DOJ REVISES CORPORATE COMPLIANCE GUIDANCE CALLING ATTENTION TO THREE AREAS WHERE MOST COMPANIES FALL SHORT: RISK ASSESSMENTS, COMPLIANCE CULTURE, AND CONTINUOUS COMPLIANCE PROGRAM IMPROVEMENT

Date: 16 May 2019

U.S. Investigations, Enforcement, and White Collar Alert

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[1] On April 30, 2019, the U.S. Department of Justice ("DOJ") Criminal Division revised its Evaluation of Corporate Compliance Programs Guidance Document (the "2019 Guidance") to assist prosecutors in evaluating the effectiveness of a corporate compliance program. [2] The 2019 Guidance — an update to a 2017 version, which was applicable only to the DOJ's Fraud Section — expands its application to DOJ's entire Criminal Division and is meant to "better harmonize the guidance with other Department guidance and standards while providing additional context to the multifactor analysis of a company's compliance program." The 2019 Guidance does not contain any new concepts, per se, but rather seems to emphasize three areas of corporate compliance where DOJ believes companies may struggle or require improvement:

1. completing meaningful **risk assessments**;
2. effectively creating a **corporate culture of compliance**; and
3. demonstrating **continuous compliance program improvement** — e.g., through testing and monitoring.

The 2019 Guidance reinforces DOJ's consistent message that "paper programs" will not cut it, and that companies must exhibit a genuine commitment to compliance by crafting compliance programs that are proportionate to identified risks; that companies should demonstrate financial, practical, and philosophical support for compliance; and that companies should continuously review, reassess, and improve their compliance program based on changing circumstances.

While implementing an effective compliance program is no easy task, the benefits, such as potential deferred prosecution agreements, non-prosecution agreements, reductions in monetary penalties under the U.S. Federal Sentencing Guidelines, and the potential avoidance of a compliance monitor, are significant.

More importantly, however, a thoughtful, well-designed compliance program specifically tailored to a company's risk profile, operated with appropriate resources and support, and tested over time, may help a company and its employees prevent violations in the first instance — thus avoiding potentially millions of dollars in criminal penalties, civil damages, internal investigation costs, stock price decline, and reputational harm.

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Consistent with the 2019 Guidance, this article focuses on three common areas for improvement in global compliance programs and discusses the implications of the 2019 Guidance on DOJ's prosecution of antitrust, Foreign Corrupt Practices Act ("FCPA"), and False Claims Act ("FCA") cases.

OVERVIEW OF THE 2019 GUIDANCE

The 2019 Guidance does not necessarily establish any new policies or provide any magic "checklist [or] formula" for compliance programs. [3] It reiterates the longstanding guidance from the Justice Manual's Principles of Federal Prosecution of Business Organizations, which requires prosecutors to ask three fundamental questions when examining the effectiveness of a corporate compliance program: (1) is the compliance program well designed?; (2) is the compliance program being implemented effectively?; and (3) does the compliance program work in practice?. [4] In the 2019 Guidance, DOJ uses the three questions to frame the issues that prosecutors should consider when evaluating a compliance program and perhaps provides a useful glimpse into some of DOJ's key current areas of focus. [5]

A. Well-Designed Compliance Programs Include Risk Assessments

To determine whether a compliance program is well designed, the 2019 Guidance focuses on whether and how a company assesses and addresses risk, establishes policies and procedures based on that risk assessment, conducts training and supports communication of the policies and procedures, promotes confidential reporting of misconduct and swift and thorough investigations of misconduct, manages third-party relationships, and conducts due diligence of acquisition targets and joint venture partners. In essence, a well-designed compliance program is proportionate to the company's identifiable risks and the corresponding policies and procedures are supported both in spirit and resources.

The DOJ is clear that a risk assessment is an essential tool for right-sizing a compliance program and allocating resources. The 2019 Guidance also highlights the need for ongoing risk assessments to help a compliance program evolve with a company's changing needs and risks. Prosecutors are told to consider not only whether a company conducted a risk assessment, but whether that risk assessment remains "current and subject to periodic review." [6] The 2019 Guidance also stresses the need for policies to be adapted and updated after a problem or misconduct is uncovered and in light of lessons learned, and it explicitly ties maintaining a current and well-designed program to a company's efforts to collect, track, and analyze information gathered from well-funded reporting mechanisms. Demonstrating continual improvement based on ongoing risk assessment proves to DOJ that the compliance function is not "asleep at the switch," but rather has a "finger on the pulse" of the organization.

B. Effective Implementation Requires Buy-in at All Levels

Looking beyond program design, the 2019 Guidance indicates that DOJ expects commitment from senior and middle management "to implement a culture of compliance from the top." [7] Actions of senior leaders and middle management aimed at encouraging compliance, demonstrating their commitment to compliance personnel, and persisting in their commitment to compliance "in the face of competing interests or business objectives" all undergo prosecutorial review. In other words, buy-in from the top down is essential to effective compliance program implementation.

