

Building a robust anti-corruption program

Seven steps to help you evaluate
and address corruption risks



Anti-corruption compliance has been top of mind for boards of directors, audit committees and senior management of many multinational companies the last few years. The trend of increased enforcement of the US Foreign Corrupt Practices Act (FCPA) that began five years ago has continued in the US. There also have been increased enforcement efforts in Europe and in the UK, where the UK Bribery Act of 2010 was recently passed. With the weakened global economy increasing competition in emerging economies, the risk to companies continues to grow. US public companies and issuers subject to the FCPA's books and records provisions remain particularly at risk given the ease of prosecution for any small payment, regardless of materiality, and the broad interpretation of the statute by regulators to include any type of improper payment, including commercial bribery.

At Ernst & Young, we have a very robust and active anti-corruption practice that has been involved in many high-profile FCPA investigations in the past few years. We have conducted numerous corruption risk assessments and have assisted companies with the development of anti-corruption compliance programs, including designing policies, financial controls, training, anti-corruption compliance internal audits and other monitoring mechanisms. Through our work, we have developed a point of view of what companies should be doing to detect and deter corruption and protect their shareholders. This article provides a step-by-step approach for large and mid-size companies to evaluate their corruption risks and put a program in place to address them responsibly.

Step one:

Know and understand the key laws – the FCPA and the UK Bribery Act

Although anti-corruption laws have been enacted by many countries, the FCPAⁱ and UK Bribery Actⁱⁱ are generally the most expansive in terms of proscribed activities and jurisdictional reach. The FCPA is the most aggressively enforced by several orders of magnitude. Accordingly, these are the laws that most global companies use as the standards for their anti-corruption compliance programs. Consult with your legal counsel concerning local bribery laws that might apply to the jurisdictions where you do business, but know and understand the FCPA and UK Bribery Act and use them as the foundation for your global anti-corruption compliance program, including anti-corruption policies, procedures, controls and training activities.

The FCPA makes it unlawful for US persons and companies to pay bribes to foreign government officials (non-US) for the purpose of obtaining or retaining business or for any improper advantage. The FCPA prohibits direct and indirect bribe paying through intermediaries. The FCPA also requires US and non-US companies with securities listed in the US (issuers) to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require issuers to make and keep detailed books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. In practice, the accounting provisions have been interpreted very broadly to include false accounting or recordkeeping for any illegal act, including commercial bribes paid both within and outside the US.

The UK Bribery Act outlaws four different types of activity:

1. Bribing another person
2. Accepting a bribe
3. Bribing foreign public officials (non-UK)
4. Being a commercial organization and failing to have in place adequate procedures to prevent bribery

Unlike the FCPA, the UK Bribery Act has no exception for facilitating payments – small “grease payments” – paid to government employees and no “books and records” prohibitions. The UK Bribery Act appears to have an even broader jurisdictional nexus than the FCPA, covering any act committed anywhere in the world by any commercial organization that carries on a business in the UK. It also explicitly outlaws commercial bribery. The Act further explicitly places liability on a company that fails to have an effective anti-bribery program in place to prevent an act of bribery. This is not an expansion beyond the FCPA as under US law and the concept of *respondeat superior*, the company is liable for the acts of an employee committing an offense on its behalf, regardless of whether it has an effective compliance program in place. This provision does, however, underscore the importance of having an effective anti-corruption compliance program in place. Under the UK Bribery Act, having an effective compliance program appears to be a defense against prosecution. In an FCPA prosecution, having an effective anti-corruption compliance program can lessen the severity of the fine or punishment, under the US Federal Sentencing Guidelines.

