

Fraud Section Guidance Highlights Factors Considered in Evaluating Corporate Compliance Programs

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Anti-Corruption

The Fraud Section of the U.S. Department of Justice (“DOJ”) quietly released new guidance last month entitled “[Evaluation of Corporate Compliance Programs](#)” (the “Guidance”). While noting that “the Fraud Section does not use any rigid formula to assess the effectiveness of corporate compliance programs,” the eight-page Guidance outlines 11 “Sample Topics and Questions” that DOJ “has frequently found relevant in evaluating a corporate compliance program” in the context of a criminal investigation.

While these topics and questions may be familiar to experienced compliance professionals, the Guidance nonetheless provides a useful synthesis of existing compliance guideposts (e.g., the DOJ/SEC FCPA Resource Guide’s “Hallmarks of Effective Compliance Programs,” Section 8B2.1 of the U.S. Sentencing Guidelines, and the Principles of Federal Prosecution of Business Organizations in the United States Attorney’s Manual). More importantly, on a number of fronts, the Guidance adds a level of specificity and granularity not found in prior public DOJ guidance. It also underscores DOJ’s increased focus on the importance of going beyond the issuance of compliance policies and procedures, continually monitoring key areas of compliance risk in a company’s business operations, and measuring the ongoing effectiveness of corporate compliance programs.

A. Compliance Counsel’s Influence Is Felt

Since her hiring in November 2015, DOJ’s Compliance Counsel, Hui Chen, has been engaged in a robust benchmarking exercise, as she has had the opportunity to hear from a number of companies in presentations on their compliance programs. The Guidance provides a detailed preview of the questions that companies can expect to face in such presentations. The questions emphasize the importance of being prepared to show how compliance programs work in practice, how policies and procedures are communicated throughout the company, and how companies measure the effectiveness of their programs. Ms. Chen is known to ask tough questions and push companies to provide detailed empirical evidence on how their programs function and demonstrably influence the company’s practical business activities. Every company should be prepared for the “root cause” question: have you identified the root cause of the problem, and what steps have you taken to prevent it from happening again?

While companies going through this process must be prepared for rigorous scrutiny of their compliance programs, in our experience, most companies that have been through this exercise will be better for it. In that sense, we view the publicly released Guidance as “democratizing” DOJ’s current thinking on compliance programs beyond the companies and practitioners who have presented to Ms. Chen. For that reason alone, the Guidance is a must-read.

B. “Root Cause” and “Missed Opportunities” Analysis

The first topic of the Guidance, “Analysis and Remediation of Underlying Conduct,” asks “[w]hat is the company’s root cause analysis of the misconduct at issue?” and “[w]ere there prior opportunities to detect the misconduct in question...?” The basic concepts of “root cause” and “missed opportunity” analysis—a process to identify the causes of an event that resulted in an undesired outcome, determine whether there were opportunities to prevent the occurrence of the event, and develop corrective actions—are fundamental to a compliance program review in the wake of a bribery issue. In our experience, however, “root cause analysis” and “missed opportunity analysis” are not terms that have made their way into the everyday lexicon of anti-corruption compliance professionals.

We view the Guidance’s use of these terms as more than semantics. DOJ will expect companies to involve stakeholders from outside the compliance and legal functions in their root cause and missed opportunity analyses, and to be prepared to provide reports or presentations on (or speak in detail to) the process and conclusions of such analyses. Additionally, practitioners may have to wrestle with the issue of whether such analyses are subject to protection under the attorney-client privilege or work-product doctrine.

C. Fleshing Out the Hallmarks of an Effective Compliance Program

In several areas, the sample questions contained in the Guidance go a level deeper into DOJ’s expectations than is described in the FCPA Resource Guide’s Hallmarks of an Effective Compliance Program. For example:

- Building on the Resource Guide’s passing reference to the importance of “tone at the middle,” the Guidance offers questions that companies can use to evaluate “specific actions... taken to demonstrate their commitment to compliance....”
- While the Resource Guide made clear that the senior executive responsible for the company’s compliance program should have direct access to an organization’s board or other governing authority, the Guidance asks whether “the board of directors and/or external auditors [have] held executive or private sessions with the compliance and control functions?”
- The Guidance expands on the idea of incentivizing compliant behavior by focusing on “specific examples of actions taken (e.g., promotions or awards denied) as a result of compliance and ethics considerations,” and whether the company has “ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?”
- The Guidance also goes a step further than the Resource Guide’s hallmark on disciplinary measures by focusing on a company’s human resources process, asking “[w]ho participated in making disciplinary decisions for the type of misconduct at issue?”
- Underscoring DOJ’s emphasis on the importance of communication about compliance issues, the Guidance asks: “[w]hat communications have there been generally when an employee is terminated for failure to comply with the company’s policies, procedures, and controls (e.g., anonymized descriptions of the type of misconduct that leads to discipline)?”

