Developing and Strengthening Your Company’s FCPA Compliance Program

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April 26, 2018

Agenda

1. The FCPA's requirements
2. Federal compliance guidance for an FCPA compliance program
3. Best practices in building and improving your compliance program
4. Q and A
Executive Summary

- The Foreign Corrupt Practices Act (FCPA) prohibits bribery of foreign public officials and requires companies to maintain accurate books and records
- Federal law enforcement policies strongly encourage companies to have an effective compliance program that addresses FCPA risks
- The U.S. Department of Justice and the U.S. Securities and Exchange Commission have issued guidance containing 10 hallmarks of an effective compliance program
- DOJ issued a new FCPA Corporate Enforcement Policy in November 2017, providing additional incentives and guidance for companies concerning FCPA compliance programs and remediation of misconduct
- A strong FCPA compliance program identifies, prevents and remediates risks across company operations
- As a best practice, collect and analyze data to demonstrate the strength of your compliance program

The FCPA’s Requirements

Anti-bribery and accounting provisions
Foreign Corrupt Practices Act background

- The Foreign Corrupt Practices Act (FCPA) is a United States law that:
  - prohibits bribery of foreign (non-U.S.) officials and
  - requires companies to maintain accurate books and records and adequate internal accounting controls
- The U.S. Department of Justice and the U.S. Securities & Exchange Commission enforce the FCPA
- It can apply "extra-territorially," meaning that individuals can be charged even if they are outside of the U.S.
- In corporate FCPA matters, the DOJ and SEC evaluate several factors about the company and its conduct when making charging decisions

The FCPA prohibits bribes paid or offered to foreign (non-U.S.) officials

Who is a foreign official?
- Government department or agency officers or employees – including low-level personnel
- Employees at companies owned or controlled (in whole or in part) by the government
- Public international organization personnel (e.g., World Bank, United Nations)
- Political party officials and candidates
- Members of royal families
The FPCA prohibits offering “anything of value” to improperly influence a decision

It is interpreted broadly

– Anything of value is anything a recipient would find useful and is not limited to tangible items of economic value.
– A gift or benefit to a relative of an official or to a third party in whose well-being an official is interested may also be considered a bribe
– Includes hiring and internships for friends and relatives
– An item with a low monetary value can still be a violation of law – the law does not define any particular monetary amount
– No “materiality” provision

Examples of bribes (“anything of value”)

– Travel expenses
– Entertainment
– Food and wine
– Employment opportunities
– Internships
– Education
– Professional training
– Cars/Motorbikes
– Electronic items
– Tickets to events
– Cash
– Loans
– Medical expenses
– Consulting fees
– Political or charitable contributions
– Gold, precious gemstones, expensive jewelry
Enforcement of anti-corruption laws
Authorities around the world are bringing corruption cases

Examples of corruption cases in 2017:
- Odebrecht S.A. & Braskem S.A.: $3.5 billion in global penalties; largest foreign bribery case in history; U.S., Brazilian and Swiss enforcers
- Telia Company AB: $965 million paid to the U.S., Netherlands, and Sweden
- Rolls-Royce: $800 million to the U.S., U.K. and Brazilian authorities
- Keppel Offshore & Marine: $422 million to U.S., Brazil, and Singapore authorities
- SBM offshore: $238 million to the U.S., plus penalties to Dutch and Brazilian authorities

These fines do not include:
- Millions in fines imposed by non-U.S. regulators
- Hundreds of millions in legal fees and expenses
- Shareholder litigation
- Suspensions and debarments
- Brand and reputational harm
- Distraction and lost productivity
- Years of government oversight

Individual employees can be criminally charged under the FCPA
20 individual defendants were charged in FCPA enforcement actions in 2017

Consequences for individuals include:
- Internal investigation
- Interview with company counsel
- Administrative leave during investigation
- Disciplinary process upon conclusion
- Jail time
- Criminal fines
- Civil penalties
- Legal fees
- Loss of professional reputation
Federal Compliance Guidance
For FCPA compliance programs

U.S. Sentencing Guidelines Chapter 8
An effective compliance and ethics program is taken into account

– Having such a program can lead to reduced fines
– To have an effective compliance and ethics program, an organization shall:
  “(1) exercise due diligence to prevent and detect criminal conduct; and
  (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”
– The guidelines provide additional detail about expectations

Available at: https://www.ussc.gov/guidelines/organizational-guidelines
DOJ’s Principles of Federal Prosecution of Business Organizations

Corporate compliance programs is a factor DOJ evaluates in charging decisions

- The Principles list factors that DOJ considers in determining whether to charge a corporation. Includes:
  - The “existence and effectiveness of the corporation’s pre-existing compliance program”
  - The corporation’s remedial actions, including any efforts to implement an effective compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.”

