

DOJ Again Updates Guidance for Evaluation of Corporate Compliance Programs

美国司法部再次更新 企业合规体系评估指引

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On June 1, 2020, the U.S. Department of Justice (“DOJ” or the “Department”) Criminal Division released an updated version of its [*Evaluation of Corporate Compliance Programs*](#) document (the “Guidance”), which serves as a reference for prosecutors in assessing corporate compliance programs in the context of DOJ investigations. The Department last revised the Guidance in April 2019, which we covered in a previous [alert](#). As with the prior iteration of the Guidance, the June 2020 revision continues to apply to all Criminal Division investigations and enforcement actions involving business organizations.

2020年6月1日，美国司法部（下称“司法部”）刑事司发布了更新版的[企业合规体系评估](#)文件（下称“指引”），该指引是供检察官在司法部调查中评估企业合规体系时参考的文件。司法部最近一次修订指引是在2019年4月，我们在之前一篇[客户期刊](#)中讨论过该版指引。如同指引之前重申的那样，2020年6月的版本仍然适用于涉及企业组织的所有刑事司调查和执法行动。

The June 2020 revisions to the Guidance are incremental in nature, but they do bring into sharper focus DOJ’s expectations with regard to what constitutes an effective compliance program and the increasingly exacting standards under which compliance programs will be evaluated in the context of a DOJ investigation. The revisions may also suggest that DOJ prosecutors will even more rigorously probe current and historical compliance program design and resources during the course of an investigation. While the updated Guidance does not reflect a sea change, it does continue the Department’s trend of expecting companies to be in a position to answer detailed questions underlying the design, resourcing, and implementation of their compliance programs, and to be able to demonstrate effectiveness through objective criteria backed by hard data. In the time of COVID-19, the Department is sending a clear signal that companies must continue to devote appropriate resources to the continuous evaluation and improvement of their compliance programs.

2020 年 6 月的指引修订起到增补的作用，但的确进一步明确了司法部对于有效合规体系构成要素的预期以及在司法部调查中评估合规体系的更加严格的标准。这些修订还可能表明，司法部检察官将在调查过程中更加严格地调查当前及以往的合规体系设计和资源。虽然更新版指引并无大的变动，但也延续了司法部一贯的预期，即希望企业能够回答与其合规体系的设计、资源配备和实施有关的详细问题，以及能够通过以可靠数据支持的客观标准证明合规体系的有效性。在新型冠状病毒肺炎疫情（下称“新冠疫情”）期间，司法部正在发出一个明确的信号：企业必须继续对其合规体系的评估和改善投入适当的资源。

Summary of Key Revisions and Key Takeaways

主要修订和要点概述

1. Compliance Program Resourcing and Empowerment is Now Identified as a Fundamental Question

合规体系的资源配备和授权现在被认定为一个基本问题

Those familiar with the April 2019 iteration of the Guidance will recall that it was organized around three “fundamental questions” from the Justice Manual that prosecutors should ask when evaluating the effectiveness of corporate compliance programs.¹ While the three “fundamental questions” from the Justice Manual remain unchanged,² the Department has now explicitly incorporated considerations of compliance program resourcing and empowerment by introducing those concepts into one of the “fundamental questions.”

熟悉 2019 年 4 月版指引重申内容的读者会记得，其是围绕《司法手册》中检察官在评估企业合规体系时应当提出的三个“基本问题”组成的。³虽然《司法手册》中的三个“基本问题”没有变化⁴，但司法部现在明确地涵盖了合规体系资源配备和授权，并通过将这些概念引入“基本问题”之一。

In particular, to answer the question “[i]s the program being applied earnestly and in good faith?,” DOJ will now ask whether “the program [is] adequately resourced and empowered to function effectively,” instead of asking whether the “program [is] being implemented effectively.” While a subtle change from a drafting standpoint, this revision signals an increased focus on whether a company has devoted adequate resources to its program and sufficiently empowered its compliance professionals. More to the point, by elevating the question of compliance resourcing and empowerment, DOJ may be sending the message to companies that they need to invest more into their compliance programs. This message may be particularly helpful to

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

² These questions are: (1) “Is the corporation’s compliance program well designed?”; (2) “Is the program being applied earnestly and in good faith?”; and (3) “Does the corporation’s compliance program work’ in practice?”

