



Evaluation of Corporate Compliance Programs

An Updated Guidance from the Criminal Division of the Department of Justice for US Corporations to Assess Compliance Programs

Overview and History

The Evaluation of Corporate Compliance Programs Guidance that was originally published in 2017 (“the 2017 Guidance”) served as the first document specifically dedicated to the topic of corporate compliance published by the Criminal Division within the Department of Justice (“DOJ”). The 2017 Guidance outlined 11 topics for the evaluation of corporate compliance programs, together with questions in respect of each topic. Although this 2017 Guidance supported the existing compliance guidelines, it did not outline new guidelines for corporations to refer to during a self-assessment of their compliance frameworks. The 2017 Guidance included more than 100 questions which prosecutors could pose to organizations as part of the evaluation process.

On April 30, 2019, the DOJ published the Updated Guidance in respect of the evaluation of corporate compliance programs (see reference to Section 9-28.000 of the Justice Manual). The goal of the Updated Guidance is to assist prosecutors in evaluating corporate compliance programs, and provides insight into their criteria that corporations operating in highly regulated industries should review in order to update their compliance plans. The new guideline updates the 2017 Guidance, and is important for organizations of all sizes and across all industries.

Summary of Updated Guidance

The updated version of the Evaluation of Corporate Compliance Programs Guidance (“the Updated Guidance”) has reorganized 12 topics under Section 9-28.000 of the Justice Manual into “three ‘fundamental questions’ a prosecutor should ask:

1. “Is the corporation’s compliance program well **designed**?” Specifically, prosecutors review the program as it relates to risk assessments, policies and procedures, employee training and investigation process, third-party management.
2. “Is the program being applied earnestly and in good faith?” In other words, is the program being **implemented** effectively? This question also considers the culture of compliance set at the top by senior management, including its position on how much autonomy and resources given to compliance, and incentives and disciplinary measures.
3. “Does the corporation’s compliance program work in practice?¹ In other words, is the program **effective**, and what metrics and key performance indicators are used to measure the program’s testing, periodic review and other investigations.

The questions included in the 2017 Guidance are included in the Updated Guidance, reinforcing their relevance in the evaluation process.

The reorganization and refinement of the contents of the guidelines serve to align the Updated Guidance with other existing documents, such as the Justice Manual (JM) and the United States Sentencing Guidelines (USSG), extracts of which are included in the Updated Guidance. This alignment provides additional insights to organizations outside the DOJ in their understanding of the expectations of what prosecutors take seriously when determining whether, and how, to pursue a corporate criminal enforcement action, in matters surrounding corporate compliance programs.

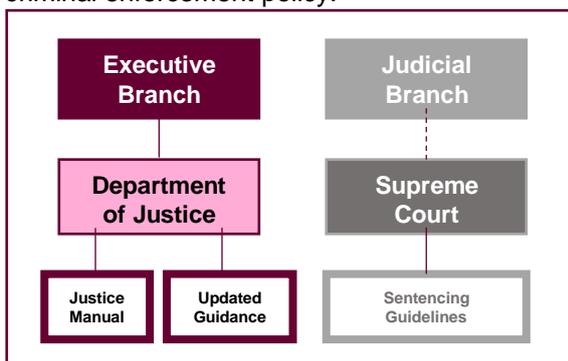
¹ Updated Guidance at p 1 – 2.

The Updated Guidance also improve upon the 2017 Guidance by providing further detail on several topics. For example, the Updated Guidance acknowledge and pose questions regarding the sometimes-contradictory objectives of an entity, to be both commercially successful and legally (and ethically) compliant.² These are set out under the sub-heading of “conduct at the top”, and include questions such as:

- Have managers tolerated greater compliance risks in pursuit of new business or greater revenues?
- Have managers encouraged employees to act unethically to achieve a business objective, or impede compliance personnel from effectively implementing their duties?

These questions reflect development in the awareness of the DOJ, and simultaneously call for a level of self-awareness on the part of organizations and those at organizations who introduce and implement compliance programs, to identify potential risks and harmful organizational practices. It is anticipated that continued evolution by the DOJ and by corporations in respect of awareness such as this will serve to further develop corporate compliance programs and their assessment.

The Criminal Division of the DOJ is responsible for the development, enforcement and supervision of the application of all federal criminal laws, excluding those specifically assigned to other divisions. The Criminal Division’s responsibilities also include the prosecution of cases of national significance, as well as the formulation and implementation of criminal enforcement policy.³



By considering the statements, publications and resources of the DOJ, one can gain insight into

² Drafted with consideration of the publication by Baker McKenzie “U.S. Department of Justice Issues Update to its Guidance on Evaluating Corporate Compliance Programs », 07 May 2019 (<https://www.bakermckenzie.com/en/insight/publications/2019/05/dj-issues-update-to-its-guidance> (accessed August 9, 2019)).

