

DOJ Publishes New Evaluation Questionnaire on Compliance Programs

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(I) Overview

United States Department of Justice (“DOJ”) published on its website a new guidance paper called “Evaluation of Corporate Compliance Programs” (“Evaluation”) in February 2017. The Evaluation provides insight into how the DOJ evaluates compliance programs by setting forth the questions DOJ frequently uses when deciding on fine mitigation or entering into a plea agreements.

While documents such as the United States Attorney’s Manual, United States Sentencing Guidelines and A Resource Guide to the U.S. Foreign Corrupt Practices Act (“FCPA Guide”) define “what” elements a compliance program is expected to have, the Evaluation provides guidance on “how”. The document does not put forward any new elements for compliance programs, but provides compliance professionals with a useful tool that they can use while assessing the integrity of their compliance programs. In fact, many questions listed in the Evaluation would be hard to answer vis-a-vis a paper compliance program. An example of such as a question would be “*Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints or investigations involving similar issues?*”. On that note, the DOJ is quick to assert its caveats that the question list should not be utilized as a box checking exercise. This is noteworthy point: as stated time and again when explaining the intricacies of compliance programs, there is no one-size-fits-all approach in compliance. How a compliance program should be established, operated and emphasized depends on many factors such as the size, sector, jurisdiction or the history (any previous FCPA violations) of the company. Hence, the question list should be used in an analytical approach in determining the crucial elements of a compliance program but fine tuning them in implementation, in accordance with the individual needs of the company.

(II) Issues Covered

The Evaluation is essentially a question list comprised of 11 sections, similar to the categorization made for the hallmarks of a compliance program in the FCPA Guide. Below are our analyses of the issues covered by the Evaluation.

(1) Analysis and Remediation of Underlying Misconduct

Under this section the Evaluation emphasizes making “a root cause analysis” and determining “systematic” problems, if any. Questions under this section encourage the companies to regard compliance programs not as one-time disconnected mistakes, but as a result of the wider company climate. If in this way, the underlying problem can be identified, analyzed and remedied, the improved compliance program will be stronger.

(2) Senior and Middle Management

Here we observe an emphasis on “shared commitment” where the “concrete acts” of the senior management is supported by, among others, middle managers. Further, we observe potential inquiries into sensitive issues such as how a company monitors its senior leaders’ behavior.

(3) Autonomy and Resources

The question set in this section is tough: Issues such as whether the compliance department involved in the decision making of the relevant conduct, whether the compliance department has a direct reporting line to the board of directors or whether request for funding by the compliance department ever been denied. Generally this section aims to determine whether (i) the company’s compliance department takes part in the decision-making process, (ii) is sufficiently qualified and experienced, (iii) autonomous, (iv) empowered and (v) have sufficient resources.

(4) Policies and Procedures

This section is divided into two sub-sections: (i) Design and Accessibility and (ii) Operational Integration. The first sub-section deals with issues such as whether relevant business units have been involved in the designing of the policy, whether the policies have been implemented effectively and whether gatekeepers (e.g. the persons who issue payments or review approvals) have been provided with sufficient training. The second sub-section is with regard to how these policies and procedures are integrated in the field including vendor management an inquiry into how the misconduct was funded.

(5) Risk Assessment

This section demonstrates that the DOJ takes into consideration the methodology for risk assessment and how effective that methodology is.

(6) Training and Communications

Questions in this section aim to find out whether tailored training in accordance with the real risks faced in the field have been provided, whether the language of the training was appropriate, whether company's reaction to misconduct was communicated to the employees and whether guidance have been available to employees.

(7) Confidential Reporting and Investigation

Here, ensuring the objectivity and independence of internal investigations have been emphasized. Again, we see the expectation that the investigation should be aimed at identifying the root causes of the problem. Further, merely investigating the problem is not enough, as DOJ also inquires the responses by the company to the investigative findings.

(8) Incentives and Disciplinary Measures

The questions under this section tackle with the gist of the compliance program. After all, what is the use of rules if one is not to implement them? Issues such as whether disciplinary actions are taken in the face of misconduct, whether managers are held accountable, whether failure to supervise has been sanctioned and whether the company incentivized ethical behavior should be reviewed.

(9) Continues Improvement, Periodic Testing and Review

This section provides questions which indicate the need for testing compliance programs by reviews and internal audits which include interviews with employees and third parties.

(10) Third Party Management

The questions provided in this section relate to whether the mechanism for third party management is implemented according to the risks presented by the third party and whether the third parties are supervised appropriately and when a misconduct occurs how are third parties with similar red flags are managed.

(11) Mergers and Acquisitions

This section sets forth questions with regard to the due diligence process before a merger or an acquisition; and the integration and implementation of the compliance program in the new entity.

(III) Conclusion

The Evaluation can help compliance professionals gain a deeper understanding of how DOJ evaluates compliance programs, as the document focuses on “how” a compliance program can be effective rather than “what” its elements should be. The questions are detailed and aimed at tackling issues that might be the common problems in different compliance programs. It is a valuable addition to other guidance documents, such as the FPCA Guide, published by the DOJ.

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(First published in Mondaq on April 24, 2017)