

U.S. Department of Justice 美国司法部

U.S. Department of Justice
美国司法部
Criminal Division
刑事司

Evaluation of Corporate Compliance
Programs
企业合规体系评估

Guidance Document
指引

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Introduction

简介

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9- 28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. See §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, the memorandum entitled “Selection of Monitors in Criminal Division Matters” issued by Assistant Attorney General Brian Benczkowski (hereafter, the “Benczkowski Memo”) instructs prosecutors to consider, at the time of the resolution, “whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems” and “whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future” to determine whether a monitor is appropriate.

《司法手册》之“联邦政府对商业组织提起公诉的原则”规定检察官在对企业展开调查、决定是否起诉、进行辩诉交易谈判或达成其他协定时所应予以考虑的具体因素（JM 9-28.300）。这些因素包括“企业合规体系在违法犯罪行为发生时及相关部门作出指控决定时的充分性与有效性”，以及企业就“实施充分有效的企业合规体系或改善现存合规体系”的整改措施所作出的努力（JM 9-28.300）（援引JM 9-28.800和JM 9- 28.1000）。此外，《美国量刑指南》建议，对单位犯罪应判处的适当罚金进行计算时，应考虑在不当行为发生时企业是否适当具备有效的合规体系（参见§§ 8B2.1、8C2.5(f)、和8C2.8(11)）。另外，助理司法部长Brian Benczkowski发布了一份名为《刑事司处理之案件中监察员的选择》的备忘录（以下称为“Benczkowski备忘录”）。该备忘录要求检察官在处理案件时，应考虑“该企业是否已对其企业合规体系和内部控制制度进行重大投入和改善”，以及“是否已针对合规体系与内部控制制度的整改措施进行测试以证明其能有效预防或发现未来可能出现的类似不当行为”，从而决定指定监察员是否适当。

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation’s compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

本文旨在协助检察官就违法犯罪行为发生时，及相关部门做出指控决定或处理案件时，对企业的合规体系是否有效以及其有效度作出知情决定，从而确定（1）处理案件或提起公诉的适当方式；（2）适当的罚金（若适用）；和（3）在任何企业刑事案件解决方案中所包含的合规义务（例如监察或汇报义务）。

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three “fundamental questions” a prosecutor should ask:

由于对企业合规体系进行评估须在刑事调查中针对具体情况进行分析，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。我们理解每家公司的风险状况和降低风险的解决方案应基于公司具体情况进行评估。由此，我们在每一个案件中都会依据公司的具体情况判断。但是，在针对具体情况作出决定时，我们可能会提出一些常见的问题。如《司法手册》所述，检察官应当明确以下三个“基本问题”：

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?” In other words, is the program being implemented effectively?
“企业是否认真善意地贯彻落实其合规体系”？换言之，企业的合规体系是否被有效实施？
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”？

See JM § 9-28.800.

参见JM § 9-28.800。

In answering each of these three “fundamental questions,” prosecutors may evaluate the company’s performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program. The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.ⁱ Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

在回答上述三个“基本问题”时，检察官可以就公司对刑事司在评估企业合规体系时通常认为相关的各项履行情况进行评估。以下所列主题事项及问题非问题清单或特定公式。基于具体案件情况，下列某些事项和问题可能并非完全相关，或者因案件涉及的具体情况，另外的事项和问题可能更为重要。ⁱⁱ 虽然我们将以下主题纳

入三个基本问题范围，但我们认为某些主题也可能同时被纳入其它类别。

I. Is the Corporation’s Compliance Program Well Designed?
企业是否妥善制订其合规体系？

The “critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct.” JM 9-28.800.

“评估任何合规体系的关键在于，该体系是否妥善制订从而最大化地有效预防和发现员工之不当行为，以及企业管理层是否执行该体系，或是否暗中鼓励或迫使员工实施不当行为。”（JM 9-28.800）。

Accordingly, prosecutors should examine “the comprehensiveness of the compliance program,” JM 9-28.800, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company’s operations and workforce.

因此，检察官应当检验“合规体系的综合性”（JM 9-28.800），确保合规体系不仅应当明确传达公司不容忍任何不当行为的信息，而且还应当具备确保将合规体系妥善融入公司运营与工作中、从适当的归责到培训计划至奖惩制度的政策和程序。

A. Risk Assessment
风险评估

The starting point for a prosecutor’s evaluation of whether a company has a well-designed compliance program is to understand the company’s business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.

检察官在评估一家公司是否拥有妥善制订之合规体系时，其出发点应从商业的角度理解公司业务，理解公司如何发现、评估和定义其风险状况，以及理解合规体系于何等程度就风险的范围提供适当审查和资源。

Prosecutors should consider whether the program is appropriately “designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business” and “complex regulatory environment[.]” JM 9-28.800.ⁱⁱⁱ For example, prosecutors should consider whether the company has analyzed and addressed the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations.

检察官应当考虑合规体系是否适当“制订以便发现具体公司业务范围”和“复杂监管环境”中“最可能发生的特定类型的不当行为”（JM 9-28.800）。^{iv} 例如，检察官

应当考虑公司是否已经分析并解决因其经营地、行业、市场竞争力、监管环境、潜在客户与商业伙伴、与外国政府的往来、向外国官员的付款、使用的第三方、礼物、差旅和招待费用、以及慈善捐赠和政治捐款等所带来的不确定风险。

Prosecutors should also consider “[t]he effectiveness of the company’s risk assessment and the manner in which the company’s compliance program has been tailored based on that risk assessment” and whether its criteria are “periodically updated.” See, e.g., JM 9-47-120(2)(c); U.S.S.G. § 8B2.1(c) (“the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct”).

检察官还应当考虑“公司风险评估的有效性和公司基于风险评估调整其合规体系所采用的方式”以及其标准是否“定期更新”（参见JM 9-47-120(2)(c)；U.S.S.G. § 8B2.1(c)等（“企业应当定期评估发生犯罪行为的风险，且应当采取适当措施制订、实施或修改[合规体系的]每一项要求，以减少发生犯罪行为的风险”））。

Prosecutors may 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. Prosecutors should therefore consider, as an indicator of risk-tailoring, “revisions to corporate compliance programs in light of lessons learned.” JM 9- 28.800.

