



# EVALUATION OF CORPORATE COMPLIANCE PROGRAMS: 2022 SUPPLEMENT



In June 2020, the United States Department of Justice (“DOJ”) published a now widely circulated revision to its guidelines for the Evaluation of Corporate Compliance Programs (“Guidelines”). Originally issued in April 2019, the updated Guidelines serve as a broad outline of an organization’s corporate compliance responsibilities. While the Guidelines do not pertain to a specific area of compliance, the overarching themes expressed in the Guidelines have become the foundation of contemporary compliance practice across the board. The principles articulated in the Guidelines provide a comprehensive framework for the implementation of effective assessment, mitigation, monitoring, auditing and continuous improvement practices.

**Recent statements made by senior DOJ officials only underscore the importance of adhering to the Guidelines when making corporate compliance decisions.**

On September 15, 2022, in remarks to an audience at New York University Law School, Deputy Attorney General Lisa Monaco reaffirmed the DOJ’s commitment to the principle of individual accountability— noting that companies would be required to disclose all material facts concerning individual misconduct on a more timely basis to qualify for full cooperation credit. Undue or intentional delay in producing information or documents— especially evidence demonstrating individual culpability— will now result in the reduction or outright denial of cooperation credit to disclosing companies. The DOJ’s emphasis on more robust and efficient disclosures should serve as a prescient reminder to organizations that the Guidelines require every company to maintain a demonstrably reliable method for the confidential and/or anonymous submission of reports concerning potential wrongdoing. The failure to maintain—and periodically test such a system—renders an organization completely incapable of meeting either the Guidelines’ basic requirements or the DOJ’s latest expectations.

In a similar vein, the Deputy Attorney General’s pronouncement that the DOJ would continue to consider the totality of an organization’s compliance record in assessing whether prosecution is warranted echoes the Guidelines’ emphasis that a compliance program be dynamic and subject to evolution based on actual lessons learned. Finally, Monaco’s bold declaration that the DOJ would not seek guilty pleas from organizations that voluntarily disclose their misconduct underscores the need for organizations to dedicate sufficient resources to enhance the quality of their internal investigation programs.

**In short, while no recent changes to the Guidelines have been made, it is clear that the DOJ is firmly committed to the principles contained therein. As a result, it is imperative for organizations across economic sectors to understand what the Guidelines require and how those Guidelines have evolved since their initial issuance in 2019.**

A review of major changes made by the DOJ to the Guidelines from 2019 to 2020 is set forth below. These changes, while not extensive or surprising, do indicate increased understanding by the DOJ of the variation in circumstances in which corporate misconduct occurs and the areas in which prosecutors should focus their inquiries. A few of the changes may cause Chief Compliance Officers to focus on areas heretofore not on their radar, and it seems clear from the changes under the first basic question of “Is the Program Well-Designed?” that prosecutors are not seeing the kind of analyses of effectiveness and periodic updates to programs that they would expect (or perhaps compliance professionals are not presenting prosecutors with documentation of such updates). For ease of use, the commentary below follows the basic headings of the 2020 update.



## INTRODUCTION

The DOJ expands on its “individualized determination” of the effectiveness of a compliance program by indicating that they make a “reasonable” individualized determination “that considers various factors including, but not limited to, the 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.”

The common basic questions that DOJ will still ask in every individualized determination are unchanged except for the reference to resourcing and empowerment to function effectively in question 2, which is new:

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?

## IS THE CORPORATION’S COMPLIANCE PROGRAM WELL DESIGNED?

Under the topic of Risk Assessment, the DOJ has summarized the starting point for prosecutors as “In short, prosecutors should endeavor to understand why the company has chosen to set up the compliance program the way it has, and why and how the company’s compliance program has evolved over time.”

A compliance program risk assessment can be a challenging exercise, so it behooves compliance officers to carefully document the initial risk assessment and compliance program elements designed to address the risks as well as updates to the risk assessment and compliance program over time.

Another clarification under Risk Assessment is the availability of credit for a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction. The April 2019 version referred to failing to prevent an infraction in a low-risk area. This clarification is consistent with DOJ’s recognition that even an effective compliance program is incapable of preventing every regulatory infraction.

Under the subtopic of **Updates and Revisions** we see two questions relating to the use of operational data and information in updating and revising the risk assessment and policies, procedures and controls:

1. Is the periodic review limited to a “snapshot” in time or based upon continuous access to operational data and information across functions?
2. Has the periodic review led to updates in policies, procedures and controls?

Under the subtopic of **Lessons Learned** we see another similar question:

Does the company have a process for tracking and incorporating into its periodic risk assessment lessons learned either from the company’s own prior issues or from other companies operating in the same industry and/or geographic region?

