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CLIENT ALERT

Carrots and Sticks? Updated DOJ Guidance Encourages Organizations to Incentivize “Good Compliance” Through Positive Reinforcement and Disciplinary Measures

In March of 2023, the Department of Justice (“DOJ”) released an update to their guidance “Evaluation of Corporate Compliance Programs.” Our Life Sciences’ industry, as well as prosecutors, have been utilizing versions of this guidance in evaluating compliance programs for years. These updates further emphasize a focus of the DOJ on incentivizing “good compliance” through both positive reinforcement and disciplinary measures. Implementation of these new considerations in practice will require not only Compliance policy and procedure updates, but Human Resources, Finance, and Legal to all have a seat at the table.

The two main updates to the DOJ guidance are the additional considerations for organizations around:

1. Compensation structure and consequence management procedures
2. Personal devices, messaging applications & communication channels.

This update comes on the heels of the launch of the DOJ’s new Pilot Program requiring similar incentives and clawbacks for corporate resolutions and public remarks by Deputy Attorney General Lisa O. Monaco and Assistant Attorney General Kenneth A. Polite Jr. at the ABA Conference in March 2023 on similar topics. For more information on the DOJ’s Pilot Program and Monaco’s and Polite’s recent remarks, please read our recent Client Alert, ***A Polite Reminder: Preventing Fraud Before It Occurs by Inspiring a Culture of Compliance and Promoting Compliance Through Compensation.***

While these two topics are new to the guidance documents, the considerations highlight themes that have been present in all the DOJ’s recent messaging around the importance of fostering a culture of compliance, the benefits of the use of data in measuring compliance programs, and the importance of considering the risks for your specific organization when designing your control environment.

Compensation Structures & Consequence Management Processes

The new DOJ guidance contains a section titled, “Compensation Structures and Consequence Management,” which replaces and greatly expands upon the section titled, “Incentives and Disciplinary Measures.”

THE STICKS

Policies & Procedures

WHAT HAS CHANGED - The DOJ is clarifying that the expectation is not only for organizations to have disciplinary procedures, but broader consequence management procedures, which it defines as “procedures to identify, investigate, discipline and remediate violations of law, regulation or policy.”

ACTIONS - An organization’s policies and procedures around discipline should go beyond the high-level disciplinary action matrix framework that may be utilized. It may be a good time for organizations to review their disciplinary procedures to see if they cover the subjects identified in the broader consequence management procedures definition.

Disciplinary Measures

WHAT HAS CHANGED - Aligned with the requirements of the newly launched Pilot Program, the DOJ guidance suggests organizations should be considering how compensation frameworks are decided and if compliance is a key consideration. Specifically, the guidance raises the question for prosecutors to ask, "Does the company have policies or procedures in place to recoup compensation that would not have been achieved but for misconduct attributable directly or indirectly to the executive or employee?"

ACTIONS - This concept is another type of stick the DOJ is suggesting organizations utilize when necessary to discourage misconduct. The question for organizations becomes, how is this implemented in practice and what legal considerations should be considered?

THE CARROTS

Providing Positive Incentives

WHAT HAS CHANGED - The updated guidance is further emphasizing not only the sticks for non-compliance, but also the carrots that should be given for good compliance. The DOJ provides some concrete examples of rewards for good behavior, such as higher compensation and bonus potential, career advancements, and the recognition of compliance "champions."

ACTIONS - Our clients have often raised questions such as, "we expect everyone to be compliant, so isn't this the baseline?" and highlighted that good compliance is hard to measure. The DOJ is now signaling that the expectation is for specific rewards to be provided for those who go above and beyond "not breaking any rules." Compliance professionals should discuss this with their partners in Human Resources and Finance to determine potential ways to implement this in practice.

"Compensation structures that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance. At the same time, providing positive incentives, such as promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership, can drive compliance."

Financial Incentives for Senior Management

WHAT HAS CHANGED - The DOJ is specifically calling out incentives for senior management, asking "what role does the compliance function have in designing and awarding financial incentives at senior levels of the organization?". This reemphasizes the critical importance of tone from the top - if leaders of the organization are not only just "following the rules" but are going above and beyond and being rewarded for good compliance, this can truly foster a culture of compliance for the broader organization.

ACTIONS - Look at how your organization is incentivizing leadership cross-functionally, and how their incentives tie not just to acting compliantly, but to additional rewards for "good compliance." If these incentives exist, ensure this is broadcasted to the broader organization.

Using Data to Track Investigations

WHAT HAS CHANGED - In a similar vein to the previous DOJ guidance update and other messages from the department, the guidance emphasizes using data to understand trends. The DOJ states prosecutors "may consider whether a company is tracking data relating to disciplinary actions to measure effectiveness of the investigation and consequence management functions."

ACTIONS - Ensure there is a feedback loop to understand how disciplinary actions, as well as positive reinforcements, are impacting investigation trends. Consider how these trends can help you to continuously involve your consequence management procedures.

Personal Devices, Messaging Applications & Communication Channels

The DOJ Guidance also specifically addresses personal devices, messaging applications, and communication channels in the investigations section of the document, highlighting that individuals are utilizing many channels to communicate on both personal and professional devices. Corporate policies should address these communication channels and disciplinary actions may need to be taken for individuals who do not comply with company policies.

Policy Environment

WHAT HAS CHANGED - The guidance first asks what policies and laws govern the organization's ability to ensure security or monitor/access business related communications? Notably, the DOJ highlights that the specificities around this may be dependent on an organizations specific risk profile and business needs.

ACTIONS - Organizations may want to consider as part of their risk evaluation the potential for the need to update policies and procedures to cover what should and should not be used for business communications.

Risk Management

WHAT HAS CHANGED - The guidance goes on to ask organizations if they have established communication channels, and what disciplinary actions are taken when an individual is discovered to not comply with company policies. It also raises the question of what happens if an individual does not give up access to a personal device for the organization to determine if in fact the individual complied with the relevant policy.

ACTIONS - Legal will need to be a key partner in any development of policy or enforcement around messaging apps and communication channels, as considerations such as local data privacy laws may come into play, especially in scenarios in which employees are utilizing their own personal devices.

"Policies governing such applications should be tailored to the corporation's risk profile and specific business needs and ensure that, as appropriate and to the greatest extent possible, business-related electronic data and communications are accessible and amenable to preservation by the company."

How Epsilon Life Sciences Can Help

Our professionals have expertise in assisting organizations in developing policies and procedures and implementing both carrots and sticks to incentivize good compliance and foster a positive culture of compliance - key areas of focus by the DOJ as evidenced by the updated guidance, along with the implementation of the Pilot Program and Monaco's and Polite's recent remarks.

Our experts:

- > Assist in the development of risk-based policies and procedures based on company-specific needs and industry best practices.
- > Assist in the development of disciplinary guidelines and consequence management processes.
- > Assist in the development of company programs and performance metrics to help incentivize "good compliance."
- > Conduct compliance culture assessments to review the culture of ethics and compliance across a company and how culture impacts decision making.
- > Conduct compliance effectiveness reviews to assess the effectiveness and maturity of a company's compliance program.
- > Work with internal and external counsel to assess the effectiveness of compliance programs at the time of alleged misconduct, to develop independent compliance program enhancement strategies, and evaluate the effectiveness of compliance program enhancements during settlement negotiations between corporations and enforcement authorities.



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