Available at: https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300

Contained in the U.S. Attorney’s Manual
Also known as the “Filip Factors” and amended by the Yates Memo


Provides legal explanations and key elements of a compliance program

Includes:
- Background about corruption laws
- Legal interpretations of the FCPA’s terms
- Explanations of the accounting provisions
- Penalties and sanctions
- Type of FCPA resolutions
- Considerations by the DOJ and SEC in bringing enforcement actions
- Self-reporting, cooperation, remediation, and compliance

Available at: https://www.justice.gov/criminal-fraud/fcpa-guidance (and it’s free)
DOJ and SEC Hallmarks of an Effective Compliance Program

FCPA resource guide identifies the following core components

1. Commitment from senior management / clearly articulated policy against corruption
2. Code of conduct and compliance policies and procedures
3. Oversight, autonomy, and resources
4. Risk assessment
5. Training and continuing advice
6. Incentives and disciplinary measures
7. Third-party due diligence and payments
8. Confidential reporting and internal investigations
9. Continuous improvement: periodic testing and review
10. M&A: Pre-acquisition due diligence and post-acquisition integration

DOJ’s Evaluation of Compliance Programs (Feb. 2017)
Guidance addressing DOJ’s expectations through questions it considers

Questions are broadly categorized into 11 program topics:

1. Analysis & Remediation of Underlying Conduct
2. Senior and Middle Management
3. Autonomy & Resources
4. Policies and Procedures
5. Risk Assessment
6. Training and Communications
7. Confidential Reporting & Investigation
8. Incentives & Disciplinary Measures
9. Continuous Improvement, Periodic Testing & Review
10. Third Party Management
11. Mergers and Acquisitions (M&A)

Available at: https://www.justice.gov/criminal-fraud/page/file/937501/download
DOJ’s FCPA Corporate Enforcement Policy (Nov. 2017)
Announced by DAG Rod Rosenstein (DOJ’s second in command)

– New policy by DOJ for investigations and prosecutions of the FCPA
– The Policy sets forth new incentives for companies to self-disclose corruption matters and provides additional details about what constitutes cooperation, compliance and remediation
– Describes items required for a company to receive full credit for timely and appropriate remediation, including:
  – Thorough analysis of causes of underlying conduct (root cause analysis)
  – Implementation of an effective compliance and ethics program [next slide]
  – Appropriate discipline of employees, including those responsible for the misconduct
  – Appropriate retention of business records [more about this on a later slide]
  – “Any additional steps that demonstrate recognition of the seriousness of the company’s misconduct, acceptance of responsibility for it, and implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks”


DOJ’s new FCPA corporate enforcement policy sets forth features of an effective compliance program

Describes expectations for including “implementation of an effective compliance and ethics program,” criteria which include:
– The company’s culture of compliance
– The resources the company has dedicated to compliance
– The quality and experience of the personnel involved in compliance
– The authority and independence of the compliance function
– The effectiveness of the company’s risk assessment and tailoring of the program to the risk assessment
– The compensation and promotion of personnel involved in compliance
– The auditing of the compliance program to ensure effectiveness
– The reporting structure of compliance personnel
DOJ’s new FCPA policy requires companies to retain business records, including communications

– The Policy states that a few items are “required” for a company to receive “full credit for timely and appropriate remediation,” including:

“Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications.”

