



COMMENTARY ON THE OECD GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS AND COMPLIANCE

Joe Murphy and Donna Boehme

BACKGROUND

With the February 2010 publication of its Good Practice Guidance on Internal Controls, Ethics and Compliance (“Good Practice Guidance” or “the Guidance”) as Annex II to the November 26, 2009 Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions¹ (“the 2009 Recommendations”), the OECD, through its anti-bribery Working Group (“the OECD Working Group”) has created an important blueprint for anti-bribery compliance programs. The Good Practice Guidance sets out in helpful detail the elements of a good anti-bribery compliance approach. From the standpoint of ethics and compliance practitioners, the Good Practice Guidance provides additional support to existing best practice in the field and validates a proactive, practical, risk-oriented strategy for detecting and preventing misconduct in organizations. Although, on its face, the Good Practice Guidance speaks primarily to foreign bribery, most of the provisions could be readily applied to ethics and compliance programs on a much broader basis as well.

¹ Working Grp. on Bribery in Int’l Bus. Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009), <http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/727.aspx> (follow “Good Practice Guidance on Internal Controls, Ethics, and Compliance (English)” hyperlink).

The Good Practice Guidance represents a dramatic step: the first international guide for compliance and ethics programs. This Guidance has the endorsement of all of the OECD members – 33 of the leading democratic economies – plus five other signatory countries that support the anti-corruption mission. As such, it has the potential to move the development of compliance and ethics programs forward on a global basis in the same way the U.S. Organizational Sentencing Guidelines standards did in 1991. Also, as was true for the Sentencing Guidelines, which technically only applied to federal judges imposing sentences in criminal cases, these standards are likely to have an influence on all aspects of programs relating to compliance far beyond their original focus on bribery. The authors have been working in the field of compliance and ethics on an international basis for many years, including consulting for companies, governments and non-governmental organizations relating to compliance and ethics programs. Our participation has included representing the SCCE in the OECD Working Group proceedings relating to the 2009 Recommendations. As a guide to practitioners and those in government we offer the following commentary on the elements of the Good Practice Guidance.

The Good Practice Guidance is divided into two parts: Parts A and B. Part A is addressed to companies and B is addressed to civil society, NGOs, business associations and other professional organizations. This commentary only addresses Part A. All commentary is noted as such and is in bold font. The Good Practice Guidance language is in italics.

Good practice guidance on internal controls, ethics, and compliance

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter “OECD Anti-Bribery Convention”); contributions from the private sector and civil society through the Working Group on Bribery’s consultations on its review of the OECD anti-bribery instruments; and previous work on

preventing and detecting bribery in business by the OECD as well as international private sector and civil society bodies.

INTRODUCTION

This Good Practice Guidance (hereinafter “Guidance”) is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions (hereinafter “foreign bribery”), and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. It recognizes that to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery.

This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter “SMEs”), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

COMMENTARY: A first point to note is that this is not referred to as a “best practice” guide; there is pragmatic recognition that while these practices are effective compliance tools, there may develop in the future additional or even better ways to prevent and detect misconduct. That said, as a practical guide promulgated by a highly prestigious international body, companies are well-advised to take these very seriously and treat them as fundamental elements of any effective anti-corruption program. In the U.S. in particular, the Attorney General, Eric Holder, has

already indicated in public remarks that the Guidance is endorsed by the U.S. government.²

ONE INTEGRATED PROGRAM.

In considering the Guidance, it is advisable not to use a narrow lens and limit the approach to corruption only. The history of the compliance and ethics field has seen the development of standards that start in one risk area and quickly develop as standards for all types of compliance programs. With the exception of item 5 which addresses corruption specifically, the Guidance contains steps that apply to compliance and ethics programs across the board. To this point, the introduction “*recognizes that to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework.*”³ The Guidance should not be applied in isolation from the rest of a company’s compliance and ethics program. In fact, companies should incorporate these Good Practice Guidance provisions into all elements of their compliance and ethics program efforts. This language also recognizes how impractical it can be for different enforcement authorities to ignore compliance efforts in other areas and promote compliance programs in one specific risk area as if it were the only one. In a practical world, a company may be willing to give a single chief ethics and compliance officer (CECO) a seat at the table at senior management meetings and to provide the necessary empowerment, independence and resources needed to be effective. But if management is asked to do this separately for a long list of areas, such as privacy, bribery, competition law, employment discrimination, etc., that may be too much

² Attorney General Eric Holder, Remarks at the Organisation for Economic Co-Operation and Development (May 31, 2010), *available at* <http://www.justice.gov/printf/PrintOut2.jsp>.

³ Working Grp. on Bribery in Int’l Bus. Transactions, *supra* note 1, annex II at Introduction (emphasis added).

to ask or expect. By consolidating compliance efforts under one senior officer, the overall program and all its elements can be much more effective. A consolidated approach also helps avoid overlapping and uncoordinated compliance activities that can be cumbersome and counterproductive, such as bombarding employees with isolated messages and training about competition law, privacy, and anticorruption law all at the same time.

The OECD's approach on this important point of having one overarching program builds upon practices in other risk areas. The Canadian Competition Bureau in its 2008 Bulletin on compliance programs showed the same insight:

The Bureau further recognizes that competition law compliance is just one area within the broader field of compliance. Such a program may be appropriately incorporated into a broader compliance program that deals with a range of compliance issues. Similarly, companies operating in multiple jurisdictions may prefer to implement a company-wide compliance program.⁴

WHY THE GUIDANCE MATTERS TO COMPANIES.

The OECD Working Group tells practitioners that the Guidance “is intended to serve as non-legally binding guidance to companies.”⁵ As a legal matter this is certainly the case, but this statement was also technically true of the U.S. Sentencing Guidelines – they did not literally bind anyone but federal judges (and today are only guides for the judges).⁶

⁴ Sheridan Scott, Comm'r of Competition, *Preface to COMPETITION BUREAU CAN., CORPORATE COMPLIANCE PROGRAMS (2008)*, available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html>.

⁵ Working Grp. on Bribery in Int'l Bus. Transactions, *supra* note 1, annex II at Introduction (emphasis added).

⁶ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2011).

Practitioners should not take much comfort from this disclaimer. While OECD is not legally imposing this Guidance on Convention signatories, it also has no power to prevent countries from using the Guidance in whatever way they choose. If history is any guide, enforcement authorities around the world are likely to use the elements of the Guidance whenever they are assessing company programs. A company under scrutiny by enforcement authorities in any OECD Convention signatory country for possible violations of anti-bribery laws might find itself hard pressed to explain why it did not implement these good practices. In this respect, the Guidance could be seen as creating certain expectations for adherence, even though it is not “legally binding.” Thus, wise companies will take proactive steps to meet all of the elements in the Guidance for two important reasons: first, the Guidance contains smart compliance practices, and second, it will likely influence the views of regulators and enforcement authorities in general.

SMALL AND MEDIUM-SIZED ENTERPRISES.