如果一项基于风险分析的合规体系对高风险交易投入了适当的关注和资源，即使该体系未能阻止发生在低风险领域的不当行为，检察官仍可将该体系的质量和有效性作为可以从宽的情节。因此，检察官应当考虑“基于汲取的经验教训对企业合规体系作出的修正”（JM 9- 28.800）并将其视为应对风险的指示因素。

- **Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faces? What information or metrics has the company collected and used to help detect the type of misconduct in question? How have the information or metrics informed the company’s compliance program?
- **风险管理流程**——公司采取了何种方法识别、分析和解决其面临的特定风险？公司收集和使用哪些信息或参数以便其发现相关类型的不当行为？这些信息或参数在公司的合规体系中怎么得以体现？
- **Risk-Tailored Resource Allocation** – Does the company devote a disproportionate amount of time to policing low-risk areas instead of high-risk areas, such as questionable payments to third-party consultants, suspicious trading activity, or excessive discounts to resellers and distributors? Does the company give greater scrutiny, as warranted, to high-risk transactions (for instance, a large-dollar contract with a government agency in a high-risk country) than more modest and routine hospitality and entertainment?

针对风险的资源分配——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，例如向第三方顾问的可疑支付、可疑的贸易活动或者向分销商和经销商提供过度的折扣？相对更加适中和常规的款待与招待活动，公司是否就高风险交易（例如与高风险国家某一政府部门间的高

标的合同) 采取力度更大的检查保障?

- **Updates and Revisions** – Is the risk assessment current and subject to periodic review? Have there been any updates to policies and procedures in light of lessons learned? Do these updates account for risks discovered through misconduct or other problems with the compliance program?

更新与修正——风险评估是否为最新以及是否定期审阅? 是否基于汲取的经验教训对政策和程序已进行任何更新? 这些更新是否有利通过不当行为或合规体系的其他问题辨识风险。

B. Policies and Procedures **政策和程序**

Any well-designed compliance program entails policies and procedures that give both content and effect to ethical norms and that address and aim to reduce risks identified by the company as part of its risk assessment process. As a threshold matter, prosecutors should examine whether the company has a code of conduct that sets forth, among other things, the company's commitment to full compliance with relevant Federal laws that is accessible and applicable to all company employees. As a corollary, prosecutors should also assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations.

任何妥善制订的合规体系均应涉及兼具道德标准的内容和有效性的、且能够解决并致力于减少公司在风险评估过程识别的风险的政策和程序。首先, 检察官应当检查公司是否有相关的行为准则载明公司承诺充分执行公司全部员工可获悉任何适用公司全部员工的相关联邦法律。因此, 检察官还应当评估公司是否已制定相关政策 and 程序, 从而将合规文化融入其日常经营之中。

- **Design** – What is the company's process for designing and implementing new policies and procedures, and has that process changed over time? Who has been involved in the design of policies and procedures? Have business units been consulted prior to rolling them out?

制订——公司采用何等流程制订和执行新政策及程序, 以及该等流程是否随着时间发生变化? 哪些人员参与政策和程序的制订? 实施前是否咨询了业务单位/部门的意见?

- **Comprehensiveness** – What efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces, including changes to the legal and regulatory landscape?

综合性——对那些反映及处理其面临之风险事项(包括法律和监管环境的变化), 公司在公司政策和程序上做出哪些努力并监督执行?

- **Accessibility** – How has the company communicated its policies and procedures to all employees and relevant third parties? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees' access?

可及性——公司如何向全部员工及相关第三方传达其政策和流程? 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？

- **Responsibility for Operational Integration** – Who has been responsible for integrating policies and procedures? Have they been rolled out in a way that ensures employees’ understanding of the policies? In what specific ways are compliance policies and procedures reinforced through the company’s internal control systems?

运营整合职责——哪些人负责整合政策和流程？政策和流程是否以确保员工理解该政策的方式进行实施？通过公司内部控制制度加强合规政策和流程使用了哪些具体方式？

- **Gatekeepers** – What, if any, guidance and training has been provided to key gatekeepers in the control processes (e.g., those with approval authority or certification responsibilities)? Do they know what misconduct to look for? Do they know when and how to escalate concerns?

看门人——若适用，公司对控制流程中的重要看门人（如具有批准权限或核验责任的人员）提供哪些指引和培训？他们是否知道应关注什么样的不当行为进？他们是否知道何时及如何上报顾虑？

C. **Training and Communications** **培训与沟通**

Another hallmark of a well-designed compliance program is appropriately tailored training and communications.

妥善制订的合规体系的另一个特点是具备适当定制的培训 and 沟通机制。

Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. Prosecutors should also assess whether the company has relayed information in a manner tailored to the audience’s size, sophistication, or subject matter expertise. Some companies, for instance, give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise. Prosecutors should also assess whether the training adequately covers prior compliance incidents and how the company measures the effectiveness of its training curriculum.

检察官应当评估公司为确保将政策和程序融入企业所采取的措施，包括针对所有董事、高级管理人员、相关员工以及适当情况下针对代理人和商业伙伴的定期培训和验核。检察官还应当评估公司传达信息的方式是否适合受众的规模、复杂性或相关专业性知识。例如，某些公司向员工提供实务建议或案例研究以解决现实中遇到的相关问题，和/或提供关于如何在需要时根据具体情况获取职业道德建议的指引。检察官亦应当评估前述培训是否充分涵盖以往的合规事件以及公司如何衡量其培训课程的有效性。

Prosecutors, in short, should examine whether the compliance program is being disseminated to, and understood by, employees in practice in order to decide whether the compliance program is “truly effective.” JM 9-28.800.

简而言之，检察官应当检测公司是否向员工传达合规体系以及员工是否理解该等合规体系，从而决定合规体系是否“真正有效”（JM 9-28.800）。

- **Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area where the misconduct occurred? Have supervisory employees received different or supplementary training? What analysis has the company undertaken to determine who should be trained and on what subjects?

基于风险的培训——相关控制职能部门的员工接受了哪些培训？公司是否为高风险和控制职能员工提供了量身定制的培训，包括培训揭示了不当行为领域的风险？是否向主管级员工提供不同或者补充的培训？公司开展了哪些分析以确定培训对象和培训主题？

- **Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the audience? Is the training provided online or in-person (or both), and what is the company’s rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? How has the company measured the effectiveness of the training? Have employees been tested on what they have learned? How has the company addressed employees who fail all or a portion of the testing?

