



International Commitment *to* Compliance Programs



Introduction

In your hands is the first draft of what we hope to be a lasting and helpful document for compliance professionals worldwide. SCCE has gathered documents from governments far and wide, all requiring or strongly suggesting the need for corporate compliance programs for companies operating within their borders.

SCCE embarked on this project for three reasons:

1. To help compliance professionals demonstrate to their leadership that compliance is an international concept, and that compliance programs can be found all over the world;
2. To encourage all governments to recognize corporate compliance efforts and encourage the adoption of compliance standards by offering reduced penalties for companies with effective compliance procedures in place; and
3. To help ensure compliance programs and the role of compliance officers have consistency in mission and practice—worldwide.

If you can help refine, correct, or supplement any of the information here, or if you have information about any other countries or governments requiring compliance programs, please email us at helpteam@corporatecompliance.org.

Organisation for Economic Co-Operation and Development (OECD)

Convention on combating bribery of foreign public officials in international business transactions.

Introduction

The OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention") went into effect on February 15, 1999. The Convention requires the 40 ratifying countries to have legislation that criminalizes the bribery of foreign public officials.

Compliance Component

Annex II of the Convention is **"addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programs or measures for preventing and detecting the bribery of foreign public officials in their international business transactions."** Annex II's Good Practice Guidance for Companies, lays out 12 steps which act as **"non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programs or measures for preventing and detecting foreign bribery."** Furthermore, an article published by the OECD as a follow-up to the Convention noted that **"compliance programs,"** when used as a business tool, **"ensure that the values of the company are strongly supported by top management, that staff is trained and educated, that guidance exists for situations requiring judgment, that effective information and reporting within and by the company is granted."**

Impact on Foreign Companies

Foreign corporations may be held accountable under the anti-bribery laws (e.g. U.K. Bribery Act) of each of the 40 nations that have ratified the Convention.

Enforcement

While the Convention itself is binding on the member nations, it is not enforceable in the way that the U.S. Department of Justice enforces the FCPA. The Convention, however, mandates that each member country create legislation which will then be enforced by the civil and criminal authorities of that particular nation.

Key Issues

The OECD has no authority to implement the Convention, but instead monitors implementation by participating countries. The member countries self-enforce the Convention provisions.

Member Countries/Signatories to the Convention

Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

China, Peru, Indonesia, and Malaysia have participated as observers in the Working Group.

For more information

www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

www.acc.com/legalresources/quickcounsel/cbopoiib.cfm

Australia

Competition and Consumer Act 2010

Introduction

Formerly known as the Trade Practices Act 1974, the goal of this legislation is to promote competition, fair trade, and consumer protection.

Compliance Component

Under Division 5 Section 246 (2)(b)(i) Non-Punitive Orders (upon violations), the court may **“order directing the person to establish a compliance program for employees or other persons involved in the person’s business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to such conduct...”**

Impact of Foreign Corporations

The Act has no specific language regarding foreign corporations.

Enforcement

The Australian Competition & Consumer Commission has authority to investigate compliance issues and issue penalties – including requiring companies to implement compliance programs to prevent breaches in the future. Additionally, The Federal Court may make enforcement and compensation orders for breaching the Act.

Key Issue

The compliance component embedded in this act is retrospective. The court may, at their discretion, order organizations to create a compliance department upon violation of the law.

For more information:

www.comlaw.gov.au/Details/C2011C00003

[www.accc.gov.au/business/business-rights-protections/
implementing-a-compliance-program](http://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program)

Austria

Criminal Law Code

Introduction

Enacted in 1999, the CFPOA aims to discourage companies for engaging in corrupt acts abroad. The law is Canada's answer to the OECD Convention. Recent amendments to the CFPOA have increased the maximum penalties and established accounting provisions comparable to the US FCPA.

Compliance Component

A special compliance program is mandatory for banks (Supervision of Securities Act, Paragraph 18). The Austrian Stock Exchange Act also mandates that a company establish a permanent, independent compliance function.

For non-banking industries the implementation of a compliance program and appointment of a compliance officer is recommended by the legislature and the court. A penalty or liability may be mitigated if a company can demonstrate a compliance program and suitable preventative measures were taken. This includes a compliance function that: **assesses legal compliance risks and advises on compliance matters, conducts internal compliance audits, ensures proper reporting of violations, acts as an independent review and evaluation body to ensure that compliance issues are being appropriately evaluated, investigated and resolved, responds to alleged violations of legal standards, regulations and laws, responds to queries and detected offenses, develops corrective actions and reports on findings, and decides consequences of violations with other senior management.**

Criminal liability is extended to companies for **“behavior of employees if offense was made possible or facilitated by ‘decision makers’ omitting to apply the necessary and reasonable care, in particular by omission to implement important measures preventing criminal offenses of technical, organizational, or personnel nature.”**

Impact of Foreign Corporations

Individuals may be prosecuted even though the act may not be punishable in a foreign country, according to foreign law, but is punishable in Austria when committed by or with an Austrian citizen or a company based in Austria.

