

White Collar Update: New DOJ Guide to Evaluation of Corporate Compliance Programs

March 6, 2017

The Fraud Section of the U.S. Department of Justice (“DOJ”) Criminal Division (the “Fraud Section”) recently published an Evaluation of Corporate Compliance Programs (the “Evaluation”) that sets forth the most common criteria that the Fraud Section uses to assess the effectiveness of a corporation’s compliance program. The existence and effectiveness of a compliance program and remedial efforts to implement or improve such a program are among the factors (commonly known as the “Filip Factors”) DOJ considers in conducting corporate investigations, making charging decisions, and negotiating resolutions. The Evaluation provides insight into DOJ’s assessment process when evaluating these factors. The Evaluation is consistent with DOJ’s previous guidance, but reemphasizes the importance of maintaining a strong compliance program to prevent and remediate misconduct.

The Fraud Section’s [Evaluation](#) is the first formal guidance for compliance programs released since DOJ hired Compliance Counsel Hui Chen. Ms. Chen assists Fraud Section prosecutors to evaluate compliance programs and design remedial compliance measures to be incorporated into corporate resolutions. The Evaluation is reminiscent of Ms. Chen’s [initial remarks](#) in fall 2015, which focused on the importance of the individualized nature of companies’ programs, the independence and funding of compliance personnel, and a commitment to prevent and remediate misconduct across a corporation. The Evaluation also echoes formal guidance published by DOJ and similar entities. Indeed, the Evaluation explicitly cites to—and frequently overlaps with—(1) the ten [Hallmarks of Effective Compliance Programs](#) from the DOJ and the Securities and Exchange Commission’s *Resource Guide to the U.S. Foreign Corrupt Practices Act*, (2) the criteria for an Effective Compliance and Ethics Program set forth in Section 8B2.1 of the U.S. Sentencing Guidelines, and (3) the twelve main anti-bribery elements from the Organization for Economic Co-operation and Development’s Anti-Corruption Ethics and Compliance Handbook for Business.

Evaluation Topics and Questions

The Evaluation is divided into eleven “sample topics,” each containing a list of questions to guide an assessment of a company’s compliance program. Although the Evaluation emphasizes that every company is different, it notes that the Fraud Section frequently uses the sample topics and questions as part of any corporate evaluation. The eleven topics focus on the general tenets of an effective compliance program and the adequacy of a company’s response to potential misconduct. The topics cover:

- *Analysis and Remediation of Underlying Misconduct*, such as a root cause analysis of the misconduct, whether systemic issues were identified, why the corporation previously missed those issues, and what changes the corporation made to reduce the risk of recurrence.
- *Senior and Middle Management*, which assesses the actions and involvement of senior leaders in the misconduct, whether they can demonstrate a shared commitment to compliance across the company, and senior management’s level of compliance oversight.

- *Autonomy and Resources*, including the stature, autonomy, and qualifications of compliance personnel, the allocation of funding to compliance functions, and the compliance group's level of involvement in training and decisions relevant to the misconduct.
- *Policies and Procedures*, including their design, implementation, and assessment, the existence and adequacy of controls or processes that should have prevented misconduct, and the approval and certification of processes relevant to the misconduct.
- *Risk Assessment*, i.e., whether the company gathers information to detect misconduct, identifies and analyzes risks, and accounts for such risks.
- *Training and Communications*, such as the content and effectiveness of training, how the company communicates information about misconduct to employees, and the resources available to guide employees about compliance policies and issues.
- *Confidential Reporting and Investigation*, including whether the company effectively and independently analyzes and pursues information from its reporting mechanisms, and whether resulting investigations identified and addressed systemic vulnerabilities across the organization.
- *Incentives and Disciplinary Measures*, including whether the company imposes accountability consistently across all levels of the organization and whether it properly incentivizes ethical behavior.
- *Continuous Improvement, Periodic Testing, and Review*, such as internal audits and control testing that might have detected the misconduct, as well as updates to risk assessments, policies, and procedures to ensure the compliance program continues to evolve.
- *Third Party Management*, which focuses on the controls, processes, and due diligence necessary to ensure appropriate relationships with and payments to third parties.
- *Mergers and Acquisitions ("M&A")*, including whether due diligence identified the risk of the misconduct, how the company integrated compliance functions into the M&A process, and the system for tracking and remediating risks identified during due diligence processes.

Practical Impact

The Evaluation reiterates DOJ's prior guidance and reaffirms the importance of key aspects of an effective compliance program. Although it does not necessarily set forth new advice, the Evaluation serves as an important resource for companies, including those considering how best to (1) design and implement a corporate compliance program; (2) audit, test, or otherwise monitor a compliance program's effectiveness; (3) structure compliance presentations to DOJ, corporate monitors, or other regulators or overseers; and (4) conduct effective compliance-related remediation and enhancement following a corporate resolution.

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