



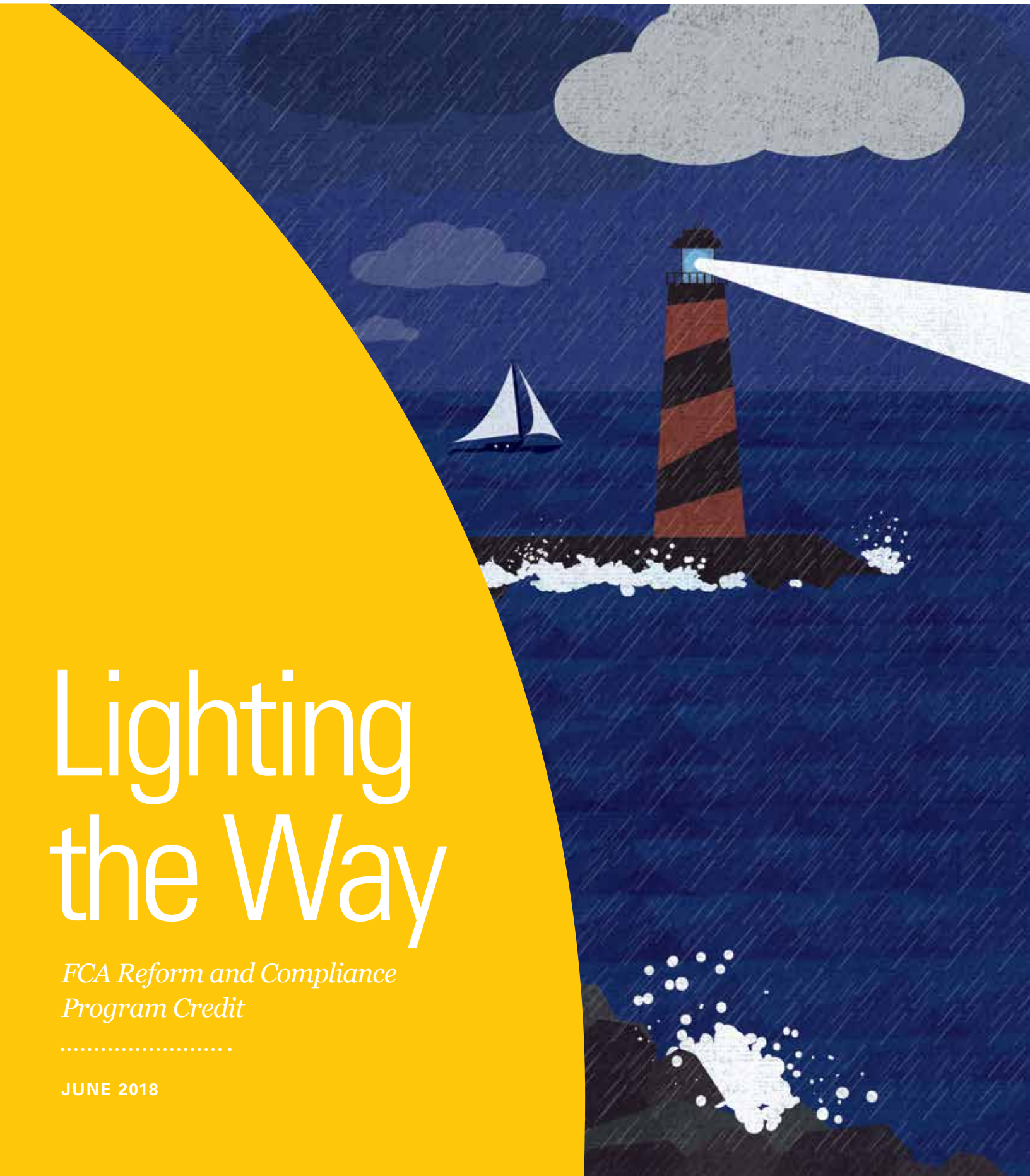
U.S. CHAMBER  
Institute for Legal Reform

# Lighting the Way

*FCA Reform and Compliance  
Program Credit*

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JUNE 2018





**U.S. CHAMBER**  
**Institute for Legal Reform**

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# Executive Summary

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The U.S. Department of Justice (DOJ) is serious about reforming its corporate enforcement policies, and is well-positioned to continue recent False Claims Act (FCA) reform efforts by focusing on credits for companies that implement effective compliance and ethics programs.