Enforcement

The central department of public prosecution was created in September 2011 to prosecute economic offenses and corruption.

Key Issue

The Board of Directors can be held personally liable. Their duty to supervise includes the implementation of proper procedures to prevent illegal behavior that would impose avoidable risks on the company.

For more information:

www.mondaq.com/x/197598/Directors+Officers/Compliance+Officer+Liability+Is+There+A+Way+Out

Brazil

Federal Statute 12,846 of 2013

Introduction

On August 1, 2013, the Brazilian government enacted Federal Statute 12,846/13. This statute, better known as the “Clean-Company Act,” allows civil and administrative authorities to bring suit against a corporation for illicit actions. The intent of Federal Statute 12,846/13 was to enhance previous anti-corruption laws that had proven largely ineffective. Furthermore, Federal Statute 12,846/13 was also created as a response to public unrest stemming from excessive corruption in both the political and corporate spheres.

Compliance Component

Federal Statute 12,846/13 allows for the mitigation of damages after a prohibited act has occurred. Notwithstanding the penalties that can be imposed, damages may be substantially reduced by: (1) having an auto-regulatory mechanism in place; (2) self-reporting when an illicit act occurs; and (3) by having a program to assist authorities during the investigatory process.

Impact on Foreign Corporations

The expansiveness of Federal Statute 12,846/13 signifies the importance of compliance programs for foreign corporations that have a subsidiary, or do business with an agent or third-party entity in Brazil. Given the harsh penalties, it is important that corporations doing business in Brazil have compliance programs that understand Brazilian regulations and can assist Brazilian authorities during the course of an investigation.

Enforcement

Brazilian authorities are likely to enforce the “Clean-Company Act.” However, the threat of inconsistent and unbalanced enforcement by the authorities looms. Also, as a result of overlapping jurisdiction, a corporation may be charged numerous times under 12,846/13 for the same act. This, in turn, may lead to a variety of penalties and seriously hinder a corporation’s development in Brazil. Therefore, it is important that corporations maintain robust compliance programs when operating in Brazil.

Key Issue

A particular feature of Federal Statute 12,846/13 is that both administrative and civil action can be brought regardless of the corporation’s intent. In short, the concept of strict liability applies to virtually any corrupt action on behalf of the corporation.

For more information

www.cov.com/files/upload/e-alert_attachment_brazilian_clean_companies_act_original.pdf *(Portuguese)*

www.economist.com/blogs/schumpeter/2014/01/brazil-s-new-anti-corruption-law

Canada

Corruption of Foreign Public Officials Act

Introduction

Enacted in 1999, the CFPOA aims to discourage companies for engaging in corrupt acts abroad. The law is Canada's answer to the OECD Convention. Recent amendments to the CFPOA have increased the maximum penalties and established accounting provisions comparable to the US FCPA.

Compliance Component

Compliance programs aren't specifically mentioned in the Act itself. However, in the 2011 Niko case the Canadian courts provided guidance as to what is expected of compliance programs in Canadian companies. The court lists 21 points for an effective anti-corruption program, including **ensuring buy-in of senior management, identifying a senior corporate officer to own the program and report to the audit committee, development of compliance standards and procedures, ensure training in all offices, subsidiaries and with agents and business partners, applying proper discipline for violations, and reviewing, testing, and updating the program at least annually.**

Impact of Foreign Corporations

The Royal Canadian Mounted Police can investigate prosecute alleged bribery committed by Canadians and Canadian companies anywhere in the world, as well as non-Canadian companies doing business inside Canada.

Enforcement

Enforcement has grown in recent years. CFPOA violations are indictable criminal offenses and can result in imprisonment for up to five years and/or a fine at the discretion of the court. Both corporations and individuals involved, including officers and directors, can be charged.

In some cases a strong corporate compliance program can help protect senior management and directors from liability should a violation occur.

Key Issue

Canada doesn't offer convicted companies an avenue to be reinstated after they have taken corrective action by demonstrating improved compliance.

For more information:

<http://laws-lois.justice.gc.ca/eng/acts/C-45.2/page-1.html>

www.stikeman.com/2011/en/pdf/CorruptionFAQ.pdf

Chile

Corporate Criminal Liability Law 20.393

Introduction

The Chilean Congress passed the Corporate Criminal Liability Law (Ley 20.393) which applies to money laundering, the financing of terrorism, and bribery of domestic and foreign public officials. Law 20.393, Article 3 sets out the “attribution of criminal responsibility,” making legal persons liable for any offense committed directly and immediately in their interest or for their benefit. Enacted in 2009, Chile’s Corporate Criminal Liability Law explicitly provides credit for corporate compliance programs (“modelos de prevención”).

