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Keep What You make: Aligning Business and Compliance Goals

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NHOA Business Summit Conference Honolulu, HI

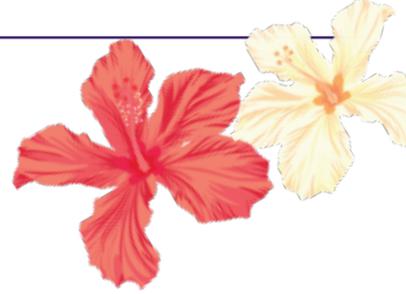
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Who Are These Guys?



- Partners and Co-Leaders of the Government Contracts and Global TradePG at McCarter & English LLP
- Significant experience handling “bet the company” litigation for multinational corporations
- Handled claims valued, in the aggregate, in the tens of billions of dollars

Agenda

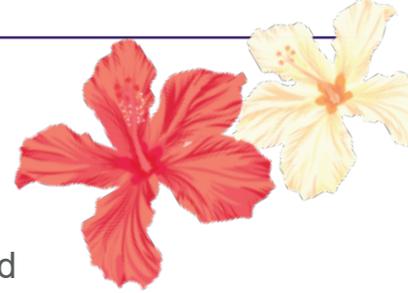


- Compliance – What is it and why do you care?
- What's Bugging You?
 - Every company is different
 - “Your” concerns vary
 - Let's Discuss



Compliance

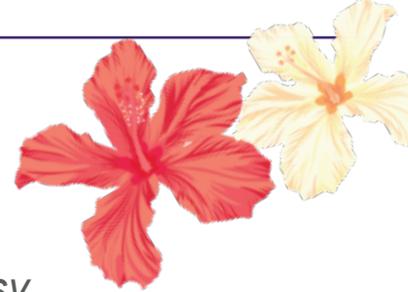
Compliance Programs



- A set of internal policies and procedures of a company to comply with laws, rules, and regulations or to uphold business reputation
 - HR
 - Finance
 - Foreign Corrupt Practices Act
 - Vendor/supply chain management
 - Export Controls
 - Federal procurement
 - Cybersecurity
- Generally managed by an individual or team
- Catalogs, collects, and understands rules set forth by government bodies
- Create, implements, and enforces a compliance program
- Programs reflect business ethics, contractual compliance, accordance with laws

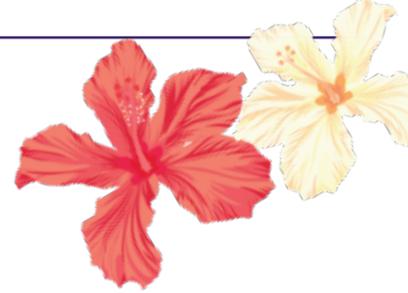
***“Sales” lets you make money,
“Compliance” lets you keep it***

Compliance: Why You Don't Care



- It costs too much – *The Scrooge Paradox*
- What we're doing is too small to be noticed – *The Inferiority Fantasy*
- What we're doing is not that big of a deal – *The David Byrne Affair*
- No one is going to know – *The Eddie Haskell Ruse*
- Because it's stupid – *The Tantrum Method*
- Those rules don't apply to us – *The Bart Simpson Theorem*
- We don't do that type of work – *The Ostrich Approach*
- We'll never do that type of work – *The Tunnel of Darkness Application*
- We don't get our supplies/materials from that country – *The Barbarino Identity*
- I'm unethical, greedy and bulletproof – *The Political Agenda*

Compliance: Who Does Care?



