

Cuneyt Akay ([00:12](#)):

[inaudible] welcome to the GP ABC podcast

Cuneyt Akay ([00:19](#)):

And your host Cuneyt Akay. The GT stands for Greenberg Traurig and the ABC stands for anti-bribery and corruption. And today we are going to turn our attention to corporate compliance and focus on the department of justices, recent revisions to its evaluation of corporate compliance program guidance and provide some key takeaways for compliance professionals from the revisions to this guidance. Now, first, we wanted to give you a little background on the evaluation of corporate compliance program guidance. The first version came out in February of 2017, and the stated purpose of the guidance was to provide a list of some important topics and sample questions that the fraud section of the DOJ has frequently found relevant in evaluating a corporate compliance program. Now, the DOJ made some revisions in 2019. Of course, again, maybe made some further revisions in June of 2020, and we will focus today's podcast on these latest revision.

Cuneyt Akay ([01:21](#)):

Now, the guidance is meant to assist prosecutors and then determining whether a compliance program was one effective at the time of the offense. And two, whether the compliance program is effective at the time of the charging decision resonance. Now, prosecutors may use this guidance for the purposes of determining three things, one the form of the resolution or prosecution two what penalty to impose on the company, if any, and three, what the compliance obligations of the company will be going forward. For example, whether there'll be an independent, an independent compliance monitor put in place, the DOJ doesn't use quote, any rigid formula to assess effectiveness of compliance programs end quote. In other words, there is no one size fits all compliance program. The DOJ included new language regarding how they evaluate compliance programs and this new language discusses how the DOJ makes individual determinations in each case, considering various factors, such as the company size industry, geographic footprint, the regulatory landscape, and both internal and external factors related to a company's operation.

Cuneyt Akay ([02:35](#)):

So the guidance asks three primary questions. One is the corporation's compliance program while designed two is the program being applied earnestly and in good faith. In other words, is the program adequately resourced and empowered to function effectively. And it's this language adequately resourced and empowered to function effectively. That is new, which we'll discuss in a few minutes. And third does the corporation's compliance program work in practice. Now here with me today, my guest on today's podcast episode to discuss these changes is Michael Marinelli. Michael is a shareholder in the GT Austin office has helped clients build and assess compliance programs for 30 years with a focus on anti-corruption export controls and sanctions issues. Well, first of all, welcome Michael to our podcast. And secondly, can you tell us what are the biggest changes you see in the DOJ's revisions to the evaluation of the corporate compliance program guidance?

Michael Marinelli ([03:35](#)):

Thank you, Cuneyt. I think the biggest thing that I've seen is the reframing of the second of the three fundamental questions that you just referenced. The prior standard was is it earnestly and in good faith being implemented that to me is fuzzy and pretty subjective. And now I think they've brought it into sharper focus by asking the question of whether the program is adequately resourced and whether it is

empowered to function effectively. And so I think it's worth pointing out that when they talk about resources, the DOJ folks are really talking about staffing. Primarily, it's not that they're not interested in the budget question, but they focus mostly on the staffing issue. Um, and the underlying analysis hasn't fundamentally fundamentally changed, but it does bring out where they're going to focus their attention. And so when you're talking about staff, yes, there is a question about how many people are staffing the compliance function, but they also are interested in who are those people and do they have the skills and qualifications necessary to perform effectively in the compliance function?

Michael Marinelli ([05:00](#)):

Do they have the ability to identify and respond to high risk situations and to say to management work to the business folks, Hey, wait a minute, this does not look right to me. In other words, they have the ability to stop something bad from happening at the front end. I think it's also worth noting that the DOJ analysis of staffing resources is not limited to the compliance team or people that have compliance in their function. They're also looking at the functions that support compliance, and that would be for example, the auditor's internal audit. Do you have an adequate internal audit group that can examine whether the program is functioning effectively? And so I think overall, when you look at this new adequately resourced issue, I think you're looking at a more advanced version of what DOJ has been saying for years, which is you cannot have just a paper program.

Michael Marinelli ([06:01](#)):

And now I think they're taking it a step further and saying, you have to have people who are running that program and performing the functions necessary to that program, and they need to be qualified, um, and, and be able to do their jobs. So I've addressed kind of the first part of the, the new language in question number two, which is adequately resourced. But there's another piece of that, which is, uh, which is a part that says, have they been empowered to function effectively? And I'd like to get your take on what you think this empowerment concept means in the guidance.

Cuneyt Akay ([06:42](#)):

That's a good question, Michael. And I think here really the key issue is whether the compliance program is effective, uh, first and foremost, and then how a team is empowered to function effectively. And the biggest revisions here regarding a team being empowered to function effectively involve the DOJ is emphasis on access to and utilization of data. And what does that really mean? Well, uh, in terms of effective implementation, the compliance program needs to have three things, one a sufficiently senior leader of that compliance team. And that really means someone that has, uh, you know, the ears of senior management, uh, may have a direct reporting line to the board of directors, someone that really has gravitas and standing with an organization to which you just talked about the resource piece. Uh, so those are the compliance program, has the sufficient resources, mainly staff, and third is, does it have sufficient autonomy to operate?