There are many more aspects to these laws that will not be described here. The point is that in designing an anti-corruption compliance program, the FCPA and the UK Bribery Act are the principal laws you should focus on in building the program, and you need to be very familiar with these laws and the current enforcement environment.ⁱⁱⁱ

Step two:

Become familiar with the accepted standards and guidance for designing an effective compliance program

Corporate compliance programs generally came into being for large companies in the United States in the early 1990s and have been evolving since that time. The Sarbanes-Oxley legislation in 2002 continued this trend. Much has been published about building corporate compliance programs in general and anti-corruption compliance programs in particular. There are, however, three documents that are “must reads” before you begin designing an anti-corruption compliance program:

- ▶ Internal Controls – Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in 1992^{iv}
- ▶ The US Federal Sentencing Guidelines for Organizations^v
- ▶ “Good practice guidance on internal controls, ethics and compliance,” Annex II to The Recommendation of the Council for the Organisation for Economic Co-operation and Development (OECD) for Further Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Corruption Compliance Framework), 26 November 2009^{vi}

The 1992 COSO report, Internal Control – Integrated Framework, provides some perspective on what your anti-corruption compliance program should seek to achieve and how you define success. The COSO Framework contains five elements for effective internal control systems:

- ▶ Control environment and tone at the top
- ▶ Risk assessment
- ▶ Control activities
- ▶ Information and communication
- ▶ Monitoring

An anti-corruption compliance program is part of the overall internal control system of a company, and the logic of the COSO framework is fully applicable in designing an effective anti-corruption compliance program. The COSO report specifies that an effective internal control system should provide “reasonable assurance” to management and the board that applicable laws are being complied with. This does not mean absolute assurance, as all instances of poor judgment cannot be anticipated and management override or collusion can overcome any compliance program or individual control. COSO also recognizes that a limiting factor in the design of any internal control system is that there are resource constraints, and the benefits of the program must be considered relative to costs. This is why risk assessment is such an important part of the COSO model. Conducting a risk assessment is crucial to establishing an effective anti-corruption compliance program because, if done properly, it best ensures that limited resources will be aligned with the most pressing risks.

The Federal Sentencing Guidelines provide an accepted framework for US corporations to organize their corporate compliance programs. Generally, “effective” programs have the following elements:

- ▶ Established standards and procedures
- ▶ High-level oversight
- ▶ Are run by competent and ethical employees
- ▶ Effective communication and training



- ▶ Effective auditing and monitoring systems
- ▶ Appropriate disciplinary measures
- ▶ Appropriate response to incidents and modification of prevention measures

As many companies already have corporate compliance programs that address other legal and reputational risk issues, it is important to leverage what your company already has in place in addressing corruption risk. For example, compliance with the FCPA should be included in your overall company code of conduct as well as be addressed in a separate and more detailed stand-alone policy. Generally, corporate compliance programs include professionals and processes to oversee compliance activities and for conducting internal investigations. These resources could also be used to oversee your anti-corruption compliance program. The Federal Sentencing Guidelines are also instructive as many of the “leading practices” in anti-corruption compliance follow a similar outline (i.e., anti-corruption standards, communication and training, and auditing and monitoring). This is no coincidence as companies that run afoul of the law will be judged by US Department of Justice prosecutors and the federal courts in accordance with these standards.

The OECD Good Practice Guidelines

The OECD has been instrumental in promoting anti-corruption efforts globally by pressing member countries to pass anti-corruption legislation similar to the US FCPA and to intensify their enforcement efforts. Recently, it has recognized the need to more directly address the private sector and, similar to the US Sentencing Commission, it has issued its own global guidelines for companies to ensure “the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions.” The OECD Good Practice Guidance on Internal Controls, Ethics and Compliance is more specific than the Federal Sentencing Guidelines. It directly addresses anti-corruption programs for global companies and calls for companies to adopt many of the leading practices we see today, including:

- ▶ Strong tone at the top
- ▶ A clearly articulated and visible corporate policy prohibiting foreign bribery
- ▶ Emphasis on individual employee responsibility for compliance
- ▶ Board of directors and senior management oversight of the program

- ▶ Specific guidance on areas that should be covered including gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitating payments; and solicitation and extortion
- ▶ Specific guidance related to retaining agents, consultants and other risky intermediaries
- ▶ Strong internal controls in place to ensure accurate recordkeeping and prevention of concealment of bribery
- ▶ Communication and anti-corruption training
- ▶ Support for whistle-blowing activity
- ▶ Appropriate disciplinary measures
- ▶ A confidential process for seeking compliance guidance and whistle blowing
- ▶ Periodic reviews and action to update and improve the program.

