Compliance & Ethics Professional

May/June 2012

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

www.corporatecompliance.org

Two days with the FBI

In cooperation with SCCE, the FBI provided compliance professionals with a rare look inside its program and the Bureau's operations

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Announcing SCCE's Website Redesign

SCCE is pleased to announce the release of its new website, with a fresh new look and a more user-friendly experience.

On May 16, SCCE's new website will go live. Your current login information will expire on May 15. New login information will be emailed to you on May 16. Please be sure your email address is updated with SCCE. If you do not receive an email with your new login and password on May 16, please call +1 952 933 4977 or 888 277 4977 or email helpteam@corporatecompliance.org to verify your email address and get your new password.

MAY 16, 2012

CHECK YOUR EMAIL FOR YOUR NEW WEBSITE LOGIN AND PASSWORD

Some benefits of the new website include:

- Track your CEUs easily
- Upload your bio and profile picture
- Register for events with ease
- Place product orders
- Apply for and/or renew your SCCE membership online
- Enjoy improved navigation
- And much more

www.corporatecompliance.org

For more information on the changes, or if you have any questions, please feel free to contact Tracey at tracey.page@corporatecompliance.org or +1 952 405 7936.

Thank you,
Your SCCE Staff

by Roy Snell, CHC, CCEP-F

What we have accomplished

Four of us from SCCE/HCCA were recently invited to meet with the head of the Department of Justice, the head of the Securities and Exchange Commission's Division of Enforcement, and the head of the Department of Justice's FCPA division. They asked for a short description of our organization. I thought I would share with you what I shared with them. Our growth has been explosive. We have not spent much time looking back. It was interesting to reflect on what we have accomplished as a very young profession.

Snell

The Society of Corporate Compliance and Ethics and the Health Care Compliance Association are part of a single 501(c)(6) organization dedicated to helping educate, network, and certify compliance and ethics professionals. Our mission is to help compliance and ethics professionals become more effective in their jobs and help them implement effective compliance programs. We have 10,500 members who are primarily in-house compliance and ethics professionals managing their organizations' compliance and ethics programs. We have individuals from academia, government, outside counsel, and more involved in our organization. We also reach many individuals through social media who are involved in other aspects of an effective compliance program, such as audit, legal, risk, fraud, and more. We have over 20,000 people following our Twitter feed, 9,500 on our dedicated social media site, 15,600 on our LinkedIn compliance groups, and 8,000 on Facebook. Through social media we are able to communicate news and information, and share documents that assist our members and others in their efforts to improve their organizations' cultures and compliance with the law.

We are involved in many aspects of compliance and ethics education. We have credentialed and assisted in the program development of several colleges that have developed degrees in the compliance and ethics field. We hold approximately 60 compliance and ethics conferences per year, the largest of which has more than 2,000 attendees. We conduct approximately 35 web conferences each year. We publish two magazines with 200 articles per year written by compliance and ethics professionals. We have developed six basic and advanced certification programs for compliance and ethics professionals. Over 4,000 people hold one of the credentials.

We have also branched out internationally. We have members from over 50 countries. We will be holding certification training in Shanghai, São Paulo, and Brussels this year. We have developed numerous national and international partnerships with government, industry, and other professional associations, and facilitated collaboration between the compliance and ethics profession and the enforcement community.

We have come a long way. We have people who can influence our profession asking for our input now, when they wouldn't give us the time of day in the past. We are having a few growing pains, but things are very good. We are hiring more people with expertise that will help take our profession and our organization to the next level. Most of all, we have surrounded ourselves with lead volunteers that have the right stuff. They are the right people to help us achieve our mission of helping compliance professionals be more effective in their jobs and implement effective compliance programs. We are looking forward to another great year. ✳

*Contact **Roy Snell** at roy.snell@corporatecompliance.org*

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Compliance & Ethics Professional

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VOLUME 9, ISSUE 3

Compliance officer ranks high in best business sector jobs list

The work of compliance officers has been spotlighted in a February report in *U.S. News and World Report*. Its "Best Jobs of 2012" is based on the Labor Department's employment projections. In an overview, the report details that 50 jobs were selected from five "quick-to-hire" industries: business, creative services, health care, science and technology, and social services. The job of compliance officer ranked 13th on the list of best business jobs. The report states, "The Bureau of Labor Statistics projects compliance officer employment growth of 15 percent between 2010 and 2020. That's 32,400 new jobs and 26,200 replacement jobs."

To view the entire report: *http://money.usnews.com/money/careers/articles/2012/02/27/the-best-jobs-of-2012*

Public rebuke of culture at Goldman Sachs opens debate

When Greg Smith, a midlevel executive at Goldman Sachs, delivered his resignation in *The New York Times* on March 14, 2012, he sparked a new round of debates about ethical failures and their impact on Wall Street. The 33-year-old confessed his disillusionment in the form of an Op-Ed article, "Why I Am Leaving Goldman Sachs." Among the sentiments he revealed: "It makes me ill how callously people still talk about ripping off clients." Smith further states, "It astounds me how little senior management gets a basic truth: If clients don't trust you, they will eventually stop doing business with you."

Worldwide media coverage of the resignation generally focused on the question of whether anything has changed on Wall Street in the three years since the financial crisis took down so many once profitable firms. Opinion pieces ran the gamut, including "Why Greg Smith is Dead Right," to "Goldman Rant a Case of Sour Grapes."

EU agencies say Google breaking law

A European Union (EU) Justice Commissioner, Viviane Reding, asserted in March that Google's new privacy policy is in breach of European law. Google's new policy, implemented on March 1, 2012, means private data collected by one of Google services can be shared with its other platforms, including YouTube, gmail and Blogger. Users cannot opt out of the new policy if they want to continue using Google's services.

In a March 1 interview with *BBC Radio Four*, Reding stated "[The new policy] is not in accordance with the law on transparency and it utilizes the data of private persons in order to hand it over to third parties, which is not what the users have agreed to." In addition, France's data regulation authority (the CNIL) has indicated that it plans to lead a European-wide investigation into the policy.

"It astounds me how little senior management gets a basic truth: If clients don't trust you, they will eventually stop doing business with you." *Greg Smith, former executive at Goldman Sachs*

Read the latest news online ▶ www.corporatecompliance.org/news

Websites uncover petty bribery around the world

A website started in August 2010 (ipaidabribe.com) has been so popular that similar sites have been launched around the world. The sites all provide a similar service: a way for citizens to anonymously confess bribes paid and bribes requested but not paid. Ipaidabribe.com, sponsored by the nonprofit Janaagraha in India, has logged more than 400,000 such confessions since its launch. The anonymous reports include everyday requests for bribes that private citizens face in order to have documentation or services delivered. In a March 5 article in *The New York Times*, Swati Ramanathan, one of the website's founders, said that public and private agencies from 17 countries have asked for assistance in setting up equivalent programs. In addition, she said that Janaagraha plans to form an international coalition of such groups so they can share and assist each other.

CALL FOR AUTHORS

Share your expertise in *Compliance & Ethics Professional,*

published bimonthly by the Society of Corporate Compliance and Ethics (SCCE). For professionals in the field, SCCE is the ultimate source of compliance and ethics information, providing the most current views on the corporate regulatory environment, internal controls, and overall conduct of business. National and global experts write informative articles, share their knowledge, and provide professional support so that readers can make informed legal and cultural corporate decisions.

To do this we need *your* help!

We welcome all who wish to propose corporate compliance topics and write articles.

CERTIFICATION is a great means for revealing an individual's story of professional growth! *Compliance & Ethics Professional* wants to hear from anyone with a **CCEP** or **CCEP-Fellow** certification who is willing to contribute an article on the benefits and professional growth he or she has derived from certification. The articles submitted should detail what certification has meant to the individual and his or her organization.

Please note the following upcoming deadlines for article submissions:

- **May 15, 2012**
- **July 15, 2012**
- **September 15, 2012**
- **November 15, 2012**

Topics to consider include

- **Anticipated enforcement trends**
- **Developments in compliance and ethics and program-related suggestions for risk mitigation**
- **Fraud, bribery, and corruption**
- **Securities and corporate governance**
- **Labor and employment law**
- **Healthcare fraud and abuse**
- **Anti-money laundering**
- **Government contracting**
- **Global competition**
- **Intellectual property**
- **Records management and business ethics**
- **Best practices**
- **Information on new laws, regulations, and rules affecting international compliance and ethics governance**

Earn CEUs!

Please note that the CCB awards 2 CEUs to authors of articles published in ***Compliance & Ethics Professional.***

If you are interested in submitting an article for publication in *Compliance & Ethics Professional,* e-mail Liz Hergert at **liz.hergert@corporatecompliance.org**

SCCE *conference* NEWS

National conferences

- **Compliance & Ethics Institute**, October 14–17, Las Vegas at Aria
  www.complianceethicsinstitute.org
  General sessions will include:
  - **Why Do We Root for the Good Guy Even If He's Doing Bad?** Jon Turteltaub, Director, *National Treasure* / Jay Kogen, Former Producer, *The Simpsons* / Chris Bohjalian, *New York Times* bestselling author of *Midwives*
  - **Strategies for Enhancing Your Effectiveness as a Compliance and Ethics Officer:** Daniel Roach, Co-Chair, SCCE Advisory Board and VP Compliance & Audit, Dignity Health
  - **Ethics, Leadership and Temptation in the Workplace:** James B. Stewart, Pulitzer Prize winner and columnist for *The New York Times*, author, *Tangled Webs: How False Statements Are Undermining America: From Martha Stewart to Bernie Madoff*
  - **Lessons We Don't Learn: Corporate Scandals, Why We Repeat Them, and How We Can Learn From Them:** Donna C. Boehme, Principal, Compliance Strategists LLC / David J. Heller, Vice President and Chief Ethics and Compliance Officer, Edison International / Joseph E. Murphy, Of Counsel, Compliance Systems Legal Group

- **Higher Education Compliance Conference**, June 3–6, Austin, Texas
  www.highereducationcompliance.org
  Sessions will include:
  - **Defining and Communicating the Role of Compliance & Ethics:** Adam Turteltaub, Vice President of Membership Development, Society of Corporate Compliance & Ethics (moderator) / Donna McNeely, University Ethics Officer, University of Illinois / Grace Fisher Renbarger, Former Vice President and Chief Ethics & Compliance Officer for Dell Inc. / Kimberly F. Turner, Chief Audit Executive, Texas Tech University System
  - **Behavioral Ethics: Why Good People Do Bad Things:** Robert Prentice, Professor of Business Law and Business Ethics in the Business, Government & Society Department, McCombs School of Business, University of Texas

Academies

www.corporatecompliance.org/academies

Academies address methods for implementing and managing compliance programs based on the Seven Element Approach. Courses will address subject matter in each of these areas and better prepare interested parties for the CCEP® exam. The Academy is designed for participants with a general knowledge of compliance concepts and anyone working in a compliance function.

Regional conferences

www.corporatecompliance.org/regional

SCCE's regional conferences are one-day programs designed to provide the hot topics and practical information that compliance professionals need to create and maintain compliance programs in a variety of industries. Upcoming 2012 regionals include:

- New York, May 18
- Anchorage, June 15
- San Francisco, June 22
- Atlanta, October 12
- Houston, November 2

Web conferences

www.corporatecompliance.org/webconferences

SCCE members save $850 by purchasing a web conference subscription. Select 10 individual sessions for only $900 (versus $1,750 if purchased separately).

Find the latest conference information online ▶ www.corporatecompliance.org/events

SCCE *website* NEWS

Contact Tracey Page at +1 952 405 7936 or email her at tracey.page@corporatecompliance.org with any questions about SCCE's website.

SCCE website redesign

On May 16, you will notice the SCCE website has been redesigned. We still have all the same information listed online as before, but we organized it so it's easier to locate and use.

A few of the major updates included in SCCE's redesign are:

- Improved navigation
- Easier registration for events
- Simpler product ordering
- More efficient processing for memberships and renewals
- Better CEU tracking
- And much more!

If you are having trouble finding anything in the coming weeks, please do not hesitate to call our office or email us to ask for something: *helpteam@corporatecompliance.org or +1 952 988 0141*

Don't forget to earn your CCB CEUs for this issue

Complete the *Compliance & Ethics Professional* CEU quiz for the articles below from this issue:

- **Overzealous I-9 compliance can result in a discrimination lawsuit**, by Justin Estep (page 50)
- **Corporate codes of conduct in the United States**, by Gilbert Geis, PhD and Henry N. Pontell, PhD (page 54)
- **Social media evidence: A new accountability**, by Dawn Lomer (page 66)

To complete the quiz:

Visit **www.corporatecompliance.org/quiz**, then select a quiz, fill in your contact information, and answer the questions. The online quiz is self-scoring and you will see your results immediately.

You may also fax or mail the completed quiz to CCB:

FAX: +1 952 988 0146

MAIL: Compliance Certification Board
6500 Barrie Road, Suite 250
Minneapolis, MN 55435, United States

Questions? Call CCB at +1 952 933 4977 or 888 277 4977.

To receive one (1) CEU for successfully completing the quiz, you must answer at least three questions correctly. Quizzes received after the expiration date indicated on the quiz will not be accepted. Each quiz is valid for 12 months, starting with the month of issue. Only the first attempt at each quiz will be accepted.

Find the latest SCCE website updates online ▶ www.corporatecompliance.org

SCCEnet NEWS

Contact Eric Newman at +1 952 405 7938 or email him at eric.newman@corporatecompliance.org with any questions about SCCEnet.

SCCEnet *(www.corporatecompliance.org/SCCEnet)* is the most comprehensive social network for compliance professionals. Subscribe to dozens of discussion groups and get your compliance questions answered. Stay informed on the latest corporate compliance news and information. Network with your colleagues and stay connected with our mobile app.

Subscribe to the following SCCEnet compliance discussion groups:

- Go to *www.corporatecompliance.org/groups* and click "My Subscriptions" to subscribe to discussion groups and participate.
  - 2012 SCCE Compliance and Ethics Institute
  - Multi-Industry Auditing and Monitoring Compliance Network
  - Multi-Industry Chief Compliance Ethics Officer Network
  - Multi-Industry Global Compliance and Ethics Community
  - Multi-Industry Ethics Forum
  - Communication Training and Curriculum Development
  - Competition Law and Antitrust Network
  - Compliance Risk Management
  - European Compliance and Ethics
  - FCPA: Foreign Corrupt Practices Act Forum
  - Financial Institutions Network
  - Higher Education Forum
  - Investment Management Forum
  - SCCE Compliance Academies
  - Social Media Compliance
  - Social Responsibility Forum
  - Utilities and Energy Network

Popular SCCEnet discussions

- Multi-Industry Chief Compliance Ethics Officer Network
  - What's a CLO? Book review for "The Cost of Compliance" shows unfamiliarity with "Compliance Officer" title: *http://bit.ly/whatsaclo*
  - In praise of office politics: *http://bit.ly/praiseofficepolitics*
  - New EU privacy rules: *http://bit.ly/euprivacy*
  - Lawyer who spotted broker fraud rewarded with 5-year SEC ordeal: *http://bit.ly/sec5year*
- Multi-Industry Auditing and Monitoring Compliance Network
  - Companies should use metrics to defend themselves from Dodd-Frank whistleblower claims, report says: *http://bit.ly/doddfrankmetrics*
- Multi-Industry Ethics Forum: Ideals and Ethics
  - The next business edge? *http://bit.ly/idealsethics*
  - Giving back: *http://bit.ly/givingbackethics*
- FCPA: Foreign Corrupt Practices Act Forum
  - FCPA Fines/Penalties: *http://bit.ly/fcpafines*

Update your SCCEnet profile using LinkedIn®

- You can update your SCCEnet profile with information from your LinkedIn® profile. *Instructions at www.corporatecompliance.org/updateprofile*

Watch compliance videos on YouTube

- Subscribe to SCCE's YouTube channel: *www.youtube.com/compliancevideos*

SCCE is now on Google+

- Add SCCE to your circles: *www.corporatecompliance.org/google*

Find the latest SCCEnet updates online ▶ www.corporatecompliance.org/sccenet

▶ **Cynthia Scavelli**, Esq., CCEP, FIS Corporate Compliance & Ethics Counsel, has been selected as one of *The Jacksonville Business Journal's* "40 Under 40" for 2012. Scavelli has also been appointed as the new leader of the Northeast Florida Compliance and Ethics User Group for 2012 in Jacksonville, Florida. The group serves as a resource to companies, community organizations, and governmental agencies in Northeast Florida to promote awareness and influence, educate, and support the value of compliance and ethics programs in business and our community.

▶ On March 5, 2012, **Lisa D. Pleasant** was appointed the Compliance Manager for St. John's Community Services of Washington DC, a nonprofit organization committed to advancing community support opportunities for people living with disabilities. She was the Regulatory Affairs Coordinator for Aria Health, a hospital in Philadelphia, and she is the former Ethics Specialist and Alternate Ethics Liaison Officer for the University of Medicine and Dentistry of New Jersey.

PEOPLE *on the* MOVE

▶ **David Childers** has been named Chief Executive Officer at Compli, a provider of on-demand Human Resources, Safety, and Compliance management software. Lon Leneve, President of Compli, says, "David is a pioneer in the GRC field and has a track record for being one of the most dynamic and innovative individuals in the industry." Prior to joining Compli, Childers was a founder and CEO of EthicsPoint, one of the leading global risk awareness organizations. Childers sits on the Board of SCCE and is a member of the Ethics & Compliance Officer Association (ECOA), the International Association of Privacy Professionals (IAPP), and a charter member of the Open Compliance Ethics Group, where he has been recognized as an OCEG Fellow.

▶ Newbridge Securities Corporation (NSC) is excited to announce the addition of **Michael Bernadino** to serve as Chief Compliance Officer, effective February 13, 2012. Bernadino is a thirty-five-year veteran of the securities industry and founding partner at IJL Financial Advisors, LLC in Charlotte, NC. Todd Newton, President and Co-CEO of Newbridge, says, "Mike brings a reputation of understanding the financial advisors needs while maintaining sound relationships with the various regulatory agencies to which we report." NSC is a FINRA member broker-dealer that engages in full service securities brokerage, investment banking, and advisory services for individuals and institutional customers.

Received a promotion? Have a new hire in your department? ▶

If you've received a promotion, award, or degree; accepted a new position; or added a new staff member to your Compliance department, please let us know. It's a great way to keep the compliance community up-to-date. Send your updates to liz.hergert@corporatecompliance.org.

Help Keep Your Compliance Program Fully Staffed

List Your Job Openings Online with SCCE

It's hard to have an effective compliance and ethics program when you have openings on your team. Help fill those openings quickly—list your compliance job opportunities with the Society of Corporate Compliance and Ethics.

