How DOJ Sees "EFFECTIVE" COMPLIANCE

The point of compliance with anti-corruption laws, including the FCPA, is to prevent corrupt behaviors. DOJ offers insight on building a compliance and training program that can help protect companies from corrupt behaviors and criminal prosecution.

In late 2014, a senior official with the US Department of Justice spoke before the Advanced Compliance and Ethics Workshop. In that presentation, Marshall L. Miller, Principal Deputy Assistant Attorney General for DOJ's Criminal Division, spoke about "... a few primary strengths and weaknesses that we have observed in corporate compliance programs of late." Focusing first on the weaknesses, he said, "As an overarching theme, the failure to expand compliance programs to meet the needs of growing corporations – particularly global corporations – drives many of the compliance problems we have seen." Then, he turned to the other side of the coin, noting that compliance programs that have proved to be the most effective were those with widespread prophylactic and training mechanisms in addition to procedures designed to uncover wrongdoings and expose individuals responsible for criminal behavior.

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How important is having an effective compliance training program for companies caught in the crosshairs of a DOJ investigation?

Speaking about the direction given to DOJ by the Principles of Federal Prosecution of Business Organizations, Miller noted, "One of those factors expressly directs us to consider the existence and effectiveness of the corporation's pre-existing compliance program in deciding whether to charge a corporation with a crime." He continued, "The existence of an effective compliance program can make all the difference when a corporation is in the Justice Department's sights."

Miller describes the experience of several different companies with vastly different outcomes. The highlighted examples point to challenges faced by all regulated companies, not just a select few. Miller's observations, cautions and recommendations correlate with what we have learned through our work with quality & compliance-focused companies, regardless of size, location, product type or corporate structure.

Growth and Risk

Miller set the stage when he said, "As an overarching theme, the failure to expand compliance programs to meet the needs of growing corporations – particularly global corporations – drives many of the compliance problems we have seen." He pointed to the experience of a global company that had pleaded guilty to FCPA for export control violations. According to Miller, the most glaring failures occurred in its overseas offices and subsidiaries. As an example, Miller noted that despite the company's global presence, it "… did not even bother to translate its compliance policy into languages other than English." Miller continued to aim hard hits at a company with operations in more than 100 countries, saying incredulously that the company, "… didn't even bother to make its compliance program intelligible to many of its employees …"

Miller pointed to another example of a rapidly-expanding global company that entered a Latin American market but failed to translate its compliance policy into Spanish, failed to implement its compliance policy at the Latin American subsidiary, failed to train its personnel and failed to regularly test or audit transactions for illicit payments.

Culture of Compliance vs. Profit

Effective compliance requires training and testing for proficiency but it also requires a "culture of compliance" that begins at the top and filters through to every level of the organization. Citing two examples in which compliance policies existed but were circumvented in favor of profits, Miller said, "Both cases reflect failures in global enforcement of compliance programs. But perhaps more starkly, they illustrate a failure of any 'culture of compliance' to extend beyond US borders. In fact, that culture so clearly favored the promotion of profits that compliance policies were viewed as mere speed bumps, rather than barriers to illegal conduct."

In our experience, few companies show blatant disregard of the requirements and intent of domestic and international anti-corruption laws. There are, however, many companies that have invested millions of dollars into their compliance initiatives but continue to fall short of "effective compliance."

It is worth remembering Miller's comment about DOJ taking into account the effectiveness of a company's pre-existing compliance program when deciding how or if to move forward with criminal prosecution. Consideration of an existing compliance program was on display when DOJ and SEC declined to prosecute Morgan Stanley for criminal violations of the FCPA. Both government agencies went to great lengths to praise the company's compliance program, yet some observers have suggested that Morgan Stanley's compliance program "failed" because Garth Peterson engaged in criminal activity. Consider this: Morgan Stanley has more than 60,000 employees working at 1300 offices in 42 countries. No company, particularly one with the size and scope of Morgan Stanley, can guarantee complete compliance by all of its employees. Garth Peterson understood the company's policies and the FCPA yet chose to engage in criminal activity by circumventing the compliance policies and procedures set in place by Morgan Stanley. His criminal behavior was identified and stopped, not by law enforcement agencies but by Morgan Stanley, which voluntarily reported his illegal activities.

