



## Department of Justice Fraud Section Provides Guidance on Evaluating Corporate Compliance Programs

On February 8, 2017, the United States Department of Justice (“DOJ”) Fraud Section published a blueprint for assessing corporate compliance efforts, titled “Evaluation of Corporate Compliance Programs” (“Guidance”).<sup>1</sup> It contains an 11-part list of “important topics” with 119 questions, which appear to summarize the Fraud Section’s view on the best practices of an effective compliance program and a framework for evaluating a company’s compliance program and remedial efforts when resolving a criminal investigation. The Guidance follows several recent Fraud Section statements about the operations of corporate compliance programs,<sup>2</sup> the DOJ’s hiring of a compliance consultant in November 2015 to assist in assessing the effectiveness of corporate compliance programs,<sup>3</sup> and requests from companies and their counsel for guidance as to the specific benchmarks the Fraud Section uses to evaluate corporate compliance and remediation measures.

The Guidance provides companies a useful roadmap the Fraud Section is likely to consider when assessing the effectiveness of corporate compliance programs and remedial efforts. Under the United States Attorneys’ Manual (“USAM”), federal prosecutors consider 10 principles when investigating and deciding whether to charge corporate entities. These factors,

known as the “Filip Factors,”<sup>4</sup> include two related to a company’s compliance program: (i) “the existence and effectiveness of the corporation’s pre-existing compliance program” and (ii) the corporation’s remedial efforts “to implement an effective corporate compliance program or to improve an existing one.”<sup>5</sup> The new Guidance provides specific questions that Fraud Section prosecutors may use to examine a company’s compliance program under the Filip Factors.

The Guidance is also a useful tool for companies and their boards, senior management, and compliance professionals in designing and implementing compliance programs and preparing for compliance presentations to the Fraud Section or other regulators.<sup>6</sup> The Guidance provides general insights into the Fraud Section’s expectations for corporate compliance program design and implementation, even for companies that have not identified compliance issues. The Guidance can thus be used by companies to evaluate their programs before a specific compliance concern arises or a company is subject to DOJ scrutiny.

The Guidance, however, does not appear to break new ground in the area of corporate compliance. Indeed, none of the topics and questions is particularly surprising. They are based on existing guidance from

the United States Federal Sentencing Guidelines; the USAM; the DOJ and U.S. Securities and Exchange Commission's ("SEC") Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA"); recent Fraud Section criminal corporate resolutions; and ethics and compliance best practices promulgated by the Organization for Economic Cooperation and Development, the United Nations Office on Drugs and Crime, and the World Bank.<sup>7</sup>

The Guidance does not provide comprehensive benchmarks that a company may need to demonstrate when under scrutiny by the DOJ, nor is it a rigid formula to assess a compliance program. It is instead a set of "common questions" that the Fraud Section may ask in analyzing a company's

compliance program. Indeed, the Guidance is clear that the Fraud Section will "make an individualized determination in each case." Notwithstanding the Guidance's limitations, it does provide some insights into the Fraud Section's view of an effective corporate compliance program.

## Topics Track Existing Guidance

The Guidance's 11 sample topics, 46 sub-topics, and 119 questions largely track the U.S. Sentencing Guidelines and the Ten Hallmarks of an Effective Corporate Compliance Program in the DOJ and SEC's FCPA Resource Guide.<sup>8</sup> The Guidance covers the following:

