Making Your Business One of the Most Ethical Companies in the World

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On March 15, 2011, Hitachi Data Systems (HDS), a wholly owned subsidiary of Hitachi, Ltd. in Japan, was recognized by the Ethisphere Institute (www.ethisphere.com) as one of the “2011 World’s Most Ethical Companies.” This award was given to HDS after Ethisphere had spent approximately six months auditing the HDS compliance program and conducting interviews with HDS employees all over the world. In 2005, the HDS compliance program consisted of certain policies (e.g., Competition, Anti-Bribery, Code of Conduct, etc.), a reporting hotline and some in-house training. However, after the development of a concerted initiative of policy and program development, training, strengthened internal controls, compliance tools and internal audits, HDS has been publicly acknowledged as one of the most ethical companies in the world. What practical steps can the reader take to enhance his or her company’s compliance program and build a strong ethical culture in their company?

HDS is headquartered in Santa Clara, California, and provides best-in-class information and storage technologies, services and solutions to its customers in both the government and private sectors. The company does business directly (through subsidiaries) or indirectly (through networks of distributors, resellers and system integrators) in approximately 160 countries, including many emerging markets identified as high-risk (corruption perception) countries on the Transparency International Corruption Index (http://www.transparency.org/policy_research/surveys_indices/cpi/2010).

1 The World’s Most Ethical Companies designation recognizes companies that truly go beyond making statements about doing business “ethically” and translate those words into action. WME honorees demonstrate real and sustained ethical leadership within their industries, putting into real business practice the Institute’s credo of “Good, Smart Business.” Source: Ethisphere Institute.
For companies that may still be in the relatively early phases of planning how to drive ethical conduct within the organization, the good news is that there are abundant sources of reference materials available, but perhaps two of the most helpful guidelines, from American sources, for a compliance program are:

1. Caremark Case
2. 2010 Federal Sentencing Guidelines

Board Oversight: a Foundation

The Caremark case (In Re Caremark International, Inc. 698 A. 2d 959 (Del. Ch. 1996)) is a useful starting point because it established that a company’s board of directors has a duty of care to oversee the company’s compliance efforts. It all begins with the board because ethical standards of conduct need to be driven from the top through effective corporate governance. Without board support and oversight, a compliance program and ethical conduct are less likely to gain traction. Therefore, if a company is at the outset of instituting an effective compliance program, it’s critical to train the board about its Caremark duties and to create a governance infrastructure that will facilitate the requisite level of board support and oversight. Chapter 8, Part B of the Federal Sentencing Guidelines Manual sets out the basic elements for a compliance and ethics program and, in particular, re-emphasizes the duty of oversight established in Caremark for board members and high-level corporate executives.

Without board oversight, it will be a struggle for an ethics and compliance program, no matter how comprehensive the underlying corporate policies, to take root in the organization. One only has to look back to the infamous example of Enron to validate this point. On paper, Enron’s ethical policies were well developed and its board was viewed as being one of the best in the United States. But the many ethical weaknesses at Enron could not be overcome by robust policies unless the board was committed to seeing that ethical standards were adhered to. Table 8.1, Part B of the Federal Sentencing Guidelines Manual provides a helpful checklist for companies to follow in developing a compliance and ethics program.

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2 For example, the Ethisphere Institute, among other sources, maintains an excellent data base of materials. Also review Deferred Prosecution Agreements for companies in your industry.
3 See §B2.1, subparagraph (b) (2) (B).
4 See Enron’s Code of Conduct: “…Employees of Enron Corp., its subsidiaries, and its affiliated companies are charged with conducting their business affairs in accordance with the highest ethical standards (emphasis added)… We work with customers and prospects openly, honestly and sincerely…”
5 The Enron board was one of the top boards listed by Chief Executive Magazine in 2000.
were due at least in part to ineffective governance and board oversight at Enron\(^6\) on such matters as conflicts of interest. The Enron, WorldCom, Parmalat and other more recent corporate ethical failures demonstrate that it is vitally important that the ethical tone be set by the board, which must continually oversee what the company is doing, coupled with the embrace by senior management of the need for an effective compliance program. To achieve this in large companies, it is necessary to create a formal governance infrastructure in which an ethical culture can be developed and then continue to thrive. Such an infrastructure, however, is not of itself, as in the case of Enron, a guarantee of ethical standards, but it is an essential and fundamental building block for a successful compliance program.

