

DOJ's Updated Guidance for Evaluation of Corporate Compliance Programs

美国司法部更新企业合规体系评估指引

May 10, 2019

2019年5月10日

Anti-corruption/FCPA
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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”; Covington’s bilingual translation [here](#)), 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.

2019年4月30日，美国司法部（下称“司法部”）刑事司发布了更新版本的《[企业合规体系评估指引](#)》（下称“《指引》”），旨在司法部调查背景下，为检察官评估企业合规体系提供参考。新《指引》相比刑事司于2017年发布的同名文件（下称“2017年指引”）更加全面和详细，新《指引》适用于刑事司所开展的涉及商业组织的所有调查和执法行动。

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.

《指引》从司法部及其他各种来源收集和提炼了原则和最佳实践，是目前关于司法部对企业合规体系预期的最详细阐述。司法部围绕合规体系制订、执行和操作有效性这三个关键问题，优化《指引》结构，使其更易于理解，也为希望根据司法部预期和最佳实践评估其合规体系的公司提供了易于调整的框架。《指引》应当作为基础资源，为致力于执行和建立有效合规体系的公司服务。

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.

尽管《指引》的许多方面将为合规专业人士所熟悉，但《指引》也揭示了司法部可能提出的新问题，以及略微优化了在以往《指引》文件中提出的要点。

Summary of Guidance

《指引》概述

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:

司法部编制《指引》时，阐述了检察官在评估企业合规体系有效性时应当提出的三个“基本问题”（来自《司法手册》²）：

1. “Is the corporation’s compliance program well designed?”
“企业是否妥善制订其合规体系？”
2. “Is the program being applied earnestly and in good faith?”
“企业是否认真善意地贯彻落实其合规体系？”
3. “Does the corporation’s compliance program work in practice?”
“在实践中，企业的合规体系是否发生作用？”

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 Compliance Programs” described in *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (“FCPA Resource Guide”).³ 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.”

在这三个问题的基础上，《指引》论述了十二个主题（其中大多是2017年指引中所述十一个主题的延续），以及《美国反海外腐败法信息指引》（下称“《FCPA信息指引》”）中所述的十项“有效合规体系的特点”。⁴如同2017年指引一样，《指引》继续强调刑事司“未规定采用任何的严格公式对企业合规体系的有效性进行评估”。

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

² 美国司法部，《司法手册》§ 9-28.000 (2018)。

³ 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. 2, 2015).

⁴ 美国司法部和美国证券交易委员会，《美国反海外腐败法信息指引》（2015年11月2日）

Is the Corporation's Compliance Program Well Designed? 企业是否妥善制订其合规体系？
<ul style="list-style-type: none">A. Risk Assessment 风险评估B. Policies and Procedures 政策和程序C. Training and Communication 培训与沟通D. Confidential Reporting Structure and Investigation Process 保密性质的报告结构和调查程序E. Third Party Management 管理第三方F. Mergers and Acquisitions 兼并与收购（并购）
Is the Corporation's Compliance Program Being Implemented Effectively? 是否有效实施企业合规体系？
<ul style="list-style-type: none">A. Commitment by Senior and Middle Management 高中级管理层的承诺B. Autonomy and Resources 自主权和资源C. Incentives and Disciplinary Measures 奖惩措施
Does the Corporation's Compliance Program Work in Practice? 企业的合规体系在实践中是否发生作用？
<ul style="list-style-type: none">A. Continuous Improvement, Periodic Testing, and Review 持续改进、定期测试和审查B. Investigation of Misconduct 不当行为的调查C. Analysis and Remediation of Any Underlying Misconduct 任何相关不当行为的分析和补救

Key Takeaways

要点

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

《指引》应当作为任何公司评估其合规体系的基础资源

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

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

自 2012 年发布以来,《FCPA 信息指引》(尤其是其“有效合规体系的特点”部分)为企业制订和/或评估其反腐败合规体系提供了指导,并集中阐述了美国执法机构关于有效反腐败合规体系关键要素的观点。司法部的最新《指引》对这些要素进行了更详细的阐述。虽然《指引》旨在协助检察官做出指控及和解的决定,企业仍应将《指引》作为其评估和衡量自身合规体系的前瞻性指导文件。通过围绕三大基石,即(1)制订(2)执行及(3)实际有效性,《指引》提供了直观和易用的评估框架,该框架应当能帮助企业更好地组织合规体系评估和提升活动,并向商业利益相关方解释这些步骤。

2. The Guidance Illustrates How Anti-Corruption Compliance Measures Have Become the Foundation for Corporate Compliance Programs **《指引》说明了反腐败合规措施为何成为企业合规体系的基础**

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.

