DESIGNING AND IMPLEMENTING AN EFFECTIVE CORPORATE COMPLIANCE PROGRAM

Belinda M. Vega*

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A comprehensive corporate compliance program is vital for a corporation to limit the potential liability arising from both criminal and civil matters. A comprehensive compliance program will not only serve to educate a company’s employees of the laws that affect your business (which can include securities, antitrust, environmental and other laws) but it may also prevent violation of those laws, saving the company money in the long run. A successful corporate compliance program may:

• Prevent violations from occurring, eliminating the company’s exposure to the severe sanctions imposed by the relevant laws. These sanctions can include criminal fines and imprisonment when the government prevails in a criminal actions and severe damages in civil actions successfully brought by the government, customers, and competitors; and

• Substantially reduce, if not eliminate, the high costs of defending a lawsuit, both in terms of litigation costs and disruption of business operations.

Moreover, if a company should be charged with a violation, an effective compliance program may yield affirmative benefits:

• An effective compliance program can have an exculpatory effect. If the company has a compliance program, this may lead a court, jury or the government to conclude that the company lacked the intent required for violating the laws;

• In the event that the company was convicted of a criminal violation, an effective compliance program could reduce its sentence; and

• If the company detected a violation through its compliance program and reported that activity, it could qualify for amnesty under a leniency program.

Quantifying the Benefits of a Corporate Compliance Program

The benefits of creating, enforcing, and abiding by a corporate compliance program are difficult to measure because the costs avoided by compliance with the laws are neither quantifiable nor susceptible to proof. In other words, one cannot calculate the amount of money that has been saved by a company that is not investigated by the government or sued in civil litigation because it is in compliance with applicable laws. Moreover, even if the benefits of a corporate compliance program could be measured in some way, it would be difficult to determine with certainty whether the compliance program is what prevented the company from being investigated or sued.
Nevertheless, one way to measure the potential benefits of a compliance program is to look at the costs that a company has historically incurred in fines or litigation. The penalties assessed against the company and the litigation costs that have been incurred can be useful estimates of the costs that may be avoided by, or the benefits of, a compliance program.

Additionally, preventing violations from occurring reduces the exposure to the severe sanctions imposed by the laws and consequently, also reduces the costs associated with litigation and disruption in business operations.

In any case, implementing a compliance program may eventually prove to be inevitable. The Justice Department now routinely requires defendants entering into settlement agreements to establish compliance programs. State governments that bring certain kinds of actions, like antitrust actions, also often require such programs to be established in settlements or as a condition to probations. 

**Designing a Corporate Compliance Program**

The two principal objectives of a corporate compliance program should be prevention and detection. It is in your company’s best interest to prevent violations because it will save the company money and preserve its business reputation. Even if all violations cannot be prevented, it is in the company’s best interest to detect violations as early as possible because it may mean lesser fines or amnesty.

**The Federal Sentencing Guideline Requirements**

The U.S. Federal Sentencing Guidelines set out, in considerable detail, what sort of program will qualify as an “effective” compliance program to reduce a company’s criminal fine range:

- **Clear articulation of policies:** the Guidelines begin with a focus on establishing “standards of conduct and internal control systems that are reasonably capable of reducing the likelihood of violations of law.” (Unlike the “internal controls” requirement in Sarbanes-Oxley, these internal controls are not limited to those likely to ensure accurate financial reporting, but extend broadly to ensure compliance with all laws.);

- **Accountability:** under the Guidelines, accountability resides with the Board itself, which must select a “high-level” individual to oversee the compliance program and assign compliance responsibility to managers throughout the organization;

- **Careful selection of compliance officers:** the Board must not assign compliance responsibilities to someone whom it knows, or should know, has a propensity to engage in illegal or illicit activities;

- **Training:** steps must be taken to communicate standards and train employees, including at upper levels of the organization;

- **Auditing effectiveness:** a compliance program must include monitoring and auditing programs designed to detect criminal conduct, periodic reevaluations of the effectiveness...
of the program, and mechanisms for anonymous reporting by employees (without fear of retribution);

**Enforcement and discipline:** in addition to enforcing the program through appropriate discipline, including disciplinary actions against those who fail to monitor compliance vigorously, the Guidelines require an organization to provide incentives for compliance as well;

**Prevention:** the organization must be responsive and comprehensive in modifying the program after a violation to prevent future violations while undertaking specific risk assessments, and modifying the program accordingly, to avoid potential violations before they occur.  

**Essential Features For a Corporate Compliance Program**

In order to develop an effective compliance program for your company, it will be necessary to analyze your business activities and identify where the potential legal risks exist within the company. Your company will then need to tailor its compliance program to address each of these risks and the specific needs of the company.

At a minimum, an effective compliance program that meets the requirements imposed by the U.S. Federal Sentencing Guidelines also should include the following key features:

**A Written Policy Statement** - A compliance program should include a clear-cut statement of the corporation’s policy to comply with the laws relevant to its business. The statement should make clear that all employees are expected to comply with these laws. This policy should be communicated to all employees in writing as part of a compliance manual.

**Basic Legal Concepts and Terms** - The written compliance manual should also include a description of the applicable laws that affect your business, the activities prohibited under the laws and the potential penalties. The manual can incorporate or reference other statements of prohibited conduct, such as more detailed guidelines for specific activities, memoranda distributed to employees, or handouts distributed in education programs. At a minimum, the manual should provide or reference guidelines for specific areas such as:

**Antitrust Laws** - Contacts with competitors (including price-fixing, market or customer allocations, group boycotts, involvement in trade associations, information exchanges); Relations with customers or suppliers (including exclusive dealing or requirements on contracts, preferential treatment/price discrimination, tying arrangements, and reciprocity and resale price restrictions); and monopolization and unilateral conduct by the company (including refusals to deal, terminations, and predatory pricing).

