

Miller & Chevalier

Best Practices for Cross-Border Investigations and Due Diligence

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- **Global reach**
 - Miller & Chevalier has been involved in client projects in more than 60 countries across the globe
 - Our attorneys speak and work in 13 languages
- **Our clients**
 - Over the past three years, Miller & Chevalier has represented approximately 40 percent of the Fortune 100, about one-quarter of the Fortune 500, and approximately 30 percent of the Global 100
- **Industry leaders**
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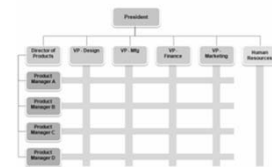
Overview

- Compliance department structures
- When borders unite: increasing expectations on companies from governments working together
- When borders divide: complications for companies in doing background checks, movement of data, and language and working with cultural differences

COMPLIANCE DEPARTMENT STRUCTURES

Structure of Compliance Department

- **Classical/centralized model**
 - Centralized compliance function; single reporting relationships within Function
 - Greater control over compliance function
 - Helps foster “culture of compliance” across subsidiaries
 - Helps ensure control over and regularity of compliance processes
 - Clear role, authority, responsibilities, and independence from the local operation
 - May silo compliance function from rest of organization
- **Matrix model**
 - Dual-reporting relationships, e.g., Local Compliance Officer reports to Head of Compliance at parent and Head of Legal at subsidiary
 - Better flow of information; faster response to situations on the ground
 - Compliance function has better understanding of organization
 - Less control over compliance personnel, especially overseas



Reporting Lines



- **Within audit function**
 - Overlap in functions, e.g., monitoring, oversight
 - May sow distrust of compliance function, due to audit’s “gotcha” attitude
- **Within legal function**
 - Powerful legal function can empower compliance
 - Legal function’s instinct to “protect” may reduce independence
 - Legal personnel needs to be trained in basic compliance tasks (investigations, help-line reporting, screening, etc.)
- **Independent compliance function**
 - Requires extra resources and integration
 - Can report to senior management or directly to the board

Adequate Support, Resources, and Independence

- The DOJ and SEC's *2012 Resource Guide's* "Hallmarks of an Effective Compliance Program":
 - "[Compliance personnel] must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented effectively"
- Adequate support, resources, and independence are crucial for effective compliance function
- Other functions must also consider themselves custodians of compliance



**WHEN BORDERS UNITE:
COOPERATING GOVERNMENTS &
CONVERGING EXPECTATIONS**

Laws Modelled After FCPA

“OECD Effect”: 43 countries have joined the OECD Anti-Bribery Convention, undertaking a commitment to enact FCPA-like laws:



U.S. Foreign Corrupt Practices Act (FCPA) (1977): *Anti-bribery provisions:* criminalizes “offer, payment, promise to pay, or authorization of the payment . . . of anything of value” to foreign official to “obtain[] or retain[] business.” *Accounting provisions:* require that issuers “devise and maintain a system of internal accounting controls” sufficient to prevent bribery



U.K. Bribery Act (UKBA) (2010): *Anti-bribery provisions:* criminal offense for a person who “offers, promises, or gives a financial or other advantage to another person, and . . . intends . . . to induce a person to perform improperly a relevant function or activity”



France's Sapin II (2016): Enhances France's existing anti-foreign bribery law by (1) establishing an anti-corruption agency, (2) requiring certain French companies with more than 500 employees to implement compliance programs, and (3) introducing the *Convention Judiciaire d'Intérêt Public (CJIP)*, similar to a U.S.-style DPA. In November 2017, HSBC Private Bank (Suisse) SA entered into the first ever CJIP under France's new law for tax law violations.

- Other OECD Anti-Bribery Convention members include Germany, Japan, Russia, and Switzerland.
- Convention signatory Brazil recently introduced its own **Clean Companies Act** (Brazil Decree 8.420 (2015)), which imposes strict corporate liability for bribes paid by employees, but also sets forth provisions for evaluation of effective compliance programs
- Many OECD laws are stricter than the FCPA (e.g., the UKBA prohibits facilitating payments)

Converging Compliance Guidance



As FCPA-like laws, proliferated, so has FCPA-like anti-corruption guidance have proliferated . . .

