

How Cole Porter Informs the Debate: Ethical Compliance v. Legal Compliance

In an article in the October 2011 issue of the ACC Docket, entitled “*Who Needs Business Ethics When You’ve Got the Law on our Side?*”, author James Nortz explores the question, “What good is this business ethics crap when there’s a law for everything?” While perhaps phrased in a different manner, most lawyers were certainly trained in law school to focus on the question of whether something was ‘legal’ in performing an analysis of whether a client *could* engage in some action. Lawyers were generally not trained on whether a client *should* engage in some action. Nortz looks at some of the differences.

Nortz frames the question more along the lines of “let the law be your guide” and recognizes this approach has “a certain simple, minimalistic, free-market appeal, avoiding messy questions regarding whose sense of right and wrong will prevail.” Within the Foreign Corrupt Practices Act (FCPA) compliance world this approach can be shown by contrasting the examples of the requirements of the Us Sentencing Guidelines and the Department of Justice’s *best practices* compliance program as set out in various Deferred Prosecution Agreements (DPAs) over the past 14 months.

USSG’s 7 Elements of an Effective Compliance Program	Panalpina DPA Best Practices Compliance Program
1. Standards and procedures to prevent and detect criminal conduct.	1. Clearly articulated and visible compliance program.
2. Leaders understand/oversee the compliance program to verify effectiveness and adequacy of support, specific individuals vested with implementation authority/responsibility.	2. Sr. management’s strong and explicit visible support.
3. Deny leadership positions to people who have engaged in misconduct.	3. Develop and promulgate compliance standards and procedures governing gifts, hospitality, travel, etc.
4. Communicate standards and procedures of the compliance program and conduct effective training.	4. Risk assessment as basis for standard and procedures.
5. Monitor and audit, maintain reporting mechanism.	5. Annual review of program.
6. Provide incentives; discipline misconduct.	6. Assign responsibility to one or more sr. corp. execs for implementation and oversight; directly reporting to the BOD; adequate level of autonomy and sufficient resources.
7. Respond quickly to allegations and modify program as required.	7. System of financial and accounting procedures.
	8. Effective communication and periodic training and certifications.

	9. System for guidance, confidential reporting and response.
	10. Disciplinary procedures.
	11. Agent and business partner due diligence.
	12. Agent and business partner agreements.
	13. Period review and testing of standards and procedures.

A review of the above shows additional detail in the Panalpina DPA *best practices* compliance program. Simply following the law in the FCPA context will not provide a company with the detail which a compliance program should sustain to adequately protect a company. Nortz also notes that an approach of “let the law be your guide” will also fail because “it implies, in the absence of a definitive rule that anything goes” (and here he is NOT referring to the Cole Porter revival.)

Nortz concludes by noting that a more rounded ethical approach will not only prevent more absurd results but provide for greatly employee productivity and more loyalty from third parties, whether those third parties are customers, agents or vendors. While noting what may seem like the obvious, that business professional must take ethical obligations into account, lawyers must remember that simply complying with legal compliance is not always sufficient.

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