Clout and Internal Compliance Systems

By John Brathwaite and Joseph E. Murphy

There is no doubt that the Organizational Sentencing Guidelines have given considerable impetus to preventive lawyering and internal, voluntary compliance programs to prevent the law is obeyed. The Guidelines have built on the experience of corporate lawyers and managers and the empirical research on corporate compliance in motivating employees to discounts put in place an "effective program to prevent and detect violations of the law." Interpreting what is an effective program is the challenge now confronting company managers, prosecutors and sentencing courts. In addition to the minimum requirements of voluntary compliance programs, there is another element that is the hallmark of an effective program. The authors have observed this from entirely different perspectives, but have reached the same conclusion on this point: Effectiveness depends first on top management backing and information and second, for the compliance staff!

Joseph Murphy draws on his 16 years experience as an in-house compliance lawyer and in ongoing discussions and exchanges with corporate lawyers and managers pursuing the same objective of ensuring corporate compliance. John Brathwaite has conducted empirical research on coal mine safety, with the results published in two books, "To Punish or Pardon: Enforcement of Coal Mine Safety," and on pharmaceutical regulation, with the results published in "Corporate Crime in the Pharmaceutical Industry." Both authors have concluded that effective, management-oriented compliance programs are the core element of a program consisting of paper and policies are not effective, while those that give authority to compliance oriented structures and processes, such as auditing safety engineers and compliance lawyers, can have a significant impact.

A credible compliance program ought to be able to produce a record of top management overseeing line managers in favor of backing compliance staff. As the drafters of the Guidelines recognized, the CEO's signature and pictures of his or her smiling face on compliance policies are not enough. Only a history of support for compliance in the face of crunch contests between line managers and compliance staff is convincing evidence that the compliance policies will be respected. One of the discouraging according to the philosophy of "watch what the bosses do, not what they say." Informal clout for compliance staff is as important as formal top management backing and the formal clout that comes from the compliance officer having a senior position in the organization.

Informal clout can mean that it cannot override the signature of a senior manager. The line manager who is a senior manager will sign off on overruling compliance staff recommendations for fear of the less powerful who are overruling will occur and the greater the clout that resides with the compliance staff. Of course, in the United States, much of the documentation will be tempered by the various levels of reliance litigation, which may tend to push the process away from documentation and into less formal methods.

A classic illustration of this source of compliance clout can be seen in the quality assurance staffs of American pharmaceutical companies, whose recommendations about purity and sterility of batches of drugs can only be overruled with the signature of the company's president. Prior to such procedural rules being implemented, quality assurance staff would periodically find themselves overridden by managers who would not tolerate a failure to meet their production goals, or a last minute change by pharmaceutical industries does not support the conclusion that compliance with the large corporate staffs necessarily do better at securing compliance. Companies with outstanding compliance records improved the accountability on line managers for compliance failures. It is they, rather than the compliance staff who must take the fundamental responsibility for compliance. But the line managers have to get the job done. A vibrant compliance program acts as a system of checks and balances on corporate compliance. But the compliance managers' success in this context is affected both by the major crunch contests, and by the seemingly small, day-to-day tests of their authority. Are the staff members' recommendations second-guessed? Is their work reviewed and edited down to the point that the program is watered down? Are they kept away from senior managers and from major decisions? Do they have an opportunity to meet with line managers to discuss the problems with the compliance staff repeatedly postponed for "more important things"? Does the problem get held back or viewed as a mere gale, this defeats its ability to act as a check on the business activities.

Ultimately, when government begins to understand the dynamics of corporate control, it will realize the key role it could play in establishing the clout of compliance managers. If these managers are in turn, to be empowered by the state to be able to win for their companies substantial, tangible benefits, e.g., reduced risks of penalties, the benefit of an effective program will be self-evaluation reports, public recognition and financial rewards, as well as the public relations efforts, and if government offers those managers a hand in partnering with the government's office to work with compliance managers – then there will be the type of dynamic that can manage the vagaries of management styles and business cycles.

For managers who want to know if their compliance programs will really achieve results, for courts who want to know whether a program is truly diligent and effective, we suggest these factors as tests of the compliance staff's clout:

1. Resources sufficient to do the compliance auditing task;
2. Senior manager rank for the compliance officer;
3. Route of corporate communication that work from the compliance staff: a) direct to the line personnel accountable for solving any particular compliance problem; and b) direct to the chief executive and the audit committee;
4. A documented history of compliance.
pliance programs." The states that provide guidance to compliance programs apparently do so on a case-by-case basis. The North Dakota Attorney General’s Office, for example, advises that on a "case-by-case basis, the North Dakota Department of Health and Consolidated Laboratories provides information to the regulated community on elements of compliance programs." Similarly, the Illinois Attorney General’s Office provides input to the regulated community regarding "case-specific and global compliance issues."

The offices responding to the survey also provided information regarding specific areas where compliance criteria have been indirectly established. For example, the labor section of the North Carolina Attorney General’s Office refers employers who request information concerning guidance for compliance with OSHA standards to the Education and Training Division of the North Carolina Department of Labor. Another example is Minnesota’s Attorney General’s Office, which has participated in the publication of advertising guidelines for the airline industry, car rental companies and environmental marketing, that interpret state statutes prohibiting false, deceptive or misleading advertising as applied to the specific activities.

The Minnesota Attorney General’s Office explains that these guidelines “provide businesses with a ‘safe harbor’ if their advertising practices adhere to the guidelines.”

INCENTIVES FOR COMPLIANCE EFFORTS

Only two states responding to the survey—Minnesota and North Dakota—provide regulatory or other incentives, such as reduced oversight or award programs, for companies making compliance efforts. North Dakota’s Attorney General Office advises that the Department of Health and Consolidated Laboratories “periodically” gives awards and citations for voluntary compliance efforts, such as “waste management facilities with good compliance records and awards to operators of water treatment and waste water facilities.”

Minnesota’s Attorney General Office also provides an incentive for businesses making compliance efforts and is considering expansion of its current incentive program. Currently, pursuant to the Minnesota printing industry agreement discussed earlier, involvement in the auditing program will be weighed in applying the state’s environmental penalty policy. Furthermore, the Minnesota Attorney General’s Office is examining “whether a broader compliance incentive program might help achieve wider voluntary compliance with environmental laws in the state.”

THE COMPLIANCE MESSAGE

The survey responses indicate that voluntary compliance efforts generally have a positive impact on state attorneys general. The lack of established compliance criteria and incentive programs, however, suggests that most state attorneys general have not yet fully accepted and incorporated the role of voluntary compliance efforts into their investigative, enforcement and penalty determinations. The impetus of the Federal Organizational Sentencing Guidelines, which stands to fill the definitional vacuum with its standards for an “effective” compliance program, may well provide a substantial boost to these state efforts. Despite the existing uncertainty, alert company managers should view the favorable survey responses as encouraging and should take these responses into account in deciding whether to implement or strengthen a compliance program.

3. The twelve states which did not provide substantive responses to the survey are: California, Florida, Georgia, Hawaii, Idaho, Missouri, Montana, Oklahoma, Commonwealth of Pennsylvania, South Carolina, Vermont and West Virginia.
8. Id.
9. Id.
11. Id.
16. Id.
17. Wyoming letter, supra note 5.
21. Id.