Are You Serious About Ethics?
For companies that can't guarantee confidentiality, the answer is no.

Patrick J. Gnazzo is vice president of business practices at United Technologies Corp. George R. Wratney is corporate ombudsman at United Technologies Corp.

You did the right thing. You created an ethics program for your organization built around a workable and enforceable code of behavior for employees. You appointed compliance or ethics officers to administer the program, and you built a structure to receive employee allegations and feedback.

Have you done enough? No.

Here's a simple truth: A certain number of your employees will not raise issues to management unless they are promised confidentiality throughout the process, including in any potential litigation. Under current law, your ethics program cannot guarantee that protection. Consequently, you will not hear some things that you should.

Of course, ethics officers (EOs) can, and do, assure employees who raise issues that the EO will do everything possible to keep the employee's identity confidential. Such assurances often are all that's needed inside the organization. But when a subpoena crosses the company threshold (or when a request from a regulator does the same), the assurance of confidentiality is jeopardized. Suddenly, the employee who had earlier contacted the EO and heard, "We will do everything possible to keep your identity confidential" learns that his name may have to surface in court.

Here's how that could happen. An employee (the source) suspects that Ralph is cheating the company on his expense report. The company's code of conduct asks (and some demand) employees to report suspected violations and illegalities. The source works next to Ralph in the office and lives in the same neighborhood. Their children attend school together. Yet the employee wants to do the right thing.

The employee approaches the EO about Ralph and asks for confidentiality. The employee does not want to fracture his relationship with Ralph at work and with Ralph's family on Maple Street. The EO gives the source the usual "we will do our best" assurance.

The EO investigates the allegation, deems that Ralph is guilty and should be fired, and Ralph is dismissed. In turn, Ralph hires an attorney and sues the employer. The compliance officer ends up on the witness stand, and the source's identity is revealed under examination. And then, as they say, "There goes the neighborhood."

We recently received a call at United Technologies from an ethics officer at another well-known U.S. company. The EO knew that we have successfully defended ombudsman privilege (the idea that a neutral, independent organizational ombuds should not be compelled to reveal the identity of a source) and asked whether we knew of such a privilege for EOs. We said, "There is none." At that, the EO replied, "My program and I are in trouble. An employee visited my office to raise an issue. I offered the usual qualified assurance of confidentiality, and now I am being subpoenaed over the issue. I will be compelled to reveal his identity; he will lose all confidence in me, and it will wreck our program."

Kevlar, Not Spandex

Employees who seek to raise issues but are timid or fearful want more than a conditional assurance of confidentiality. They want a guarantee made of Kevlar, not Spandex. How can you make that guarantee? First of all, realize that unlike attorney-client, doctor-patient, priest-penitent, and other limited privileges, no law covers the relationship between ethics or compliance officers and employees. While compliance and ethics officers can suggest they will "keep this confidential," they risk much if they suggest a privilege they cannot defend later. As Supreme Court Justice William Rehnquist wrote in the 1981 decision on Upjohn Co. v. United States, "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Second, realize that if the guarantee does not exist, a certain portion of the workforce will not raise an issue, however troubling, through official channels. They will sit, and perhaps suffer, in silence, that suffering seeming more bearable than retribution. An organization can have a policy that prohibits retribution, but a manager who wants to "get even" with a reporting employee can write performance appraisals that gradually build a case for the employee's termination for "poor performance." Slow, deliberate retribution is difficult to prove. Their employers will suffer as well-they will not receive knowledge of issues occurring in the workplace.

So how can your company offer a genuine guarantee of confidentiality to employees? One way that has worked is to establish an ombudsman office such as we have had since 1986 at United Technologies, where corporate ombuds are available to hear employees' concerns in confidence.

Organizational ombudsman's offices are structured to protect the identity of the reporting source. Those ombuds receive information from employees, convey that information to management with the employees' permission, and pledge to not reveal the employees' identities. Organizational ombuds are neutrals. They do not investigate, act on behalf of management, make recommendations regarding discipline, or keep official records of the organization. They act as a confidential, neutral conduit for the flow of information and possess

Are You Serious About Ethics? (cont.)
For companies that can't guarantee confidentiality, the answer is no.

no information that is not discoverable elsewhere. The position offers a contrast to that of an ethics officer, who is obligated to take action once the EO has received notice of an issue; unlike an ombudsman, an ethics officer investigates the complaint and can get involved in any disciplinary outcome. Most importantly, ethics officers, like other staff organizations, cannot unequivocally offer confidentiality.

