

Risk & Compliance Management

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Daniel Lucien Bühr



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1 What legal role does corporate risk and compliance management play in your jurisdiction?

Compliance programmes that prevent, detect and respond to potential wrongdoing or misconduct are part of the expectations of the US government for organisations regardless of whether they operate in the US or in other countries around the world. While there is generally no legal requirement that organisations establish and maintain an effective compliance programme, having an effective compliance programme in place may serve to reduce fines, penalties and other terms of the settlement of any government investigation, whether brought on the basis of civil or criminal law. In addition, having a compliance programme that is effective is recognised as assisting in protecting the reputation of the organisation.

2 Which laws and regulations specifically address corporate risk and compliance management?

The primary source addressing compliance expectations is the US Federal Sentencing Guidelines (www.ussc.gov/guidelin.htm), as set forth in Chapter 8, Part B, Subpart 2.1 of those Guidelines). The Guidelines have been modified over time to reflect the ongoing evolution of compliance expectations. These Guidelines are established by the US Department of Justice (DOJ) and address how to calculate fines, penalties and prison sentences for a wide variety of offences committed by corporations and individuals. The Guidelines provide a formula for each offence that is then adjusted based on the underlying facts surrounding the conduct in question for aggravating and mitigating factors. One of the mitigating factors recognised for organisations is the existence of a compliance programme. The Guidelines set out the elements needed for a compliance programme to receive credit for reducing fines and penalties that would otherwise be due. These Guidelines are used by a variety of government agencies to guide their own regulatory and enforcement efforts.

3 Which are the primary types of undertakings targeted by the rules related to risk and compliance management?

All organisations, companies, corporations or other entities regardless of form are covered.

4 Identify the principal regulatory and enforcement bodies with responsibility for corporate compliance. What are their main powers?

The primary agency that considers the impact of compliance issues is the DOJ, which may bring criminal or civil enforcement actions under the laws of the United States. In general, the DOJ has wide authority to enforce the laws of the United States. Typically, this means that the DOJ uses a variety of laws to address misconduct. While there is no direct action that can be brought for failure to maintain a compliance programme on its own, the presence or absence of a compliance programme is an important factor that the DOJ considers in the resolution of many matters. The DOJ has authority to impose, as part of the resolution of any action, requirements to implement and maintain a compliance programme and often does so. The DOJ also may enforce the terms of any settlement, and therefore has ongoing oversight of how well a compliance programme is being implemented and maintained.

In addition, many other agencies may also impose compliance expectations or requirements on organisations, and often work in conjunction with the DOJ. The agencies include, among others, the Securities and Exchange Commission (SEC), the Environmental Protection Agency, the Department of Health and Human Services, the Federal Trade Commission, the Financial Industry Regulatory Authority and the Office of Foreign Assets Control (OFAC). All of the agencies may impose requirements relating to industry-specific compliance standards on organisations as part of the resolution of an investigation.

Finally, state governments and state agencies may also be involved in enforcement matters and may also require organisations to make compliance commitments as part of a settlement of an enforcement action.

5 Are 'risk management' and 'compliance management' defined by laws and regulations?

The elements of a compliance programme are set out in the Guidelines. In addition, these elements are widely recognised in guidelines or settlements entered into by organisations with the US government through various enforcement agencies. In general, risk management principles are recognised as part of an effective compliance programme, and are described as part of the process to control risks, and to prevent, detect and respond to wrongdoing.

6 Are risk and compliance management processes set out in laws and regulations?

The Guidelines set out the details regarding processes involved for an effective compliance programme. In addition, for bribery and corruption risks, detailed information has been published regarding compliance programme responsibilities. This information can be found in A Resource Guide to the US Foreign Corrupt Practices Act, published in 2012 by the DOJ and the SEC (www.justice.gov/criminal-fraud/fcpa-guidance) and in the United States Attorneys Manual (www.justice.gov/usam/united-states-attorneys-manual).

