Antitrust Compliance: Practical Ways to Mitigate Antitrust Risk

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Antitrust is a potential high-risk area for many companies, both big and small. This is especially true in recent years with increased criminal enforcement efforts by the Department of Justice Antitrust Division. In the last five fiscal years alone, the Division has obtained almost $5 billion in criminal fines and the fines per company have significantly increased.\(^1\) Since 2010, 40 companies have paid criminal fines of $10 million or more.\(^2\) The Division is also prosecuting more individuals and those individuals are being sentenced to prison terms with more frequency and for longer periods of time. Almost twice as many individuals are going to prison for antitrust violations when compared to the 1990s and the average prison sentence is over three times longer than in the 1990s.\(^3\) Add in the potential civil liability, and the consequences of an antitrust violation are even more severe and substantial. Given the high stakes for both companies and individuals, it is important that companies take a proactive approach to mitigating their antitrust risk. Below are some preemptive ways for companies to reduce and manage their antitrust risk and ensure that their employees are steering clear of antitrust violations.

- **Implement an effective compliance program.** Compliance programs have two overarching objectives: prevention and detection. An effective compliance program should aim to educate employees, issue-spot risks, deter risky conduct, and encourage employees to report potential issues. An effective compliance program should also be tailored to a company’s particular areas of risk, regularly reviewed and updated, endorsed by senior management, and consistently enforced. It is also beneficial to create incentives for identifying and disclosing questionable conduct, such as tying compliance and oversight to reviews, career progression or compensation decisions.

- **Develop and circulate a written policy statement and guidelines.** Communication is key to any effective compliance program and developing a written policy statement and guidelines can help in that regard. The policy statement should express the company’s commitment to complying with the antitrust laws and should be accompanied by guidelines that lay out the practical “do’s and don’ts” in clear language that is easy to understand. Each employee should be required to acknowledge receipt, understanding, and compliance with the statement and guidelines, and be directed to experienced counsel should they have any questions.

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\(^1\) In fiscal year 2013, the Division filed 50 criminal cases and obtained $1.1 billion in criminal fines. Department of Justice Antitrust Division, “Criminal Enforcement: Fine and Jail Charts Through Fiscal Year 2013,” available at http://www.justice.gov/atr/public/criminal/264101.html.


Institute mandatory employee training. Employee training sessions should be conducted in-person by knowledgeable counsel, but can also incorporate additional video or web-based training tools. Counsel should use practical examples to educate employees on the do’s and don’ts, especially as it relates to their specific business. Effective training sessions educate employees on the consequences of antitrust violations for both the company and the individuals involved. It is also important to dispel employees of the notion that the government would never be able to detect their conduct. A useful method is educating employees on the government’s paths of detection, such as the use of dawn raids and the amnesty program.

Conduct regular antitrust audits. An effective antitrust audit reviews and evaluates a company’s potential antitrust risk areas, and provides recommendations for ways to eliminate or reduce those risks. Generally, an antitrust audit will involve employee interviews and/or questionnaires and will include a collection and review of employees’ email and documents. The scope of the interviews and document collection and review will depend on the purpose and goals of the audit, and should be specifically tailored to the company’s pre-identified antitrust risk areas.

Involving antitrust counsel in high-risk meetings with competitors. Certain meetings with competitors pose high antitrust risks for companies. Such meetings are lawful as long as they are not used to reduce competition, but the meeting discussion must remain within the boundaries of the antitrust laws. Antitrust counsel involvement can help to achieve this objective. Meeting agendas should be reviewed by counsel and adhered to during the meeting, and accurate meeting minutes should be kept and reviewed by counsel following the meeting. It is also advisable to have antitrust counsel present at the meeting to re-direct risky discussions and to certify, should questions later arise, that the discussions remained within the antitrust boundaries.

By taking a proactive approach to antitrust compliance, companies can mitigate and manage their antitrust risks, which can save millions of dollars in the long run and also protect the company and employees from potential criminal prosecution. Antitrust counsel can help companies develop and implement a compliance strategy that is tailored to their business and targets their unique antitrust risks.

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COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT:
A PRACTICAL PRIMER

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EXECUTIVE SUMMARY

**Purpose:** The purpose of this report is to provide: (1) an overview of the Foreign Corrupt Practices Act (the “FCPA”), (2) an analysis of how the federal government—particularly the Department of Justice (the “DOJ”)—enforces the FCPA, and (3) a framework for developing effective compliance programs.

**Summary:** Enacted in 1977, the FCPA prohibits corrupt payments to foreign officials for the purposes of procuring or maintaining business. Today, adhering to the mandates of the FCPA is one of the most prominent issues in corporate compliance. A company that fails to take FCPA compliance seriously exposes itself to substantial risk. The ramifications of a DOJ investigation on an organization can be considerable, settlements can be costly, and an indictment can be crippling.

The FCPA has two constituent parts: (1) the recordkeeping and internal controls provisions, primarily enforced by the Securities and Exchange Commission (the “SEC”) and (2) the anti-bribery provisions, enforced by the DOJ. This report focuses on compliance with the anti-bribery provisions, because they typically are the impetus for investigations and harsh penalties, which include civil fines, criminal sanctions, the loss of government contracts, and the loss of future contracts through disbarment.

To successfully prosecute an anti-bribery violation, the government generally must prove that an entity either offered or gave something of value to a foreign official for the purpose of favorably influencing such an official. The FCPA permits an exception for facilitating payments (i.e., those payments made to expedite ordinary and common actions of a foreign official, and not those payments used to procure or maintain business). It also provides two affirmative defenses. First, defendants can prove that their payments or promises were lawful under the written laws of the relevant foreign countries. Second, defendants can prove that their payments or promises were reasonable and bona fide expenditures related to (1) the promotion, demonstration, or explanation of products or services or (2) the execution or performance of a contract with a foreign government. In accordance with the FCPA’s purpose of preventing corruption, both of these defenses are construed narrowly.

Companies derive three distinct benefits by establishing effective FCPA compliance programs. First, the DOJ explicitly places independent value on whether companies have effective compliance programs in their decision whether to pursue charges of FCPA violations. Second, effective compliance programs actually prevent future FCPA violations, thus limiting companies’ exposure to liability. Third, effective compliance programs assist companies in mitigating the harm resulting from any violations that are not prevented.

Well-functioning compliance programs create these benefits by educating, monitoring, and regulating employees and the workplace. But complying with the FCPA proves to be a

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1 However, recent enforcement trends have demonstrated that the SEC and DOJ increasingly enforce all provisions of the FCPA equally.
formidable challenge for most companies, especially those that conduct extensive activities abroad. The available guidance from the government on how to comply with the FCPA’s requirements and prohibitions is extremely limited. Moreover, the guidance that the government has made available is vague, disjointed, and sparse.

The three main sources that the DOJ utilizes to interpret the language of the FCPA are: (1) the United States Attorney’s guidelines, (2) the United States Federal Sentencing Guidelines, and (3) the Organisation for Economic Co-operation and Development’s (the “OECD”) Good Practice Guidance. These sources are instrumental for understanding both how the DOJ interprets the FCPA and how it views compliance programs.

Program Recommendations and Considerations: The best source for determining how the DOJ actually assesses compliance policies is the agency’s use of the deferred and non-prosecution agreements. There appear to be twelve elements commonly required by such agreements. At a minimum, these elements must be satisfied for a compliance program to be effective:

1. **Clearly Written Policy:** A clearly articulated, written, and visible corporate policy against FCPA violations.

2. **Standards Governing Certain Expenses, Payments:** Standards and policies that apply to all officers, directors, employees and third parties business associates governing:
   - (a) Gifts;
   - (b) Hospitality, entertainment, and expenses;
   - (c) Customer travel;
   - (d) Political contributions;
   - (e) Charitable donations and sponsorships;
   - (f) Facilitation payments; and
   - (g) Solicitation and extortion.

3. **Risk Assessment:** Risk assessment addressing the foreign bribery risks confronting the individual circumstances of the company including:
   - (a) Its geographical organization;
   - (b) Anticipated interactions with governmental officials;
   - (c) Industrial sector of operation;
   - (d) Involvement in joint-venture arrangements;
   - (e) Importance of licenses and permits in the company’s operations;
   - (f) Degree of governmental oversight and inspection; and
   - (g) Volume and importance of goods and personnel clearing through customs and immigration.

4. **Annual Review of Policies:** Annual review and updating of compliance policies taking into account relevant developments in the field and evolving international standards.
5. **Senior Executive Responsibility**: Insistence on senior executive responsibility for oversight of the compliance program, with direct reporting obligations to independent monitoring bodies.

6. **Financial and Accounting Procedures**: Institute financial and accounting procedures “reasonably designed” to prevent books, records, and accounts to be used for the purpose of foreign bribery or concealing bribery.

7. **Training and Certifications**: Implement mechanisms designed to ensure effective communication of compliance program to all directors, officers, employees, and third-party transaction partners, including:
   - (a) Periodic training; and
   - (b) Annual certifications procedures, certifying compliance with the stated training requirements.

8. **Voluntary Internal Reporting**: Encourage voluntarily internal reporting by providing for:
   - (a) Guidance and advice on complying with the compliance program;
   - (b) Anonymous reporting, including protection for those who report breaches occurring within the company; and
   - (c) Appropriate, and discrete, response to requests.

9. **Disciplinary Procedures**: Institute appropriate disciplinary procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm caused, and steps are taken to prevent further similar misconduct, potentially including making modifications to the compliance program where necessary.

10. **Due Diligence**: Require appropriate due diligence pertaining to retention and oversight of all agents/business partners including:
    - (a) Documented risk-based due diligence pertaining both the hiring and regular oversight of agents/business partners;
    - (b) Informing agents/business partners that the company is committed to abiding by the law and its policies against bribery; and
    - (c) Seeking reciprocal commitment from their agents/business partners.

11. **Contractual Provisions**: Include standard provisions in contracts with agents/business partners reasonably designed to prevent violations of anti-corruption laws including:
    - (a) Anti-corruption representations;
    - (b) Rights to conduct audits of books and records of agent/business partners; and
    - (c) Rights to terminate an agent/business partner if they breach any anti-corruption laws.

12. **Periodic Testing of Compliance Program**: Periodic testing of the compliance program to evaluate its effectiveness.
The DOJ has not provided a comprehensive guideline, containing specific ways of accomplishing these objectives; it has only provided general guidance. Our analysis of a wide variety of FCPA materials yield the following concrete suggestions for designing and monitoring an FCPA compliance program:

(1) Conduct a risk-based assessment of the business;
(2) Create a comprehensive and effective FCPA code of conduct;
(3) Devise methods of policy communication and implementing these policies;
(4) Assess the compliance infrastructure; and
(5) Perform regular audits to gauge FCPA compliance.

**Conclusion**: This report demonstrates the importance of FCPA compliance programs, presents a framework for understanding and designing such programs, and provides metrics that aim to improve the efficacy of compliance programs. Designing an effective compliance program is necessarily a fact-specific, case-by-case exercise. However, this report’s suggestions place companies on the right path—toward full FCPA compliance.
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I. INTRODUCTION

The Foreign Corrupt Practices Act 2 (the “FCPA”) has quickly become one of the most prominent issues in contemporary corporate compliance. A company that fails to take FCPA compliance seriously exposes itself to enormous risk. The ramifications of a Department of Justice (the “DOJ” or the “Department”) investigation on an organization can be considerable, settlements can be costly, and an indictment can be crippling. The criminal and civil fines levied for violating the FCPA have been severe, and the fines imposed on organizations have skyrocketed in recent times. In the fiscal year 2010, the DOJ’s Criminal Division secured $1 billion in judgments and settlements through enforcing the FCPA—the largest amount in the history of FCPA enforcement.3 What was once a largely unenforced statute has become a powerful weapon in the DOJ’s arsenal.

Accordingly, companies and their legal counsel must institute robust, systematic compliance programs to attempt to avoid violating the FCPA. However, instituting effective compliance programs is a challenging task, because government guidance for how companies may avoid liability is limited, and when it is available it is often vague and disjointed.

The purpose of this report is threefold: first, to present a basic overview of the FCPA; second, to provide an analysis of how the DOJ enforces the FCPA; and third, to synthesize a framework, based on this analysis, for developing effective compliance programs.

This report begins by explaining the basic structure and function of the FCPA. To provide the context necessary to understand the relevance of compliance programs, it outlines the FCPA’s statutory requirements and indicates which government agencies enforce the various provisions. This report focuses on the enforcement efforts of the DOJ, because it is the agency that has recently brought some of the most substantial FCPA actions and has provided the most extensive compliance guidance.

Next, the report presents the essential components of an FCPA compliance program. It does so by presenting official government policy and analyzing various important DOJ actions.

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3 Department of Justice, Department of Justice Secures More than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division, No. 11-085 (Jan. 21, 2011), available at http://www.justice.gov/opa/pr/2011/January/11-crm-085.html (the total amount of judgments and settlements collected as a result of Criminal Division actions was over $2 billion; the amount collected under FCPA actions was approximately $1 billion).
Finally, the report discusses ways companies can assess the effectiveness of their FCPA compliance programs. This includes providing metrics that companies should consider using to judge their own program’s efficacy. The report concludes by recommending some best practices for general areas of risk that can be addressed by effective compliance programs.

II. WHAT IS THE FCPA?

In 1976, the Securities and Exchange Commission (the “SEC”) issued the groundbreaking “Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices.”\(^4\) The report characterized the problem of companies making questionable and illegal corporate payments as “serious and widespread,”\(^5\) stating that such payments were “far more widespread than anyone originally anticipated.”\(^6\) It indicated that over 400 United States companies were making substantial illegal political contributions and payments to foreign officials for the purpose of procuring business. The report recommended that Congress enact legislation to deal with this problem and restore the integrity of U.S. business.

In response to the SEC’s report, Congress enacted the Foreign Corrupt Practices Act of 1977.\(^7\) The FCPA consists of two types of provisions: (1) anti-bribery provisions, and (2) recordkeeping and internal controls provisions. The FCPA is enforced by two different government agencies: the SEC and the DOJ. The SEC, with respect to FCPA violations, primarily investigates and brings enforcement actions against publicly held companies.\(^8\) The SEC has the authority to enforce both the anti-bribery and the recordkeeping and internal controls provisions by bringing civil charges against companies.

The DOJ has jurisdiction over both publicly and privately held companies. Generally, the DOJ’s enforcement power is more expansive than the SEC’s. Unlike the SEC, the DOJ can


\(^5\) Id. at 622.

\(^6\) Id. at 633.


enforce both the recordkeeping and internal control provisions and the anti-bribery provisions by bringing criminal charges. That said, the DOJ has traditionally enforced the anti-bribery provisions, although it increasingly brings charges based solely on recordkeeping and internal control provisions. For systematic and egregious violations, the DOJ will sometimes bring charges of knowing circumvention of the recordkeeping and internal control requirements. But more often it uses violations of the recordkeeping and internal control provisions as evidence in support of allegations of anti-bribery violations. This report will principally focus on the DOJ, because of its primary role in the enforcement of the FCPA provisions.\footnote{See generally Miriam H. Baer, \textit{Governing Corporate Compliance}, 50 B.C. L. Rev. 949, 952–53 (2009) ("Through [the DOJ and the United States Attorneys’ Offices’] unequaled power to indict corporate entities, federal prosecutors have grasped the ability to define and impose notions of what constitutes effective “corporate compliance.” As a result, compliance regulation is quasi-adjudicative in nature, and the debates that surround it are both legalistic and adversarial.")(footnotes omitted).}

\section{The Recordkeeping and Internal Controls Provisions}

The FCPA has been characterized as "the fountainhead of modern internal control regulation."\footnote{Lawrence A. Cunningham, \textit{The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills}, 29 J. Corp. L. 267, 276 (2004).} The FCPA’s Recordkeeping and Internal Controls Provisions apply only to issuers—companies with securities registered with the SEC and companies who are required to file reports to the SEC—\textit{regardless} of whether they operate outside of the United States. Indeed, most cases brought under the recordkeeping and internal controls provisions do not involve bribery of foreign officials. Instead, they “frequently involve various other schemes by which company employees or directors seek to move money about ‘under the radar’ of the investors and/or the SEC.”\footnote{Lillian V. Blageff, \textit{Foreign Corrupt Practices Reporter}, 1 Foreign Corrupt Prac. Act Rep. § 1:20 (2011).}

Generally speaking, both the recordkeeping and the internal controls provisions “require companies to follow generally accepted accounting principles . . . and to take steps to make sure that what is on paper reflects reality.”\footnote{\textit{Id.} at §1:21.} The recordkeeping provisions require issuers to “make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.”\footnote{15 U.S.C. § 78m(b)(2)(A).} This obligation is quite extensive, because “records” is defined broadly to include “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type.”\footnote{15 U.S.C. § 78c(a)(37).}
The internal controls provisions mandate that companies comply with several procedural requirements. These provisions require issuers to:

devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.\textsuperscript{15}

The government considers these factors holistically. The test for compliance with the internal controls provisions is “whether a system, taken as a whole, reasonably meets the statute’s specified objectives.”\textsuperscript{16}

Any violation of either the recordkeeping or the internal controls provisions will give rise to civil liability,\textsuperscript{17} as long as it is not an inadvertent mistake.\textsuperscript{18} But for a company (or an individual through an aiding and abetting theory) to be held criminally liable, it must violate these provisions knowingly.\textsuperscript{19}

\textbf{B. The Anti-Bribery Provisions}

The FCPA’s anti-bribery provisions apply more broadly than the recordkeeping and internal controls provisions. The anti-bribery provisions apply not only to issuers,\textsuperscript{20} but also to “domestic concerns”\textsuperscript{21} and foreign nationals or businesses,\textsuperscript{22} or agents thereof. Domestic concerns include any citizen, national or resident of the United States and any corporation that has its principle place of business in the United States, or is organized under the laws of any state.\textsuperscript{23} Foreign nationals and businesses are included under the residual catchall anti-bribery

\textsuperscript{15} 15 U.S.C. § 78m(b)(2)(B).
\textsuperscript{17} 15 U.S.C. §§ 78m(b)(4)–(5).
\textsuperscript{18} See Williams, supra, note 16.
\textsuperscript{19} 15 U.S.C. §§ 78m(b)(4)–(5).
\textsuperscript{20} \textit{Id.} at § 78dd-1(a)(3).
\textsuperscript{21} \textit{Id.} at § 78dd-2(a)(3).
\textsuperscript{22} \textit{Id.} at § 78dd-3(a)(3).
\textsuperscript{23} \textit{Id.} at § 78dd-2(h).
provision, which applies to “any person” that is not an issuer or a domestic concern that commits acts in violation of the provision “while in the territory of the United States.”\textsuperscript{24} Notably, recipients of bribes are generally not held liable under the FCPA, even as conspirators.\textsuperscript{25}

There are five elements required to prove a violation of the anti-bribery provisions.

- First, an entity—an issuer, a domestic concern, or a foreign national or business acting in the United States—must act in furtherance of either (1) an offer, a payment, a promise to pay or an authorization to pay any money, or (2) an offer, gift, promise to give, or authorization of giving anything of value.\textsuperscript{26}

- Second, the offer, payment, promise, or authorization must be given to (1) any foreign political party or party official, (2) any candidate for foreign political office, or (3) any foreign official—defined as any officer or employee of a foreign government or public international organization acting on behalf of that government or organization\textsuperscript{27}—or to (4) any person that the entity knows will pass the payment offer, promise, or authorization on to any of the above.\textsuperscript{28}

- Third, the act must be (1) made by an issuer or a domestic concern and make use of any means or instrumentality of interstate commerce; (2) the act must be made by a national of or an entity organized under the law of the United States outside of the United States; or (3) the act must be made by any other person—a foreign national or business—inside the United States, but not necessarily using a means or instrumentality of interstate commerce.\textsuperscript{29}

- Fourth, the entity must act for the corrupt purpose of (1) influencing an official act or decision of that person, (2) inducing that person to do or omit doing any act in violation of his or her lawful duty, (3) securing an improper advantage, or (4) inducing that person to use his influence with a foreign government to affect or influence any government act or decision.\textsuperscript{30}

- Fifth, the act must be to assist the company in obtaining, retaining, or directing business.\textsuperscript{31}

\textsuperscript{24} Id. at § 78dd-3(a).

\textsuperscript{25} See United States v. Castle, 925 F.2d 831 (5th Cir. 1991).

\textsuperscript{26} 15 U.S.C. §§ 78dd-1(a), dd-2(a), dd-3(a).

\textsuperscript{27} Id. at § 78dd-1(f)(1)(A).

\textsuperscript{28} Id. at §§ 78dd-1(a), -2(a), -3(a).

\textsuperscript{29} Id. at §§ 78dd-1(a), -1(i), -2(a), -3(a).

\textsuperscript{30} Id. at §§ 78dd-1(a), -2(a), -3(a).

\textsuperscript{31} Id. at §§ 78dd-1(a), -2(a), -3(a).
Companies should be aware that the DOJ has the ability to bring charges of conspiracy to violate the anti-bribery provisions of the FCPA under the general conspiracy statute. This is important because it is considerably easier for a prosecutor to prove conspiracy to commit an anti-bribery violation than it is to prove the underlying anti-bribery violation itself. A prosecutor only needs to prove (1) an agreement by two or more persons (2) to commit an FCPA violation (3) with knowledge of the conspiracy and by actually participating in the conspiracy, as long as (4) at least one co-conspirator commits one overt act in furtherance of the conspiracy.

