

Educating Your Board About Compliance

AUGUST 16, 2019

KASEY T. INGRAM, JD, CCEP
@KASEYINGRAMJD

What this Program Will Do



- Explain the Board's responsibilities for ensuring compliance.
- Provide methods for describing potential compliance risk areas to the Board.
- Present steps the Board may take to ensure management accountability for compliance.

What this Program Won't Do



Provide Substantive Answers to Specific Compliance Concerns

Tell You Exactly What Compliance Concerns You May Have for Your Particular Business.

Why Should the Board Care?

If Board fails to oversee compliance, it may

- affect Board's ability to govern;
- result in large fines; and/or
- create personal liability.

Examples

- **Carnival Cruise Lines** (<https://www.justice.gov/opa/pr/princess-cruise-lines-and-its-parent-company-plead-guilty-environmental-probation-violations>)
- **Facebook** (<https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>)
- **Blue Bell Creameries** (<https://courts.delaware.gov/Opinions/Download.aspx?id=291200>)

Compliance is the Smart Move

Risk Reduction

Good Citizen / Public Image

External Pressure

Prospect of Reduced Fines and Penalties

Greater Efficiency and Improved Outcomes

Guidance to Prevent Misconduct



BOARD RESPONSIBILITIES

U.S. Requirements for Compliance Programs

Key Guidance Documents for Establishing an Effective Ethics & Compliance Program

- 2018 U.S. Sentencing Commission Guidelines Manual, Chapter 8, Section 8B2.1 “Effective Compliance and Ethics Program”
- 2018 Justice Manual, Title 9: Criminal, Article 9-28.000 - PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, Section 9-28.800 Corporate Compliance Programs
- April 2019 U.S. Dept. of Justice (“DOJ”) Criminal Division Guidance Document for Evaluation of Corporate Compliance Programs
- May 2019 U.S. Dept. of Treasury Framework for OFAC Compliance Commitments
- July 2019 U.S. Dept. of Justice (“DOJ”) Antitrust Division Guidance Document for Evaluation of Corporate Compliance Programs in Antitrust Criminal Investigations
- State Corporate Law

International Requirements for Compliance Programs

Examples

- UK Bribery Act Guidance
- Brazil Clean Company Act
- German Corporate Governance Code
- OECD Good Practice Guidance



Different Leadership Roles in Compliance

Board of Directors

- Be knowledgeable about the program;
- Exercise effective and ongoing oversight;
- Promote Culture of Compliance.

Executive Management

- Have overall responsibility for the compliance program;
- Ensure that the program is effective;
- Promote Culture of Compliance.

Front Line Compliance Employees

- Have overall responsibility for the day to day operations for the compliance program;
- Report status to Executive Management and/or the Board;
- Have adequate resources, appropriate authority, and direct access to the Board;
- Promote Culture of Compliance.

Board's Fiduciary Duty to Oversee Compliance

"We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability:

- a) the directors utterly failed to implement any reporting or information system or controls; or
- b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."

Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006)

Failure to Oversee Can Create Liability

“In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.”

Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006)

Boards Need a Reasonable System of Monitoring and Reporting about Key Compliance Risks

“Although Caremark may not require as much as some commentators wish, it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation’s central compliance risks.”

Marchand v. Barnhill, C.A. No. 2017-0586-JRS, Del. S.Ct., June 19, 2019 at 36.

“Bad faith is established, under Caremark, when ‘the directors [completely] fail[] to implement any reporting or information system or controls[,] or . . . having implemented such a system or controls, consciously fail[] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.’ **In short, to satisfy their duty of loyalty, directors must make a good faith effort to implement an oversight system and then monitor it.**”

See id. at 30 (emphasis added).

What is Required from the Board?

“The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.”

<https://www.uscc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN>

What Does the DOJ Expect From a Corporate Compliance Program?

- (1) Is the compliance program well-designed?
- (2) Is the program being implemented effectively?
- (3) Does the compliance program actually work in practice?

Is the Program Well-Designed?

To Determine the DOJ Reviews the Following:

- Risk Assessment
- Policies & Procedures
- Training & Communications
- Confidential Reporting & Investigation
- Third Party Management
- Mergers & Acquisitions

Is the Program Being Implemented Effectively?