The introductory paragraph also notes the flexible intent of the Guidance. In a particular nod to small and medium enterprises with more limited resources, the Guidance recognizes that every company should take a fit-for-purpose approach that appropriately addresses its particular circumstances.⁷ This is a view also seen in the U.S. Sentencing Guidelines, which recognize that compliance and ethics programs will vary appropriately based on the size of an organization.⁸ There is wisdom in this recognition that size is a factor in building a program, but never an excuse for not having one. Any size organization can commit violations, and any size organization is capable of

⁷ Working Grp. on Bribery in Int’l Bus. Transactions, *supra* note 1, annex II at Introduction.

⁸ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.2 (2011).

making a commitment to know and follow the law. If a company has the resources to research foreign markets, scope out agents in those markets, and adjust its marketing sales activities for those markets, then it certainly can devote some attention to preventing illegal conduct by those acting for it. This nuanced view contrasts sharply with an alternative approach, also seen in the United States, taken in the field of federal government contracting, where the federal agencies responsible for such contracting drew back from requiring programs for entities that were small, rather than the more perceptive OECD approach of recognizing that size is just a matter of scale.⁹ The advice to companies remains the same: look at what should be done practically given the operational risks and resources of your company, and draw advice and assistance from peers and trade and business associations to implement fit-for-purpose steps to prevent misconduct.

A) Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.

COMMENTARY: Risk assessment is a logical first step for any program. Before taking mitigating action to address risks, one should first know what those risks

⁹ See Federal Acquisition Regulation for Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, 67091-92 (Nov. 12, 2008).

are. In the U.S. Sentencing Guidelines there is a similar element calling for risk assessment:

(c) In implementing subsection (b) [the 7 compliance and ethics program elements], the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.¹⁰

In conducting this assessment under the U.S. Sentencing Guidelines, companies are to determine how likely a violation may be, and what its impact would be.¹¹ The strong logic of this analysis suggests the same approach should be taken under the Good Practice Guidance.

ASSESSING RISK PERIODICALLY.

The Good Practice Guidance predictably reminds companies that “[s]uch circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary.”¹² No one-time assessment of risks is going to be effective on a permanent basis. Changes in the business and the surrounding environment are certainly going to have an effect on risk in the anticorruption area. The U.S. Sentencing Guidelines, although briefer in their reference, make this same point, calling for organizations to conduct their risk assessments “periodically.”¹³ Likely, this would include responding to changes and events as

¹⁰ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(c) (2011).

¹¹ *Id.* § 8B2.1 cmt. 7.

¹² Working Grp. on Bribery in Int’l Bus. Transactions, *supra* note 1, annex II at § A.

¹³ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(c) (2011).

they happen. But it should also include periodically stepping back from the day-to-day work involved in a program and surveying the environment to assess what may have changed that affects the risks. One structured step that companies can consider is to have an interdepartmental compliance committee that meets periodically with risk assessment as a permanent agenda item.

EXAMINING BRIBERY RISK SPECIFICALLY.

While the U.S. Sentencing Guidelines speak to risk assessment in programs in general, the Good Practice Guidance correctly highlights the point that within each risk area such as foreign bribery there also needs to be risk assessment. This assessment, in turn, then provides the basis for allocating resources to address the varied risks associated with that particular legal area.

For example, a multinational company could examine how each of its markets rates under the Transparency International Risk Perception Index as a starting point for focusing its anti-bribery compliance efforts. Other factors such as results of prior audits, the nature of helpline calls from any location, who its customers are, the use of third party intermediaries and news reports relating to corruption would all be factors in the assessment process. This process, in turn, would then be used to determine how to allocate compliance resources.

Companies should consider, inter alia, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

COMMENTARY: Here the simple inclusion of the words “*inter alia*” contains a very important message. This list, while an excellent starting point, is not intended to be the exclusive list and merely reflects an international consensus as to certain base-line

measures. Therefore, companies need to use the list and be sure they have covered all the points here, but they should not expect that by covering all of these elements that there may not be other measures that could be considered by prosecutors and regulators as necessary for the company's line of business and methods of operation. Such steps as obtaining and exercising the right to audit third party business partners, which make sense as a practical compliance step, may also be expected by government authorities that are asked to credit a company's compliance and ethics program. Accordingly, even when applying the Good Practice Guidance, companies will still need to remain vigilant in tracking developments in the compliance and ethics field and employing program steps based on their risk assessments and what they reasonably believe is needed to prevent and detect violations.

On this point, item 12 of the Guidance dealing with the need to conduct assessments of the program provides very important insight. Such assessments are to be conducted:

“taking into account relevant developments in the field, and evolving international and industry standards.”

MONITORING INDUSTRY PRACTICE.

In other words, both in designing the original program and in reviewing it over time, companies need to look to what others are doing, and what is happening in the compliance and ethics field worldwide. This approach draws from the 1980s' U.S. Defense Industry Initiatives on Business Ethics and Conduct's ("DII") standard number 4, which requires the DII members to “share best practices with respect to business ethics and compliance, and participate in the annual DII Best

Practices Forum.”¹⁴ The DII standards, in turn, led to the provision in the Commentary to the U.S. Sentencing Guidelines, which warn companies that failure to meet “industry practice” may cause their programs not to receive credit under the Guidelines.¹⁵

Other compliance program standards. Companies also need to be alert to the existence and relevance of other compliance program standards and requirements. Some of these may relate specifically to corruption, but others are broad enough to cover all programs including those dealing with corruption. For example, a company doing business in Australia should add to the Guidance standards the detailed elements set forth in AS 3806-2006, the standards on compliance programs promulgated by Standards Australia.¹⁶ (New Zealand has also adopted these standards for programs in that country.)¹⁷ An Italian company should follow the provisions of Italy’s laws, including the interpretations set out in Italian case law. Of course, American companies and any other entities that could be subject to U.S. law should consider the U.S. Sentencing Guidelines standards, the description of expected compliance program efforts set forth in the U.S. Attorneys Manual,¹⁸ the teachings of Delaware case law¹⁹ and guidance offered by the Criminal

¹⁴ *The DII Principles*, DEF. INDUS. INITIATIVE ON BUS. ETHICS & CONDUCT, <http://www.dii.org/about-us/dii-principles> (last visited May 12, 2012).

¹⁵ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 CMT. 2(B) (2011).

¹⁶ See generally STANDARDS RELATING TO COMPLIANCE PROGRAMS (2006) (Austl.), available at <http://www.saiglobal.com/PDFTemp/Previews/OSH/as/as3000/3800/3806-2006.pdf>.

¹⁷ See generally STANDARDS RELATING TO COMPLIANCE PROGRAMMES (2009) (N.Z.).

¹⁸ U.S. ATTORNEYS’ MANUAL § 9-28.800 (2011), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcr m.htm#9-28.800.