In addition, in some sectors like the healthcare and pharmaceutical industries, specific guidelines have been developed that apply the compliance standards set forth in the Guidelines to specific business practices. For example, the application of compliance requirements to the pharmaceutical industry has been set forth in the OIG Compliance Program Guidance for Pharmaceutical Manufacturers (www.gpo.gov/fdsys/granule/FR-2003-05-05/03-10949) issued in 2003 and the document entitled, Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors issued jointly by the Office of Inspector General of the US Department of Health and Human Services and the American Health Lawyers Association in 2003 (<https://oig.hhs.gov/compliance/compliance-guidance/compliance-resource-material.asp>).

7 Give details of the main standards and guidelines regarding risk and compliance management processes.

The main standards and guidelines are based on the Guidelines and have been further developed through implementation of the Guidelines by various agencies and resolution of enforcement actions. These standards are generally described as follows.

Support and commitment from the top

As a foundational matter, senior management and boards of directors should create a 'tone at the top' that promotes a culture of compliance. In evaluating an organisation's compliance programme, US authorities say they will consider whether senior management has clearly articulated expectations of conducting business in compliance with all laws and organisation standards, communicated these expectations in unambiguous terms, followed these standards themselves, and supported compliance with appropriate resources. While 'tone at the top' is necessary, a commitment to compliance must be reinforced by middle management and others throughout the organisation as compliance is the duty of individuals at all levels.

Clearly articulated and visible corporate policies

Organisations should have written policies, procedures and codes of conduct that prohibit improper conduct. The policies should cover key risk areas and provide clear standards of expected behaviour. Typically, a code of conduct is included as a key document that sets forth expectations on acceptable conduct.

Governance and oversight

The governing authority should be knowledgeable about the content and operation of the compliance programme and exercise reasonable oversight with respect to its implementation and effectiveness.

The high-level personnel of an organisation should ensure that an organisation has an effective compliance and ethics programme. Specific individuals within high-level personnel should be assigned overall responsibility for the compliance programme. In addition, specific individuals within an organisation should be delegated day-to-day operational responsibility for the compliance programme. Individuals with operational responsibility should report periodically to high-level personnel and, as appropriate, to the governing authority or an appropriate subgroup, on the effectiveness of the compliance programme. To carry out such operational responsibility, these individuals should be given adequate resources, appropriate authority and direct access to the governing authority, or an appropriate subgroup.

A dedicated compliance infrastructure, with one or more senior corporate officers responsible for compliance, is needed. US enforcement authorities will look at whether an organisation devoted adequate staffing and resources to the compliance programme given the size, structure and risk profile of the business. At a minimum, US authorities expect that lead compliance personnel will have direct access to an organisation's governing authority, such as the board of directors or an audit committee.

Excluded persons

An organisation should use reasonable efforts not to include within its substantial authority personnel any individual whom an organisation 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 programme. Practically, this means that an organisation should routinely check whether employees are debarred from doing business with the US government, usually through checking online exclusions databases.

Training and communication

Organisations should take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance programme, by conducting effective training programmes and otherwise disseminating information appropriate to the respective roles and responsibilities of those required to be trained. The individuals included for this training are the members of the governing authority, high-level personnel, substantial authority personnel, organisation employees, and, as appropriate, an organisation's agents. A compliance programme cannot be effective without adequate communication and training. While the nature and type of training given depends on the circumstances of the organisation and how it conducts business, the ultimate goal of training and communication is to make sure that individuals understand what is expected of them and are able to incorporate compliance guidelines in their everyday activities.

Moreover, it is expected that communication regarding compliance issues should not take place only in formal settings. While the nature of communication may vary based on the organisation and its business,

in general it is expected that communication efforts could include such elements as internal newsletters for employees, a separate space on the intranet devoted to ethics, dissemination of examples of good practices of ethical conduct, posting of pamphlets and announcements on bulletin boards, presentation of positive results obtained from the implementation of the code of conduct and incorporation of the ethical and integrity principles and values in the organisation's mission and vision statements. An effective compliance programme must provide resources for an organisation's employees and relevant third parties to obtain compliance information. Specific organisation personnel should be designated to help answer questions.

