

US Department of Justice Fraud Section Guidance Highlights Factors Considered in Evaluating Corporate Compliance Programs

美司法部欺诈司强调评估公司合规计划时 所考虑的因素

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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.

美国司法部（“司法部”）刑事司欺诈处（“欺诈处”）上个月低调地发布了一份题为《[公司合规计划评估](#)》的新指引（“指引”）。这份长达八页的指引指出：“欺诈处不使用任何严格的公式来评估公司合规计划的有效性”，但同时也列出了司法部在刑事调查背景下“评估公司合规计划时往往看重的”11个“样本话题和问题”。

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.

虽然这些话题和问题对于资深合规专业人员而言可能很熟悉，但指引还是对现有的合规指引进行了有用的总结（如司法部/证交会《FCPA 资源指南》的“有效合规计划的标志”、《美国量刑指南》第 8B 2.1 条以及《美国检察官手册》中的对企业组织提起联邦诉讼的原则）。更重要的是，在若干领域，指引达到了以前司法部公开指引中未曾见到的细致入微程度。指引还强调司法部对

以下方面比较重视：实施合规政策和程序，持续监控公司业务运营中的重点合规风险领域，以及衡量公司合规计划的持续有效性。

A. Compliance Counsel's Influence Is Felt 合规法律顾问的影响力已彰显

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?

自其于 2015 年 11 月上任以来，司法部合规法律顾问陈永惠（Hui Chen）已经进行了稳健的基准测试，因为她有机会听取若干公司关于其合规计划的演示。指引对此类演示中公司可预期的问题进行了详细预演。这些问题强调了做好准备进行下列说明的重要性：如何践行合规计划、政策和程序如何传达到全公司，以及公司如何衡量其计划的有效性。陈女士为人所知的工作风格是提出难以回答的问题，以及敦促公司就其计划如何发挥作用以及明显地影响公司的实际业务活动提供详尽的经验性实例。每家公司都应当对以下的“根本原因”问题做好准备：你是否找到了问题的根本原因，以及你采取了什么措施防止其再次发生？

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.

尽管经历这一过程的公司须做好其合规计划接受严格审查的准备，但根据我们的经验，多数经历过这一过程的公司表现会比较好。在这个意义上，我们认为公开发布的指引旨在将司法部目前关于合规计划的想法“民主化”，而不局限于已对陈女士进行演示的公司和律师。仅仅为了这个原因，指引也是必须了解的。

B. "Root Cause" and "Missed Opportunities" Analysis “根本原因”和“错失机会”分析

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.

指引的第一个话题“底层行为的分析和补救”问道“公司对所述不当行为的根本原因的分析是什么？”和“有没有事先发现所述不当行为的机会？”对于发现贿赂问题后的合规计划审核而言，“根本原因”和“错失机会”分析（即以下过程：确定导致不良结果的事件的原因，确定是否有机会预防该事件的发生，以及制订纠正措施）的基本理念是十分重要的。但是，根据我们的经验，“根本原因分析”和“错失机会分析”并非已收入反腐败合规专业人士日常词典的术语。

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.

对于指引使用的这些术语，我们认为不能光看语义。司法部希望公司在进行其根本原因和错失机会分析时听取合规和法务部门以外的利益相关方的意见，并准备好提供关于这些分析的过程和结论的报告或演示（或作出相关的详细说明）。此外，律师可能不得不纠结于这些分析是否会受律师客户保密特权或工作成果原则保护的问题。

C. Fleshing Out the Hallmarks of an Effective Compliance Program

充实有效的合规计划的标志

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:

在几种情形下，相比《FCPA 资源指南》有效合规计划标志中所述的司法部预期，指引中包含的样本问题更加深入。例如：

- 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...”
基于《资源指南》提及“中间语调”的重要性，指引提出公司可用于评估“用以证明其对合规的投入程度的具体行动”的问题。
- 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?”
尽管《资源指南》明确指出，负责公司合规计划的高管应当可以直接接触该组织的董事会或其他治理机构，但指引提出了以下问题：“董事会和/或外部审计师是否[已]与合规和控制部门进行了内部或私下的会议”？
- 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?”

通过关注“因合规和道德考量而采取的行动（如拒绝给予升职或奖励）的具体例子”，以及公司是否“曾就所述不当行为解聘任何员工或对其进行纪律处分（减少或取消奖金、发出警告信等）？”指引引申了激励合规行为的想法。

- 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?” 对于《资源指南》关于纪律处分的标志，指引也通过关注公司的人力资源流程深入一步，并提出以下问题：“谁参与了就所述不当行为作出纪律处分决定？”

- 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)?”