We have used the legal process successfully a half-dozen times in order to defend our ability to protect confidentiality. Here's an example of how it works. A former employee sues the company, alleging unfair dismissal. His attorney asks him, "Who in the company was aware of your issue?" And the employee replies, "Well, there was my boss, and my HR rep. And, oh yes, I did discuss my issue with the ombudsman."

"The ombudsman! Let's subpoena him along with the others."

Our ombuds have successfully resisted having to testify by asserting that we have an implied bilateral contract based on the understanding that communications with the ombuds are confidential. Our position is that the confidentiality contract is held by both the company and the employee who calls the ombuds, that it takes both sides to agree to break the contract, and the company never will. We argue, as stated above, that the ombuds is neutral and therefore is not involved in management actions such as discipline and investigations. The ombudsman's files are not files of official company actions.

Also, we assert ombuds' confidentiality privilege, based on Federal Rule of Evidence 501. This allows U.S. federal courts to recognize privileges as developed on a case-by-case basis under common law. We do this not only to keep our promises to past employees who have contacted us but also to assure those who are thinking of contacting us that we will not reveal their names.

The recent enactment of the Sarbanes-Oxley Act expands corporate whistleblower protections, but the act's coverage of whistleblowers relates basically to those who raise concerns regarding questionable accounting, auditing, or similar internal controls. In addition, the act's requirements for procedures to provide "the confidential, anonymous submissions by employees" ask for something the law does not now provide: a guarantee of confidentiality for the source.

The dilemma is rooted in the fact that responsible organizations create ethics and compliance programs to help guide and limit employee behavior. The organizations provide feedback mechanisms for employees to report suspected wrongdoing. The nature of the workplace, which can include vengeful managers and co-workers, is partially overlooked.

"It is never easy for subordinates to be honest with their superiors," wrote Warren Bennis in The New York Times last year. "After a string of box-office flops, Samuel Goldwyn is said to have told a meeting of his top staff, 'I want you to tell me exactly what's wrong with me and M.G.M.-even if [it] means losing your job.'"

The Guarantee on the Job

Here's an example of the way the process works at United Technologies. One of our administrative staff called the ombudsman's office with terror in her voice. Reluctant to provide her name, she said, "My boss is cheating the company. Only he and I know it. If I report him, as I am supposed to do, he will find out and fire me-or worse." She truly feared for her physical safety as well as continued employment. She hoped the confidential ombudsman office could help but doubted that the company could safely investigate a situation in which only two people knew of the offense-and one was the alleged culprit.

After three weeks of calls to the ombudsman and assurances that the company would do a blanket, "routine" audit, she agreed to reveal what she knew. The information was passed to the ethics officer for investigation, but the source was never revealed to anyone, including the ethics officer. The investigation proved she was correct, the boss was fired, she's still with us, and no one ever knew. Had we not been able to offer a guaranteed, confidential outlet, we think she would never have called in the first place.

Without guaranteed confidentiality, employees can find themselves with nowhere to take their issues. Sometimes, particularly at smaller plants and offices in remote locations, local management controls the flow of information so tightly that employees are left with no recourse unless the ombudsman option exists.

We think our company is no different than most. Every employee of every company has issues that he would like to raise to management's attention. What helps set us apart from most is that our employees have this alternate mechanism through which issues can be raised under a Kevlar umbrella of identity protection. We will not divulge the identity of a source, period.

Consider the following situations, all of which were resolved successfully and fairly from both the employees' and management's perspective:

Our ombuds office received a call from an employee in Asia whose supervisor told her that she was going to be fired because she was seven months pregnant and unmarried. Her condition offended the supervisor's sense of morality, and he said, "If you are not married by the time your baby is born, we will fire you." The inquiry revealed that the supervisor's boss had agreed in

Are You Serious About Ethics? (cont.)
For companies that can't guarantee confidentiality, the answer is no.

advance with the decision to fire her.
A U.S.-based employee called after first being given a 90-day performance-improvement plan, which was then cut by 30 days, with the threat of discipline "up to and including dismissal" for failure to comply. The performance-improvement plan, concocted by his manager and HR representative, contained no specific goals, measurements, or objectives. He was told to "get better," but no one defined what "getting better" looked like.
A managing director in Central Europe decided he could save money in his budget by not telling employees about a new tuition-assistance program offered by the company. An employee who learned of the program through the grapevine, and who felt there was no way he could raise the issue within his company, called the ombudsman.

