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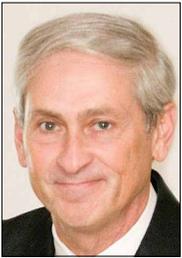
Compliance dilemma: It takes disruption to beat corruption

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by Jeffrey M. Kaplan

Compliance law and compliance culture

There is a tendency to think of the cultural approach to compliance and ethics as distinctly un-law like. In my view, that is a mistake – as such an approach to C&E is indeed consistent with the law's expectations. That is, as amended in 2004, the Federal Sentencing Guidelines for Organizations provide, among other things, that "to have an effective [C&E] program...an organization shall...promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." This



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expectation was based in part on several prominent cases of corporate wrongdoing from that time period—particularly the Enron and WorldCom matters—where corrupt organizational cultures evidently "trumped" the companies' C&E policies and procedures.

The expectations are not only U.S.-based. In the UK, the Ministry of Justice's *The Bribery Act of 2010: Guidance about procedures which relevant organisations can put into place to prevent persons associated with them from bribing* makes numerous references to the need for companies to create a compliance culture, as does that country's Office of Fair Trade in its important publication *Drivers of Compliance and Non-compliance with Competition Law: An OFT report*. In Australia, the Commonwealth Criminal Code of 2001 provides that a deficient corporate culture can be the basis for organizational liability for a range of offenses.

Of course, what actually constitutes a culture of compliance is another issue. Several

elements are frequently spoken of in this regard; having an ethical "tone at the top," a vibrant "speak-up culture," and meaningful accountability – both in terms of positive and negative incentives—may be the most often cited. All are certainly essential to having an effective compliance program.

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But for any given organization, the inquiry should go well beyond these and take into account other, more general aspects of the organization's culture—such as whether it allows employees to be put under undue pressure to achieve business results (pushing them past the "breaking point"). The inquiry should consider, as well, the interplay of the entity's own culture with that of the geographies in which it operates and also that of its industry or industries, because these may prove to be strong forces for good or ill.

Finally, the true test of an organization's compliance culture is whether good corporate conduct operates as a reflex. This is critically important because compliance and ethics challenges often are not presented with due time for rigorous analysis, but rather call for a near-immediate response. *

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