NO.	TOPIC	SUB-TOPICS
1	Analysis and Remediation of Underlying Conduct	<ul style="list-style-type: none"> <li>• Root Cause Analysis</li> <li>• Prior Indications</li> <li>• Remediation</li> </ul>
2	Senior and Middle Management	<ul style="list-style-type: none"> <li>• Conduct at the Top</li> <li>• Shared Commitment</li> <li>• Oversight</li> </ul>
3	Autonomy and Resources	<ul style="list-style-type: none"> <li>• Compliance Role</li> <li>• Stature</li> <li>• Experience and Qualifications</li> <li>• Autonomy</li> <li>• Empowerment</li> <li>• Funding and Resources</li> <li>• Outsourced Compliance Functions</li> </ul>
4	Policies and Procedures	<ul style="list-style-type: none"> <li>• Designing Compliance Policies and Procedures</li> <li>• Applicable Policies and Procedures</li> <li>• Gatekeepers</li> <li>• Accessibility</li> <li>• Responsibility for Integration</li> <li>• Controls</li> <li>• Payment Systems</li> <li>• Approval/Certification Process</li> <li>• Vendor Management</li> </ul>
5	Risk Assessment	<ul style="list-style-type: none"> <li>• Risk Management Process</li> <li>• Information Gathering and Analysis</li> <li>• Manifested Risks</li> </ul>
6	Training and Communications	<ul style="list-style-type: none"> <li>• Risk-Based Training</li> <li>• Form/Content/Effectiveness of Training</li> <li>• Communications about Misconduct</li> <li>• Availability of Guidance</li> </ul>

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NO.	TOPIC	SUB-TOPICS
7	Confidential Reporting and Investigation	<ul style="list-style-type: none"> <li>• Effectiveness of the Reporting Mechanism</li> <li>• Properly Scoped Investigation by Qualified Personnel</li> <li>• Response to Investigations</li> </ul>
8	Incentives and Disciplinary Measures	<ul style="list-style-type: none"> <li>• Accountability</li> <li>• Human Resources Process</li> <li>• Consistent Application</li> <li>• Incentive System</li> </ul>
9	Continuous Improvement, Periodic Testing, and Review	<ul style="list-style-type: none"> <li>• Internal Audit</li> <li>• Control Testing</li> <li>• Evolving Updates</li> </ul>
10	Third-Party Management	<ul style="list-style-type: none"> <li>• Risk-Based and Integrated Processes</li> <li>• Appropriate Controls</li> <li>• Management of Relationships</li> <li>• Real Actions and Consequences</li> </ul>
11	Mergers & Acquisitions	<ul style="list-style-type: none"> <li>• Due Diligence Process</li> <li>• Integration in the M&amp;A Process</li> <li>• Process Connecting Due Diligence to Implementation</li> </ul>

There are four key takeaways from the Guidance:

**Compliance Programs Should Be Embedded Into a Company's Business Functions.** Companies should be aware that a “paper compliance policy” will not withstand the Fraud Section’s scrutiny. The questions are designed to look past a company’s paper policy to pressure-test program implementation and enforcement in practice at various levels. Prosecutors look at the design and accessibility of policies and procedures, including whether the policies and procedures have been effectively implemented with clear guidance, training, and communication to the relevant functions. Prosecutors also look at whether companies evaluate the usefulness of the policies and procedures and whether the functions with ownership of the policies and procedures are held accountable for that ownership. Prosecutors also consider how senior and middle management encourage and demonstrate commitment to compliance “through their words and actions.”

**Compliance Programs Should Be Autonomous and Appropriately Resourced.** Companies should be aware that prosecutors expect corporate compliance functions to be independent and autonomous, with appropriate resources and access to the board of directors. For example, prosecutors look at how the compliance function compares with

other functions in terms of stature, compensation, reporting line, and resources. Prosecutors also evaluate whether compliance personnel possess appropriate experience and qualifications for their responsibilities, as well as whether appropriate funding and resources are devoted to the compliance function. Prosecutors evaluate the reporting line from the compliance function to the board of directors of a company, the independence of the compliance function from senior management, and the “empowerment” of the compliance organization to stop or modify transactions as a result of compliance concerns.

**Compliance Programs Should Be Tailored to a Company's Risk Profile.** Companies should utilize their risk assessment processes to ensure their compliance programs are tailored to their specific risks and challenges. Prosecutors consider the methodology a company uses to “identify, analyze, and address the particular risks it face[s]” and the design and implementation of specific compliance programs to address those risks.

**Compliance Programs Should Be Continuously Improved.** Prosecutors consider whether a company’s compliance program is subject to continuous testing. Prosecutors look at periodic testing and review processes, such as audits and controls testing, to ensure a company “update[s] its risk

assessments and review[s] its compliance policies, procedures, and practices.” They also look at the metrics collected and used to help detect misconduct.