In this respect, the Guidance adds welcome specificity to the more abstract statements in the Resource Guide.

D. Empowering Compliance Professionals Seeking Resources and a Seat at the Table

DOJ has long emphasized that in order to be effective, a company's compliance function must receive support from the highest levels of the organization. A weak, under-resourced compliance program will not be effective and will not pass muster if reviewed by DOJ. To that end, the Guidance may provide compliance personnel with an additional, objective source to help drive the compliance agenda. The Guidance makes clear that if there were "times when requests for resources by the compliance and relevant control functions have been denied," companies must be prepared to speak to how "those decisions [have] been made." Similarly, if the compliance function has struggled to get a seat at the table when significant business decisions are made, companies must be prepared to explain whether compliance has "played [a role] in the company's strategic and operational decisions" and why "the compliance function has [not] been integrated into the merger, acquisition, and integration process?"

E. Focus on Hard Data and Measuring Effectiveness

The Guidance emphasizes the need to evaluate whether a compliance program is working in practice. While the need to effectively implement compliance policies and procedures has been emphasized in the Resource Guide and other sources, the Guidance expands upon that concept in a number of important respects. Indeed, virtually the entirety of the Guidance focuses on the question of how policies and procedures have been functionally implemented into a company's business operations, and how they have been monitored and tested in a way that can be demonstrated on the basis of concrete measurables. No fewer than seven of the eleven topics set out in the Guidance include questions about how companies assess, measure, and analyze the effectiveness of their compliance policies and procedures in particular risk areas. For example:

- "How has the company assessed whether the[] policies and procedures have been effectively implemented?"
- "How has the company evaluated the usefulness of these policies and procedures?"
- "How has the company measured the effectiveness of the training?"
- "What methodology has the company used to identify, analyze, and address the particular risks it faced?"
- "What information or metrics has the company collected and used to help detect the type of misconduct in question?"
- "How has the company collected, analyzed, and used information from its reporting mechanisms?"
- "How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?"

This persistent emphasis on measuring and testing the effectiveness of the compliance program across various angles drives home the need to be thoughtful at the design and implementation phase, and when making changes to the program driven by, for example, risk assessment or audit findings. The questions the DOJ are asking, in this regard, are not simply *whether* you are conducting risk assessments or audits to test your compliance program, but exactly *how* you are doing that and how you have come to conclude that those exercises are effective. The Guidance sets a high bar for companies that have focused successfully on policies, controls,

and auditing, but have made less progress in terms of monitoring and developing compliance Key Performance Indicators to measure effectiveness.

In order to provide a meaningful assessment of the effectiveness of a compliance program, companies must ensure that they have access to quality data to evaluate. In the context of measuring the effectiveness of training, for example, this means more than tracking attendance; it might take the form of quizzes at the end of the training, surveys of attendees, or interviews with employees following the training. For companies with more resources, data analytics may provide a useful window into the effectiveness of many aspects of a compliance program. However, programs that are hastily designed and implemented will not allow companies to conduct a meaningful evaluation of their effectiveness. Instead, compliance professionals will be faced with a familiar problem of “garbage in, garbage out.”

F. Emphasis on Evolution of Compliance Program

Finally, the Guidance re-emphasizes the importance of compliance programs evolving to meet the industry-specific risks presented by a company’s business profile and practices. Indeed, the first set of questions a company can expect to face in a potential enforcement action will focus on whether the misconduct at issue can be attributed to programmatic or systemic failures by the company and its management. Companies must also be prepared to speak to how often they have “updated [their] risk assessments and reviewed [their] compliance policies, procedures, and practices?” and what steps they have “taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries.”

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