




**SCCE 17th ANNUAL COMPLIANCE & ETHICS
INSTITUTE**

**October 21-24, 2018
Las Vegas, NV**

*Compliance Oversight for Boards and Management
Corporate Responsibility & Liability:
A Global Perspective*


Gabriel L. Imperato, Managing Partner
Nelson Mullins Broad and Cassel
Fort Lauderdale, FL
Gabriel.Imperato@nelsonmullins.com



General Expectations of Boards

- Understand member role and responsibilities.
- Awareness of the complexity of laws and regulations governing organization.
- Provide advisory oversight and direction.

2



What is the Basis for Boards' Need to Know?

- Why does the government focus in on Board involvement?
- What federal "written agreement" specifically details Board oversight?
- How are Boards educated about compliance and regulatory issues?
- What specific regulations should the Board be aware of, if any?

3

What are the Obligations of the Board of Directors?

Two Primary Obligations

- ✓ Decision-making function
Applying duty of care principles to a specific decision
- ✓ Oversight function
Applying duty of care principles with respect to the general activity in overseeing the day-to-day business activities of the organization

4

What is "Duty of Care"?

Fiduciary duty of care involves the determination of whether the board of directors has acted:

- In good faith
- With the level of care that an ordinarily prudent person would exercise under the circumstances
- In a manner that they reasonably believe is in the "best interest" of the organization

Embedded in duty of care is the concept of "reasonable inquiry" and avoidance of conflict of interest and self dealing.

5

Compliance Program Focus Areas for the Board of Directors

Structural

- Understanding the scope of CP

Operational

- Understanding of the operations of the CP

6

Board's Responsibilities

- Understand the organization's internal reporting system;
- Determine if the structure of the organization's CP is appropriate to the size and complexity of the operations
- Determine whether there is the level of compliance resources available to the compliance function to adequately address the identified compliance risks
- Ensure the compliance officer (CO) has the authority to act
- Ensure compliance reports are received from the CO

7

Compliance Program Oversight by the Board of Directors


- Are there periodic compliance risk assessments with subsequent prioritization of identified risks and an action plan to mitigate those risks?
- Is there a compliance audit and monitoring plan?
- Are there appropriate policies, procedures or other internal controls to address potential risks?
- Is there open communication or is there fear of retaliation?

8

**United States Sentencing Commission-
Federal Sentencing Guidelines**

- Effective November 1, 1991
- Control sentencing of organizations for most federal criminal violations
- Sentencing credit for "effective programs to prevent and detect violations of law"

9




Essential Elements of a Compliance Plan*

- Standards and Procedures
- Oversight
- Education and Training
- Monitoring and Auditing
- Reporting
- Enforcement and Discipline
- Response and Prevention
- Risk Assessment
- Promotion of Organization Culture for Ethics and Compliance

* Federal Sentencing Guidelines, Chapter 8, 1991


10



Amendments to FSG's, 2004

- Report published **October 7, 2003**
- <http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm>
- Effective **November 1, 2004**
- Key Recommendations:
 - ❖ "culture" of ethics and compliance
 - ❖ Defining ethics and compliance standards & procedures
 - ❖ Spelling out compliance obligations
 - ❖ Adequate resources
 - ❖ Clarifying employee screening practices
 - ❖ Training as an essential element
 - ❖ Means for anonymous reporting
 - ❖ Ongoing risk assessments.

11



Amendments to FSG's, 2010

Expands an organization's eligibility for a reduced culpability if it has an effective program

- Effective in Detecting Criminal Conduct
 - ❖ The ethics and compliance program must detect the offense before its discovery outside the organization or before such discovery was reasonably likely
 - ❖ The organization must promptly report the offense to the proper governmental authorities
 - ❖ No person with operational responsibility in the program participated in, condoned, or was willfully ignorant of the offense.

12

2010 Changes (Cont'd.)

- ❑ Enhanced Autonomy for Compliance Personnel
 - ❖ "direct reporting" channel between compliance personnel and the organization's governing authority
 - ❖ "express authority" for the "individual or individual with operational responsibility for the compliance and ethics program" to communicate "personally" with the governing authority
 - promptly on any matter involving criminal conduct or potential criminal conduct
 - no less than annually on the implementation and effectiveness of the compliance and ethics program
- ❑ If these requirements are met, corporations may receive credit for their ethics and compliance program.

