Building an Effective Compliance Program Scaled for a Small Organization (and a Small Legal Team)

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Agenda

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• Securing Organizational “Buy-In”  
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  o Seven Core Components of Effective Compliance Programs
• Building the Program  
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  o Considerations on Scope & Complexity  
  o Fundamental Elements
• Implementing the Program  
  o Communication and Training  
  o Ongoing Monitoring, Auditing and Reporting
• Challenges of “Dual Role” In-House Counsel & Compliance Officer
Introduction

- Large vs. Small Organizations
- Public vs. Private Companies
- Highly Regulated vs. Non-Highly Regulated
  - Financial institutions
  - Health care providers
  - Pharmaceutical companies
  - Government contractors
  - Energy & utilities
  - Educational institutions
  - ...

Securing Institutional “Buy-In”

- The success of any compliance program hinges on securing “buy-in” from institutional stakeholders
  - Board of Directors
  - Executive Management
  - Mid-Level Managers and Supervisors
- Stakeholders may have different key concerns, so messaging may need to be tailored accordingly
  - Board: Risk
  - Executive Management: Resources
  - Mid-Level Managers and Supervisors: Implementation
- Let’s start at the top....
Overview: Federal Sentencing Guidelines

- Organizations, like individuals, can be found guilty of criminal conduct, and punishment for felonies & Class A misdemeanors is governed by Chapter 8 of the U.S. Sentencing Commission (USSC) Sentencing Guidelines.
  - Fraud
  - Environmental waste discharge
  - Tax offenses
  - Antitrust offenses
  - Food & drug violations

Overview: Federal Sentencing Guidelines (cont’d)

- When the USSC issued the organizational guidelines, it attempted to alleviate the harshness of institutional vulnerability by incorporating into the sentencing structure the preventative and deterrent aspects of systematic compliance programs.
  - Potential fine range is mitigated — in some cases up to 95 percent — if an organization can demonstrate that it had established an effective compliance program.
So...what is an “effective compliance program”? The definition of an effective compliance program requires the exercise of due diligence to prevent and detect criminal conduct and the promotion of an organizational culture that encourages a commitment to compliance with the law.

Chapter 8 of the Federal Sentencing Guidelines outlines seven key criteria of effective programs.

### Overview: Federal Sentencing Guidelines (cont’d)

- Standards & Procedures
  - “The organization shall establish standards and procedures to prevent and detect criminal conduct.”
  - Must be “reasonably capable of reducing the likelihood of criminal conduct.”

- Oversight & Operational Effectiveness
  - “The [Board of Directors] shall be knowledgeable about the content and operation of the...program and shall exercise reasonable oversight with respect to implementation and effectiveness of the compliance and ethics program.”
Due Care in Delegation of Authority

“The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.”

Communication, Training & Education

“The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures...by conducting effective training programs and otherwise disseminating information appropriate to...individuals’ respective roles and responsibilities.”

Monitoring, Auditing, and Reporting Systems

“The organization shall take reasonable steps:

• to ensure that the [program] is follows, including monitoring and auditing to detect criminal conduct;
• to evaluate periodically the effectiveness of the [program];
• to have and publicize a system...whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”
**Seven Core Components of Effective Compliance Programs (cont’d)**

- **Enforcement & Discipline**
  - “The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through
  - • (A) appropriate incentives to perform in accordance with the [program]; and
  - • (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.”

- **Appropriate Response & Risk Assessment**
  - “After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately...and to prevent further similar criminal conduct, including making any necessary modifications to the [Program].”
  - “The organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement or modify each requirement [of the Program] to reduce the risk of criminal conduct.”
Determining Organizational Objectives

- Determining a set of organizational objectives at the start—even if broadly stated—can be helpful.
- For example:
  - To formalize our commitment to legal, financial, and regulatory compliance in a way that expressly satisfies the federal guidelines.
  - To reduce the risk of compliance failures by enhancing key aspects of Company management and establishing clear written policies.
  - To minimize financial exposure if a noncompliance event occurs.
  - To increase the overall value of the Company to existing shareholders and potential investors.
- Formalizing and documenting good company practices that are already in place makes it easier to demonstrate those practices if called upon to do so.
  - For well-run companies, establishing a formal compliance program likely will not involve major changes to what they already do.

