

ClientAlert

White Collar Practice

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New Guidance for Compliance Programs in Recent Deferred Prosecution Agreement

Highlights

- DOJ imposes “enhanced compliance obligations” that provide new details on elements of corporate compliance programs.
- Important to customize compliance programs to account for industry and market-specific risks.
- Multinational corporations should expect heightened compliance obligations in the event of an enforcement action.

Discussion

Settlement agreements, non-prosecution agreements and deferred prosecution agreements have been primary sources of guidance from the US Department of Justice (“DOJ”) on the components of an effective corporate compliance program. While such documents are not legally binding on anyone other than the corporation involved, all corporations can glean important information from these agreements concerning the DOJ’s current thinking on compliance matters.

The deferred prosecution agreement (“DPA”) between the DOJ and Johnson & Johnson provides some new insights that may call for corporations to review and assess their own internal compliance programs. In addition to a general description of nine components that ought to be included in any corporate compliance program, the DPA includes enhanced compliance obligations that provide more detail and explanation of the DOJ’s expectations for corporate compliance efforts. The enhanced compliance obligations imposed as part of its April 8, 2011 DPA with Johnson & Johnson and its subsidiaries for violations of the Foreign Corrupt Practices Act (“FCPA”) suggest the DOJ’s expectations for corporate compliance programs continue to evolve.

The enhanced compliance requirements set forth in the Johnson & Johnson DPA¹ address several important components of a rigorous compliance program and outline in greater detail the elements the DOJ might expect of an effective corporate compliance program.



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¹ The Enhanced Compliance Obligations are located in Attachment D of Johnson & Johnson’s Deferred Prosecution Agreement with the DOJ, which can be found [here](#).

Compliance Program Oversight

Appoint a Chief Compliance Officer with “significant experience with compliance with the FCPA.” Maintain a global compliance team that consists of compliance leaders for each business sector and corporate function and regional compliance leaders with reporting obligations to the Chief Compliance Officer.

Gifts and Entertainment Expenses

Implement policies and procedures regarding gifts and expenses that, at a minimum, require gifts to “be modest in value” and in accordance with applicable laws and regulations, require that expenses are “reasonable” and limited to expenses incidental to product education, training, or legitimate conferences or business meetings. The policies must encompass all government officials and should identify any specific government positions that company personnel are most likely to interact with based on a company’s particular industry.

Internal Reporting Systems

Maintain systems for handling reports and complaints regarding potential violations of anti-corruption laws and ensure “reasonable access” to an anonymous, toll-free hotline and an anonymous electronic complaint form where applicable laws permit anonymous reporting. A “Sensitive Issue Triage Committee,” which must include internal audit, legal and compliance personnel, must review and respond to reports of corruption “promptly and consistently.”

Risk Assessments and Audits

Conduct targeted risk assessments on a staggered, periodic basis of operations in markets involving interactions with government officials or other anti-corruption compliance risks. Assessments should identify new risk areas and modifications to address changing risks must be implemented. Identify at least “five operating companies that are high risk for corruption because of their sector and location and [] conduct FCPA Audits of those operating companies at least once every three years.” Risk factors to consider include (i) degree of interaction with government officials; (ii) internal reports of potential corruption; (iii) degree of risk according to certain corruption indexes; and (iv) financial audit results. FCPA audits must include:

- On-site visits by qualified auditors.
- Participation, where appropriate, in on-site visits by internal compliance and legal personnel.

- Reviews of sample contracts with individual health care providers.
- Creation of action plans to address issues uncovered by audits that are shared with senior management and contain steps to enhance compliance, remediate program weaknesses and deter violations.
- Review of books and records that may present corruption risks.

Acquisitions

Conduct anti-corruption due diligence before acquiring another business entity. When that is not possible under applicable laws and regulations, complete review after acquisition and report any findings to the DOJ. Within one year of acquisition, implement anti-corruption policies and procedures for acquired entity and perform an FCPA audit within 18 months of acquisition.

Third-Parties

Conduct due diligence reviews of third parties, such as agents, sales representatives and consultants, that includes, at a minimum, a review of the third party’s qualifications and reputation, the rationale for use of the third party and the FCPA risk that results from using a third party. Where appropriate, include in contracts with third parties provisions designed to deter and prevent FCPA violations that includes, among other conditions, books and records, audit rights and termination rights if the third party breaches any agreement related to its compliance with anti-corruption laws and regulations.

Training

Provide annual training to individuals in senior-level positions, in-depth training for internal audit, financial and legal personnel, and training to third parties that interact on the company’s behalf with government officials at least once every three years.

The DOJ imposed the enhanced compliance requirements while also recognizing Johnson & Johnson’s substantial cooperation with the DOJ and other agencies. In its press release announcing the deferred prosecution agreement, the DOJ lauded “J&J’s timely voluntary disclosure, and thorough and wide-reaching self-investigation of the underlying conduct; the extraordinary cooperation provided by the company to the department, the SEC and multiple foreign enforcement authorities, including significant assistance in the industry-wide investigation.²” The press release also notes that Johnson & Johnson’s criminal fine was reduced because of its settlement with enforcement

² Press Release, US Department of Justice, “Johnson & Johnson Agrees to Pay US\$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations,” Apr. 8, 2011 available at <http://www.justice.gov/opa/pr/2011/April/11-crm-446.html> (last visited July 11, 2011).

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authorities in the UK. Finally, in lieu of a corporate monitor, the DOJ is requiring Johnson & Johnson to provide the agency with status reports on its implementation of the enhanced compliance obligations every six months for the duration of the agreement. While it is too soon to be certain, this requirement may reflect a trend towards the reduced use of corporate monitors and an increased focus on self-policing during the remediation efforts of corporations charged with FCPA violations.

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