Benefits include:

- Listing is posted for 90 days to maximize exposure
- Targeted audience
- Your ad is also included in our monthly SCCE Jobs Newsletter, which reaches more than 14,000 emails

Don't leave your compliance positions open any longer than necessary. Post your job listings with SCCE today.

www.corporatecompliance.org/newjobs
or call +1 952 933 4977 or 888 277 4977

SCCE

Society of Corporate Compliance and Ethics

FBI Corporate Compliance Officer Outreach Event

October 25–26, 2011 • Washington, DC & Quantico, Virginia

by Adam Turteltaub

Two days with the FBI

When compliance and ethics professionals hear "FBI," the initial reaction is likely one of fear. There are few things that throw companies into more disarray than a dawn raid by the Bureau.

Yet, on October 25 and 26, 2011, the FBI turned expectations on their head and played host to the Ethics and Compliance profession. In a fascinating two-day event, held at headquarters in Washington DC and its training facilities in Quantico, Virginia, the FBI highlighted its internal compliance program and the effect it is having on both its agents and professional staff. In cooperation with the Society of Corporate Compliance and Ethics, the FBI provided approximately 50 compliance professionals with a rare look inside its program and the Bureau's operations.

The program was led by Patrick W. Kelley, an SCCE member and Assistant Director of the FBI's Office of Integrity and Compliance, a position which reports to FBI Director Robert S. Mueller III through Deputy Director Sean Joyce. The FBI is the rare agency of the federal government that has a compliance program.

Like many private sector programs, the FBI's was born out of actions that fell outside of the law. The misuse of National Security Letters (an investigative tool analogous to an administrative subpoena) led to a comprehensive examination of how to prevent any future abuses, including the development of a compliance program.

As part of its research into how to build a compliance program, the FBI quickly realized that there was much that could be learned from the private sector and began reaching out to the corporate compliance community. SCCE met with the Bureau for a full day, as part of that process, and shared its expertise.

The program on October 25 and 26 was a "thank you" to the Compliance community for its support. It was also a reflection of the importance that FBI Director Robert

Mueller places on compliance programs. As Patrick Kelley noted, "He recognizes you as the first line of defense." The program began with Kelley outlining the mission of the FBI, which places prevention of terrorism as its first priority.

He also shared the Bureau's motto—Fidelity, Bravery, Integrity—noting that integrity is very much at the core of the Bureau's compliance program. It is even one of the organization's core values, he explained. Director Mueller said, "In fact, integrity is the value that binds together the very fabric of our institutional identity. It defines us and what we stand for; it is how we operate and how we measure our success. In short, integrity is the touchstone for everything we do."

All new Special Agents of the FBI receive eight hours of ethics training, versus the standard of just one hour for most federal employees. In addition, immediately prior to being sworn in for their positions, every FBI employee is shown a video that highlights the Bureau's core values. The inspiring production features FBI employees who faced difficult decisions in which they were guided by the core values.

"We thought that using real FBI personnel to tell real FBI stories to illustrate each of the core values would be the best way to reach both experienced and new employees, and to show that the values really are more than just words," said Kelley.

The compliance and ethics program doesn't stop with the video, though. There is a permanent office with a total staff of 17 people. In addition, compliance management committees, organized along branch or functional lines, meet each quarter, and there is a formal meeting every four months with the FBI director and the top executives to review the program and the risk areas.

Attendees left favorably impressed by the FBI's efforts. "I left with a deeper appreciation of the FBI organization. There were many valuable lessons to be taken from the program, but one that left a lasting impression was the FBI core values. The FBI values are ingrained throughout their business organization, and it is a message that is leveraged from the top down to all employees. Everyone is expected to be a leader!" said Terri Lee, Corporate Responsibility Leader of the Electric Power Research Institute.

The program for the meeting wasn't solely about the FBI's compliance and ethics program. It contained a number of sessions designed to both enhance the Compliance community's understanding of the FBI and of compliance risks that the private sector faces.

Bryan Smith of the Economic Crimes Unit warned the attendees of an uptick in securities and commodities fraud, particularly around insider trading. He went on to explain that the FBI prioritizes these cases based on factors such as systemic risk to the US financial market and public confidence in the US financial system, as well as the number of victims. He also provided strong ammunition to those advocating for self-reporting of incidents. He assured the attendees that the companies that self report and cooperate fare far better than those that do not.

Madeline Payne, an Intelligence Analyst with the Economic Espionage Unit, followed Bryan Smith's presentation. Her focus, and that of her unit, is protecting trade secrets from misappropriation. It's a significant problem, especially among engineers, because so many trade secrets reside in their heads.

It's also a problem with two fronts for companies to consider. While most might focus on the loss of a trade secret to a competitor, there is another grave challenge: the transfer of proprietary data to foreign governments. Those committing this type of crime are also significant flight risks, because they are often nationals of the country that they are stealing data for.

Companies also need to be alert to the risks of money laundering through gift and stored-value cards. Increasingly, explained Douglas Leff, Supervisory Special Agent in the Asset Forfeiture & Money Laundering Unit, criminals are taking advantage of this virtually untraceable means of moving money. Companies, particularly retailers, need to be wary of unusually high volumes of transactions using these instruments. Businesses may also want to consider monitoring employee expenses which reflect gift card purchases. These purchases may be innocent, but they may be an indicator of a Foreign Corrupt Practices Act (FCPA) violation.

Another emerging risk area is social media. Michael Kolessar, Supervisory Special Agent in the Cyber Unit, reported an increase in incidents of extortion using social media. He recounted a case in which a disaffected customer threatened to unleash a torrent of online complaints about a company unless it agreed to his demands. Kolessar urged companies to report these demands to law enforcement promptly while the data is readily accessible. Contrary to the belief that digital communications last forever, he explained that many Internet providers purge their records every three months, making it difficult to prove who the sender of an email was.

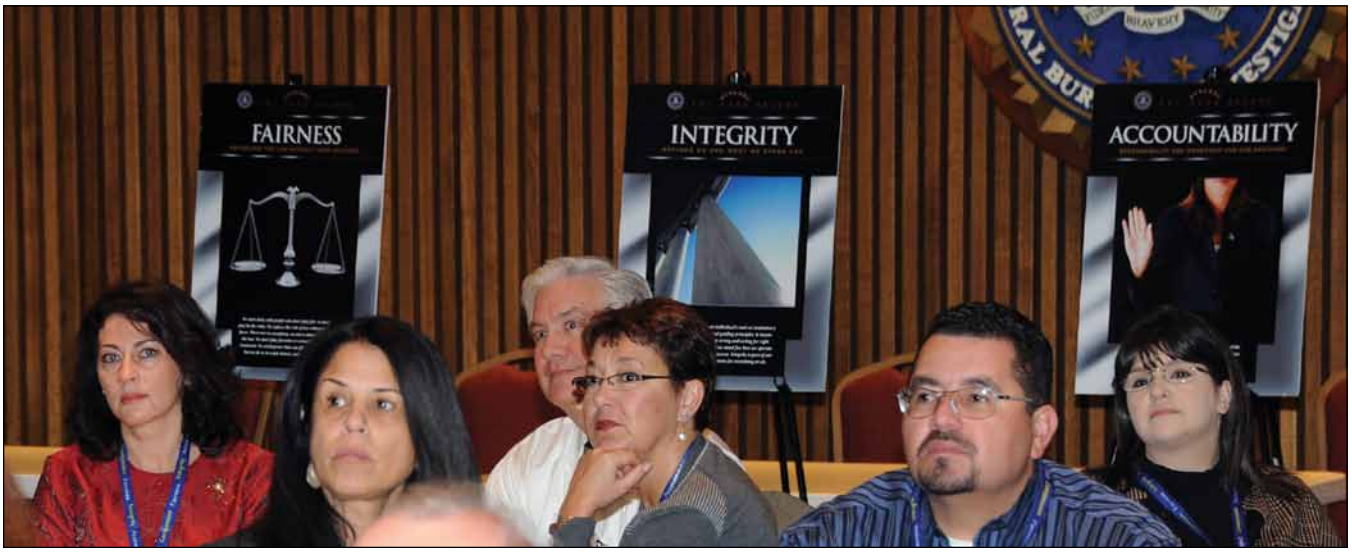
He also warned companies to be aware of the risks of cloud computing. The distributed storage model makes it much more difficult for law enforcement to identify a criminal after an intrusion.

The day ended with a heated discussion of the FCPA. It featured a panel consisting of Paula Ebersole, Supervisory Special Agent of the FBI's Washington Field Office; Chris Favro, a retired FBI agent and now Senior Counsel, Compliance and Business Conduct for 3M; and Charles Duross, Assistant Chief of the US Department of Justice's Fraud Section. The conversation included a discussion of the desire of the Compliance community for the Department of Justice to provide more information about how companies can earn credit for their compliance programs.

Roy Snell, CEO of SCCE and the Health Care Compliance Association, pointed out, "This is exactly the kind of data we need to demonstrate to CEOs and boards the value that compliance programs can bring to their organizations."

Day Two of the program took place at the FBI's training facility in Quantico, Virginia. The tour included the Memorial Wall, which honors agents killed in the line of duty, and famed Hogan's Alley, a few Hollywood-built city blocks designed to give agents the opportunity to train in "real life" settings.

The training in enforcement for recruits also includes 40 hours of legal education, the group learned. Lisa Baker, Chief of the Legal Instruction Unit, shared a portion of the training on the protection of civil rights. This program helps recruits understand the source of their authority, as well as the limits of it, and the value of adhering to those limits. This portion of the training begins with the U.S. Constitution and Bill of Rights,



a copy of which is provided to each recruit. To drive the lessons home, the training includes examples of the risks that can occur when those Constitutional boundaries are breached.

COINTELPRO, a program from several decades ago that monitored people the FBI had deemed a potential threat to the nation, is one of the incidents studies. This program once included a list of more than 26,000 Americans to be "rounded up" in case of a national emergency. The investigation of COINTELPRO led to significant changes within the FBI, including a set of guidelines for the FBI that would form the basis of its compliance program.

Baker explained that the policy environment for domestic operations is now based on the Constitution, federal statutes, and Executive Orders, plus the Attorney General Guidelines, the FBI Domestic Investigation and Operational Guide, as well as Bureau Program Policy Implementation Guides. Together these are used to direct the FBI's operations and ensure they comply with the law and the Bureau's own standards.

In addition, the FBI operates under a set of core values, Patrick Kelley explained. These are:

- Rigorous obedience to the Constitution of the United States
- Respect for the dignity of all those we protect
- Compassion
- Fairness
- Uncompromising personal and institutional integrity
- Accountability by accepting responsibility for our actions and decisions and their consequences
- Leadership, by example, both personal and professional

These values help define how the FBI views itself. For example, according to the FBI's internal ethics manual: "It is our policy to comply fully with all laws, regulations, and rules governing our operations, programs and activities…Public service is a public trust. Those of us lucky enough to serve the public in and through this great organization must adhere to that principle in everything we do."

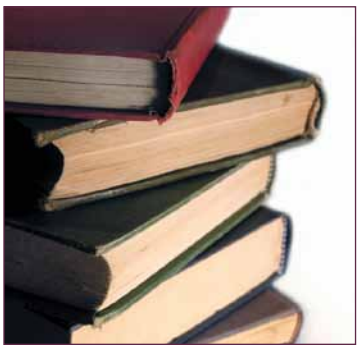
The day concluded with a fascinating and fun peek into how agents are trained to take those values and the law, and apply them when facing a scenario in which deadly force may be used.

Carl Benoit, Supervisory Special Agent and instructor at Quantico, gave the attendees a sample of a two-day training program in which scenes play out on a screen and participants (in the case of this program, three female and one male attendee) had to decide both whether to shoot and when. Their results were shown on the screen and dissected by Benoit. This session illuminated the Constitutional requirements and Supreme Court interpretations of when deadly force may be used, and how difficult it can be to do the right thing in a fast-evolving situation in which the time between a simple confrontation and shots fired by a suspect could be less than two seconds.

"The 'Deadly Force' exercise was particularly amazing to me," reported Jim Brigham, Vice President Internal Audit at Petco. "I didn't really appreciate how quickly and decisively agents have to act until I went through this exercise. Even though I knew the exercise was harmless, as the screen counted down to the scene I could feel my anticipation grow. As the suspect on the screen turned around, I could see the gun at his waistline. He started to run and pull his gun and I started to shoot. I was much too late and, in the excitement, far too inaccurate. This was an incredible teaching tool which only reinforced my admiration of the men and women who serve us as FBI agents."

In sum, it was an insightful two days. It helped the compliance and ethics professionals who attended to better understand the risks that they face, the asset the FBI could be to their companies, as well as the particularly challenges faced by FBI agents and staff as they live up to their motto of Fidelity, Bravery, Integrity. ✳

Adam Turteltaub *is Vice President of Membership Development for the SCCE in Minneapolis, MN. He may be reached at adam.turteltaub@corporatecompliance.org.*



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by Donna Boehme

Goldman Sachs. Culture. Muppets. Talk amongst yourselves.

You've got to feel pretty bad for the Goldman Sachs PR folks, who probably spit out their sips of triple soy vanilla latte in unison as they turned on their iPads to former exec Greg Smith's explosive take-this-job-and-shove-it resignation in the form of a *New York Times* op-ed. On the other hand, what a perfect made-for-TV movie for those of us in the compliance and ethics peanut gallery. You really can't make this stuff up.

Boehme

If you haven't read Smith's scathing op-ed, "Why I Am Leaving Goldman Sachs," publicly rebuking the firm for its "toxic culture" and alleging that execs routinely referred to their clients as "muppets" (British slang for "idiots"—where have you *been*?), here it is. Go ahead, we'll wait: *www.nytimes.com/2012/03/14/opinion/why-i-am-leaving-goldman-sachs.html*

Although Goldman, as expected, has vigorously refuted the claims (again, PR people working overtime), this comes at a time when Wall Street firms are under fire for their greedy, risk-taking culture that may or may not have led to the financial meltdown, and plays right into the hands of those who argue for more—not less—regulation. For the purpose of our discussion here, I'm not voting either way. For the moment, let's just file these observations under the category of "The Things We Think and Do Not Say."

Observation #1: Circle-the-wagons syndrome.

Anyone following the speed of Wall Street circling the wagons could get a bad case of whiplash. Connect the dots to *Bloomberg's* ugly editorial excoriation of Smith himself the next day. *www.bloomberg.com/news/2012-03-14/yes-mr-smith-goldman-sachs-is-all-about-making-money-view.html*

Observation #2: Society still hates snitches.

Forget firm culture; as a society, we still recoil when people get out of line and speak up. That's why Satan created retaliation. Goldman's counter-attack on Smith was swift and continues. In my networks, I'm watching many who are usually happy to talk about "tone at the top" and "transparency" back away from this one.

Observation #3: The CCO's fairy tale rarely comes true.

The former CCO in me wants to believe Goldman will take Smith's criticisms to heart and engage their employees in an open dialogue about ethical culture. But I know the chances of that, to quote my all-time favorite E*Trade talking-baby commercial, "are the same as being mauled by a polar bear and a regular bear in the same day." *www.youtube.com/watch?v=HqVBKO_QM3o*

And that's my two cents. Now, go and *talk amongst yourselves!* ✳

*Send comments to **Donna Boehme** at dboehme@compliancestrategists.com.*

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by Robert Bond

Understanding the proposed EU data protection regulation

» The EU is in the process of revising its data privacy regime to harmonise data protection across its member states.
» The propsed Data Protection Framework will implement greater enforcement powers that apply to both data controllers and data processors.
» The Framework will focus on consent, breaches, data transfers, accountability, and liability.
» Individuals will have greater control of their personal data, and special protections for the data of children are included.
» Foreign businesses that target EU citizens will incur significant compliance obligations.

Over the past few years, the European Union (EU) has been consulting with key stakeholders on the need to overhaul the EU data privacy regime and to produce a harmonized general data protection framework.


Bond

On the November 29, 2011, the European Commission "leaked" an updated version of its draft General Data Protection Regulation (Regulation) intended to produce a harmonized Data Protection Framework for the EU, which among other things will repeal the Data Protection Directive (95/46/EC). The proposed Regulation was finally announced on January 25, 2012.

The intention of the Regulation is "to build a stronger and more coherent Data Protection Framework in the EU, backed by strong enforcement that will allow the digital economy to develop across the internal market, put individuals in control of their own data, and reinforce legal and practical certainty for economic operators and public authorities." However, the Regulation in its current form imposes significant changes to the way in which businesses will have to comply with data protection laws and regulations in the EU.

The European Commission considers that a Regulation

> will be the most appropriate legal instrument to define the framework for the protection of personal data in the EU, since the direct applicability of the Regulation will reduce legal fragmentation and provide greater legal certainty by introducing a harmonized set of core rules, improving the protection of fundamental rights of individuals, and contributing to the functionality of the internal market.

The key principles of the Data Protection Directive and the majority of the definitions therein remain the same. However, there are significant changes to some definitions, clarification over some of the principles (in particular, consent), and reinforcement of current solutions for data transfers. Most importantly, there are new obligations for both the data controller and the data processor with respect to the role of the data protection officer, as well as obligations involving mandatory reporting of data breaches, dramatic increases to enforcement powers and fines, and specific responsibilities with regard to the personal data of children.

Based on the wording of the proposed Regulation, businesses with entities in Europe that process personal data, use equipment in the EU for processing personal data, or are not in the EU but process personal data of EU data subjects or monitor their behavior, will incur significant compliance obligations.

As the Regulation applies to both data controllers and data processors, and dramatically extends the enforcement powers of the regulators and the fines for non-compliance (i.e., 2% of worldwide revenue for negligent or reckless breach), businesses will need to prepare for investment in EU data protection compliance.

The current Regulation runs to 116 pages, but our summary of the key provisions is as follows:

- The Regulation will be binding on all EU member states from the date that it comes into force. That date will be the 20th day following the date of publication of the Regulation in the official journal of the European Union, and the application of the Regulation may be two years from the aforementioned date. Our understanding is that it will take at least a year to debate the Regulation and for it to be approved by the EU, which means that we can expect the Regulation to be published in its final form and enter into force in the second half of 2013, giving a two-year period for businesses to come into compliance by 2015, although it is possible that it may be expedited so as to come in to force by 2014.

- The Regulation applies both to data controllers and data processors that have either legal entities in the EU, or process personal data of EU data subjects, irrespective of the location of the controller or processor; but the Regulation does not apply where the processing is by an individual purely for personal or household activities.

- Most of the current definitions of data subject, personal data, and the like, remain the same, except that sensitive personal data now includes genetic and biometric information, and consent is defined as "any freely given specific, informed and specific indication of" the data subject's signification for the purposes of processing. Also, "personal data breach" is now defined with respect to breach of security for which new obligations arise.

- The data protection principles broadly remain the same, although it should be noted that consent and the mechanisms for gaining consent are provided in detail in the Regulation. Among other things, the Regulation states that consent cannot be automatically implied with respect to the processing of employee data, nor with respect to the processing of the data of a child, where the child is under the age of 13 and parental consent has not been given.

- Fair processing statements or privacy notices will have to be in plain and intelligible language, and drafted with certain data subjects in mind, "in particular for any information addressed specifically to a child" (where a child here is defined as under the age of 18).

