Evaluation of corporate compliance programs and the revised FCPA resource guide

Navigating updated guidance from the United States Department of Justice Criminal Division and the Securities and Exchange Commission

Forensic & Integrity Services
Evaluation of corporate compliance programs

On June 1, 2020, the Department of Justice (DOJ) Criminal Division released revised guidance to be used in the design and evaluation of corporate compliance programs. This guidance builds upon guidance issued in April 2019 related to the evaluation of corporate compliance programs. The guidance issued by the DOJ in April 2019 was an expansion of the DOJ’s 2017 guidance on the same topic.

As part of its updated guidance in 2019, as well as its revised guidance issued in June 2020, the DOJ has continued to reinforce that its focus is not on the existence of a compliance program, but instead on considerations made when implementing, reviewing and enforcing the compliance programs. Specifically, the DOJ expects to see the following five components as part of each compliance function it reviews:

- Commitment from management
- Continual risk assessments
- Effective internal controls
- Ongoing testing and auditing
- Training

The DOJ has recently settled many cases that stem from ineffective compliance functions and has listed the evaluation of compliance functions as a top priority for 2020.

DOJ’s guiding questions used in the evaluation of compliance programs include:

- 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?

“... a corporate compliance program must be evaluated in the specific context of a criminal investigation ... the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs.”

– DOJ guidance, April 30, 2019
DOJ guidance on corporate compliance program design

Expanding on the three main questions the DOJ asks corporations to consider when designing or updating their compliance program, the DOJ also asks that corporations consider the following questions when implementing or refining compliance programs:

- **Is the compliance program well designed?**
  - Risk assessment
  - Policies and procedures
  - Training and communication
  - Confidential reporting structure and investigation process
  - Third-party management
  - Mergers and acquisitions

- **Is the compliance program being applied earnestly and in good faith?**
  - Commitment by senior and middle management
  - Autonomy and resources
  - Incentives and disciplinary measures

- **Does the corporation’s compliance program work in practice?**
  - Continuous improvement, periodic testing and review
  - Investigation of misconduct
  - Analysis and remediation of any underlying misconduct
Do you have real-time data and contemporaneous documentation readily available to answer the following questions about your compliance program?

- Is the risk assessment current and subject to periodic review?
- How are policies and procedures reinforced by the company’s internal controls system?
- Has training addressed lessons learned from prior incidents?
- Are the reporting and investigating mechanisms sufficiently funded?
- How does the company track its third parties?
- Who conducted the risk review for the acquired or merged entities and how was it done?
- How have senior leaders encouraged or discouraged compliance?
- What role has the compliance function played in the strategic decisions of the company?
- Have disciplinary actions and incentives been fairly and consistently applied across the organization?
- What types of audits would have identified issues relevant to the identified misconduct?
- What is the process for responding to investigative findings?
- Does the company perform a root cause analysis of any misconduct?
Navigating major updates in June 2020 guidance

Evaluation of a corporate compliance program
The DOJ’s guidance elaborates on how it evaluates corporate compliance programs stating that the Criminal Division will make a “reasonable, individualized determination in each case that considers 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, that might impact its compliance program.”

The assessment of a company’s compliance program may be conducted both at the time of the offense and at the time of the charging decision and resolution.

Prosecutor’s 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?

Policies and procedures
The DOJ addresses accessibility by employees both domestically and around the world. Corporations are asked, “Have the policies and procedures been published in a searchable format for easy reference? Does the company track access to various policies and procedures to understand what policies are attracting more attention from relevant employees? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees’ access?”

Design of a compliance program – risk assessment
The DOJ’s revised guidance instructs prosecutors to “understand why the company has chosen to set up the compliance program the way that it has, and why and how the company’s compliance program has evolved over time.”

Revisions to corporate compliance programs
The updated guidance places an emphasis on the lessons learned when revising a risk-based compliance program and states:
“Updates and revisions – Is the risk assessment current and subject to periodic review? Is the periodic review limited to a “snapshot” in time or based upon continuous access to operational data and information across functions? Has the periodic review led to updates in policies, procedures, and controls? Do these updates account for risks discovered through misconduct or other problems with the compliance program?”

Lessons learned
Does the company have a process for tracking and incorporating into its periodic risk assessment lessons learned either from the company’s own prior issues or from those of other companies operating in the same industry and/or geographical region?
Navigating major updates in June 2020 guidance

Training and communications
The DOJ acknowledges that “companies have invested in shorter, more targeted training sessions to enable employees to timely identify and raise issues to appropriate compliance, internal audit, or other risk management functions.”
In evaluating trading and communication programs, the DOJ examines whether companies are providing a platform for employees to interact during the training program, whether it’s online or in person.
Additionally, the revised guidance questions if a company has addressed employees who fail all or a portion of the testing. The DOJ also asks if the company has evaluated the extent to which training programs have had an impact on employee behavior or operations.

Confidential reporting mechanisms
The updated guidance also addresses if a company has taken measures to test whether employees are aware of a hotline and feel comfortable using it and if the company periodically tests the effectiveness of the hotline.

Third-party risk management
Concerning due diligence of third-party relationships, the DOJ urges prosecutors to ask if “the company engages in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?”

Mergers and acquisitions (M&A)
The updated guidance addresses pre-M&A due diligence, and asks for a process around “timely and orderly integration of the acquired entity into existing compliance program structures and internal controls.” Considering pre-M&A due diligence, “enables the acquiring company to evaluate more accurately each target’s value and negotiate for the costs of any corruption or misconduct to be borne by the target.” The DOJ’s guidance notes that “flawed” or “incomplete” M&A-related diligence can result in misconduct at the acquired entity to persist, “causing resulting harm to a business’s profitability and reputation and risking civil and criminal liability.”