Compliance Component

Law 20.393 requires “supervisory duties” of management to everyone in an organization. An organization or individual managers may be held liable if an offense is committed as a consequence of a breach of one’s duties to manage and supervise. Supervisory duties are fulfilled when, prior to criminal activity, management has adopted and implemented a program of organization, management, and supervision to prevent crimes.

Law 20.393, Art 4, 2): Management of the Legal Entity shall provide the individual in charge of prevention with sufficient means and powers to be able to perform his or her functions, which must consider at least the following: a) the necessary material resources and means to adequately perform his or her tasks, considering the size and economic capacity of the legal entity; b) direct access to the Management of the Legal Entity to inform it in good time and by suitable means of the measures and plans implemented in compliance with his or her mission

and to render account of his or her management and report at least on a six-monthly basis.

Impact of Foreign Corporations

The law applies to all Chilean corporate entities.

Enforcement

With only three convictions under Law 20.393 (as of November 2015), settlements are increasingly popular. Chilean law allows for Conditional Suspensions of Proceedings during investigations. They are essentially settlements between prosecutors and corporate entities. Courts approve the settlements and then determine conditions that must be met. Such conditions can include adoption of a compliance program, obligations to make restitution payments, or other requirements as the courts see fit.

Corporate Criminal Liability Law provides that corporate entities can have their compliance programs certified. Chile's Securities and Insurance Authority authorizes local firms to review compliance programs and certify them as sufficient. Certifying firms are listed on the Securities and Insurance Authority's website.

The effect of these compliance program certifications is still unknown in Chile. Some maintain that certifications should entitle a company to full immunity. Others believe that having one's compliance program certified merely increases the standard of proof in the case of a violation, pushing the burden to the government to establish that the company did not fulfill its obligation to prevent the crime, despite having obtained certification. It is clear, however, that when companies do not have such compliance program certifications; it is more difficult for them to prove that they have fulfilled their legal duties.

Key Issue

Chilean law does not attribute criminal liability to legal entities based on a theory of *mens rea*, instead, applying a theory that the corporate entity failed to fulfill its obligation of preventing the specific crime.

For more information:

Law: www.leychile.cl/Consulta

<http://corporatecomplianceinsights.com/anti-corruption-laws-in-chile-three-things-companies-should-know/>

Germany

Criminal Code & Administrative Offences Act

Introduction

German anti-corruption provisions are contained in the Criminal Code and the Administrative Offences Act (OWiG). The Criminal Code applies to people, which the Administrative Offences Act applies to companies.

Compliance Component

Owners and managers of companies can be held responsible for intentionally or negligently omitting necessary supervisory measures for preventing criminal offenses. This liability indirectly requires companies to implement compliance programs to mitigate risks.

Impact of Foreign Corporations

Corruption offenses committed abroad can be enforced in Germany. Foreign companies operating in Germany risk criminal and civil liability for actions of persons acting on their behalf in Germany.

Enforcement

Germany is the third largest enforcer of out-of-state bribery. Persons convicted of bribery offenses under the Criminal Code face up to 10 years imprisonment, a fine and confiscation of money obtained as a result of the offence. Under the Administrative Offences Act, the fine is no less than €10 million for each intentional criminal offence and €5 million for each negligent criminal offence.

Key Issue

While compliance programs are not explicitly required, the liability extended to individuals and companies for intentionally or negligently omitting necessary supervisory measures for preventing criminal offenses, acts as a strong suggestion from the German government for companies to implement compliance programs.

For more information:

Law: www.gesetze-im-internet.de/englisch_owig/index.html
www.iuscomp.org/gla/statutes/StGB.htm

India

Competition Act of 2002

Introduction

The Competition Act prohibits anti-competitive agreements, abuse of dominance, and regulates mergers and acquisitions. It also gives to the Competition Commission of India the authority to undertake competition advocacy, awareness, and training on competition issues.

Compliance Component

The Competition Compliance Program stems from the Preamble of the Competition Act:

“ . . . Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto...”

Further, S. 49(3) of the Act mandates the Commission to undertake Competition Advocacy measures to spread awareness and increase compliance with the provisions of the Competition Act, 2002.

The Competition Law Compliance Program has become synonymous with the Competition Advocacy. Compliance involves the active efforts on the part of an enterprise to comply with the provisions of the Act. When the enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly the corporation, or its employees, do not infringe the provisions of the Act, it can be stated to maintain a ‘Competition Compliance Program’.

According to the Competition Commission, creation of compliance programs will help companies, “avoid fines or mitigate their severity, pre-empt the possibility of their concluding potentially void agreements, and reduce the costs and negative effects of litigation and regulatory intervention.”

