

An Effective FCPA Compliance Program-by Lanny Breuer

At the recent Compliance Week 2010 Annual Conference one of the issues discussed by Assistant Attorney General, for the Criminal Division of the US Department of Justice, Lanny Breuer, was what the Department of Justice (DOJ) might consider as an “effective compliance and ethics program” under the Foreign Corrupt Practices Act (FCPA), if a FCPA violation occurs and a company’s compliance program comes under scrutiny from the Criminal Division of the DOJ. We believe that Breuer gave the conference attendees quite a bit of information that can be utilized by companies in crafting and evaluating their compliance policies.

Breuer noted that the most effective type of compliance program is one that “prevents fraud and corruption in the first place but when such compliance program has not done so, there are defined policies in place to “quickly detect, fix and report the [FCPA] violations.” Additionally, an effective compliance program should not be static but dynamic to meet changing business circumstances, such as when a company might move to doing business in a high risk country. Effective compliance programs should also be ever-evolving through continued assessments, as the compliance world grows and matures. Breuer cited two source material references as benchmarks; he listed (1) the Principles of Federal Prosecution of Business Organization and its full section on corporate compliance programs and (2) the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance.

Breuer then delineated several elements that the Criminal Division would evaluate in assessing a company’s compliance program, should a FCPA violation occur.

- Does your company have an effective compliance “Tone at the Top”; so that the Board and CEO are demonstrated to be fully committed to an effective compliance program?
- A company’s compliance program should not only punish compliance violations, through termination, other disciplinary actions or reduction in or denial of bonus but should also reward good ethical behavior in a corporation by promotion of ethical employees or other rewards such as a significant component of an overall bonus program. Regarding employee discipline, Breuer emphasized the DOJ would review all circumstances surrounding a company’s decision regarding discipline but that any “superficial steps” would not impress the DOJ.
- A company should have a strong whistle-blower program through a hotline or other appropriate mechanism and protection for any employee who reports such conduct through anonymous reporting and a clear no-retaliation policy.
- The compliance function led by a person with senior level management authority, the overall compliance function should have clear reporting lines to such senior level employee and such person should have a direct reporting by a company’s compliance officer to the company’s Board of Directors.
- There should be periodic reviews of a company’s compliance program, utilizing internal resources such as a company’s Internal Audit function and outside professional consultants.

- A company's effective compliance program should be extended directly into foreign business partners, such as agents, distributors, reseller and joint venture partners.

Breuer ended this portion of his talk by re-emphasizing that the DOJ was not only interested in your company's compliance program but also other companies with whom you might be doing business with and the effectiveness (or lack thereof) of their compliance program. This would not only extend to foreign business partners but also those companies in your Supply Chain and conceivably down to your customer base.

So do you have an "effective compliance program" as outlined by Lanny Breuer?