培训的形式/内容/有效性——培训的形式和语言是否适合培训对象？培训采用网络还是现场方式（或者两者兼有），以及公司采用该等方式的理由是什么？培训是否涉及从以往合规事件中汲取的经验教训？公司如何衡量培训的有效性？是否测试员工对所学内容的掌握情况？公司如何处理未通过全部或部分测试的员工？

- **Communications about Misconduct** – What has senior management done to let employees know the company’s position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined 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)?

关于不当行为的沟通——高级管理人员采取了哪些措施让员工知悉公司对不当行为所采取的立场？当员工因未遵守公司政策、程序和控制措施而被解雇或受到其他纪律惩罚时，通常会采取哪些沟通措施（例如对导致处分的不当行为进行不具名的描述）？

- **Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

提供的指引——公司向员工开放了哪些资源用以为员工提供合规政策的指引？公司如何评估其员工是否知晓何时应寻求建议以及他们是否愿意寻求建议？

D. Confidential Reporting Structure and Investigation Process
保密性质的报告结构和调查程序

Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct. Prosecutors should assess whether the company's complaint-handling process includes pro-active measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers. Prosecutors should also assess the company's processes for handling investigations of such complaints, including the routing of complaints to proper personnel, timely completion of thorough investigations, and appropriate follow-up and discipline.

妥善制订的合规体系的另一个特点是存在有效可靠的机制使员工能够以匿名或保密形式举报涉嫌违反公司行为准则、公司政策的行为，或可疑或实际的不当行为。检察官应当评估公司的投诉处理程序是否包含了创建无需担心报复的工作环境的积极措施、提交投诉的适当程序以及保护举报人的程序。检察官还应当评估公司处理该等投诉的调查程序，包括向适当人员提交投诉的路径、及时地完成全面调查、以及适当的跟进和惩罚措施。

Confidential reporting mechanisms are highly probative of whether a company has "established corporate governance mechanisms that can effectively detect and prevent misconduct." JM 9-28.800; *see also* U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

保密报告机制对于证明公司是否已经“建立能够有效发现和预防不当行为的公司治理机制”非常有用。JM 9-28.800；同时参见U.S.S.G. § 8B2.1(b)(5)(C)（有效运作的合规体系是具备并已经公布“一项制度，其可能包括允许以匿名或保密形式进行举报的机制，据此，企业员工及代理人可以就潜在或实际的犯罪行为进行举报或寻求指引，而无需担心遭遇报复”）。

- **Effectiveness of the Reporting Mechanism** – Does the company have an anonymous reporting mechanism, and, if not, why not? How is the reporting mechanism publicized to the company's employees? Has it been used? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?

报告机制的有效性——公司是否具备匿名举报机制，若没有该等机制，请解释原因。公司如何向公司员工公布举报机制？是否已经使用该等机制？公司如何对其所收悉的指控的严重性进行评估？合规部门对报

告和调查信息是否已拥有充分的访问权限？

- **Properly Scoped Investigations by Qualified Personnel** – How does the company determine which complaints or red flags merit further investigation? How does the company ensure that investigations are properly scoped? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented? How does the company determine who should conduct an investigation, and who makes that determination?

由具备资质的人员所负责的范围适当的调查——公司如何确定对哪些投诉或危险信号展开进一步调查？公司如何确保调查范围适当？公司采取哪些措施确保调查是独立、客观、恰当开展并恰当记录的？公司如何决定由谁负责开展调查，以及该等决定由谁作出？

- **Investigation Response** – Does the company apply timing metrics to ensure responsiveness? Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?

调查回应——公司是否使用时间标准来确保调查回应？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。

- **Resources and Tracking of Results** – Are the reporting and investigating mechanisms sufficiently funded? How has the company collected, tracked, analyzed, and used information from its reporting mechanisms? Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses?

资源和结果追踪——是否为举报和调查机制提供充足的资金？公司如何收集、追踪、分析和使用来自其报告机制的信息？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？

E. Third Party Management **管理第三方**

A well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the degree of appropriate due diligence may vary based on the size and nature of the company or transaction, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.

妥善制订的合规体系应当对公司第三方关系开展基于风险的尽职调查。虽然适当尽职调查的程度可能因公司或交易规模和性质的不同而有所差别，但是检察官应当评估公司对第三方合作伙伴（包括通常在国际商业交易中被借以掩饰向外国官员行贿

等不当行为的代理人、顾问和经销商) 资质和关联机构的理解程度。

Prosecutors should also assess whether the company knows its third-party partners' reputations and relationships, if any, with foreign officials, and the business rationale for needing the third party in the transaction. For example, a prosecutor should analyze whether the company has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region. Prosecutors should further assess whether the company engaged in ongoing monitoring of the third-party relationships, be it through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

检察官还应当评估公司是否了解其第三方合作伙伴的声誉及与外国官员的关系(若有)，并且评估公司在交易中需要该等第三方提供服务的商业理由。例如，检察官应当分析公司是否已确保与第三方的合同条款明确描述待履行的服务、第三方将实际履行服务、以及其报酬与相应行业及地理区域提供之服务相称。检察官应当进一步评估公司是否通过更新的尽职调查、培训、审计和/或第三方提供的年度合规证明对第三方关系进行持续监督。

In sum, a company's third-party due diligence practices are a factor that prosecutors should assess to determine whether a compliance program is in fact able to "detect the particular types of misconduct most likely to occur in a particular corporation's line of business." JM 9- 28.800.

总之，公司对第三方开展尽职调查的做法是检察官在判定一项合规体系实际上是否能够“发现具体公司业务范围内最可能发生的特定类型的行为”(JM 9-28.800)时，应当评估的因素之一。

- **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?

基于风险与整合的流程——公司的第三方管理流程如何与公司所识别的企业风险的性质和级别相适应？如何将该流程整合入相关的采购与供应商管理流程？

- **Appropriate Controls** – How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

适当的控制措施——公司如何确保存在使用第三方的适当商业理由？如果第三方卷入相关不当行为，当初使用该等第三方的商业理由是什么？有哪些机制确保合同条款详细描述待履行的服务、付款条款适当、合同所述工作得到履行、以及报酬与提供的服务相称？

- **Management of Relationships** – How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third party relationship managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties?

关系管理——公司如何就合规风险考虑和分析针对第三方的报酬和激励结构？公司如何监督其第三方？公司是否拥有分析第三方账簿及账目的审计权，以及公司以往是否行使过该等权利？公司如何就何为合规风险及如何控制该等风险为其第三方关系管理人员提供培训？公司如何激励第三方的合规和道德行为？

- **Real Actions and Consequences** – Does the company track red flags that are identified from due diligence of third parties and how those red flags are addressed? Does the company keep track of third parties that do not pass the company's due diligence or that are terminated, and does the company take steps to ensure that those third parties are not hired or re-hired at a later date? If third parties were involved in the misconduct at issue in the investigation, were red flags identified from the due diligence or after hiring the third party, and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues?

