

# Column: Achieving a culture of compliance

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Guest Columnists

Simply having a compliance program is no longer enough in today's legal and regulatory climate. In the eyes of regulators, "check the box" or "paper" compliance programs are as good as not having one at all.

Organizations now face the more difficult task of achieving a culture of compliance. Without a culture of compliance, regulators will be reluctant to grant an organization any credit or leniency if things go awry – e.g., if wrongdoing by a bad actor comes to light that should have been prevented by compliance training. More fundamentally, however, if a company cannot establish a culture of compliance, it will not be able to rely on its compliance program to mitigate risk, both by deterring wrongdoing and encouraging prompt disclosure when wrongdoing occurs.

The U.S. Department of Justice (DOJ) has been a leader in encouraging companies to implement robust compliance programs, particularly in its enforcement of the Foreign Corrupt Practices Act (FCPA), which generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business.

In November, at the International Conference on the FCPA, Deputy Attorney General Rod Rosenstein announced a revised policy for FCPA enforcement titled the FCPA Corporate Enforcement Policy. The new policy was added to the U.S. Attorneys' Manual at Section 9-47.120. It builds upon the FCPA Pilot Program that became effective in April 2016 and is directed at further incentivizing companies to voluntarily self-disclose misconduct, cooperate with investigations, and timely and appropriately remediate.

It also provides organizations greater certainty regarding the type of credit they can expect upon satisfying these three standards.

Beginning with credit, if a company satisfies the standards of self-disclosure, cooperation and remediation, there is a presumption that the DOJ will resolve the case through a declination of prosecution – a presumption that did not exist under prior policy. In fact, Rosenstein noted that nine matters have come to the Department of Justice's attention through voluntary disclosure since 2016 and each was resolved through non-prosecution agreements (payment of disgorgement was required for some of these matters).

In the event the company meets the three standards but the DOJ nonetheless determines an enforcement action is required because of aggravating factors, the company can still qualify for a reduction in sentencing recommendation (by 50 percent off the low end of the U.S. Sentencing Guidelines' fine range) and may even avoid the appointment of an independent monitor.

Implementing an effective compliance program is a primary consideration for whether a company meets the third "remediation" requirement. Under the revised FCPA policy, the DOJ has enhanced prior guidance concerning compliance programs by delineating explicit criteria or hallmarks of an effective compliance program.

The result is that organizations now have a checklist detailing how the department evaluates the adequacy and effectiveness of a compliance program.

Significantly, the first of eight criteria listed by the DOJ when evaluating an organization's compliance program is "[t]he company's culture of compliance," which it defines to include "awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated."

This criterion is clear evidence that the department is focused on more than just the existence of a compliance program; it wants to see that a company has achieved a "culture of compliance" at all levels of its organization.

Additional criteria set forth in the FCPA policy include the following: (1) the resources the company has dedicated to compliance; (2) the quality and experience of the personnel dedicated to compliance; (3) the authority and independence of the compliance function, and the availability of the compliance expertise to the board; and (4) the reporting structure of any compliance personnel employed or contracted by the company.

One can view these additional criteria as particular ways for an organization to achieve a culture of compliance.

In other words, to implement such a culture, an organization should dedicate financial resources and qualified people to its compliance program so they can carry out the important tasks of teaching and training; empower compliance personnel; and give compliance personnel meaningful access to, and influence with, the board of directors and other senior leaders.

Some additional ways in which organizations can foster a culture of compliance include continued education, the strategic use of technology to train employees, and establishing and abiding by an "open door" policy for reporting misconduct.

It is imperative that employees have the ability to anonymously and confidentially report potential compliance issues without fear of retaliation.

Additionally, establishing a culture of compliance should start with the company's leadership.

While the chief compliance officer will necessarily be the face and leader of the compliance program, the board of directors and other senior leaders must also demonstrate buy-in to the company's compliance program and be held to the same standards as all other employees, particularly with respect to both training and discipline.

It is important to note that establishing an effective compliance program is one of the few measures a company can take to ensure it receives credit from the DOJ before it is faced with the difficult decision of whether to self-report potential FCPA violations.

The other two elements – self-disclosure and full cooperation – necessarily focus on how an organization behaves after it learns of misconduct. For this reason, it is prudent for any organization that has some exposure to FCPA violations to audit (and improve, if necessary) its compliance program in light of the recently published expectations.

The DOJ's revised FCPA enforcement policy is just one example of where a government agency requires companies to implement compliance programs that successfully achieve a culture of compliance.

Organizations should expect that other regulators at the state and federal levels will require the same of an organization's compliance program, especially when it comes to the subject of whether an organization should be prosecuted for misconduct.

In the end, if a company is hoping to truly mitigate risk, and thereby win some clemency from regulators in the course of investigations or enforcement actions, our advice is simple: Focus on fostering a culture of compliance in your organization.

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