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# **A Guide for Developing and Implementing a Corporate Compliance Program**

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# **Areas Where a Corporate Compliance Program Is Particularly Important**

- **Top areas for corporate compliance risk include:**
  - **Cybersecurity, especially in those areas that impact core operations or private/proprietary information;**
  - **Areas where the corporation has had issues or violations in the past;**
  - **Areas where there have been recent regulatory changes or new legislation;**
  - **New business lines and high-risk products;**
  - **Foreign Corrupt Practices Act (FCPA);**
  - **Sarbanes-Oxley, anti-money laundering, and insider trading; and**
  - **Sexual harassment and other discrimination.**



# Overarching Goals of a Corporate Compliance Program

- **Prevent violations of the law and of corporate values**
- **Detect any criminal conduct or unethical behavior that does occur**
- **Remediate the misconduct as quickly as possible**
- **Decrease any penalties to the corporation associated with the criminal conduct**



# **Basic Steps for Achieving the Benefits of a Corporate Compliance Program**

- **Design the corporate compliance program based on a risk assessment**
- **Implement the program by incorporating it into organizational policies and procedures**
- **Disseminate these policies and procedures to the organization's employees, provide compliance training, and publish the consequences for violating the policies**
- **Enforce the policies and procedures by investigating violations and taking necessary disciplinary action**
- **Update the risk assessment, the corporate compliance program, and related policies and procedures on a regular basis and when a violation occurs**



# **What Should a Corporate Compliance Program Include?**

- **A corporate compliance program should be designed to meet the criteria set forth in Chapter 8 of the U.S. Sentencing Guidelines.**
- **Based on the U.S. Sentencing Guidelines, to have an effective compliance program, an organization must establish standards and procedures to prevent and detect criminal conduct.**
- **Corporate compliance programs should also take into account organizational values and contractual obligations.**
- **The organization's governing body must be knowledgeable about the content and operation of the compliance program and must exercise reasonable oversight with respect to its implementation.**



# **What Should a Corporate Compliance Program Include?**

- **Specific individuals within the organization should be delegated day-to-day operational responsibility for the compliance program.**
- **The individuals with operational responsibility must report periodically (at least once a year) to high-level personnel and, as appropriate, to the governing body of the organization on the effectiveness of the compliance program.**
- **To carry out operational responsibility, such individuals should be given adequate resources, appropriate authority, and direct access to the organization's governing body or an appropriate subgroup of the governing body.**
- **Anyone who has previously engaged in illegal conduct or other conduct inconsistent with organizational values should not have responsibility for any aspect of the corporate compliance program.**



# **What Should a Corporate Compliance Program Include?**

- **It is important for an organization to perform a risk assessment, identifying the unique risks and challenges that it faces in light of its business and to update that assessment periodically. An organization should design its compliance program to detect and rectify the most likely types of misconduct.**
- **In its risk assessment, the organization should consider the risks presented by the location of its operations, the industry sector, the competitiveness of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel and entertainment expenses, and charitable and political donations.**



# **What Should a Corporate Compliance Program Include?**

- **The organization must take reasonable steps to periodically communicate its policies and procedures to its employees and agents, including conducting effective training programs.**
- **The compliance program should be consistently enforced across the organization and should include appropriate incentives for employees to act in accordance with corporate policies as well as appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.**
- **The organization must also take reasonable steps:**
  - **To ensure that its compliance program is followed, including monitoring and auditing to detect criminal conduct;**
  - **To periodically evaluate the effectiveness of its compliance program; and**
  - **To have and publicize a system whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. It is best for such reporting to be anonymous.**



# **How the Government Evaluates a Corporate Compliance Program**

- In May 2019, the U.S. Department of Justice (DOJ) announced an update to its guidance on how it evaluates the effectiveness of corporate compliance programs.
- The updated guidance evaluates compliance programs using three fundamental questions:
  - 1) Is the organization's compliance program well-designed?
  - 2) Is the program being applied earnestly and in good faith?
  - 3) Does the organization's compliance program work in practice?
- DOJ assigns significant weight to effective corporate compliance programs when determining whether to charge organizations that have engaged in wrongdoing.



# **The Absence of an Effective Compliance Program May Result in Further Penalties**

- **If an organization has violated the law and does not have an effective corporate compliance program, a court may impose harsher penalties, especially if a corporate compliance program was required by law.**
- **Additionally, an organization without an effective corporate compliance program will likely be placed on probation with a condition to implement a corporate compliance program.**
- **This condition will remain under the oversight of the court for the duration of probation, and the court may appoint a monitor to oversee the implementation of the compliance program.**



# **Uncovering Compliance Issues Through an Internal Investigation**

- **An internal investigation should be conducted if it is suspected that the corporate compliance program has been violated or if other misconduct is suspected.**
- **If it is determined that an internal investigation is necessary, the organization should consider engaging experienced and independent outside counsel to conduct a full and unbiased investigation of the alleged misconduct.**
- **Counsel for the organization should give *Upjohn* warnings to employees and agents who are being interviewed as part of the internal investigation.**
- **If a violation is detected, the organization should consult counsel and weigh the risks and rewards of self-reporting the violation to the Government and cooperating in a Government investigation. The organization should also take other reasonable steps to remedy the harm resulting from the criminal conduct, which may include providing restitution to identifiable victims, disciplining employees, and updating its compliance program.**



# **When Self-Reporting to a Government Agency Is Advisable**

- **If an organization self-reports to the Government, the organization may qualify for reductions in the calculation of the U.S. Sentencing Guidelines, decreased fines and penalties, or other leniency.**
- **The Government may even decline to prosecute an organization that self-reports. For example, recently, the CFTC issued a detailed “declination” letter setting forth its decision not to penalize Deutsche Bank. The letter noted Deutsche Bank’s timely and voluntary self-disclosure, full cooperation, and proactive remediation.**
- **However, if an organization unreasonably delays reporting the offense to appropriate governmental authorities, then “cooperation credit” may no longer apply.**



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