

UPDATE OF CONFINDUSTRIA GUIDELINES FOR THE DRAFTING OF 231 ORGANISATIONAL MODELS

In an update to the last version published back in March 2014, Confindustria (the main Italian association representing manufacturing and service companies) published on June 25 the new "*Guidelines for the construction of organization, management and control models pursuant to Legislative Decree no. 231 of June 8, 2001*" (the "**Guidelines**") containing case studies and operational instructions that provide companies with a practical tool for the drafting of systems and controls models (the "**231 Organisational Model**") suitable for preventing the administrative liability set forth by Legislative Decree no. 231/2001.

Key issues

- Update to the Guidelines offering companies advice and practical measures considered in theory to be suitable for the requirements set forth by Legislative Decree no. 231/2001;
- Advice to corporate entities on the drafting of 231 Organisational Models.

GUIDELINES UPDATE

Confindustria has introduced new guidelines for members that have decided to adopt a model pursuant to Legislative Decree no. 231/2001 on the creation of systems and controls models in light of legislative changes through the preparation of instructions and measures taken from business practice, in the hope that "*the courts appreciate the costs and organisational efforts made by companies to align themselves with the provisions of Legislative Decree no 231/2001*".

In particular, in the General Section, the significant innovations consist in the adoption of an integrated approach to risk management, accompanied by a focus on tax compliance, an addition to the chapter concerning the Supervisory Board (*Organismo di Vigilanza*) with the introduction of the cases in which the function is assigned to the Board of Statutory Auditors and with reference to the new Corporate Governance Code. The Special Section, on the other hand, has been revised to deal with the new predicate offence, accompanied by examples of the risk areas and preventive controls.

CONTENTS

Set out below are the chapters containing the major changes made by the Confindustria update:

The features of corporate liability

The update highlights the possibility that the list of predicate offences, following the introduction of the offence of self-laundering, would no longer be exhaustive,

leading to a possible situation that would make it practically impossible for companies to put in place preventive measures.

Moreover, the Guidelines refer to Supreme Court judgments concerning the proper interpretation of the concepts of interest and advantage of the entity, which enhances the purpose component of the conduct and cost savings in the identification of the criteria of objective imputation.

Following the amendments introduced by Law 3/2019 (the so-called "*Spazzacorrotti*" amendments), the section concerning disqualification measures has been updated and provides for some offences against the Public Administration, with a different penalty treatment depending on whether the offence was committed by a senior executive or a subordinate.

Risk identification and protocols

The new Guidelines contain a new paragraph dedicated to the enhancement of integrated management systems through the provision of integrated compliance, in order to offer more effective controls and procedures through the elimination of the dysfunctions typical of the traditional approach. In this regard, Confindustria encourages coordination and collaboration mechanisms between the various company functions concerned and involved in the risk management system.

A paragraph is dedicated to the aforesaid systems concerning the provision of specific protocols for the prevention of tax offences, and other control tools aimed at guaranteeing mitigation of tax risk. In this context, coordination with the Tax Control Framework becomes important, with which the 231 Organisational Model has similarities that can be exploited with a view to synergy and integration of the systems.

The update does not fail to consider the Law 179/2017 on Whistleblowing, highlighting the need, for companies with an organisational model, to regulate the procedures for making and managing reports possibly through, amongst other things, the introduction of an *ad hoc* procedure.

The second chapter closes with the introduction of a paragraph regarding the measures required for compliance with Law 254/2016 transposing Directive 95/2014/EU which aims to increase the transparency of information on business activities. In particular, the legislation provides for the drafting of a statement, by public interest entities with certain characteristics – including, *inter alia*, of an environmental and social nature - containing non-financial information.

Supervisory Board (*Organismo di Vigilanza*)

In the chapter dedicated to the Supervisory Board (*Organismo di Vigilanza*) Confindustria highlights the importance of the allocation of an annual budget for the purposes of an autonomous body charged with the verification activities necessary for the performance of the tasks envisaged. In addition, the new Guidelines note that the body's internal members should be persons without operational roles, in accordance with the majority case law on the point.

The update also concerns the recent introduction of the Corporate Governance Code, which stipulates that, with a view to greater coordination and cooperation between the various functions, where the Body does not coincide with the Board of Auditors, the Board of Directors must necessarily consider the possibility of appointing to the Body at least one non-executive director and/or a member of the Supervisory Board (*Organismo di Vigilanza*) and/or the holder of the

company's control functions. However, a Supervisory Board (*Organismo di Vigilanza*) composed solely of external members is still acceptable, if coordination with the internal control bodies is ensured.

Appendix: Case Study

Inherited from previous versions, the appendix to the Guidelines dedicated to Case Studies remains in place. In this second document, in accordance with the traditional approach, for each category of administrative offence some general considerations are set forth with respect to the individual underlying offences referenced therein, as well as identifying the main areas of risk and some examples of preventive controls. The appendix, although it does not undergo any structural changes compared to the 2014 version – which was already an improvement in terms of clarity and user-friendliness – has been revised with a view to covering the new cases of predicate offences introduced since the last update.

WHAT IS TO BE DONE?

In light of the above, it is advisable for the corporate entities to conduct a careful review of their 231 system, with a view to assessing the possible need for changes following the new Guidelines by, *inter alia*, taking as a benchmark the practical instructions provided in the Case Study, while bearing in mind the need to contextualise each individual case in relation to the characteristics of each company's own organisational structure.

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