

# DOJ and SEC's Updated Guidance on Corporate Compliance Programs

*What Has Changed, the Areas of Increasing Emphasis, and Potential Adjustments*

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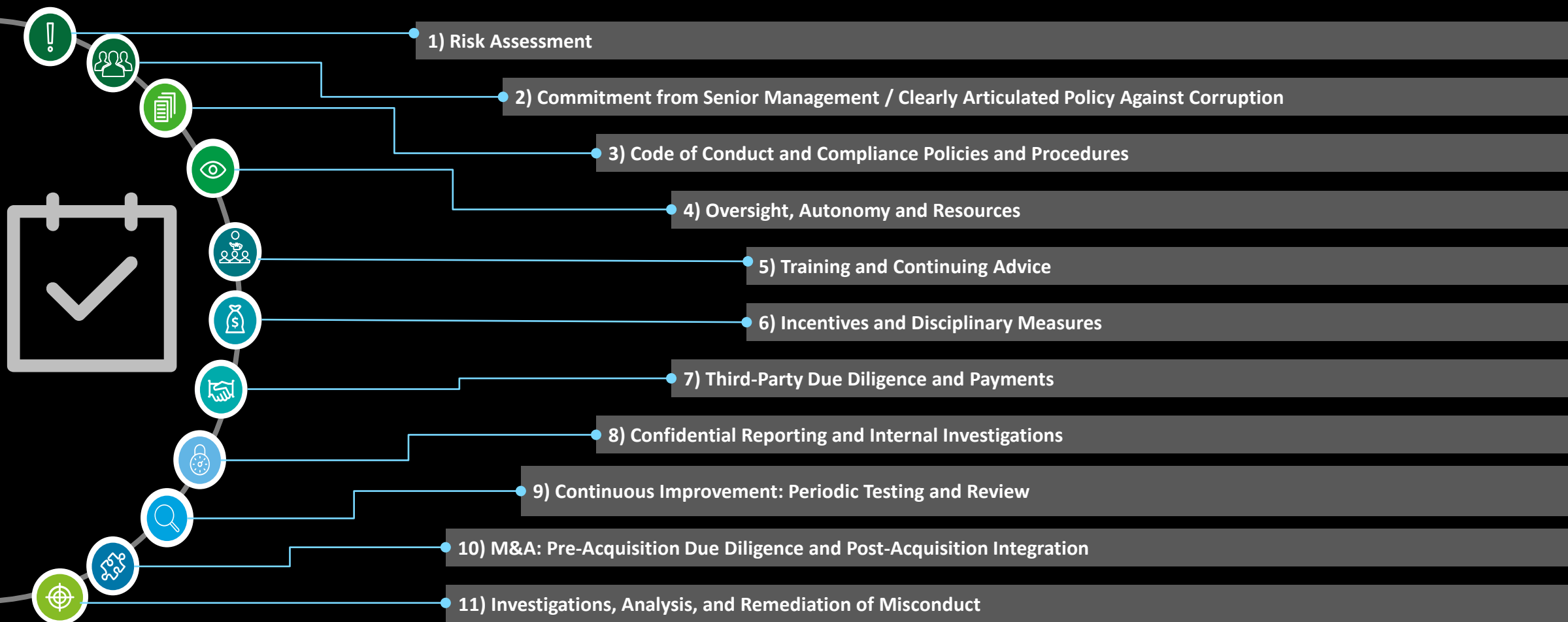
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# Agenda

- 1 Hallmarks of an effective compliance program
- 2 Key areas of emphasis for corporate compliance programs according to DOJ and SEC publications
- 3 Considerations around how corporations can address the changes

# Hallmarks of an effective compliance program

On June 1, 2020, the DOJ updated its guidance document entitled Evaluation of Corporate Compliance Programs (ECCP).<sup>1</sup> Subsequently, on July 3, 2020, the DOJ and SEC issued an updated version of their 2012 “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (“Resource Guide”).<sup>2</sup> As DOJ and SEC’s expectations continue to evolve in both sophistication and granularity with respect to compliance programs, companies may need to make significant or additional investments to keep up.



