Be Prepared!
Compliance Programs, Internal Investigations, and What to Do When the Feds Come Knocking

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Corporate Compliance Programs
COMPLIANCE, WHY HAVE IT?

- Not mandated by law
- A culture of ethical conduct increases morale
- Minimizes business and management exposure to criminal and civil penalties when incidents occur
- Employee safety
- Aids in any investigations
- Educates employees and management on appropriate workplace conduct
THE APPLICABLE “FILIP” FACTORS

- Considered when:
  - Investigating a corporate entity
  - Determining whether to bring charges
  - Negotiating plea or other agreements

- “The pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management”
- “The corporation’s willingness to cooperate in the investigation of its agents”
- “The corporation’s timely and voluntary disclosure of wrongdoing”
- The corporation’s post-incident remedial efforts “to implement an effective corporate compliance program or to improve an existing one”
- “The existence and effectiveness of the corporation’s pre-existing compliance program”
Evaluating Effectiveness
The 7 Steps to Evaluating Effective Compliance

These seven steps, as set forth in the Federal Sentencing Guidelines, are considered by the government in determining whether a compliance program is truly “effective.”

If a program is an “effective” one, it addresses and provides evidence in favor of the other Filip factors listed previously.

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<th>The 7 Guidelines to Effectiveness</th>
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<td>1. Organization must establish standards and procedures to prevent and detect criminal conduct</td>
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<td>2. The top management of the organization, including the board of directors, must be involved in the implementation and operation of the program</td>
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<td>3. The organization must take care not to allow personnel known to have engaged in inappropriate conduct in sensitive positions</td>
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<td>4. The organization must have taken steps to communicate periodically and in a practical manner the compliance program</td>
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<td>5. The organization must have an active monitoring and audit program</td>
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<td>6. The organization must promote and enforce the program through appropriate incentives and disciplinary measures</td>
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<td>7. After an offense has been detected, the organization must take reasonable steps to respond appropriately and to prevent further similar offenses, including to make necessary changes to modify the compliance and ethics program</td>
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DOJ WEIGHS IN

“From a prosecutor’s point of view, an effective compliance program is a program that promotes an organizational culture that encourages ethical conduct and compliance with the law. A well-constructed, thoughtfully implemented and consistently enforced compliance and ethics programs helps to prevent, detect, remediate and report misconduct. DOJ hopes compliance and ethics programs are tailored to a company’s specific challenges and requirements.”
1. STANDARDS AND PROCEDURES

- Established by
  - Board Resolution
  - Organizational/Charter Document

- Contains
  - A short statement from the Board and/or Management in support of its purpose
2. MANAGEMENT & BOARD INVOLVEMENT

- Source of evidence in other circumstances as well, such as a *Caremark* fiduciary duty challenge
- Often done through a board-staffed compliance or audit committee
- Annual Board/Committee check-in
3. NO GROSSLY NEGLIGENT STAFFING
4. PERIODIC COMMUNICATION

- Throughout the organization
  - All employees and management levels

- Annual training program
  - A mass e-mail containing the compliance program and a certification read-response

- Expressed in a **practical manner**
  - Case studies
  - Video training
5. ACTIVE MONITORING & AUDIT

- Chief Compliance Officer
- Audits
- Maximize resources
- Cross-training
- Watch the watchers!
6. INCENTIVE AND DISCIPLINE

- Accountability
  - Company takes action when responding to bad conduct
- Consistent application
  - Applied fairly and equally
- Incentive system
  - Promotion consideration
  - Award consideration
7. ACTION & ONGOING IMPROVEMENT

- Report
- Investigate
- Take action
- Improve and refine
- Stop future bad conduct
Recent Trends
PROGRAM TONE & STRUCTURE

- Aspirational
- Business integration
- Separation from Legal
MOST RECENT DOJ GUIDANCE

- Memorandum on the Evaluation of Corporate Compliance Programs

- Selections of Corporate Monitors in Criminal Division Matters
Basics of Internal Investigations
GOALS OF AN INTERNAL INVESTIGATION

