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INTERNAL INVESTIGATIONS

Three Seyfarth Shaw attorneys discuss the importance of having an effective, up-to-date corporate compliance program in advance of a government inquiry or investigation. The authors explain that it is important for companies to use this as an opportunity to carefully reexamine (and if necessary improve) investigation processes they previously put in place in order to ensure those controls at least meet, if not exceed, the Justice Department's newly-released questions and expectations.

Adding Meat to the Bone: The Department of Justice Issues New 'Meatier' Guidance on Corporate Compliance Programs



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Every business organization—no matter its size or public-private status—must detect and prevent misconduct that threatens to harm its business and other interests. That principle, supported by the U.S. Sentencing Guidelines, is intuitive for anyone focused on achieving business success. Yet companies continue to struggle with exactly how to design and implement such an ideal system—that is to say, an *effective* corporate compliance program.

New DOJ Guidance: One Stop Shop

Just last month, in February 2017, the Department of Justice's Fraud Section issued a new, important blueprint for what the DOJ expects to see in just such an ef-

fective compliance program. Entitled "Evaluation of Corporate Compliance Programs," the document divides up 11 topics into "Sample Topics and Questions," gathered from many sources but certainly reflecting the collective knowledge (and wisdom) federal prosecutors will employ when the government shines its spotlight on a company's compliance efforts.

Describing the document as "neither a checklist nor a formula," the DOJ is careful not to embrace a one-size-fits-all, "cookie cutter" compliance approach, but rather stresses its preference for a tailored solution that fits the real-life risks and dimensions of a company's size, resources, and business operations. Despite such flexibility, another reading of the guidance, which is phrased in the form of more than 100 questions, is that these are among *the* questions the DOJ *will* ask compliance professionals, were it ever necessary for the DOJ to examine a business organization's program. Viewed from this perspective, the DOJ's guidance document is immensely valuable; it's like having the professor share

the teacher's edition of the course book with most, if not all, the questions found inside.

Touchstones of an Effective Compliance Program

The 11 topics cover areas central to any effective compliance program and have increasingly become critical measuring sticks for the DOJ in evaluating the effectiveness of corporate compliance programs. That is especially true when the investigation involves significant fraud or Foreign Corrupt Practices Act violations. These 11 enumerated focus points are:

1. Analysis and Remediation of Underlying Misconduct
2. Senior and Middle Management
3. Autonomy and Resources
4. Policies and Procedures
5. Risk Assessment
6. Training and Communications
7. Confidential Reporting and Investigation
8. Incentives and Disciplinary Measures
9. Continuous Improvement, Periodic Testing and Review
10. Third Party Management
11. Mergers and Acquisitions (M&A)

Although those subject areas aren't in and of themselves groundbreaking, the questions within each topic evince the DOJ's expectation that compliance programs must "come of age" in key areas. Even more, the consolidation of these topics into one cohesive document enables compliance professionals and others to zero-in on what the DOJ (and other enforcers and regulators) care about, thereby removing much of the guess work that may have previously plagued the process. Among the areas highlighted, three stand out:

- (a) capable and thorough investigations;
- (b) informed oversight; and
- (c) proactive education.

The Need for Independent Investigations

Exemplifying the DOJ's enhanced focus on sophisticated investigations, the document kicks off with these three questions:

- "What is the company's root cause analysis of the misconduct at issue?"
- "What systemic issues were identified?"
- "Who in the company was involved in making the analysis?"

Such questions anticipate that companies will conduct investigations that will probe deeply and unearth fundamental problems, rather than doing cursory reviews or assuming that instances of misconduct are the

classic "one offs." The last of these questions (about who is involved in the analysis) suggests that legal experts and senior company personnel should participate in deconstructing the serious misconduct.

But the DOJ seemingly wants more than just capable *internal* resources in all cases. In Section 7 of the guidance, the DOJ calls for a "Properly Scoped Investigation by Qualified Personnel," and in doing so, mandates that investigations be "independent, objective, appropriately conducted, and properly documented." Building on these criteria, the DOJ asks whether these investigations have been "used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager[s] and senior executives." Taken together, such questions strongly encourage every company to implement an investigation system that ensures appropriate independence and utilizes expert and, where appropriate, external resources to get to the heart of the problem and avoid DOJ criticism about "independence" or "objectivity."

Oversight's Continued Importance

The guidance also stresses the importance of shared, informed and effective oversight. The DOJ expects senior business leaders to take "concrete actions" to model leadership, both in compliance initiatives and remediation, and it expects the board of directors and senior leadership will have (or will obtain) "compliance expertise" to properly oversee and understand how

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compliance efforts and investigations are addressed. Similarly, the DOJ wants to know what specific actions other stakeholders have taken to show their commitment to compliance and remedial efforts (e.g., business and operations managers, HR, Finance, Procurement and Legal), and whether the company's "key gatekeepers" who issue payments or review approvals have been given clear guidance and know how and where to raise concerns. These areas of inquiry show a sharpened analysis of the actual compliance activities of senior leadership, middle managers, and those whose jobs involve implementing and monitoring compliance controls.

Training Makes a Difference

Training and communications likewise play significant roles in the document. Among other best practices, the DOJ expects to see "anonymized descriptions of the type of misconduct that leads to discipline," "tailored training for high-risk and control employees," and details of how the company has assessed "whether its employees know when to seek advice and whether they would be willing to do so." In other words, more is needed than circulating a code of conduct to employees, delivering online compliance training, and collecting annual certifications that employees have read and understood both. A company must be able to show it tailored its training to key risk areas, educated all employ-

ees on actual remedial measures, and did an assessment of how well employees understood what to raise and how willing they were to raise issues of non-compliance. That's a lot more than just an annual certification.

Conclusion

In all, having such a user-friendly "teacher's edition" guidance document in advance of a government inquiry or investigation is very helpful. It means that compliance and investigation programs may use this as an opportunity to carefully reexamine processes they previously put in place, in order to ensure those controls *at least* meet, if not exceed, the DOJ's identified questions and expectations. Although those targeted areas will no doubt inform government FCPA investigations, the broader message is that effective compliance programs must do more than just prevent criminal misconduct and must also be more than just a paper plan on the 11 topic areas.

Rather, to be effective the compliance program must be a system that: (a) nurtures careful, in-depth and independent examination of compliance concerns; (b) truly fosters an ethical culture from its board to its senior leaders to its middle managers; and (c) proactively guides the very individuals who are critical to effective compliance, that is, the company's employees and its leaders.