



Morgan Lewis

RETAIL INDUSTRY LEADERS ASSOCIATION: COMPLIANCE 3.0

November 10, 2022

What is Compliance?

- Corporate Compliance is the process of making sure companies and their associates follow the laws, regulations, and standards that apply to companies.
- An effective corporate compliance program allows companies to affirmatively minimize the risk of misconduct.
- While the Government recognizes that “one size does not fit all” when it comes to compliance, there are certain hallmarks of a compliance program that regulators expect to see. Moreover, regulator expectations change depending on the industry and size of the entity.



The Elements of an Effective Compliance Program

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Regulators Have Been Explicit About What Constitutes An Effective Corporate Compliance Program



These seven elements help establish a “culture of compliance.”

Effective corporate compliance programs also have:

1. A vendor/supplier risk management program
2. A robust M&A due diligence and timely integration process
3. A process to review new market entry or the entry into new products and services

References:

- ❖ [Evaluation of Corporate Compliance Programs \(Updated June 2020\)](#)
- ❖ [A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition \(July 2020\)](#)
- ❖ [United States Sentencing Commission, Guidelines Manual \(2018\)](#)

Oversight & Governance Expectations



June 2020 – DOJ Issued Updated “*Guidance on Evaluation of Corporate Compliance Program*”

Is the company’s program well-designed?

Is the company’s program being applied earnestly and in good faith?

Does the company’s program work in practice?

Oversight & Governance Expectations (cont'd)



- There is an expectation that companies hire a qualified individual, who is designated as the CCO.
 - The CCO has overall operational responsibility for the Code of Ethics and corporate policies, training and awareness, reporting/Helpline and investigations, remediation and continuous enhancements of the program.
 - The CCO should also be autonomous with direct access to the Audit Committee, and should have authority with sufficient stature to adequately and appropriately oversee all elements of an effective program.
 - The CCO's team is adequately resourced given the size and complexity of the risks to be managed, and the members are sufficiently leveled and compensated.

Oversight & Governance Expectations (cont'd)



- Finally, a Compliance Committee should exist to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
 - The Committee shall take reasonable steps to ensure that the compliance and ethics program is reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting misconduct. This requires: (1) risk identification and rating; (2) ensuring qualified and adequate resources are assigned to manage high risk areas; (3) developing and deploying policies, processes and trainings to associates who may encounter that risk; (4) implementing controls to mitigate the risk; and (5) monitoring and auditing to ensure controls are implemented and effective.
 - The Committee is chaired by the CCO with cross-functional, business and geographic senior-level members who actively participate in the discussion and are involved in decision-making.

Code, Policies & Procedures Expectations



- A Code of Ethics exists, is publicly available, and sets the tone for the culture of compliance within the company.
- The Code is supported by written policies and procedures that are:
 - Specific to risk areas and outline expectations of associates, as well as the process to adequately manage or control those risks;
 - Communicated to all associates and relevant third parties;
 - Translated into local language, as necessary and/or required; and
 - Published and accessible to all associates “in a searchable format for easy reference”.
- The company should have the ability to “track access to various policies and procedures to understand what policies are attracting more attention from relevant associates.”

Evaluation of Corporate Compliance Programs, page 4.

Training & Communication Expectations Pose Unique Challenges in Retail...



- The company delivers annual training that:
 - Clearly communicates its expectations of associates related to doing business;
 - Outlines key compliance obligations tied to specific policies and procedures;
 - Shares where associates can raise potential violations of the Code, policies, procedures or the law;
 - Enables associates to raise questions about the training content; and
 - Is measured for effectiveness.
- That training is complemented by tailored training on high-risk areas to targeted audiences (i.e., management, sales and marketing, operations roles responsible for implementing controls).

Training & Communication Expectations Pose Unique Challenges in Retail... (cont'd)



- All of this is buttressed by regular communications from the top and middle management who:
 - “[T]hrough their words and actions, encouraged or discouraged compliance”;
 - Have “persisted in [their] commitment to compliance” in the face of competing interests or business objectives”; and
 - Communicate specific Lessons Learned, anonymized summaries of investigation outcomes or communications leveraging newspaper headlines to articulate company expectations and share potential consequences for misconduct.

Evaluation of Corporate Compliance Programs, page 10.

