



# CPI Antitrust Chronicle

## June 2015 (2)

### Agency Assessments of Compliance Programs

Joe Murphy  
Compliance Strategists

## Agency Assessments of Compliance Programs

Joe Murphy<sup>1</sup>

### I. INTRODUCTION

Compliance and ethics programs are the way organizations take management steps to prevent and detect illegal and unethical conduct. They can be more or less rigorous and effective, depending on the level of commitment. Historically it has been government that drives organizations to adopt such programs, and especially to move them beyond mere paper and preaching into meaningful steps.

Enforcement authorities have recognized that their role is not simply to collect fines and obtain convictions, but to prevent violations before the harm is done. They recognize that company compliance and ethics programs are essential tools in this mission. When government takes compliance and ethics programs into account and uses them as a means to transform industry conduct, there is enormous leverage to get companies to upgrade those programs. For government to be effective in this, however, it must be credible in its assessment and imposition of programs.

### II. FUNDAMENTAL POINTS

For government officials dealing with compliance and ethics programs there are a few key concepts to begin the analysis:

#### *A. The Burden of Proof is on the Company*

The first is that generally, the burden of proof is on the company. Compliance and ethics programs become relevant after an agency has reason to believe a company has committed a violation. The company is then trying to convince the government to treat it better. At this point it is the company's job to come forward with proof that it had a diligent and effective program.

#### *B. Assessing a Program is a Straightforward Issue of Fact*

The second fundamental point is that assessing a program, when the company has the burden of making its case, is not terribly difficult and in fact is generally straightforward. Unlike digging out evidence of a crime from those who may be facing punishment, in assessing a compliance and ethics program the company has every motive to provide the evidence that its program is creditworthy. At the same time, there are well-established standards available for assessing the bona fides of a program. Moreover, a key measure of whether a program is effective is whether it reaches employees. Simply by talking with employees during the course of an

---

<sup>1</sup> Joe Murphy, CCEP, is Senior Advisor, Compliance Strategists. He is also author of *501 Ideas for Your Compliance and Ethics Program* (SCCE; 2008). He can be reached in Haddonfield, NJ, at [jemurphy5730@gmail.com](mailto:jemurphy5730@gmail.com) or 1 856-278-1664.

investigation, investigators can get a very deep sense of whether the program was real or cosmetic.

### ***C. Compliance & Ethics is a Separate Field***

The third fundamental point is that compliance and ethics is a separate field of expertise. As is true for any field, before practicing in that field one needs to know the subject. Agencies that are working with compliance and ethics programs need to ensure that they have the expertise to do the job. This is not the same expertise needed to practice law or be a good litigator. To be effective, agencies need at least some staff members who have studied and know the field of compliance and ethics.

### ***D. The Agency's Approach Must Be Serious and Practical.***

No matter what an agency may say in speeches about the importance of compliance and ethics efforts, if it ignores good programs in practice, then businesses will correctly read the real message: programs do not count.

## **III. WHAT IS THE ASSESSMENT FOR?**

Agencies may assess a company's compliance and ethics program for a number of reasons, depending on the nature of the legal system and the type of offense:

- a) whether to proceed against the company at all;
- b) whether a case should be administrative, civil, or criminal;
- c) what charges to bring;
- d) whether to settle or prosecute the case;
- e) whether to offer to settle on more favorable terms;
- f) whether to pursue individuals instead of the company;
- g) whether to allow the company to conduct its own investigation and report back to the agency;
- h) what type of relief to seek if a case is brought;
- i) whether a company should be debarred or have other privileges denied;
- j) if a financial penalty or fine is to be imposed, how much;
- k) whether to impose a monitor; and
- l) what entity is to be held responsible—e.g., a parent company or a subsidiary.

Whenever imposition, enhancement, or retention of a compliance and ethics program is a condition for going forward, the agency needs to be able to assess the company's actions in implementing a program.

In assessing programs, there are two different approaches. One is a pass-fail approach where programs either make the grade or they do not; this is the standard of the U.S. Sentencing Guidelines. However, while the Guidelines do an excellent job of spelling out the essential factors

in a program, they have not been used much in corporate sentencing and thus have been almost non-existent in terms of applying the pass-fail approach.

The alternative, and generally superior approach, is to assess programs on a graduated basis, not an absolute one. Rather than the simplistic, all-or-nothing judgment, this allows for the degrees of variance that are likely to be found in corporate compliance and ethics programs. This is suggested in the guidelines used by U.S. federal prosecutors under the *U.S. Attorneys Manual*, which covers the various options prosecutors have in determining how to treat a company and how to settle cases.

