

Miller & Chevalier

Best Practices for Cross-Border Investigations and Due Diligence

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 - Our attorneys speak and work in 13 languages
- Our clients**
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- Industry leaders**
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FOUNDED IN
1920

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Overview

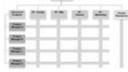
- Compliance department structures
- When borders unite: increasing expectations on companies from governments working together
- When borders divide: complications for companies in doing background checks, movement of data, and language and working with cultural differences

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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'Interdiction Public (CJIP), similar to a U.S.-style DPA. In November 2017, HSBC Private Bank (Swiss) 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



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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