Risk Assessments, Monitoring & Auditing Expectations



- The overarching goal of compliance is to assess risks and build programs to mitigate risks, but also to test effectiveness of controls, and to detect non-compliant conduct: “The starting point for a prosecutor’s evaluation of whether a company has a well-designed compliance program is to understand the company’s business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.”
- Monitoring is expected in two distinct ways: regulatory monitoring; and second line validation that controls have been implemented, as designed.
 - **Regulatory monitoring:** Critical to understanding your risk is having an ability to monitor all applicable laws and regulations that apply to your business. Risk owners are accountable for monitoring such changes, and then understanding the impact of those changes on internal processes and controls, and updating policies, processes and controls to ensure compliance with those changes.
 - **Controls monitoring:** There is a growing focus on the need for second line (i.e., risk owners) to conduct ongoing monitoring of internal controls designed to mitigate (detect or prevent) specific risks for which they are accountable. More and more of that monitoring is being done through real-time data analytics. Both compliance and internal audit should be receiving periodic reports from all risk owners of their monitoring activity.

Evaluation of Corporate Compliance Programs, page 2.

Risk Assessments, Monitoring & Auditing Expectations (cont'd)



- Internal Audit then is key in auditing those controls: “What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often does internal audit conduct assessments in high-risk areas?”
- Compliance and other relevant control function personnel should have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions.

Evaluation of Corporate Compliance Programs, page 15.

Reporting & Investigating Expectations



- Well-publicized avenues are available for any individual to confidentially report potential violations of the Code, policies, procedures or the law. Those avenues include a vehicle to allow for anonymous reporting (the Helpline).
- The company has a process to periodically test whether associates are aware of the Helpline and feel comfortable using it.
- Qualified investigations personnel are in place who can ensure “the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented.”
- The company has an enterprise-wide investigations process in place to protect whistleblowers, to assess who investigates what, to determine when a matter ought to be conducted under privilege, and to ensure a thorough yet timely resolution of the matter.
- The Board ought to identify and document which types of significant matters it would like to receive notice and updates on from compliance (i.e., allegations of significant fraud or systemic control failures, allegations of violations of the law, allegations implicating the C-Suite).
- Compliance should have access to all investigations data to enable trend analysis around patterns of misconduct or other red flags for compliance weaknesses, and to validate that the outcomes were fair and consistent regardless of who investigated the matter or where the investigation occurred in the company.

Evaluation of Corporate Compliance Programs, pages 7, 16.

Incentives & Discipline Expectations



- Compliance has an established process in place to ensure that:
 - the outcome of an investigation is fair and consistent, regardless of who investigates around the company;
 - the appropriate parties (e.g., Legal, HR, Compliance, etc.) are part of the disciplinary process, and the compliance officer’s recommendations are taken seriously.
 - consistent discipline is issued when misconduct is identified (“Does the compliance function monitor its investigations and resulting discipline to ensure consistency?”); and
 - consequences exist for failing to take required training or to sign required attestations.
- The company periodically communicates to associates specific instances of misconduct and subsequent disciplinary action or corrective action (in an anonymized way) to reinforce expectations of associates, and to help establish and reinforce a culture of compliance.
- There exists a company-wide effort to incent ethical and compliance behavior (i.e., awards, recognition from senior management, bonus, promotion opportunities).

Evaluation of Corporate Compliance Programs, page 13

Response & Prevention Expectations



- The company has a process to understand the root cause of any identified problem, whether detected proactively or through an investigation, including determining whether:
 - any systemic issues were identified;
 - any controls failed;
 - there were policies and procedures designed to detect the issue;
 - there were any gaps or ambiguities in those written policies or procedures; or
 - there was a lack of communication and/or training by the policy or process owner.
- The company should have a process to remediate those issues to prevent the misconduct from occurring again. That process should include:
 - Tracking the organizational remediation efforts to completion; and
 - Auditing of completed actions to ensure they are effective in preventing the detected behavior.
- In addition to specific issues identified in investigations, the company should have a process to track, report and audit management action plans committed to following an internal audit, or any identified mitigation plans following from the company's periodic risk assessment process.
- Finally, the company could ensure that failure to timely or effectively remediate identified issues results in discipline for the accountable process owner.

