

INCENTIVES IN YOUR ANTITRUST COMPLIANCE PROGRAM



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Incentives play an essential role in having an effective and credible compliance program. The U.S. DOJ has made this clear in its guidance statements. There tends to be, however, reluctance in companies to embrace the use of incentives for this purpose. This paper explains why using incentives is essential and provides guidance on ways to do this. The steps for using incentives include:

- Being sure compliance has input on all incentive and reward systems
- Compliance having a say on who is promoted
- Having compliance performance taken into account on personnel evaluations
- Including compliance elements in reward and recognition programs
- Recognition of the compliance staff
- Recognition for those who speak up, but avoiding a mercenary bounty system.

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I. WHAT SHOULD BE IN AN ANTITRUST COMPLIANCE PROGRAM?

An antitrust or competition law compliance program is essential today for very practical reasons. It helps companies ensure that they act legally and ethically, helps prevent the costs, disruption and harms to reputation that can come from violations of law, and works to prevent the company from itself becoming the victim of other companies' anticompetitive practices. In the worst case, should a violation occur, a credible program can work to convince regulators and enforcers to treat the company fairly in recognition of its diligent efforts to prevent such violations. But whatever the purpose of a compliance program may be, it is clear today that the program must be effective and credible; mere paper efforts achieve nothing.

When we think about what should be in a compliance program perhaps the first things that spring to mind are training and policies. We may then think about having a speak-up system and holding people accountable for when they break the rules. When planning what needs to be in a program, there are generally lists of agreed-upon steps, such as the well-known seven steps from the U.S. Organizational Sentencing Guidelines.² Although there are different lists from various sources they do tend to be relatively consistent. This is so because compliance is really about how you manage people in organizations. Each compliance step is in practice a somewhat tailored version of fundamental management steps.

Generally, when we think of how organizations get things done, one factor that is fairly obvious is the need to motivate people. A core element of any management system and thus any compliance program always has to be incentives. Within that context it should be understood that incentives include all positive means to motivate, so it can go well beyond merely giving out cash. In companies, for example, it would also include various forms of recognition including promotions, recognition ceremonies, and awards.

Thus, any insightful set of compliance program standards should include coverage of incentives. One of the foremost sources of compliance program standards was the U.S. Organizational Sentencing Guidelines. While these standards, as first promulgated in 1991, did not specifically include incentives, they have been part of the standards since 2004:

“(6) The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program;”³

They are included in a provision that separately covers discipline, making it clear that the reference to incentives is different from discipline. Thus, if a company asserts it uses incentives because it disciplines wrongdoers this will fail the test for having all the elements of an effective program.

If we are dealing with enforcers, what would they be looking for with respect to incentives? On this point we do have specific guidance from the U.S. Department of Justice (“DOJ”).

II. GUIDANCE FROM THE DOJ

How can a company include incentives in its compliance program? What does this mean in practice? While governments do not generally dictate to companies how they must do this, it is very clear that they expect this area to be addressed. DOJ’s Antitrust Division has been quite explicit in its guidance on questions Division officials will ask about a company’s compliance program:

- “What incentives does the company provide to promote performance in accordance with the compliance program? See U.S.S.G. § 8B2.1(b)(6)(A).
- Has the company considered the implications on antitrust compliance of its incentives, compensation structure, and rewards? Does the company incentivize antitrust compliance? Have there been specific examples of actions taken (e.g., promotions or awards denied, or bonuses clawed back) because of compliance considerations? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel?”⁴

² U.S. Sentencing Guidelines, Ch. 8 <https://guidelines.ussc.gov/gl/§8B2.1>.

³ *Id.* §8B2.1(b)(6)(A) <https://guidelines.ussc.gov/gl/§8B2.1>.

⁴ U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations 12 (July 2019) <https://www.justice.gov/atr/page/file/1182001/download>.

The Division's approach is quite consistent with the approach to compliance programs set out throughout the Department of Justice. On September 15, 2022, the Deputy Attorney General, Lisa Monaco, issued a memorandum to be followed by all parts of the Department, addressing the Department's expectation of compliance programs. While the Memorandum does cover discipline, it also addresses the more positive side of incentives.

