

Client Alert

Special Matters & Government Investigations Practice Group

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For more information, contact:

Christopher A. Wray
+1 202 626 5570
+1 404 572 3544
cwray@kslaw.com

Jason A. Jones
+1 202 626 2645
jajones@kslaw.com

Brandt Leibe
+1 713 751 3235
bleibe@kslaw.com

Sara Kay Wheeler
+1 404 572 4685
skwheeler@kslaw.com

King & Spalding

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309
+1 404 572 4600

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
+1 202 737 0500

Houston
1100 Louisiana Street
Suite 4000
Houston, Texas 77002-5213
+1 713 751 3200

www.kslaw.com

DOJ Issues New Corporate Compliance Guidelines *Document Outlines Criteria for the Criminal Division's Evaluation of Corporate Compliance Programs*

Recently, and without the fanfare that often accompanies new policy guidance regarding corporate fraud, the Fraud Section of the Department of Justice posted a document on its website entitled “Evaluation of Corporate Compliance Programs” (hereinafter “Compliance Guidance”).¹ The stated purpose of the document is to provide “sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program,” and no doubt reflects the influence of the DOJ Compliance Consultant, Hui Chen.

The Compliance Guidance outlines eleven broad “sample topics and questions” in a checklist format. No topic or question is particularly novel or breaks new ground. But whenever the Department issues written guidance to corporations regarding how it will approach evaluation of corporate criminal conduct and remediation, companies should take careful note.

“Sample Topics” Emphasized by the Department

The following “sample topics” are enumerated in the Compliance Guidance, along with a series of questions reflecting how the Department will evaluate a company’s investigation and remediation in that area.

- ***Analysis and Remediation of Underlying Conduct.*** It will not come as a surprise that among the first questions the Department will ask a company are: What was the “root cause” of the misconduct, and how “systemic” was the problem? The Department will want to hear how the misconduct was identified, and whether the company’s compliance program caught the issue in a timely fashion. If the company’s compliance program missed chances to detect the misconduct, that will of course inform the Department’s view of where remedial efforts should focus going forward.
- ***Senior and Middle Management.*** When talking about compliance, one often hears discussion about the “tone at the top,” and the “tone at the middle” – concepts that now border on the cliché. But the concepts cannot be ignored, and the Department places special emphasis on determining whether corporate leadership created an environment that fostered misconduct, or

whether the misconduct was truly an aberration. The Department will also seek information as to how leadership reacted once the misconduct was uncovered. Was there swift investigation and remediation, or was the problem allowed to fester and grow? The Department will look for concrete examples of instances in which senior leadership demonstrated a commitment to compliance, including through remediation efforts.

- *Compliance Autonomy and Resources.* The Department has frequently urged companies to ensure that their compliance function is substantially independent of corporate management and properly funded. Federal prosecutors rarely sit down with companies who have done everything right – the issue is usually what went wrong, and why. In order to assess those questions, the role and autonomy of the compliance function will be essential. As the Compliance Guidance makes clear, a company’s compliance department should be active, empowered, experienced, and funded at a level that is commensurate with the risks faced by the particular business. If a company chooses to outsource the compliance function, it should be prepared to explain to the Department why it did so, and what efforts were made to ensure that the process would be effective.
- *Policies and Procedures.* The strength or weakness of existing compliance procedures and controls will determine the extent of remediation that will be expected by the Department. The Department will want to know how a program was designed and implemented, and whether careful thought (backed by dedicated resources) was put into crafting a program targeted to the risks faced by the business. Was the program “off-the-shelf” and half-heartedly implemented, or was it thoughtfully tailored to prevent the type of misconduct that ultimately occurred? In addition, even if a company has “gold standard” policies, they will not be useful if they are not implemented and integrated in the business in a diligent and consistent fashion. Questions will be raised regarding how particular controls and approval processes were implemented to detect and prevent misconduct, and whether they should have been improved after the misconduct was identified.
- *Risk Assessment.* A company will be expected to evaluate and understand the risks that it faces in whatever jurisdictions and industries in which it operates on a continuous basis. The Department will want to hear concrete information about the methodology a company has used to determine that risk – and whether the company continues to reassess risk in an organized fashion.
- *Training and Communication.* The Department does not expect all companies to have the same compliance program or training regimen. It does, however, expect a company to design its training program to address the risks the company actually faces. Particular attention should be paid to ensuring that training is effectively and timely delivered. Is compliance training done in the local language? How does the company monitor and ensure that the training was received – and more importantly, understood? Are there resources available to employees across the globe who may seek advice?
- *Confidential Reporting and Investigation.* Most sophisticated companies have a “hotline” for reporting of concerns that employees may have. When sitting down with the Department, however, companies should be prepared for questions about how effective the hotline has been. For example, how many complaints has the company received? If the answer is none or very few, the Department may be skeptical that the program has been properly implemented, or that employees are aware of its existence. The Department will also seek data and detailed information about how particular complaints were elevated and investigated, and may ask about how the company resolved them.
- *Incentives and Disciplinary Measures.* Once misconduct is identified and investigated, companies face difficult decisions about whether particular employees should be disciplined. The Department will press companies to demonstrate that they took misconduct seriously, and it will want to see that disciplinary actions were consistently and fairly applied. The flip side, of course, is whether a company positively incentivizes and prioritizes compliance