Impact of Foreign Corporations

The law applies to all Indian companies and all companies doing business in India.

Enforcement

Since 2009, the Competition Commission of India has enforced the Competition Act. Since Indian competition law jurisprudence is still in its infancy, it may be difficult to discern specific trends in the CCI’s approach to enforcing the provisions of the Competition Act. The law lists heavy fines for non-compliance: In the case of anticompetitive agreements and abuse of dominance, a 10% fine levied on the company’s average turnover for the 3 years preceding the violation. In the case of a cartel, the penalty can be up to three times its profit for each year of its violation of regulations or 10% of its turnover for each year of its violation, whichever is higher. The CCI can also split an entity for abuse of dominance.

Key Issue

According to the Competition Commission, Compliance Programs should have three main objectives:

1. Prevent violation of law;
2. Promote a culture of compliance; and
3. Encourage good corporate citizenship.

For more information:

Law: www.leychile.cl/Consulta

corporatecomplianceinsights.com/anti-corruption-laws-in-chile-three-things-companies-should-know/

Italy

Legislative Decree 231

Introduction

Legislative Decree no. 231 of 2001 (“Law 231”) created the legal framework wherein most organizations, corporations, and entities may be held accountable for crimes of corruption and misappropriation of public funds, as well as unrelated, non-compliance activities. Law 231 was created to comply with the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Compliance Component

Law 231 advocates compliance programs through the Italian courts. There are two important concepts to be taken from Law 231. First, if a compliance program was in place prior to the criminal act and was “well-tailored” to the risk areas in which the act was committed, the corporation will likely not be found responsible.

Second, the implementation of a “well-tailored” compliance program after an act may help mitigate penalties and help avoid judicially initiated “interim” measures. However, corporations are still held accountable even if they introduce compliance programs after an act occurs.

Impact on Foreign Corporations

Law 231 permits Italian authorities to prosecute foreign entities when: (1) a foreign corporation violates Law 231 through its own actions; (2) a foreign corporation violates Law 231 through an Italian representative or agent; or (3) a foreign corporation that, although not operating in Italian territory, participates in activities that “go into” Italy.

Enforcement

As Law 231 is almost 15 years old, both case law and enforcement history are well-developed. The Courts of Naples, Rome, and Milan have all upheld and enforced Law 231. One criticism of the enforcement of Law 231 is the lack of consistency. In some cases, Italian authorities have been willing to shield corporations from liability, and in other instances take harsh actions against corporations.

Key Issues

Law 231 does not mandate that corporations implement compliance programs. However, executive-level officers may be held personally accountable for breaching their fiduciary and management duties by failing to implement and maintain a compliance program.

Although Law 231 does not *require* a compliance program, the region of Calabria (similar to a U.S. state) does require corporations operating in the region to have a compliance program in place.

For more information:

www.camera.it/parlam/leggi/deleghe/01231dl.htm (*Italian*)

www.ethic-intelligence.com/experts/351-how-italy-has-toughened-its-anti-corruption-laws-and-what-it-means-for-companies

Japan

Unfair Competition Prevention Act (Act No 47 Of 1993)

Introduction

Enacted in 1993, the UCPA aims to discourage companies for engaging in corrupt acts abroad. The law is Japan's answer to the OECD Convention. The UCPA criminalized the bribery of public officials. Japanese corporations are not directly subject to the UCPA, instead the act focuses on individuals. However, companies can be held accountable for procuring acts of bribery or failing to put in place adequate measures to prevent bribery by their employees.

Compliance Component

Compliance programs aren't specifically mentioned in the Act itself. However, it is widely accepted that personal liability falls to employers to monitor and oversee their employees. When determining penalties for violation of the UCPA, employer negligence in hiring and oversight is presumed. **Strict cautions preventing bribery must be shown to avoid heavy penalties. This includes training, and specific instructions to employees to prevent bribery.**

Impact of Foreign Corporations

The UCPA applies to Japanese nationals outside the territory of Japan. The Japanese Penal Code, Article 197 applies to public officers committing bribery outside of Japan. Bribery inside Japan is forbidden by Article 198 of the Penal Code.

Enforcement

Police in Japan investigate bribery, and public prosecutors indict the accused. Individuals convicted under the UCPA are subject to a 5-million yen fine or 5 years imprisonment, or both.

In some cases a strong corporate compliance program can help protect senior management and directors from liability should a violation occur.

Key Issue

The UCPA and Japanese Penal Code hold managers and directors individually liable for the acts of those they manage. Negligence on the part of managers and directors is presumed when an employee violates the UCPA.

