

# *From Radio to Talkies: The Evolution of Global Compliance, Internal Investigations and Government Enforcement of Transnational Anticorruption Laws*

June 10, 2021



# EVOLUTION OF GLOBAL COMPLIANCE

Corporate compliance and corporate compliance programs (CP) have permeated the US federal criminal universe for decades.

## **United States Attorneys' Manual**

In the 1980's, the DOJ birthed the US Attorneys' Manual (USAM), which set forth the principles of federal prosecution federal prosecutors to follow.

There is a chapter in the USAM titled "Principles of Federal Prosecution of Business Organizations." It outlines specific factors prosecutors are to consider in conducting investigations, bringing charges, and negotiating pleas or other agreements with corporate entities. (JM 9-28.300)

One of those specific factors is the existence and "effectiveness" of a company's CP.

A company's CP is deemed "effective" by the DOJ if it has these (7) essential elements:

**1. Implements of written policies and procedures**

Standards of Conduct Guide  
Ethics policy

**2. Designates of a compliance officer and compliance committee**

Compliance Advisory Committee

**3. Conducts effective training and education**

Compliance Training

**4. Develops effective lines of communication**

Hotline

**5. Conducts internal monitoring and auditing**

Internal Audits  
Compliance Inspections  
Peer Reviews  
External Audits, Reviews and Inspections

**6. Enforces standards through well-publicized disciplinary guidelines, consequences levied consistently regardless of employee's stature within the organization, enforcement that is consistent with appropriate disciplinary action.**

HR's discipline webpage

**7. Responds promptly to detected problems and undertakes corrective action**

Hotline procedures require two weeks for action

In 2018, the USAM was updated and changed its name to the ***Justice Manual (JM)***.

There was no change to the requisite seven (7) elements that constitute an "effective" CP.

## **Federal Sentencing Guidelines**

On November 1, 1987, we saw the release of the Federal Sentencing Guidelines (FSG).

The FSG were passed by Congress to establish a uniform sentencing policy for all defendants convicted in the US federal court system.

At first, the FSG addressed only individual defendants, not corporate entities.

On November 1, 1991, an eighth chapter was added to the FSG, titled “Sentencing of Organizations.”

This chapter applies only when the convicted defendant is an organization.

This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

A sentencing factor set forth in Chapter 8 is the “effectiveness” of a company’s CP, as measured in part, by the presence or absence of those seven (7) essential elements.

## **Corporate Compliance Updates from the DOJ'S and SEC'S FCPA Resource Guide**

For those of you who are not familiar with the FCPA Resource Guide, it was a joint guidance issued by the two agencies that enforce the Foreign Corrupt Practices Act, the DOJ and SEC. Together, in November 2012, they published a booklet titled “Joint Guidance on the US Foreign Corrupt Practices Act, A Resource Guide to the FCPA.” It soon became known as the FCPA Resource Guide.

Regardless of whether your company is a multinational, you need to pay attention to what the DOJ and SEC have issued in their recent updates to their FCPA Resource Guide about corporate compliance.

Their Guidance to corporations about their compliance programs applies across the board to all US companies that come within the purview of DOJ or SEC enforcement, be it for FCPA violations or other types of federal civil and criminal offenses.

These two agencies first updated the Resource Guide in June 2015, and most recently in July of 2020, with the second edition of the Guide.

The main purposes of this second edition remained unchanged:

1. Outline the government's interpretation of the law
2. Provide insight into enforcement priorities
3. Communicate clear understanding of the exercise of discretion

There were also some new areas of emphasis:

1. Additional law enforcement partners and international cooperation
2. Disgorgement and forfeiture
3. Investigation, analysis, and remediation
4. Compliance expectations and monitors
5. Specific case law issue

In June 2020, the DOJ modified its Corporate Compliance Programs Guidelines.

## **DOJ's Corporate Compliance Programs Guidelines**

The DOJ has stated that it intends to periodically update its Evaluation of Corporate Compliance Programs Guidelines.

