

WHITE PAPER

**E & C PROGRAMS
THAT WORK IN
PRACTICE:
THE DEPARTMENT
OF JUSTICE FRAUD
SECTION UPDATES
ITS EVALUATION
GUIDANCE**





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On June 1, the Fraud Section of the Department of Justice released updated guidance on how prosecutors should evaluate the effectiveness of an organization's ethics and compliance program. The updated guidance incorporates the Fraud Section's previous versions from February 2017 and April 2019. The updates add emphasis but do not rewrite the earlier guidance or make major changes, with the exception of greater focus on whether the ethics and compliance program under scrutiny has enough resources and stature to be effective.

The enhanced emphasis includes some important principles which were highlighted in LRN's annual [Program Effectiveness Report](#). Both the updated guidance and LRN's research stress that effective E & C programs need to adopt a proactive, user-friendly approach tailored to their organization:

- **Dynamic & Adaptable:** E & C programs must be dynamic and updated to reflect the organization's evolving risk profile using real time data drawn from multiple sources
- **Rooted in Reality:** Programs need to reflect changes in the organization's risk profile, lessons to be learned from compliance failures, audits, and other sources in their training, policies, and priorities;
- **Clear & Impactful:** Clear and accessible policies, procedures and training that really impact and guide behavior are the true measures by which a program should be evaluated, not regurgitations of complicated laws and regulations.

Additionally, the updates add more detail to the Fraud Section's expectations for mitigating third party risk and continue to stress the importance of incorporating ethics and compliance considerations into mergers and acquisitions due diligence and integration processes.

NO SNAPSHOTS PLEASE: KEEP IT DYNAMIC

Recent guidance from other regulators, as well as the DOJ, has consistently focused on the importance of going beyond paper programs and looking at how programs are designed, implemented and work in practice. The updated guidance goes one step further and emphasizes that risk analyses and the resulting risk mitigation measures put in place must be dynamic.

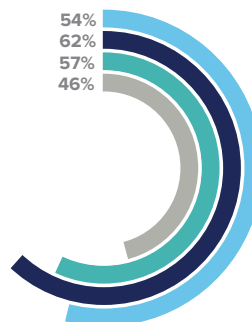
Effective programs constantly evolve and refresh their elements to meet the changing nature of business and risk. As a result, prosecutors are directed to evaluate whether an organization’s risk assessment is a “snapshot” in time or based upon continuous access to operational data and information across the organization’s functions. This suggests that real-time data analytics are essential to ensure that programs don’t get stuck in cruise control and can proactively spot emerging risks or problems.

In keeping with the emphasis by regulators, LRN’s findings in its [2020 Program Effectiveness Report](#) analyzed the differences between high-performing and less effective E & C programs and found that high performing programs were robust and dynamic in their risk and assessment functions and increasingly employ data analytics:

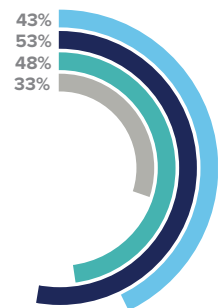
2020 DOJ EVALUATION GUIDANCE

- How are **audits** carried out?
- How often and how does the company **measure its culture** of compliance?
- Does the company **seek input from all levels of employees...**?
- What steps has the company **taken in response** to its measurement of the compliance culture?
- How often has the company updated its risk assessments and **reviewed its compliance policies, procedures, and practices**?
- What is the company’s **root cause analysis** of the misconduct at issue?

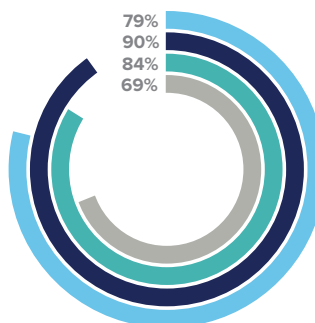
MY ORGANIZATION REVIEWS ITS E&C PROCEDURES ANNUALLY TO ENSURE THEY REFLECT AND ADDRESS KEY RISKS.



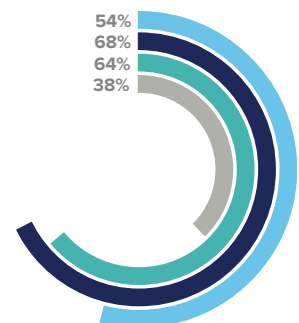
MY ORGANIZATION ASSESSES ETHICAL CULTURE VIA DIAGNOSTICS FOCUSED ON FACTORS SUCH AS TRUST, RESPECT, AND TRANSPARENCY.