Understanding the above-referenced laws and compliance guidelines provides the necessary framework to begin the process of building your anti-corruption compliance program.^{vii}

Step three:

Conduct a corruption risk assessment

Taking the time to thoughtfully identify and analyze risk is essential to developing an effective anti-corruption compliance program. COSO recognizes the importance of risk assessment in developing any internal control framework: resources are limited and a company needs to allocate its scarce compliance resources as efficiently as possible. A thorough and complete risk assessment process also puts a company in a position, should issues arise that were not foreseen, to demonstrate that it used due care in assessing its risk. In short, a thorough risk assessment adds both efficiency and credibility to your anti-corruption compliance efforts.

The first stage of the corruption risk assessment should focus on actual risks posed by the nature of a company's operations, the degree of business with governmental entities, its use of agents and other intermediaries, the countries where it does business, the regulatory environment and other factors. The second stage should identify what policies and controls the company has in place to mitigate its corruption risk and analyze the effectiveness or gaps in such policies and controls (i.e., the residual corruption risk still facing the company). The third stage is to produce a plan to build an effective and efficient anti-corruption compliance program based on the present risk, the current controls in place and additional resources available to provide reasonable assurance of compliance.

The actual procedures to be conducted and the intensity of the risk assessment will vary by company. Generally, the more thorough the risk assessment, the more confident you can be that you have sufficiently identified and analyzed your corruption risks. There is, however, a point of diminishing returns. The actual procedures involve information collection and analysis, generally through document collection, interviews and financial analysis. More robust risk assessments also involve transaction testing that can be performed at the corporate level and in high-risk locations. The output of the risk assessment is often a detailed report on the company's anti-corruption risks and gaps in its current anti-corruption compliance regime. Most importantly, the output should consist of detailed recommendations for the design and implementation of the anti-corruption compliance program elements needed to effectively meet the company's needs.

A thorough risk assessment adds both efficiency and credibility to your anti-corruption compliance efforts.

Step four:

Design and implement the program

We have seen the following leading practices by companies implementing anti-corruption compliance programs. It should be noted, however, that the elements of an effective anti-corruption compliance program will vary by company. Not all leading practices may be necessary for your company, and the intensity of the individual elements may vary. A company's particular situation may require additional or fewer processes or controls.

Corporate anti-corruption policy

Companies should develop a company-wide anti-corruption policy based on the requirements of the FCPA and the UK Bribery Act. The overall compliance policy should be a clear and unambiguous statement of the company's position that both governmental and commercial bribery on any scale or level will not be tolerated. It also should discuss the company's commitment to accuracy in reporting and recording transactions and having in place internal controls to ensure proper control, accountability and safeguarding of shareholder assets. The policy also should provide operational guidance on how compliance will be achieved in certain high-risk areas, including:

- ▶ Bribery of government officials
- ▶ Commercial bribery and other corrupt activities undertaken for the financial gain of the company
- ▶ Misreporting and concealment in the accounting records of bribery and other improper acts
- ▶ Use of third-party agents, consultants and other intermediaries in potential bribe schemes
- ▶ Facilitating payments
- ▶ Travel, entertaining and gift giving to government customers
- ▶ Charitable giving and community payments
- ▶ Controls around cash, petty cash and certain vendor disbursements and other high-risk transactions
- ▶ Corruption risk in mergers and acquisitions
- ▶ Other areas of high risk such as customs and offset commitments

The policy should encourage employees to report violations or seek guidance, as well as offer examples of "red flags" for employees to recognize or avoid problem situations. Under the UK Bribery Act and in accordance with leading practices, facilitating payments, although legal under the FCPA, should be banned except in extreme circumstances where life or property is at risk.

