

DOJ Urges Data Access In Compliance Manual Tweaks

By **Al Barbarino**

Law360 (June 2, 2020, 8:13 PM EDT) -- The Department of Justice has updated the guidance used by prosecutors in its criminal division to probe corporate compliance programs, including new language that stresses the importance of programs that adapt quickly while placing particular emphasis on personnel's access to data and the effectiveness of reporting hotlines.

New statements in the guidance ask prosecutors to explore whether "any impediments exist that limit access to relevant sources of data and, if so, what is the company doing to address the impediment," the updates released on Monday show.

In addition, prosecutors should address whether or not the company ensures that employees are comfortable with internal hotlines and if the firm periodically tests "the effectiveness of the hotline, for example by tracking a report from start to finish."

Kenneth A. Polite Jr., a partner with Morgan Lewis & Bockius LLP and a former U.S. attorney for the Eastern District of Louisiana, told Law360 that the DOJ's remarks on data and hotlines tie into a broader focus across the updates stressing the importance of fluid compliance programs that can readily adapt to change.

"It's not enough to just have a hotline that is essentially collecting dust," said Polite, who also previously served as chief compliance officer of Entergy Corp. "If you are identifying that there is limited access to certain data and you aren't doing anything to address the limitation, that's a red flag that your compliance program isn't particularly effective."

The DOJ has stated in previous incarnations of the guidance that prosecutors ask three overarching questions in assessing a compliance program: Is it well-designed, is it implemented effectively and does it "actually work in practice."

However, the new guidance scraps the question about a program's "being implemented effectively," instead directing prosecutors to probe if the program is "adequately resourced and empowered to function effectively."

"The revision does a great job to give much-needed clarity to some previously vague, undefined terms that some personnel had struggled to qualify and quantity," Polite said.

"Over and over, you see additional language that amplifies this notion that your compliance program must be dynamic, not static," he added. "You must collect, use and monitor data and respond continually, whether you're talking about a hotline, due diligence, mergers and acquisitions, third-party risk, or various other areas of your program."

In addition, the new guidance asks if firms are updating policies to address "lessons learned" from prior misconduct, expands upon due diligence practices related to third-party dealings and mergers and acquisitions, and stresses that compliance should be integrated into company culture "at all levels of the company."

The guidance follows a previous April 2019 update that sought to "better harmonize the guidance" with other departments "while providing additional context to the multifactor analysis of a company's compliance program," the DOJ said at the time.

--Editing by Jack Karp.