

EXPERT ANALYSIS

Recent DOJ Guidance for Corporate Compliance Programs: 'Best Practices' For Internal Investigations

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What does the U.S. Department of Justice think is a high-quality internal investigation? How does the DOJ decide whether an investigation was good enough to help a company avoid, or at least mitigate, criminal charges? In recent speeches, DOJ officials have provided important guidance on the agency's view of best practices, and some useful commonsense reminders, for corporate counsel and their investigating board committees. Much of that guidance came May 19 in remarks by Criminal Division head Assistant Attorney General Leslie Caldwell,¹ as well as in other recent speeches.

Caldwell made clear that the DOJ does indeed take the time to scrutinize and "evaluate the quality of a company's internal investigation." She explained that the department does this evaluation "through our own investigation" as well as "in considering what charges to bring against a company."

The DOJ decides whether to charge a company using the Principles of Federal Prosecution of Business Organizations, also known as the nine Filip factors. The charging decision, under Filip factor 5, is based partly on "the existence and effectiveness of the corporation's pre-existing compliance program."²

The DOJ asks whether the company "has established corporate governance mechanisms that can effectively detect and prevent misconduct."³

This DOJ guidance reinforces the point that an internal investigation should be understood as part of a company's compliance program. Here's why. A company will get credit from the DOJ only if its compliance program is "effective." And the DOJ says effective compliance programs must have procedures designed to "uncover wrong-doing" in the company and "expose individuals responsible for criminal behavior."⁴ Those "procedures" are the tools the company uses in its investigation.

DOJ ON 'BEST PRACTICES'

The DOJ "will not tell a company how it should conduct an investigation," according to Caldwell. In connection with evaluating a company's efforts, however, Caldwell said the department "ha[s] seen some 'best practices' with regard to internal investigations." On that front, Caldwell has repeatedly delivered two messages:

- Companies that over-investigate do so at their own cost and peril.
- Companies' internal investigations must identify and deliver evidence against individual wrongdoers.

The quality of the company's investigation, then, will also determine how effectively the company is deemed to have cooperated with the government in delivering that evidence.⁵

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Tailor and target

The DOJ is placing a premium on targeted investigations. Caldwell said a company should set out to “root[] out relevant facts, identify[] and interview[] the knowledge-able actors and captur[e] and preserv[e] relevant documents and other evidence.” If an investigation “unearths criminal conduct,” she said, then the continued “inquiry should be thorough enough to identify the relevant facts, players, documents and other evidence, and to get a sense of the pervasiveness of the misconduct.”

Money and time

Caldwell insists it is “reasonable to take resources — time and money — into account” in tailoring the investigation. She warns that the department has seen “needlessly costly and overbroad investigations.” It is not “necessary or productive for a company to employ its internal investigators to look under every rock and pebble.”

Or, as Caldwell has previously phrased it, a company will not earn extra credit with the DOJ should it “aimlessly boil the ocean.”⁶

To the contrary, she stresses “doing so will cost companies much more in the end” not only in fees but “because it ultimately will delay [the government’s] investigation and delay resolution and closure for the company.” The devil, of course, resides in the details and in the judgments about scope to be made by experienced investigators.

Communicate and cooperate

Companies choosing to cooperate with the government will reap the benefit of additional help in “appropriately targeting their investigations,” according to Caldwell. To the “extent possible,” she said, the DOJ “will make clear to those companies [its] areas of interest.”

Caldwell said, “I tell my prosecutors that where possible, if it would not compromise our own investigation, we should share information with a cooperating company to help focus the company’s internal inquiry.”

Finally, Caldwell “encourage[s] an open dialogue between company counsel and our prosecutors about the progress of the internal investigation.” This dialogue “comes easily” to companies truly committed to demonstrating cooperation.

RECOMMENDATIONS

Here are some suggestions for specific steps to consider in light of the guidance in Caldwell’s speeches.

Design your investigative procedures now

We know that a company’s “pre-existing compliance program” must have procedures designed to “uncover wrongdoing.” Of course, the precise investigative “procedures” will vary with future circumstances. But don’t wait for a crisis. General investigative procedures can be developed now and incorporated into the compliance program. If the need for an investigation arises, the company will be able to move more swiftly and smoothly.

Develop your compliance program’s investigations ‘playbook’

Think of those general procedures, tailored to the organization, as comprising an investigations “playbook” for the in-house lawyer’s or director’s bookshelf. Develop them after discussions with pertinent corporate constituencies and with outside counsel or advisers. Ask what would happen in a hypothetical investigation: How would it be staffed? Who would be the points of contact and authority? What evidence collection issues might arise unique to how the company operates?

The playbook might also include information for critical IT personnel and vendors, the latest data map (an inventory of the company’s electronic and other data sources), HR policies

and employment/collective bargaining agreements, templates, company policies regarding whistleblower complaints, and any other information key personnel may need for an investigation.

Prepare to manage the project!

Caldwell's exhortation that it is "reasonable" to take "time and money" into account to avoid investigations that cause undue delay highlights the importance of actively managing the internal investigation. The company's point of contact — the investigating board committee or in-house lawyer — should use project management techniques with the investigators: Scope the project (reassess as needed); map out team responsibilities; use timelines and budgets; and schedule regular dialogue with the DOJ to keep the investigation tailored and avoid the risks of under- or over-investigation.

CONCLUSION

Companies should treat an internal investigation as part of their compliance program, rather than something they must undertake as a result of having a compliance program. An ineffective investigation could prevent the company from getting full credit from the DOJ for its costly and otherwise state-of-the-art compliance efforts as well as for its cooperation.

NOTES

¹ Leslie R. Caldwell, Assistant Attorney General, U.S. Dep't of Justice, Remarks at the Compliance Week Conference, Washington (May 19, 2015), available at <http://1.usa.gov/1LlFnIw>.

² U.S. Attorneys' Manual 9-28.300.

³ U.S. Attorneys' Manual 9-28.800.

⁴ Marshall L. Miller, Principal Deputy Assistant Attorney General, U.S. Dep't of Justice, Remarks at the Advanced Compliance and Ethics Workshop in New York (Oct. 7, 2014), available at <http://1.usa.gov/1EQ3XM9>.

⁵ See U.S. Attorneys' Manual 9-28.300 (Filip factor 5: "company's willingness to cooperate in the investigation of its agents").

⁶ Leslie R. Caldwell, Assistant Attorney General, U.S. Dep't of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), available at <http://1.usa.gov/1G40wnS>.

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