

8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, Criminal Division policies on monitor selection instruct prosecutors to consider, at the time of the resolution, whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems and whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future to determine whether a monitor is appropriate.

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (*e.g.*, monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?

3. Does the corporation's compliance program work in practice?

*See JM 9-28.800.*

In answering each of these three “fundamental questions,” prosecutors may evaluate the company's performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program both at the time of the offense and at the time of the charging decision and resolution.<sup>1</sup> The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue and the circumstances of the company.<sup>2</sup> Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

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The critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or permitting employees to engage in misconduct. JM 9-28.800.

Accordingly, prosecutors should examine the comprehensiveness of the compliance program, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to lines of reporting and communication, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce.

governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations. Where relevant, prosecutors should consider the technology—especially new and emerging technology—that the company and its employees are using to conduct company business, whether the company has conducted a risk assessment regarding the use of that technology, and whether the company has taken appropriate steps to mitigate any risk associated with the use of that technology.

Prosecutors should also consider “[t]he effectiveness of the company’s risk assessment and the manner in which the company’s compliance program has been tailored based on that risk assessment” and whether its criteria are “periodically updated.” *See, e.g.*, JM 9-47-120(2)(c); U.S.S.G. § 8B2.1(c) (“the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct”).

Prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction. Prosecutors should therefore consider, as an indicator of risk-tailoring, “revisions to corporate compliance programs in light of lessons learned.” JM 9-28.800.

– What methodology has the company used to identify, analyze, and address the particular risks it faces? What features of the company reduce its exposure to such risks? Is the company’s approach to risk management proactive



– How has the company communicated its policies and procedures to all employees and relevant third parties? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees’ access? Have the policies and procedures been published in a searchable format for easy reference? How does the company confirm that employees know how to access relevant policies? Does the company track access to various policies and procedures to understand what policies are attracting more attention from relevant employees?

– Who has been responsible for integrating policies and procedures? Have they been rolled out in a way that ensures employees’ understanding of the policies? In what specific ways are compliance policies and procedures reinforced through the company’s internal control systems?

– What, if any, guidance and training has been provided to key gatekeepers in the control processes (*e.g.*, those with approval authority or certification responsibilities)? Do they know what misconduct to look for? Do they know when and how to escalate concerns?

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Another hallmark of a well-designed compliance program is appropriately tailored training and communications.

Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. Prosecutors should also assess whether the company has relayed information in a manner tailored to the audience’s size, sophistication, or subject matter expertise. Some companies, for instance, give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise. Other companies have invested in shorter, more targeted training sessions to enable employees to timely identify and raise issues to appropriate compliance, internal audit, or other risk management functions. Prosecutors should also assess whether the training adequately covers prior compliance incidents and how the company measures the effectiveness of its training curriculum.

Prosecutors, in short, should examine whether the compliance program is being disseminated to, and understood by, employees in practice in order to decide whether the compliance program is “truly effective.” JM 9-28.800.

– What training have employees in relevant control functions

What analysis has the company undertaken to determine who should be trained and on what subjects?

– Has the training been offered in the form and language appropriate for the audience? Are the company's training and communications tailored to the particular needs, interests, and values of relevant employees? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? Has the training addressed lessons learned from compliance issues faced by other companies operating in the same industry and/or geographical region? Whether online or in-person, is there a process by which employees can ask questions arising out of the trainings? How has the company measured the effectiveness of the training? Has the company evaluated the employees' engagement with the training session and whether they have learned the covered subject matter? How has the company addressed employees who fail all or a portion of the testing? Has the company evaluated the extent to which the training has an impact on employee behavior or operations?

– What has senior management done to let employees know the company's position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company's policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?

– What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

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Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or

properly documented? How does the company determine who should conduct an investigation, and who makes that determination?

- Does the company apply timing metrics to ensure



procurement and vendor management processes? Does the third-party management process function allow for the review of vendors in a timely manner? How is the company leveraging available data to evaluate vendor risk during the course of the relationship with the vendor?

– How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

– How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third-party relationship managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties? Does the company engage in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process?

– Does the company track red flags that are identified from due diligence of third parties and how those red flags are addressed? Does the company keep track of third parties that do not pass the company's due diligence or that are terminated, and does the company take steps to ensure that those third parties are not hired or re-hired at a later date? If third parties were involved in the misconduct

The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.

– Was the company able to complete pre-acquisition due diligence and, if not, why not? Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?

– How has the compliance function been integrated into the merger, acquisition, and integration process? Does the company account for migrating or combining critical enterprise resource planning systems as part of the integration process? To what extent did compliance and risk management functions play a role in designing and executing the integration strategy?

– What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process?