¹⁹ See, e.g., *Stone v. Ritter*, 911 A.2d 362 (Del. 2006); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

Division's Fraud Section, including examples given in settled cases.²⁰

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery;

COMMENTARY: It is clear that mere written policies will not meet this standard, nor can companies simply delegate compliance to one manager and then walk away from responsibility. The top management must not only say the right things but must walk the talk. "*Strong, explicit and visible support*" is a tough standard that takes quite a bit of attention by senior management who must take action to drive ethical leadership down the management line.²¹

SUPPORTING THE COMPLIANCE AND ETHICS PROGRAM.

There is also a risk that this language may be misread merely to say "support and commitment" to acting legally. Of course that is expected but that is not what this language says. It expressly calls for support of the program. Indeed, prior to development of the Good Practice Guidance, the OECD Working Group hosted a public consultation in March 2009 soliciting views of civil society, NGO's, and others during which participants (including one of the authors) were able to comment on aspects of an effective compliance and ethics program. During that seminar, the participants repeatedly stressed the need for the highest-level

²⁰ See Consent Order at para. 4a, United States v. Metcalf & Eddy, Inc., No. 99CV12566-NG (D. Mass. 1999); Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep't of Justice, to Saul M. Pilchen, Esq., attorney for Paradigm B.V. app. B at para. 1 (Sept. 21, 2007).

²¹ For one perspective on how senior management can show such support, see Joe Murphy, *How the CEO Can Make the Difference in Compliance and Ethics*, 20 ETHIKOS 9 (2007).

officials of the company to actively and visibly support the program; in other words, to take affirmative steps to set the right “tone at the top.” This cannot be accomplished simply by saying the executives will obey the law. Rather, this means support of such things as the training, compliance audits, imposing discipline for violations, and other elements of the program. If, for example, senior management circumvents the program elements and undermines the efforts of the compliance and ethics officer, then it cannot meet this standard no matter how often the CEO announces his personal beliefs in opposing corruption.

2. a clearly articulated and visible corporate policy prohibiting foreign bribery;

COMMENTARY: This provision borrows from the U.S. Sentencing Guidelines’ item 1 on policies²² but emphasizes the need for the policy to be “*clearly articulated and visible.*”²³ The approach here is practical and real world in orientation. This would likely be measured, for example, by interviewing employees to see if they knew the policy existed. The policy should at least be in the company’s code of conduct provided to all employees. It should also be easy to find on the company web site. In order to be “clearly articulated,” a policy should be understandable to laypersons (i.e. non-lawyers); for instance, plainly stated standards of behavior are preferred to repeating black letter law. In practice, some companies have further developed examples or FAQs to supplement their policies and to help employees understand how they are intended to operate. It is likely that the genesis of this language is the U.S. Department of Justice, which had required

²² U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(1) (2011).

²³ Working Grp. on Bribery in Int’l Bus. Transactions, *supra* note 1, annex II at § A.2.

just such “clearly articulated” policies in its settlement of FCPA cases.²⁴

3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;

COMMENTARY: This provision is an important reminder that compliance is not a function left to the compliance officer. Even with a CECO, it is really all employees who are responsible for compliance in their areas of responsibility. The U.S. Sentencing Guidelines have a somewhat different focus but with the same message:

“High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program. . . .”²⁵

There needs to be a compliance officer to lead and oversee the program and provide expertise, tools, and guidance, but the job of senior management is to see that the program is embedded in all parts of the organization.

This point is also reflected in the Commentary to the SCCE Code of Professional Ethics for Compliance and Ethics Professionals:

Rule 2.2 CEPs [compliance and ethics professionals] shall ensure to the best of their abilities that employing organizations comply with all relevant laws.

Commentary: While CEPs should exercise a leadership role in compliance assurance, all employees have the responsibility to ensure compliance.²⁶

²⁴ See Consent Order at para. 4a, United States v. Metcalf & Eddy, Inc., No. 99CV12566-NG (D. Mass. 1999); Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep’t of Justice, to Saul M. Pilchen, Esq., attorney for Paradigm B.V. app. B at para. 1 (Sept. 21, 2007).

²⁵ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(2)(B) (2011).

²⁶ SOC’Y OF CORPORATE COMPLIANCE & ETHICS CODE OF PROFESSIONAL ETHICS FOR COMPLIANCE AND ETHICS PROFESSIONALS R. 2.2 & cmt., *available*

For companies to meet this part of the standards it should be clearly articulated to employees that they are individually responsible for ensuring that what they do is legal and consistent with the spirit and letter of company policy. Senior managers must take item 1 seriously and make a point of promoting the anti-bribery compliance program and the company's commitment to honest business dealings and preventing bribery throughout the operations they manage. They must also be models of the behavior they are trying to promote. Because this reference includes compliance with the requirements of the compliance and ethics program and not just compliance with the law, companies should make support of, and fidelity to, the compliance and ethics program one of the bases for employees' performance goals and evaluations.

4. oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;

COMMENTARY: For the program to be effective there needs to be a Chief Ethics and Compliance Officer ("CECO"). The CECO, in turn, needs to be positioned and equipped to get the job done. In theory a company could opt to have an anti-bribery CECO, but this may not be practical or recommended. There are numerous compliance risk areas, and it would be administratively difficult to have separate CECOs for bribery, competition law, privacy, fraud, securities law, etc. The better approach is to have one fully-empowered CECO who oversees anti-bribery efforts as well as

at

http://www.corporatecompliance.org/Content/NavigationMenu/Resources/ProfessionalCode/SCCECodeOfEthics_English.pdf.

compliance measures for other key risk areas. This is envisioned in the reference in the introduction to the anti-bribery effort being “interconnected with a company’s overall compliance framework.”²⁷

AUTONOMY FROM MANAGEMENT.

In this context, direct access to the board is indispensable. “Autonomy from management” communicates that it cannot be business as usual. For example, it is unlikely that just putting this additional label on the general counsel would provide that autonomy. This reference to autonomy also reflects the experience from cases like the Madoff scandal in the U.S., where the “compliance officer” was a relative of the CEO. One important role of a CECO is to address the possibility of misconduct at senior management level; autonomy helps give the CECO the perspective to perform this function. This is one area where small and medium-sized enterprises would likely be held to a different standard than large companies. While a large company can afford to have a CECO dedicated to the compliance and ethics task, in a small company this is not as practical. Nevertheless, steps can be taken to maximize the ability of the executive holding the CECO title as well as other responsibilities to function effectively and with an appropriate degree of autonomy.

WHAT SHOULD BE REPORTED TO THE BOARD?

What would be included in the reference to reporting “matters” directly to an independent monitoring body such as an audit committee? The most practical interpretation would be that this includes allegations, investigations and findings of violations as well as reports to the monitoring body on

²⁷ Working Grp. on Bribery in Int’l Bus. Transactions, *supra* note 1, annex II at Introduction.

the implementation and effectiveness of the compliance and ethics program. Coverage of implementation and effectiveness would match the scope of the Commentary on item 2 of the Sentencing Guidelines, that the compliance officer “should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.”²⁸ In addition, it would be closely aligned to the new revisions to the Guidelines relating to programs receiving credit in the event that higher level personnel are involved in a violation. Among the conditions for receiving such credit is a requirement that the person responsible for the program be authorized to report “(A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.”²⁹

REPORTING DIRECTLY TO THE BOARD.

