

Compliance for Energy Contractors

Generating Defensive Data: Structuring Your Compliance System for Effective Results

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Defensive Data – Essential

If system does not generate data confirming compliance:

- higher likelihood of error;
- lower likelihood of early detection and remediation;
- higher costs of investigations;
- higher defense costs;
- system that does not generate data does not meet “best practices;”
- signal to buyer or investor that problems lurk.

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Defensive Data – Essential

Generate data confirming compliance and:

- increase compliance;
- identify and resolve violations;
- permit VSDs and remediation;
- lower investigative costs;
- lower defense costs;
- meet “best practices;”
- increase value of company.

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US Sentencing Guidelines

Section 8B2.1, Organizational Guidelines

- Promotion of organized and ethical culture;
- Established standards and procedures;
- Consistent enforcement and promotion of program;
- High level personnel training on compliance program;
- Several clear chains of command for reporting;
- Consistent self evaluation of program effectiveness;
- Means for anonymous reporting and follow-through.

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US Sentencing Guidelines cont'd

How to prove the “minimum” standards?

- Design a system that produces data;
- Encourage reporting ;
- Anonymity or confidentiality;
- Constant reporting (data grabs) even if “all is well;”
- Data demonstrates integrity of program;
- Open access to the data.

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Mitigation under the ITAR

- VSD and remediation key mitigation factors;
- Data allows for identification of issue;
- Program supports mitigation;
- 126.1 – must immediately disclose;
- 127.12(c) – should immediately disclose;
- Lack of demonstrable data equals compromised ability to achieve mitigation credit.

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Mitigation under OFAC

OFAC Appendix A, Section E -- mitigation credit for compliance program.

OFAC looks for a efficient, in depth program that:

- Generates data to prove the adequacy of the program based on its OFAC risk profile;
- Has a “clear and thorough” policy/procedure manual;
- Trains and educations employees according to manual;
- Maintains list of blocked entities and disseminates that information pursuant to the compliance program;
- Includes procedures for handling transactions that are validly blocked or rejected.

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Mitigation under OFAC cont'd

To demonstrate OFAC Compliance in the event of an alleged violation, the entity should:

- Maintain a list of all false positive matches to help identify future false positive matches.
- Maintain a list to help demonstrate that an entity checks current customer lists and transactions for potential OFAC matches.

Without this data, an entity cannot show the compliance program is up to standard.

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Integrative Approach

- Compliance systems should integrate controls from multiple applicable regulatory regimes that apply to conduct.

e.g., FCPA with ITAR and EAR and OFAC

e.g., export controls with government contracting requirements, contracts, FARs, DFARs

- Confirmatory data should reflect integration;
- Overarching policy should express integration;
- For each regulatory regime, note the particular policy imperatives;
- Data should be auditable;
- Procedures and training should be testable.

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CONCLUSION

For more information, please contact:

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