For more information:

www.nortonrosefulbright.com/knowledge/publications/121095/business-ethics-and-anti-corruption-laws-japan

Korea

Commercial Code, Article 542-13

Introduction

The Compliance Standard and Compliance Officer article of the Commercial Act came into force on April 15, 2012. The act requires corporations with total assets of more than 300 billion won (approximately \$260 million USD) to have one or more compliance officers. Most listed companies already had compliance officers responsible for running in-house compliance programs, and viewed the new regulation as an implicit plan by lawmakers to create jobs for new graduates of law schools in Korea.

Compliance Component

Article 542-13 includes the following provisions:

- 1. The Board of Directors appoints Compliance Officers for a term of 3-years**
- 2. Compliance officers report findings to the Board of Directors**
- 3. Compliance officers shall perform their duties independently**

Impact of Foreign Corporations

The law applies only to domestic Korean corporations.

Enforcement

The Supreme Prosecutor's Office and the National Police Agency are tasked with enforcement and investigation of Commercial Code violations.

Key Issue

Lawmakers suggested that in order to implement a compliance system properly, corporations should satisfy the following requirements:

1. There must be tangible incentives; and
2. The compliance officer/program must be differentiated from the internal auditor or audit committee.

For more information:

http://koreanlii.or.kr/w/index.php/Compliance_officer

Mexico

Federal Law against Corruption in Public Procurement

Introduction

Based on the US Foreign Corrupt Practices Act (“FCPA”) and the UK Bribery Act, Mexico’s *Federal Law Against Corruption in Public Procurement* (“Anti-Corruption Law”) holds both individuals and corporations accountable for illicit actions committed in order to gain an unfair business advantage in the procurement of public contracts.

Compliance Component

Chapter 7, Article 33 of the Anti-Corruption Law discusses the need to have **“measures that inhibit the practice of misconduct, to guide partners, managers and employees of companies on compliance and integrity programs,”** that contain the **“tools of denunciation and protection for whistleblowers.”**

Impact on Foreign Companies

With more restrictive measures than the FCPA, foreign corporations must be prepared for the potential impact of having to modify their existing compliance procedures when bidding for public contracts in Mexico.

Enforcement

It is unknown how strictly Mexican authorities will enforce the Anti-Corruption Law. However, it is important to note that the potential penalties are severe. Corporations that violate the Anti-Corruption Law may be banned from bidding on public contracts for various—and often lengthy—periods of time.

Key Issue

Unlike the FCPA, which permits facilitation payments, such actions are prohibited under the Anti-Corruption Law.

For more information:

dof.gob.mx/nota_detalle.php?codigo=5253615&fecha=11/06/2012
(Spanish)

www.latinbusinesschronicle.com/app/article.aspx?id=6818

New Zealand

Anti-Money Laundering & Countering Financial of Terrorism Act

Introduction

NZ's contribution to the Financial Action Task Force. By way of background: the FATF has been tasked worldwide with combatting international money laundering, bribery and corruption, improper insider dealings, tax fraud, financing of terrorist activities as well as other illegal activities. The Act went into effect on 1 July 2013.

Compliance Component

The first requirement of the act is to establish a compliance programme. According to the Ministry of Justice, "This involves: a) appointing a compliance officer; and b) developing a reporting and compliance programme. The key elements of the compliance programme will include a comprehensive risk assessment, vetting and training obligations for managers, reporting procedures, record keeping, due diligence, and other processes for minimizing the risk of abuses."

Impact on Foreign Corporations

The Act extends outside NZ to any person resident or by any organization doing business in New Zealand to the extent that such conduct relates to goods, services, or interest in New Zealand.

Enforcement

The consequences of a breach of the AML/CFT Act are not to be under-estimated. Penalties are substantial, even for lower level non-compliance offences. Failure to adequately monitor accounts and transactions can lead to penalties of up to \$100,000 for an individual and up to \$1 million for a corporate entity.

Failure to operate an AML/CFT programme, to conduct client due diligence or to keep required records could subject individuals to penalties of up to \$200,000 and bodies corporate up to \$2 million. Criminal penalties for more serious offences may include imprisonment.

For more information:

www.justice.govt.nz/policy/criminal-justice/aml-cft/information-for-businesses

New Zealand

Fair Trading Act

Introduction

NZ's Fair Trading Act exists to prohibit certain conduct and practices in trade and to provide for the disclosure of consumer information relating to the supply of goods and services to promote product safety.

Compliance Component

The Fair Trading Act highly recommends all businesses implement a compliance programme in-house. The existence of a compliance programme may also assist businesses in establishing legal defenses to any prosecution under the Act. The courts may also favourably view the existence of a compliance programme when imposing penalties for breaches of the Act which occurred despite the diligent supervision of the business.

Impact on Foreign Corporations

The Act does not extend outside of New Zealand corporations.