Resourced and empowered compliance programs
Concerning data resources and access, the DOJ’s revisions focus on whether compliance and control personnel “have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions? Do any impediments exist that limit access to relevant sources of data and, if so, what is the company doing to address the impediments?”
Key highlights of the newly issued second edition of the Foreign Corrupt Practices Act (FCPA) Resource Guide

- The Department of Justice Criminal Division and the Securities and Exchange Commission released on July 3, 2020 a second edition of the FCPA Resource Guide, marking the first substantive changes since it was first published in 2012.
- This second edition codifies into one comprehensive document all recent policy developments, as well as recent enforcement actions and the FCPA Corporate Enforcement Policy; the selection and monitors in Criminal Division matters; coordination of corporate resolution penalties (the Anti-Piling on Policy); and the Criminal Division’s evaluation of corporate compliance programs’ guidance.

- The FCPA Resource Guide expands guidance concerning the evaluation of corporate compliance programs. Specifically, the new guide adds significantly more detail concerning confidential reporting and investigations; periodic testing and review; pre- and post-acquisition due diligence in the context of mergers and acquisitions; and expectations around investigations and remediation efforts.

- The revised guide provides clarity about internal accounting controls versus compliance programs. This edition provides new commentary from the agencies stressing the interplay between internal accounting controls and compliance programs, compared to the original guide that left the word “accounting” out. Specifically, the new edition states, “[a]lthough a company’s internal accounting controls are not synonymous with a company’s compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer’s internal accounting controls.”

- Further clarity on “successor liability” in mergers and acquisitions is also contained in the second edition. The revised guide notes that, in instances where “robust pre-acquisition due diligence may not be possible,” the agencies “will look to the timeliness and thoroughness of the acquiring company’s post-acquisition due diligence and compliance integration efforts.” Referencing the FCPA Corporate Enforcement Policy, the revised guide also reinforces the point that “in appropriate cases, an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.”
A compliance program without real-time data on measuring its effectiveness is not enough

- As noted by the issuance of updated guidance by the DOJ and SEC, integrity is more important today than it has ever been. As companies anticipate and respond to current challenges, such as by changing suppliers and shifting priorities, it’s essential that compliance standards are upheld. If they’re not, companies are exposing themselves to major risk.

- In times of crisis, personal conduct can be the first standard to slip evidenced by the latest insights gleaned from thousands of companies that participated in the EY Global Integrity Report 2020.

- Organizations are not machines. They are complex systems made up of humans with individual instincts and behaviors that are influenced by their environment.

- Thirty-five percent of respondents to the EY Global Integrity Report believe that unethical behavior in their organization is often tolerated when the people involved are senior or high performers. This figure increases to 41% for the senior manager respondents. Forty-six percent of respondents believe that there are managers in their organization who would sacrifice integrity for short-term financial gain. This figure increases to 51% for senior managers.

- The more senior an employee, the more likely they would be to act unethically. Senior employees are more likely to justify unethical behavior such as ignoring unethical conduct in their team, misleading external parties such as auditors or regulators or offering/accepting a bribe in order to boost their own career progression or remuneration. This is concerning as leaders set the tone at the top and define standards of behavior for their organizations. However, these scenarios can potentially be flagged through advanced analytics and text mining techniques.

- Those employees who believe they demonstrate the highest levels of integrity have more confidence in their past conduct. With over half (51%) of all respondents concerned if information about their work decisions came under public scrutiny, COVID-19 and the ensuing economic crisis will undoubtedly uncover their unethical behavior and actions. This leaves companies wide open to the threat of reputational damage especially considering how large our digital footprint is – decisions, statements and social media posts, for example, are all preserved electronically.

- Well over half (59%) of respondents say that it is challenging for organizations to maintain their standards of integrity in periods of rapid change or difficult market conditions. This figure rises to 63% for those in emerging markets.

- Such findings paint an ominous picture, even pre-COVID-19. Now that companies are under extreme pressure to survive, ethical standards may slip even further. In times of trouble, a deep commitment to measuring and monitoring personal and corporate integrity is more important than ever.
Access to real-time data is critically important to evaluate compliance program effectiveness

EY Forensic & Integrity Services professionals assist clients with developing technology solutions to make data-driven decisions across the compliance function.

- Governance and decision making structure
  - External governance
  - Internal governance
  - Principles, policies, standards
  - Accountability and decision rights
  - Culture and ethics

- Process model:
  - Risk identification
  - Risk prioritization
  - Planning risk response
  - Implement and mitigate
  - Monitor risks
  - Independent assessment

- Talent development
  - Workforce analytics and strategic planning
  - Roles and competencies
  - Performance management
  - Workforce deployment and redeployment strategies

- Key performance outcomes
  - Management by objective
  - Performance metrics and accountability

- Functions (framework)
  - Organization structure
    - Key executive roles and responsibilities accountabilities
  - Operating structure
    - Centralized
    - Decentralized
    - Federated
    - Capability sourcing

- Information systems
  - IT enablement

- Data and information
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- Watchlist and sanctions support
- Investigations
- Corporate compliance program design
- Assessments, monitoring and improvements

**Regulatory reporting and response**
- Export compliance and international expansion
- Internal and external restructuring
- Supply chain management
- Federal supply schedule contracting

**Compliance technology services**
- Forensic data analytics and data science
- Data integration and fusion
- Intelligent automation
- Artificial intelligence (AI)-enabled risk scoring and case management
- Data integrity forensics

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- **Approximately 4,000** forensic professionals
- **130+ countries** where forensic teams have performed investigations or compliance work
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