

# New Federal Enforcement and Corporate Compliance – Knowing and Managing the Risks

February 3, 2021

*Sergio Acosta*

*Jacqueline M. Arango*

*Rubén Castillo*



**akerman**

# Biden Administration – Anticipated Priorities of Attorney General Garland’s DOJ

- Healthcare Fraud
- Covid Related Fraud (CARES Act Funds/False Claims Act)
- Environmental Crimes
- Financial Industry Supervision
- Potential SEC Corporate Disclosure Rule Expansion
- Anti-Money Laundering Act
- Cybersecurity Initiatives
- Overall Increase Emphasis on Holding Individual Actors Accountable

# Key DOJ Policies and Guidance

- Principles of Federal Prosecutions of Business Organizations
- Guidance Concerning Corporate Compliance Programs
- Other Relevant Policies
  - FCPA Corporate Enforcement Policy
  - Individual Accountability for Corporate Wrongdoing
  - Selection of Monitors in Criminal Division Matters
  - U.S. Sentencing Guidelines, Chapter 8
  - Policy on Coordination of Corporate Resolution Penalties
    - *A/K/A the “No Piling On” Policy*

# Principles of Federal Prosecution of Business Organizations – Key Provisions

- Prosecution of Corporate Crime is a High Priority for DOJ
- Indictment vs. NPA/DPA vs. Declination
- Factors to be considered:
  - Nature and Seriousness of the Offense;
  - Pervasiveness of Wrongdoing Within the Corporation;
  - History of Similar Conduct;
  - Voluntary Disclosure and/or Cooperation;
  - Adequacy and Effectiveness of Compliance Program;
  - Remedial Measures, including Implementation or Improvement of Existing Compliance Program; and
  - Adequacy of Civil or Regulatory Remedies.

# DOJ Guidance for Corporate Compliance Programs

- February 2017 and April 2019 Guidance
  - Key Characteristics
    - Autonomy and Resources
    - Risk Assessment
    - Training
    - Tone at the Top
    - Continuous improvement, testing, and review
    - Management of Third Parties
- Evaluation of Corporate Compliance Programs – June 2020
  - Key Points of Emphasis
    - Empower and provide adequate resources to the compliance function; and
    - Continuously assess and make necessary revisions to ensure the program's effectiveness

# DOJ Policy Continues to Mirror the Organizational Federal Sentencing Guidelines (Chapter 8)

- Organizations Need to Exercise Due Diligence to Promote Ethical Conduct and Encourage Commitment to Compliance With The Law – 7 Key Principles
  - 1) Establish Standards and Procedures Reasonably Capable of Preventing and Detecting Criminal Conduct
  - 2) Program Responsibility Must Involve High Level Personnel and Adequate Resources
  - 3) Need Personnel Screenings
  - 4) Training at All Levels
  - 5) Evaluation, Monitoring, and Auditing
  - 6) Reporting Systems
  - 7) Need to Promote and Police Program

# Prosecutors and Judges Evaluate Three Fundamental Questions

1. Is Compliance Program well designed?
2. Is Compliance Program adequately resourced and empowered?
3. How effective is the Compliance Program?

# Well Designed Programs

- Need to begin and end with updated risk assessments.
- Is Compliance Program designed to detect most likely misconduct faced by business environment?
- Was the location of business operations appropriately considered?
- Foreign business operations?
- Remote workers – cybersecurity threats.



# Adequately Resourced Programs

- Not a paper program.
- Involvement of senior and middle management.
- Investments of data resources.
- Timely access to needed data.
- Use of incentives to foster a true culture of compliance.

# Effectiveness of Compliance Program

- Custom program.
- Periodic reassessment and continuous improvements after review.
- Updated risk assessments.
- Confidential reporting structure.
- Coverage of third-party relationships.
- Consideration of new mergers and acquisitions.
- Consistent and even-handed disciplinary measures.

# Risk Assessments

- The DOJ guidance recommends that the company analyzes and addresses “...the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations.”
- A successful risk assessment will:
  - Identify, analyze, and address all key organizational risks.
  - Provide the needed information to appropriately allocate resources to mitigate these risks based on their severity.
  - flexible enough to allow for regular reevaluation of all risks.

# Create Rock-solid Policies and Procedures

- A well-defined code of conduct, along with your organization's policies and procedures are the foundation of your compliance program, and their ultimate purpose should be to protect your organization from risk.
- Key policies should be informed by the risk assessment and be designed to help mitigate those identified risks.
- Establish a code of conduct that instills a true culture of compliance, with top-down support from the highest levels of the organization.

# Train and Communicate with Employees

- Take a risk-based approach – Target employees within high-risk business units; Management level employees should also address their direct reports.
- Be tailored to the specific audience – Deliver in the native language of the region and in a format that makes it most digestible.
- Use real-world scenarios when possible.
- Be informed by past history and episodes of misconduct – Ensure the training includes areas that have caused issues in the past.
- Training materials should be preserved and attendance at training sessions should be tracked.

# Reporting and Investigations

- Implement easy and anonymous reporting system.
- Create a systematic approach to investigate reports to determine credibility and potential consequences.
- Reporting process must be done without fear of retaliation from both the company and the individuals involved.
- Reports should be responded to in an efficient manner. Additional steps must be taken to ensure investigations “are independent, objective, appropriately conducted, and properly documented.”

# Travel, Entertainment, and Gifts

- Approve expenses before they are incurred.
- Ensure that expenses are reasonable and bona fide.
- Institute specific policies for inspection trips.
- Retain full documentation of expenses.
- Allow gifts only of nominal value that bear the Company logo.
- Require the value of gifts to be proportionate with legitimate and generally accepted local customs.
- Ensure that gifts are properly accounted for in books and records.
- Prohibit all cash gifts, even small amounts at holidays.

# Third Party Due Diligence

- Conduct a thorough background check to ensure that the third party is qualified and has a solid reputation for business integrity.
- Obtain disclosures from the agent/consultant regarding any relationships with government officials.
- Closely monitor all payments to the agent/consultant and ensure that there are: (1) no cash payments; (2) reasonable commission percentages based on work performed; and (3) receipts for all requested reimbursements.
- Communicate the company's zero-tolerance policy for involvement in corrupt activity to the agent or consultant.
- Review payment terms and confirm that the third party is actually performing work and that compensation is appropriate for the work performed.
- Undertake some form of ongoing monitoring of your third-party relationships.



# Be Proactive

- Carryout Internal Audits – By conducting regular audits, you can identify areas of risk before they become a problem, prioritize areas for improvement, and gain a deeper understanding of processes and procedures as they currently exist at your facility.
- Document and Record – Documentation and record keeping is an important part of an effective compliance program and this means having effective technology in place.

# Questions?

## Contact Us



**Sergio Acosta**

Co-Chair, White Collar Crime  
and Government  
Investigations Practice  
sergio.acosta@akerman.com



**Jackie Arango**

Co-Chair, White Collar Crime  
and Government  
Investigations Practice  
jacqueline.arango@akerman.com



**Rubén Castillo**

Chair, Akerman Bench  
ruben.castillo@akerman.com

Akerman LLP  
700+ Lawyers  
25 Offices

[akerman.com](http://akerman.com)