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ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

Being Proactive Pays Off

Failing to Prepare is Preparing to Fail

"If you think compliance is expensive, try non-compliance."

U.S. Deputy Attorney General
Paul McNulty

"Now! *That* should clear up a few things around here!"

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Introductions

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Reactive Compliance, Proactive Compliance, and Predictive Compliance

Goal – Predictive Compliance

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Reactive Compliance

- The bedrock of any compliance program
- Dealing with compliance on an as-needed basis
- Often takes the form of responding after a violation has occurred, either at your company or companies in a similar line of business
- Weighs actual risk of violation/enforcement against effort
- Works well with limited resources

Pros: May reduce cost, and you're focused only on what you absolutely need to be.

Cons: Can feel like constant fire drills, which can be stressful for all involved. May also be more expensive in the long run if there's serious trouble.

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Proactive Compliance

- Anticipating what's to come, and getting out ahead of the problem
- Requires more resources upfront, but may save resources if there is a violation or enforcement efforts
- Includes proactive efforts like:
  - Training
  - Dawn raid policy
  - Firewalls to contain competitively sensitive information
  - Compliance dashboard
  - Risk analysis

Pros: You get out in front of things a bit.

Cons: May induce compliance fatigue; may create a false sense of security.

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Evaluation of Corporate Compliance Programs – DOJ Guidance 2/2017

- DOJ Evaluation of Corporate Compliance Programs – February 2017
  - Important topics and sample questions that the Fraud Section has found relevant in evaluating a corporate compliance program:
- Root Cause Analysis – What is the company's root cause analysis of the misconduct at issue? What systemic issues were identified? Who in the company was involved in making the analysis?
- Prior Indications – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations involving similar issues? What is the company's analysis of why such opportunities were missed?
- Remediation – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?
- Information Gathering and Analysis – What information or metrics has the company collected and used to help detect the type of misconduct in question? How has the information or metrics informed the company's compliance program?
- Risk-Based Training – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees that addressed the risks in the area where the misconduct occurred? What analysis has the company undertaken to determine who should be trained and on what subjects?
- Effectiveness of the Reporting Mechanism – How has the company collected, analyzed, and used information from its reporting mechanisms? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?
- Control Testing – Has the company reviewed and audited its compliance program in the area relating to the misconduct, including testing of relevant controls, collection and analysis of compliance data, and interviews of employees and third-parties? How are the results reported and action items tracked? What control testing has the company generally undertaken?

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Predictive Compliance

- Using the information you have and can get to determine what compliance risks you are likely to face, and when.
- It can be particularly useful in areas where, by the time you get to a violation, you're facing serious expense in defending, and serious consequences.
- This doesn't work for every practice area, or for every situation within a given area.
- Predictive compliance cannot supplant reactive compliance or proactive efforts – a good program has elements of each where appropriate.
- It depends on what resources you have and what risks you face.

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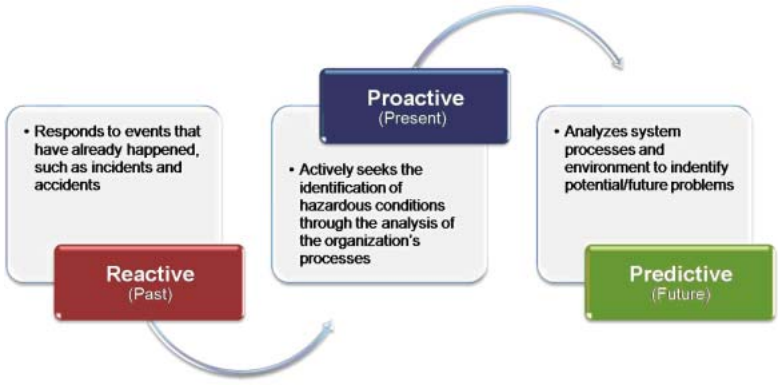
Working Together



Source: faa.gov

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Predictive Compliance

Predictive Compliance Program Tips

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Predictive Compliance Program

- It's all about the data!
  - What data do you already collect that you can optimize and analyze?
- Employee surveys
  - Culture perception, satisfaction surveys, how many complete it?
- Exit Interviews
- Hotline data
  - Trends, anonymity rates, cluster issues, identify "tipping points."
- Publicly available websites and social media– Glassdoor, Facebook, … What are people saying about you?
- Internal audit – use them as a resource and share the data.
- Financial audit data – predictive analytics already being done?
- External consultant/auditor predictive analytics tools.
- Enterprise Risk Management – what data is being compiled on ERM risks to the organization? How to take ERM data to help predict and prevent future compliance problems.