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Additionally, DOJ makes clear that adequate autonomy and resources should be provided to the compliance personnel charged with administering the program. One way to examine whether a company is genuinely committed to a culture of compliance, from the top down, is to look at the independence and autonomy of the compliance function and the level of resources (e.g., personnel, resources, technology) devoted to safeguarding that culture.

C. Compliance Programs Will Not Work Well in Practice Without Constant Vigilance

The 2019 Guidance emphasizes that, though a compliance program should foreclose opportunities for misconduct, it should also identify misconduct through periodic testing and monitoring and demonstrate continual improvement to prevent future misconduct based on lessons learned from the discovery of past incidents or other identifiable risks. To accomplish this, a company may consider conducting program evaluations, periodic compliance audits, walk-throughs of relevant internal controls, review of document flow on key business processes involving enhanced risk, transaction sampling, and other tests of key business relationships, particularly following an expansion or change in operations.

Importantly, the 2019 Guidance notes that DOJ "recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees." Should misconduct occur, however, "a strong indicator that the compliance program was working effectively" [8] is whether the program successfully identified, reported, and remediated the misconduct.

2019 GUIDANCE IN CONTEXT: IMPLICATIONS ON ANTITRUST, FCPA, AND FCA ENFORCEMENT

As described briefly below, the 2019 Guidance may have somewhat different implications for the prosecution of different types of misconduct:

Antitrust Division Policy

Historically, the DOJ Antitrust Division has not given any consideration to a corporation's antitrust compliance program when making prosecution decisions. As explicitly stated in the Justice Manual, "the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty [for an antitrust violation] is available only to the first corporation to make full disclosure to the government." [9] The existence of an effective compliance program has, however, been given at least some consideration by the Antitrust Division at the sentencing stage, and the Antitrust Division recently stated that they are continuing to assess whether and how to credit effective compliance. [10] The existence of an effective compliance program at the time of sentencing may help a company avoid a term of corporate probation and may, under certain circumstances, result in a reduced criminal fine.

The Antitrust Division has made a clear distinction between "backward-looking" and "forward-looking" compliance efforts. Backward-looking efforts — e.g., the preexistence of a compliance program that failed to detect the misconduct — will not be credited. Forward-looking efforts — e.g., the implementation or enhancement of an effective compliance program by a company already involved in an investigation — may receive some consideration in calculating a corporation's fine if those efforts were proactive and the company genuinely sought to change its culture of compliance. Forward-looking credit has only been given in a few prosecutions to date, and

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the Antitrust Division has indicated that the bar is high for this type of credit, requiring a true transformation of the company's culture of compliance led by the company's leadership.

While the existence of a compliance program will not immunize a company from prosecution for antitrust violations, implementation of a compliance program that effectively addresses and monitors antitrust risk can significantly reduce a company's exposure. For instance, early detection of conduct that could violate the antitrust laws may allow a company to take advantage of the Antitrust Division's Corporate Leniency Program. Under this program, a company that is the first to report an antitrust violation to the government and that cooperates in the government's investigation and prosecution of the company's co-conspirators will earn itself and all of its executives and employees amnesty from criminal prosecution, as well as certain benefits and reduced exposure in follow-on civil litigation.

Antitrust Division officials have made a number of speeches about compliance over the past few years and hosted a public roundtable on criminal antitrust compliance last year. Themes in those speeches have included proper risk assessments, creating a culture of compliance from the top down, and continuous improvements to compliance programs (especially for programs that failed to detect misconduct). The 2019 Guidance echoes those themes but provides a more detailed discussion on the specific questions prosecutors will ask when assessing the existence of those characteristics.

The FCPA Corporate Enforcement Policy

The 2019 Guidance complements and expands on previous publications regarding the enforcement of the FCPA. For example, DOJ's FCPA Corporate Enforcement Policy, published in November 2017 and amended in March 2019, [11] explains how a company can receive full or partial credit from DOJ and even avoid prosecution for FCPA violations through: (1) voluntary self-disclosure, (2) full cooperation, and (3) timely and appropriate remediation. [12] Central to each of these is an effective compliance program that can identify the misconduct that must be disclosed, that supports cooperation with DOJ, and that can be used to remediate the issues that led to the misconduct. For example, in December 2018, DOJ declined to prosecute Polycom, Inc. ("Polycom") for alleged bribery in China and the falsification of books and records. In that case, Polycom identified the misconduct through its compliance program, voluntarily disclosed it to DOJ after uncovering it, used the mechanisms set up through its compliance program to independently investigate the misconduct, identified and terminated individuals involved in the misconduct, disciplined other employees, and terminated the company's relationship with one of its partners. [13] Additionally, Polycom took steps to enhance its compliance program and internal accounting controls in an effort to prevent future misconduct. [14] By allowing DOJ to pursue individual bad actors and because of the company's direct efforts to enhance what DOJ found to be an already effective pre-existing compliance program, Polycom avoided a prolonged criminal investigation and the threat of further criminal liability.