Many companies, especially publicly held companies, already have the basic or more developed elements of corporate governance in place, such as “outside” or independent (non-management) directors and board committees, such as an audit committee. If a company has an audit committee, the chief compliance officer or the person charged with responsibility for compliance should report directly to the audit committee in addition to reporting to management on day-to-day operational issues. If there is no audit committee, consider having that person report to the board chair\(^7\). In this way, the compliance officer’s (and internal auditor’s) independence can be preserved in the face of business or management pressure.

Structuring a Compliance Program

The Federal Sentencing Guidelines Manual provides a helpful outline of the elements of an effective compliance program. Essentially, these may be summarized as follows.

1. High-level Accountability; Tone at the Top
2. Clearly Worded Policies
3. Due Diligence in Selecting Employees and Business Partners
4. Training
5. Communications
6. Reporting Hotline
7. Consistent Discipline and Enforcement
8. Audit Effectiveness
9. Prevention and Improvement

The above principles were used as a reference point to create the framework for compliance and ethical conduct at HDS, and are a useful guide for any company.

Tone at the Top and Communication

Numerous articles have been written about the meaning and importance of “tone at the top.” At its simplest, tone at the top can be described as the leadership necessary to create a culture in which employees do the right thing and take responsibility for the company conducting its business in an ethical manner. The standard here is that executive leaders must not only “do the right thing,” they must be seen by employees to be doing the right thing, and most importantly, they need to communicate the importance of doing the right thing to all employees.

As discussed, both Caremark and the Federal Sentencing Guidelines emphasize the importance of executive communication\(^8\). What, therefore, are some practical steps that can be taken to support executive leaders with their communications about ethical values?

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\(^6\) See Gillian and Martin, Financial Engineering, Corporate Governance and the Collapse of Enron, WP 2002-001, Center for Corporate Governance, University of Delaware (http://www.be.udel.edu/ccg/).

\(^7\) The internal auditor, if any, should also report to the audit committee.

A first step is for executive leaders to set the direction by adopting the values according to which they want the company to conduct its business. Companies typically establish and publish these values to employees at an early stage in the development of the company, and most revisit and revise their value statements from time to time. Therefore, in the unlikely event that a company has not already established its corporate values, this is an important step to take.

Assuming corporate values are established, have executive management set the direction by aligning ethical priorities with the corporate values. This is easily done by having top executives talk about the Code of Conduct and ethical business practices so that they become ethical behaviour champions within the company. When the executive team meets to discuss and set the top corporate goals for each year that are to be communicated to employees, make sure that business ethics becomes one of those goals. In this way, the entire executive team supports the importance of promoting an ethical environment.

With the executive team aligned around the value of ethical behaviour, have them communicate it to the company. When the CEO and his or her team stress the importance of winning business the “right way,” it has a strong impact on other employees. However, many executives are not necessarily skilled at communicating values to employees or discussing ethical business conduct. If a company is just beginning to introduce these kinds of communications, they can be scripted in plain language for executives to use in company meetings in a manner that aligns ethics with business goals. Here are some suggestions:

- **Have executives and top leaders talk about ethics at every opportunity** – at all company meetings, including sales meetings, corporate leadership meetings, employee roundtable sessions, channel partner meetings, new hire orientation meetings, and customer meetings.

- **Customer discussions can be very effective and can sometimes serve as compelling war stories.** Few things are more powerful than a CEO relating to the executive team or the company that customers say they want to do business with the company because they believe it has a high level of integrity, and view it as a trusted partner.

- **Prepare a written annual ethics message** that the CEO can send to the whole company. Some subjects to reinforce in these kinds of messages include:
  
  - No retaliation against employees who raise concerns in good faith.
  - Executives, like other employees, must follow policies that will be enforced evenly – i.e., no special rules for “special” people.
  - The company trusts employees’ opinions and counts on them to speak up

- **Prepare other written messages** that senior leaders can send to their teams.

- **Align employee performance reviews with ethics** so that employees are recognized in their reviews for ethical behaviour and the courage to confront situations they know are wrong.

The fundamental point is that the communications must be effective. Employees should know and understand from the day they come on board just how important ethical business conduct is to the company and its success in world markets.
Policies

Typically, the key corporate policy for promoting ethics is the code of conduct. Accordingly, careful thought must be go into the architecture of the code so it is easily understood by employees in different internal organizations or functions, many of whom may be located in different countries, or who simply do not need to access policies or particular policies on a regular basis. The goal is to create a “user-friendly” code that employees will consult. Too often, key sections of codes of conduct may be too legalistic and incomprehensible to most employees, especially those living in other countries. Like all other policies, the code should:

- **Be clear, unambiguous**, and easily read and understood.
- **Not be excessively long** or seek to address every conceivable ethical or legal risk. It should be well-organized and succinct.
- **Identify the most important risks** for the business and write the code around them.
- **Be translated into other languages** if the company does business internationally and has employees situated in other countries. Don’t expect employees in China, whose English may be weak or nonexistent, to read and understand a code written in English.