Let's review the important modifications set forth in the June 2020 update. They include:

1. Adequate Resources: The DOJ has shifted away from conducting an assessment of how the company implemented its compliance program to analyzing whether the company's compliance program has been provided adequate resources by the company.
2. Dynamic Evaluation: The DOJ is encouraging its prosecutors to conduct analysis of a company's compliance program's evolution, rather than only a snapshot in time.
3. Lessons Learned: The DOJ will be performing an assessment of whether the company has learned from its past mistakes and adjusted its program based on its internal investigations and broader industry trends.



The Updates in June 2020 also focused on Best Practices.

Highlights include an emphasis on the importance of incorporating advancements developed by the broader compliance community, including the use of data analytics and consistency of approach.

Here are some examples of Best Practices for Corporate Compliance Programs as issued by the DOJ and SEC:

1. Policies and Procedures: They expect a company's policies and procedures to be accessible, going beyond an assumption that employees have ready access to electronic policies and procedures and seeking evidence – like data analytics – that the company monitors the access and usability of such policies.
2. Confidential Reporting Structure and Investigation Process: They have reinforced expectations that reporting channels be publicized not only to a company's employees, but also to other third parties, and suggests a data analytics-driven evaluation of the effectiveness of the reporting structure.
3. Incentives and Discipline: A new factor has been added to the “Consistent Application” evaluation regarding whether a company's compliance function monitors investigations and resulting discipline to ensure consistency.

## Compliance Guidance Evolution within The DOJ

The DOJ is providing greater transparency in its corporate resolutions and highlighting the important role CPs play in preventing an eliminating criminal conduct.

The DOJ has been publishing its press releases on its Fraud Section's website, so companies can see what cooperation and remediation steps a company took to receive a declination, or avoid the appointment of a monitor, and read about its updated compliance guidance.

The DOJ's compliance guidance over the past two years has provided greater predictability and transparency in corporate prosecutions, helping companies to make informed and cost-effective decisions about how best to structure and develop their CPs.

# **OTHER US ENFORCEMENT AGENCIES ARE EMBRACING COMPLIANCE GUIDANCE**

# US Enforcement Agencies Are Embracing Compliance Guidance

## OFAC

On May 2, 2019, the US Treasury Department's Office of Foreign Assets Control (OFAC) published its long-awaited compliance guidance in a document titled "A Framework for OFAC Compliance Commitments."

It evaluates five basic areas evaluating in determining whether a company is OFAC compliant:

1. Management Commitment
2. Risk Assessment
3. Internal Controls
4. Testing and Auditing
5. Training

# US Enforcement Agencies Are Embracing Compliance Guidance (*cont'd*)

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## Antitrust Division

In July 2019, the Antitrust Division issued its own corporate compliance guidance that is substantially similar to the Criminal Division's.

Previously, the Antitrust Division did not consider the effectiveness of CPs when making charging decisions.

Its leniency program, however, has always created strong incentives for a company to maintain a strong and robust CP.

**OTHER NATIONS  
ENTERED  
THE COMPLIANCE ARENA**

# Nations Entering the Compliance Arena

As more countries become involved in prosecuting their respective anti-bribery laws, and increased multi-jurisdictional coordination is taking place among prosecutorial bodies both within the US and abroad, CPs are becoming an important factor for companies doing business outside the US.

Since 2018, foreign governments in LATAM have received more than \$1 billion in penalties from their anti-bribery prosecutions.

In early 2020, two European countries received over \$3 billion in settlement amounts regarding FCPA investigations of Europe-based companies.

Last year, foreign governments received over \$5 billion in global anti-corruption settlements in FCPA cases.

Acting Assistant AG Brian Rabbit noted that the DOJ's coordination with one or more foreign enforcement authorities has become an increasingly important aspect of the DOJ's work.

Depending on the country, an effective CP can constitute (a) an absolute defense, (b) an affirmative defense, or (c) a mitigating factor at sentencing to a corporate prosecution for bribery.