实际行动和后果——公司是否追踪通过对第三方进行的尽职调查而发现的危险信号以及如何解决该等危险信号？公司是否记录未通过公司尽职调查的或者被终止合作的第三方，公司是否采取措施以确保之后不会雇佣或再雇佣该等第三方？如果第三方卷入被调查的不当行为，危险信号是通过尽职调查发现还是在雇佣该等第三方之后发现，以及如何解决该等危险信号？是否曾因合规问题暂停或终止与类似第三方的合作或者对其进行审计？

F. Mergers and Acquisitions (M&A) **兼并与收购（并购）**

A well-designed compliance program should include comprehensive due diligence of any acquisition targets. Pre-M&A due diligence enables the acquiring company to evaluate more accurately each target's value and negotiate for the costs of any corruption or misconduct to be borne by the target. Flawed or incomplete due diligence can allow misconduct to continue at the target company, causing resulting harm to a business's profitability and reputation and risking civil and criminal liability.

妥善制订的合规体系应当包括对任何收购目标的综合尽职调查。并购前的尽职调查能使收购方公司更准确地评估每个目标的价值，并就收购目标所存在的任何腐败或不当行为的成本进行谈判。有瑕疵的或者不完整的尽职调查可能使得目标公司的不当行为继续，以致给公司的盈利能力和声誉造成损害以及产生民事和刑事责任风险。

The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.

公司使其收购目标受限于适当审查的程度在一定意义上预示着其合规体系在实施后是否能够有效执行其内部控制制度并整改企业所有层面的不当行为。

- **Due Diligence Process** – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?
尽职调查流程——尽职调查过程中是否发现不当行为或者相关风险？谁就被收购/兼并的实体进行风险审查？如何进行审查？通常关于并购的尽职调查流程是怎样的？
- **Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process?
并购过程中的整合——合规部门如何参与至兼并、收购及整合流程？
- **Process Connecting Due Diligence to Implementation** – What has been the company’s process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company’s process for implementing compliance policies and procedures at new entities?
连接尽职调查与实施的流程——公司对于其在尽职调查过程中所发现的不当行为或相关不当行为风险的追踪和整改流程是什么？公司对新实体实施合规政策和流程的步骤是什么？

II. **Is the Corporation’s Compliance Program Being Implemented Effectively?** **是否有效实施企业合规体系？**

Even a well-designed compliance program may be unsuccessful in practice if implementation is lax or ineffective. Prosecutors are instructed to probe specifically whether a compliance program is a “paper program” or one “implemented, reviewed, and revised, as appropriate, in an effective manner.” JM 9-28.800. In addition, prosecutors should determine “whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts.” JM 9-28.800. Prosecutors should also determine “whether the corporation’s employees are adequately informed about the compliance program and are convinced of the corporation’s commitment to it.” JM 9-28.800; *see also* JM 9-47.120(2)(c) (criteria for an effective compliance program include “[t]he company’s culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated”).

如果在执行方面松懈或者效果不佳，即使妥善制订的合规体系在实践中也可能达不到预想的目的。根据相关指导，检察官需调查的内容尤其包括：一套合规体系究竟只是一份“书面计划”还是一项“以有效方式予以实施、审查和修改（视具体情

况而定)”的制度（JM 9-28.800）。此外，检察官应当确定“企业是否已经配备充分的人员审核、记录、分析和利用企业合规努力的成果。”（JM 9-28.800）。检察官还应当确定“企业的员工是否适当知悉合规体系以及是否信任企业对合规体系的承诺。”（JM 9-28.800；同时参见JM 9-47.120(2)(c)（有效合规体系的标准包括“公司的合规文化，包括员工具有关于被调查之行为等任何犯罪行为均不被容忍的意识”））。

A. Commitment by Senior and Middle Management
高中级管理层的承诺

Beyond compliance structures, policies, and procedures, it is important for a company to create and foster a culture of ethics and compliance with the law. The effectiveness of a compliance program requires a high-level commitment by company leadership to implement a culture of compliance from the top.

除了合规结构、政策和程序之外，公司创建并培养关于职业道德与合规的文化也十分重要。一项有效的合规体系要求公司领导层作出从最高领导层开始实施合规文化的高度承诺。

The company’s top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have clearly articulated the company’s ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example. Prosecutors should also examine how middle management, in turn, have reinforced those standards and encouraged employees to abide by them. See U.S.S.G. § 8B2.1(b)(2)(A)-(C) (the company’s “*governing authority* shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight” of it; “[*h*]igh-level personnel ... shall ensure that the organization has an effective compliance and ethics program” (emphasis added)).

公司的最高领导层，即董事会和行政领导层，为公司其余人定下了基调。检察官应当检查高级管理人员在何等程度上明确阐述公司的道德标准、以清楚无疑的方式传达和传播该等标准、以及通过示例表明对道德标准的严格遵守。同样地，检察官还应当检查中级管理人员如何加强该等标准并鼓励员工遵守该等标准。参见 U.S.S.G. § 8B2.1(b)(2)(A)-(C)（公司的“*治理机构*”应当了解合规与道德制度的内容及操作，且应当尽合理努力监督”其实施：“高层人员.....应当确保企业具备有效的合规与道德体系”（斜体格式为后加以表强调））。

- **Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged compliance, including the type of misconduct involved in the investigation? What concrete actions have they taken to demonstrate leadership in the company’s compliance and remediation efforts? How have they modelled proper behavior to subordinates? Have managers tolerated greater compliance risks in pursuit of new business or greater revenues? Have managers encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?