What is meant by reporting “directly”? While there should normally be written reports to the board regarding compliance matters, it is very likely that this term envisions personal, live reporting by the CECO to the board. This is the standard explicitly employed in the Sentencing Guidelines revision, calling for the compliance officer to have “express authority to communicate personally” to the board or board committee.³⁰ This reporting should also be on an unfiltered basis; any ability of management to interdict or censor this reporting relationship conflicts with the concepts of “autonomy” and “authority” and seriously detracts from the CECO’s ability to report candidly and fully to the board.

²⁸ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. 3 (2011).

²⁹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 11 (2012).

³⁰ *Id.*

Authority. “Authority” as used in this Guidance includes the power to get things done and also to stand up to management. In the compliance and ethics field, this draws its origins from sources such as the work of Australia’s John Braithwaite and his research on the importance of “clout” for compliance professionals. The U.S. Sentencing Guidelines’ pending revisions also support the direct, unfiltered access by the CECO to the company’s governing authority. The emphasis on CECO positioning and independence can also be found in US settlement agreements, agency guidance and case law.

SENIOR CORPORATE OFFICER.

Interestingly, this is one area where review of prior U.S. Department of Justice materials suggests an evolution in the approach. In both *Metcalf & Eddy* and the later *Paradigm* case, the person responsible for the program was required to be a “senior corporate official.”³¹ The OECD Guidance is more specific, calling for a “senior corporate *officer*.” While one could argue about who is an “official” in a company, an officer is more precise, and a “senior officer” would without doubt be at the top of the company – part of the “C” suite. This is an essential element, because the compliance officer needs to have a seat at the executive table in order to function effectively. *Paradigm* also sheds light on the origin of the Good Practice Guidance language on reporting to the board. In *Paradigm* para. 4 it is also specified that the compliance officer “shall have the authority to report matters directly to Paradigm’s Audit Committee of the Board of Directors.”³²

³¹ Consent Order at para. 4(b), *United States v. Metcalf & Eddy, Inc.*, No. 99CV12566-NG (D. Mass. 1999); Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep’t of Justice, to Saul M. Pilchen, Esq., attorney for Paradigm B.V. (Sept. 21, 2007), app. B at para. 4.

³² Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep’t of Justice, to Saul M. Pilchen, Esq., attorney for Paradigm B.V. (Sept. 21, 2007), app. B at para. 4.

The term “senior corporate officer” is significantly more stringent than terms like “senior manager” or “corporate officer,” and this may reflect a history of mis-positioning this role in companies. A corporate officer or senior manager could, in usual corporate practice, report to a higher level officer. But a “senior corporate officer” is clearly not a technical compliance specialist with an inflated title. One cannot be a “senior corporate officer” and still report to other officers like the General Counsel; rather, the selection of these specific words, combined with the reference to autonomy and authority signal that the CECO reports to the very top of the company.

This builds on growing awareness in the field of compliance and ethics that the proper positioning and empowerment of the CECO are essential for a program to be effective. For example, a March 5, 2009 RAND conference, “Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds,”³³ specifically examined the CECO role and the critical need for a senior-level, empowered leader to oversee an effective program.³⁴ Similar conclusions have been reached by professional associations representing compliance and ethics practitioners.³⁵

5. ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all

³³ See generally MICHAEL D. GREENBURG, RAND CORP., CONFERENCE PROCEEDINGS: PERSPECTIVES OF CHIEF ETHICS AND COMPLIANCE OFFICERS ON THE DETECTION AND PREVENTION OF CORPORATE MISDEEDS: WHAT THE POLICY COMMUNITY SHOULD KNOW (2009), available at http://www.rand.org/pubs/conf_proceedings/CF258/.

³⁴ *Id.* at 11.

³⁵ See CHIEF ETHICS & COMPLIANCE OFFICER DEFINITION WORKING GRP., ETHICS RESOURCE CENTER, LEADING CORPORATE INTEGRITY: DEFINING THE ROLE OF THE CHIEF ETHICS & COMPLIANCE OFFICER (CECO) 15, (2007), available at http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf.

directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, 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;*

COMMENTARY: Of the Guidance's 12 provisions, this is the one most tied specifically to bribery, and the patterns of violations that have been seen in this area. The Guidance language calls for programs "*on, inter alia, the following areas.*"³⁶ Apparently a company should address the risks inherent in each activity, but does not necessarily have to prohibit all of them. Even "solicitation and extortion," which would seem to address inherently improper conduct, might follow the language of the U.S. FCPA, which does contain a limited exemption for payments in response to extortion associated with potential violence.³⁷

FACILITATION PAYMENTS.

One caution about this general advice, however, relates to the treatment of facilitation payments. Under a controversial provision of the FCPA, these were not prohibited under that law, albeit through a very narrow exception. Other countries, when enacting their own versions of such laws, have not permitted this exception, although ironically no other country has yet to prosecute any cases for facilitation

³⁶ Working Grp. on Bribery in Int'l Bus. Transactions, *supra* note 1, annex II at § A(5).

³⁷ Working Grp. on Bribery in Int'l Bus. Transactions, *supra* note 1, annex II at § A(5)(vii).

payments. The new anti-bribery law in the UK, the Bribery Act 2010, is an example of this prohibition. Skeptics in the past could be excused for believing that governments were willing to adopt strict language in the law because they did not actually intend to enforce anything so there was no loss in prohibiting everything. However, the 2009 OECD Recommendations increase the pressure on signatory countries to re-examine the legitimacy of the facilitating payments exception, and to encourage companies to prohibit or restrict this practice in their codes of conduct. No matter what laws like the FCPA may say and no matter what other OECD signatories may permit, it is important for companies addressing this aspect to be aware that such payments typically violate local law, and that any employee who makes such payments in jurisdictions like Singapore is taking a terrible risk.

Given the specific reference to each of these risk areas, companies need to consider specific protocols and practices in each of the relevant high risk areas, beyond merely publishing the company policy. For those who are subject to the FCPA, the drafters of the policy and those who administer it should be current with the Department of Justice's and Securities and Exchange Commission's enforcement practices and the violations that have been addressed both in enforcement cases and in Department responses to opinion requests.

6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "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 ethics and compliance programme or measures for preventing and detecting such bribery; and

iii) seeking a reciprocal commitment from business partners.

COMMENTARY: This provision reflects a growing trend to extend compliance efforts to third parties. This is a leap beyond the US Sentencing Guidelines, in which the 7 elements only contain two references to third parties.³⁸ Training and communications under item 4 apply “as appropriate, [to] the organization’s agents;” the company’s reporting system under item 5 is for “employees and agents.”³⁹ However, the focus on third parties is clearly evident in US Department of Justice FCPA settlement agreements, as well as the Woolf Report in the UK regarding BAE’s compliance program.⁴⁰

The trend can also be seen in other areas of compliance risk. For example, in the US, the 2008 amendments to the Federal Acquisition Regulation not only require certain government contractors to have compliance programs, but also require that they in turn require similar programs from their subcontractors if they are above a certain size threshold.⁴¹

³⁸ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B) (2011).