DAG Monaco states generally that "prosecutors should consider how the corporation has incentivized employee behavior as part of its efforts to create a culture of ethics and compliance within its organization." Providing more specific guidance, she goes on to state:

"Similarly, corporations can promote an ethical corporate culture by rewarding those executives and employees who promote compliance within the organization. Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise. When effectively implemented, such provisions incentivize executives and employees to engage in and promote compliant behavior and emphasize the corporation's commitment to its compliance programs and its culture."⁵

In all of these standards and guidance references the focus is not on simply avoiding violations. Managers are not being rewarded merely because their people follow the law. (No awards like this: "Congratulations, you have gone through an entire month without being indicted.") Rather the focus is on practical management elements, such as their support for the compliance and ethics program, support of those who speak up, and championing the company's values in visible ways.

III. HOW DO YOU DO THIS?

The message is fairly clear. If you want your compliance program to be effective and actually work, and you want it to be credible when dealing with enforcers, then it must include the use of incentives. What does this mean in practice? The various government guidance materials quoted above include some examples of possible approaches for dealing with incentives. In the following are ways to categorize these different approaches.⁶

A. Input on Incentive/Promotional Programs

When the company is developing its internal incentive and bonus programs, compliance needs to have a seat at the table. This approach can be seen in the language in the first of the Antitrust Division's incentive questions, asking if the company has considered how its incentives will impact antitrust compliance.⁷ The basis for this concern can clearly be seen in the Wells Fargo sales practices case.⁸ Salespeople were expected to get each new customer to take eight services from the Bank. (The sales theme of "8 is great" was apparently used because it rhymed.) Any adult could have seen that this was unrealistic and would lead people to cheat. If a compliance person had been in the room they could have raised the concerns and focused on the serious risks this raised and what controls would be needed if such a program proceeded. So when the marketing department comes up with a clever reward program triggered only when all competition has been eliminated or prices are increased in a highly competitive market, the compliance person can be the one who asks how this can be done consistently with the law.⁹

B. Input on Managers' and Officers' Promotions

A similar point can apply to managers' and officers' promotions. Employees watch carefully to see who gets promoted and who gets passed over.

⁵ Deputy Attorney General, Lisa Monaco, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group 9-10 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

⁶ For more detailed discussion of the use of incentives in compliance programs, see Murphy, "Using Incentives in Your Compliance and Ethics Program" (SCCE; 2012), https://assets.hcca-info.org/Portals/0/PDFs/Resources/library/814_0_IncentivesCEProgram-Murphy.pdf.

⁷ See also International Standard, ISO 37301, Compliance management systems – Requirements with guidance for use, §7.2.2, last sentence, calling for periodic reviews for the same reason <https://www.iso.org/standard/75080.html>.

⁸ "Wells Fargo Agrees to Pay \$3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorization" (Feb. 21, 2020) <https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices>.

⁹ See Murphy, "Should you have a say on incentive and reward plans?", 22 Compliance and Ethics: Ideas & Answers <https://www.linkedin.com/pulse/compliance-ethics-ideas-answers-edition-22-joe-murphy-ccep/>.

If an overly aggressive manager who cuts corners and never attends any compliance training gets promoted, the employees then know what really is important in the company. These types of stories are a major part of what shapes a company's culture.

I had a professional contact with this issue with a client at one time. I was starting to recommend the company follow this approach of reviewing important promotions when my contact interrupted to say they already did this. Senior level promotions had to be reviewed with the compliance officer. I was startled until I found out why. The company had previously publicly announced a high-level promotion that required approval by the board. Shortly afterward it emerged that this same manager had been under investigation by the compliance office. The result of the investigation was that the manager had to resign. At that point the board of directors made it clear that this was never to happen again.

C. Personnel Evaluations

Support for and promotion of the compliance program and the company's values deserve a place in personnel evaluations.¹⁰ Note that this is not attempting to measure anyone's inherent morality or ethics. Rather, it evaluates someone's role in acting as a manager. Does the person use the company's code of conduct? Do they listen to employees when they express concerns about matters related to compliance? Does the manager remind employees of the important messages from the antitrust compliance training? On a cascading basis, all levels of management can, in turn, be evaluated on how well they evaluate their subordinates on this point.¹¹

D. Reward and Recognition Programs

Companies often have separate reward and recognition programs for behavior they value. An outstanding salesperson might get a free trip to a conference in a vacation spot. The top production unit might get a bonus for the entire unit. A local boss might publicly praise one of the workers for an important safety innovation.

