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DOJ's Recent Guidance on Compliance Programs

By Christopher L. Nasson, Michael D. Ricciuti, Barry M. Hartman and Clifford C. Histed

In assessing potential sanctions against corporations, prosecutors must decide whether and how to exercise their discretion when evaluating penalties to impose upon a company whose employees engaged in wrongdoing despite the company's controls designed to prevent illegal conduct. There are in existence no fewer than 11 policies or statements issued by a variety of federal authorities providing guidance in analyzing corporate compliance programs in making this assessment.¹ Most recently, on February 8, 2017, the Department of Justice's ("DOJ") Fraud Section issued additional guidance, "Evaluation of Corporate Compliance Programs" (the "Compliance Programs Memorandum"). The Compliance Programs Memorandum provides a list of "important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program."² This alert reviews the Compliance Programs Memorandum and what, if any, change it makes in how prosecutors exercise their discretion.

The Compliance Programs Memorandum

DOJ makes clear in the Compliance Programs Memorandum that there is no "one-size-fits-all" approach for establishing an effective corporate compliance program. Rather, "each company's risk profile and solutions to reduce its risks warrant particularized evaluation."³ Nevertheless, there are "common questions" that DOJ will ask when it evaluates a company's compliance program.⁴ The Compliance Programs Memorandum lists dozens of these "common questions," divided under the following headings:

1. Analysis and Remediation of Underlying Conduct
2. Senior and Middle Management
3. Autonomy and Resources
4. Policies and Procedures
5. Risk Assessment

¹ See e.g., *United States Attorneys' Manual* ("USAM"), <https://www.justice.gov/usam/united-states-attorneys-manual>; the *United States Sentencing Guidelines* ("USSG"), <http://www.ussc.gov/guidelines>; *DOJ & Securities & Exchange Commission* ("SEC") *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("FCPA Guide"), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>; *SEC Enforcement Manual*, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>; *Commodity Futures Trading Commission's Cooperation Factors in Enforcement Division Sanction Recommendations*, <http://www.cftc.gov/idc/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf>; *Federal Trade Commission's Competition Policy Guidance*, <https://www.ftc.gov/tips-advice/competition-guidance>; *Health & Human Services Compliance Education Materials*, <https://oig.hhs.gov/compliance/101/>; *DOJ Environment and Natural Resources Division's Factors in Decisions on Criminal Prosecutions*, <https://www.justice.gov/enrd/selected-publications/factors-decisions-criminal-prosecutions>; *Environmental Protection Agency's Audit Policy*, https://www.epa.gov/compliance/epas-audit-policy#_bookmark3; *Department of Labor - Occupational Safety and Health Administration's Compliance Directives*, https://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=DIRECTIVES&p_toc_level=2&p_keyvalue=CPL&p_status=CURRENT.

² DOJ, Criminal Division, Fraud Section, *Evaluation of Corporate Compliance Programs* (Feb. 8, 2017).

³ *Id.*

⁴ *Id.*

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6. Training and Communications
7. Confidential Reporting and Investigation
8. Incentives and Disciplinary Measures
9. Continuous Improvement, Periodic Testing, and Review
10. Third-Party Management
11. Mergers and Acquisitions

The Compliance Programs Memorandum notes that these topics and their corresponding questions constitute neither a checklist nor a formula, and that in any particular case, specific topics may be more or less relevant.

Scope and Application of the Guidance

The Compliance Programs Memorandum applies to domestic companies and foreign companies with any business interests in the United States and provides a one-stop shop for summarizing the key issues in crafting a compliance program that DOJ will find to be acceptable. Companies would be well-advised to review their compliance policies and procedures to ensure that they can withstand scrutiny under the Compliance Programs Memorandum.

This is Not New

The substance of the guidance provided in the Compliance Programs Memorandum is not new. For years, prosecutors responsible for investigating companies have considered the topics and questions listed in the Compliance Programs Memorandum in deciding whether to bring charges against a company and/or its employees. Indeed, many of these topics and questions appear in publicly available resources such as the USAM, USSG, FCPA Guide, and the Organization for Economic Cooperation and Development's *Anti-Corruption Ethics and Compliance Handbook for Business* and *Good Practice Guidance on Internal Controls, Ethics, and Compliance* memorandum. Several federal agencies use almost identical factors in their enforcement policies.⁵

Three Benefits from the Compliance Programs Memorandum

First, the Compliance Programs Memorandum represents DOJ Fraud Section's effort to consolidate in a single location the issues it considers relevant in evaluating a corporate compliance program. Prior to the publication of the Compliance Programs Memorandum, companies and their compliance counsel had to cobble together guidance from a variety of sources. DOJ has now provided compliance counsel with a single source from which to begin their development of new compliance programs or analysis of preexisting ones.

Second, the Compliance Programs Memorandum provides a benchmark against which a company's compliance efforts can be measured. Attending to the considerations expressed in this Memorandum can and should impact a prosecution decision.

⁵ See Note 1, *supra*.

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Third, the Compliance Programs Memorandum represents the first formal guidance issued by DOJ's Fraud Section since the presidential administration change and the confirmation of the new Attorney General and thus may provide some insight into the new administration's enforcement priorities — in this case, perhaps focusing initially on compliance efforts (often used to avert prosecution) and not prosecutorial initiatives.

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