C. Exceptions and Affirmative Defenses

The FCPA provides one exception and two affirmative defenses for the anti-bribery provisions

1. Facilitating or Expediting Payments

The FCPA’s only exception allows for “facilitating or expediting payment[s]” to foreign officials for the purpose of “expedit[ing] or secur[ing] the performance of a routine governmental action.” This exception is important because it exempts from FCPA liability certain types of payments that are useful (and occasionally necessary) for doing business. Knowing which payments qualify as facilitating or expediting payments and are exempted under the FCPA allows companies to comply with the FCPA’s ethical mandates while still running their businesses as efficiently as possible. Unfortunately, the line distinguishing anti-bribery violations from exempted facilitating or expediting payments is blurry at best.

Courts have characterized expediting and facilitating payments as “‘essentially ministerial’ actions that ‘merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.’” These are not payments that may result in a

33 See id.
34 15 U.S.C. §§ 77dd-1(b), -2(b), -3(b).
35 Even though facilitation or expediting payments are permitted under the FCPA, these payments are discouraged by the OECD Working Group on Bribery and prohibited outright under the U.K. Bribery Act, most other transnational bribery laws, and virtually all countries’ local bribery laws. Therefore, this exception is not likely to be significant to many multinational corporations.
36 The line is, in fact, so blurry that many FCPA policies don’t endeavor to mention facilitating payments.
decision to award new business, but instead are only decisions made to expedite actions that are "ordinarily and commonly performed by a foreign official." These payments may include, but are not limited to: obtaining permits, licenses, or other official documents to do business in a foreign country; processing governmental papers; providing police protection, mail services, or scheduling inspections; and providing utilities services, cargo services, or protecting perishable commodities. Often, but not always, these payments are de minimis.

A layperson not fully educated on the intricacies of the FCPA may be under the misimpression that the term "facilitating payments" includes payments that it does not. For example, a layperson may reasonably believe that offering to gratuitously pay for the construction of a country’s road infrastructure in exchange for a lucrative but related contract constitutes a facilitating payment. However, such an offer almost certainly constitutes a violation of the anti-bribery provisions. Thus, it is safer to characterize these payments as expediting payments, rather than facilitating payments.

It may be hard for a company to determine which payments qualify as expediting or facilitating payments. Consequently, companies should take special care to ensure that their compliance programs do not mechanistically approve expediting payments. Instead, programs should recognize that whether payments qualify as expediting payments is likely to be highly fact dependent. Additionally, in some cases, payments initially intended to be expediting payments may evolve into prohibited payments over time. Individuals making payments approaching the border of acceptability should be required to provide additional documentation of the transaction and seek legal advice regarding the specific transaction. Companies should also consider requiring that all facilitation payments be pre-authorized, if practicable.

Companies should be aware that, although the FCPA allows facilitating and expediting payments, the global trend in anti-corruption regulation is to ban such payments. The OECD made this apparent in 2009, when it recommended that the exemption of facilitation payments from anti-bribery laws be eliminated. Companies should be aware of international

40 Id. at § 77d-1(f)(3)(A).
41 See Robert W. Tarun, The Foreign Corrupt Practice Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners, 16 (ABA 2010) ("While the FCPA may exempt facilitating payments, many foreign countries do not . . . .").
42 See Responses to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments 6 (Dec. 10, 2009), available at http://www.oecd.org/dataoecd/7/46/40498398.pdf. The OECD recommended the elimination of the exemption for facilitating payments for three reasons. First, facilitation payments have
developments in anti-corruption law because it is becoming increasingly important for companies to comply with the laws and regulations of not only the United States, but also those of foreign countries that exercise expansive transnational jurisdiction. One prominent example of this is the U.K. Bribery Act of 2010 (the “Bribery Act”).

The Bribery Act—perhaps the strictest of any anti-bribery law—does not provide an exemption for facilitating payments. Depending on how rigorously the U.K. government enforces the act—which took effect in July 2011—it may prove to be a dramatic change in global anti-corruption law. This report does not explore the intricacies of complying with the Bribery Act, but companies that may be subject to the U.K.’s expansive jurisdiction should take care to apprise themselves of its requirements. Generally, the Bribery Act recognizes that exemptions for facilitating payments “create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees . . . and perpetuate an existing ‘culture’ of bribery and have the potential to be abused.” Thus, the Bribery Act prohibits facilitating payments.

2. Local Law

The FCPA allows for an affirmative defense for anti-bribery violations if a defendant can prove that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.” Courts have recognized that the purpose of this defense is to “acknowledge[ ] . . . that some payments that would be unethical or even illegal within the

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44 The precise effect that the Bribery Act will have on international anti-corruption law remains unclear. However, the language of the act is expansive enough to warrant that companies take significant precaution in complying with it by keeping up to date with the U.K.’s enforcement actions. See generally Robert Amaee, Robert Amaee on U.K. Bribery Act Guidance, FCPA Professor, 2011 WLNR 6189219 (Mar. 31, 2011).

45 The Bribery Act’s global jurisdiction extends, inter alia, to any company doing business in the U.K.

46 Id.

United States might not be perceived similarly in foreign countries, and those payments should not be criminalized.” On its face, this statement may be viewed as capitulating to corrupt nations. But in practice, the exception and the affirmative defenses have been construed extremely narrowly. Additionally, the defense is statutorily limited to the written laws and regulations of a country. Thus, it is never a defense to claim that prohibited payments were made because “this is how business is done” in a foreign country.

In unique instances a company may reasonably believe that certain otherwise prohibited payments are legal under the written laws of a foreign nation. For example, a company may be engaging in lobbying practices that could be prohibited under the expansive language of the FCPA, and may believe that such practices are legal under foreign law and thus exempt from the FCPA. However, given the difficulty of asserting the defense, it typically has “little practical relevance in most situations.” Thus, companies must not only be very confident that their actions are legal, but they must also be able to prove that they are legal as a matter of law. The FCPA, after all, provides an affirmative defense for payments under local law, not an exception — i.e., the FCPA does not require the DOJ to prove that a payment was illegal under foreign law; to exercise the defense, a defendant must prove that its actions were legal under the relevant foreign law.

The precise meaning of this defense is largely unclear. As with many of the FCPA’s provisions, the lack of caselaw creates a dearth of guidance. One aspect of the defense that seems clear is that to exercise the defense, a defendant must be able to point to a written law expressly permitting the payment in question. Perhaps unintuitively, given our traditional

48 United States v. Castle, 925 F.2d 831, 834 (5th Cir. 1991).
49 Jacqueline L. Bonneau, Note, Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement, 49 Colum. J. Transnat’l L. 365, 381 (2011) (“While these exclusions do represent as concession to the culture of bribery, they are usually construed quite narrowly . . . .”).
51 See United States v. Kozeny, 582 F. Supp.2d 535, 538 (S.D.N.Y. 2008) (“Though foreign law once was treated as an issue of fact, it now is viewed as a question of law and may be determined through the use of any relevant source, including expert testimony.”), quoting United States v. Vilar, No. 05 Cr. 621, 2007 WL 1075041, at *55 n.35 (S.D.N.Y. Apr. 4, 2007).
presumption of innocence, defendants cannot prove the legality of their action under written law by proving an absence of illegality. Additionally, courts have recognized that the inquiry as to whether a payment is legal under written foreign law is a question of law, not a question of fact.\(^5^4\) Thus, litigants may have to use expert witnesses to prove the substantive legality of a transaction.\(^5^5\)

Further complicating the matter, courts have indicated that the substantive legality of a transaction is not dependent on whether an individual is “relieved of criminal responsibility for his actions by a provision of the foreign law.”\(^5^6\) An obvious implication of this statement is that there is no affirmative defense for payments that cannot be prosecuted in a foreign nation due to a technicality, such as the expiration of a statute of limitations.\(^5^7\) However, courts have also indicated that even if the substantive law of a country “relieves” a defendant of liability, a defendant will still have no affirmative defense under the FCPA.

For example, in United States v. Kozeny,\(^5^8\) the court held that a defendant could not raise an affirmative defense under the FCPA even though the laws of Azerbaijan explicitly provided that entities would not be held liable for generally prohibited bribes if they voluntarily reported the bribe after it was made.\(^5^9\) The court ruled that the moment at which the legality of a payment is determined is the time of its payment: if a bribe is illegal at the moment it is paid, it will never be considered “lawful under the written laws” of a foreign nation for the purpose of raising the affirmative defense. It is irrelevant whether some subsequent action retroactively resolves the payor of liability under a country’s written law.\(^6^0\) Thus, companies should never rely on any form of post-payment amnesty; they must always focus on the legality of the payment at the moment it was paid.

When the meaning or application of a foreign country’s written laws is unclear, or the laws are silent, companies must take the utmost care to verify that a payment is certainly permitted under a country’s written law before they execute such a transaction. If a company

\(^{54}\) See Kozeny, 582 F. Supp.2d at 538.

\(^{55}\) See id. (“[I]n deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.”).

\(^{56}\) Id. at 539.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id. at 539–40.

\(^{60}\) Id.
cannot determine the legality of a payment under a country’s written law, it must either forgo making the payment, or assume the risk of violation. In addition to the tremendous costs of defending an FCPA violation, companies may have to employ expert witnesses to attempt to prove the legality of their payment under foreign law.61

3. **Bona Fide Business Expenditures**

An affirmative defense is also provided if “the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure . . . incurred by or on behalf of a foreign official, party, party official, or candidate.” However, the gifts or payments must be “directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”62

Needless to say, it is very hard to predict with any certainty whether a payment will be viewed as prohibited, or as a reasonable and *bona fide* business expenditure. The FCPA expressly indicates that expenditures for travel and lodging are examples of *bona fide* expenses.63 Commentators have noted that such payments are “normally made when associated with product demonstrations, facility tours, or contract performance.”64 Thus, on its face, the *bona fide* expenditures defense is broader and more generally applicable than the written law affirmative defense.65 But again, the lack of caselaw interpreting these provisions leaves the specifics of the defense largely unclear.

There are several intuitive signals indicating that expenditures may not be *bona fide* and reasonable. These include situations where expenditures are made for family members of foreign officials and where expenditures may be considered gratuitous under the circumstances.66 One commentator illustrated this by explaining that it is unlikely that “[a] side

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61 See *id.* at 537 (explaining that “the Court held a hearing in which . . . experts testified as to their interpretations of the relevant law” to determine whether certain payments were exempt from the FCPA because they were legal under Azeri law).


63 *Id.*


trip to a resort en route to a corporate location, or payment for the travel of a foreign official’s spouse,” would be considered *bona fide*. In fact, this type of expenditure is a prime example of an improper payment. But, importantly, less egregious payments may also fail to satisfy the defense. For example, in *Metcalf & Eddy, Inc.*, the DOJ found that a company violated the FCPA when it allegedly overpaid a foreign official’s estimated per diem allowance and covered the entirety of the official’s expenses. Thus, *Metcalf & Eddy* indicates that the DOJ will look unfavorably on companies that pay foreign officials’ expenses carte blanche.

In an abundance of caution, individuals and companies attempting to comply with the FCPA should never assume that an expenditure will satisfy the *bona fide* expenditures defense. Again, companies must recognize that to absolve themselves of liability, they must prove that their payments are reasonable and *bona fide* under the FCPA. Thus, companies must exercise sound judgment when providing business accommodations, and must make an effort to ensure that all transactions are transparent and properly documented.

D. Penalties

1. Civil and Criminal Fines and Sentences

Violation of the FCPA can result in stiff civil and criminal penalties for both individuals and entities. An entity that violates the anti-bribery provisions may be faced with a criminal fine of up to $2 million per violation. Individuals who violate the provisions may face up to five years in prison, a fine of $250,000, or both. An entity that violates the recordkeeping and internal controls provisions may be assessed criminal fines of up to $25 million. Individuals violating these recordkeeping provisions may be faced with sentences of up to twenty years in

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67 Tarun, supra, note 41, at 17.


69 See id. See also Tarun, supra, note 41, at 17 (citing *Metcalf & Eddy* as evidence of his claim that the *bona fide* expenditures defense “does not give companies carte blanche to pay travel expenses for government officials”).

70 See id. at 26–27.


72 See id. at § 78ff(a). See also 18 U.S.C.S. § 3571 (West 2011) (Under the Alternative Fines Act, an individual violating the FCPA may be fined $250,000 or up to twice the amount of the pecuniary gain from the offense).

prison, fines of up to $5 million, or both.\textsuperscript{74} Civil actions brought against individuals and entities by the DOJ under the FCPA are subject to a penalty of $10,000.\textsuperscript{75}

The actual calculation of a criminal penalty, whether a fine or a prison sentence, is based on factors enumerated in the advisory United States Federal Sentencing Guidelines\textsuperscript{76} (the “Guidelines”) used to determine the culpability of an offending individual or entity. Factors that are particularly relevant to FCPA compliance programs include the history of prior violations, and any steps taken to prevent violations.\textsuperscript{77}

When aggregated, these penalties can be overwhelming, even for a large company. Several recent fines have totaled over $400 million. For example, in 2010, BAE Systems plead guilty to conspiring to defraud the United States, to make false statements concerning its FCPA compliance efforts, and to violate the Arms Export Control Act and International Traffic in Arms Regulations. As a consequence, BAE Systems was assessed a $400 million criminal fine.\textsuperscript{78} In 2008, Siemens paid a combined total of more than $1.6 billion in fines, disgorgement, and other payouts due to anti-corruption charges brought in various countries, which included over $800 million to United States authorities under the FCPA.\textsuperscript{79} And in 2011, Lindsey Manufacturing was the first company to be convicted by a jury on FCPA violations.\textsuperscript{80} Judge Matz of the U.S. District Court for the Central District of California threw out the convictions and dismissed the indictment in Lindsey Manufacturing due to government misconduct.\textsuperscript{81} Nevertheless, had the convictions proceeded to sentencing, Lindsey’s CEO and CFO, who were

\begin{flushleft}
\textsuperscript{74} Id.
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\textsuperscript{75} Id. at §§ 78dd-2(g)(1)(B), (2)(B). \See id. at §§78dd-3(e)(1)(B), (2)(B); Id. at §§ 78ff(c)(1)(B), (2)(B).
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\textsuperscript{76} See U.S.S.G. § 8A1.1 (making the Guidelines applicable to all organizations for felony and class A misdemeanor offenses).
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\textsuperscript{77} See id. at § 8A1.2.
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\textsuperscript{81} See United States v. Aguilar, No. Cr. 10-01031(A)-AHM, 2011 WL 6097144, Order Granting Motion to Dismiss (C.D. Cal., Dec. 1, 2011). The Court threw out the convictions and dismissed the indictment due to several findings of government misconduct—including, \textit{inter alia}, committing Brady violations and making material misrepresentations to the Court—despite affirming that “the Lindsey Defendants are [not] entitled to a finding of factual innocence.” Id. at 40.
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also convicted as individuals, would have been “face[d] maximum prison sentences of 30 years.”

2. **Loss of Government Contracts**

Fines are not the only penalties resulting from FCPA violations by entities. There are significant collateral consequences when the government enforces the FCPA against a company, either through a non-prosecution agreement, a deferred prosecution agreement or an indictment. These include ineligibility to receive export licenses, and suspension and debarment from the securities industry. But for many industries, the most catastrophic of these is suspension or debarment from contracting with the United States government.

Indictment alone can lead to a suspension of doing business with the United States government. Debarment and suspension are technically not penalties for bad conduct; they are supposed to be tools to protect the Government from engaging with irresponsible contractors. Nonetheless, “[s]uspension and debarment are powerful weapons at the Government’s disposal.” When the government suspends or debars an entity, generally all of the entity’s constituent divisions are banned from contracting with the entire executive branch of the government. This can have “devastating consequences” for a company; “some have likened [it] to the death penalty.” The “shock and infamy of suspension or debarment” can drive contractors out of business, especially if they are small companies or are heavily reliant on government contracts. Also, companies should keep in mind that violating the anti-bribery provisions of the FCPA may result in suspension or disbarment in foreign countries. This is especially true with regard to multilateral lending institutions around the world.

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82 See Koppel, supra, note 80.

83 Tarun, supra, note 41, at 28 (footnotes and citations omitted).

84 Id. (footnotes and citations omitted).

85 If debarment and suspension were penalties, their use in response to only an indictment would raise more significant due process concerns than they already do.


88 Canni, supra, note 86, at 579 (quotations and citations omitted).


90 See Deming, supra, note 50, at 686.
Companies should be aware of their dependence on government business when conducting risk calculations regarding FCPA compliance. This is especially true when a company’s business-plan is heavily reliant on government work. Some industries are heavily based on interacting with federal programs such as “the Defense Department procurement programs, the Commodity Futures Trading Commission, and the Overseas Private Investment Corporation.”\(^91\) In such cases, any FCPA violation can provide the government with the bludgeon of cutting off business relationships with a company, which may dramatically devalue or even destroy it.

E. Opinion Procedures

The application of the FCPA’s anti-bribery provisions to many business situations is not always clear. Given the inherent vagueness of the anti-bribery prohibitions and their affirmative defenses, companies may find themselves in situations where they believe they are conducting a legitimate business practice while still worrying about potential liability. Congress recognized this, and, as a result, the FCPA includes opinion procedure provisions.

Under the opinion procedure provisions, an issuer or domestic concern may request an opinion of the DOJ indicating whether it intends to bring enforcement actions for specific business conduct.\(^92\) This process essentially allows companies engaging in what they believe may be risky business practices to present “certain specified, prospective—not hypothetical—conduct”\(^93\) to the DOJ for the purpose of receiving an opinion similar to a declaratory judgment.\(^94\) Unlike a declaratory judgment, however, the DOJ’s written opinion does not affect anyone other than the petitioning party and the Department.\(^95\) Additionally, the opinions do not list the name of the requesting party.\(^96\)

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\(^91\) *Id.* (footnotes and citations omitted).


\(^93\) 28 C.F.R. § 80.1.

\(^94\) See 28 C.F.R. § 80.6 (the request must “be specific and must be accompanied by all relevant and material information bearing on the conduct” relevant to the opinion sought, including all the “circumstances of the prospective conduct”). See generally 28 C.F.R. § 80 (outlining the FCPA Opinion Procedure).

\(^95\) 28 C.F.R. § 80.10 (In any opinion procedure action “there shall be a rebuttable presumption that a requestor’s conduct, which is specified in a request, and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department’s present enforcement policy, is in compliance with those provisions of the FCPA.”).

\(^96\) The DOJ’s Opinion Procedure Releases (“Releases”) do not usually identify the name of the Requestor, but the DOJ reserves the right to do so. In some instances, the Releases have identified the Requestor by name.
Importantly, making a request for an opinion may instigate the DOJ to conduct any independent investigation it deems necessary under the circumstances. Thus, companies should carefully weigh the potential reward of receiving the DOJ’s blessing of a transaction with the risks that result from increased DOJ scrutiny. This scrutiny may not be limited to the business practices specified in the opinion action. It may put the entire company under the microscope of the DOJ.

III. FUNDAMENTAL COMPONENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

As explained above, the penalties for violating the FCPA can be substantial. Further, the applications of the FCPA’s prohibitions are often vague. Thus, companies engaging in business abroad should rightfully be wary of the significant risks posed by the FCPA. Avoiding FCPA violations is, indeed, vital. Crafting an effective compliance program should be a top priority for companies that engage in business within the scope of the FCPA’s prohibitions.

This section will begin by explaining the purposes and values of creating an FCPA compliance program. Next, it will provide a brief overview of the components of compliance programs. And finally, it will examine four primary sources that are essential to consult when crafting an FCPA compliance program.

A. The Purposes of a Compliance Program

There are three primary benefits of FCPA compliance programs. First, there is independent value in a company maintaining a comprehensive—and practical—FCPA compliance policy. The DOJ factors compliance programs into its decision whether to bring charges against a company, because such programs “deter wrongdoing and generate ethical norms within the firm.” Thus, the sufficiency of a company’s compliance policy may influence whether the DOJ decides to bring charges against a company. Further, if the DOJ pursues charges, a company with an effective compliance program will be more likely to receive lenient treatment from the DOJ, both informally and when the Government calculates sanction amounts. In contrast, a company that maintains a “paper program”—one that formally exists but is not actually enforced—will not convince the DOJ to give a company the benefit of the doubt in the event of a violation.

97 Id. at § 80.7.

98 Companies should note that an effective compliance program will also insulate it from liability under other foreign law, such as the Bribery Act.

99 See Baer, supra, note 9, at 959 (Implementing “paper programs” may, in fact, be worse than having no program at all).

Second, effective compliance programs prevent FCPA violations, thus protecting companies from exposure to liability. This benefit is distinct from how the DOJ judges compliance programs. The DOJ’s evaluation of a program is, after all, moot if the program is effective at preventing violations (and resulting DOJ scrutiny) in the first place.

And third, effective compliance programs help companies mitigate any harm resulting from FCPA violations. A well-functioning compliance program ensures that transactions are properly documented, and that the company detects and remediates any FCPA violations after they occur. This allows companies to disclose, or to evaluate whether it is appropriate to disclose, violations to government authorities and to effectively cooperate with the DOJ to mitigate any potential harm. This report will examine how the DOJ evaluates the adequacy of FCPA compliance programs and synthesize a framework for developing an effective FCPA compliance program.