- OECD's 2010 Good Practice Guidance
- UK's 2010 Adequate Procedures Guidance
- DOJ and SEC's 2012 FCPA Resource Guide
- Brazil's Decree 8.420/2015 for evaluating compliance systems
- ISO's 2016 Anti-Bribery Management Systems

. . . we have seen a convergence of international compliance standards (with some remaining differences)

Converging Compliance Guidance

	OECD Recommendations	UK's Adequate Procedures	DOJ/SEC FCPA Resource Guide	Brazil Decree 8.420/2015	ISO 37001	DOJ Evaluation
Written Company Policy	X	X	X	X	X	X
Anti-Corruption Training for Employees/Agents	X	X	X	X	X	X
Culture of Anti-Corruption "From the Top"	X	X	X	X	X	X
Sufficient Compliance Staff	X	X	X	X	X	X
Disciplinary Measures for Employees who Commit Violation	X		X	X	X	X

Greater Cooperation Among Governments

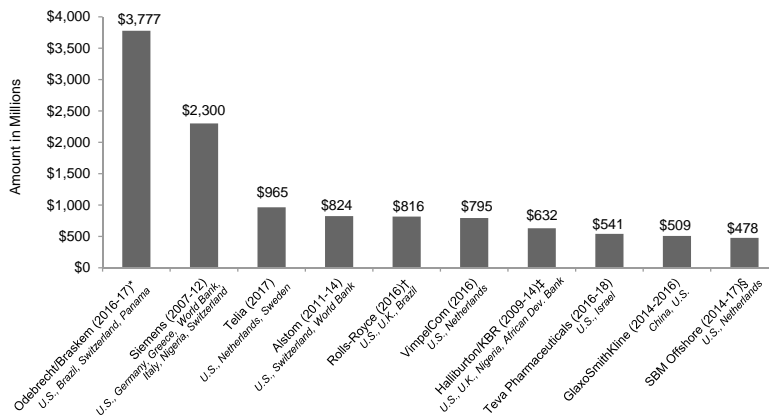
Greater cooperation among enforcement authorities:

- Recent trend in multi-jurisdictional settlements, where governments agree to split penalties for same/similar misconduct
- e.g., U.S. calculated total penalties for Telia Co. AB of up to \$1B, but agreed to credit nearly \$500M for penalties paid to Sweden & Netherlands
- Split penalties bring in enforcement authorities from new countries: Brazil, Israel, Netherlands, Singapore, Switzerland



Greater Cooperation Among Governments

Ten Largest Global Resolutions Involving the FCPA



Note: Updated through February, 2018. These statistics count the 10 largest global resolutions by penalty size involving the FCPA. This chart includes both "coordinated" global settlements, as well as related follow-on settlements.

*This figure incorporates U.S. authorities' analysis of Odebrecht's "ability to pay."

†This figure includes SFO investigation costs.

‡This figure includes legal fees paid to Nigerian authorities.

§ This figure does not include SBM's unfinalized agreement(s) with Brazilian authorities.

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WHEN BORDERS DIVIDE:
 COMPLICATIONS FOR COMPANIES IN DOING
 BACKGROUND CHECKS, MOVEMENT OF
 DATA, AND LANGUAGE AND WORKING WITH
 CULTURAL DIFFERENCES

Difficulties Compliance Functions May Face Across Borders

- Data protection, privacy, and localization laws – sometimes difficult to move data, including e-mails, across borders. The breach (even negligent) can result in serious civil or criminal penalties.
- For example:
 - 2016 E.U. General Data Protection Regulation (GDPR) may impose penalties of up to 4% annual worldwide turnover for improperly sharing employee e-mails across borders; other countries have similar data protection laws
 - 2014 Russia Data Localization Law requires that personal data on citizens of the Russian Federation be stored in databases located in the territory of Russia

Difficulties Compliance Functions May Face Across Borders

- Cultural and language differences among subsidiaries
 - DOJ and SEC Resource Guide notes that “it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it”
 - Codes of Conduct, training materials, etc., should be translated into several languages
 - Language and cultural barriers may make it difficult for Compliance teams to build relationships with local subsidiaries, known situations on the ground

Difficulties Compliance Functions May Face Across Borders

- Background checks and third-party due diligence
 - Third-party providers may be excellent for background checks in one region, e.g., speak local language, knows people on the ground for interviews, but have no experience in another region
 - Compliance officers in one country may not know red flags or false positives from employee screening in another country

Partial Solution: Risk Assessments



- Risk assessments can be crucial method to balance centralized control and local diversity
- Tailor policies for background corruption risk for country, industry, type of relationship (e.g., freight-forwarder, government relations)
- Conduct background desktop research for red flags about partner, contractor, employee
- Carry out more detailed due diligence in response to red flags or in higher-risk situations, e.g.:
 - Engaging a third party to represent company before government
 - Proposed social contribution in high-corruption areas
 - Potential political connection for JV partner in medium-risk region

Questions?



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