The FCA Cooperation Credit Checklist

On May 7, 2019, shortly after the release of the 2019 Guidance, DOJ issued its Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters (Justice Manual 4-4.112) ("FCA Guidelines"). [15] The FCA Guidelines identify the "factors that will be considered and the credit that will be provided by [DOJ] attorneys when entities or individuals voluntarily self-disclose" potential FCA violations, cooperate with FCA investigations and settlements, or "take adequate and effective remedial measures." [16] Like

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the FCPA Corporate Enforcement Policy, the FCA Guidelines highlight the importance of having a robust compliance program so companies can avail themselves of DOJ's cooperation credits if they identify misconduct.

The FCA Guidelines identify 10 forms of cooperation to earn full credit in an FCA investigation, including "[i]dentifying individuals substantially involved in or responsible for the misconduct" and "[d]isclosing relevant facts and identifying opportunities for the government to obtain [relevant] evidence." [17] Each of these forms of cooperation is directly tied to an effective compliance program with the mechanisms and resources to timely investigate and disclose the misconduct.

The FCA Guidelines also note the importance of a company's remediation efforts once misconduct has been identified. Central to these remediation efforts is "implementing or improving an effective compliance program designed to ensure the misconduct or similar problem does not occur again." [18] Finally, the FCA Guidelines identify other considerations for prosecutors when assessing the availability of cooperation credit. Such considerations include "the prior existence of a compliance program" and "the nature and effectiveness of such a compliance program in evaluating whether any violation of law was committed knowingly." [19] In general, the timing and substance of the 2019 Guidelines and the FCA Guidelines suggests a concerted attempt to develop consistent messaging with respect to the evaluation and benefits of corporate compliance programs across different areas of enforcement.

Key Takeaways

The 2019 Guidance and DOJ's other publications on corporate compliance make clear that DOJ will see right through "paper" compliance programs and that companies should consider ways to develop programs to meet the DOJ's expectations. Based on the 2019 Guidance, elements of such programs may include:

- Periodic, multidisciplinary risk assessments;
- Clear and sustained commitment from senior management to building a culture of compliance;
- Experienced compliance program administrators with autonomy and independence from management and sufficient resources to administer the program;
- Regular communication and training of employees based on risk assessment of needs relative to job function;
- Periodic monitoring and testing of higher-risk transactions, processes, and business relationships;
- Regular testing of employees' understanding of company policies and adherence to relevant procedures and internal controls;
- A well-published, user-friendly mechanism for reporting actual or suspected violations of policy or applicable laws; and
- Periodic review, re-evaluation, and revision of key policies, procedures, and internal controls based on changing operations.

NOTES:

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[1] Thank you to Scott Hefferman and Eric Harris for their contributions to this article.
[2] *Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs* (Apr. 30, 2019), https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs.
[3] 2019 Guidance, at 2.
[4] *Id*. at 3.
[5] The 2019 Guidance also conforms to the DOJ's other recent publications indicating that the DOJ is focused on prosecuting individuals, seeks corporate cooperation to do so, and rewards that cooperation. *See, e.g.*, https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 14
[9] 9-28.400 – Special Policy Concerns (updated August 2008), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.400.
[10] Assistant Attorney General of the Antitrust Division, Makan Delrahim, recently said that the Division is "considering whether and how to further credit effective compliance" and that he is considering "a range of options…to further encourage the adoption of robust compliance programs." He also stated that the Antitrust Division "share[s] the [DOJ's] commitment to ensuring that good corporate citizens who invest in compliance, self-report, and remediate get a 'fair shake.'" Assistant Attorney General Makan Delrahim Delivers Remarks at Fordham University School of Law (May 1, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-fordham-university-school-law.
[11] FCPA Corporate Enforcement Policy (Justice Manual 9-47.120) (updated March 2019), https://www.justice.gov/criminal-fraud/file/838416/download; *see also* Brian F. Saulnier et al., *Takeaways from the 34th International Conference on the Foreign Corrupt Practices Act* (Dec. 7, 2017),
[12] FCPA Corporate Enforcement Policy (Justice Manual 9-47.120) (updated March 2019), https://www.justice.gov/criminal-fraud/file/838416/download.
[13] December 20, 2018 Polycom, Inc. Declination Letter, https://www.justice.gov/criminal-fraud/file/1122966/download.
[14] *Id.*
[15] *See* FCA Guidelines, https://www.law360.com/articles/1157495/attachments/0.
[16] *Id.*
[17] *Id.* at 4
[18] *Id.*
[19] *Id.* at 5

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