Have you adapted last year’s guidance to your program yet?

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Looking back on 2019, you can’t help but notice how many major events have happened. From the many different guidance documents issued to the many enforcement actions taken, 2019 was a monumental year for compliance. If you haven’t used some of the guidance to shape your compliance program already, it’s time to do so now. A gap analysis of your program’s elements against the different guidance documents would be highly recommended as you work toward improving your compliance program.

A brief history of compliance

Internal compliance programs are not a new phenomenon. The first in-house compliance programs started emerging in innovative public companies in the mid-1970s. Three big events kick-started the compliance profession during that time: the establishment of the Environmental Protection Agency, the establishment of the Drug Enforcement Administration, and the passage of the Foreign Corrupt Practices Act (FCPA).

Over the past five decades, the compliance industry has evolved based on guidance that has been published by the Department of Justice (DOJ), enforcement actions, and legislation. The first major guidance that helped define a robust compliance program came out in 1991 with the updated Federal Sentencing Guidelines (FSG). Those guidelines spelled out, in the definition section, the elements of a robust compliance program, which became the foundation for the compliance industry of today.

Since then, other major legislation and published guidance memos have expanded compliance programs and mandated certain elements that were previously thought of as simply encouraged, not compulsory. For example, the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 have formed the requirements around whistleblowers and helped establish anonymous whistleblower hotlines at most companies. In 2015, the Yates Memo brought individual liability for corporate actions to the forefront of compliance professionals’ minds. The Benczkowski Memo of 2018 defined the standards for corporate monitors when companies were found to have deficient compliance programs. In 2017, DOJ issued their first corporate compliance guidance that was to apply across all types of cases in which the Criminal Division would get involved. This guidance was updated in 2019.

New compliance guidance in 2019

In 2019, three separate guidance documents were released by various authoritative bodies: DOJ Criminal Division’s Evaluation of Corporate Compliance Programs guidance (Criminal Division guidance), the Department of the Treasury Office of Foreign Assets Control’s guidance on compliance (OFAC guidance), and the DOJ Antitrust Division’s Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (Antitrust guidance). Each is reviewed in detail in Table 1.

An additional guidance document was issued discussing how corporations can obtain cooperation credit during False Claims Act cases. While this document did not specifically spell out what a compliance program should look like, it did state that remediation that occurs after an issue has been identified will be taken into account.
consideration. It states, “Under the policy, the Department of Justice will take into account corrective action that a company has taken in response to a False Claims Act violation. Such remedial measures may include undertaking a thorough analysis of the root cause of the misconduct, appropriately disciplining or replacing those responsible for the misconduct, accepting responsibility for the violation and implementing or improving compliance programs to prevent a recurrence.” This emphasizes the importance of a robust compliance program that can put controls in place to correct issues and prevent them from happening in the future.

**Same old standards, improved guidance**

The three primary guidance documents issued this year all have the main compliance program elements that we saw back in 1991 with the FSG guidance: standards and procedures, oversight, due diligence with regard to internal employees working in compliance-related roles, communication and training, monitoring and auditing to detect misconduct, enforcement and consistent discipline, and response and prevention. However, each set of new guidance published in 2019 brings some new standards to the former compliance program elements that, if implemented, can help you bring your compliance program to the next level.

There are several areas we could focus on to explain the differences between the old and the new guidance. In this article, I will focus on the biggest changes. I have also included a table (Table 1) highlighting the differences between the five guidance documents.

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Table 1: A comparison of compliance guidance

<table>
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<th>Response and prevention</th>
<th>Internal investigation, continuous improvement</th>
<th>Investigations of misconduct, continuous improvement, analysis and remediation</th>
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<td>Culture of compliance</td>
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<td>Design and comprehensiveness of program, culture of compliance</td>
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Culture

The Criminal Division guidance states, “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.”[6] This emphasis on culture requires compliance professionals to get out of their offices and ensure every employee—from the senior leaders all the way down to the frontline employees—understands the importance of ethics. Making the right choice for the company doesn’t just mean making more money for the company or for yourself. The company should clearly define their values, and integrity, or a similar concept, should be one of them.

Middle management

In past guidance documents, including the 1991 FSG and the 2012 FCPA guidance, senior management was the primary emphasis when talking about oversight of the compliance program and ensuring a culture of compliance. There is a greater emphasis in the new guidance on middle management’s commitment to a culture of compliance. Regardless of whether senior leaders are constantly discussing ethics, it may not permeate down to the frontline employees if middle management is singing a different song. Frontline employees will tend to do what their direct leader tells them to do and what they are personally incentivized to do. If middle management feels the pressure to meet the numbers and pushes that pressure down to frontline employees, ethics will get lost in the mix.

Root cause analysis

Both the Criminal Division guidance and the OFAC guidance introduce the concept of root cause analysis. While remediation and corrective action were always considered, root cause analysis was not discussed at all in the 1991 FSG or even the 2012 FCPA guidance. It is hard to remediate and prevent misconduct from occurring if you don’t know the root cause of the actions that led to it. The Criminal Division guidance states, “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.” The OFAC guidance has an entire section dedicated to root cause analysis and defines some of the root causes that OFAC has seen in companies that have had violations in the past.