- In a privacy statement or privacy notice, Article 12 indicates that there needs to be specific information given to a data subject with respect to the nature and purposes of the processing of their data and of their rights. There are also detailed requirements in relation to profiling and the collection of data via social network services.

- Although subject access requests are still permitted, Article 17 additionally provides the "right to be forgotten" and to have

personal data erased. This new right, in conjunction with the right of data portability in Article 16, will require businesses to implement stricter controls over the management of databases, particularly where they are outsourced.

- Articles 16 and 17 now provide the right to object to profiling, and detail the obligations of companies that use profiling technologies.

- The obligations for the data controller, joint data controllers, and the data processor are redefined. In addition, the data processor will have direct liability for compliance, which does not exist in the current regime.

- While the concept of registration with a data protection authority is likely to remain in place, there is now under Article 28 a new obligation for the controller and processor to maintain an internal register of compliance, and to make this register available on request to the Data Protection Authority by virtue of its new powers.

- There are enhanced requirements for data security, and specifically in Article 31, there is a mandatory breach notification procedure for all but small enterprises.

- There are new details in relation to Privacy Impact Assessments and specific prior authorizations and prior consultations before data processing or data transfers may be permitted. In relation to data transfers, there is considerably more detail on binding corporate rules as a solution to trans-border data flows or trans-border data transfers.

- For the first time, the role of the data protection officer is introduced for all but small businesses. This will require businesses to put in place not only contracts for this new position, but also appropriate training and authority for purposes of compliance. We think it likely that the data protection officer will be the person responsible for maintaining internal compliance registers, and serving as the interface between the business and the regulators.

- Although there are other specific issues, the last one that we wanted to mention is in relation to the new powers of enforcement for the Data Protection Authorities who will monitor, audit, provide guidance, hear complaints, conduct investigations, opine on compliance issues, and issue licences for international data transfers. Furthermore, with respect to breaches of the Regulation, there is a whole new range of penalties and sanctions with fines for minor breaches of 0.5% of a business's annual worldwide turnover, rising to 2% of annual worldwide turnover in the case of intentional or negligent breach of the Regulations.

Although there is no guarantee that the proposed Regulation will be the final published Regulation, we anticipate that at this stage few significant changes or additions will be made, and therefore, we are starting the process of considering the full range of compliance, policies, practices, and procedures that will be necessary for small, medium, and large enterprises, whether operating in a single EU member state or operating globally. ✳

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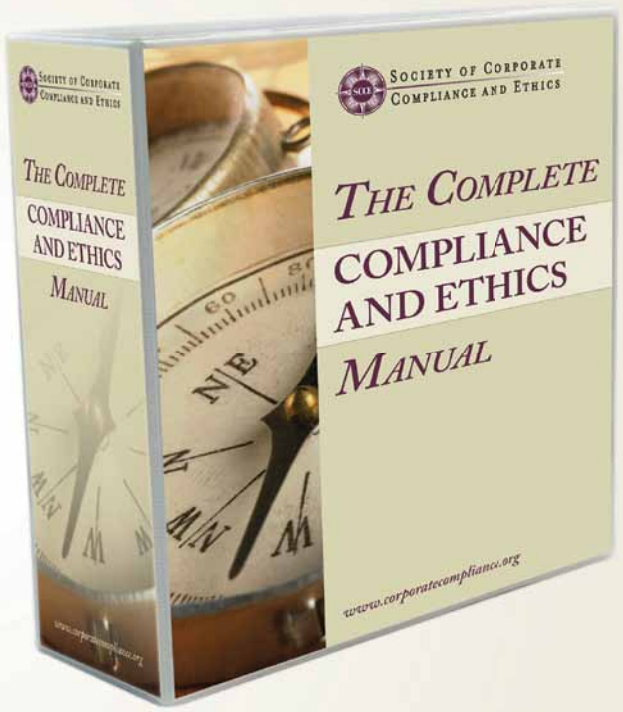

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Society of Corporate Compliance and Ethics

by Art Weiss, JD, CCEP

Excuses, excuses

"That's a dumb rule!"
"Everyone else does it."
"Nobody will care."
"They can afford it."
"Who is going to know?"
"They owe me."

Shall I go on? The list of excuses for unethical or sometimes even illegal behavior can become quite long. These excuses are nothing more than rationalizations and justifications for engaging in conduct which we know is wrong, but (pick one from the list above). Admittedly, there may be a few dumb rules and even a few dumb laws out there. Some folks pick and choose which rules can be ignored or broken. Society heads towards trouble when that happens.

Weiss

Have you ever heard of an employee taking home office supplies—maybe during August when it's back-to-school time? Maybe some Post-it® Notes, staples, paperclips, or paper? That's theft, people! Big deal. "They can afford it." "They owe me." "Everyone else does it." Those kinds of rationalizations can spill over into accounting, safety, environmental, conflicts of interest, gifts, and many other regulations and laws with which compliance professionals deal.

Be honest. Do you turn your cell phone off when the flight attendant says? Or do you turn off the screen, put it into airplane mode, or turn it face down? Is it a dumb rule? There has never been an aviation accident caused by having electronic devices remain on during flight (that we know of). Recently, a Southwest Airlines passenger was met by the police after refusing to turn off his cell phone, and a well-known American Airlines passenger made big news when he was removed from a flight because he wouldn't stop playing a game on his device when asked—a violation of FAA regulations.

Some folks pick and choose which rules can be ignored or broken. Society heads towards trouble when that happens.

It was interesting to read the online debate that ensued in some of the comments posted under the story about the Southwest incident. One commenter blamed the airlines and justified the passenger's conduct by saying that passengers need to be on their phones, because of all the flight delays. Another said the government and media are lying. That scares me, and it should scare you too.

For those responsible for enforcing rules and laws, there is hope, however. They are certain to agree with the commenter who said, "I think it's nonsense, but just follow the rules, people." ✳

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by Peter J. Crosa

Buyers on the take

» Embezzlement or misappropriation isn't limited to line employees. The E&C purview net should be cast from the lowest level employee to the executive board, and from stockroom to boardroom.

» Staff is more likely to be influenced by unscrupulous vendors while away from the office.

» No vendor should be considered incapable of inappropriate influence, from janitors to lawyers.

» Investigators frequently uncover an employee perpetrator who has a tragic character flaw that is germane to misappropriation.

» Cash kickbacks, entertainment, and other untraceable gifts are often subject to misappropriation.

I've met many a vendor who has a story about buyers on the take. It frequently involves hearsay or what someone told someone else. The topic comes up in almost all of my workshops and no ethics and compliance program would be complete without addressing the matter.

To be sure, embezzlement in industry doesn't start with buyers. I once investigated a loss on behalf of a major corporation that insured the fidelity of the board of directors of a hybrid Miami health insurer. The hybrid group specialized in selling health insurance plans to small businesses at incredibly low rates. Unfortunately, one, or some, or all of the board members absconded with the $75 million in premiums they'd collected. One of the men, I later determined, was a Columbian logistics entrepreneur (think about it) whose nephew drove a Maserati to his exclusive Coconut Grove private prep school. When policyholder employees started submitting medical claims, no funds were available for the payment of claims.

Crosa

I remember investigating a vendor who furnished a "VIP buyer lounge" in a special room above his warehouse. Desks were set up for buyers to do their paperwork, and refrigerators were loaded with snacks and adult beverages. Buyers were invited to come in any day of the week and encouraged to bring their files to work in privacy, away from the bustle of their office, ringing phones, and other distractions, in order to get some paperwork done. Of course, this was the vendor's attempt to get a foot in the door on the next major purchase.

I remember listening to an interview of a senior buyer. He was recounting how someone he knew (I'm sure he was describing himself) was at a law firm Christmas party and walked in to use the men's room. One of the attorney hosts walked in and stood at the adjacent urinal, pulled an envelope from his coat pocket, and handed the buyer the envelope with eleven $100 bills in it. Three thoughts struck me. First, why eleven $100 bills? Why not ten or fifteen or twenty? Second, why at the urinal? Don't even speak to me if I'm standing at a urinal. Third, I thought, wow attorneys do this too? So much for my naïve perception of attorneys as the pillars of our society.

Those events are generally a thing of the past. Today, you'll occasionally read headlines in the trade papers about a bailee who tipped off looters to a high-value shipment or buyers who created phantom vendors, wrote checks in payment of merchandise, and converted the checks to cash for their own private use. But in today's environment of electronic paper trails, audits, and other covert detection methods, that method of embezzlement is *insanity*. But,

admittedly it happens. And, almost always, investigators will develop a perpetrator with a tragic flaw, such as a cocaine habit gone awry, a mistress, or a g-string diva. No offense to strippers, but I've investigated dozens of cases of embezzlement, and there's almost always a stripper driving the crime.

One more story involving a fairly big-ticket item. A vendor financed a $40,000 addition to a buyer's home—free of charge. This came out in one of my workshops, and again, it was "hearsay" but totally believable. The justification, according to the vendor, was "that buyer gave us over a million dollars in business last year." Of course, upon further inquiry, I learned that after the addition was built, the buyer was so nervous about continuing work with that vendor that the flow of business ceased. The moral of the story is: If you want to kill the goose that lays golden eggs, build an addition onto his house.

Now, fast–forward to 2011. Earlier that year, I was speaking with a jewelry vendor about his efforts to increase his market share of business to retail buyers. At some point, he tossed into the conversation a comment that stopped me in my tracks. The dialogue was something like this:

Vendor: Of course, I know you've got to be ready to pay off the buyer.

PJC: Well, that was a thing of the past and doesn't really happen anymore. It's unlikely a buyer is going to hit you up for cash.

Before I could finish the "sh" in cash, he said "Oh no, it *does* happen. We just lost an account because the buyers were pressuring us for cash kickbacks."

I told him that it was dangerous to even do business with buyers who were so blatant about demanding cash for business and that there are other ways to influence buyers, while helping them stay on the high ground. Incidentally, I'm not outraged by a vendor thinking he has to pay off a buyer. After all, we do engage in promotional and entertainment expense and, to an enterprising vendor, there may be little difference in taking a client to dinner or giving him the equivalent cash or a gift certificate. But to the corporate entity, and generally speaking, society, there is a difference. The money used to influence buyers can be directly linked to increased costs to their employer and, ultimately, to the end consumer.

A few months later, another vendor in a completely different specialty mentioned that he had been told that a vendor he knows is having to pay kickbacks to a buyer. What was particularly unusual was that the situation he described involved a preferred vendor program in which the vendor had already completed the qualifying process to participate in the program. Not only that, but these programs usually involve a contract that includes audit permission language designed to prevent kickbacks to buyers. That alone made me wonder about the veracity of the information, or at least maybe the whole story wasn't being conveyed.

The bottom line here is that, whereas I hadn't personally heard of any such activity for several years (unless I read it in the trade papers), I'm hearing it again and more often. Is it possible the economic crisis of recent times is having an effect on the supply chain throughout industries—industries that normally safeguard their integrity and reputation with the utmost care? This could mean we're in a treacherous environment.

So, here's some advice. Ethics and compliance operatives must insist on frequent review and adherence to established policies on vendor/buyer relationships. Frankly, it would not break my heart to see very rigid "zero tolerance" rules on vendor promo and entertainment. The following admonition is applicable to both buyer and vendor. If a vendor or buyer pressures you or tries inappropriate influence, that person is a loose

cannon and will eventually slip up and sabotage themselves, just before throwing you under the bus.

Second, vendors may think that influencing buyers is a necessary reality in order to be competitive. Ethics and compliance operatives should be aware that inappropriate vendor influence is not always blatant and easy to spot. Here are some examples of promo and entertainment expenses that may be overlooked by corporate ethics and compliance folks:

- Sponsoring a Little League or softball sports team or other charitable cause
- Lunch or dinner
- Drinks—a vendor may rationalize, "How many times have I bought strangers a drink (and who cares)"
- A birthday or holiday card and gift sent to the buyer's home
- Sports or concert tickets left at the will-call window
- A complimentary visit to the vendor's vacation home at the beach or in the mountains

Corporations that staff a "buyer/acquisitions" department need to be cautious about their rules and how compliance is verified and enforced. Compliance alone is not the end all. Ethics and compliance must be promoted on a personal level. All ethics is personal. It stands with one person and can fall with one person. ✳

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by Meric Craig Bloch, CCEP, CFE, PCI, LPI

Are you in control of your investigation?

When a serious allegation of misconduct arises, the business people involved simultaneously react to a number of concerns. There is the implicated employee who was previously in a position of trust. There may be an unhappy customer who now has a "crisis of confidence" in your company's ability to perform. There may be executives whom the business people fear will blame them for allowing the problem to happen. The implicated employee may be a sales superstar whom the department managers fear losing to the competition. These factors usually lead to business people trying to steer the investigation towards their particular goals and away from their professional fears.

Bloch

Ownership of an investigation comes from the pride that is taken in conducting the most complete and objective review that is professionally possible. Ownership comes from adhering to a set of guidelines and principles, rather than politics and situations. The ultimate objective of an investigation is a full inquiry that is not motivated by politics, personality, or expediency.

These principles can be tested when the urgencies of a critical situation arise, but adhering to them becomes more important than ever. Establish your role at the outset as the "quarterback" of the investigation. Leave no doubt with your colleagues that the company places the investigative responsibility on you. Whatever their motives are for wanting to take such an active role, it is you, not they, who remain accountable to the company for a successful, professional, and proficient investigation. Investigation-by-committee simply does not work.

When people seem to be interfering with your investigation, ask yourself why these people seek an active role. You'll quickly find that their motives are understandable and usually practical. They are likely motivated by a fear of what the investigation will show and how they may be blamed by their superiors. If this happens, don't get into a wrestling match with them about the investigation. Instead, explore why they feel they need such an assertive role instead of just being the customer of your efforts. You may find you can accommodate their needs fairly easily, and they will step aside and let you do your job.

There is room in the investigative process for others to participate. Indeed, this is the best way to keep it business-focused—but it is you, not they, who have the training and responsibility for completing a proficient investigation. Solicit their needs and concerns, and then do your best to respond to their priorities. Help where you can. Make sure you understand their post-investigation needs. But you have to set the strategy and decide what has to be done to complete the investigation. You own the process and its outcome. ✳

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by Marlowe Doman

It's time to change the SEC's culture

» Individuals may get financial rewards if they provide the SEC with information that leads to successful enforcement actions against Wall Street wrongdoers.

» If the action is successful, whistleblowers can be granted between 10% and 30% of any fine over $1 million collected by the SEC.

» For the laws to achieve their goals of exposing and halting Wall Street corruption, the SEC must confront its own culture and dark past toward whistleblowers.

» Over the past decade, the SEC allegedly mistreated its employees who attempted to correct wrongdoing within the Commission, as well as outsiders who reported securities violations.

» The Dodd-Frank whistleblower provisions provide the SEC with an opportunity for a fresh start in its treatment of whistleblowers.

Doman

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress passed promising legislation that rewards and protects whistleblowers who report violations of federal securities laws to the Securities and Exchange Commission (SEC). However, for the laws to achieve their goals of exposing and halting Wall Street corruption, the agency must confront its own culture and dark past toward whistleblowers. The SEC has discouraged and even retaliated against whistleblowers who have attempted to correct wrongdoing in the financial sector.

The SEC whistleblower laws allow financial rewards to individuals who provide the agency with information that leads to successful enforcement actions against Wall Street wrongdoers.

The provisions provide for financial rewards similar to the False Claims Act, which rewards whistleblowers with a share of damages recovered from people or organizations that defraud the federal government. After Congress passed Dodd-Frank, the SEC created the new Office of the Whistleblower which, according to its website, was formed to handle whistleblower tips, assist SEC enforcement personnel, and assist in determining the appropriate size of a whistleblower's reward.

The final rules for the implementation of the Dodd-Frank whistleblower provisions were released by the SEC in 2011, after outside commentary was submitted to the agency. There are limits to the scope of the financial rewards and anti-retaliation protections accorded to SEC whistleblowers. For a whistleblower to receive a reward, the SEC must be able to recover at least $1 million in financial penalties from the offending party. A whistleblower must also provide original information to qualify for the reward, meaning that the SEC was not previously aware of the information. If the action is successful, whistleblowers can be granted between 10% and 30% of any fine over $1 million collected by the SEC. The percentage size of the reward is based on several factors, including the amount of assistance and the significance of the information given by the whistleblower.

Certain individuals are excluded from recovering under the law. For example, a whistleblower cannot receive a reward if he

provides information to the SEC and is then convicted in a criminal case related to the same violation. In other words, if a company's employee reports a financial fraud to the SEC, and the same employee is later convicted in a criminal prosecution for taking part in the same fraud he reported, then he could not recover a reward.

Notwithstanding these major developments, it is essential that the SEC changes its behavior towards whistleblowers for the new provisions to be successful. Over the past decade, there has been mistreatment toward SEC employees who were attempting to correct wrongdoing within the Commission, as well as toward outsiders reporting securities violations to the SEC. The most high-profile example was the treatment of Harry Markopolos, who reported Bernie Madoff's Ponzi scheme to the SEC, prior to passage of the Dodd-Frank Act. Markopolos wrote in his book, *No One Would Listen*,[1] that when he attempted to bring Madoff's crimes to the attention of Meaghan Cheung, the SEC's New York branch Chief of Enforcement, she treated him with disdain and eventually ignored him.

Furthermore, there have been several instances in which the Commission retaliated against mid-level or junior SEC employees who spoke up when higher-ups mishandled agency investigations.

Perhaps the most outrageous case involved Gary Aguirre, a first-year SEC attorney who was fired in 2005, after he attempted to investigate former Morgan Stanley CEO John Mack (also known as "Mack the Knife") for his role in an insider trading scandal, according to *Rolling Stone*'s Matt Taibbi.[2] Aguirre dug up evidence that showed Mack may have tipped off Pequot Capital hedge fund manager Art Samberg that a company named Heller Financial was about to be bought out by General Electric. Samberg bought stock in Heller before the GE buyout and made $18 million dollars. As an apparent quid pro quo for Mack's insider tip, Samberg included Mack in another financial deal which netted millions of dollars for Mack.

Aguirre, doing exactly what his job description entailed, wanted to interview Mack. Instead, Aguirre's superiors instructed him not to investigate Mack, because of Mack's powerful political connections. After Aguirre complained about being prevented from doing his job, he was fired. The story ended when Aguirre sued the SEC and received a $755,000 wrongful termination settlement. Furthermore, a U.S. Senate report vindicated Aguirre. Samberg later was forced to shut down Pequot and pay a $28 million fine for his role in a separate insider trading scandal involving Microsoft, according to *Bloomberg News*.[3] John Mack was never punished for his role in the Heller scandal.

SEC employee Julie Preuitt also faced retaliation when she protested the SEC's failure to investigate fraudster Robert Stanford's billion dollar Ponzi scheme, according to the *Washington Post*.[4] Starting in the late 1990s, Preuitt repeatedly attempted to investigate Stanford, and was blocked by higher-ups to the point that she felt "absolutely heartsick," according to her Senate testimony. In 2007, when Preuitt complained after she was again prevented from conducting a detailed investigation of Stanford, she was reprimanded. Also, the agency reprimanded another employee who defended Preuitt.

