

# Anti-Corruption/FCPA Compliance Program Elements

Foley GRS has identified the key components of a credible and defensible anti-corruption/FCPA compliance program.

## AT A GLANCE

- **Culture of Compliance.** A compliance program should promote an organizational culture that encourages ethical conduct and a commitment to compliance from the top of the company down.
- **Standards Clearly Communicated.** FCPA and anti-corruption policies, standards, and procedures should be widely disseminated, easily accessible, and specifically tailored to a particular company's business and the particular risks associated with that business.
- **Applies to All.** An anti-corruption/FCPA compliance program should apply to all directors, officers, and employees, and certain business partners in foreign jurisdictions such as agents, consultants, representatives, distributors, and joint venture partners.
- **Program Tailored to Each Business.** There is no single template for a compliance program because an effective compliance program is tailored to the company's specific business and to the risks associated with that business. There are, however, three key inquiries that will be made in assessing a compliance program:
  - 1) Is the company's compliance program well-designed?
  - 2) Is it being applied in good faith?
  - 3) Is it working?
- **Compliance Internal Controls.** The company's internal controls should be harnessed both to reinforce the compliance measures and to implement the compliance requirements.
- **Clear Lines of Responsibility.** The board of directors (or other organizational governing authority) should have overall responsibility for the compliance program and must remain knowledgeable about the content and operation of the program. Likewise, the compliance department should have adequate resources and direct access to the governing authority of the company.
- **Consistent Follow-Up.** The company should consistently and thoroughly follow up on potential violations of anti-corruption laws and its anti-corruption policies, using a graduated response based on an objective evaluation of the potential import of red flags or other indicators of a potential violation.

## FOR MORE INFORMATION

In today's ever-evolving regulatory environment, can your company really afford not to have the right internal controls in place? Foley is here to help. Contact Foley Partner **David Simon** at 414.297.5519 or [dsimon@foley.com](mailto:dsimon@foley.com) today.

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## DOJ/SEC “HALLMARKS” OF EFFECTIVE COMPLIANCE

On November 14, 2012, the DOJ’s Criminal Division and the SEC’s Enforcement Division issued long-awaited Guidance regarding FCPA compliance and enforcement. The Guidance identified the key hallmarks of an effective compliance program in the view of the DOJ and SEC, which in many ways represent minimum “best practices” that are appropriate for most companies. Key principles identified include:

- Commitment from senior management and a clearly articulated policy against corruption
- Strong company-specific risk assessment
- Written compliance procedures, in the form of a general code of conduct and specific anti-corruption compliance policies and procedures
- Appropriate oversight, autonomy, and devotion of resources to anti-corruption compliance
- Periodic training and continuing advice
- Positive incentives and publicized disciplinary measures
- Risk-based third-party due diligence
- Ongoing auditing of the efficacy of compliance procedures and related internal controls
- Confidential reporting and internal investigation
- Continuous improvement across all areas of compliance and risk assessment

## CORPORATE POLICY DEMONSTRATING A STRONG COMMITMENT AGAINST CORRUPTION

Before a compliance program is drafted, the organization should first undertake a comprehensive risk assessment. The purpose of the risk assessment is to identify key risk points, including areas where there are significant dealings with foreign officials and employees of state-owned companies; business units that operate in countries

with high levels of perceived corruption; areas where anti-corruption concerns previously have surfaced; business operations that rely heavily on third-party intermediaries, such as agents and distributors; and so forth. Harnessing business unit personnel to help prepare the risk assessment often yields significant dividends not only in the identification of key risk areas, but also in gathering support for the eventual implementation of the compliance program.

A compliance program should begin with a clearly articulated corporate policy prohibiting violations of the FCPA and other applicable anti-corruption laws. It is important for each of the codes, policies, and procedures to be clear, concise, and easily accessible (i.e., widely distributed and easy to find on the company’s intranet) to all employees and those third parties conducting business on the company’s behalf. It also should reflect the promulgation of a compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other anti-corruption laws, and should otherwise promote an organizational culture that encourages ethical conduct and a “tone from the top,” demonstrating a commitment to compliance across all levels of the company.

