Compliance matters: meeting SFO expectations

Jonny Frank & Annabel Kerley offer practical guidance for companies under investigation

IN BRIEF

- Covers the Serious Fraud Office guidance on compliance programmes.
- Offers practical tips and steps to follow for companies whose compliance programmes are under investigation.

The UK Serious Fraud Office (SFO) published updated guidance within its Operational Handbook on the effectiveness of corporate compliance programmes in January. The guidance, 'Evaluating a compliance Programme ', speaks loudly to organisations, both on the importance of effective remediation and being prepared for the SFO to review the compliance programme itself, in addition to a criminal investigation into the underlying facts (see *https://bit.ly/2SayBxl*).

In these types of enquiries, time is of the essence, so global and UK-based companies must act immediately. To help get started, below are actionable takeaways for remediation tactics that should meet the SFO's expectations as well as tips to help organisations prepare for an investigation into their compliance programme.

Steps for effective remediation

In deciding whether to prosecute, the guidance explains the SFO will consider an organisation's improved compliance programme, even if it had a poor programme at the time of wrongdoing. As part of the charging decision under the Guidance on Corporate Prosecutions, prosecutors must assess the organisation's 'remedial actions' and whether there is 'a genuinely proactive and effective corporate compliance programme'.

Similar to the updated guidance issued by the US Department of Justice in April 2019, the SFO's newly revised 'internal guidance' flags remedial efforts as key to mitigating significant fines and penalties. Prosecutors are encouraged to pay close attention to what a company does after an enquiry commences, which opens up the potential for leniency if a company can demonstrate good faith efforts to fix the problem. Here are some tips.

Start Immediately. Speed is critical. The guidance indicates SFO teams will explore compliance issues 'early in the investigation'. Serious misconduct takes months, if not years, to remediate, particularly when it requires changes in corporate culture. Delayed remediation suffers from investigation and resource fatigue. Organisations that delay remediation are often too emotionally and financially spent to devote proper attention and resources toit. More importantly, it's one thing to demonstrate completed remediation; it is quite another if the organisation can assert only that it plans to take, or has just taken, corrective actions.

Organise separate fact-finding and remediation workstreams. An emerging best practice is for companies and external counsel to immediately activate two separate and proactive workstreams—one for fact-finding and one for remediation—rather than delay corrective action pending the outcome of an investigation. Initiating two distinct, yet concurrent, workstreams affords the company under investigation several benefits. Dedicating resources to remediation exclusively means compliance practitioners can avoid the distraction of a lengthy and/or involved investigation.

Protect privilege. Separate workstreams enable legal counsel to protect privileged communications. At inception, both the 'fact-finding' and 'remediation' workstreams should work under the direction of counsel. Careful consideration of the legal professional privilege status of both workstreams should be made at the outset and kept under review.

Create a root cause document. Root cause analysis underpins remediation efforts and the enhancement of any sound compliance programme. For serious or pervasive misconduct, root cause analysis should dig deeper than the specific misconduct. Questions to consider include the following. What incentives and pressures motivated the misconduct? What control weaknesses were exploited? What red flags did the company fail to spot? To impress the regulator, document the root cause analysis in a report that describes procedures performed, root causes identified, and actions taken to remediate.

Extend enquiries across businesses and geographies. Typically, wrongdoers engage in a range of unethical behaviour thus comprehensive root cause analysis enables companies to determine 'who and what else?' Extended enquiries typically take the form of a forensic audit that uncovers potential misconduct by the same perpetrator(s) and similar misconduct by others in the organisation. Forensic auditors apply audit procedures (eg, forensic data analytics, process walk-throughs, transaction testing) to search for red flags, which, depending on type and number, can give rise to investigations.

Take appropriate action based upon lessons learned. Ultimately, a comprehensive assessment of internal control failures will lead the organisation to either enhance its control activities or implement detective controls if prevention is not practical. What's critical is acting based upon the risks uncovered. The company should also ensure it is meeting regulatory expectations for disciplining perpetrators and any secondary wrongdoers.

Discipline primary and secondary wrongdoers. The government expects the organisation to discipline perpetrators fairly and consistently (eg, equal treatment of high revenue producers). But, what about disciplining supervisors for negligent oversight or bystanders for failing to report the wrongdoing? Effective remediation demands organisations also discipline personnel who are indirectly complicit in the misconduct.

