

DOJ Provides Additional Guidance and Clarity Regarding Its Evaluation of Corporate Compliance Programs

May 7, 2019

On April 30, 2019, Assistant Attorney General Brian Benczkowski of the Criminal Division of the Department of Justice (“DOJ”) announced an updated version of the Criminal Division’s Evaluation of Corporate Compliance Programs (the “2019 Guidance”). The 2019 Guidance is intended to assist DOJ prosecutors in determining the appropriate resolution in a criminal case by evaluating the effectiveness of a company’s compliance program both at the time of the relevant conduct and at the time of a charging decision or resolution. The additional guidance makes clear that DOJ continues to place great emphasis on the evaluation of the effectiveness of a company’s compliance program in the context of determining an appropriate resolution to an investigation.

The 2019 Guidance is an updated version of DOJ’s February 2017 guidance (the “2017 Guidance”) entitled “Evaluation of Corporate Compliance Programs,” about which we have [previously written](#). The 2019 Guidance describes the criteria that the Criminal Division uses to assess the effectiveness of a corporation’s compliance program. The criteria are intended to answer three fundamental questions set forth in DOJ’s Justice Manual:

- “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?”¹

The 2019 Guidance lists topics and questions that should be considered under each of these questions in order to evaluate the corporate compliance program, which in turn helps assist prosecutors in determining the appropriate (1) resolution form, (2) monetary penalty, and (3) compliance obligations imposed by the resolution. But as AAG Benczkowski underscored, these topics and questions are “neither a checklist nor a formula.”² Rather, DOJ will make an “individualized determination” in evaluating a corporate compliance program, and “each company’s risk profile and solutions to reduce its risks warrant particularized evaluation.”³

The 2019 Guidance is consistent with, and draws heavily from, the 2017 Guidance and DOJ’s prior guidance on the topic, including the Justice Manual’s “[Principles of Federal Prosecution of Business Organizations](#),” the Federal Sentencing Guidelines’ seven elements of an “[Effective Compliance and Ethics Program](#),” and the FCPA Resource Guide’s ten “[Hallmarks of Effective Compliance Programs](#).”

¹ Justice Manual § 9-28.800, available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

² Brian A. Benczkowski, Keynote Address, Ethics and Compliance Initiative 2019 Annual Impact Conference (Apr. 30, 2019), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and>.

³ U.S. Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs*, at 1 (updated Apr. 2019), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

The 2019 Guidance reemphasizes the importance of maintaining a strong compliance program to prevent and remediate misconduct. The updated guidance may be in part a reaction to the fact that companies have been requesting additional information on this topic, particularly in the wake of DOJ's [October 2018 memorandum](#) suggesting a more scaled-back approach to monitorships and providing that prosecutors should consider the effectiveness of a company's compliance program in determining whether a monitor is appropriate. Indeed, in his remarks, AAG Benczkowski noted that the updated guidance is intended to aid companies by giving them deeper insight and greater transparency into what the government will demand of compliance programs.⁴

2019 Guidance Components

While the updated guidance does not appear to impose any new obligations with respect to corporate compliance programs, it is more comprehensive and provides further granularity and greater detail than the 2017 Guidance. In particular, it expands on the 2017 Guidance's sample topics and questions for prosecutors to weigh when determining whether a company is deserving of credit for its compliance program in a resolution. As with the 2017 Guidance, the 2019 Guidance provides considerations for risk assessments; policies and procedures; training and communication; confidential reporting and investigations; commitment by senior and middle management; autonomy and resources; incentives and disciplinary measures; continuous improvement, periodic testing, and review; third-party management; mergers and acquisitions; and analysis and remediation of underlying misconduct.

While the 2019 Guidance largely restates prior guidance on the topic, there are instances in which the updated guidance sets forth additional information and inquiries that provide further clarity around certain aspects of a corporate compliance program. For example:

- Risk Assessment
 - The 2019 Guidance reflects an increased emphasis on risk-tailored resource allocation, and directs prosecutors to consider whether the company devotes “a disproportionate amount of time to policing low-risk areas instead of high-risk areas, such as questionable payments to third-party consultants, suspicious trading activity, or excessive discounts to resellers and distributors.”⁵
- Policies and Procedures
 - The 2019 Guidance asks prosecutors to consider whether, if the company has foreign subsidiaries, there are “linguistic or other barriers to foreign employees’ access” to policies and procedures.⁶
- Training and Communications
 - The 2019 Guidance notes that “[s]ome companies, for instance, 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.”⁷ It also asks prosecutors to consider

⁴ See Brian A. Benczkowski, Keynote Address, Ethics and Compliance Initiative 2019 Annual Impact Conference (Apr. 30, 2019), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and>.

⁵ U.S. Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs*, at 3 (updated Apr. 2019), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁶ *Id.* at 4.

⁷ *Id.*

whether employees have “been tested on what they have learned,” and whether the company has “addressed employees who fail all or a portion of the testing.”⁸

- Confidential Reporting Structure and Investigation Process
 - The 2019 Guidance reflects an increased emphasis on the availability of anonymous reporting, and asks prosecutors to consider the following:
 - Whether the company has adequate “processes to protect whistleblowers.”
 - Whether the company has “an anonymous reporting mechanism, and, if not, why not.”
 - How the anonymous reporting mechanism has been publicized to the company’s employees.
 - Whether the anonymous reporting mechanism has been used.
 - Whether the company has taken “pro-active measures to create a workplace atmosphere without a fear of retaliation.”⁹
- Commitment by Senior and Middle Management
 - The 2019 Guidance asks prosecutors to consider whether managers have tolerated greater compliance risks in pursuit of new business or greater revenues, and whether managers have encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties.¹⁰
- Autonomy and Resources
 - The 2019 Guidance reflects an emphasis on compliance structure, and asks prosecutors to consider “[w]here within the company is the compliance function housed (e.g., within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)” and “[t]o whom does the compliance function report.”¹¹
- Incentives and Disciplinary Measures
 - The 2019 Guidance reflects an increased focus on transparency, and asks prosecutors to consider whether “the actual reasons for discipline” are communicated to employees or, alternatively, whether “pre-textual reasons [have] been provided to protect the company from whistleblowing or outside scrutiny.”¹²
- Continuous Improvement, Periodic Testing, and Review
 - The 2019 Guidance reflects an emphasis on the need for compliance programs to constantly evolve. To that end, it asks prosecutors to consider the process for determining where and how frequently internal audit will undertake an audit, along with the rationale behind that process. It also asks prosecutors to consider whether and how often the

⁸ *Id.* at 5.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 9-10.

¹¹ *Id.* at 11.

¹² *Id.* at 12.

company measures its culture of compliance, including whether it “seek[s] input from all levels of employees to determine whether they perceive senior and middle management’s commitment to compliance.”¹³

Practical Impact

The 2019 Guidance reiterates and expands upon DOJ’s prior guidance and reaffirms the importance of key aspects of an effective compliance program. Given the additional granularity and practical advice provided by the 2019 Guidance, it can serve as an important resource for compliance and legal professionals, including those considering how best to (1) design and implement a corporate compliance program; (2) audit, test, or otherwise monitor or benchmark a compliance program’s effectiveness; (3) structure compliance presentations to DOJ, corporate monitors, or other regulators; and (4) conduct effective compliance-related remediation and enhancement following a corporate resolution.

¹³ *Id.* at 15.

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