《指引》的适用范围从欺诈司扩大到整个刑事司,表明反腐败合规的基本原则已被更广泛地认为是企业合规体系的重要基础。在全球反腐败执法力度日益增强的今天,企业合规体系是否成熟很大程度上是通过对贿赂和腐败风险的关注得以实现的。但一个有效反腐败合规体系的许多方面,如风险评估、第三方尽职调查及保密报告,则具有更广泛的适用性。随着《指引》的出台,企业过去用于衡量其反腐败合规体系力度的一般原则现在适用于更广泛的合规风险领域。《指引》还表明,围绕监管领域(反腐败、贸易管制、竞争等)的封闭体系已不再被采纳,取而代之的是专注于可能影响多个监管领域的重要风险领域(如第三方风险)的经整合的合规体系。

3. The Guidance Provides Several New Points of Emphasis **《指引》提出了诸多新要点**

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:

尽管《指引》中列出的许多具体问题均来自 2017 年指引,但司法部也增加了数个企业在评估和提升其合规体系时值得考虑的问题。例如:

- “How does the company determine which complaints or red flags merit further investigation?”
“公司如何确定对哪些投诉或危险信号展开进一步调查？”
- “How does the company determine who should conduct an investigation, and who makes that determination?”
“公司如何决定由谁负责开展调查，及由谁做出最终决定？”
“Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?”
“公司是否具备相应程序监督调查结果和确保问责性，以便就任何结论或建议进行回应？”
- “Have supervisory employees received different or supplemental training?”
“是否向主管级员工提供不同或者补充的培训？”
- “Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training?”
“公司是否进行了缺口分析以确定在其政策、控制或培训中是否未充分涉及特定的风险领域？”
- “If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees’ access to policies and procedures?”
“如果公司有外国子公司，外国员工接触该等政策和流程时是否存在语言或其他障碍？”
- “Have there been any updates to policies and procedures in light of lessons learned?”
“是否基于汲取的经验教训对政策和程序已进行任何更新？”
- “Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses?”
“公司是否定期分析报告或调查结果以研究不当行为模式，或者分析其他危险信号以研究合规漏洞？”
- “How often and how does the company measure its culture of compliance?”
“公司如何评估其合规文化以及评估的频率如何？”

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.

虽然这些问题基本上没有什么新意，但表明司法部重视对合规体系在实践中所发挥作用的评估，以及将“汲取的经验教训”加以整合，以改良合规体系。

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

公司应当寻找机会重新分配低风险领域的合规资源

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.”

《指引》最引人注目的一项新增内容是风险为本的资源分配部分。虽然司法部长长期以来明确表示其希望公司制订适应自身具体风险状况的合规体系，但是《指引》现表示“在一套基于风险为本的合规体系对高风险交易投入了适当关注和资源的情况下，即使该体系未能阻止发生在低风险领域的违规行为，检察官仍可将该风险为本体系的质量和有效性作为可以从宽的情节”。

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.”⁵ 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.

《指引》建议公司在“更加适中和常规的款待与招待活动”等领域可以投入更少的资源，此项规定与以往的指引稍有不同。例如，《FCPA 信息指引》对于“[某些国际性公司]为审查和批准涉及外国官员和私人客户并具有明确的金额限制和年度限额的常规礼物、旅游和招待所采纳的基于网络（web）的审批流程”表示赞许。⁶ 而且，近年来，证交会已针对礼物、招待、旅游和款待活动开展多次执法行动。因此，公司应当注意，虽然公司向该等领域投入的资源水平或许已遵循以风险为本，但是公司仍需继续关注这些领域。

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

《指引》强调持续测试和审查合规体系的重要性

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.

正如我们在[关于 2017 年指引的评述](#)一文中所指出的，司法部反复强调公司有必要评估其合规体系是否实际发生作用。《指引》再次强调了这个问题，要求检察官考虑公司“是否已付出有意义的努力来审查其合规体系并确保其有效性”。相关指标包括公司是否已经“通过调查员工来衡量其合规文化及评估其控制措施的强弱程度”以及“开展定期审计以确保其正常发挥作用”。《指引》因此给出了一个新的理由让公司审视其合规体系在实践中是否正常发挥作用，以及让公司研

⁵ *Id.* at 58.

⁶ 同上。见第 58 页。

究如何改善其合规体系。《指引》的作用之一还在于能进一步推动公司评估其在收集和分析数据方面的能力，例如使用数据分析方法，以衡量其合规体系在实践中如何发挥作用。

Areas to Watch 应当关注的领域

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

司法部在 FCPA 领域以外的执法行动和调查中将如何应用《指引》？

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.

随着司法部在刑事司执行《指引》，我们将观察司法部如何评估反贿赂和反腐败以外领域的企业合规体系。我们还将观察司法部是全面评估企业合规体系，还是仅关注发生不当行为的领域。

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, 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.

当然，公司还需要继续考虑其他执法部门发布的合规体系指引，例如财政部新发布的[关于制裁合规体系的框架](#)。虽然这将增加合规体系制订、执行和测试的复杂程度，但是，若基于多种指引规定而制订一套综合的合规体系，则能够帮助公司向司法部证明其已执行一套妥善制订且已在实践中发挥作用的合规体系。

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

证交会是否将赞同采用《指引》中的方法实施风险为本的资源分配？

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.

司法部检察官应评估公司是否投入不成比例的时间来处理低风险领域而非高风险领域的问题。我们将观察证交会是否会采取类似方法来评估其监管的公司是否执行充分的内部会计控制制度以避免违反 FCPA 会计规定。如果证交会不采取类似方法，公司可能仍会觉得有必要在诸如适中和常规的款待与招待活动等低风险领域投入大量精力和资源。

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

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