International Recognition for Compliance and Ethics Programs: The 2010 OECD Good Practice Guidance on Internal Controls, Ethics and Compliance

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Any compliance and ethics professional who has spoken in front of a multinational audience during the last two decades knows the challenge of promoting compliance and ethics principles with only a U.S.-centric sounding U.S. Sentencing Guidelines for Organizations (USSG) as a standard.[2] The USSG have served organizations well, establishing a compelling model for proactively managing their legal compliance and ethics issues, together with strong incentives to do so. Results so far have been impressive: the USSG have been influential throughout the world, not only with both U.S. and non-U.S. based multinationals implementing global programs, but also as a beacon of best practice to other key jurisdictions.[3]

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[2] Chapter Eight of the U.S. Sentencing Guidelines sets out for organizations the key criteria and principles to be included in an effective compliance and ethics program. The USSG were designed to be flexible to allow organizations to implement them as appropriate in a manner best suited to their particular circumstances, e.g. size, industry, jurisdictions, type of operations. Although voluntary (with the promise of leniency in sentencing and penalty considerations), the USSG have been influential as the most widely recognized standard for effective compliance and ethics programs. See P. Desio, *An Overview of the Organizational Guidelines*, USSG, http://www.ussc.gov/Guidelines/Organizational_Guidelines/ORGOVERVIEW.pdf

[3] See e.g., *Australian Standard on Compliance Programs (AS 3806-2006)* (Revised 2006), http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/Australia/AustralianStandards.pdf; Competition Commission of Singapore, *CCS Guidelines on the Appropriate Amount of Penalty* (2007), http://app.ccs.gov.sg/cms/user_documents/main/pdf/CCSGuideline_Penalty_20071033.pdf; Canadian Competition Bureau, *Bulletin on Corporate Compliance Programs* (Revised 2010), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03280.html; U.K. Ministry of Justice, *The Bribery Act 2010 Guidance*, (2011), http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm.

But now, for the first time, an international standard for compliance and ethics programs has been set by express agreement of 38 nations — 34 of the leading democratic economies that are members of the Organization for Economic Cooperation and Development (OECD),[4] plus four non-member signatories to its anticorruption mission. The resulting document, the February 2010 publication of the OECD's "Good Practice Guidance on Internal Controls, Ethics and Compliance" ("Good Practice Guidance" or "the Guidance"),[5] now joins the body of the USSG and similar policy guidelines and laws either in place or being enacted in other jurisdictions around the world, and articulates the first multi-nationally recognized, common principles for effective corporate compliance and ethics. As this article will discuss, this is a quiet, yet significant step forward for organizational compliance and ethics — a striking declaration that belongs on the desks of multinationals' boards, senior management and compliance and ethics officers.

Why is the publication of the Good Practice Guidance such a milestone? Doesn't the Guidance apply specifically to anticorruption programs only? On its face, the Good Practice Guidance sets out in helpful detail the elements of a good anti-bribery compliance approach as an appendix to the OECD's anticorruption recommendations.[6] In particular, in establishing 12 enumerated criteria for companies to consider in combating foreign bribery, the Guidance expressly refers to "ethics and compliance programmes" over a dozen times, expanding well beyond the more limited concept of audit, accounting and internal controls as the sole focus for compliance, an approach commonly seen outside the U.S.[7] 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 approach to detecting and preventing misconduct in organizations. However, while the Good Practice Guidance speaks primarily to foreign bribery, most of the

[4] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html. On May 25, 2011, Russia was invited to join the OECD anti-bribery convention and will thus become the thirty-ninth nation to sign on to the Guidance: http://www.oecd.org/document/24/0,3746,en_21571361_44315115_47983768_1_1_1_1,00.html.

[5] The 2010 Guidance was published as an appendix to the December 9, 2009 OECD publication, *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* ("the 2009 Recommendations") through its Working Group on Bribery in International Business Transactions ("the OECD Working Group"), http://www.oecd.org/dataoecd/11/40/44176910.pdf.

[6] "Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance," *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, http://www.oecd.org/dataoecd/11/40/44176910.pdf.

[7] For instance, the Guidance states in its opening paragraph: "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)" (emphasis added).

provisions could readily be applied to ethics and compliance programs on a much broader basis as well, and as such, represents a dramatic step forward. It is quite significant that the Guidance has the express endorsement of a highly prestigious international body which has the potential to move the development of programs forward on a global basis in the same way the USSG standards did in the U.S. in 1991. Also, as was true for the USSG, these standards may well have an influence on all aspects of programs relating to compliance far beyond the specific area of bribery. Notably, in 2010 Mark Mendelsohn, then chief FCPA prosecutor for the U.S. Department of Justice, indicated in public remarks that the Guidance is endorsed by the U.S. government.[8] He has since further commented: "It actually represents the first multi-governmentally endorsed set of standards for anticorruption compliance programs for companies to use. Now for the first time you actually have all OECD governments endorsing a common set of principles and talking very directly to the private sector about the important role that they play in fighting corruption."[9]