SEC Inspector General David Kotz later reported that senior officials at Preuitt's Fort Worth office had a practice of shutting down cases that they deemed too complicated. Instead, the office wanted quick resolutions to boost its number of successful cases.

Preuitt was vindicated in March of 2012 when Stanford was convicted by a jury on 13

criminal counts of fraud for stealing billions of dollars from investors.[5] If the SEC would have heeded Preuitt's calls for action in the late 1990s, it could have prevented Stanford from stealing as much money as he did.

The recent whistleblower case of SEC attorney Darcy Flynn shows improvement in agency treatment toward whistleblowers, yet some troubling signs remain. In 2010, Flynn was given an assignment to destroy documents related to past investigations of financial firms, which he later realized was illegal, according to the *Washington Post*.[6] If the SEC later received more information that could show a pattern of fraud when tied to the prior investigation, getting rid of the past evidence could prevent the SEC from connecting the dots. Flynn's concerns were brought to the attention of SEC senior management, yet SEC staff continued to discard documents. Flynn also made requests to Chairman Schapiro's office for certain protections for himself, which were not granted.

Flynn then alerted Senator Charles Grassley, as well as other members of government, and invoked federal whistleblower protections. Of even greater concern, Flynn allegedly witnessed his seniors at the SEC trying to concoct an evasive response to the allegations, according to the report of SEC Inspector General Koch.[7]

According to Taibbi, Flynn also brought another troubling allegation to the government's attention that he witnessed back in 2001.[8] At that time, Flynn and other agents were investigating Deutsche Bank for fraud, when the investigation was mysteriously shut down by the agency's enforcement division. A few months later, the director of the SEC's Enforcement Division, Dick Walker, was hired as Deutsche Bank's general counsel.

While there have been no reports of direct retaliation against Flynn, it is noteworthy that Flynn has retained the former SEC lawyer Aguirre as private counsel. Considering Aguirre's prior victory over the SEC, the agency may be loathe to attempt another public battle with him.

The SEC's troublesome past with internal and external whistleblowers leaves an impression that the agency does not value them. A failure to treat internal whistleblowers appropriately will only further reduce the agency's credibility with the general public, and call into question its dedication to fair and ethical law enforcement.

However, recent developments at the Office of the Whistleblower show improvement. Former SEC attorney Jordan Thomas, who was instrumental in developing the office, stated that it received hundreds of tips within weeks of its opening, according to the *Wall Street Journal*.[9] Thomas, who now practices in the private sector, said that the agency is doing its best to encourage whistleblowers to report wrongdoing.

The Dodd-Frank whistleblower provisions provide the SEC with an opportunity for a fresh start in its treatment of whistleblowers. The SEC must do more to change its negative reputation for protecting the high-level financiers that the agency is supposed to be policing, as well as preventing *any* retaliation against internal and external whistleblowers who wish to bring such fraudsters to justice. Otherwise, the Office of the Whistleblower will likely fail in its mission and scare away people who wish to expose Wall Street wrongdoing.

It is clear that there are well-meaning and tenacious investigators who work for the SEC. This fact cuts against its negative public image, which has suffered terribly since the 2008 meltdown. Regardless, the agency has a poor track record in terms of dealing with whistleblowers. Thus, it is time for the agency's

leaders to change its culture by promoting positive attitudes towards internal whistleblowers, and encouraging outsiders to report industry wrongdoing. ✳

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by Jeffrey M. Kaplan

Attorney-client privilege

Whether or not they happen to be attorneys, compliance and ethics (C&E) professionals are often faced with issues concerning the attorney-client privilege, so I thought a brief overview of that topic—as it applies to C&E programs—would make sense for this column.

As a general matter, a communication is subject to the privilege where (1) an actual or prospective attorney-client relationship exists, and (2) the communication took place (a) for the purpose of obtaining or providing legal assistance and (b) in confidence. Since a Supreme Court decision in 1981,[1] the right of a corporation to claim the privilege has been generally accepted.

Kaplan

But far less clear is the application of the privilege to many C&E-related communications, because only legal—not business—advice can be protected by it. Yet some organizations try to apply the privilege too broadly, such as to C&E training-type communications and general administrative work of the program. In a related vein, some seek to apply the privilege to audits, investigations, risk assessments, and program assessments where legal advice could be—but is not actually—involved, or without sufficient documentation of such involvement.

These practices are potentially dangerous. Not only could they lead to disclosure of sensitive C&E information but, in some circumstances, they could carry a risk of personal exposure to the lawyers involved. That is, in the 1990s, various tobacco industry lawyers were investigated by the Justice Department under a fraud/obstruction of justice theory for what was seen as a bad-faith use of the privilege to hide sensitive information, although no such charges were brought.

To help reduce these risks, I often recommend that companies formally assign the role of program counsel to an in-house attorney. This can be documented in the C&E program charter and/or the attorney's job description. Counsel's advice-giving role should also be chronicled on an ongoing basis (e.g., in C&E committee minutes and agenda, self-assessments, risk assessments, and related communications).

I often recommend that companies formally assign the role of program counsel to an in-house attorney.

Needless to say, program counsel must, in fact, give legal advice for the communications in question to be privileged. But given the importance of law to C&E programs, doing so should not be much of a challenge. Most importantly, focusing on ensuring that the privilege is maintained should itself encourage a company to pay sufficient attention to C&E law, which, in turn, can be useful from the perspective of ensuring program efficacy. ✳

1. *Upjohn v. United States*, 449 U.S. 383.

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by Roz Bliss

Ethical decision-making models: Decisions, decisions

» Ethical decision-making models help employees make the good choices.
» Employees know when something just doesn't seem right.
» Encourage employees to examine and identify possible alternatives.
» What would a reasonable person think about this decision?
» It takes courage to do the right thing.

Employees everywhere are doing more with less. Increased pressures to achieve goals, budget cuts, fear of layoffs, coupled with external pressures of economic uncertainty and high unemployment, create an environment of increased risk taking and opportunities for unethical behaviors.

Bliss

Compliance and ethics professionals work hard to communicate and train on "hot topics" but as we all know, we can't be all places at all times.

An ethical decision-making model is a tool designed to help employees make the proper decision when the right choice is not obvious. An initial Internet search on this topic reveals hundreds of options, both academic and industry-specific. From a business perspective, how do you identify, customize, and socialize a model that is easily identifiable and effective?

Brevity is an important aspect in choosing a model. While pages of explanation and insights can be useful, employees faced with an ethical dilemma, where the answer is not obvious, often need prompt and efficient solutions to resolve challenges. A company model needs to be accessible, easy to follow, and provide consistent and reliable results.

The decision-making process

Frameworks for ethical decision-making models generally contain a three step process: clarification, analysis, and implementation. Each phase needs to be methodically completed to reach a final decision.

Clarification

Employees know when something just doesn't seem right. It may be an initial gut feeling or just a general feeling of unease or distress. Perhaps they remember something from past training or company orientation that triggers this sense of discomfort. In most cases, there is an obvious answer. The ethical decision-making model is designed to assist when the solution is not readily apparent.

The first phase assists the employee with understanding and defining the nature of the dilemma they are faced with. Think of this as the start of a decision tree. What is the root of this challenge? Employees need to gather the pertinent information and ask themselves basic questions: Is there a legal or regulatory concern? Does the dilemma conflict with company policies, standards, or values? An affirmative answer to either of these questions allows the employee to bypass the analysis phase and go directly to implementing a solution.

Analysis

In this second phase, analysis, the goal is to encourage employees to examine and identify possible alternatives. This action is a self examination and is introspective by nature. The considerations include stakeholders who may be affected or impacted by the decision. Perhaps the most poignant concern is the classic "headline test." How would this employee feel if their decision was made public, perhaps in the front page of their local newspaper? What would a reasonable person think about this decision? How would they explain it to their manager or family?

In most cases, there are viable alternatives based on stakeholder priorities. There may be multiple considerations with varied outcomes. Employees need to examine each scenario and determine which option they believe would cause the least harm or greatest good.

Implementation

Arriving at a correct conclusion is futile without implementation. It takes courage to take the next step to do the right thing. Employees need to feel safe from retribution and retaliation. Written codes, policies, and procedures are required and continued communications and training need to be in place to reinforce these messages. Company messages should foster an open door policy and encourage employees to bring issues forward to their managers, higher-level managers, Ethics Office, Human Resources, Law department and/or company hotline.

Developing the right model

Identifying the appropriate questions and guide for your company's model depends on the ethical culture and requirements of your organization. Northrop Grumman Corporation, a US-based global defense contractor, uses a Just In Case (JIC) model for its 75,000 employees. This model was designed using the JIC acronym for the Judgment, Introspection, and Courage phases of the decision-making process. It is helpful to brand your model with an easy to remember logo or visual depiction. In the case of Northrop Grumman Corporation, the ethical decision-making model surrounds the ethics values logo for the company.

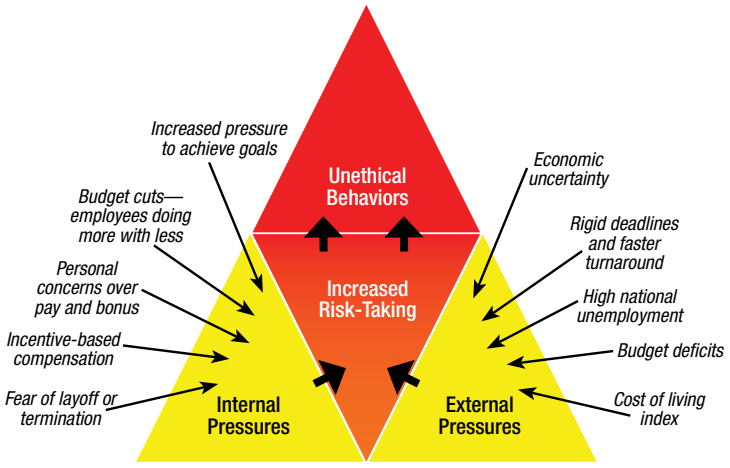

Figure 1: Northrop Grumman's Ethical Decision-Making Model

Customizing the model to your company

Company cultures are varied and unique. Creating a successful ethical decision-making model requires viable input from employees and other stakeholders. In the case of the Northrop Grumman model, focus groups were conducted at various levels of the organization to solicit feedback and determine levels of commitment to using this tool. Originally, the JIC model's phases were Judgment, Intention, and Courage. Feedback from employee focus groups suggested that even the best of intentions may lead down the wrong path. Hence, the model was changed from Intention to Introspection.

Figure 2: Northrop Grumman's Ethics logo

Socializing the model

Annual and refresher training provides opportunities to socialize your company's ethical decision-making model. Brochures, wallet cards, calendars, and give-ways are additional methods to raise awareness of this tool.

However, it takes more than simple awareness to integrate this methodology into your ethical culture. Manager training and interactive group meetings help bring this model to life. It is helpful to introduce this model using real life examples from the workforce. Allow employees to role play using these scenarios to work through the various stages of the model. The ever-changing nature of ethical dilemmas provides continual fodder for ongoing discussions.

Summary

Remember, an ethical decision-making model is just a tool to help employees make the right decision. It does not replace frequent and robust ethics and compliance programs, training, and communications. It's just another tool in the belt to help build a strong and successful program! ✳

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— Assistant U.S. Attorney General Lanny Breuer,
Prepared Remarks to Compliance Week 2010: 5th Annual Conference

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by Dan Small and Robert F. Roach

Powerful witness preparation: The pure and simple truth

» The need to tell the truth does not lessen the need to prepare the witness to testify.
» If you make a mistake, stop and fix it. The jury will understand.
» Deal with the bad stuff up front. Being defensive or trying to cover it up will only make things worse.
» Witnesses should include positive aspects about themselves as part of telling the truth.
» Witnesses should concentrate on what they saw, heard, or did and avoid speculation.

In this series of articles, lead author and seasoned trial attorney Dan Small sets forth ten, time-tested rules to assist you in the critical task of preparing witnesses. Robert F. Roach assisted Dan in this series by providing additional "in-house" perspective and commentary. The first installment of this series was published in our January/February issue.

There is great wisdom in the quote, adopted from Mark Twain, "Always tell the truth. It makes it easier to remember what you said the first time." Real witness preparation is an intensive and challenging process. However, it must begin and end with one fundamental principle: Always tell the truth. The witness must be clear and comfortable that at no time is the lawyer telling him/her what to say, other than to say the truth.

The need to tell the truth, though, does not lessen the need to prepare. On the contrary, it only heightens it. To quote a very different author, Oscar Wilde, "The pure and simple truth is rarely pure and never simple." The goal of good witness preparation is to get to the truth and bring it out effectively in this difficult environment. Truth is often the first casualty of poor preparation.

Rule 3: Tell the Truth

No witness takes an oath to "tell the truth." That is a myth. The oath at the beginning of testimony is to "tell the Truth, the whole Truth, and nothing but the Truth." Like many things in our normal lives, we tend to blur it all together into one image. Like many things in the precise and artificial world of being a witness, we need to examine the *entire* statement and make sure that we understand and consider all three parts.


Small


Roach

1. "The Truth"

Witnesses should understand that this is not only a rule of law; it is a rule of self-preservation. Lying, or stretching the truth, as a witness may not only be a crime. It's foolish.

Witnesses should understand, to be blunt about it, that they are not as good at lying as they think they are. That's because they are used to getting away with it relatively easily. In normal conversations, certain kinds of social "white lies" are generally accepted or ignored. Even more serious lying is rarely directly challenged, and never with the kind of intensity and expertise you will experience if you try it as a witness.

The consequences of telling a lie are often worse than whatever it was the questioner was asking about in the first place. It is what

we used to call the "Watergate Syndrome," perhaps now the "Martha Stewart Syndrome": people getting caught and prosecuted for covering up, not for the initial subject matter being investigated. Don't do it. Tell the truth.

There are no shortcuts here. The truth of what you saw, heard, or did, and remember, is a narrow, precise line. No matter how often or hard someone tries to get you to veer off that line, resist the "oh, what the heck" tendency. Once you're off track, it becomes harder and harder to get back on. No matter how many times a question is asked, and in however many different ways, the truth—and your truthful answer—must remain the same.

As prosecutors, we used the acronym BOBS: Bring Out the Bad Stuff. Whatever the issues are, you and your lawyer can deal with them. It will be much harder if they only come out after you've tried to cover up or gloss over the problems.

"The Truth" also includes honest mistakes

In a witness environment, the setting, the oath, and the court reporter all combine to make people feel that they cannot make a mistake. So, when they inevitably do, they panic and either ignore it or try to mold and shape it into something else. Don't do it! When you make a mistake, which every witness does at some point, keep two things in mind.

First, remember the Law of Holes: "When you're in a hole, stop digging!" Trying to work around a mistake will ultimately only make it worse. As soon as you realize you made a mistake—however that happens—stop and fix it. The goal is a clear and accurate record, so stop and *clarify* any mistakes.

Second, don't worry about it. You should *not* expect to be perfect. Juror #6 doesn't expect it either. He's nervous, too. He knows he would make mistakes, and he does not want robots talking to him. Your mistake draws you closer to him, not further away.

2. "The whole Truth"

The "whole truth" means both the good stuff and the bad stuff. Both need to come out, and in many situations, the witness must take the lead in bringing them forward.

The bad stuff

None of us is perfect, and most of us have things in our past that are embarrassing or difficult. The Internet, and its search engines, can make those things live forever. As a witness, some of those things may become relevant, or the questioner will try to make them relevant. The key is to avoid making the situation worse by trying to hide or be defensive about these things. As prosecutors, we used the acronym BOBS: Bring Out the Bad Stuff. Whatever the issues are, you and your lawyer can deal with them. It will be much harder if they only come out after you've tried to cover up or gloss over the problems.

The good stuff

Just as a witness must take responsibility for bringing out the bad stuff, they must also bring out the good stuff about themselves, their work, those involved in the litigation, or other matters. The questioner will not ask. It must come from the witness. For example, a wide range of healthcare professionals get up in the morning, get dressed, have some breakfast, go to work—and then spend the day saving lives or helping those in need. After a while, to them, it's just what they do every day, nothing special to talk about. But to Juror #6,

it is amazing, wonderful work, *if* it's truthfully described.

That can only come from the witness. Every witness, in every profession and all walks of life, has good stuff to talk about. An important goal of preparation is to find it and convince the witness that, for this one day, it is not "vanity" to talk about it. It is an essential part of telling the whole truth.

3. "Nothing but the Truth"

In this environment, truth has a different and more precise meaning than it does in a normal conversation. Truth in a conversation is what you believe. But "belief" includes guesses, inferences, and all kinds of other things that stretch a precise definition of the truth. Truth in the witness environment is strictly limited to what the witness *saw*, *heard*, or *did*. Anything beyond that is speculation. Thus, a witness can testify to something if they:

- saw it—witnessed it, read it, etc.;
- heard it—heard someone say it, whether to them or others; or
- did it—wrote it, said it, took some action.

Everything else is a guess. So much of what makes us intelligent, interesting, intuitive people, and so much of what makes us good conversationalists, is based on our view of what's in someone else's head. Why did someone do something? What did they mean when they said something? How did they react to something/someone? It's all guessing. We do it every day in normal conversation, and take pride in it. Don't do it as a witness.

"The Truth, the whole Truth, and nothing but the Truth" is hard work, but essential. ✳

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Hear from your peers

Rob Clark, Jr, CIA, CISA, CCEP, CBM,
Chief Compliance Officer,
Clark Atlanta University, Atlanta, GA

1) Why did you decide to get certified?

I chose to pursue this because it was apparent that in the field of Compliance, this is THE designation to hold. I have spent over 20 years in auditing and compliance and have earned the certifications of Certified Internal Auditor (CIA) and Certified Information Systems Auditor (CISA), but when I was hired in March 2010 by Clark Atlanta University to be the Chief Compliance Officer, as well as the Chief Audit Executive, I wanted to demonstrate competency in the Compliance arena with this designation.

2) Has obtaining the CCEP certification helped you? If so, in what ways?

Since I just achieved the designation, it is still fairly new. I have received positive support and recognition from the President, the Provost, Executive Cabinet, and the Audit Committee of the Board of Trustees.

It has also helped to earn that much more credibility as I was just featured in an article in *Compliance Week* about the robust compliance program employed here at CAU.

3) Would you recommend that your peers get certified?

Absolutely. I believe that, as professionals, we should be in a constant state of improvement and expanding our skill sets and competencies. I believe it will give holders of the designation that much more credibility with our organizations and stakeholders.

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Certified Compliance & Ethics Professional

by Adam Turteltaub

The economy, compliance, and ethics

» The percentage of compliance programs with increasing budgets is on the rise.

» Although budgets are on the rise, staffing levels for the Compliance department are not following suit.

