

Compliance Program Requirements

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When Do You Need A Compliance Program?

- All government contractors with a non-commercial item contract performed in the US over \$5M and with a performance period longer than 120 days **must** have a compliance program
- All government contractors **should** have a compliance program
 - Proposed rules may expand the requirement to commercial item contracts and contracts performed in the US over \$5M and with a performance period longer than 120 days
 - In the event of a government investigation of criminal misconduct, the company will receive “credit” for a having a compliance program in place
 - Government contractors are subject to the civil False Claims Act
 - Permits the filing of *qui tam* actions
 - *Qui tam* lawsuits are often initiated by disgruntled employees



What Should it Include?

- Code of Ethics and Business Conduct (see separate presentation)
- Leadership and Tone from the Top
- Internal Control Systems
- Training and Communication Program



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Leadership and Tone from the Top

- Executive leadership must continuously emphasize the company's commitment to compliance
 - Introductions during training sessions
 - Brown Bag Lunches
 - Newsletters
- Executive leadership as positive role models
 - Attend training programs with other employees
 - Lead by example
 - Easily accessible to employees
- Senior person named as compliance officer
- Periodic reports to senior management or the Board of Directors, as applicable



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Internal Control Systems

- Effective policies and procedures in place that address key issues
 - Company-Wide Concerns (e.g., compliance with employment laws, health and safety concerns, etc.)
 - Government Contract Specific Issues (e.g., TINA, cost accounting issues, timekeeping, export controls, etc.)
 - Disciplinary Policies and Procedures
 - Clearly communicated to employees
 - Consistent with the provisions of the company's Code of Conduct
 - Uniformly applied to all employees
 - Flexible enough to distinguish between technical/inadvertent violations and more serious violations
 - Progressive – take into account the severity and frequency of violations and mitigating circumstances
 - Document Retention
 - Policy on what documents the company will maintain and for how long
 - Consistent with regulatory audit requirements and contract commitments
 - Incentives for employees to conduct business in an ethical manner and disclose violations (i.e., part of employee's performance evaluation)



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Internal Control Systems (cont...)

- Name a compliance officer and, if appropriate, appoint a compliance committee, responsible for:
 - Ensuring that the compliance program is properly developed and implemented
 - Delegating compliance responsibilities to other individuals and departments, as appropriate (i.e., Human Resources, division controllers, etc.)
 - Reporting periodically to senior management



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Internal Control Systems (cont...)

- Effective prevention and detection procedures in place
 - Contractual safeguards
 - Flowdown all required clauses to subcontractors
 - Only accept the required FAR clauses and agency supplemental clauses, an other clauses only if you will comply with them
 - Ensure contracts are written and definitized prior to performance
 - Execute Non-Disclosure Agreements prior to disclosing proprietary information or permitting third-parties on the premises
 - Maintain a library of form agreements, with rules regarding their use
 - Due diligence for third party representatives
 - Team members
 - Joint venture partners
 - Outside consultants
 - Vendor code of conduct



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Internal Control Systems (cont...)

- Reporting Requirements
 - When to involve inside counsel
 - Do you need guidance on what the law requires you to do?
 - When to involve outside counsel
 - Is it important that conversations remain privileged?
 - Legal advice vs. business advice
 - Crime/fraud exception
 - Does the issue involve an area of subject matter expertise?
 - When to report to senior management and the Board of Directors
 - Create a mechanism for making voluntary disclosures to the government and a process for making such disclosures
 - Note “voluntary” disclosures may become mandatory
 - If applicable, have a system regarding public company disclosure controls and procedures (e.g., 10Q and 10K reporting requirements)



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Internal Control Systems (cont...)

- Internal Anonymous Reporting Mechanism
 - Publicize the existence of the system
 - Posting of Agency Hotline Posters
 - Use of the internet and the company's intranet
 - Make the system easily accessible to all employees
 - Emphasize the option for employees to make anonymous reports and provide assurances of anonymity
 - Note an anonymous report may make it difficult, if not impossible, for the company to fully investigate the claim
 - Memorialize all reports received



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Internal Control Systems (cont...)

