

DOJ and Sentencing Commission Guidelines: Road Map to Compliance Effectiveness

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The Department of Justice (DOJ) and U.S. Sentencing Commission (USSC) stress that an effective compliance program is one that prevents, identifies, and mitigates unlawful conduct. Evidencing an effective compliance program would be a consideration in prosecutorial decisions and for potential mitigation of penalties. The challenge is structuring and operating a program that can provide credible evidence of being effective in meeting these goals. The DOJ's 2020 "Updated Evaluation of Corporate Compliance Programs," the USSC's publication highlighting its 30th Anniversary, and the September 2022 Memo from the Deputy Attorney General (DAG), provide a road map of what it takes to have a compliance program viewed as effective. The challenge for compliance officers is applying these guidelines to create a compliance program with sufficient oversight and accountability that demonstrates credible evidence of meeting the standards.

UNITED STATES SENTENCING COMMISSION (USSC)

The USSC was created by the Sentencing Reform Act of 1984 to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."¹ Through the Act, the Commission was directed "to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes."² In 1991, the USSC collaborated with government and private sector stakeholders to release Chapter Eight of the Federal Sentencing Guidelines, titled, "Effective Compliance and Ethics Programs."³ There have been revisions to Chapter Eight over the years but it continues to be the abiding source for the requisite elements for an effective compliance program.⁴

In short, these guidelines permit the Court to determine the level of culpability of an organization to the unlawful acts identified. If it is determined that there was an effective compliance program and the

wrongdoing was by a “rogue” employee, then this would lead to mitigation of penalties. On the other hand, failure to evidence a commitment of compliance, would be an aggravating factors in assigning penalties.

While the USSC recognized that compliance programs could not eliminate all offenses, they could identify when and how the organization went “off course.” This evidences compliance program effectiveness; a program that fosters prompt reporting to law enforcement as appropriate along with mitigation and corrective action to reduce the likelihood of the offense re-occurring. In fact, Chapter 8 states “The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”⁵ A September 15, 2022, memo from Deputy Attorney General (DAG) Lisa Monaco to Department of Justice (DOJ) Components, including United States Attorneys’ offices, similarly states:

*Indeed, timely voluntary disclosures do not simply reveal misconduct at a corporation; they can also reflect that a corporation is appropriately working to detect misconduct and takes seriously its responsibility to instill and act upon a culture of compliance.*⁶

To mark its 30th anniversary, the USSC released *The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence*, summarizing “the history of Chapter Eight’s development, ... a snapshot of corporate sentencing over the last 30 years, ... [and] Chapter Eight’s impact beyond federal sentencing.”⁷ According to that publication, only 10.4 percent of the 4,946 organizational offenders sentenced for wrongdoing over the past 30 years had compliance programs.⁸ That being stated, 58 percent of the 90 organizational offenders in 2021 had compliance programs.⁹ Thus, it appears that compliance is slowly

but surely becoming more of an accepted asset to organizations.

Of course, the government’s confidence in the value of an effective compliance program is not limited to health care. The September 2022 Monaco Memo states that while it “refers to corporations and companies, the terms apply to all types of business organizations ...”¹⁰ Likewise, the data noted in USSC’s 30th Anniversary publication spans many organizational types. Nevertheless, according to the USSC’s data collected from 2000 to 2021, 14 percent of all offenders were in health care, second only to manufacturers. That healthcare providers should implement a compliance program was further reinforced with the passage of the Patient Protection and Affordable Care Act, which requires health care providers to “establish a compliance program that contains the core elements.”¹¹ Therefore, healthcare compliance programs should no longer be considered optional or “nice to have;” they should be part of the organization’s cultural and ethical fabric ... and they should be effective.

IMPACT OF THE USSC’S GUIDELINES

The USSC’s Federal Sentencing Guidelines was the foundation for the modern compliance program and rapidly resulted in expansion of the development of compliance programs. Following the issuance of the Guidelines, many government agencies adapted the guiding principles for their agencies. The Department of Health and Human Services (HHS) Office of Inspector General (OIG) took the same standard elements set forth by the USSC and applied them to the healthcare sector. The OIG noted that that their compliance program guidance documents were “based on substantive policy recommendations, the elements of the Federal Sentencing Guidelines, and applicable statutes, regulations and Federal health care program requirements.”¹² “The OIG believes that every effective compliance program must

begin with a formal commitment by the hospital's governing body to include all of the applicable elements ... These elements are based on the seven steps of the Federal Sentencing Guidelines."^{13,14}

Businesses and organization of all types across all sectors responded to the USSC Guidelines by developing compliance programs that follow the seven standard elements of an effective compliance program outline in the Guidelines. National organizations such as the Health Care Compliance Association, the Society of Corporate Compliance and Ethics, the Ethics and Compliance Initiative, and the National Society of Compliance Professionals were established to further support organizations in their compliance endeavors. Professional journals to help compliance professionals remain on top of current regulatory issues and best practices also came into being.