³⁹ *Id.* § 8B2.1(b)(4)-(5).

⁴⁰ See WOOLF COMM., BUSINESS ETHICS, GLOBAL COMPANIES AND THE DEFENCE INDUSTRY: ETHICAL BUSINESS CONDUCT IN BAE SYSTEMS PLC – THE WAY FORWARD 17-18 (2008), available at <http://www.giaccentre.org/documents/WOOLFREPORT2008.pdf>.

⁴¹ Federal Acquisition Regulations for Contractor Business Ethics and Compliance Program and Disclosure Requirements, 73 Fed. Reg. at 67,091-92.

ESSENTIAL ELEMENTS.

One particularly notable choice of words in this Guidance item is the introductory reference to “the following *essential* elements.” This is a bit anomalous, positioned in a document that purports to be only “Guidance,” but it is an important precursor of things to come. Companies should prepare for the possibility, indeed the probability, that the Guidance will take on increasing importance and should not be treated as mere suggestions. If the OECD Working Group nations indicate that something is “essential,” companies had better take them very seriously. In the future, it is predictable that meeting all of the Guidance elements will be viewed by regulators and enforcement authorities as “essential.”

PRECEDENTS ON THIRD PARTIES.

Examples of what would be expected of companies in dealing with third parties can be found in settled U.S. Department of Justice cases.⁴² *Metcalf & Eddy* is particularly instructive on the types of diligence that may be called for relating to third parties. There, the consent decree specified:

c. The establishment and maintenance of a committee to review (i) the retention of any agent, consultant, or other representative for purposes of business development in a foreign jurisdiction, and (ii) all contracts related thereto. The committee also will review the suitability of all prospective joint venture partners for purposes of compliance with the Foreign Corrupt Practices Act, as well as the adequacy of the due diligence performed in

⁴² See generally Consent Order, United States v. Metcalf & Eddy, Inc., No. 99CV12566-NG (D. Mass. 1999); Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep't of Justice, to Saul M. Pilchen, Esq., attorney for Paradigm B.V. (Sept. 21, 2007), app. B.

connection with the selection of the joint venture partner, any subsequent due diligence relating to the continued suitability of such joint venture partner, and any due diligence in connection with approvals of the retention of sub-agents and consultants by the joint venture for purpose of business development in a jurisdiction other than the United States. The majority of the committee shall be comprised of persons who are not subordinate to the most senior officer of the department or unit responsible for the relevant transaction.⁴³

RED FLAGS.

In addressing corruption risk, “*documented risk-based due diligence pertaining to . . . business partners*” would include responding appropriately to any indications of red flags. Lists of these red flags are common in the anti-bribery field. For example, one list of sixteen red flags is set forth in the Woolf Report.⁴⁴ However, as with all elements of a good practice program, a company’s list of red flags should be periodically updated to reflect the evolving risks and experiences of the business.

INFORMING THIRD PARTIES.

Under (ii), companies are to inform their “*business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s ethics and compliance programme or measures for preventing and detecting such bribery*”

⁴³ Consent Order at para. 4(c), United States v. Metcalf & Eddy, Inc., No. 99CV12566-NG (D. Mass. 1999).

⁴⁴ WOOLF COMM., *supra* note 40, at 26.

...”⁴⁵ Not only would the company tell third parties that it did not intend to participate in or benefit from any corrupt practices, but it also is to tell them about its compliance and ethics program. A company could do this informally in discussions with business partners, but the better and safer approach would be to document this communication in the contractual language. It would also make sense to provide at least relevant portions of that program to third parties. Certainly the U.S. Sentencing Guidelines provide a basis for making the company’s reporting system known and available to “agents.”⁴⁶ But the approach of the Guidance appears to go well beyond that.

RECIPROCAL COMMITMENTS.

What would be meant by “*seeking a reciprocal commitment from business partners?*” As a starting step a company dealing with third parties would be expected to have contractual language from the third party pledging not to engage in corrupt practices. In addition, although not explicitly called for by the Guidance, companies should consider the need for contract terms to give this credibility – the ability to audit and investigate acts of the third party and meaningful penalty provisions for violations and for refusal to cooperate in anti-corruption activities. For companies operating in any country where enforcement authorities are focusing increasingly on foreign bribery violations (which seems now to be a widespread phenomenon among the OECD Convention signatory countries), negotiating in contracts with third parties the ability to audit and investigate misconduct should be a standard practice.

⁴⁵ Working Grp. on Bribery in Int’l Bus. Transactions, *supra* note 1, annex II at para. 6(ii).

⁴⁶ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(5)(C) (2011).

PROMOTING THIRD PARTY COMPLIANCE AND ETHICS PROGRAMS.

Beyond these contract terms, however, would be the next step of asking the third party to join the company in taking active steps to prevent and detect corrupt practices. A reciprocal commitment could be interpreted to mean that the company expects the third parties it deals with also to have compliance and ethics programs to prevent corrupt practices. Logically, this would follow from the immediately preceding language which instructs companies to inform their business partners on both points: the commitment to following the law and the company's compliance and ethics program.

This interpretation would also be consistent with the precatory language in the U.S. Sentencing Guidelines commentary:

As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.⁴⁷

In the Guidelines, however, this is not set forth as a requirement for an effective compliance and ethics program but only on an aspirational basis. For companies addressing the risk of corruption, it is not yet clear whether enforcement authorities will necessarily read this Guidance language that broadly, but there would certainly be value for a company in encouraging its agents and business partners to follow its lead in implementing an effective ethics and compliance program. And it is clear under item (ii) that it will already be communicating with third parties about its own program.

7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to

⁴⁷ *Id.* § 8B2.1 cmt. 2(C)(ii).

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;

COMMENTARY: The OECD Working Group recognized through its interactions with representatives of the private sector and the professional community that prevention of corruption required full compliance and ethics programs, not just “internal controls.” On the other hand, internal controls are a key part of compliance programs. In the United States, it is often overlooked that the first element of the Sentencing Guidelines standards, item 1, which refers to “standards and procedures,” means more than a code of conduct; item 1 is accompanied by a commentary that specifies that “procedures” require “internal controls:”

‘Standards and procedures’ means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.⁴⁸

In the United States, having a system of internal controls to ensure the accuracy of books and records has been the law for companies under the jurisdiction of the SEC since the enactment of the FCPA.⁴⁹ It has been further reinforced with the enactment of the Sarbanes-Oxley Act.⁵⁰ It is also one of the elements required of all signatory nations to the OECD Convention, so this should be familiar for companies. However, companies should not simply assume that they have adequate controls to address the risk of foreign bribery simply because they have passed a Sarbanes-Oxley review; rather, the controls need a separate focus on the risk of foreign bribery.