B. The Facets of a Compliance Program

A compliance program is a company’s first line of defense against FCPA liability. Compliance programs accomplish their general purposes by executing policy-setting and investigatory functions. Specifically, compliance programs are aimed at both educating officers and employees about their obligations, as well as monitoring and regulating their performance under the FCPA. The educational aspect includes offering practical guidance to employees and managers on how to avoid violating the FCPA. The monitoring and regulating aspects require the implementation of programs, which “should include a code of conduct, gifts policy, training policy, political and charitable contributions policy, delegation of authority policy, and accounting policies regarding the proper recording of transactions.”

These policies may be disseminated in a variety of ways. For example, a company may choose to incorporate its FCPA compliance policy as a part of the employee code of business

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101 See generally Baer, supra, note 9, at 960–61.

conduct and ethics or maintain a freestanding FCPA compliance policy manual.103 Regardless of the format, it is of the utmost importance that the official written policy be broadly supported by upper management and competently implemented.

C. Sources of Guidance in Crafting a Compliance Program

The three main sources that the DOJ utilizes or otherwise references to inform and supplement the language of the FCPA are the United States Attorney’s Manual, the United States Federal Sentencing Guidelines, and the Organization for Economic Co-operation and Development (the “OECD”) Convention.104 Each source offers lengthy lists of factors relevant to creating effective FCPA compliance programs. Yet, companies attempting to comply with the FCPA cannot only look at the official policies and general recommendations of the DOJ. Crafting compliance policies by relying on the text of the Principles, the Guidelines, and the OECD Guidance can only take an organization so far. To ensure complete compliance, organizations must keep up to date with how the DOJ interprets and enforces the provisions of the FCPA.

1. Principles of Federal Prosecution of Business Organizations

The section of the United States Attorney’s Manual relevant to charging corporations—entitled Principles of Federal Prosecution of Business Organizations (the “Principles”)—is one of the most important sources of formal DOJ policy regarding charging corporations under the FCPA.105 The Principles require prosecutors to apply “the same factors in determining whether to charge a corporation as to they do with respect to individuals,” which include “the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches.”106 But the Principles also recognize that prosecuting business organizations is a unique endeavor that entails unique concerns. These unique concerns come in the form of special prosecutorial duties and considerations.

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103 Notably, because FCPA compliance programs require a significant amount of detail, it is often impractical for companies to incorporate them into their code of ethics. Further codes of ethics are difficult to amend (particularly under the public disclosure requirements of Sarbanes-Oxley), and thus a compliance program stylized as a freestanding document is generally preferable.

104 The OECD Convention does not represent DOJ policy, but has been referenced by the agency as an appropriate source of guidance.


106 Id. at 3.
The Principles state that prosecutors have a duty to protect economic and capital markets, to protect those who compete in these markets through lawful means, and to generally protect the American public from corporate misconduct. The Principles also enumerate specific factors that prosecutors must consider when determining whether to bring charges or enter into agreements with organizations. These factors include:

- The nature and seriousness of the offense, including risk of harm to the public and any policies governing the prosecution of corporations for specific types of crimes;
- The pervasiveness of wrongdoing within the corporation, including managerial complicity;
- The organization’s history of similar misconduct;
- The corporation’s disclosure of wrongdoing and willingness to cooperate;
- The existence and effectiveness of the corporation’s compliance program;
- The corporation’s remedial actions, including efforts to implement or improve effective corporate compliance programs, to replace management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with government agencies;
- The harmful collateral consequences of charges or agreements, including those to investors and the public;
- The adequacy of personal prosecution as opposed to organizational prosecution; and
- The adequacy of non-criminal remedies.

Many of these factors are particularly relevant to instituting an FCPA compliance program. Indeed, the Principles explicitly provide some guidance regarding the impact of compliance programs on the DOJ’s decision of whether to bring FCPA charges.

The Principles indicate that compliance programs are specifically relevant in the DOJ’s evaluation of four general contexts: (1) the pervasiveness of wrongdoing within the corporation; (2) the history of a corporation’s conduct; (3) whether a corporation should be eligible for a reduced sanction because of voluntary disclosures; and (4) whether a corporation has taken significant remedial actions to deter future violations. Finally, the Principles also require prosecutors to independently consider the sufficiency of a company’s compliance program.

**Pervasiveness of Wrongdoing**

When evaluating the pervasiveness of wrongdoing within the corporation, the Principles specifically state that it may be inappropriate for the government to hold a

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107 Id. at 1.
108 See id. at 3–4.
corporation liable for isolated or small numbers of actions by its employees, “particularly [corporations] with a robust compliance program in place.” The Principles emphasize that the corporation’s management oversees the actions of the corporation’s employees, and thus management is “responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged.” Referring to the United States Sentencing Guidelines, the Principles state that “Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense.” In evaluating pervasiveness, compliance programs are relevant in determining when any wrongdoing can be fairly attributed to the actions of a corporation’s management and the culture it has fostered.

History of Conduct

Similarly, the Principles state that a history of wrongful conduct is relevant in the DOJ’s determination of how to resolve cases. The DOJ will look unfavorably on organizations that have “not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it.” However, it should be noted that unenforced compliance programs—so-called “paper programs”—would not constitute evidence weighing against a finding of pervasiveness or a negative history of conduct. Indeed, “history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs.”

Voluntary Disclosures

The DOJ’s determination of whether a corporation deserves a lessened sanction due to voluntary disclosures also takes the effectiveness of corporate compliance programs into consideration. The DOJ “encourages corporations, as a part of their compliance programs, to conduct internal investigations and to disclose . . . relevant facts to the appropriate authorities.” The DOJ may reward corporations for employing effective compliance programs and specifically states that “prosecutors may consider a corporation’s timely and voluntary disclosure in evaluating the adequacy of the corporation’s compliance program and its management’s commitment to the compliance program.”

109 Id. at 5–6.
110 Id. at 6.
111 Id. at 6, quoting U.S.S.G. § 8C2.5, cmt. 4.
112 Id. at 6.
113 Id. at 6.
114 Id. at 14.
115 Id. at 14.
Remedial Actions

An area of specific concern for corporations is whether they can take remedial measures to influence the DOJ’s decision to bring charges of FCPA violations. When looking at a corporation’s remedial measures in response to FCPA violations, the DOJ assesses many factors, several of which take corporate compliance programs into account. The factors that the DOJ looks at when evaluating the remedial measures of a corporation are:

- Whether the corporation appropriately disciplined wrongdoers, even if they are at the highest level of seniority;
- Whether the corporation is focused on “the integrity and credibility of its remedial and disciplinary measures” rather than on the protect of wrongdoers;
- Whether the corporation has paid restitution in advance of a court order, so long as the restitution constitutes evidence of the corporations acceptance of responsibility given the circumstances; and
- Whether a corporation has quickly recognized flaws in its compliance program and has made efforts to improve the program.\(^\text{116}\)

In considering these factors, the DOJ looks for corporations to take meaningful actions to “ensure that such misconduct does not recur.”\(^\text{117}\) The Policies state that “corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.”\(^\text{118}\)

Independent Focus on Compliance Programs

Finally, the Policies dictate that prosecutors should focus specifically on the existence and effectiveness of corporate compliance programs in place at the time of any FCPA violations. In section 9-28.800 of the Principles—entitled “Corporate Compliance Programs—the DOJ explains how it evaluates corporate compliance programs and how the existence of effective or ineffective compliance programs affects its decisionmaking. The Principles state that the existence of a compliance program is not sufficient to insulate an organization from liability.\(^\text{119}\) However, the DOJ “encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own.”\(^\text{120}\)

\(^{116}\) Id. at 17.

\(^{117}\) Id. at 16–17.

\(^{118}\) Id.

\(^{119}\) Id. at 14.

\(^{120}\) Id. at 14.
A prosecutor’s central inquiry is “whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.” This inquiry is not formulaic. Instead, the Policies suggest that prosecutors look at a variety of factors. These factors can be divided into three categories according to their focus: (1) the existence and design of the program; (2) the administration of the program; and (3) the misconduct in question. The factors, divided into their respective categories, are:

1. **The Existence and Design of the Program**
   (a) Whether a compliance program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees;
   (b) Whether the compliance program is designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business;
   (c) The comprehensiveness of a compliance program; and
   (d) Whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct.

2. **The Administration of the Program**
   (a) Whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives;
   (b) Whether a compliance program is being applied earnestly and in good faith;
   (c) Whether a compliance program “works”;
   (d) Whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner;
   (e) Whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts; and

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121 *Id.* at 15–16.

122 The Principles ask the following exemplary questions: “[D]o the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers’ recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.” *Id.* at 15, citing, for e.g., *In re Caremark Int. Inc. Derivative Litig.*, 698 A.2d 959, 968–70 (Del. Ch. 1996).
Whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it.

3. The Misconduct In Question

(a) The extent and pervasiveness of the misconduct in question;
(b) The number and level of the corporate employees involved in the misconduct;
(c) The seriousness, duration, and frequency of the misconduct;
(d) Whether a corporation has taken remedial actions, “including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned”; and
(e) The promptness of any disclosure of wrongdoing to the government.123

These factors are not exhaustive, and are often overlapping, but they provide insight into how DOJ prosecutors conduct investigations and determine whether to bring charges under the FCPA. Importantly, the factors place an emphasis on the effective administration of a program. The Policies explicitly dismiss the value of “paper programs,” and emphasize that a program should be customized to ensure compliance in the specific context in which the organization operates.

2. The United States Federal Sentencing Guidelines

The Principles are not the only source of authority that should guide corporate compliance practices. The United States Federal Sentencing Guidelines (the “Guidelines”) specifically encourage the establishment of effective compliance programs by mandating that “[t]wo factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.”124 Under the Amended November 2010 Guidelines, the government may now significantly reduce fines and other sanctions if an organization takes reasonable steps “to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents.”125

The Guidelines indicate in general terms how the government will evaluate compliance programs when considering whether to mitigate fines or sanctions. They define effective compliance programs functionally, by placing an emphasis on the results of a program—that is,

123 See generally id. at 14–16.
125 U.S.S.G. § 8A.1 Commentary 3(k) (2011). See also Deming, supra, note 50, at 646.
whether it is “reasonably designed, implemented and enforced so that [it] is generally effective in preventing and deterring criminal conduct.” 126 Again, there is no clear formula. An effective compliance program consists of evidence that an organization “exercise[s] due diligence to prevent and detect criminal conduct; and otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” 127 To achieve due diligence and the promotion of such an organizational culture, the Guidelines minimally require:

- The organization to “establish standards and procedures to prevent and detect criminal conduct.” 128
- The “organization’s governing authority . . . be knowledgeable about the content and operation of the compliance and ethics program and . . . exercise reasonable oversight . . . .” 129
- “High-level personnel of the organization . . . ensure that the organization has an effective . . . program . . . .” 130
- “Specific individual(s) within the organization . . . be delegated day-to-day operational responsibility for the . . . program . . . [and] shall report periodically . . . on the effectiveness of the . . . program.” 131
- “To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority . . . .” 132
- The “organization . . . use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known . . . has engaged in illegal activities or other conduct inconsistent with an effective . . . program.” 133
- The “organization . . . take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the . . . program . . . by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities,” 134 to “members of the governing authority, high-level


127 Id. at § 8B2.1(a)(1)–(2).

128 Id. at § 8B2.1(b)(1).

129 Id. at § 8B2.1(b)(2)(A).

130 Id. at § 8B2.1(b)(2)(B).

131 Id. at § 8B2.1(b)(2)(C).

132 Id.

133 Id. at § 8B2.1(b)(3).

134 Id. at § 8B2.1(b)(4)(A).
personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents.” \(^{135}\)

- “The organization . . . take reasonable steps . . . to ensure that the organization’s . . . program is followed, including monitoring and auditing to detect criminal conduct.” \(^{136}\)

- “The organization . . . take reasonable steps . . . to evaluate periodically the effectiveness of the organization’s . . . program.” \(^{137}\)

- “The organization shall take reasonable steps . . . to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.” \(^{138}\)

- “The organization’s . . . program . . . be promoted and enforced consistently throughout the organization through appropriate incentives to perform in accordance with the . . . program; and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.” \(^{139}\)

- “After criminal conduct has been detected, the organization . . . take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s . . . program.” \(^{140}\)

- And in doing all of the above, “the organization . . . periodically assess the risk of criminal conduct and . . . take appropriate steps to design, implement, or modify each [above] requirement . . . to reduce the risk of criminal conduct identified through this process.” \(^{141}\)

This lengthy list of factors demonstrates that all effective compliance programs must have certain minimum standards in the eyes of the DOJ. Further, none of the factors rely on the existence of a written compliance program. Again, the DOJ’s focus is primarily on the efficacy of a compliance program. The DOJ reinforces this by stating that in determining whether an organization has complied with the above standards, the DOJ should consider “(i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) [recurrence of] similar misconduct.” \(^{142}\)

\(^{135}\) Id. at § 8B2.1(b)(4)(B).

\(^{136}\) Id. at § 8B2.1(b)(5)(A).

\(^{137}\) Id. at § 8B2.1(b)(5)(B).

\(^{138}\) Id. at § 8B2.1(b)(5)(C).

\(^{139}\) Id. at § 8B2.1(b)(6).

\(^{140}\) Id. at § 8B2.1(b)(7).

\(^{141}\) Id. at § 8B2.1(c).

\(^{142}\) Id. at § 8B2.1 cmt. 2(A).
3. **The OECD Convention and Guidance**

Finally, another source of authority that should guide effective FCPA compliance practices is the OECD’s Convention, to which the United States is a signatory. The OECD Convention requires member states to criminalize the bribery of foreign public officials in generally the same way the FCPA does. The OECD’s Good Practice Guidance on Internal Controls, Ethics, and Compliance (the “OECD Guidance”) is important because it has been strongly endorsed by the DOJ. Recently, United States Attorney General Eric Holder designed the document “state-of-the-art guidance” and “encourage[d] companies to use it as a benchmark in their own compliance programs.”

The OECD Guidance recommends that organizations create effective compliance programs by assessing their bribery risks based on their individual circumstances—such as their geography, industry, size, type, and legal structure. These “circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness” of a compliance program. The OECD Guidance recommends the following fourteen measures to prevent and detect bribery:

- Establishing “strong, explicit and visible support and commitment from senior management to the company’s [compliance program] . . . .”
- Creating “a clearly articulated and visible corporate policy prohibiting foreign bribery.”
- Requiring “compliance with this prohibition and the related internal controls . . . [to be] the duty of individuals at all levels of the company.”
- Ensuring that the “oversight of [compliance programs], including the authority to report matters directly to independent monitoring bodies . . . is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority.”
- Creating “[a compliance program] . . . designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all

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143 The OECD Convention requires parties “to make it a criminal offense under their national laws for any person to intentionally offer, promise, or give any undue pecuniary or other advantage, directly or through intermediaries, to foreign public officials in order to obtain or retain business or to obtain any other improper advantage.” Deming, supra, note 50, at 310, citing OECD Doc. DAFFE/IME/BR(97)20, art. 1, para. 1, reprinted in 37 I.L.M. 1 (1998).


146 Id.
entities over which a company has effective control... on, *inter alia*, the following areas: (i) gifts; (ii) hospitality, entertainment and expenses; (iii) customer travel; (iv) political contributions; (v) charitable donations and sponsorships; (vi) facilitation payments; and (vii) solicitation and extortion.”

- Creating “[a compliance program] designed to prevent and detect foreign bribery applicable... to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners [“business partners”]... including, *inter alia*, the following essential elements: (i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners; (ii) informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s [compliance program]; and (iii) seeking a reciprocal commitment from business partners.”

- Maintaining “a system of financial and accounting procedures... reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery.”

- Enacting “measures designed to ensure periodic communication, and documented training for all levels of the company, on the company’s [compliance program].”

- Taking “appropriate measures to encourage and provide positive support for the observance of [compliance programs] at all levels of the company.”

- Establishing “appropriate disciplinary procedures to address... violations, at all levels of the company, of laws against foreign bribery...”

- Maintaining “effective measures for... providing guidance and advice to directors, officers, employees, and... business partners, on complying with the company’s [compliance program], including when they need urgent advice on difficult situations in foreign jurisdictions.”

- Maintaining “effective measures for... internal and where possible confidential reporting [for those] not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for [those] willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds.”

- Maintaining “effective measures for... undertaking appropriate action in response to such reports.”

- Conducting “periodic reviews of [compliance programs], designed to evaluate and improve their effectiveness... taking into account relevant developments in the field, and evolving international and industry standards.”

These standards, though not the official policy of the DOJ, and not cited in U.S. court opinions, have been endorsed by top DOJ officials as best practices that inform should effective FCPA compliance programs.

147 *Id.*
4. DOJ Actions and Opinions: Changes in Enforcement

Companies attempting to comply with the FCPA should not limit themselves to official policies and general DOJ recommendations. Crafting compliance policies by relying on the text of the Principles, the Guidelines, and the OECD Guidance can only take an organization so far. To ensure complete and substantively meaningful compliance, organizations must keep up to date with how the courts interpret, and how the DOJ enforces, the provisions of the FCPA.148

The DOJ exercises a considerable amount of discretion in deciding whether to bring criminal charges against an organization under the anti-bribery provisions of the FCPA. The DOJ not only enjoys substantial—and, in the eyes of some, excessive—prosecutorial discretion,149 but also benefits from a general lack of judicial precedent interpreting the statutory provisions of the FCPA.150 Since its enactment in 1977, the FCPA has remained largely unchanged as a statute and there have been remarkably few cases interpreting its application.151 As a practical consequence, the DOJ often ends up being the final arbiter of the meaning of the FCPA’s statutory provisions through its use of prosecution deferral agreements and no-action letters, which are sometimes referred to as “diversion agreements.”152

The lack of caselaw interpreting the FCPA predictably creates a dearth of guiding precedent. Thus, organizations must keep abreast of enforcement actions by keeping themselves updated on the government’s public announcements and disclosures,153 while also staying

148 The SEC also has the power to enforce FCPA provisions against publically traded companies. Traditionally, the SEC has enforced the books and records and internal controls provisions of the FCPA, although the DOJ has become more active in enforcing these provisions, but typically only for systemic and egregious violations.

149 See Principles of Federal Prosecution of Business Organizations, United States Attorneys Manual, supra, note 105 (“In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.”) (emphasis added).


151 There has been a recent trend, however, of increased enforcement of the FCPA, which may lead to an increase in FCPA cases being brought in court as opposed to being settled through non-adjudicatory alternatives. See generally Section I.

152 See generally Cortney C. Thomas, The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified, 29 Rev. Litig. 439, 451 (2010) (“Diversion, in the form of non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”), however, punishes a culpable corporation while at the same time escaping the potential consequences of a full-scale prosecution.”).

current on FCPA news and commentary. Typically, congressional amendments to the FCPA and changes in official DOJ policy will not be the most common indicators of changing enforcement strategies. For example, there was no major statutory or official policy change predating the watershed action brought against Siemens in 2008, despite the $450 million criminal fine being the largest FCPA enforcement action at the time it was announced.

Additionally, the government has been using more aggressive investigative techniques in FCPA investigations. Evidence of this is the government’s recent undercover investigation in what is commonly referred to as the “Shot Show” sting operation. The operation was lauded by the DOJ as “the largest single investigation and prosecution against individuals in the history of the DOJ’s enforcement” of the FCPA. Organizations should interpret the undercover operation as proof that the DOJ is beginning to use more traditional law enforcement techniques to strictly enforce the FCPA. As a consequence, organizations should increase their efforts to ensure that their compliance programs are comprehensive. Programs must not only demonstrate a good faith effort to comply with the FCPA, but they must also be effective in preventing any violations.

Both the above-mentioned Siemens action and the “Shot Show” undercover sting operation should serve as notice to companies that the DOJ is increasingly stepping up FCPA enforcement and is taking its anti-corruption policies more seriously. However, the Siemens action, in particular, should also serve as a reminder of the global nature of the campaign against corruption. Siemens was held accountable for bribery by the United States and German governments, but also entered into a settlement with the World Bank Group following its investigation of the company’s corrupt practices in Russia. Moreover, more and more nations are bringing companion—and even successive duplicative actions to U.S locations. This trend in

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154 Two particularly good sources of FCPA-related news are (1) the FCPA Blog, which is run by various contributing practitioners and academics (publicly available at: http://www.fcpablog.com/) and (2) the FCPA Professor, which is run by Mike Koehler, a leading expert on the FCPA and other anti-corruption laws and initiatives (publicly available at http://www.fcpaprofessor.com/).


what one practitioner has coined as “carbon copy” prosecutions is an important development that companies will be facing into the foreseeable future.158

As foreign governments continue to prioritize anti-corruption efforts—such as the United Kingdom has done with the passage of the UK Bribery Act in 2010159—organizations must maintain strict anti-bribery compliance policies to ensure that they will not be held liable for their business practices either within or outside of the United States.

IV. EFFECTIVE COMPLIANCE PROGRAMS FROM THE DOJ’S PERSPECTIVE

Designing compliance programs is an especially difficult process because such programs are often scrutinized only after a violation has occurred. That is to say, the DOJ is never prospectively evaluating and critiquing a company’s FCPA compliance program, unless it is already investigating the company for potential violations. Thus, the DOJ ordinarily does not laud the compliance policies of companies who are successfully avoiding violations. The guidance coming from the DOJ primarily arises from critiques and criticisms of compliance programs that have failed. This guidance is limited, but is the best information that companies have to inform the development and implementation of their FCPA compliance programs.

This section first discusses the process of how compliance programs are evaluated generally. This discussion provides the reader with a conceptual understanding of how compliance programs are viewed by prosecutors. Next, this section presents the twelve factors of an effective compliance program, which are based on an analysis of the DOJ’s actual treatment of programs. Last, this section also examines additional context-specific factors that may be relevant to similarly situated companies, and may provide further insight into the DOJ’s evaluation process.

