Chapter 14

PREVENTION OF LIABILITY FOR FCPA VIOLATIONS

By
Jeffrey M. Kaplan and Rebecca Walker*

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Compliance Materials

Document 1: Foreign Corrupt Practices Act Compliance Policy

* Partners, Kaplan & Walker LLP, Princeton, N.J., and Santa Monica, Calif.

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Prevention of Liability for FCPA Violations Corruption

While there was a time when bribery was an expected way to do business in certain parts of the world, corruption is under enhanced enforcement globally. Governments have also heightened expectations with respect to anti-corruption compliance programs. In this chapter, we address several of the more salient anti-corruption legal mandates and then discuss the various components of anti-corruption compliance programs.

A. Anti-Corruption Legal Mandates

1. Overview of FCPA

The Foreign Corrupt Practices Act of 1977 (FCPA)[1] was enacted following the discovery that a large number of U.S. companies had paid bribes to government officials, politicians, and political parties. The FCPA makes it unlawful for a U.S. person and for certain foreign issuers of U.S. securities to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business or to otherwise secure an undue advantage. The law also requires public companies to maintain accurate books and records and an adequate system of internal accounting controls.

Under the law,

- An unlawful payment can involve not only providing money but offering or providing anything of value.
- A "foreign official" means "any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity . . . regardless of rank or position."[2] The Department of Justice has interpreted this category to include employees of state-owned or controlled enterprises, although that interpretation has never been tested in court.

2. Knowledge Element

The FCPA prohibits both direct and indirect payments to foreign officials. Thus, a company can face FCPA liability based on improper payments made by its agents or other business partners. Because, historically, corrupt payments have often been made by agents and other third-party business representatives, this is one of the more important aspects of the law from a compliance perspective. For instance, in *United States v. Bourke*, a defendant who had not made payments directly to a foreign government official was convicted based on the following jury instruction on the element of knowledge:

> The FCPA provides that a person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if:
>
> i. such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> ii. such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.
>
> On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal.
>
> It also bears noting that while a finding that the person was aware of the high probability of the existence of a fact is enough to prove that this person possessed knowledge, it is not sufficient in order to determine that the person acted "willfully" or "corruptly," which is a separate and distinct element of the offense.[3]

3. Exceptions and Defenses

The FCPA provides an exception for payments to facilitate or expedite performance of a "routine governmental action," such as "obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associ-

[1] 15 U.S.C. §§ 78dd-1, et seq.
[2] *Id.*

[3] United States v. Bourke, U.S. District Court for the Southern District of New York, No. 1:05-cr-00518-SAS-2 reprinted at http://www.fcpablog.com/blog/2009/7/20/back-to-bourke.html.

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ated with contract performance or transit of goods across country."[4] However, because facilitating payments are unlawful under the anti-corruption laws of a large number of countries, many U.S. companies prohibit them.

Additionally, a defense to FCPA bribery provisions exists where the payment in question was lawful under the written laws of the relevant foreign country or where the money was spent as part of demonstrating a product or performing a contractual obligation.[5] The former of these two defenses is generally very difficult to prove.

4. Penalties

Under the FCPA's criminal provisions, corporations and other business organizations are subject to a fine of up to $2 million and individuals are subject to a fine of up to $100,000 and imprisonment for up to five years. However, under the Alternative Fines Act, FCPA fines may actually be quite higher—up to twice the benefit that the defendant sought to obtain by making the corrupt payment.[6] Additionally, fines imposed on individuals may not be paid by their employer or principal.[7]

In addition, the FCPA provides for civil penalties.[8] Also, "a company or person or firm found in violation of the FCPA may be barred from doing business with the Federal government or ruled ineligible to receive export licenses.[9] Finally, "conduct that violates the anti-bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws."[10]

Fines under the FCPA have increased dramatically in the past few years, with multiple cases of fines reaching the hundreds of millions of dollars.[11]

