

# Recent DOJ Pronouncements on Corporate Compliance and Monitorships

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**Eric R. Feldman, CCEP-I**  
*Senior VP and Managing Director*  
Affiliated Monitors, Inc.

**Brian Michael**  
*Partner*  
King & Spalding

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# Agenda

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- **October 2018** - Memo on “Selection of Monitors in Criminal Division Matters”
- **April 2019** - DOJ “Evaluation of Corporate Compliance Programs” (the “2019 Guidance”)
- **November 2019** - “FCPA Corporate Enforcement Policy”
- **December 2019** - DOJ “Export Control and Sanctions Enforcement Policy for Business Organizations”
- **May 2019** - DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters”



— October 2018 “Benczkowski  
Memo” on Selection of Monitors in  
Criminal Division Matters”



# The “Benczkowski Memo”

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- First major DOJ pronouncement re: corporate monitors under current Administration.
- Significant shift from earlier guidelines:
  - Signaling to both prosecutors and businesses the Administration's view that **monitorship appointments will not be taken lightly and will be required only when clearly warranted.**
  - Summarizes the DOJ's position on whether a corporate monitor is necessary, stating that **"the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens"** on the corporation.



- The April 2019 DOJ “Evaluation of Corporate Compliance Programs” (the “2019 Guidance”)



# The “2019 Guidance”

- Update to the 2017 Evaluation of Corporate Compliance Programs
  - Made further to “Principles of Federal Prosecution of Business Organizations”
- In deciding adequacy and effectiveness of compliance program, prosecutors requested to consider 3 fundamental questions:
  - Is the corporation’s compliance program well designed?
  - Is the program being applied earnestly and in good faith?
    - In other words, is the program being implemented effectively?
  - Does the corporation’s compliance program work in practice?



# Is the corporation's compliance program well designed?

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The following are to be considered -

- Risk Assessment
- Policies and Procedures
- Training and Communications
- Confidential Reporting Structure and Investigation Process
- 3rd Party Management
- Mergers and Acquisitions pre- and post-acquisition



# Is the program being implemented effectively?

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The 2019 guidance distinguishes between a “paper program” and an effective compliance program -- the following factors are to be considered in deciding the effectiveness of compliance program:

- Commitment by Senior and Middle Management
- Autonomy and Resources
- Incentives and Disciplinary Measures





# Does the corporation's compliance program work in practice?

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- To determine if compliance program works in practice, guidance considers both a retrospective and current review process
- The effectiveness of the program at the time of the incident(s)
  - **Factors:** How the misconduct was detected, the investigation resources available to investigate misconducts, and the remedial efforts in place
- Its evolution at the time of the charging decision or resolution
  - **Factors:** Whether there is continuous improvement in the compliance program and internal control systems, and the ability of the improvements to prevent or detect similar incident(s) in the future through periodic testing and reviews



— The November 2019 “FCPA  
Corporate Enforcement Policy”



# November 2019 “FCPA Corporate Enforcement Policy”

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- **Declination** (50% Reduction of low-end fine range):
  - Requires self disclosure, full cooperation, and timely and appropriate implementation of remedial actions in the absence of aggravating factors
  - Generally not be subjected to an independent monitor if at the time of the resolution, an effective compliance program has been implemented.
- **Aggravating factors** includes executive management involvement in the misconduct, company profited from misconduct, criminal recidivism, and pervasiveness of the misconduct within the company.
- **Up to 25% reduction of the low-end fine range** will be accorded to companies that did **not** voluntarily disclose a misconduct(s) **but** cooperates fully with investigation and implement remedial actions.
- **M&A Due Diligence and Remediation** was updated to extend the presumption of declination to companies that voluntarily self-discloses misconduct(s) in the acquired entity which it became aware through due diligence and “post-acquisition audits or compliance integration efforts



- The December 2019 DOJ “Export Control and Sanctions Enforcement Policy for Business Organizations”



# December 2019 DOJ “Export Control and Sanctions Enforcement Policy for Business Organizations”

- **Replaces** October 2016 “Guidance Regarding Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations.”
- **Sets out criteria** of the DOJ National Security Division through the Counterintelligence and Export Control Section (CES) for a resolution where companies self-disclose in export control and/or sanction matters.
- **Presumption that a non-prosecution agreement** will be entered in favor of a company that self discloses, cooperates and takes timely remedial action in an export control or sanction matter.
- **But, if aggravating factors exist**, a company that self discloses, fully cooperates and takes remedial action may be entitled to a DPA or guilty plea with a lesser fine and an independent monitor will **not** be required **if** the company has implemented an effective compliance program.
  - Examples of aggravating factors include “Exports of military items to a hostile foreign power” and “Knowing involvement of upper management in the criminal conduct.”



- The May 2019 DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters”



# May 2019 DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters”

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- Factors for consideration when companies **self-disclose, cooperate, and take remedial actions** in matters under the FCA:
  - **timeliness and voluntariness** of the assistance;
  - **truthfulness, completeness, and reliability** of any information or testimony provided;
  - **nature and extent of the assistance**; and
  - **significance and usefulness** of the cooperation to the government
- **If** a company is not qualified to receive maximum credits, **may be qualified for partial credits** if it cooperates fully with the government’s investigation
- **But NO credit** for any company that **conceals** the involvement of **senior management** or any individual in the **absence of good faith**



## Conclusion: *Common Threads*

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Company **must** adopt a **risk-based compliance program** that is incorporated into its **day to day operations**

**Effective and adequate compliance** program will **confer some advantages** on a company in the event of misconduct(s)

Effective compliance program must have **commitment of senior leadership** with **continuous risk assessment, internal controls and training**





# Resources

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The October 2018 Benczkowski Memo on “Selection of Monitors in Criminal Division Matters” - <https://www.justice.gov/opa/speech/file/1100531/download>

The April 2019 DOJ “Evaluation of Corporate Compliance Programs” – The 2019 Guidance - <https://www.justice.gov/criminal-fraud/page/file/937501/download>

The November 2019 “FCPA Corporate Enforcement Policy” - <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>

The December 2019 DOJ “Export Control and Sanctions Enforcement Policy for Business Organizations” - [https://www.justice.gov/nsd/ces\\_vsd\\_policy\\_2019/download](https://www.justice.gov/nsd/ces_vsd_policy_2019/download)

The May 2019 DOJ “Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters” - <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112>

The Department of Treasury – “A Framework for OFAC Compliance Commitments” - [https://www.treasury.gov/resource-center/sanctions/Documents/framework\\_ofac\\_cc.pdf](https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf)



# Questions?



**Eric R. Feldman**

Senior Vice President and  
Managing Director  
*Corporate Ethics & Compliance  
Programs*

efeldman@affiliatedmonitors.com  
+1 866 201-0903



**Brian R. Michael**

Partner  
*Special Matters & Government  
Investigations*

bmichael@kslaw.com  
+1 213 443 4317

