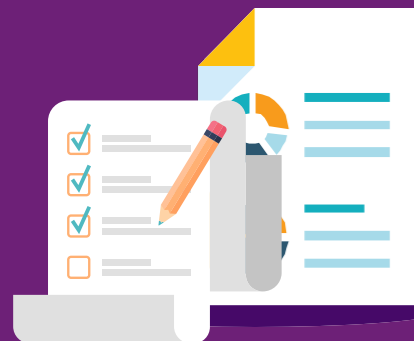


Regulatory alert

Updated 2020 guidance from the DOJ on effective corporate compliance programmes



On 1 June 2020, the U.S. Department of Justice's (DOJ) Criminal Division published updated guidance on the 'Evaluation of Corporate Compliance Programmes' (guidance) to reflect its evolving view of the adequacy and effectiveness of the Corporate Compliance Programmes (CCP).

This guidance was first published in February 2017, which was meant to assist prosecutors to assess "the adequacy and effectiveness of the corporation's compliance programme at the time of offense, as well as at the time of a charging decision or resolution" for determining the appropriate resolution or prosecution, monetary penalty (if any) and compliance obligations (e.g., monitoring or reporting obligations).

Besides prosecutors, the guidance has been used by general counsels, compliance officers of companies to design and implement a compliance programme that is considered 'adequate and effective' when an investigation arises.

This guidance was updated once before in April 2019, which organised various elements of an effective CCP under three fundamental questions:

1. Is the compliance programme well designed?
2. Is the programme being implemented effectively and in good faith?
3. Does the compliance programme work in practice?

While the June 2020 update has retained most of the earlier content, the key changes include the following:

1) Reasonable and individualised approach for CCP evaluation

The changes in the 2020 guidance put explicit emphasis on an individualised and reasonable approach for determining the effectiveness of the CCP by the prosecutors. The following are the additional points mentioned in the 2020 guidance.

- a. To make "a reasonable, individualised determination" in each case that considers various factors, including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape and other factors, both internal and external to the company's operations, that might impact its compliance programme
- b. To endeavour to understand why the company has chosen to set up the compliance programme the way that it has and why and how the company's compliance programme has evolved over time and to consider "the reasons for the structural choices the company has made"
- c. To consider whether certain aspects of a compliance programme may be impacted by a foreign law and how has the company addressed it to maintain the integrity and effectiveness of its compliance programme while still abiding by foreign law.



2) Are compliance programmes 'snapshots' in time or dynamic?

The updates in the 2020 guidance emphasise that the updates and revisions to risk assessment shouldn't be merely based on a periodic review limited to a 'snapshot' in time but it should be subject to dynamic reviews based upon continuous access to operational data and information across functions. The guidance further asks the prosecutors to check whether the periodic review has led to informed updates in compliance policies, procedures and controls.

The 2020 guidance further widens the scope to assess whether a company has a process of tracking and incorporating into its periodic reviews lessons learned from other companies operating in the same industry and/or geographical region or facing similar risks.

The above emphasis clearly demonstrates that DOJ prosecutors will be looking for the scope of periodic risk assessments and tangible changes to company policies and procedures.

3) Ease of reference and tracking access to policies and procedures

The previous version of the guidance was focused on the mode, coverage and linguistic barriers of the company's communications regarding compliance policies and procedures. The 2020 guidance goes a step further to check the following.

- a. Whether the policies and procedures were published in a searchable format for easy reference
- b. Whether a company tracks access to various policies and procedures to understand what policies are attracting more attention from the relevant employees.



4) Effectiveness of training and its impact evaluation

The updates in the 2020 guidance asks prosecutors to consider the following additional factors while assessing the effectiveness of the training programme.

- a. Whether companies have a shorter, more targeted training sessions to enable employees to timely identify and raise issues to appropriate compliance, internal audit or other risk-management functions
- b. Whether online or in-person training, is there a process by which employees can ask questions arising out of the training?
- c. Has the company evaluated the extent to which the training has an impact on employee behaviour or operations?



5) Effectiveness of the reporting mechanism

The updates in the 2020 guidance ask prosecutors to consider the following additional factors while assessing the effectiveness of the reporting mechanism.

- a. How is the reporting mechanism publicised to third parties?
- b. Does the company take measures to test whether employees are aware of the hotline and feel comfortable using it?
- c. Does the company periodically test the effectiveness of the hotline, for example by tracking a report from start to finish?



6) Third-party risk management – not a one-time exercise

The 2020 updates require prosecutors to assess whether the company engages in risk management of third parties throughout the lifespan of the relationship or primarily during the onboarding exercise. The updated guidance requires that the company -

- a. Has a well-designed compliance program which applies a risk-based due diligence to its third-party relationships. The need for and degree of, appropriate due diligence may vary based on the size and nature of the company, transaction, and third party, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transaction
- b. Knows the business rationale for needing the third party in the transaction and the risks posed by third-party partners, including the third-party partners' reputations and relationships, if any, with foreign officials
- c. Has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region
- d. Is engaged in the ongoing monitoring of the third-party relationships, be it through updated due diligence, training, audits, and/or annual compliance certifications by the third party



7) Timely and orderly integration and post-acquisition audits

The 2020 updates to the guidance require prosecutors to assess the following.

- a. Whether a company's CCP has a process for timely and orderly integration of the acquired entity into the existing compliance programme structures and internal controls
- b. What has been the company's process for conducting post-acquisition audits?



8) Adequate resourcing and empowerment of CCP to function effectively

The 2020 updates have amended the guidance's second fundamental question from whether the compliance programme is "being implemented effectively" to whether the programme is "adequately resourced and empowered to function effectively". The 2020 guidance further includes the terms "*under-resourced or otherwise ineffective*" as determining factors for a well-designed CCP failing in practice. The change makes it clear that companies can't afford to have an effective CCP design and then fail to devote sufficient funds or personnel to put the programmes into practice.

The 2020 guidance recognises the importance for a company to create and foster a culture of ethics and compliance with the law "at all level of the company". The guidance further introduces the concept of "tone from the middle" requiring a high-level commitment by company leadership to implement a culture of compliance from the middle. The previous version was focussed only on the "tone at the top".

The 2020 updates also recognise the need for technology solutions in monitoring the effectiveness of CCP. Hence, the updated guidance asks the prosecutors to consider the following.

- a. Whether compliance and control function personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions
- b. Whether any impediment exists that limits access to relevant sources of data and, if so, what is the company doing to address those impediments?



Summary

The 2020 updates to the DOJ guidance is a clear call to move away from 'tick-in-the box' compliance. It has become imperative for companies to understand that a good design will not sail through if it fails in practical application. Hence, companies should consider providing the CCP with adequate resourcing and empowerment. Also, while designing the CCP, companies need to have a documented basis for the structure of the CCP adopted by them. It should clearly demonstrate that companies have considered relevant internal and external factors, including the impact of foreign law, if any. Companies should revisit their CCP to ensure that it is in line with the 2020 updates to the guidance.

The Indian regulatory framework has also seen changes in 2018 that lay emphasis on the need for organisations to have an effective CCP. The 2018 amendments to the India Prevention of Corruption Act, 1988 prevents an organisation from taking the plea that bribery and corruption instances are individual offences, except when it can prove that it had adequate compliance procedures and safeguards in place to prevent its associated persons from such conduct.

Source: U.S. Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs, June 2020



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