Autonomy and resources dedicated to compliance
Both the Criminal Division guidance and the Antitrust guidance discuss resources dedicated to the compliance function. Autonomy has been an area of debate in the compliance industry for a while. Where should the compliance function reside in the organization? The Criminal Division guidance does not specifically answer this question, but it does state that the compliance leader should have “sufficient autonomy from management, such as direct access to the board of directors or the board’s audit committee.” The Antitrust guidance echoes that by saying, “the program must have sufficient autonomy, authority, and seniority within the company’s governance structure.” This guidance points to a compliance professional who is high enough in the company hierarchy to gain and maintain respect and have the authority to get things done. With regard to resources, the Antitrust guidance points to compliance resources dedicated specifically to the antitrust compliance program. Both the Criminal Division guidance and the Antitrust guidance ask the question, “Are compliance personnel dedicated to compliance responsibilities, or do they have other, noncompliance responsibilities within the company?” Prosecutors will be looking closely at the answer to that question if a violation is identified.

**Incorporating guidance into your compliance program**

With new guidance forming a new foundation for compliance programs, every company should be performing a gap analysis to identify any areas of improvement. The focus will likely be on the newer areas of the guidance.

When you are designing your compliance program, think like a regulator. What are they going to look for? How can you use the resources you have to meet their expectations? Both the Criminal Division guidance and the Antitrust guidance lay out the foundations for your gap analysis. Ask yourself the questions posed in the guidance documents to identify any areas of improvement.

Changing the culture is a very difficult thing to do. If employees have experienced retaliation for speaking up in the past, the word will get out, causing people to be afraid of speaking up. Additionally, if the culture of misconduct (“It’s just how we do things around here”) is pervasive, it is very difficult to change. New hires will see how the tenured employees are doing business and will assume that’s how they are also supposed to act. Making the compliance program visible to employees and building trustworthy relationships will help move the needle. Finding blank space to fill with ethics communications is a great way to begin changing culture. For example, if you have a large meeting with several speakers, put a 30-second video that promotes your compliance team or the hotline on the screen between the speeches to remind employees how to do business right. Incorporate your communications into newsletters that already go out to the entire organization. Participate in internal social media through blog posts or tweets. Hand out hotline material at new hire orientations and share with new hires what the company values look like.

A way to get middle management engaged is providing them with tools and resources to talk with their team about ethics, values, and doing the right thing. A manager tool kit with discussion questions, FAQ answers, videos, one-page handouts, or small wallet cards can help. Training them on how to escalate misconduct that is reported to them, as well as having a form or reporting mechanism available to them, is critical. Most people will report misconduct to their direct manager, but if the manager doesn’t know what to do next, things could easily fall through the cracks, be investigated incorrectly, be a cause for retaliation, and/or put the company at legal risk.

Conducting a root cause analysis can sometimes feel overwhelming for those of us who are not Six Sigma–trained. However, the simplest way to get to the root cause of a misconduct issue or violation is to ask yourself the Five Whys. For example, if an employee is found to have bribed a government official, ask yourself:

1. **Why?** Perhaps they didn’t know it wasn’t okay to do so.
2. **Why?** Perhaps they read the policy, but it wasn’t clear who government officials were.
3. **Why?** Perhaps in that country, some companies are owned partially by the government, and the employee was unaware that the person they were interacting with was a government official.
4. **Why?** Perhaps the policy and training didn’t spell out clearly who might be considered a government
5. **Why?** Perhaps the person writing the policy and training wasn’t sufficiently aware of the culture of the country they were doing business with in order to incorporate that knowledge into the policy.

In this case, policy and process complexity seem to be the root cause. Cultural awareness training for the policy writer may be the initial answer, in addition to rewriting the policy to clearly explain, in the native language, who it is inappropriate to provide gifts to, if anyone. Also, the employee should be retrained and re-attest the updated policy as a part of the remediation effort.

**Implement and incorporate**

With all these changes and requirements mapped out by the new guidance, it is important to dedicate resources to implementing the guidance and incorporating it into the day-to-day compliance program. Having both the resources and the authority to effect change in the company and the company’s culture will be a key requirement for successfully embracing the new guidance and ensuring your compliance program is robust and defensible.

Opinions included in this article are the author’s alone and not necessarily that of the company or any organizations of which she is a part.

**Takeaways**

- 2019 was the biggest year for compliance since 2012, when the Foreign Corrupt Practices Act resource guide came out, in terms of both compliance guidance and enforcement actions.
- Three separate compliance guidance documents were released by various authoritative bodies in 2019 that are crucial to ensuring robust compliance programs.
- There are new standards that can help bring your compliance program to the next level: culture, middle management, root cause analysis, and dedicated resources.
- Think like a regulator. The guidance has provided questions that can be used as a starting place for conducting a gap analysis of your program.
- Changing culture is difficult but paramount to having a robust, defensible compliance program.

6 U.S. Dep’t of Justice, Criminal Div., Evaluation of Corporate Compliance Programs.