Taking a Broader View of Compliance Risks and Enforcement Readiness: Tips on Maintaining Good Regulatory Relationships, and Preparing for Grand Jury Subpoenas and Search Warrants

By Peter C. Anderson, JD, CCEP

Introduction

Every compliance professional knows that one of the most important factors that helps reduce the risk of aggressive governmental enforcement is an effective and well-documented corporate compliance program. When companies and their executives first discover they are under criminal investigation, the first reaction is often total shock and disbelief. This element of surprise gives the government a tremendous advantage at all stages of an investigation. Rare is the company that ever suspects or anticipates that it could possibly become the target of a criminal investigation. Accordingly, this false sense of security removes any incentive to take precautionary measures.

This article broadens the preventive focus of compliance by offering some additional protections across the full spectrum of enforcement—including some practical precautionary suggestions for demonstrating “good corporate citizenship” and maintaining productive relationships with regulators, as well as some responsive tips on how to be better prepared to respond to grand jury investigations.
Keeping Things Civil: Tips on Maintaining Good Relationships with Regulators and Inspectors

Every company should strive to demonstrate to the regulators that it is committed and qualified to objectively self-policing its own operations in a responsible, trustworthy and lawful fashion. Once that level of trust is established over time, the regulators are more likely to direct their limited regulatory resources toward the inspection of other companies. Precautionary steps that are taken well in advance of the events that trigger governmental scrutiny can minimize the chances that trouble with regulators will escalate. If a civil inspector never makes a criminal referral, the prosecutor never becomes aware of the problem. However, timing is everything. Once an investigation begins (or even appears likely), the maximum benefit and negotiating leverage associated with these efforts vaporizes. In other words, the time at which these steps are taken will control how the prosecutor will interpret them. If the steps have been in place for years, the prosecutor is more likely to view them as genuine good-faith efforts.

Most prosecutors recognize how difficult and counterproductive it is to prosecute a company that has gone beyond mere codes of conduct and policy statements—and has actually taken concrete and identifiable steps to demonstrate the company’s financial and institutional commitment to compliance and self-governance. The more steps a company undertakes to prioritize compliance, the more ammunition it has for persuading the prosecutor not to seek criminal charges. Like most things in life and business, you get what you pay for. A sound and effective compliance program must be tailored to the operations and risks of that particular company, fully implemented, and constantly re-evaluated and improved.

In contrast to the proactive steps briefly described above, those measures taken “after-the-fact” will be much less persuasive and are likely to fall on deaf ears. Prosecutors will often view these efforts as purely “reactive” measures, taken only in response to the investigation, and designed to get the company out of trouble. The government may even see them simply as a company’s attempt to “buy its way out” of a criminal indictment. In short, once a company is “caught,” a company’s pledge of additional funds for future compliance,
statements of good intentions, and expressions of general concern about compliance are ineffective and unpersuasive. Nothing speaks louder than those steps taken by the company well in advance of any sign of trouble.

One of the more obvious and general suggestions for avoiding regulatory problems (which is commonly ignored) is to prioritize, establish and maintain good working relationships with regulators and inspectors. Ideally, this attitude would be easy to achieve, well received, and mutually reciprocated. Occasionally, this balance does occur where the agency adopts a “customer service” model or philosophy. However, even in those adversarial situations where confrontation and suspicion abounds and arises solely from the actions and attitudes of the regulators, it is the company that must diligently strive to solve the problems and improve the communication. Even though this scenario may appear unfair at first glance, the company must always remember who loses when these problems are left unaddressed, regardless of which side “started it.” The following is a list of additional practical suggestions that address those factors that have traditionally spawned regulatory criminal investigations:

**Tip 1: Maintain respect (or at least its appearance)**

Every company employee and representative should strive to be respectful toward inspectors. These individuals may in fact have limited technical competence, and may be viewed as “nit-picky bureaucrats.” However, conveying a disrespectful attitude and spawning a bad relationship can escalate and come back to haunt your company—not the inspector. Joint investigations between local, state and federal agencies are becoming commonplace. The federal agencies often rely upon inspectors to determine who the “bad actors” are within each industry sector, since these individuals are on the “front line” of enforcement. It is wise to think twice before doing anything that might invite the wrath of a scorned inspector and cause a referral to be made to criminal investigators.

