

DOJ Compliance Program Guidance Shows Value of a Compliance Committee

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Though directed at prosecutors, the June 1, 2020, [guidance on corporate compliance programs](#) (Guidance) from the U.S. Department of Justice (DOJ) is a source of practical advice for in-house legal and compliance teams in structuring their programs. To ensure that a company's compliance efforts match prosecutorial expectations and place it in the best position to achieve positive resolutions, a compliance committee should be created and empowered to tailor policies and procedures to the company's specific risks. Equally important, a compliance committee that keeps records of its decision-making (in the form of minutes from meetings or otherwise) will arm a company with valuable evidence to provide the DOJ if the company's compliance function is reviewed in connection with the resolution of an investigation.

Reducing Corporate Culpability

The Guidance directs prosecutors to evaluate a company's compliance program in connection with: (1) determining what form of resolution to pursue (*e.g.*, guilty plea, deferred prosecution agreement (DPA), nonprosecution agreement (NPA), declination); (2) setting a monetary penalty; and (3) determining the compliance obligations to put in place in connection with a resolution. (For more on the guidance, see our June 15, 2020, client alert, "[Key Takeaways From Updated DOJ Corporate Compliance Evaluation Guidance](#).") Each happens once the DOJ has established that an individual at the company have violated a criminal statute. At that point, the DOJ takes the position that it has the ability to impute to the company the culpability of any individual who committed the offense.

The DOJ's analysis of a compliance program can be thought of as an analysis of whether the corporation has demonstrated a commitment to ensuring compliance with the law such that its culpability should be discounted from that of the individual wrongdoers. This could help the company achieve better results in resolutions with the DOJ — including a DPA, NPA or, if the company identified and remedied the misconduct, even a declination of prosecution. Similarly, where the DOJ views the compliance program as strong, monetary penalties may decrease and the company may be spared the expense of a monitor.

Compliance Committees

Companies seeking to bring their compliance programs in line with the Guidance should strongly consider establishing a committee on compliance issues that meets regularly to consider the compliance structure at the institution and to record related decisions and their rationales. The Guidance makes clear that setting up and maintaining a compliance program is a fact-specific exercise. Personnel within the company are best positioned to make decisions about a program's structure based on information that they have, and the creation of a dedicated committee provides a formal structure for a program's review and improvement. A compliance committee's work product can also help during an investigation, when the DOJ will examine whether the compliance program matches the company's operations.

The Guidance is divided into three sections that ask the following questions: (1) "Is the corporation's compliance program well-designed?" (2) "Is the corporation's compliance program adequately resourced and empowered to function effectively?" and (3) "Does the corporation's compliance program work in practice?" Each of these queries could be effectively addressed by a compliance committee.

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A compliance committee and the records it generates about the assessment of a company's risk will help establish that a compliance program is well designed because the Guidance directs prosecutors to look at the company's risk assessment in making such a determination. A company facing a DOJ review will want evidence that it performed a risk assessment, but companies do not always document their decision-making processes in setting up compliance programs, and compliance personnel shift over time. If a program was developed several years before a resolution is sought, the company could struggle to demonstrate to the prosecutor both that it performed a risk assessment and what that assessment found. A committee that takes meeting minutes and records the decision-making concerning this process would generate the documentary evidence necessary to show a prosecutor that risks were identified, considered and reflected in the design and implementation of a company's compliance program.

A compliance committee can also demonstrate that compliance is well resourced and empowered to operate. Here, the DOJ will be looking for evidence that management at the company is supportive of compliance efforts — that adequate autonomy and resources are in place to pursue them, and that compliance is a consideration in the creation of incentives and discipline measures. The establishment of a committee and its access to senior management or a board of directors through a reporting schedule is evidence that management is committed to compliance. Indeed,

companies should strongly consider management participation on the committee. Also, a compliance committee that meets regularly can ensure that discipline and incentives in connection with compliance are consistently applied across a large organization, which is another item that the Guidance identifies for review.

Finally, the Guidance's advice on whether a compliance program works in practice highlights the value of a compliance committee. It notes that "[o]ne hallmark of an effective compliance program is its ability to improve and evolve." The Guidance directs prosecutors to examine whether the program is periodically tested and reviewed. Overseeing the results of periodic testing, review and improvement would be a primary function of the committee. Its minutes would be strong evidence that this function is being performed.

A company can provide persuasive evidence to prosecutors that it is sufficiently committed to compliance by having a dedicated committee that oversees tailored compliance efforts and maintains relevant documentation. This can position the company for a more favorable resolution — such as a DPA or NPA, a lower penalty and no monitor, or even a declination. Perhaps most importantly, a compliance committee and the strong compliance program that it can help create is useful for preventing misconduct from occurring in the first place, which is a goal that companies and the government share.