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Corporate Compliance and DOJ Guidance: Designing and Implementing Programs Tailored to Company Business and Culture

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Updates to DOJ Evaluation of Corporate Compliance Programs

DOJ Evaluation of Corporate Compliance Programs

- Originally released in February 2017, updated on April 30, 2019 and June 1, 2020 by the DOJ Criminal Division
- Serves as guidance for prosecutors in deciding:
 - Whether and how to bring a criminal case
 - A company’s culpability score under U.S. Sentencing Guidelines
 - Whether an independent monitor is needed post-resolution
- No “one size fits all” prescription for compliance programs
- Topics covered by guidance are “neither a checklist nor a formula”

DOJ Evaluation of Corporate Compliance Programs

1. Is the corporation's compliance program well designed?

- A. Risk Assessment
- B. Policies and Procedures
- C. Training and Communication
- D. Confidential Reporting Structure and Investigation Process
- E. Third Party Management
- F. Mergers and Acquisitions (M&A)

2. Is the program being applied earnestly and in good faith? Is the program **adequately resourced and empowered to function effectively?^a**

- A. Commitment by Senior and Middle Management
- B. Autonomy and Resources
- C. Incentives and Disciplinary Measures

3. Does the corporation's compliance program work in practice?

- A. Continuous improvement, Periodic Testing, and Review
- B. Investigation of Misconduct
- C. Analysis and Remediation

^aDOJ added the blue language as its principal revision in the June 2020 Update. The previous Guidance read, "Is the program being implemented effectively?"

DOJ Evaluation of Corporate Compliance Programs

1. **Is the corporation's compliance program well designed?**
 - Comprehensiveness of the program
 - Tailoring to company risk profile
 - Prioritization of high-risk challenges
 - Availability and allocation of company resources
 - Training frequency and communication of management's commitment to ethics and compliance
 - Assessment of third party partners through due diligence, monitoring, and contracting controls
 - Application of third party due-diligence to M&A context

- A. Risk Assessment
- B. Policies and Procedures
- C. Training and Communication
- D. Confidential Reporting Structure and Investigation Process
- E. Third Party Management
- F. Mergers and Acquisitions

DOJ Evaluation of Corporate Compliance Programs

2. Is the program being applied earnestly and in good faith? Is the program **adequately resourced and empowered to function effectively**?

- Compliance program is not simply a “paper program” or “snapshot”
- Measured and balanced tradeoff between lowering compliance risk and pursuing new or greater business revenue
- Program design that is aware of need for compliance independence, resources, and reporting structures
- Discipline for misconduct that is applied consistently and equally regardless of employee seniority
- Incentives to encourage good compliance behavior
- Program is regularly updated and data monitored

- A. Commitment by Senior and Middle Management
- B. Autonomy and Resources
- C. Incentives and Disciplinary Measures

DOJ Evaluation of Corporate Compliance Programs

3. Does the corporation's compliance program work in practice?

- The presence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective
- Compliance is assessed at both:
 - The time of misconduct
 - The time of the resolution with the company
- Program flexibility to address new business risks
- Adequate “culture of compliance” with input from employees at various levels of seniority
- Tools for regular self-assessment, monitoring, and testing of the compliance program
- Mechanism for investigating misconduct and determining root causes

- A. Continuous improvement, Periodic Testing, and Review
- B. Investigation of Misconduct
- C. Analysis and Remediation

Third Parties

— To mitigate third party corruption risk, consider:

Diligence

Business Rationale

Certification

**Controls &
Ongoing Management**

Relevant Questions from the DOJ Guidance:

- **Due Diligence** – Does the company have an appropriate due diligence process for its risk level?
- **Business Rationale**– How does the company ensure there is an appropriate business rationale for the use of third parties?
- **Controls & Management**– How has the company considered & analyzed the compensation and incentive structures for third parties? How does the company monitor its third parties? Does the company have and use audit rights? Does the company provide compliance training to its third parties?

Mitigating Risk in the M&A Context

- To mitigate corruption risk of a merger, acquisition, joint venture, or engagement with business pattern, consider:

Diligence

Contract Provisions

Structuring the Transaction

**Identifying Protections if
Corruption Appears**

Relevant Questions from the DOJ Guidance:

- **Due Diligence Process** – What is the diligence process? Any issues identified?
- **Integration in the M&A Process** – How has the compliance function been integrated into the M&A and integration process?
- **Connecting Diligence to Implementation** – What is the process for tracking and remediating misconduct or risks identified during the diligence process? What is the process for implementing compliance at new entities?

Corporate Compliance Program Update Takeaways

1

Has the compliance program been tailored to the company's risk profile and has the company leveraged its resources to address changing business risks?

2

Is the ethics and compliance program dynamic?
Has it been tested or evaluated at regular intervals?

3

What information gathering, measurement systems, and record-keeping is applied in the day-to-day operations of the compliance program?

4

Are appropriate and sufficient resources allocated to compliance and made available?

5

Do all levels of seniority within the corporate structure demonstrate a commitment to compliance in words and actions?

6

Have "lessons learned" been used to improve the compliance program?

Thank You

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