³ <https://www.justice.gov/criminal/about-criminal-division> (accessed on July 11, 2019).

the importance of corporate compliance programs to the DOJ. First, given the number of resources published and/or updated in recent years, corporate compliance programs are significant in assessments by the DOJ. Second, these resources often explain the motivation and rationale behind the importance of compliance programs.

The first resource addressing corporate compliance programs is the JM, which “contains publicly available DOJ policies and procedures.”⁴ Previously the United States Attorneys’ Manual, the JM states its authority as “provid[ing] internal DOJ guidance.” JM 9-28.000 addresses Principles of Federal Prosecution of Business Organization.⁵ Several points under this Title of the JM can be highlighted for present purposes:

- “The prosecution of corporate crime is a high priority for the Department of Justice.”
- “Corporations should not be treated leniently because of their artificial nature, nor should they be subject to harsher treatment.”
- “One of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing.”
- “Because a corporation can act through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing.”
- “Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The [DOJ] encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers in its own.”

These points clearly reflect the rationale of the DOJ in highlighting corporate compliance programs, and in considering them for prosecution. The Updated Guidance helps

⁴ Justice Manual (JM) 1-1.100

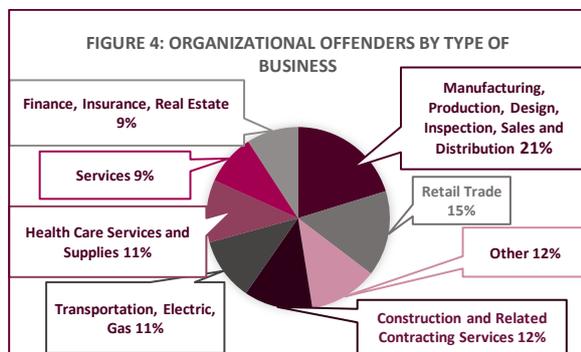
⁵ JM 9-28.200 – General Considerations of Corporate Liability, at A. General Principle.

clarify the prosecution’s expectation for compliance programs with an emphasis on the role of compliance as pertaining criminal enforcement against corporations.

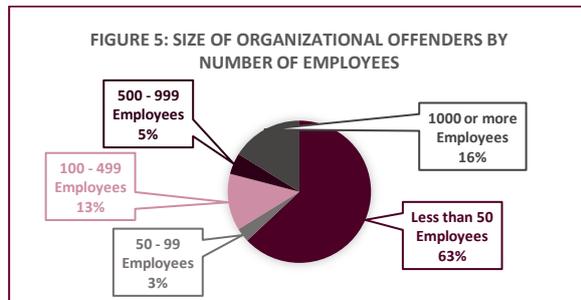
Key Impacts for Corporations

The research and findings of the United States Supreme Court (USSC) provide insight into the necessity of corporate compliance programs and the scope of their impact in the light of prosecution and sentencing of organizations. The following findings are meaningful for purposes of this publication.

The industries/type of business of the 99 Corporations sentenced during the 2018 Fiscal Year are as follows⁶:



The number of employees of the 99 Organizations sentenced during the 2018 fiscal year are as follows⁷:



In terms of sentencing, courts sentenced organizational offenders to pay fines and/or restitutions in 81 of the 99 cases involving organizations.⁸ The total mean and median of these amounts are as follows:



The noted findings demonstrate the following:

1. While the most at-risk industries in terms of potential criminal prosecution have previously been “Manufacturing, Production, Design, Inspection, Sales and Distribution,” the other industries represented are almost all at equal risk of criminal prosecution, and as such likely to benefit from the implementation of an effective corporate compliance program.
2. The most vulnerable organizations to criminal activity, and as such criminal prosecution, are organizations employing fewer than 50 employees. However, the next most at-risk organizations are those employing 1,000 or more employees. The figures also show that the introduction or improvement of corporate compliance programs would likely benefit all organizations, regardless of their size.
3. Criminal prosecution, conviction, and sentencing can have notable pecuniary consequences. These figures serve as a reminder of the importance of effective corporate compliance programs, to reduce or eliminate the risk of prosecution, and in the hopes of reducing negative consequences should a crime be committed and a fine or restitution be imposed.

⁶ USSG Figure O-4 Organizational Offenders by Type of Business <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/FigureO4.pdf> (accessed August 7, 2019).

