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A CPA recounts exponential growth in Compliance

an interview with **Patricia Bickel**

Compliance and Privacy Officer; Director, Professional Integrity Program
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See page 20

27

A growing voice in the compliance chorus:
The Department of Justice Criminal Division

Tony Maida

33

Do you have an effective compliance program?

Mary Ellen McLaughlin

41

The anatomy of a DLP incident: Using automation to improve compliance

Eric J. Moriak

47

The changing nature of compliance under payment for quality and cost effectiveness

Paul R. DeMuro

by Walter E. Johnson, MSA, CHC, CCEP-I, CRCMP; Cindy Hart, LPN, CPA, CPC, CHC; Adam K. Weinstein, MBA, MPA, FACHE; and Frank Ruelas

COMPLIANCE 101

The seven essential elements, Part 6: Enforcement & discipline

- » Non-compliance will be punished according to the discipline policy.
- » Failure to report non-compliance will result in disciplinary action.
- » The discipline process should be clearly communicated in a policy.
- » Rewards for demonstrating compliance help to ensure compliance.
- » Discipline must be fair and consistent.

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Your compliance program continues to evolve. Developing and implementing the preceding five elements demonstrates determination and commitment from the board of directors (board), the compliance officer (CO), the compliance committee, and the operational units. In the grand scheme of managing an effective compliance program, information related to enforcement and discipline should not be a surprise or considered a secret to anyone within the organization. The elements of enforcement and discipline are already known through the code of

conduct. Although your employees are aware of enforcement and discipline, a smooth implementation is not guaranteed. In fact, implementation or management of the enforcement and disciplinary element has its own unique set of challenges.

Although there is tremendous effort dedicated toward establishing an effective compliance program, failure to enforce and discipline appropriately will discredit the entire program. Your organization has to show it is serious about its compliance program through the use of discipline. Indeed, the Federal Sentencing Guidelines mandate the use of discipline applied consistently to



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all employees, regardless of the employee's title.¹ The Federal Sentencing Guidelines in Chapter 8 states, in part:

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

The (range of) fines for any other organization should be based on the seriousness of the offense and the culpability of the organization.... Culpability generally will be determined by six factors that the sentencing court must consider.

The four factors that increase the ultimate punishment of an organization are:

- (i) the involvement in or tolerance of criminal activity;
- (ii) the prior history of the organization;
- (iii) the violation of an order; and
- (iv) the obstruction of justice

The two factors that mitigate the ultimate punishment of an organization are:

- (i) the existence of an effective compliance and ethics program; and
- (ii) self-reporting, cooperation, or acceptance of responsibility.²

Protect the program

Compliance is the responsibility of every employee.³ The board and C-suite establish the ethical culture. The CO is the ethical conscience receiving support from the board and C-suite. Through enforcement and discipline, the CO protects the credibility of the compliance program. Actions must be congruent to the documented framework (e.g., code of conduct, policies, and procedures).

Equal efforts

Compliance officers must provide as much attention to providing incentives as they do to enforcement and discipline. By ignoring incentives, you may severely undercut your program.⁴ Incentives also can help reinforce that COs are not (as often stereotyped) people that are looking anywhere and everywhere to find an "I gotcha" moment, or only focused on all that is wrong within an organization. On the contrary, many COs do well fostering relationships and building trust by openly emphasizing and pointing out those activities that represent compliance with the program. Remember, enforcement is not a bad word. One can just as easily show enforcement in the support of that which is positive, by implementing incentives, rewards, and recognition.

Discipline elements

Although the idea of enforcement and discipline may trigger negative thoughts among those who are the subject to its implementation, enforcement and discipline are critical aspects of a compliance program and represent the commitment of the organization. The discipline policy should clearly state the discipline guidelines and include progressive

disciplinary measures up to and including termination. The levels of discipline can start with oral warnings and advance to written warnings, probation, suspension, ineligibility for promotion, and termination. The policy should also include discipline for failure to act to detect or prevent misconduct and failure to report misconduct, per the code of conduct.

Enforcement and discipline are at the core of establishing the validity of a compliance program. A clear message is communicated to members of the workforce with endorsement by the organization's uppermost levels of management. Demonstrating support for the compliance program via genuine efforts to enforce adherence and mete out consistent discipline assures the compliance program will meet its objectives. Support from leadership encourages employees to abide by the objectives of the compliance program.

Positive elements

An effective means of ensuring compliance is rewarding employees for demonstrating compliant behavior and fostering a culture of compliance. One effective way to accomplish this is to include compliance efforts in employee and departmental goals. In this way, the employee has an incentive to maintain compliance and act ethically. Reaching goals can result in a bonus, a promotion, additional responsibilities, professional growth, or a raise. Recognition also goes a long way with employees. A letter to their manager or the leadership team can boost morale and encourage continued compliance at no cost to the organization.

A clear message is communicated to members of the workforce with endorsement by the organization's uppermost levels of management.

Explaining the reason behind policies usually results in better compliance. When employees understand that some policies are the result of government rules or are mandated by accrediting organizations, the employees are more willing to comply.

Consistency

Often stated, but not as often practiced, is the challenge of applying the enforcement of disciplinary standards throughout the organization. Just as the compliance program stretches throughout and within an organization in how it applies to everyone, the same should hold true with its disciplinary methods. Joseph Murphy describes this as "Tough at the top" and states that sanctions should be tougher the higher up one is in the corporate hierarchy.⁵

Enforcement and discipline may not be the most celebrated of the seven elements. It

is logical to assume that there are a fair number of compliance officers that would rather write a policy, put together a training presentation, or do an audit rather than perform an enforcement- or discipline-related task. However, the element of enforcement and discipline and, more importantly, how it is consistently applied throughout the organization, are paramount

when promoting the program. Enforcement and discipline, or the lack thereof, establishes a dividing line among those organizations whose compliance program exists on paper and ones that exist in practice. Enforcement should include holding people accountable for actions that are contrary to the rules and principles established by the organization.

Compliance program implementation occurs in a setting and environment where people have ideas about how compliance programs do and do not work. Ask anyone you work with and you will not have to go far before you find someone who shares how discipline was handled differently due to title, role, or credentials. Although inconsistent discipline is a fact of life that the CO deals with, it is not something that has to continue in the compliance program you are managing. Do not lose sight of the target. Consistency is not only an expectation, it is a requirement. The CO should ensure that policies and procedures describing sanctions for violations are clearly communicated and followed.

Summary

Now you have implemented your standards of conduct, established your compliance committee, developed an education and training program, conducted auditing and monitoring, advanced reporting mechanisms and methods of investigation, and ensured consistent discipline and enforcement. You are well on your way to a fully-implemented effective compliance program. ☐

1. Joseph E. Murphy: *501 Ideas for Your Compliance and Ethics Program, "Lessons from 30 Years of Practice"* Copyright 2008. The Society for Corporate Compliance and Ethics.
2. Federal Sentencing Guidelines, Chapter 8. Available at <http://bit.ly/19rYJex>
3. Debbie Troklus and Greg Warner: *Compliance 101*. Third Edition. September 1, 2011. Health Care Compliance Association.
4. Joe Murphy: "What are the Federal Sentencing Guidelines seven elements?" The Last Word column, *Compliance & Ethics Professional*. May 2015, page 82.
5. Ibid, ref #1, Idea #312.

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