

# How do you demonstrate the effectiveness of your corporate compliance program?

By Bill Foale, Paul Harris, and Jeff Taylor

Not every wrong gets prosecuted. For a variety of reasons, a law enforcement authority may determine not to prosecute a particular matter. One important consideration in reaching this decision is the likelihood of whether or not the wrongful conduct will recur. Having an effective corporate compliance program can be a significant factor in reaching this decision. Creating a compliance program for your company is one thing, but what good is it if you can't demonstrate its effectiveness?

Many companies that do have a robust compliance program fail to document adequately their compliance activities. The failure to document compliance activities equates to an inability to demonstrate the effectiveness of a company's compliance program when under scrutiny by a law enforcement authority. This can lead to bad results for the company, particularly when a company is seeking leniency from a law enforcement authority.

The existence of an effective compliance program is one of many factors that prosecutors will consider when determining whether or how to charge a company. Companies may often be asked to provide evidence to assess the effectiveness of their compliance programs at times relevant to the conduct under review. In these instances, a company that has not maintained contemporaneous documentation of its past compliance activities will find itself scrambling to collect sufficient evidence to demonstrate the effectiveness of its plan.

The Federal Sentencing Guidelines state that an effective compliance program is one that is reasonably designed, implemented, and enforced so that it gen-

erally will be effective in preventing and detecting criminal conduct. At the most basic level, to be considered effective, a compliance program must meet the seven criteria established in the Sentencing Guidelines. We will explain to you what those criteria are and suggest how you can meet them, thus demonstrating your company's effective compliance program.

The first element of effectiveness is having established policies and proce-

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dures. This element is often the easiest to prove as the policies and procedures may be set forth in various documents including a code of conduct, code of ethics, employee handbook, personnel policies, travel and entertainment policies, FCPA policy, health and safety guidelines, and overall documentation of the corporate compliance program. Law enforcement agencies are often critical of corporate compliance materials that "just sit on the shelf." Accordingly, it is equally important to demonstrate the operational aspect of the program as well, which may be more

difficult to show. It is important to demonstrate that the compliance program functions on a day-to-day basis. Sources of relevant documentation may include internal audit plans, hotline logs, records of internal investigations, disciplinary records, training materials, training attendance lists, and correspondence or e-mails addressing compliance matters.

The second element of compliance program effectiveness is commitment by key decision makers and organizational leadership to the compliance process. While it is relatively easy to identify those charged with corporate compliance responsibilities, showing their commitment to the process can be tricky. This commitment may be prevalent from their involvement in revisions to the corporate compliance program; correspondence with employees emphasizing the need for compliance; participation in supervision of the compliance program; investigation of complaints; and inappropriate behavior and reports to management, the audit committee, or the board of directors.

The third measure of effectiveness requires a company to use reasonable efforts and due diligence not to place any individual in a position of substantial authority who the organization knew, or should have known, has a history of engaging in violations of law. Discretionary authority is frequently exercised at all levels of senior and middle management, and sometimes at lower levels of management as well. Accordingly, this measure would apply broadly to a company's management team. Most companies perform some level of background check prior to extending an offer of employment to an individual, however, few companies per-



form similar checks when employees are promoted to positions of authority or given significant increases in authority. Alternative sources of support may come from a history of positive performance evaluations, support and recommendations of fellow employees who know the individual, or a lack of past disciplinary action.

Another essential element of effectiveness, as outlined by the Federal Sentencing Guidelines, is communicating the compliance standards and procedures to all employees and agents of the company. Education is the hallmark of meeting this standard. Companies frequently rely upon training programs, seminars, wall posters, e-mail notifications, and periodic signed certifications from employees to make sure that employees fully understand the program. Many companies periodically notify their agents of the need to observe the company's policies, include clauses in agency agreements that require compliance with stated policies, or invite agents to participate in company-sponsored training programs.

Effective compliance programs also include mechanisms to monitor the ongoing compliance functions and to encourage employees to report violations, often anonymously, and to reassure that such reports are confidential and will be processed without repercussion. The corporate compliance officer, internal audit or other senior management are often tasked with the monitoring function. Internal audit may include procedures to test compliance. Compliance officers may interview employees or review hotline logs to see that employees understand their obligations under the program.

Internal audit reports, employee interviews, hotline logs, and employee certifications that all known violations have been reported serve as documentation of these processes.

Finally, when a violation of law is detected, effectiveness requires that the organization take reasonable steps to respond appropriately to the violation. Law enforcement officials frequently inquire about disciplinary action taken as a result of the violation. The failure to take meaningful disciplinary action, which may include suspension, reassignment, termination, or forfeiture of a bonus, may be viewed as condoning the inappropriate behavior. Evidence of these actions is usually documented in personnel files.

Reasonable steps also include taking action to prevent and detect recurrences of similar conduct. This responsibility is often demonstrated through timely, thorough internal investigations, expanded auditing procedures and modifications to the compliance program, relevant internal controls, or oversight responsibilities. These steps should be followed

up with the processes discussed about regarding communication of policies and procedures.

Law enforcement officials and federal regulators have placed antifraud and government contract compliance initiatives, along with Foreign Corrupt Practices Act enforcement, on the front burner. Companies must do so as well or risk criminal and civil penalties, loss of business opportunities, debarment-related penalties, and inevitable damage to the organization's reputation. An effective, well-documented compliance program will remain the first line of defense in this era of increased scrutiny well into the foreseeable future. A continually updated and robust compliance program that allows company-wide understanding of and adherence to the many legal and regulatory compliance requirements will always provide the best armor in this targeted area.

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*The views expressed herein are those of the authors and do not necessarily reflect the views of Ernst & Young LLP.*

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