Basic requirements are the same for all organizations, but expectations on scope and resource-load vary by size of the organization.
- Identify major compliance risks relevant to the organization, then build the framework needed to address those risks.
  - Complexity and resource-load will be highly variable, but ideally will be “scalable” to accommodate growth or change in regulatory demands (e.g., private-to-public company transition)
Building the Program:
Fundamental Elements

- **Code of Conduct**
  - Practical, plain-language description of the program and the compliance risks that are relevant to the organization

- **Written Policies and Procedures**
  - Provide detailed guidance on how employees should conduct the business of the company
  - Specifically address legal and regulatory risks and rules
  - Compliance Manual to guide administration of Code

- **Program Leadership & Training**
  - Compliance Committee
  - Board Oversight & Channels of Communication

- **Reporting System**

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Building the Program:
Fundamental Elements (cont’d)

- **Code of Conduct** (cont’d)
  - Keystone of any program
  - Statement of organization’s core values, vision, and mission
  - Overall guide for uniform management of company rules and policies
  - Guidelines for raising concerns and complaints, for addressing and disciplining misconduct and violations
• **Written Policies and Procedures**
  
  - Some policies are universally applicable, but will vary in approach and scope, depending on the business:
    - Anti-harassment, non-discrimination, conflicts of interest, internal accounting practices, record retention, anti-corruption, political contributions, intellectual property, etc.
  
  - Other policies are vary by industry or business:
    - Sarbanes-Oxley requirements, agency regulatory policies (FDA, USDA, FCC, FAA), government contracts, export controls and customs, hazardous waste disposal, information privacy, etc.
  
  - Compliance Manual can be helpful to program leadership for uniform administration and enforcement

• **Program Leadership & Training**
  
  - Compliance Committee
    - Organized group of high-level management responsible for the program, with at least 1 individual having direct access to the Board (CCO)
    - Responsible not only for operating the program, but also for fostering a culture that promotes compliance
    - Responsible for ensuring proper training on Code and policies
  
  - Board of Directors
    - Chartered committee or full Board provides oversight over implementation and effectiveness of program
    - Direct line of communication with CCO
Building the Program:
Fundamental Elements (cont’d)

- Reporting System
  - Clearly established lines of communication for employees to report compliance concerns, lodge complaints, or ask questions.
  - Hotline or other means of confidential reporting is important (and may be mandated)
  - Non-retaliation policy should be clearly documented, communicated to employees, and strictly enforced.

Implementing the Program

- Communication
  - Code of Conduct should be distributed to all employees and, ideally, written acknowledgement obtained
  - Policies and procedures accessible to all employees via intranet, accessible server, or other means
  - “Rollout” is ideally announced by President/CEO rather than Legal

- Training
  - Initial Code training should be mandatory for all employees and written records should be kept
  - Policy-specific training as needed
  - “Marketing” is important!
Implementing the Program (cont’d)

- Monitoring & Auditing
  - Day-to-day monitoring is mostly in the hands of mid-level management—communication is key
  - Periodic detailed audits of key risk areas helps refresh best practices as well as prevent compliance problems

- Reporting
  - Informal reporting (to supervisors, managers) tends to be more common than hotline reporting in many organizations
  - Ensure that managers are well-trained to report “up the ladder” when employees raise issues
  - Of course, follow-up is critical

Challenges of “Dual Role” In-House Counsel & Compliance Officer

- Dual role may work well for some organizations, but be inappropriate for others
- Integrating the roles into a single function can be beneficial
  - For small legal teams or solo GCs, it might be the only option
  - For in-house counsel who’s deeply involved in the business, looking at opportunities through a compliance “lens” can help identify and avoid issues early on
- But, wearing two hats can also bring challenges...
Challenges of “Dual Role” In-House Counsel & Compliance Officer (cont’d)

- Self-reporting and the attorney-client privilege
  - Professional responsibility rules regarding attorney-client privilege may be at odds with self-reporting and mandatory disclosure rules
  - Even with client consent, it is uncomfortable for in-house counsel to be advising executive leadership to self-report (especially if not mandatory) while also defending against allegations of wrongdoing or non-compliance

- “Blended” perspective
  - “Pure” compliance officer and “pure” legal advocate will often have conflicting perspectives
  - Blending the role may be seen to deprive corporate leadership of perspectives that may be beneficial

Challenges of “Dual Role” In-House Counsel & Compliance Officer (cont’d)

- A broader range of skills are required to take on both compliance and legal roles
  - Compliance programs need to be managed, and thus require strong management skills
  - Strong interpersonal skills are needed to keep lines of communication open, as well as to conduct a thorough investigation with sensitivity and discretion
  - In-house counsel may seem intimidating to many employees, which can discourage internal reporting

- The role of the corporate compliance officer is ever-increasing—and there are only so many hours in the day
Questions?

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