Note that these can be financial rewards, but that is not really the point. It is the idea that those who show leadership relating to the compliance program and promoting the company's values are recognized and lauded.

Compliance and ethics can be a part of any company recognition program. There can also be standalone recognition programs just related to the compliance program. In one company, for example, there was a compliance video contest. The winners were feted at a senior management event.¹²

E. Bounties for Whistleblowers?

The methods for using incentives discussed here are very practical and straightforward. But there is one incentive question that is much more sensitive: the treatment of those who speak up, i.e., whistleblowers. Should they receive cash rewards from their company for speaking up and turning in their colleagues?

At first glance this might make sense to some. It is behavior the company wants so why not pay for it? And the government's use of rewards seems to work: the SEC offers huge rewards for those who contact them about serious violations. But does it make sense in the corporate context?

The first point is a basic question: if a company elects to compete with the SEC is it really prepared to pay the millions of dollars the SEC may pay to an employee? Will it be able to make the assessments the SEC makes in such cases?

¹⁰ For an example in a money laundering case of what an enforcer could require where a company failed to cover incentives in a compliance program, see *U.S. v. Danske Bank A/S* Crim 679, Plea Agreement, Attachment C Compliance Commitments 14 (Dec. 12, 2022) https://www.justice.gov/d9/press-releases/attachments/2022/12/13/danske_plea_508_compliant_0.pdf ("The Bank will implement evaluation criteria related to compliance in its executive review and bonus system so that each Bank executive is evaluated on what the executive has done to ensure that the executive's business or department is in compliance with the Compliance Programs and applicable laws and regulations. A failing score in compliance will make the executive ineligible for any bonus for that year. The Bank will include in its evaluation criteria and bonus system provisions that allow the Bank to implement measures to incentivize future compliant behavior and discipline executives for conduct occurring after the filing of the Agreement that is later determined to have contributed to future compliance failures, subject to applicable law.")

¹¹ See also International Standard, ISO 37301, Compliance management systems – Requirements with guidance for use, §5.3.1 dealing with compliance objectives and compliance performance <https://www.iso.org/standard/75080.html>.

¹² Murphy, 501 Ideas for Your Compliance and Ethics Program: Lessons from 30 Years of Practice 68 (Idea 332 "Ethics Film Festival")(SCCE; 2008), <https://www.amazon.com/Ideas-Your-Compliance-Ethics-Program/dp/097922103X>.

But there are much more fundamental reasons why this is probably an unwise use of incentives. The reality is that most people who go to the government only do so after reporting internally and then being ignored or mistreated. People who speak up do not seem to do it for money. Rather they are motivated by caring about what is right. But if the company puts up money it turns a moral decision into a financial one. Thus, the company likely ends up wasting money since people would have reported to them anyway, plus making it a financial decision may cause people to weigh the risks and not report.

The best use of incentives in this context is simply to treat the reporter as someone who is being loyal to the company and recognize their courage. As for tangible rewards, those can come into play when someone reports a defect in the program or suggests a way to improve the program. But paying workers to turn in their fellow workers can injure morale and undermine the trust people need to work with one another.

F. Recognizing the Compliance & Ethics Staff

The last item on this list is one that has been recognized by enforcers in their standards: how is the compliance staff recognized? The Antitrust Division enforcers asked, for example: “Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel? Is their financial treatment a sign that they are valued? Are they likely to be promoted?”¹³ The treatment of the compliance staff can help send a message that compliance really is valued in the company.

Do enforcers expect us to pay attention to incentives in compliance programs? Yes, and they are right to do so. Is this a step companies can and should do? Again the answer is yes and there is no reason to treat this any less importantly than the training, policies, and speak-up systems. The steps suggested here can be implemented at least as quickly and practically as all the other compliance program elements.



¹³ See note 4, *supra*.

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