

COMPLIANCE AND ETHICS PROGRAMS FOR GOVERNMENT ORGANIZATIONS

Lessons From the Private Sector

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Organizational Integrity

Legal Compliance

- Our major premise is that compliance with the law is a baseline expectation flowing from our national commitment to **the rule of law** and to the principle that that **public office is a public trust**.
- A program to prevent and detect organizational non-compliance with the law is a core element of modern corporate governance.
- The Rutgers Center for Government Compliance and Ethics was established to advance the application of effective corporate ethics and compliance program principles as an element of public governance at the federal, state and local levels.
- The session will provide an overview of the development of corporate compliance programs, the business case and the benefits of the adoption of such programs in a government environment.

Topic Areas

- A few Examples
- What laws?
- The Center's Mission
- The Federal Sentencing Guidelines for Organizations / Program Elements
- Private Side motivation
- Public Side motivation / Benefits
- Possible Objections

A Few Examples

Federal Mine Safety and Health Administration

- In March 2010, the Department of Labor's Office of Inspector General (OIG), issued a report, captioned Journeyman Mine Inspectors [in the Mine Safety and Health Administration] Do Not Receive Required Periodic Retraining, in violation of the Federal Mine Safety and Health Act of 1977 (Section 505).
- <http://www.oig.dol.gov/public/reports/oa/2010/05-10-001-06-001.pdf>



DOL OIG Conclusion

- “This [non-compliance] increases the possibility that hazardous conditions may not be identified and corrected during inspections which, in turn, could increase the risk of accidents, injuries, fatalities, and adverse health conditions for miners.”
- Begs the question: What else is out there?

West Virginia Upper Big Branch Coal Mine Explosion



29 of 31 men working at this site died April 5, 2010.



National Security Letter - Issue in brief March 2007

- What are they?
 - FBI issued letters to obtain information from telephone companies, financial institutions, internet service providers and consumer credit agencies.
- The Authority - 5 provisions contained in 4 statutes.
- <http://www.justice.gov/oig/special/s0703b/final.pdf>

DOJ OIG Findings

- Faulty recordkeeping understated the total number of NSLs issued – by about 20%. Those numbers were reported to Congress.
- Failure to self-report non-compliance to the President's Intelligence Oversight Board.
- 46 of 77 files contained one or more errors –
– 60 % error rate.

Reasons

- No clear guidance, leading to:
 - Confusion amongst those administering the program.

Motivation

- “Moreover it is important to recognize that in most cases the FBI was seeking to obtain information it could have obtained if it had followed applicable statutes, guidelines and internal policies.” (OIG report at p. xlvii)

Reaction

- Congressional hearings / criticism
- Adverse news editorials
- Internal reviews / responses to the OIG
- Internal question – what else is out there?

Reaction

- “If a private company reflected the same disregard for technical and legal compliance as did the FBI, the FBI and Justice would be all over them.”
 - » Washingtonian Magazine, Sept. 2008, p. 119 quoting Alan Raul, Vice Chair of the President’s Privacy and Civil Liberties Oversight Board.

Some Other Examples

- **Center for Medicare and Medicaid Services:**
Deficiencies In Contract Management Controls Are Pervasive: <http://www.gao.gov/products/GAO-10-60>.
- **State and Municipal Bonds:**
<http://www.sec.gov/litigation/admin/2010/33-9135.pdf> (New Jersey negligent misrepresentation)
<http://www.sec.gov/litigation/admin/2006/33-8751.pdf> (San Diego intentional misrepresentation)
- **Minerals Management Services:**
<http://www.doi.gov/images/stories/reports/doc//RIKinvestigation.txt> (Cultural issues – ethics rules do not apply)
- **Local compliance with HUD rules:**
Generally: <http://www.hud.gov/offices/oig/reports/oigstate.cfm>
- **Atlanta school system cheating scandal:**
http://gov.georgia.gov/00/press/detail/0,2668,165937316_165937374_173112104,00.html

Sample of Laws With Which the Federal Agencies Must Comply

Non-exhaustive list of laws governing Agency operations / in addition to your own authorization law

- The U.S. Constitution
- Federal Statutes
 - Title 5 - Government Organization and Employees
 - Title 28 Judiciary and Judicial Procedure
 - Title 31 Money and Finance
 - Title 40 Public Buildings, Property, and Works
 - Title 41 Public Contracts

Other:

- Presidential & OMB Directives / Congressional Prerogatives - demands
- Inter-agency agreements / memoranda of understanding
- Other agency regulations: e.g. federal travel regulations
- Internal Rules / Policies / Directives

The Center's Mission

- Advance the application of effective ethics and compliance **program principles** as an element of public governance at the federal, state and local levels in the United States and internationally through a variety of activities including research, education, networking and thought leadership.
- Where do we find those program principles?
 - Federal Sentencing Guidelines for Organizations
 - Industry Best Practice

Federal Sentencing Guidelines for Organizations

- FSGO - Around since 1991.
- Amended 2004 and 2010.
- Standard for evaluating organizational due diligence in preventing and detecting organizational non-compliance.
- Requires risk analysis.
- Affects “charging” decisions and sentencing.

