

Beyond Compliance: Three Tips From Recent Cases

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Not long after Deputy Attorney General Sally Quillian Yates announced the U.S. Department of Justice's renewed focus on individual accountability for corporate crimes (the so-called Yates Memo), the DOJ also signaled that it would look more closely at the quality of compliance programs as a critical factor in resolving corporate wrongdoing. While the efficacy of such compliance programs have long been one of many factors considered, it has only grown in importance over time. The Fraud Section even took the step in November 2015 of hiring a new, full-time compliance expert, to provide "expert guidance" to prosecutors on the "existence and effectiveness" of corporate compliance programs and remedial measures.

Now, almost a year later, recent corporate cases resolved in the Southern District of New York illustrate the increased level of detail to which prosecutors are examining compliance



programs and make clear that the robustness of a company's compliance, training, and auditing programs will be a key focus of the DOJ when making charging decisions, and could result in substantially greater or lesser punishments. These recent examples underscore that compliance officers would be well advised to:

Make Incentives Match Compliance Goals

A compliance policy's promise on paper to follow the law is one thing, but prosecutors will take a skeptical

view of that promise if the company's compensation practices do not reinforce its policy. For example, a recent settlement with a for-profit school for violations of a U.S. Department of Education rule which prohibits incentive compensation for enrolling new students criticized the school for setting daily, weekly, and monthly targets for metrics like the number of phone calls made and interviews scheduled, and making such targets a "primary" factor in promotions for its enrollment personnel. *United States ex rel. Cage*

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v. The Allen School, 13 Civ. 4431 (PAE) (S.D.N.Y.). Although the company's policy called for employees to follow the Department of Education rule, its framework for compensation sent a conflicting message that ultimately resulted in the company running afoul of the law. Compliance officers would be well advised to assess carefully whether the compensation system used by the business supports—rather than frustrates—its compliance goals.

Verify What Your Employees Report

Self-reporting by employees concerning their adherence to internal policy may be a necessary part of a compliance program, particularly where a significant component of the employees' jobs takes place outside the office, but it should not be the sole basis by which their compliance is assessed. Rather, companies should look for ways to independently verify employee conduct wherever feasible. For example, in a recent settlement with a pharmaceutical company for violations of the federal anti-kickback statute, 42 U.S.C. § 1320a-7b, and the False Claims Act, premised on funding speaker programs for physicians and other health care professionals to recommend and promote certain of the company's products, *United States ex rel. Peikin v. Salix Pharmaceuticals*, 12 Civ. 8370 (DLC) (S.D.N.Y.), the company's internal policy required speaker programs to satisfy certain criteria. The events were to be held at venues conducive to an exchange of information, the cost of the meal was to be "modest" by local restaurant standards, and attendees were supposed to be health care professionals

with a legitimate interest in the scheduled topics and who had never been presented that topic before. Instead, however, there were many instances of the designated speaker spending little or no time discussing the company's products; doctors attending multiple programs on the same topic (at which the same presentation was scheduled to be given) within a short period of time; and programs taking place at high-end restaurants, with company sales representatives reporting that certain physicians attended, when they had not, solely to make the per-person cost of the event appear lower. The settlement criticized the company for not using sign-in sheets to track attendance, ensuring that the same topic was not presented more than once, verifying that only health care professionals with a legitimate interest in the scheduled topic presented, and corroborating the per-person cost of the dinners reported to the company. In other words, the existence of a policy and reliance on employees self-reporting compliance may not be enough; rather, simple measures, such as sign-in sheets, can offer businesses an effective way to assess independently employees' adherence.

Effectively Train Employees on Policy

A written compliance policy, no matter how strong, can only be effective to the extent it is communicated well to, and understood by, employees. Indeed, two separate settlements demonstrate that one of the key measures of the strength of a company's compliance policy is how effectively the company educates its employees. Both cases involved construction

companies accused of securing federally funded infrastructure projects by fraudulently claiming to involve disadvantaged business enterprises as subcontractors in the projects. However, in one, *United States v. Granite Construction*, the government agreed not to prosecute the parent company on the strength of the "far reaching" remedial measures it had undertaken, which included site visits by compliance program staff and mandatory training for managers and employees. In the other, by contrast, the company was forced to admit to making false statements and was further required to implement an internal training program for its employees regarding disadvantaged, minority-owned and women-owned businesses as a remedial measure for a period of two years. *United States v. Yonkers Contracting*, 15 Civ. 8630 (NSR) (S.D.N.Y.).

Together, these examples reinforce the message that prosecutors are serious about vetting corporate compliance programs and making sure they are effective. A good compliance policy on paper may be unlikely to be enough to avoid criminal liability. Focusing on the implementation of that policy—from training to verification to compensation—is critical.