If the individuals referred to above had failed to report, who would have suffered? The answer is simple: everyone associated with that organization-except the perpetrators. The kind of behaviors cited can lead to workplace tensions and anxiety, lower morale, reduced productivity, increased costs, and possibly costly litigation.

Keeping the Peace

Surveys by the Ethics Resource Center and the Society for Human Resources Management are consistent in finding that a third of employees observe misconduct at work-and half of those decide not to report it. Reasons cited for failing to report: fear of retribution or retaliation, lack of trust that the organization will keep their reporting confidential, and concern about being labeled a whistleblower.

Overall, in 2002, we learned of 2,569 issues from United Technologies employees worldwide via our confidential ombudsman program. Five percent involved allegations of waste, fraud, abuse, and other actions that negatively affect company assets. Each issue was turned over to our Business Practices Organization for investigation. The remaining 95 percent involved issues and allegations about management practices, misapplications of company policy, concerns over environmental issues and product quality, and a host of other topics.

We are convinced that organizations and their ethics programs can be strengthened if a defendable promise of confidentiality can be made. If such a promise were available, more employees would feel comfortable coming forward, more allegations would be available for review, more opportunities for corrective action would be created, stronger organizations would result, and customers, shareowners, trustees, and other stakeholders would benefit. The source who reported about Ralph's expense report would not need to fear being labeled a "whistleblower," for no one would know his name. And there would be peace in the neighborhood, back on Maple Street.

Alternatives to Ombuds

The process works. But what about those organizations that choose not to employ an ombuds? A potential solution would be a national source-protection law that would prevent third-party litigants from forcing any organization to reveal the name(s) of sources who raise allegations of wrongdoing or any other issue in the workplace (with the understanding that company-union contracts and certain other situations might be excluded).

Discussions around this sort of source-protection law within the Fellows Program of the Washington, D.C.-based nonprofit Ethics Resource Center led to the idea that a new organization should be formed to address the public-policy issues surrounding ethics programs, including source protection. Thus, in 2000, the Coalition for Ethics and Compliance Initiatives was born. The coalition's primary focus is "to support changes in government policy and law that will recognize privileges for the good faith use of effective compliance programs to discover and report suspected misconduct and potential illegalities."

A source-protection law would not exempt the source from discipline should he be party to the offense. But neither would he ever be revealed as the source and therefore would not be subject to the threats (and potential realities) of workplace retribution.

Some in the legal profession object to the idea. "We want to interview the source," they might say. The counterargument is that it's better to have the issue surfaced for examination, and not have the source's name, than to have no issue at all.

Suppose five employees dump a barrel full of toxic substances from the plant into the state park rather than cart it to a proper disposal site. They forge the required paperwork so no one will know. Then one of the five gets a guilty conscience and wants to report the wrongdoing but knows his colleagues will hammer him if they find out. What does he do if he has no confidential outlet to report the deed? Is the public better served if he reports or does not report?

-P.J.G. and G.R.W.

Are You Serious About Ethics? (cont.)
For companies that can't guarantee confidentiality, the answer is no.

Why So Few?

Despite the advantages that an ombudsman program offers, to date only a fraction of Fortune 500 companies have implemented one. What has kept companies from adding this extra layer of protection? A large part of it, of course, boils down to cost. "It takes a huge leap of faith on an organization's part to believe that they will get the payback from investing in this type of program," says Halliburton ombudsman Janet Hill. Because the value that ombuds programs add is often in dollars saved-in legal fees, for example-it can be hard to track. "If you've got an accountant type who's looking at what's being spent on a program's budget, it's really hard to quantify what's not happening in the legal area because you have the program."

Often, companies don't overcome that reluctance until there's a pressing reason to establish an ombudsman program. Halliburton, for example, initiated its program in 1993 after an employee filed a lawsuit that the company still refers to as "the case that nobody won." "The employee didn't win anything-he spent a lot of money and in the process left the company. The company certainly didn't win, because it spent almost half a million dollars," says Hill. "That was the primary driver that caused our management to step back and say, 'There's got to be a way to deal with in-house conflicts that gives people more options than to just go and get an attorney.'"

John Barkat, president of the Hillsborough, N.J.-based Ombudsman Association, agrees that many ombudsman programs are initiated after a crisis. Other companies do it for compliance reasons; the passage of the Sarbanes-Oxley Act, which calls for confidential reporting mechanisms within companies, may prompt some new programs. But Barkat is hopeful that those won't be main drivers for the increasing popularity of organizational ombudsman offices. He points out: "Some organizations might say, 'We're doing it for the right reasons-because we want to have a better work environment.'"

-Melissa Master