Companies may choose to address corruption issues in more detail in a series of policies, but we believe it is best to have one overriding company anti-corruption policy. The anti-corruption policy should be approved by the board of directors, distributed to company management, be the central focus of anti-corruption compliance training and be posted on the company's internal website with other compliance-related policies.

References to the anti-corruption policy should be included in the written code of conduct issued to all company employees. The code of conduct should contain a short and simple statement of the requirements and of employees' duty to comply. Compliance with the anti-corruption policy should have a prominent place in the company's code of conduct and in overall corporate compliance program. Setting clear standards, creating an appropriate tone at the top, educating and training, auditing, monitoring and implementing appropriate investigative and disciplinary action should all be part of the strategy.

Conduct anti-corruption compliance training

Anti-corruption training is imperative. This is especially true for global organizations employing nationals in countries with a high history of corruption. For employees who grew up in these countries, training is crucial. They need to be told in no uncertain terms that management does not tolerate corruption and the “old ways” of doing business. At a minimum, every person in a position to obtain business through bribery or other improper means should receive anti-corruption compliance training. Also consider training all accounting, financial, legal and internal audit employees.

Training should highlight the company’s position that it does not tolerate corruption, its anti-corruption policies to ensure compliance with the requirements of the FCPA and UK Bribery Act, potential “red flags” or problem situations, and guidance for employees to get help. Consider a mixture of live training for certain targeted

and senior employees and web-based training for all employees. Along with senior management, employees in sales, marketing, finance, legal and internal audit should receive enhanced training. Continually update the training and provide it to new or transitioning employees. Many companies complement their training with a certification program, whereby the employee certifies that he or she has taken the training, understands his or her responsibility and is not aware of or has reported any and all incidents of corruption.

Adopt policies for retaining agents, consultants and other vendors

More than 90% of reported FCPA cases involve the use of third-party intermediaries such as agents or consultants. Accordingly, this is a very important area and the central focus of many companies’ anti-corruption compliance programs. It is also perhaps the most expensive in terms of effort and resources needed to address the risks posed by intermediaries.

Efforts we have observed to mitigate corruption risks posed by agents, consultants, commercial sales representatives and other third parties break down into four separate activities:

1. Pre-contract due diligence and acceptance procedures
2. Contracting provisions with anti-bribery representations and warranties and other vendor requirements such as certifications and anti-corruption training
3. Special payments review and approval
4. Audits of intermediaries

Such programs can be expensive, and a great deal of thought is needed to determine the right level of oversight required to effectively manage the risk. An initial step is identifying the different types and numbers of vendors with which the company does business. The company then needs to categorize its vendors, analyze the risks posed by vendor type and determine



if any groups warrant enhanced treatment to mitigate corruption risks. Different types of vendors pose different risks, so the procedures to be adopted may vary by vendor type. In starting a program for new vendors, you also need to decide how you will qualify existing vendors with which you wish to continue doing business. Often a review of past contracts and transactions is part of the process in qualifying existing vendors into the program.

1) Pre-contract due diligence and acceptance

Pre-contract due diligence and acceptance procedures for the most risky vendors such as agents or sales representatives interfacing with governments could include the use of an outside service provider to perform background screening.^{viii} There are many companies that provide these services at different levels of thoroughness and at different price points. Additional acceptance procedures could include requiring the

vendor to fill out a questionnaire and the vendor's sponsor to prepare a business justification memorandum, detailing the business purpose for hiring the vendor.

One important aspect of an anti-corruption program for vendors is to put responsibility on and hold employees accountable by requiring them to sponsor vendors and provide a business justification for their hiring. There also should be a robust approval process for hiring the vendor once all the information has been gathered. Leading practices include sign-off by senior legal and/or compliance officers who are more detached from the business operations.

