

Recent Compliance Guidance and Enforcement Actions: U.S., U.K., and Europe

Christine Braamskamp
Erin Schrantz



1

Overview

- Department of Justice: 2019 Guidance “Evaluation of Corporate Compliance Programs”
- U.S. Enforcement Actions
- Serious Fraud Office: 2020 Guidance
- International Cooperation: The Airbus Example
- Strategies to Identify and Remediate Compliance Risks



2

DOJ GUIDANCE ON CORPORATE COMPLIANCE



3

DOJ April 2019 Guidance

- Codifies prior paper in Fraud Section and expands application to all Criminal Division prosecutors
- Roadmap for prosecutors
- Reinforces that compliance program should be:
 - Tailored to unique risks of the company
 - Implemented, and not just papered



4

DOJ April 2019 Guidance

- Framed around 3 questions:
 1. Is the company's program well designed?
 2. Is it being applied earnestly and in good faith – that is, is it being effectively implemented?
 3. Does the program work in practice?
- Starts with thoughtful risk assessment
- Hits the major “hallmarks” including robust policies, procedures, training, monitoring, and third-party risk mitigation



5

DOJ April 2019 Guidance

- New themes emerge . . .

1. Culture, Culture, Culture: compliant culture evident or lacking

- ✓ Engagement of senior/middle management
- ✓ Whether policies and procedures incorporate culture of compliance into day-to-day operations of the business (in practice and effect)
- ✓ Is training off-the-shelf or real-world examples, and do supervisors receive training on how to model
- ✓ Presence or absence of positive compliance incentives



6

DOJ April 2019 Guidance

2. Relationship Between Compliance and Business

- ✓ Tension between pursuit of profits and compliance?
- ✓ Do compliance personnel and business units work together on risk mitigation – e.g., third-party relationships
- ✓ Does the corporation deploy “pro active measures” to encourage reporting concerns, and are business managers trained on what to do when they receive reports?



7

DOJ April 2019 Guidance

3. Compliance Keeping Pace with Growth:

- ✓ Does compliance function keep pace with business growth and changing risk landscape?
- ✓ Does the company have mechanisms to learn lessons, spot trends, and improve in the face of past failures?
- ✓ Has the company's process to design/implement policies and procedures evolved over time, or is it static?



8

U.S. ENFORCEMENT HIGHLIGHTS



9

U.S. Enforcement: Deficient Compliance

- *Walmart* (June 2019)
 - Compliance not keeping pace with growth: *“Walmart profited from rapid international expansion, but in doing so chose not to take necessary steps to avoid corruption”*
- *Ericsson* (Dec. 2019)
 - Cultural problem: *“Ericsson conducted telecom business with the guiding principle that ‘money talks.’ . . . Implementing strong compliance systems and internal controls are basic principles that international companies must follow to steer clear of illegal activity.”*



10

DOJ Enforcement: Deficient Compliance

- Sally Yates, former Deputy Attorney General:
- “If I think back on any major corporate fraud case from the almost 30 years that I was at DOJ, you can trace most all of those to **a failed corporate culture issue.**”
- *Law360*, “Ex-DOJ Deputy Warns Of Virus’ Long-Term Compliance Risks”



11

NEW SFO GUIDANCE ON COMPLIANCE PROGRAMS



12

SFO Compliance Evaluation Policy

- When will the Guidance be used and for what purpose and key points/themes
- The SFO will evaluate a compliance programme “if it is investigating an organisation”
- The Guidance is for SFO investigators and should be used at the outset of an investigation
- The SFO will consider whether or not the programme is simply a 'paper exercise' and consider whether:
 - It works for each organisation and is appropriate for that organisation in the field in which it operates
 - It is proportionate and risk-based
 - It is regularly reviewed



13

SFO Compliance Evaluation Policy

- SFO Guidance replicates the six principles set out in the UK Ministry of Justice Guidance:
- “It is helpful to arrange the assessment around the six principles in the guidance published by the Ministry of Justice”
 - Proportionate Procedures
 - Top Level Commitment
 - Risk Assessment
 - Due Diligence
 - Communication (including training)
 - Monitoring and Review
- SFO will take into account international requirements, so:



14

RECENT U.K. ENFORCEMENT TRENDS



15

Recent U.K. Enforcement Trends

- The SFO has suffered several recent high-profile court losses, mainly when prosecuting individuals
- The SFO continues to emphasise its desire for corporates to cooperate and enter into deferred prosecution agreements
- The SFO's willingness to engage in global settlements also continues, evidenced by the recent Airbus settlement
- The SFO - DOJ cooperative relationship is strong, with DOJ personnel working within the SFO
- The *Airbus* settlement shows the increasing importance of the French anticorruption authorities in Europe (Parquet National Financier and Agence Française Anticorruption).
- Brexit may result in a slowing down of the sharing of investigative information across borders and proper legal basis is yet to be put in place.



16

LESSONS IN COMPLIANCE *AIRBUS*



17

Airbus Compliance Failings

1. Several members of the key compliance committees were aware of, or involved in, material wrongdoing by the business.
2. Information in respect of third-party agents provided to decision makers in compliance was often incomplete, misleading or inaccurate.
3. A remediation committee set up to review the previous use of agents also contained individuals who were either aware, or complicit, in the previous wrongdoing.
4. Key compliance committees were unable to meet regularly, and with a constantly shifting membership, continuity was difficult to achieve.



18

Airbus Subsequent Remediation

1. Removing wrongdoers from its organisation.
2. Enhancing its compliance capabilities.
3. Redesigning internal financial controls under the guidance of a newly appointed chief financial officer.
4. Restructuring its ethics and compliance teams. These changes were made to ensure functional independence from the business.
5. Airbus commissioned an independent review of Airbus' ethics and compliance procedures.



19

Risk Mitigation Strategies & Best Practices

- Strategies to identify and remediate compliance risks
 - Talk to personnel across functions and in the front office to identify risks and risky behavior
 - Secure “buy-in” from the business
 - Build up proper tone “in the middle” management ranks and not just at the top
 - Leverage data analytics to monitor compliance around most significant risk areas
 - Incentivize good compliance through performance reviews and compensation



20

QUESTIONS?



JENNER&BLOCK