HOW DOES ONE DETERMINE IF THEIR PROGRAM IS EFFECTIVE?

Chapter Eight sets forth the seven standard elements for an *effective* compliance program (emphasis added); however, the Guidelines do not detail how best to implement these elements operationally to be effective. The USSC's 30th Anniversary publication noted that 10.4 percent of the organizational offenders had compliance and ethics programs in place, but only 0.5 percent of offenders (11) were given a reduced culpability score, thereby lowering the organization's fine range, for having an *effective* compliance and ethics programs (emphasis added).¹⁵ That being stated, the USSC could not determine what constituted sufficient effectiveness to warrant the sentencing credit.¹⁶ Merriam-Webster defines effective as "producing a decided, decisive, or desired effect."¹⁷ Webster continues "Effective typically describes things—such as policies, treatment, arguments, and techniques—that do what they are intended to do."¹⁸ Therefore for a compliance program to be effective, one must

"do what they intended to do." Indeed, the Monaco Memo states, "Prosecutors should look to what has happened in practice ... not just what is written down."¹⁹

DOJ AS A ROAD MAP TO EFFECTIVENESS

The DOJ Guidelines and the Monaco Memo focus on essential characteristics of an effective program, which have been familiarly boiled down to whether: (1) the program is well designed; (2) the program is applied earnestly and in good faith; and 3) the program works in practice.²⁰ The DOJ Guidelines states "[t]he Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs."²¹ While DOJ may not use a "rigid formula," there are multiple "clues" throughout the Guidelines and the Monaco Memo that can guide compliance officers on how to build and maintain a compliance program that would be viewed as "effective" and "well designed" by the Department of Justice.

The Guidelines places a heavy emphasis on an organization having a risk assessment around which the compliance program should be built and maintained. It notes that the starting point to evaluating the efficacy of a compliance program and understanding how the company has defined risk is its risk profile. "In short, prosecutors should endeavor to understand why the company has chosen to set up the compliance program the way that it has, and why and how the company's compliance program has evolved over time ... to address existing and changing compliance risks."²² The Monaco memo reinforces the DOJ's emphasis on risk assessment as a cornerstone of a compliance program, stating "[p]rior guidance has identified numerous considerations for this evaluation, including, *inter alia*, how corporations measure and identify compliance risk."²³

DOJ highlights the importance of written compliance guidance in the form of policies and procedures and a "code of conduct that sets forth ... the company's

commitment to full compliance with relevant federal laws,” along with “policies and procedures that incorporate the culture of compliance into its day to day operations.”²⁴ However, simply meeting this element by creating broad or vague policies and procedures and a generalized code of conduct implies a “check the box” program that may not be deemed effective. Program effectiveness would be best served if these documents were aligned with the company’s risk profile based on the aforementioned risk assessment. Similarly, an “off the shelf” compliance training program would meet the requisite element of training and education; however, the DOJ Guidelines point to risk-based training and educating employees on prior compliance incidents.

The DOJ Guidelines notes that “[A] hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis.”²⁵ DOJ ascribes the use of root cause analysis as a mechanism “to understand both what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future.”²⁶ Similarly, the Monaco Memo advises prosecutors to “consider whether the present and prior instances of misconduct share the same root causes” and “what remediation was taken to address the root cause of prior misconduct.”²⁷

The DOJ Guidelines states that “[a]nother hallmark of a compliance program that is working effectively is the existence of a well functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents.”²⁸ Prosecutors are advised to assess if compliance monitors “its investigations and resulting discipline to ensure consistency.”²⁹ The Monaco Memo reinforces the importance of compliance internal investigations in determining whether

an independent compliance monitor is needed to reduce the risk of further corporate misconduct. The Memo advises prosecutors to determine “[w]hether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct.”³⁰ Taken together, it is clear that a compliance program should be able to evidence a strong investigative process to be considered effective. Key leaders need to be aware and supportive of being able to investigate allegation of misconduct properly. This includes ensuring there is a process to predicate investigations, and have qualified individuals available to conduct them.

