

DOJ's Update to Its Evaluation of Corporate Compliance Programs Provides Additional Detail, but Not Necessarily Additional Clarity

On Tuesday, the Department of Justice's Criminal Division released an update (the "Update") to the "Evaluation of Corporate Compliance Programs"¹ first released by the Fraud Section in 2017. That document provided a compendium of key questions for use by both prosecutors—to assist in their consideration and evaluation of companies' compliance practices—as well as companies and their in-house compliance professionals as food for thought in confronting their own compliance challenges. According to DOJ, this week's Update² "seeks to better harmonize the [Fraud Section] guidance with other Department guidance and standards while providing additional context to the multifactor analysis of a company's compliance program."³ Although the Update provides significant additional detail in a number of areas, it does not provide concrete guidance on how prosecutors should rank the relevant factors or apply them in evaluating a given compliance program which might satisfy some criteria, but fall short on others. As a result, executives and practitioners may be left to guess at how prosecutors ultimately will come out when they evaluate the company's or client's compliance program. Nevertheless, what is clear is that DOJ is absolutely committed to ensuring that companies implement strong compliance programs that both deter and correct allegations of misconduct. Companies and clients that fail to do so should expect to face thorough and exacting investigations from prosecutors trained better than ever in compliance issues.

I. BACKGROUND ON DOJ'S GUIDANCE ON THE EVALUATION OF CORPORATE COMPLIANCE PROGRAMS

Tuesday's release is the latest installment of DOJ's efforts in recent years to emphasize the importance of compliance and increase the attention that prosecutors and executives alike pay to it before, during, and after corporate criminal investigation and resolutions. For example, in 2015, DOJ created the position of Compliance Counsel to the Fraud Section to help prosecutors further develop their skills in evaluating corporate compliance and remediation measures, and to improve DOJ's communication with stakeholders regarding its expectations. Senior leadership in the Fraud Section and the Criminal Division's Office of the Assistant Attorney General increasingly spoke about compliance and to audiences of compliance personnel, emphasizing the critical role such actors played in companies dealing with high-risk markets or industries. In further demonstrating DOJ's commitment to compliance, Assistant Attorney General Brian A. Benczkowski announced this week that prosecutors for the first time were undergoing compliance training to ensure that "they will have the necessary tools to undertake a rigorous and informed analysis" when making prosecutorial decisions concerning a company's

¹ U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 8, 2017).

² U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Apr. 30, 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

³ Press Release, U.S. Department of Justice Criminal Division, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019), <https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs>.

compliance program.⁴

As noted above, in 2017, the Fraud Section released the evaluation guidance revised and expanded this week. The prior version of the guidance consisted of 11 categories and cataloged 119 questions covering topics prosecutors typically sought answers to while investigating a company's compliance program and which compliance personnel also were encouraged to consider in looking at their own business. The 11 umbrella topics included: (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; and (11) Mergers and Acquisitions.

While the guidance explained a number of features of effective compliance practices and penetrating questions prosecutors should ask in evaluating those practices, it did not provide clear insight into how prosecutors should weigh the various factors in conducting their evaluation. After all, the preamble made clear that “[t]he topics and questions . . . form neither a checklist nor a formula,” and that “[i]n any particular case, the topics and questions set forth . . . may not all be relevant, and others may be more salient given the particular facts at issue.”⁵ As a result, for those companies that had neither totally deficient nor top-notch compliance programs, it was difficult to predict what prosecutors' bottom line would be on their programs. What was clear was that those evaluating corporate compliance in considering a potential criminal resolution were going to be digging deeper and looking not just to the tone at the top but, rather, at the “conduct at the top.”

II. APRIL 30, 2019 UPDATE TO EVALUATION OF CORPORATE COMPLIANCE PROGRAMS

In a keynote address delivered Tuesday at the Ethics and Compliance Initiative annual conference in Dallas, Assistant Attorney General Brian A. Benczkowski announced DOJ's official release of the Update, stating that “[i]n drafting the updated version of the document, [DOJ] has] sought to provide additional transparency in how [it] will analyze a company's compliance program.”⁶ In implementing this initiative, the Update divides the guiding themes from the 2017 evaluation and places each under one of three sections, borrowed from “fundamental questions” posed in DOJ's Justice Manual: (1) “Is the corporation's compliance program well designed?”; (2) “Is the program being applied earnestly and in good faith?”; and (3) “Does the corporation's compliance program work in practice?”⁷ In addition to the 11 topics covered in the prior version, the Update adds a new subsection entitled “Investigation of

⁴ Brian A. Benczkowski, Assistant Attorney General, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and>.

⁵ U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 8, 2017).

