

# Compliance & Ethics Professional

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## Why the hero gets to break all the rules

### an interview with Jon Turteltaub

Hollywood director of *While You Were Sleeping*,  
*Cool Runnings*, *Phenomenon*, *National Treasure*,  
*National Treasure 2: Book of Secrets*,  
and many more

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by Joe Murphy, CCEP

# Third party due diligence: Time to change the Federal Sentencing Guidelines?

I believe the Federal Sentencing Guidelines provide an excellent template for an effective compliance program, but this does not take away from the need for them to evolve over time. One issue that is scarcely addressed in the Guidelines is third parties and agents.



Murphy

Specifically, the word “agents” is used only twice; once in item 4(B) listing who should be trained (“as appropriate”) and once in item 5(C) noting that reporting systems should be available to third parties.

But over time, the role of third parties in compliance efforts has grown substantially, especially with increased focus on foreign corruption. Experience shows that in foreign corruption, third parties present great risks that need to be addressed in the compliance program. Nor is this risk limited to foreign corruption; in today’s economy, third parties play an integral role in many businesses and thus represent a compliance risk.

In 2010, when the Organization for Economic Co-operation and Development (OECD) Working Group on Bribery came out with its groundbreaking “Good Practice Guidance”<sup>1</sup> relating to anti-corruption compliance programs, one of its 12 points was devoted to third party risk:

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;

...in today’s economy, third parties play an integral role in many businesses and thus represent a compliance risk.

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.<sup>2</sup>

Perhaps it is time for the Sentencing Guidelines standards to address directly this

compliance program element. One possible approach would be to expand item 3, dealing with diligence in delegating authority, as follows:

**Revise item 3 to read:**

(3) The organization shall use reasonable efforts:

(a) [dealing with hiring and promoting employees]; and

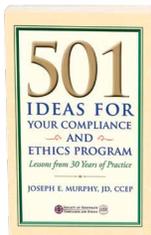
(b) to address the risks of dealing with agents and other third parties, including due diligence in retaining and monitoring such third parties,

and encouraging such third parties, especially small organizations, to institute effective compliance and ethics programs.

This would fit the flexible approach characteristic of the Guidelines, plus give companies an important incentive to encourage compliance programs in the third parties they deal with. \*

1. OECD: Good Practice Guidance on Internal Controls, Ethics, and Compliance, February 18, 2010. Available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/44884389.pdf>
2. Ibid, Section A) Good Practice Guidance for Companies, at 6.

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