A. Generally

Prosecutors are lawyers, not auditors. Whereas auditors typically question the processes and the results of a compliance program, “the lawyer’s view emphasizes process.”160 Thus,


159 See generally Bribery Act 2010, supra, note 43.

160 See Cunningham, supra, note 10, at 308.
when prosecutors reevaluate the efficacy of FCPA compliance programs they will undoubtedly be concerned with the systematic decisionmaking and monitoring processes that companies have put in place to prevent violations. Prosecutors understand that for large companies, no compliance system can provide absolute assurance of non-violation. But they will, at minimum, require companies to demonstrate that they have planned, implemented, and enforced compliance programs that utilize thought out and extensive procedures.

Although prosecutors will likely emphasize the role of process in a compliance program, they undoubtedly will also consider the results of a compliance program. Prosecutors investigating potential FCPA violations must assess the effectiveness of compliance programs after they have failed to prevent violations. Unfortunately for companies that find themselves in violation of the FCPA, it is reasonable to assume that prosecutors may suffer from hindsight bias—they may assign “higher probabilities to actual outcomes than would have been assigned based on expected outcomes.”161 This means that companies should ensure that their compliance programs not only prevent violations, but that they also, as appropriate, focus on assisting prosecutor’s investigations of conduct that has already occurred.

Understanding the perspective and institutional function of a prosecutor will help a company develop a compliance program that is looked favorably upon by the DOJ. Under the current FCPA enforcement regime, companies have an incentive to institute compliance programs that assist prosecutors in their investigative inquiry by (1) emphasizing the role of process as a preventive mechanisms, and (2) instituting after-the-fact investigatory programs and policies that will foster cooperation with prosecutors.162 These, however, are broad characteristics of effective compliance programs. The DOJ itself has identified several specific characteristics essential to an effective compliance program.

B. DOJ Treatment of Compliance Programs

The best source for DOJ treatment of compliance policies can be found in deferred and non-prosecution agreements. The DOJ first enumerated their required elements of an effective compliance program in the 1999 Consent and Undertaking in the case of United States v. Metcalf & Eddy.163 The elements in Metcalf & Eddy still offer some guidance to companies attempting to formulate effective compliance programs.164 Since 1999, however, various agreements with the

161 Id. at 309.
162 See Baer, supra, note 9, at 999.
164 In Metcalf & Eddy, supra, note 68, the DOJ articulated the nine elements necessary for an effective compliance program. These elements were: (1) creating a clearly articulated corporate policy against FCPA violations; (2) assigning one or more senior officials to implement and monitor the compliance policy; (3) establishing and maintaining a committee to review business with foreign
DOJ have elaborated upon the original *Metcalf & Eddy* elements, and in some cases have added new considerations.

Recent deferred and non-prosecution agreements are especially helpful when crafting an FCPA compliance policy. This is especially true because of the dramatic increase in FCPA enforcement since 2009, which has provided a larger sample size of data. In 2004, the DOJ charged only two individuals with FCPA violations and collected $11 million in criminal fines. In 2009–2010, by contrast, the DOJ charged over 50 individuals and collected nearly $2 billion. An analysis of recent enforcement actions reveals both (1) current insight into the DOJ’s baseline requirements for effective FCPA compliance programs and (2) substantial consistency in what it looks for in these minimum requirements. Specifically, based on our analysis of DPAs and NPAs, we have found that twelve elements are commonly required. At a minimum, these elements must be satisfied for a compliance program to be considered effective:

1. **Clearly Written Policy**: A clearly articulated, written, and visible corporate policy against FCPA violations.
2. **Standards Governing Certain Expenses, Payments**: Standards and policies that apply to all officers, directors, employees and third parties business associates governing:
   - (a) Gifts;
   - (b) Hospitality, entertainment, and expenses;
   - (c) Customer travel;
   - (d) Political contributions;
   - (e) Charitable donations and sponsorships;
   - (f) Facilitation payments; and
   - (g) Solicitation and extortion.
3. **Risk Assessment**: Risk assessment addressing the foreign bribery risks confronting the individual circumstances of the company including:
   - (a) Its geographical organization;

 contractors; (4) implementing clear procedures to prevent the delegation of discretionary authority to individuals with a propensity to engage in illegal activities; (5) implementing clear procedures to ensure that the company forms business relationships with reputable and qualified business partners for the purposes of doing business in foreign jurisdictions; (6) communicating the standards and procedures of the compliance program through regular training; (7) implementing appropriate disciplinary mechanisms; (8) instituting a reporting system that protects whistleblowers from retribution; and (9) requiring foreign business contracts to include prohibitions on FCPA violations. See id.

(b) Anticipated interactions with governmental officials;
(c) Industrial sector of operation;
(d) Involvement in joint-venture arrangements;
(e) Importance of licenses and permits in the company’s operations;
(f) Degree of governmental oversight and inspection; and
(g) Volume and importance of goods and personnel clearing through customs and immigration.

4. **Annual Review of Policies**: Annual review and updating of compliance policies taking into account relevant developments in the field and evolving international standards.

5. **Senior Executive Responsibility**: Insistence on senior executive responsibility for oversight of the compliance program, with direct reporting obligations to independent monitoring bodies.

6. **Financial and Accounting Procedures**: Institute financial and accounting procedures “reasonably designed” to prevent books, records, and accounts to be used for the purpose of foreign bribery or concealing bribery.

7. **Training and Certifications**: Implement mechanisms designed to ensure effective communication of compliance program to all directors, officers, employees, and third-party transaction partners, including:
   - (a) Periodic training; and
   - (b) Annual certifications procedures, certifying compliance with the stated training requirements.

8. **Voluntary Internal Reporting**: Encourage voluntarily internal reporting by providing for:
   - (a) Guidance and advice on complying with the compliance program;
   - (b) Anonymous reporting, including protection for those who report breaches occurring within the company; and
   - (c) Appropriate, and discrete, response to requests.

9. **Disciplinary Procedures**: Institute appropriate disciplinary procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm caused, and steps are taken to prevent further similar misconduct, potentially including making modifications to the compliance program where necessary.

10. **Due Diligence**: Require appropriate due diligence pertaining to retention and oversight of all agents/business partners including:
    - (a) Documented risk-based due diligence pertaining both the hiring and regular oversight of agents/business partners;
    - (b) Informing agents/business partners that the company is committed to abiding by the law and its policies against bribery; and
    - (c) Seeking reciprocal commitment from their agents business partners.
11. **Contractual Provisions:** Include standard provisions in contracts with agents/business partners reasonably designed to prevent violations of anti-corruption laws including:
   (a) Anti-corruption representations;
   (b) Rights to conduct audits of books and records of agent/business partners; and
   (c) Rights to terminate an agent/business partner if they breach any anti-corruption laws.

12. **Periodic Testing of Compliance Program:** Periodic testing of the compliance program to evaluate its effectiveness.\(^{166}\)

Additionally, among FCPA proceedings brought in 2011 by the DOJ, there are a few instances where the DOJ required *additional* elements for certain defendants for seemingly contextual reasons specific to those defendants’ situations and the nature of their FCPA violations.

In *United States v. Maxwell Technologies*,\(^{167}\) the DOJ, in addition to the minimum twelve elements, also required defendant Maxwell’s senior management to provide “strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code.”\(^{168}\) This additional requirement reflected the nature of Maxwell’s violation. In the deferred prosecution agreement, Maxwell admitted to taking part in a bribery scheme in which it paid nearly $3 million to an agent to be distributed to Chinese foreign officials, in return for securing contracts that profited Maxwell.\(^{169}\) Maxwell’s management within the United States discovered these payments and, rather than end the bribery scheme, “tacitly approved” of it, concealed the payments, and subsequently the scheme grew even larger. Furthermore, during the relevant time periods, Maxwell reclassified the amounts paid as bribes as a “reduction in revenue.”

In *United States v. JGC Corp.*,\(^{170}\) the DOJ imposed an even harsher additional requirement on the defendant JGC’s FCPA compliance program—mandating that it retain an “independent

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\(^{168}\) *Id.* at 30.

\(^{169}\) *See Id.*

\(^{170}\) No. 4:11-CR-00260 (S.D. Tex. Apr. 6, 2011).
compliance consultant,’’ subject to DOJ approval, responsible for overseeing its FCPA compliance program for at least two years and given substantial authority to do so.171 As with Maxwell Technologies, this burdensome requirement reflected the nature of JGC’s FCPA violation, which the DOJ considered substantial.172 During a ten-year period from 1994–2004, JGC and its co-conspirators participated in a scheme to pay tens of millions of dollars in to numerous Nigerian government officials to secure billions of dollars of business related to a project. The DOJ found that JGC’s officers, employees, and agents acted “willfully . . . in furtherance of the authorization, promise, and payment of bribes to Nigerian government officials pursuant to the scheme.”173

In United States v. DePuy, Inc.,174 the DOJ imposed several specific and stringent due diligence and training requirements on the defendant Depuy’s parent company, Johnson & Johnson.175 These additional requirements reflect both the nature of Depuy’s operating environment in countries like Greece, where corruption is extremely prevalent,176 and the sector-specific risk in industries like healthcare, where the party receiving the bribe has great discretion. In this industry, doctors and healthcare providers have broad discretion over prescribing medication. Johnson & Johnson’s representatives acknowledged that they provided cash, laptops, and excessive travel expenses to healthcare providers to incent these providers to prescribe Johnson & Johnson medication.177 As part of the deferred prosecution agreement with the DOJ, Johnson & Johnson agreed that it “will identify no less than five [Johnson & Johnson] operating companies that are high risk for corruption because of their sector.”178 Based on this agreement, companies operating in similar industries—namely where the counterparty to the transaction has substantial discretion over the allocation of funds and decisionmaking ability—should be on notice to design their compliance program to take this industry specific risk into account.

171 Id. at 49.
172 Id.
173 Id. at 28–29.
174 4:11-CR-099 (D.D.C. Apr. 8, 2011)
175 Id. at 33–37.
178 Id. at 34.
Yet, even in these deferred and non-prosecution agreements, the DOJ’s guidance often remains broad and the DOJ has repeatedly cited a list of minimum elements necessary for effective FCPA compliance programs, enumerated in deferred and non-prosecution agreements, it’s still unclear what the DOJ envisions in the actual wording of compliance policies. For example, as one practitioner recently pointed out, it is still unclear what the proper amount an employee may spend at dinner with a government official as part of a bona fide business expense.179

In sum, the DOJ does not provide a definitive blueprint for companies in designing effective FCPA compliance programs. However, an analysis of the DOJ’s approach to FCPA violations reveals substantial consistency in its expectations. It appears that all compliance programs must adequately cover at least the above-mentioned twelve minimum elements to be considered effective, and that in certain circumstances, companies may be required to include additional elements based on factors specific to that company.

V. METRICS FOR AN EFFECTIVE COMPLIANCE PROGRAM

Many DOJ diversion agreements lay out the features of an effective compliance program without actually specifying the metrics or methods for compliance analysis. For example, the deferred prosecution agreement between Johnson & Johnson and the DOJ required Johnson & Johnson to implement “periodic testing of the compliance code, standards, and procedures designed to evaluate their effectiveness in detecting and reducing violations of anticorruption laws and Johnson & Johnson’s compliance code.”180 However, the DOJ did not mandate specific ways of accomplishing these objectives; it only provided general guidance. Our analysis yields the following concrete suggestions for designing and monitoring an FCPA compliance program.

A. Risk-Based Assessment of a Business

The adequacy of a company’s FCPA compliance program will depend largely on company-specific factors, such as industry, size, and geographic reach. Thus, a critical step in compliance program analysis is to perform a company-specific risk assessment. Companies should create a summary of:

1. Business areas at greatest risk of corruption (i.e. those requiring significant foreign discretionary or regulatory approval);
2. Geographic locations of corruption risk;


180 Deferred Prosecution Agreement, United States v. Depuy, Inc., supra, note 177.
3. Specific employees and agents of the company working in these areas; and
4. Most importantly, foreign consultants and business partners with whom the company does business.\textsuperscript{181}

By identifying these four general factors, a company can focus the substance of their compliance program on specific business and geographical areas that pose the most significant level of FCPA risk.

The process of identifying foreign areas of risk should be conducted with the underlying focus on identifying areas where decisionmakers have significant discretion, specifically over the decision whether to engage in business (or allow companies to engage in business through the granting of licenses, permits, patents, etc.). Business areas that have highly formalized decisionmaking processes and are subject to significant oversight are, as a general matter, less susceptible to corruption than business areas that are heavily reliant the informal choices of decisionmakers.

Companies should also identify specific points of contact between themselves and foreign officials, including:

1. Points of contact between foreign officials and any operating companies; and
2. Points of contact between foreign officials and any outside parties acting on behalf of the company, including agents, consultants, representatives, distributors, teaming partners, and joint venture partners.\textsuperscript{182}

The anti-bribery provisions of the FCPA prohibit the influence of foreign officials, and thus the most prominent points of risk in any project or transaction necessarily involve either direct or indirect contact with foreign officials. Identifying precisely (1) which situations foreign officials are necessarily involved in and (2) which contexts foreign officials may be influential in will help companies to identify and regulate risky interactions.

Finally, to gauge specific levels of FCPA risk, companies should be generally aware of the culture of corruption in the geographical or national context they are working in. They can do this by conducting independent research or by referencing an index, such as Transparency


\textsuperscript{182} Id.
International’s Annual Corruption Perceptions Index (the “CPI”), which ranks the level of corruption of 180 countries.183

B. Assessment of FCPA Code of Conduct

Analysis of the above-detailed written policies pertaining to FCPA compliance is another essential step in compliance program analysis. “A company’s code of conduct provides a window into the company’s overall compliance program.”184 Written FCPA policies are necessary preconditions to implementing an effective compliance program. Although the DOJ is primarily focused on whether a written compliance program is actually being enforced, the scope and specificity of written FCPA policies are positive indicators of a strong compliance program. The more thoughtful, organic, and process-driven the FCPA-related policies are, the more the DOJ will favor them.

1. Scope

An effective compliance program must be expansive in scope. It must address all of the riskiest transactions, and it must regulate them with the specificity required to adequately prevent and monitor illegal payments or offers. A complete FCPA compliance program will have specific FCPA-related policies on:

1. Gifts and bribes;
2. Travel and entertainment;
3. Facilitating payments;185
4. Employees acting through third parties;
5. Third-party transaction partner due diligence;
6. Approval authority;
7. Charitable contributions;
8. Accounting for facilitating payments and agency fees;
9. Petty cash; and
10. Loans and advances.186


184 See McConnell, et al., supra, note 179.

185 Although, as previously mentioned, many FCPA compliance programs will consciously omit policies on facilitating payments. Companies do this because most employees will open themselves up to significant liability by attempting to interpret and follow a facilitating payments policy. The risks of including a policy that may expose a company to FCPA liability far outweigh the potential benefits resulting from any facilitating payments.

186 See McConnell, et al., supra, note 179.
Additionally FCPA standards and procedures must apply to all company officials and employees that could expose it to liability. Not even the highest levels of management should be exempt. The DOJ has specifically indicated that universal coverage of FCPA programs is not only to directly prevent violations, but also to encourage managers and directors to embrace a corporate culture where compliance policies are respected and enforced. Specifically, the FCPA appliance program apply to all:

1. Directors;
2. Officers;
3. Employees; and
4. Outside parties acting on behalf of the company in a foreign jurisdiction, including but not limited to: (a) Agents, (b) Consultants; (c) Representatives, (d) Distributors, (e) Teaming partners; and (f) Joint venture partners.187

2. Specificity

It is difficult to abstractly describe the required level of specificity for FCPA programs, because they are inherently context-specific. However, there are several practices that are typically essential to an effective FCPA policy. A sufficiently specific FCPA policy must:

1. Defines key terms;
2. Provides illustrative examples of appropriate versus unlawful activity; and
3. Includes methods for detection of improper behavior.188

Additionally, each policy with respect to a particular action should state:

1. Whether the action is prohibited absolutely;
2. The circumstances, if any, under which the action may be permitted;
3. Whether prior approval is required before the action is taken;
4. Whether such approval must be obtained from management, the compliance function, or the legal department; and
5. Required documentation procedures.189

C. Methods of Policy Communication and Implementation

188 McConnell, et al., supra, note 179.
189 Id.
The existence of a written program alone will not satisfy the DOJ. Prosecutors always inquire whether a company’s compliance program is being adequately enforced—that is, whether it is a “paper program.” Companies should primarily focus on the actual implementation of their compliance program, but they should also ensure that the communication and enforcement of a program is transparent and obvious. The existence of various channels for communication, implementation, and enforcement of a company’s FCPA policies also indicate a robust compliance program.

1. Communication

The DOJ requires that companies effectively communicate their FCPA compliance programs to all employees. This includes ensuring that “the policies, responsibilities, and lines of communication are clearly established.” Mechanisms to ensure effective communication of FCPA policies, standards and procedures include:

1. Mandatory, periodic training for all directors, officers, and employees;
2. Annual certifications certifying compliance with the training requirements;
3. Messaging in all communication channels with staff, including regular newsletters and town-hall style meetings held on other topics; and
4. Creating a compliance culture demonstrating support for compliance efforts.

2. Implementation

A company must have in place appropriate disciplinary procedures to address any violations of the anticorruption laws and the company’s compliance code by any wrongdoer, including senior management. Disciplinary procedures must focus not only on the specific deterrence of future bad conduct by any wrongdoer, but also must focus on general deterrence to prevent similar misconduct by any agent of the company.

190 See Blageff at §1:27 (“Companies that take their compliance programs seriously tend to make sure that the policies, responsibilities, and lines of communication are clearly established. The key to early handling of actual and potential problems is for information to flow quickly to people who have an assigned responsibility for dealing with them.”).


192 Carlsson-Sweeny, supra, note 181.

One aspect of effective enforcement is ensuring that contractors are aware and formally bound to a company’s FCPA policies. Thus, agreements, contracts, and renewals thereof with all agents and business partners should contain as standard provisions:

1. Anticorruption representations and undertakings related to compliance;
2. Rights to conduct audits of the books and records of the agent or business to ensure compliance; and
3. Rights to terminate an agent or business partner as a result of any breach of anticorruption laws, regulations, or related representations and undertakings.194

This concept of establishing contractual duties with agents can also be extended to directors, officers, employees, and third-party agents. All such individuals that have contact with foreign government officials should be required to certify annually that they have not engaged in behavior that violated the FCPA or the company’s compliance policies.195

D. Assessment of Compliance Infrastructure

An aspect of the DOJ’s inquiry into whether a written compliance program is actually effective is to ask whether a company has established the compliance infrastructure necessary to monitor and enforce its FCPA policy. This infrastructure is not limited to providing education and oversight. There must be mechanisms in place to ensure that employees feel it is safe to report FCPA violations or suspicious transactions. Also, any oversight or investigations must be properly documented and recorded so that in the case of a violation a company is able to minimize any liability it may face by fully cooperating with the DOJ.

1. Availability of Reporting and Support Mechanisms

An effective compliance program includes mechanisms for making and handling reports and complaints related to potential violations of anticorruption laws and regulations. Standard reporting mechanisms should include:

1. Reasonable access to an anonymous toll-free hotline;
2. Reasonable access to an anonymous electronic complaint form, where anonymous reporting is legally permissible;196

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194 Deferred Prosecution Agreement, DePuy Inc., supra, note 177, at 32.
195 Carlsson-Sweeny, supra, note 181.
196 Deferred Prosecution Agreement, DePuy Inc., supra, note 177, at 34.
3. An established process for referral, review, and response of reports by a standing committee that includes internal audit, legal, and compliance personnel; and
4. A system in place for employees to receive urgent advice when confronting potential violations in foreign countries.

These mechanisms represent generally applicable reporting procedures necessary for an effective compliance program. Companies should consider the overall sufficiency of their reporting requirements by evaluating the risks and incentives of reporting FCPA violations or suspicious practices for employees at all levels of the company. This is necessarily a contextual inquiry that each company must make individually.

2. Responsibility for Compliance Oversight

The DOJ has emphasized the importance of having at least one member of a company’s senior management responsible for the enforcement of policies, standards, and procedures. Their emphasis is because “[m]any FCPA compliance problems can be traced back to a company’s failure to define roles and make individuals accountable for ensuring compliance.”197 Thus, responsibility for the implementation and oversight of compliance policies, standards, and procedures should be assigned to one or more senior corporate executives:

1. A Chief Compliance Officer with the authority to report matters directly to the company’s Board of Directors and significant experience with compliance with the FCPA, including its anti-bribery, books and records, and internal controls provisions, as well as other applicable anticorruption laws and regulations.198
2. Heads of compliance within each high-risk business sector and geographic region, with responsibility for overseeing the company-wide compliance program within that sector or region and obligations to report directly to the Chief Compliance Officer and Audit Committee.199

E. FCPA Auditing

There is no shortage of guidance on how to effectively conduct a general compliance audit.200 However, there are several factors specific to the FCPA that companies should focus

199 Id. at 32.
on. First, a company should identify divisions of their operations that are high risk for corruption based on:

1. Sector and location;
2. High degree of interaction with government officials;
3. The existence of internal reports of potential corruption risk; and
4. Financial audit results.

