



# QUICK TAKE

## Six Elements of an Effective Compliance and Ethics Program

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Companies, directors, and officers today are operating in an environment of ever-increasing laws and regulations, including anticorruption, antifraud, antitrust, anti-money laundering, sanctions and export controls, privacy, and Environmental, Social and Governance (ESG). Enforcement agencies are aggressively prosecuting companies and their employees, officers, and directors for violations of such laws, which can lead to substantial fines, penalties, and consequences, up to and including imprisonment, particularly given the heightened level of scrutiny by regulators such as the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). Fortunately, various U.S. and international laws provide companies with a defense or an opportunity to mitigate fines and penalties for violations of law if they have an effective corporate compliance and ethics program in place. The goal of such a program is to ensure compliance with

applicable laws and to detect and prevent criminal conduct by a company's employees, consultants, and agents, thereby reducing the risk of violating the law. Further, if a violation of law does occur, an effective compliance and ethics program is designed to provide a basis for demonstrating to regulators that such violation was a result of unauthorized individual action and not corporate acquiescence.

The U.S. Federal Sentencing Guidelines and various frameworks and memoranda from the DOJ, SEC and the U.S. Office of Foreign Asset Control (OFAC) are useful for determining the key elements of an effective compliance and ethics program.<sup>1</sup> The fundamental compliance and ethics program questions that are outlined in the latest DOJ Compliance Program Guidance are as follows: (1) Is the compliance program well designed?; (2) Is the compliance program being applied earnestly and in good faith? (This is

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viewed as whether the compliance program is adequately resourced and empowered to function effectively.); and (3) does the compliance program work in practice?

An effective compliance and ethics program consists of various elements, including: (1) ethical culture and governance; (2) risk assessment and due diligence; (3) policies and procedures; (4) training and communication; (5) reporting and investigations; and (6) monitoring and auditing. Regulators have determined that a one-size-fits-all compliance program or a mere “paper program” is properly tailored and implemented to each company’s particular business and that such elements are regularly updated to address changes in an organization’s governance, operations, and regulations. The following is a discussion of each of the elements of an effective compliance and ethics program.



### 1. Ethical Culture and Governance

**Promote an organizational culture that encourages ethical conduct and compliance with the law. Maintain a sound governance structure and practices to support the compliance and ethics program.**

- The tone of a company’s ethical culture is set at the top of the organizational structure. Your board and executive management must demonstrate that ethics at your organization is paramount. But it’s also critical to ensure

that a company’s middle management is taking ethics seriously. Your organization can foster an ethical culture by leading with a code of ethics and ensuring its compliance throughout the organization. It’s also important to ensure the company consistently rewards good conduct and disciplines bad conduct, including violations of the code of ethics.

- The ethical culture of an organization is also demonstrated by the time, resources, and funding dedicated to fostering ethics and compliance.
- From a governance perspective, the creation of a compliance committee is key to ensuring a compliance and ethics program is effective. This group would oversee the program and the compliance officer; establish a compliance budget and recommend resources; and review results from compliance focus groups, audits, and surveys, which would help create custom compliance programming to help mitigate risks. This committee is also responsible for reviewing program reports and developing an annual compliance plan.

### 2. Risk Assessment and Due Diligence

**Periodically assess the risk of criminal and unethical conduct and modify the program to reduce risk. Conduct due diligence to mitigate risks.**

- Regulators, rating agencies, and other stakeholders expect companies to conduct assessments to ensure they are not exposing the company to unreasonable levels of risk. Specifically, an organization must: (1) evaluate, quantify, and prioritize compliance risks; (2) develop risk mitigation plans including training, policy development, and compliance controls; and (3) ensure there is ongoing assessment and measurement of the compliance and ethics program’s effectiveness.
- A company is also expected to conduct due diligence of employees, customers, third parties, and mergers and acquisitions targets.
- Regulators don’t expect companies to take a “scorch the earth” approach when it comes to risk assessments and due diligence. Instead, they advise companies to take a “risk-based” approach that balances the time, resources, and funds invested in those activities against the highest risks faced by the organization.

