

Adviser: DOJ Steps Up Antitrust Enforcement

A new year provides an opportunity to take stock of your compliance program



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Crain's Cleveland Business (January 18, 2020) It may be tempting in a moment of quiet reflection to look back at 2019 and think "Good riddance!" For corporate compliance and ethics, however, 2019 was a banner year. A full 15 years after the United States Sentencing Guidelines first introduced incentives for organizations to implement effective compliance and ethics programs, the U.S. Department of Justice Criminal Division published a final version of its "Evaluation of Corporate Compliance Programs" guidance document. A few months later, the Justice Department's Antitrust Division published its own guidance specific to antitrust compliance programs. Although in most respects the guidance offered by the Justice Department should not be surprising to compliance professionals, a new year provides an opportunity to take stock of your organization's compliance program and ensure it's all that it should be.

"Evaluation of Corporate Compliance Programs" is designed to guide prosecutors in determining whether a company has an adequate and effective compliance program. Although its official use is

limited to situations involving an organization that has engaged in potentially criminal conduct and it should not be mistaken for a best practices guide, the guidance nevertheless has the potential to offer a useful benchmark for assessing a program. The minimum benchmark, according to the guidance, is that a compliance program must be well-designed and applied in good faith, and it must work in practice.

A well-designed program must address actual organizational risks. The organization must scrutinize and identify its unique risks and then apply its resources accordingly. It must have policies and procedures that are thoughtful and applied in practice. Its training must be risk-based; a one-size-fits-all approach is not adequate. A well-designed program will also include a confidential reporting and investigation process, as well as risk-based screening of third parties.

These critical pieces cannot be part of a mere paper program. The compliance and ethics program must be sincerely adopted by the organization's senior and middle management, which includes ensuring the compliance function is sufficiently staffed and funded and that the organization's employees (including senior management) are evaluated according to whether they have met compliance goals. A compliance program that's implemented in good faith is sufficiently independent from management that it can effectively detect and prevent misconduct. Many well-designed compliance programs have failed because were not effectively implemented.

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Lastly, an effective compliance program must work in practice. This means the program must always be in a continuous state of improvement. It must be tested, analyzed and modified as needed.

Improvement also means conducting competent and thorough investigations and remediating any defects revealed by an investigation.

Because the guidance is intended to serve a defined purpose, it's important not to read too much into these specifics; instead, they should be viewed as part of an overall assessment of whether an organization's program is designed to effect meaningful ethical change within the organization and is producing that change in practice.

To incentivize organizations to behave more ethically, the Justice Department is taking a carrot-and-stick approach. The compliance program guidance is the carrot, and the Procurement Collusion Strike Force (PCSF) is the stick.

The PCSF, announced in November 2019, is leading a national effort to increase antitrust violation detection and enforcement in connection with federal, state and local government procurement projects. The strike force is a multi-agency partnership consisting of prosecutors from the Justice Department's Antitrust Division and 13 United States Attorneys' Offices, including the Southern District of Ohio, investigators from the FBI, the Department of Defense Office of Inspector General, the U.S. Postal Service Office of Inspector General and other partner Offices of Inspector General.

As part of the PCSF's enforcement efforts, attorneys from the Justice Department, along with

agents from the FBI and Offices of Inspector General, will train government procurement officials and contracting officers on antitrust risks and detection. It will then investigate and prosecute the antitrust violations it discovers. The formation of the strike force will likely lead to increased government investigations and prosecutions.

The events of 2019 send a clear signal that the government expects all organizations, large or small, to take compliance and ethics issues seriously. A wise New Year's resolution for your organization should be to re-evaluate the effectiveness of your compliance efforts and make improvements where necessary.

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