5. Books and Records

The FCPA also has accounting provisions that require covered entities to 1) maintain books and records that accurately and fairly reflect the transactions of the organization in reasonable detail and 2) design a system of internal accounting controls reasonably calculated to ensure that the entity's financial statements are accurately and fairly stated.[12] A violation of these provisions can itself—and without an element of corruption—be the subject of criminal prosecution. However, corruption cases are sometimes brought purely under these provisions, too.[13]

6. Other Tools Used to Prosecute Bribery Under U.S. Law

In addition to the FCPA, the federal government has other statutory tools at its disposal to prosecute bribery and related offenses. In 2009, for example, DOJ brought an indictment against Control Components Inc. ("CCI") and six of its former employees, alleging violations of both the FCPA and the Travel Act.[14] The Travel Act prohibits traveling between states or countries or using an interstate facility in aid of any crime.[15] In the CCI case, the government tied its Travel Act charges to allegations that the defendants violated or conspired to violate California's anti-bribery law, which prohibits corrupt payments of more than $1,000 between any two people,

[4] Department of Justice, Foreign Corrupt Practices Act Antibribery Provisions, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

[5] 15 U.S.C. § 78dd-1(c)(2).

[6] 18 U.S.C. § 3571(d).

[7] 15 U.S.C. § 78dd-2(g)(3); 15 U.S.C. § 78ff(c)(3).

[8] See DOJ FCPA Antibribery Provisions, *supra* note 4.

"The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to $10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the anti-bribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person. The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the anti-bribery provisions."

[9] *Id.*

[10] *Id.*

[11] See, e.g., http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html (regarding plea agreement in the case against Siemens AG); http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti.html (regarding plea agreement in the case against Snamprogetti Netherlands B.V.); http://www.justice.gov/opa/pr/2010/June/10-crm-751.html (regarding plea agreement in the case against Technip S.A.).

[12] 15 U.S.C. § 78m(b)(2).

[13] See cases collected at http://www.fcpablog.com/blog/tag/accounting.

[14] United States v. Control Components Inc., No. SA CR 09-162, (C.D. Ca 2009). The criminal information is available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/cci-info.pdf. The plea agreement is available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/cci-plea-agree.pdf.

[15] 18 U.S.C. § 1952.

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including private commercial parties.[16] Using both of these statutes, the government was thus able to prosecute commercial bribery between private parties outside the United States, in addition to its charges related to bribery of foreign public officials.

The U.S. Securities and Exchange Commission brought a fairly novel case in 2009 involving theories of control-person liability against executives who allegedly failed to create appropriate internal controls to ensure FCPA compliance. Specifically, the SEC charged Nature's Sunshine Products Inc. with violating the FCPA's anti-bribery, books and records, and internal controls provisions based on payments allegedly made by a Brazilian subsidiary of the company to customs officials to facilitate importing unregistered products, then falsifying books and records to conceal the payments.[17] In addition to the company, the SEC also charged the then-chief operating officer and chief financial officer of the company with violating the FCPA's books and records and internal controls provisions based on their positions as "control persons."[18] The SEC did not allege that the executives had personal knowledge of the payments but instead charged that they had failed adequately to supervise employees responsible for maintaining the company's books and records and system of internal controls. This is another example of how various laws can be used in support of anti-bribery enforcement.

7. Enforcement Actions: Self Reporting and Compliance Programs

DOJ officials frequently state that the department gives "credit" for companies that a) self report violations and/or b) had an effective FCPA program at the time of the offense.[19] With respect to the former, a study published in 2010 cast some doubt on the actual benefit of self reporting.[20] With respect to the latter, a study published in 2009 identified two examples of FCPA cases that are not publicly available where a target company's compliance program resulted in the company avoiding criminal charges completely.[21]

