

Thinking About Training

By Jeffrey M. Kaplan and Rebecca Walker

Training is generally the most time consuming and costly part of a compliance and ethics (C&E) program. But it is rarely the most effective or efficient part. This article will discuss both the why and what of C&E training, and offer some suggestions to companies looking to enhance the efficacy of this key aspect of their programs, with an eye toward what the C&E training of the future might entail.

Training and the law

C&E training has, of course, been with us for many years—perhaps starting with the antitrust compliance programs that were initiated in the 1960s following high-profile electrical contracting bid-rigging cases. More recently, C&E training has achieved a status that could be considered *almost* mandatory. (Of course, training is in fact truly mandatory only with respect to a relatively few discrete areas of law or regulation—such as anti-harassment under some state laws, and Federal Energy Regulatory Commission [FERC] “standards of conduct,” among others.)

The general status of C&E training as nearly mandatory is due, above all, to the 2004 revisions to the Sentencing Guidelines for Organizations, which now provide that an organization “shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to [the board, high-level personnel, substantial authority personnel, other employees and, as appropriate, agents] by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.” However, there have also been many other official articulations of C&E program expectations that include training, such as the 2003 Health & Human Services’ OIG Compliance Program Guidance for Pharmaceutical Manufacturers, which has an extensive discussion of training.¹

Moreover, C&E training has been recently cited as a basis for providing leniency in government investigations. This occurred in 2007 both in the U.S.—in a federal criminal settlement involving an orthopedics manufacturing company²—and also in a decision of the French Competition Council reducing a competition law fine due, in part, to the defendant company’s C&E training.³

Of course, receiving legal “credit” is not the principal reason to provide C&E training. More important are several other factors. First, for many risk areas, employees may genuinely need help in understanding what the law requires. A far from complete list of these risk areas includes insider trading, export control, and antitrust and competition law, all of which have requirements that can, on some level, be confusing to most employees and even many lawyers.

Second, in addition to information on legal requirements, training can provide important company-specific guidance that is helpful in ensuring compliance, such as information regarding company procedures and reporting requirements. This type of training might, for example, provide employees with instruction on the type of due diligence to conduct before hiring an agent in certain countries, or on the types of approval required before making a political contribution.

Third, C&E training can be extremely effective at communicating the company’s commitment to *ethics* as well as compliance.

The Sentencing Guidelines provide that companies must not only provide training—they must do so in an effective manner.

Jeffrey M. Kaplan and Rebecca Walker are partners in the law firm of Kaplan & Walker LLP, and both have editorial positions with *ethikos*.

¹ Indeed, California’s and Nevada’s laws requiring pharma companies to have programs that meet the OIG Guidance can be read as mandating training.

² <http://www.usdoj.gov/usao/nj/press/files/pdf/files/hips0927.rel.pdf>.

³ Jan. 23, 2007 Competition Council of France decision concerning SITA.

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Fourth, as *ethikos'* Joe Murphy has often noted, training can provide motivation for employees to conduct themselves in a compliant fashion. Indeed, the very fact that management chooses to devote significant employee time and resources to training sends a message to employees that C&E is genuinely important to the company. Additional motivation comes from an understanding of the consequences of violations (jail, fines, impact on family, the reality of shame, etc.) and an understanding of the benefits and values behind what the law requires. (Most major business crime, Murphy has pointed out, is not the result of a lack of knowledge of what the law requires, but—at least in part—of motive.)⁴

Finally, training can be important in yet another way—to impart skills that are important for C&E program effectiveness. Examples of training that serves these purposes—such as how managers should receive C&E complaints or how to conduct investigations—are described later in this article.

There should be no question, then, that training applies both to having an effective C&E program and, in the event that it is ever necessary, to proving the efficacy of the program to the government. But how should individual companies go about providing training that in fact matters?

Designing a C&E training curriculum

In addressing this challenge, companies need first to decide who should be trained on what. In other words, they should design a C&E training curriculum—as opposed to proceeding on a largely ad hoc basis (as many organizations do). To assist with this we discuss below some of the areas that, as a general matter, companies should consider including in training for the five categories of trainees set forth in the corporate Sentencing Guidelines (the board, high-level personnel, substantial authority personnel, employees, and agents), as well a sixth category—C&E and other “control” type personnel.

