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DOJ Issues Updated Guidance on Corporate Compliance Programs

This week, Assistant Attorney General Brian Benczkowski of DOJ's Criminal Division announced newly updated [guidance](#) for white-collar prosecutors, identifying factors to be considered in evaluating corporate compliance programs. The update both expands upon guidance first issued in February 2017 and aims to harmonize that guidance with DOJ's principles for corporate prosecution. This guidance represents the latest development in DOJ's broader effort — on which we previously reported in [March](#), [July](#), and [twice](#) in [October](#) of last year — to promote predictability and transparency in white collar enforcement and to clarify the benefits of a responsible corporate approach to misconduct, in this case through maintenance of a robust and effective corporate compliance program. All responsible companies should pay close attention to the key lessons signaled in this new DOJ guidance.

The updated guidance, a restructured and more detailed version of its predecessor, is organized into three parts, tracking the “fundamental questions” DOJ's [Justice Manual](#) directs prosecutors to ask in assessing corporate compliance programs: (1) Is the compliance program well designed? (2) Is it implemented earnestly and in good faith? (3) Does it work in practice? The answers to these questions — as fleshed out by the many topics and subtopics identified in the guidance — will guide DOJ prosecutors as they consider whether companies under investigation will receive a declination or be prosecuted, the size of any monetary penalties that may be imposed, and whether to require a compliance monitor as part of a negotiated resolution.

By identifying categories and a detailed catalogue of key questions, the guidance provides a window into what DOJ considers to be the hallmarks of a well-designed and effective compliance program. While many of those hallmarks are familiar holdovers from the 2017 guidance, there are two areas of heightened emphasis that warrant particular attention:

First, the guidance stresses that compliance programs should be dynamic and responsive to a company's unique risks and incident history. The guidance directs prosecutors to determine whether compliance programs have been updated “in light of lessons learned,” and to consider if a company's program has evolved “to address existing and changing compliance risks.” Companies therefore should maintain a clear, well-documented record of “continuous improvement,” based on

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periodic review and recalibration, to best prepare its compliance program for scrutiny.

Second, the guidance places enhanced emphasis on data-driven decision making, directing prosecutors from the outset to assess “how information or metrics informed the company’s compliance program.” Throughout, the guidance focuses on the use of metrics, counseling prosecutors to assess how a company under scrutiny has employed data to assess and enhance the effectiveness of its training programs, its internal controls, the tracking of misconduct, the responsiveness of internal investigations, and the impact of compliance-promoting incentive compensation. In the wake of this guidance, companies should take a hard look at the way they collect and employ compliance data to ensure that their record will stand up to this new, heightened level of attention.

This new guidance represents DOJ’s clearest statement to date that effective compliance programs can have a material impact on charging decisions, as well as the extent of penalties and compliance obligations imposed in any corporate resolution. In his [speech](#) announcing the updated guidance, AAG Benczkowski emphasized that implementing an effective compliance program is a precondition to eligibility for a declination under DOJ’s FCPA Corporate Enforcement Policy. And the guidance itself highlights that prosecutors may “reward efforts to promote improvement and sustainability” of compliance programs in the form of any prosecution or resolution. Companies with robust compliance programs that continually improve based on lessons learned and data gathered have a real opportunity to benefit.

These new signals from DOJ thus present unique opportunities, while simultaneously raising the stakes. DOJ’s “compliance carrot” may enable companies with strong programs to earn a declination or reduced penalties when misconduct occurs. But with the clearer guidance and stronger incentives comes greater scrutiny. As DOJ prosecutors focus on the dynamic nature of compliance programs and their use of metrics, companies will need to provide measurable evidence of continuing compliance progress. Companies that do so will not only position themselves well in the event of a DOJ investigation, but will stand the best chance of deterring misconduct in the first place or nipping it in the bud before it blooms into a corporate crisis.

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