

## Kaplan & Walker LLP

### C&E Program Assessments: A “Roadmap” for Program Credit?

The Department of Justice has – to a degree never seen before – begun to send a strong message to the business community about the need for assessing C&E programs. Most notably, at a conference held on May 31, 2010 by the Organization for Economic Cooperation and Development, Attorney General Eric Holder called “on businesses to change the tone at the top, to re-evaluate their compliance programs and internal controls, to find ways to encourage a culture of compliance...”

A few days before this, at the annual Compliance Week conference, comments by two of Holder’s colleagues underscored the importance of C&E program assessments to the Department of Justice. One official - Assistant Attorney General Lanny Breuer – listed in his prepared remarks “periodic reviews and re-evaluations to test and ensure program effectiveness” as one of the things “the Criminal Division cares about.” According to one account, Mr. Breuer went further than that in his actual speech, “emphasizing that an effective compliance program is not static but dynamic, adapting to meet new and additional compliance challenges and subject to periodic reviews and appraisals by outside experts.”<sup>1</sup> The other official - Acting Deputy Attorney General Gary Grindler – pointed out that recent recommendations for revisions to the Sentencing Guidelines encourage program assessments in some instances. As Grindler noted, those revisions provide, among other things, that, following discovery of an offense, a company should assess its program, make “modifications necessary to ensure the program is effective” and consider using “an outside professional advisor to ensure adequate assessment and implementation of any modifications.” Combined with a strong endorsement of program assessments in a speech last Fall by the Vice Chair of the Sentencing Commission and their inclusion in the very important OECD anti-bribery good practice guidance issued in March, the recent statements by Justice Department officials should put

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<sup>1</sup> Thomas R. Fox, FCPA Compliance and Ethics Blog (May 27, 2010), available at <http://tfoxlaw.wordpress.com/>.

assessments at or near the top of the agenda of companies looking to achieve or maintain best practice C&E programs.

In some companies, however, there may be those concerned that a program assessment could actually be harmful, the same way that internal investigations have been seen as providing a “roadmap” for the government to prosecute a company. In fact, an assessment can serve as a “roadmap” of sorts – but one which can *help* a company secure favorable treatment from the government. That is because, absent an independent expert’s review of the volumes of complex information typically relevant to a program, a prosecutor may have a difficult time identifying a program that is indeed credit worthy.

Of course, an assessment should not be conducted for the purpose of helping a company receive credit in an enforcement proceeding. The goal should instead be a thorough and candid review of the program, and the report should include a comprehensive set of recommendations designed to ensure optimal program design and operation. Moreover, a company must be prepared to act on the recommendations – or be able to explain why it chooses not to do so.

But identification of program strengths is another purpose of an assessment, because this can be helpful to ensuring continuation of such practices, in particular in the event of contemplated cutbacks to the C&E program. Indeed, given the historical C&E experience of companies losing program momentum, this aspect of an assessment can be every bit as important as the recommendations. And, it is this dimension that can help serve as a “roadmap” to receiving program credit at a later point, should one ever be needed.

### Performing Program Assessments

There are numerous types of C&E program assessments. A company can undertake an assessment of its entire C&E program, or can assess particular subject matter areas (such as an FCPA assessment) or parts of a business. They can also be performed with respect to a program function, such as investigations, training or board oversight. Assessments can be

performed by internal personnel (e.g., by the C&E Department, the Internal Audit Department, the Law Department) or by outside C&E professionals. They may be performed as a periodic “check-up” of the program, or may be performed in response to a violation of some kind (as is contemplated by the recent revisions to the Sentencing Guidelines).

Practitioners may wish to consider organizing the assessment around the Sentencing Guidelines’ elements of an effective C&E program (e.g., standards and procedures, program structure, due diligence in hiring, auditing and monitoring, etc.). In addition, it can be helpful to assess certain attributes of a program – characteristics that apply to one or more element that are critical to determining effectiveness. These include characteristics such as the program’s level of independence from the businesses and other functions, the authority of the program, and the adequacy of program resources, among others. When reviewing the program for a particular business unit, a particular legal risk area, or the C&E program as a whole, each of the various elements and attributes should be considered (although some may be more important than others, depending on the particular organization and the particular type of program being reviewed).

Generally, whether performed by in-house or outside C&E professionals, program assessments will include review of numerous program-related documents and discussions with Company employees. The goal is to identify how the program is designed, implemented and documented with respect to each element and attribute under review. The employees who can shed light on these questions include not only C&E program personnel (although they will be exceedingly helpful to the process, of course), but also representatives from the business and from the various functions. In addition, it can be very helpful to talk to “rank and file” employees, as they provide valuable insight into how employees perceive the program and the Company’s commitment to C&E. Such discussions can occur in one-on-one interviews or focus groups. Valuable information regarding these questions can also be gleaned from employee surveys, both those that have already been conducted by a company in the normal course and those conducted in connection with the assessment itself.

## Privilege?

An important question to be addressed at the outset of an assessment is the question of whether it should be performed under the attorney-client privilege. The principal reason for doing so is that an expectation of confidentiality might be necessary to getting complete information about a program, i.e., to help ensure that the assessment itself is effective. For instance, if employees are asked for any examples of a senior person violating company rules but not being sufficiently disciplined, the prospect that their responses might be used to hurt the company (e.g., in a litigation) could have a chilling effect on their willingness to provide this important information candidly.

Of course, conducting the assessment under the privilege will create certain requirements with respect to the manner in which interviews are conducted, documents are exchanged and the final report is disseminated.<sup>2</sup> Also, in the event of a government investigation, a company may wish to waive privilege with respect to the report. However, privilege can be important to protecting the information in private litigation, where one's adversary is less likely to use the results of an assessment in a fair-minded way than one hopes prosecutors would, particularly given the recent encouragement by the Justice Department to conduct such assessments.

## Conclusion

Regardless of how an assessment is conducted and by whom, the appropriate documentation of the assessment itself and follow-up on the recommendations contained therein are critical – both to the company seeking to enhance its program and to any third parties that may later review the assessment report.

*This memorandum may be considered attorney advertising. It was prepared for general informational purposes only and is not intended as legal advice.*

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<sup>2</sup> *Upjohn v. United States*, 449 U.S. 383 (1981).