8. Anti-Corruption Mandates Outside of the United States

In addition to U.S. laws prohibiting bribery of non-U.S. government officials, many other countries have also implemented legislation prohibiting the bribery of foreign government officials. Many such statutes were enacted in order to implement the Organisation of Economic Cooperation and Development's Anti-Bribery Convention. The OECD Anti-Bribery Convention, which entered into force in February 1999, requires signatory nations to criminalize bribery of foreign public officials in international business transactions. Specifically, the Convention requires signatories to take such measures as may be necessary to establish that it is a criminal offense under the law for any person intentionally to offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or for other improper advantage in the conduct of international business.[22] The Anti-Bribery Convention, which has been ratified by 38 countries, includes a peer-driven monitoring mechanism to ensure implementation, which is carried out by the OECD Working Group on Bribery in International Transactions, comprised of OECD member States.[23]

In December 2009, the OECD's Working Group issued additional guidance for preventing bribery to

[16] Cal. Penal Code § 641.3.

[17] *Securities and Exchange Commission v. Nature's Sunshine Products Inc.*, No. 2:09CV0672 (D. Utah 2009), available at http://www.sec.gov/litigation/complaints/2009/comp21162.pdf.

[18] *Id.*

[19] See, e.g., speech of Assistant Attorney General Lanny Breuer, available at Thomas R. Fox, FCPA Compliance and Ethics Blog (May 27, 2010), http://tfoxlaw.wordpress.com/.

[20] Bruce Hinchey, unpublished paper discussed at http://www.fcpablog.com/blog/2010/8/2/no-good-deed-goes-unpunished.html.

[21] Berenbeim and Kaplan, *Ethics and Compliance Enforcement Decisions—The Information Gap* (The Conference Board 2009): "The first, which transpired between 2005 and 2007, involved employees of a company's Asian subsidiary giving gifts to officials of a foreign government ministry to obtain licenses, as well as providing thousands of dollars of merchandise to other government employees. Nonetheless, in light of the parent company's having conducted an internal investigation, having disclosed the matter to DoJ, and on the basis of its impressive E&C compliance program at the time of the offense, DoJ decided not to bring charges against the company. The second non-public case (occurring in the same approximate time period) involved a real estate developer working for an Asian subsidiary of a U.S. company who made a payment to an official in connection with developing a research lab. The company discovered the payment and promptly preserved documents and authorized an internal investigation. DoJ did not prosecute this company, either, in part because of its quick and voluntary disclosure, and in part due to the impressive E&C program the company had at the time of the offense."

[22] Organisation of Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at http://www.oecd.org/dataoecd/4/18/38028044.pdf.

[23] See *id.* at Article 12.

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its member states and to private organizations in a document titled Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[24] Although not binding, the recommendations create certain anti-bribery standards, and the OECD will examine implementation of these standards by member countries. The recommendations include specific guidance on anti-corruption compliance programs, including the general recommendation that signatory countries encourage organizations to "develop and adopt adequate internal controls, ethics and compliance programs and other measures for preventing and detecting foreign bribery."[25] Furthermore, governments are encouraged to require company management to make public disclosure of their compliance and ethics programs, including those related to preventing and detecting bribery.[26] The recommendations also discuss the importance of independent audit committees[27] and of providing avenues for employees and others to report suspected violations of anti-corruption laws and policies.[28] Importantly, the recommendations suggest as well requiring government agencies to consider compliance programs in their procurement and other decisions, such as granting subsidies and licenses.[29]

In March 2010, the OECD Working Group issued an Annex to the recommendations, called the Good Practice Guidance on Internal Controls, Ethics and Compliance.[30] This guidance includes fairly detailed standards for organizations to consider in implementing anti-bribery compliance programs. It is discussed more fully below.

a. UK Anti-Bribery Law

Another important recent development in the international anti-corruption movement is the enactment of the United Kingdom's Bribery Act (the "UK Act") in April 2010—a law that is, in some ways, more stringent than the FCPA. In particular, the UK Act creates strict liability for corporations and partnerships for failing to prevent bribery that occurs within the organization[31] but establishes an affirmative defense for corporations that put in place prior to the offense in question "adequate procedures" designed to prevent bribes.[32] While the meaning of "adequate procedures" is not defined in the UK Act itself, Section 9 of the Act requires the secretary of state to publish guidance about procedures that organizations should consider implementing.[33]