⁴⁸ *Id.* § 8B2.1 cmt. 1.

⁴⁹ See 15 U.S.C. § 78m (Westlaw, current through P.L. 112-104 (excluding P.L. 112-91, 112-95, 112-96, and 112-102) approved 4-2-12).

⁵⁰ See, e.g., Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002).

8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;

COMMENTARY: Sometimes in the compliance and ethics field there is a tendency to focus only on training to get the message across. However, training also needs to be accompanied by other forms of communication, and that is reflected in this standard. A similar approach can be seen in U.S. Sentencing Guidelines item 4 calling for “reasonable steps to communicate periodically and in a practical manner” by “conducting effective training programs and otherwise disseminating information”⁵¹ In both the U.S. Sentencing Guidelines and the Guidance, the connecting word “and” means there are two different things. Training is a necessary element, but it is not sufficient without communications and “otherwise disseminating information.”⁵²

The idea of mixing traditional concepts of training and other means of communications is illustrated in the Canadian government's guidance on competition law compliance programs, which would be equally appropriate for addressing risks like corruption. Although this guidance speaks of “training,” the examples given include communications tools like manuals, email and bulletins:

[A] business can use small group seminars, manuals, email messages, online training or workshops to effectively educate staff. Bringing together employees who perform similar duties to present and discuss scenarios dealing with the specific realities of their work provides the link

⁵¹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(4)(A) (2011).

⁵² *Id.*

between the business' policies and procedures and the situations an employee may face. Additional training could include descriptions of prohibited conduct and the issuance of regular bulletins that discuss current compliance issues that may affect the operations of the business.⁵³

This is a model that would apply exactly to a company seriously attempting to reach its employees with any compliance message, including an anti-corruption one.

An ongoing communications approach helps ensure the continuity of the message. It is not practical, and probably not even effective, to keep training employees on a frequent basis to get the message across. But using different communications messages and media permits a degree of variety that is more likely to reach employees and refresh the message. For example, in Joseph Murphy's 501 Ideas for Your Compliance and Ethics Program,⁵⁴ there is a list of 27 ideas just on communications separate from the discussion of training.⁵⁵

DOCUMENTED TRAINING.

The Guidance's reference to "documented training" means that companies should be able to demonstrate who was trained, when, and how the training was done. An enforcement agency investigating a company for corrupt practices is not going to take the company's word that it actually trained anyone; companies need to be able to prove this. For online training, individual registration and a record of testing are standard. For

⁵³ COMPETITION BUREAU CAN., CORPORATE COMPLIANCE PROGRAMS 12 (2008), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html>.

⁵⁴ Joseph E. Murphy, 501 Ideas for Your Compliance and Ethics Program 43-47 (2008).

⁵⁵ *Id.* at 34.

in-person training, the usual approach is sign-in sheets. Certification that employees have read relevant policies and agree to follow them is also a popular approach, particularly for governments.⁵⁶

There is something of a drafting anomaly at the end of this provision in the reference to performing this function “as well as, where appropriate, for subsidiaries.” What makes this so odd is that it appears to serve no particular purpose. Nothing else in the Guidance even suggests the language is intended only for parent or holding companies. The Guidance is addressed to “companies.” A “subsidiary” would be a company, just like any other company. The meaning of “where appropriate” would be the same for any company anywhere. Training on foreign bribery would not be appropriate if there were no transactions that fit the definition; for all other entities it would be appropriate. For practitioners interpreting this it is best to use a common sense test of what is appropriate and not spend time on what is a “subsidiary” and why that should matter.

Unlike the U.S. Sentencing Guidelines, these standards do not discuss making the communications “practical.” But this omission is likely of no significance, since there would be no business or other reason to have training that was not practical. Moreover, for a company to prove that it trained its employees it is important that employees actually remember the training. The more practical the training is, the more likely it is that they will remember that they had training and be able to apply it in their day-to-day operations.

9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against foreign bribery, at all levels of the company;

⁵⁶ See, e.g., Consent Order at para. 5(b)(ii), United States v. Metcalf & Eddy, Inc., No. 99CV12566-NG (D. Mass. 1999); Letter from Steven A. Tyrrell, Chief, Fraud Section, Dep’t of Justice, to Saul M. Pilchen, Esq., attorney for Paradigm B.V. (Sept. 21, 2007), app. B at para. 5.

COMMENTARY: This provision reflects the importance of incentives in compliance programs. In the U.S., this was initially a serious omission from the 1991 Sentencing Guidelines but was added in the 2004 revisions.⁵⁷ However, the concept was not new in 2004; incentives had been included in compliance programs and program standards dating from the 1980s.⁵⁸

The message here is not that employees should be rewarded for not breaking the law. Rather, the focus is on the compliance program and providing “positive support” for managers and employees to show compliance and ethical leadership. This language is consistent with one of the best practice steps in the field at some leading companies that link compensation to ethical and compliance leadership criteria.

Unlike the U.S. Sentencing Guidelines reference to incentives, the Guidance does not pair this concept with its reference to “discipline.” Perhaps this will help avoid having companies view the application of discipline as a substitute for incentives. “Positive support” certainly calls for more than the imposition of negative sanctions against those who break the rules.

10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company’s ethics and compliance programme or measures regarding foreign bribery;

⁵⁷ See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(6)(A)(2011).

⁵⁸ For an extensive discussion of incentives in compliance and ethics programs, see Joe Murphy, *Using Incentives in Your Compliance and Ethics Program* 7-12, (Soc’y of Corp. Compliance and Ethics, White Paper, 2009), available at <http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/724.aspx>.

COMMENTARY: The Guidance requires that those involved in violations be held accountable, including those at the top of the company. The reference to discipline “*at all levels of the company*” could just as easily be read to say: “including discipline at the top.” It is highly unlikely that government anywhere is worried that companies will only punish the top managers and let the junior employees off easy. Rather, at least the skeptical government officials’ perspective is that companies would prefer to find junior level scapegoats and let the senior people and high performers off with a wrist slap.

DISCIPLINE FOR PROGRAM VIOLATIONS.

One very important feature of this provision is that it goes beyond violations of law and includes discipline for violations of the company’s compliance and ethics program. This is a critical element. Companies may be loath to admit that there has been an actual violation of the law, but there is much less risk for the company in taking action based on a violation of the compliance and ethics program. Moreover, a normal company could operate for quite some time without ever having an actual violation of anti-bribery laws; on the other hand, it is much more likely that there will be infringements of the program. Thus, if a company is ever called upon to prove that it took action under this element, while it would be credible to say that there had never been a proven violation of the law, for a large company the absence of discipline for anyone for failure to follow the program would likely not be credible. For example, it is not unusual to have employees, especially more senior managers, believe that the compliance training is not necessary for them and thus to avoid the training. If the program is to be credible, such resistance to the program should be subject to discipline. “Discipline” in this context would be at an appropriate level; termination may not be appropriate for compliance training truancy, but

holding up a bonus until the training was completed would be fair and likely very effective.

