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Updates on Evaluation of Corporate Compliance Programs

On June 1, 2020, the U.S. Department of Justice (“**DOJ**”) released an update to its guidance on “Evaluation of Corporate Compliance Programs” (“**2020 Guidance**”).¹ The 2020 Guidance, as its predecessors, provides guidance to federal prosecutors on how to assess whether a corporation’s compliance program was effective both at the time of the offense and at the time of the decision as to whether or not to indict the corporation or resolve the matter in an agreement. Based on such assessment, prosecutors will make decisions that will affect the corporation, such as the (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

It is important to note that many Israeli (as any non-U.S. jurisdiction) entities and individuals may be exposed to certain U.S. laws and regulations that have extraterritorial application. For example, in certain cases the Foreign Corrupt Practices Act (“**FCPA**”) may apply to acts that occurred outside the U.S. (for example, an act conducted by a U.S. national, even when occurred outside the U.S.). Other U.S. laws and regulations allow U.S. authorities to investigate and prosecute Israeli entities if their extraterritorial conduct has a U.S. nexus (for example, wire transfers through U.S. banks or wire communications through U.S. communication lines).

While the revisions introduced in the 2020 Guidance are not extensive, there are few takeaways worth mentioning:

- **Is the Compliance Program Adequately Resourced?** Per the 2020 Guidance, the compliance program should be “*adequately resourced and empowered to function*,” so that the program not end up as a “paper program.” Accordingly, prosecutors are instructed, among other things, to probe (1) whether those with the day-to-day operational responsibility for the compliance program are well resourced; and (2) whether the corporation invests in further training and development of compliance and other control personnel.
- **Importance of Data.** Corporations are required to periodically review their compliance program, and the policies, procedures and controls thereof. Under the 2020 Guidance, prosecutors should consider whether the periodic review of the Compliance Program is limited to a “snapshot” in time or based upon “*continuous access to operational data and information across functions*.” The DOJ also added a new section called “Data Resources and Access”, which emphasizes the importance of compliance and control personnel having sufficient access to relevant sources of data to allow for timely and effective monitoring and testing of policies, controls and transactions.

- | **Pre-M&A Due Diligence and Post-Merger Integration.** The 2020 Guidance recognizes the significance of conducting a pre-M&A due diligence of any acquisition target in order to recognize any corruption or misconduct in such entity. Prosecutors are instructed to assess if the acquiring entity was able to complete pre-acquisition due diligence and, if not, why not. The 2020 Guidance further advises that a well-designed compliance program should include a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls.
- | **Local Law Considerations.** The 2020 Guidance acknowledges that a compliance program may be impacted by local non-U.S. legal requirements. Thus an Israeli entity that is required to adhere to local laws and regulations should also be able to demonstrate how it maintains the integrity and effectiveness of its compliance program while abiding by its local laws and regulations.

As the operations of more and more Israeli companies have been the subject of investigations and enforcement actions taken by U.S. authorities in the last few years, it is important for any Israeli company with global operations to adopt and implement an effective compliance program that meets the requirements of the 2020 Guidance.

Gornitzky's Global Compliance and Cross-Border Investigations team specializes in crafting effective anti-bribery and anti-corruption compliance programs, tailored to the company's needs, designed to ensure compliance with both global and local anti-corruption standards, and reviewing existing policies to ensure that they meet current standards.

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¹ [Link to the 2020 Guidance.](#)