As reflected in the recent Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, DOJ is engaged in an ongoing effort to better understand the essential elements of an effective compliance and ethics program.<sup>1</sup> This effort is important and necessary because companies regularly look to DOJ guidance when structuring and evaluating compliance and ethics programs. In addition to considering the essential elements of such programs, DOJ can and should

consider what incentives companies need to successfully implement them. Many companies already have such programs, but if DOJ formalizes a policy to offer credit, it will provide a significant incentive to companies that have not yet taken that step. This paper addresses how DOJ can incentivize companies to implement effective compliance and ethics programs by clearly and unequivocally stating the credits that will be afforded to companies that implement them.

# Building on Recent Reform Efforts

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The Department's recent policy changes and remarks by DOJ officials highlight the importance of effective corporate compliance and ethics programs and recognize the need to treat companies as allies and partners to better detect and prevent wrongdoing.

These recent policy changes include:

- the FCPA Corporate Enforcement Policy, which formalizes incentives offered to companies for disclosure, cooperation, and remediation in FCPA investigations, including implementation of effective compliance and ethics programs<sup>2</sup>; and
- the Policy on Coordination of Corporate Resolution Penalties, which recognizes the value of corporate voluntary disclosures and cooperation, and directs DOJ to coordinate with other agencies to avoid disproportionate or duplicative penalties, i.e., the “piling on” of fines and other penalties in cases of corporate misconduct.<sup>3</sup>

DOJ also recently focused on FCA enforcement reform with the Granston memo, which instructs DOJ attorneys to consider affirmatively seeking dismissal of *qui tam* suits under various circumstances,<sup>4</sup> and the Brand memo, which limits the use of agency guidance documents in FCA litigation and other affirmative civil enforcement litigation.<sup>5</sup>

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# Incentivizing Investment in Compliance

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The recent DOJ policy reforms are welcome and necessary steps towards recognizing that “when a company creates and fosters a culture of compliance, it creates value” and that “compliance is an investment,” as Deputy Attorney General Rod Rosenstein remarked at Compliance Week’s 2018 Annual Conference for Compliance and Risk Professionals.<sup>6</sup>

In addition, as Acting Associate Attorney General Jesse Panuccio explained at the American Bar Association’s 12th National Institute on the Civil False Claims Act and *Qui Tam* Enforcement, DOJ wants to “reward companies that invest in strong compliance measures,” particularly those companies that “do not just adopt compliance programs on paper, but incorporate them into the corporate culture.”<sup>7</sup>

As discussed more fully below, because implementing an effective compliance and ethics program requires a significant investment of limited company resources, there should be reasonable incentives to help encourage companies that do not already have such programs to make this investment. To enhance those incentives, particularly with respect to FCA reform, DOJ should modify the United States Attorneys’ Manual (USAM) to identify (even

*“ To enhance those incentives, particularly with respect to FCA reform, DOJ should modify the United States Attorneys’ Manual (USAM) to identify (even if preliminarily) the essential elements of an effective compliance and ethics program. ”*

if preliminarily) the essential elements of an effective compliance and ethics program. As part of that change, the Department should also establish clear and concrete credits in the enforcement process for companies that implement such programs prior to the initiation of an FCA investigation or enforcement proceeding. The FCA is one of the “most important antifraud tool[s] the Government has,” and focusing on prevention of misconduct rather than post-hoc enforcement will benefit the public and “allow[] the Government to use its limited resources” more effectively.<sup>8</sup>

According to Principal Deputy Assistant Attorney General Andrew Finch of the Antitrust Division, DOJ is currently considering similar suggestions for crediting companies for their pre-existing compliance and ethics programs in criminal antitrust enforcement actions, possibly at the charging stage or at sentencing, even though historically DOJ has not given any credit for compliance and ethics programs in this area.<sup>9</sup> Companies facing an FCA investigation or enforcement proceeding would similarly benefit from a formalized policy crediting companies that invest in compliance and ethics programs before misconduct takes place, and not merely as a remedial measure.

Indeed, the United States Sentencing Guidelines already state that companies with effective compliance and ethics programs can receive leniency in sentencing.<sup>10</sup> Additionally, the government already recognizes and credits companies that have pre-existing compliance programs

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in the context of corporate integrity agreements (CIA) with healthcare entities. Historically, the policy of the Office of Inspector General for the Department of Health and Human Services (HHS-OIG) has been to impose a CIA on any healthcare entity that settles an FCA action in exchange for HHS-OIG releasing its ability to impose administrative sanctions on the entity for the same misconduct that gave rise to the FCA proceeding. If the entity had a pre-existing robust compliance program, the HHS-OIG could exercise discretion not to impose a CIA, or to impose a less cumbersome CIA. Incorporating concrete credit incentives for having effective compliance programs into the USAM would further reinforce the importance of these programs.

