

CEP Magazine – February 2022 Are you training your directors, too?

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You’ve just completed your compliance and ethics presentation to the audit committee or perhaps the full board. Your comments regarding the success of your revamped compliance and ethics training program were well received. You can relax a bit, knowing that the recent employee survey revealed that the training program is changing behaviors and that your program training requirements are being met, right? Not necessarily.

A 2017 survey of Society of Corporate Compliance and Ethics (SCCE) members regarding board compliance revealed that a third of publicly traded companies—despite government and regulatory guidance to the contrary—reported offering no compliance training to members of the board.^[1] A 2021 survey of in-house governance professionals by *Corporate Secretary* placed that number even higher, at more than 40%.^[2]

When did you last provide the board of directors compliance and ethics training? Have you ever?

The regulatory push

The appropriateness of providing compliance and ethics training to the board of directors is well established and originates with, not surprisingly, the source document for corporate compliance programs and the de facto measure of an effective compliance program, chapter eight of the Federal Sentencing Guidelines, “Sentencing of Organizations.”^[3] In relation to board training, the commentary to chapter eight provides: “The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.”^[4] “Agents” is defined elsewhere in the guidelines as including members of the board of directors.

In a 2004 amendment to the guidelines, application of the training requirement to the board of directors was more explicitly stated. Section B2.1(b)(4)(A) reads: “The 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 individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.”^[5] Continuing, subparagraph (B) reads: “The individuals referred to in subparagraph (A) are the *members of the governing authority*, high-level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents” (emphasis added).



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Further, whereas the 1991 commentary seemed to allow for the “dissemination of publications” as a means of satisfying the requirement for the communication of standards and procedures to employees and agents, the 2004 amendment—by replacement of the word “or” with “and” between “training programs” and “otherwise disseminating information”—suggests that for a compliance training program to be considered effective, *actual training* must be provided and, further, that the training must be specific to “individuals’ respective roles and responsibilities.”

The U.S. Department of Justice’s *Evaluation of Corporate of Compliance Programs*, the department’s guide to prosecutors considering charges against companies, carries this message forward, citing the guidelines and adding: “Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for *all directors*, officers, relevant employees, and, where appropriate, agents and business partners” (emphasis added).¹⁶¹

The guidance in connection with board training is making its way into the best practices of private sector organizations. For instance, Ethisphere, an organization that promotes the standards of ethical business practices, annually recognizes high-achieving companies via its World’s Most Ethical Company designation. In 2018, approximately 80% of those companies recognized provided board compliance training. In 2021, the percentage stands at 87%, likely due, in part, to the rise of environmental, social, and governance (ESG) efforts. As ESG scores become commonplace—and as investors increasingly direct capital with ESG in mind—governance broadly, and board training in particular, will have implications beyond compliance that directly affect corporate value.

So now that you’ve decided to provide compliance and ethics training to the board, keeping the SCCE survey results front of mind can be helpful in fleshing out your program’s “what,” “when,” and “how.”

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