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See page 16



29

Some thoughts
on antitrust
risk assessment
Robert E. Connolly

35

Binding Corporate Rules, Part 4:
From creation to approval
Jan Dhont, Alyssa Cervantes,
and Delphine Charlot

39

Corruption within
Compliance in
higher education
Diane T. Hockenberry

49

CCO Liability:
Mixed messages
from the SEC
Scott Killingsworth

by Jeffrey M. Kaplan

Compliance program assessments: Why you should bother

One of the principal foundations of compliance and ethics program law is the expectation that companies will have their programs assessed from time to time. It is found in the Sentencing Guidelines (“[t]he organization shall take reasonable



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steps...to evaluate periodically the effectiveness of the organization’s compliance and ethics program¹); the FCPA resource guide issued by the U.S. Department of Justice and Securities and Exchange Commission (the “DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale²); the OECD’s anti-corruption best practice guidance (“[c]ompanies should [c]onduct ...periodic reviews of [their] ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards...”³); and the laws of many other countries, including, most recently, those of Spain.⁴

Given these expectations, failing to conduct an assessment—while likely not itself fatal—could hurt a company in an investigation or enforcement proceeding. By contrast, having conducted an assessment could shape the government’s view of a company positively in such a setting. In light

of how large fines can now be for corporate offenses, the enforcement factor alone seems reason enough to undertake an assessment. Yet not all companies have taken this step.

Perhaps some feel that the potential penalties are motivation enough to have strong programs, and they do not need an assessment to get them to do a good job when it comes to ethics and compliance. However, while the incentives for companies to have strong programs are indeed powerful, individual executives—who often take a short-term approach to managing their companies—may view their personal incentives differently. An assessment can help minimize this “moral hazard”-based tension that is often hurtful to compliance. It can also provide best practices information of which a company might otherwise be unaware.

Finally, an assessment can lay the groundwork for a “road map” that a company can follow for years to come in implementing and improving a program. Among the benefits of such a roadmap is providing a clear path for the board of directors and corporate officers in exercising their legal obligation to oversee the program. *

1. 2014 Guidelines: Chapter Eight—Sentencing of Organizations. Available at <http://bit.ly/1gFo2gg>
2. Foreign Corrupt Practices Act (FCPA): Guidance. Available at <http://bit.ly/1uqCRfgb>
3. Good Practice Guidance on Internal Controls, Ethics, and Compliance. Available at <http://bit.ly/1THnQLS>
4. Article 33 of the amended Spanish Criminal Code.

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