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Predictive Compliance Program

- What other data is out there that you may not be collecting… yet?
- Proactive email searches.
- Monitoring activities as an early warning system.
- Focusing on "Root Cause Analysis" when problems arise and tracking/addressing those causes.
- Data from outside organizations: hotline benchmarking, CEB, others.
- Constantly evolve your compliance program to meet changing risks.
- Identify processes or procedures are overly complex or overly burdensome – one of the main reasons of compliance incidents.
- What kinds of culture do you have and how can you predict issues?
- Identify areas where controls are insufficient.
- Identify areas of potential self-interest (bonus structures, meeting quarterly sales goals, deadlines for a product launch).

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Predictive Compliance Program

- Have compliance embedded into organization.
  - Identify local ethics officers.
  - Identify ethical champions within organization.
- Compliance as part of the leadership team.
  - Be a part of the overall strategy of the organization and be aware of changes before they occur to help adapt the compliance program before issues arise.
- Have a plan for how to deal with different organizational changes:
  - Merger or acquisition
  - Macro-economic changes
  - New business line
  - New country
  - New product or service
  - Large hiring or layoff action
  - Leadership changes
- Talk to people and listen! Hold small group meetings at different locations and at different levels of the organization.

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Predictive Compliance Pays Off

Two Case Studies: Antitrust and Cybersecurity

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Antitrust – An Extreme Case

- Antitrust violations can be extremely costly.
  - Investigations
  - Private litigation
  - Business interruption
  - Reputational damage
  - Damages
- Most common proactive measures are policies and training, and may not be effective.
  - Issues are complex, seem abstract, and there are many grey areas.
  - Differences between jurisdictions present issues for global companies.
- Violations may actually make people more likely to reoffend.
- Compliance program generally doesn't lead to a fine reduction.

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Antitrust – An Extreme Case

- Predictive measures may help you locate at risk departments, individuals, and behaviors within your company.
- In the case of antitrust, you may be able to halt a conspiracy before it gets going, and even if you can't, you may be able to be the first in for leniency.
- Leniency and cooperation can lead to a greater reduced fine or no fine.

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Possible Predictive Activities

- Looking for economic conditions that may create conspiracy
  - Changes in demand
  - Changes in competitive environment (increase in outside competition, increase in production costs)
  - Drop in profitability (excessive capacity)
- Email screens
  - Searching for key terms in communications with competitors and suppliers
  - There are risks to this approach – company tolerance, optics, privacy implications
  - Conspiracies are often conducted mostly through conversations, but we find that eventually, something gets written down

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Cybercrime – Evolving Security Threats

- Difficult to prepare for and is effective because:
  - Highly organized and skillful
  - Lack of fixed location
    - Cybercriminals reach across the world and commit crimes in multiple jurisdictions
  - Anonymity: criminals easily adopt alter egos and conceal their tracks
    - Multiple participants (or not?)
    - Insiders
  - Wrongdoers hide behind legal barriers to apprehension
  - Human psychology: trust, naivety, hope, and greed

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Cybercrime – Evolving Security Threats

- Common types of for-profit cybercrime:
  - Fraud
  - Business email compromise
  - Ransomware
  - Data breaches
  - Phishing & spearphishing
  - Identity theft
  - Social engineering (using data gleaned from social media)

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Cybercrime – Evolving Security Threats

- Not-for-profit cybercrime:
  - Harassment/Threats of Violence
  - Extortion
  - Stalking
  - Terrorism
  - Hacktivism

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Cybersecurity

- Reactive Compliance
  - May be too little, too late because data, money, or trade secrets have already left the building
- Proactive Compliance
  - Incident Response, Business Continuity, and Disaster Recovery Plans
  - May be too abstract and general when considered against evolving threats

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Cybersecurity – Practical Predictive Compliance

- What are your crown jewels?
  - Classify information assets based on value to the organization
- Develop in-house expertise where it matters
  - Protect again attacks
  - Detection and containment
- Incident Response Plan
- Tabletops – tailored to your business, crown jewels, and risks

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Cybersecurity – Practical Predictive Compliance

