

**Crediting Compliance and Ethics Programs:  
The Latest from the Department of Justice**

Of the various legal incentives for companies to adopt compliance and ethics (“C&E”) programs, none is more important than the possibility of avoiding criminal prosecution. Over the years, the Department of Justice (“DoJ”) has promoted this potential benefit of C&E programs in a number of ways, each time with an increasing degree of formality. In the early and mid-1990’s it was done through articles and speeches by top DoJ officials; then, beginning in 1999, in memoranda issued by various Deputy AG’s – Holder, Thompson and McNulty – as part of a broader set of standards for corporate criminal charging decisions; and, as of August 28, through inclusion in the *US Attorney’s Manual* section on charging decisions.

The language of this latest incarnation of DoJ’s C&E policy comes largely from the Thompson and McNulty memos, but a close reading reveals several possibly significant changes. First, there is a somewhat heightened expectation of C&E efforts. The revised policy instructs prosecutors to ask whether C&E programs are being applied “earnestly” and in good faith. Second, prior policy language, which had stated that the very fact of a violation “may suggest that the corporate management is not adequately enforcing its program” has been eliminated, a helpful modification as this could have made proof of program efficacy unduly difficult.

Third, the policy now provides that C&E crediting decisions are not of an all or nothing nature. Specifically, the policy provides that a truly effective compliance program can result in a decision not to charge the corporation *or to mitigate charges or sanctions against the corporation*. Fourth, the standards create an expectation that programs be “reviewed and revised” – as well as designed and implemented, underscoring the benefit to companies of periodic program assessment. Finally, there is additional focus on the sufficiency of discipline for C&E violations. Specifically, amongst those factors that prosecutors should consider in determining the effectiveness of a C&E program, the policy lists “disciplinary action against past violators uncovered by the prior compliance program.”

While these changes may not seem momentous, they are nonetheless critical to note, in particular given that these factors could be reviewed in what could be a life or death setting for a corporation.