Enforcement

The Communications Commission is tasked with enforcement. Their powers of investigation and enforcement extend to all businesses and include compulsory interview powers, enforceable undertakings, significant fines, management banning orders, and inspections of public places without warrants.

For more information:

www.comcom.govt.nz/fair-trading/developing-a-fair-trading-compliance-programme/

Russia

Federal Anti-Corruption Law No. 273

Introduction

Law No. 273 requires domestic and foreign companies operating in Russia to implement extensive compliance programmes. The Law's provisions are similar to the FCPA and the UK Bribery Act.

Compliance Component

Under Article 13.3 of Law No. 273, companies are required to develop and implement the following compliance measures:

- 1. Definition of the divisions or officials responsible for prevention of corruption and other violations;**
- 2. Cooperation of organizations with law enforcement authorities;**
- 3. Development and introduction of standards and procedures aimed at ensuring compliance;**
- 4. Adoption of a code of ethics and business conduct applicable to the employees of the organization;**
- 5. Prevention and settlement of conflicts of interest; and**
- 6. Prevention of unofficial reporting and the use of forged documents.**

Impact of Foreign Corporations

The Law applies to all “organizations” operating in Russia.

Enforcement

Article 13.3 was introduced on January 1, 2013. Current Russian case law suggests that as companies develop robust compliance programs, they may be able to use them as a defense when under investigation.

Key Issue

While requiring companies to take measures to prevent corruption, the specific measures listed in Article 13.3 are neither mandatory nor exclusive. Even if a company enacts all 6 of the steps in Article 13.3, they may not be shielded from liability. Under the law, a company is guilty of an administrative offense if it had an opportunity to comply with the legal requirements, but did not undertake “all possible measures to ensure compliance.”

For more information:

Law: <http://docs.cntd.ru/document/902135263> (Russian)

www.lexology.com/library/detail.aspx?g=c3c2ef56-b3cb-477e-9ec3-f24a655286b6

South Africa

King III Report on Corporate Governance

Introduction

Released on September 1 2009, the King III Report on Corporate Governance (“King Report”) is the third installment of South Africa’s guidelines and expectations for corporate governance. The King Reports are unlike other documents written on corporate governance because the focus is placed on the social, financial, and environmental characteristics of a corporation.

Compliance Component

Principle 6.4 of the King Report recommends that **“the board should delegate to management the implementation of an effective compliance framework and processes.”**

Principle 6.4.3 states, **“Compliance with laws, rules, codes and standards should be incorporated in the code of conduct of the company.”**

Principle 6.4.4 states, **“Management should establish the appropriate structures, educate and train, and communicate and measure key performance indicators relevant to compliance.”**

Principle 6.4.7 advises that a **“compliance officer should be a suitably skilled and experienced person who should have access and interact regularly on strategic compliance matters with the board and/or appropriate board committee and executive management.”**

Impact of Foreign Corporations

The King Report applies to entities incorporated in or resident in South Africa. Foreign subsidiaries and local companies should apply the principles and recommendations prescribed by the holding company and subject to entity-specific foreign legislation.

Enforcement

Implementation of the recommendations of the King Report are mandatory for companies listed on the Johannesburg Stock Exchange (“JSE”). However, companies not listed on the JSE are subject to the “apply or explain” concept.

Key Issue

The concept of “apply or explain” is new to the King III Report and different from the “comply or explain” concept that was in earlier editions of the King Report. The significance of this concept is that companies have a choice about whether or not to implement the King III recommendations. Boards of directors can assess their corporate goals and conclude that following a King III recommendation is not in the best interest of the company. The King III report creators believed that explaining how the principles and recommendations were applied, or if not applied, the reasons, results in compliance.

For more information

www.ecgi.org/codes/documents/king3.pdf

Spain

Criminal Code

Introduction

Pursuant to amendments to the Spanish Criminal Code taking effect on July 1, 2015, Spain now regulates corporate compliance programs.

Compliance Component

The amended code provides companies with an exemption from criminal liability for crimes committed by their officers or employees, provided the company meets certain requirements set forth under the new law. **Specifically, Article 33 of the amended code exempts companies from criminal liability under the following conditions:**

- **the directors have adopted a compliance program that meets the legal requirements under Spanish law;**
- **the supervision of the program is entrusted to a company's body or individual with authorized powers of initiative and control (Compliance Body);**
- **the officers or the employees have committed a crime by intentionally violating the compliance program; and**
- **the Compliance Body did not neglect its duties of supervision, oversight and control.**

The amended Spanish code also lists six key elements that a compliance program must include in order to insulate a company from criminal liability. **These six elements, as enumerated in Article 33 bis 5, are:**

- 1. Risk assessment;**
- 2. Standards and controls to mitigate any criminal risks detected;**
- 3. Financial controls to prevent the crimes;**
- 4. Obligation to report to the Compliance Body any violations of the standards and controls (a whistleblowing channel);**
- 5. Disciplinary system to sanction violations of the compliance program by officers and employees; and**
- 6. Periodic review of the compliance program, making the necessary adjustments when serious violations occur or when the company undergoes organizational, structural or economic changes.**

Impact of Foreign Corporations

The Spanish Criminal Code only applies to companies based in Spain.