#### IV. WHAT STANDARD SHOULD APPLY?

Compliance and ethics programs need to be assessed according to a standard; this is not an “I’ll know it when I see it” process. After decades of organized approaches to compliance and ethics programs, there are now well-established elements that should be expected in any program. It is neither necessary that an agency develop its own standards out of the ether, nor reasonable to make it a guessing-game for companies in dealing with this important issue.

Before assessing any company’s compliance and ethics program, the agency should be able to define in general what such a program is. Fundamentally it consists of two things: (1) a management commitment to do the right thing, and (2) management steps to make that commitment happen. It is the management steps that give the concept its universality. All organizations need to be managed using basic management steps, and the process of doing so provides a consistent base for all organizations dealing with compliance and ethics. The details of how each organization does this may vary, but the core elements remain the same.

#### V. WHERE TO START

Where does an agency start in this process to assess company compliance and ethics programs competently? A basic management principle for any organization is the need to assign responsibility to someone to ensure that a project gets done. So, too, in undertaking a compliance and ethics program assessment, it makes sense to designate at least one staff expert on the subject—the compliance and ethics program “go to” expert within the agency. This person would then take the steps necessary to become an expert in the field of compliance and ethics, including by pursuing the training and resources available on this subject. There is a great deal of this available; for example, the Society of Corporate Compliance and Ethics’ (“SCCE”) website, [www.corporatecompliance.org](http://www.corporatecompliance.org) has useful material available, plus information on a variety of other sources. SCCE provides intensive training academies, including locations in South America, Europe, Asia, the United States, and the Middle East.

Once the agency’s compliance expert is up to speed, that person can provide training, assistance, and research for others in the agency dealing with compliance and ethics programs. It is not necessary that this person actually do all the assessment and other related work, as long as the person is in position to ensure consistency and effectiveness in the agency’s actions and approaches.

#### VI. FACT-FINDING AT THE BEGINNING OF AN INVESTIGATION

As noted, determining whether a company has a credible compliance and ethics program is an issue of fact. This means the objective is to gather relevant information about the program.

The best time to start this is at the very beginning of an investigation, rather than waiting for a company to make a formal presentation on its program. This can be done through discussions with anyone associated with the company and from company materials that are publicly available.

In the course of an investigation, whether through formal criminal investigative proceedings, or through interviews with current and former employees, the agency can obtain important insight into the culture and the actual steps taken in the company's compliance and ethics program. A company merely going through the motions does not constitute a compliance program. In an agency's investigation, if none of the employees who have information about an alleged violation have had any contact with the compliance and ethics program, this strongly indicates that the program was not credible. If there is no knowledge of a code of conduct, a reporting system, training, or the compliance officer/compliance program managers, then in effect there was no program.

Here are some sample questions to ask employees, former employees, and others associated with the company during the investigation process:

1. What does the person know about the company's compliance and ethics program?
2. Who was the compliance officer? If people do not know this, especially those at the executive level, that tells you something very important about the program's lack of impact.
3. Did they have a code of conduct? Did the person ever read it? Can the person remember anything at all about it?
4. Was there a system for reporting concerns? It is not important that anyone actually remember the number, as long as they knew there was a system for bypassing local management if needed.
5. Was there a system for getting compliance advice? If there is an available business unit lawyer who can provide compliance advice, this is an important sign of commitment to compliance, even if the person is not formally designated as part of the compliance program. But investigators need to distinguish between just having a business or deal lawyer from having one whose focus is ensuring that people follow the rules.
6. Were there ever any audits or reviews on compliance issues? This could be done by the legal, the internal audit, or the compliance and ethics office. While these reviews might have been confidential, if they were done word would get around.
7. Did the person have compliance training in the risk area? If they do not remember if they had any training, then that is equal to no training.
8. Was there anything in the person's annual assessment, evaluation, or objectives related to compliance and ethics? Again, if they do not remember that pretty much shows it was not taken seriously.
9. Did the person ever hear of anyone being disciplined under the compliance program? Much of this might be confidential, but word of these types of things travels in

companies, and the better programs provide some publicity relating to discipline (without disclosing names).

10. Did the person's supervisor ever say anything about the code of conduct or compliance?
11. Did the person personally know anyone associated with the compliance and ethics program? The more serious programs will have local representatives in the business units. These do not have to be full-time, but compliance should be a serious part of what they do (e.g., in the position description), and the people in the business unit should at least know the person is there.

For publicly traded companies there should also be information available relating to the compliance and ethics program in publicly available sources. The easiest to find is typically the code of conduct. As a matter of diligence it is useful to have this, and the code can provide background on the compliance and ethics program—but always take codes of conduct with some skepticism. By themselves they have no meaning unless they are actually used. There may also be other program elements available on a company's website.