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Effective implementation also requires those charged with a compliance program's day-to-day oversight to act with adequate authority and stature. As a threshold matter, prosecutors should evaluate how the compliance program is structured. Additionally, prosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient qualifications, seniority, and stature (both actual and perceived) within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company. "A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization." Commentary to U.S.S.G. § 8B2.1 note 2(C). By contrast, "a small organization may [rely on] less formality and fewer resources." *Id.* Regardless, if a compliance program is to be truly effective, compliance personnel must be empowered within the company.

Prosecutors should evaluate whether internal audit functions are conducted at a level sufficient to ensure their independence and accuracy, as an indicator of whether compliance personnel are in fact empowered and positioned to effectively detect and prevent misconduct. Prosecutors should also evaluate "[t]he resources the company has dedicated to compliance,"

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company responded to specific instances where compliance raised concerns? Have there been transactions or deals that were stopped, modified, or further scrutinized as a result of compliance concerns?

– Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? How does the company invest in further training and development of the compliance and other control personnel? Who reviews the performance of the compliance function and what i

– Has the company outsourced all or parts of its

Compensation structures that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance. At the same time, providing positive incentives, such as promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership, can drive compliance. Prosecutors should examine whether a company has made working on compliance a means of career advancement, offered opportunities for managers and employees to serve as a compliance “champion”, or made compliance a significant metric for management bonuses. In evaluating

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corporation's employees.” JM 9-28.800. Of course, if a compliance program did identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively.

In assessing whether a company’s compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company’s remedial efforts. Prosecutors should also consider whether the company’s compliance program had a track record of preventing or detecting other instances of misconduct, and whether the company exercised due diligence to prevent and detect criminal conduct. *See* U.S.S.G. § 8B2.1(a)(1).

To determine whether a company’s compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the underlying misconduct and the degree of remediation needed to prevent similar events in the future. Prosecutors should also assess how the company has leveraged its data to gain insights into the effectiveness of its compliance program and otherwise sought to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. *See* U.S.S.G. § 8B2.1(a)(2).

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One hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment. A company’s business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the applicable industry standards. Accordingly, prosecutors should consider whether the company has engaged in meaningful efforts to review its compliance program and ensure that it is not stale. Some companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company’s size and complexity.

Prosecutors may reward efforts to promote improvement and sustainability. In evaluating whether a particular compliance program works in practice, prosecutors should consider “revisions to corporate compliance programs in light of lessons learned.” JM 9-28.800; *see also* JM 9-47-120(2)(c) (looking to “[t]he auditing of the compliance program to assure its effectiveness”). This can include analysis of how the company responded to other instances of misconduct in addition to how the company addressed reports of potential misconduct and risks over time. Prosecutors should likewise look to whether a company has taken “reasonable steps” to “ensure that the organization’s compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct,” and “evaluate periodically the effectiveness of the organization’s”

program. U.S.S.G. § 8B2.1(b)(5). Proactive efforts like these may not only be rewarded in connection with the form of any resolution or prosecution (such as through remediation credit or a lower applicable fine range under the Sentencing Guidelines), but more importantly, may avert problems down the line.

– What is the process for determining where and how frequently internal audit will undertake an audit, and what is the rationale behind that process? How are audits carried out? What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management





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Finally, a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on “the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.” JM 9-28.800; *see also* JM 9-47.120(3)(c) (“to receive full credit for timely and appropriate remediation” under the FCPA Corporate Enforcement Policy, a company should demonstrate “a root cause analysis” and, where appropriate, “remediation to address the root causes”).

Prosecutors should consider “any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program.” JM 98-28.800; *see also* JM 9-47-120(2)(c) (looking to “[a]ppropriate discipline of employees,

– Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company’s analysis of why such opportunities were missed?

– What specific changes has the company made to reduce the risk that the same or similar issues will occur in the future? What specific remediation has

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issued by Assistant Attorney General Kenneth A. Polite, Jr., on March 2, 2023, *available at* <https://www.justice.gov/criminal-fraud/file/1100366/download>.

Criminal Division corporate resolution agreements, *available at* <https://www.justice.gov/news> (the Department of Justice's ("DOJ") Public Affairs website contains press releases for all Criminal Division corporate resolutions which contain links to charging documents and agreements).

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<sup>3</sup> As discussed in the Justice Manual, many companies operate in complex regulatory



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3. For this definition, no system should be considered too simple to qualify as a covered AI system due to a lack of technical complexity (*e.g.*, the smaller number of parameters in a model, the type of model, or the amount of data used for training purposes).

This definition includes systems that are fully autonomous, partially autonomous, and not autonomous, and it includes systems that operate both with and without human oversight.