Enforcement

It is unknown yet how the Spanish authorities will enforce this law. However, much like in the U.K., the recent Spanish legislation is designed to provide an affirmative compliance defense for companies that can demonstrate the six elements of an effective compliance program described in the new law.

Key Issue

Directors are legally-obligated to adopt a compliance program and the program must be supervised by a body or individual authorized to exercise high-level control.

Switzerland

Swiss Criminal Code, Article 102

Introduction

When corruption/bribery has occurred in Switzerland, there are two types of criminal liability for an organization:

1. A secondary criminal liability when it is not possible to attribute the act to any specific natural person; and
2. A primary liability where the undertaking is responsible for failing to take all “reasonable organizational measures” required to prevent the offense.

Compliance Component

In cases of primary liability, an effective compliance program can eliminate the criminal liability of the entity, as long as the entity has taken all of the reasonable organizational measures required to prevent the offense in question. Additionally, in all cases, an effective compliance program can mitigate the criminal liability of an entity.

Impact of Foreign Corporations

The law applies only to domestic Swiss corporations.

Enforcement

The Swiss Code of Criminal Procedure regulates prosecution of corruption.

Key Issue

If corruption occurs and a legal entity lacks adequate compliance procedures, by law that entity is criminally liable.

For more information:

<http://globalcompliancenews.com/anti-corruption/anti-corruption-laws-around-the-world/anti-corruption-switzerland/>

Tanzania

Public Procurement Regulations

Introduction

Regulation 100 (2) of the Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender Regulations (PPRA) – Government Notice No. 97 of 2005 requires that procuring entities, bidders, and approving authorities include in the bidding document an assertion that Tanzania’s laws against fraud and corruption are observed.

Compliance Component

The PPRA requires all bidders to affirm by memorandum that their entity has an anti-bribery policy/code of conduct and a compliance program and submit the policy/code and compliance program for review. The language of the memorandum includes, “This company has an anti-bribery policy/code of conduct and a compliance program which includes all reasonable steps necessary to assure that the no-bribery commitment given in this statement will be complied with...”

Impact of Foreign Corporations

The law applies to any bidding entity for public contracts in Tanzania.

Enforcement

If successful bidders fail to comply with its no-bribery commitment, severe civil sanctions will apply.

Key Issue

This regulation only applies to entities seeking public contracts in Tanzania.

Ukraine

Criminal Code

Introduction

As of September 2014, Ukrainian legal entities may be criminally liable for the crime of corruption committed by their employees or other authorized persons (e.g., those acting on the basis of a power of attorney or other agents).

Compliance Component

The existence of a compliance program, per se, does not preclude criminal investigation or sanctions against a company. However, at the time of determining the punishment, the existence of and the evidence of the concrete steps for the implementation and enforcement of a compliance program shall be viewed as a mitigating factor by the presiding judge

Impact of Foreign Corporations

The law applies to all legal entities in Ukraine.

Enforcement

The Ukrainian legal system does not have a specific regulator with exclusive responsibilities to criminally prosecute corruption cases. Any person (individual, legal entity, state official and international organization, etc.) may request that an investigator/prosecutor start a criminal investigation for corruption.

Key Issue

The value of compliance programs is not only that it is a mitigating factor for punishment, but also that proper awareness and training of employees should decrease the likelihood of an illegal event taking place.

United Kingdom

Bribery Act 2010

Introduction

The United Kingdom's Bribery Act went in effect on July 1, 2011, replacing all prior bribery laws.

Compliance Component

Much like the “seven elements” of the United States’ Sentencing Guidelines, the United Kingdom established “six principles” to guide corporations and their compliance programs. The six principles are: (1) that a **“commercial organization’s procedures... are proportionate to the bribery risks”**; (2) that **“top-level management”** is committed; (3) **“the commercial organization assess the nature and extent of its exposure to potential external and internal risks”**; (4) **“the commercial organization applies due diligence procedures”**; (5) **“the commercial organization seeks to ensure that its... procedures and policies are embedded and understood throughout the organization”**; and (6) that **“the commercial organization monitors and reviews procedures”** making **“improvements where necessary.”** Furthermore, it should be noted that a **“commercial organization will have a full defense if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.”**

Impact on Foreign Companies

A foreign corporation may be subject to the Act, if the corporation “carries on a business, or part of a business, in any part of the United Kingdom.” Additionally, a foreign corporation may be held responsible if a person who has a “close connection” with the United Kingdom carries out an act of bribery. A “close connection” includes UK citizens, UK nationals who reside overseas, and also “individuals ordinarily resident” in the United Kingdom.