<sup>1</sup> US Department of Justice, Criminal Division, “Evaluation of Corporate Compliance Programs, Guidance Document,” June 2020 (updated). <https://www.justice.gov/criminal-fraud/page/file/937501/download>

<sup>2</sup> Department of Justice, Criminal Division, and US Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” Second Edition – July 2020 <https://www.justice.gov/criminal-fraud/file/1292051/download>  
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# Heightened expectations from risk assessments

Results of risk assessment are expected to be leveraged for tailoring the compliance program.

Corporations should consider making appropriate tweaks to risk assessments based on the following areas emphasized by the DOJ:

**Updates based on continuous access to data vs. snapshots**

Periodic review based upon continuous access to operational data and information across functions, and not limited to a “snapshot”<sup>1</sup> in time.

**Incorporating lessons learned**

Increased importance of a process to track and incorporate lessons learned into the risk assessment (both the “company’s own prior issues” or “those of other companies operating in the same industry and/or geographical region”).<sup>1</sup> Additionally, lessons learned from investigations, whistleblower reports, M&A activity, or otherwise should be considered.

**Risk-tailored resource allocation**

Continued emphasis on tailoring compliance programs to risk and devoting time and scrutiny efforts proportionate to the risk profile of a given area of the compliance program.

<sup>1</sup> US Department of Justice, Criminal Division, “Evaluation of Corporate Compliance Programs, Guidance Document,” June 2020 (updated). [https://www.justice.gov/criminal-fraud/page/file/937501/download`](https://www.justice.gov/criminal-fraud/page/file/937501/download)  
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# Increased emphasis on structure, autonomy, and resources

Corporations are expected to apply the compliance program “in good faith,” in other words, that it be “adequately resourced and empowered” to function effectively.<sup>2</sup>

Both DOJ and SEC recognize that the amount of resources devoted to compliance will depend on the company’s size, complexity, industry, geographical reach, and risks associated with business. Corporations are encouraged to self-assess structure, autonomy, and resources based on these key elements:



## Responsibility for oversight and implementation

- Is the responsibility for the oversight and implementation of compliance program assigned to one or more specific senior executives?
- Do these senior executives have the following to ensure that the compliance program is implemented effectively:
  - appropriate authority within the organization,
  - adequate autonomy from management, and
  - sufficient resources?



## Access to relevant data

- Does compliance have sufficient access to data “to allow for timely and effective monitoring and/or testing of policies, controls, and transactions?”<sup>1</sup>
- Do compliance and control personnel face “impediments” that “limit access to relevant sources of data” for purposes of monitoring and testing?<sup>1</sup>
- If yes, is the company addressing “the impediments” to such access?<sup>1</sup>



## Document evolution & decision making

- Why has the company chosen to set up the compliance program the way that it has?<sup>1</sup>
- The reasons for the structural choices the company has made.
- How has the company’s compliance program evolved over time?

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<sup>2</sup> Department of Justice, Criminal Division, and US Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” Second Edition – July 2020 <https://www.justice.gov/criminal-fraud/file/1292051/download>



# Customized training for compliance / control personnel (and high-risk employees)

DOJ places increased emphasis on tailored training for control functions, evaluating effectiveness, and issue elevation.

- **Tailored training** - DOJ will specifically ask companies if they have “invest[ed] in further training and development of the compliance and other control personnel.”<sup>1</sup>



- ✓ **Key takeaway** - Companies are encouraged to supplement their training decks with modules geared separately for control personnel (and, based on prior updates, high-risk employees).

- **Effective training** - There is a new expectation, that each company evaluates “the extent to which the training has an impact on employee behavior or operations.”<sup>1</sup>



- ✓ **Key takeaway** - Companies are encouraged to assess improved behavior (e.g., if the issue / exception rate for a risk area decreased over time due to targeted trainings).

- **Issue elevation** - DOJ wants to see training that “enable[s] employees to timely identify and raise issues to appropriate [control] functions.”<sup>1</sup>



- ✓ **Key takeaway** - Companies may want to develop processes by which employees can more easily ask questions arising out of the trainings and track questions and issues that flow from the training.