TRENDS AND POLICY DEVELOPMENTS IN CORPORATE ENFORCEMENT

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Compliance, Compliance, Compliance

On June 1, 2020, the DOJ Criminal Division updated its Evaluation of Corporate Compliance Program guidance to bring greater emphasis to:

- The need for compliance programs to be “adequately resourced and empowered to function effectively.”
- The evolution of compliance programs based upon lessons learned, measuring the effectiveness of training, and the appreciation of risk.
- The compliance function’s ability to access relevant sources of data in a timely way.
- How effectively a company has integrated acquired operations into its compliance structures and controls.
- The accessibility of policies and the tracking of hotline reporting.
- **Compliance Programs continued to be assessed at two points in time:**
 - As of the time of the misconduct; and
 - At the time of the charging decision.

DAG Monaco Corporate Policy Revisions (Sept. 15, 2022)

Following discussions with the Corporate Crime Advisory Group, there are several through lines, some tweaks, and little truly new in the following key areas:

**Individual Accountability
and Cooperation**

Voluntary Disclosures

Cross-Border Issues

Third-Party Messaging

Compensation Claw backs

**Consideration of Prior
Misconduct**

**Monitorships and Compliance
Improvements**

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- Voluntary Disclosures
- Cross-Border Issues
- Third-Party Messaging
- Compensation Claw backs
- Consideration of Prior Misconduct
- Monitorships and Compliance Improvements

Focus on Individual Accountability and Cooperation

- As ever, holding individuals accountable is the Department's "first priority"
- In order to advance Department goal to "hold accountable the individuals who commit and profit from corporate crime", "**corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct**" (not really new, but more difficult, and affects *any* cooperation credit).
 - Expectation that **disclosures are not made "too long after the misconduct in question" or "swiftly"** (a factor in level of cooperation credit).
 - Expectation that company is prioritizing producing the "most relevant" evidence "for assessing individual culpability" first.
- New emphasis on timeliness of cooperation and disclosures making it more difficult for companies to conduct meaningful internal investigations or fully understand facts or narrative before reporting.

Focus on Individual Accountability and Cooperation

- Guidance and commentary pointedly extends to **foreign individuals**.
 - Look to other nations to evaluate whether there is a strong likelihood of prosecution in another jurisdiction.
 - “Prosecutors should not be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.”
- Complexities associated with government expectations of cooperating companies to make foreign witnesses available.
- Impact on ex-US executive and director clients.

Voluntary Disclosure – New Attempt at Promoting Baseline Consistency within DOJ

- Continued emphasis on the importance of voluntary self-disclosure of misconduct by corporations (but nothing new offered to entice; internal drivers).
- Direction to each Department of Justice component involved in corporate enforcement to design self-disclosure policies tailored to their programmatic priorities (but still major gaps in moving toward true consistency) by end of year.
- Core principles:
 - Absent aggravating factors, “DOJ **will not seek guilty plea** where corporation has **voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated** the criminal conduct.”
 - “The Department **will not require** the imposition of an independent compliance **monitor** for a cooperating corporation **that voluntarily self-discloses** the relevant conduct if, at the time of resolution, it **also demonstrates that it has implemented and tested an effective compliance program.**”

Cross-Border Issues Relevant to Cooperation

- “Companies seeking credit for cooperation must timely preserve, collect, and disclose relevant documents located both within the United States and overseas.”
- If foreign law – including blocking statutes, data privacy laws, etc. – prevent production to DOJ, “the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.”
- “Where a corporation actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement, an **adverse inference** as to the corporation's cooperation may be applicable if such a corporation subsequently fails to produce foreign evidence.”

Use of Personal Devices and Third-Party Applications (New but told more to come ...)

- Failure to preserve relevant information is evidence of an ineffective compliance program as well as a lack of cooperation (new articulation).
- Ensure that your company policies (privacy, acceptable use, trade secret, legal hold) are consistent, and reflect company's expectations of employee use of personal devices and/or third-party messaging applications (not new).
- Conduct monitoring to ensure that your policies are being followed. If there is any indication that they are not, then investigate and discipline (aligned with new focus on effectiveness).
- Additional guidance is forthcoming, but for now, companies should be looking at current policies and practices, should be monitoring for non-compliance, and should be disciplining those not following those policies.

Compensation Claw backs (New but told more to come ...)

