



# ESTABLISHING AN EFFECTIVE ETHICS OFFICE

One Company's Experience  
in the Post-Enron Era

By Joseph G. Sepesy

**The phone rings,** an employee appears at the door, the e-mail pings, or there is a letter in the mailbox—with each communication another employee is requesting assistance, sharing a potential workplace concern, or simply asking for assurance that he or she is doing the right thing. Welcome to The Dow Chemical Company's Office of Global Ethics and Compliance (Ethics Office). What follows is an overview of who we are, what we do, how we do it, and, ultimately, our goals and objectives.

## History

Dow formalized its Ethics Office in 1998. While Dow's commitment to ethics and compliance dates back to the founding of the company by Herbert H. Dow in 1897, the Ethics Office that exists today was primarily driven by five factors:

- *In Re Caremark Int'l Inc Derivative Litigation*<sup>1</sup>
- the Sarbanes-Oxley Act of 2002<sup>2</sup>
- the U.S. Organizational Sentencing Guidelines<sup>3</sup>
- the U.S. Department of Justice, Principles of Federal Prosecution of Business Organizations, commonly referred to as The Thompson Memo<sup>4</sup>
- the clear recognition that a formal ethics and compliance program is good business

## Legal Requirements

Consider what is demanded, in part, of corporations by the above five factors.

In the *Caremark* case, Chancellor Allen wrote:

*Thus, I am of the view that a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.*<sup>5</sup>

Title III, Section 301 of The Sarbanes-Oxley Act requires:

*"(4) Complaints.—Each audit committee shall establish procedures for—*

- the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and*
- the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."*

Part B of the U.S. Organizational Sentencing Guidelines requires:

*"8B2.1. Effective Compliance and Ethics Program*

- To have an effective compliance and ethics program . . . an organization shall—*
  - exercise due diligence to prevent and detect criminal conduct; and*
  - otherwise promote an organizational culture that encourages ethical con-*

*duct and a commitment to compliance with the law."*

The Thompson Memo states:

### II. Charging a Corporation: Factors to Be Considered

*A. General Principle: . . . In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate agent:*

*. . .*

*5. the existence and adequacy of the corporation's compliance program (see section VII, infra); . . .*

*B. Comment: . . . Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner.*

The legal mandate and the executive mandate to the newly-formed Ethics Office was clear: create a program.

## Dow Chemical Reacts

In moving the Ethics Office from vision to reality, Dow quickly concluded that a formal Code of Business Conduct (Code) was an essential first step. But at the same time, Dow realized that the Code was just the first of many important steps. While Dow had a prior Code, Dow's first booklet-type Code was printed and distributed in more than a dozen languages in 1999. The second, and more comprehensive Code, was finalized and approved by Dow's Board of Directors in July of 2003. This Code was also translated into more than a dozen languages and made available electronically to employees on Dow's intranet, and to the public at [www.dow.com](http://www.dow.com).

Dow's challenge—then and now—is how to develop and maintain an Ethics Office that is practical, well-communicated, well-accepted throughout the entire organization, and at all times supported by Dow executive management.

The early Ethics Office consisted of three people: a director of Global Ethics and Compliance who was also an assistant general counsel in Dow's Legal Department, an experienced paralegal from Dow's Legal

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FAST FACTS



Department, and an experienced office professional also from Dow's Legal Department. Clearly, Dow drew upon its legal department and legal resources to staff the original Ethics Office. These three pioneers started the Ethics Office with only a management directive to build a best-in-class office, a handful of information gained from benchmarking with other companies, and a genuine commitment to succeed.

Today, the three founding members continue as part of the Ethics Office that now consists of:

- director
- deputy director
- business unit ethics officer
- communications specialist
- investigative specialist
- training administrator specialist
- office professional
- 14 Regional Ethics and Compliance Committees

### First Challenge—Internet Abuse

In 1999, the Ethics Office was presented with a major challenge that in retrospect played a key role in fast-tracking the implementation of the critical components required for an effective ethics program. In the 1990s, Dow executive management decided to create a comprehensive information-sharing program throughout the global organization that included, for many employees, Internet access. While Internet access was provided to enhance business productivity, unfortunately a group of employees chose to use the access for unapproved uses, such as searching for and sharing pornography.

This issue quickly involved Dow's Code and the Ethics Office. The accessing and sharing of pornographic material was in clear violation of Dow policy and the Code.

