

Session 505: DOJ's Guidance on Compliance

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1



“In drafting the updated version of the document, we sought to provide additional transparency in how we analyze a company’s compliance program.”

-Assistant Attorney General Brian A. Benczkowski

2

Agenda



- Overview
- Compliance Program Design
- Compliance Program Implementation
- Compliance Program Effectiveness
- Key Takeaways
- Discussion and Q&A

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3

3

Overview



- On April 30, 2019, the U.S. Department of Justice (“DOJ”) released **updated guidance on its approach to evaluating corporate compliance programs**
- The Guidance reflects the importance the DOJ places on organizations employing a **risk-based, fit for purpose compliance program**
- There is a sharp **emphasis on the need for companies to test their programs** and for compliance programs to **evolve as the risk landscape changes**



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4

4

The Guidance focuses on three important principles



- ✓ Is the program well designed?
- ✓ Is the program being implemented effectively?
- ✓ Is the program working in practice?

5

Compliance Program Design

6

Key Elements of Program Design



- When considering the **DESIGN** of a compliance program, the DOJ will focus on how **engrained compliance is within the company's operations**, including
 - **How a company approaches risk assessments**
 - **Policies and procedures**
 - **Training and communication**
 - **Investigative procedures**
 - **Management of third parties**

7

Risk Assessment and Management



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."

-See Guidance, pg. 3

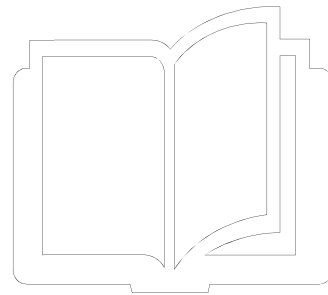
- Prosecutors will assess a company's **risk assessment methodology** used to identify and address specific risks
- The DOJ will consider whether a risk assessment is
 - **Performed periodically** and
 - How **policies** and **procedures are adjusted** based on the outcome of those assessments

8

Policies and Procedures



- **Risk assessments help inform** the guidance provided within a **company's policies and procedures**
- The Guidance **emphasizes that policies and procedures**
 - **Reinforce a "culture of compliance"**
 - Must be **operationalized**
 - Should **align with other internal controls** within the company



Training and Communication



- DOJ will **evaluate whether compliance training reinforces expectations provided in a company's policies and procedures**, and is **relevant** and **tailored** to the audience
- The DOJ also will evaluate whether **training is supplemented with compliance communication** that conveys a strong message about misconduct not being tolerated



Investigations Procedures



- A robust **investigative process helps identify misconduct**
- The DOJ will test whether a company
 - Maintains a **mechanism for reporting allegations** of misconduct and concerns
 - **Promptly investigates** concerns
 - **Implements the appropriate remediation and discipline**

For the first time in written guidance, the DOJ recognizes the importance of skill and experience of those trusted with the investigative function

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11

Third Party Management



- The Guidance emphasizes the **importance** of a company **knowing its third parties**
- There is an expectation that companies will
 - **Design a risk-based approach to third party due diligence**
 - **Develop a strategy** that helps **identify compliance “red flags”**
- This includes **compliance due diligence of acquisition targets**
 - The DOJ reinforces how important it is for the **Compliance function being involved** in the evaluation of a target entity and integration activities

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12

Compliance Program Implementation

13

Key Elements of Program Implementation



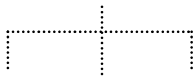
- When considering the **IMPLEMENTATION** of a compliance program, the DOJ will evaluate
 - **Commitment to the compliance program by management**
 - **Autonomy and resources of the compliance program**
 - **Incentive and discipline measures**

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14

14

Commitment to the Compliance Program by Management



- Company **management** and the **Board** of Directors must **lead by example** and **establish a culture of compliance**

- The DOJ now also recognizes the **importance of middle management**

- These leaders play a critical role developing and maintaining a compliant culture

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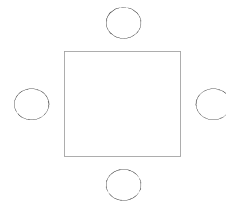
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Autonomy and Resources



- The DOJ will consider the **structure of a compliance program** and its **ability to function independently** of management
- **Resources** devoted to a compliance program **also will be reviewed**
 - Size and experience of the Compliance team
 - Outsourced components of the compliance program
 - Funding
 - Seniority and stature



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16

16

Incentive and Discipline Measures



- The DOJ will assess whether a company has **clear disciplinary procedures** and if they are **enforced consistently**
- The Guidance references examples where companies found that **publicizing misconduct was an effective deterrent**
- It also notes that some companies have **leveraged compliance as a metric for career advancement** and compensation decisions

[T]he 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...

-See U.S.S.G. § 8B2.1(b)(5)(C)

Program Effectiveness

Key Elements of Program Effectiveness



[P]rosecutors should also 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.

-See Guidance, pg. 13

- In its final section of the Guidance, the DOJ will evaluate **how a compliance program WORKS IN PRACTICE** and will consider
 - **Continuous improvement, periodic testing and review**
 - **Investigation of misconduct**
 - **Remediation of misconduct**

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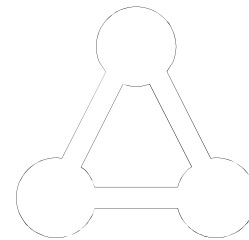
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19

Continuous Improvement, Periodic Testing and Review



- The Guidance **considers whether a company takes “reasonable steps”** to determine its program is followed
 - This includes periodic evaluations, such as how often compliance audits and risk assessments are performed
- The DOJ also will evaluate whether a **company has considered controls that may have failed to enable misconduct** to occur, and what **actions were taken to remediate** them



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20

20

Investigation and Remediation of Misconduct



- The DOJ will also **assess program “effectiveness” through actions taken by companies to investigate and remediate misconduct**
- The Guidance considers
 - Ability to **properly scope investigations**
 - Whether a **root cause analysis** was performed
 - Whether **systemic issues** were identified
 - If **policies and procedures should have prevented the misconduct**

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.

-See Guidance, pg. 13

Key Takeaways

Key Takeaways



- The Guidance highlights **important components** of a corporate compliance program
 - Is a compliance program able to **respond to evolving regulatory, industry, and operational risks**?
 - Can a company **confirm** that their **compliance program is well designed, effectively implemented, and works in practice**?
- Non-U.S. companies should also consider the Guidance—**international compliance guidance documents have often aligned with the U.S.**

Effective compliance programs are the basis for mitigating, detecting, and remediating wrongdoing

23

Discussion and Q&A



24