- What do your employment agreements say vis a vis misconduct? Do you include claw back provisions?
 - If so, do you ever seek to claw back monies (i.e., have you ever “taken affirmative steps to execute on such agreements and claw back compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue”)?
 - If not, you need to review and potentially revise those agreements. More importantly, as cases arise, there needs to be a discussion regarding the need to actually trigger the claw back.
 - **Awareness of current policy is key – does it preserve flexibility for company down the road?**
- What is your culture around terminations?
 - Do you have an articulated “zero tolerance” policy? For what? Is that followed 100% of the time? If not, then it isn’t zero tolerance.
 - Is management aligned on what constitutes a terminable offense regardless of level, country, rating, high potential?
 - Do you typically enter into severance agreements to exit employees? Or do you take the terminate and let them sue you approach?
- Do your severance agreements include:
 - Claw back provisions? Under what conditions? Has the company ever tried to recoup those monies?
 - NDA and non-disparagement clauses? Do they have exceptions for speaking to regulators?

Compensation Claw backs (SEC Rule - October 26, 2022)

- A divided U.S. Securities and Exchange Commission finalized a rule that will require “executive officers” at publicly traded companies to return bonuses in the event of a later-discovered accounting error; more specifically:
 - Incentives awarded (incl. stock options) within three year period prior to restatement if it is later discovered that those financials were inaccurately reported;
 - Even if executive not responsible for the error;
 - Executives can be made to reimburse their companies even if a financial report is reissued to correct a nonmaterial error (“little r”), so long as that information *could* become material (“big R”) if left uncorrected. Note that two Commissioners objected to inclusion of “little r” restatements.
- “Executive officer” = company’s president; principal financial officer; principal accounting officer or controller; any vice president in charge of a principal business unit, division or function such as sales administration or finance; or any other officer who performs a policymaking function at the company, which could include executive officers at a parent company or subsidiary.
- Companies have one year to comply and must disclose their policies in annual reports.
- Stay tuned! My partner, Kelly Gibson, can talk in much more detail on this topic in her upcoming RILA presentation...

Consideration of “History of Misconduct”

- Role of “recidivism” (and how that should be defined) in shaping corporate criminal resolution outcomes.
- Evaluating a corporation’s **global history** of misconduct (criminal, civil and regulatory resolutions) (as announced in October 2021).
- September 2022 Monaco Memo:
 - Some clarification as to *how* historic; the following will be accorded most weight:
 - **criminal last 10 years;**
 - **civil/regulatory last 5 years; and**
 - **anything pending**
- Compared to similarly situated entities (e.g., highly regulated industry).

Monitorships and Compliance Improvements

- Expressly stating there is no presumption in favor of a monitor. Offering factors to evaluate when determining if a Monitor is necessary:
 - Voluntary self-disclosure;
 - Existence of an effective compliance program and sufficient controls to detect and prevent similar misconduct in the future;
 - Compliance program has been adequately tested, and internal controls likely to detect and prevent similar misconduct;
 - Conduct long-lasting or pervasive, or approved, facilitated or ignored by senior management;
 - Conduct exploited an inadequate compliance program and system of internal controls;
 - Conduct included active participation by compliance, or failure by compliance to appropriately escalate and manage issue;
 - Adequate investigation occurred with appropriate remediation measures implemented;
 - Change in company's risk profile make likelihood of recurrent minimal or nonexistent;
 - Company faces unique risks or challenges given geographies or sectors; and
 - Existence of other oversight (industry regulators, monitored by another, different agency).

Compliance Certifications (May 2022)

- Let's not forget that on May 26, 2022, Monaco announced a new policy requiring CEOs and CCOs to submit certifications under penalty of perjury in connection with any DOJ resolution. That policy, she stated, was meant to “empower” CCOs by ensuring that:
 - CCOs are “in the room” and reporting to the board directly about “what has or has not gone on in the course of fulfilling the company's obligations.”
 - “[T]he business is taking ownership of its role in the compliance program and the Head of Compliance receives all relevant compliance-related information and can voice any concerns prior to certification.”
- First test case is Glencore plea agreement: the company's CEO and CCO will have to submit a document certifying to the DOJ's fraud section that the company has “met its compliance obligations pursuant to this agreement” and that the company's compliance program is reasonably designed to detect and prevent the misconduct at issue in the resolution.
- This policy has had a mixed reception from practitioners, many of whom will be taking a wait and see approach to fully understanding the implications surrounding these certifications.

