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DOJ Issues Updated Guidance on the Evaluation of Corporate Compliance Programs

DOJ Provides More Detailed Guidance for Assessing Compliance Programs in Determining the Nature, Form, and Consequences of Corporate Criminal Resolutions

SUMMARY

On April 30, 2019, the Criminal Division of the U.S. Department of Justice (“DOJ”) released updated guidance (“Guidance”) to its attorneys on how to evaluate the design, implementation, and effective operation of corporate compliance programs in determining whether, and to what extent, the DOJ considers a corporation’s compliance program to have been effective at the time of the offense and to be effective at the time of a charging decision or resolution.¹ The Guidance, announced in a speech by Assistant Attorney General Brian Benczkowski, builds on prior recent guidance from the DOJ.² Those sources include guidance by the DOJ’s Fraud Section in February 2017,³ the DOJ’s March 2018 announcement that the DOJ’s FCPA Corporate Enforcement Policy would be applied as non-binding guidance in all Criminal Division cases,⁴ and the DOJ’s October 2018 announcement of updated Criminal Division policy concerning the selection and appointment of corporate compliance monitors.⁵ According to the DOJ, the Guidance is intended to “better harmonize the [prior] guidance with other Department guidance and standards while providing additional context to the multifactor analysis of a company’s compliance program.”⁶ In particular, the Guidance provides additional detail concerning the factors that Criminal Division attorneys are required to consider in evaluating corporate compliance programs for the purpose of determining the appropriate form of any corporate criminal resolution, including whether to impose a monitor and any associated monetary penalties.⁷

BACKGROUND

DOJ policy and the U.S. Sentencing Guidelines have for years directed federal prosecutors and sentencing judges to evaluate corporate compliance programs.⁸ Most notably, the Justice Manual's "Principles of Federal Prosecution of Business Organizations" state that prosecutors, in deciding whether to bring criminal charges against a corporation, should consider "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one."⁹ In addition, the Criminal Division memorandum entitled "Selection of Monitors in Criminal Division Matters," requires prosecutors, in determining whether to impose a compliance monitor, to consider "whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future."¹⁰ Further, in determining potential criminal fines against corporations under the U.S. Sentencing Guidelines, prosecutors consider whether the corporation had an effective compliance program at the time of the misconduct as a mitigating factor in calculating a corporation's culpability score.¹¹

DISCUSSION

Building on that backdrop, the Guidance states that it is intended to assist prosecutors in evaluating whether a "corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations)."

The Guidance notes that although the Criminal Division does not use a "rigid formula" to evaluate corporate compliance programs, there are "common questions that [the DOJ] may ask in the course of making an individualized determination." In particular, as articulated by the Guidance, the Justice Manual already requires prosecutors to consider three "fundamental questions" in evaluating corporate compliance programs:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?"
3. "Does the corporation's compliance program work in practice?"

The Guidance is structured thematically, addressing various topics under the rubric of these three questions. The use of this thematic structure, along with overviews of each topic, mark a significant change from the previous version of the Guidance, which was structured as a list of 11 compliance

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“topics” and 46 sub-topics with sample questions for evaluation.¹² The Guidance (unlike its previous version, which was authored by, and only binding on, the DOJ’s Fraud Section) was written with the input of multiple offices within the Criminal Division, including the Office of the Assistant Attorney General, the Fraud Section, and the Money Laundering and Asset Recovery Section.

“Is the corporation’s compliance program well designed?” Part I of the Guidance sets out the elements of a well-designed compliance program, including in the areas of risk assessment, company policies and procedures, training and communications, confidential reporting structure and investigation process, third party management, and mergers and acquisitions. Although none of these elements is new, the update includes various additions, including:

- **Risk assessment:** The Guidance states that a company’s assessment of risks is the “starting point” for evaluating the design of compliance programs, and adds as focus areas whether the company has allocated resources in a manner tailored to risks, and whether the risk assessment is subject to periodic updates.
- **Policies and procedures:** The Guidance directs prosecutors to examine as a “threshold matter . . . whether the company has a code of conduct” that is “accessible and applicable to all company employees.” The Guidance also adds “comprehensiveness” as a new criterion, and states that prosecutors should ask about efforts a company made “to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces, including changes to the legal and regulatory landscape.” In addition, under the criterion, “responsibility for operational integration,” the Guidance directs prosecutors to ask “[i]n what specific ways are compliance policies and procedures reinforced through the company’s internal control systems[.]” Other criteria from the original version of the Guidance concerning operational integration of the compliance function have been moved to other sections or merged into other criteria.
- **Compliance training and communication:** The Guidance directs prosecutors to assess whether “policies and procedures have been integrated into the organization” through periodic training and whether the company “relayed information in a manner tailored to the audience’s size, sophistication, or subject matter expertise.” The Guidance also adds evaluative questions for prosecutors, including whether “supervisory employees received different or supplementary training” and whether “training addressed lessons learned from prior compliance incidents.”
- **Reporting and investigation processes:** The Guidance adds the criterion of “resources and tracking of results,” directing prosecutors to determine if “reporting and investigating mechanisms [are] sufficiently funded” and if the company “analyze[s] the reports or investigation findings for patterns of misconduct.”
- **Third party management:** The Guidance adds new emphasis on due diligence on third parties, directing prosecutors to assess “the extent to which the company has an understanding of the qualifications and associations” of third party partners. The Guidance directs prosecutors to assess whether the company has “audit rights to analyze the books and accounts of third parties” and whether the company has used those rights.