Enforcement

The United Kingdom’s Serious Fraud Office (SFO) is the main agency responsible for enforcing the provisions of the Bribery Act. Enforcement actions by the SFO may include prosecuting bodies on their asset recovery powers and publishing the details of their illegal conduct.

Key Issues

The Bribery Act does not permit facilitation payments.

The Bribery Act does not limit its scope to only the bribery of a foreign officials, a bribe by a person or entity under its jurisdiction is enough to violate the Act.

For more information:

www.legislation.gov.uk/ukpga/2010/23/data.pdf

United States

Foreign Corrupt Practices Act

Introduction

The Foreign Corrupt Practices Act (FCPA) was created to curtail the practice of American companies bribing foreign officials in exchange for business advantages. The main intent of the FCPA was to make it “unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.” As the one of the most important anti-corruption laws today, the FCPA has become a cornerstone of compliance-creating legislation throughout the world.

Compliance Component

The FCPA tacitly encourages corporations to create and implement robust compliance programs. Corporations—both foreign and domestic—that maintain compliance programs consistent with the U.S. Sentencing Guidelines are less likely to violate the FCPA. Second, if during the course of an investigation, an organization is found to have an effective compliance program, such recognition may lead to a reduced penalty for violating the FCPA.

Impact of Foreign Corporations

Foreign corporations that operate or desire to operate—in almost any capacity—in the United States may be subject to FCPA enforcement. Transactions that have any connection to the U.S. are often sufficient to trigger U.S. jurisdiction.

Enforcement

Foreign and domestic corporations have paid hefty fines to the US Department of Justice and the Securities and Exchange Commission for FCPA violations. Given the history of large settlements and rigid enforcement, corporations need to understand the significant risks involved when operating in high-risk environments.

Key Issues

The FCPA has an exception for small “facilitation” payments. These are “payments designed to expedite or to secure the performance of a routine governmental action by a foreign official.” The DOJ has commented that large “facilitation” payments rarely, if ever, will be protected under the exception.

The FCPA includes both criminal and civil elements. It requires companies to line-item bribes in their accounting. The failure to do so is a “books and records violation” which can trigger civil actions by the SEC, in addition to criminal enforcement actions independently taken by the DOJ for the act of bribery itself.

For more information

www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf

www.justice.gov/criminal/fraud/fcpa/

United States

United States Federal Sentencing Guidelines

Introduction

The United States Federal Sentencing Guidelines (“Sentencing Guidelines”) were established in 1991 to govern the sentencing of corporate entities when convicted of felonies or serious misdemeanors. Although they are not mandatory, courts throughout the United States use them as a guide when sentencing corporations.

Compliance Component

Chapter 8, Section 2 of the Sentencing Guidelines Manual (“Manual”) is titled “Effective Compliance and Ethics Program.” Section 8, B2.1, states **“such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.”** Furthermore, in this section the “seven elements” of an effective compliance program are listed. These elements state that compliance programs: (1) should **“establish standards and procedures”**; (2) that the **“governing authority shall be knowledgeable”**; (3) that **“the organization shall use reasonable effort not to include within the substantial authority personnel... any individual [who]... has engaged in illegal activities”**; (4) that **“the organization shall... communicate... its standards and procedures”**; (5) that the corporation **“shall take reasonable steps to ensure the... program is followed”**; (6) that the **“program shall be promoted and enforced”**; and (7) that **“after criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately... and prevent further similar conduct.”**

Impact of Foreign Corporations

Foreign corporations that operate in the United States or have a business relationship with companies incorporated in the United States are subject to its jurisdiction. Therefore, foreign corporations should have compliance programs that are guided by the seven elements.

Enforcement

While the Sentencing Guidelines are not law, and therefore unenforceable, a corporation's use of the seven elements may demonstrate that it made an attempt to implement an effective compliance and ethics program. Federal courts can take this into consideration when determining the culpability of corporations.

Key Issue

The Sentencing Guidelines were mandatory and legally enforceable, until a Supreme Court ruling in 2005. Since that decision, the Sentencing Guidelines are considered suggestions and guidance for federal courts.

For more information

www.usc.gov/guidelines-manual/guidelines-manual

Share your knowledge

Do you have knowledge of other government-issued documents that mention compliance programs, compliance officers, and/or compliance functions?

Please share your knowledge with us and we may add it to this resource. Contact SCCE at:

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SCCE exists to champion ethical practice and compliance standards in all organizations and to provide the necessary resources for compliance professionals and others who share these principles.



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