» Stress levels among compliance professionals are rising as they do more work with fewer staff.

» Compliance is more likely to be seen as a positive asset, rather than a hindrance to doing business.

» Many respondents thought that economic conditions may lead to more compliance failures.

Beginning in 2009, shortly after the Market Meltdown, the Health Care Compliance Association and the Society of Corporate Compliance and Ethics began annually surveying the Compliance community.

The goal of this research was to determine what has happened to compliance programs and staffing, as well as where budgets and staffing are likely to go in the coming year. The survey has also examined the job security of compliance professionals, as well as the related measure of management attitudes towards compliance and ethics programs.

Turteltaub

The survey was again fielded at the end of 2011. At that time, tentative signs of economic recovery appeared to be sprouting up. The unemployment rate had declined to 8.5% and the economy had added jobs every month since September 2010.

The question was whether the compliance economy was experiencing similar signs of recovery.

The survey revealed a brightening picture. The percentage of compliance programs with increasing budgets is on the rise (see figure 1). More than a third (38%) of respondents reported that their budgets had increased in 2011. This is an increase from 32% in 2010 and just 26% the year prior, indications that the financial commitment to compliance is on the rise. And it should be noted that an even higher percentage expect 2012 spending to increase.

Still, it should also be noted that the budgets are not necessarily leapfrogging forward. Of the 38% reporting an increase, roughly two thirds saw budgets increase "somewhat" with just one third seeing budgets increase greatly. Respondents from publicly-traded companies were more likely than any other group to report their budgets had increased greatly.

Also seeing a gain, although a slight and directional one, was staffing (see figure 2). The year-to-year gain in respondents who reported a rise in staffing was a small one, but it too appears to reflect a trend. Here again, publicly-traded companies led the rest of industry with 45% reporting an increase in staffing. And looking to 2012, respondents expected that trend to continue.

Although a recent survey of compliance professionals revealed significant levels of on-the-job stress, fear of losing one's job does not seem to be a driver of that stress. Overall, just 4% of respondents reported that they were very concerned about losing their jobs, and 52% were not at all concerned, virtually unchanged from a year earlier. When measuring their risk versus others where they work, 77% felt that their jobs were about the same or less at risk than those of others within their organizations.

One explanation for the job security may be that management perceptions of compliance are generally seen as positive (see figure 3). More than half (56%) of respondents reported that their management sees compliance as a somewhat or very positive asset in helping the organization through the current economic conditions. By contrast, just 17% report that their management sees compliance as somewhat of or a great hindrance. Interestingly, these numbers have remained largely unchanged over the past few years, despite the increasing numbers of corporate scandals.

And fears of more scandals remain high among compliance professionals. More than a third (36%) of respondents believe that the current economy "greatly" increases the risk of compliance failures, and another 52% believe that it "somewhat" increases the risk. These numbers are remarkably similar to the previous year's findings (37% and 53% respectively).

In sum, the research suggests that the worst of the recession may be over, at least for compliance budgets. More compliance professionals are seeing their budgets rise, and they anticipate that this trend will likely continue next year.

It's troubling, though, that the rise in spending is not being accompanied by an increase in staffing. With growing demands upon compliance programs, both from increased regulation and enforcement, the demands on existing staff are increasing. Recent research has indicated that the compliance community is already feeling great stress. The data indicates that a brightening economic picture is not translating into more people to do the work, and to relieve the stress of those already working in Compliance. ✳

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Figure 1

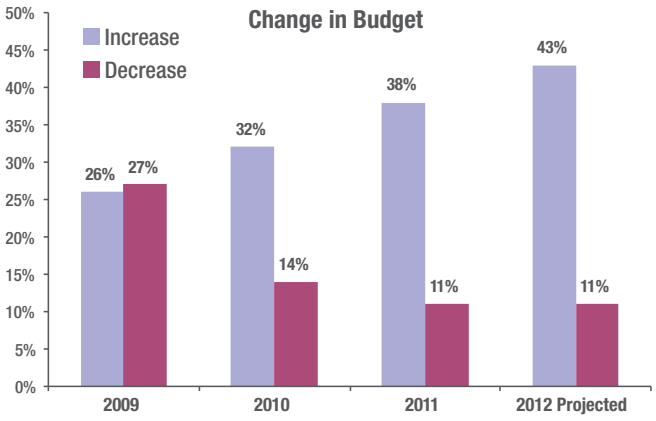


Figure 2

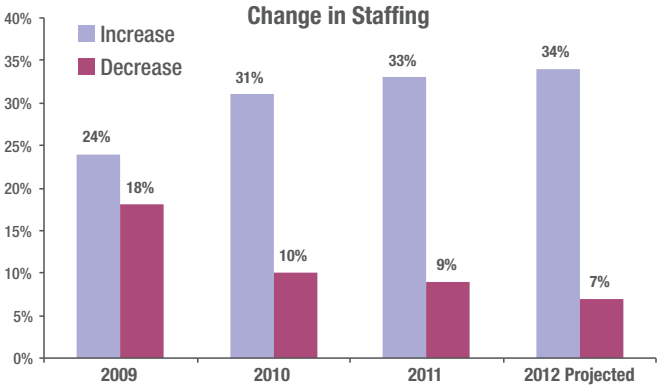
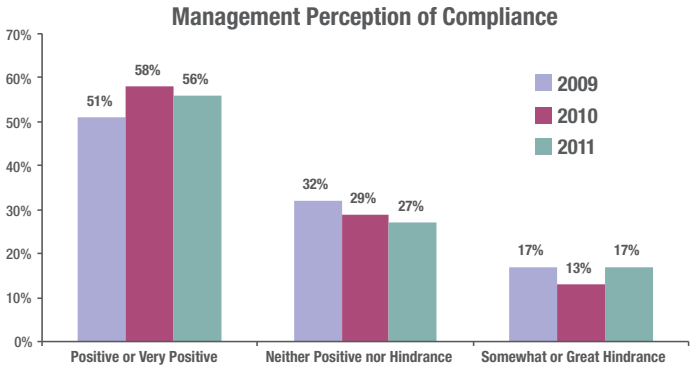


Figure 3



by Justin Estep

Overzealous I-9 compliance can result in a discrimination lawsuit

» The United States government has drastically increased Form I-9 audits.
» Many Human Resources representatives are misinformed about Form I-9 specifics.
» The United States government is also investigating Form I-9 discrimination.
» Companies are forced to pay heavy Form I-9 discrimination fines.
» Consistent Form I-9 policy is the best deterrence to fines.

As most of corporate America is already aware, Form I-9 compliance enforcement has increased at an exponential rate during the Obama administration. Since January 2010, more than 5,000 companies from many industries have been subject to Form I-9 audits by Immigration and Customs Enforcement (ICE).[1] Many of these investigations have resulted in fines issued by the U.S government, and some ICE raids have led to criminal charges being brought against owners and managers. An unintended consequence of Form I-9 ICE raids has been the growing number of discrimination suits brought as a result. These suits are rarely brought against employers who are maliciously preventing people from working, but many times are levied against persons who were misinformed about Form I-9 requirements and broke the law by being "over compliant."


Estep

In order to limit a company's Form I-9 liability, every Human Resources (HR) department representative should be trained in the rules and regulations governing the I-9 form. A thorough vetting of the M-274 (The Handbook for Employers: Instructions for Completing a Form I-9)[2] by each HR representative is essential to avoiding fines and sanctions related to the form. A Form I-9 policy, based on the guidance found within the M-274, is vital because of the intricacies of the Immigration and Nationality Act (INA), which governs employment verification laws related to I-9 forms. The convoluted and detailed INA regulations for I-9 forms result in investigations of employers who had nothing but the best intentions. One of the most commonly overlooked regulations in the INA is the anti-discrimination provision, which prevents employers from asking potential employees for specific documents to verify employment eligibility. The INA anti-discrimination provision also prohibits employers from placing additional document burdens on work-authorized employees.

Unfortunately, many HR representatives still "over document" employees' work authorization, exposing their company to discrimination lawsuits brought by the United States Department of Justice (DOJ) as well as other government entities, or even the wronged individuals themselves. In order to comply with employment eligibility verification regulations, an employer must examine either an original document from List A (U.S. passport, Employment Authorization document,

In the current enforcement environment, many employers have become concerned that their I-9 forms may contain errors and have overcompensated by developing unnecessary (and sometimes illegal) practices to improve their I-9 compliance.

Permanent Resident card, etc.) or a combination of a List B (driver's license, voter registration card, etc.) and a List C document government-issued birth certificate, Social Security card, etc.). The potential employee must be allowed to provide any combination of valid documents in order to satisfy Form I-9 requirements.

In the current enforcement environment, many employers have become concerned that their I-9 forms may contain errors and have overcompensated by developing unnecessary (and sometimes illegal) practices to improve their I-9 compliance. As a result, some companies have asked individuals to provide specific documents for employment eligibility verification, or if a candidate is not a citizen of the United States, they have asked for more documents than are necessary to complete a Form I-9.

Generations Healthcare, a healthcare provider based in California, was recently investigated and is now being prosecuted by the DOJ for mandating that all non-US citizens, who apply for employment with Generations' St. Francis Pavilion facility in Daly City, present extra work authorization documentation, a burden that was not placed on native-born US citizens.[3]

Other employers, such as Garland Sales Inc., a Georgia rug manufacturer, refused to accept sufficient employment verification documents from persons of foreign origin, and would request that naturalized US citizens provide their permanent resident card, or "green card."[4] If the employee refused Garland's request, their employment offer was rescinded. As a result, the Office of Special Counsel (OSC) for Immigration Related Unfair Employment Practices prosecuted the company and required them to pay $10,000 in back pay and civil penalties.

To protect a company from an OSC employment discrimination investigation, and to also remain vigilant in employment verification practices, we recommend that a company's HR department has a detailed Form I-9 compliance policy with a corresponding checklist. Specifically, the policy should instruct your HR department to provide each potential employee with the government approved list of acceptable Form I-9 documents. This ensures that no miscommunication can occur and prevents your HR department from accidentally requesting specific documentation, which could be construed as discriminatory.

Above all, a company's Form I-9 policy should stress consistency. Most OSC investigations target companies that treat foreign nationals and naturalized U.S. citizens differently than native born U.S. citizens. By keeping employment eligibility verification processes consistent for each potential employee and keeping a well-trained HR staff, any company should be able to navigate the ever choppier enforcement waters surrounding the Form I-9. ✳

1. Jordan, Miriam: "Crackdown Resumes on Firms' Illegal Hires." *Wall Street Journal*, November 15, 2011
2. U.S. Citizen and Immigration Services: Handbook for Employers: Instructions for Completing Form I-9 Employment Eligibility Verification Form. M-274 (Rev. 06/01/11) N. Available at http://www.uscis.gov/files/form/m-274.pdf
3. United States Department of Justice: "Justice Department Files Lawsuit Against California Healthcare Provider Alleging Discrimination." News release, September 30, 2011. Available at http://www.justice.gov/opa/pr/2011/September/11-crt-1301.html
4. -United States Department of Justice. "Justice Department Settles Allegations of Citizenship Status Discrimination and Retaliation Against Georgia Rug Manufacturer." News release, December 30, 2011. Available at http://www.justice.gov/opa/pr/2011/December/11-crt-1718.html

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Frederico Melville Novella
Chairman of the Risk and Compliance Committee

Christie Ippisch
Corporate Compliance Officer

Grupo Progreso
Guatemala City
Guatemala

an interview by Adam Turteltaub

Meet Frederico Melville Novella and Christie Ippisch

AT: Tell us a bit about Grupo Progreso's business.

FMN: Grupo Progreso started operations in Guatemala in 1899 with a cement company called Cementos Novella. In 2007, it expanded its operations to have a new division of distribution and sale of construction materials and aggregates, white line (home appliances and fixtures), tools, etc.

With 112 years in business, its core business is the production of cement, and it has approximately 7,000 employees overall. It operates from Guatemala to Panama; and we are in all the Central American countries with different products.

AT: For how many years has the company had a compliance function?

FMN: Since the company started operations, it has been managed with a strict code of ethics, with the example set by the founder Carlos F. Novella and his offspring. Then, six years ago, in March 2006, a formal code of ethics was written and made public to all of the employees. Also, the role of a Compliance department with a compliance officer started that year.

AT: What led the company to create a Compliance function?

FMN: Grupo Progreso is a family-owned company. They were focused on maintaining the legacy of the family founder by incorporating this family's legacy in the corporation. The founder's principles were instilled in his offspring and following generations, and then were written down as a code of values, ethics, and conduct (COVEC).

As the Chairman of the Board and Lead Director of the Corporate Risk and Compliance Committee, I was aware of the necessities of a Compliance department. I was the main promoter of the compliance program,

with the support of the board members, who have also always believed in the necessity of this department.

AT: How standard is it for companies in Guatemala to establish a Compliance department?

CI: We are one of the leading Guatemalan corporations. This is a new trend, seen today as an actual necessity. Cementos Progreso has been recognized and given awards by Centrarse, which is a local entity that promotes the social responsibility of companies.

AT: How is the compliance team structured?

CI: The compliance officer reports to the Audit Committee. Here we call it the Risk and Compliance Committee. There is a vice president who is responsible for Compliance, Legal and Risk (audit). The compliance officer reports organizationally to him.

AT: What's your background, and how did you become a member of the compliance team?

CI: I have twenty-three years of experience, mainly in banking. I was treasurer of the second largest bank in Guatemala during early 1990s, then I worked almost nine years for Citibank as Country Treasurer, and then I was the Financial Institutions and Public Sector Head.

While I worked for Citibank, we focused on training banks, financial companies, and the government with topics like anti-money laundering, know-your-customer policies, managing regulatory issues, etc. Due to my background, I started as an advisor to the Risk and Compliance Committee, becoming the Corporate Compliance Officer.

AT: What is the outline of your program? In the U.S., companies tend to follow the Federal Sentencing Guidelines, of course. What did you use?

CI: Basically, my role as a Corporate Compliance Officer is to establish the mechanisms of control and application of the code of ethics and conduct. And I effectively manage the mechanisms to notify us of good or bad conduct. The hotline, emails, suggestion boxes, and notifications are presented directly to me.

I also work to create a culture of integrity and doing the right thing. This includes establishing procedures and controls to identify and manage conflicts of interests. I also monitor that the company complies with the laws and regulations, supported by areas such as Internal Audit and Legal.

AT: What are some of the key compliance challenges that Grupo Progreso faces?

CI: Trying our best, through our people, to help change a negative view of compliance into a winning culture and a winning organizational compliance culture! It is a challenging subject, since locally you need to convince the board members that implementing a code of ethics and all of the compliance structure will benefit the company, and it's not only an extra bureaucratic process within the company.

AT: Are these challenges typical for your industry, or are they common for other businesses in Guatemala?

CI: They are common for all businesses in Guatemala.

AT: What role does the Guatemalan government play in encouraging compliance programs?

CI: They have been proactive by starting to implement the role of the compliance officer in the financial system with strict anti-money laundering controls, and all international requirements, such as the antiterrorist laws. The government—the Superintendent of Tax Administration, for example—has enforced and strengthened regulatory issues and controls significantly. ✳

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Christie Ippisch *can be contacted at cippisch@hotmail.com.*

by Gilbert Geis, PhD and Henry N. Pontell, PhD

Corporate codes of conduct in the United States

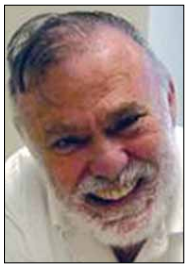
» A code of conduct informs employees about acceptable behaviors the company expects and the conduct that will not be tolerated.
» Codes have proliferated as courts have held employers responsible for monitoring the actions of their employees.
» If codes are not enforced, employees will see them as window dressing, and ignoring the rules will become part of the corporate culture.
» The content of codes has changes as price fixing, foreign bribes, sexual harassment, and insider trading scandals have come to light.
» The effectiveness of a code of conduct is not a mitigating factor in the Dodd-Frank legislation.

The Corporate Compliance Committee of the American Bar Association's Section of Business Law defines business codes of conduct in the following terms:

> A corporate compliance and ethics program consists of an organization's code(s) of conduct, policies, and procedures designed to achieve compliance with applicable legal regulations and internal ethical standards. To do so, the organization must: first, create an ethical corporate culture that educates and motivates the organization's employees to act consistent with legal rules and cultural norms and second, deter and detect violations through risk assessment, monitoring, auditing, and appropriate discipline.[1]

In a shorthand definition, two law writers note that, for them, a corporate code of conduct is "any written statement of ethics, law, or policy (or some combination thereof) indicating the obligation of one or more classes of corporate employees."[2]

The striking surge in recent decades in the number of corporate codes of conduct in the United States has been motivated primarily by the prospect of more lenient treatment if a company employee is discovered violating a law related to his/her job. Sophisticated company codes and devoted dedication to indoctrination of employees regarding the importance of the codes may result in amnesty from prosecution, less severe penal sanctions, or reduced civil fines. The codes also hold the prospect of deterring undesirable practices more efficiently than regulatory oversight, because of the formal forewarning to possible miscreants that certain behaviors are forbidden by company policy.[3] The development of corporate codes of conduct also requires corporate executives to determine what forms of behavior (beyond those that are illegal) violate the moral and ethical standards that the company desires to uphold. The codes further can serve as discussion topics for internal seminars that seek to translate their words into attitudes and actions on the part of all of a company's workers.


Geis


Pontell

The codes thus represent an attempt by the business world to de-fang the vicarious liability doctrine enunciated by American courts that decrees that a company can be found guilty of criminal conduct if an employee does business in a manner that violates the law, even though the employee had received explicit orders that he/she was not to engage in that conduct. The doctrine has

been called "the blackest hole in the theory of corporate criminal law."[4] In the leading case, *United States v. Hilton Hotels Corp.*, a purchasing agent had twice been told not to boycott suppliers who refused to contribute to a fund to promote tourism. The employee granted that he defied orders and said he did so out of anger and pique at the suppliers. The court, in finding the company guilty, justified its ruling with the following reasoning:

> With such important interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they chose to delegate their affairs, thus stimulating a maximum effort by others and managers to assure adherence by such agents to the requirements of the [law].[5]

The Supreme Court's decision turned its back on an earlier federal appellate court ruling that had held in 1946 that the Holland Furnace Company was not liable for the wartime act of a salesperson who, contrary to the rules of the War Production Board, had sold a new furnace to a customer whose own furnace was not worn out, damaged beyond repair, or destroyed.[6]

Arguments against vicarious liability rest on the assumption that a company with a strong compliance program has already maximized whatever detection and deterrence force its prosecution for the wrongdoing of its employee might carry.[7] This viewpoint, however, is at best arguable. It could be that charging the corporation will intensify and improve its efforts to keep employees honest and may cause other entities to re-evaluate their compliance codes so as not to have an offense, such as the one in question, occur in their ranks.