In his Compliance Week remarks, Mr. Rosenstein underscored the importance of compliance programs by identifying two questions DOJ asks when things go wrong: (1) “What was the state of the compliance program at the time of the improper conduct?”; and (2) “What is the current state of the compliance function, after remediation to address any lessons learned?”<sup>11</sup>

The first question highlights the importance of forward-looking investment in an effective compliance and ethics program. Focusing on credit for the measures a company had in place at the time the misconduct occurred is essential to incentivizing investment in such programs. The Department of Justice's recent FCPA Corporate Enforcement Policy,<sup>12</sup> its earlier FCPA Pilot Program,<sup>13</sup> and its guidance on Evaluation of Corporate Compliance Programs all appropriately

recognize the importance of crediting effective compliance and ethics programs.<sup>14</sup> However, they focus on post-violation compliance and lack the essential focus on crediting pre-existing programs.<sup>15</sup> Providing credit for pre-existing programs encourages companies to implement them in the first place, not only after misconduct occurs.

As reflected in Mr. Rosenstein's Compliance Week remarks,<sup>16</sup> DOJ evaluates compliance programs, at least in part, from a preemptive framework. DOJ should build on its recent FCPA reform efforts and incentivize preemptive compliance by providing credit in FCA actions for pre-existing effective ethics and compliance programs. This approach is consistent with Mr. Rosenstein's recognition that enforcement actions “achieve deterrence indirectly... [b]ut a company with a robust compliance program can prevent corruption and reduce the need for enforcement” and that “[t]he government should provide incentives for companies to engage in ethical corporate behavior.”<sup>17</sup>



*“ Providing credit for pre-existing programs encourages companies to implement them in the first place, not only after misconduct occurs. ”*



# The Importance of Forward-Looking Investment in Compliance & Ethics Programs

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Effective compliance and ethics programs benefit companies, the government, and the public: they reduce the risks of wrongdoing, increase the likelihood that wrongdoing will be discovered, bring wrongdoing to the attention of management and appropriate law enforcement officials, and increase the likelihood of suitable corrective action.<sup>18</sup>

These programs also encourage reporting of misconduct, protect those who identify wrongdoing, and formulate timely remedial responses.<sup>19</sup> Effective compliance and ethics programs provide for accountability, both internal and external, including the voluntary disclosure of misconduct to appropriate government law enforcement officials and full cooperation with any resulting government investigations and remediation.<sup>20</sup>

Indeed, research demonstrates that effectively-implemented compliance and ethics programs achieve positive results—misconduct is reduced by as much as 66 percent and reporting of wrongdoing to management increases by 88 percent.<sup>21</sup> On the other hand, employees in organizations

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*“ DOJ should therefore leverage its unique position to incentivize companies to adopt such programs before misconduct occurs, not just afterwards as part of the remediation process.”*

with weak ethics and compliance cultures are three times more likely to say they experienced pressure to compromise standards, 41 percent less likely to report observed misconduct, and 27 percent more likely to say that they experienced retaliation after reporting misconduct.<sup>22</sup>

Early investment in compliance and ethics programs is akin to “preventive medicine,” which “help[s] ensure that issues will be detected and addressed at an early stage.”<sup>23</sup> As Mr. Panuccio recently pointed out in his American Bar Association remarks,

“[t]he challenge of corporate compliance is especially acute in large and diverse organizations” where the number of individuals involved and the complexity of business naturally increases the likelihood of rogue employees or managers.<sup>24</sup> Early investment is also necessary due to the fact that such programs take time to develop and become effective. These programs need “adequate resources, dedication of time and effort to training and retraining, a commitment to consistent and transparent discipline, [and] a commitment to investigate all reports of wrongdoing,” none of which can happen overnight.<sup>25</sup>

Successful implementation of an effective compliance and ethics program is challenging and requires forward-thinking allocation of limited company resources. Companies that implement such programs should be rewarded for tackling this challenge and making the investment. These companies make compliance part of their culture and serve as partners and allies for law enforcement. DOJ should therefore leverage its unique position to incentivize companies to adopt such programs before misconduct occurs, not just afterwards as part of the remediation process.