Monitoring and auditing

Organisations are expected to take reasonable steps to ensure that the compliance programme is followed, including monitoring and auditing to detect criminal conduct, to evaluate periodically the effectiveness of the compliance programme and to have and publicise a system, which may include mechanisms that allow for anonymity or confidentiality, whereby organisation employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation. These mechanisms for reporting potential or actual misconduct typically include the institution of hotlines, ombudsmen or other anonymous reporting systems. Monitoring and auditing serve as the basis for determining if the policies and procedures are being implemented effectively. What activities to monitor and audit are a function of the nature of the business and the way in which an organisation operates. Accordingly, there is no set rule as to what activities should be reviewed, but it is essential for an organisation to be able to justify the efforts it undertakes in that regard.

Incentives and discipline

The compliance programme should be promoted and enforced consistently throughout an organisation through appropriate incentives to perform in accordance with the compliance programme and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct. Organisations should reward their employees for good behaviour, and consider including the review of business ethics competencies in the appraisal and promotion of management and measuring the achievement of targets not only against financial indicators, but also against the way the targets have been met and specifically against the compliance with the organisation's policies. Incorporating adherence to compliance as a significant metric for management's bonuses, recognising compliance professionals and internal audit staff, and making working in the compliance organisation a way to advance an employee's career are all ways to promote compliance. While incentives are important, so are disciplinary procedures to address violations. To evaluate the credibility of a compliance programme, US authorities will assess whether an organisation has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation and consistently applied.

Response to incidents

An organisation's response to a report of potential misconduct is also critical. Organisations must have an infrastructure in place to respond to the report, conduct appropriate investigations and document the response process, in a consistent manner. After criminal conduct has been detected, an organisation should take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the compliance programme.

Risk assessment and periodic reviews

In implementing the requirements listed above, an organisation should periodically assess the risk of criminal conduct and should take appropriate steps to design, implement or modify each requirement set forth above to reduce the risk of criminal conduct identified through those processes. Periodic reviews and assessments of a compliance programme are viewed as essential, as a programme that remains static is likely to become ineffective as risks shift. For example, organisations may use employee surveys to measure their compliance culture and strength of internal controls, identify best practices and detect new

Update and trends

On 8 February 2017, the Criminal Division of the US Department of Justice released new guidance on corporate compliance programmes. This release contains a list of important topics and sample questions that the government has found relevant in evaluating corporate compliance programmes, and can be found at www.justice.gov/criminal-fraud/page/file/937501/download.

Reflecting the increased priority of prosecuting individuals, the US government issued new guidelines on 9 September 2015, referred to informally as the 'Yates Memo', that established several changes to DOJ policy, particularly regarding the definition of cooperation credit for corporations. The Memo can be found at www.justice.gov/archives/dag/file/769036/download.

risk areas, or may conduct audits to assess whether controls have been implemented effectively.

8 Are undertakings domiciled or operating in your jurisdiction subject to risk and compliance governance obligations?

Any organisation, regardless of the form of the entity that operates in the United States or is subject to US law, is expected to meet these compliance obligations.

9 What are the key risk and compliance management obligations of undertakings?

Organisations are expected to implement and maintain an effective compliance programme as described above.

10 What are the risk and compliance management obligations of members of governing bodies and senior management of undertakings?

Members of governing bodies and senior management have several responsibilities regarding risk and compliance. First, governing board members have responsibility for compliance programme oversight. This means that board members must ensure that the compliance programme is effective, that it is designed to mitigate compliance risks and that it has sufficient resources to prevent, detect and respond to potential misconduct. Second, board members must hold senior management and those responsible for the compliance programme accountable to implement the programme. Board members also must establish a 'tone at the top' that demonstrates to employees and external parties that the organisation expects all who are associated with it to act properly and in accordance with applicable laws and regulations as well as organisation policies.