Boards of directors. Training for boards (who are referred to in the Guidelines as a company’s “governing authority”) should address general C&E standards applicable to directors, which include directors’ fiduciary duties—principally the duties of loyalty and care. But directors should also be trained on individual areas of risk relevant to their position. Among these are conflicts of interest, the protection of confidential information, insider trading and securities law. (Indeed, it is worth noting in this

regard that in the past few months there have been press reports of several insider trading cases involving outside directors.) As illustrated by the Hewlett-Packard case, boards should also be trained on oversight of board-level investigations. Ideally, risk-area training would include scenarios demonstrating how issues relating to board-relevant risk areas can arise in a non-nefarious context. (Even more so than with employees, it is likely best from a “diplomatic” perspective in training boards not to suggest that they would act maliciously—regardless of whether this approach tracks a true risk calculus for directors.)

Finally, boards should be trained on C&E program oversight, which is an element of a director’s fiduciary duties under Delaware law.⁵ This requires providing boards with training regarding compliance law and practice and their C&E oversight responsibilities, as well as with an understanding of their company’s program. Less obviously, it can also be helpful to provide directors with key questions that they should ask the compliance officer in executive sessions about the program as part of their ongoing oversight. These questions should ideally focus on areas where a director can most likely make a difference—such as ensuring the sufficiency of a program’s resources or its “clout.” Directors can also be trained to ask about the key C&E risk areas the company faces.⁶

Senior managers. There are three general types of training that companies should consider providing to senior managers (a category which, for the most part, overlaps with what the Guidelines call “high-level personnel”).

The first is risk-area training for subjects directly applicable to senior managers, which includes those areas already mentioned as applicable to boards (conflicts of interest, the protection of confidential information, insider trading and securities law), as well as antitrust, protection of company resources, and financial reporting. (Some companies may want to train boards on the latter two topics as well.) There may also be other risk areas that warrant senior manager training, depending on the company’s specific risk profile. For instance, in some companies, it may be important to train senior managers on political fund raising and lobbying issues. And, for companies in heavily regulated industries—such as defense contracting—executives should receive a broad range of industry-specific compliance training.

Second, companies should consider training senior managers on those risks that impact the employees whom they supervise. Thus, if an executive supervises the sales function, she should receive training on antitrust and other aspects of “sales compliance.”

Finally, like the board, senior managers should be trained on the C&E program, and what their role in it entails. This could

⁵ *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

⁶ See Kaplan, “Stone v Ritter: Implication for Directors, and Compliance Programs,” *ethikos*, Jan.-Feb. 2007, for a list of seven questions boards might wish to ask about their companies’ programs.

⁴ See Murphy, “Training ‘in a Practical Manner,’” 6 *Corporate Conduct Quarterly* (now *ethikos*) 2 (1998).

include, for example, the following topics:

- Maintaining an ethical organizational culture.
- Avoiding the creation of pressure likely to lead to C&E violations.
- Leading by example.
- Monitoring subordinates' activities.
- Receiving reports of suspected misconduct (discussed in more detail below).

Mid-level managers. Risk area training for mid-level managers (a category that, to some extent, overlaps with what the Guidelines calls "substantial authority personnel") tends to be based less on the sort of supervisory analysis that is applicable to senior managers and more on a "front line" analysis, meaning risks relevant to their day-to-day work. So, for instance, companies should consider training employees in R&D on competitive intelligence gathering, employees who do business overseas on the Foreign Corrupt Practices Act (FCPA), and so forth.

Additionally, mid-level managers should receive general program-related training, which could include similar topics to those applicable to senior managers described above—but presented in ways more relevant to them. For example, a mid-level manager needs to know not only how to avoid creating pressure that could cause her subordinates to violate C&E standards, but also how to respond to what might appear to be such pressure from her superiors.