The vendor due diligence needs to be updated periodically, perhaps every three years or so. In updating the due diligence, background checks are rerun and new and updated information is requested of the vendor.

2) Contracting provisions

Anti-corruption contracting provisions that we often see in contracts with high-risk agents and consultants include:

- ▶ Requirement of compliance with local law and the FCPA (and the UK Bribery Act once effective) and specific language that the vendor will not make any prohibited payments
- ▶ Requirement of compliance with the company's anti-corruption policy
- ▶ Disclosures of all foreign government officials who are directors, officers or employees and any relatives of such that may be foreign government officials
- ▶ Certifications of compliance with the FCPA and the company's anti-corruption compliance program on an annual or periodic basis
- ▶ Right of the company to terminate the contract and withhold payment if the



vendor pays bribes or violates any of the contract terms, including the right to audit

- ▶ Requirement that payment be made to a bank account in the vendor's name and in the country where the vendor is located and not off-shore or in a tax haven jurisdiction
- ▶ Requirement that the vendor maintain detailed and accurate books and records and internal controls as required by the FCPA
- ▶ Right to audit the vendor's books and records on a periodic basis to assure that no improper payments have been made

3) Special payment review and approval

In a situation where there are very high-risk vendors, some companies provide special processes for review and pre-approval of payments. These processes include the vendor submitting required documentation, such as a statement of work summarizing the services provided by the vendor, review and analysis of invoice line items in comparison to the contract, and various levels of sign-offs depending on the amount of the payment and perceived risk. Often senior legal, compliance or other company officials who are not directly involved in the business operations are included in the approval process.

4) Vendor anti-corruption audits

Although this is far from a widespread practice, we are seeing more companies auditing their high-risk vendors and with more frequency. The scope of such audits is determined by the vendor contract, so the degree of specificity in the contract as to what the company can and cannot do is very important. Further negotiations at the time of the audit can be expected, so having the right to terminate the vendor's contract and withhold payment could be crucial leverage in negotiating the scope. Most vendor audits are focused principally on vendor payments. Although there often is a

need to sign confidentiality agreements in connection with such audits, the company should preserve its right to disclose findings of corrupt activity to authorities if it seems fit to do so.

Incorporate anti-corruption into employee travel, gifts and entertainment rules

Giving gifts or providing meals, entertainment or travel to government employees could, under certain circumstances, violate the FCPA or UK Bribery Act. Such payments, or even offers, need to be monitored carefully to avoid even the appearance of impropriety. This is an area of special concern in certain Asian countries, where the culture of gift giving and business entertainment is firmly ingrained and government and private sector officials at various levels are known to frequently request and expect such courtesies.

Gift giving, meals and entertainment provided to government officials should be addressed in the company's overall anti-corruption policy and training. Compliance is greatly enhanced where additional communications and controls are in place related to the employee travel and entertainment (T&E) expense reimbursement process. Many companies have detailed rules for employee submission of T&E expenses for reimbursement including T&E policies and paper or electronic forms to be completed. These policies and forms can be used as additional control processes to ensure the proper review and approval of gifts, meals and entertainment of government officials. For example, an automated T&E submittal process can provide for pre-approvals of gifts to government officials or meals and entertainment of government officials that the employee must initiate if he or she wishes to be reimbursed for such expenses. Additional controls that strengthen compliance in this area serve as useful reminders to employees that they need to treat relations with government customers carefully to avoid even the appearance of impropriety.

In addition to enhanced T&E controls, some companies have enhanced procedures directly related to gifts. A clearly stated approval process for gifts and a gift log that can be audited can be important components of a gifts and entertainment policy.