In September 2010, the UK's secretary of state promulgated draft standards entitled "Guidance About Procedures Which Relevant Commercial Organisations Can Put in Place to Prevent Persons Associated with Them from Bribing."[34] These draft standards include a discussion of:

- risk assessment;
- top-level commitment;
- due diligence in knowing with whom the organization does business;
- clear, practical, and accessible policies and procedures;
- effective implementation; and
- monitoring and review.

B. Anti-Corruption Compliance Programs

This section describes the elements of an effective anti-corruption compliance program. It is based on a) the general (i.e., non-risk area specific) articulation of an effective compliance and ethics ("C&E") program in the U.S. Sentencing Guidelines for Organizations ("the Sentencing Guidelines"); b) an Opinion Procedure Release issued by DOJ in 2004[35] which, while specific to the issues set forth therein, provides insight into DOJ's general view of effective compliance in the anti-corruption realm; c) a Good Practice Guidance on Internal Controls, Ethics and Compliance issued in 2010 by an anti-bribery working group of the OECD ("the Good Practice Guidance")[36]; and d) the authors' experiences in developing and reviewing

[24] OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (released Dec. 9, 2009), available at http://www.oecd.org/dataoecd/11/40/44176910.pdf.
[25] See *id.* at § X(C)(i).
[26] See *id.* at § X(C)(iii).
[27] See *id.* at § X(C)(iv).
[28] See *id.* at § X(C)(v).
[29] See *id.* at § X(C)(vi).
[30] See Appendix, Document 51.
[31] United Kingdom Bribery Act 2010, Section 7(1), available at http://www.legislation.gov.uk/ukpga/2010/23/contents.
[32] See *id.* at § 7(2).
[33] See *id.* at § 9.
[34] Ministry of Justice, Guidance About Procedures Which Relevant Commercial Organisations Can Put in Place to Prevent Persons Associated with Them from Bribing (Sept. 14, 2010), available at http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf.
[35] Foreign Corrupt Practices Act Review, Opinion Procedure Release 04-02 (July 12, 2004) (the "Opinion Procedure Release"), at http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf.
[36] Available at http://www.oecd.org/dataoecd/5/51/44884389.pdf.

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anti-corruption compliance programs for various organizations.

1. Risk Assessment

Risk assessment should be the foundation of virtually any C&E program. This is evident from the Sentencing Guidelines provision that an "organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each [element of its C&E program] to reduce the risk of criminal conduct identified through this process."[37] Put otherwise, risk assessment is the process by which companies determine where, when, and how to deploy the various compliance "tools"—meaning the various program elements, such as policies, procedures, training and auditing, among others—to address given areas of C&E risk. Given that the need for deploying such tools is generally more complex and resource consuming for anti-corruption than other compliance areas, sound risk assessment can be essential to program efficacy with respect to anti-corruption compliance.

Additionally, the Good Practice Guidance provides: "Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures."[38]

For most companies, a principal method of assessing anti-corruption risk is through use of the Transparency International Corruption Perception Index, which measures perceived corruption risks of various countries. Companies should also generally assess other location-specific risk factors, such as amount of sales to governments and use of third-party business representatives.

Moreover, the risk assessment should address not only the magnitude and likelihood of risks but also the *causes* of risk, which can help with the deployment of FCPA compliance tools. For instance, where anti-corruption risks are based on a lack of appreciation of the law, training and other forms of C&E communications are often warranted.

Finally, companies should ensure that the effective "boundaries" of the anti-corruption program are coterminous with their risks. For instance, not only should sales people be the focus of program efforts (e.g., training, auditing), but so should those in the corporate function whose duties—e.g., in dealing with foreign regulators and other officials—can create anti-corruption risk.

