

CORPORATE LEGAL TIMES

Compliance And Ethics Issues Unnerve General Counsel

Counsel Divulge Best Compliance Practices, Seek Solutions

BY AMALIA DELIGIANNIS

BEFORE THE ENRON, WorldCom and Tyco scandals reared their ugly heads, many executives saw compliance as a necessary evil to keep legal departments off their backs and regulators from nailing them with hefty fines. Few took compliance programs seriously and, in some cases, preferred to roll the dice by treading the line between compliance and corruption.

Those days are long gone. Every company in the United States now understands the importance of compliance programs and appreciates how they keep companies out of trouble, Wall Street analysts placated and shareholders smiling. Even companies with stellar compliance procedures in place before Bernie Ebbers, Andrew Fastow and Dennis Kozlowski soiled the reputation of corporate America are now re-evaluating their compliance efforts and implementing new methods.

At Martindale-Hubbell's recent Counsel To Counsel forum in San Francisco, "On Our Best Behavior: Corporate Ethics and Compliance Programs," a group of general counsel and law firm lawyers discussed different approaches to compliance and revealed challenges associated with developing and implementing viable compliance programs in the post-Enron era.

Different Strokes

Most of the participants agreed the current economic environment and changing regulations have increased the onus on in-house counsel to ensure their clients are implementing robust and comprehensive compliance programs. The problem, how-

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ever, is doing so amid budgetary and personnel cutbacks.

The key, most agreed, was that general counsel need to delegate the responsibility for compliance decisions to senior level attorneys and establish auditing procedures to ensure employees are adhering to compliance efforts. How in-house counsel achieve this, however, depends on company structure and culture.

For instance, Mark Michael, senior vice president, general counsel and secretary for Santa Clara, Calif.-based 3Com Corp. and co-chair of the event, admits his company doesn't have a full-blown compliance program in place. Instead, the company approaches compliance from an ad-hoc, decentralized perspective. Each corporate function and business unit is responsible for complying with the ever-changing regulatory and legal environment, as well as implementing effective risk-management procedures.

"It's not the worst thing not to have a dedicated compliance department, although my preference would be to have one," he says. "The groups responsible for ad-hoc compliance report to the general counsel who functions as the chief compliance officer and provides reports to the board and audit committee."

The corporate functions and business units help feed data to the general counsel, who then relays the information to the appropriate channels. For instance, the legal department at 3Com regularly provides its audit committee with a report that explains what systems are in place for monitoring compliance and how the company is adjusting these systems as new

rules and regulations take effect. The legal department also briefs the CEO and board on legal and governance issues that may have a material impact on the company.

The payback of a strong compliance program is that it can significantly reduce corporate liability and stem the flow of litigation. And a company that is experiencing an increase in litigation and regulatory enforcements may need to take a hard look at their compliance programs.

Michael presented a case study about the process 3Com uses to analyze and report on litigation, investigation and compliance. The CEO and other members of senior management receive a briefing from the legal department each quarter that examines litigation costs and trends. By analyzing litigation data, the company can identify potential problem areas and put out fires before they rage out of control. Moreover, since each specific business unit is responsible for litigation costs, business managers are much more aware

C2C Forum At a Glance:

"On Our Best Behavior: Corporate Ethics & Compliance Programs"

Co-Chairs:

- > **Mark Michael**, senior vice president, general counsel and secretary, 3Com Corp.
- > **Kevin Chiarello**, senior vice president and corporate compliance officer, Fidelity National Financial Inc.

Law Firm Co-Hosts:

- > Kirkland & Ellis
- > Littler Mendelson
- > Preston Gates & Ellis

Facilitator:

- > Leigh Dance, ELD Project Marketing International

of the consequences of making mistakes and are therefore more proactive in their approach to risk management.

While 3Com has taken a more decentralized approach to compliance, Redmond, Wash.-based Microsoft Corp. has done the opposite, assembling a task force to develop a clear framework for developing compliance policies and relaying objectives down to business groups. No matter if the compliance issue is related to employment law, antitrust law, privacy or security laws, the task force's process sets clear roles and responsibilities at both the corporate and business unit levels to accomplish the company's overarching objectives.