## STANDARDS AND PROCEDURES

At a minimum, a corporate anti-corruption/FCPA compliance program should include standards and procedures that address the following areas:

- Transactions involving “things of value” given or promised, directly or indirectly, to “foreign officials,” including employees of state-owned or controlled enterprises.
- Commercial bribery and “pay-to-play.”
- Promotional or marketing expenses involving foreign officials, including policies addressing expenditures for gifts, meals, travel, and entertainment. Business courtesies should never be given either as a reward for, or to induce, a favor or action by a foreign official, customer, or supplier.

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- Political contributions to foreign candidates, parties, or other political activity.
- Donations, scholarships, internships, sponsorships, or other charitable contributions.
- Transactions indirectly involving foreign officials through third parties and intermediaries, including pre-transactional due diligence, representations, warranties, contractual clauses, and defined “red flags.”
- Investments in international joint ventures, international mergers/acquisitions, or other international investments.
- Adequate due diligence requirements to address successor liability in the context of mergers and acquisitions to accurately value target companies; to reduce the risk of a company unknowingly continuing to pay bribes post-acquisition; and to effectively allocate the costs and responsibilities for the consequences of potential violations prior to acquisition.
- Payments otherwise lawful under the FCPA, but nevertheless impermissible under foreign local law.
- Robust internal controls – a system of financial and accounting procedures, including a system of internal accounting controls designed to ensure the maintenance of fair and accurate books, records, and accounts (pursuant to Section 404 of the Sarbanes-Oxley Act, which can be applied to the requirements and monitoring necessary for bribe-related conduct).

## TRAINING

Training is an essential part of any compliance program, and should be provided based upon risk-based groupings, with persons at higher risk – such as employees who have frequent dealings with foreign officials or employees of state-owned

companies, or employees who frequently operate abroad – given more detailed training. Others who are less likely to encounter corrupt situations can be covered in more general training, such as code of conduct training, which addresses the company’s requirements.

To make it relevant to trainees, the training should be practical and focused on real-world situations often encountered by the company. Ideally, the training should occur for all new hires and annually for all employees. The company should keep a log of everyone trained as proof of training in the event that an enforcement action occurs.

## CERTIFICATIONS

The anti-corruption/FCPA policies, standards, and procedures should apply to all directors, officers, and employees, and certain business partners in foreign jurisdictions such as agents, consultants, representatives, distributors, and joint venture partners (collectively, Third Parties). Directors, officers, employees, and Third Parties should be required to certify annually and in writing that the signing party: a) has read, understands, and will comply with the company’s FCPA policies, standards, and procedures; b) has not participated in any unreported or prohibited transactions or activities within the reporting period, and knows of no participation in prohibited activity by any other director, officer, employee, or Third Party; and c) has received training in the company’s anti-corruption requirements.

## OVERSIGHT/AUTONOMY/RESOURCES

Although the structure, size, and complexity of the compliance program will vary by company, those in charge of overseeing compliance must have autonomy, sufficient resources to effectively implement, update, and oversee the compliance program, and direct access to the governing body of the company, such as the board of directors and related committees (i.e., an audit committee). Resources also should be set aside for any

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in-person training that the company has decided is appropriate to conduct. The board of directors (or other organizational governing authority) should have overall responsibility for the compliance program and must remain knowledgeable about the content and operation of the program. One or more senior corporate officials within the organization should have day-to-day responsibility for the implementation and oversight of the FCPA policies, standards, and procedures. A poorly resourced compliance department will not fare well if scrutinized by enforcement agencies.

## COMMUNICATIONS

Mechanisms should be designed to ensure that the policies, standards, and procedures (including timely dissemination of new training and updates) are effectively communicated across all levels of the company, including to directors, officers, employees (especially those who have frequent interactions with foreign governments or state-owned entities, or supervise those who do so), and, in appropriate circumstances, to Third Parties, including a) periodic training and re-training; and b) timely dissemination through written communications concerning the requirements of the FCPA and other applicable laws and updates to the law or emerging areas of risk in the company.

