

Investigations, Compliance and Defense

DOJ Releases New Guidance on “Evaluation of Corporate Compliance Programs”

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Introduction

On Tuesday, April 30, the Department of Justice (DOJ) Criminal Division released a new document entitled “[Evaluation of Corporate Compliance Programs](#).” The guidance document (the Guidance) replaces a 2017 paper of the same name, but largely reflects a continuity of approach—both in the personnel evaluating compliance programs and the factors they should examine. The 2017 paper provided an informal set of questions to evaluate corporate compliance programs. The Guidance now expands on those same questions, provides greater context to understand the purpose behind the questions and organizes the analysis of compliance programs around three fundamental inquiries:

- Is the corporation’s compliance program well designed?
- Is the program being applied earnestly and in good faith?
- Does the corporation’s compliance program work in practice?

The Guidance also reflects a significant move to formalize and substantiate the 2017 paper, which had been posted to the Fraud Section website with little fanfare, and which governed only those prosecutors in the Fraud Section. Assistant Attorney General Brian Benczkowski announced the Guidance in a speech and published the document as formal Guidance applicable to the entire Criminal Division of DOJ.

As a policy document of the Criminal Division, the Guidance details a broad set of principles under key themes that corporate America can use as a benchmark to evaluate their own compliance efforts. First, the Guidance emphasizes the critical importance of a “culture of compliance” and whether that culture has permeated a corporation’s day-to-day business practices. Second, the Guidance instructs prosecutors to probe how a compliance function interacts with business units, and specifically whether the compliance function and the revenue-generators live in tension or work together to mitigate risk. Third, the Guidance reinforces that compliance processes cannot be set up “off-the-rack” and left alone; instead, compliance must be tailored to an individual corporation’s commercial market and unique risk footprint. An effective compliance program is dynamic, learns from past mistakes and keeps pace with a corporation’s evolving risks.

A “Culture of Compliance”

The Guidance underscores that corporate culture is the holistic lens through which DOJ will judge the effectiveness of a compliance program. Prosecutors are instructed under the Guidance to evaluate a company’s “culture of compliance,” and the Guidance provides them a roadmap to do so. Although corporate culture can seem amorphous and opaque, the Guidance enumerates the ways in which a compliant culture manifests itself: the engagement of senior and middle management, the quality of risk assessment processes, the quality of policies and training and the presence—or absence—of positive compliance incentives.

For example, the Guidance instructs prosecutors to test culture through an assessment of how senior and middle management foster compliance. Prosecutors will examine 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.” The Guidance also provides a clearer articulation of the expectation that middle management has reinforced those standards and “encouraged employees to abide by them.”

In answering whether a compliance program is well-designed, the Guidance also instructs prosecutors to “assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations.” DOJ is not simply evaluating whether a company published policies that address a specific risk and implemented procedures to control that risk. The Guidance calls for a deeper assessment of whether those policies and procedures *in practice and effect* are actually instilling a more compliant culture in the business operations of the company.

The Guidance highlights training as another avenue for prosecutors to explore whether a company has a strong or weak compliance culture. For example, is training off-the-shelf or does it “give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise”? For supervisors, the Guidance asks whether supervisors receive “different or supplementary training” to help them inculcate a robust compliance culture. And where many companies require and track whether employees complete training, the Guidance suggests a company needs to do more to actually “measure[] the effectiveness of its training curriculum.”

When it comes to promoting a strong compliance culture, the Guidance offers concrete examples of ways to incentivize compliant behavior with positive rewards. The Guidance highlights how “some companies have also found that providing positive incentives—personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership—have driven compliance.” As another example, the Guidance notes that “some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.” With these examples now expressly articulated in the Guidance, companies should expect that DOJ will ask whether measures like these are in place and, if not, why a company decided not to implement them.

Relationship Between Compliance Function and Business Units

Many questions contained in the Guidance coalesce around another theme for prosecutors to explore: whether compliance resources and business units work together on shared compliance goals or operate at cross purposes.

For example, in evaluating whether senior and middle managers are effectively implementing a company’s compliance program, the Guidance includes questions that explore potential tensions between pursuit of profits and compliance. For example, prosecutors will ask whether “managers tolerated greater compliance risks in pursuit of new business or greater revenues” or “encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties.” These questions get at the heart of whether business personnel understand the compliance risks they generate and share in the strategies to mitigate those risks or view compliance as a function to circumvent.

The Guidance also expands on a number of compliance components that require coordination between compliance personnel and the business units to work effectively. As with the prior guidance, third-party risk mitigation strategies remain an important component of an effective compliance program. Here, the Guidance emphasizes the need to understand “the business rationale for needing the third party in the transaction” and instructs prosecutors to “analyze whether the company has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region.” Compliance personnel cannot make those factual determinations alone and need reliable information from the business personnel who manage those third-party relationships to understand the business rationale supporting them.

Similarly, on the topic of reporting, the Guidance highlights the need for “pro-active measures” to encourage reporting without fear of retaliation and directs prosecutors to evaluate “the routing of complaints to *proper* personnel” (emphasis added). Although the Guidance does not explain who are “proper personnel,” typically legal or compliance officers are regarded as possessing the independence and training to assess complaints. Often, a small fraction of complaints are reported through anonymous hotlines, and companies permit—or even encourage—personnel to report concerns to their immediate supervisors. The Guidance suggests that DOJ will explore whether supervisors who receive complaints know what to do with them and know when to escalate them. Prosecutors will also test whether a company has put in place any “pro-active measures” to mitigate the risk that supervisors who receive complaints do not engage in retaliation.

Compliance Keeping Pace with Growth

The Guidance reflects the reality that there is no such thing as a permanently adequate compliance system. Emphasizing compliance as a “living” process that keeps pace and evolves as a company (and its risk profile) changes over time, the Guidance makes clear that DOJ expects companies to learn from past experience and constantly improve. To that end, the Guidance includes prominent new language respecting the need for companies to revise their policies and procedures “in light of lessons learned,” including accounting for “risks discovered through misconduct or other problems with the compliance program.” Although the mere fact of an incident of misconduct does not render a compliance program inadequate, DOJ will look at how the program evolves in response. The new Guidance emphasizes the importance of tracking the results of a company’s reporting and compliance systems, asking in particular whether a company “periodically analyze[s] the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses.”

Beyond responding to specific findings or incidents, the Guidance contemplates that companies will conduct ongoing self-evaluations regarding the program. The Guidance notes with approval that “[s]ome companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company’s size and complexity.” It also specifically instructs prosecutors to consider whether a “company’s process for designing and implementing new policies and procedures” has “changed over time,” indicating that the change management process itself should take into account the evolution of a company’s risk-profile. In the area of compliance culture as well, the Guidance advises prosecutors to inquire into how the company has assessed, and responded to, measurements of its compliance culture.

Conclusion

The new Guidance represents an evolution of the prior 2017 paper, setting forth more detailed frameworks by which prosecutors can assess companies’ commitment to compliance. Emphasizing the importance of ongoing enhancements and the integration of the commitment to compliance throughout all levels and facets of the company, the Guidance sets an expectation of a living and vibrant compliance program. This renewed, and more formalized, commitment to standards for the assessment of corporate compliance programs and culture by prosecutors also provides companies with a robust framework for ongoing self-assessment.



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