



*The Top Ten Reasons Your Compliance Plan Fails to Reduce the Risk of Whistleblower Claims and FCA Enforcement*

*Co-sponsored by the Business Law and Governance, Fraud and Abuse, Hospitals and Health Systems, In-House Counsel, and Teaching Hospitals and Academic Medical Centers Practice Groups*

September 15, 2009 · 1:00-2:30 pm Eastern

More Reasons Why Compliance Plans Don't Reduce Whistleblower and Fraud Enforcement Risk

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# Effective Compliance Programs Are Required and Commonplace... Right?

# Testimony and Legislation Suggests Need for Mandatory Compliance

## **Testimony of Inspector General Dan Levinson before House Committee on Energy and Commerce on June 25, 2009**

Providers and suppliers need to be assisted in adopting and maintaining practices that promote and maintain compliance with program requirements, including quality and safety standards.

## **Testimony of Lew Morris, OIG Chief Counsel before Senate Finance Committee on April 22, 2009**

Health care providers ... should adopt internal controls and other measures that promote compliance and prevent, detect, and respond to health care fraud, waste, and abuse. Compliance programs are an essential component of a comprehensive anti-fraud strategy, and policymakers should consider how to motivate health care providers to incorporate integrity safeguards and tools into their organizations.

## **“American’s Affordable Health Choices Act of 2009” (HR 3200)**

Includes provision requiring that providers and suppliers adopt compliance programs as a condition of participation in Medicare and Medicaid programs.

## **New York Medicaid Mandate**

Effective October 1, 2009, New York (18 N.Y.C.R.R. Section 521.1) requires every Medicaid provider receiving in excess of \$500,000 per annum to have an effective corporate Compliance Program.

# **Most Compliance Plans Will Pass the Stress of Enforcement Review... Right?**

## **Settlements Reflect Compliance Programs Are Not Working**

- The rare DOJ and OIG settlement fails to dictate compliance terms including certifications, monitors, IROs, education, and development of effective programs.
- In many cases (Tenet and Pfizer to name just a couple obvious examples) organizations have made substantial investments in sophisticated programs that are deemed ineffective.
- Compliance programs are not identifying and avoiding serious and preventable departures from lawful conduct with onerous resulting sanctions.
- The problem may be the lack of supporting culture as opposed to an understanding of what effective compliance requires.

# Scrutiny of Compliance Remains Steady

## United States v. Caputo

Corporate compliance officers are very much today's corporate 'fire personnel.' They are often the company's 'first responders' and must focus on both proactive and reactive efforts to be effective. Proactive efforts need to emphasize the complimentary goals of prevention and corporate ethical behavior. Reactive efforts measure how well a corporation reacts when it learns that questionable and potentially illegal corporate conduct has occurred.

**But Your Compliance Program  
Actually Works and Reduces Risk...  
Right?**

# **More Reasons Compliance Plans Don't Reduce Whistleblower and Fraud Enforcement Risk**

# 1. Process Masks Substance

- Paper and process dominate the compliance process.
- Compliance programs fail to react to the evolving nature of whistleblower and enforcement threats.
- The major whistleblower and enforcement cases in the news don't involve the OIG Work Plan or the internal compliance work plan.
- The enforcer's key question: "Why didn't your compliance program identify and head off this problem?"
- The problems resulting in painful settlements were missed or blown by operating compliance programs.

## 2. Compliance Is Not a Priority

- Compliance is a non-revenue producing function that is not a business priority.
- Few organizations credibly promote the importance of compliance and commitment to doing the right thing.
- Compliance is not a subject of executive or managerial performance review.
- Lack of internal support, recognition reinforces the low stature of the compliance function.
- Compliance functions are carried out in silos.
- Everyone assumes their program is adequate and deems enforcement risk to be a matter of random selection or fate.

### 3. The Written Program Is Not Operated

- Compliance programs fail to carry out key operations outlined in policies and procedures.
- Stale or “shelf” programs are common and create governance oversight issues and enhanced sanctions.
- It is better to have no compliance program than to ignore the one represented to be in operation (and at risk of being deemed “fake”).
- Compliance programs are not the subject of meaningful governance oversight or review.
- Compliance programs are not updated to conform to operational reality never mind the evolving risk environment.

## 4. Compliance Lacks Adequate Resources

- Compliance Officers are vital to effective programs but marginalized and routinely denied budget, personnel and other needed resources.
- Compliance reporting lines and authority remains a serious issue with many officers lacking appropriate reporting channels and support.
- Compliance Officers are not viewed as members of senior management.
- Cases of Compliance Officers ignoring problems and going along with management directed operation of deficient programs will aggravate enforcement response.

## 5. Compliance Risks Are Not Effectively Assessed

- Compliance effectiveness and risk assessments demand resources that do not compete well as business priorities (even in good economic times).
- Compliance programs are not subject to regular reviews for effectiveness, with typical result being failure to identify or focus workplans on priority risk areas.
- Inadequate risk assessments aggravates organizational exposure to whistleblower claims and enforcement, and result in aggravated sanctions.
- The bulk of existing programs fail to meet effectiveness standards, fail to identify actual risks, and thus fail to manage organizational risk in a manner that eliminates problems.