³ 美国司法部，《司法手册》§ 9-28.000 (2018)

⁴ 这三个问题是：(1) “企业是否妥善制订其合规体系？”；(2) “企业是否认真善意地贯彻落实其合规体系？”；(3) 在实践中，“企业的合规体系是否发生作用”？

compliance professionals facing budgetary pressures and seeking to make the business case for program investments during the COVID-19 pandemic. While DOJ's focus on the resourcing and stature of compliance programs is nothing new, we expect that this change, as well as others described below, may result in prosecutors probing these areas more rigorously during the course of an investigation, and companies may need to be even more prepared to answer difficult questions about compliance program budgets, headcount, and autonomy.

具体而言，为了回答“是否认真善意地贯彻落实其合规体系”，如今司法部将询问：“该体系是否有充分的资源配备和授权以便有效地发挥作用，”而不是问：“该体系是否得到了有效的执行”。虽然从起草的角度看只是细微的变化，但该项修订表明（司法部）对于企业是否对其体系投入了充分的资源以及对其合规专业人员给予了充分的授权有了更多的关注。更为重要的是，通过提高合规资源配备和授权问题的重要性，司法部可能是在向企业传达这样的讯息：企业需要对其合规体系投入更多。对于那些在新冠疫情期间面临预算压力并努力为合规体系投资寻找业务理由的合规专业人员而言，该讯息可能尤其有帮助。虽然司法部对合规体系资源配备和重要程度的关注不是什么新鲜事，我们预计该变化以及下文提到的其他变化可能导致检察官在调查过程中更加严格地审查这些方面，企业可能需要更好地做好准备，以回答关于合规体系预算、人员配备和自主权的棘手问题。

2. The Revisions Helpfully Emphasize a Risk-Based, Company-Specific Analysis 修订有助于强调基于风险和企业具体情况的分析。

Compliance professionals are well familiar with the principles that compliance programs must be risk-based and tailored to the particular circumstances of any given company. Regulators have long recognized these concepts as well, and the revised Guidance reinforces to prosecutors that each company's compliance program must be evaluated on a case-by-case basis.

合规专业人员非常熟悉以下原则：合规体系必须基于风险并针对任何给定公司的特定情况量身定制。监管机构也早已认识到这些概念，并且修订版指引对检察官强调：必须对每个公司的合规体系进行逐案评估。

In this vein, the revised Guidance commits DOJ to make a “reasonable, individualized” determination of the effectiveness of a corporate compliance program on a case-by-case basis – with the concept of reasonableness being a welcome and new addition to the Guidance. Prosecutors are instructed in the Guidance, in another addition, to consider “various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program.”

有鉴于此，修订版指引要求司法部根据具体情况对企业合规体系的有效性做出“合理、个性化”的认定——合理性的概念是对指引的一项受到好评的新增内容。作为另一项新增内容，指引中还指示检察官考虑“各种因素，包括但不限于公司的规模、行业、地理足迹、监管环境及其他可能影响公司合规体系的公司内部和外部运营因素。”

The revised Guidance also newly instructs prosecutors to consider the “circumstances of the company” in evaluating a company's compliance program within the framework of the three “fundamental questions” and the balance of the Guidance. Similar to its approach to evaluating foreign data privacy issues that may emerge during the course of an investigation, in a footnote,

the revised Guidance adds that in evaluating the “circumstances of the company,” prosecutors should consider whether “certain aspects of a compliance program may be impacted by foreign law” and urges prosecutors to question a company’s basis for its conclusions about foreign law and how allowances made for foreign law were addressed while still maintaining the integrity and effectiveness of the company’s compliance program.

修订版指引还首次指示检察官在评估一家公司的合规体系时在指引的三个“基本问题”和其余部分的框架内考虑“公司的情况”。与评估调查过程中可能出现的外国数据隐私问题的方法类似，修订版指引在脚注中补充说，在评估“公司的情况”时，检察官应考虑“合规体系的某些方面可能会受到外国法律的影响”，并敦促检察官质疑公司关于外国法律结论的依据，以及如何在保持公司合规体系完整性和有效性的同时处理对外国法律的考虑。

3. The Guidance Includes Enhanced Expectations for Risk (and Compliance Program) Assessments

指引包括对风险（以及合规体系）评估的更高预期

Several of the key revisions to the Guidance concern risk assessments, one of the topics that prosecutors will evaluate under the rubric of the three “fundamental questions.”