Companies may also wish to provide training relating to the risk-filled area of receiving C&E reports from other employees. Such training might include the following topics:

- how to create an environment in which employees feel comfortable making reports;
- how to really listen when receiving such a report;
- what to do after receiving the report (including who to contact);
- what *not* to do (including conducting one's own investigation or breaching confidentiality—even for seemingly good reasons); and
- how to avoid engaging in conduct that might be seen as retaliatory, with an explanation of how behavior that is well intended could nonetheless fall into that category.

When discussing the sensitive topic of dealing with reports of suspected misconduct, companies may also want to recognize how difficult it can be for managers when allegations are made against them or against employees in their departments, and provide some guidance regarding dealing with this aspect of employee reporting.

Other employees. A risk assessment should help determine the topics on which other employees should be trained. "Code of conduct" training is often a good place to start, with discussions of risk areas that are broadly applicable, such as conflicts of interest, confidential information, respectful treatment of fellow

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employees, and proper use of company assets.

Finally, whether as part of code training or in some other context, all employees should receive training about the program itself. This training can describe the program and its key players and should emphasize the need to report suspected violations and seek guidance on C&E matters, explaining the measures the company takes to protect whistleblowers and its commitment to appropriately investigating C&E matters and imposing discipline where warranted. Such training can also be a very useful springboard for discussions of the company's values and its commitment to ethical business practices.

One particular challenge that many companies have not yet addressed is training "virtual" or "distributed" employees in light of risks particularly applicable to them. A study released in February 2008 showed that such employees "feel less urgency to be vigilant in their online behavior."⁷ This suggests, among other things, the need for training virtual employees on appropriate use of technological resources, including e-mail and Internet use.

Agents and other third parties. While not as common as training for employees, many companies have developed C&E training for third parties, such as agents, distributors, contractors, suppliers, and others. Indeed, those risks presented by third parties are generally a growing area of C&E concern.⁸ As noted above, the Sentencing Guidelines address the issue of third-party training by providing that organizations must *periodically communicate their standards and procedures to employees, directors and agents, as appropriate, by conducting effective training programs and otherwise disseminating information appropriate to their roles and responsibilities.*

Whether training is appropriate for agents or other third parties and on what topics it should be conducted depends on both the results of a company's risk assessment and the more practical consideration of a company's ability to effectuate training. The types of risks posed by third parties are almost as numerous as the types of risks that are posed by employees, including, corruption, violation of competition law, conflicts of interest, inappropriate disclosure of confidential information, and workplace safety.

⁷ See "Cisco Study on Remote Workers Reveals Need for Greater Diligence Toward Security," Feb. 5, 2008 available at http://newsroom.cisco.com/dlls/2008/prod_020508.html

⁸ See Berenbeim and Walker, "Finding the Right Balance: The Essentials of Third Party Ethics Programs," The Conference Board (January 2008).

Boards should be trained on C&E program oversight, which is an element of a director's fiduciary duties under Delaware law.

Indeed, companies have for many years trained contractors on workplace safety standards when they are working on site.

What risks are posed by particular categories of third parties and whether they warrant or are amenable to mitigation through training are questions that can be asked during the risk assessment process.

In addition to training in particular subject matter areas, companies should also consider training third parties on those requirements of the company's C&E program that are relevant to third parties, such as the company's commitment to compliance and business ethics and its requirement of reporting suspected misconduct, including explaining how third parties can report suspected issues.

The logistics of training third parties can be exceedingly difficult, depending on where the third parties are located. Some third parties may inhabit the same physical space as a company's employees (such as temporary workers and contractors), which makes training much easier. On the other hand, third parties may be located far from a company's facilities. In this event, computer-based training may be the most practical form of training.

C&E and other "control" personnel. Training should also be considered for members of the C&E staff and others with compliance or control-related functions—such as members of the legal, human resources, internal audit, and security departments. Among the topics that can be covered in such training are effective program implementation, responding to reports of concerns, and the conduct and oversight of investigations. Additionally, such individuals could receive training in those subject matter risk areas that are of high risk to the company, which would obviously depend on the company's risk profile.

