

THROUGH NEW COMPLIANCE GUIDANCE, DOJ ENCOURAGES BUILDING AND ASSESSING EFFECTIVE COMPLIANCE PROGRAMS

The US Department of Justice, Criminal Division ("DOJ"), has updated its guidance governing what makes a corporate compliance program effective, affording additional visibility into how prosecutors will evaluate companies in connection with alleged wrongdoing. DOJ does not use a "rigid formula" to assess corporate compliance programs, instead evaluating each company's risk profile and steps taken to mitigate that risk. DOJ in recent years has been investing in developing internal expertise on compliance, and is continuing its trend to emphasize mitigating and aggravating factors depending on the strength of a company's compliance framework.

Companies should consider DOJ's guidance when developing or updating their sustainable compliance programs, and ensure that their programs have considered DOJ's expectations.

Introduction

Since 2017, DOJ has issued corporate compliance program guidance, providing prosecutors with tools to evaluate compliance programs and giving direction to corporations building out compliance programs.

When determining whether to bring charges and when negotiating plea or other agreements, DOJ [urges](#) US Attorneys to consider the "adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as the time of a charging decision," along with any remedial efforts. DOJ's guidance relies on the US Sentencing Guidelines and prior guidance [issued](#) by Assistant Attorney General Brian Benczkowski to instruct prosecutors to consider other factors; the guidance document is intended to harmonize these sources of authority.

Updated Guidance

On 1 June 2020, DOJ [issued](#) revised guidance on its "Evaluation of Corporate Compliance Programs" (the "**Revised Guidance**"), updating DOJ's previous guidance, which Clifford Chance [discussed](#) at the time. According to DOJ, the Revised Guidance reflects feedback received from "the business and compliance communities," as well as DOJ's own experience.

DOJ does not propose specific policies, procedures, or steps. Rather, the Revised Guidance suggests that a prosecutor must conduct a comprehensive evaluation of the program's effectiveness before deciding whether the program is a mitigating or an aggravating factor in the case.

Indeed, DOJ emphasizes the importance of considering each company uniquely, rejecting that any single compliance program can fit all. For instance, DOJ directs prosecutors to consider "the circumstances of the company," such as the implications of non-US law on a compliance program. DOJ enumerates several company-specific factors that will guide its review of a compliance program, including "the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program."

This individualized focus underlies DOJ's revised guidance, which remains organized around three "fundamental questions":

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 adequately resourced and empowered to function effectively?"
3. "Does the corporation's compliance program work in practice?"

The Revised Guidance updates only the second of these questions, instructing prosecutors to consider whether the compliance program is "adequately resourced and empowered to function effectively," changing the prior guidance that the compliance program should "be[] implemented effectively."

This modification and other holistic amendments in the Revised Guidance reflect DOJ's intention to conduct individualized assessments of each company, the functions in place, and how the particular compliance program manages the company's risk. The guidance also underscores the importance of including a compliance program review as part of an internal investigation, as demonstrating a strong compliance program (or knowing the weaknesses) will be critical when a company faces potential criminal exposure and needs to make a submission to DOJ on the state of its compliance program.

Recommendations

Based on DOJ's updates in the Revised Guidance, here are ten suggestions to help ensure your compliance program is effective. While your company may not need to incorporate all of the following, we recommend reviewing your compliance program with each of the following in mind.

1. Periodically review and update the relevant risk assessments.

- Demonstrate that the compliance program is tailored to the unique risks your company faces by conducting and documenting periodic reviews of the risk assessment. It is critical to tie the risk assessment to the compliance program.
- Examine and implement changes in response to lessons learned from internal audits, compliance reviews, and risk assessments, as well as from relevant market precedents, government guidance, and industry standards.
- Perform health checks on your compliance program; do not wait for something to go wrong. In addition to periodic reviews and testing, consider significant external triggering events for targeted testing.

2. Allocate sufficient resources to the compliance function.

- Ensure the compliance function has adequate resources and access to data in order to effectively monitor and test policies, controls, and transactions.
- Consider DOJ's previous guidance to maintain clear, independent reporting lines for the compliance function – separate from the business. Now is the time to see whether you need to restructure your compliance function to reflect this independence.

3. Conduct robust risk-based due diligence.

- Conduct pre-acquisition and post-acquisition due diligence to ensure effective integration of all policies and procedures. This is the opportunity to detect issues you may be inheriting that could impact the deal or result in a costly penalty down the road.
- Document any legitimate reasons for omitting or not performing pre-acquisition due diligence.
- Continue to audit any new entities post-acquisition to assess compliance. It is not enough to assume that once acquired the newly integrated company will fall into line, but instead check and recheck to make sure that policies, procedures, and culture are embedded.

4. Ensure policies and procedures are easily accessible.

- Publish policies and procedures in searchable PDF format (for ease of use by the reader), and track which policies and procedures are accessed.
- Consider translations of policies if relevant to your employees and markets, and make sure they are located where employees can readily find them.

5. Rollout and document comprehensive compliance training.

- Tailor trainings for individuals in compliance functions and for other employees – ensuring all personnel understand compliance and ethics expectations. Consider different ways of delivering training

tailored both linguistically and culturally, including classroom and online mechanisms.

- Document the content of the training programs.
- Develop and document strategies for addressing employees who fail testing.
- Evaluate how compliance training impacts employee conduct and business operations.

6. Publicize the reporting hotline and ensure strict confidentiality.

- Provide details about the reporting hotline to all employees via email, monitor pop-ups/screen savers, or fridge magnets.
- Consider surveying employees about whether they feel comfortable using the reporting hotline; assess whether the quality and quantity of reports received suggests that employees are in fact comfortable using the hotline.
- Test the effectiveness of the reporting hotline by tracking a report from start to finish (perhaps through the internal audit function).
- Provide details about the reporting hotline to vendors, subcontractors, and the supply chain.

7. Ensure consistent application of compliance-related disciplinary measures throughout the organization.

- Ensure the compliance function monitors investigations and any corresponding discipline to ensure they are conducted and applied consistently. While HR issues typically will not be within the expertise of the compliance function, it is important both to maintaining a culture of compliance and embedding lessons learned from past mistakes that employee discipline for compliance failures be monitored and rationalized.

8. Develop and retain documentation explaining the rationale for the compliance program.

- Document all updates to and rationale for any changes to your compliance program (e.g., policies and procedures) or governance structure (e.g., organizational charts, position roles). This goes beyond version control, and instead requires the discipline to create an audit trail.
- Maintain historical organizational charts for the company and any relevant committees or departments in a way that easily can be retrieved instead of having to be retroactively recreated.

9. Maintain a culture of compliance.

- Establish a tone of compliance throughout and at all levels of the company, emphasizing the company's commitment to compliance, as well as the value and importance of compliance. The emphasis should be tangible and impact compensation and promotion

opportunities. Further, company leadership should have a visible statement about compliance that can be highlighted when DOJ asks about your culture of compliance.

10. Review compliance of third parties.

- Review, on a risk basis, the compliance culture and programs of the third parties with whom you engage – both at the outset and throughout the course of the relationship.

Compliance expectations continue to rise, and are not likely to reverse course. Government authorities in the United States, including DOJ, are increasingly focused on incentivizing companies, through both negative and positive reinforcement, to ensure a properly tailored compliance program.

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