The company should conduct random periodic audits of the divisions that are particularly high risk based on the factors above. These periodic audits (“FCPA Audits”) should be conducted with the goal of detecting violations of anticorruption laws and regulations.\(^{201}\)

1. **Frequency**

The frequency with which companies perform FCPA Audits should be directly based on the risk-assessment calculated above. Companies should perform FCPA Audits designed to detect violations of anticorruption laws and regulations:

1. For high-risk operating companies, at least once every three years; and
2. For other operating companies that pose corruption risk, no less than once every five years.\(^{202}\)

The DOJ will always look favorably on increased auditing, so companies should try to surpass the minimum required frequencies. Further, companies must ensure that their auditing practices remain effective over time by reviewing the list of high risk operating companies annually and update it as necessary.\(^{203}\)

2. **Process Considerations**

Finally, companies should ensure that their audit practices are subject to rigorous process standards. As explained above, the DOJ will look favorably upon compliance practices that are process-intensive. The more well thought-out and rigorous a company’s auditing procedures are, the more likely the procedures will be (1) actually effective at preventing FCPA violations and (2) deemed sufficient by the DOJ. Some examples of basic process standards are:

1. All compliance measures should be thoroughly documented.

\(^{201}\) See Deferred Prosecution Agreement, *DePuy Inc.*, supra, note 177, at 34 (describing the required procedures for risk assessments and audits).

\(^{202}\) *Id.*

\(^{203}\) *Id.*
VI. CONCLUSION

FCPA compliance is a central challenge for modern companies transacting business cross-borders. As this report demonstrates, the stakes are enormous. The criminal and civil fines imposed on violators have been severe; recently the fines imposed on organizations have skyrocketed, and there is no indication the DOJ is going to slow its escalating enforcement actions.

The lack of clear guidance offered by the DOJ exacerbates the challenges companies face. Yet, companies are not without recourse. The main way that companies can minimize their risk is through instituting effective compliance programs. These programs are comprised of systematic procedures instituted to efficiently and effectively prevent violations of the FCPA.

This report squarely takes on the challenge of establishing effective compliance programs. Firstly, the report provides companies with an analysis of how the DOJ enforces the FCPA. Secondly, this report creates a framework, based on this analysis, for developing effective compliance programs. Specifically, this report offers suggestions for creating and monitoring such a program through assessing the following areas: company-specific risks, the company’s code of conduct, the methods of policy communication and implementation, and the compliance infrastructure.

In the abstract, the solution seems simple. If you can detect a violation, you can likely prevent it. But in reality, it is often difficult to detect violations before they occur. Therefore, improved metrics and benchmarking cannot entirely solve the problem of undetected violations.

Nevertheless, having a strong framework in place makes infractions and resulting liability less likely to occur. It is also likely to reduce the scope of damages if a violation occurs by allowing for a company to promptly and effectively disclose violations and cooperate with the DOJ. In this era of increased risk exposure for FCPA violations, companies must do

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everything they can to minimize their liability. The recommendations offered by this report guide companies in the right direction: toward efficient and effective FCPA compliance.
Effective Antitrust Compliance Programs: Preventing Violations and Minimizing Penalties

Implementing Mechanisms to Detect Wrongdoing, Leveraging Compliance Programs in Investigations and Sentencing

TUESDAY, SEPTEMBER 23, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

Deirdre A. McEvoy, Counsel, Patterson Belknap Webb & Tyler, New York

Mark Rosman, Partner, Wilson Sonsini Goodrich & Rosati, Washington, D.C.


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Effective Antitrust Compliance Programs

Developing and Implementing Programs to Meet Regulatory Requirements and Detect Potential Violations

Deirdre A. McEvoy

September 23, 2014
What is an Antitrust Compliance Program?

- Formal corporate-wide program, with top-level buy-in, designed to prevent antitrust violations
  - Educate company personnel on the antitrust laws
  - Address both civil and criminal antitrust violations
- If not successful in preventing antitrust violations, want program to detect wrongdoing as early as possible, while damages are still small
  - Significant benefits possible in detecting criminal antitrust violations early
Antitrust Compliance and Cartels

• Compliance programs often are particularly important in preventing and detecting cartel activity
  ■ Cartels can engage in a wide-variety of illegal conduct
    ■ Price-fixing
    ■ Bid-rigging
    ■ Coordinated sales
    ■ Customer and territorial allocation
  ■ Red flags regarding potential cartel activity*
    ■ Increased trade association activity;
    ■ Sales transactions between your company and its competitors, particularly around the end of the year;
    ■ Data indicating market shares more stable than would be expected for the industry;
    ■ Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves; and
    ■ Sudden, unexplained price increases and copies of competitors’ price announcements in your files.

*Antitrust Compliance Programs: The Government’s Perspective, Address by William J. Kolasky, Deputy Assistant Attorney General for Antitrust, Antitrust Division, US Department of Justice, before the Corporate Compliance 2002 Conference, Practicing Law Institute, San Francisco, California, July 12, 2002
Why Are Antitrust Compliance Programs Important?

- Substantial civil repercussions for antitrust violations
  - Private antitrust suits may result in treble damages
  - Private suits and civil investigations by antitrust authorities are costly and distracting
  - Implications for future mergers, acquisitions and joint ventures
- Serious criminal repercussions for antitrust violations
  - Monetary fines
    - Corporate fines - $100M per offense or twice the gain or loss
    - Individual fines – from $350,000 - $1M per offense
  - Possible prison sentence
    - Maximum term of 10 years per offense, even first-time offenders
Why Are Antitrust Compliance Programs Important?

• Compliance programs are critical when violations occur
  ■ McNulty memo
    ■ Existence and effectiveness of a compliance program an element in determining whether and how to prosecute, although not sufficient standing alone to justify non-prosecution
  ■ Leniency program
  ■ Sentencing Guidelines
    ■ Federal court may depart from standard fines and jail terms, and impose a lesser sentence, if compliance program in place
  ■ Antitrust Criminal Penalty Enhancement and Reform Act of 2004
    ■ Limits damages recoverable from a corporate amnesty applicant to the damages it actually inflicted if the applicant cooperates with private plaintiffs in their damages actions against remaining cartel members
Why Are Antitrust Compliance Programs Important?

• The impact of antitrust violations is very real
  ■ Criminal fines in the hundreds of millions
    ■ Criminal antitrust fines in excess of $1 billion in 2013
    ■ Auto Parts: multi-year investigation resulting in over $2 billion in fines, including:
      ■ Bridgestone Corporation: $425M fine (2014)
      ■ Furukawa Electric Co. Ltd.: $220M fine (2012)
      ■ Yazaki Corporation: $470M fine (2012)
      ■ AU Optronics: $500M fine (2012)
    ■ 25 months average jail time (2010-2013)
  • Aside from fines and jail, the time, cost, and distraction to a company of an investigation and follow-on litigation cannot be underestimated
What are the Elements of an Effective Antitrust Compliance Program?

• To be deemed effective under the Sentencing Guidelines a compliance program at minimum must:
  ■ Establish and communicate clear standards;
  ■ Require the exercise of due diligence to prevent and detect criminal conduct;
  ■ Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law;
  ■ Assign oversight responsibility to high-level executives to ensure effectiveness;
What are the Elements of an Effective Antitrust Compliance Program?

• Minimum elements continued

  ■ Grant operational oversight in the normal course of business to specifically designated individuals. These individuals must receive adequate resources, appropriate authority, and direct access to executive authority;

  ■ Implement training programs and disseminate information about antitrust compliance;

  ■ Establish consistent enforcement of disciplinary mechanisms and incentives to follow the compliance program; and

  ■ Provide that reasonable steps are taken when a violation occurs to respond and prevent future violations.
What are the Elements of an Effective Antitrust Compliance Program?

• The Sentencing Guidelines emphasize the importance of an empowered compliance officer
  
  - Compliance “credit” now available even if most senior management is complicit in the antitrust violations if the individual in charge of compliance:
    
    - Reports directly to highest governing authority or an appropriate subgroup thereof;
    
    - Has authority to communicate personally and promptly on any matter involving criminal conduct or potential criminal conduct; and
    
    - No less than annually reports to group on the implementation and effectiveness of the compliance an ethics program.
Topics an Effective Antitrust Compliance Program Should Address

• **Communications with competitors:** agreements among competitors that reduce competition on price, quality, service, or customer allocation may violate antitrust laws

• **Dealing with customers and suppliers:** exclusive dealing arrangements are generally considered competitive, but restraints in the supply chain must be tested for reasonableness by analyzing the market and balancing harmful effects against benefits

• **Monopolization and dominance:** compliance programs should include examples of different types of predatory or exclusionary practices that might raise antitrust scrutiny

• **Price discrimination among buyers:** Robinson-Patman Act prohibits the sale of two products of similar grade and quantity at different prices to two different buyers where the price difference may result in injury to competition
Deirdre A. McEvoy is Counsel in the firm’s Litigation department and a member of the firm’s White Collar Defense and Investigations Team. Ms. McEvoy most recently served as Chief of the New York Field Office of the U.S. Department of Justice’s Antitrust Division. Under her leadership, the Office experienced unprecedented change, growth and development. Ms. McEvoy managed the Office’s first trials in close to a decade and, under her supervision, the Office secured several important convictions. The staff of 25 federal prosecutors and other legal staff that she managed handled primarily criminal antitrust enforcement matters, with a focus on cartel and other fraudulent conduct in financial markets.

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In 2010, Ms. McEvoy received a Prosecutor of the Year Award from the Federal Law Enforcement Foundation for the investigation and prosecution of securities fraud at a major international public company.

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Effective Antitrust Compliance Programs:

Developing and Implementing Programs to Meet Regulatory Requirements and Detect Potential Violations

Enforcing an Effective Compliance Program

September 23, 2014

Douglas M. Tween
New York
Evolution of Compliance

The bare compliance policy
Tailored compliance policy
Instilling a culture of compliance – ensuring all are aware and trained
Testing compliance – audits and health checks
Facilitating the detection of non-compliance – whistleblowing and internal amnesty programs
Enforcing an Effective Compliance Program

- Policies
- Standards of conduct
- Training
- Reporting requirements & procedures
- Audits & health checks
- Internal investigations
Policies

- Corporate policies should cover:
  - Sherman 1 – agreements unreasonably restraining trade
  - Clayton 2 and Robinson-Patman – price discrimination
  - Sherman 2 – monopolization
  - Clayton 7 – mergers & acquisitions
  - FTC Act – unfair competition
  - State antitrust laws
  - Foreign antitrust laws
Policies

– Corporate policies should cover:
  – Penalties for violations of antitrust laws
  – Effect of compliance program on penalties
  – DOJ and other leniency policies
Standards of Conduct

- Employees should:
  - Become familiar with company policies
  - Participate in training
  - Comply with company policies and cooperate with the company in any investigations
  - Disclose any potential violations
  - Provide annual certification of compliance with antitrust laws and policies
Tailored Meaningful Training

– No “one size fits all” or “off the shelf” compliance training
– Assess specific antitrust risks so that materials are as relevant and tailored as possible
– Use plain language – not legalistic and not too lengthy
– Not just another “Legal Initiative” – a business driven and management supported initiative
– Focus on what can be done, not just what cannot be done
Some Issues to Consider in Preparing …

- Who will be attending?
  - Senior executives?
  - Sales and marketing team?
  - Client service personnel?
  ➔ What is their level of knowledge?
    What are the competition law issues they deal with?

- Use case studies and make them relevant
  - Tailor case studies to the client and their market
  - Do they have any ‘real life’ scenarios that can be used?
Training – Content

– Basic principles for all employees:
  – why compliance is important
  – dealing with competitors
  – dealing with customers and suppliers
  – document creation and language
  – dealing with complaints/investigations
Training – Content

- Detailed modules on key topics:
  - trade association attendance
  - deals with competitors
  - dealing with search warrants/dawn raids
  - distribution models (for different regions)
  - merger control for deal-makers
- Case studies, scenarios, quizzes
- Don’t mention the law!
Training

– Consider a mix of in-person and web-based
– Consider size of group
– Identify key business units/individuals according to risk
– Involve senior personnel to show client ‘buy-in’
– Pitch according to audience (e.g. sales/marketing; legal)
– Cascade, through "train the trainer"
– Webinars
– Importance of documenting who is trained
Reporting Requirements & Procedures

- USSG require compliance effective program to include and publicize a system where employees may report or seek guidance without fear of retaliation
- Make clear employees are required to report both:
  - (1) actions of the company or employees that raise potential antitrust concerns; and
  - (2) misconduct that potentially violates antitrust laws
- Goals to prevent violations before they occur and to detect and remediate violations that have occurred
Reporting Requirements & Procedures

- Designate person(s) to receive reports
  - CCO, GC, HR, other
  - Mechanism to allow for anonymous complaints
    - Hotline
- Circulate list to examples of activity to report
  - Dealings with competitors/customers/suppliers
Audits & Health Checks

– Should there be an audit?
  – In-house or outside counsel
– Scope of the audit
  – Depends on size and locations of company, nature of business, use of sales personnel
  – Interviews, electronic document review, file review
– Presenting the results to management
  – Writing or verbal?
  – Recording the audit, who conducting, reporting results
– Dealing with issues identified during the audit
Internal Investigations

– Develop protocol for conducting investigations
  – Conduct as expeditiously as possible
  – Hold all relevant evidence
  – Preserve attorney-client and work product privileges
  – Identify relevant individuals for interviews
  – Maintain confidentiality to the extent possible
  – Document findings
  – Form of reporting
  – Discipline if appropriate
Doug Tween is the Chair of Baker & McKenzie's White Collar Defense and Investigations practice group and head of the firm’s New York Litigation Department. He is Co-Chair of the American Bar Association's Compliance and Ethics Committee, past Chair of the Cartel and Criminal Practice Committee, and a Non-Governmental Advisor to the International Competition Network. He is ranked by Chambers & Partners and Law360 and is a New York Super Lawyer.

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He received his J.D., cum laude, in 1989 from Northwestern University School of Law, where he was Articles Editor of the Law Review. He received his B.A. from Columbia College in 1984. After graduation from law school, he served as a law clerk to the Honorable William H. Timbers of the U.S. Court of Appeals for the Second Circuit. He is admitted to practice in the States of New York and Connecticut.
Antitrust Compliance Webinar: Practical Tips for Handling Government Investigations

Mark Rosman
Wilson, Sonsini, Goodrich & Rosati
September 23, 2014
Knock. Knock.
Who’s there? It’s the FBI.
How the Investigation Starts

- Knock at the door(s)
- Grand Jury subpoenas – documents/testimony
- Search Warrants – homes/offices
- Coordinated among multiple jurisdictions around the globe
- Overt vs. Covert
How an Effective Antitrust Compliance Program Helps

• Structure in place to handle knock at the door
• Employees know what to do and not to do
• Jumpstart internal investigation – time is critical at this stage
• Policy gives framework for what to look for
• Program gives added credibility with DOJ at the start
• Helps to avoid probation if charged
What a Compliance Program Is and Is Not

• A Compliance Program is:
  – A mitigating factor for sentencing (potentially)

• A Compliance Program is NOT
  – A defense to antitrust allegation
  – A factor in deciding whether to charge
  – Like FCPA compliance
How an Ineffective Antitrust Compliance Program Hurts

• Ineffective program may create huge liabilities
• Massive criminal fines
• Jail time for executives
• Class action suits
• Damaged reputation
• Probably better than nothing if it’s real and embedded
• If it’s only cosmetic, hurts credibility with DOJ
DOJ Leniency Policy

- Type A: Self Reporting
- You find problem through effective compliance program and audit
- Cost/benefit may favor self reporting
- Huge benefits: No jail for execs, no criminal fines, civil damages detrebled
- Similar policies in other countries
Type A Leniency Requirements

• Sherman Act violation
• First to qualify
• Took prompt and effective action to terminate conduct
• Full, continuing, and complete cooperation
• Not the organizer and leader
Type B Leniency

• After the knock at the door
• Still may be eligible, if no one else has applied
• DOJ does not have a prosecutable case against the company
• Time is of the essence
• Compliance program may propel early internal investigation
Amnesty Plus

- Once the investigation has begun
- DOJ gives company credit for any additional products or conduct
- No additional charges for new product
- Discounts in fine for original product
- Compliance program can aid in discovering additional conduct
Brent Snyder
Deputy Assistant Attorney General
Speech: Compliance is a Culture, Not Just a Policy (Sept. 9, 2014)

Why Have a Compliance Program?

• Compliance program must be combined with a real commitment by senior management to be truly effective

• “Most basic point” – an effective compliance program should prevent employees from conspiring to fix prices, rig bids, or allocate markets

• Compliance programs important today because “risk of detection and punishment has never been higher”

• Benefits include leniency for company and individuals

• Partially effective compliance program is better than nothing
What Makes an Effective Compliance Program?

• No “one size fits all” answer
  – Chapter 8 of the United States Sentencing Guidelines provides minimal requirements

• Starts at the top

• Company-wide commitment, including training on compliance policy

• Proactive, with monitoring, auditing, and anonymous reporting system available to employees

• Company must address individuals who violate policy

• Company must be prepared to self-report if it uncovers violation – and policy should reflect that readiness
Brent Snyder
Deputy Assistant Attorney General
Speech: Compliance is a Culture, Not Just a Policy (Sept. 9, 2014)

Two Hard Truths

1. A policy alone almost never avoids criminal antitrust charges because an effective policy would have deterred the conduct. You can’t argue that you have an effective policy when there is evidence of criminal violations.

2. The DOJ likely won’t give a company credit for a preexisting compliance program, for much the same reason – culpability is lowered when there is an “effective” compliance program. Nonetheless, not fair to characterize DOJ policy as “all stick and no carrot”
Mark Rosman is a partner in the Washington, D.C., office of Wilson Sonsini Goodrich & Rosati and a member of the firm's antitrust practice. With nearly 20 years of experience as a trial attorney and prosecutor in the Antitrust Division of the U.S. Department of Justice, Mark is well positioned to represent and counsel clients in connection with a variety of national and international antitrust matters, including cartel defense, criminal enforcement investigations, and merger and civil non-merger cases.

Prior to joining the firm, Mark served as Assistant Chief of the National Criminal Enforcement Section in the U.S. Department of Justice's Antitrust Division. In this role, he oversaw teams of trial attorneys and law enforcement agents who prosecuted numerous cartel cases and related violations, including Foreign Corrupt Practices Act (FCPA) violations, bribery, wire fraud, obstruction of justice, and kickbacks. Mark was lead attorney on many of the section's most prominent enforcement actions, including the Antitrust Division's investigation into air transportation price-fixing—one of its largest ever—which resulted in a record $1.8 billion in fines.

Previously, Mark was Special Assistant to the Directors of Enforcement in the Antitrust Division's Office of Operations, where he assisted Directors and Deputy Assistant Attorneys General in criminal matters and merger and civil non-merger cases. He worked on many cases involving amnesty, recommended indictments, plea agreements, immunity, investigations, and case development. Mark began his legal career as a trial attorney in the Dallas field office of the Antitrust Division.

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- Co-author with J. VanHooreweghe, "Considerations for Improving Antitrust Cartel Enforcement in the United States," The 10th ABA/IBA International Cartel Workshop, Rome, Italy, 2014 (based on M. Rosman's testimony before the United States Senate on November 14, 2013, at a hearing concerning U.S. cartel enforcement before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary)
- "A First-Person Look at the Price-Fixing Investigation," *Air Cargo World Magazine*, May 2011
- "Fixing Prices and Rigging Bids," The White Paper, National Association of Fraud Examiners, July/August 2001
SELECT SPEAKING ENGAGEMENTS:

- Faculty and Panel Leader, 10th ABA International Cartel Workshop, Rome, Italy, February 2014
- Panelist, Antitrust Liability/Immunity Panel, Fifth Annual McGill Conference on International Aviation Liability and Insurance, Montreal, Canada, October 2013
- Non-Governmental Advisor for USA, International Competition Network Cartel Workshop, Cape Town, South Africa, October 2013
- Moderator, "Navigating the Globe: Cartel Enforcement Around the World - Germany," ABA Cartel and Criminal Practice Committee, July 2013
- Chair and Moderator, "Dancing with the DOJ: Negotiating a Plea Agreement," ABA Antitrust Spring Meeting, April 2013
- Panelist, "Update on Criminal Antitrust Enforcement," New York State Bar Association Annual Antitrust Meeting, New York, New York, January 2013
- Moderator, "Navigating the Globe: Cartel Enforcement Around the World - India, Singapore, and Taiwan," ABA Cartel and Criminal Practice Committee, October 2012
- Moderator, In-House Counsel Antitrust and FCPA Compliance Roundtable, IATA Legal Symposium, Shanghai, China, February 2012
- Panelist, "Recent Nonprosecution Agreement for Antitrust Violations: New Trend or Anomaly?" ABA Section of Criminal Justice and Section of Antitrust, White Collar Crime and Cartel Committees, September 2011
- Lecturer, "Consumer Protection and Cartel Analysis in Toll Sector and Privatized Roads Market," Institute of Brazilian Lawyers and Inter-American Bar Association, São Paulo, Brazil, June 2011
- Panelist, "Competition Compliance in Airfreight," Cargo Network Services Partnership Conference, Phoenix, Arizona, May 2011
- "Criminalization of Competition Law Enforcement: The U.S. Perspective," 44th FIW Symposium (Institute for Economic Order and Competition), Innsbruck, Austria, March 2011
SELECT SPEAKING ENGAGEMENTS (continued):

- "Gary Stephan: A Conversation with Mark Rosman," American University, Katzen Center for the Arts, Washington, D.C., November 2010
- Presenter, Marine Hose Panel, International Competition Network (ICN) Cartels Workshop, Cairo, Egypt, October 2009
- Presenter, Cartel Panel, International Bar Association Annual Conference, Madrid, Spain, October 2009
- Presenter, Marine Hose Trial Brown Bag, ABA Trial Practice Section, Washington, D.C., May 2009
- Faculty, Plea Negotiation Panel, ABA International Cartel Workshop, San Francisco, California, February 2008

ADMISSIONS:

- Practice supervised by a member of the Bar of the District of Columbia
- State Bar of California
- State Bar of Florida
DOJ WARNING ABOUT CORPORATE COMPLIANCE PROGRAMS, PROBATION, AND EXTERNAL COMPLIANCE MONITORS

November 06, 2014

The U.S. Department of Justice, as part of a new policy focus, expects companies to establish compliance programs or risk probation and external corporate monitors in antitrust matters.