Making training effective

The time and resources that many companies invest in C&E training make its effectiveness imperative. The goals of training—to enhance employees' understanding of the law and company policy and promote ethical business conduct—will not be achieved if training is not comprehensible and interesting enough to be heard and remembered. The Sentencing Guidelines highlight this notion by providing that companies must not only provide training—they must do so in an *effective manner*. For risk area training, the following are often important to training effectiveness:

- Current and sufficiently comprehensive information about a risk area.

- Guidance about what should prompt a question or C&E report (typically red flags for that area) and to whom questions can be posed.
- Compelling scenarios that make the story "stick." This is because the mental "shelf life" of training can be a key to effectiveness.

- For certain subjects, showing the "hard edge" of C&E, such as discussion of actual cases—to emphasize how real the risks are of violating applicable standards.

- Materials that are presented in language that is accessible and easily understood by the trainees.

For program training, the content should help learners understand how the program works generally; what their particular role in the program is; and why—from a business and law perspective—it is essential for them to surface C&E concerns.

This last point is particularly important because employees may doubt that their companies really do want to receive this type of information. Training can, of course, be presented in a variety of media (live, computer-based, video, etc.), and companies should consider utilizing a variety of methods of communicating the C&E message to employees.

Managing and selling training

Administering a C&E training program can be enormously challenging, particularly for large and complex organizations. Of critical importance is having a comprehensive training and communications plan, including information regarding: who will receive training and communications; on what subjects; how (web-based, live, or other, and who is responsible for providing the live training); when and how often. The curriculum described above should ideally be captured in a document—so it can be used as a management tool, checked (and audited), and provide the basis for continuously improving the program.

Of course, while the topic of training covers a lot of ground, it should be seen as only one part of a larger communications program. Other types of communications include letters or e-mails from managers, posters, and articles in company newspapers, among many others. It is generally helpful to consider all of the various means of communicating the C&E message when devising a training curriculum. The various methods of communicating can reinforce each other. The total mix of information that a company imparts to its different groups of employees and third parties should be borne in mind.

"Selling" training—meaning getting employees not only to take the courses, but to care about them—can also be quite a task. Among other things, companies should consider communications campaigns that build up interest in the training, such as CEO messages or video teasers akin to "coming attractions."

Managers should be encouraged to find ways to make their subordinates care about training. Among the ways to do this are measuring training completion rates, using subordinates' rates in

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managers' performance evaluations and, if possible, fostering a sense of competition among managers to have the best training record or be the first to have all of one's subordinates trained. Companies may also wish to include this topic in the section of the code of conduct that addresses managers' responsibilities (if any), and also to address it in manager training.

To get managers to care about their own training, companies should consider including C&E training issues within a larger "leadership curriculum." Tying C&E to career enhancement may give the subject a more positive feel, and thus contribute to the efficacy of the effort.

The future of C&E training

How closely will the training of five years from now resemble today's training? It seems likely that companies will need to find new approaches to training. Among the drivers for such changes will be the desire to keep the message fresh, the need to provide training in a more risk-oriented way and pressures to train in a more efficient manner (meaning taking only the time truly needed for the training and only training employees on those topics that are truly relevant to them).

These drivers should lead companies to develop training that

is more risk and role sensitive. One approach to this would be to have for a given subject (such as conflicts of interest) "core" training that can be supplemented with content deployed based on a trainee's business line, job function and geography.

First steps have already been taken toward developing training of this sort in some companies, but obviously the effort to train in a comprehensive manner using this model will be a significant task. Nonetheless, the result should provide organizations with greater training effectiveness in that the training will be addressed to trainees' particular C&E risks; and greater training efficiency, in that focused presentations of this sort can cut down overall training time. Moreover, training of this sort can be wrapped together with other C&E program functions, such as risk assessments and measuring program efficacy.

Conclusion

For many companies the task of establishing a foundation for their C&E program is largely complete (even if much work remains to be done on effective implementation, as well as in some areas of program design, such as incentives). But the work of maintaining program currency and efficacy requires on-going attention—both as a general matter, but particularly with respect to training. Keeping the message and the method "fresh" is a challenge, but creative and effective training is a necessary component of an effective program. □

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