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# Periodic testing and review: Access to and use of data in assessing effectiveness

To be able to demonstrate effectiveness, both DOJ and SEC state that “an organization should take the time to review and test its controls.”<sup>2</sup> DOJ further enhances the guidance on periodic testing as follows:

## Lessons learned

Emphasis on reviewing and adapting compliance programs based on lessons learned from a company’s own issues and those of other companies “facing similar risks.”<sup>1</sup>

## Access to data for testing and monitoring

“Do compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring....?”<sup>1</sup>

## Remedying impediments to data access

“Do any impediments exist that limit access to relevant sources of data and, if so, what is the company doing to address the impediments?”<sup>1</sup>

Companies should develop risk-based, tailored procedures to test key aspects of their compliance program; not just for whether they are well designed and “applied earnestly and in good faith,” but also whether the program “works in practice”<sup>1</sup> (i.e., is effective).

<sup>1</sup> US Department of Justice, Criminal Division, “Evaluation of Corporate Compliance Programs, Guidance Document,” June 2020 (updated). <https://www.justice.gov/criminal-fraud/page/file/937501/download>

<sup>2</sup> Department of Justice, Criminal Division, and US Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” Second Edition – July 2020 <https://www.justice.gov/criminal-fraud/file/1292051/download>  
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# Paramount importance on response to potential misconduct

“The truest measure of an effective compliance program is how it responds to misconduct.”<sup>2</sup>

Common traits of an effective investigation structure can be grouped into **four themes**:

**1**

**Well-functioning and appropriately funded mechanism for timely and thorough investigations**

**2**

**Established mechanisms for responding to specific incidents of misconduct**

**3**

**Established means of documenting response, including disciplinary or remediation measures**

**4**

**Root cause analysis of misconduct and integration of lessons learned into policies, trainings, and controls**

<sup>2</sup> Department of Justice, Criminal Division, and US Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” Second Edition – July 2020 <https://www.justice.gov/criminal-fraud/file/1292051/download>  
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# Focus on effective confidential reporting mechanisms

DOJ's heightened focus on effectiveness testing for reporting mechanisms.

DOJ places increased emphasis on these areas:

2

Measures to test whether employees are aware of the hotline and feel comfortable using it

1

Publicizing reporting mechanism, not just to company employees, but also to "other third parties"<sup>1</sup>

3

Periodic testing of the effectiveness of reporting mechanisms (e.g., by tracking a report from start to finish)

## Considerations to help facilitate whistleblower reporting internally and implement an effective reporting mechanism:

- Positive tone and conduct at the top (and middle)
- Establish the hotline as an integral part of a company's compliance program, and publicize the availability of reporting mechanism(s)
- Anonymity, confidentiality, and zero retaliation policy
- Hotline managed by independent third-party providers
- Allow multiple methods of reporting compliance concerns to be available
- Extend the reporting mechanism(s) to stakeholders beyond employees (e.g., third parties)
- Employee surveys to assess employee awareness, comfort level, and related issues

<sup>1</sup> US Department of Justice, Criminal Division, "Evaluation of Corporate Compliance Programs, Guidance Document," June 2020 (updated). <https://www.justice.gov/criminal-fraud/page/file/937501/download>

# Third-Party Due Diligence and Payments

DOJ's continued emphasis on third party risk management



## Increased emphasis on the entire life cycle of third party risk management

- ✓ “Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?”<sup>1</sup>

### Considerations for ongoing monitoring:

- 1** Employ analytic methods that integrate external data reviews and enterprise data testing
- 2** Update due diligence with additional certifications and external background research
- 3** Develop a risk-based, proportionate plan to exercise audit rights

<sup>1</sup> US Department of Justice, Criminal Division, “Evaluation of Corporate Compliance Programs, Guidance Document,” June 2020 (updated). [https://www.justice.gov/criminal-fraud/page/file/937501/download`](https://www.justice.gov/criminal-fraud/page/file/937501/download)  
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# Emphasis on post-acquisition integration

DOJ and SEC now explicitly recognize situations where pre-acquisition due diligence may not be not possible.