An advantage of publishing the code in electronic form is that it can be interactive to assist employees to further their understanding of certain concepts through hotlinks embedded in the text. Hotlinks can give a reader access to other sources of information, such as relevant corporate policies, FAQs on the topic concerned, and ways to send questions to other departments (e.g., Finance or HR). Other useful functionality to include is “roll-over” definitions of certain legal terms (e.g., “data protection”) so that if an employee moves a mouse cursor over a term like data protection, the meaning can be explained in a pop-up window in plain, easy-to-understand language. In the excerpt taken from an interactive code below, the icons at the foot of the page include a video, links to other policies (book icon), FAQs and a link to other departments for questions. As seen in the excerpt below, all the reader has to do to access related policies is to click on the open book icon.

**Data Protection**

*(Company X)* complies with data protection laws in all countries in which it does business and takes particular care when transmitting personal information across international borders.

You must confirm with your manager that proper authorization has been obtained before you process or disclose to a third party any personal information of your colleagues, or of employees of our sales prospects, customers, suppliers or strategic partners.

Short video vignettes that illustrate and explain particular concepts can be embedded into relevant sections of the code and identified by an icon, such as the ones in the above diagram. These can be especially useful to help employees seeking guidance on whether

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9 At HDS, for example, the code is currently translated into seven languages.
a particular situation falls within a certain policy. It’s generally easy to create videos to illustrate most situations, and the reader just clicks on the icon to watch the video.

While clearly worded, easy-to-understand policies are important, policies alone are just one element of the program. Having established them, employees must know how to access them. In addition to a code of conduct for employees, also consider creating codes of conduct for suppliers and sales partners.

A Portal for Policies

Company policies are often posted to internal web sites or intranets with the intent that they can be easily identified and accessed. However, in many organizations, the location of policies is not well-organized, and employees may find it difficult to find policies generally or the particular policy they need to consult. Most employees access online policies by typing key words into a browser search tool or try to locate policies by clicking on a particular department’s (e.g., Finance) internal web page to find relevant policies created by that department.

In addition to a corporate web site, companies with international business operations that also maintain overseas facilities and have employees in other countries may have regional websites serving particular regions where regional policies are posted. However, two problems frequently arise.

Firstly, employees may find that locating the appropriate policy is a confusing process because the policy may appear in several different web site locations (sometimes in different versions and formats).

Secondly, employees who use browsers to navigate web sites may get search results that include an older, superseded version of the policy being sought. Worse still, sometimes only the older policy is located by the search.

These problems can be addressed, and the search for policies greatly simplified, if all policies are hosted in a single online portal. There are several advantages with this approach.

1. **The portal becomes a “one-stop shopping center”** for employees trying to locate a policy (the employee no longer has to search among multiple web sites or locations).

2. **The policies in the portal are the current versions.**

3. **The portal can include functionality that prompts policy owners**, such as the CFO, to update policies after a prescribed period (e.g., every three years) to ensure that the organization is reviewing, and where necessary, updating its policies on a continual basis.
4. **Older, superseded versions of policies can be archived** on the portal if this is desired.

The following is an illustration of a policy portal. The search feature will bring up related policies, so a search for “FCPA” will result in the anti-bribery policy as well as related policies, such as “gifts and entertainment.”

![Policy Portal Illustration]

In any investigative review, a company should be able to demonstrate that all policies were easily accessible to all employees and that employees have been trained on key policies.

**Training**

Training programs around the code of conduct, anti-bribery and related topics are important for internal purposes, but should not be limited to employees. If no formal training plan is yet in place, companies should consider developing both online or “e-learning” training as well as face-to-face or classroom training modules when developing training.

The key factor is that the training module needs to go beyond simply summarizing the legal requirements in an area of compliance, such as anti-bribery, and the penalties for failure to meet them. Training should be aligned with the company’s business. Employees need to understand from the training what they have to do, what is expected of them, how they should partner with Finance, Legal, Global Trade, HR and other functions, and why compliance is important to both their success and the company’s success.

