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On April 30, 2019, the Department of Justice (“DOJ”) published “Evaluation of Corporate Compliance Programs,” (the “Guide”), which directs prosecutors in evaluating a company’s compliance program.¹ This 2019 publication updates DOJ’s original corporate compliance evaluation guide, which the Criminal Division had issued in February of 2017.²

While the 2017 document was the DOJ’s first prosecutorial guide to evaluating corporate compliance programs, the 2019 document primarily updates the original guide by restructuring it in a more concise format. Indeed, the purpose of the document remains the same: to “assist prosecutors in making informed decisions as to whether, and to what extent, the corporation’s compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution.”³

Defense counsel should use the Guide as a

roadmap to help clients establish corporate compliance programs, as well as evaluate and improve their clients’ current corporate compliance programs.

DOJ recognizes that each company’s risk profile and policies are different from a corporate compliance perspective. Evaluating a company’s compliance program must, therefore, be individualized. As such, DOJ’s Guide does not use a particular formula to assess the effectiveness of corporate compliance programs, but it instead poses three primary questions in making an individualized determination:

1. Is the corporation’s compliance program well designed?
2. Is the program applied earnestly and in good faith? In other words, is the program being implemented effectively?
3. Does the compliance program work in practice?⁴

Prosecutors enjoy flexibility in answering these questions. Prosecutors may weigh one question more heavily than the others, creating a unique evaluation given the relevant circumstances and facts of each case.⁵ In other words, the questions serve as guideposts rather than impose a checklist.

Defense counsel should analyze the three questions just as a prosecutor would, considering the specific points summarized below.

According to DOJ's Guide, the critical factor in evaluating any compliance program is its comprehensiveness. Thus, in assessing the first question—whether a corporation's compliance program is well designed—the Guide suggests analyzing various factors that focus on the infrastructure of a corporation's compliance program. These factors include whether the compliance program includes a sufficient risk assessment for the particular company; whether the policies, procedures, training and communications are well-designed; whether there is an efficient and thorough confidential reporting structure and investigation process; whether the program applies risk-based due diligence to its third party relationships; and whether

the program includes comprehensive due diligence of corporate mergers and acquisitions.⁶ Because prosecutors will consider these factors in answering the first question, defense counsel should too.


The purpose of evaluating these factors is to assess whether the program is designed for "maximum effectiveness" in preventing and detecting wrongdoing. And the Guide makes it clear that in addition to looking for wrongdoing, prosecutors—and thus defense counsel—must determine whether there is proper corporate infrastructure to ensure that there is a system for detection and discipline if misconduct exists.⁷

But, because "[e]ven a well-designed compliance program may be unsuccessful in practice if implementation is lax or ineffective,"⁸ prosecutors are then directed to the second question—whether the program is applied earnestly and in good faith. The second question examines whether the program is properly and effectively implemented. Prosecutors must review the commitment by senior and middle management; the program's autonomy and resources; and the corporation's incentives and disciplinary measures.⁹ They must also focus

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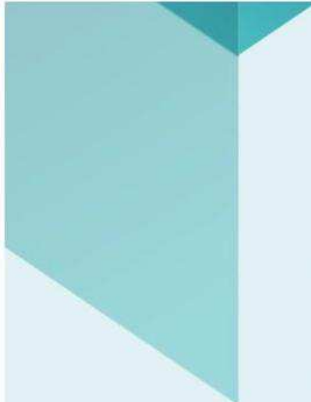
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on a company's governing authorities, analyzing the conduct of senior leadership, and how individuals in these positions encourage or discourage compliance.¹⁰ The Guide instructs prosecutors to specifically probe into whether "a compliance program is a 'paper program' or if it is one 'implemented, reviewed, and revised, as appropriate, in an effective manner.'"¹¹ And prosecutors are also tasked with investigating the qualifications of compliance and control personnel, which requires assessing the experience and responsibilities of such employees.¹²

Prosecutors are directed to especially consider the company's culture of compliance and whether the company has an outward stance that misconduct will not be tolerated.¹³ To that end, the Guide points prosecutors towards the human resources department, and advises prosecutors to ask questions regarding the decisionmakers in disciplinary actions, consistency in the application of disciplinary action, and what is actually communicated to the employees about disciplinary actions.¹⁴ It urges prosecutors to evaluate the company's disciplinary framework and assess its overall effectiveness.¹⁵ The Guide also

mentions the effect of publicizing disciplinary actions internally—which has proven deterrent effects.¹⁶ It also advises prosecutors to review any incentive structure in which employees are rewarded or promoted for demonstrating ethical leadership. Again, defense counsel should consider these same points in advising clients about their compliance programs, whether those programs are first being established or whether they are being evaluated after they have already been established.

The DOJ recognizes the difficulty in assessing the effectiveness of a corporate compliance program in practice—nevertheless, that is the third question prosecutors must examine. In fact, the most difficult question for prosecutors to answer is whether the compliance program was working effectively at the time of the offense.¹⁷ The Guide sets forth various points to consider when answering this third and final question, including whether there is continuous improvement, periodic testing, and review of the compliance program; whether misconduct within the corporation is investigated; and whether that underlying misconduct is analyzed and remediated.¹⁸



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Additionally, a hallmark of an effective compliance program is its ability to change and adapt, so as companies' businesses and risks change, DOJ will also evaluate whether the subject company's compliance efforts have evolved as well.¹⁹

The existence of misconduct alone does not suggest a compliance program was ineffective.²⁰ Rather, prosecutors are encouraged to consider if and how the misconduct was detected, what was done to investigate the alleged misconduct, and any corrective action. Examples of relevant corrective action include whether the company performed a root cause analysis, or if it revised its policies to address the misconduct.²¹ In other words, remedial action, including disciplinary action against violators, is an important consideration in a prosecutor's inquiry. As prosecutors are directed to focus on the above-described issues in answering the third question, so should defense counsel who are advising clients about their compliance programs.

In conclusion, while the updated Guide does not include much new material, its new organization provides clarity about how prosecutors should make investigative and prosecutorial decisions regarding corporate compliance programs. The Guide is thus valuable for corporations seeking to understand the

criteria by which prosecutors will evaluate their compliance programs. Defense counsel should, therefore, review the Guide when creating and implementing compliance programs as well when reviewing compliance programs in place. The full Guide is accessible at <https://www.justice.gov/criminal-fraud/page/file/937501>. 

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