These additions relate directly to the continuous improvement, periodic testing and review topics under the common question of “Does the Corporation’s Compliance Program Work in Practice?” and certainly to the additions relating to resourcing. It is reasonable to assume that the DOJ has seen compliance programs that have not been tested, updated and properly resourced, and companies are now aware that prosecutors will be focusing on these weaknesses. Companies that feel they are already following this guidance should ensure that they are adequately documenting the continuous improvement of their program.

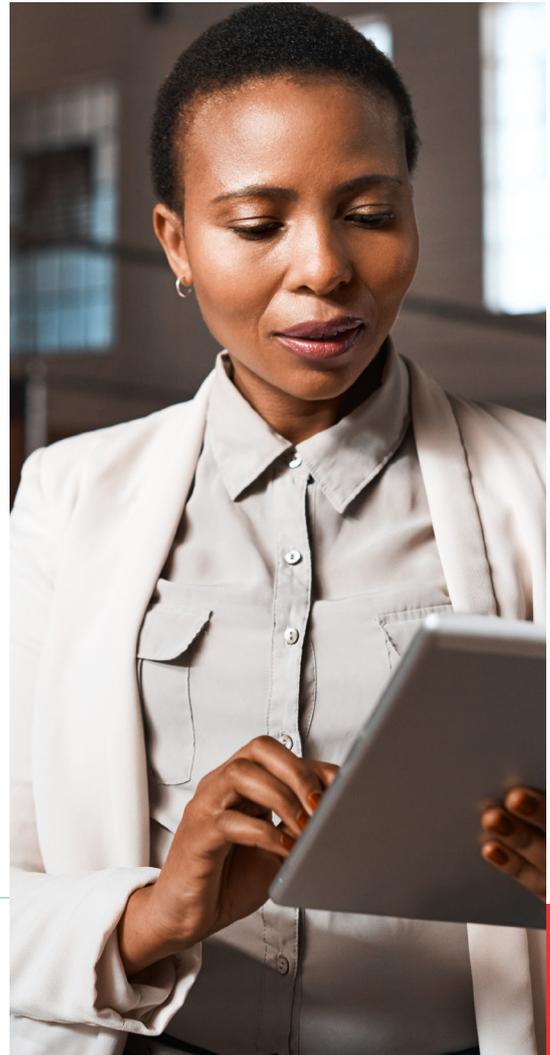
The only addition to the topic **Policies and Procedures** appears under Accessibility, where prosecutors will examine:

1. Have the policies and procedures been published in a searchable format for easy reference?
2. Does the company track access to various policies and procedures to understand what policies are attracting more attention from relevant employees?

These questions may be challenging for a compliance officer to address unless the corporation has an overall policy management process in which policies and procedures relating to the compliance program are made readily available to employees and there is a system of review and attestation of new or updated policies.

Under the topic of **Training and Communications** the DOJ has included for prosecutors the following information:

Other companies have invested in shorter, more targeted training sessions to enable employees to timely identify and raise issues to appropriate compliance, internal audit, or other risk management functions.





This addresses the trend in the compliance community of “micro-learning” modules which have been proven more effective than long, dry lecture-style training.

Under the subtopic **Form/Content/Effectiveness of Training** prosecutors will now examine:

**Has the company evaluated the extent to which the training has an impact on employee behavior or operations?**

There are many potential ways to evaluate the effectiveness of compliance training, including, but not limited to, a test included in the training, employee surveys or evaluations of training, and questions posed to supervisors on compliance issues or received anonymously after training. All of these inputs to demonstrate effectiveness of training require some form of system to document effectiveness.

The topic **Confidential Reporting Structure and Investigation Process** includes some additional questions for prosecutors to examine. Under the subtopic **Effectiveness of the Reporting Mechanism** these questions are:

1. How is the reporting mechanism publicized to the company’s employees and other third parties?
2. Does the company take measures to test whether employees are aware of the hotline and feel comfortable using it?

Publicizing the reporting mechanism to “other third parties” is a bit unclear. Inserting a company’s hotline information into contract provisions with third parties may not result in the hotline information ever being made available to employees of the third party who may witness or have knowledge of wrongdoing. The only effective way of publicizing the reporting mechanism to the employees of “other third parties” may be a campaign or training of some kind. As far as company employee awareness, that could be accomplished through compliance training and periodic surveys. Many companies extend compliance training to all or a subset of their third parties; hotline information could be conveyed to third-party employees through that training.

