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Recent DOJ compliance policy makes the case for proactive monitoring

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On June 1, 2020, the Department of Justice (DOJ), without any fanfare, quietly slipped out its 2020 revision of the *Evaluation of Corporate Compliance Programs* guidance.^[1] As with its predecessors in 2017 and 2019, this update further refines the DOJ's guidance to companies about how often they should review the structure of their ethics and compliance programs, the importance of a compliance officer's access to data, and greater clarity on how companies should integrate mergers and acquisitions into their existing programs and corporate culture.

This third installment of the guidance underscores why and how law enforcement pays such close attention to a company's ethics, compliance, and anti-fraud activities. Since early 2017, the DOJ has clarified its previously nebulous position on the value of proactive compliance efforts by introducing a series of memos and additions to the *Justice Manual* aimed to answer the following questions:

- What do government regulators expect a company's ethics and compliance programs to look like?
- What steps can companies take before an ethical failure, or between the time of an offense and resolution, to structure (or remediate) ethics, compliance, and anti-fraud activities in a manner that will help mitigate the consequences of enforcement actions?
- How can a company determine whether its ethics and compliance activities are having the intended impact?

While government guidance provides insight into the potential value of strong ethics and compliance programs when resolving enforcement matters, the DOJ or other government agencies do not proactively evaluate a company's ethics and compliance posture unless that company is under investigation. So how then do companies determine the sufficiency of their ethics and compliance activities?

The role of a compliance monitor

Quite often, government agencies will require companies to engage an independent monitor as a key element in the resolution and settlement of an enforcement matter. A compliance monitor is an objective neutral party that reports to both the government and the company on the company's compliance with the terms of a settlement. A monitor may be engaged as part of a deferred prosecution agreement, consent decree, suspension and debarment action, or as a condition of antitrust/merger approvals. Regardless of the underlying matter, a compliance monitor must be a qualified independent party who designs and implements a custom monitoring program to satisfy the unique requirements of the applicable government agreement. In most cases, monitors are required to conduct a comprehensive assessment of a company's ethics and compliance program, anti-fraud activities, and corporate culture as part of their responsibilities under the government agreement.

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