13

Individual Accountability for Organization Misconduct


- ❑ "One of the most effective ways to combat corporate misconduct is by **seeking accountability from the individuals who perpetrated the wrongdoing.**"
- ❑ "Such accountability is important for several reasons:
 - ❖ it deters future illegal activity,
 - ❖ it incentivizes changes in corporate behavior,
 - ❖ it ensures that the proper parties are held responsible for their actions, and
 - ❖ it promotes the public's confidence in our justice system."

14

Oversight and Accountability

- ❑ Governing Authority – Knowledgeable about compliance program with reasonable oversight (*Board of Directors*)
- ❑ Ethics & Compliance Officer – high level individual
 - ❖ Reporting structure clearly defined
 - "direct to the top", no buffers
 - ❖ Strong leader – independent, empowered, effective
 - ❖ Shall have adequate resources and authority
 - ❖ Access to Board with periodic reporting responsibilities
- ❑ Compliance Committee, Regional liaisons, Program Staff, etc.


15



The Principles of Federal Prosecution of Business Organizations in the United States Attorneys Manual

- Specific factors for Department of Justice prosecutors to consider in conducting an investigation of an organization;
- Determining whether to bring charges against the organization;
- Negotiating resolution of criminal and civil matters with organization;
- The factors include "the existence and effectiveness of the organization's pre-existing compliance program and efforts to implement an effective compliance program;
- Deferred Prosecution and/or Corporate Integrity Agreements.


16



Department of Justice Evaluation of Corporate Compliance Programs

- Analysis and Remediation of Underlying Misconduct
- Senior and Middle Management
- Autonomy and Resources
- Policies and Procedures
- Risk Assessment
- Training and Communications
- Confidential Reporting and Investigation
- Incentives and Disciplinary Measures
- Continuous Improvement, Periodic Testing and Review
- Third Party Management
- Mergers and Acquisitions (M&A)

17



International Standards for Compliance Programs

- United States Sentencing Guidelines ("USSG")
- United States Attorney's Manual ("USAM")
- A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide")
- Good Practice Guidance on Internal Controls, Ethics and Compliance by the Organization for Economic Cooperation and Development ("OECD") Council
- Anti-Corruption Ethics and Compliance Handbook for Business (OECD Handbook) by OECD, United Nations Office on Drugs and Crime and the World Bank.

18

Reference Material on Link to 17th Annual SCCE Compliance and Ethics Institute

- ❑ Department of Justice Criminal Division Evaluation of Corporate Compliance Programs
- ❑ White Paper – The Seven Elements of an Effective Compliance and Ethics Program
- ❑ Practical Guidance for Health Care Governing Boards on Compliance Oversight
- ❑ United States Securities and Exchange Commission Statement on Cooperation and Agency Enforcement Decisions
- ❑ Corporate Integrity Agreement between the Office of Inspector General of Health and Human Services and South Miami Hospital
- ❑ Non-Prosecution Agreement between the General Cable Corporation and United States Department of Justice
- ❑ Non-Prosecution Agreement between Tenet HealthSystem Medical, Inc. and United States Department of Justice
- ❑ Compliance and Governance for Health Care Organizations by Gabriel L. Imperato, Esq. and Anne N. Branan, Esq.
- ❑ Department of Justice Increases Focus on Organizational Compliance by Gabriel Imperato, Esq.

19

Anti-Corruption, Bribery and Kickbacks: The U.S. Foreign Corrupt Practices Act, the U.K. and European Union Anti-Bribery Laws and the Brazilian Anti-Corruption Law

- ❑ Global Issue: United States Foreign Corrupt Practices Act ("FCPA"), United Kingdom Anti-Corruption Law ("U.K. Anti-Bribery Act"), European Union Anti-Bribery Laws, and the Brazilian Anti-Corruption Law ("Clean Company Act").
- ❑ FCPA Anti-Bribery Provisions: Anything of value to a foreign government official to promote action to obtain an improper advantage in retaining business
- ❑ U.K. Anti-Bribery Act: Organization strict liability for employee agents offering unjust advantage (i.e. bribery payments) to foreign or domestic government officials and any other parties if Act represents the "directing mind and will" of the company
- ❑ France Anti-Bribery and Corruption Law: Mandates certain organizations to adopt compliance programs and sanctions anyone abusing their influence to obtain a favorable decision from domestic or foreign public officials (i.e. "trading in influence").
- ❑ European Anti-Bribery Laws: Consistent with the U.S. Foreign Corrupt Practices Act, although more limited in scope and also focused only on bribery of public officials
- ❑ Brazilian Anti-Corruption Law: Organization strict liability for employee acts offering unjust advantage (i.e. bribery payments) to foreign or domestic government officials or related third-parties
- ❑ Compliance, Audits and Red Flags: Training, risk assessment, internal controls, audit and monitoring, third party screening and contractual protections