MY ORGANIZATION DOES A ROOT CAUSE ANALYSIS AFTER MISCONDUCT



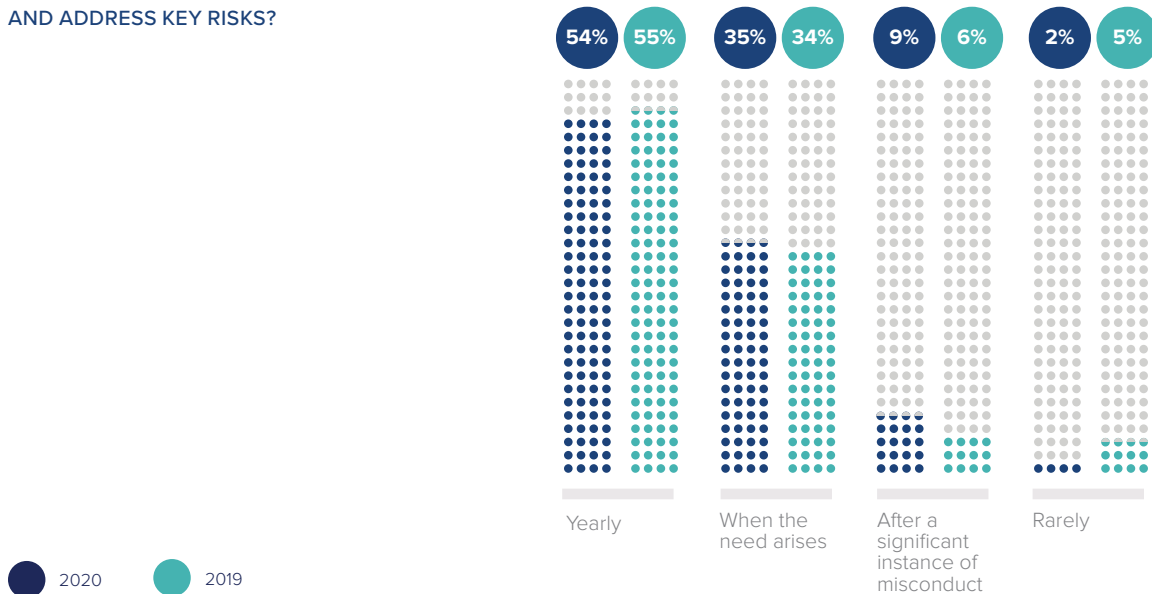
MY ORGANIZATION USES DATA ANALYTICS TO ANALYZE PATTERNS OF MISCONDUCT AND/OR IDENTIFY RED FLAGS PROACTIVELY.



● OVERALL ● HIGH IMPACT ● MEDIUM IMPACT ● LOW IMPACT

Over half of the programs LRN surveyed review their procedures yearly to ensure key risks are addressed:

HOW OFTEN DOES YOUR ORGANIZATION REVIEW ITS ETHICS AND COMPLIANCE PROCEDURES TO ENSURE THEY REFLECT AND ADDRESS KEY RISKS?



This emphasis is particularly critical in the wake of the COVID-19 crisis as evaluating and mitigating the risks of reopening and the impact of the crisis on their E & C programs will affect nearly all organizations.

GET REAL: USE EXAMPLES THAT RESONATE, TEST SYSTEMS AND FOCUS ON FEEDBACK

The updated DOJ Fraud Section guidance makes clear that effective E & C programs reflect their organization or industry’s experiences in the real world. They evolve and incorporate lessons learned and sanitized real-life scenarios into their policies, training and communications. They actively engage employees by facilitating questions, soliciting feedback and testing major systems such as the hotline or training. To help judge the level of engagement, the updates include new questions for prosecutors to ask:

- Are lessons learned either by the organization or other entities incorporated into the compliance program?
- Is there a process by which employees can ask questions arising out of live or online training?
- Are employees aware of and comfortable using the hotline and does the company periodically test the effectiveness of the hotline?
- Has the company evaluated how training has impacted employee behavior or operations?

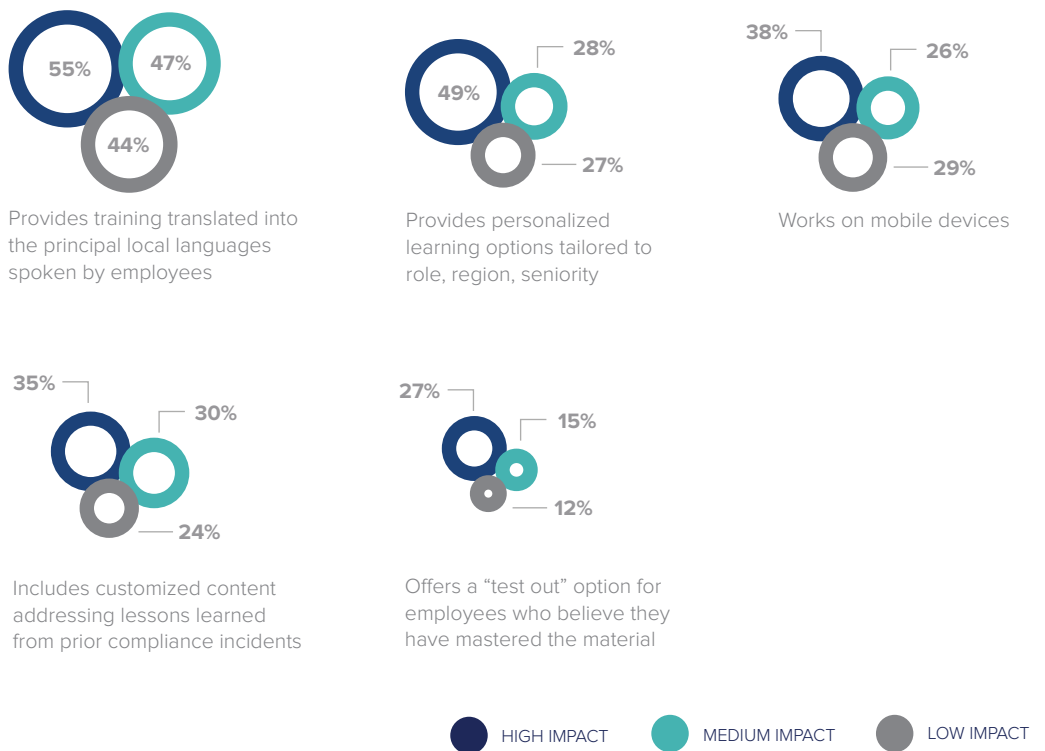
LRN's 2020 Program Effectiveness Report found that high-performing E & C programs embraced and went beyond many of those practices:

