

Client Alert

June 2020

DOJ Revises Guidance on Evaluation of Corporate Compliance Programs

What Happened: On Monday, June 1, 2020, the US Justice Department (“DOJ”) published [revised guidance](#) on how it evaluates corporate compliance programs when making charging decisions. DOJ last updated the guidance in April 2019. The revisions largely focus on ensuring corporate compliance programs are structured to evolve and adapt to changing corporate circumstances and adequately resourced to function meaningfully.

Background

DOJ’s Evaluation of Corporate Compliance Programs guidance document (the “Guidance”) is designed as a tool to assist prosecutors in assessing the effectiveness of a company’s compliance program. That assessment in turn informs prosecutors’ decisions on the appropriate form of resolution, including prosecution and imposition of penalties. The assessment is also used to determine the need for ongoing compliance obligations to be included in any such resolution. However, in addition to assisting prosecutors, the Guidance serves as a valuable resource for compliance and legal professionals looking to design or enhance compliance programs. The June 2020 Guidance is the third iteration of the Guidance since its original publication in 2017, a fact which demonstrates DOJ’s commitment to transparency and adaptability in the face of a frequently evolving compliance landscape.

Analysis

As in earlier versions, the revised Guidance begins by laying out the “three fundamental questions” that lay at the heart of DOJ’s evaluation of any compliance program:

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

Notably, the June 2020 Guidance directs prosecutors to ask these fundamental questions “both at the time of the offense and at the time of the charging decision and resolution.” This change highlights DOJ’s interest in examining how a company’s compliance program has evolved over time and particularly whether such company has used the “lessons learned” from past compliance failures—whether its own or those of similarly situated companies—to enhance its compliance functions.

DOJ made a number of changes that highlight the need for compliance programs to be dynamic and data-driven. Throughout the revisions, however, the Guidance’s key theme remains the same as in its prior iterations: compliance programs should be risk-based, tailored to the specific circumstances of the company and updated regularly in order to ensure optimal ongoing effectiveness.

Below are some of the key revisions in the June 2020 Guidance.

Emphasis on Data Analytics. Building on the preexisting guidance that companies should monitor and update their compliance programs on an ongoing basis, the June 2020 Guidance encourages companies to employ a data-driven approach when doing so. In performing periodic reviews of their foundational risk assessments, companies should utilize “continuous access to operational data and information across functions.” The revised Guidance alludes to a number of potential metrics for companies to consider employing, to include: tracking responses to employee surveys about the compliance culture; reviewing statistics on internal audit findings concerning compliance and related disciplinary decisions; tracking employee access to policies and procedures to understand which are being utilized; and testing employee awareness and use of the company’s compliance hotline. In addition, the Guidance calls for companies to monitor, track and incorporate “lessons learned” from both a company’s own prior experience and the experience of related companies in the same industry or geographic region.

Compliance Resources. DOJ has revised the second fundamental question, which formerly asked only if the compliance program was effectively implemented, to specifically ask whether the program is “adequately resourced and empowered to function effectively.” This question does not focus purely on financial resources. Again looking towards the application of data-driven compliance efforts, the Guidance asks whether “compliance and control personnel have sufficient ... access to relevant sources of data” related to compliance monitoring and, if not, what the company is doing to address any “impediments” that might limit such access. Further, the Guidance asks whether a company’s compliance function monitors its own behavior—meaning its investigations and disciplinary decisions—to ensure consistency. Having processes in place to track and analyze consistency in their own compliance operations will allow companies to ensure fair application of policies and standards, which in turn promotes trust and employee buy-in to the company’s culture of compliance.

Contextual Analysis. The revised Guidance includes language instructing that DOJ’s evaluation of a compliance program should be context-based, focusing on the “circumstances of the company.” The Guidance calls for examination of “various factors including, but not limited to, the company’s size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company’s operations....” While the specific language is new, this focus on context is a reminder to companies that their compliance programs should be risk-based and should expand in parallel with the growth of the company.

Take-Aways

The key message of the Guidance remains that compliance programs should be risk-based and supported by processes and information that enable regular monitoring and adaptation. What the June 2020 revisions add is a push to bring the world of compliance monitoring into the data-driven reality of the 21st century. The emphasis on data and resources is a direct reflection of how DOJ views favorably programs that adapt and change with evolving circumstances, internal or external. As companies grapple with the global COVID-19 pandemic and related economic insecurity, the revised Guidance’s emphasis on adequate resourcing is a timely reminder that cutting compliance resources could carry long-term implications that will negatively impact the company in the event of a future enforcement action.

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