Recently, the U.S. Department of Justice (DOJ) announced a significant policy focus on the need for effective corporate compliance programs in antitrust matters. The DOJ expects that companies will operate effective compliance programs or they will risk the consequences for failing to do so. Assistant Attorney General Bill Baer, who leads the DOJ Antitrust Division, made this unmistakably clear by warning: “We reserve the right to insist on probation, including the use of [corporate] monitors, if doing so is necessary to ensure an effective compliance program and to prevent recidivism.”[1]

The same week, Deputy Assistant Attorney General Brent Snyder, who oversees criminal enforcement in the Antitrust Division, identified the central factors that the Antitrust Division will consider in assessing a company’s compliance program and whether it will request corporate probation and an external compliance monitor at company expense.[2] The emphasis on compliance programs was echoed in a separate speech by Leslie Caldwell, the head of the DOJ Criminal Division.[3]

Collectively, these major speeches by senior DOJ officials over a three-week period highlight the DOJ’s increased focus on the adequacy of company compliance programs. This LawFlash reviews this recent DOJ emphasis and the relevant factors considered by the Antitrust Division.

Role of Compliance Programs
An effective compliance program can advance three significant objectives: prevention, detection, and mitigation. First, a sufficient compliance program may prevent unlawful conduct that could expose a company to significant criminal liability. The potential liability may be substantial, depending on the conduct. Recent criminal fines obtained by the Antitrust Division have exceeded tens and hundreds of millions of dollars.[4]

Second, a compliance program may lead to early detection of reportable conduct. Upon detection, a company can assess the best remedial steps. The company may also consider applying for automatic leniency under the Antitrust Division Leniency Program. Under this program, a company may avoid any criminal liability and significantly minimize its civil liability if it is the first to report improper conduct and meets six other conditions of the program.[5] As Mr. Baer noted, “Effective compliance programs . . . maximize the chance for a company guilty of price fixing to find out about the conspiracy early enough to qualify for corporate leniency or otherwise cooperate with our investigation.”[6]

Third, once a criminal case has commenced, a strong compliance program can help mitigate the criminal fine and sentencing consequences, including whether the court will place the company on probation for up to five years or impose an independent monitor.[7] The DOJ has announced that it will evaluate a company’s compliance program as part of the sentencing process.

**Five Areas to Evaluate the Effectiveness of an Antitrust Compliance Program**

Mr. Snyder highlighted five aspects that the Antitrust “Division looks for when evaluating a company’s compliance program”:

- The senior management and the board of directors must “support and cultivate a culture of compliance.” Executive leadership sets the tone for compliance in a company.
- The compliance commitment should pervade the entire company, including executives, managers, and “those with sales and pricing responsibilities.” Depending on the circumstances, compliance training and education may also be appropriate for “subsidiaries, distributors, agents, and contractors.”
- The compliance program should be proactive by including training, providing a feedback forum, monitoring and auditing “risk activities,” and evaluating the program’s effectiveness.
- The company should “discipline employees who either commit antitrust crimes or fail to take the reasonable steps necessary to stop the criminal conduct in the first place.”
- A company should take steps to prevent a reoccurrence after criminal antitrust conduct has been discovered.[8]

In early October, Ms. Caldwell separately discussed “the failures of corporate compliance” and reviewed the “hallmarks of good compliance programs.”[9] Although her comments do not directly apply to antitrust cases, they reinforce similar factors and provide useful guidance to companies establishing a strong compliance program. The guidance includes, for example, periodic review of compliance standards; a strong commitment from company leaders; oversight of the compliance program; training, guidance, internal reporting, and investigation; enforcement of compliance standards; and monitoring and testing. The speech also underscores the recent DOJ focus on the effectiveness of a company’s compliance program in making prosecution and sentencing decisions in criminal cases.

**Antitrust Corporate Probation Factors**
As part of any corporate sentencing, one question the Antitrust Division now considers is whether a company should be placed on probation. Under U.S. sentencing laws, a company may be placed on probation as part of the final sentence[10] for a period of up to five years.[11] A company under probation must comply with certain conditions during the probation period, including visits and inspections by a probation officer. Standard probation conditions typically include requirements to obey all laws, complete fine payments and community service, and satisfy any other special conditions imposed by the court.[12] Another condition under the Sentencing Guidelines is for a company to “develop and submit to the court an effective compliance and ethics program.”[13]

In recent years, it has generally been uncommon for the Antitrust Division to request corporate probation after a company agrees to plead guilty and pay a negotiated criminal fine. However, as announced in the recent speeches, the Antitrust Division has now indicated a greater willingness to insist on or request that the court impose a term of corporate probation.

Mr. Snyder noted that an effective compliance program is one central factor that the Antitrust Division will consider in deciding whether to request corporate probation:

If a company has no preexisting compliance program or makes no efforts to strengthen a compliance program that has proved ineffective, then that company is a likely candidate for probation. . . . This is where a company’s decision to retain culpable individuals who do not accept responsibility in key management positions will be considered in deciding whether the company demonstrates a commitment to effective compliance. Conversely, companies that can demonstrate they have adopted or strengthened existing compliance programs may be able to avoid probation.[14]

He added that the Antitrust Division is considering how to “credit companies that proactively adopt or strengthen compliance programs after coming under investigation.”[15]

External Corporate Compliance Monitors

The Antitrust Division speeches also warn about the enhanced possibility of imposing an external corporate monitor at company expense for “the most egregious cases.”[16] According to Mr. Snyder, a corporate monitor may be requested to ensure that the company adopts an effective compliance program. An independent monitor will be considered for companies “that refuse to accept responsibility or acknowledge the illegality of their conduct” or where there is a heightened “risk of recidivism.”[17] Mr. Snyder anticipates that the Antitrust “Division will more frequently request it [a corporate monitor] in the future.”[18]

Thus far, a corporate monitor has been imposed in one criminal antitrust case and one civil case. These cases provide guidance on how the Antitrust Division may proceed in any request for an external corporate monitor.

When it comes to external compliance monitors in criminal cases, the failure of a company to have an effective compliance program and demonstrate acceptance of responsibility and reform will invite a request for probation and an independent monitor by the Antitrust Division. Courts often impose an external corporate monitor at company expense and authorize the monitor to review and inspect compliance and related issues. Mr. Baer stated, “Consistent with the division’s willingness to request external monitors in the civil context, the division will consider seeking conditions of criminal probation that include independent monitors when faced with circumstances in
which the division is not persuaded that penalties alone will deter future illegal behavior.” [19]

**The Need for a Tailored Compliance Program**

Finally, the DOJ speeches recognize the reality that there is no uniform compliance program (or “one size fits all”). [20] The core compliance features should be tailored to fit the company and industry. Mr. Snyder explained as follows:

Compliance programs should be designed to account for the nature of a company’s business and for the markets in which it operates. A multinational auto parts manufacturer with plants and sales all over the world likely requires a different approach to compliance than a road-building contractor that operates in a single state. Both companies have a need for effective compliance, but the necessary approach may be very different [21].

Ms. Caldwell indicated that the government would be particularly focused on a company’s “culture of compliance” and the manner in which it communicates with its employees regarding its compliance program. She stated, “Compliance programs must be put into place and—more importantly—communicated repeatedly and enforced properly throughout the entire organization. The emphasis on compliance must be heard not only in the executive suites at headquarters, but wherever the company operates around the globe.” [22]

Ultimately, a compliance program should be tailored to a specific company, industry, and risks [23] Ms. Caldwell has explained that the DOJ focuses on the following components of a compliance program when evaluating its effectiveness in conjunction with criminal investigation, prosecution, and sentencing issues:

- High-level commitment
- Written policies
- Periodic risk-based review
- Proper oversight and independence
- Training and guidance
- Internal reporting
- Investigation
- Enforcement and discipline
- Third-party relationships
- Monitoring and testing[24]

**Conclusion**

Collectively, the recent policy speeches send a strong and clear message about the DOJ’s high priority and focus on corporate compliance in antitrust and other investigations. An effective compliance program may prevent conduct that would otherwise invite an antitrust investigation. A compliance program can help detect reportable conduct that may be remedied or considered in a leniency application. If a criminal case is already under way, a strong compliance program may mitigate the consequences of the sentence, including whether corporate probation and a corporate monitor should be imposed.

Conversely, the recent policy statements send a firm warning that probation and a corporate monitor will be considered in future antitrust cases. The prospect of potentially being placed on probation and saddled with the significant financial, administrative, and operational burdens associated with a corporate monitor should be strong motivation for companies to assess the current effectiveness of their compliance programs against the recently identified DOJ factors.
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[2] Brent Snyder, Deputy Ass’t Att’y Gen., Antitrust Div., DOJ, Compliance is a Culture, Not Just a Policy (Sept. 9, 2014) [hereinafter Compliance is a Culture], available here.


[4] For a list of corporate fines exceeding $10 million, as updated by the Antitrust Division, see here.

Type A leniency is automatic upon satisfying six conditions. Type B leniency may be granted where the Antitrust Division is already aware of the conduct but "does not yet have evidence against the company that is likely to result in a sustainable conviction" and where other specific conditions are met.


[7] U.S.S.G. Chap. 8 (Introductory Commentary) (noting “the existence of an effective compliance and ethics program” may "mitigate the ultimate punishment of" a company).

[8] Compliance is a Culture, supra note 2, at 4–7.


[14] Compliance is a Culture, supra note 2, at 8–9.

[15] Id. at 9.

[16] Id.
[17]. Id.
[18]. Id. at 10.


[20]. See Compliance is a Culture, supra note 2, at 4 (noting there is no "one size fits all" approach to compliance programs); Ethics and Compliance, supra note 3 ("There is, of course, no 'off the rack' compliance program that can be installed at every company. Effective compliance programs must be tailored to the unique needs and risks faced by each company.").

[21]. Compliance is a Culture, supra note 2, at 4.

[22]. Ethics and Compliance, supra note 3.

[23]. For other guidance on compliance programs, see U.S.S.G. § 8B2.1 (listing minimum requirements for an "Effective Compliance and Ethics Program"); see also ICC Commission on Competition, International Chamber of Commerce Antitrust Compliance Toolkit (2013).

Good morning. I want to thank Joe Murphy, Herb Zinn, and the Practicing Law Institute for giving me this opportunity to share with you the Antitrust Division's perspective on the critical importance antitrust compliance programs play in deterring antitrust crimes. I worked on my first internal investigation 25 years ago for a company based here in San Francisco, so it's a particular joy to be back here again talking about this important subject today.

The need for effective corporate compliance programs has never been more evident. It seems that almost every day we read of another case of flagrant disregard of the law by the top executives of yet another large and previously well respected company. These nearly daily disclosures of widespread accounting fraud, self-dealing, and just plain greed threaten to undermine confidence in our financial markets and jeopardize our economic recovery. Given my responsibilities for our relations with other antitrust authorities worldwide, I also fear that these disclosures will undermine our credibility abroad, weakening our ability to serve as a model for the rest of the world, and providing ammunition for those who do not share our commitment to free markets and economic democracy.

During the time I've been at the Antitrust Division, as I've visited our field offices which do the bulk of our criminal enforcement, one consistent theme I've heard is that the companies we investigate rarely have effective antitrust compliance programs. Our staffs tell me they have been surprised at how sloppy many large, publicly traded companies have become about antitrust compliance. It appears that as companies have down-sized their legal and auditing staffs, and turned their attention more and more to deal-making, one of
the first places they cut is antitrust (and, I suspect, other) compliance. And we've all now seen the results. It's time for in-house counsel to return to practicing preventive law.

My task today is to talk about how to design a compliance program to prevent and detect antitrust crimes. David and Phil will discuss the role compliance programs can play in preventing environmental crimes and fraud. But in focusing only on criminal misconduct, I do not want us to lose sight of the equally important role compliance programs can play in preventing civil antitrust offenses. As all of you know, violations of the antitrust laws, be they civil or criminal, can expose your companies and clients to hundreds of millions, if not billions, of dollars in treble damage liability. A well-designed compliance program can reduce the risk of this civil exposure as well.

I want to begin by telling you a little bit about our criminal antitrust enforcement program and the important role our leniency program plays in it. Second, I want to share with you some of the common characteristics of the cartels we've prosecuted. Third, I will describe the essential elements of an effective antitrust compliance program. Finally, I will identify some of the common red flags you should be looking for as you counsel your clients and conduct antitrust audits.

I. The Antitrust Division's Criminal Enforcement Program

As I've said in other speeches, investigating and prosecuting hard core cartels has always been, and remains, our number one enforcement priority. Cartels whether in the form of price fixing, output restrictions, bid rigging, or market division raise prices and restrict supply enriching producers at consumers' expense and acting as a drag on the entire economy. In our view, these are crimes, pure and simple, and those who perpetrate them are criminals who belong in jail.

As commerce has become more global, so too have cartels. Over the last five years, we have successfully prosecuted sixteen major multinational cartels in industries as diverse as animal feed additives, vitamins, graphite electrodes for steel mills, and fine arts auction houses. These cartels affected over $55 billion in commerce worldwide and resulted in mark-ups as high as 100 percent in some cases. We have collected nearly $2 billion in fines and sentenced some 20 senior corporate executives to jail terms of more than one year, the maximum sentence being ten years. In the last few years, the European Union has joined our battle against cartels with a vengeance. Last year alone, the European Commission imposed fines in the aggregate of 1.9 billion Euros on some 40 companies for engaging in illegal multinational cartels.

Our expanded corporate leniency program has been the key to our uncovering and successfully prosecuting these cartels. This program offers any company that comes forward and blows the whistle on a cartel in which it has been participating, and which then cooperates fully with our investigation, complete amnesty from prosecution, so long as it meets the conditions set forth in the program. Amnesty is automatic if the company comes forward before we have opened an investigation, but may still be available if the company is the first to agree to cooperate in an ongoing investigation. A grant of amnesty protects not only the company, but also all of its directors, officers, and employees who also agree to cooperate.

Since the current version of this program was put in place in 1993, it has been instrumental in most of the major cartel cases we have prosecuted. In the last several years, we have received an average of one amnesty application per month. So successful has our program been that many other jurisdictions around the world, including the European Union, are now copying it.

It should be obvious that our amnesty program substantially increases the importance of having an effective antitrust compliance program that is designed to prevent antitrust violations and to detect them quickly when they occur. The existence of the amnesty program dramatically increases the likelihood that the cartel will be detected and punished. Only a company with an effective antitrust compliance program can hope to be in a position to be the first company in the door.
II. Common Characteristics of Multinational Cartels

Designing an effective antitrust compliance program requires knowing what it is you are trying to prevent. What I want to talk about next, therefore, are the common characteristics of the multinational cartels we've prosecuted. I'm hopeful that this will assist you in counseling your clients about what conduct to avoid and in designing an effective program for assuring they do not engage in unlawful cartel activity.

A. Brazen Nature of Cartels

The most startling characteristic of the multinational cartels we have prosecuted is how cold blooded and bold they are. The members of those cartels showed utter contempt for antitrust enforcement. The cartels invariably involved hardcore cartel activity -- price fixing, bid-rigging, and market- and customer-allocation agreements. Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection. The conspirators openly discussed, and even joked about, the criminal nature of their agreements; they discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they went to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world, creating false "covers" -- i.e. facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy. In one cartel, the members were reminded at every meeting -- "No notes leave the room."

B. Involvement of Senior Executives

The second most startling characteristic of these cartels is that they typically involve the most senior executives at the firms involved -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy.

These executives are not only disdainful of their customers and of the law, but also show equal contempt for their own company's rules -- rules adopted to protect the company and them from criminal conduct. They will, therefore, go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity.

A good example is the extent to which one executive of a corporation we recently prosecuted went to frustrate the efforts of the company's general counsel to enforce the company's antitrust compliance program. This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive...
worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particularly true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. Some cartel members go so far as to try to keep their cartel activity secret from all U.S.-based employees, even those responsible for carrying out their instructions as to the firm's output and prices. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas.

D. Using Trade Associations As Cover

International cartels frequently use trade associations as a means of providing "cover" for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting. Similarly, the citric acid cartel used a legitimate industry trade association to act as a cover for the unlawful meetings of the cartel. The cartel's so-called "masters," i.e., the senior decision-makers for the cartel members, held a series of secret, conspiratorial, "unofficial" meetings in conjunction with the official meetings of ECAMA, a legitimate industry trade association based in Brussels. At these unofficial meetings, the cartel members agreed to fix the prices of citric acid and set market share quotas worldwide. A former ADM executive testified that the official ECAMA meetings provided a "combination of cover and convenience" for the citric acid cartel. As he explained it, ECAMA provided "cover" because it gave the citric acid conspirators "good cause" to be together at the particular location for the official meetings -- which were held in Belgium, Austria, Israel, Ireland, England, and Switzerland. Since the cartel members were all attending those meetings anyway, it was convenient to meet secretly, in an "unofficial capacity" for illegal purposes, during the time period set aside for the industry association gathering.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also
allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual "budget" for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

G. Audits And The Use Of Scoresheets

Most cartels develop a "scoresheet" to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the "auditor." The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm's monthly sales, year-to-date sales, and annual "budget" or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line.

H. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

I. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term "over budget" and "under budget" in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for "compensation."

J. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Excess capacity in the hands of leading firms can be a particularly effective tool for punishing cheating and thereby enforcing collusive agreements. In lysine, ADM, which had substantial excess capacity, repeatedly threatened to flood the market with lysine if the other producers refused to agree to a volume allocation agreement proposed by ADM. In another case where competitors bought from one another, the cartel member with the extra capacity threatened to not sell to a competitor who was undercutting the cartel.

K. The Structure of Cartels
We have found that cartels can involve a surprisingly large number of firms. The number of participants in several of the cartels we prosecuted were surprisingly high. Five or six members were not uncommon and occasionally we have uncovered cartels with 10 or more members. This appears to be due in part at least to fringe players in the market feeling they will profit more by going along with the cartel than by trying to take share away from the larger firms by undercutting their prices. Nevertheless, industry concentration does matter. As economic theory predicts, the industries in which we have detected cartels are usually highly concentrated with the largest firms acting as ringleaders and the fringe players following along. In one case, there was evidence that the industry had attempted unsuccessfully to coordinate prices for several years before the cartel finally got off the ground after the industry consolidated down to approximately six players.

We have also found that a single cartel will often involve multiple forms of agreement. Just as George Stigler observed, cartels can take many forms, with the choice of form being determined in part at least by balancing the comparative cost of reaching and enforcing the collusive agreement against the risk of detection. The vitamin cartel, for example, included price-fixing, bid-rigging, customer and territorial allocations, and coordinated total sales.

These cartels also tended to be more durable than is sometimes thought. After the ADM plea, the Wall Street Journal stated "If colluders push prices too high, defectors and new entrants will set things right." Our experience has shown that this is not the case. Several of the cartels we prosecuted had been in existence for over ten years, including one (sorbates) that lasted 17 years, from 1979 to 1996.

We also found that while product homogeneity and high entry barriers may facilitate cartel behavior, they are not essential to it. While the products in our cartel cases tend to be fungible, there are sometimes exceptions. One case we prosecuted involved bid rigging on school bus bodies. School bus bodies have many options, but the conspirators were able to work out a formula that incorporated the options and trade-in value to determine a price at or below which the designated winning bidder was supposed to bid. Similarly, while most of our cartel cases involve industries in which entry tends to be difficult, there are notable exceptions, such as in the Division's many bid-rigging cases in the road building industry. The road building industry, at least at the time of the conspiracies, was not difficult to enter, yet the Division turned up numerous cartels.

L. Large, sophisticated buyers can still be victims.

In merger analysis, some assume that large purchasers in the market will provide sufficient discipline to prevent cartels. Our experience shows to the contrary that many successful cartels sell to large, sophisticated buyers. In the lysine cartel, the buyers included Tysons Foods and Con Agra; in citric acid, the buyers included Coca-Cola and Procter & Gamble; and in graphite electrodes, the victims included every major steel producer in the world. It is particularly ironic that one of the largest victims of the vitamins cartel had itself been one of the perpetrators of the citric acid cartel.

M. Cartel members include large, publicly traded companies

Our cases have turned up hard-core cartel activity top management at some of the world's largest corporations and most respected corporations including Christies/Sotheby's, ADM, Hoffmann-La Roche, BASF, ABB, and a host of others. We have repeatedly found that even the largest companies have become sloppy about their antitrust compliance programs and that they are not doing all they should to educate managers about the risks at which they put themselves and their companies by engaging in cartel activity.

N. Cartel participants tend to be recidivists

Finally, we have found that cartel participants tend to be recidivists. The most notorious example is Hoffmann-La Roche, which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel. Another example was a domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons
did likewise after they took over the reins of the businesses in the 1990s.