- Insider Threats
  - Not always intentional or malicious, also can be negligence
  - Regular training and awareness programs to prevent unwitting assistance of a malicious insider or external actors
  - Monitor employee activity
    - Build a baseline for employee behavior and use it to predict, deter, and detect deviations
  - Assess and audit areas vulnerable to insider threats
    - Consider using independent third parties to audit

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Predictive Compliance

Government Investigations – A Balanced Approach

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Government Investigations

- Government investigations usually lend themselves to a blend of reactive, proactive, and predictive compliance.
- Predictive examples:
  - Which agency is most likely to come?
  - How will they come/ask for?
  - Watch out for industry sweeps/practice targets
  - Follow agency guidance/speeches
  - Informal contacts
  - Prior investigations
  - Dealing with whistleblower/90 day warning

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Government Investigations – Practical Predictive Compliance

- Dawn Raid Procedures
  - Quick Reference Guide for front desk/receptionist/security areas
  - 24/7 contact information for company legal and executive management
  - Specific to each location
  - Training on the procedures – make them easy to follow
- Identify all IT resources to lock down if necessary and responsible parties. Identify ways to prevent intentional misconduct and wiping of phones/computers. Limit untraceable means of communication.
- Know your insurance information in advance with notice requirements.
- Hold a "dry run" emergency preparedness drill.
- Investigation Procedures
  - Specific section on government investigations
- Communications Strategy
- Network of qualified outside counsel and other investigative partners that specialize in your areas of risk. Negotiate rates and sign MSAs in advance so that you can mobilize quickly with the right partners. Include forensic imaging companies that you trust.

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Resources

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"Effective Compliance Programs" in Antitrust

- In the DOJ Sentencing Guideline, a company is eligible for credit based on its pre-existing compliance program when its compliance program is deemed to be generally "effective."
  - Usually, when finding a company liable, the Antitrust Division doesn't consider the pre-existing compliance program "effective" because the company violated the antitrust laws.
- Under the Guideline, involvement of high-level management creates a rebuttable presumption that the company lacked an effective compliance program.
  - Usually, antitrust violations require the participation of high-level management to make the conspiracy happen. At a minimum, they are usually aware it is happening.

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Antitrust Damages

- For a list of antitrust cases where fines exceed $10 million, see: https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more
- For a list of U.S. antitrust criminal enforcement trends: https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts
- For statistics on antitrust fines imposed by the EU Commission: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

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Evaluation of Corporate Compliance Programs

- DOJ Evaluation of Corporate Compliance Programs February 8, 2017 – Guidance Document found here: https://www.justice.gov/criminal-fraud/page/file/937501/download

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Dawn Raid Checklist

Checklist: How to Handle Unexpected Visits from Authorized Government Officials

- ✓ At all times: Be cooperative and professional. Do not obstruct. Do not destroy any documents.
- ✓ 1. Immediately Contact:
  - a. The highest ranking employee on site, such as the Chief of Party, Country Representative, or Director of Finance and Administration and HQ (list contacts) and Security (list contact).
- ✓ 2. Verify the Identity of Unexpected Visitors (See Appendix B)
- ✓ 3. Ask if They Have a Subpoena, Warrant, or Like Documentation
  - a. If Yes - Review it, request to make a copy, and email a copy to HQ
  - b. If No - Do not consent to a search. Ask the authorized government officials to make a detailed request in writing to the Chief Ethics and Compliance Officer.
- ✓ 4. Requests for Interviews

  Employee participation is not required. If interviewed at a XXX office during business hours, then the General Counsel or Chief Ethics and Compliance Officer must be present.
- ✓ 5. Document What Transpired as Soon as Possible (See Appendix C)

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How to Build a Predictive System

Predictive compliance thrives on information and data.

- Potential sources within the company
  - Risk assessments and risk registers
  - Interviews
  - Email searches
- Potential outside sources
  - Industry reports
  - Agency speeches
  - Legal cases/investigation documents
- Inside knowledge
  - Deep knowledge of key individuals at the company
  - Understanding of what might motivate people to violate the law

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Supporting Predictive Compliance

- Management buy in
  - As in all compliance efforts, management support is key.
  - This probably requires a business case.
- Determining what resources you will need
- Determining whether there are any legal obstacles for what you propose
  - Company policies
  - Privacy laws
- Building and testing the system

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Questions

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