- **高层的行为**——高层领导如何通过他们的言行鼓励或阻止合规，包括调查所涉类型的不当行为？采取了什么具体措施以展示其在公司合规和整改措施方面的领导力？高层领导如何向下属示范恰当的行为？管理人员是否为了追求新业务或更多的收益而容忍更大的合规风险？管理人员是否鼓励员工以不符合职业道德的方式行事以实现商业目标，或者是否阻碍合规人员有效履行其职责？
- **Shared Commitment** – What actions have senior leaders and middle-management stakeholders (e.g., business and operational managers, finance, procurement, legal, human resources) taken to demonstrate their commitment to compliance or compliance personnel, including their remediation efforts? Have they persisted in that commitment in the face of competing interests or business objectives?
- **共同的承诺**——高层领导和中层管理级别的利益相关方（如业务和运营经理、财务、采购、法务、人力资源）采取了哪些行动以表明他们对合规或合规人员的承诺，包括他们进行整改的努力？他们在竞争利益或商业目标面前是否坚持前述承诺？
- **Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?
- **监督**——董事会能够获得什么样的专业合规帮助？董事会和/或外部审计师是否曾与合规和控制职能部门召开行政会议或非公开会议？董事会和高级管理层对不当行为发生的领域实施监督时审查过哪些类型的信息？

B. Autonomy and Resources
自主权和资源

Effective implementation also requires those charged with a compliance program’s day- to-day oversight to act with adequate authority and stature. As a threshold matter, prosecutors should evaluate how the compliance program is structured. Additionally, prosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board’s audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company. “A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization.” Commentary to U.S.S.G. § 8B2.1 note 2(C). By contrast, “a small organization may [rely on] less formality and fewer resources.” *Id.* Regardless, if a compliance program is to be truly effective, compliance personnel must be empowered within the company.

有效的执行还要求被赋予合规体系日常监督职责的人员具有足够的权威和地位采取行动。作为最低限度，检察官应当评估合规体系是如何架构的。此外，检察官应当考虑合规职能部门中人员和资源的充分性，具体而言即，负责合规的人员是否(1)在组织内有足够的年资；(2)足够的资源来有效执行所需的审计、记录及分析任务的工作；和(3)足够的独立于管理层的自主权，如直接接触董事会或董事会审计委员会的权利。然而，每项因素是否充分因特定公司的规模、结构和风险特征而不同。“大组织一般会比小组织投入更多的正式操作和更多的资源。”（《美国量刑指南》注释§8B2.1注2(C)）相比之下，“小组织可[依赖]较少的正式性和资源。”（同上）无论如何，要使一项合规体系真正有效，必须在公司内部赋予合规人员权力。

Prosecutors should evaluate whether “internal audit functions [are] conducted at a level sufficient to ensure their independence and accuracy,” as an indicator of whether compliance personnel are in fact empowered and positioned to “effectively detect and prevent misconduct.” JM 9-28.800. Prosecutors should also evaluate “[t]he resources the company has dedicated to compliance,” “[t]he quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk,” and “[t]he authority and independence of the compliance function and the availability of compliance expertise to the board.” JM 9-47.120(2)(c); see also JM 9-28.800 (instructing prosecutors to evaluate whether “the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization’s compliance with the law”); U.S.S.G. § 8B2.1(b)(2)(C) (those with “day-to-day operational responsibility” shall have “adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority”).

检察官应当将“内部审计职能发挥的水平是否足够确保其独立性和准确性”作为衡量合规人员是否真正被赋予权力且能够“有效发现和阻止不当行为”的一项指标。（《司法手册》9-28.800）。检察官还应当评估“公司已向合规投入的资源”、“参与合规的人员所具备的素质和经验，是否能够了解和认定构成潜在风险的交易和活动”以及“合规职能部门的权限和独立性和董事会获得合规专长的便利性。”（《司法手册》9-47.120(2)(c)；另参见《司法手册》9-28.800（指示检察官评估“董事是否在组织内建立了合理制订的信息和报告制度，为管理层和董事提供及时准确的信息，以便其就组织的合规性作出知情决策”）；《美国量刑指南》§ 8B2.1(b)(2)(C)（负有“日常运营责任”的人员应具备“充分的资源、适当的权限以及直接向主管机构或主管机构相关分支机构报告的权限”））。

- **Structure** – Where within the company is the compliance function housed (e.g., within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)? To whom does the compliance function report? Is the compliance function run by a designated chief compliance officer, or another executive within the company, and does that person have other roles within the company? Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance

responsibilities within the company? Why has the company chosen the compliance structure it has in place?

- **架构**——合规职能部门设在公司何处（如设在法务部内，设在一个业务部门下或作为向首席执行官和/或董事会报告的一个独立职能部门）？该合规部门向谁报告？该合规部门是由一名指定的首席合规官负责，还是由公司内部另一高管负责？且该人是否在公司内部担任其他职务？合规人员在公司内部是专职承担合规职责，还是同时承担其他非合规职责？为何公司选择其目前实施的合规架构？

- **Seniority and Stature** – How does the compliance function compare with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company’s strategic and operational decisions? How has the company responded to specific instances where compliance raised concerns? Have there been transactions or deals that were stopped, modified, or further scrutinized as a result of compliance concerns?

年资和地位——与公司内部其他战略部门相比，合规职能部门在地位、薪资水平、级别/职位、报告线、资源以及接触重要决策者的途径方面情况如何？合规部门和相关控制部门人员的流动率如何？合规部门在公司战略和运营决策中起什么样的作用？公司对于合规部门提出顾虑的具体情形作何反应？是否有因合规部门提出的顾虑而被中止、修改或进一步审查的交易？

- **Experience and Qualifications** – Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? Who reviews the performance of the compliance function and what is the review process?

经验和资格——合规和内控人员是否具备其职责所要求的适当经验和资格？这些职位的经验和资格水平是否随时间推移而有变化？谁审查合规职能部门的业绩？审查过程是怎样的？

- **Funding and Resources** – Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts? Has the company allocated sufficient funds for the same? Have there been times when requests for resources by compliance and control functions have been denied, and if so, on what grounds?

资金和资源——是否有足够的合规人员有效地审核、记录、分析合规结果并就该结果采取行动？公司是否为此分配了足够的资金？是否有合规和控制职能部门的资源请求被驳回的情况？如有，是以什么理由驳回的？

- **Autonomy** – Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? Are members of the senior management present for these meetings? How does the company ensure the independence of the compliance and control personnel?
自主权——合规与相关控制职能部门是否直接向董事会的任何人汇报？他们与董事会会面的频率如何？高级管理人员是否出席这些会面？公司如何确保合规和控制人员的独立性？
- **Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? If so, why, and who is responsible for overseeing or liaising with the external firm or consultant? What level of access does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?
外包合规职能——公司是否曾外包其全部或部分合规职能给外部公司或顾问？如是，为什么？谁负责监督或联络该外部公司或顾问？该外部公司或顾问对公司信息的访问权限如何？外部流程的有效性是如何评估的？

C. Incentives and Disciplinary Measures
奖惩措施

Another hallmark of effective implementation of a compliance program is the establishment of incentives for compliance and disincentives for non-compliance. Prosecutors should assess whether the company has clear disciplinary procedures in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations. Prosecutors should also assess the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct. See U.S.S.G. § 8B2.1(b)(5)(C) (“the organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct”).