## When pre-acquisition due diligence is impracticable

- Companies encouraged to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition.
- In instances where robust pre-acquisition due diligence may not be possible, evaluation of “if not, why not?”<sup>1</sup>
- Emphasis on timeliness and thoroughness of the acquiring company’s post-acquisition due diligence and compliance integration efforts.



## Acquiring entity having a “robust compliance program”<sup>2</sup>

- Recognition of the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a “robust compliance program” in place and it implements the program, as quickly as practicable, at the merged or acquired entity.<sup>2</sup>



## Post-acquisition audits

- Emphasis on implementing compliance policies and procedures, and conducting post-acquisition audits, at newly acquired entities.

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# Adequate internal controls vs. effective compliance programs

DOJ and SEC clarified that effective compliance programs are not synonymous with a company's internal financial controls, but there is overlap.

1

DOJ and SEC state that the accounting provisions refer not simply to “internal controls”<sup>2</sup> but to “internal accounting controls.”<sup>2</sup>

2

“A company's internal accounting controls are not synonymous with a company's compliance program”<sup>2</sup> – but compliance programs may contain procedures that overlap with internal accounting controls.

3

DOJ and SEC assert that effective compliance programs “reinforce[ ]”<sup>2</sup> internal financial controls.

4

There are similarities, though. Both “must take into account the operational realities and risks attendant to the company's business” (e.g., the nature of its product / services and how they get to market, “the extent of its government interaction,” etc.).<sup>2</sup>

5

Both must also “be tailored to the risks specific to [the company's] operations.”<sup>2</sup>

<sup>2</sup> Department of Justice, Criminal Division, and US Securities and Exchange Commission, “A Resource Guide to the US Foreign Corrupt Practices Act,” Second Edition – July 2020 <https://www.justice.gov/criminal-fraud/file/1292051/download>  
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# Other changes and increased areas of focus

DOJ's emphases with respect to other elements on an effective compliance program.



## Commitment from Senior Management / Clearly Articulated Policy Against Corruption

**Compliance assessments – measuring tone and conduct, both at the top and in middle management.**

- ✓ New language emphasizes a culture of ethics and compliance “at all levels of the company” and that effective programs implement a culture “from the middle and the top.”<sup>1</sup>
- ✓ Continued emphasis not just on tone, but on “conduct at the top,” “concrete actions ... to demonstrate leadership,” and “modelled proper behavior.”<sup>1</sup>



## Code of Conduct and Compliance Policies and Procedures

**Enhanced focus on accessibility of compliance policies and procedures.**

- ✓ **Searchable policies and procedures:** New language asking if policies and procedures are published “in a searchable format for easy reference.”<sup>1</sup>
- ✓ **Tracking Page Hits:** Does your company “track access” to policies and procedures, in order to understand which policies and procedures “are attracting more attention from relevant employees?”<sup>1</sup>



## Incentives and Disciplinary Measures

**Greater emphasis on tracking discipline to ensure consistency.**

- ✓ “Does the compliance function monitor ... investigations and resulting discipline to ensure consistency?”<sup>1</sup>

<sup>1</sup> US Department of Justice, Criminal Division, “Evaluation of Corporate Compliance Programs, Guidance Document,” June 2020 (updated). [https://www.justice.gov/criminal-fraud/page/file/937501/download`](https://www.justice.gov/criminal-fraud/page/file/937501/download)



# Key takeaways

The DOJ and SEC continue to emphasize the effectiveness of the corporation's compliance program (and effectiveness testing).

The requisite building blocks of an effective compliance function are (i) adequate resources and empowerment within the corporation and (ii) access to and utilization of data for testing and monitoring.

Response to potential misconduct and application of lessons learned into compliance program are also of paramount importance – to both the DOJ and the SEC.

Risk assessments are not static, but rely on continuous access to operational data and incorporate lessons learned from issues facing both the company and other similarly situated entities.

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