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Regulators Target Weak Compliance Cultures

By Melissa J. Anderson June 1, 2015

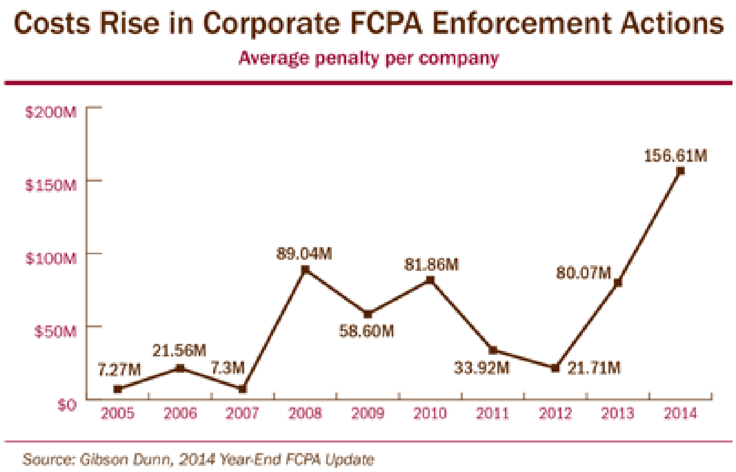
Government investigators can spot a weak compliance program easily, according to officials at the **SEC** and **Department of Justice**. A "paper program," as weak compliance programs are commonly known, could merit a harsher penalty if the company is investigated by the regulators.

Common red flags include a program that shifts blame from senior executives to low-level employees, an underfunded or underutilized compliance department, and a compliance function without the power to say no to business deals, officials say. Boards can help their companies avoid regulatory scrutiny by addressing these red flags and ensuring that their compliance process works in real life, and not just on paper.

Enforcement by the SEC and DOJ is getting tougher. For example, the average Foreign Corrupt Practices Act resolution cost an all-time high of $156.6 million per company last year, according to **Gibson Dunn** research. But a healthy compliance program can help reduce these costs.

"One of the sentencing guidelines they look at is how strong the culture of compliance in an organization is," says **Jean-Marc Levy**, president of ethics and compliance solutions at the consulting firm **LRN** and a member of the company's executive committee.

"That's the biggest shift boards should be sensitive to. There is a realization that there is a difference between doing the right thing versus doing things right. What's legally required as a floor is not necessarily sufficient in order to establish a true culture of compliance," Levy says.



For example, on May 20 the SEC fined Australian mining company **BHP Billiton** $25 million, its largest civil penalty ever, for FCPA violations within its global hospitality program. The company had invited almost 200 government officials and employees of state-owned businesses to attend the 2008 Beijing Olympics on its own dime, offering luxury hotel packages and sightseeing trips in addition to tickets to the games. Sixty of the officials took BHP Billiton up on the offer, with 24 bringing along family members. According to the SEC, the guests had the power to help the company secure business in locations like Burundi, the Philippines, Democratic Republic of the Congo and Guinea.

The company required employees to fill out internal applications on individual guests to gauge whether their invitation could be seen as an ethics violation, but the forms were often inaccurate or incomplete. For example, many employees described a potential guest as a "customer" while omitting the guest's position as a government representative. The forms were also never reviewed by the company's compliance personnel. According to the SEC, this shows how BHP Billiton "failed to devise and maintain sufficient internal controls" over the hospitality unit.

"They had the form filled out, but no one looked at it," said **Kara Brockmeyer** while speaking on a panel at the Compliance Week annual conference in May. Brockmeyer is chief of the FCPA unit in the Division of Enforcement at the SEC. According to Brockmeyer, a strong compliance program would have seen compliance personnel investigating the forms and making a clear yes or no determination on whether the individual could be invited.

She also suggested that cases like this can be used as a "weapon" by compliance personnel when asking for a bigger budget or staff, or when saying no to a business deal.

According to **Laura Perkins**, assistant chief of the FCPA unit in the criminal division of the DOJ, it's easy for officials to find out if a compliance program is effective.

"It's easy in a half-hour or two-hour meeting to make something sound good, but when you drill down and ask questions," she said during the same panel, the truth about a program is not hard to spot. Those same questions could be useful for a board or audit committee interested in finding out whether their own company's compliance program is effective. They include:

- How do you know if your program works?
- Have you tested it?
- Have you translated compliance policies and documents into local languages?
- Have you distributed policies at all of your locations?
- Have you certified that employees have attended required training?
- Have you maintained records on whether they attended training?

These questions have become more salient since the **Federal Bureau of Investigation** announced in March the establishment of three international corruption squads, in New York City, Los Angeles and Washington, D.C. Perkins said companies can expect to see more FCPA cases as a result. Some boards may want to make changes if they don't like the answers they're getting, she suggested.

"When I advise companies, one of the things I'm usually doing is helping them restructure the compliance department so there is independence and empowerment and line of sight, so the compliance function can operate without having its hands tied or its judgment micromanaged," says **Donna Boehme**, principal of **Compliance Strategies** and the former group compliance and ethics officer for BP.

According to Boehme, restructuring compliance can be difficult for a company to undertake, especially since many sources of internal power will shift and managers may be expected to follow new processes and report to new people. Employees may question whether the espoused changes are meaningful.

These are reasons why it's important for company leaders to model new behavior expected under ethics and compliance codes as well, said **Donnie Smith**, president and CEO of **Tyson Foods**, during the Compliance Week conference.

According to Smith, compliance is taught by example and starts with the senior team. Tyson was the subject of several scandals throughout the early 2000s: a questionable environmental record, accusations of price manipulation, charges of mistreatment of animals and undisclosed use of antibiotics in some of its products. When Smith was promoted to CEO in November 2009, Tyson began shifting toward a "values-based" culture, he said. Suppliers, partners and customers now have "the freedom to call us on anything," he added.

"If you've got a culture that's toxic, you're not going to achieve half of what's possible. [Compliance] helps define that line," said Smith.

Tyson Foods reported $37.5 billion in revenue last year, up from $26.7 billion in 2009, the year Smith took the helm. It also completed its biggest acquisition ever, of Hillshire Brands, last year. The company is now expected to produce more than $40 billion in annual sales. According to Smith, this is proof that a strong ethics and compliance program pays off.

"The line that separates right from wrong is always there," said Smith, who is also a director on Tyson's board. "It's absolutely critical to make sure it's crystal clear about where that line is."