Many companies require all employees to complete mandatory online training modules every year or every two years, and require new employees to complete the training within a short period after the commencement of their employment. It goes without saying that the e-learning and classroom training courses must be easy to understand and engaging. Most importantly, they should be designed around the business activities of the company.

The goal should be to achieve a one hundred percent completion rate among employees for e-learning training courses, and the challenge of achieving this can be aided by a strong tone at the top. Executives and top leaders set an example if they lead the way by completing training courses on a timely basis. But more importantly, executives need to be the champions of the training program so that the message of the importance of timely completion flows down to all employees.

While online training for employees is both useful and effective, it needs to be supplemented with “classroom” (either onsite or via webinars) or face-to-face training in all the geographies in which the company does business. Yet again, executive leadership is important. Have the most senior executive in the region (and if the CEO or CFO is in town, utilize him or her) introduce the training session and re-emphasize the importance of the company’s values and the commitment to doing ethical business. A message about the importance of ethics from senior business leaders to employees in their teams is of
immense value, especially if the leader remains present during the training session and participates in the question-and-answer session at the end of it.

These classroom or seminar training sessions also serve to reinforce the importance the company places on ethical conduct because employees see their leaders participating. The company’s general counsel and compliance officer should attend as many sessions in person as reasonably possible because their attendance also sends an important message about the importance of the training, especially to employees in remote locations. Plus, it is just as important to train third parties, such as channel partners, on key policies like anti-bribery, competitive practices or export control policy.

Bear in mind that training does not always need to be conducted in a formal context. If the general counsel or compliance officer is travelling to another company office, “round table” meetings with employees afford a useful vehicle for discussions about business ethics. If the company does business in multiple jurisdictions, but has a centralized legal department, consider transitioning legal into a distributed model where lawyers are hired locally in different countries, especially high-risk countries. Not only does this provide the advantage of introducing local language skills for training, but lawyers are fiduciaries and their presence in a foreign office can help to reinforce compliance.

The importance of conducting training in local languages and relating the training to local business must never be overlooked. For instance, train Russian employees in Russian and use Russian examples to illustrate the important points. Always try to relate the training to local business operations.

Due Diligence

The Federal Sentencing Guidelines specifically call out the importance of conducting reasonable due diligence to ensure that individuals being hired have not been engaged in illegal activities or conduct inconsistent with an effective compliance program. Commonly, background checks are generally used before hiring new employees or engaging new channel partners such as distributors, resellers and system integrators.10

What is at stake is that a company’s good reputation is entrusted to each new prospective employee or channel partner. Clearly, ethical companies want to hire employees who have ethical reputations, and effective background checks are important for this purpose, especially when hiring employees in countries that are high on the Transparency International Corruption Index.11

The same considerations are true for channel partners, consultants, contractors, etc. Apart from the fact that a company does not want to inadvertently fall afoul of competition laws, anti-bribery laws, or export control laws and regulations because of the misdeeds of a channel partner, a company’s reputation in the market and its brand value can be substantially impaired by the wrongful acts of a channel partner. Therefore, because a company will want to do business with channel partners, agents and other organizations that are legitimate business enterprises with solid reputations, it is important to:

- Use sound business judgment when engaging with channel partners.
- Develop effective standards for conducting due diligence based on a risk analysis.
- Decide the appropriate degree of background investigation before entering into a contractual relationship.

10 See 2010 Federal Sentencing Guidelines Manual §B2.1, subparagraph (b) (3) and Commentary §4 (B).
11 Privacy laws in some countries may prohibit or limit the extent of background checks. The Federal Sentencing Guidelines do not specifically require background checks.
A useful approach is to create a due diligence policy that sets out the level of due diligence to be conducted for individuals and business entities in countries classified at different levels of the Corruption Index. The requisite degree of due diligence obviously has to be formulated in the light of a myriad of factors relating to the company’s business and risk determination.

Due diligence can be expensive and may often be outsourced to third-party companies, but by classifying the levels of due diligence to be performed, costs can be reasonably controlled. For example, for a potential channel partner headquartered in a high-corruption-risk country, the report may be more comprehensive and include, in additional to other factors, a visit to the channel partner’s offices to verify the physical location of the entity, and interviews with the entity’s employees or other customers.

A less detailed report may be required for entities in countries that are much lower on the Corruption Index. The most important point is easily summed up by the old adage, “An ounce of prevention is worth a pound of cure.” In other words, performing due diligence at a moderate expense before engaging with a third party might save the company millions of dollars, especially if it turns out that the channel partner had a history of engaging in bribery.