– The Policy’s reference to records retention and software has been interpreted to mean that DOJ discourages use of communications (messaging) apps

– On March 8, 2018, a DOJ attorney said that businesses should consider prohibiting messaging services, based on the new FCPA enforcement policy

Best practices in building and improving your company’s compliance program
Components of an anti-corruption compliance program
A strong program identifies, prevents, and remediates risks

- Targeted and effective communication
- Dedicated anti-corruption team
- Third party / partner due diligence
- Books and records controls
- Top-level commitment to compliance
- Third-party anti-corruption contract terms
- Internal training on anti-corruption
- Supplier, partner codes of conduct
- External training
- Clear internal policies and guidance
- Travel and entertainment controls
- Agent commission controls
- Outside counsel / outside auditor support
- M&A due diligence, pre- and post-transaction
- Integration plans for acquisitions
- Strong investigations team
- Well-publicized open door and non-retaliation policy
- Compliance hotline / anonymous reporting
- Risk assessments
- Accountability for remedial measures
- Focused anti-corruption audits
- Anti-corruption included in more general audits

Best practice: conduct risk-based due diligence on third parties, initially and ongoing

Understand the qualifications and associations of third-party partners, including business reputation and involvement with foreign officials

Continue the assessment: periodically re-screen the third party, update the diligence conducted, or request annual compliance certifications by the third party
Best practice: gather and analyze data concerning third parties

Examples of third parties
– Suppliers
– Agents
– Logistics Service Providers
– Distributors
– Resellers
– Equipment manufacturers
– Lobbyists
– Consultants

Examples of data to collect, and analysis
– Number of third parties screened, and by type
– Number of third parties rejected after screening, and by type
– Breakdown of reasons third parties were rejected (failure to provide information? Inaccurate disclosures of information?)
– Types of issues or trends identified
– How the compliance program has been strengthened as a result of that data analysis
– How red flags identified in due diligence were addressed

Third Party Risks: Examples of Red Flags
– The transaction is in a high-risk country or industry
– Unqualified or unidentified third parties
– Excessive margins or unreasonable charges
– Vague or insufficient descriptions of work, services, or product
– Unnecessary middleman or broker
– Unusual payment patterns or financial arrangements
– Involvement of a shell or holding company
– Third party has a poor reputation or has been accused of improper business practices (credible rumors or media reports, prior government investigations, etc.)
– Third party’s value is based primarily on connections or access to information
Guidance from DOJ about using third parties

Be able to justify the use of the third party.
- Explain the business rationale for the use of third parties
- Pay compensation commensurate with services rendered
- Ensure that the payment terms are appropriate

Be able to monitor the relationship with the third party.
- Specifically describe the work to be performed in the contract
- Verify that the described contractual work is actually performed

Incentivize compliance and ethical behavior by the third party.
- Train company employees about the risks and how to manage the third party
- Communicate expectations for ethical behavior to the third party
- Seek assurances from the third party, such as through certifications, of its commitment to compliance

Impose consequences on third parties for non-compliance.
- Audit third parties as needed
- Suspend or terminate third parties as needed

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Best practice: Review transactions to identify red flags
DOJ and SEC guidance says to evaluate the risks presented by the following

- The country and industry sector
- The business opportunity
- Potential business partners
- Level of involvement with governments
- Amounts of government regulation and oversight
- Exposure to customs and immigration in conducting business affairs

Questions to ask when reviewing transactions
Particularly in high-risk locations or involving high-risk structures

- Who are we dealing with?
- Who is receiving payment?
- Are the company’s standard processes being followed?
- Can you confidently explain the deal?
Best practice: Collect data to demonstrate effectiveness of transaction reviews

Examples of types of data to collect:
- Geography
- Type of transaction
- Business line and/or product sold
- Third parties involved
- Public sector involvement
- Levels of approval obtained and required
- Results of transaction reviews: rejected, sent back for additional information, approved
- Turnaround time for reviews

Use this data to target the transaction reviews more effectively
- Be able to show that transactions were scrutinized, modified or stopped due to compliance concerns

Components of an anti-corruption compliance program

A strong program identifies, prevents, and remediates risks
Gifts, meals, travel and entertainment have been the subject of DOJ and SEC enforcement actions

According to the DOJ and SEC:
- Cash is "the most obvious form of corrupt payment"
- A small token or gift can often be an appropriate way for businesspeople to display respect
- Hallmarks of appropriate gift-giving include:
  - Gift being given openly and transparently
  - Properly recorded in the giver’s books and records
  - Provided only to reflect esteem or gratitude
  - Permitted under local law
- "Items of nominal value" (cab fare, reasonable meals and entertainment, company promotional items) "are unlikely to improperly influence an official"
- "The larger and more extravagant the gift, the more likely it was given with an improper purpose"

