Corporate Responsibility & Liability: A Global Perspective

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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"
Seven Essential Elements of a Compliance Plan (paraphrased)*

- Standards and Procedures
- Oversight
- Education and Training
- Monitoring and Auditing
- Reporting
- Enforcement and Discipline
- Response and Prevention

* Federal Sentencing Guidelines, Chapter 8, 1991

Amendments to FSG's, 2004

- Report published October 7, 2003
- 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.
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.

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.
Individual Accountability for Corporate Wrongdoing – Yates Memo

- Written by: Sally Quillian Yates – Deputy Attorney General – 9/5/15
- "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."

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.
The Principles of Federal Prosecution of Business Organizations in the United States Attorneys Manual ("Filip Factors")

- 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.

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)
Department of Justice Evaluation of Corporate Compliance Programs (Cont'd.)

- United States Sentencing Guidelines ("USSG")
- United States Attorney’s Manual ("USAM")
- Good Practice Guidance on Internal Controls, Ethics and Compliance by the Organization for Economic Cooperation and Development ("OECD") Council

Reference Material on Link to SCCE European Compliance and Ethics Institute 2018

- 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.
THE END