Perhaps a more productive approach is for a company to view and treat these inspectors as it would difficult but valuable, customers. Just as key customers bring in necessary income, “mistreated” regulatory inspectors have the potential to drain large sums of money and impose additional “costs.” Just as a business can’t operate without loyal but difficult customers, a business can be seriously harmed by an inspector with a grudge. In short, inspectors should be
handled with care and minor disputes should be put in their proper perspective.

**Tip 2: Demonstrate objective good faith**

Every regulated company should strive to convey “good faith” compliance efforts and demonstrate this attitude through proper file maintenance and concrete actions. Mere intentions or future plans will not be sufficient. Every company claims to care about compliance. Regulators will probably only respond favorably to those actions which are actually taken. The critical test is not whether your company thinks that it is a “good corporate citizen,” but whether an objective reviewer of your regulatory files would reach that conclusion. Remember, some day these files may have to “speak for themselves” if they are reviewed by a prosecutor or even a jury. In addition, for better or worse, these files often remain in place long after a particular inspector’s tenure with the agency. Depending on the content and attitude reflected in these files, they can either serve as the company’s protective shield or the government’s spear. The ultimate goal is to build up a high level of trust over time and to convince the regulators that your company has made the necessary staffing and resource commitments to be able to “self-regulate.” As previously noted, governmental perceptions are often the reality in the regulatory context.

**Tip 3: Avoid the appearance of bad housekeeping**

One factor that is certain to invite increased regulatory scrutiny of any facility is the appearance of “bad housekeeping.” Even though such conditions may not actually constitute a regulatory violation, they often raise broader concerns and invite speculation of more serious and systematic problems. In other words, the regulators may fairly assume that a company that does not take the effort to maintain a good image or keep orderly records may also be “cutting corners” in other, more significant areas. In short, bad housekeeping is likely to generate complaints from neighbors, and invite aggressive regulatory inspections.

**Tip 4: Create a process for addressing employee complaints or concerns**

A large percentage of criminal investigations are triggered by “whistle-
“blowing” calls from current or former employees. Some of these governmental informants are legitimate, while others are extremely biased and have an “axe to grind” against the company. Recognizing that it is better to hear bad news early and keep it in-house, companies can monitor these potential concerns and problems before they get referred to the government. One way is to create a confidential process or mechanism that invites, addresses and incorporates employee concerns and complaints. The company must keep careful track of the responses, and it must strive to address as many of the concerns as it can (within reason). If the employees perceive that their employer is at least willing to listen to complaints, this reduces the level of animosity that often fuels the decision to call the government. Another advantage of such a process is that it can be used to undermine the credibility of those disgruntled employees who simply rushed to the government without even giving the company an opportunity to address, and possibly correct, the underlying problem.

**Tip 5: Maintain continuity with agency inspectors**

Companies should designate one person (or two at most) to serve as the primary contact people who will regularly meet and communicate with inspectors and the agencies, as well as receive and centralize all regulatory correspondence. These individuals should possess the necessary qualifications, including high intelligence, familiarity with company operations, excellent social and communication skills, and a high level of interest in this position. This job must combine the qualities of public relations, customer service, and sales. This position is an extremely vital component to maintaining good relationships with the agency. The right person can make tremendous contributions, while the wrong person can be disastrous. These contact people should also be adequately trained and instructed as to the importance of their responsibilities.

This company official also should be tasked with the responsibility of meeting with agency representatives on a regular basis. He or she can informally canvass them for current or upcoming regulatory priorities, as well as unresolved problems and possible suggestions on how the company might be able to improve. This level of genuine concern should go a long way in helping to establish credibility with the agency. In addition, this contact person should also take detailed notes of each agency encounter and inspection, including the comments made and any observations of the inspectors’ attitudes. Over time, these notes will record and plot such changes in attitude that may serve as one
means of predicting the likelihood of a more aggressive enforcement effort in the future.