# Credits are Necessary to Incentivize Effective Compliance & Ethics Programs

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The remarks by Mr. Rosenstein and Mr. Panuccio and the developments in DOJ policy clearly demonstrate the increasing recognition inside the government of the benefits conferred by effective compliance and ethics programs, and the need to appropriately credit such programs in the law enforcement process in order to incentivize companies to put them in place.

The best incentive that law enforcement officials can provide is certainty that a company's decision to invest in a compliance program will be recognized and credited if and when the company faces a criminal or civil enforcement action.

Companies that know they will receive credit for implementing an effective compliance and ethics program, if and when misconduct occurs, are much more likely to make this significant and sustained investment. Assurance that this investment in compliance will be recognized and credited in an FCA enforcement action provides the necessary business rationale for long-term investment in an effective compliance and ethics program.

Crediting companies for implementing an effective compliance and ethics program, even if such a program did not prevent or detect the misconduct in question, is important for several reasons.

## **FIRST**

It recognizes that no compliance and ethics plan, no matter how effective, is perfect. As Mr. Rosenstein acknowledged with respect to DOJ itself, "when any one of our 115,000 employees makes a mistake, it can affect the entire organization."<sup>26</sup> Although an effective compliance and ethics program can go a long way in reducing the risk of wrongdoing, misconduct by rogue employees or managers is inevitable, even for companies that implement such programs. It is widely understood that

no compliance program can prevent 100 percent of misconduct at all times, and “such a standard for judging the efficacy of compliance programs is unreasonable.”<sup>27</sup>

Nevertheless, compliance and ethics programs provide many benefits to companies and the public alike. Companies need assurance that when such misconduct occurs, their investment in an effective compliance and ethics program will be appropriately credited by DOJ if they face a criminal or civil enforcement action.

## **SECOND**

Providing clear and concrete benefits to companies that adopt effective compliance and ethics programs encourages companies to adopt such programs earlier and more fully than they otherwise might. Such efforts help those companies prevent misconduct and allow DOJ to focus its limited resources on criminals who pose the most dangerous and imminent threats to the American people—terrorists, drug traffickers, and transnational cyber criminals. As Mr. Rosenstein pointed out, “those groups do not have compliance programs. They do not make voluntary disclosures. They are not our partners in keeping the American economy healthy and prosperous.”<sup>28</sup>

*“Certainty that a significant investment in compliance will be recognized and credited by DOJ provides a powerful incentive for the company to invest in an effective compliance and ethics program.”*

With this extended bandwidth, DOJ can pursue the bad actors that threaten the American people and economy and increase ethics and compliance across entire industries, rather than focusing efforts on specific companies under the microscope in enforcement actions.<sup>29</sup> Moreover, this approach also has the added benefit of improving the dynamic between the government and industry and fostering cooperative partnerships with companies that demonstrate a commitment to ethics and compliance.

### THIRD

Certainty on the part of companies regarding whether and how effective compliance and ethics programs will be credited is the key factor in investing in such programs in the first place. This is especially true for small and mid-sized companies for which compliance programs represent a greater cost center with a more significant impact on smaller profit margins. Certainty that a significant investment in compliance will be recognized and credited by DOJ provides a powerful incentive for the companies of all sizes to invest in an effective compliance and ethics program.

Credits are the most effective way for DOJ to incentivize companies to implement robust compliance and ethics programs. There are always competing voices inside companies on this type of issue, those advocating for more investment in compliance and those advocating for less. The key for the government is to validate the first set of voices by making it clear that investing early in an effective compliance and ethics program is in the best interest of the shareholders and the company. DOJ can accomplish this by detection and enforcement against those who do not do the right thing, and, equally importantly, by providing certain benefits for those who do.

# Compliance Credits

## Offer a Flexible Approach

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In the FCA action context, the credits DOJ could provide to companies for having effective compliance and ethics programs could take several forms. Such credits could include a quantified reduction in the damages multiplier and civil penalties sought by DOJ in settlements and lawsuits, or recommendations to and coordination with appropriate administrative agency officials regarding suspension, debarment, or exclusion decisions.

For example, in the FCA context, a DOJ policy could provide that if a company had an effective compliance and ethics program at the time the misconduct occurred, there would be a presumption that DOJ would not seek any civil penalties or a damages multiplier greater than one and one-half times the government's actual damages in settlement negotiations with the company. This credit could be increased

to the extent that the company, in addition to having had an effective compliance and ethics program in place at the time of the misconduct, also voluntarily disclosed the misconduct, fully cooperated with DOJ's investigation, and undertook appropriate remediation that addressed the root causes of the misconduct, including enhancing its compliance and ethics program to address any lessons learned.