- Federal and local law enforcement
- Your investors
- Your acquirers
- Your customers
- Your prime contractors
- Your subcontractors
- Your employees (*i.e.* future plaintiffs/*qui tam* relators)
- Your Board and C-suite (*i.e.* future civil/criminal defendants)

DOJ Cares - Evaluation of Corporate Compliance Programs



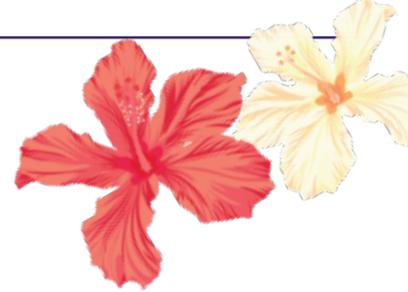
- DOJ Issued and recently updated guidance it uses to determine the effectiveness of corporate compliance programs
- Provides examples of topics and sample questions that are frequently used by the DOJ in the evaluation of a corporate compliance program
- Focuses on the steps taken by company leadership to foster a corporate culture of compliance
- Differentiates between a “paper program” and a “real program”

The answers are not in the glossy diagrams of a company's 'core values' or their training slides; rather, they are in what happens in real life, in the smallest details that manifest themselves in the company's daily operations.

– Hui Chen, DOJ Compliance Counsel

- Not a checklist; the Compliance Guidelines helps predict what to expect in the event of a DOJ investigation

DOJ Cares - Evaluation of Corporate Compliance Programs (Cont.)



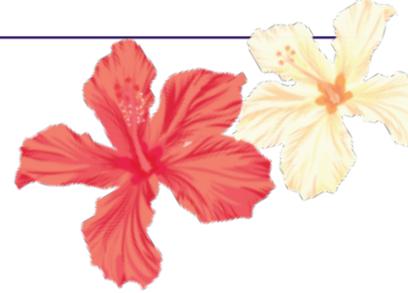
- Provides eleven topics and questions investigators may ask when evaluating the adequacy of a compliance program
- Prosecutors will take the answers into consideration when conducting an investigation of a corporate entity, determining whether to bring charges, and negotiating plea or other agreements
- Companies should use these topics and questions to serve as best practices to measure corporate compliance programs and further refine existing programs
 - Analysis and Remediation of Underlying Misconduct - no system vulnerabilities or accountability lapses in detecting issues and have a system in place to expose vulnerabilities and implement corrective measures to reduce the risk of repeat misconduct.
 - Senior and Middle Management - compliance is top down and requires concrete actions in compliance and remediation efforts and to ensure appropriate information is shared among different components of the company – including the board of directors.
 - Autonomy and Resources - determine whether the compliance department is autonomous and can remain objective from the rest of the company and empowered to identify, escalate, and address problems.

DOJ Cares - Evaluation of Corporate Compliance Programs (Cont.)



- Policies and Procedures – examines the company’s process for designing, implementing, assessing and revising the usefulness of policies and procedures, and whether the departments or functions have ownership of and are held accountable for their oversight.
- Risk Assessment - a methodology to identify, analyze and address risks for misconduct within the company.
- Training and Communications – examines the training provided to employees who work in high-risk and control positions and that training is effectively communicated.
- Confidential Reporting and Investigation – is there an effective and confidential reporting mechanism, including the ability to evaluate the risk level or seriousness of reports.
- Incentives and Disciplinary Measures - a company must be prepared to take appropriate disciplinary measures upon identifying misconduct and ensure proper accountability.
- Continuous Improvement, Periodic Testing and Review - Wash, rinse, repeat.
- Third-Party Management – applies to third parties outside of a company’s control demanding the document use of risk-based process to manage those third parties.
- Mergers and Acquisitions - due diligence should root out and identify misconduct or the risk of misconduct and account for implementing their compliance policies and procedures at the new entity.