## VII. THE COMPANY PRESENTATION

A company under investigation may request the opportunity to present information about its program to the agency. Here there is an important initial note of caution: If, instead of proposing a presentation, the company offers to send its code of conduct and/or compliance manual, consider just politely saying that the agency is not interested. No piece of paper can constitute a compliance and ethics program, and just looking at such a manual or code will not have value, unless it is only a precursor to a full presentation.

What are the dynamics of such a presentation? It is useful to start with the company's supporting documentation (as long as the whole "program" is not just a manual) in advance. This provides important background for the live question-and-answer sessions with company personnel. Expect the company to have documentation relating to every element of the program. Thus, in applying a standard like the Sentencing Guidelines or the OECD's Good Practice Guidance, expect documents on each element and sub-element. Request that they be organized on this basis, rather than lumped indiscriminately together. Companies may resist this, but that may be because they realize they have gaps in the program.

It should be no burden on the company to cover each point separately. If the company sends over boxes of extraneous materials (e.g., stacks of unrelated internal audit reports, glossy PR reports on corporate social responsibility, etc.), do not be reluctant to send them back and ask that they be pruned down to materials only related to the compliance and ethics program, organized according to the applicable compliance program standards.

Even though the burden of proof is on the company, the agency should not be reluctant to ask questions. For example, if the initial paper has nothing on discipline, this should be pointed out to the company. If there is nothing on audits, ask for this as well, but be clear that it is only compliance audits, not standard financial audits that matter.

For the presentation, the agency needs to hear from the right people. If the presentation is only by outside counsel this is likely to limit the depth of any answers to questions. It may be necessary to remind counsel that the burden is on the company, and unanswered questions or

assumptions by counsel will not help. Even the company's general counsel may not be the best source for information.

Essential participants include the person actually responsible for the day-to-day operation of the program. Often, when the general counsel states that he or she is the compliance officer, this does not mean that person does the day-to-day work. In major corporations the general counsel position is a full-time job; in practical terms it is impossible for a general counsel in a major firm to be the person with day-to-day responsibility for the program. Typically it is someone lower in the organization who does the real work, and that operational person needs to be there in person to discuss the program.

Similarly, it is important to hear from whoever in the company specialized in compliance in the specific risk area under investigation. Included would also be others who work in the compliance and ethics program. So, if a problem occurred in a specific subsidiary or business unit, the agency should ask to speak with the compliance person responsible for that unit.

In recent years, one difficult question in investigations has been the role of privilege. In a jurisdiction that recognizes privilege, in the context of learning about a company's program agency personnel should not require that the company waive privilege. Nevertheless the burden of proof is on the company, and the company cannot ask enforcement personnel to simply "trust them" because they do not want to risk waiving privilege by showing the government what they have done in their program. The company is free to design and staff the compliance and ethics program as it sees fit, as long as it can prove what it has done and the impact it had. But the company cannot reasonably expect the government to simply trust them and take their word for the legitimacy of the program; if there is no real proof then there cannot be real credit.

## VIII. IMPROVING COMPANY PROGRAMS

When an agency does take compliance and ethics programs into consideration and evaluates them, it has enormous potential leverage in moving companies to upgrade their program efforts. But if the consideration of programs is done in secret, or with no useful information provided to businesses, then the agency will lose much of the benefit of its work. Thus, in evaluating company compliance and ethics programs it is essential for the agency to publicize what it is doing.

Agencies should recognize that through this process of evaluating company programs they are molding corporate behavior. So it is essential that the information be specific. If the government points to specific steps in a compliance program, this can be electrifying in the compliance and ethics field. For example, if an agency said it refused to credit a program because the compliance officer was nothing more than an un-empowered lawyer in the legal department and the company had failed to have any form of incentives in its program, this could cause enormous progress in the development of good programs. Or, if an agency gave a company credit, and pointed out (i) that the chief ethics and compliance officer could only be fired by the board, (ii) the company's sales incentive program had to be reviewed by the compliance officer, and (iii) the company used computer-based screening to spot red flags of illegal conduct, this could give an enormous boost to the development of programs with real teeth.

If there is concern about confidentiality in investigations, examples can be publicized without identifying individual companies. As long as there are details of what program steps were good or deficient, how companies are treated when they have good programs, and the examples are clearly drawn from actual cases (albeit unidentified), such publicity will have the needed salutary effect.

Another strong caution is not to bury the compliance and ethics program's role under a list of factors. Anyone in industry who is paying attention already knows the government wants companies to come in and confess their violations, and to help the government in its investigation. It is no surprise when companies get credit for this. If an agency press release goes on at great length about how the company cooperated and accepted responsibility, and then tacks on a brief reference to the company's compliance program, this may be better than nothing, but not by much. Everyone already knows that agencies want them to turn themselves in and cooperate, so that should be treated as a separate matter.