As the 38 nations continue to develop their approach to corporate anti-bribery compliance programs, their policies and other implementation activities will add to the rapidly evolving body of standards for compliance and ethics programs around the world. Going forward, compliance and ethics practitioners can rely not only on the well-established USSG, but also the Good Practice Guidance, which has expressly extended the proactive self-governance principles of the USSG internationally. Notably, the Guidance is not only consistent with the principles of the USSG, but in some instances even breaks new ground in setting out yet higher expectations. And what's more, boards, CEOs, general counsels and stakeholders of multinationals can no longer dismiss compliance and ethics programs as purely a "U.S.-centric approach" — now that the practice of proactive, risk-based self-governance has officially gone global.

The authors have prepared a more detailed analysis of the Good Practice Guidance (now pending publication). Following are some general observations on the Guidance and its application:

- **Flexible, pragmatic, not legally binding but positioned to set a global standard.** The Guidance is not referred to as a "best practice" guide and describes its recommendations as *"non-legally binding guidance."* There is a pragmatic recognition that

[8] D. Hoechler, "'Roided Up Enforcement: DOJ Unit That Prosecutes FCPA to Bulk Up 'Substantially'," *Corporate Counsel*, February 25, 2010. http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202444478279&Roided_Up_Enforcement_DOJ_Unit_That_Prosecutes_FCPA_to_Bulk_Up_Substantially.

[9] Mark Mendelsohn interview, "Recent Top DOJ Official Shares Insights Into FCPA Policies, Enforcement Strategies, Public-Private Cooperation and Role of the OECD," *The Metropolitan Corporate Counsel*, August 2, 2010, http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2010&EntryNo=11254.

while the identified criteria reflect effective compliance tools, the Guidance is not intended as a "one size fits all" and the methods for preventing and detecting misconduct are continuously evolving.

The recommendations are intended to be flexible, in particular, to accommodate small and medium sized enterprises, taking into account their size, resources, industry and circumstances. The advice to companies remains the same: consider what can be done practically, and draw advice and assistance from peers and trade and business associations, to implement steps to prevent misconduct.[10]

Finally, although the 2009 OECD Recommendations (to which the Guidance is appended) are not legally binding, they are likely to have the same significant political implications as the original 1999 OECD Anti-bribery Convention, resulting in intense pressure on signatory nations to demonstrate their meaningful implementation of those agreed guidelines. We believe that wise companies should treat the Guidance as a legal standard for two important reasons: first, because the Guidance contains smart compliance practices, and second, it will likely influence the views of regulators and enforcement authorities generally.

- P**otential broad application beyond anti-bribery arena.** Historically, the compliance and ethics field has seen the development of standards that start in one risk area and subsequently develop as standards for all types of compliance programs. This is in part due to the fact that compliance measures never work effectively in a silo but must be part of a company's integrated approach to preventing and detecting misconduct in all high risk areas. The Guidance states expressly in its introduction that to be effective, anti-bribery measures "should be interconnected with a company's overall compliance framework." The authors believe the Guidance should not be applied in isolation from the rest of a company's compliance and ethics program. In fact, companies should incorporate the Good Practice Guidance provisions into all elements of their compliance and ethics program efforts.[11]

[10] The USSG take a similar, fit-for-purpose approach. See USSG section 8B2.1 App. note 2 (C)(iii).

[11] A similar approach was taken by the Canadian Competition Bureau in its 2010 Bulletin on compliance programs: "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." Competition Bureau Canada, *Corporate Compliance Programs*, preface (2010), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf.

- **Incorporates most of the elements of the USSG, and in some instances sets higher standards.** The Guidance generally follows the roadmap of the USSG in outlining key elements of an effective program, including periodic risk assessment, "strong, explicit and visible" management commitment, clear written standards and policies, training and communication "for all levels of the company," positive incentives and support,[12] appropriate disciplinary procedures "at all levels of the company",[13] a system for confidential reporting "where possible"[14] and periodic reviews of the compliance program's effectiveness. Not surprisingly, the Guidance exceeds the USSG in presenting significantly more detailed standards for anti-bribery efforts, calling out specific high risk areas such as facilitation payments, gifts, hospitality, political contributions and third parties.[15] In making specific reference to each of these risk areas, it is clear that companies need to consider specific protocols and practices in each of the relevant high risk areas, beyond merely publishing the company policy. In addition, the Guidance recommends "properly documented risk-based due diligence" on third party intermediaries and partners.[16] This is similar to, but more detailed than, the

[12] A serious omission to the USSG, this element was added with the 2004 amendments. See USSG section 8B2.1(b)(6)(A). For an extensive discussion of incentives in compliance and ethics programs, see J. Murphy, "Building Incentives in Your Compliance & Ethics Program" (January 2009), http://www.corporatecompliance.org/Content/NavigationMenu/Resources/IssuesAnswers/BuildingIncentivesInYourComplianceProgram_NonMemb.pdf.