Monitor, review, and audit. The guidance directs SFO teams to consider ongoing monitoring and review of the programme. To be credible, an independent source must conduct the audit. Counsel lacks independence because lawyers serve as company advocates. Internal audit teams can provide independent assurance as long as they are not reviewing their own work and are knowledgeable, skilled and experienced in auditing remediation and compliance programmes.

Go public. Organisations are increasingly transparent about efforts to remediate misconduct. Airbus's website, for example, posts a detailed summary and chronology of its remediation efforts.

Investigating the compliance programme

The guidance requires SFO teams to investigate the compliance programme as part of the overall investigation. This evaluation includes both the compliance programme in existence at the time of the misconduct and the programme in place when deciding whether to prosecute, including efforts to remediate.

Regarding the programme at the time of misconduct, the guidance instructs SFO teams to evaluate the likelihood of the organisation mounting a successful defence to a failing corporate compliance programme in order to prevent criminal charges (eg, bribery, facilitation of tax evasion). And, the guidance instructs SFO teams to consider the effectiveness of the current compliance programme in assessing the organisation's suitability for a deferred prosecution agreement (DPA) and more lenient sentence.

The guidance gives broad latitude on how SFO teams should approach investigating a compliance programme. The guidance explains the investigation includes the same tools SFO teams employ to investigate the underlying conduct (eg, voluntary disclosures and interviews, document reviews, interviews).

Regarding elements to consider, the guidance borrows from the 2011 'Six Principles' guidance the Ministry of Justice published under the Bribery Act.

Principle 1: proportionate procedures. The guidance notes this principle should tie to the need to conduct a risk assessment, explaining adequacy of procedures must be measured proportionate to risk.

Principle 2: top level commitment. The guidance notes the importance of top-level management commitment, often referred to as 'tone at the top'. The professional literature also speaks to the importance of commitment and 'walking the talk' at middle management and lower levels.

Principle 3: risk assessment. The guidance emphasises the importance of effective risk assessment tailored to external (eg, geographic) and internal (eg, compensation schemes) factors.

Principle 4: due diligence. Due diligence is a fundamental element of anti-bribery compliance programmes regarding mergers and acquisitions, recruitment and third-party management.

Principle 5: communication and training. The guidance notes the importance of internal and external communication, including training proportionate to the risks the organisation faces.

Principle 6: monitoring and review. The guidance links this principle to proportionate procedures (Principle 1) and risk assessment (Principle 3) and the need for the compliance programme to evolve.

An open-book exam

Organisations must prepare whether the SFO is investigating (and the organisation is defending) the compliance programme at the time of the misconduct or the remediation-enhanced programme. The guidance creates an open-book exam, which organisations can pass if they act promptly. Here are some tactics to consider.

Be proactive. It is a mistake to wait for prosecutors and regulators to investigate the compliance programme. The remediation workstream should begin immediately to collect evidence to demonstrate the organisation meets the Six Principles or, if it does not, develop a corrective action plan. To prove top-level commitment, for example, the team can collect ethics campaigns, speeches, townhalls, policies, processes, etc. To demonstrate effective risk management, communication, training, monitoring and review, the remediation workstream can gather evidence from the compliance, risk and human resources functions, as well as revenue generating business units.

Tell the compliance programme story. Prosecutors and regulators are not compliance experts. Help them connect the dots. Be prepared to tell the organisation's compliance programme story, whether in a report or presentation, and not just answer government requests for information.

Obtain a third-party expert opinion. A growing US trend is for the government or organisation to retain an expert to issue a third party opinion on the effectiveness of the remediation and compliance programme. The government or company engages an independent third party to opine in a similar way to an independent auditor's Sarbanes-Oxley audit of management's assessment of the effectiveness of internal control over financial reporting.

Consider a voluntary or self-imposed monitor. For serious misconduct, the organisation should consider engaging a voluntary or self-imposed monitor, particularly if it appears likely the government might impose one. Airbus, Barclay's Capital and Rolls Royce successfully used this strategy to avoid criminal prosecution or a monitor, and received significantly reduced penalties.

Think about senior management attestation. Senior management in regulated industries (eg financial services) are accustomed to issuing attestations and certifications. These certifications require a framework and evidence to support the certification and typically involve a waterfall of sub-certifications. Management certification to the effectiveness of the compliance programme controls, particularly when voluntary, speaks loudly to government investigation of the effectiveness of the organisation's compliance programme.

The guidance is clear on the importance of effective remediation and preparation for government investigation of the compliance programme. Following these tips may not only result in leniency for UK-based companies, but equally important, help to restore reputations and avert larger problems down the line. **NLJ**

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