Best Practices for Effective Compliance Training

Both DOJ and SEC considered Morgan Stanley's compliance training program to be especially praiseworthy. The Morgan Stanley program included several "best practices" that we recommend to our clients, including the following:

Multiple Training Formats: We emphasize the importance of using multiple learning techniques to stimulate engagement and drive comprehension among diverse groups of learners. Training formats may include online learning, live presentations, newsletters and various technology-based messaging. Younger employees, in particular, are more open to technology-based learning techniques, such as text messages and even social networking. According to reports, Morgan Stanley's training program included in-person presentations, web-based training and reminder messaging.

Target the Learner: Effective training is defined by the learner, not the number of hours or specific format used to distribute materials. Training should not only target learning requirements, but also the knowledge needs of the learner. Employees outside of the US may require more thorough knowledge about the FCPA than would employees with limited or no contact with foreign government officials. But at the same time, training must be tailored to the learning needs of the learner. Language is the most obvious learning needed to be considered, but training should also take into account the learner's cultural expectations, literacy levels, social conventions and even religious restrictions.
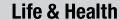

Reinforce the Message: Training is not a one-time event. A comprehensive training program on FCPA, for example, should be followed by ongoing reminders that reinforce the company's commitment to compliance. According to reports, Morgan Stanley provided more than 50 training sessions on FCPA and anti-corruption topics for Asia-based employees. Equally important, the company regularly distributed "reminders." According to DOJ and SEC, reminder messages addressed topics, including the FCPA, gift-giving and receiving, contact with regulators and government officials, guidelines for engaging consultants, global anti-bribery, Code of Conduct, travel and expense policy and even a specific reminder about gifts and entertainment related to the Beijing and Hong Kong Olympic Games.

Go Beyond Compliance: No training program can answer every individual situation in which an employee may be involved — but well-designed training can help employees identify potential risks and make informed decisions about the next step. Often that "next step" is reaching out to the Corporate Compliance Officer for guidance. It may also be reporting a suspected violation.

An effective compliance program continually reinforces a corporate culture in which mutual support and trust among employees promote the right actions at the right time.

Preventing Bad Behavior

Notwithstanding the massive global commitment to preventing and prosecuting business corruption, headlines continue to show that corruption has not been eradicated. Miller's presentation to a room of compliance professionals acknowledged that corruption was all too common, but he sought to put that reality into an important context.

"While the Justice Department is often the last line of defense against fraud and corruption, all of you who work in compliance are the first," said Miller. "Criminal prosecutions can and do deter future bad behavior, but your work can prevent that conduct before it happens."

... It is that commitment to prevent bad behavior before it happens that drives compliance professionals in developing robust, resilient and effective compliance training programs.

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UL EduNeering develops technology-driven solutions to help organizations mitigate risks, improve business performance and establish qualification and training programs through a proprietary, cloud-based platform, ComplianceWire®.

For more than 30 years, UL has served corporate and government customers in the Life Science, Health Care, Energy and Industrial sectors. Our global quality and compliance management approach integrates ComplianceWire, training content and advisory services, enabling clients to align learning strategies with their quality and compliance objectives.

Since 1999, under a unique partnership with the FDA's Office of Regulatory Affairs (ORA), UL has provided the online training, documentation tracking and 21 CFR Part 11-validated platform for ORA-U, the FDA's virtual university. Additionally, UL maintains exclusive partnerships with leading regulatory and industry trade organizations, including AdvaMed, the Drug Information Association, the Personal Care Products Council and the Duke Clinical Research Institute.