Payments for travel and related expenses for non-US government officials are permitted under the FCPA in limited circumstances when related to the demonstration of a product or performing a contractual obligation. For example, it is permissible to pay a government official's travel expenses to visit a factory in the US so the official can ascertain the quality control processes involved in manufacturing a product to be purchased by a foreign government. In our experience, many government officials are aware of this exception, and we have seen multiple incidents where government employees have requested trips of this nature. There are also a number of reported cases highlighting abuses in this area. If the company believes it is in its interest to pay for such trips, it must be careful to pay only for expenses and minimal meals and entertainment that can be linked directly to the business purpose of the trip. Companies should have express policies in dealing with such trips to ensure all payments are bona fide business expenses and that there is no appearance of impropriety. Any travel or lodging provided to non-US government officials should be subjected to a heightened approval process, pre-approved in advance and expenses reconciled thereafter. The US Department of Justice has published guidance on these situations that should be read carefully.

Ban facilitating payments

Facilitating payments are legal under the FCPA as narrowly defined payments to government officials for routine and non-discretionary action. These are commonly thought of as "grease payments," generally provided to low-level government employees. There is no such exception for facilitating payments in the UK Bribery Act,

so such payments are presumably illegal under that legislation. Many payments that meet the FCPA's narrow definition of facilitating payments are also illegal in the local country where made. Given the different legal treatment accorded such payments by the various authorities and the inherent difficulties in enforcing a policy that prohibits bribery but allows facilitating payments, many companies are banning facilitating payments altogether, with limited exceptions for situations involving potential imminent harm to life or property. If your company decides that it will allow facilitating payments, it should develop a process to ensure appropriate review and pre-approval of all such payments, including analysis of their legality under local law, the UK Bribery Act and the FCPA.

Develop guidance for charitable giving and offset commitments

Charitable giving guidelines should be designed to ensure that charitable donations are not being provided to organizations that act as conduits for bribes. All charitable giving should be subject to an approval process that asks specific questions related to the purpose of the gift and the bona fides of the organization. There should be heightened scrutiny in countries with a high incidence of corruption.

Similar to charitable giving, many government contracts require companies to make other investments or offset commitments. These can take the form of a direct offset, where the company invests in a business related to its contract, such as investing in a local parts supplier. It also can be in the form of an indirect offset, where the investment is in a totally unrelated business. The purpose of these offset commitments is to invest in the country and create local jobs, but the risks of corruption can be significant. We suggest that companies involved in offsets institute a strict due diligence, approval and transaction monitoring process for any offset partners, similar to dealing with a very high-risk agent.

Implement anti-corruption financial controls

Good controllership is the first line of defense against corrupt payments. For example, strict enforcement of T&E rules related to meals and entertainment and the detailed reporting of the business purpose and people entertained supports anti-corruption compliance. Reconciling bank accounts on a monthly basis is a key cash control that also protects against misappropriation and possible off-books payments.

Increased financial controls in high-risk areas can be a critical firewall in avoiding FCPA books and records violations. Often this means enhancing financial controls beyond what might normally be considered adequate to ensure accurate financial reporting under Sarbanes-Oxley. This is because there is the additional purpose of deterring and detecting illicit or improper payments for which there is no materiality standard. Such controls include enhanced transaction review, approval and accounting procedures, controls around bank accounts and petty cash, enhanced vendor approval and payment processes and increased scrutiny of high-risk transactions. Companies should focus on high-corruption-risk areas such as:

- ▶ Transactions with consultants, agents and other high-risk intermediaries
- ▶ Gifts, meals and entertainment of government officials
- ▶ Customs and cross-border shipping
- ▶ Charitable giving
- ▶ Offset commitments

Companies should also focus on high-risk processes such as petty cash and executive travel, meals and entertainment. Companies should implement additional financial controls in high-risk countries and for high-risk operations. Companies should implement strict account posting requirements for high-risk transactions to promote increased transparency and accountability.

Heightened controls should be put in place in high-risk locations to mitigate the risk of an improper payment. For example, the use of petty cash in a high-risk country might present a heightened risk of corrupt payments. Additional controls could include restricting the permitted uses of petty cash, more rigorous documentation requirements or a heightened review process for petty cash fund reimbursement. In countries where there is a high incidence of gift giving and meals and entertaining of government officials, additional controls around T&E expenditures might be prudent. In countries where bribes to customs officials are commonplace, increased controls should be put in place around payments to freight forwarders, including a process that calls for a line by line review of invoices for suspicious charges.