Antitrust activity

The Sherman Antitrust law of 1890 represented an attempt by the United States to combat the increasing monopolistic trend in the business world. The eminent economist Adam Smith, as far back as 1776, wrote about the desire of businesses to eliminate competition by conspiring to fix prices. "People of the same trade seldom meet together, even for merriment and diversion," Smith wrote, "but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[8]

One General Electric conspirator said: "Every direct supervisor I had directed me to meet with competition. It had become so common and gone on for so many years, I think we lost sight of the fact that it was illegal."

The 1961 heavy electrical antitrust conspiracy led to the production of the first wave of corporate codes of conduct in the United States. These codes largely dealt with price-fixing, the subject that in the early days was the major focus of corporate codes of conduct.[9] The case involved 29 corporations and 45 individuals, including vice presidents of the industry giants Westinghouse and General Electric (GE). Seven of the defendants received 30-day jail sentences, an outcome that, at the time, was considered draconian.

One General Electric conspirator said: "Every direct supervisor I had directed me to meet with competition. It had become so common and gone on for so many years, I think we lost sight of the fact that it was illegal."[10] Yet, General Electric in 1946 had issued a directive, number 20.5, that spelled out the company's policy against price-fixing in terms stronger than those found in the federal law. It read:

> It is the policy of the company to comply strictly in all respects with the antitrust laws. There shall be no exception to this policy, nor shall it be compromised or qualified by an employee acting for or on behalf of the company. No employee shall enter into any understanding, agreement, plan or scheme, express or implied, formal or informal, with any competitor, in regard to prices, terms or conditions of sale, production, distribution, territories, or customers; nor exchange or discuss with a competitor prices, terms, or conditions of sale, or any other competitive information; nor engage in any other conduct that in the opinion of the company's counsel violates any of the antitrust laws.[11]

Each manager periodically was asked to indicate in writing that he/she was adhering to this policy, specifying that: "I am observing it and will observe it in the future." But, most employees presumed that the directive was window-dressing, meant to lull the public and the regulatory authorities. One GE employee, however, refused to engage in price-fixing after he initialed the document. A witness before a U.S. Senate committee investigating the price-fixing crimes explained what happened:

> [My superior] told me, "This fellow is a fine fellow, he is capable in every respect except he was not broad enough for his job, that he was so religious that he thought, in spite of what his superiors said, he thought that having signed that, that he should not do any of this and he is getting us in trouble with competition.[10]

The consequences for the convicted violators, in part, reflected the existence of the code at General Electric. The company fired all those implicated in the conspiracy. The other charged companies, without internal directives, retained the malefactors.

Bribery to secure foreign contracts

Two developments prompted further activity in the development of internal codes of conduct in American companies. The first was the Watergate break-in by thugs working on behalf of the re-election of President Richard M. Nixon. The investigation of the botched burglary uncovered numerous illegal donations of corporate moneys to the president's election campaigns. These contributions tended to be disguised by accounting tactics that broke them into small amounts unlikely to be discovered by external auditors who rarely did more than a cursory sampling of such transactions.

It is telling that, despite these guidelines, prosecutions for insider trading often rely not on the core law but on auxiliary violations such as perjury.

The second situation was the discovery that American companies were paying huge bribes to overseas corporations, politicians, and political parties to obtain contracts. An amnesty approach saw more than 400 companies, including 117 of those on the Fortune 500 List, admit to having paid out more than $300 million to foreign sources. In 1977, Congress enacted the Foreign Corrupt Practices Act that criminalized such actions. Corporations responded to both of these scandals by creating internal governance rules that prohibited overseas bribery.[12] Specifically, offending companies had to assure the Securities and Exchange Commission that they had taken steps to see that such activities did not recur.

In addition, in 1988, the Insider Trading and Securities Fraud Enforcement Act

mandated that broker-dealers and investment advisers had to establish, maintain, and enforce reasonably designed written policies and procedures, taking into consideration details of their operations in order to prevent the misuse of material, nonpublic information. It is telling that, despite these guidelines, prosecutions for insider trading often rely not on the core law but on auxiliary violations such as perjury. The reason is that *mens rea*, or criminal intent, is often particularly difficult to establish, because the accused can often claim that he/she always intended to engage in the transaction and that it was coincidental that the move was made prior to internal awareness of, as yet, nonpublic information about an anticipated large gain or loss in the stock.

What do the codes say?

Corporate codes of conduct have became more widespread and somewhat more complex with the passage of time and with the federal mandates discussed below, but their essential nature does not differ much today from the codes put in place during the half century that followed the end of the second World War. The pioneer survey of corporate codes of conduct was undertaken in 1984 by Fried Frank, an international corporate law firm headquartered in New York and with offices in, among other places, London, Hong Kong, and Shanghai. The survey was updated three years later with about one-third of the companies responding. Subjects were companies listed by *Fortune* magazine as the largest five hundred in the United States. Presumably, those who responded were the most likely to have codes in place (90% of them did), although organizational privacy and secrecy concerns may have limited the response somewhat.

A common thread in the codes was the desire to protect the company from liability. Table 1, from the second Fried Frank survey, indicates the categories reported by the companies.

TABLE 1: Issues addressed in corporate codes of conduct[13]

ISSUE	PERCENT
Conflict of interest	97%
Gifts	87%
Misuse of confidential information	83%
Foreign corrupt practices	83%
Political contributions	79%
Insider trading	73%
Antitrust	64%
Labor relations	27%
Other	29%

Source: Siegel (2006:1603)

Cressey and Moore also found what they called "a disproportionate degree of attention" accorded to conflicts of interest in the corporate codes. They note that this discrepancy is particularly pronounced in regard to nonindustrial firms. They believe that a traditional emphasis had been placed on preventing acts directly harming the company and that only recently had concerns about public interests come to the fore.[14]

The Federal Sentencing Guidelines

The compliance code movement picked up considerable speed in 1991 with the introduction of the United States Sentencing Commission's Guidelines for the Sentencing of Organizations (FSGO),[15] a document that set out criteria for aggravating or mitigating stipulated penalties. The FSGO established "the most significant impetus toward internal corporate policing."[16] The most important mitigating factor was the presence of a program "to prevent and detect violations of law." The Commission issued what came to be called the "seven steps" for constructing a satisfactory compliance effort. These steps call for a program that is "reasonably designed, implemented, and enforced so that it generally will

be effective." Obviously, the hedge words "reasonably" and "generally" provide a good deal of leeway for prosecutorial and judicial judgment and it is hardly surprising that mitigations on the grounds of compliance programs have not been readily achieved.

The greater importance of corporate codes of conduct was illustrated in the *Caremark* cases in which the members of the board of directors were sued for what was alleged to be their failure to deal with, or even learn about, illegal actions within the healthcare company.

This first set of guidelines specified the designation of specific high-level personnel to set the program into operation. In a burst of bureaucratic statement-of-the-obvious, the seven steps indicated that those running the program ought themselves not to possess what was labeled "a propensity to engage in illegal activities." Finally, the guidelines noted that companies should take into account their particular characteristics in formulating rules, such as their size, the likelihood of certain forms of wrongdoing given their kind of business, and their prior history of corporate misconduct.

After several years of study and debate, in 2004 the USSC, responding to a report of an ad hoc committee, revised the FSGO, expanding their reach and renaming them the "ethics and compliance program." The new guidelines urged the diligent promotion of compliance and the provision of incentives to see that they are obeyed. They also called for ongoing evaluation of the effectiveness of the compliance program to expand the earlier focus on post-violation inquiries about what had gone wrong. The training of new employees and refresher courses for existing personnel was also made more stringent. Particularly important were stricter standards for members of the board of directors who were now required to "be knowledgeable about the content and operation of the compliance and ethics program and [to] exercise reasonable oversight with respect to [its] implementation and effectiveness." Finally, the new guidelines mandated risk assessment procedures to determine those matters that had to be stressed in the guidelines.[17]

The FSGO had been authorized because of disconcerting evidence that different judges were imposing very different penalties for offenders who seemingly had committed much the same kind of crime. But the rather rigid guidelines had irritated many judges, because they saw them as undermining their judgment about proper punishment, reducing them to no more than robots consulting preexisting tables. This view prevailed with the Supreme Court in 2004 when, in *United States v. Booker*, the FSGO were decreed to be advisory, not mandatory. Later research found that about 70% of the sentences levied following the *Booker* decision adhered to the FSGO.[18] The greater judicial flexibility nonetheless did permit businesses to try to benefit from the development and installation of comprehensive codes of conduct.

The greater importance of corporate codes of conduct was illustrated in the *Caremark* cases[19] in which the members of the board of directors were sued for what was alleged to be their failure to deal with, or even learn about, illegal actions within the healthcare company. A Delaware chancery court thought that this was asking too much of the board, but it endorsed a settlement stipulation that explicitly imposed a somewhat precise fiduciary duty on the directors to attend to internal violations, although the judge suspected that the

rule would not notably alter significantly what had always been part of the directors' obligations. The stipulation decreed:

> The Board will establish a Compliance and Ethics Committee of four Directors, two of which will be non-management directors, to meet at least four times a year to effectuate these [compliance] policies and monitor business segment compliance with the ARPL [the Anti-Referrals Payment Law which prohibits kickbacks], and report to the Board semi-annually concerning compliance by each business segment.[19]

The most prominent attention in the United States to corporate guidelines has been in regard to workplace sexual harassment. The U.S. Supreme Court offered a standard for consideration of such guidelines by the judiciary:

> While proof that an employee has promulgated an anti-harassment policy with compliant procedure is not necessary in every instance as a matter of law, the need for stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."[20]

Kimberly Ellerth, a salesperson in the company's Chicago office, had sued Burlington Industries for alleged sexual overtures by her supervisor and his implied threats of retaliation for her failure to "loosen up." She had not reported her concerns to officials of the company. The Supreme Court indicated that the core issue was vicarious liability and that Burlington in its defense could claim that it had made suitable efforts to inhibit such kinds of behavior by its employees. The Court indicted two possible elements of such a defense: (1) That it exercised reasonable care to prevent and correct promptly any sexually harassing behaviors; and (2) that the employee unreasonably failed either to take advantage of any preventative or corrective opportunities provided or otherwise avoided them.[21]

Tyson Corporation: A case study

In December 1997, Tyson Foods, Inc. pled guilty to felony charges based on its illegally giving the United States Secretary of Agriculture approximately $12,000 in gifts and favors, including football tickets, travel subsidies, and food. As part of its settlement agreement the company, which at the time had 66,000 employees in 27 American states and a number of foreign countries, agreed to pay a multimillion dollar fine and be placed on a four-year term of probation. The settlement also mandated the creation of an Ethics Code Office and the creation of a corporate code of conduct. In addition, two persons were prosecuted by the Independent Counsel appointed to handle the case. A Tyson lobbyist was acquitted of the bribery charge, but convicted for making false statements to federal agents and received a small fine. The company's media director was found guilty of bribery and sentenced to the minimum term allowable under the FSGO, a year and a day of prison time. The agricultural secretary was never tried. The Tyson story provides insights into how governance codes can be mandated and their operation can be closely monitored. And it also tells a tale of the kinds of indulgences persons performing in the political arena can achieve.

The settlement arrangement required that Tyson report quarterly on its ethics program to a federal judge, a probation officer, the United States Department of Agriculture (USDA), and the Office of the Independent Counsel (OIC, which was abolished in 1999 and reformed as a branch of the federal Department of Justice). During the probationary period, there were more than 70 surprise

visits to the company site by inspectors for the USDA and OIC. They checked records of ethics training sessions, saw to it that posters proclaiming the existence of a help-line for whistleblowers were displayed prominently, and randomly questioned employees about the company's code of conduct. Had the inspectors been dissatisfied with Tyson's ethics efforts, its probation could have been revoked and serious penalties inflicted on it.

The man in charge of the reformative program was an attorney, but he notes that nationwide only 19% of persons in positions equivalent to his are lawyers, and only 3% have backgrounds in security work—most are from the management ranks of their company. He emphasizes that the corporate code of conduct must be "much more than a statement of ideals" and notes that it should, when they are relevant, cover the following topics: advertising, antitrust and unfair competition, bribery and improper payments, company books and records, conflicts of interest, environmental affairs, equal employment opportunity, frauds and misrepresentation, government contracting, international business, political contributions, proprietary information, and securities transactions.[22]

The surprise ending to the case came while both men were in the process of appealing their convictions. In late 2000 and early 2001, President Bill Clinton granted full pardons to both malefactors. The lesson seems to be that white-collar bribery is an insignificant white-collar crime; after all, lobbyists engage in it constantly, albeit typically staying just inside the laws which they themselves have had a significant hand in formulating. That a code of conduct and strict supervision of the wrongdoing company can be a consequence of the bribery is perhaps the best that can be expected, given the very tight link between corporate contributions and the survival of politicians in office.

Sarbanes-Oxley

The Sarbanes-Oxley Act of 2002 (SOX), more formally known as the Public Company Accounting Reform and Investor Protection Act, was passed as a result of a widely-publicized series of scandals that involved Enron and its auditor and collaborator in crime, the auditing and consulting firm of Arthur Andersen, as well as WorldCom, Tyco, HealthSouth, and several other prominent business operations. SOX requires public companies to report whether they have a code of ethics that applies to their principal financial officer, comptroller, or principal accounting officer. When the Securities and Exchange Commission (SEC) promulgated regulations to flesh out the statute, it added the principal executive officer to the roster of those obligated to meet the terms of a corporate code of conduct. A satisfactory code must contain at least five elements:

1. Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
2. Full, fair, accurate, timely, and understandable disclosure in reports that a registrant files with, or submits to, the Commission and in other public communications made by the registrant.
3. Compliance with applicable government laws, rules, and regulations;
4. The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
5. Accountability for adherence to the code.[23]

If a company decides not to adopt such a code, it must indicate why it had failed to do so. If a code is adopted, it must be publicly available and any changes in its content must be conveyed to the SEC.

The prosecutors' perspective

The Thompson Memorandum

The federal Department of Justice (DOJ) in 2003 indicated how it intended to respond in cases in which reliance on a corporate code of conduct was an intricate part of the culture of a company suspected of having violated the law. The DOJ statement—known as the Thompson Memorandum, after the deputy attorney general over whose signature it was released—lists nine considerations that federal prosecutors should take into account in deciding whether to investigate, charge, or negotiate a plea with the organization. Three of the considerations relate to codes of conduct:

1. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;
2. The existence and adequacy of the corporation's compliance program; and
3. The corporation's remedial actions, including any effort to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.[24]

The Thompson Memorandum spelled out in some detail the ingredients of a corporate code of conduct that should be taken into account when determining the disposition of a case. The critical factors, it declared, are "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in conduct to achieve business objectives." The Memorandum repeated that point in other words as well: the aim would be to determine whether compliance rules were merely a "paper program" or whether they "were designed in and implemented in an effective manner."

The fact that an infraction had presumably occurred which brought the company to the attention of the authorities could, of course, challenge any claim of effective design and implementation. Besides, the words "adequately" and "maximum effectiveness" leave a good deal to be desired in regard to preciseness.

The McNulty Memorandum

The emphasis on waiving attorney-client privilege and work project privilege aroused a storm of protest from business organizations and the defense bar. In late 2006, in an update of the Thompson Memorandum, assistant attorney general Paul McNulty added three elements to the clause in response to criticisms of the guideline undercutting the traditional attorney privileges. These were:

1. A corporation can cooperate without waiving its privilege if it can provide the necessary information through other means.
2. Waiver requests should be made only if there is a "legitimate need," defined as "a careful balancing of important policy considerations underlying the attorney-client privilege and the work project doctrine and the law enforcements needs of the government's 's investigation."
3. Waiver requests require high-level supervisory approval, which varies depending on the sensitivity of the information being sought.[25]

It is, at best, arguable whether the McNulty Memorandum will do much to keep

prosecutors from demanding waivers. As one writer expressed it, McNulty compared to Thompson can be regarded as "a distinction without a difference," when a prosecutor is seeking a conviction and may well use every weapon available in his or her arsenal to achieve that end.[26]

The Dodd-Frank Regulatory Reform Act

The severe global economic depression that began to unfold in 2008 involved very dubious actions by some of the largest and most powerful investment firms and banks in the United States, including Bear Stearns, Lehman Brothers, Merrill Lynch, Countrywide, AIG, and Bank of America. The meltdown inevitably brought to the forefront the question: Why had not the earlier reforms, particularly the emphasis on corporate codes of acceptable conduct, been unable to prevent the disaster? William Laufer addressed this disturbing consideration in the following terms:

> We must consider how firms that are held in the highest regard, which have cutting-edge compliance policies, and records of good corporate citizenship, are alleged to condone tacitly, tolerate, or participate actively in elaborate frauds.[27]

Laufer notes in particular the case of Goldman Sachs (the most successful Wall Street firm) which allowed one of its clients, a wealthy investor, to designate which toxic subprime derivatives were to be peddled to Goldman customers while he himself was shorting these same derivatives. Goldman Sachs settled with the SEC for $500 million for its sins, less than the amount that it annually contributes to charity.

But what is particularly notable about the Dodd-Frank Wall Street Reform and Consumer Protection Act (a measure that ran to more than 2,000 pages) was that it paid no heed to corporate compliance with codes of conduct. Perhaps the bill's sponsors believed that codes of conduct had failed, or perhaps they believed that they were as satisfactory and useful as they possibly could be. In any case, it was neither the regulatory stick nor the self-regulatory carrot that carried the day.

Auditing codes of conduct

Two fundamental questions lie at the heart of an audit of corporate codes of conduct. First, do such codes deter the conduct that they, at least on their face, intend to inhibit? Second, even if unlawful conduct occurs, does a decent corporate effort to prevent such behavior prove beneficial to the corporation in the ensuing determination of how the case is to be dealt with? Or, on the other hand, as Gary Spence, a prominent defense lawyer has claimed, are the codes "being adopted more for public relations than for the good of the public?"[28] This issue is beyond empirical determination, because there is not and likely never will be an accurate roster of corporate wrongdoing, so that changes in illegal corporate behavior can be correlated with the appearance of intervening variables, such as codes of conduct.