指引的几处关键修订涉及风险评估，这是检察官将在三个“基本问题”框架下评估的主题之一。

First, the Department instructed its prosecutors to “endeavor to understand why the company has chosen to set up the compliance program the way that it has, and why and how the company’s compliance program has evolved over time.” Second, the updated Guidance instructs prosecutors to consider whether periodic risk assessments are limited to a “snapshot” in time or based upon “continuous access to operational data and information across functions,” and whether periodic risk assessments have led to “updates in policies, procedures, and controls.” Together, these additions may result in further probing during the course of an investigation of compliance professionals’ thinking about the design and implementation of a company’s compliance program and a more detailed review of historic risk and compliance program assessments, including precisely how a company responded to items identified during such assessments. And the reference to “continuous access to operational data and information across functions” signals an increased focus on leveraging technology and data in compliance programs, a theme that comes through several times in the updated Guidance.

首先，司法部指示检察官“努力理解为什么公司选择以其现有方式建立合规体系，以及公司合规体系为何以及如何随着时间的推移发展。”其次，更新版指引指示检察官考虑定期风险评估是仅限于时间“快照”，还是基于“对各职能部门运营数据和信息的持续访问”，以及定期风险评估是否导致了“政策、程序和控制措施的更新”。合在一起，这些新增内容可能导致的结果是，在对考虑公司合规体系设计和实施的合规专业人员进行调查的过程中，检察官会进行更严格的检查，并对过去的风险和合规体系评估进行更详尽的审查，包括公司如何应对在此类评估期间发现的问题。提及“对各职能部门运营数据和信息的持续访问”表明，司法部越来越重视在合规体系中利用技术和数据，这一主题在更新的指引中多次出现。

In a third addition to the Guidance’s evaluation criteria for risk assessments, DOJ instructed prosecutors to consider whether companies have a process for incorporating into periodic risk assessments “lessons learned” from a company’s own prior issues or from issues faced by companies operating in the same industry or geography. While not a major shift in best

practices, companies should ensure that risk and compliance program assessment exercises take stock of both the company's individualized risk profile (e.g., learnings from past investigations) and lessons that can be learned from peers.

在指引对风险评估进行评估的标准的第三项补充中，司法部指示检察官考虑公司是否有将从公司本身的先前问题或在同一行业或地区中运营的公司所面临的问题中汲取的“经验教训”纳入定期风险评估的流程。尽管不是对最佳实践的重大转变，但公司应确保风险和合规体系评估活动能够评估公司的个性化风险预测（例如，从过去的调查中学到的知识）以及可以从同行那里汲取的经验教训。

In a final revision in the risk assessment section of the Guidance, DOJ wrote that prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate resources to high-risk transactions, even if it fails to prevent an infraction. In the previous version of the Guidance, the latter clause was limited to failure to prevent an infraction “in a low-risk area,” which DOJ struck from the current version of the Guidance. This suggests that an effective and appropriately resourced, risk-based compliance program may receive credit from DOJ prosecutors, even when it fails to prevent misconduct in a high-risk area.

在对指引风险评估部分的最后一条修订中，司法部写道，检察官可以对于高风险交易投入适当资源的基于风险的合规体系的质量和有效性授予从宽奖励，即使其未能防止违规行为。在先前版本的指引中，后一条款仅限于未能防止“低风险地区”的违规行为，司法部将其从当前版本的指引中删除。这表明，即使未能在高风险地区防止不当行为，经过有效且适当地资源配置，基于风险的合规体系也可能会获得司法部检察官的从宽奖励。

Setting aside the individual revisions to the Guidance dealing with risk assessments, the message is clear: the Department expects that companies will undertake meaningful, periodic risk and compliance program assessments and take concrete and demonstrable steps to enhance compliance programs based on the information learned. Beyond that, however, the question of whether risk assessments are limited to a “snapshot” in time may signal heightened expectations for dynamic and closer-to-real-time assessment of risks based on continuous review of data regarding company operations (e.g., spikes in spending in high-risk areas or increased numbers of third parties).

姑且不谈指引中有关风险评估的各项修订，有一点很明确：司法部期望企业将进行有意义的、定期的风险和合规体系评估，并根据所获得的信息采取具体且可证明的步骤来增强合规体系。但是，除此之外，风险评估是否仅限于时间“快照”这一问题可能表明，司法部对基于公司运营相关数据（例如高风险地区支出的猛增或第三方数量的增加）持续审查的动态和更接近实时的风险评估寄予更高的期望。