"The fundamental idea is to create accountability throughout the organization," says John Frank, associate general counsel of Microsoft. "Compliance is by and large business processes and making sure there's clear assignment and accountability of who owns those processes."

Some of the participants said one area that in-house counsel overlook when implementing compliance programs are the actions of international divisions.

Many companies have had their reputations ruined because they failed to accurately monitor overseas operations. A few years ago, for instance, Unocal Corp. joined forces with Total Fina Elf SA and the Burmese government to build a 254-mile pipeline to transport natural gas from four offshore platforms in the Andaman Sea. But the company became entangled in a legal nightmare when Burmese troops hired to protect the pipeline committed human rights abuses against local villagers. A group representing some of the victims of those abuses is now suing the company for the actions of these troops.

"Companies live in a fishbowl today," says Ronald M. Loeb, senior vice president and general counsel for San Francisco-based Williams-Sonoma Inc. "There is no such thing as manufacturing in some obscure country or some offshore location and feeling that you're immune from scrutiny. Socially responsible companies are meeting this challenge by instituting global compliance programs, which include codes of conduct for their vendors; standards of performance; periodic audits to ensure compliance; and, in some instances, public access to audit results."



(Clockwise from top left): Lisa Bodensteiner, executive vice president of Calpine Corp.; Robert Shives Jr., associate general counsel of Fujitsu America Inc.; Darryl Chiang, corporate counsel of Hitachi America Ltd.; John Frank, associate general counsel of Microsoft Corp.; Beth Frensilli, senior vice president and general counsel of Commerce One Operations Inc.; Stephen Juelsgaard, general counsel, senior vice president and secretary of Genentech Inc.

An Educated Workforce

Whatever approach a company takes toward compliance, one thing is for sure: Companywide communication of objectives is a key component to achieving success. And it's not just the board and executives that need to stay abreast of regulatory or legal changes that could impact them—employees need to as well.

"If you're expecting employees to comply with all this, you have to help them understand what it all means," says William H. May, vice president, general counsel and secretary for Fullerton, Calif.-based Beckman Coulter Inc., a manufacturer of products and systems for the medical and research laboratory environment. "We have an obligation to employees to educate them."

Informing a company's employees, executives and board of changes in compliance can be achieved via e-mail, executive forums and online training. Companies also can use web-based technology to train employees and feed them a consistent message about corporate compliance. In addition, the legal department should educate the employee about how to report compliance violations and develop systems, such as hotlines, that make the process easier and protect the employee's identity.

For such a system to work and for employees to feel comfortable reporting violations requires buy-in and support from the top. Company executives and board members that don't take compliance seriously will not have employees that care about compliance, the participants agreed.

For example, Catholic Healthcare West, a non-profit healthcare provider located in Arizona, Nevada and California, performs internal financial disclosures quarterly, wherein "subsidiary" financial officers complete disclosures.

"We investigate everything that looks like it might be a problem. If we don't know about something that is reported, we look into it to make sure we know what it is," says Derek F. Covert, senior vice president and general counsel of Catholic Healthcare West. "If the culture is a culture of compliance and your executive leadership is supportive of it, then it lasts. It becomes part of the organizational culture."

Ultimately, the participants agreed that no template exists for creating the perfect corporate compliance mechanisms. A per-

fect system doesn't stem from procedures and methodologies but rather from an ethical culture that is shaped by the CEO and board. And if the CEO doesn't support such a culture, then there is little a general counsel and the legal department can do to change that.

"The goal at the end of the day is to do things the right way and not to do them according to somebody's cookbook of how they believe you should do it," says Stephen G. Juelsgaard, general counsel, executive vice president and secretary for Genentech Inc., a biotechnology company based in South San Francisco, Calif. ◀

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- > **August:** How the Legal Function Protects Corporate Image
- > **September:** Risky Business: Corporate Counsel Approaches to Managing Risk in a Tough Economy
- > **October:** Managing Cross-Border Disputes & Litigation in a Mad, Mad World
- > **November:** Efficient & Effective: Optimizing the In-House Counsel-Law Firm Relationship
- > **December:** Friends Like These: Best Practices for Establishing Your Preferred Provider
- > **January:** What Have You Done for Me Lately? Demonstrating the Value of In-house Counsel to the Corporation



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