Under the subtopic **Resources and Tracking of Results** prosecutors will examine:

**Does the company periodically test the effectiveness of the hotline, for example by tracking a report from start to finish?**

This is a very basic question that many companies will handle on an ad-hoc basis. More effectively, other companies will utilize fully configurable software tools to manage compliance incidents, whether they originate from a hotline call or other source, from initial notification to close-out of the investigation.

Under the topic **Third Party Management**, DOJ has reordered the introductory language to emphasize that prosecutors will be examining the business rationale for needing the third party before moving on to examine the reputation, relationships with foreign officials and other risks posed by the third party.

Many companies incorporate a “business justification” internal questionnaire into their third-party management software programs so that this guidance is satisfied, and documentation is available.



Under the subtopic **Management of Relationships** prosecutors will examine:

**Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?**

The way the DOJ has worded this question suggests the answer. Certainly, for high- and perhaps medium-risk third parties, periodic review of the third-party relationship would be the reasonable course of action, perhaps coupled with continuous monitoring of the third party against global sanctions and watchlists and negative news databases.

Under the topic **Mergers and Acquisitions**, DOJ has added the expectation of “a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls.”

Under the subtopic **Due Diligence Process**, prosecutors will now be examining:

**Was the company able to complete pre-acquisition due diligence and, if not, why not?**

Compliance professionals are often not included on the acquisition due diligence team and compliance-related due diligence is often not undertaken prior to closing of a transaction. This new question will force companies to include, to the extent possible, pre-transactional compliance-related due diligence, or be able to provide a documented explanation of why they could not.

Under the subtopic, **Process Connecting Due Diligence to Implementation**, the DOJ has added “and conducting post-acquisition audits, at newly acquired entities” to the examination of the company’s process for implementing compliance policies and procedures at newly acquired entities.

This addition is consistent with the emphasis on integration of the acquired entity into the company’s program. Some companies are ahead of the curve and have met this guidance for years by not only conducting basic compliance-related due diligence on a target’s key third parties, but also conducting a gap analysis of the target’s compliance program against the acquirer’s program so that integration steps can begin immediately upon closing. As is the case with any acquisition, early engagement by compliance professionals in information production requests and due diligence will improve the overall picture of compliance risk represented by the target.



## IS THE CORPORATION'S COMPLIANCE PROGRAM ADEQUATELY RESOURCED AND EMPOWERED TO FUNCTION EFFECTIVELY?

The above revision to the language of the second common question suggests that DOJ is concerned that compliance functions are not being given adequate resources and that compliance officers are not sufficiently empowered within their organizations. The introduction to this section cites "under-resourced" as a source of ineffectiveness.

Under the topic **Autonomy and Resources**, prosecutors will now address the following question under the subtopic Structure:

**What are the reasons for the structural choices the company has made?**

Companies should be prepared to explain the reasons for assigning compliance responsibilities to employees with other non-compliance responsibilities and the reporting relationships and independence of such employees.

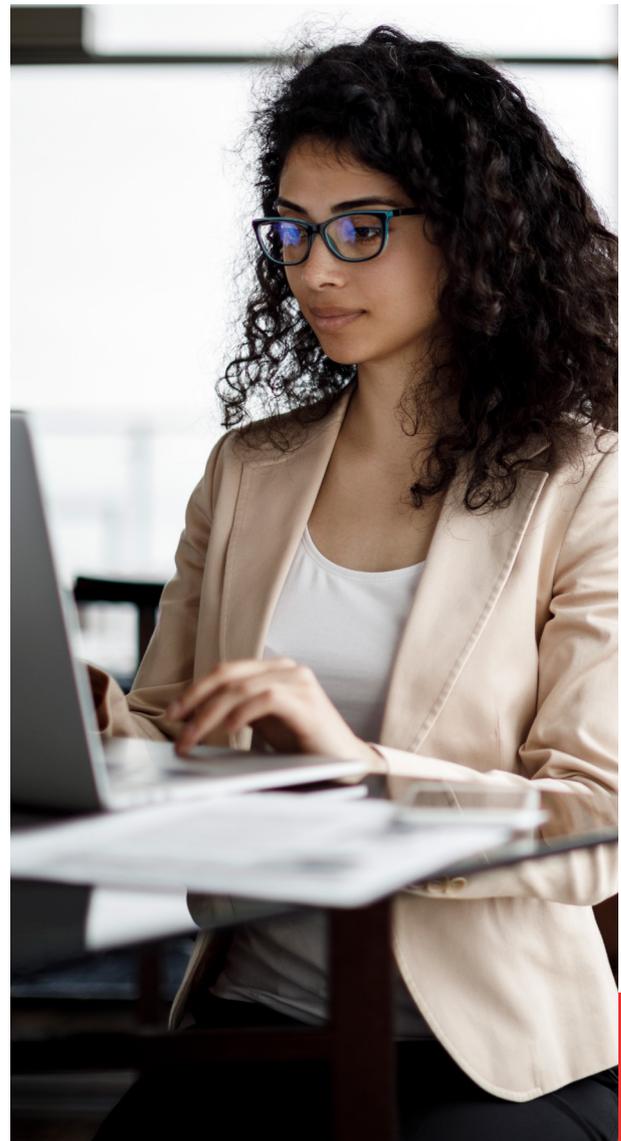
Under the subtopic **Experience and Qualifications** companies should now be prepared to answer the following question:

