

DOJ Issues New Guidance on the Evaluation of Corporate Compliance Programs in Federal Fraud Investigations

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On February 8th, the U.S. Department of Justice (DOJ) quietly issued new guidance on how the agency evaluates corporate compliance programs during fraud investigations. The guidance, published on the agency's website as the "Evaluation of Corporate Compliance Programs," lists 119 "sample questions" that the DOJ's Fraud Section has frequently found relevant in determining whether to bring charges or negotiate plea and other agreements. The February 8th issuance is the agency's first formal guidance under the new presidential administration, and the latest effort by the DOJ's "compliance initiative," which launched at the hiring of compliance counsel expert Hui Chen in November 2015. The new guidance is particularly valuable for healthcare organizations in light of the agency's [heightened efforts to prosecute Medicare Advantage plans](#) for fraudulent reporting under the False Claims Act.



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Principles of Federal Prosecution in Corporate Fraud Cases

The "Principles of Federal Prosecution of Business Organizations," first published by the DOJ in 1999, articulates the principles that federal prosecutors consider when assessing cases involving corporate fraud. For example, prosecutors will look to "the existence and effectiveness of the corporation's pre-existing compliance program," as well as the corporation's remedial efforts "to implement an effective corporate compliance program or to improve an existing one." The DOJ last updated the principles, or "Filip Factors," in November 2015 to require companies to turn over all information about individuals' conduct to earn cooperation credit during an investigation.

The February 8th guidance draws from existing federal sentencing guidelines as well as best practices published by the Organization for Economic Cooperation and Development (OECD) and the Securities and Exchange Commission (SEC). The document's 119 sample questions are organized into eleven topics that the DOJ adapted from the "Ten Hallmarks of an Effective Compliance Program," a set of principles published by the DOJ and SEC in the Foreign Corrupt Practices Act (FCPA) Resource Guide (2012), an international best practices guide of the FCPA's anti-bribery and accounting transparency provisions under the Securities Exchange Act of 1934.

Sample questions are organized into the following topics:

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

While corporate compliance officers are likely well versed in the existing guidelines, the new guidance offers more express, practical examples of how federal prosecutors may investigate a company's compliance program under the Filip Factors.

What Can Corporations Expect from the New Guidance?

During a federal investigation, the DOJ is not only interested in the corporate compliance program's written policies, e.g. risk management methodology and compliance training, but also in concrete examples that demonstrate how the program has operated in practice.

For example, the DOJ may investigate the compliance program's "empowerment" during instances where compliance raised concerns of misconduct. The guidance asks corporations if, because of compliance concerns, there had been any transactions or deals that were stopped, modified, or more closely examined. Further, in evaluating a program's "operational integration," the guidance asks the corporation how the misconduct in question was funded (e.g., purchase orders, employee reimbursements, discounts, petty cash), and if the processes that could have prevented or detected improper access had been improved.

The guidance also indicates that the DOJ will consider the corporation's incentive system for employees to comply with laws and ethical behavior, and suggests that senior leaders and other stakeholders will be held accountable for their involvement in encouraging or discouraging the misconduct in question.

Although the agency cautions that "each company's risk profile and solutions to reduce its risks warrant particularized evaluation," the sample questions and topics are those that the Fraud Section has "frequently found relevant" in evaluating a corporate compliance program.

Katherine Fragoso contributed to this post.

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