

Updated DOJ Guidance on Corporate Compliance Programs Emphasizes Technology, Real-Time Compliance Data, and Lessons Learned

The guidance provides insights for corporations seeking to develop and implement a best-in-class compliance program.

On June 1, 2020, the US Department of Justice (DOJ) issued updated guidance (Updated Guidance) regarding how prosecutors should evaluate corporate compliance programs when conducting investigations, determining whether to bring charges, and negotiating corporate resolutions. The DOJ first issued the guidance, [Evaluation of Corporate Compliance Programs](#), in February 2017 and added details in April 2019. Companies seeking to design and implement effective compliance programs should look to the Updated Guidance for the DOJ's latest expectations.

7 Key Updates

1. The DOJ continues to encourage companies to leverage technology and engage with compliance data in real time.

The Updated Guidance includes a new section, "Data Resources and Access," which asks prosecutors to evaluate whether compliance and controls personnel have sufficient access to data for "timely and effective monitoring and/or testing of policies, controls, and transactions." This focus on technology and compliance data appears throughout the Updated Guidance, and offers the following insights:

- Companies should consider whether their periodic risk assessments are limited to a "snapshot" in time or are "based upon continuous access to operational data and information across functions."
- Companies should consider publishing policies and procedures in a searchable format, and explore ways to electronically track employee access to policies and procedures.
- Companies should be conducting ongoing risk management of third parties, instead of only during the onboarding process.

2. The Updated Guidance emphasizes lessons learned.

The Updated Guidance encourages companies designing risk assessments to incorporate lessons learned from their own experiences and those of industry and regional peers, and specifically asks whether companies have reviewed and adapted their compliance programs based on lessons learned

from their own company or companies with similar risk profiles. Even before the 2020 update, the DOJ had already counseled companies to ensure training adequately covered prior incidents and program revisions considered lessons learned.

3. The Updated Guidance offers insights into the DOJ's perspective on effective training.

The Updated Guidance suggests “shorter, more targeted” training sessions that allow employees to timely escalate issues, and also recommends that companies establish mechanisms for employees to ask questions stemming from the trainings. It also adds that companies should invest in further trainings for their compliance and controls personnel.

4. The Updated Guidance provides more specificity for companies regarding testing the effectiveness of their compliance program.

The DOJ notes that an effective compliance program should have mechanisms to evaluate the impact of training on employee behavior, as well as mechanisms to test whether employees are aware of their employee hotline and are comfortable using it. Previously, the guidance advised companies to test the effectiveness of the hotline by tracking a report from start to finish.

5. For mergers and acquisitions, the Updated Guidance reiterates the importance of post-acquisition integration.

The Updated Guidance specifically asks prosecutors to evaluate a company's processes for conducting post-acquisition audits at newly acquired entities, and adds several references to post-acquisition integration. Previously, the guidance focused more on pre-acquisition due diligence.

6. The Updated Guidance changes one of the DOJ's three fundamental questions that prosecutors consider when evaluating a corporate compliance program.

Instead of asking whether a program is being “implemented effectively,” the Updated Guidance asks whether a program is “adequately resourced and empowered to function.” This nuance may be an acknowledgment by the DOJ that prosecutors typically only evaluate corporate compliance programs that didn't effectively prevent the misconduct before the DOJ. As revised, this new threshold question may be a more appropriate way of assessing whether a company has a meaningful compliance program despite the failure that resulted in the DOJ's involvement.

7. The Updated Guidance provides details regarding the “reasonable, individualized determination” that prosecutors make at the time of charging and at the time of resolution.

Specifically, the Updated Guidance states that prosecutors should consider the size of a company, its industry, its geographic footprint, and the regulatory landscape in conducting their analysis. It also notes that prosecutors should consider how foreign law impacts the design and implementation of compliance programs, where relevant.

Conclusion

The Updated Guidance underscores the need for corporate compliance programs to be intentionally designed and appropriately resourced — especially with respect to data and technology and lessons learned. Companies seeking to have a best-in-class compliance program should regularly review their program to ensure that it is designed not just to address their risks, but also to meet the DOJ's expectations, including the standards set forth in the Updated Guidance.

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