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### 3. Policies and Procedures

***Adopt and distribute policies and procedures to prevent and detect criminal and unethical conduct.***

- The code of ethics is the cornerstone of any compliance program. It provides guiding principles and values that set the tone, spirit, and culture of the company. The code of ethics also emphasizes compliance with important applicable laws and outlines expectations for ethical conduct by employees, officers, and directors.
- A company's policies address compliance with laws and establish ethical standards relating to specific areas of risk within a company. They also provide specific guidelines by which employees, officers, and directors are to conduct themselves when engaging in activities on behalf of the company. It's important that the company policies be tailored to their operations and business practices, and that they are drafted in a reader-friendly manner.
- Some of the key company policies include the employee handbook, the anticorruption policy, the trade compliance manual, the privacy policy, and the supplier code of conduct.
- Companies should ensure that their policies are readily available and accessible to their employees and other relevant stakeholders.

### 4. Training and Communication

***Continuously train and communicate on policies and procedures to ensure comprehension, certification, and compliance.***

- Conduct training to all employees on the code of ethics and general policies, and provide specialized training for relevant employees in specific areas of risk.
- Create a compliance and ethics program website to include frequently asked questions and employee resources.
- Provide periodic communication to employees about the compliance and ethics program, including new policies and procedures.
- Compliance training can be delivered using a variety of methods, including live, recorded, and online. There's no one-size-fits-all approach to training, but it should also be conducted based on a "risk-based approach." The higher the risk area, the more likely a live, in-person training to the relevant audience is appropriate.

It's important to ensure that all training delivered is acknowledged by the recipient and that the company maintains accurate records of all such trainings.

### 5. Reporting and Investigations

***Maintain a mechanism for reporting allegations of criminal and unethical conduct on a confidential and anonymous basis without fear of retaliation. Investigate all reports of violations in a focused, objective, comprehensive, and responsive manner.***

- Employees should have a method for reporting violations of law and policy in a company. One effective reporting method is the creation of an ethics hotline. Tips are the leading means of detection of workplace fraud, and phone- and web-based hotlines are the main means of capturing those tips.
- The company should ensure that it is actively and publicly promoting its hotline.
- When a violation of law or policy is reported, it is important to ensure there is no retaliation against the reporting person, or it can create a "chilling effect" on future reports.
- Companies should promptly and thoroughly investigate the compliance reports it receives.
- Investigation procedures should be adopted and followed when conducting internal investigations to ensure consistency in the process regardless of which department or party is responsible for leading the investigation.

### 6. Monitoring and Auditing

***Conduct monitoring and auditing to detect criminal and unethical conduct and periodically evaluate the effectiveness of the compliance program.***

- Determine what revisions should be made to the compliance program to comply with new laws and regulations or to adjust to a company's changing culture or operating procedures.
- Create a plan to visit all business locations, perform reviews, and develop and improve employee- and vendor-screening processes.
- Track most frequently asked questions and expand the audit and monitor process to incorporate relevant parties in the supply chain (customers, business partners, etc.). Target auditing and monitoring metrics with annual benchmarks tied to performance evaluations.



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- Evaluate lessons learned from past violations, investigations, mergers, transactions, and failed partnerships, and incorporate corrective measures into your program to avoid reoccurrence and to strengthen the ethical culture.

Although establishing an effective compliance and ethics program requires substantial time, commitment, and resources, doing so will: (1) reduce the risk of regulatory violations and unethical behavior at your organization; (2) provide a stronger defense against DOJ, SEC, and other regulatory enforcement actions; and (3) strengthen your organization's shareholder, customer, and public confidence, trust, and loyalty. But it will not happen overnight.

Developing and implementing a compliance and ethics program takes time, resilience, and resources, but with the effective elements above as your guide, a dedicated compliance officer or counsel to lead the initiative, and an organization that is genuinely committed to an ethical culture, you can adopt a program that will add considerable value to your business or organization.



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### Endnote

<sup>1</sup> In May 2019, OFAC published "A Framework for OFAC Compliance Commitments," [https://www.treasury.gov/resource-center/sanctions/Documents/framework\\_ofac\\_cc.pdf](https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf). In July 2019, the DOJ released new guidance on its "Evaluation of Corporate Compliance Program," which contains factors prosecutors should evaluate to determine if corporate compliance programs and efforts comply with the law, <https://www.justice.gov/atr/page/file/1182001/download>. In March 2023, DOJ Updated Corporate Compliance Program Guidance, <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

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