Evolution of Effective Corporate Compliance Programs: Where Regulators Expect Companies to Be Today

Compliance
1.0: Paper
Program

Compliance
2.0: Program
Implemented

Compliance
3.0: Tested

Questions?

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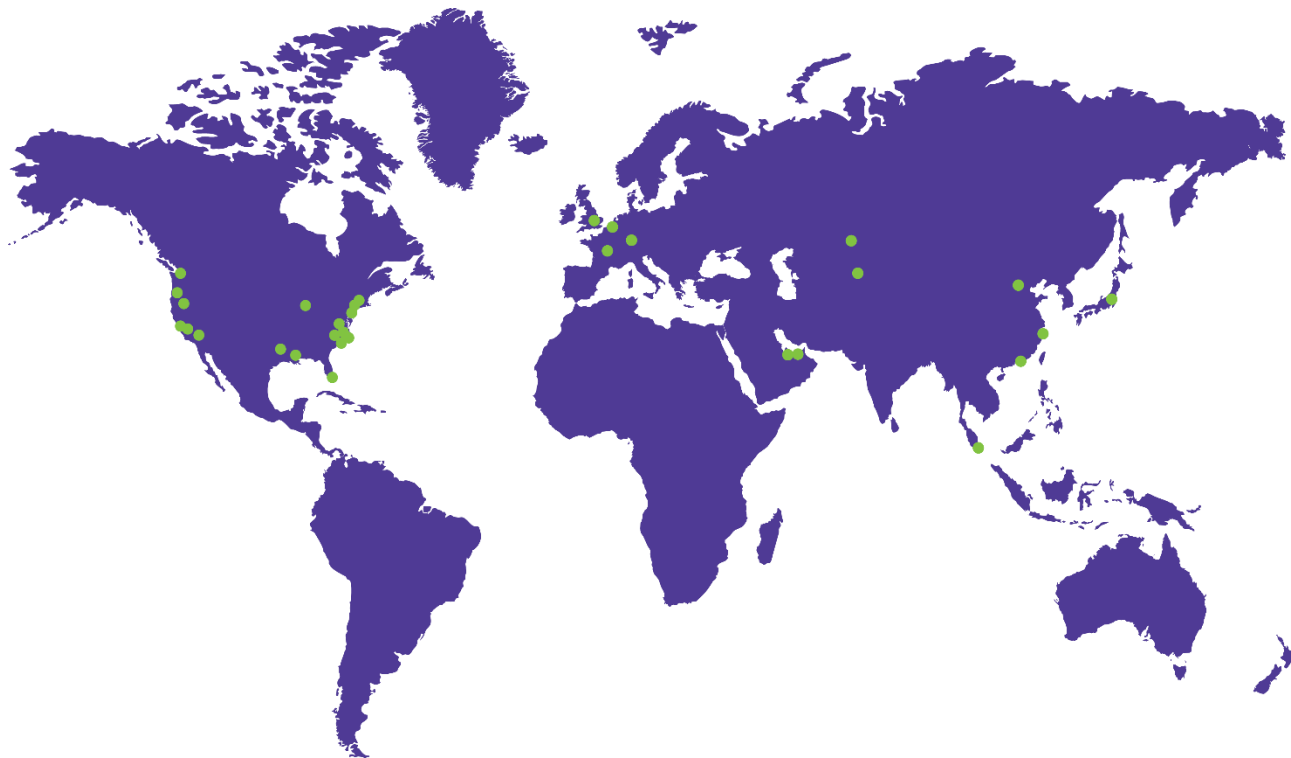
Amy Schuh is a litigator who focuses on corporate ethics and compliance counseling, internal and government investigations, and mergers and acquisitions due diligence and integration, particularly in the technology and life sciences sectors. She builds, enhances, and streamlines corporate compliance programs, as well as global anti-corruption and investigations programs. Amy, a former senior vice president and chief ethics and compliance officer at a major information technology company, supported the company's active M&A profile during due diligence and integration. She also enhanced its corporate ethics and compliance program, and worked closely with the US Department of Justice and US Securities and Exchange Commission in connection with the company's on-going reporting requirements related to an FCPA resolution. Prior, Amy was the executive director of global investigations for a major international pharmaceutical company, where she enhanced the company's compliance program, specifically as it related to its corporate policies and procedures and its global anti-corruption compliance program. Previously, in 2008, Amy was tapped to create a corporate compliance program for a Fortune 10 company.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

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