

DOJ Issues Important Guidance for Evaluation of Corporate Compliance

Featuring Jana Volante Walshak of Fox Rothschild LLP

Welcome to FoxCast. We're talking this morning with Fox Rothschild Partner Jana Volante Walshak in Pittsburgh. Our topic is the new guidance provided by the U.S. Department of Justice on how its prosecutors evaluate a company's corporate compliance culture and practices.

Jana is a member of Fox's White Collar Criminal Defense and Regulatory Compliance Group. She's been involved in representing corporations, their officers and executives and other professionals in investigations conducted by state and federal prosecutors. She has experience representing witnesses testifying before grand juries and responding to grand jury subpoenas and has helped clients conduct internal investigations and implement corporate compliance programs. And she recently co-authored an article about today's topic, which was published in a national health care journal. Jana, so glad to have you.

Jana Volante Walshak: Thank you. Good morning.

Question: Jana, your recent article was in the context of health care, but corporate compliance is not limited to that field.

Jana Volante Walshak: That's right. The new Department of Justice guidance applies to all types of industries.

Question: Jana, the DOJ seems to continually be updating its guidance to prosecutors about what it looks for in evaluating a corporation's compliance program.

Jana Volante Walshak: Absolutely. The updates are so important. Organizations must reevaluate and revise their compliance programs at least annually to account for changes in their businesses as well as changes in the law and in the DOJ guidance.

The DOJ evaluates corporate compliance on a company-by-company basis, looking at the company's size, industry and regulatory landscape. Previously it had focused on three fundamental questions: 1) is the corporation's compliance program well designed; 2) is the program being applied earnestly and in good faith; and 3) does the corporation's compliance program work in practice?

Question: Jana, what's the purpose of the new guidance?

Jana Volante Walshak: The DOJ revised the second question that it focuses on. Instead of only asking if the compliance program is being applied earnestly and in good faith, the DOJ is now also asking: "Is the program adequately resourced and empowered to function effectively?"

Question: What does it mean for a compliance program to be adequately resourced and empowered to function effectively?

Jana Volante Walshak: DOJ made it clear that it's not the results of a compliance program that are necessarily important. Rather, it's the investment that an organization makes in its compliance program. For instance, according to the revisions, DOJ evaluates an organization's investment in the training and development of its compliance personnel. A "paper" compliance program devoid of the staff and resources needed to implement it is not sufficient and will not be viewed as functioning effectively.

Question: Please tell our listeners more about the recent amendments?

Jana Volante Walshak: The new amendments make it clear that an organization's system for investigating any allegations or suspicions of internal misconduct must be comprehensive. And by that I mean enough to identify root causes, system vulnerabilities and accountability lapses. The DOJ now provides more detail for prosecutors to determine if a compliance program is well designed. It advises prosecutors to "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."

The amendments also focus on thoroughness of the continuing risk assessment. For instance, DOJ evaluates whether the risk assessment is "limited to a 'snapshot' in time or based upon continuous access to operational data and information across functions." DOJ asks: Is there a process to incorporate into the company's risk assessment "lessons learned" from the company's prior issues or from issues faced by other companies in the same industry?

Question: Are there other amendments?

Jana Volante Walshak: There are. The DOJ now checks to see if a company's policies and procedures are accessible to its employees. Additionally, DOJ now asks if the company periodically tests the effectiveness of its anonymous compliance hotline, for example, by tracking a report from start to finish.

The guidance also covers the thoroughness of risk management relating to transactions with third parties.

Question: How does DOJ address a company's compliance culture?

Jana Volante Walshak: DOJ has made it clear that a culture of compliance must exist at all levels of the organization and be implemented by middle as well as upper management. A top-down compliance program and compliance culture is a good start. But middle management must also be committed to the implementation of the compliance program. In fact, in these revisions, DOJ puts an emphasis on the structure of an organization's compliance program, indicating that an organization must have good reasons for how it structures compliance. This includes which department houses an organization's compliance function and to whom – the board of directors or the CEO – the compliance officer reports.

Additionally, DOJ now makes it clear that it's essential for an organization to give its compliance personnel sufficient access to data. This will allow them to evaluate and monitor the organization's policies and controls. A compliance department must strive for consistency in its investigations and in any resulting disciplinary actions.

Question: Jana, what about guidance for prosecutors to determine if a compliance program works in practice?

Jana Volante Walshak: The amendments help prosecutors evaluate a compliance program following corporate misconduct. At the time of a charging decision, the guidance requires a determination of whether the program was working effectively at the time of the offense. The guidance indicates that prosecutors should consider whether and how the misconduct was detected, what resources were in place to launch an investigation, and the nature and thoroughness of the company's remedies.

Prosecutors should also consider whether the program evolved over time to address existing and changing compliance risks. They should also consider whether the company undertook an adequate and honest root cause analysis. The goal is to better understand what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future, especially where the misconduct was not immediately detected.

Question: Jana, how does the DOJ suggest that a compliance program improve and evolve?

Jana Volante Walshak: A company should periodically update its risk assessments and review its compliance policies, procedures, and practices. It should also undertake a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training. Finally, the company should review and adapt its compliance program based upon lessons learned from its own misconduct and/or that of other companies facing similar risks.

Question: The requirement that organizations learn from others is new, yes? Why is it so important?

Jana Volante Walshak: What better lesson is there than learning from the failures or the misconduct of others facing similar risks? A compliance program that does not evolve following such circumstances is a telling sign that the program is not sufficiently tailored to prevent and detect a violation of law.

Question: What guidance is the DOJ giving to how well a company is functioning and funded for responding to alleged or suspicions of misconduct by the company, its employees, or agents?

Jana Volante Walshak: DOJ is focusing on the process that's being used for responding to investigative findings and on how high up in the company investigative findings go. The new amendments emphasize the reality that there may be more than one supervisor who made the system vulnerable by either intentional misconduct or accountability lapses.

***Question:** If you had to summarize the DOJ's updated guidance, what are the key takeaways?*

Jana Volante Walshak: It's important for organizations to frequently reevaluate and update their corporate compliance programs in light of new risks, changes in business practices and changes in the law. It's imperative that organizations enforce their corporate compliance programs and dedicate sufficient resources to the process.

***Question:** Well, listeners, unfortunately we're out of time today. To confidentially discuss how the Department of Justice might view your company's compliance program, please contact Jana Volante Walshak at 412-394-5523 or at jvolantewalshak@foxrothschild.com – that's J-V-O-L-A-N-T-E-W-A-L-S-H-A-K – at foxrothschild.com. Please visit us on the web at www.foxrothschild.com.*