With regard to senior management, the expectation is similar to that of members of the governing body. Senior management should ensure that the compliance programme has the resources and capabilities to implement a programme that prevents, detects and responds to potential misconduct. Senior management also has an obligation to demonstrate support for compliance through 'tone at the top.' This requires management to show by verbal communication and their actions that they require all employees to act in a compliant way and that misconduct will not be tolerated. This tone can be demonstrated through written and verbal communication to employees by email, in other written communication, through presentations at meetings, and through one-on-one interactions where employees are encouraged to only conduct business ethically and in accordance with applicable laws and organisation policies.

11 Do undertakings face civil liability for risk and compliance management deficiencies?

Those organisations that engage in misconduct involving compliance obligations under law face potential civil liability, which could include fines, disgorgement of gains, restitution and debarment from participating in government programmes. Liability occurs from a violation of applicable law or regulation, as opposed to a violation of a compliance programme requirement. For example, civil liability could occur if an organisation fails to obtain a required permit, but civil liability would not occur if an organisation's employee failed to follow a policy requiring a permit to be obtained.

In addition, organisations may face the risk of civil liability from private litigants who may claim that the organisation failed to fulfil its obligation to manage risk through a compliance programme, resulting in loss of value to an investor who would not have experienced a loss if the programme had been managed effectively. These private legal actions may result in added defence costs as well as judgments or settlements, depending on the facts of the underlying matter.

12 Do undertakings face administrative or regulatory consequences for risk and compliance management deficiencies?

Administrative or regulatory action may result in being debarred from conducting business with government entities, restrictions or suspension of a licence, or fines associated with the underlying conduct. The nature of the action that could be taken is a function of the requirements of the underlying administrative provisions or regulations that specify the consequences of the violation. In instances where an organisation has settled an enforcement action, compliance obligations may have been undertaken as part of the settlement agreements. Failure to meet those settlement obligations relating to compliance may result in fines or penalties. For example, an organisation may have committed as part of a settlement to conduct annual training on compliance topics. Failure to complete that training obligation may result in administrative or regulatory action, including fines or penalties.

13 Do undertakings face criminal liability for risk and compliance management deficiencies?

Criminal liability may occur for violations of applicable law. This liability may occur, for example, if the conduct violates a law such as the Foreign Corrupt Practices Act (FCPA), which prohibits the payment of bribes to non-US government officials to obtain an improper advantage. Payment of the bribe would result in criminal liability for the bribe payer. Organisations that face criminal liability, however, do so based on the underlying law, rather than the failure to maintain an effective compliance programme.

14 Do members of governing bodies and senior management face civil liability for breach of risk and compliance management obligations?

Those who participate in the underlying misconduct run the risk of civil liability. Generally, however, without the active involvement of governing body members or management in the misconduct, the risk of personal liability is low. Liability could occur if private litigants establish that management failed in its oversight duties in a securities law action, or if as part of a government-negotiated settlement, management makes representations about the compliance programme that are later determined to be incorrect.

15 Do members of governing bodies and senior management face administrative or regulatory consequences for breach of risk and compliance management obligations?

In general, members do not face the risk of administrative or regulatory consequences for compliance programme management issues. Risk could occur, however, if members participate in the underlying misconduct or undertake specific obligations regarding compliance as part of a government settlement and fail to fulfil those obligations.

16 Do members of governing bodies and senior management face criminal liability for breach of risk and compliance management obligations?

If members of governing bodies and senior management participate in the underlying criminal misconduct, there may be liability. Without active involvement in the criminal misconduct, the risk of criminal liability to board members and senior management is low for failing to implement compliance programme obligations.

17 Is there a corporate compliance defence? What are the requirements?

There is no corporate compliance defence. Having an effective compliance programme, however, may result in the reduction of fines, penalties and other adverse actions in the settlement of the enforcement action.