4. DOJ Has an Increased Focus on Obtaining, Tracking, and Acting on Compliance-Relevant Data

司法部更加关注取得、追踪合规相关数据和就其采取行动

Several additions to the Guidance suggest that the Department expects companies to focus more on collecting and monitoring data. The enhanced emphasis on data includes assessing how policies, procedures, training, and reporting mechanisms are being utilized by employees and what steps the company has taken to build on lessons that can be drawn from such

information. For instance, the Guidance now instructs prosecutors to evaluate whether a company tracks “access to various policies and procedures to understand what policies are attracting more attention from relevant employees.” Similarly, the Guidance asks whether a company has “evaluated the extent to which [] training has an impact on employee behavior or operations.” Finally, with respect to reporting mechanisms, the revised Guidance asks whether a company “take[s] measures to test whether employees are aware of the hotline and feel comfortable using it” and whether a company “periodically test[s] the effectiveness of the hotline.” Thus, instead of merely asking how companies evaluate the effectiveness of their policies, procedures, training, and reporting mechanisms, the Guidance more explicitly signals an expectation that companies will more proactively leverage objective data to *prove* the effectiveness of these aspects of their compliance programs.

指引的几项补充表明，司法部要求企业将更多精力放在收集和监控数据上。对数据的进一步强调包括评估员工如何利用政策、程序、培训和报告机制，以及公司采取了哪些步骤来借鉴可从此类信息中汲取的教训。例如，指引现在指示检察官评估企业是否追踪“对各项政策和程序的访问，以了解哪些政策吸引了相关员工更多的关注”。同样，指引询问，企业是否“已评估[]培训对员工行为或运营的影响程度”。最后，关于报告机制，修订版指引询问，企业是否“采取措施来检验员工是否了解热线电话并愿意使用热线电话”，以及企业是否“定期测试热线电话的有效性”。因此，指引不仅询问企业如何评估其政策、程序、培训和报告机制的有效性，还更明确地表明了以下期望：企业将更积极地利用客观数据来证明其合规体系这些方面的有效性。

The focus on data also extends to a company’s ability to use data to conduct monitoring and other testing of the compliance program. In the section of the Guidance expanding upon the question of compliance program resources and empowerment, the Department added an evaluation criteria focused on “Data Resources and Access,” asking whether compliance and control personnel have “sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls, and transactions.” Another addition to the Guidance asks whether “any impediments exist that limit access to relevant sources of data and, if so, what [] the company [is] doing to address the impediments.” Finally, as noted above, the revised section on risk assessments also focuses on continuous access to operational data.

对数据的关注还扩展到企业使用数据对合规体系进行监控和其他检验的能力。在指引所扩展的关于合规体系资源和授权的询问中，司法部添加了针对“数据资源和访问”的评估标准，询问合规和控制人员是否具有“对相关数据源进行直接或间接访问的足够权限以便及时有效地监控和/或检验政策、控制措施和交易。”指引的另一项补充内容询问，“是否存在任何限制访问相关数据源的障碍，如果存在，则公司正在采取什么措施来解决这些障碍”。最后，如上所述，修订后的风险评估部分还看重对运营数据的持续访问权限。

Taken together, these additions suggest an increased focus on leveraging data and analytics to implement – and demonstrate – an effective compliance program. We will be watching to see how DOJ will apply its increased emphasis on data and analytics to companies with a lower risk profile, and based on size, industry, and the other company-specific factors identified in the Guidance and above.

综上所述，这些新增内容表明，司法部越来越关注利用数据和分析来实施（并证明）一个有效的合规体系。我们会继续关注，司法部将如何根据规模、行业以及指引及以上内容中确定的其他企业特定因素，将其对数据和分析的日益重视应用于那些风险较低的公司。

5. The Guidance Emphasizes that Third-Party Management Should Be a Continuous Process

指引强调第三方管理应当是一个连续的过程

The revisions to the Guidance add a subtle, yet important, question regarding a company's approach to third-party risk management by asking whether a company "engage[s] in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process." This suggests that third-party compliance measures can neither be a one-time exercise nor limited to integrity due diligence; rather, companies must continue to evaluate compliance risk with respect to third-party business partners throughout the relationship and pay attention to information that arises during the course of the relationship.

通过询问企业是否“在关系的整个生命周期中，或者主要是在首次聘用第三方的过程中对第三方进行风险管理”，指引的修订添加了一个有关企业第三方风险管理方法的微妙但重要的问题。这表明第三方合规措施既不能一次性执行，也不能仅限于诚信尽职调查；相反，公司必须在整个关系过程中持续评估与第三方业务伙伴有关的合规风险，并注意在关系过程中出现的信息。

If you have any questions concerning the material discussed in this client alert, please contact the following members of our White Collar Defense & Investigations and Anti-corruption/FCPA practices:

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