

DOJ's Updated Guidance for Evaluation of Corporate Compliance Programs

May 10, 2019

Anti-corruption/FCPA

On April 30, 2019, the U.S. Department of Justice (“DOJ”) Criminal Division released an updated version of the *[Evaluation of Corporate Compliance Programs](#)* (the “Guidance”), which serves as a reference for prosecutors in assessing corporate compliance programs in the context of DOJ investigations. More comprehensive and detailed than the document of the same title released by the Fraud Section in 2017 (the “2017 Guidance”), the new Guidance applies to all Criminal Division investigations and enforcement actions involving business organizations.

The Guidance collects and distills principles and best practices from various DOJ and other sources, and now stands as the most detailed statement of DOJ’s expectations for corporate compliance programs. By structuring the Guidance around three key questions on the design, implementation, and practical effectiveness of compliance programs, DOJ has made the Guidance more user-friendly, providing a readily translatable framework for companies looking to assess their compliance programs against DOJ expectations and best practices. The Guidance should serve as a foundational resource for companies seeking to implement and maintain effective compliance programs.

While many aspects of the Guidance will be familiar to compliance professionals, the Guidance reveals new questions that DOJ may pose and slightly refined points of emphasis in comparison to past guidance documents.

Summary of Guidance

DOJ organized the Guidance to address three “fundamental questions” from the Justice Manual¹ that prosecutors should ask when evaluating the effectiveness of corporate compliance programs:

1. “Is the corporation’s compliance program well designed?”
2. “Is the program being applied earnestly and in good faith?”
3. “Does the corporation’s compliance program work in practice?”

Organized around these three questions, the Guidance addresses twelve topics, which largely track the eleven topics set out in the 2017 Guidance, and the ten “Hallmarks of Effective

¹ U.S. Dep’t of Justice, Justice Manual § 9-28.000 (2018).

Compliance Programs” described in *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (“*FCPA Resource Guide*”).² Like the 2017 Guidance, the Guidance continues to emphasize that the Criminal Division “does not use any rigid formula to assess effectiveness of corporate compliance programs.”

Is the Corporation’s Compliance Program Well Designed?
<ul style="list-style-type: none">A. Risk AssessmentB. Policies and ProceduresC. Training and CommunicationD. Confidential Reporting Structure and Investigation ProcessE. Third Party ManagementF. Mergers and Acquisitions
Is the Corporation’s Compliance Program Being Implemented Effectively?
<ul style="list-style-type: none">A. Commitment by Senior and Middle ManagementB. Autonomy and ResourcesC. Incentives and Disciplinary Measures
Does the Corporation’s Compliance Program Work in Practice?
<ul style="list-style-type: none">A. Continuous Improvement, Periodic Testing, and ReviewB. Investigation of MisconductC. Analysis and Remediation of Any Underlying Misconduct

Key Takeaways

1. The Guidance Should Be a Foundational Resource in Any Company’s Evaluation of Its Compliance Program

Since its publication in 2012, the *FCPA Resource Guide* — and particularly its “Hallmarks of an Effective Compliance Program” — has guided companies developing and/or evaluating their anti-corruption compliance programs, setting forth in one place U.S. enforcement authorities’ views of the key elements of an effective anti-corruption compliance program. DOJ’s new Guidance is an even more detailed expression of those elements. While the Guidance is intended to assist prosecutors in making charging and resolution decisions, companies should use the Guidance as a forward-looking roadmap to help evaluate and benchmark their own compliance programs. By focusing on three pillars — (1) design, (2) implementation, and (3) practical effectiveness — the Guidance provides an intuitive and user-friendly evaluative

² U.S. Dep’t of Justice & U.S. Sec. and Exch. Comm’n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012).

framework that should help companies better organize program assessment and enhancement exercises and explain those steps to business stakeholders.

2. The Guidance Illustrates How Anti-Corruption Compliance Measures Have Become the Foundation for Corporate Compliance Programs

The broader application of the Guidance beyond the Fraud Section to the entire Criminal Division has affirmed that the principles underlying anti-corruption compliance have become a key foundation for corporate compliance programs more broadly. In an era with increased global anti-corruption enforcement, the maturation of corporate compliance programs has largely been driven by a focus on bribery and corruption risks. But many aspects of effective anti-corruption compliance programs such as risk assessments, third party due diligence, and confidential reporting, have broader application. With the rollout of the Guidance, the same general principles that a company uses to benchmark the strength of its anti-corruption compliance program now apply to a much broader category of compliance risk areas. The Guidance also reflects the shift away from siloed programs that are organized around regulatory regimes (anti-corruption, trade controls, competition, etc.), in favor of integrated compliance programs that focus on key exposure areas, like third party risk, that can cut across multiple regulatory areas.

3. The Guidance Provides Several New Points of Emphasis

Though many of the specific questions listed in the Guidance carry over from the 2017 Guidance, DOJ has added a number of noteworthy questions for companies to consider as they assess and enhance their compliance programs. For example:

- “How does the company determine which complaints or red flags merit further investigation?”
- “How does the company determine who should conduct an investigation, and who makes that determination?”
“Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?”
- “Have supervisory employees received different or supplemental training?”
- “Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training?”
- “If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees’ access to policies and procedures?”
- “Have there been any updates to policies and procedures in light of lessons learned?”
- “Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses?”
- “How often and how does the company measure its culture of compliance?”