11. effective measures for:

i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;

COMMENTARY: This is a very practical element that should be considered in any part of a company's compliance and ethics program – having systems to enable employees around the world to get advice when and as needed. One source of this concept can be seen in the 2004 changes to the U.S. Sentencing Guidelines, which added to the existing provision dealing with reporting systems the concept of also providing advice; companies are to have systems through which employees and agents “may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”⁵⁹ In the area of overseas bribery, however, one can picture the bewildered employee on a first trip overseas being confronted with a forceful demand for a bribe and not knowing where to turn. Having a system available to provide “urgent advice” makes enormous sense. This may be similar to the types of crisis response systems companies may have for a variety of threats where key people may need to be contacted at a moment's notice.

To meet this standard a company may elect to have company counsel available on a 24- hour, 7-day basis and ensure via training that at-risk employees are aware of this resource. But in high-risk areas, it may be wise to have reliable and reputable local counsel available in that geographic area for beleaguered employees.

⁵⁹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(5)(C) (2011).

ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and

COMMENTARY: This language is very similar to the language in the 2009 Recommendations, section X(C)(v), regarding governments' promotion of compliance and ethics programs.⁶⁰ Here, the OECD is promoting the use of internal whistleblowing systems. This is quite a striking step, coming from a group centered in Paris, the home of the French Privacy Authority (CNIL) that had previously launched an attack on whistleblowing systems. This is another indication of how misguided it can be to presume that Europeans, and particularly the French, oppose whistleblowing systems because of events that occurred more than half a century ago. These systems are an essential part of compliance and ethics programs everywhere companies operate and face compliance risks. Modifications may be needed to meet cultural needs (this would be true, for example, in implementing such systems in various part of the US), but such reporting systems are always needed.

Confidentiality. Importantly this standard refers to having a system for confidential reporting "where possible." This is an acknowledgement that confidentiality can be impossible to guarantee for several reasons. First, it can be impossible to conduct an investigation without employees correctly guessing who the source was. Second, information about whistleblowers may be discoverable in litigation and by the government in enforcement proceedings.

⁶⁰ Working Grp. on Bribery in Int'l Bus. Transactions, *supra* note 1, at § X(C)(v).

Companies may also have to disclose this information as part of voluntary disclosures. Then, too, there may be misguided privacy laws that require disclosure of this sensitive information to the person under investigation.

PROTECTING PROFESSIONAL STANDARDS.

This language is not limited to merely resisting or reporting bribery. Rather, it is quite broad, covering refusals to violate “*professional standards or ethics.*” Many in the U.S. may assume that this is something already covered under US standards. But it is likely that most company codes of conduct do not address refusal to violate *professional standards.* Such standards would include not only standards that might apply to the particular entity, e.g. lawyers’ professional ethics applicable to a law firm, but also standards that would apply to any professionals employed by a company, such as legal ethics applicable to a company’s lawyers.

There is another important dimension to this recognition of professional ethical standards. The SCCE has established just such a professional standard for compliance and ethics professionals: The “Code of Professional Ethics for Ethics and Compliance Professionals.”⁶¹ Under this standard, compliance and ethics professionals are obligated to take such steps as escalating threatened misconduct, being diligent in implementing a program, and reporting on the program to senior management and the board.⁶² For the first time, there is now an authority saying that companies should protect these professionals in doing their jobs. This has generally not existed before.

⁶¹ SOC’Y OF CORPORATE COMPLIANCE & ETHICS, *supra* note 26.

⁶² *Id.* at R. 1.4.

IN GOOD FAITH AND ON REASONABLE GROUNDS.

Those who report breaches of law or professional standards “*in good faith and on reasonable grounds*” are to be protected. “*In good faith*” is a commonly used standard to address malicious misuse of reporting systems. There is a question, however, about the intent of the additional element of “*reasonable grounds.*” This reflects continuing concern about false accusations. The good faith standard is a broad and somewhat subjective standard to protect those who raise issues; as long as the reporter can demonstrate that he or she believed something, there is protection. “*Reasonable grounds*” introduces an objective element; in effect, the claim of good faith must also be credible. This is probably attributable to the OECD Working Group’s diplomatic environment, and is not a best practice standard. Often, those not familiar with reporting systems are haunted by the specter of false denunciations. But in the real world the few instances of misuse pale in comparison to the prevalence of retaliation for honest reporting. Experience will likely teach all those trying to implement effective compliance and ethics programs that the appropriate balance needs to be in favor of protecting the person making a report, and not for the rare case of false accusation. The best protection from unfounded claims is for companies to take a professional approach to conducting investigations, which includes protecting the reputation of the accused unless and until allegations are factually validated.

It is possible that over time this “*reasonable grounds*” caveat will fall out of favor and not be embraced generally, or be ignored in practice. If it is not, there is a danger it could be used as a pretext to retaliate against all types of whistleblowers, and even to dismiss reports without ever investigating them. There is grave risk particularly that allegations involving senior managers will be interpreted as ipso facto not being “reasonable,” thus providing cover to sabotage the entire reporting system. In this one respect companies should take no comfort from the

Good Practice Guidance's language. It is very likely that enforcement authorities in each country will use these standards as a base; where the standards appear to permit conduct that the national authority believes will actually undercut the impact of a compliance program, however, it is likely that such authorities will not permit the Good Practice Guidance to be used to justify such a result.

NEED FOR ALTERNATIVE CHANNELS.

The origins of this concept of whistleblower systems are varied. Of course they are part of the U.S. Sentencing Guidelines standards,⁶³ but they have been an accepted part of compliance and ethics programs before the Guidelines were adopted and promoted by governments beyond the efforts of the U.S. Sentencing Commission. In France, for example, competition law enforcement authorities have required inclusion of such systems in settlements of cartel cases.⁶⁴ An essential element of all such systems is that there needs to be a means for employees to circumvent managers and officers in positions of power above them in order to warn the company's senior management or its board of potential illegal conduct. Thus, merely telling employees to follow their chain of command or to funnel all matters through local management would not meet this standard and would be a prescription for failure.

iii) undertaking appropriate action in response to such reports;

⁶³ See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(5)(C) (2011).

⁶⁴ See *Two Major Rental Laundry Firms Will Pay Fines, Create Alarm System*, 93 ANTITRUST & TRADE REGULATION REP. (BNA) 93 (2007) (reporting on French companies setting up whistleblower systems to settle a cartel case brought by the French Competition Council).