## 6. Hotlines Are Not Advertised

- Organizations lack functioning hotlines and other effective reporting mechanisms.
- Below norm hotline usage is typical and indicative of an ineffective compliance program.
- Few organizations promote hotline use and many still fail to allow anonymous reporting or opportunity for follow-up.
- Enforcement authorities focus on whether issues were raised internally, and evaluate efforts to generate internal reporting and responses thereto.
- Program reviews regularly expose failure to educate employees to use hotlines or other mechanisms to report concerns.

## 7. Compliance Education Is Ineffective

- Compliance education is limited, boring and fails to offer tailored and meaningful messages to employees at all levels.
- Organizations fail to effectively communicate compliance basics never mind False Claims Act and whistleblower protection specifics.
- Computer lessons predominate over live and interactive education that can raise interest, improve understanding and increase internal reporting.
- Certifications are increasingly necessary to ensure that compliance issues are being identified and addressed.

## 8. Compliance Reports Are Mishandled

- Even in cases where internal reporting mechanisms are functioning, employee complaints are routinely mishandled or ignored.
- Organizations fail to properly assess internal reports or respond in a way that deters whistleblowing to external parties.
- Anonymous compliance reports are still frequently dismissed or discounted without investigation.
- Managers are not trained to properly respond or handle reports.
- The bulk of the significant enforcement cases today stem from internal reporters who were disregarded by internal responsible parties.

## 9. Enforcement Settlements Are Ignored

- Compliance programs fail to consider the applicability of enforcement actions and reported settlement terms to their related organization.
- Notable settlements are fodder for arguments distinguishing other unlucky organizations and disclaimers of risk of similar exposure.
- Enforcement settlements are not viewed as defining effective compliance program elements or “best practices”.
- Enforcement trends, regulatory guidance and whistleblower related cases and settlements are not used to focus compliance efforts to prevent similar problems.

## 10. Employees Are Misunderstood

- At best, employees seriously question (if not dismiss) the putative commitment to corporate compliance and ethics.
- Employees do not believe that they are welcome or encouraged by their managers to raise concerns or report problems (regardless of what their managers think).
- Whistleblowers are routinely “stonewalled” or “ignored” when they do raise concerns that ultimately result in serious enforcement problems.
- Middle managers in particular appear to lack the ability to understand employees’ perceptions that there are impediments to internal reporting.

# 11. Organizations Are Not Prepared to Investigate Compliance Reports

- The rare organization prepares to competently investigate reported compliance issues or problems.
- There is a routine failure to correctly assess potential liability, formulate effective corrective action or understand the likely enforcement response.
- Improper internal investigation is more frequent and serves to aggravate problems.
- The Compliance Officer and inside counsel are essential but may also need protective distance.

## 12. “Disgruntled Employees” Are Disregarded

- The prevailing view remains that compliance reports are the product of “disgruntled employees.”
- Whistleblower reports are dismissed, and usually quickly and for all the wrong reasons.
- There is a failure to focus on the substance and relative merits of the complaint or reported concern.
- Enforcement authorities are well versed in evaluating the motivations and credibility of whistleblowers together with the substance of their complaints.

## 13. Whistleblowers Are Not Protected

- Training and education fails to convey the prohibition on retaliation or make the point that protection is part of a commitment to compliance.
- Protection is particularly important when whistleblowers are internally identified or suspected and remain in their positions.
- Dismissals of whistleblowers run substantial risks and must be handled without aggravating exposure to liability.
- Increasing retaliation claims reflect actual reality and practice.

# 14. Economic Distress Further Undercuts Compliance

- The business case for compliance is generally not accepted by managers - never mind in the course of a serious recession.
- RIFs and other cost-reduction efforts serve to further aggravate disillusioned employees (including Compliance Officers).
- Compliance resources are being further reduced at a time when enforcement scrutiny is accelerating and employees are being educated on their protected role as whistleblowers.
- Lack of priority treatment of compliance and RIFs serve as recipe for more whistleblower, FCA and retaliation claims.

# Enough Already. So What Can Be Done to Reduce the Risk of Ineffective Compliance?

# Improving Compliance in the Current Enforcement Climate

- Make commitment to compliance and ethics a stated priority that flows from the top and is the subject of ongoing reinforcement.
- Ensure compliance has adequate resources and reporting authority, including proper reporting access.
- Require Board involvement and interaction sufficient to confirm there is a competent and effective compliance system in operation.
- Perform ongoing assessments to assure effectiveness and make modifications necessary to identify and correct problems.
- Enhance reporting mechanisms to assure employees that their reports are welcome, and will be rewarded and protected.
- Increase use of certification and training to ensure problems are reported internally.
- Seek feedback and expert input to achieve documented operational compliance that will be credited as best practice.
- Audit, monitor and address risks based on actual enforcement experience and settlement terms.
- Be prepared to explain to enforcement authorities why your program should be credited as effective and not the subject of dictated compliance terms.
- Engage your local enforcer and vet your compliance program against prevailing effectiveness standards and expectations.
- Establish a comprehensive plan for investigation and response to hotline and other compliance reports or detected issues.

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