DOJ Eyes More Dynamic Corporate Compliance Programs in Updates to Department Manual

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Last week, the Department of Justice (“DOJ”) updated its Manual on Evaluation of Corporate Compliance Programs (“June 2020 Guidance”), which is intended to aid prosecutors in making corporate charging decisions. Initially issued in 2017, and last updated in April 2019, the Guidance provides prosecutors a number of questions to consider in evaluating the design, implementation, and effectiveness of corporate compliance programs. This assessment is central for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution.

A review of the June 2020 Guidance reveals that future criminal investigations will give heightened scrutiny to whether corporate compliance programs (1) are adequately resourced, (2) have formalized processes in place to continually evaluate their effectiveness, (3) have effectively incorporated the use of data analytics, and (4) adequately address cross-border implications.

1. **Adequately Resourced:** Prior to the recent updates, DOJ’s guidance sought to determine whether compliance programs were “implemented effectively.” Under its June 2020 Guidance, however, DOJ seeks compliance programs that
are “adequately resourced and empowered to function effectively.”

2. **Continual Evaluation:** The June 2020 Guidance supplements its Risk Assessment section to incorporate “Lessons Learned,” which seeks to determine whether a company has a process in place for tracking and incorporating lessons learned (either by that company, or by others in the same industry) into its risk-based compliance program.

3. **Incorporate Use of Data and Analytics:** The June 2020 Guidance adds a section concerning *Data Resources and Access*, which seeks to assess the use of data to monitor and test the effectiveness of compliance programs.

4. **Cross-Border Implications:** The June 2020 Guidance clarifies DOJ’s intention to give increased scrutiny to corporate assertions of impediments from foreign regulation, including that compliance structures or decisions are guided by foreign law.

The June 2020 Guidance also serve as a valuable teaching tool for corporations seeking to update their compliance program.

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