合规体系得到有效执行的另一个证明是合规的奖励措施和不合规的惩戒措施。检察官应当评估公司是否有明确的纪律处分流程，是否在整个组织内一致地实施这些流程，并确保这些流程与违规行为相称。检察官还应当评估公司在多大程度上将下列信息传递给其员工：不道德行为不会被容忍且会带来立显的后果，而不论从事该行为的员工的职位或职务如何。（参见《美国量刑指南》§ 8B2.1(b)(5)(C)）（“组织的合规体系应通过下列措施予以提升并在整个组织内一致地实施：(A)根据合规和伦理制度执行的适当奖励措施；和(B)对于参与犯罪行为以及未采取合理措施防止或发现犯罪行为所实施的处分措施”）。

By way of example, some companies have found that publicizing disciplinary actions internally, where appropriate, can have valuable deterrent effects. At the same time, some companies have also found that providing positive incentives – personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership – have driven compliance. Some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.

例如，一些公司发现，在内部适当地宣传处分措施可产生有效的威慑作用。同时，一些公司也发现，提供积极的奖励——针对改进和制订合规体系或展示伦理领导力的人员提供的升职、授奖和发放奖金——对合规产生了促进的作用。一些公司甚至将合规作为管理层奖金的一个重要衡量因素和/或使合规工作成为职业升迁的一个途径。

- **Human Resources Process** – Who participates in making disciplinary decisions, including for the type of misconduct at issue? Is the same process followed for each instance of misconduct, and if not, why? Are the actual reasons for discipline communicated to employees? If not, why not? Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to protect the company from whistleblowing or outside scrutiny?

人力资源流程——谁参与作出处分决定，包括相关不当行为的类型？对于每项不当行为，是否遵循相同的程序？如果不是，为什么？是否将处分的实际理由告知员工？如果不是，为什么？限制信息有无法律或调查相关的原因，或者，是否为了保护公司不被举报或受到外部审查而提供了假借的理由？

- **Consistent Application** – Have disciplinary actions and incentives been fairly and consistently applied across the organization? Are there similar instances of misconduct that were treated disparately, and if so, why?
一致的实施——是否在全公司公平一致地实施奖惩措施？有没有类似不当行为得到不同的对待？如有，为什么？

- **Incentive System** – Has the company considered the implications of its incentives and rewards on compliance? How does the company incentivize compliance and ethical behavior? Have there been specific examples of actions taken (e.g., promotions or awards denied) as a result of compliance and ethics considerations? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel?

激励机制——公司是否考虑了其激励机制对合规的影响？公司如何激励合规及道德行为？有没有因合规和道德考虑而采取行动的具体例子（如拒绝升职或奖励）？谁决定合规人员的薪酬（包括奖金）以及处分和升职？

III. 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？

The Principles of Federal Prosecution of Business Organizations require prosecutors to assess “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision.” JM 9-28.300. Due to the backward- looking nature of the first inquiry, one of the most difficult questions prosecutors must answer in evaluating a compliance program following misconduct is whether the program was working effectively at the time of the offense, especially where the misconduct was not immediately detected.

《联邦政府起诉商业组织原则》要求检察官评估“违法行为发生时以及指控决定作出时公司既有的合规体系的存续性与有效性。”（《司法手册》9-28.300）。鉴于首次调查的回顾性质，检察官在不当行为发生后评估合规体系时，必须回答的最难问题之一是在违法行为发生时该体系是否在有效地发挥作用（尤其是在不当行为未被立即发现的情况下）。

In answering this question, it is important to note that the existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense. See U.S.S.G. § 8B2.1(a) (“[t]he failure to prevent or detect the instant offense does not mean that the program is not generally effective in preventing and deterring misconduct”). Indeed, “[t]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees.” JM 9-28.800. Of course, if a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively.

回答这一问题时，务必要注意，不当行为的存在本身并不表明，在违法行为发生时合规体系未发挥作用或无效。（参见《美国量刑指南》§ 8B2.1(a)：“未能防止或发现被指违法行为并不表明，该体系在阻止和威慑不当行为方面总体上无效”）。实际上，“司法部承认，没有任何合规体系能够防止公司员工的所有犯罪活动。”（《司法手册》9-28.800）。当然，如果一套合规体系的确有效地发现了不当行为，包括使及时补救和自我报告成为可能，检察官应当将此情形视为合规体系有效发挥作用的一个有力指标。

In assessing whether a company’s compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company’s remedial efforts.

在评估一家公司的合规体系在不当行为发生时是否有效时，检察官应当考虑不当行为是否被发现，以及是如何被发现的，为调查疑似不当行为投入了哪些调查资源，以及该公司补救努力的性质和力度。

To determine whether a company’s compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should

also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future.

为确定一家公司的合规体系在指控决定作出时是否有效地发挥作用，检查官应当考虑该制度是否随时间推移而变化，以解决现有和不断变化的合规风险。检察官还应当考虑该公司是否进行了充分和诚实的根本原因分析，以了解是什么导致了不当行为以及在将来防止类似事件所需采取补救措施的程度。

For example, prosecutors should consider, among other factors, “whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems” and “whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.” Benczkowski Memo at 2 (observing that “[w]here a corporation’s compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will not likely be necessary”).

例如，检察官主要应当考虑“公司是否对其企业合规体系和内部控制体系进行了大量的投入和改进”以及“对合规体系和内部控制系统的补救性改进措施是否经过测试，以证明其在将来会防止或发现类似的不当行为。” Benczkowski 备忘录第2页（指出“如果在和解之时一家公司的合规体系和控制措施被证明有效且有适当资源支持，监察员则可能并非必需。”）

A. Continuous Improvement, Periodic Testing, and Review **持续改进、定期测试和审查**

One hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment. A company’s business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the applicable industry standards. Accordingly, prosecutors should consider whether the company has engaged in meaningful efforts to review its compliance program and ensure that it is not stale. Some companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company’s size and complexity.

