



WEEKLY

11/6/2015

New Department of Justice Guidance on Effective Compliance Programs

By Michael W. Peregrine, McDermott Will & Emery LLP

Health lawyers may want to brief their clients on two new, related developments from the Department of Justice's (DOJ's) Fraud Section with direct implications for the organization's compliance program and the board's compliance oversight duties.

The first development is the formal appointment of a "compliance counsel," to advise prosecutors as they consider whether a corporation maintained a good faith compliance program at the time of the conduct giving rise to the prospect of charges, and whether the corporation has taken meaningful remedial action to detect and prevent future wrongdoing. **The second (related) development** is the articulation of particular metrics DOJ and its compliance counsel will apply in evaluating corporate compliance programs for effectiveness. Collectively, these developments help to raise the stakes for the health system's compliance program commitment, and may prompt refinements to that program. As such, the developments could be the subject of a general counsel (perhaps teaming with the compliance officer) briefing to the Audit & Compliance Committee.

The Compliance Counsel

As of November 3, DOJ's Fraud Section retained former prosecutor and corporate counsel Hui Chen to serve as a full time compliance expert.^[1] A primary duty of this new position is to help determine whether corporations subject to DOJ investigation have maintained a good faith compliance program. The DOJ's Principles of Federal Prosecution of Business Organizations (a/k/a the "Filip Guidelines")^[2] make it clear that the existence and effectiveness of a corporation's pre-existing compliance program is a factor DOJ will take into consideration when making a prosecution decision.

The hiring of the new compliance counsel is intended to demonstrate the seriousness with which DOJ views corporate compliance. The expectation is that the compliance counsel will help prosecutors develop appropriate benchmarks for evaluating corporate compliance and remediation measures, and communicating with stakeholders in setting those benchmarks. This would include providing prosecutors with a "reality check" concerning the validity of a corporation's program and of claims to its effectiveness. Along the same lines, once a corporate resolution is reached requiring ongoing Fraud Section assessments of a company's compliance and remediation efforts, the compliance counsel will support prosecutors and corporate monitors as they evaluate whether the implementation of such measures is effective and in keeping with the terms and purposes of Fraud Section resolutions.^[3]

Compliance Program Evaluation Metrics

In a speech on November 2, Leslie Caldwell, Chief of the DOJ's Criminal Division, elaborated on DOJ's core perspectives on prosecution of compliance violations, the role of the compliance counsel, and on DOJ's perspective on the benefits of an effective compliance plan.^[4] Describing legal and compliance advisors as the "good guys," Caldwell expressed assurance that DOJ is not interested in prosecuting mistakes, accidents, or bad business judgments, but rather compliance violations that are intentional, and particularly egregious or pervasive.

In that regard, the compliance counsel will help prosecutors evaluate compliance programs on a case-by-case basis, applying the following types of metrics:

- Does the corporation ensure that its directors and managers offer strong support for corporate compliance policies?
- Do compliance program staff have stature within the company? Are the compliance teams adequately funded and able to access needed resources?
- Are compliance policies clear and in writing? Are they easily understood by employees?
- Are the compliance program guidelines effectively communicated to employees? Are they easy to find and do employees get repeated training, including as to who to contact with concerns?
- Are the compliance policies subject to periodic review and updating as to evolving risks and circumstances?
- Do mechanisms exist to enforce the compliance policies, is compliance incentivized, and are violators likely disciplined on an even-handed basis?
- Are third parties (e.g., vendors, agents, consultants) informed of (and held accountable for) compliance expectations?^[5]

The DOJ metrics are very practical in nature and (in the context of the Filip Guidelines) approach the issue of program effectiveness in a manner that is different, yet complimentary, to the possibly more familiar approach taken by the Federal Sentencing Guidelines.

In her comments, Caldwell dismissed suggestions that this renewed commitment on the integrity of the compliance committee signaled the willingness of DOJ to accept a so-called “compliance defense.”

An Action Plan

Any health system response to these developments should reflect an awareness of DOJ’s renewed criminal and civil fraud enforcement commitment, as well as its intent to be more transparent with respect to how prosecution and related decisions are made. In other words, if DOJ is reinforcing its commitment to pursuing health care fraud (and individuals determined responsible for corporate wrongdoing) health systems should reinforce their commitment to promoting a corporate culture of compliance with applicable law, by assuring “state of the art” compliance programs.

The health system’s response is likely to be focused on the following action items, among others: (1) comparing its existing compliance program against the DOJ’s described metrics, and making changes where appropriate; (2) revising its approach to internal investigations to track the principles of the Yates Memorandum;^[6] (3) assuring the availability of appropriate levels of indemnification and “D&O” coverage to officers, directors, and management; and (4) educating board and key committee members on the principles of these two DOJ initiatives.

It would be appropriate for any action plan arising from these initiatives to be a joint effort between the general counsel and the chief compliance officer, rather than solely that of the compliance officer. This is primarily because implications of these new developments extend beyond the four corners of the compliance program, and require:

- interpretation of the specific FSG and Filip criteria for program effectiveness;
- evaluation of the relationship of program effectiveness to DOJ’s Yates corporate prosecution standards; and
- advising the board and its audit and compliance committees on the relationship of the new developments to their Caremark compliance program oversight obligations.

Each of these implications is grounded in law and legal principles, and their consideration on behalf of the health system requires informed legal analysis. Accordingly, the general counsel must play a leading role in the health system's response, working closely together with the chief compliance officer.

Conclusion

Two new compliance program developments from the Department of Justice are worthy of consideration by health systems, and may suggest certain changes to how systems approach elements of the compliance program—and the board's oversight of that program.

Michael W. Peregrine, a partner at McDermott Will & Emery, advises corporations, officers and directors on matters relating to corporate governance, fiduciary duties and officer-director liability issues. His views do not necessarily reflect the views of McDermott Will & Emery or its clients. The author wishes to thank his associate, Kelsey J. Leingang, for her assistance in the preparation of this article.

[1] <http://www.justice.gov/criminal-fraud/file/790236/download#sthash.G0l4IPgY.dpuf>.

[2] Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components, United States Attorneys (Aug. 28, 2008) (a/k/a "Filip Memorandum"), available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.

[3] See *supra*, note 1.

[4] <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-sifma-compliance-and-legal-society#sthash.G0l4IPgY.dpuf>.

[5] *Id.*, see also The Wall Street Journal, "U.S. Department of Justice Outlines Metrics for New Compliance Expert" (Nov. 2, 2015); <http://blogs.wsj.com/riskandcompliance/2015/11/02/u-s-justice-department-outlines-metrics-for-new-compliance-expert/>.

[6] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, September 9, 2015, Individual Accountability for Corporate Wrongdoing (Guidelines), available at <http://www.justice.gov/dag/file/769036/download>.