**Tip 6: Monitor inspections**

It is highly recommended that every company designate at least two individuals to accompany inspectors during regulatory tours of the plant or facility. During inspections, these representatives should avoid unnecessary confrontation. If the inspector questions the presence of two representatives, they should explain that it is company policy based on the company’s desire to work with regulators. They should also convey that the company wants to discover any problems that may exist and assist in providing the necessary information. These individuals should take careful and detailed notes of the inspection (usually immediately afterward).

**Tip 7: Request post-inspection debriefings**

Company representatives should routinely request a brief meeting at the conclusion of any inspection to determine the concerns (if any) the inspector might have. If no concerns are mentioned, this should be duly noted as well. Over time, the company’s files will not only contain important substantive information, but will also reflect a sound process implemented by a responsible company. If necessary, these files will be readily admissible at trial as business records and will serve to bolster the credibility of the company. The inspectors should also be asked if they would provide the company with a copy of any written report. Once again, the importance of keeping detailed notes that record exactly what was communicated by the inspector during this meeting cannot be overemphasized. These notes should be incorporated into a detailed memo to the file.

**Tip 8: Document compliance expenditures**

Companies should make every effort to try to accommodate reasonable requests for corrective actions, especially if they are not too costly. In addition, detailed records should be maintained of all the requests; what was done in response; the total amount of money, time and resources spent on each task; and the dates on which the requested tasks were completed. Records should also be kept that plot out the expenditures from year to year, with an estimate
of what percentage of the company’s “bottom line” is spent on compliance. This type of “compliance accounting” may go far toward demonstrating good-faith. The goal should be to maintain these records in a similar fashion as other financial documents (e.g., accounting, tax or insurance records). While the failure to keep accurate records of compliance expenditures is not a punishable offense, the presence of these records can be extremely persuasive in defending a company and showing its commitment to corporate compliance. Too many companies simply fail to accurately itemize and keep track of these expenditures because they fail to see the utility or purpose.

**Tip 9: Don’t ignore problems—Try to resolve them**

Company representatives should always follow-up and follow-through when presented with regulatory requests or when problems are discovered and communicated. Many times individuals may sincerely believe the request is unnecessary, unreasonable or too costly, or that the problem is trivial. In the presence of such requests, company representatives must not overreact and must avoid taking the matter personally. Efforts must be taken to insure that such conflicts do not escalate. In addition, all perceived “attacks” upon the individual inspector should be avoided. Such attacks usually only serve to invite unwelcome and repeated “counterattacks” by the regulators that may last for years. At the time the requests or demands are made, if necessary, representatives should express their disagreement or even disappointment, as well as the need for company officials to review the findings before deciding how to proceed. Also, if certain “run-ins” do occur with regulators, company representatives should seek to re-open communications at the earliest appropriate time, even if this means risking another uncomfortable disagreement. Silence is not always golden. Facing the prospect of additional tense discussions is far better than being completely unaware of the potentially hidden dangers that may be masked by silence.

**Tip 10: Pick your fights**

After company representatives have carefully and logically analyzed the available options (perhaps with the advice from experienced compliance counsel), they may conclude that they simply cannot comply with the regulatory request (for a variety of legitimate reasons). However, this decision should be the result of an objective and informed evaluation of the factual and legal basis for the regulatory request, as well as the direct and indirect
consequences surrounding a petition or challenge. In short, some disputes are worth fighting, but some are not. If the company decides not to comply with the request, the next recommended step is usually not to take formal action, but rather to establish an ongoing dialogue. One possible approach might be to write to the inspector (with a “cc” copy to his direct supervisor) requesting a meeting to revisit the problem and address some of your company’s concerns.

In general, it is advisable to avoid cutting the inspector out of the loop and instantly rushing to his supervisor. “Going over” the inspector’s head can be ineffective, counterproductive and is likely to lead to negative consequences. First, the supervisor will usually start by consulting the inspector to get his or her story. Second, the inspector may feel embarrassed or disrespected, and may want to retaliate. Third, your inspector is a repeat player and is likely to return for future inspections more frequently, with even more “scrutiny.”