At the same time, as one writer has observed: "For all that is known about the history and content of corporate ethics codes it is striking how little is known about their effect in regulating conduct." The writer points out that even the little that is known is "inconclusive" and notes that the knowledge base largely is made up of studies of college undergraduates or business school majors who respond to questionnaires, a situation very different from the everyday world of corporate decision-making.[29]

This opinion echoes an earlier observation making the same point: "Unfortunately, very little research has been devoted towards discovering whether they [that is, corporate codes of conduct] are effective in promoting

ethical decision-making behavior."[30] This pair of researchers sought to gain some insight into the question by testing 150 business students regarding ethical choices and found that corporate codes of ethics are not influential in determining a person's decision-making in situations involving ethical considerations. This conclusion, at best a suggestive hint at the possible inadequacy of codes of conduct alone, reinforces the earlier recommendation of two managerial scholars that codes of conduct should be accompanied by five other elements:

- **Offer training programs** which independently and explicitly address specific treatment of ethical issues;
- **Limit the opportunity to engage in unethical behavior** by providing a well-developed structure and a system of checks and balances, including explicit penalties for unethical behavior;
- **Let the employees know what penalties the company imposes** on those who engage in unethical behavior;
- **Recognize how the behavior of co-workers and superiors can influence** the behavior of other employees in the organization; and
- **Develop an ethics committee** to address new issues and help establish and evaluate existing codes and policies.[31]

In regard to the question concerning prosecutorial leniency because of corporate due diligence in seeking to create a law-abiding workforce, a 1989 plaint by attorneys for the Rockwell Corporation during the sentencing phase of a case involving wrongful double-billing sets forth the company's chagrin that its best compliance efforts had been ignored:

> The case…raises an issue that cuts to the heart of self-governance. If a defense contractor spends as much time, effort, and money on self-governance as Rockwell has, deals with an incidence of employee wrongdoing in full accordance with the Government's expectations as Rockwell has, and it is then rewarded with the wrath the Government normally reserves for the recalcitrant, is such effort warranted?[32]

This is of course but one anecdotal item and it occurred before greater emphasis was placed on corporate conduct codes. Do companies continue to believe that their formal efforts to coerce, cajole, and otherwise create conformity are not adequately recognized and rewarded? Or has the great surge in the appearance of corporate codes of conduct provided better protection to corporate entities embroiled in instances of corporate violations of laws and regulations?

Liability based on codes of conduct

There exists in regard to corporate codes of conduct what Goldsmith and King[16] call the "unintended dilemma" that arises when a company responds to regulatory incentives by inaugurating a compliance program that generates incriminating information that may produce civil and criminal liability. Earlier, and often, companies learning of such wayward-ness may have informed the authorities of their problem, negotiated a correction, and cleared the matter up. Today, in the United States they seem more likely to calculate the chances that they will be caught and assume that risk, if they believe that the odds are in their favor.

One of the reasons for this shift is that the situation has changed and companies may find themselves in a court facing civil lawsuits that arise from self-incrimination. As a law professor has noted: "Corporations will sometimes be held liable for violating the voluntary standards that they adopt in codes of conduct, even if these standards are higher than the obligations imposed on the corporations

by the law.[33] These lawsuits typically rest on allegations of false and misleading advertising and breach of contract, with the codes of conduct being characterized as a binding agreement to do what it says.

Illustrative is the story of the Nike Corporation which closed its domestic factories in 1980 and outsourced production of its shoes to sites such as Indonesia, Pakistan, and Vietnam. A decade later, Nike found itself being harshly criticized by the American media for the working conditions in the factories of its overseas suppliers. It was reported, for instance, to pay Vietnamese workers $.60 a day, the country's minimum wage, when it cost an estimated $2.10 a day to have decent meals.[34] Nike responded at first by maintaining that it was responsible only to meet the legal requirements of the foreign countries, but this position did not avert a domestic boycott of its products. In 1992, Nike adopted a corporate code of conduct for its suppliers and specified its responsibility for their adoption of measures regarding matters such as minimum wages, overtime, occupational health and safety, and environmental protection. The conduct mandated in the codes often was far more demanding than local requirements: for instance, footwear workers were required to be 18 years of age.

Today, in the United States [companies] seem more likely to calculate the chances that they will be caught and assume that risk, if they believe that the odds are in their favor.

Nonetheless, critics complained that the codes were nothing more than public relations gestures. In 1998, the company was sued in a California court on an allegation that its reports violated the state law against false advertising. The suit was backed up by a report indicating the use of dangerous chemicals in a South Korean factory producing Nike products and the claim that working conditions often violated the specifications in the code of conduct. Nike unsuccessfully argued that what was being called false advertising was permissible under the freedom of speech provisions of the First Amendment in the Constitution. Nike finally settled the case by agreeing to a $1.5 million donation to the Fair Labor Association.[35]

The Nike case was said to create fear that it would deter businesses from incorporating adequate corporate social responsibility principles (CSR) in their codes of conduct. This would take place in the face of what are said to be:

> reports and literature [that] these codes do appear to be helping reshape cultural attitudes within at least some MNCs [multinational corporations] by raising corporate awareness of potentially adverse MSN activity in the developing world and by creating benchmarks through which an external group may measure their business.[35]

Considering these issues one writer has observed: "Unfortunately, no empirical evidence exists that measures how many corporations reconsidered adopting CSR principles in their codes of conduct in the wake of the Nike case." The same writer notes that in regard to such codes, companies currently face the problem of "creating additional legal obligations and providing opponents with the rope to hang them with."[33]

Suggestive experimental data

There is some intriguing but hardly quite-on-target experimental data regarding the use of honesty prompts on subsequent behavior. One such study found that persons who were asked to list the Ten Commandments (even if they could recall only a few or none of them) did not cheat on an honesty test to the extent that others without such an instruction did. The same result was obtained when the experimenter indicated that the test was being conducted under the terms of the (non-existent) university honor code.[36] But, these were short-term results with relatively inconsequential payoffs involved. As the American muckraker Upton Sinclair declared: "It is difficult to get a man to understand something when his salary depends upon not understanding."[37] And it is difficult to remain honest when a competitor is outpacing you by playing fast and loose with the law. ✳

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by Dawn Lomer

Social media evidence: A new accountability

» Courts are seeing an explosion of evidence from social media sites.
» Case law regarding social media evidence is still developing.
» Attorneys and investigators should stay abreast of new rulings as they happen.
» Ethics and common sense rule when it comes to gaining access to personal social media information.
» Rules of preservation apply to social media, just as they do elsewhere.

When 19-year-old Rodney Bradford updated his status on Facebook on October 18, 2009, he had no idea that his message about craving pancakes would become the crucial piece of evidence that would clear him of first-degree robbery charges. The Harlem teenager spent two weeks in jail before his father noticed the status update, which had been posted one minute before the robbery occurred, from a location 12 miles away from the crime. The district attorney subpoenaed Facebook for documentation to prove Bradford had updated his status from his father's home in Harlem, providing Bradford with a rock-solid alibi and a ticket to freedom.


Lomer

With more than 800 million users on Facebook, 200 million registered Twitter users, about 135 million on LinkedIn, and more than 60 million already on Google+, it's clear that social media has become part of everyday life for a huge percentage of the world's population with access to the Internet. It makes people's activities, even thoughts and feelings, trackable and discoverable.

And while Bradford's Facebook evidence worked in his favor, that's often not the case for those whose social media activity is brought under scrutiny in the courts, which are seeing an explosion of this type of evidence. The implications are huge for companies whose employees use social media both at work and at home. In fact, half of all companies will need to produce material from social media sites for e-discovery by the end of 2013, according to a 2011 Gartner report,[1] entitled *Social Media Governance: An Ounce of Prevention*.

A world of evidence

"We are entering an entirely new world of communication, unprecedented in human history," says attorney Benjamin Wright, an author, e-discovery expert, and instructor at SANS Institute. "Social media makes e-mail look like stone tablets, in terms of the flexibility of communication, the volume of communication and the multiplication of copies of communication. I believe that our legal system is only beginning to scratch the surface of the questions related to how we gather evidence, how we respect privacy and how we authenticate the evidence in the courtroom," he says.

Because it's a relatively new field, new challenges are coming to light each month as more and more social media evidence is being used. It can be a valuable source of information for both sides in any case, so understanding how to collect it ethically and leverage it legally will ensure it's admissible.

"In e-discovery, there is no difference between social media and electronic or even paper artifacts. The phrase to remember is 'if it exists, it is discoverable'," said Debra Logan, Vice President and distinguished analyst at Gartner, in a company press release.[2] "Unique aspects of social media present additional challenges, but as with an overall information governance strategy, the key to avoiding or mitigating potential legal issues in the use of social media for business purposes is to have a governance framework, policy, and user education," she said.

Ethical evidence-gathering

Social media can certainly be a useful tool for e-discovery when used responsibly, and it can sometimes be incredibly easy to access evidence on these sites. If parties in a dispute leave their personal sites open for public scrutiny, the evidence is generally accessible to anyone, although there can be limitations on copyright and use of pictures. But, when a party in an investigation has a social media profile with tight privacy settings, getting access to the information can be more difficult.

A court may order that passwords be disclosed or might request a user to provide the evidence from his/her own social media pages to lawyers for the other side. But, without a formal request for disclosure, investigators and attorneys may be left with some difficult dilemmas.

To make matters even more complicated, how you can access information and what information you can use as evidence—each has its own set of developing rules. So far there are relatively few standardized, widely accepted methods for gathering evidence from social media sites. One approach is for the lawyer or investigator to print the social media page and show it to the judge or administrator. Capturing images using a screen grab, time-stamping, and using a web cam to record yourself recording the evidence can be helpful to establish time and place. But this assumes that the material you need to access is readily available.

Do not deceive

Attorneys and investigators have to be careful about how they access information posted on a social media profile. They cannot misrepresent who they are in order to join their opposition's private social media network. For example, you cannot create an account under an alias, "friend" the person under investigation, and then expect to use that information to support your case. The evidence won't be admissible. It also violates the terms of service on some social media sites.

"Lawyers and private investigators have ethical requirements," says Wright. "Interpretation of those ethical requirements is that these professionals will not engage in deceit. Professionals need to think very carefully before they use some kind of deceit in order to be 'friended' by someone else," he says, adding that in the right circumstances, police officers working undercover may be justified in assuming an identity to gather evidence, based on the acceptable rules and procedures of a legitimate undercover investigation.

Duty to preserve

Another ethical issue surrounds evidence preservation. If social media profiles belong to the people who create them, creators should have the right to delete whatever they want, right? Not necessarily. "Lawyers are starting to realize that information contained on social media sites may be related to litigation and are having to navigate the intersection of technology and the law," says Rebecca Shwayri, an attorney and e-discovery expert at Carlton Fields. "Because many social networking sites are owned and controlled by third parties, the preservation issues can be more difficult to manage," she says.

However, "There can be very serious penalties for the destruction of evidence at a time that you know that the social media evidence will be relevant for some kind of a lawsuit or investigation," says Wright. A Virginia lawyer and his client found this out the hard way.

Isaiah Lester was suing Allied Concrete for the alleged wrongful death of his wife, Jessica, who died when an Allied Concrete truck rolled onto her car. His lawyer, Matthew Murray, instructed Lester to "clean up" his social media profiles, which contained material that cast doubt on Lester's level of grief. Lester deleted 16 photos from his Facebook profile, including images of him partying, holding a beer, and wearing a t-shirt that read "I [heart] hot moms." The deletion came to light in the course of the trial, and of the 16 photos deleted, 15 were retrieved and presented in court. There were serious consequences. The court found that the deletion of the photos constituted misconduct by Lester and Murray, and awarded a total of $722,000 to Allied Concrete for attorney fees—$180,000 to be paid by Lester and $542,000 from Murray, who has since resigned.

Company social media sites are more straightforward. "If a company is maintaining its own social media page related to its products and resources, information on the social media page should be preserved when there is a reasonable threat of litigation, assuming such information is related to the litigation," says Shwayri. When it comes to personal social media pages, however, evidence preservation can be more complicated. "Given the millions of users of social media, it is not reasonable to expect social media sites to archive all information related to users just in case of a lawsuit," says Shwayri. "Most users probably don't archive their own material because the material is held by third-party sites."

While the case law is still developing surrounding social media evidence, its potential effect on an investigation, and even our behavior, is becoming clear. "At a very philosophical level… [social media] creates a greater accountability to one another and to society," says Wright, "because, in fact, we're all able to watch one another and we all know that anything I say or do tonight can come back to haunt me tomorrow." ✳

1. Gartner: Social Media Governance: An Ounce of Prevention. December 17, 2010. The report can be ordered at *www.gartner.com/DisplayDocument?ref=clientFriendlyUrl&id=1498916*
2. Gartner press release: "Gartner says by year-end 2013, half of all companies will have been asked to produce material from social media websites for E-discovery." February 17, 2011. Available at *www.gartner.com/it/page.jsp?id=1550715*

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by Eric R. Feldman

Building transparency, accountability, and ethics in government contracting

» The Federal Acquisition Regulations (FAR) require contractors to self-report credible evidence of violations of federal criminal law and significant overpayments.

» The federal government now requires more robust corporate ethics and business conduct programs as a component of "present responsibility" determinations when considering suspension and debarment actions.

» A record number of suspensions and debarments of unethical contractors were made in 2011.

» Agency suspension and debarment officials have placed greater emphasis on deficiencies in corporate ethical culture than on specific FAR violations during recent suspension and debarment actions.

» Contractors can decrease their risk by taking proactive steps designed to improve both the corporate ethical culture and the effectiveness of the business ethics and compliance program.

Much has been written about the 2008 amendments to the Federal Acquisition Regulations (FAR), which require federal contractors to report "credible evidence of a violation of federal criminal law or the False Claims Act" to the respective federal agency Inspector General and the agency contracting officer. Before the FAR Mandatory Disclosure Rule was approved, industry comments predicted that the proposed change would result in mass SWAT teams of federal agents descending on government contractors, and that agency suspension and debarment officials would routinely disqualify contractors for "failure to timely disclose" even the smallest of infractions. Fortunately, neither of these things has happened.

Feldman

What also hasn't happened, however, is the kind of increased transparency and collaborative working relationships between contractors and federal agencies envisioned by the authors of the rule (including myself) who were serving on the National Procurement Fraud Task Force at the Department of Justice (DOJ). To date, the vast majority of disclosures have been limited to the Department of Defense (rather than the civilian agencies), and those disclosures have been focused on smaller cost mischarging and false claims cases, rather than the large kickbacks, gratuities, product substitution, and Procurement Integrity Act violations that federal law enforcement believes are running rampant in federal contracting.

When any type of disclosure is made, a contractor runs the risk that contracting officers, Defense Contract Audit Agency staff, or suspension and debarment officials will immediately ask some very fundamental questions about the ethical environment of the company that may have allowed the violation to occur. A company's compliance with FAR 52.203-13 requirements for a contractor Code of Business Ethics and Conduct and a related ethics program might be called into question, leading suspension and debarment officials to question the company's "present

responsibility" and possibly to suspend or debar them or their officers from future federal contracts, even before an investigation of the facts is completed.

Further, FAR 9.104-1 requirements (i.e., that *prospective* contractors be "responsible" parties) can also be invoked if it is determined that a contractor does not have "a satisfactory record of integrity and business ethics" —potentially disqualifying the contractor from future work. All of these risks are greater when a prime contractor or a whistleblower makes the disclosure regarding the subcontractor, thus calling into question the subcontractor's transparency, ethics, and integrity.

Transparency is the goal

The Mandatory Disclosure Rule was originally modeled after a National Reconnaissance Office (NRO) contract provision developed by that agency's Office of Inspector General (OIG) in mid-2004. The NRO is an agency of the Intelligence Community that conducts the research and development, acquisition, launch, and operations of the nation's spy satellite network. The NRO provision was intended to address the growing number of procurement fraud cases coming to the Inspector General's (IG's) attention from sources other than the contractor's own systems of control and disclosure.

I was the IG during this time and the presumption was, if contractors were required to report credible evidence of fraud to the OIG, with serious penalties for failing to report in a timely manner, the IG and the contractor would work more collaboratively in both conducting the investigation and in preventing future incidents from occurring. NRO management became convinced of the value of this approach, and the mandatory reporting provision was inserted into all NRO contracts in August, 2004.

The NRO OIG's experience with the contract provision from 2004 through 2007 demonstrated the effectiveness of this approach in creating a more transparent, collaborative environment between a government agency and its substantial—and mission critical—contractor base. As the number of disclosures increased, the NRO OIG created additional opportunities for sharing the best practices in procurement fraud prevention and detection between the government and contractors, and among contractors themselves. For example, the annual Business Ethics Conference hosted by the OIG was attended by a large portion of the contractor base. The conference provided an opportunity to share data and fraud trends, reporting issues, as well as fraud prevention and investigative techniques. Conference participation increased steadily, with up to 90% of invited contractors sending staff.

The NRO documented its experiences in the *Journal of Public Inquiry*, a publication for federal Inspectors General.[1] When the National Procurement Fraud Task Force was established circa 2006, several of the agency IG's, who had become familiar with the NRO's mandatory disclosure experience, raised this idea for possible government-wide application. Department of Defense representatives acknowledged that the voluntary disclosure program, which initially produced dozens of significant disclosures after its implementation in 1986, had waxed and waned, with few disclosures coming in during the 2006/2007 timeframe. With substantial increases in procurement fraud (particularly in the war zones) and increasing public outrage, it appeared the time for a mandatory disclosure requirement had come.

Federal agencies seek a corporate ethical culture

The proposed FAR rule on mandatory disclosure was initially drafted based on the NRO experience, but requirements for more robust corporate business ethics and conduct programs, and specifications regarding both source selection and present responsibility

standards, were wisely added by a variety of experienced IG's, agency suspension and debarment officials, and DOJ representatives. The final FAR package was forwarded in the form of a memorandum from Alice Fisher, then Assistant Inspector General for the Criminal Division at DOJ, to the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget. After several modifications (including an initial exclusion for overseas contracts inserted at the White House level but subsequently eliminated by the 2008 Defense Supplemental Appropriations Bill), the rule was sent out for industry comment and ultimately adopted.

The government seeks ethical behavior that flows from a corporate culture of providing employees with appropriate tools (e.g., training, reporting mechanisms, and corporate communications) and encouraging staff to do the right thing in dealing with government customers.

Although some confusion and disagreement still exist over terms like "credible evidence," "timely disclosure," subcontractor "flow down," and "full cooperation" with government officials, one thing has become abundantly clear: Through disclosure and improved contractor self-governance, the government is looking for more than just compliance. The government seeks ethical behavior that flows from a corporate culture of providing employees with appropriate tools (e.g., training, reporting mechanisms, and corporate communications) and encouraging staff to do the right thing in dealing with government customers.

Since the creation of the Defense Industry Initiative in 1986, the nation's largest federal contractors have invested considerable resources in developing comprehensive business ethics and compliance programs. Notable programs include strong leadership commitment and "tone at the top," anonymous reporting hotlines, comprehensive codes of conduct, and tailored ethics training.

Many of these programs started strictly as compliance activities under the company's Legal department, aimed at ensuring adherence to the increasingly complex federal regulations that govern the contracting process. Over time, however, most evolved into comprehensive, values-based programs that recognize legal standards, but aim for even higher ethical standards of business conduct.

Increased attention to values-based ethics is due, in part, to statements contained in the Organizational Sentencing Guidelines, particularly the November 2010 amendments that give credit to companies which develop and maintain an "ethical culture." As a result, agency contracting officials, Inspectors General, and agency suspension and debarment officers are focusing greater attention on mandatory disclosure as one element of transparency that can demonstrate the presence—or absence—of a corporate ethical culture.