## Latin America

CPs are relevant under the anti-bribery laws of these countries in Latin America:

1. **Argentina**
2. **Brazil**
3. **Chile**
4. **Colombia**
5. **Costa Rica**
6. **Mexico**
7. **Peru**
8. **UK**
9. **Venezuela**



# NATIONS ENTERED THE COMPLIANCE ARENA (*cont'd*)

## ASIA

### 1. China:

The PRC authorities will generally not consider a CP as a mitigating factor in sentencing, and there is no provision in any of China's anti-bribery laws or regulations for a CP to constitute either an absolute or affirmative defense to an anti-bribery charge.

### 2. Hong Kong: CPs do not offer an absolute or affirmative defense under Hong Kong law.

- a. Depending on the facts of the case, the existence of an internal CP or guide might be helpful, but the law does not generally recognize any safe harbor based on the existence of compliance procedures.
- b. It may, in some cases, help the director better defend against vicarious liability if the employer has trained its staff not to do certain things.
- c. Nevertheless, we recommend CPs for clients wherever possible, especially in businesses at higher risk of employees or other industry players getting involved in bribery.

# NATIONS ENTERED THE COMPLIANCE ARENA (*cont'd*)

## ASIA (*cont'd*)

### 3. Japan:

CPs cannot serve as an absolute or affirmative defense to an anti-bribery charge, but there is case precedence where an internal CP has been considered as a mitigating factor in sentencing for an anti-bribery conviction.

### 4. Korea:

In Korea, the existence of a CP is not specified as a mitigating factor in any statute. While Korean courts do sometimes consider it as a mitigating factor, the impact of a CP is rather arbitrary.

### 5. Australia:

Australian anti-bribery laws do not provide that CPs constitute an absolute defense or an affirmative defense.

# NATIONS ENTERED THE COMPLIANCE ARENA (*cont'd*)

## ASIA (*cont'd*)

### Australia: (*cont'd*)

- a. In addition, there is no reference to CPs constituting a sentencing mitigating factor, although the existence and compliance with a CP may be a factor which is taken into account in sentencing.
- b. Australian legislation does not require body corporates to have an anti-bribery and corruption (ABC) CP.
- c. However, Australia is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) and does encourage businesses to abide by the OECD's recommendations, including the "Good Practice Guidance on Internal Controls, Ethics and Compliance."
- d. Accordingly, best practice for body corporates in Australia is to have an effective ABC CP in place to prevent and detect the bribery of foreign public officials (and any other type of ABC).

# NATIONS ENTERED THE COMPLIANCE ARENA (*cont'd*)

## THE NETHERLANDS

A proposal has been put together with colleagues from multiple parties, asking the government to:

- a. Introduce mandatory probation for every corporate settlement;
- b. Mandate third-party oversight of a company's subsequent remediation efforts; and to
- c. Create a mechanism that would empower the Public Prosecution Service to prosecute companies that fail to make improvements.

The current law covering corporate criminal settlements, under Section 74 of the Dutch Criminal Code, allows:

- a. Prosecutors to strike resolutions with corporates, but it
- b. does not compel the corporate to include compliance improvements, and
- c. it provides no avenue to allow authorities to inspect businesses' remediation efforts, or
- d. to go after those that fail to implement such measures.

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## Airbus

Airbus agreed in early 2020 to pay nearly \$4 billion to settle bribery violations with the majority of the penalty going to France and UK authorities.

## Goldman Sachs

In October, 2020, Goldman Sachs entered into a large settlement with 10 authorities in the US, UK, Singapore and Hong Kong to resolve its role in the bribery and embezzlement scheme concerning Malaysia's development fund, 1MDB.

For those of you who are in-house representing publicly-traded companies, or represent non-US companies with ADRs that trade on a US exchange, you should know that Cain advised that the Commission will continue to focus, not only on detecting which non-traditional industries may be susceptible to violating the FCPA, but also on being up-to-date with the evolving methods by which illicit funds are extracted from companies to pay bribes.

# THE IMPACT OF COVID-19

Shrinking budgets may require making cuts to CPs.