DOJ expects compliance programs to be constantly evolving and improving.

To evaluate effective implementation, DOJ reviews the following:

- Commitment by Senior and Middle Management
- Autonomy and Resources Provided to the Compliance Function
- Incentives and Disciplinary Measures

Does the Compliance Program Actually Work?

DOJ recognizes “that the existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense.”

“In assessing whether a company’s compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company’s remedial efforts.

To determine whether a company’s compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future.”

<https://www.justice.gov/criminal-fraud/page/file/937501/download> at 13

Factors Related to Effectiveness

- Continuous Improvement
- Periodic Testing
- Review of Program
- Analysis and Remediation of Underlying Misconduct

What Does DOJ Expect from the Board?

“Oversight –

- What compliance expertise has been available on the board of directors?
- Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions?
- What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?”

<https://www.justice.gov/criminal-fraud/page/file/937501/download> at 10

DETERMINING RISK

Board Responsibilities

- Request Periodic Risk Assessments and Updates
- Review Risk Assessments and Recommendations
- Ensure Mitigation is completed through Periodic Updates and Reports

Risk Assessment

A Periodic Risk Assessment enables the organization to:

- Determine the types and degrees of risks present for the organization.
- Take appropriate steps to design, implement, or modify program to reduce the risk



Basic Compliance Risk Assessment Process

1. Identify risks arising from legal requirements and known risk factors
2. Rank those risks according to impact and likelihood of occurrence
3. Identify areas of vulnerability and prioritize those areas
4. Develop and implement controls to minimize those risks

Common Risk Factors

Country/Culture Risk

Industry Risk

Commercial Risk

Business Risk

Transaction Risk



Risk Assessment Output/ Results

Report should contain the following information

- Methodology
- Scope and limits of the assessment
- Summary of Key Risks, not All Risks
- Identifications of areas requiring further assessment or review
- Recommendations/Mitigation Plan with timetable



Circulation should be limited and Privileged items should be clearly marked

Risk Assessment Methodology Should Be Transparent

- **Members of Risk Assessment Team**
 - Should have representative from all key areas (Compliance, Legal, Internal Audit, Finance, IT, HR, Operations, Supply Chain, Procurement, Sales, etc.)
- **Sources of Information**
 - Questionnaires
 - Interviews
 - Existing internal reports
- **Review of existing systems and controls**
- **Basis for Conclusions**

Risk Summary Should Be Useful

- Identifies Scope of Assessment
- Identifies Key Risks
- Identifies Mitigation Plan with Action Items and Deadlines
- Provides Graphical Representation or Chart for Easy Reference
 - Heat Map
 - Risk Register

SAMPLE HEAT MAP

	Medium	High	Critical
Severity	Low	Medium	High
	Low	Low	Medium
	Likelihood		

SAMPLE RISK REGISTER

RISK	Description	Impact	Likelihood	Triggers	Rank	Mitigation	Owner	Deadline	Comments

Establishing Accountability



Elements of an Effective Ethics & Compliance Program

1. The organization has standards and procedures to prevent and detect criminal conduct.
2. The leaders of the organization understand and oversee the compliance program to ensure adequate support and verify its effectiveness.
3. Specific individuals are vested with implementation of the program.
4. The organization denies leadership positions to people who have engaged in misconduct.
5. The organization communicates the standards and procedures of the compliance program.
6. The organization conducts effective training.
7. The organization monitors and audits the program.
8. The organization maintains a reporting mechanism to allow employees to report suspected violations or other concerns.
9. The organization provides incentives to comply with the program and disciplines misconduct.
10. The organization responds quickly to allegations and modifies the program as required.

How Can A Company Meet these Requirements?

- Issue/Maintain Corporate Policies & Procedures
- Provide oversight through a Chief Compliance Officer with reporting to the Board
- Hold Leaders Accountable
- Provide Communications & Training
- Audit programs
- Provide Hotline and other reporting mechanisms
- Ensure Accountability for both good and bad conduct
- Respond to issues and Revise program as needed
- Conduct Third Party Due Diligence

How does the Board Maintain Oversight and Accountability?