Please see the following link for the *Resource Guide to the U.S. Foreign Corrupt Practices Act*:
www.justice.gov/criminal-fraud/fcpa-guidance

20

Broad Application and Additional Actions Against Individuals

- Criminal, civil and administrative liability based on Responsible Corporate Officer Doctrine can be applied for organizational violations of laws.
- Corporate Integrity Agreements by the Office of Inspector General of Health and Human Services have already required individual responsibility and accountability for Board members, management officials, business unit managers and Chief Compliance Officers (i.e. Pfizer and Astra Zeneca).


21



Individual Accountability for Corporate Wrongdoing

- Not a new policy for the Department of Justice or the Office of Inspector General of Health and Human Services – but increased focus on individual conduct and new requirements in practice
- Deterrence of organizational misconduct and promoting compliance and ethical culture
- Cooperation credit for organizations; disclosure of facts related to individual conduct in criminal and civil cases


22



Individual Accountability for Corporate Wrongdoing (Cont'd.)

- Criminal liability ordinarily focuses on individuals, but now civil liability will shift focus from exclusively on recovery of money to also focus on individuals' liability regardless of ability to pay
- Criminal and civil organization resolutions and settlements will not include releases for individuals, except in rare circumstances and declinations to prosecute individuals must be explicitly justified to DOJ supervisors
- Consequences for organizational compliance – cooperation and self-disclosure and related internal investigations – individual accountability.


23



What Does the Government Expect from Business Organizations

- Partnership with Federal and State governments in detecting and preventing misconduct and promoting an ethical corporate culture
- Organizations which fail to ferret out wrongful conduct and non-compliant activity will likely suffer the consequences of not doing so
- Cooperation in investigating an organization's own wrongdoing – self-disclosure and individual liability.


24



How is the Compliance Program Addressing Significant Risks

- One of the primary goals of the compliance program is to help ensure that we get it right the first time
- Organization responds to all reports of non-compliant activity
- New business ventures are evaluated for potential risk
- Timely response is made to newly developed rules and regulations


25



Board Questions to Evaluate a Compliance Program

- Is there anyone interfering with your ability to implement any of the elements of an effective compliance program?
- Is there anyone interfering with your ability to prevent, find, or fix this organization's legal, policy or ethical issues?
- Do you have any responsibility outside of compliance and ethics that could cause you to have a conflict?
- Do you report to anyone who has any responsibilities that could cause conflicts of interest for the compliance program?
- Is anyone with a conflict of interest guiding or directing the compliance and ethics program?


26



Board Questions to Evaluate a Compliance Program (cont'd.)

- Are there any issues that have been reported to you that are not being addressed?
- Has any issue been outstanding beyond a reasonable amount of time?
- Have we ever had an outside evaluation of our compliance and ethics program?
- Are we staying abreast of current trends in enforcement and effective compliance program management?
- Are we anticipating any potential new legal risks in the near future?
- Are there any substantive compliance issues currently under investigation?


27



Board Questions to Evaluate a Compliance Program (cont'd.)

- what issues are the enforcement community currently reviewing/investigating in our industry and where do we stand on those issues?
- How do you evaluate our organization's ethical culture?
- Is there anything that leadership can do to help further develop, maintain, or support the compliance and ethics programs?
- Is there any further compliance and ethics education that you think leadership should attend?
- Do we need more compliance and ethics expertise on our governing body?


28



Board Questions to Evaluate a Compliance Program (cont'd.)

- Do you have a good working relationship and independent access to internal and external legal counsel, consultants and auditors?
- Are you getting cooperation on compliance training and what type of feedback are you getting from the training?
- What are you most concerned about?
- Do you feel that everyone in this organization feels comfortable reporting potential issues and do they have a reasonable opportunity/mechanism to share their concerns about a policy, legal or ethic infraction with you?

29



Next Steps

- The governing body and leadership can engage in an effective dialogue with the compliance professional with some version of the suggested Board questions
- Once your organization develops this best practice, the leadership question list can further evolve into a more effective tool for maintaining an effective relationship with leadership in the future

30

