

Compliance with regulations and “due care” in business operations is of course crucial. But just doing the right thing may not be enough if you cannot prove what you did.

Evidence of a robust compliance program, that systematically addresses the prevention, detection and discipline of compliance failures with periodic training and guidance can help mitigate the fallout from small and even large compliance failures.

Can you document what you did and why?

Can you demonstrate your business process rationale?

Can you provide evidence of your guidance and training?

Own your story. Don't delegate it to the media.

This best practices seminar is aimed at entities that have a compliance program in place, but lack the mechanism to demonstrate what they have done in a common-sense way.



# establish integrated *policies*

- Issue escalation (who reports what to who and when).
- Record retention (what are the categories of business records, how long should they be kept and where).
- Coordinate who verifies information and who talks to media.
- Confidentiality & privilege.
- Litigation hold | e-Discovery.
- Contract writing guidelines.
- Roles & responsibilities (RASIC).
- Sarbanes-Oxley Contingent Liability Reporting.
- Word & symbol usage guides, particularly for global entities.



# train and provide *guidance*

## – Training

- Cross functional audience including procurement, sales, M&A, etc.
- Most persuasive when trainer uses specific “burning platform” examples from the industry, company, business unit, or trainer in question
- Update as appropriate, offer annually and make available on company portal. Offer a number for follow up support.
- See following slides for training exemplar:
  - record *SMART*
  - distribute *PURPOSEFULLY*
  - retain *PER POLICY*
  - understand *CONSEQUENCES*

## – Audit

- Utilize litigation hold process audit.
- Who completed training.
- Compliance with policies and procedures.



# create *S.M.A.R.T.* documents

- SMART records: **S**pecific, **M**easurable, **A**ccurate, **R**elevant, and **T**imely
- Understand your roles/responsibilities in the documentation & communication process. Opine only if it is your job, the circumstances require it and it is based on verified investigation and analysis.
- Obtain legal or other review as appropriate
- Record verified, accurate facts and evidence of transaction related decisions. Avoid speculation. Describe what was done and why. Use plain language/active voice. Include analysis/context. Close loops.
- Follow writing guidelines. Avoid ambiguity and unnecessary jargon. Limit acronyms and adjectives. Avoid “loaded” words and emphasis such as CAPS, color, **bold**, underline, punctuation!

# distribute information *purposefully*

- Intentionally, thoughtfully and coolly. Not automatically, reactively, defensively or emotionally.
- Consider central document repository for project teams (version control)
- Know and follow escalation processes and policies.
- Only as, and to whom, necessary. Do not reply to: all; groups; or anyone unknown to you. Avoid "bcc." Consider forwarding.
- Understand roles & responsibilities. Why "cc" someone?
- Avoid long email strings. Pick up the phone after a couple of volleys.
- Understand and utilize "privilege" as intended.

# retain information *per policy*

- Know and follow all applicable record retention policies.
- Retain final, necessary business records.
- Avoid version profusion (central repository concept).
- Avoid multiple copies of same document in different locations.
- Retain in designated locations. Do not retain in:
  - Office drawers
  - Laptop, Tablet
  - Thumb drive
  - iPhone, Blackberry, home computer, etc.
  - E-mail archive
  - iCloud, G-Drive, Amazon, Dropbox, etc.

# use record retention policy *proactively*

- Plan strategic use of key records to drive your narrative.
- Use SPOC to bring order from chaos. Coordinate plan with key stakeholders in communications, IT, legal, compliance, procurement, marketing, sales, finance and risk management.
- Understand context and harmonize with other relevant procedures for unusual changes to orders, NDAs, issue escalation, subpoenas, “dawn raids”, social media and crisis management.
- Use focus groups and jury research to objectively evaluate and refine your narrative.
- Actively monitor media and social media. Better proactive than reactive.

# teach why *the policy matters*

- Inability to timely locate/utilize key business records can result in:
  - Increased fees (document review, depositions, discovery hearings); employee distraction; erroneously broad recall scope; negative press and social media.
  - Harmful evidentiary rulings barring substantive defenses and testimony in follow on civil litigation about compliance programs and business decisions; unfavorable verdicts; friction with regulatory agencies.
- Multiple copies/versions:
  - Increase litigation hold costs (preservation, collection, processing, analysis, review, production, speculation (especially without context));
  - Drive up discovery costs and potentially alter outcomes.
- Inaccuracy, lack-of-context and ambiguity can be:
  - Misinterpreted by news media/counsel, and misunderstood by juries, regulatory agencies, customers;
  - Compounded by social media multiplier and influence judges.