On the other hand, if your response letter is placed in their files and simply ignored, you will have managed to put the ball back in their court. If no action occurs, it will be more difficult in the future for the agency to accuse you of lacking good faith.

Companies should recognize that this approach does not require them to completely “cave-in” to every regulatory request. However, even if formal actions are eventually taken, at least the company will have demonstrated a prior willingness to try to work it out. For those requests or demands that will inevitably be imposed, try to seek a workable solution that allows implementation over a period of time. This is another area where the company’s past good-will with the regulators should pay off. In short, regulatory problems rarely just go away, and the files and correspondence will remain intact. Borrowing from the principle of compound interest, the longer the problems remain unaddressed, the larger your company’s “bad faith” debt will have accrued.

**Tip 11: Carefully monitor your company’s regulatory files**

Every company should conduct periodic reviews of its own regulatory files (i.e. at least on a semi-annual basis). This should include a thorough review of the files maintained on its own premises, as well as a careful monitoring of the agency’s files that pertain to its facility. These public files can be a wealth of information and a valuable source for discovering potential problems that may have never been brought to the company’s attention. This review may also
reveal important discrepancies or inaccuracies that can be quickly corrected, clarified or resolved. Also, these monitoring efforts should be noted in your policies as further proof of your company’s “good faith.”

Lastly, these files are often the first source of information that a federal agency or prosecutor will request and review in deciding whether to initiate an investigation or go forward with a prosecution. You and your company will not be given an opportunity to influence this decision. Therefore, the regulatory correspondence and records have to “speak” for you. In short, these files may serve as the “silent umpire” that may be consulted without any notice. For example, silence and inaction in the face of outstanding agency requests or notices of violations can be definitive proof that the company and the recipient of the notice knew about the problem or alleged violations. In criminal terms, this documentation goes a long way to satisfy the government’s burden of proving that the violations were “knowingly” committed. In addition, these unaddressed notices or requests are likely to be viewed as evidence of bad faith, irresponsible management, or simply a low-level institutional concern for compliance.

**Tip 12: Compare best practices with others in your industry and stay at the top**

One fact that regulators and prosecutors can never ignore is how the compliance record, practices and overall attitude of a particular company compares with other members of an industry. Accordingly, companies should carefully monitor their competitors with regard to the budgetary and personnel allocations used for compliance, and their overall compliance record. In addition, companies should continually strive to learn from their competitor’s success stories as well as their shortcomings. No company should underestimate the advantages and enforcement protection associated with being perceived by the regulators as being the best in the industry. In short, companies should strive to be at the top 10% of their industry, and should compile the objective benchmarks to support this finding.

Comprehensive and regular audits of company operations used to assess the level of compliance certainly play a role in demonstrating “good faith” and may play an integral part of a company’s compliance program. Most commentators agree that it is much cheaper to correct problems of noncompliance that are discovered and voluntarily corrected by the company.
The presence of such a program (equipped with accurate and detailed records) is perhaps the most direct example of a “self-regulating” entity that deserves to be “passed over” by the regulator’s wrath or the prosecutor’s indictment. Scarce regulatory enforcement resources should be used wisely against those companies who need to be punished, and not wasted unnecessarily on those companies who are both trustworthy and reliable in their self-regulating efforts.

However, there are risks associated with conducting compliance audits. First of all, every company who undertakes such measures must be completely willing to deal with the results, and correct the problems discovered, no matter how severe. In other words, once the problem genie is released from the company’s bottle there is no way of cramming it back in and simply pretending it does not exist. Such avoidance or willful blindness throws out a large welcome mat and roadmap for prosecutors. Thus, it may just be a matter of time before they come knocking (perhaps with a search warrant). In short, in spite of the tangible benefits and good intentions associated with compliance audits, a company should carefully evaluate the decision to conduct them, and must be fully committed to undertake the necessary and perhaps costly corrective measures mandated by the audits.