

US DOJ PUBLISHES UPDATED "GUIDANCE DOCUMENT" ON "EVALUATION OF CORPORATE COMPLIANCE PROGRAMS"

On April 30, 2019, the US Department of Justice ("DOJ"), Criminal Division, published an updated "Guidance Document" on "Evaluation of Corporate Compliance Programs"¹ ("Guidance").

The Guidance provides prosecutors, and thereby companies, with specifics around requirements for corporate compliance programs which DOJ will evaluate when conducting an investigation of a corporation. This evaluation will inform charging decisions and the form of resolution of a matter, and factor into the determination of the appropriate monetary penalty and compliance obligations. DOJ helpfully notes that its Guidance is not intended as a "one size fits all" for developing a corporate compliance program, but nonetheless provides companies with a helpful "checklist" to consider when both designing a program and importantly, when presenting the program to DOJ in connection with an investigation or settlement negotiation.

The Guidance is framed around three questions: (1) "Is the corporation's compliance program well designed?"; (2) "Is the program being applied earnestly and in good faith?"; and (3) "Does the corporation's compliance program work in practice?". Without question, a company facing DOJ will need to be in a position to answer a resounding "yes" to these three questions, but as with any compliance program, the detail is where DOJ will distinguish companies with respect to their corporate compliance programs.

The Guidance describes attributes of a "well designed" compliance program, which not surprisingly focuses on a company's use of risk-assessments to

¹ <https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs>; <https://www.justice.gov/criminal-fraud/page/file/937501/download>;

understand its business and develop an appropriate compliance program that responds to the risks identified. The Guidance notes that prosecutors should consider whether a company's risk assessment and compliance are focused on high risk areas (for example "a large-dollar contract with a government agency in a high-risk country"), rather than giving disproportionate attention to routine, low-risk, low-value transactions. The Guidance focuses on training of employees – in particular, tailored, understandable, and effective training -- which is consistent with DOJ's continued focus on the conduct of individual employees and individual responsibility.

The Guidance emphasizes that creating a culture of compliance is important to DOJ. While the Guidance references the common phrase "tone from the top," it also notes that the message is the responsibility of both senior management and middle management, including "business and operational managers, finance, procurement, legal, [and] human resources." Management should focus on the sufficiency and adequacy of compliance-related resources, the stature and effectiveness of the compliance function, continuous monitoring and periodic audit, and regular updating of risk assessments and responsive actions. Similarly, the Guidance reflects DOJ's general expectation that a company have a mechanism for employees to report issues and that those issues are heard and addressed as well as a system which rewards those who comply and punishes those who do not.

In addition to employees, the Guidance notes that a corporate compliance program should address risks raised by relationships with third-parties, including with respect to the management and control of third-parties used by the company. Similarly, the Guidance also specifically calls out compliance in the context of mergers and acquisitions where pre-acquisition due diligence and post-acquisition due diligence should be reflected in a company's compliance program.

The Guidance helpfully notes that misconduct is not evidence of a failed compliance program, but instead provides companies an opportunity to demonstrate how they identified, addressed, remediated and took steps to prevent the reoccurrence of the misconduct including through enhancements to their compliance program after identifying the "root causes." The Guidance recognizes that companies need to be constantly assessing, auditing, testing, and seeking to improve their compliance programs and that DOJ's evaluation of the compliance program takes into consideration the dynamic nature of compliance.

While any Guidance is appreciated, it will be interesting to see how companies will adopt or enhance compliance programs to address this Guidance, as well as the sanctions compliance guidance that is anticipated to be forthcoming from the US Department of Treasury Office of Foreign Assets Control ("OFAC"). Both the DOJ and OFAC guidance documents emphasize the need for companies to conduct comprehensive risk assessments of their business. The Guidance provides a framework and potential checklist for measuring a compliance program and either identifying necessary enhancements or preparing explanations as to why a specific item on the checklist is not necessary given the company's risk profile and operations. Companies would be wise to reexamine their compliance and training programs, governance and staffing in light of the Guidance and see whether it would impress a DOJ prosecutor applying the Guidance.

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