[13] Here the Guidance actually goes beyond violations of law and includes discipline for violations of the company's ethics and compliance 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 program.

[14] The Guidance provides that only those who report breaches of law or professional standards "*in good faith and on reasonable grounds"* are to be protected. This qualification is not surprising, given the concerns of some OECD members about false accusations, privacy issues and the diplomatic environment leading to the final Guidance.

[15] The Guidance highlights some known high risk areas for multinationals:

> 5. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:
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> 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

[16] A focus on third parties is clearly evident in US Department of Justice FCPA settlement agreements, such as Metcalf and Eddy, http://www.corporatecompliance.org/Content/NavigationMenu/Resources/ComplianceBasics/MetcalfEddy.pdf; as well as the Woolf Report in the UK regarding BAE's compliance

relevant USSG commentary.[17] At a minimum, the Guidance is an important tool and standard for multinationals to review against their existing anticorruption programs even if those measures currently meet the USSG.

- **Provides support and acknowledgement of the role of the CECO.** Another significant area in which the Guidance exceeds the express statements of the USSG is in its strong acknowledgement of the role and stature needed for the individual leading and overseeing the company program, the chief compliance and ethics officer. Although the specific title of "chief compliance and ethics officer" is not explicitly stated, the Guidance does make clear that the company should provide for oversight by *"one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority,"* who has *"the authority to report matters directly to independent monitoring bodies such as the audit committees of boards of directors or of supervisory boards."*[18]

  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.[19] When considered alongside the 2010 amendments to

program. See Woolf Committee, *Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc – The Way Forward* (May 2008), http://ir.baesystems.com/investors/woolf/.

[17] Commentary to the USSG provides: "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." USSG section 8B2.1 App. Note 2(C)(ii).

[18] OECD Working Group on Bribery in International Business Transactions, "Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance," *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, http://www.oecd.org/dataoecd/11/40/44176910.pdf.

[19] There is a growing recognition that the chief compliance and ethics officer should not report to the General Counsel or other senior corporate officer, so that the role will be empowered and have sufficient autonomy from management in order to exercise independent oversight over the program. In the Tenet Healthcare fraud case, where the general counsel also served double-duty as the chief compliance officer, Senator Charles Grassley famously commented: "It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement." http://grassley.senate.gov/releases/2003/p03r09-08.htm. Since Tenet, there is a long list of settlement agreements that have expressly required that the chief compliance officer "should not be, and should not be subordinate to, the general counsel or chief financial officer." For just a few examples, see the Tenet, Pfizer, Bayer and Siemens settlement agreements: http://oig.hhs.gov/fraud/cia/agreements/TenetCIAFinal.pdf;

the USSG, which provide that the individual tasked for oversight of the program must have "direct reporting obligations" to the governing authority, the support and rationale for an experienced, empowered, senior-level, chief compliance and ethics officer with adequate resources continues to gain momentum and recognition.[20]

- **Omits due diligence in hiring and promoting employees.** One obvious difference in approach between the Guidance and the USSG is the omission of the requirement that companies exercise due diligence and appropriate screening in the hiring and promoting of employees, in particular to avoid putting into positions of authority managers likely to violate laws.[21]

- **The proof is in the pudding.** As with the OECD Recommendations to which the Guidance is appended, ultimately the true test of its impact will be in the actions of the OECD to monitor and utilize peer pressure to hold member and signatory nations to their stated commitments. If the recent surge of anti-bribery enforcement actions in a number of member nations is any indicator, the global influence and spread of the proactive compliance and ethics principles set out in the Guidance has a promising future.

As noted, the entry of the Good Practice Guidance into the compliance and ethics arena as a new global standard is a milestone with particular significance for multinationals. Coming at a time of rapid expansion and evolution in the field, the Guidance adds an important global imprimatur to an existing body of best practice recognized by an increasing number of regulators, prosecutors and policymakers around the world.

http://oig.hhs.gov/fraud/cia/agreements/pfizer_inc_08312009.pdf;
http://oig.hhs.gov/fraud/cia/agreements/fully_executed_bayer_cia_112508.pdf;
http://www.justice.gov/opa/documents/siemens-ag-stmt-offense.pdf.

[20] See also the March 5, 2009 RAND Symposium: "Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds," http://www.rand.org/pubs/conf_proceedings/CF258/, which specifically examined the CECO role and the critical need for a senior-level, empowered leader to oversee an effective program. See interview by Roy Snell, CEO of Society of Corporate Compliance and Ethics, with one of the authors on the topic of a CECO reporting to the GC. "Just How Independent Should Compliance Be From Legal?" *Journal of Healthcare Compliance*, March/April 2011, http://compliancestrategists.net/sitebuildercontent/sitebuilderfiles/_snell.interviewboehme3.2011.pdf.

[21] 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 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.