- Have someone on the Board with Compliance Expertise
- Maintain direct access to Chief Compliance Officer
- Verify that the Chief Compliance Officer
 - Develops & Implements Standards, Policies and Procedures
 - Provides Communications & Training
 - Regularly audits and monitors program
 - Responds to issues and Revises program as needed
- Hold Leaders Accountable
 - Ensure Accountability for both good and bad conduct
 - Perform Background Checks before hiring
 - Beware of Information Silos



Compliance Reporting

- Recommend Annual Report from Chief Compliance Officer
- Reporting should cover Requirements for an Effective Compliance Program
- Recommendations:
 - Provide Report in Advance
 - Request annual meeting where Chief Compliance Officer meets with Board to discuss report and any other issues that may arise.
 - Establish periodic Board training related to compliance.



Compliance Reporting (SAMPLE)



	Compliance Element	Status	Compliance Actions	Potential Gaps	Plan for Next Year
1.	The organization periodically assesses its risk of criminal conduct and implements standards and procedures to prevent and detect criminal conduct.	MET NOT MET or IN PROGRESS			
2.	The leaders of the organization understand and oversee the compliance program to promote a culture of compliance & ethics, ensure adequate support and verify its effectiveness.				
3.	Specific individuals are vested with implementation of the program.				
4.	The organization denies leadership positions to people who have engaged in misconduct.				
5.	The organization communicates the standards and procedures of the compliance program.				
6.	The organization conducts effective training.				
7.	The organization regularly assesses, monitors and audits the effectiveness of the program.				
8.	The organization maintains a reporting mechanism to allow employees to report suspected violations or other concerns.				
9.	The organization provides incentives to comply with the program and disciplines misconduct.				
10.	The organization responds quickly to allegations and modifies the program as required.				

Board Expectations for Training



Expectations of effectiveness are measured by

- **Who a company trains,**
- **How the training is conducted; and**
- **How often training occurs.**



CULTURE – CULTURE - CULTURE

Culture can make or break your compliance & ethics program.
A great “paper” program means nothing without the right culture.



Questions the Board Should Ask to Understand the Culture

- Is the company receiving an expected number of hotline calls for its size and industry?
- Does the Board get to speak with employees without CEO interference?
- Is the employee turnover rate high or low for the company's size and industry?
- What is the “feel” when the Board visits?
- Do internal company communications stress a culture of compliance?
- Does bad news regularly flow up the chain of command? If so, what happens?

Monitoring...Auditing...Response



- ❖ **Monitoring:** Reviewing and detecting compliance gaps in real time and then reacting quickly to remediate them.
- ❖ **Auditing:** Targeted, in-depth review of a specific risk, business component or region during a particular timeframe, particularly as seen in financial records.
- ❖ **Response:** Addressing compliance gaps through investigations, corrective actions, and continuous improvement.

Reasons for Auditing & Monitoring

- Ensure that compliance activities are being performed
- Determine gaps and corrective actions needed
- Catch the Rogue Employee



Keeping Current

Board should ensure that the Chief Compliance Officer -

- Reviews audit results
- Monitors legal/regulatory changes
- Periodically re-assesses risk
- Revises program accordingly



The Compliance Program should be Dynamic not Static.

Practical Ways the Board Can Address Accountability

- Tie Management Performance Bonuses to Compliance efforts
 - If training not completed, no bonus
 - If compliance not integral to operations, no bonus
- Meet with Key Personnel without the CEO around
 - Need to understand if there is a culture of transparency or fear
- Ask for off-schedule meetings with the Compliance team to “Check In”
- If possible, get out in the operations and interact with front-line employees



Takeaways

The Board Needs to monitor implementation and effectiveness of compliance program:

- Be actively involved
- Attend Board meetings
- Ensure compliance policies, systems and procedures in place.
- Receive regular compliance briefings and training.
- Review, consider and evaluate information provided
- Inquire further when presented with questionable circumstances or potential issues

Once Board knows of a potential compliance issue, it must act.

QUESTIONS?

Kasey T. Ingram
General Counsel & Chief Compliance Officer
ISK Americas Incorporated
IngramK@ISKAmericas.com
[@KaseyIngramJD](https://twitter.com/KaseyIngramJD)