## REPORTING PROCEDURES AND INVESTIGATION

The program should include an effective system for confidential reporting (both directly and anonymously) of suspected or actual criminal conduct and/or violations of the anti-corruption/FCPA compliance policies, standards, and procedures for directors, officers, employees, and Third Parties. Once an allegation surfaces, there must be sufficient resources for investigation, documentation of the company's response, and implementation of any necessary disciplinary or remedial measures.

## RESPONDING TO POSSIBLE VIOLATIONS

The DOJ and SEC have asserted that the key components driving decisions to decline FCPA prosecutions include: diligent discovery by the company; swift and decisive action (including investigating internally and terminating or disciplining any individuals or Third Parties involved); self-reporting and cooperation with any agency investigations (including disclosure of the results of the company's internal investigation); and a strong compliance program with robust internal controls and corrective measures (including re-training, additional new training programs, instituting new or enhanced compliance programs and internal controls, hiring new compliance officers, or restructuring existing compliance departments).

There is a robust debate in the FCPA compliance community over whether self-disclosure by companies truly does bring significant benefits. Whether to self-disclose a potential FCPA violation presents a difficult, fact-specific question.

## INCENTIVES AND DISCIPLINARY PROCEDURES

Companies should develop and implement appropriate disciplinary procedures to address, among other things, conduct that violates the FCPA and other applicable anti-corruption laws, as well as the failure to take reasonable steps to prevent and detect misconduct by others. Positive incentives and publicized disciplinary measures drive compliant behavior across all levels of a company. An effective compliance program reinforces a company culture of compliance where good behavior is rewarded and bad behavior is sanctioned fairly and consistently, regardless of position within the company.

## RISK-BASED DUE DILIGENCE OF THIRD PARTIES

An effective compliance program should include appropriate risk-based due diligence of Third Parties acting on the company's behalf. A Third Party's qualifications, associations, and business reputation should be assessed prior to retention and greater

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scrutiny should be applied if red flags surface. An adequate assessment should be made of the necessity of the Third Party, the role it will fill, and the extent of expected interactions with foreign officials or employees of state-owned companies. Companies should pay particular attention up front to any terms of payment and the establishment of procedures to allow for auditing of the Third Party, if that should appear to be necessary. Post-retention due diligence is a best practice; accordingly, companies should monitor Third-Party relationships periodically through audits, re-training, or other methods. Companies should also maintain complete records and files relating to such due diligence and oversight.

## **STANDARDIZED AGREEMENTS FOR THIRD PARTIES**

The company should include standard provisions in contracts with Third Parties that are reasonably calculated to prevent and detect FCPA violations. These provisions may, depending on the circumstances, include a) FCPA representations and undertakings relating to compliance with the FCPA; b) the right to conduct audits of the books and records of the Third Party, usually based on a reasonable suspicion of a violation; and c) termination rights if there is any breach of any anti-corruption law or a breach of representations and undertakings related to such matters, including the ability to disclaim and reverse any economic benefit that would otherwise be received based on the actions of the Third Party.

## **PERIODIC AUDITS AND RISK ASSESSMENTS**

The compliance program should include periodic audits and risk assessments to ensure continuing compliance with, and successful implementation of, FCPA and other anti-corruption policies, standards, and procedures, including a thorough and thoughtful assessment of the areas of risk based upon the company's scope of operations, business models, geographic locations, degree of

interactions with foreign officials and state-owned entities, use of Third Parties, gifts, travel expenses, entertainment expenses, charitable and political donations, and so forth. To get credit for the risk assessment, a company should make it rigorous, contemporaneously document the process, and perform updates at reasonable intervals.

## **CONTINUOUS IMPROVEMENT**

There must be frequent analysis, updated risk assessment, and review of all aspects of the compliance program. In particular, when issues or problems are discovered, the program should be revisited and adjustments made to reflect learning from the experience. The compliance program and its implementation should be constantly evolving to address changes in the business, shifts in the industry, and updates to available regulatory or legal guidance.