## Conclusion

While the Guidance provides no “sea change” in the area of corporate compliance, it is a useful tool for companies in developing and evaluating compliance programs and for preparing compliance-related submissions to the Fraud Section and other regulators. The Guidance reinforces the Fraud Section’s expectations for the integration—on paper and in practice—of effective compliance programs. The Fraud Section will “pressure test” and take into account the effectiveness of a company’s compliance program and remedial efforts when resolving a corporate criminal case. This blueprint also offers valuable direction for companies and their boards, senior management, and compliance professionals looking for a framework to develop and assess their corporate compliance programs. The DOJ’s continued focus on compliance is a reminder that companies need robust anti-corruption compliance policies and procedures to prevent, identify, and remediate any compliance issues that may arise.

## Lawyer Contacts

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## Endnotes

- 1 U.S. Department of Justice (“DOJ”) Criminal Division Fraud Section, *Evaluation of Corporate Compliance Programs* (Feb. 8, 2017).
- 2 See, e.g., Leslie R. Caldwell, Assistant Attorney General, DOJ, *Remarks at SIFMA Compliance and Legal Society New York Regional Seminar* (Nov. 2, 2015); NYU Program on Corporate Compliance and Enforcement, *Public Portion of the Roundtable Discussion with Fraud Section Chief Andrew Weissmann and New Compliance Counsel Hui Chen of the DOJ’s Criminal Division* (Nov. 13, 2015); Laura Jacobus, *DOJ’s Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview*, Ethics & Compliance Initiative (Feb. 1, 2016).
- 3 DOJ, *New Compliance Counsel Expert Retained by the DOJ Fraud Section* (Nov. 2, 2015).
- 4 DOJ, *U.S. Attorneys’ Manual* (“USAM”), § 9-28.000.
- 5 *Id.* at § 9-28.300 (A) 5 and 7.
- 6 The Guidance should be of particular interest to all federal government contractors and subcontractors. The federal government, in Federal Acquisition Regulation (“FAR”) Subparts 3.9 and 3.10, has mandatory rules concerning a contractor’s obligations to maintain an ethics program and to protect whistleblowers against retaliation. FAR, Whistleblower Protections for Contractor Employees, 3.9 (2015); FAR, Contractor Code of Business Ethics and Conduct, 3.10 (2005). These rules are similar, but not identical, to the standards for an effective compliance program set forth in the U.S. Sentencing Guidelines. See United States Sentencing Guidelines (“USSG”) § 8B2.1. Accordingly, the Guidance also provides direction to federal government contractors and subcontractors for the establishment and implementation of an effective compliance and ethics program. In addition, the Guidance is important for a contractor to utilize in demonstrating its “present responsibility” and for mitigating against the significant administrative remedies, such as suspension and debarment, that the federal government may pursue against a federal contractor or subcontractor for failures in contractor compliance, in addition to the civil and criminal penalties. As a practical matter, the standards for compliance programs in the Guidance reflect the Fraud Section’s view on “best practices” for all commercial companies, regardless of the industry in which they practice. Therefore, the best practice for federal government contractors and subcontractors is to: (i) use the FAR rules as the “checklist” for mandatory ethics obligations, consistent with the size, duration, and type of contracts performed by the company; and (ii) supplement that checklist, as appropriate, with the direction set forth in both the FAR and the Guidance.
- 7 United States Sentencing Guidelines (“USSG”) § 8B2.1; USAM, § 9-28.000; DOJ and SEC, *A Resource Guide to the FCPA*, DOJ Criminal Division & SEC Enforcement Division (“FCPA Resource Guide”), at 57-66 (Nov. 2, 2015); OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (adopted Feb. 18, 2010); OECD, *United Nations Office on Drugs and Crime, and World Bank, Anti-Corruption Ethics and Compliance Handbook for Business* (“OECD Handbook”), §§ C.1 - C.12 (2013).
- 8 USSG § 8B2.1; FCPA Resource Guide, at 57-63.

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