A due diligence tool, such as a cloud-based data base in which all due diligence reports are maintained, is a useful asset because the reports are immediately retrievable if they need to be reviewed for any reason at a later point in time. The diagram below is a screen shot of the tool used at HDS. Due diligence reports can be requested online via the tool, and completed reports can be stored and accessed via the tool.

Hotline

The existence of a hotline should be well-publicized within a company so that all employees are aware of it. An easy way to accomplish this is to place posters advertising the hotline in every office and in local languages. Important considerations are:

- Make it easy for employees to access the hotline.
Greg Coplans

- **If the company does business in multiple countries**, employees should be able to call the hotline using local numbers, and calls should be answered by local telephone operators who answer in the local language.

- **Emphasize that employees who report in good faith** are protected by the company’s non-retaliation policy.

- **Emphasize that the company trusts its employees** to report problems.

- **Let employees know** that all allegations will be investigated.

- **Maintain an online tool** that employees can use to report problems anonymously or otherwise.

**Consistent Discipline and Enforcement**

This is a key element of building and sustaining employee trust, especially because employees are encouraged to report problems they encounter. Employees always know what is happening in any organization, even when there is no public announcement of a particular action. They should be confident that all wrongful acts are appropriately addressed, that wrongdoers are subject to the same uniform standards of discipline, and that serious policy violations or other wrongful acts will be addressed with disciplinary action.

**Audit Effectiveness**

Once a robust compliance plan has been established, it is not enough to rely on such aspects as tone at the top, ethics messaging, training and due diligence. Audits of internal controls and compliance with policies and controls must be periodically performed, especially around operations in markets in countries high on the Corruption Index. These audits test how well controls are working, whether key policies are being followed, and also help to foster communication that ethical conduct is important. If the company has an internal audit function, train the internal auditors so they can identify and report compliance red flags identified during audits.

Ethics and compliance programs are not static in nature. Companies do business in constantly changing business and regulatory environments, and compliance programs require continuous improvement and alignment with business developments. Audits, especially independent audits, evaluating the efficacy of compliance programs and areas of compliance, such as export control or anti-bribery, are a useful vehicle for identifying gaps or areas of weakness. In addition, they can help to reinforce the importance of maintaining an effective compliance program to the organization through the reporting of the audit results to the executive team and the board.

While not an audit, and not required under the Federal Sentencing Guidelines, another potential source of feedback is to survey employees to measure tone at the top by asking questions about the compliance program and perceptions of ethics, including such questions as:

- Would employees report a violation if they knew of one?
Ethical Business Practice

- Do employees believe management is serious about enforcing policies?
- Would management address the problem if it was reported?
- Do employees feel pressure from managers to breach policies or the law to achieve revenue or other business results?

Employee surveys, however, only measure employee perception of a compliance program and tone at the top, and are not a direct measurement of either. A company would have to decide whether such a survey would be appropriate or useful.

Prevention and Improvement

Most importantly, if a problem arises from a weak internal control, a poorly worded policy or some other gap, the control, policy or gap must be remediated, and if necessary, employees should be trained on the changes. In addition, involve executives by making them part of the process for implementing new or remediated controls so that a fraud or other problem does not reoccur or that chances of it reoccurring are greatly diminished. Most importantly, one of the best defenses a company may have against prosecution is to demonstrate that it made every reasonable effort to sustain and improve an effective compliance program. Present the compliance program to the board or audit committee every year and encourage them to ask questions.

The Federal Sentencing Guidelines make it clear that if you receive that unwelcome contact from the DOJ or SEC, or if you conclude that you have to make a voluntary disclosure, the fact that your company (1) maintained a robust compliance program, (2) has a strong tone at the top, (3) dealt with problems in an appropriate manner, and (4) took steps to prevent the recurrence of misconduct will all be taken into account. Not only will you sleep better, but your executives should too.

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Hitachi Data Systems (HDS) provides best-in-class information technologies, services and solutions that deliver compelling customer ROI, unmatched return on assets (ROA) and demonstrable business impact. With a vision that IT must be virtualized, automated, cloud-ready and sustainable, HDS offers solutions that improve IT costs and agility.

HDS believes that data drives our world – and information is the new currency. HDS has nearly 5,000 employees worldwide and does business in more than 100 countries and regions.

HDS is trusted by the world’s leading enterprises, including more than 70% of the Fortune 100 and more than 80% of the Fortune Global 100. HDS is a wholly owned subsidiary of Hitachi, Ltd.