A Note on Fraud



FAR 33.209 – Suspected Fraudulent Claims

- Beware of submitting claims that might be perceived as misrepresenting facts!
- Contracting Officer is required to refer the matter to the agency official responsible for investigating fraud

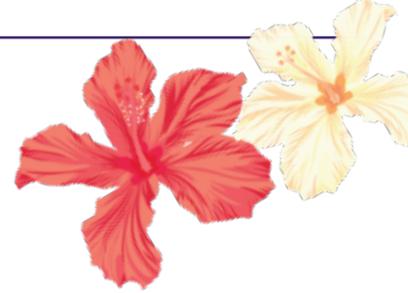
FAR 33.201 – Misrepresentation of Fact

- Means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead



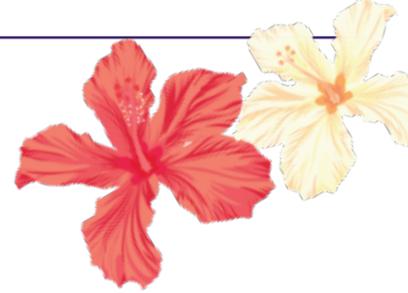
So What's Bugging you?

We'll Get You Started...



- Subcontracting/Teaming
- Joint Ventures
- Subcontracting Limitations
- PPP Loan Forgiveness/REAs
- Affiliation
- Supply Chain/BAA/TAA
- Might we suggest a side of...
 - Collusion
 - Cybersecurity

Why Should I Care About Antitrust Compliance?



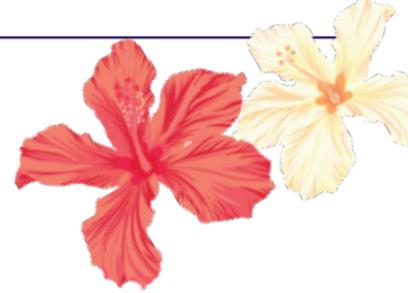
- Because of the Biden Administration’s increased scrutiny of competitive practices across specific sectors of the U.S. economy:
 - E.O. 14036 “Promoting Competition in the American Economy” (July 9, 2021)
 - Creates 72 initiatives to address sectors where the Administration believes there are competition problems (i.e., “Big Tech,” agriculture, healthcare, banking/finance, transportation)
 - Adopts a “whole-of-government competition policy” that encourages coordinated efforts across all federal agencies that have a role in antitrust enforcement to address “overconcentration, monopolization, and unfair competition in the American economy”
 - Creates a new White House Competition Council that will implement the administrative actions of the E.O. and identify other administrative and legislative changes needed to promote the E.O.’s goals
 - The Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) will lead this new coordinated effort to enforce the antitrust laws vigorously

Why Should I Care About Antitrust Compliance?



- Because of the DOJ’s increasing enforcement focus on potential antitrust issues inherent in competition for federal procurement opportunities:
 - In late 2019, the DOJ established its Procurement Collusion Strike Force (“PCSF”) with a goal of “detering, detecting, investigating and prosecuting” antitrust violations and related criminal schemes that affect federal procurement
 - With the establishment of the PCSF, government contractors should expect more audits, investigations, and inquiries into contracting practices to detect potential antitrust violations, with a potential focus on particular contractor industries (e.g., aerospace, defense) and practices (e.g., teaming agreements) the PCSF believes present a greater risk of collusion
 - In Fall 2020, the PCSF expanded its scope with the launch of PCSF: Global, an initiative designed to deter, detect, investigate, and prosecute collusive schemes involving federal procurement OCONUS
 - Accordingly, designing, implementing, and monitoring/enhancing a corporate compliance program that educates employees on identifying and addressing potential anticompetitive conduct is crucial for government contractors

DOJ Cares – Civil Cyber-Fraud Initiative Targets Federal Contractors



- In October 2021, the DOJ announced the launch of its Civil Cyber-Fraud Initiative to combat “new and emerging cyber threats to the security of sensitive information and critical systems” and targeting the accountability of federal contractors and federal grant recipients for cybersecurity obligations
- The Initiative will hold persons and entities accountable, via the False Claims Act, for deficient cybersecurity practices, including:
 - (1) placing USG information or systems at risk by knowingly providing deficient cybersecurity products or services,
 - (2) knowingly misrepresenting cybersecurity practices or protocols, and/or
 - (3) knowingly violating obligations to monitor and report cybersecurity incidents and breaches

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More questions?

We're here to help.