Until this point, the Ethics Office was in the role of (1) reinforcing the importance of complying with corporate policy and legal obligations, and (2) receiving complaints and questions. However, the Internet-usage issue involved the Ethics Office as an active participant in core company processes. Dow's Legal Department, Human Resources Department, and Ethics Office were now equal players. The Ethics Office participated in the investigation process, the evaluation process,

and the discipline process arising from the inappropriate use of the Internet by some Dow employees.

As a consequence of the Internet abuse, Dow delivered a computer-based training module on respect and responsibility to all Dow employees. This was also the first real opportunity for the Ethics Office to prepare and deliver formal training to the global Dow workforce. Consider the challenge: How do you deliver uniform training to over 41,000 employees, in multiple countries, speaking various languages, and having differing cultural norms and accepted practices? To address this, Dow retained the services of a company experienced in delivering sophisticated legal-ethical training material online. With the delivery of this training module, the Ethics Office crossed a fundamental threshold: we learned that it is possible to deliver online training globally. At the same time, we learned of the unimaginable technical and administrative issues associated with delivering such training. These issues continue to this day, thereby underscoring the importance of our training administrator specialist.

### Global Approach

The Internet-usage issue and the delivery of the first online training program confirmed Dow's initial belief that it could not operate a global Ethics Office solely from corporate headquarters in Midland, Michigan. This realization resulted in the formation of 14 Regional Ethics and Compliance Committees (RECCs). The 14 RECCs coincided with the 14 global business geographies then in place within Dow. Each RECC consists of the:

- top regional business/geographic leader
- senior finance representative
- senior human resources representative
- senior legal representative

The Ethics Office is responsible for identifying potential RECC candidates, but the ultimate selection and appointment of each RECC member is the responsibility of Dow's president and chief executive officer.

### Management Responsibility

The 14 RECCs not only promote the ethics program worldwide, but they reinforce

“tone at the top.” Dow's Ethics Office is committed to the belief that an effective corporate ethics program is only as good as the leaders at the top of the corporate organization. Research shows that employees look to their top leaders and managers for guidance and direction when confronted with ethical and compliance issues. By implementing the 14 RECCs, Dow employees can look to the top company executives as well as the top country and geographical leaders to reinforce the type of behavior and conduct that is expected of all Dow employees.

In addition, the 14 RECCs assist the Ethics Office with regional issues. The RECC members better understand the local compliance and ethical risks, they know the languages, and they understand the culture—all essential elements in understanding, evaluating, investigating, and addressing local ethics and compliance issues.

### Corporate Concerns

Not only does the Ethics Office promote compliance with the Code, but it provides employees, contractors, and other interested parties with the opportunity to share concerns they may have regarding possible violations of law or Dow policy.

The Ethics Office encourages parties to come forward with their questions and good-faith concerns. While there is no one typical communication with the Ethics Office, examples include:

- conflict-of-interest questions
- reports of behavior in violation of Dow's Respect and Responsibility Policy
- allegations of fraud, including misuse of corporate funds and assets

To facilitate this communication process, Dow has implemented—through a third-party vendor—the Dow EthicsLine. This is a telephone helpline that allows parties to share their respective concerns—anonously if they wish.<sup>6</sup> In addition to the Dow EthicsLine, the Ethics Office operates an internal e-mail account, while also welcoming telephone calls and personal visits. To further assist employees, the Ethics Office is physically located in a low-traffic area of Dow's corporate headquarters. Not surprisingly, communication with the Ethics Office occurs in a number



of ways, including the occasional letter under the door.

### Investigation Process

The Ethics Office depends on the support and assistance of other functions within Dow; Legal, Diversity and Inclusion; Emergency Services and Security; Human Resources; Information Systems; Fraud Investigative Services; Environmental Health and Safety; Auditing; and many others all play key roles in the operation of the Ethics Office. In fact, these functions often bring matters to the attention of the Ethics Office. Teamwork and careful coordination are essential components of an effective ethics and compliance program.

Dow's Ethics Office quickly concluded that, not only is it important to provide a

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mechanism for reporting work-place concerns, it is equally important to handle each concern in a consistent manner. To address this need for consistency, Dow developed and implemented the Dow Global Investigative Process (DGIP). DGIP is Dow's mechanism for receiving, evaluating, investigating, documenting, resolving, and periodically following up on matters that are brought to the attention of the Ethics Office. DGIP establishes a:

- consistent process for handling complaints
- centralized database for recording complaints and investigation results
- mechanism for tracking trends
- mechanism that identifies future training needs
- mechanism that facilitates the consistent application of disciplinary steps and corrective actions
- mechanism for confirming that agreed-upon corrective actions have been implemented

In addition to the investigation process established by DGIP, Dow has also adopted a set of nine investigation principles. These principles serve as the foundation for each

investigation undertaken by the Ethics Office and its designated investigators.