⁶ Brian A. Benczkowski, Assistant Attorney General, Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019).

⁷ U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Apr. 30, 2019) (quoting JM § 9-28.800, Corporate Compliance Programs, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.800>).

Misconduct,”⁸ which targets whether the compliance program is effective in practice by having a system for thorough investigations and responses to reports of misconduct.

In addition, unlike the 2017 document, which simply listed each theme and the corresponding questions, the Update provides additional detail regarding the import of the three sections’ overarching categories with detailed introductory paragraphs. Certain in particular are illustrative of the overall changes and are worth exploring. *First*, under “Autonomy and Resources,” the Update explains that “prosecutors should address the sufficiency of the personnel and resources within the compliance functions, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board’s audit committee.”⁹ The pronouncement of these types of factors should prove particularly useful for companies and management that are creating a compliance program for the first time or those that are attempting to buttress their existing programs.

Second, under “Commitment by Senior and Middle Management,” the Update reinforces that a company’s executives will be held to a high standard when it comes to compliance. The Update states that “[t]he company’s top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have clearly articulated the company’s ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example.”¹⁰

A recent DOJ criminal filing touches on these two areas in particular, and is illuminating as to how seriously DOJ takes this guidance. Prosecutors in New York last week announced that they had charged William Pietruszewski, the former chief compliance officer of Rochester Drug Co-Operative, Inc., with narcotics conspiracy, conspiracy to defraud the United States and failure to file suspicious order reports, stemming from the company’s sale of pharmaceutical drugs to customers it found to be “suspicious.”¹¹ According to the criminal complaint filed against RDC, Pietruszewski and other senior executives ignored warnings from lower-level employees that customers regularly were exceeding their monthly prescription limits and engaging in other suspicious activity, such as cash payments. Pietruszewski had been installed as the chief compliance officer despite having very little training or experience in the field, and without a direct reporting line to the board of directors. He has pled guilty to the charges and faces a mandatory minimum of ten years in prison.¹²

This case should serve as a warning beacon that compliance officers are not out of a prosecutor’s reach when it comes to compliance violations, especially in those instances where a company’s compliance program wholly departs from the evaluation’s scriptures. Pietruszewski plainly failed to have sufficient authority to remediate and sufficient autonomy from management, two key issues highlighted in the Update. Moreover, it is apparent that prosecutors took specific aim at RDC’s executives, including

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Press Release, United States Attorney’s Office for the Southern District of New York, Manhattan U.S. Attorney and DEA Announce Charges Against Rochester Drug Co-Operative And Two Executives For Unlawfully Distributing Controlled Substances (Apr. 23, 2019), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-dea-announce-charges-against-rochester-drug-co-operative-and>.

¹² *Id.*

Pietruszewski, for their failure to “rigorously adhere” to compliance principles as the Update suggests would be the case in the future.

III. KEY TAKEAWAYS

DOJ’s expansion on the areas addressed by the 2017 evaluation is a welcome improvement, and should be especially helpful for companies proactively seeking to improve their compliance programs. Moreover, the DOJ has now made clear that these principles are applicable across the Criminal Division and not only within the confines of the Fraud Section. Nevertheless, one area of concern that persists, perhaps even more so than before, is how relevant decision-makers, be it prosecutors or the courts, will use these factors in practice. The preamble attempts to provide greater clarity in this area by declaring that

[t]his document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation’s compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, 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 (e.g., monitorship or reporting obligations).¹³

But this does not make any more concrete to what extent, if any, certain factors may be weighed or credited. Instead, the Update parrots the language from the prior version that it is to be considered “neither a checklist nor a formula.”

In the case of RDC and Pietruszewski, for example, the company apparently failed to implement even the most basic compliance procedures. It is unclear whether the prosecutors would have been as aggressive had the company been more diligent, such as by instituting a more rigorous training program, but nevertheless failed to wholly address the reports of misconduct. By failing to provide clear guidance on exactly how they should implement these principles, the Update reserves to prosecutors a great deal of discretion in individual cases and arguably creates the kind of “open-ended, rough-and-tumble of factors” that Justice Souter criticized in *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

Much like after the 2017 evaluation, it appears we will have to take a wait-and-see approach as to the specific effects of the Update and its various provisions, as DOJ announces future charging decisions and corporate resolutions. In the meantime, however, it is clear that the DOJ’s emphasis on compliance is here to stay and companies should expect prosecutors to ask an increasing number of detailed questions regarding compliance programs and be increasingly well-versed themselves in analyzing such programs.

¹³ U.S. Department of Justice Criminal Division Fraud Section, Evaluation of Corporate Compliance Programs (Apr. 30, 2019).

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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