有效合规体系的一个证明是其改进和演变的能力。实践中控制措施的实际执行定然会揭示风险领域和潜在调整。一家公司的业务会随时间推移而改变，其经营环境、其客户的性质、适用于其行动的法律以及适用的行业标准也会变化。因此，检察官应当考虑该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。一些公司通过调查员工来衡量其合规文化，衡量其控制措施的强弱程度，和/或开展定期审计以确保其正常发挥职能，但评估的性质和频率可能取决于公司的规模和复杂程度。

Prosecutors may reward efforts to promote improvement and sustainability. In evaluating whether a particular compliance program works in practice, prosecutors should consider “revisions to corporate compliance programs in light of lessons learned.” JM 9-28.800; *see also* JM 9-47-120(2)(c) (looking to “[t]he auditing of the compliance program to assure its effectiveness”). Prosecutors should likewise look to whether a company has taken “reasonable steps” to “ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct,” and “evaluate periodically the effectiveness of the organization’s” program. U.S.S.G. § 8B2.1(b)(5). Proactive efforts like these may not only be rewarded in connection with the form of any resolution or prosecution (such as through remediation credit or a lower applicable fine range under the Sentencing Guidelines), but more importantly, may avert problems down the line.

检察官可对促进改进和可持续性的行为加以奖励。在评估特定合规体系在实践中是否发挥作用时，检察官应当考虑“基于汲取的经验教训对企业合规体系所作的修订。”（《司法手册》9-28.800；另参见《司法手册》9-47-120(2)(c)，通过对“合规体系的审计来确保其有效性”）。检察官还应当考虑一家公司是否采取了“合理的措施”以“确保公司的合规和伦理制度是否得到了遵循，包括监控和审计以发现犯罪行为，”和“定期评估公司制度的有效性。”（《美国量刑指南》§ 8B2.1(b)(5)）。像这样的积极努力不仅可以任何和解或指控的形式（如通过基于补救的宽大处理或量刑指南下较低的罚款范围）予以奖励，（更重要的是）还可以避免将来出现类似问题。

- **Internal Audit** – What is the process for determining where and how frequently internal audit will undertake an audit, and what is the rationale behind that process? How are audits carried out? What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often does internal audit conduct assessments in high-risk areas?
内部审计——确定内部审计部门在何处进行审计以及进行审计的频率的流程是什么，该流程的依据是什么？如何进行审计？什么类型的审计会发现与不当行为有关的问题？这些审计发生了吗？结果如何？定期向管理层和董事会报告了什么类型的相关审计结果及补救措施进度？管理层和董事会如何进行追踪？内部审计在高风险领域进行评估的频率如何？
- **Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct? More generally, what testing of controls, collection and analysis of compliance data, and interviews of employees and third- parties does the company undertake? How are the results reported and action items tracked?
控制测试——公司是否在与不当行为相关的领域审查和审计了其合规体系？更广泛而言，公司进行了哪些控制的测试、合规数据的收集和分析以及与员工和第三方的会谈？结果是如何报告的，行动项目是如何追踪的？

- **Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries?
变化的更新——公司更新风险评估及审查其合规政策、流程和操作的频率如何？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？公司采取了什么措施以确定特定业务部门/子公司的政策/流程/操作合理？

- **Culture of Compliance** – How often and how does the company measure its culture of compliance? Does the company seek input from all levels of employees to determine whether they perceive senior and middle management’s commitment to compliance? What steps has the company taken in response to its measurement of the compliance culture?
合规文化——公司如何衡量其合规文化以及衡量的频率如何？公司是否向各级别的员工征求意见以确定其是否了解中高级管理层的合规承诺？公司为衡量其合规文化采取了哪些措施？

B. Investigation of Misconduct
不当行为的调查

Another hallmark of a compliance program that is working effectively is the existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company’s response, including any disciplinary or remediation measures taken.

合规体系有效运行的另一项证明是，有一个运转良好且有适当资金支持的机制以支持对于公司、其员工或代理人不当行为的任何指控或怀疑的及时和彻底的调查。有效的调查架构也会有效地记录公司的反应，包括所采取的任何处分或补救措施。

- **Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?
由合格人员进行的范围适当的调查——公司如何确保调查范围的适当，且独立、客观、以适当方式进行且以适当方式存档？

- **Response to Investigations** – Have the company’s investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

对调查的回应——公司的调查是否被用于发现根本原因、系统漏洞以及责任失效（包括在主管经理和高级管理层之间）？回应调查结果的程序是什么？调查结果在公司中能到达多高层级？

C. Analysis and Remediation of Any Underlying Misconduct
任何相关不当行为的分析和补救

Finally, a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

最后，合规体系在实践中有效发挥作用的一个证明是公司能够对不当行为进行全面根本原因分析以及进行及时适当补救以解决根本原因的程度。

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on “the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.” JM 9-28.800; see also JM 9-47.120(3)(c) (“to receive full credit for timely and appropriate remediation” under the FCPA Corporate Enforcement Policy, a company should demonstrate “a root cause analysis” and, where appropriate, “remediation to address the root causes”).

检察官评估合规体系有效性时被指示回顾“犯罪不当行为的范围和普遍性；参与的公司员工的人数和级别；不当行为的严重程度、持续时间和频率；公司采取的任何补救行动，例如，包括对先前合规体系下发现的过往违规者的纪律处分，以及基于汲取的经验教训对公司合规体系进行的修订。”（《司法手册》9-28.800；另参见JM 9-47.120(3)(c)，根据FCPA公司执法政策，“为获得基于及时适当补救的充分宽大处理，”一家公司应当证明进行过“根本原因分析”，且在适当的情况下“进行了补救以解决这些根本原因”）。

Prosecutors should consider “any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program.” JM 98-28.800; see also JM 9-47-120(2)(c) (looking to “[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred” and “any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risk”).