Whenever it is determined that an investigation is required, one fundamental question always arises: Who should conduct the investigation? Dow's Ethics Office was not designed to conduct every investigation. Instead, the Ethics Office relies on subject-matter experts within the company to assist with the investigation process. The Ethics Office refers to these subject-matter experts as compliance subject matter experts. Depending on the specifics of the complaint, an investigator skilled in that particular discipline is included in the investigation process. The intent is to involve, early in the process, investigators with expertise in the area being investigated. At times, the Ethics Office may even choose to involve third-party experts

to assist with an investigation. The decision to retain a third-party investigator is often driven by the complexity of the issue, the parties involved, or the need to eliminate any perceived bias in the investigation process. Each case is carefully evaluated by the Ethics Office and the applicable RECC on a case-by-case basis throughout the investigation process to determine who should conduct the investigation.

### Non-Retaliation Policy

The Ethics Office is continuously challenged to operate an ethics program that employees can trust and believe will assist them in their respective moments of need. As an Ethics Office, we believe and remind ourselves every day that it is a difficult, emotional decision for any employee to raise an ethical or a compliance issue.

Our further belief, which is shared by our colleagues counseling other companies in the areas of ethics and compliance, is that most people are reluctant to contact an ethics and compliance office out of fear that nothing will happen or fear that they will suffer retaliation for bringing a matter to the attention of the organization. Our daily goal is to dis-

pel these perceptions, continuously reinforce Dow's Non-Retaliation Policy, and treat those who raise an ethical issue in a fair and timely manner. We know that positive experiences with the Ethics Office are more effective than any formal communications piece.

### Training

From its inception, the Ethics Office played a key role in delivering selected training programs and certifications to Dow employees. Training is a combination of both live and online programs. For example, in 2006, the Ethics Office, in conjunction with its third-party web-based training vendor, will deliver online training addressing the following subject areas:

- conflict of interest
- questionable payments
- records management
- document creation
- financial reporting
- Foreign Corrupt Practices Act
- preventing sexual harassment
- respect and responsibility
- travel and expense reporting

These online training programs are in addition to the significant classroom training programs that are provided throughout Dow by multiple functions, including the Ethics Office.

Some of these online training programs were developed exclusively by the training vendor, while others were developed by Dow in conjunction with the training vendor. One of the many advantages presented by this training vendor is the ability of the Ethics Office to target training to specific employees and functions within the company and track completion of the training programs. This tracking mechanism allows the Ethics Office to report on delivery and completion of mandatory training. However, an ongoing challenge for the Ethics Office is to deliver effective training in a manner that is engaging and educational and yet not inundate Dow employees with too much training. It is a careful and constant balancing act.

### Tone at the Top

Establishing the correct management tone and support is essential to the success of any ethics and compliance program.

Recently, Andrew N. Liveris, Dow's president, chief executive officer, and chairman of the board, was the keynote speaker at The Conference Board's 2006 Ethics and Compliance Conference in New York City. During his speech, Andrew stated:

*I am absolutely convinced that setting high ethical standards starts at the top of the organization, but I am equally convinced that high standards must permeate the entire organization right down to the shop floor. Only by establishing a reputation for honesty and integrity will you be able to get the best people to work for you, the best customers to do business with you, and the investors to have confidence in you.*

Andrew's support is essential to the success of the Ethics Office.

Dow's Ethics Office has assembled a group of individuals who work well together, who understand the need for process and consistency, who are committed to assisting the Dow workforce, and who support the "tone at the top" established by Dow's senior management. ♦



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### Footnotes

1. *In Re Caremark Int'l Inc Derivative Litigation*, 698 A2d 959 (Del Ch, 1996).
2. 15 USC 7201.
3. <http://www.ussc.gov/2005guid/TABCON05.htm>.
4. [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).
5. *Caremark*, supra at 970.
6. However, it should be noted that certain European Union countries have placed limitations upon the promotion and use of anonymous help lines. The French Commission nationale de l'informatique ET des libertes (CNIL) has established Whistleblower Guidelines. See <http://www.cnil.fr>. See also [http://europa.eu.int/comm/justice\\_home/fsj/privacy/index\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/privacy/index_en.htm).