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### DOJ Emphasizes Adequate Funding in Updated Compliance Guidance

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By Nina Youngstrom

Whether an organization shows its commitment to compliance with dollars is a new focus of the second update to guidance on evaluating compliance programs from the Department of Justice (DOJ). In its updated *Evaluation of Corporate Compliance Programs*,<sup>[1]</sup> released June 1, DOJ indicates that adequate funding of the program and its people helps distinguish between a paper and an active program.

The guidance is used by white-collar prosecutors who evaluate compliance programs when deciding whether to file fraud charges and what the charges should be. Compliance officers also use the guidance to benchmark their organization's compliance program. DOJ published the first version in 2017 and revised it in April 2019. The *Evaluation of Corporate Compliance Programs* modifies the Principles of Federal Prosecution of Business Organizations in the *Justice Manual*.<sup>[2]</sup>

There are detailed questions about compliance programs in the guidance, which is organized around three "fundamental questions" that prosecutors try to answer when evaluating effectiveness. The 2020 version modified the second question to refocus on resources:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program adequately resourced and empowered to function effectively?
3. "Does the corporation's compliance program work" in practice?

In elaborating on resources, DOJ explained that "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.' [Justice Manual § 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.' [Justice Manual § 9-28.800]."

The emphasis on funding doesn't come as a shock. "You would have to have adequate resources before you get to adequate or better effectiveness," said attorney Gabriel Imperato, with Nelson Mullins Broad and Cassel in Fort Lauderdale, Florida.

Prosecutors have always factored in the funding of compliance programs, although it's significant to see this in writing, said Kirk Ogrosky, former deputy chief of DOJ's fraud section. "You can have compliance officers who are making a fraction of what other senior executives are making," he said.

The guidance also encourages organizations to advance compliance at all times, even during an investigation, said former federal prosecutor Robert Trusiak, an attorney in Buffalo, New York. As DOJ states, "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 both at the time of the offense and at the time of the charging decision and resolution.” DOJ reinforces this point when it talks about the risk assessment. “Prosecutors should endeavor to understand why the company has chosen to set up the compliance program the way that it has, and why and how the company’s compliance program has evolved over time.”

In other words, Trusiak said, “effective compliance is not set it and forget it. Compliance is an iterative process.”

## **DOJ Revises Other Questions**

DOJ’s revisions ripple through the rest of the document, which is loaded with specific questions about commitment by senior and middle management, risk assessments, due diligence, communication with employees, oversight of third parties and other hot topics.

For example, the 2019 guidance asked whether the organization’s risk assessment was “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?”

The 2020 guidance drills down. “Is the periodic review limited to a ‘snapshot’ in time or based upon continuous access to operational data and information across functions? Has the periodic review led to updates in policies, procedures, and controls?”

There are also more questions about how organizations ensure that policies get in the hands of employees and vendors. For example, “have the policies and procedures been published in a searchable format for easy reference? Does the company track access to various policies and procedures to understand what policies are attracting more attention from relevant employees?” The stakes also are raised on employee awareness of the hotline. “Does the company take measures to test whether employees are aware of the hotline and feel comfortable using it?”

Imperato noted that DOJ “dwells a fair amount on third-party due diligence” and whether it continues after the deal is done. For example, DOJ asks, “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, and conducting post acquisition audits, at newly acquired entities?”

Questions on learning from mistakes were also tweaked. “Does the company review and adapt its compliance program based upon lessons learned from its own misconduct and/or that of other companies facing similar risks?” There are other changes to questions, including, for example, about training and “monitoring investigations and resulting discipline.”

Imperato said he will attach the updated guidance to his board training, along with other documents. “This automatically becomes the benchmark...for setting up a compliance program and determining its effectiveness.”

Ogrosky noted, however, that even well-funded, effective compliance programs may fail to detect bad actors. “Fraud is a non-self-revealing offense,” he said. “The people who commit fraud at large corporations are doing it to avoid the compliance folks.” He’s referring to flat-out fraud, not a debate about whether an arrangement fits within a safe harbor, for example.

Whether fraudsters inside corporations are unmasked depends more on whether executives ask the right questions vs. looking the other way, Ogrosky said. For example, if a salesperson outperforms his or her peers 50 times over, managers should dig into it. “If a contractor is able to do what no one has been able to do, ask why,

because the fraud is not self-revealing.” DOJ will expect the corporation to accept some responsibility for bad actors, even when they have good compliance programs, he said.

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1 U.S. Dep’t of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* (Updated June 2020), <http://bit.ly/2Z2Dp8R>.

2 U.S. Dep’t of Justice, *Justice Manual*, Principles of Federal Prosecution of Business Organizations, § 9-28.000 (2020), <http://bit.ly/2GtxXFt>.

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