While these questions hardly break new ground, they underscore DOJ’s emphasis on assessing how a compliance program works in practice and on incorporating “lessons learned” to enhance compliance programs.

4. Companies Should Look for Opportunities to Reallocate Compliance Resources Away from Lower Risk Areas

One of the most notable additions to the Guidance is a section on risk-based resource allocation. While DOJ has long made clear that it expects a company to tailor its compliance program to its specific risk profile, the Guidance now instructs prosecutors to “credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction in a low-risk area.”

The Guidance’s suggestion that companies may devote fewer resources, e.g., to “more modest and routine hospitality and entertainment” represents a slight departure from previous guidance. For example, the *FCPA Resource Guide* praises the “web-based approval processes [that some companies with global operations have adopted] to review and approve routine gifts, travel, and entertainment involving foreign officials and private customers with clear monetary limits and annual limitations.”³ Moreover, in recent years, the SEC has pursued a number of enforcement actions focused on gifts, hospitality, travel, and entertainment, which should remind companies that, while the level of resources they devote to these areas may be risk-based, these areas will continue to demand attention.

5. The Guidance Highlights the Importance of Continuous Testing and Review of Compliance Programs

As we pointed out in our [commentary on the 2017 Guidance](#), DOJ has repeatedly emphasized the need for companies to evaluate whether a compliance program is actually working. The Guidance doubles down on this question, directing prosecutors to consider whether a company “has engaged in meaningful efforts to review its compliance program and ensure that it is not stale.” Indicators include whether the company has “survey[ed] employees to gauge the compliance culture and evaluate the strength of controls” and “conduct[ed] periodic audits to ensure that the controls are functioning well.” The Guidance thus offers a renewed reason for companies to take a hard look at whether their compliance programs are functioning in practice, and wrestle with how their programs can be improved. Among other things, the Guidance may provide further impetus for companies to evaluate their ability to collect and analyze data to help assess how their programs are functioning in practice, such as through the use of data analytics.

Areas to Watch

1. How will DOJ apply the Guidance in enforcement actions and investigations outside of the FCPA context?

As DOJ implements the Guidance across the Criminal Division, we will be watching to see how DOJ evaluates corporate compliance programs in areas other than anti-bribery and anti-corruption. We also will be looking to see whether DOJ evaluates corporate compliance programs holistically, or focuses solely on the area in which misconduct occurred.

Companies will, of course, need to continue to consider compliance program guidance issued by other enforcement authorities, such as the Treasury Department’s new [framework for sanctions compliance programs](#). While this will add layers of complexity to program design,

³ *Id.* at 58.

implementation, and testing, designing an integrated compliance program that accounts for the multiple sources of guidance can help a company persuade DOJ that it has implemented a well-designed compliance program that works in practice.

2. Will the SEC endorse the Guidance approach to risk-based resource allocation?

DOJ prosecutors are instructed to assess whether a company is devoting a disproportionate amount of time to policing low-risk areas instead of high-risk areas. We will be watching to see whether the SEC takes a similar approach when it assesses whether SEC-regulated companies have implemented adequate internal accounting controls for purposes of avoiding an FCPA accounting provisions violation. Absent a similar approach by the SEC, companies may still feel a need to focus significant attention and resources on lower-risk areas such as modest and routine hospitality and entertainment.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Anti-corruption/FCPA practice:

<u>Lanny Breuer</u>	+1 202 662 5674	<u>lbreuer@cov.com</u>
<u>Eric Carlson</u>	+86 21 6036 2503	<u>ecarlson@cov.com</u>
<u>Steven Fagell</u>	+1 202 662 5293	<u>sfagell@cov.com</u>
<u>Mark Finucane</u>	+1 202 662 5601	<u>mfinucane@cov.com</u>
<u>Randy Friedland</u>	+1 202 662 5142	<u>rfriedland@cov.com</u>
<u>James Garland</u>	+1 202 662 5337	<u>jgarland@cov.com</u>
<u>Ben Haley</u>	++27 (0) 11 944 6914	<u>bhaley@cov.com</u>
<u>Nancy Kestenbaum</u>	+1 212 841 1125	<u>nkastenbaum@cov.com</u>
<u>Mona Patel</u>	+1 202 662 5797	<u>mpatel@cov.com</u>
<u>Mythili Raman</u>	+1 202 662 5929	<u>mraman@cov.com</u>
<u>Don Ridings</u>	+1 202 662 5357	<u>dridings@cov.com</u>
<u>Jennifer Saperstein</u>	+1 202 662 5682	<u>jsaperstein@cov.com</u>
<u>Daniel Shallman</u>	+1 424 332 4752	<u>dshallman@cov.com</u>
<u>Veronica Yopez</u>	+1 202 662 5165	<u>vyepez@cov.com</u>

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.