III. Designing an Effective Compliance Program

Now that you know what an illegal cartel looks like, let's talk about how to design an antitrust compliance program that can deter cartel activity by your company's executives.

A. The goals of a successful compliance program

A sound antitrust compliance program should have two principal objectives: prevention and detection. From our perspective, the true benefit of compliance programs is to prevent the commission of antitrust crimes, not to enable organizations that commit such violations to escape punishment for them. This should be true for the company as well. A corporate compliance program generally will not protect the company from prosecution and certainly will not protect it from potentially devastating treble damage liability. Therefore, every company's first objective in its compliance program should be to prevent wrongdoing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small. Early detection of antitrust crimes will give a company a head start in the race for amnesty. But, equally important, it will enable it to nip the wrongdoing in the bud before the damages from the cartel become so large that they would be material to the company's bottom-line.

A well-designed compliance program may also, in some circumstances, help your company qualify for sentence mitigation under the sentencing guidelines. I want to emphasize that once a violation occurs, a compliance program can do little, if anything, to persuade the Division not to prosecute. Organizational liability, both civil and criminal, is grounded on the theory of respondeat superior. We have rarely, if ever, seen a case where an employee who committed an antitrust violation was acting solely for his own benefit and not the company's. A strong corporate compliance program can, however, help at the sentencing stage, so long as the employees who committed the violation were not "high-level personnel" of the organization. Again, however, it is important to emphasize that in our experience most antitrust crimes are committed by just such high-ranking officials, which would disqualify the company from receiving any sentence mitigation, no matter how good its corporate compliance program. This again shows why it is so important if a company learns of a violation that it report it promptly and seek to qualify for our amnesty program. Finally, a strong compliance program may help your company avoid suspension and debarment, so long as the company takes aggressive steps to discipline the wrongdoers, make the victims whole, and assure that future violations do not occur.

B. Minimum requirements for an effective compliance program

The sentencing guidelines set forth seven minimum requirements that a compliance program must satisfy in order to qualify for sentence mitigation. These are:

- Clearly established compliance standards;
- Assigning overall responsibility to oversee compliance to high-level executives within the company;
- Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;
- Taking reasonable steps to communicate standards and procedures effectively to all employees;
- Taking reasonable steps to achieve compliance with standards;
- Consistent enforcement of standards through appropriate disciplinary mechanisms; and
- Taking reasonable steps when an offense occurs to respond and to present future violations.

It's important to stress that these are minimum requirements. To be truly effective, a compliance program must be customized to fit the firm's business, organization, personnel, and culture. The first three requirements are reasonably self-explanatory. I want, therefore, to focus my attention on the last four requirements.
a. **Effective communication.** Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by a set of practical do's and don'ts written in plain English so that every employee can understand them. A policy statement is, however, only the beginning. The company should have an active training program that includes in-person instruction by knowledgeable counsel. The in-person training sessions can be supplemented by video and Internet training tools, but these are no replacement for some personal instruction. The instruction should be as practical as possible, including case studies drawn from the company's actual experiences. The instruction should also include education as to the consequences of antitrust violations, both for the company and the individual employee. You could, for example, tell your employees that in the last several years, the Division has sentenced more than 20 senior executives to serve one year or more of jail time for antitrust crimes. One of these executives, who compounded his antitrust offenses with bribery and money laundering, is now serving a ten-year sentence. And, as Alfred Taubman recently learned, an executive's stature in the community and record of community service will not save him or her from prison. You might also tell your employees about the magnitude of the criminal fines and treble damage violators have had to pay. Hoffman LaRoche alone has paid more than $1 billion in fines and damages for its involvement in the vitamins price-fixing conspiracy.

b. **Steps to achieve compliance.** While training is important, it is not sufficient to assure compliance with the antitrust laws. To achieve that goal, a company must have a proactive law department that is dedicated to practicing preventive law. It is critical that the company's lawyers regularly attend management meetings and regularly visit the company's facilities so that employees know whom to call if they have a question or a problem. It is also critical that the lawyers win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces. A company also needs to have in place and to publicize a reporting system so that employees know to whom to report possible misconduct. Many companies establish ombudsmen and hot lines for this purpose, while others require their employees to report possible wrongdoing to the law department. Whatever system is in place should assure employees seeking to report misconduct confidentiality and protection from retaliation. Finally, a company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files (especially e-mails) of employees with competitive decision-making authority or sales and marketing responsibilities. It is important also to interview employees about their business and their contacts with competitors.

c. **Enforcement of standards through appropriate discipline.** It is absolutely critical that the company establish a record of consistently disciplining employees who disregard the company's antitrust compliance policy or who fail to report misconduct by others. In so doing, it is equally critical that the company discipline the chiefs, not just the Indians. The company should discipline senior managers who failed adequately to supervise or who created a climate of disrespect for antitrust principles in their organizations, even if they did not have actual knowledge of the particular wrongdoing.

d. **Reasonable steps to respond to violations.** When the worst happens and you discover that your company has committed a possible antitrust crime, it is also critical that the company respond promptly and energetically. This includes initiating an immediate investigation and reporting promptly to the agency. Remember: qualifying for amnesty can sometimes become a race with the first company in the door receiving the most lenient treatment. In addition to disciplining the employees responsible, the company should also take steps to make restitution to its customers, either through settling the inevitable treble damage actions or through commercial arrangements directly with the customers. The company should also re-examine its compliance program in order to learn from its mistakes and should make whatever modifications are necessary to assure that future violations do not occur.

As important these steps are, nothing is more important than senior management commitment and leadership. A culture of competition must begin at the very top of the company. Respect for the law is a necessary, but not sufficient, condition. Senior management must value competition and must be vocal in making that commitment known to employees. In the cases we prosecute, we find almost invariably that in
companies that violate the antitrust laws, the tone of disrespect for the law and for competition permeated the entire company, usually starting at the very top. Look at some of the people we have prosecuted: Alfred Taubman, the chairman and principal shareholder of Sotheby's; Mick Andreas, son of the long-time chairman and CEO, Dwayne Andreas, who was himself being groomed to take over the reins. In fact, ADM is a particularly good illustration of the kind of corporate culture that breeds antitrust crimes. It was a culture that believed, as one senior executive put it, that, "Our competitors are our friends. Our customers are the enemy." Both in representing defendants in criminal investigations in private practice and now as a prosecutor, this is exactly the attitude I've found in almost every company that commits antitrust crimes. And it's an attitude that can be changed only if the company's senior officers and directors all believe in the value of competition and communicate to their employees.

In addition to strong, positive leadership, it is important also that a company have sound incentive structures in place. There should be strong negative incentives against violating the antitrust laws and strong positive incentives for reporting and deterring violations. But companies should also have incentives that reward tough competition, not collusion. You want your sale force, for example, to have an incentive to sell more, not less at a higher price.

IV. Important Red Flags

In counseling your clients and in conducting antitrust audits, there are any number of common red flags to look for. Here are five.

*Trade association activity.* Look to see whether the positions of attendees at trade association meetings match the ostensible purpose of the meeting. Look for a pattern of meetings outside the United States. Look at whether the association is gathering detailed industry data, especially specific transaction data or forward-looking pricing and output data. Look to see whether meetings are attended by counsel and whether there is an agenda for the meetings and a record of what was discussed.

*Sales transactions between your company and its competitors, particularly around the end of the year.* While there are many legitimate reasons for competitors to buy from one another, such transactions can be used to "true up" a market allocation scheme.

*Data on market shares.* Look at your company's market shares to see if they are more stable than you would expect in a competitive market. Market shares that are stable over a long period of time are a strong indicator of collusion.\(^7\)

*Executives receiving calls at home or from callers giving fictitious names or refusing to identify themselves.* When conducting audits, therefore, talk not only to the executives, but to their assistants.

*Sudden, unexplained price increases and copies of competitor price announcements in your company's files.* If you find any, look at the fax footprints or the cover e-mail to see where they came from.

V. Conclusion

The stakes have never been higher. An effective antitrust compliance program can literally mean the difference between survival and possible extinction to a corporation whose responsible officers or employees are tempted to engage in -- or are engaging in -- an antitrust conspiracy. In today's enforcement environment, a multinational firm, and its executives, engaged in cartel activity face enormous exposure: criminal convictions in the United States; massive fines for the firm and substantial jail sentences for the individuals; proceedings by other, increasingly active antitrust enforcement agencies around the world where fines may be, individually or cumulatively, as great as or greater than in the United States; private treble damage actions in the United States; damage actions in other countries; and debarment. Given this exposure, it would be difficult to overstate the value of a compliance program that prevented the violation in the first place. And if a
violation does occur, it again would be difficult to overstate the value of a compliance program in detecting the offense early because amnesty is available to only one firm, the first to successfully apply in each cartel investigation. I hope my remarks today will serve their intended purpose of persuading you when you get back to your companies to make it your first priority to assure that your compliance program is up to the task.

**FOOTNOTES**

1. Deputy Assistant Attorney General for International Enforcement. The material in this paper draws heavily from materials developed and prepared by James M. Griffin, the Deputy Assistant Attorney General for Criminal Antitrust Enforcement, who in turn drew on materials prepared by his predecessor, Gary R. Spratling. I particularly want to thank Rebecca Meiklejohn of our New York Field Office for being the first to alert me to the neglect of corporate compliance the Division has found in several of its investigations and Donna Peel of our Chicago Field Office for contributing several of the common characteristics of multinational cartels. The views expressed in this article reflect those of the author and not necessarily those of the Division and the author accepts full responsibility for any errors.


4. The six conditions for obtaining automatic leniency are: (1) At the time the corporation comes forward, the Division has not received information about the illegal activity from any other source; (2) The corporation, upon its discovery of the illegal activity, takes prompt and effective actions to terminate its part in the activity; (3) The corporation reports the wrongdoing with candor and completeness and provides full cooperation to the division throughout the investigation; (4) The confession of wrongdoing is truly a corporate act; (5) Where possible, the corporation makes restitution to the injured parties; and (6) The corporation did not coerce another party to participate in the illegal activity and was not the leader or originator of the activity. If condition one is not met, but the others are, the company may still qualify if (1) it is the first corporation to come forward, and (2) the Division at that point does not yet have evidence likely to result in a sustainable conviction against the firm.


7. See, e.g., U.S. International Trade Commission, Report to the President on Global Steel Trade: Structural Problems and Future Solutions 65-84 (July 2000)(citing stable market shares in Japanese steel industry as evidence that the industry is cartelized).
Atlanta, GA, United States

Wednesday, October 1, 2014

Thank you, for that kind introduction. And thank you to the Ethics and Compliance Officers Association for inviting me to speak with you today about the important topic of corporate compliance. I understand that you have been hosting these conferences for more than 20 years, and I commend you for that!

As the Assistant Attorney General for the Justice Department’s Criminal Division, I have the privilege of leading a team of 600 talented and dedicated lawyers who work on the cutting edge of federal criminal law enforcement, as well as promoting the rule of law overseas.

While the Justice Department is often the last line of defense against fraud and corruption, all of you are the first. Criminal prosecutions can and do deter future bad behavior, but they most often serve as an after-the-fact sanction for misconduct.

Your collective work is designed to ensure corporate compliance and ethical practices from the outset. The importance of your work cannot be overstated: it serves to protect the integrity of our public markets, the country’s financial systems, our intellectual property, the retirement accounts of our hardworking citizens, and our taxpayer dollars used to fund healthcare programs and government and military contracts.

A very large part of the mission of the Criminal Division is fighting major corporate fraud and corruption. Our Fraud Section employs approximately 100 prosecutors who are experienced in investigating health care fraud, defense procurement fraud, securities and financial fraud, and violations of the Foreign Corrupt Practices Act.

Our Asset Forfeiture and Money Laundering Section investigates and prosecutes international money laundering and violations of U.S. sanctions laws, and it recovers the proceeds of foreign official corruption by kleptocrats.

Unfortunately, in our fraud, corruption, money laundering, and sanctions cases, we have seen too many failures of corporate compliance.

In this day and age – more than a decade after the Sarbanes-Oxley Act – we come across very few companies that do not have any compliance program. In fact, we have seen a marked improvement in compliance programs over the years. In years past, it was not uncommon to see companies with only rudimentary compliance programs.

That situation is illustrated by a case resolved just last year, involving Weatherford International, a Swiss oil services company that trades on the New York Stock Exchange. Three subsidiaries of Weatherford International pleaded guilty to violating the anti-bribery provisions of the Foreign Corrupt Practices Act and export controls violations.

Before 2008, the company had little more than a weak paper compliance program. The subsidiaries admitted that the company did not have a dedicated compliance officer or compliance personnel, did not conduct anti-corruption training, and did not have an effective system for investigating employee reporting of ethics and compliance violations. Weatherford companies paid $252 million in penalties and fines.
It is increasingly rare that we encounter circumstances in which a company has such a feeble compliance program. And I doubt that anyone in this audience works for a company like that, or you probably would not be here.

More often, we encounter companies with compliance programs that are strong on paper, but much weaker in practice.

That concept is illustrated by our recent, landmark criminal resolution with BNP Paribas, which is the largest bank in France and the one of the largest banks in the world.

BNPP admitted to helping individuals and entities associated with Sudan, Iran, and Cuba – all of whom are prohibited by law from accessing the U.S. financial system – to clear U.S. dollar transactions through U.S. banks.

The majority of the illegal payments were made on behalf of entities in Sudan, which was subject to a U.S. embargo based on the Sudanese government’s role in facilitating terrorism and committing human rights abuses.

Between 2004 and 2012, BNPP knowingly moved more than $8.8 billion through the U.S. financial system on behalf of Sudanese, Iranian and Cuban sanctioned entities. In the case of Sudan, BNPP’s conduct gave Sudan its only significant access to world financial markets, essentially helping to prop up a corrupt and repressive regime.

BNPP’s conduct represented a massive disregard for compliance, both with the law and with its own internal policies. And these egregious violations of law occurred despite concerns expressed on more than one occasion by compliance officers, and even in written opinions by outside counsel.

Some compliance people at BNPP did raise objections to the conduct. For example, one senior compliance officer at BNPP wrote to other high-level compliance and legal employees reminding them that certain Sudanese banks with which BNPP dealt “play a pivotal part in the support of the Sudanese government which . . . has hosted Osama Bin Laden and refuses the United Nations intervention in Darfur.”

Another senior compliance officer further warned that a satellite bank system was being used to evade U.S. sanctions and stated, “As I understand it, we have a number of Arab Banks (nine identified) on our books that only carry out clearing transactions for Sudanese banks in dollars. . . . This practice effectively means that we are circumventing the US embargo on transactions in USD by Sudan.”

In response to another e-mail voicing the same concern, a high-level employee explained that these transactions had the “full support” of management at BNPP Paris.

And in a meeting of BNPP’s top management, senior compliance personnel expressed concern about the bank’s role in working with Sudanese sanctioned entities. At that meeting, the compliance team was given a very wrong message: money speaks louder than compliance with the law.

And unfortunately, rather than push back, the compliance personnel backed down, and continued to allow the illegal transactions. An email summarizing that meeting explained management’s thinking: “[t]he relationship with this body of counterparties (meaning the nine Arab banks) is a historical one and the commercial stakes are significant. For these reasons, Compliance does not want to stand in the way of maintaining this activity . . . .”

All of these warnings went unheeded in favor of continued profits. The “tone at the top” in BNPP was, frankly, not just unsupportive of compliance, but against it. And, the company put its profit margins ahead of its business ethics.
BNPP may now realize that elevating illegal profit streams over compliance with the law does not pay. In July of this year, BNPP pleaded guilty in federal court to criminal charges related to its support of the Sudanese regime, as well as others, and was required to pay a record $8.8 billion monetary penalty.

If the warnings of the bank’s compliance staff had been heeded, or if the compliance team had insisted on raising their concerns to a higher level, such as the company’s board, the company may have avoided at least some of these very serious consequences.

Now, we recognize that even with proper support of a compliance program by management, perfect compliance in this increasingly global economy is incredibly difficult. Compliance departments are asked to monitor business units that are spread about the globe.

More than the geographic divide, however, there often are cultural divides from country-to-country that you must bridge. This is again demonstrated by the BNPP case.

During the investigation, we uncovered emails in which foreign bank branch employees expressly directed others to hide the criminal transactions from U.S. branch employees to ensure that the revenue stream could continue.

They directed the removal of references to Cuba, Iran, and Sudan from paperwork relating to these transactions, knowing that these references would have raised flags for diligent compliance employees.

Further emails directed an end run around U.S.-based compliance personnel. One employee wrote: "I only see the solution of going through another bank than BNPP NY for all transactions to these destinations. The other, less gratifying alternatives are to stop working in USD in these zones or to disguise the reality . . ."

There is no doubt that monitoring compliance on a global scale is a difficult, but difficulty cannot be used as an excuse to turn a blind eye to problematic business practices. Compliance programs must be put into place and—more importantly—communicated repeatedly and enforced properly throughout the entire organization.

The emphasis on compliance must be heard not only in the executive suites at headquarters, but wherever the company operates around the globe.

When considering criminal action against a company, one factor that the Justice Department evaluates is the company’s compliance program.

Under the department’s internal guidance, the Principles of Federal Prosecution of Business Organizations, prosecutors must consider “the existence and effectiveness of the corporation’s pre-existing compliance program.”

As all of you know, the United States Sentencing Guidelines also expressly include a company’s corporate compliance program as a factor in corporate sentencing in criminal cases.

There is, of course, no “off the rack” compliance program that can be installed at every company. Effective compliance programs must be tailored to the unique needs and risks faced by each company.

But there are hallmarks of good compliance programs. The department includes many of these in our non-prosecution agreements and deferred prosecution agreements, and I’d like to discuss them with you.

1. **High-level commitment.** A company must ensure that its directors and senior management provide strong, explicit, and visible commitment to its corporate compliance policy. Stated differently, and again, “tone from the top.”

This means that the importance of compliance should be communicated from the very top of the company. I once heard of a large company whose prominent CEO refused to put his signature on a company-wide
communication announcing the company’s new compliance program.

When asked why not, he replied: “Because we don’t hire those kinds of people.” Well, he could not have been more wrong. Every company hires “those kinds of people.”

Every company hires human beings who, when they are in a tough and maybe unfamiliar situation with no clear guidance about what is expected, will sometimes choose the wrong path. And that becomes even harder when they are operating in countries with business cultures very different from our own.

2. Written Policies. A company should have a clearly articulated and visible corporate compliance policy memorialized in a written compliance code. Again, employees need to know what to do—or not do—when faced with a tough judgment call involving business ethics. Companies need to make that as easy as possible for their employees.

3. Periodic Risk-Based Review. A company should periodically evaluate these compliance codes on the basis of a risk assessment addressing the individual circumstances of the company. Companies change over time through natural growth, mergers, and acquisitions.

Compliance policies should be live organisms that also change and grow with the company. You are only as strong as your weakest flank.

I once represented a company that had an A+ compliance program. But then they acquired a Chinese subsidiary and for several years failed to communicate to their new—and then not-so new--Chinese employees the need for FCPA compliance.

The predictable result: the Chinese employees continued doing business in the way that was familiar to them. And the US parent found itself in deep violation of the FCPA.

4. Proper Oversight and Independence. A company should assign responsibility to senior executives for the implementation and oversight of the compliance program.

Those executives should have the authority to report directly to independent monitoring bodies, including internal audit and the Board of Directors, and should have autonomy from management. Compliance programs needed to be funded; they need to have resources.

And they need to have teeth and respect within the company. For years, Wall Street banks housed their compliance programs across the Hudson River, in New Jersey. They were out of sight, out of mind. They were underpaid. And nobody paid much attention to them.

Compliance programs need to have an appropriate stature within the company, or compliance will be the last thing on the mind of an employee tempted to engage in wrongdoing.

5. Training and Guidance. A company should implement mechanisms designed to ensure that its compliance code is effectively communicated to all directors, officers, employees. This means repeated communication, frequent and effective training, and an ability to provide guidance when issues arise.

And as I said before, employees should see that the importance of compliance is being communicated from the top—whether the CEO, the Board, the General Counsel, or some other very highly respected senior-level figure within the company.

6. Internal Reporting. A company should have an effective system for confidential, internal reporting of compliance violations. I know that many companies have multiple mechanisms, which is good.

7. Investigation. A company should establish an effective process with sufficient resources for responding to, investigating, and documenting allegations of violations. What this means on the ground will depend on the
A sophisticated multi-national corporation obviously will be expected to have more resources devoted to compliance than a small regional company.

8. **Enforcement and Discipline.** A company should implement mechanisms designed to enforce its compliance code, including appropriately incentivizing compliance and disciplining violations.

And the response to a violation must be even-handed. Too often, we see situations where low level employees who may have implemented the bad conduct are fired, but their boss, who saw what they were doing and did nothing—and maybe even directed the conduct—is left in place.

This should not happen. Not only from a department perspective, but from a business perspective. Leaving in place senior managers who sanction bad behavior sends a very wrong message about the company’s true commitment to compliance and ethics.

People watch what people do much more carefully than what they say. When it comes to compliance, you must both say and do.

9. **Third-Party Relationships.** A company should institute compliance requirements pertaining to the oversight of all agents and business partners.

I cannot emphasize strongly enough the need to sensitize third parties, like vendors, agents, and consultants, to the importance of not compliance.

And these partners need to understand that the company really expects its partners to be compliant. This often means more than just including a boilerplate paragraph in a contract in which the partner promises to comply with the law and company policies. It means warning, and even terminating, relationships with partners who fail to behave in a compliant manner.