- Find out what happened
- Stop the bad actors
- Minimize exposure to the company
- Proactively provide coaching and training to avoid repeat issues
- Preserve the relationship with employees falsely accused of bad acts or found to have committed relatively inconsequential transgressions
- Do it all quickly and efficiently so as to avoid further disruption to the business
PHASES OF AN INTERNAL INVESTIGATION

- Scoping
- Document Review
- Interviews
- Report & Recommendations
- Follow Up
SCOPING

- Receipt of Escalation From . . .
  - Ethics line
  - Directly from employees familiar with the internal investigations team
  - Third Parties (vendors, competitors, governmental entities)

- Preliminary Review
  - Look for relevant persons, time periods, and issues that will set the scope of the investigation

- Scoping Interviews with Reporter
  - If the reporter is known, schedule a confidential interview (with notice to HR) to get more details on the issue

- PST Files / Instant Messaging Logs
  - Have IT pull the relevant personnel’s PST files and instant messaging logs
  - Put those files and logs into a document review database

- Search Terms
  - Decide on an initial list of targeted search terms to run. Be conscious of keeping the extent of the search commensurate with the risk posed to the company
DOCUMENT REVIEW

- Document Review Program (Ringtail; Relativity; Etc.)
- Review scaled to be commensurate with the risk posed to the company
- Email, Text, Instant Messenger, Gift reporting logs, Other …
- Draft document chronology to be used to formulate interview plan and as evidence for ultimate report & recommendations
INTERVIEWS

- Attorney-Client Privilege – Upjohn Warnings
- Include HR if possible
- Remember your goals, especially...
  - Find out what happened; and
  - Preserve employee relationship if no evidence of unethical conduct
REPORT & RECOMMENDATION

- Communicate to internal stakeholders (e.g., in-house counsel, board member(s), etc.)
  - Findings
  - Discipline Recommendations
  - Legal advice
- Memorialize Report & Recommendations for future reference
FOLLOW UP

- Discipline
- Coaching/trainings for involved employees
- Improvements or Clarifications to Code of Conduct
- Proactive trainings to problematic groups or regions
When the Feds Come Knocking on Your Door
THE BASICS

- Investigative Inquiries: Any formal or informal demand or request for documents, testimony, or other evidence from any government official for use in enforcing any federal, state, or local law
- Establish a company policy for handling investigative inquiries
  - Ensure employees are aware of the policy
  - Hold trainings for employees (1x/year)
- Appoint a Designated Person (“DP”)
  - Provide work phone and email to employees
TYPES OF INQUIRIES

- Investigative Inquiries occur in two primary ways
  - Telephone Calls
  - Physical Visits

- Gather relevant information
  - Identity of officer (e.g., name, agency affiliation)
  - Reason for contact

- If a physical visit
  - Notify the DP immediately
  - Request the DP meet the officer at reception
RESPONSIBILITIES OF DP DURING VISIT

- Confirm identity of government officials present
  - Review credentials carefully to confirm name and affiliations
  - Request business cards

- Gather Relevant Information
  - Reason of visit
  - Copy of official documents (e.g., search warrant)

- Provide the officer with company counsel’s information

- Warrants
  - Comply with limited scope of search warrants
  - Direct official to any individual listed in an arrest warrant

- Subpoenas: Deliver to company counsel to review
INTERVIEW REQUESTS

- Government official may ask for an interview
- Remember
  - No one can require you to sit for an interview or answer questions
  - You have a right to consult with an attorney
  - Inform the official that requests for any privileged or protected information should be directed to Company counsel
FOLLOW-UP WORK

- Draft a memorandum of the government official’s actions for Company counsel
- Consider whether to engage outside counsel
- Consider whether to conduct an internal investigation
- Remember: If the investigation is supervised by an attorney, it is protected by the attorney-client privilege
- Compliance Program
K&L GATES COMPLIANCE PROGRAMS AND INVESTIGATION SUPPORT

- K&L Gates prepares, reviews/revises compliance programs for companies of all sizes
- K&L Gates provides investigation support to internal compliance departments to facilitate this entire process. We provide scalable support, while maintaining institutional knowledge about the client
- Our services include . . .
  - Ringtail
  - eDat or Junior Associate reviewers
  - Lawyers with investigative experience to conduct interviews and make recommendations on potential discipline
Thank You

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