Companies need to exercise caution here:

1. Make sure cuts are reasonable in light of reductions being made elsewhere in the company.
2. Make your cuts commensurate with a decrease in your company's risk profile (*e.g.* closing your foreign manufacturing plant; reducing third parties contracts; placing a hold on travel and entertainment, etc.).
3. If your compliance resources are being realigned to address current needs, document those current needs.
4. Document the rationale for structuring and allocating resources within your compliance program as you did.

# **AREAS OF RISK IN THE MIDST OF A FINANCIAL CRISIS**



This pandemic is not the first financial crisis corporate America has faced.

In the 2008 financial crisis, there were common accounting and securities fraud schemes that can serve as a guide for your companies when examining and evaluating the effectiveness of your companies' current compliance programs in this COVID-19 crisis.

These Schemes include:

1. **Improper Revenue Recognition:** Recording premature or fictitious revenue to inflate current period earnings on income statement.
2. **Financial Statement Sheet Manipulation:** Manipulation of balance sheet including schemes to overstate assets and understate liabilities will directly impact the income statement.
3. **Fraudulent Disclosures:** Material misstatements or omissions in SEC filings or public statements.
4. **Insider Trading:** Buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material non-public information ("MNPI") about the security.

# Areas of Risk in the Midst of a Financial Crisis

## *(cont'd)*

Examples of Improper Revenue Recognition schemes during a financial crisis may include:

1. “Channel stuffing”
2. “Roundtrip” transactions (with auto-reversal)
3. Consignment sale agreements
4. Side agreements
5. Right to return affecting true sale
6. Promotional allowance manipulations
7. Bundled sales and services
8. Software revenue recognition
9. Holding accounting periods open
10. Shipping schemes (e.g., bill and holds; altering shipping documentation)

# Areas of Risk in the Midst of a Financial Crisis

## (*cont'd*)

Examples of Financial Statement Manipulation common schemes during a financial crisis include:

1. “Smoothing” earnings
2. Taking a “Big Bath”
3. Improper asset valuation
4. Inventory schemes (*e.g.*, inflating the value of inventory; off-site or fictitious inventory)
5. Off-balance-sheet debt
6. Accounts receivable manipulations
7. Adjustments to estimates

# Areas of Risk in the Midst of a Financial Crisis

## *(cont'd)*

Examples of Fraudulent Disclosures common schemes during a financial crisis include:

1. False and misleading statements regarding financial condition
2. Failure to disclose known trends and risks regarding financial results
3. Failure to disclose employee bonuses
4. Misleading statements regarding availability or viability of product to treat or prevent COVID-19

# Areas of Risk in the Midst of a Financial Crisis

## (*cont'd*)

Examples of Insider Trading common schemes during a financial crisis include:

1. Trading or “tipping” others while in possession of material non-public information regarding:
  - A. A company’s level or risk
  - B. A company’s expected ability to meet earnings projections
  - C. Distributors’ expected ability to purchase product
  - D. Status of independent auditor to sign-off on financial statements
  - E. Delays in earning reports or SEC filings
  - F. Status of regulatory approvals of a company’s product (e.g., US Food and Drug Administration approval)
  - G. Regulatory investigation or shareholder suit

## Red Flags in Financial Records:

1. Consistently meeting earnings projections even in an unstable economy
2. Corporate debt financing changes
3. Cash reserves depleted
4. Management disputes with auditors
5. Insiders reduce their holdings of company stock
6. Cost cutting in non-revenue generating roles like compliance and internal audit
7. Lack of separation of duties, one employee doing it all and doesn't take vacations
8. Employees personal financial pressure
9. Falsified records, particularly charitable donations for COVID-19 relief
10. Lack of due diligence

## Suggestions to Mitigate Financial Risks:

1. Replace or modify internal controls to address COVID-19 related changes in business operations and staffing
2. Ensure that Legal/Compliance, Finance, Controller, and Internal Audit functions are appropriately resourced and empowered
3. Tone at the Top
4. Training for Legal/Compliance and Business Leaders on commitment to adhere to critical accounting controls and policies
5. Monitoring and review of transactions (e.g., email review, data analysis tools)
6. Consider requiring senior executives and directors with access to material non-public information to enter into “Rule 10b5-1 plans”

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# Global Coverage

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