检察官应当考虑“公司采取的任何补救行动，例如，包括对先前合规体系下发现的过往违规者的纪律处分”（《司法手册》98-28.800；另参见《司法手册》9-47-120(2)(c)，通过“适当地处分员工，包括公司认定对不当行为负有责任的员工，无论是直接参与或是疏于监督，以及在犯罪行为发生的领域中负有监督职责的员工，”以及“证明承认不当行为严重程度、承担与之相关的责任以及实施措施以减少该不当行

为再次发生风险，包括发现未来风险的措施”）。

- **Root Cause Analysis** – What is the company’s root cause analysis of the misconduct at issue? Were any systemic issues identified? Who in the company was involved in making the analysis?
根本原因分析——公司对相关不当行为的根本原因分析是什么？是否发现了任何系统性问题？公司中有哪些人参与了分析？
- **Prior Weaknesses** – What controls failed? If policies or procedures should have prohibited the misconduct, were they effectively implemented, and have functions that had ownership of these policies and procedures been held accountable?
先前弱点——哪些控制措施未发生作用？如果有政策或程序本应禁止不当行为，那这些政策和程序是否得到了有效执行？作为这些政策和程序所有者的职能部门是否已被问责？
- **Payment Systems** – How was the misconduct in question funded (e.g., purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?
付款体系——不受质疑资金的不当行为是如何实施的（如购买订单、员工报销、折扣、小额现金）？哪些流程本可阻止或发现这些资金的不当使用？是否对这些流程进行了改进？
- **Vendor Management** – If vendors were involved in the misconduct, what was the process for vendor selection and did the vendor undergo that process?
供应商管理——如果供应商参与了不当行为，选择供应商的流程是什么？选择该供应商是否经过了此流程？
- **Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company’s analysis of why such opportunities were missed?
先前迹象——之前是否有发现相关不当行为的机会，如审计报告指出公司存在相关控制措施的失败，或指控、投诉或调查？公司对其为何错失发现相关问题的机会是如何进行分析的？
- **Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?
补救——公司实施了哪些具体改进措施以确保相同或类似的问题在将来不再发生？采取了哪些具体的补救措施以解决在根本原因分析和错失机会分析中所发现的问题？

- **Accountability** – What disciplinary actions did the company take in response to the misconduct and were they timely? Were managers held accountable for misconduct that occurred under their supervision? Did the company consider disciplinary actions for failures in supervision? What is the company’s record (e.g., number and types of disciplinary actions) on employee discipline relating to the types of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?
- 问责制**——对于不当行为，公司采取了哪些纪律处分措施，以及这些措施是否及时？经理是否对其监督下发生的不当行为承担责任？公司的应对措施是否考虑就主管的监督失职采取纪律处分措施？对于涉及相关类型不当行为的员工处分，公司有哪些记录（例如纪律处分的次数和类型）？公司是否曾就相关类型的不当行为解雇或以其他方式处分任何人（减少或取消奖金、发出警告信等）？

ⁱ Many of the topics also appear in the following resources:

- Justice Manual (“JM”)
 - JM 9-28.000 Principles of Federal Prosecution of Business Organizations, Justice Manual (“JM”), available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.
 - JM 9-47.120FCPA Corporate Enforcement Policy, available at <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120>.
- Chapter 8 – Sentencing of Organizations - United States Sentencing Guidelines (“U.S.S.G.”), available at <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN>.
- Memorandum entitled “Selection of Monitors in Criminal Division Matters,” issued by Assistant Attorney General Brian Benczkowski on October 11, 2018, available at <https://www.justice.gov/criminal-fraud/file/1100366/download>.
- Criminal Division corporate resolution agreements, available at <https://www.justice.gov/news> (DOJ’s Public Affairs website contains press releases for all Criminal Division corporate resolutions which contain links to charging documents and agreements).
- A Resource Guide to the U.S. Foreign Corrupt Practices Act (“FCPA Guide”) published in November 2012 by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.
- Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Co-operation and Development (“OECD”) Council on February 18, 2010 available at <https://www.oecd.org/daf/anti-bribery/44884389.pdf>.
- Anti-Corruption Ethics and Compliance Handbook for Business (“OECD Handbook”) published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank available at <https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>.

ⁱⁱ 其中许多主题亦出现于以下文件中：

- 《司法手册》（JM）：
 - JM 9-28.000《联邦政府起诉商业组织原则》，《司法手册》（JM），请访问<https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>。
 - JM 9-47.120《FCPA公司执法政策》，请访问<https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120>。
- 第8章 – 单位犯罪的量刑 - 《美国量刑指南》（“U.S.S.G.”），请访问<https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN>。
- 助理司法部长Brian Benczkowski于2018年10月11日发布的名为“刑事司处理之案件中监察员的选择”的备忘录，请访问<https://www.justice.gov/criminal-fraud/file/1100366/download>。
- 刑事司的公司案件和解协议，请访问<https://www.justice.gov/news>（司法部的公共事务网站包含关于刑事司所有公司案件和解的新闻稿，其包含链接至指控文件和协议的链接。
- 美国司法部（司法部）与证券交易委员会（证交会）于2012年11月发布的美国《反海外腐败法》信息指引（“FCPA”指引），请访问<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>。
- 经济合作与发展组织（“经合组织”）理事会于2010年2月18日通过的《关于内部控制、职业道德与合规的良好实践指引》，请访问<https://www.oecd.org/daf/anti-bribery/44884389.pdf>。
- 经合组织、联合国毒品和犯罪问题办公室及世界银行于2013年发布的《企业反腐败道德和合规手册》（“经合组织手册”），请访问<https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>。

ⁱⁱⁱ As discussed in the Justice Manual, many companies operate in complex regulatory environments outside the normal experience of criminal prosecutors. JM 9-28.000. For example, financial institutions such as banks, subject to the Bank Secrecy Act statute and regulations, require prosecutors to conduct specialized analyses of their compliance programs in the context of their anti-money laundering requirements. Consultation with the Money Laundering and Asset Recovery Section is recommended when reviewing AML compliance. See <https://www.justice.gov/criminal-mlars>. Prosecutors may also wish to review guidance published by relevant federal and state agencies. See Federal Financial Institutions Examination Council/Bank Secrecy Act/Anti-Money Laundering Examination Manual, available at https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm).

^{iv} 如《司法手册》所述，许多公司运营所在的监管环境十分复杂，超出刑事检察官的正常经验（JM 9-28.000）。例如，受《银行保密法》等法律法规规管的银行等金融机构要求检察官在他们的反洗钱要求背景下对他们的合规体系进行专项分析。在审查反洗钱合规情况时，建议同洗钱与资产追回科进行商议。参见<https://www.justice.gov/criminal-mlars>。检察官可能还希望参阅相关联邦和州级部门发布的指引。参见联邦金融机构检查委员会/《银行保密法》/《反洗钱检查手册》，请访问https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm。

Translator's Note

The original English version of this document was published [here](#) by the Fraud Section of the U.S. Department of Justice in April 2019.

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For more information about Covington's China-related anti-corruption practice, please contact Eric Carlson, an anti-corruption partner in our Shanghai office, at ecarlson@cov.com, or visit our webpage [here](#).

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