18 Discuss the most recent leading cases regarding corporate risk and compliance management failures.

In 2017, there were a number of settlements involving the failure of organisations to manage compliance risks. Notable settlements included:

- In January 2017, Rolls-Royce plc agreed to pay the United States a criminal penalty of \$170 million for alleged FCPA violations. The DOJ settlement was part of an \$800 million resolution of investigations by US, UK and Brazilian authorities under applicable anti-corruption laws.
- In January 2017, Zimmer Biomet Holdings Inc agreed to pay more than \$30 million to resolve DOJ and SEC investigations into the organisation's 'repeat' violations of the FCPA. Biomet, purchased by Zimmer in 2015, previously resolved FCPA offences in 2012 when it paid nearly \$23 million.
- In January 2017, Sociedad Química y Minera de Chile SA paid \$30.5 million to settle an FCPA investigation over alleged bribes paid to Chilean politicians. Sociedad Química y Minera de Chile paid a criminal penalty to the DOJ of nearly \$15.5 million and a civil penalty to the SEC of \$15 million, where the payments themselves were authorised by a senior organisation executive.
- In March 2017, ZTE Corporation agreed to enter a guilty plea and to pay a \$430,488,798 penalty to the United States for conspiring to violate the International Emergency Economic Powers Act by illegally shipping US-origin items to Iran, obstructing justice and making a material false statement. ZTE simultaneously reached settlement agreements with the US Department of Commerce's Bureau of Industry and Security (BIS) and the US Department of the Treasury's OFAC. In total, ZTE has agreed to pay the US government \$892,360,064. The BIS suspended an additional \$300,000,000, which ZTE will pay if it violates its settlement agreement with the BIS.
- The Volkswagen diesel emissions investigation continues, with Volkswagen agreeing to a \$14.7 billion settlement in October 2016 regarding its 2.0L diesel cars. In March 2017, VW pleaded guilty to fraud, obstruction of justice and falsifying statements as part of a \$4.3 billion settlement with the DOJ. The investigation is continuing.

In addition, several individuals were sentenced to prison for FCPA violations. For example:

- In February 2017, Victor Hugo Valdez Pinon, a Texas-based citizen of Mexico, was sentenced to a year and a day in prison for planning to bribe Mexican government officials in exchange for air-plane maintenance contracts. He had pleaded guilty to conspiracy to violate the FCPA and conspiracy to commit wire fraud, and also was required to forfeit \$250,000 and pay restitution of around \$90,000. Douglas Ray, a co-defendant of Pinon, was sentenced to 18 months in prison after pleading guilty to conspiracy to violate the FCPA and conspiracy to commit wire fraud, and was also ordered to pay \$590,000 in restitution. Co-defendants of Pinon and Ray, Daniel Perez and Kamta Ramnarine, were each sentenced to three years' probation after pleading guilty to conspiracy to violate the FCPA.
- In January 2017, Ban Ki Sang, the brother of former United Nations Secretary-General Ban Ki-moon, was charged in New York with one count of conspiracy to violate the FCPA, three counts of violating the FCPA, one count of conspiracy to commit money laundering and one count of money laundering. He allegedly plotted to bribe a man posing as an agent for a Middle East sovereign wealth fund in exchange for financing a building sale in Vietnam. Ban Ki Sang's son, Joo Hyun Bahn, was also charged in federal court in New York with one count of conspiracy to violate the FCPA, three counts of violating the FCPA, one count of conspiracy to commit money laundering, one count of money laundering and one count of aggravated identity theft. He was arrested and released on bail.

19 Are there risk and compliance management obligations for government, government agencies and state-owned enterprises?

There are no specific obligations for government entities or agencies regarding implementing or maintaining compliance programmes. Government employees, like private sector employees who engage in misconduct, may be charged under applicable law.

20 What are the key statutory and regulatory differences between public sector and private sector risk and compliance management obligations?

There are no specific compliance obligations of governments or government agencies.

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