- Internal Audits
 - Role of Internal Audits
 - Ensure company's practices and procedures conform with government procurement laws and regulations
 - Determine whether employees are properly performing their duties in accordance with the law and company policies and procedures



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Internal Control Systems (cont...)

- Internal Audits (cont...)
 - Conducting Internal Audits
 - Determine who should conduct the audit - corporate personnel or outside consultants
 - Subject matter expertise
 - Whether independence is important
 - Protection of attorney client privilege
 - Select Audit Areas
 - Historical risk areas
 - Areas that generate large revenue
 - Priorities of the government
 - Input from audit committee and board of directors



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Internal Control Systems (cont...)

- Internal Audits (cont...)
 - Performing the Audit
 - Review formal policies and procedures
 - Interview personnel to assess whether existing policies are followed and effective
 - Document methodology and evaluation
 - Audit specific transactions
 - Corrective action plan –
 - provide recommendations (e.g., areas for improvement, gaps in policies, inefficient overlap, areas of confusion, etc.)
 - specify steps management and the company can take to remedy any problems
 - set specific deadlines for remedial measures
 - Follow up review to see that corrective action plan is implemented



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Internal Control Systems (cont...)

- Internal Investigations
 - Role of Internal Investigations
 - Investigate allegations of employee misconduct
 - Investigation can occur before, or contemporaneous with, a government investigation
 - Performing Internal Investigations
 - Retain outside counsel to conduct the investigation to maintain attorney-client privilege and confidentiality and to get an independent, experienced investigator
 - Collect documents (including electronic files and e-mail) from anyone that may have relevant information and have counsel review documents
 - Document collection and retention notices
 - Preserve and maintain integrity of all data collected (including logging all documents received and the source of those documents)



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Internal Control Systems (cont...)

- Performing Internal Investigations (cont...)
 - Interview all employees (and former employees) with knowledge on the subject of the investigation
 - Upjohn Warning: Counsel needs to inform employees that they represents the company, not the individually employees and that the conversation is privileged and confidential, but the privilege belongs to the company, not the individual
 - Determine if any individual employees need separate counsel and whether the company will compensate the employee for legal fees and expenses
 - Prepare a final report (oral or written)
 - Include recommended disciplinary action for the employee, if any
 - Provide report to senior management or the Board



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Training and Communication Program

- Formal training program on the Code of Conduct for **all** employees
- Targeted training on key risk areas available to select target audiences
 - Determine your company’s key risk areas
 - Determine what training is appropriate for what groups of employees (i.e., sales, purchasing, management, etc.), and what will be mandatory
 - Clearly inform employees about training that is mandatory for them
- Emphasize during training the “why” in addition to the “what”
- Periodically update training programs and provide refresher courses
 - Government contracting is a “political beast” – the laws and regulations are constantly changing



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Training and Communication Program (cont...)

- Determine the appropriate training method for each program
 - Live session
 - Video session
 - Newsletter or other handout
- Use “real life” examples
- Test knowledge gained from training
- Track training completion – keep records!
- Include training completion as part of employees’ training evaluations
- Periodically review and update the training program



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Lessons from Successful Compliance Programs

- Compliance programs are not “one size fits all”
 - Companies need to create compliance programs to address their own philosophy, core values, business type, and corporate structure
 - Public companies will have additional compliance requirements
- Provide employees with the tools they need to do things the “right” way
 - Employees need information and training to know the legal and ethical way to conduct business
 - Employees need to know where to turn if they have questions
 - Employees must know how to report misconduct and feel comfortable making such reports



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Lessons from Successful Compliance Programs (cont...)

- No compliance program can guarantee that your employees will not violate the law, but having a comprehensive and effective program reduces that risk and can reduce the company's exposure
 - Existence and effectiveness of a contractor's compliance program is considered in suspension and debarment determinations as well as in charging decisions
- Perform an internal assessment or seek an external assessment of your compliance program now!
 - Do not wait for the initiation of a government investigation
 - An effective compliance program can prevent violations and “discover” risks before they become problems



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