2. Policies

The Sentencing Guidelines provide that, to have an effective C&E program, an "organization shall establish standards and procedures to prevent and detect criminal conduct."[39] The Opinion Procedure Release speaks to the need for a "clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, and all business partners, including, but not limited to, agents, consultants, representatives, and joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction . . . that are reasonably capable of reducing the prospect that the FCPA or any applicable foreign anti-corruption law of [the company's] Compliance Code will be violated." Similarly, the Good Practice Guidance provides that companies should have "a clearly articulated and visible corporate policy prohibiting foreign bribery."[40]

For some companies, merely having a code-of-conduct provision addressing anti-corruption mandates should be sufficient. However, for companies with a relatively high degree of risk in this area, anti-corruption policy should be reflected not only in a code of conduct but also in a self standing, more detailed policy of limited distribution—which sometimes takes the form of a manual.

Additionally, anti-corruption standards should be reflected in other relevant policies, such as those addressing: gifts and entertainment and expenses; customer travel; political contributions; charitable donations, and sponsorships. Finally, in addition to addressing public-sector corruption (the principal fo-

[37] U.S.S.G. § 8B2.1(c).
[38] OECD Good Practice Guidance, *supra* note 36, at part A.
[39] U.S.S.G. § 8B2.1 (b)(1).
[40] OECD Good Practice Guidance, *supra* note 36, at part A(2).

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cus of the FCPA), policies should address commercial and other types of private-sector bribery.

3. Internal Controls

There are several types of internal controls relevant to anti-corruption compliance. The most general of these is financial controls. As articulated in the Opinion Procedures Release, companies should have "[f]inancial and accounting procedures designed to ensure that [the Company] maintains a system of internal accounting controls and makes and keeps accurate books, records, and accounts." The Good Practice Guidance has a similar provision.[41] Indeed, internal controls play a critically important role in anti-corruption compliance,[42] perhaps as much as with any area of legal risk (other than, of course, financial reporting risks).

While the overall soundness of financial controls is important to this aspect of anti-corruption compliance, companies need to pay particular attention to several types of financial controls to ensure anti-corruption compliance. Among these are procedures relating to accounts payable, petty cash, and travel-and-entertainment reimbursement.

A second type of internal controls involves procedures to ensure that there have been required pre-approvals before anything of value—typically a gift, entertainment, or travel costs—can be provided to a foreign government official. Efficacy with respect to this sort of internal control is very context specific, but one general point of importance is that whatever system is used should be user friendly. Otherwise, there is a danger that it will be ignored or circumvented.

A third type of internal control concerns the use of third parties. These are addressed later in this chapter.

4. Program Management and Oversight

a. Management

The Sentencing Guidelines provide that a high-level person should be responsible for C&E at a company, and they also recognize the role of those charged with administering a program on a day-to-day basis.[43] While these provisions (like all of those in the guidelines) speak to C&E programs generally rather than compliance with a particular area of substantive law, appointing a senior person to be responsible can be essential for robust compliance efforts in significant individual risk areas, such as anti-corruption. Indeed, the Good Practice Guidance has a similar provision specific to anti-bribery compliance.[44]

Among other things, companies should have a formal designation of anti-bribery compliance responsibility to the senior official with pertinent responsibility. Additionally, those who manage the anti-corruption compliance program should have sufficient authority and resources.[45]

Finally, for any company with demanding anti-corruption compliance needs:

- other managers—including those in operations—should have documented, risk-tailored program-related responsibilities; and
- an anti-corruption program should be supported by relevant legal expertise (e.g., in the FCPA and other national anti-corruption laws) in a company's law department because the law in this area is not entirely intuitive and is also fairly dynamic.

b. Oversight

Under the Sentencing Guidelines, DOJ standards concerning prosecution of organizations and Delaware law,[46] boards of directors—typically through a board committee—should oversee a company's C&E program. The OECD's Good Practice Guidance also discusses board oversight, encouraging organizations to make it the duty of senior corporate officers to report bribery compliance matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards.[47] And, as a matter of best practice (and possibly of law[48]) such a committee should—at least for

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[41] It provides that companies should have a "system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery."