Cuneyt Akay ([07:40](#)):

And here's where we see the biggest change and the DOJ has guidance because they add language around data resources and access, and particularly for the compliance teams, access to data and the resources, um, that the compliance team may be looking for. And there's two things here. One is do the compliance personnel have sufficient direct or indirect access to relevant data to allow for timely and effective testing and or monitoring of the company's policies and controls as well as their transactions. So the DOJ is signaling to compliance professionals that they need to have sufficient access to relevant

data within the business, and then be able to utilize that data, either test or monitor those transactions and then see how they're doing against the existing policies and controls in place. Secondly, do impediments exist that limit access to relevant sources of data? And if so, what is the company doing to address those impediments?

Cuneyt Akay ([08:42](#)):

Again here, the DOJ is really signaling, not only do you need to have data, but you also need to make sure that the compliance team has relevant, um, access and, uh, relevant sources data. So in other words, to make sure that the compliance team has access to the different business units and all the business units, particularly those business units that may have may conduct higher risk transactions. So the first part is making sure there's access to and utilization of data in terms of when a program is implemented. But similarly, in terms of the design of the compliance program, as we all know, the starting point of an effective program is a risk assessment. And here the DOJ has indicated then an effective program requires ongoing compliance and ongoing compliance requires continuous access to operational data. So in discussing risk assessments, the DOJ added language in the guidance about whether a risk assessment is limited to a snapshot in time, or is it based on continuous access to operational data and information across functions?

Cuneyt Akay ([09:52](#)):

And what does that really mean? Well, the DOJ again, is signaling that a risk assessment or, um, which is the starting point of an effective compliance program. Can't be limited to a snapshot in time, but that for a team and a compliance organization, to be empowered, to function effectively, that team, particularly during risk assessments needs to be able to access data continuously and it needs to have operational data at its fingertips. And of course the last part of that is whether the periodic review of that data leads the compliance team and is the compliance team empowered to use the periodic review of that data to update policies, procedures, and controls. Of course, it's the reaction to that data that is so important for compliance personnel. And as we know, Michael, you know, when we talk about policies, procedures, and controls, and making sure that a compliance program is empowered to function effectively, we know in many instances, the third party, the third party management is the biggest risk for a compliance organization for a company as a whole. So I know that there's some changes here in the third party management piece of the guidance, and it would be great if you could give us some of your thoughts and insights into those revision.

Michael Marinelli ([11:07](#)):

The big thing that has changed in the third party management piece is DOJ guidance stating that the company needs to know the business rationale for needing a third party in the transaction. And the risks posed by third parties. We've always known the third parties in any corruption context are a huge source of risk. Most bribes are paid through third parties. We know that from the enforcement cases, we know that from the Stanford study, we know that from the O U C D study and, and you, and I know that from our own practice in this area. So you have this pool of by definition high-risk people and what the government is saying is you need to understand what those people are doing for your business. And I see there being really two components to the, to understanding the business rationale for the third party.

Michael Marinelli ([12:13](#)):

The first part of it is why are we using a third party in the first place? What specifically is this person or entity going to do for the company and not incidentally, is that written down somewhere? Is it carefully defined, for example, in an agreement? So you have the question broadly speaking, why are we using a third party in the context we're using them in. The second part of the inquiry? Why is the company using this particular sort third party is the third party qualified to do the work they're supposed to be doing? How were they selected? Were there specific criteria? Are those criteria spelled out somewhere? So the government is really asking for companies to take up their assessment of third parties to take it up a notch. Um, and I will say this just, you know, from what we've seen over the years, if the business people cannot answer these fundamental questions, then you've probably got a problem somewhere. So as a practical matter, tie this up into pieces, the government is saying first, the companies should have a process that answers these questions before the third party is engaged, not after the fact as part of the internal investigation of what went. The second thing the government is saying is that it's no longer enough to just run due diligence on a third party. They've been saying to do that for years now, they're saying you need to evaluate the reasons that that third party is in your company and whether those reasons are valid.

Cuneyt Akay ([13:58](#)):

Well, thank you, Michael. And thank you for joining us on today's podcast. I think the three takeaways, particularly for compliance professionals from these revisions, for the DOJ's evaluation of corporate compliance program guidance, really three things. One is that programs should be in need to be adequately resourced. And this is certainly with the new language. They've added a point of emphasis by the DOJ. Secondly, uh, in the second point is that effective compliance requires ongoing access to data and data utilization. And to make sure the compliance teams are empowered to use that data to make necessarily necessary changes to their compliance programs. And third from a third party measurement perspective, it isn't enough just to run due diligence on third parties. The DOJ is certainly telling us the companies need to take a further look and need to evaluate really why third parties happened to be necessary for this transaction or necessary for the company to do business. So again, thank you, Michael Marinelli for joining us on today's podcast and thank you all for listening, and we'll see you on the next podcast. Take care.

Cuneyt Akay ([15:31](#)):

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