TO EVALUATE TRAINING EFFECTIVENESS,
MY ORGANIZATION...



High-performing programs make training accessible and relevant:

MY ORGANIZATION'S
TRAINING PROGRAM:



In addition, high-performing programs increasingly use cultural diagnostics to assess the impact of training and policies on employee behavior.

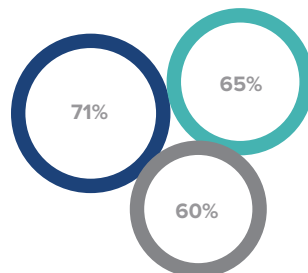
KEEPING IT SIMPLE AND SEARCHABLE

For the past five years, regulators have been increasingly vocal about the need to make policies and procedures more accessible and easier to use by ordinary employees. Many compliance policies nonetheless resemble a thicket of legal jargon and complexities rather than a users' guide to appropriate and compliant behavior. The June guidance picks up this theme and goes one step further by asking:

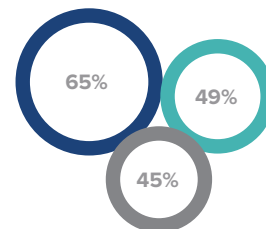
- Have the policies and procedures been published in a searchable format for easy reference?
- Does the company track access to various policies and procedures to understand what policies are attracting more attention?
- Are policies and procedures updated to reflect evolving risks?

The regulators' emphasis in this area signals that E & C programs need to be user-friendly and adopt formats that can provide useful insights. LRN's work with our partners in the area of policy simplification aims to incorporate policies, procedures and live links to E & C staff for easy submission of questions or requests for guidance into a "one-stop shop." LRN's findings regarding best practices shows that high-performing programs excel in this area:

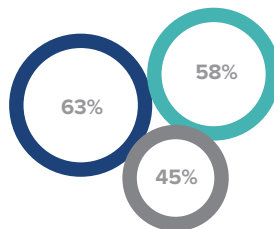
MY ORGANIZATION'S POLICIES ARE (% AGREE):



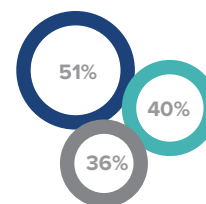
Available to all employees and third parties as appropriate



In simple language so they are easy for employees to understand



Reviewed and updated annually and biennially



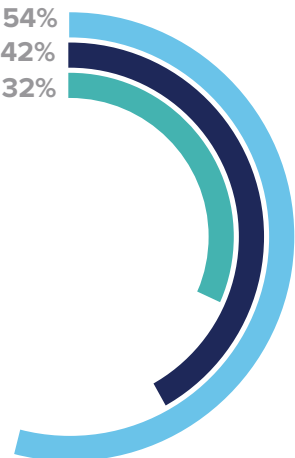
Designed and updated based on the risk assessment



By adopting the web-based integrated policy and procedures approach LRN recommends, companies can make policies more navigable and simultaneously gain useful analytics that indicate what areas need more focus and greater attention. Our research shows that the number of organizations utilizing analytics to recognize patterns of misconduct and act proactively appear to have increased significantly over the past three years:

MY ORGANIZATION USES DATA ANALYTICS TO ANALYZE PATTERNS OF MISCONDUCT AND/OR IDENTIFY RED FLAGS PROACTIVELY.

- 2020
- 2019
- 2018



Thus, the DOJ’s updates to its program effectiveness evaluation criteria reflect broader trends embraced by high-performing programs. Moving beyond a static, paper-based program and getting ethics & compliance into the gears of the organization is no longer optional, now it’s explicitly required.



ABOUT LRN

LRN offers education, tools, and advisory services to help organizations develop values-based cultures and leadership, strengthen ethics and compliance efforts, and inspire principled performance.

Founded in 1994, LRN is a global company that has educated more than 20 million employees and has worked with more than 700 companies in 100 countries worldwide.

LRN's work is grounded in HOW®, a philosophical framework for individual and organizational behavior in a world that is increasingly complex and interdependent.

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