**Customs** - Importation of products into a country is subject to various customs, fiscal laws and regulations. Your company must be sure that all imports comply with these requirements and that any information provided to customs and tax officials is accurate and truthful. An effective compliance program would alert employees of the customs laws that affect your business and provide a mechanism for reporting violations and asking questions.
International Bribery and Corruption - The U.S. Foreign Corrupt Practices Act (FCPA) prohibits bribes to foreign governments and other officials (such as political candidates, political parties and their officials, employees of government-owned businesses, U.N. officials, etc.). A violation of these laws is a serious criminal offense for both companies and individuals and can result in fines, loss of export privileges, and imprisonment. Most developed countries have similar prohibitions. An effective compliance program would alert employees of the bribery and corruption laws, prohibit any violation of them, impose penalties, and provide mechanisms for consulting with company management if there are questions or concerns.6

Trade Restrictions, Export Controls and Boycott Laws - The United Nations, the EU, Switzerland, the U.S. and a number of other countries impose restrictions on export and trade dealing with certain countries, entities and individuals. Trade restrictions in the U.S. also impose licensing requirements on the exports of certain products or technology. U.S. Anti-boycott laws also prohibit participation in or cooperation with a foreign boycott not sanctioned by the U.S., such as the Arab League boycott of Israel. These laws are complex and broad. An effective compliance program should alert employees of the laws, prohibit any violation of them and impose penalties, and provide mechanisms for consulting with company management if there are questions or concerns.

Unfair Business Practices - An effective compliance program should discourage employees from violating U.S. unfair business practice laws. This includes prohibiting employees from making false statements about competitors or their services, prohibiting the stealing or misuse of a competitor’s trade secrets, and prohibiting the interference with a competitor’s or a customer’s contractual relations.

Compliance Officer and Reporting System - The company should designate a compliance officer who oversees the compliance program and reports to either the chief executive officer, the general counsel, or another high-level executive at the company. If the violation involves a high-level executive, the compliance officer should be given authority to report directly to the governing board of the company. The compliance officer should not be someone who the company knows, or should know through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with the compliance program. A compliance manual should include a system permitting employees to report criminal conduct by others without fear of retribution and permitting employees to ask questions. A helpline or hotline which allows employees to make reports anonymously should be part of that system.

Training - The company should conduct mandatory training programs on a regular basis to communicate standards and procedures effectively to all employees. The training should be aimed at educating the employees about the applicable laws and instilling sensitivity in employees so that they recognize potentially dangerous areas of conduct and consult with the appropriate persons, before acting.

Disciplinary Measures - The company must consistently discipline employees who disregard the company’s compliance policy or who fail to report misconduct of others. This means that standards, once adopted, must apply to all employees equally.
Auditing and Periodic Assessment of Effectiveness - The company should conduct periodic reviews of corporate records and personnel interviews, aimed at both ensuring compliance with your policy and at identifying actual and potential problems.

The company should also periodically access the effectiveness of the compliance program by analyzing the company’s responsiveness to reports of violations.

Document Retention - An effective compliance program should also include policies and procedures for the retention of business documents.

Global Consideration and Implementation

If the company conducts business in other parts of the world, any effective compliance program should also outline the laws of all the countries in which your company does business and/or provide a mechanism through which employees can consult local management in those countries to obtain more information about the applicable laws in the region and to report violations.

The Need for an Effective Corporate Compliance Program Cannot be Overemphasized

The need for an effective corporate compliance program cannot be overemphasized, especially in these times of increased scrutiny on corporate governance. A violation of applicable laws can mean prison sentences for company employees, hundreds and millions of dollars in criminal fines, severe civil damages, not only in the U.S. but abroad, and an immeasurable damage to business reputation. For that reason, prevention provided by a compliance program is well worth the time and money it takes to create an effective program.

1 The existence of an enforced compliance program has been considered a material factor in acquitting defendants in civil actions. See Dri-Wal, Inc. v. Fireboard Corp., 1970 Trade Cas. (CCH) P 73,155 (N.D. Cal. 1970).

2 The U.S. Federal Sentencing Guidelines provide that a court should consider the existence of a corporate compliance program in imposing fines on corporate defendants. The Guidelines provide specific criteria required in a compliance program to qualify for a reduction in fine.

3 For example, the Antitrust Division has a policy of granting leniency in criminal prosecutions to corporations that report their participation in anticompetitive activity. The company must be the first participant in the misconduct to report it to the government. A corporation that reports its participation in illegal conduct and satisfies the program’s criteria, which includes making restitution to injured parties and other requirements, automatically receives amnesty. The European Community also had adopted a leniency policy that provides immunity to persons who report illegal cartel activity to the EC. See “Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases,” 2002 O.J. C 45.

4 See Matthew Bender, Antitrust Counseling and Litigation Techniques, § 5.02 (2006).
See 2005 Federal Sentencing Guidelines Manual, §8B2.1. The Guidelines can be found at http://www.uscc.gov/2005guid/8b2_1.htm. Although, as we have previously explained, the Guidelines are no longer mandatory under United States v. Booker, they are advisory and continue to inform sentencing decisions. In addition, the Department of Justice generally insists that defendants entering into plea agreements consent to the application of the Guidelines in arriving at agreed upon sentences.

There may be other laws that affect your business and which should also be included in an effective corporate compliance program, such as health and safety laws, environmental laws and employment laws. You should consider making a comprehensive assessment of what laws most affect the Company’s business and benchmark its current practices/policies against them.