Suspension and debarment actions

The Obama Administration, under pressure from Congress to weed out government contractors for ethics violations and poor performance, proposed to suspend or debar almost as many contractors in 2011 as the Bush Administration did during its entire second term.[2] Federal agencies are under scrutiny after a series of Congressional

hearings and reports from agency IGs and the Government Accountability Office accused procurement officials of failing to keep unethical contractors out of the $500 billion a year federal market. According to the General Services Administration, the proposed debarments (more than 1,000 during 2011) are the most since 1997, the earliest year comparable data is available.

As Kathleen Miller reported in *Bloomberg News*, Moira Mack, a spokesperson for the Office of Management and Budget, said, "For too long, the government failed to use suspension and debarment, even in the face of egregious conduct by contractors. That's why this administration has been pushing for tougher oversight of contractors, and we've seen results." The Project on Government Oversight, a federal contracting watchdog, agreed stating, "We are starting to see the pendulum swing to more contractor accountability, but government needs to do a lot more to ensure it only works with responsible contractors and thereby protects the public."

Agencies can propose contractors for debarment for poor performance, as well as a variety of ethical issues, including overbilling, falsely claiming entitlement to special treatment under minority or small business programs, or violating any of the many FAR requirements that govern the bidding, negotiation, execution, and management of government contracts. Because of the FAR Mandatory Disclosure Rule, an increasing number of such ethical issues are being reported by the contractors themselves, their prime contractors, or subcontractors. From the contractors' vantage point, the political push for greater accountability through the use of suspensions and debarments, combined with the Mandatory Disclosure Rule, make them vulnerable both for reporting and failing to report. They view themselves to be "between a rock and a hard place."

An interesting phenomenon is emerging: It is not uncommon for a prime contractor (in order to proactively protect itself) to "drop a dime" on a subcontractor or supplier for even a minor FAR violation by disclosing it to the agency IG and contracting officer. The IG or contracting officer sends the disclosure to the agency's suspension and debarment official (SDO). This is standard procedure within the Department of Defense. The SDO asks the subcontractor what it knew, when, and why it did not disclose the infraction. If a determination is made that there is a deficiency in the subcontractor's ethical culture, the SDO issues a debarment notice, based on a lack of "present responsibility" as defined in the FAR ethics and integrity provisions. This is not a contrived scenario; it has happened multiple times in the past year.

How should a contractor respond?

The scenario described above puts the federal contractor or subcontractor in the awkward position of either indicating that its controls and compliance mechanisms were so weak that its corporate leadership did not know about the alleged violation, or that it knew but failed to disclose. Either explanation can be devastating for the contractor and its future business with the government, because each indicates the contractor has a weak ethical culture and needs to significantly strengthen its corporate ethics and compliance programs in order to demonstrate "present responsibility."

What is a contractor to do? If the company has followed the practices neatly described in the 2010 amendments to the Organizational Sentencing Guidelines, it has likely chartered "periodic independent assessments of the effectiveness of its ethics and compliance activities" already. These assessments can be used to demonstrate that the company has indeed established a credible, effective ethics program that promotes an ethical culture.

The problem violation can then be characterized as an anomaly, a one-time failure by a bad actor who circumvented company controls and was outside the norms of company culture.

But what if such an independent assessment had not been previously conducted, and the company's ethics and compliance activities have not been values-based, comprehensive, or effective? In recent cases, the government has been willing to set aside debarment determinations in favor of several company actions, including:

- A complete internal investigation that identifies the facts surrounding the alleged violation, the causal factors that led to the problem, and recommendations for improvements to processes and controls;
- A comprehensive external, independent assessment of the company's ethical culture by a values-based ethics expert, including evaluation of the company's ethics and compliance program, and specific recommendations for improvement;
- A company action plan that outlines proposed steps for implementing each of the recommendations contained in the independent assessment; and
- A period of independent monitoring (typically 2-5 years) to evaluate company progress in implementing the actions promised in its plan, and to report on improvements to the corporate ethics and compliance posture.

The independent monitor as corporate mentor

An independent monitor is often thought of as a corporate "cop" brought in as the result of a Deferred or Non-prosecution Agreement with the DOJ. A monitor is tasked with reporting on whether the corporate behavior that got the company into trouble has either ceased or is continuing to occur. In some cases, the monitor has been a retired senior military officer, political appointee, a law firm, or a large accounting firm that includes monitoring among several lines of business services it provides to its clients. The monitoring approach is often limited to looking over the shoulder of the subject company to report any obvious, continuing violations in the specific area that got the company in trouble in the first place.

> Establishing standards for corporate self-governance and creating an ethical culture through comprehensive ethics and compliance programs, and holding contractors accountable for maintaining these standards, is a more logical way to reduce risk and improve accountability to the taxpayer.

In the new paradigm of transparency and ethical culture as an essential element of government contracting, this traditional, reactive approach to monitoring is outdated. SDOs, U.S. Attorney's Offices, government regulators, and others who scrutinize the behavior of government contractors and regulated entities are focusing greater attention on less punitive, more effective ways of rehabilitating companies so they can continue to be government contractors, regulated professionals, productive employers, and responsible mission partners. It is not just that these government entities face unmanageable caseloads (which they do), or that they are suffering from woefully inadequate resources to accomplish their mission (which they are). Many individuals who have worked in this area believe that repeated, multiple government investigations of contractor misconduct are simply not the most effective way of making sure that

contractors are ethical. Establishing standards for corporate self-governance and creating an ethical culture through comprehensive ethics and compliance programs, and holding contractors accountable for maintaining these standards, is a more logical way to reduce risk and improve accountability to the taxpayer.

In 2008, Acting Deputy Attorney General Craig S. Morford issued a memorandum to U.S. Attorneys outlining the best practice principles for using and choosing independent monitors. The memorandum was written in response to the frequent appointment of former senior government officials (including former Attorney General Ashcroft) to serve as monitors, leaving in doubt the independence and integrity of the monitoring process used in such agreements. The Morford memo reiterated the inherent value of independent monitoring, stating that "the corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees, and the public at large benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace." [3]

Ideally, an independent corporate monitor is a person or entity who has in-depth knowledge and experience with regulatory schemes and oversees businesses that have been sanctioned for the violation of one or more regulations or laws. In some cases, the independent monitor is engaged proactively in response to investigations and the threat or *potential* for sanctions. The corporation pays for the monitor, and, in exchange for agreeing to ongoing oversight, typically avoids more severe sanctions (such as suspension, debarment, or prosecution). Describing the monitor's role, Morford said that, once an agreement is reached on how to prevent future misconduct, "[a] monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals." More specifically, the memo indicates the monitor should "oversee a company's commitment to overhaul deficient controls, procedures, and culture."

In practical terms, the most effective independent monitor, consistent with the Morford view described above, would take any number of the following steps to "mentor" the company, resulting in a strengthening of the company's ability to function as a responsible government contractor:

- Assess the company's corporate ethical culture;
- Evaluate internal controls over corporate financial, purchasing, contracting, human resources, property management, or other key business processes;
- Assess key risks and vulnerabilities, particularly in the areas of fraud and due diligence over subcontractors and suppliers;
- Evaluate the adequacy of the company's business ethics and conduct programs; and
- Make recommendations for improvement.

Convergence of the FAR and independent monitoring

Government agencies, regulators, contracting officers, and SDOs are looking for an important characteristic in government contractors: *transparency.* In many ways, the mandatory disclosure requirements and the ethics and business conduct provisions of the FAR provide tacit recognition that mistakes in government contracting will occur; that some employees might make bad, even unethical decisions; and that the difference between an ethical and an unethical company is often the manner in which the company deals with the problem *after* it occurs. In fact, SDOs are increasingly focusing on the state

of a company's "ethical culture" in making decisions on "present responsibility" —the main factor that drives whether to suspend or debar a contractor from doing business with the government. This is recognized in the FAR-mandated penalties for a company's "failure to timely disclose" credible evidence of violations or overpayments (i.e., suspension or debarment).

As of the writing of this piece, there had not yet been a case of the government suspending or debarring a company solely for violating the Mandatory Disclosure Rule. However, there have been several cases in which the government determined that the underlying violation, coupled with the failure to disclose in a transparent manner, signaled an unethical corporate culture that raised enough questions about the company's "present responsibility" that a proposed debarment was in order.

In an increasing number of cases, well-advised companies have avoided or reversed suspension/debarment decisions by offering to proactively hire an independent monitor to (1) conduct an independent assessment of the ethical culture of the company, (2) evaluate the strength of the corporate ethics and compliance activities, (3) make specific recommendations to improve the ethics program and internal controls of the company, and (4) independently monitor (with reports to the government) the company's progress in implementing the monitor's recommendations.

The steps described above have not only been enough to avoid suspension, debarment, prosecution, and other punitive actions, but they have also created greater transparency in the government contracting process. Strengthening their ethical culture, establishing or enhancing the FAR-mandated business ethics and conduct programs, and educating staff about the broad applicability of mandatory reporting requirements have, in fact, helped companies become more responsible government contractors. In the final analysis, isn't that the end game we are all working toward? ✳

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2. Miller, Kathleen: "US Agencies Want 1,000-plus Contractors Barred." *Bloomberg News*, December 28, 2011.
3. Morford Craig S: "Selection and Use of Monitors n Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations." U.S. Department of Justice, Office of the Deputy Attorney General, March 7, 2008.

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by Joe Murphy, CCEP

"Papa don't preach": Advice from Madonna for your CEO

We all know the CEO needs to set the right tone at the top, but what does that mean? Here is one area where maybe Madonna has the right idea: "Papa don't preach." Tone at the top is not "talk at the top;" it should mean action at the top to support your program.

What often passes for tone at the top is some policy statement, perhaps written in fulminating style, swearing a mighty oath to support the law. From my experience in antitrust compliance, I would say this is the rule rather than the exception. The general counsel or antitrust lawyer writes it and the CEO signs it (with or without reading it). Of course, employees (who are fairly smart on these types of things) know that this is from the lawyers, not the CEO.

Murphy

Interestingly, guidance written by the UK's Office of Fair Trading (OFT) on how to do a competition law compliance program seems to catch this point.[1] For example, the OFT's guidance stresses the need for commitment from senior management and the board. But unlike some of the other standards around, the OFT indicates that this means action, not just talk. The guidance makes a very good point about senior management showing what they have done to help the company comply, such as attending the compliance training themselves. It tells management that "They need to demonstrate this commitment through their actions clearly and unambiguously."

Another suggestion from the OFT is "the remainder of the board of directors (or senior management team if the business is not a company) challenge the effectiveness of compliance measures that have been undertaken, for example by asking questions about what is being done to identify, assess, mitigate and review competition law risk."

> Tone at the top is not "talk at the top;" it should mean action at the top to support your program.

In an article I wrote for *ethikos* magazine[2] a few years ago, I offered a list of 11 steps a CEO could do to make a difference, without ever saying the words "ethics" or "compliance." Something as simple as having an obviously used copy of the company code of conduct on his or her desk could send a subtle but important message. Going around the table at an executive staff meeting, asking each VP what he or she had done to promote the program would be another, more dramatic step. The CEO could call the helpline with a question (I once heard a CEO say he had done this—to the apparent surprise of his ethics officer), or publicly turn down a business trip because of the appearance of a conflict of interest.

The CEO and other executives can set the tone at the top in many ways, but start by promising not to preach. ✳

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2. Joe Murphy: "How the CEO Can Make the Difference in Compliance and Ethics," *ethikos* , vol. 20, no. 6; (May/June 2007)

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Understanding the proposed EU data protection regulation

by Robert Bond (page 24)

- The EU is in the process of revising its data privacy regime to harmonise data protection across its member states.
- The propsed Data Protection Framework will implement greater enforcement powers that apply to both data controllers and data processors.
- The Framework will focus on consent, breaches, data transfers, accountability, and liability.
- Individuals will have greater control of their personal data, and special protections for the data of children are included.
- Foreign businesses that target EU citizens will incur significant compliance obligations.

Buyers on the take

by Peter J. Crosa (page 30)

- Embezzlement or misappropriation isn't limited to line employees. The E&C purview net should be cast from the lowest level employee to the executive board, and from stockroom to boardroom.
- Staff is more likely to be influenced by unscrupulous vendors while away from the office.
- No vendor should be considered incapable of inappropriate influence, from janitors to lawyers.
- Investigators frequently uncover an employee perpetrator who has a tragic character flaw that is germane to misappropriation.
- Cash kickbacks, entertainment, and other untraceable gifts are often subject to misappropriation.

It's time to change the SEC's culture

by Marlowe Doman (page 34)

- Individuals may get financial rewards if they provide the SEC with information that leads to successful enforcement actions against Wall Street wrongdoers.
- If the action is successful, whistleblowers can be granted between 10% and 30% of any fine over $1 million collected by the SEC.
- For the laws to achieve their goals of exposing and halting Wall Street corruption, the SEC must confront its own culture and dark past toward whistleblowers.
- Over the past decade, the SEC allegedly mistreated its employees who attempted to correct wrongdoing within the Commission, as well as outsiders who reported securities violations.
- The Dodd-Frank whistleblower provisions provide the SEC with an opportunity for a fresh start in its treatment of whistleblowers.

Ethical decision-making models: Decisions, decisions

by Roz Bliss (page 40)

- Ethical decision-making models help employees make the good choices.
- Employees know when something just doesn't seem right.
- Encourage employees to examine and identify possible alternatives.
- What would a reasonable person think about this decision?
- It takes courage to do the right thing.

Powerful witness preparation: The pure and simple truth

by Dan Small and Robert F. Roach (page 44)

- The need to tell the truth does not lessen the need to prepare the witness to testify.
- If you make a mistake, stop and fix it. The jury will understand.
- Deal with the bad stuff up front. Being defensive or trying to cover it up will only make things worse.
- Witnesses should include positive aspects about themselves as part of telling the truth.
- Witnesses should concentrate on what they saw, heard, or did and avoid speculation.

The economy, compliance, and ethics

by Adam Turteltaub (page 48)

- The percentage of compliance programs with increasing budgets is on the rise.
- Although budgets are on the rise, staffing levels for the Compliance department are not following suit.
- Stress levels among compliance professionals are rising as they do more work with fewer staff.
- Compliance is more likely to be seen as a positive asset, rather than a hindrance to doing business.
- Many respondents thought that economic conditions may lead to more compliance failures.

Overzealous I-9 compliance can result in a discrimination lawsuit

by Justin Estep (page 50)

- The United States government has drastically increased Form I-9 audits.
- Many Human Resources representatives are misinformed about Form I-9 specifics.
- The United States government is also investigating Form I-9 discrimination.
- Companies are forced to pay heavy Form I-9 discrimination fines.
- Consistent Form I-9 policy is the best deterrence to fines.

Corporate codes of conduct in the United States

by Gilbert Geis, PhD & Henry N. Pontell, PhD (page 54)

- A code of conduct informs employees about acceptable behaviors the company expects and the conduct that will not be tolerated.
- Codes have proliferated as courts have held employers responsible for monitoring the actions of their employees.
- If codes are not enforced, employees will see them as window dressing, and ignoring the rules will become part of the corporate culture.
- The content of codes has changes as price fixing, foreign bribes, sexual harassment, and insider trading scandals have come to light.
- The effectiveness of a code of conduct is not a mitigating factor in the Dodd-Frank legislation.

Social media evidence: A new accountability

by Dawn Lomer (page 66)

- Courts are seeing an explosion of evidence from social media sites.
- Case law regarding social media evidence is still developing.
- Attorneys and investigators should stay abreast of new rulings as they happen.
- Ethics and common sense rule when it comes to gaining access to personal social media information.
- Rules of preservation apply to social media, just as they do elsewhere.

Building transparency, accountability, and ethics in government contracting

by Eric R. Feldman (page 70)

- The Federal Acquisition Regulations (FAR) require contractors to self-report credible evidence of violations of federal criminal law and significant overpayments.
- The federal government now requires more robust corporate ethics and business conduct programs as a component of "present responsibility" determinations when considering suspension and debarment actions.
- A record number of suspensions and debarments of unethical contractors were made in 2011.
- Agency suspension and debarment officials have placed greater emphasis on deficiencies in corporate ethical culture than on specific FAR violations during recent suspension and debarment actions.
- Contractors can decrease their risk by taking proactive steps designed to improve both the corporate ethical culture and the effectiveness of the business ethics and compliance program.

SCCE's 2012 Upcoming Events

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May 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1 *May Day*	2	3	4	5
6	7 Basic Compliance & Ethics Academy São Paulo, Brazil	8 **Corporate Compliance & Ethics Week** May 6–12, 2012	9	10 CCEP-I Exam	11	12
13 *Mother's Day*	14 **WEB CONFERENCE:** Anti-Corruption: What Every Ethics & Compliance Professional Needs To Know	15	16	17	18 Upper Northeast Regional Conference New York, NY	19
20	21 Basic Compliance & Ethics Academy Brussels, Belgium	22	23	24 CCEP-I Exam	25	26 *Shavuot begins*
27	28 SCCE OFFICE CLOSED *Memorial Day*	29	30	31		

June 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3 Higher Education Compliance Conference Austin, TX	4	5	6 CCEP® Exam	7	8	9
10	11 Basic Compliance & Ethics Academy Scottsdale, AZ	12	13	14 CCEP® Exam	15 Alaska Regional Conference Anchorage, AK	16
17 *Father's Day*	18	19	20 *First Day of Summer*	21	22 West Coast Regional Conference San Francisco, CA	23
24	25 Basic Compliance & Ethics Academy San Diego, CA	26	27	28 CCEP® Exam	29	30

July 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 *Canada Day*	2	3	4 SCCE OFFICE CLOSED *Independence Day*	5	6	7
8	9 Basic Compliance & Ethics Academy Shanghai, China	10	11	12 CCEP-I Exam	13	14
15	16	17	18	19	20 *Ramadan begins*	21
22	23	24	25	26	27	28
29	30	31				

All Upcoming Events

Basic Compliance & Ethics Academies

May 7–10 • São Paulo, Brazil
May 21–24 • Brussels, Belgium
June 11–14 • Scottsdale, AZ
June 25–28 • San Diego, CA
July 9–12 • Shanghai, China
August 13–16 • Boston, MA
November 12–15 • Orlando, FL
December 10–13 • San Diego, CA

Regional Conferences

Upper Northeast • May 18 • New York, NY
Alaska • June 15 • Anchorage, AK
West Coast • June 22 • San Francisco, CA
Southeast • October 12 • Atlanta, GA
Southwest • November 2 • Houston, TX

Higher Education Compliance Conference

June 3–6 • Austin, Texas

11th Annual Compliance & Ethics Institute

October 14–17 • Las Vegas, Nevada
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Dates and locations are subject to change.

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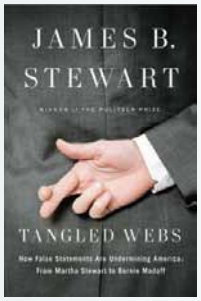

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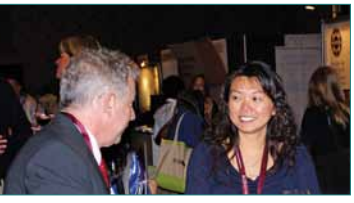

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