"A Guide for Developing and Implementing a Corporate Compliance Program"
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Corporate compliance programs are extremely important in helping organizations avoid vicarious liability for the criminal conduct of their employees and in reducing the severity of any penalties that are imposed. An organization should institute a corporate compliance program with the following goals in mind: (1) preventing violations of the law and of corporate values; (2) detecting any criminal conduct or unethical behavior that does occur; (3) remediating the misconduct as quickly as possible; and (4) decreasing any penalties associated with the criminal conduct. To achieve these goals, an organization should take the following steps: (1) design the corporate compliance program based on a risk assessment; (2) implement the program by incorporating it into company policies and procedures; (3) disseminate to company employees the new policies and procedures as well as the consequences for violating them and provide training on compliance; (4) enforce the policies and procedures by investigating violations and taking necessary disciplinary action; and (5) update the risk assessment, the corporate compliance program, and related policies and procedures on a regular basis and when a violation occurs.

In May 2019, the U.S. Department of Justice (DOJ) updated its guidance regarding how it evaluates the effectiveness of an organization's compliance program. According to that guidance, DOJ uses three fundamental questions to evaluate corporate compliance programs: (1) Is the compliance program well-designed? (2) Is the program being applied earnestly and in good faith? (3) Does the compliance program work in practice? Among other considerations for a corporate compliance program to be well-designed, it must be customized to an organization's specific risk profile. Using a 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. Additionally, an organization's compliance program should set forth the organization's commitment to full compliance with relevant federal laws in a way that is accessible and applicable to the organization's employees. It should also take organizational values and contractual obligations into account.

A "paper program" will not hold weight with law enforcement. Therefore, a corporate compliance program must be effectively implemented and disseminated to its employees. To implement its corporate compliance program, an organization should establish policies and procedures that incorporate a culture of compliance into its day-to-day operations. It should disseminate those policies and procedures to its employees and provide them with training regarding compliance. The organization must also show commitment to its corporate compliance program, in particular the commitment of its senior management and Board of Directors to rigorously adhering to the program.

Those responsible for compliance should have sufficient autonomy from management and direct access to the Board of Directors or its audit committee. Compliance personnel should also have appropriate qualifications and experience, and they should be given adequate resources to carry out their duties. If any aspect of compliance is outsourced, then the external firm must have sufficient access to company information.

A corporate compliance program should be put in place before any violations occur, if possible. The Government acknowledges that no corporate compliance program can prevent all misconduct. However, a corporate compliance program is effective if it devotes appropriate resources and attention to high-risk transactions, identifies misconduct, and allows for timely remediation. Additionally, an organization's disciplinary history will be considered by prosecutors, including whether the organization has ever terminated or disciplined anyone for the type of misconduct at issue. The recurrence of similar misconduct may cause DOJ to question a compliance program's effectiveness.

If any violations of the organization's policies or of the law are suspected, an internal investigation should be conducted. It is preferable that the investigation be independent and, therefore, conducted by outside counsel. Any violations that are found should be remediated as quickly as possible, which may include disciplining any employees who violated the law or who should have prevented the violation, self-reporting violations to the Government, and revising the corporate compliance program to prevent similar violations in the future. Not only should clear disciplinary procedures be in place, they should be enforced consistently across the organization.

Finally, an organization's risk assessment must be updated periodically, and its corporate compliance program must be revised accordingly given that DOJ considers revisions to compliance programs in light of "lessons learned." The organization should undertake a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training. It is also important to revise the corporate compliance program when a violation occurs.