

Corporate Compliance Insights

*New
Department of Justice
Evaluation:*

Valuable Document for the Compliance Practitioner

By Thomas Fox

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**To compete internationally,
you must comply internationally.**

*"A strong
compliance program
provides us a
competitive advantage"*

Lori Queisser

Executive Vice President
Chief Compliance Officer
Teva Pharmaceuticals
and Conselium client



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The Department of Justice in February 2017 quietly released a document titled “[*Evaluation of Corporate Compliance Programs*](#)” (Evaluation) on the Fraud Section of its website. The document is an 11-part list of questions which encapsulates the DOJ’s most current thinking on what constitutes a *best practices* compliance program. Within the list are some 46 different questions that a Chief Compliance Officer (CCO) or compliance practitioner can use to benchmark a compliance program. In short, it is an incredibly valuable and most significantly useful resource for every compliance practitioner. Over the next couple of blog posts, I will be taking a look at the Evaluation.

The Evaluation, most generally, follows the DOJ and Securities and Exchange Commission’s (SEC) seminal Ten Hallmarks of an Effective Compliance Program, released in the 2012 FCPA Guidance. If there is one over-riding theme in the Evaluation, it is the DOJ’s emphasis on *doing compliance* as the questions posed are designed to test how far down your compliance program is incorporated into the fabric of your organization. The Evaluation is not simply a restatement of the Ten Hallmarks, as it clearly incorporates the DOJ’s evolution in what constitutes a *best practices* compliance program, and it certainly builds upon the information put forward in the DOJ’s FCPA Pilot Program regarding effective compliance programs, most particularly found in Prong 3 Remediation. Once again, I detect the hand of DOJ Compliance Counsel Hui Chen in not only helping the DOJ to understand what constitutes an effective compliance program but also providing solid information to the greater compliance community on this score.

As there are 11 areas of inquiry and 10 Hallmarks, one of the interesting considerations is Evaluation No. 1 - the analysis and remediation of underlying conduct. In this area, you understand the root cause of any incident, is it systemic and who made the analysis? You will also need to evaluate your detection or if the conduct was missed, why was it missed? Finally, you need to explain the remediation.

Next is the area of senior and middle management where you will need to evaluate the specific conduct of senior management in not only discouraging Foreign Corrupt Practices Act (FCPA) violative conduct but also the role of senior management in remedial actions. How do senior leaders and other stakeholders model appropriate behavior and share information on

compliance throughout the organization and how is that conduct monitored on an ongoing basis?

Finally, the Board's role is re-emphasized as the Evaluation asks the following questions, "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?" If you are following my month long series of One Month to a Better Board, you will recognize these as significant issues that many Boards have yet to adequately deal with going forward. The Evaluation also looks at the CCO and compliance function's upward communications with the Board by looking at reporting lines, CCO access to the Board and independence of the compliance function within the organization.

Next is the area of autonomy and resources for the CCO and the compliance function. This section follows the FCPA Pilot Program Prong Three on remediation by inquiring into the professionalism and expertise of both the CCO and the compliance function. It also asks about the stature of the CCO and compliance function within the organization, including specifically "compensation levels, rank/title, reporting line, resources, and access to key decision-makers". It also asks about turnover and promotion opportunities. You need to evaluate the role of compliance in strategic planning and whether the compliance function is truly "empowered" within an organization. This final point will entail documenting any "specific transactions or deals that were stopped, modified, or more closely examined as a result of compliance concerns". Also echoing the Pilot Program Remediation Prong was an inquiry into funding and dollar resources available to the compliance function.

In a new area of review, the Evaluation considers "outsourced compliance functions" for the first time. It asks the following questions, "Has the company outsourced all or parts of its compliance functions to an external firm or consultant? What has been the rationale for doing so? Who has been involved in the decision to outsource? How has that process been managed (including who oversaw and/or liaised with the external firm/consultant)? What access level does the external firm or consultant have to company

information? How has the effectiveness of the outsourced process been assessed?”

In the area of “Policies and Procedures” we see a clear operationalization inquiry as you are required to evaluate who had input into the design of your compliance policies and procedures and the process for drafting, all coupled with consultation with the business units. You also need to look at the specific policies and procedures which may have failed and determine how and why they failed. There are some inquiries into “gatekeepers, e.g. the persons who issue payments or review approvals” regarding their training and ongoing monitoring.

Next, and once again following on the operationalization of your compliance program, is a section entitled “Operational Integration” which includes who is responsible for integrating your policies and procedures throughout your organization, what internal controls are in place and specific inquiries into the role of the company payment system in any FCPA violation. This last inquiry is coupled with a review of your vendor management program going forward.

In the area of risk assessments, you need to consider the methodology the company used to identify, analyze, and address the particular risks it faced, coupled with the metrics your company has collected and used to help detect the type of misconduct in question and, most interestingly, how this information has “informed the company’s compliance program”? In a section entitled “Manifested Risks” the Evaluation poses the following question, “How has the company’s risk assessment process accounted for manifested risks?”

