

A PROSECUTOR’S GUIDE TO EVALUATING A COMPLIANCE PROGRAM: WHAT SHOULD YOUR BOARD BE ASKING?

The U.S. Department of Justice (DOJ) Criminal Division announced, on April 30, 2019, the release of a guidance document for prosecutors on the evaluation of corporate compliance programs. This guidance reflects the DOJ’s evolving view of compliance program effectiveness.

“Effective compliance programs play a critical role in preventing misconduct, facilitating investigations, and informing fair resolutions. Today’s guidance document is part of our broader efforts in training, hiring, and enforcement to help promote corporate behaviors that benefit the American public and ensure that prosecutors evaluate the effectiveness of compliance in a rigorous and transparent manner.”

ASSISTANT ATTORNEY GENERAL BRIAN A. BENCZKOWSK

Boards and management should enhance their evaluation of the company’s compliance program with this guidance in mind. While there is no set formula to evaluate the effectiveness of a compliance program, there are three fundamental questions raised by this guidance:

1. Is the Compliance Program Well-Designed?
2. Is the Program Being Implemented Effectively and in Good Faith?
3. Does the Compliance Program Work in Practice?

IS THE COMPLIANCE PROGRAM WELL-DESIGNED?

The guidance emphasizes a focus on a living, breathing, evolving compliance program that is designed to prevent and detect misconduct, and specifically discusses six elements of a well-designed compliance program aimed at preventing and detecting wrongdoing.

Within each of these six elements, the board of directors and management should be able to affirmatively answer questions that provide the necessary probing on both functionality and effectiveness of the compliance program design.

<p>Risk Assessment</p> <ul style="list-style-type: none"> • Does the compliance program have a thorough understanding of the commercial aspect of the organization? • Has the corporation revised corporate compliance programs to address lessons learned? 	<p>Policy and Procedures</p> <ul style="list-style-type: none"> • Does the company update policies and procedures based on changing legal and regulatory landscapes? • Are policies and procedures accessible to employees in all applicable languages? 	<p>Training and Communications</p> <ul style="list-style-type: none"> • Have employees received training based on prior compliance incidents? • Are trainings offered in appropriate languages (if applicable)?
<p>Confidential Reporting Structure and Investigation Process</p> <ul style="list-style-type: none"> • Does the company have a process in place to determine which complaints require further investigation and that investigations are properly scoped? • Do employees feel they are free from retaliation if they report a complaint or act as a whistleblower? 	<p>Third-Party Management</p> <ul style="list-style-type: none"> • Has risk-based due diligence been applied to third-party relationships? • Does the company incentivize compliance and ethical behaviors by third parties? 	<p>Mergers and Acquisitions</p> <ul style="list-style-type: none"> • Has compliance been integrated into the merger and acquisition process? • Is there a process for tracking and remediating misconduct or risks of misconduct identified during due diligence?

About Navigant

Navigant has integrated this guidance into a tried and tested methodology for evaluating compliance programs for effectiveness and sustainability, leveraging the entire Department of Justice and Office of Inspector General guidance since 2003. If you would like more information on our services related to board and compliance committee support (whether under a corporate integrity agreement requirement or proactively) please contact:



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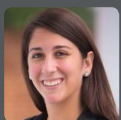
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IS THE PROGRAM BEING IMPLEMENTED EFFECTIVELY AND IN GOOD FAITH?

The compliance program should be continuously reviewed and updated — based on changes in the industry, and laws and regulations, as well as results from internal controls evaluations — and incorporate lessons learned from previous investigations. In other words, the compliance program must not be stale and exist only on paper.

The guidance has identified three actions compliance programs should perform to ensure a compliance program is in fact implemented effectively.

The board of directors and management need to explore the following three areas and confirm that there is:

- Commitment by senior and middle management to the compliance program.
- Autonomy and adequate resources for the effective running of the compliance program.
- Appropriate incentives and disciplinary measures available to reinforce alignment with the compliance program.

DOES THE COMPLIANCE PROGRAM WORK IN PRACTICE?

Finally, the DOJ has emphasized three indicators of effectiveness that are important for prosecutors to evaluate in the context of potential/alleged misconduct:

- Continuous improvement, periodic testing, and review
- Investigations and root-cause analysis of potential misconduct
- Analysis and remediation of any underlying misconduct

HOW DOES THIS GUIDANCE IMPACT YOU?

The DOJ's guidance for prosecutors' evaluation of corporate compliance programs highlights key compliance processes that investigators are likely to focus on during an investigation of misconduct. A summary of takeaways for the board of directors includes:

- The company must continuously review and revise the compliance program based on lessons learned through investigations, the risk assessment process, and updates to regulations
- The company must test controls to demonstrate that similar misconduct would be prevented or detected
- The company must appropriately fund and resource the compliance program

The board of directors must actively engage with compliance leadership to understand not only that their company's compliance program is well-designed, but that the program is being implemented effectively and works in practice.

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