit committee has this responsibility, or failing that, has the final say in any evaluation performed by management.
14. **Length of term.** As with most employment contracts, this one should provide for the length of the term, to protect the compliance officer’s position. It should also spell out what the renewal terms are.

15. **Renewal.** Any decision to renew would be made by the audit committee, with the advice of management. If a decision is made not to renew, the contract would recite that the decision must be communicated in a detailed, written explanation by the audit committee. This helps keep everyone honest.

16. **Termination for cause.** While much of the focus of this discussion is on how to protect the compliance officer, compliance officers are human and subject to the same temptations as others. Moreover, the more power the compliance officer has, the greater the risk of abuse of that power. Thus the contract should provide for termination for cause. However, there needs to be protection from the potential for abuse of this provision. One approach is to set up a highly structured and formalized system to address this contingency. For example:

   The compliance officer may be terminated for cause, upon the recommendation of the audit committee, and the vote of the full board of directors. As an interim measure, the compliance officer may be suspended by the chair of the audit committee, or by the vote of the entire committee, if there is a credible allegation raising probable cause of misconduct justifying termination, and there is promptly initiated an investigation by a professional firm retained by the audit committee. Prior notice of any proposed suspension or termination and the reasons therefor, must be provided in writing to the compliance officer. A cause justifying termination of the compliance officer means: a) a criminal act, or an act of moral turpitude, dishonesty, theft, or unethical business conduct; b) refusal to obey lawful orders given by the audit committee, as long as any such orders are consistent with professional standards applicable to the compliance officer, including the SCCE Code of Professional Ethics for Compliance and Ethics Professionals; or c) failure to perform the responsibilities of this contract, as determined in good faith by the audit committee.

17. **Severance package.** Any termination or forced resignation of the compliance officer except for cause, or any resignation based on the compliance officer’s refusal to accept or support illegal conduct by the company, shall result in the payment to the compliance officer of substantial severance, for example, two years’ salary, payable within 30 days of the compliance officer’s last day of employment. The company would also pay for the compliance officer’s health care insurance for the two year period, unless the compliance officer obtains equal or better coverage through employment at another company.

18. **References.** Except if the compliance officer is terminated for cause, the company would agree to provide letters of reference if and when the compliance officer leaves the company.

19. **Resources.** The compliance officer is to have adequate budget and resources. If there is more detail available about the intended resources, then that can also be recited here.
20. **Compliance staff.** This provision can describe the amount and nature of the supporting staff, the compliance officer’s ability to obtain appropriate staff (in terms of numbers and quality), and the compliance officer’s degree of control over that staff. You should not underestimate the importance of this point; absence of resources and staff can seriously undermine the program. On the other hand, a small staff can work quite well as long as other departments in the company assist in the compliance program. In fact, rather than having a large staff, it can be better if others with the necessary skills in other parts of the company are brought into the picture. Involving others can increase ownership of and support for the program.

21. **Access to company legal counsel.** The contract can specify that the compliance officer will have direct access to company counsel. It is useful to recite that counsel represents the company, and that the compliance officer’s discussions with counsel may be disclosed by counsel only to the audit committee. While ethically all company counsel represent the company and not individual employees, in fact counsel will often feel an allegiance to particular managers. It can be helpful to spell out here that the compliance officer’s communications with company counsel may cover points that may not be shared with others, even the top officers.

22. **Access to outside advice.** The compliance officer should have clear authority to retain outside professionals and other experts, as necessary.

23. **Indemnification and insurance.** The company is to indemnify the compliance officer for any conduct in the line of duty other than illegal conduct in bad faith. The company will also obtain from a nationally recognized insurance company Directors and Officer’s liability insurance for the compliance officer. You need to have an insurance expert look at this point, to be sure the D&O policy has the coverage you need. Do not just accept a general commitment to provide coverage under a D&O policy; there are too many variations that could result in a disaster for you if a problem occurs.