In assessing whether a company’s compliance program was effective at the time of a detected misconduct, the Guidelines advises prosecutors to “consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company’s remedial efforts.”³¹ Note however, that “repeated misconduct may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards.”³²

CORPORATE VS. INDIVIDUAL ACCOUNTABILITY

Chapter 8 of the USSC Guidelines lists the key elements for an effective compliance program, but it does not specify individual accountability. It stresses the importance of promoting a “culture that encourages ethical conduct and a commitment to compliance with the law.” The entire governing authority is charged with being knowledgeable about the content and operation of the compliance and ethics program” with requisite oversight. The only slightest reference to individual accountability can be found in the requirement that “high-level personnel ... ensure that the organization has an effective compliance and ethics program” and that “individual(s) within high-level personnel shall be assigned overall

responsibility for the compliance and ethics program.”³³

Similarly, the DOJ Guidelines lumps senior leadership into one group without stressing the potential individual culpability if the company commits an offense. The Guidelines stresses that a company’s board of directors and leadership “set the tone for the rest of the company.” Senior management should clearly articulate “the company’s ethical standards.” The Guidelines advises prosecutors to consider whether “senior leaders, through their words and actions, encouraged or discouraged compliance.” And whether they have “modelled proper behavior.”³⁴

The Monaco memo echoes in large measure the 2015 DAG Sally Yates memo, by emphasizing individual and corporate accountability, stating “[t]he Department’s first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime.”³⁵ “Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable.”³⁶ Evidence about individual misconduct must be provided to the DOJ “such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals.”³⁷

Further, the Monaco Memo stresses individual responsibility, stating that misconduct can best be deterred if it is “clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable.”³⁸ The use of financial incentives and disincentives can create a culture of compliance. Financial incentives include including compliant behavior in performance reviews and compensation calculations, while disincentives may include retroactive discipline, partial escrowing of compensation, etc.³⁹ Compliance officers should therefore consider collaborating with human resources to incorporate

these incentives and disincentives into employee handbooks.

PUTTING ALL THE PIECES TOGETHER

The basic requisite elements of an *effective* compliance program have not changed significantly over the last 30 years. The challenge is developing and effectively managing each of the standard compliance program elements and ensuring they align with and address the legal and regulatory risks related to the organizations structure, operation and services. Layering the points made in the guidance documents discussed herein on top of the basic elements will move a compliance program toward greater effectiveness.

It is the commitment of the organization, each individual associated with the organization, and the compliance department that will be scrutinized in the event of a compliance failure such as a criminal offense. Leaders should be involved and provide the necessary oversight of the organization and of the compliance program. They cannot put their head in the sand, or they will be considered equally culpable in the event of a detected offense. As stated in the Monaco Memo, “Prosecutors should evaluate the corporation’s commitment to fostering a strong culture of compliance at all levels of the corporation – not just within its compliance department.”⁴⁰

Endnotes

1. Original Introduction to the Guidelines Manual, United States Sentencing Commission, 2021, <https://guidelines.usc.gov/intro>.
2. *Ibid*.
3. United Sentencing Guidelines, §8B2.1 - EFFECTIVE COMPLIANCE AND ETHICS PROGRAM, 2021, <https://guidelines.usc.gov/gl/%C2%A78B2.1>.
4. It should be noted that the terms “company,” “corporation,” and “organization” are used interchangeably throughout.
5. *Supra* note 3.
6. Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, September 2022, <https://www.justice.gov/opa/speech/file/1535301/download> (“Monaco Memo”), at 6.

7. The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence, August 2022, <https://www.ussc.gov/research/research-reports/organizational-sentencing-guidelines-thirty-years-innovation-and-influence>, at 1.
8. Note also that while some statistics in the USSC report drill down to health care, this overall percentage does not.
9. *Supra* note 7 at 25.
10. *Supra* note 6 at 2, footnote 2.
11. 124 Stat. 119, Patient Protection and Affordable Care Act (42 U.S.C. § 1395cc(j)(9)(A)).
12. Publication of the OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987 (February 13, 1998), <https://www.govinfo.gov/content/pkg/FR-1998-02-23/pdf/98-4399.pdf>.
13. *Ibid.*
14. It should be noted, that while quoting the hospital guidance, the OIG's stance on program elements and effectiveness is consistent throughout all subsequent guidance documents for other healthcare entities.
15. *Supra* note 7 at 38.
16. *Ibid.*
17. <https://www.merriam-webster.com/dictionary/effective>.
18. *Ibid.*
19. *Supra* note 6 at 10.
20. *Ibid.* See also note 7 at 43.
21. U.S. Department of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (Updated June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.
22. *Id.* at 14.
23. *Supra* note 6 at 9.
24. *Supra* note 21 at 4.
25. *Id.* at 17.
26. *Id.* at 14.
27. *Supra* note 6 at 6.
28. *Supra* note 21 at 16.
29. *Id.* at 13.
30. *Supra* note 6 at 12.
31. *Supra* note 21 at 14.
32. *Supra* note 6 at 5.
33. *Supra* note 3.
34. *Supra* note 21 at 10.
35. *Id.* at 2.
36. *Id.* at 10.
37. *Id.* at 3.
38. *Id.* at 10.
39. *Ibid.*
40. *Id.* at 9.

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