**How does the company invest in further training and development of the compliance and other control personnel?**

DOJ has added a new subtopic, **Data Resources and Access** for prosecutors to examine:

1. Do compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of policies, controls and transactions?
2. Do any impediments exist that limit access to relevant sources of data and, if so, what is the company doing to address the impediments?

These new questions appear to address whether those responsible for compliance have broad access to people and records throughout the organization to explore critical compliance touch points such as payments to sales agents and distributors, justification for, and payments to, consultants, as well as the findings of the internal audit group. The questions may also be directed to the availability of outside data sources such as global watchlist and negative media screening tools for third parties.



Under the topic **Incentives and Disciplinary Measures**, prosecutors will be expected to determine whether the compliance function is involved based upon this question under the subtopic Consistent Application:

**Does the compliance function monitor its investigations and resulting discipline to ensure consistency?**

This places the compliance function in the position of monitoring the consistency of discipline resulting from infractions by higher level employees or executives against discipline meted out to lower-level employees for similar infractions.

## DOES THE CORPORATION'S COMPLIANCE PROGRAM WORK IN PRACTICE?

Under the topic, Continuous Improvement, Periodic Testing, and Review, the following question has been added to the subtopic Evolving Updates:

Does the company review and adapt its compliance program based upon lessons learned from its own misconduct and/or that of other companies facing similar risks?

This new question reinforces that compliance professionals need to be monitoring global enforcement actions and updating their compliance programs to reflect lessons learned from those infractions as well as the company's own misconduct.

### UPDATED REFERENCES

DOJ has now added the following references to new Guidelines:

- Evaluation of Corporation Compliance Programs in Criminal Antitrust Investigations; and
- A Framework for OFAC Compliance Commitments

DOJ has also added an endnote indicating that "prosecutors should consider whether certain aspects of a compliance program may be impacted by foreign law."

Compliance professionals should become familiar with the antitrust and OFAC guidance and review their compliance programs so that both of these separate compliance areas are covered if they apply. For most multinationals, OFAC compliance has become increasingly important as sanctions are increasingly used to accomplish U.S. foreign policy objectives and sanctions programs change frequently. While there is substantial similarity of guidance by global regulators, compliance professionals should ensure that compliance with foreign law or guidance does not adversely impact effectiveness in the eyes of the DOJ or other U.S. regulators.



## KEY TAKEAWAYS

While most of the changes and additions contained in the June 2020 revision to the Guidelines can be viewed as simply refinement, there are a few areas warranting careful review by compliance professionals:

- The program must be “adequately resourced” and the compliance function must be empowered to “function effectively”
- The program, once established, must be periodically updated and refined or there is the risk that prosecutors will deem it a “paper” program
- Compliance policies and procedures should be readily accessible to employees, and the company should have the ability to track access to such policies and procedures
- Companies should consider the use of more targeted, micro-learning compliance and code of conduct training and develop means to evaluate effectiveness of such training
- Companies should consider extending hotline access to other third parties and take steps to measure the awareness by employees of the hotline availability and determine if employees feel comfortable using it
- The business rationale for engaging third parties should be documented along with the prescribed risk-based due diligence at the inception of, and throughout, the relationship with the third party
- Pre- or post-acquisition compliance-related due diligence is a given, and the company should have an explanation of why it was unable to conduct pre-acquisition due diligence if that was the case
- Integration of an acquired entity into the company’s compliance program structures and internal controls should also be a priority in an effective compliance program
- Compliance professionals and others must have access to relevant data to allow for effective monitoring and testing of policies, controls and transactions
- The compliance function should be able to demonstrate consistent discipline for misconduct
- An effective compliance program will incorporate published guidance from the DOJ’s Antitrust Division and Treasury’s OFAC
- Multinationals faced with compliance with foreign laws and guidance, such as France’s AFA, should carefully integrate such guidance into their programs while maintaining the effectiveness of the program in the eyes of the DOJ

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