The DOJ and SEC suggest that a compliance program:
- Have clear and easily accessible guidelines and processes in place for gift-giving
- Have guidelines that apply to gift-giving by the company’s directors, officers, employees, and agents
- In larger companies, have automated gift-giving clearance processes
- In larger companies, have clear monetary thresholds for gifts along with annual limitations, with limited exceptions approved by appropriate management

Best practice: Consider several factors in reviews of gifts, meals, travel and entertainment

Type of recipient: Public sector? Family member?
Value of the amenity
Type of amenity
Any appearance of impropriety
Use of third parties
The business relationship / status of negotiations
Applicable country-specific rules
Consider prohibiting certain types of amenities

- Cash, loans, or cash-equivalent gift cards
- Illegal or sexually explicit items
- Gifts that violate the recipient’s policies
- Any item provided in exchange for an improper advantage
- Gifts during a competitive bid process or negotiation
- Anything that would create even an appearance of impropriety or cause reputational harm
- Soliciting an amenity from a third party

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High-risk transaction reviews
Best practice: internal company training should be specialized and accessible

Training plan should be specialized by location or function, such as tailored training for the “gatekeepers” who review payments.

Training should be provided in easy-to-use and engaging formats. Consider videos and interactive training, as well as live training.

Training should be offered in local languages, particularly in high-risk locations.

Best practice: vary and tailor internal communications

Consider communications that anonymize descriptions of actual misconduct that occurred and the disciplinary actions that resulted.

“Tone at the top” should include “tone in the middle” and communications about ethics and compliance should cascade to all employees.
Collect and analyze data concerning training and communications

Examples of data to track
- Ethics and compliance communications provided, at all levels
- Completion rates of the training, and break it down by region, business units, seniority of employees, more
- Languages of translations
- Methods of training offered and formats

Examples of analysis to conduct
- Demonstrate communications addressing specific incidents (reactive) and more general compliance and ethics topics (proactive)
- Evaluate measures to assess effectiveness of the training, such as quizzes during training or an assessment test before and after training
- Be able to justify the languages the training and communications are translated into as they relate to risks identified or local laws
- Be able to explain the risks identified by location, population, employee type, and other factors and how the communications and training are tailored to those risks
- Show how training is modified for different audiences or regions

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Best practice: conduct pre-acquisition due diligence in acquired or merged entities

A thorough review should be conducted of an entity before a merger or acquisition takes place. Request information about the entity's compliance program generally and facts specific to FCPA risks, such as any public-sector transactions and deals in countries at a high risk of corruption.

Best practice: conduct post-acquisition diligence as needed

Follow up on any red flags identified pre-acquisition during the post-acquisition phase. Consider conducting site interviews, asking follow up questions, and reviewing additional data.
**Best practice: a “swift and successful post-acquisition integration”**

Integrate the acquired entity into your company’s compliance program and control environment

- DOJ and the SEC can take action against successor companies, particularly if the successor company failed to stop the misconduct
- But DOJ and the SEC have also declined to take action against successor companies, particularly if it voluntarily disclosed and remediated the misconduct
- DOJ and the SEC recommend that:
  - Companies apply the acquiring company’s code of conduct and compliance policies “as quickly as is practicable” to the newly acquired business
  - Companies train the directors, officers and employees of the newly-acquired company about the FCPA, and if appropriate, train their agents and business partners
  - Conduct a FCPA-specific audit of the newly acquired companies
  - Companies disclose to DOJ and the SEC any corrupt payments discovered as part of its diligence

**Components of an anti-corruption compliance program**

A strong program identifies, prevents, and remedies risks
Best practice: Establish and publicize anonymous reporting mechanisms

DOJ looks at how companies enable its employees to anonymously report concerns.

Consider:
- A phone hotline, available at all times, and with language capability
- A designated email box
- A concern/complaint form online
- “Open door” policy
- Designated contacts and methods within HR, senior executives, and/or the Board of Directors
- Frequent communications about the availability of the reporting mechanisms
- Policies that emphasize confidentiality of reporting and non-retaliation

Best practice: Gather and analyze the reporting data, and address issues raised

DOJ looks at how companies collect information from the reporting mechanisms.

Consider:
- Volume of reports
- Types of issues raised
- Channels used by region and/or business lines
- Percentage of reports by region and/or business lines
- Breaking down issues by region and/or business lines
- Types of “Gatekeepers” involved in the allegations
- Rate of managers involved in the allegations
- Reporting trends over time
Questions?

Thank you
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