– See United States Sentencing Guidelines, Chapter 8 et seq., particularly USSG § 8B2.1, for the elements of an effective compliance and ethics program: http://www.ussc.gov/guidelines/2010_guidelines/Manual_HTML/Chapter_8.htm

FSGO Compliance Program Elements

- Legal and ethical risk analysis/mitigation.
- Oversight from a knowledgeable governing body.
- A high-level manager with overall responsibility.
- Incentives / discipline to promote and enforce the program.
- Mechanisms to raise compliance concerns / non-reprisal policy.
- Applying compliance controls – policies / training / monitoring / auditing
- Communications and training.
- Periodic evaluation of the effectiveness of the program.

Best Practice Element

- Compliance is the Business of the Business.
 - This concept defines the roles and responsibilities of the compliance and ethics function and the rest of the agency.

Role of the Compliance Officer

- Underlying notion – “Compliance is the Business of the Business.”
 - Facilitate risk identification / mitigation.
 - Set the agendas for compliance committee.
 - Train on the compliance program.
 - Monitor Help line.
 - Recommend compliance control solutions.
 - Develop and implement compliance policies.
 - Measure effectiveness.

Why Did the Private Sector Adopt Compliance Programs?

To avoid this →



Seriously

To mitigate against the possibility of:

- Fines
- Civil liability
- Loss of Reputation
- Administrative action - debarment

Why Should the Public Sector Adopt this methodology?

- Just good public policy:
 - Upholds the rule of law / public office is a public trust.
 - Government entities are “organizations” within the meaning of the federal criminal law. (18 U.S.C. §18)
 - Affect on ethics:
 - How we do things as important as what we do.
 - FSGO: “The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.”

GAO / OMB Standards for Internal Controls

- **Internal Control**

- An integral component of an organization's management that provides reasonable assurance that the following objectives are being achieved:

- effectiveness and efficiency of operations,
 - reliability of financial reporting, and
 - **compliance with applicable laws and regulations.**

- **Compliance Program** – is a methodology for achieving internal control over compliance with the law.

- [GAO: http://www.gao.gov/special.pubs/ai00021p.pdf](http://www.gao.gov/special.pubs/ai00021p.pdf)
- OMB: http://www.whitehouse.gov/omb/circulars_a123_rev

Benefits

- Address issues before they reach critical mass.
- Credibility with oversight partners and encourage employee ethical behavior through organizational leadership.
- “Regulating agencies” better regulate corporate compliance through the agency experience.
- Analyze cause of non-compliance – Systemic problem? Employee problem?

Benefits (Cont'd)

- Detect internal management control weaknesses.
- Give life to often stated agency values of individual and organizational integrity.
- Agencies forced to solve problems across functional lines and gain effectiveness and efficiency in doing so.
- Cost effective by getting the job done right the first time and avoid costly fixes.

Differences Between Government and Private Sector

- No Board of Directors
 - Need high level involvement
- Risks much different

Private

- Criminal Liability
- Civil Liability
- Administrative Finding
- Reputation

Government

- Public trust
- Privacy and civil rights
- Constitutional rights
- Reputation
- Abridgment of authority
- Confidence in our institutions

Possible Objections

- There are significant oversight mechanisms in place.
- We already have too much on our plates – you tell us where the risks are and we will advise you on the solution.
- We already have an Ethics program.
- There is no requirement that we do this.

Initial Decision Points

- Scope of program – mission only or all rules.
- Infrastructure to manage the program.
- Senior leadership involvement.
- To whom should the compliance officer report?
- Size and role of the compliance office.
- Incorporating existing structure – Ethics office / internal audit .

Employer - Employee Obligations

- Duty of government:
 - To its citizens: assure that it is carrying out its mission in compliance with the law.
 - To employees: provide proper guidance, training monitoring, and auditing.
- Duty of Employees:
 - Know the rules.
 - Comply with the rules.
 - Report non-compliance and shortcomings in the policies, training, and monitoring.

James Madison, Federalist Paper No. 51 (1788)

- *If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; **and in the next place oblige it to control itself.***



Conclusion

- Agency compliance with the law is at the heart of organizational integrity and is a shared responsibility.
- A program to prevent and detect organizational non-compliance is a core element of modern corporate governance.
- The RCGCE was established to advance the application of effective ethics and compliance program principles as an element of public governance at the federal, state and local levels.
- Hopefully this session has provided you with an overview of compliance programs in the private sector and a rationale based on guiding principles and actual benefits for adoption of such programs by government agencies.