The next area of inquiry is in training and communications. Here the inquiries are around whether you have adequately risk-based your training and then delivered effective training “tailored” for high-risk employees. This picks up the language from the most recent General Cable (GC) Foreign Corrupt Practices Act (FCPA) enforcement action and demonstrates how the continuous loop of innovation in compliance is driving the evolution of best practices. It was GC who provided the tailored training as a part of their remediation efforts and now we find that being built into this DOJ

Evaluation. The DOJ also reiterates you need to determine the effectiveness of your compliance training.

The Evaluation specifically suggests a company communicate about employee misconduct throughout its organization. Added to this is an inquiry into the effectiveness and availability of compliance guidance. Finally, and definitely a key inquiry, is whether employees are able and willing to seek compliance advice.

Under confidential reporting and investigations, the tests are around determining the effectiveness of your compliance reporting mechanisms through your triage protocol, the seriousness of how a company might take a reported issue and whether compliance is kept in the loop around investigations. You will also need to consider your investigative protocol and whether investigations “have been properly scoped, and were independent, objective, appropriately conducted, and properly documented”? Following these protocol inquiries are those regarding your company’s response to investigations. The Evaluation asks, “Has the company’s investigation been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?” While it seems clear, it bears stating now, that all such actions must be documented going forward to show to any regulator who comes knocking.

The next section is an inquiry into carrots and sticks, or more formerly incentives and disciplinary measures. Once again demonstrating the need to put compliance into the fabric of an organization there is an inquiry into the role of Human Resources (HR) in any disciplinary process. There is also a series of inquiries into the response to Code of Conduct or other violations, “What disciplinary actions did the company take in response to the misconduct and when did they occur? Were managers held accountable for misconduct that occurred under their supervision? Did the company’s response consider disciplinary actions for supervisors’ failure in oversight?” Of course, the disciplinary action will should be evaluated. Finally, and in an inquiry which I can only say warms my heart, it asks has “the disciplinary actions and incentives been fairly and consistently applied across the organization?”

But it is not only the sticks a company employs but also what incentives you have in place for doing business ethically and in compliance. You need to consider how you have incentivized compliance and what the rewards have been. Also recognizing that compensation systems can misplace pay incentives, the Evaluation asks, “has the company considered the potential negative compliance implications of its incentives and rewards?”

There are questions around continuous improvement, periodic testing and review. First are inquiries into your internal audit functions, including the audit protocol, audit findings, who received them and how they were used for remediation going forward, particularly in high-risk business units or geographic areas. A company needs to consider its internal compliance controls environment going forward, including testing of “relevant controls, collection and analysis of compliance data, and interviews of employees and third-parties? How are the results reported and action items tracked? What control testing has the company generally undertaken?” Lastly, is how often you have updated your compliance program, including your policies and procedures and Code of Conduct.

The next area is around third parties. As this has long been recognized as one of the highest risk areas in the FCPA, it re-emphasizes the need to identify those with whom you are doing business, perform an appropriate level of due diligence; then investigate and clear any red flags which may have arisen. Beyond these straight-forward and well-known requirements, the Evaluation also focuses on the appropriate internal compliance controls for third parties in both the sales side and supply chain (SC).

Finally, and most importantly, the Evaluation recognizes that the management of your third parties is where the rubber hits the road, in a section literally entitled “Management of Relationships” where it raises these questions, “How has the company considered and analyzed the third party’s incentive model against compliance risks? How has the company monitored the third parties in question? How has the company trained the relationship managers about what the compliance risks are and how to manage them? How has the company incentivized compliance and ethical behavior by third parties?”

In the area of mergers and acquisitions (M&A), the Evaluation points to the

need to perform both pre-acquisition due diligence and post-acquisition integration. However, it brings in the concept to use the pre-acquisition phase to your post-acquisition integration, in asking the following questions, “What has been the company’s process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company’s process for implementing compliance policies and procedures at new entities?”

Some Observations

This DOJ Evaluation is a document every compliance practitioner should in several ways. It is clearly a metric by which you can evaluate your own compliance program. It also provides clear guidance on the expectations of government regulators regarding what your program should consist of, how it should be effected and where you need to go down the road. It is also a valuable teaching tool as you can lay out for your Board and senior management the clear requirements for any *best practices* compliance program.

The document also re-emphasizes that you should listen when the DOJ communicate their expectations around compliance. Beginning with the initial public remarks of Hui Chen and comments by former Assistant Attorney General Leslie Caldwell in November 2015, through the announcement of the FCPA Pilot Program in April 2016 and subsequent public remarks by Caldwell, Sally Yates and Daniel Kahn, the DOJ has consistently articulated the need for the operationalization of a corporate compliance program. Indeed, one can draw a straight-line from Caldwell’s November 2015 remarks at the SIFMA Compliance and Legal Society New York Regional Seminar where she presented the requirements to operationalize compliance in discussing compliance program metrics.

Any company which simply puts a paper program in place, whether it is certified or not, and then sits back on its collective hands, is in for a very rude awakening if it comes before the DOJ in an investigation or enforcement action. For it is in *doing compliance* that the DOJ will give credit to a functioning compliance program. The Evaluation of Corporate Compliance Programs is a most welcome document for the entire compliance community. It clearly illustrates many evolving compliance concepts coming into the DOJ’s view of an effective compliance program. Finally, it gives the

CCO or compliance practitioner an excellent set of questions with which to benchmark your company's compliance program and remediate any gaps which might pose risks to your company.

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