

Compliance Means Never Having To Say You're Sorry

The corporate scandals of the last few years have increased public and governmental focus on issues of regulatory compliance. Is your company up to speed?

A company constructs a radio tower at a location near sites that are listed on or eligible for listing on the National Register of Historic Places, but without conducting an environmental impact analysis.

A company operates a radio transmitter in a remote forest area, but radio frequency fields exceed applicable exposure limits in locations that might be accessed by hikers or forest rangers.

A company maintains its radio tower in full compliance with Federal Communications Commission (FCC) lighting and painting requirements but does not post the FCC Antenna Registration Number at the site.

What do these companies have in common? The licensees were subjected to enforcement action by the FCC and could have avoided such problems through a routine compliance program. While it is easy to think of compliance as just the avoidance of FCC enforcement action, there are a number of reasons to maintain a compliance program.

Failure to comply with some licensing and operational requirements can result in automatic license cancellation. With the increasing demand for radio spectrum and frequent changes in licensing rules, it is often not possible to secure relicensing on the same frequencies or with the same terms and conditions.

Even as it claims to be decreasing regulatory burdens, the FCC is placing a greater emphasis on enforcement of the remaining regulatory requirements. This was no more evident than in the consolidation of all FCC enforcement activities into a single Enforcement Bureau just a few years ago. Activities that might have been tacitly excused are now the focus of attention by agency personnel charged with enforcing all

FCC regulations. Incidentally, the FCC recently closed some loopholes in its regulations regarding "truthful statements" to make sure that all statements made to the FCC are based on accurate and complete information.

With the well-publicized financial scandals affecting both the for-profit (e.g., Enron and WorldCom) and not-for-profit sectors (e.g., the United Way), there is increasing pressure on corporate management to ensure that all levels of the company act lawfully, ethically, and responsibly. The Sarbanes-Oxley Act (SOA), enacted in July 2002, imposes specific obligations on the management of public companies to ensure the accuracy of corporate disclosures and the effectiveness of internal controls and procedures for financial reporting and non-financial disclosures (e.g., the regulatory environment). Even if a company is not directly subject to the SOA, it is anticipated that many of the provisions of the SOA will become "best practices" for other companies as well. In addition, privately held companies that either acquire or merge with public companies will have to become familiar with SOA in order to successfully integrate operations.

Compliance Is A Many Splendored Thing

Compliance begins on the front lines, by ensuring that personnel having any involvement with facilities or services subject to FCC regulation can identify potential regulatory issues and either act on them or bring them to management's attention for review. Some issues may only be apparent to field personnel (e.g., tower lighting problems), while others may only be apparent to corporate management or counsel (e.g., corporate

reorganizations or transfers of control). The FCC views a corporate licensee holistically and does not excuse nonperformance on the basis that, for example, the person responsible for FCC licensing was not aware of the problem.

The SOA reinforces the need for top-to-bottom compliance efforts. The SOA requires reporting mechanisms to be in place and provides "whistleblower" protections for any officer, employee, contractor, subcontractor, or agent against any adverse employment action as a consequence of furnishing information in connection with any fraud or securities investigation. In addition, Section 1107 of the SOA provides for criminal fines and imprisonment of up to ten years for anyone who retaliates or interferes with a person's employment for providing information to a law enforcement officer regarding the commission or possible commission of any federal offense. The regulation applies whether or not the offense is a violation of the SOA and whether or not the company is publicly or privately held. Thus, the SOA removes disincentives for all employees to speak up about violations that could have a material impact on the company and its stockholders.

As noted above, the SOA imposes a direct obligation on the chief executive officer (CEO) and chief financial officer (CFO) of a public company to certify compliance with securities laws and the accuracy and completeness of financial and other corporate reports. Moreover, they must certify that they have evaluated the adequacy of the company's internal controls and procedures for financial reporting. False certifications can subject the CEO and CFO to civil and criminal penalties. Thus, management should be even more sensitive to compliance issues and to ensuring that there are no mate-

rial violations that might have implications for the company's financial and other corporate disclosures.

Finally, the SOA imposes very controversial requirements on in-house and outside counsel to a public company to report "up the ladder" to management evidence of a material violation of securities law, a breach of fiduciary duty, or similar violation by the company or any of its agents. If the chief

legal counsel or CEO does not appropriately respond to the evidence, such as by taking remedial measures, the attorney is required to report the evidence to an independent audit committee of the board of directors or to another committee of the board. Recently adopted regulations of the Securities and Exchange Commission (SEC) indicate that this duty includes the requirement to report up the ladder a "material violation of any

United States federal or state law." Although the full extent of this reporting obligation is not yet known, the rule adopted by the SEC suggests that it will be interpreted broadly. Thus, the SOA has enlisted corporate counsel in the effort to weed out evidence of corporate wrongdoing and take appropriate steps to address it.

All You Need Is Compliance

Although most companies do not set out to violate the FCC rules, there are too many opportunities for matters to be overlooked or to fall between the cracks of departmental responsibility. This has been seen most significantly in the case of corporate reorganizations involving companies holding FCC licenses, where corporate management is unaware of the need to secure prior FCC authority for the transaction, yet the individuals responsible for FCC licensing may be unfamiliar with the transactions being contemplated in the boardroom.

To help maintain compliance, each FCC licensee should 1) develop a compliance manual of all relevant FCC rules and policies impacting the company's operations, 2) develop procedures for dealing with violations that are discovered in the normal course of business, and 3) provide regular compliance training appropriate to all company personnel involved in FCC-regulated activities. It should be noted that the FCC looks favorably on companies that have adopted such programs and will typically require a compliance program as part of a consent decree intended to settle an enforcement matter.

A compliance manual should be directed to the principle FCC rules and policies affecting the types of facilities and services used by the company. While FCC licensees are expected to be familiar with the specific provisions of the FCC rules governing the particular radio services in which they are licensed, an effective compliance manual should focus attention on the provisions that are most often overlooked and/or more frequently cited by the FCC in enforcement cases. Among these are:

- FCC licensing requirements generally
- Station construction and operating requirements
- Maintenance of FCC licenses and station records



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Company personnel should be instructed on the procedures to follow if potential violations are discovered during the normal course of business. In most situations, liability can be reduced or eliminated if immediate remedial action is taken. Employees therefore must feel free to report perceived violations so that problems can be addressed promptly.

Many companies have found that regular (e.g., annual) compliance training programs are effective in impressing on employees the importance of regulatory compliance and in reminding them of the types of problems that can arise for the company if regulatory issues are overlooked. Compliance training

also provides an opportunity to learn of new regulatory developments that may impact the company's operations and allows personnel to see how their efforts contribute to overall corporate compliance. It is not unusual for the discussion at a training session to reveal new issues that might not have arisen otherwise.

Can't Help Falling Into Compliance

The corporate scandals of the last few years have increased public and governmental attention to issues of regulatory compliance. The Sarbanes-Oxley Act and the regulations it has spawned are requiring management to develop procedures to respond to evidence of material violations, thereby placing more pressure on employees at all levels to remain cognizant of regulatory requirements.

Even as the FCC is attempting to decrease the number of regulations, it has step-

ped up its enforcement of all the remaining ones. With a compliance manual, reporting procedures, and regular compliance training, a company can maintain in good standing its licenses and other FCC-regulated assets, leaving others to answer the musical question, "Who's sorry now?" ■

Jeffrey L. Sheldon is a partner in the Telecommunications Practice Group of McDermott, Will & Emery. He can be contacted at <jsheldon@mwe.com> or 202.756.8082.

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