

ISSUE ALERTS

NEW DOJ GUIDANCE TAKES A CLOSER LOOK AT CORPORATE COMPLIANCE PROGRAMS AND INCENTIVIZES COOPERATION IN FALSE CLAIMS ACT VIOLATIONS

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DOJ ISSUES GUIDANCE

The Department of Justice (“DOJ”) has issued guidance regarding its evaluation of corporate compliance programs in fraud investigations and its treatment of cooperation in False Claims Act (“FCA”) cases. Both documents provide important reminders to individuals and entities about the importance of effective compliance programs and responding proactively to potential noncompliance.

EVALUATION OF CORPORATE COMPLIANCE PROGRAMS

On April 30, 2019, the Fraud Section of the DOJ Criminal Division updated its guidance document entitled the “Evaluation of Corporate Compliance Programs” (“Evaluation”). According to the Introduction, this 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.”

The Evaluation provides no rigid formula for analyzing corporate compliance programs but states that there are generally three “fundamental questions” prosecutors should consider:

- Is the corporation’s compliance program **well designed**?
- Is the program being applied earnestly and in good faith? In other words, is the program being implemented **effectively**?
- Does the corporation’s compliance program **work in practice**?

For each of these topics, the Evaluation identifies specific elements for prosecutors to consider when evaluating compliance programs. In analyzing whether a compliance program is **well designed**, prosecutors should consider the entity’s risk assessment, policies and procedures, training and communications, confidential reporting structure and investigation process, third party management, and mergers and acquisitions. The elements of an **effectively**

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implemented compliance program should include a commitment by senior and middle management, autonomy and resources, and incentives and disciplinary measures. Finally, the DOJ identifies metrics relevant to considering whether the compliance program **works in practice**. These metrics include continuous improvement, periodic testing, and review; investigation of misconduct; and analysis and remediation of any underlying misconduct.

Although this guidance is aimed at prosecutorial considerations after an offense has occurred, it also provides a roadmap for providers to consider when evaluating the effectiveness of their current compliance programs.

COOPERATION CREDIT

On May 7, 2019, the DOJ Civil Division issued formal guidance regarding how the DOJ will award cooperation credit to defendants in FCA proceedings. This guidance, codified in Justice Manual Section 4-4.112, specifies what types of cooperation will make a defendant eligible for cooperation credit. According to the guidance, the three main factors considered by the DOJ are disclosure, cooperation, and remedial action.

The DOJ notes that it has a “strong interest” in incentivizing individuals and entities to voluntarily disclose potential FCA violations when they are discovered. An individual or entity who makes a timely and voluntary self-disclosure of an FCA violation will be eligible to receive credit during the resolution of the FCA case.

The DOJ further provides a non-exhaustive list of ten activities which can also constitute cooperation in an FCA investigation. These activities include, among others, identifying the individuals substantially involved in or responsible for the misconduct, disclosing relevant facts and identifying opportunities for the government to obtain relevant evidence, and preserving, collecting, and disclosing relevant documents and information beyond existing legal requirements.

The DOJ will also consider whether an entity takes appropriate remedial actions in response to an FCA violation.

These DOJ documents demonstrate the importance of effective compliance programs and timely responses to any suspected or actual violations. Individuals and entities should regularly evaluate their compliance programs for their design and effectiveness.

The full text of the Evaluation of Corporate Compliance Programs can be found [here](#).

The full text of the DOJ’s cooperation credit guidance can be found [here](#).

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PRACTICE AREAS

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