It is critical to communicate the importance of FCPA compliance to business unit controllers, accounts payable and other accounting professionals. Provide specific guidance to ensure accounting professionals are watching for "red flags." Be clear about how certain expenses should be recorded. Develop a specific strategy for communicating anti-corruption requirements to key financial reporting and accounting personnel. These communications could be part of a controller's manual or other accounting policies and should be discussed at meetings and in training sessions.

Employ an anti-corruption compliance certification program

Many companies have formal programs requiring senior employees to regularly certify and re-certify compliance with the FCPA and other anti-corruption laws. Certifications will not stop the deliberate wrongdoer, but the requirement serves as a continuing reminder of a manager's compliance responsibility. Certification processes also may identify issues that might not have surfaced otherwise. A specific certification of compliance with the company's anti-corruption policy could be included as part of an existing business conduct certification program.

Step five:

Monitor the program

Monitoring is crucial. Compliance programs that are not monitored are generally not very effective. Monitoring means anti-corruption compliance audits. It also can include data mining and analytics.

The purpose of anti-corruption compliance audits should be both to audit for compliance with the various elements of the anti-corruption compliance program and to test for substantive compliance by seeking to identify potential violations or “red flags.” Audits also often uncover new risks not previously seen or fully appreciated. In this way, they act as part of an ongoing corruption risk assessment process.

Creating an effective anti-corruption compliance monitoring program requires having the right people, processes and resources. Anti-corruption compliance audit programs should be designed based on risk, address the areas of elevated corruption risk faced by the company and test the controls in place to mitigate the risk. Audits should be conducted at the various business units based on a periodic or annual anti-corruption compliance audit risk assessment that ranks the business units and locations by risk and ensures adequate audit coverage of those locations over a defined time period.

The auditors need to be trained in the particulars of FCPA and the UK Bribery Act. Core skill sets to have on the audit team include good interviewing skills, the knowledge and experience to select high-risk transactions for testing and the experience to recognize red flags for potential violations. Some companies choose to have their internal audit department conduct these audits. Others employ different strategies – pairing legal or compliance department personnel with internal auditors or using outside forensic accountants.

Anti-corruption audits should be stand-alone audits that are not integrated with a larger set of procedures. Generally we have found that integrating anti-corruption audit procedures into larger audit programs is ineffective; it inevitably leads to situations where the auditor doing the testing lacks the necessary training, focus or supervision to do the work properly. In conducting substantive testing, the purpose is to uncover potential corruption violations or FCPA red flags. However, the audit is not an investigation. It is a business process like other internal audits a company might undertake – a predetermined set of procedures designed to test for compliance with company policies. Potential FCPA violations or “red flags” uncovered in the audits are reported to the legal or compliance department for further investigation.

Anti-corruption audits have a powerful deterrent effect. They send a message that the senior management is committed to compliance and that they are checking to make sure compliance is achieved. Appropriate follow-up and disciplinary action are crucial to creating an anti-corruption culture.

As financial systems become more automated, companies are turning more and more to analytics as a tool for compliance monitoring. Analytics can be a very useful tool to complement a robust anti-corruption compliance audit program. Vendor analytics can be used to identify various risk traits associated with high-risk vendors, including high-risk locations, different bank account locations, offshore banking, PEP (politically exposed persons) or possible association with government officials, and vendors with similar addresses. As with audits, the key is to deploy the right tools but also to have trained personnel who can interpret and recognize trends and anomalies in the data.