and ethical behavior. Promotions, awards, and other incentives for specific instances of ethical behavior will be seen by the Department as good indicators of an effective program.

- *Continuous Improvement, Periodic Testing and Review.* A properly designed and implemented compliance program is not static – it must grow and develop along with the business, and care must be taken to ensure that a company’s controls keep pace with the company’s evolving risk profile. The Compliance Guidance emphasizes the need for continuing analysis by internal audit, especially when particular instances of misconduct arise. A company should review and audit its program in a routine cadence, and should update the policies, procedures and related practices accordingly.
- *Third Party Management.* Analysis of corporate criminal enforcement actions in the past few years, especially in the FCPA context, demonstrates that third parties continue to present a significant risk for any business. The Compliance Guidance recognizes that risk, and places special emphasis on the processes that a company implements to manage it. The Department expects companies to manage its third parties in a manner that corresponds to the nature and level of the enterprise risk, and to integrate the process into its procurement and vendor management systems. It will look to see whether a company has carefully evaluated whether using third parties is necessary or advisable at all, given the particular risks faced, and how those third parties are compensated. Companies should be also prepared to discuss data in this regard. For example, when red flags arise, how has the company responded? Have third parties been rejected by the approval process for such red flags. If not, why not?
- *Mergers and Acquisitions.* The Department recognizes the risks attendant to mergers and acquisitions, especially those involving businesses with an international footprint. The questions likely to be raised will focus on what due diligence efforts the company made both before and after the transaction. What diligence did the company attempt before the transaction, and did it identify as a risk the type of misconduct that occurred? After the transaction closed, did the company stop looking, or did it continue to conduct diligence and audit the newly acquired business? How was the compliance function of the integrated, and how long did it take? If there were delays, the company must be prepared to explain why, especially if additional misconduct occurred during the delay.

Conclusion

In the past several years, the Fraud Section of the Department of Justice has made significant efforts at transparency in the enforcement of corporate criminal law. Building on helpful prior efforts such as the 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act*, the Compliance Guidance is another useful step. While the outline does not break new ground or offer a magic formula for compliance professionals or corporate executives, it does provide a useful roadmap into the types of questions the Department will ask if a company comes before the Department and must explain itself. Although most companies will never face evaluation of their compliance program by the Department of Justice, the Compliance Guidelines will serve as an important reference point for evaluating whether compliance programs measure up to the expectations of the enforcement authorities.

King & Spalding’s Global Anti-Corruption and FCPA practice is led by the former Assistant Attorney General in charge of the DOJ’s Criminal Division and includes many former senior government officials from the DOJ and SEC. Our lawyers have extensive experience on both sides of the table and a strong network of relationships in the global enforcement community. This gives us the perspective and credibility to counsel you on multiple fronts and across borders – and help reduce your risks when doing business overseas.

We assist clients in a wide variety of industries with every aspect of FCPA counseling and representation, and we do so in every region of the world. Our team of lawyers has long experience advising companies on compliance issues, and includes former compliance professionals from major international corporations. Armed with that experience, we develop and implement compliance and due diligence plans that help you anticipate, prevent and resolve issues before they become more serious. We manage internal investigations and government inquiries effectively and efficiently – no matter how complex and far-reaching they are. Our experience as government investigators and our high level of credibility with enforcement authorities gives us the judgment to guide clients to the best possible outcome, and to do so out of the public eye.

When multiple parallel investigations in different countries are required, we have the depth to handle them in close coordination – ensuring every issue is uncovered and addressed efficiently. Our team practices from eight offices in the U.S. and 11 other international offices and has handled anti-corruption matters in more than 70 countries around the globe.

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ⁱ "Evaluation of Corporate Compliance Programs," U.S. Department of Justice, Criminal Division, Fraud Section, available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.