“Is the corporation’s compliance program being implemented effectively?” Part II identifies the features of effective implementation of compliance programs, including commitment by senior and middle management, autonomy and resources, and incentives and disciplinary measures. Although each of these elements was included in the previous version of the Guidance, the Guidance expands on the following topics, among other additions:

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- **Involvement of senior and middle management:** The Guidance emphasizes that prosecutors will evaluate “the extent to which senior management have clearly articulated the company’s ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example,” and whether “managers tolerated greater compliance risks in pursuit of new business or greater revenues.”
- **Autonomy and resources of compliance programs:** The Guidance directs prosecutors to evaluate “the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board’s audit committee.” The Guidance also focuses on the “structure” of compliance programs, requiring prosecutors, among other things, to identify the locus of the compliance functions within the company, including the office to which that function reports.
- **Incentives and disciplinary measures:** The Guidance directs prosecutors to “assess whether the company has clear disciplinary procedures in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations,” as well as whether “the company’s communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct.”

“Does the corporation’s compliance program work in practice?” Part III provides criteria for assessing whether a compliance program is effective in practice, including assessment of a compliance program’s capacity for continuous improvement, periodic testing and review, investigation of misconduct, and analysis and remediation of underlying misconduct. This section incorporates information from other DOJ policies, but also provides a new criterion: “compliance culture.” In particular:

- **Testing and continuous improvement of compliance programs:** The Guidance directs prosecutors to evaluate how the company measures its culture of compliance, whether the company seeks input from employees to determine if they “perceive . . . management’s commitment to compliance,” and what steps the company has “taken in response to its measurement of the compliance culture[.]”

IMPLICATIONS

Although the Guidance does not include any major changes to DOJ policy concerning elements and contours of corporate compliance programs, it provides the most detail to date on how the Criminal Division will evaluate corporate compliance programs in criminal cases. The Guidance includes new emphasis on various aspects, including risk assessments, codes of conduct, employee discipline for compliance infractions, and the culture of compliance.

In addition, the Guidance rephrases one of the “fundamental questions” included in the Justice Manual concerning the evaluation of corporate compliance programs—whether the compliance program is “applied earnestly and in good faith”—into a different question: whether a compliance program is “implemented effectively.” This rephrasing might signal that the Criminal Division will shift its focus from the more subjective assessment of the company’s good faith application of compliance controls to a more

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objective inquiry into whether the company has implemented its compliance program in an effective manner.

The Guidance also states that it contains “neither a checklist nor a formula” for compliance programs, and that its “topics and questions” may be less or more relevant depending on the specific facts at issue in each case. Although it remains to be seen how the DOJ will apply the Guidance in practice, the seeming comprehensiveness of the Guidance could mean that the DOJ will have stronger grounds in the future to deem companies to be on notice of how the DOJ will evaluate their compliance programs.

Coupled with other new DOJ policies concerning compliance programs announced in recent years by the Criminal Division, the Guidance reaffirms the DOJ’s continued and increasingly focused interest in the design, implementation, and effective operation of corporate compliance programs. It suggests that the DOJ will prioritize the careful evaluation of corporate compliance programs as it determines the nature and form of any criminal resolution and associated penalties.

Companies should carefully review the Guidance, particularly with respect to the new detail provided by the DOJ regarding its areas of interest in assessing compliance programs, and should consider the Guidance a useful resource for understanding the DOJ’s expectations for both the design and implementation of corporate compliance programs.

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ENDNOTES

- 1 U.S. Dep't of Justice, Criminal Division, "Evaluation of Corporate Compliance Programs" (Apr. 30, 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.
- 2 Brian A. Benczkowski, Assistant Attorney General, U.S. Department of Justice, Keynote Address at the Ethics and Compliance Initiative 2019 Annual Impact Conference ("Benczkowski Address") (Apr. 30, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and>.
- 3 U.S. Dep't of Justice, Criminal Division, Fraud Section, "Evaluation of Corporate Compliance Programs" (Feb. 8, 2017).
- 4 John P. Cronan, Acting Assistant Attorney General, U.S. Department of Justice, Remarks at American Bar Association National Institute on White Collar Crime (March 1, 2018).
- 5 Memorandum from Brian A. Benczkowski, Assistant Attorney General, U.S. Department of Justice (Oct. 11, 2018) ("Benczkowski Memorandum"); *see also* S&C Client Memorandum: DOJ Releases New Memorandum on Standards and Policies for Retention of Corporate Compliance Monitors (Oct. 22, 2018), <https://www.sullcrom.com/files/upload/SC-Publication-DOJ-Releases-New-Memo-on-Retention-of-Monitors.pdf>.
- 6 U.S. Dep't of Justice, "Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs" (Apr. 30, 2019), <https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs>.
- 7 While the Guidance is binding on all attorneys in offices within the DOJ's Criminal Division, this guidance is not binding on attorneys within U.S. Attorneys' offices, though such attorneys nevertheless may use the Guidance in their investigations.
- 8 "Evaluation of Corporate Compliance Programs" (2019), 1.
- 9 JM § 9-28.300.
- 10 Benczkowski Memorandum, 2.
- 11 *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11); *see also* Benczkowski Address (stating that "prosecutors assess a company's compliance program at the time of the misconduct to determine the company's culpability score under the U.S. Sentencing Guidelines, which determines the company's ultimate fine range").
- 12 "Evaluation of Corporate Compliance Programs" (2017), 1. The general areas for evaluation of compliance programs included: analysis and remediation of underlying misconduct; senior and middle management; autonomy and resources; policies and procedures, including design and accessibility and operational integration; risk assessment; training and communications; confidential reporting and investigation; incentives and disciplinary measures; continuous improvement and periodic testing and review; third party management; and mergers and acquisitions.

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