24. **Benchmarking and professional standards.** The contract can recite that the compliance officer is expected to keep current with industry practice and is encouraged to participate in ethics and compliance professional associations, and to attend and give presentations at their meetings. The compliance officer may be expected to obtain professional certification as appropriate, e.g., the CCEP certification from SCCE. The company will pay for membership in and attendance at programs sponsored by ethics and compliance professional associations, such as the SCCE.

25. **Nondisclosure.** The compliance officer will not reveal confidential information obtained in the course of employment with the company, recognizing that under certain circumstances confidentiality must yield to other values or concerns, e.g., to stop an act which creates
appreciable risk to health and safety, or to reveal a confidence when necessary to comply with a subpoena or other legal process or to meet a legal or ethical requirement to disclose information. If the compliance officer is a lawyer, for example, state professional ethics rules may require disclosure of certain types of misconduct, such as a fraud perpetrated on a court. If you have the negotiating leverage, avoid just accepting the standard corporate language, which may be overbroad in terms of attempts to keep information confidential.

26. Arbitration. If you desire to avoid litigation you can provide that the compliance officer may invoke arbitration of disputes.
Appendix 1

Questions To Ask Before Accepting An In-House Compliance And Ethics Job Offer\textsuperscript{37}

1. What are the pay and benefits? There is more to this question than the usual, however. You want to be sure these are comparable to others in the company at comparable positions.

2. Who will you report to? If you are the compliance officer, are you a real officer or is this a sham title, with you reporting to an assistant vice president or a deputy general counsel? Is your boss a true believer in the compliance mission?

3. What is the title? In many companies where title conveys status, a weak title can undercut your effectiveness.

4. Is there a board resolution setting up the program and electing the compliance officer? You want to know how committed the company really is. Without a resolution how do you know the board is on record with its commitment? Ask for a copy of the resolution.

5. Does the board understand compliance and ethics, and have any source of expertise, so it will understand its essential role? Is there a compliance officer from another company on the board? If you will be reporting to the audit committee, can you talk to the chair of that committee?

6. Does the compliance officer participate in the executive meetings, including the CEO’s staff meetings? Is this officer really a senior officer?

7. Is there a position description? Compare it to published model descriptions. Make sure it conforms to what you are being promised.

8. What is the scope of the compliance program? Does it cover all legal, ethical and reputational risks, or are there important carve-outs, like EEO, privacy, product safety, EH&S, and Sarbanes-Oxley? Each carve-out reduces your authority and creates room for turf conflicts.

9. Does compliance have direct, unfiltered access to the CEO and the board’s audit committee? This is a clear sign of the level of commitment. Every level of filtering, including editing by company legal counsel, directly and significantly reduces the compliance person’s authority and ability to do the job. There is no problem with seeking advice on reports, but you need to have the ultimate say.

10. Do compliance people have real independence and authority? Do they have full access to all people, places and paper (including computer records)?

11. What is the relationship to the legal department? Will you be subordinate to or controlled by a strong general counsel, or will the lawyers be your helpers and allies?

\textsuperscript{37} Adapted from Murphy, “Questions to Ask About an In-House Compliance and Ethics Job Offer,” 18 ethikos (Nov./Dec. 2004).
12. Are there any past or pending compliance debacles, like an ongoing government investigation, or a voluntary disclosure by the company?

13. What has been the past turnover in the position? Can you talk to others who have held this position? To your future subordinates?

14. What resources will you have? Will you have budget and authority to retain outside experts? Access to inside resources and experts, e.g., a lawyer assigned especially to help you and an interdepartmental compliance and ethics committee to support the program?

15. What protections does the company provide for you? A strong employment contract? A golden parachute? Required approval by the board before you can be discharged or demoted? Mandatory reporting to the board on such critical issues as management ignoring your advice? Insurance and indemnification?

16. Will they support networking and participation in the compliance profession? Is the company a member of a compliance/ethics professional organization, such as the SCCE, or an industry practice group? Will they provide budget for you to participate? Will they let you speak publicly and write on the subject of compliance?

17. Will they accept your commitment to the SCCE Code of Professional Ethics for Compliance and Ethics Professionals and the standards it sets for your conduct as a compliance and ethics professional?