⁷ USSG Figure O-5 Size of Organizational Offenders by Number of Employees [https://www.uscc.gov/sites/default/files/pdf/research-and-](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/FigureO5.pdf)

[https://www.uscc.gov/sites/default/files/pdf/research-and-](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018/FigureO5.pdf)

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⁸ USSG Table O-2 Amount of Fine and Restitution Ordered for Organizational Offenders by Type of Crime <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018/TableO2.pdf> (accessed August 8, 2019).

Sia Partners Added Value

The DOJ's Updated Guidance will consider the robustness of corporate compliance programs, including recognizing the time and resources that corporations have allocated to compliance programs. In addition, this guidance encourages companies to maintain robust compliance programs, in its decision to bring charges against them. Corporations, especially those in highly regulated industries such as financial services, should review the Updated Guidance and evaluate their compliance programs accordingly in order to prepare for the next inquiry from the DOJ.

Sia Partners assists corporations with enhancing the quality of their risk assessments, and with implementations of effective corporate compliance programs. The 2018 USSC findings demonstrate that prosecutors will examine organizations of all sizes and industries, and will pay close scrutiny to ensure their compliance programs address potential risks. According to the Updated Guidance, which will serve as a useful roadmap in any assessment of corporate compliance programs, the following should be emphasized:

Conduct Risk Assessments:

- a. Risk assessments should be conducted thoroughly and frequently;
- b. Focus on lessons learned, and how these lessons can be developed upon and incorporated into future internal compliance programs and guidelines; and
- c. Risk assessments and compliance guidelines should be enhanced in response to instances of misconduct, following internal and/or external investigations and findings.

Compliance Personnel:

- a. Does the organization have sufficient compliance personnel?
- b. Where within the organization is the compliance team housed, and how are they incorporated or excluded from the corporate structure within the organization? To whom do compliance personnel report to and take direction from?

- c. How does the function of compliance personnel compare to other functions within the organization, in terms of ranking, compensation structure, titles and access to persons in power?⁹

Oversight of Third Parties and other External Resources:

- a. Conduct the necessary due diligence processes in respect of third parties as frequently as necessary. Third parties in this context means "third-party partners, including the agents, consultants, and distributors" of which corporations conduct business.
- b. Consider the corporation's reputation, the necessity of working with third parties, and whether the organization has taken adequate steps in communicating to the third parties the relevant internal compliance policies. Also consider what consequences exist for non-compliance by third parties with the organizations internal policies, and whether the organization is consistent in how it responds to wrong doings by third parties with which they frequently do business.

Develop a "Culture of Compliance" within the Corporation:

- a. Personnel in all areas in an organization should be held accountable and should receive regular trainings and updates regarding internal policies;
- b. The Updated Guidance, with reference to the JM, pose the question which is relevant here, being "whether a compliance program is a 'paper program' or one 'implemented, reviewed, and revised, as appropriate, in an effective manner.' JM 9-28.800"¹⁰
- c. Furthermore, emphasis on a single level of personnel will not effectively create a culture of compliance; while senior leadership often set the tone for the rest of the organization, "the tone and actions of middle management" reinforce those standards. As such,

⁹ Drafted with consideration of the publication by Gibson Dunn "Updated DOJ Criminal Division Guidance on the "Evaluation of Corporate Compliance Programs" (<https://www.gibsondunn.com/updated-doj-criminal-division->

[guidance-on-evaluation-of-corporate-compliance-programs/](https://www.gibsondunn.com/updated-doj-criminal-division-) (accessed August 8, 2019)).

¹⁰ Updated Guidance at p 9.

leadership by mid-level management, and whether such managers have historically been held accountable for any misconduct by them or under their supervision, are factors which the DOJ is likely to consider.

whether to prosecute that organization. Corporations in all industries should review the Updated Guidance and evaluate their compliance programs to help ensure they are consistent with what the prosecutors expect as they examine the programs for any compliance related issues.

Key Takeaways

1. The DOJ will pursue and prosecute corporations that fail to maintain a well implemented compliance program. Regardless of the organization's size or industry, there is a risk of prosecution under the Updated Guidance, especially for organizations of certain sizes since they are more at risk than others.
2. Corporate compliance programs can serve organizations in the following ways:
 - 2.1. Preventative effects of implementing such a program, and
 - 2.2. The existence of a program aids the DOJ in investigating and choosing
3. As noted in the Updated Guidance, "the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs," and each corporate compliance program will be assessed on a case-by-case basis. However, there are common questions that prosecutors can ask in the process of individually assessing each entity. Therefore, the updated compliance frameworks based on the Updated Guidance are also a useful tool for corporations striving to keep their compliance programs effective, relevant, and up to date.

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