COMMENTARY: This provision calls for responding in an “appropriate” way to allegations of misconduct. Most important would be to ensure that reports result in investigations being conducted professionally. Ignoring reports, or conducting them in a way that prejudices the legitimacy of the investigation will likely fail any government’s standard of appropriateness. An appropriate response should also call for steps to prevent a recurrence of the violation. This is a concept carefully included in the US Sentencing Guidelines standards, item 7.⁶⁵

12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

Commentary: The concept of regular evaluations of compliance programs has been developing over time into a standard element for programs. It was added to the U.S. Sentencing Guidelines in the 2004 revisions, and is now item 5(B):

“(5) The organization shall take reasonable steps—

...
 (B) to evaluate periodically the effectiveness of the organization’s compliance and ethics program;”⁶⁶

This is a recognition that organizations are dynamic and change over time, and that risks also evolve. Thus, no program can be expected to continue effectively

⁶⁵ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(7) (2011). For a discussion of some of the ways companies can stumble on addressing reports of misconduct, see generally Donna Boehme, *Ten Ways to Derail Your Hotline Performance*, COMPLIANCE WEEK, May 5, 2009, available at <http://compliancestrategists.net/sitebuildercontent/sitebuilderfiles/db-complianceweek.pdf>.

⁶⁶ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (B)(5)(B) (2011).

without periodic review and adjustments. Best practices in this area would include having an outside entity review the program anew on a periodic basis. It is also possible to use peer reviews for this purpose, having a company's program assessed by a team of compliance professionals from other companies. The reviewers would typically work closely with the company's internal compliance and ethics staff and review with them drafts and preliminary findings. For a truly independent review, however, those subject to the review (the managers of the compliance program) should not be able to control what the reviewers review and report. While the compliance and ethics team should have input, it is best if the reviewers are beholden only to the board, so that their report can be fully candid and uncensored.

PROGRAM CERTIFICATION.

Every compliance and ethics program standard that addresses the need for evaluation includes a reference to doing this periodically; it is essential that reviews be ongoing and not one-time steps. In this regard, companies need to approach any "certification" program or other external seals of approval for their program with great skepticism. First, they need to understand that such certifications will not be binding on any enforcement authority. But most importantly, certification can easily give a company a false sense of security and cause it to relax its diligence. Companies should assume their work is never done and that their program needs to be evaluated and challenged regularly.

Evaluation of the program is also included as one of five steps used by the Competition Commission of Singapore in its treatment of competition law compliance programs in the Commission's penalty policy:

"2.13 In considering how much mitigating value to be accorded to the

**existence of any compliance programme,
the CCS will consider:**

...

• **whether the programme is evaluated and reviewed at regular intervals.”⁶⁷**

It is also part of the U.S.’s imposition of privacy protection compliance programs for banks and creditors under the Federal Trade Commission’s Red Flags Rule.⁶⁸

CONCLUSION

The OECD’s Good Practice Guidance is a useful template for an anticorruption compliance program, as well as for all programs in general. It is particularly interesting to see how closely it is aligned to other standards globally; this is an indication that when it comes to designing a good compliance and ethics program there is really little mystery involved. Good compliance programs are good management programs; if one understands what makes organizations and people work, then one understands what should be in a program. So the basics – set standards, tell people what the standards are, have someone in charge to make the program happen, hold people accountable, keep checking and improving it – are logically going to be similar for everyone who is serious about making compliance programs work.

Having said this, however, it is also important to observe areas of difference in approach. For example, while the commentary above notes similarities to the US Sentencing Guidelines there are also differences.

⁶⁷ COMPETITION COMM. SING., CCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY 6 (2007), *available at* http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/CCSGuideline_Penalty_20071033.pdf (citing § 2.13).

⁶⁸ See FED. TRADE COMM., FIGHTING FRAUD WITH THE RED FLAGS RULE, A HOW-TO GUIDE FOR BUSINESS 4 (2009) (“[B]ecause identity theft is an ever-changing threat, you must address how you will re-evaluate your Program periodically to reflect new risks from this crime.”).

USSGS ITEM 3.

If there is one element of the US Sentencing Guidelines that stands out as an anomaly it is certainly item 3, dealing with diligence in hiring and promoting employees.⁶⁹ Even in the U.S., when in December 1991, the Environmental Protection Agency became the first US agency to adopt the Guidelines standards, it completely omitted item 3.⁷⁰ Similarly, as other governments have adopted standards, such as those in the competition law area, item 3 is typically omitted. So it is not surprising that OECD also omitted this provision. Most interesting, however, is that the OECD has arguably leapfrogged the Sentencing Guidelines by bringing this same due diligence concept to an important element only weakly covered in the U.S. Sentencing Guidelines – diligence in retaining and managing third parties. In this respect, the U.S. Sentencing Commission should consider the model set by OECD for broader application of this diligence concept relating to third parties across all areas of compliance.

USSGS ITEM 5(A).

One troublesome omission from the Good Practice Guidance is a reference to compliance auditing, monitoring, and other checking to determine whether there is actual misconduct. On this point the language in item 5(A) of the Sentencing Guidelines is very pointed and offers a strong model:

**“(5) The organization shall take reasonable steps—
to ensure that the organization’s compliance and ethics program is**

⁶⁹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(3) (2011).

⁷⁰ See Jeffrey M. Kaplan, *Impact of the Sentencing Guidelines*, 1 CORP. CONDUCT Q. 1 (1991) (citing 56 Fed. Reg. 64785 (Dec. 12, 1991)).

followed, including monitoring and auditing to detect criminal conduct;⁷¹

While the Guidance essentially included the ideas covered in items (5)(B) and (C) dealing with evaluating the program and having reporting/guidance systems, a commitment to reviewing what is actually happening in the business though such steps as compliance monitoring and auditing is a sine qua non of effectiveness. Evaluating a program from time to time is all well and good, but it is not the same as actually checking what is happening on the front lines of the business. The Sentencing Guidelines reference is quite pointed, calling for efforts to unearth criminal conduct, making it perfectly clear that merely checking to see if processes are in place will not meet the standard.

Item 7 in the Guidance does call for internal controls,⁷² and an argument could certainly be made that this could include auditing and monitoring to unearth misconduct, but it should not be necessary to infer what should have been spelled out in the Guidance. This is a gap in the Guidance that should be remedied in the future.

DISCIPLINE FOR SUPERVISORY FAILURES.

Also of note in the U.S. Sentencing Guidelines is item 6's reference to imposing discipline for "failing to take reasonable steps to prevent or detect" violations.⁷³ The Guidance's item 10 does not include this language. However it does provide for discipline for violations of the "*company's ethics and compliance programme*;"⁷⁴ if the program provides that supervisors are to be diligent in taking steps to prevent and detect

⁷¹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(B)(5)(A) (2011).

⁷² *Id.* § 8B2.1(b)(7).

⁷³ *Id.* § 8B2.1(b)(6)(B).

⁷⁴ Working Grp. on Bribery in Int'l Bus. Transactions, *supra* note 1.

misconduct, then the result with respect to managers could be the same. But overall the U.S. Sentencing Guidelines' language on this point is probably a preferable model because of the emphasis on management responsibility and the message that companies should not engage in the scapegoating of junior level employees.

In general, practitioners should find the Good Practice Guidance a valuable tool in their compliance and ethics work. It is also recommended that the OECD Working Group continue to monitor this area for further developments, so that the Guidance in the future will reflect the evolving state of the art in preventing and detecting violations in companies.