10. **Monitoring and Testing.** A company should conduct periodic reviews and testing of its compliance code to improve its effectiveness in preventing and detecting violations. Kick the tires regularly. As I said, compliance programs must evolve with changes in the law, business practices, technology and culture.

As I said, there is no “one-size fits all” compliance program. But these are guideposts that we consider important to the success of a strong program.

And as important as the compliance program itself is implementation. When we investigate a case, we look at the messages about compliance that are given to employees.

More than just reading the paper program or the code of conduct, we look at what employees are told in their day-to-day work.

We are looking at e-mails, chats, and recorded phone calls. We are talking to witnesses about the messages they received from their supervisors and management – did they receive messages about compliance, or about making money at all costs.

And we examine the incentives that a company provides to encourage compliant behavior – or not. If a company is actually encouraging compliance, if its values are to be ethical and within the law, then that message must be conveyed to employees in a meaningful way. Otherwise, the Department of Justice will not view the compliance program as credible.

And sometimes, effective implementation of a compliance program means standing apart from the other companies in your industry. We have seen significant misconduct taking place throughout an industry.

But the excuse that “everyone else is doing it” didn’t work in grade school, and it sure won’t work when federal agents come knocking at your door.
Let's take the LIBOR case as an example. LIBOR – the London Interbank Offered Rate – is the primary benchmark for short-term interest rates around the world. It is used as a reference rate for many interest rate contracts, mortgages, credit cards, student loans and other consumer lending products.

LIBOR necessarily depends on the integrity of the rate setting process and the bankers who provide input into that process. But an investigation by the Criminal Division, the Antitrust Division and the FBI has shown that banks and individual employees were manipulating the banks’ LIBOR submissions to benefit their trading positions, at the expense of counterparties to the trades.

To date, five global financial institutions have resolved the criminal investigation of LIBOR manipulation with the Justice Department, and each of them admitted to their misconduct. We have charged nine individuals, and two of those have pleaded guilty.

In some cases, this manipulation was boldly described in emails, as was the belief that others in the industry were engaged in similar, or worse, manipulation. For example, at the Dutch bank Rabobank, a LIBOR submitter agreed to manipulate the bank’s LIBOR contribution and wrote, “I’ll probably get a few phone calls but no worries mate… there’s bigger crooks in the market than us guys!”

The financial institutions that have resolved the LIBOR investigation so far have paid more than $4 billion to the Department of Justice and regulators. Our investigation continues, and will not stop until we have rooted out those individuals and companies responsible for this corporate financial malfeasance.

Effective compliance programs must be embedded in a company’s culture. And they need to be applied even in the face of misconduct by other companies in the same industry, even if that might mean a short-term competitive disadvantage.

A company’s executives can choose to rise above the rest – or race to the bottom. I am telling you that the Criminal Division will hold responsible companies and individuals that knowingly violate the law, no matter if the excuse is that “everyone” was doing it.

Now what should you do when your robust compliance program fails? Or, when it works, allowing you to discover criminal misconduct? I encourage you to conduct a thorough investigation and to disclose potentially criminal misconduct to the Justice Department.

When criminal misconduct is discovered, a critical factor in the department’s prosecutorial decision making is the extent and nature of the company’s cooperation.

The department’s Principles of Federal Prosecution of Business Organizations provides that prosecutors should consider “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”

Now let me flesh out the often discussed, but sometimes poorly understood, concept of cooperation.

Most companies now understand the benefits of voluntarily disclosing the misconduct before we come asking, and the benefits of conducting an internal investigation and providing facts about the misconduct to the government.

But companies all too often tout what they view as strong cooperation, while ignoring that prosecutors specifically consider “the company’s willingness to cooperate in the investigation of its agents.”

Corporations do not act, but for the actions of individuals. In all but a few cases, an individual or group of individuals is responsible for the corporation’s criminal conduct. The prosecution of culpable individuals – including corporate executives – for their criminal wrongdoing continues to be a high priority for the department.
For a company to receive full cooperation credit following a self-report, it must root out the misconduct and identify the individuals responsible, even if they are senior executives.

We are not asking that you become surrogate FBI agents or prosecutors, or that you use law enforcement tactics like body wires. And we do not need to hear you say that executive A violated a particular criminal law. All we are saying is that we expect you to provide us with facts. We will take it from there.

But a company that interviews its employees in an effort to whitewash the facts or spread the company’s narrative spin risks receiving any cooperation credit.

Additionally, for a company to receive full cooperation credit, the company must provide relevant documents and evidence, and should do so in a timely fashion.

We find that global companies are increasingly hasty to invoke foreign data privacy laws to avoid providing evidence to the department. While we recognize that some of these laws pose real challenges to data access and transfer, many do not.

As a result, we are looking closely—with an ever more skeptical eye—to ensure that these claims are honest and not obstructionist. A company that reads foreign data protection laws expansively, to restrict its disclosure of documents, when it could be read more narrowly, is in dangerous territory if it wants to receive full cooperation credit.

Although the department welcomes and encourages corporate cooperation, we do not rely upon it. We conduct our own robust investigations—often alongside that of the company—to build our own criminal cases and to pressure-test corporate claims of cooperation.

Companies claiming to cooperate while conducting lackluster investigations with little results should not be surprised when they do not get credit for their supposed efforts. And they should not be surprised when they face the consequences of our own investigations.

The benefits of corporate cooperation are clear. We often explicitly describe the benefits when we reach resolutions with companies. As just one example, earlier this year, the department announced Alcoa World Alumina’s guilty plea to FCPA charges stemming from its payment of millions of dollars in bribes to officials of the Kingdom of Bahrain.

As part of the plea, Alcoa paid $223 million in criminal fines and forfeiture. The department publicly commended Alcoa for its cooperation, which included conducting an extensive internal investigation, making proffers to the government, voluntarily making current and former employees available for interviews, and providing relevant documents to the department.

Alcoa’s cooperation was mentioned specifically as a factor that lowered the size of the criminal fine. In fact, absent cooperation, Alcoa could have faced a fine of more than $1 billion. Many people, however, want concrete examples of cases where we decided not to pursue charges at all in light of a company’s cooperation. The department is not typically in a position to disclose these declinations, and indeed many companies do not want the world to know that they were under department scrutiny.

Since it is difficult for me to publicly discuss some of the most positive results of cooperation, perhaps I can illustrate the point in reverse. In the plea agreement with BNP Paribas, the department highlighted the bank’s lack of cooperation with the government investigation as a crucial factor in the decision to require a guilty plea and record monetary penalties.

Significantly, BNPP affirmatively hampered the department’s ability to prosecute individual executives and employees for their criminal misconduct. To be sure, the breadth of the pervasive criminal misconduct in that case played a large part in the resolutions.
But, had the bank fully cooperated with the government investigation from the outset and provided the facts about the involvement of its employees, the bank would have been in a much better position on its day of reckoning.

The Criminal Division is more committed than ever to investigating corporate fraud and corruption. We will investigate regardless whether a company choses to cooperate.

But for a company to receive credit for its compliance program, it must have demonstrated effectiveness, with messages about compliance that come from the top and echo throughout the corporate hallways.

And for a company to receive full cooperation credit, it must uncover the misconduct, identify the responsible individuals, and fully disclose the facts to the department.

I want to thank you again for having me today, and I look forward to engaging with you on compliance issues over the coming years. I also want to thank you for your considerable efforts to keep your companies on the right side of the line.

I sincerely hope that you are all successful in that regard, so that we meet only at conferences like this, not across the Criminal Division conference room table discussing our investigation of your company.
Compliance is a Culture,
Not Just a Policy

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Thank you to the International Chamber of Commerce and the U.S. Council for International Business for inviting me to speak today. I’m happy to be able to share some thoughts on corporate compliance efforts from the Antitrust Division’s perspective.

First, let me say that we’re glad to see the work that the ICC, the USCIB and others are doing to improve corporate compliance programs. Compliance with laws of all types is the cornerstone of good corporate citizenship. Although a compliance program must be combined with a real commitment by senior management to be truly effective, this work by the ICC and the USCIB helps ensure that the cornerstone of corporate citizenship will be strong for companies that implement programs based on the Compliance Toolkit.

This work by the ICC and USCIB is also a vital complement to the work of the Antitrust Division. We all have the same goal – to prevent antitrust violations. And, we commend this important contribution by the business community. The most effective way to stop crime is to ensure it never starts. Effective corporate compliance programs are an important part of that effort.

As prosecutors, we are seldom positioned to stop a crime before it starts. We must rely on deterrence. This means we seek large criminal fines for corporations and significant jail time for executives who commit antitrust crimes. Certainly, compliance programs that prevent antitrust violations are far more preferable.

This leads me to the most basic point I want to make today, which is also the most important one. A truly well-run compliance program should prevent a company from conspiring to fix prices, rig bids, or allocate markets. Effective compliance programs should prevent that crime from beginning or, at a minimum, detect it and stop it shortly after it starts. Without question the best outcome for a company and its shareholders is to never be a subject of an
international cartel investigation. And an effective compliance program has the potential to be a significant contributor to that end.

The risks of participating in a price-fixing cartel should be obvious: high fines for the company; significant jail time for executives; expensive attorneys’ fees; substantial civil damages owed to customers; and exposure to further criminal investigations -- not to mention the associated bad publicity and internal distraction from the actual business of the company. All these outcomes can be avoided if companies implement effective compliance programs.

Compliance is especially important because the risk of detection and punishment has never been higher. Today dozens of countries have effective and aggressive cartel enforcement programs. An increasing number of them have followed the U.S.’s lead and criminalized anticompetitive conspiracies. More and more countries are working together through Interpol to identify individual conspirators as they travel from country to country. And in the last few years, the U.S. has obtained extradition of executives both for conspiring to fix prices and for obstructing our investigations. In short, with each passing year the world gets smaller and there are fewer places to hide from international cartel enforcement.

In an ideal world, every company would have an effective compliance program, and all compliance programs would prevent cartel activity. Unfortunately, this is not an ideal world. But companies can still benefit from their compliance programs, even when those programs fall short of preventing all collusion.

Even where a company's compliance program does not prevent all collusion, it may allow the company to self-report its conduct to the Division under our Corporate Leniency Program. For those of you who are not familiar with it, the Division's Leniency Program allows companies to self-report their
participation in illegal cartels. In exchange for self-reporting the illegal conduct, and for complete cooperation with the resulting investigation, a corporate leniency applicant will not be prosecuted by the Division.

The Division will take a similar approach to the corporate applicant's current employees, if they admit their knowledge and participation in the conspiracy and cooperate completely with the investigation.

Leniency may also permit a company to obtain a reduction in treble damages liability in the civil lawsuits that inevitably arise from our investigations. Companies may also apply for leniency abroad. Dozens of countries today have leniency programs modeled after the Division's, and we frequently see companies apply for leniency in more than one country at a time.

Even a partially effective compliance program can help a company meet many of the requirements of the Division's leniency program. To earn leniency, among other things a company must be the first to report the illegal conspiracy, must promptly stop its participation in that conspiracy, and must fully disclose its crimes.

A company with at least a partially effective compliance program should be able to discover the cartel early, increasing its chances of seeking leniency before its co-conspirators do, and then promptly stop its participation, disclose its antitrust crimes completely, and fully cooperate with the Division's investigation.

In sum, compliance programs make good sense – both good common sense and good business sense. Compliance programs help prevent companies from committing crimes in the first place. Even if they fail to do so, partially successful compliance programs may help companies qualify for leniency.
Either outcome easily warrants your companies’ efforts to adopt and strengthen compliance programs.

This leads to an obvious question, and the next topic I want to address – what makes an effective compliance program?

The Division has not provided a “one size fits all” answer to that question. Nor are we likely to do so. Not all effective compliance programs are built alike. Compliance programs should be designed to account for the nature of a company’s business and for the markets in which it operates. A multinational auto parts manufacturer with plants and sales all over the world likely requires a different approach to compliance than a road-building contractor that operates in a single state. Both companies have a need for effective compliance, but the necessary approach may be very different.

Nevertheless, I can make a few points of general application. Federal prosecutors are guided by the United States Sentencing Guidelines when it comes to matters related to sentencing and remedies. Chapter 8 of the United States Sentencing Guidelines provides guidance for minimal requirements of an effective compliance and ethics program. The Guidelines set out several common-sense principles that, when applied, increase the likelihood that a compliance program will be effective. The ICC Antitrust Compliance Toolkit extends those principles, providing guidance for a more comprehensive compliance program.

Today, I want to take a couple of minutes to touch on a few points the Sentencing Guidelines and the Toolkit have in common. These are the sort of things the Division looks for when evaluating a company’s compliance program.

First, it starts at the top. A company’s senior executives and board of directors must fully support and engage with the company’s compliance efforts.
If senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one. Employees will pick up on the lead of their bosses. If the bosses take compliance seriously, the employees are far more likely to take it seriously. If they don’t, the employees won’t. It’s as simple as that.

When senior management takes a lax approach to questionable competitor contacts or bosses make jokes about reaching agreements with competitors, they increase the likelihood that employees will treat compliance as optional.

Before taking my current job, I was leading the investigation of a company that had regular, comprehensive compliance training for all key company personnel. I knew the outside attorneys who provided the training. They were very good. A senior company executive was the star pupil in compliance quizzes given by outside counsel.

As it turns out, however, the senior executive, and even the head of the company, would walk out of that compliance training and do the very things the training was designed to prevent. They were fixing prices every single day. For years. Subordinates took their lead from the bosses and were involved, too. From the top of the company to nearly the bottom. The company was rife with price fixing. It started at the top.

Even though they are at the top, senior management must help lay the foundation upon which a company builds its culture of compliance. It does not matter how comprehensive a company’s compliance program is if the senior management does not make it a foundation of the company’s corporate culture.

For senior management, supporting compliance efforts means being fully knowledgeable about those efforts, providing the necessary resources, and assigning the right people to oversee them. This includes making sure the
compliance program is implemented successfully. This means not just receiving regular reports but actively monitoring the program. Executives and board members cannot simply go through the motions and hope that the company's compliance program works. They must make clear to employees that compliance is important and mandatory.

Second, a company should ensure that the entire organization is committed to its compliance efforts and can participate in them. This means educating all executives and managers, and most employees – especially those with sales and pricing responsibilities. When appropriate, it may also mean providing training for subsidiaries, distributors, agents, and contractors. And it means providing all members of the organization the opportunity to report anonymously and seek guidance about potential or actual criminal conduct without fear of retaliation.

Third, a company should ensure that it has a proactive compliance program. This means that in addition to providing training and a forum for feedback, a company should make sure that at risk activities are regularly monitored and audited. And the company should regularly evaluate the compliance program itself to understand what it can improve. The fact that each of you is here today says to me that your respective companies understand this.

Fourth, a company should think carefully about its approach to individuals who personally violated the antitrust laws or otherwise engaged in conduct inconsistent with an effective compliance program. A company must encourage individuals to adhere to the compliance program. And a company should be willing to discipline employees who either commit antitrust crimes or fail to take the reasonable steps necessary to stop the criminal conduct in the first place. It has been departmental policy not to insert itself into the personnel matters of companies by requiring the termination of culpable employees, and
that has not changed. A company’s retention, however, of culpable employees in positions where they can repeat their conduct, impede a company’s internal investigation and cooperation, or influence employees who may be called upon to testify against them, raises serious questions and concerns about the company’s commitment to effective antitrust compliance.

Finally, a company that discovers criminal antitrust conduct should be prepared to take the steps necessary to stop it from happening again. This likely includes making changes to a compliance program that failed to prevent the criminal conduct initially. A company should also recognize that, in such circumstances, it will be required to accept responsibility for that conduct, which is the final topic I would like to touch on this afternoon.

Effective compliance programs prevent antitrust violations. They do not absolve them. So, it is important that guilty companies accept responsibility for their crimes. With that in mind, I'll start with two hard truths and then get to an easier one.

The first hard truth: The existence of a compliance program almost never allows the company to avoid criminal antitrust charges. Why? Because a truly effective compliance program would have prevented the crime in the first place or resulted in its early detection. This has been the Division's position for at least the last twenty years, and it isn't likely to change. Companies don't accidentally conspire to fix prices, rig bids, or allocate markets. Cartels are seldom short-lived and, in my experience, aren’t limited to low level or rogue employees.

Instead, the vast majority of conspiracies we see reflect true corporate acts. The conspiracies primarily benefit the companies. As a result, both the companies and individual participants are proper subjects of our investigations. Companies should be fined so they do not profit from the crimes. And
companies should expect that the Division and the courts will take steps so that they do not commit crimes again.

The second hard truth: the Division, like the Department of Justice as a whole, almost never recommends that companies receive credit at sentencing for a preexisting compliance program. The Sentencing Guidelines allow companies to receive lower culpability scores, and thus lower fines, if they have “effective” compliance programs. Eligibility for this credit requires discovery and self-reporting before the offense is discovered or likely to be discovered outside of the company.

As a practical matter, however, it is almost never the case that a company other than the leniency applicant approaches the Division before we conduct searches or issue grand jury subpoenas. Nor do we see companies detecting, stopping, and reporting illegal conduct before significant time has passed.

In these situations, it is hard to see how a company's compliance program has earned it a significant reduction in its corporate fine. Receiving leniency is the ultimate credit for having an effective compliance program. No other company is likely to satisfy the requirements of the Sentencing Guidelines for an effective compliance program.

These may seem like tough positions for the Division to take, but the Division is no different than the Department as a whole. Now it is time for the easier truth, however. Having a compliance program may still benefit a company preparing to plead guilty to an antitrust crime in a couple different ways.

First, companies may avoid additional oversight by the court and the Division. The Sentencing Guidelines require every convicted company to have an effective compliance program. That is not optional. If a company has no
preexisting compliance program or makes no efforts to strengthen a compliance program that has proved ineffective, then that company is a likely candidate for probation.

In those situations, the Division will seek terms of probation that will require the company either to adopt an effective compliance program or address deficiencies in an existing compliance program. This is where a company’s decision to retain culpable individuals who do not accept responsibility in key management positions will be considered in deciding whether the company demonstrates a commitment to effective compliance. Conversely, companies that can demonstrate they have adopted or strengthened existing compliance programs may be able to avoid probation.

In addition, we are actively considering ways in which we can credit companies that proactively adopt or strengthen compliance programs after coming under investigation. Although we have not finalized our thinking in this area, any crediting of compliance will require a company to demonstrate that its program or improvements are more than just a facade. As I mentioned earlier, true compliance starts at the top, is not optional, and is part of the company’s culture.

In the most egregious cases, the Division will not give a company the autonomy to decide for itself what compliance program works best for it. In those cases, in addition to probation, the Division will seek the appointment of a compliance monitor to oversee the adoption of an effective compliance program. While those situations will most often be limited to companies that refuse to accept responsibility or acknowledge the illegality of their conduct, there may be cases when it will be appropriate for even a pleading company if that company, through word or deed, demonstrates a risk of recidivism.
To date, the Division has sought the appointment of a compliance monitor in only one a criminal matter, but the appointment of monitors is not uncommon in other contexts in the Department of Justice, and, I suspect the Division will more frequently request it in the future. For that reason, it is worth describing the circumstances that led to the Division’s decision to seek the appointment of a compliance monitor.

In 2009, a grand jury indicted AU Optronics, its American subsidiary, and several of its senior executives for their participation in a long-running conspiracy to fix the price of liquid crystal displays – the screens used in laptop computers and computer monitors. The company had no preexisting compliance program and, even after it was under investigation, took few steps to put one in place.

Before, during, and after the 8-week trial that led to its conviction in 2012, AUO maintained not only that it had done nothing wrong, but also that the charged price-fixing conduct should not even be treated as illegal. Even after conviction, it did not accept responsibility. It continued to make defiant public statements and took wholly inadequate steps to adopt a compliance program. And, given the tone from the top executives at the company, any such compliance program could never have been effective. As a result, we asked that AUO and its U.S. subsidiary be placed on probation and that the court appoint an independent monitor to oversee the implementation of an appropriate compliance program.

AUO actively resisted this request, but the district court agreed with us. It imposed a three-year term of probation. That probation required AUO to develop and implement an effective compliance and ethics program. And, as importantly, AUO was required to hire, at its own expense, an independent
monitor to oversee the implementation of an antitrust compliance program and provide quarterly reports to the U.S. Probation Office.

The lesson from the AUO case should be clear: active refusal to accept responsibility, including resisting effective compliance, will result in probation and independent monitors. The Division will take a similarly hard line with companies that do not take their compliance programs seriously.

I want to close with just a few more remarks. I’ve been told that the Division’s approach to compliance programs is all stick and no carrot. I don’t think that’s true, but more importantly, I think it misses the point. The purpose of having an effective compliance program is not so that the Division will cut you a break if your company commits a crime. That view is a concession of failure. Instead, the purpose of having an effective compliance program is to be a good and responsible corporate citizen. The purpose of having an effective compliance program is to avoid ever being the subject of a criminal antitrust investigation. The purpose of having an effective compliance program is the prospect of early detection and leniency. Each of these reasons for having a compliance program is a carrot – a very valuable carrot. And, if the stick becomes necessary, it is the company’s conduct and how it responds to the investigation that will determine what the stick looks like.

That is the point I want to leave you with. At all times, and in all ways, compliance, and the consequences of ineffective compliance, are controlled by the company. It starts and ends there. The ICC is giving you some of the tools of compliance, and they are very good tools. But ultimately how you use the tools, what you build with the tools, and how solid that structure is depends on you and your companies.

Thank you.