指引指出，司法部重视就合规问题进行沟通的重要性，并提出以下问题：“当一名员工因未遵守公司的政策、流程和控制措施而被解雇时，一般会进行哪些沟通（如，对导致纪律处分的不当行为类型的匿名描述）？”

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

在此方面，指引对资源指南中较为抽象的声明作出了令人欢迎的澄清。

D. Empowering Compliance Professionals Seeking Resources and a Seat at the Table 帮助合规专业人士寻找资源和一席之地

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?”

司法部一直在强调，为了保持有效性，一家公司的合规部门必须得到该公司最高管理层的支持。缺乏力度和资源的合规计划不会有效，也不会通过司法部的审核。为此，指引可向合规人员提供帮助推动合规日程的更多客观来源。指引明确指出，“如果出现合规和相关控制部门的资源要求被拒绝的情况”，公司必须准备好说明“这些决定是如何作出的”。同样，如果公司在作出重大业务决定时合规部门难以发出声音，公司必须准备好说明合规是否“在公司的战略和运营决策中起到[作用]”，以及为何“合规部门[未]参与兼并、收购和整合过程”。

E. Focus on Hard Data and Measuring Effectiveness

侧重硬数据和衡量有效性

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:

指引强调了评估合规计划在实践中是否可行的必要性。尽管《资源指南》和其他资料中强调了有效执行合规政策和程序的必要性，但指引仍然在若干重要方面延伸了该理念。实际上，指引几乎全文都围绕着以下问题：如何在公司的业务运营中有效地执行合规政策和程序，以及如何以可基于实际衡量因素证明的方式监控和检验这些政策和程序。指引中列出的十一个话题中至少有七个包含关于公司如何评估、衡量和分析其在特定风险领域的合规政策和程序有效性的问题。例如：

- “How has the company assessed whether the[] policies and procedures have been effectively implemented?”
“公司如何评估[]政策和程序是否得到了有效的执行？”
- “How has the company evaluated the usefulness of these policies and procedures?”
“公司如何评估这些政策和程序的有用性？”
- “How has the company measured the effectiveness of the training?”
“公司如何衡量培训的有效性？”
- “What methodology has the company used to identify, analyze, and address the particular risks it faced?”
“公司发现、分析和解决其面临的特定风险采取了什么方法？”
- “What information or metrics has the company collected and used to help detect the type of misconduct in question?”
“为帮助发现所述类型的不当行为公司收集并使用了哪些信息或参数？”
- “How has the company collected, analyzed, and used information from its reporting mechanisms?”
“公司如何收集、分析和使用来自其报告机制的信息？”
- “How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?”
“公司如何评估其员工是否知道何时寻求建议以及是否愿意这么做？”

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.

这种对于从多个角度衡量和检验合规计划有效性的持续强调明确了在设计和执行阶段以及在基于风险评估或审计结论对计划作出变更时进行周密安排的必要性。在这方面，司法部提出的问题不仅仅是你是否为检验你的合规计划而进行了风险评估或审计，而是你是怎么做的以及你是怎么得出这些计划有效的结论的。对于那些虽然重视政策、控制措施和审计但在监控和制订用以衡量计划有效性的合规关键绩效指标方面无甚建树的公司，指引设置了很高的门槛。

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.”

为了对合规计划的有效性进行有意义的评估，公司须确保其能够利用优质数据进行评估。例如，在衡量培训有效性的情况下，这不仅仅意味着追踪参与情况；可能采取的形式有培训结束时的小测验、对参加培训者的调查或培训后对员工的访谈。对于有更多资源的公司而言，数据分析可能对于分析合规计划诸多方面的有效性很有帮助。但是，仓促设计和执行的计划无助于公司对其有效性进行有意义的评估。相反，合规专业人士将会面临“垃圾进垃圾出”的熟悉问题。

F. Emphasis on Evolution of Compliance Program

对合规计划进化的强调

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.”

最后，指引再次强调了发展合规计划以应对公司业务特点和实践所呈现的特定行业风险的重要性。实际上，公司在潜在执法行动中可能面临的第一批问题将围绕所述不当行为是否可归因于公司及其管理层的程序性或系统性的缺陷。公司还须准备好说明他们“更新[其]风险评估和回顾[其]合规政策、程序和实践”的频率，以及他们“采取了哪些措施以确定这些政策/程序/实践对于特定业务部门/子公司是否有效”。

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