Step six:

Incorporate anti-corruption procedures into mergers and acquisitions and joint venture due diligence

Companies should develop a policy and specific procedures for anti-corruption due diligence in any contemplated merger, acquisition or joint venture. Conducting anti-corruption due diligence makes good business sense as the risk includes:

- ▶ Inheriting liability for past corrupt activities
- ▶ Becoming liable for continuing corrupt activities that you failed to identify and stop
- ▶ Overpaying for a business that was built on corruption
- ▶ Inheriting corrupt employees from the acquired company
- ▶ Becoming saddled with significant increased compliance costs required to change the new business that were not anticipated

In the US, many FCPA prosecutions have arisen in the context of mergers and acquisitions where past actions of corruption came to light in the due diligence. The US Department of Justice has taken the position that companies must conduct thorough due diligence on the issue of past corruption to avoid inheriting liability for such actions.

The amount of anti-corruption due diligence that can be performed in the context of a merger or acquisition is subject to negotiation between the buyer and the seller and is often conducted under intense time constraints. If the situation permits, anti-corruption due diligence should include some or all of the following activities:

- ▶ Background investigation and public database searches of key executives
- ▶ Interviews of key executives relating to past corruption and risks of corruption in the business
- ▶ Review of documents related to acquired company's anti-corruption compliance program, past incidents of corruption and risks of corruption in the business
- ▶ Forensic accounting and transaction testing procedures related to high-corruption-risk transactions

Statements accurately disclosing any past corrupt actions or FCPA violations should be included in the seller's representations and warranties related to the transaction or as part of the merger or joint venture contract. The contract also should address future compliance with the FCPA, UK Bribery Act and other anti-corruption laws.

Following the closing of the transaction, the acquiring company should put anti-corruption compliance high on its integration plan and conduct further risk assessment procedures as necessary to ensure it has a good grasp of and is addressing the corruption risks posed by the new organization.

Monitoring is crucial. Compliance programs that are not monitored are generally not very effective.

Step seven:

Periodically re-assess risk and modify the program

As risks change over time, comprehensive corruption risk assessments should be conducted periodically to ensure that the anti-corruption program is evolving to meet new risks posed by the changing business and external environment. Assuming a robust monitoring structure is already in place that offers the company continual feedback on its risks, we would suggest a process that provides an extensive review of corruption risk every three to five years. If the business changes significantly, such a process should be accelerated.

In conclusion

No compliance program, no matter how expensive or extensive, can provide absolute assurance of compliance. An effective anti-corruption compliance program will positively affect a company's culture and deter wrongdoing, make non-compliance far less likely and, in the unhappy event of a violation, better position your company for potential dealings with regulatory authorities. Be mindful that one byproduct of the increased rate of corporate prosecutions and settlements has been a dramatic increase in criminal prosecutions of executives. For executives, the risks are real – they are not just about money. These leading practices can provide a good starting point and useful benchmark as you begin to think about building an anti-corruption compliance program that works for your company.



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ⁱ 15 U.S.C. Section 78dd-1 et. seq. See also the US Department of Justice Fraud Section's websites for additional information and Opinion Releases relative to the FCPA at www.justice.gov/criminal/fraud/fcpa.

ⁱⁱ See www.justice.gov.uk/publications/bribery-bill.htm.

ⁱⁱⁱ Of course, you should always consult with legal counsel regarding the legal underpinnings of any compliance program.

^{iv} See www.coso.org.

^v 2007 Federal Sentencing Guidelines Manual – Chapter 8, Sentencing of Organizations can be found at www.ussc.gov/orgguide.htm.

^{vi} The OECD Guidelines can be found at www.oecd.org/dataoecd/11/40/44176910.pdf.

^{vii} Under the UK Bribery Act, the UK Secretary of State is required to publish guidance about procedures that relevant commercial organizations can put in place to prevent bribery on their behalf. This guidance will be another source of important reference for companies implementing anti-corruption compliance programs.

^{viii} Typical background screening procedures to be performed on vendors and vendor officials include electronic public database searches for past criminal convictions, civil lawsuits filed against the vendor, credit and bankruptcy filing information, corporate filings and affiliations, media search for derogatory information, etc.