*“ DOJ could recommend to appropriate agency authorities that a company that maintained an effective compliance and ethics program at the time of alleged misconduct not be subject to a suspension, debarment, or exclusion proceeding for such misconduct. ”*

In addition, DOJ could recommend to appropriate agency authorities that a company that maintained an effective compliance and ethics program at the time of the alleged misconduct not be subject to a suspension, debarment, or exclusion proceeding for such misconduct.

Further, to implement the Policy on Coordination of Corporate Resolution Penalties and to achieve uniformity, DOJ

could also engage with other government agencies to encourage them to develop guidelines for suspension, debarment, and exclusion proceedings that would ensure that companies are not subject to those penalties, provided that those companies had and continued to maintain an effective compliance and ethics program.

# Conclusion

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Consistent with DOJ's other recent policy initiatives, the Department can and should take the lead in incentivizing companies to adopt effective ethics and compliance programs. Crediting companies that implement such programs rightly focuses on prevention rather than relying solely on post-hoc enforcement.

This forward-thinking approach harnesses the power of enforcement incentives to elevate ethics and compliance programs across organizations and industries and prevent, detect, and mitigate wrongdoing on the front end.

As Mr. Rosenstein pointed out, DOJ already begins its analysis by evaluating a company's existing compliance program at the time of alleged misconduct.<sup>30</sup> Crediting companies with effective compliance and ethics programs encourages early investment in such programs and recognizes the important role they have in creating a culture of compliance in companies. Moreover, doing so achieves DOJ's stated goal of appropriately "reward[ing] companies that invest in strong compliance measures," as Mr. Panuccio described.<sup>31</sup>

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# Endnotes

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- 1 U.S. Dep't of Justice, USAM Insert 9-47.120, FCPA Corporate Enforcement Policy (2017), <https://www.justice.gov/criminal-fraud/file/838416/download>.
- 2 *Id.*
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- 4 U.S. Dep't of Justice, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c) (2)(A) (Jan. 10, 2018), <https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf>.
- 5 U.S. Dep't of Justice, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.
- 6 Rod Rosenstein, Deputy Attorney Gen., Address at the Compliance Week 2018 Annual Conference for Compliance and Risk Professionals (May 21, 2018).
- 7 Jesse Panuccio, Acting Assoc. Attorney Gen., Address at the American Bar Association 12th National Institute on the Civil False Claims Act and *Qui Tam* Enforcement (June 14, 2018).
- 8 Oversight of the False Claims Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the House Comm. on the Judiciary, 114th Cong. 72 (2016) (statement of Larry D. Thompson, Professor of Law at the Univ. of Ga. Sch. of Law).
- 9 Andrew Finch, Principal Deputy Assistant Attorney Gen., Address at Antitrust in the Private Sector: Hot Issues & Global Perspectives (May 2, 2018); *see also* Kathryn M. Hellings, Daniel E. Shulak, Susan A. Musser, and Collin T. Phillips, DOJ hosts roundtable discussion on criminal antitrust compliance, Hogan Lovells (Apr. 12, 2018), <http://ehoganlovells.com/rvff003a0f7a9a5c5cbcde106de047bcffab37dfa0>.
- 10 *See* U.S. Sentencing Guidelines, U.S. Sentencing Comm'n, § 8B2.1.
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- 18 See Inst. for Legal Reform, Fixing the False Claims Act: The Case for Compliance-Focused Reforms, U.S. Chamber 8-9 (2013), [https://www.instituteforlegalreform.com/uploads/sites/1/Fixing\\_The\\_FCA\\_Pages\\_Web.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf).
- 19 *Id.*
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- 21 Report of ECI's Blue Ribbon Panel on Principles and Practices of High-Quality Ethics & Compliance Programs (Apr. 2016) at 12.
- 22 The State of Ethics & Compliance in the Workplace, Ethics & Compliance Initiative 10 (2018).
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- 29 See, e.g., Inst. for Legal Reform, Fixing the False Claims Act: The Case for Compliance-Focused Reforms, U.S. Chamber 9 (2013), [https://www.instituteforlegalreform.com/uploads/sites/1/Fixing\\_The\\_FCA\\_Pages\\_Web.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf) (comparing post-hoc assessment by DOJ of a company's compliance program to "closing the barn door after all the livestock have run out of the building.").
- 30 Rod Rosenstein, Deputy Attorney Gen., Address at the Compliance Week 2018 Annual Conference for Compliance and Risk Professionals (May 21, 2018).
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