

Global Issues Forum: Global Compliance – Best Practices

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Practical issues associated with structuring and operating compliance programs in accordance with laws within the US and globally.



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PART I:

Compliance Program Best Practices

The Compliance Program – Basic Elements

- Requirements for an Effective Compliance Program (USSG Section 8B2.1):
 - Written policies and procedures
 - Designated compliance officer (and often compliance/risk committee)
 - Effective training and education
 - Effective lines of communication (including a hotline)
 - Internal monitoring and auditing
 - Enforcement of standards through well-publicized disciplinary guidelines
 - Prompt response to detected problems through uniformly applied corrective actions

The Three Purposes of a Compliance Program

1. Prevention

- Written policies/code of conduct
- Compliance officer and oversight
- Training/education

2. Detection

- Reporting hotline
- Monitoring/auditing and internal reporting
- Non-retaliation

The Three Purposes of a Compliance Program

3. Correction

- Investigations/remediation
- Disciplinary policies

PART II:

Application of Best Practices

Life Cycle of Compliance Risk



Regulations/laws in this presentation will be US-focused, with sections addressing foreign jurisdictions where appropriate/important/key

Hypothetical

- “Company” is a US-based public company, traded on NYSE, that manufactures products
 - Company maintains operations and sells products around the world
- In 2010, Company acquired a number of foreign subsidiaries
 - The newly acquired subsidiaries were required to adopt Company’s Revenue Recognition Policy
 - Company’s corporate finance group delegated revenue recognition decision-making authority to the subsidiaries
- The Company has received an anonymous hotline report that beginning in 2011, the VP of Sales for Company’s foreign subsidiary initiated a scheme to inflate the foreign subsidiary’s revenue numbers at or near the end of the reporting periods
 - There is also a general concern regarding large undocumented payments by the subsidiary that have been going on for years – even before the merger

Risk Assessment & Identification



Risk Assessment & Identification

- What are the first steps in response to the hotline report?
- How do you prioritize and address each concern?
 - Role of internal audit
 - Review internal metrics and data
 - Review prior risk assessment and audits
- Do you report the concerns immediately? If so, to whom?

Investigation



Investigation – Preliminary Considerations

- Once the decision is made to investigate the concerns:
 - Issuance of document hold and initiation of review
 - Application of global privacy laws?
 - Interplay between legal and compliance roles?
 - Who will control and direct the investigation?
 - Important to trigger and protect the Company's privilege

Investigation – Managing the Investigation

- How do you manage local witness interviews?
 - Upjohn warnings
 - Local law and other employee protections
- Do you have an investigation report generated?
 - If not, how do you report out the results of the investigation?
 - To whom are the results of the investigation reported?

Reporting to the Board/Management



Reporting to the Board/Management

- How and when do you communicate with each of these internal stakeholders?
 - Board
 - Management
 - Compliance or Risk Committee

Reporting to the Board/Management – Oversight and Responsibility

- What is the Board or Audit Committee's role?
 - Direct line to compliance function
 - Periodic reports

- What is management's role?
 - Overall responsibility
 - Operational authority

- What is role of Compliance or Risk Committee?

Reporting to the Government/Disclosure



Reporting to the Government/Disclosure

- How and when do you communicate with each of these external stakeholders?
 - Law enforcement or regulatory body
 - Outside auditors
 - Shareholders
 - Market

Reporting to the Government/Disclosure

- How do you make the decision to self-report or otherwise disclose the results of the investigation?
 - Leniency for timely disclosures to DOJ
 - FCPA Corporate Enforcement Policy incorporated into US Attorney's Manual
 - US Sentencing Guidelines § 8C2.5(g)
 - DOJ's Criminal Division to model policy after FCPA Corporate Enforcement Policy
 - Cooperation credit for SEC investigations
 - Credit for existing compliance programs
 - DOJ Antitrust Division credit for first party to report conspiracy

Reporting to the Government/Disclosure

- How to determine benefits of self-reporting?
- How to determine when, how to self-report?
 - If self reporting, how to preserve privilege?
- How to best manage difficult public disclosures?

Remedy/Mitigation



Remedy/Mitigation – Analysis and Remediation

- How do you determine the appropriate employee discipline?
- How do you identifying faulty or circumvented internal controls?
- How do you implement and test remedial measures?
- What other steps should the Company take to mitigate risks?

Key Takeaways

- The Company will be judged on the way it responded to the issue from the moment it was identified (or should have been identified)
- Companies must have a reasonably designed compliance program – with adequate resources – in place before a crisis or issue arises
- Must take proactive steps to detect misconduct (e.g., compliance audits, data analytics)
 - Including easily accessible and multiple reporting mechanisms to raise concerns
- Must undertake prompt and appropriate response to potential problems
 - Investigation, or
 - Adequate documentation of reason for no investigation
- Company must then take appropriate action based on what was identified
 - Both internally and externally

Key Takeaways

- Mitigation and Remediation must include:
 - Discipline of wrongdoers
 - Changes to affected systems/processes
 - Changes to compliance program
- Important to proactively use the compliance program to:
 - Communicate expectations and awareness of applicable laws and regulations
 - Develop program metrics to measure and improve the program
 - Partner with the business and internal audit
 - Strengthen controls
 - Prevent future bad conduct
 - Tailor training and job specific communications
- When done right, a compliance program can be invaluable in protecting the Company
 - But the standards are very high and ever evolving

Handouts

- Summary of DOJ's Revised FCPA Corporate Enforcement Policy
- DOJ Evaluation of Corporate Compliance Programs
- USSG Section 8B2.1
- JPMorgan Non-Prosecution Agreement (NPA)
 - The non-prosecution decision was based in large part on the effectiveness of the Company's compliance program; in fact, "compliance" is mentioned 80+ times in the NPA itself.

QUESTIONS?