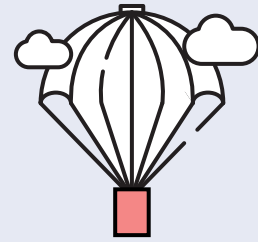


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Department of Justice Evaluation of Compliance Program 2023 Update

In March, the Department of Justice published an update to the Evaluation of Corporate Compliance Programs. The document describes factors that prosecutors should take under advisement to determine whether to bring charges, negotiate a plea, or develop other types of agreements.

The United States Sentencing Guidelines §§ 8B2.1, 8C2.5(f), and 8C2.8(11), advises that “consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine”. Prosecutors are instructed to consider various factors such as “...a company’s size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company’s operations, that might impact its compliance program” (USDOJ, 2023).

There are three fundamental questions noted in the Justice Manual that prosecutors consider,

1. Is the corporation’s compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?
3. Does the corporation’s compliance program work in practice?



These three questions are very general, and you might be wondering what information is used to answer these questions. The update provides some insight into the elements evaluated to answer each of these questions. On the next page is a very basic overview of those elements.

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1. Is the corporation's compliance program well designed?

To evaluate the design of the compliance program prosecutors will specifically evaluate your risk assessment, policies and procedures, training and communication, the existence of a confidential reporting structure, investigation process, third party management, and any mergers and acquisitions.

2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively.

This question appears to be very subjective, but in this area, prosecutors are looking beyond the compliance structure for evidence that a culture of ethics and compliance with the law has been fostered at all levels. This is done by evaluating the commitment to compliance by senior and middle management, the autonomy and resources provided to the program, and the companies compensation structures and consequence management.

3. Does the corporation's compliance program work in practice?

"[t]he Department recognizes that no compliance program can prevent all criminal activity by a corporation's employees." JM 9-28.800. What prosecutors are interested in is whether the program is designed to detect misconduct and what is done once misconduct is identified. "One hallmark of an effective compliance program is its capacity to improve and evolve" (USDOJ, 2023, p.15).

Elements that prosecutors evaluate when answering the question of whether the program works in practice include continuous improvement, periodic testing and review, investigation of misconduct, and the analysis and remediation of the underlying misconduct.

Summary

Developing an effective program will have an impact on the forms of resolution or prosecution, the amount of monetary penalty imposed, and the compliance obligations outlined in a Corporate Integrity Agreement. Familiarizing yourself with the processes used by prosecutors in their decision of whether to bring charges or negotiate a plea or an agreement is essential in reducing your risk of negative impacts should misconduct occur.

For more detailed information related to the Department of Justice's Evaluation of a Corporate Compliance Program update see: <https://www.justice.gov/criminal-fraud/page/file/937501/download>

Resource: US. Department of Justice: Criminal Division. (2023). Evaluation of Corporate Compliance Programs. Available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>



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