[42] Notably, before the passage of the Sarbanes-Oxley Act, it was the FCPA that—distinct from that law's anti-bribery provisions—mandated effective internal controls for public companies generally.

[43] U.S.S.G. § 8B2.1 (b)(2).

[44] OECD Good Practice Guidance, *supra* note 36 at part A(1).

[45] OECD Good Practice Guidance, *supra* note 36 at part A(4).

[46] U.S.S.G. § 8B2.1 (b)(2)(A); Appendix, Document 12: Department of Justice, *U.S. Attorneys' Manual, Principles of Federal Prosecution of Business Organizations*, Section 9-28:800; *Stone v. Ritter*, 911 A.2d 362 (Del. 2006); Appendix, Document 62: *In Re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996).

[47] OECD Good Practice Guidance, *supra* note 36, at part A(4).

[48] In the *Stone* case the directors, in addition to overseeing the compliance program generally, also oversaw compliance with the area of legal risk at issue in that case, a fact recited by the court in dismissing the lawsuit against the directors.

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companies with significant anti-corruption risk—oversee aspects of the anti-corruption compliance program.

For such companies, the relevant board committee should receive periodic reports—generally on no less than an annual basis—on:

- the results of anti-corruption risk assessments,
- the plans to address such risks, and
- the extent to which the most recent prior plan was met.

5. Delegation of Authority

The Sentencing Guidelines provide that organizations "must use reasonable efforts not to include within substantial authority personnel anyone whom it knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program."[49] In the anti-bribery context, the most important type of "due diligence" is often that performed on agents and other business partners prior to hire. Indeed, the OECD's Good Practice Guidance provides that organizations should engage in "properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners."[50]

In order to ensure appropriate third party due diligence, some organizations require that, prior to retaining higher-risk third parties, the third party will be subject to review, which may include, e.g., inquiries and requests for information pertaining to:

- professional and commercial qualifications;
- financial resources;
- experience, including years of employment and knowledge of the industry;
- whether any government official has an interest in the representative firm;
- prior and current government service positions and positions in quasi-government entities; and
- whether any family members or relatives are government officials.

Other aspects of third party compliance measures are addressed later in this chapter.

[49] U.S.S.G. § 8b2.1(b)(3).
[50] OECD Good Practice Guidance, *supra* note 36, at part A(6)(i).

6. Training and Communications

The Sentencing Guidelines provide that an "organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to [various types of individuals described in the guidelines] by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities."[51] Additionally, the OECD Good Practice Guidance recommends that companies take "measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries."[52]

There is no doubt that the government considers training important (perhaps because it is, relatively speaking, easier for the government to review training than it is many other aspects of a compliance program.)[53] And, because the seriousness—and to some extent, content—of anti-corruption mandates may not be obvious to many employees (particularly those working in high-risk locations) training is indeed often an essential component to a successful anti-corruption compliance program.

Companies need to consider whether their training and other communications have effective content and are sufficiently impactful, whether they reach the right audiences and whether they are delivered with appropriate frequency. They should also consider whether a company could "prove"—if ever required to do so—that all those who should have been trained were in fact trained.

While various of these challenges support the use of web-based training, it is often very helpful to have in-person anti-corruption training to supplement web-based training. First, live training permits greater interaction with trainees, which can be important to a) gauge their level of understanding of (or comfort with) a topic—which, in turn, can be key for program efficacy with respect to high-risk compliance areas, such as anti-corruption; and b) respond to their questions about the topic. Second, such training is also more readily adaptable to the issues relevant

[51] U.S.S.G. § 8b2.1(b)(3).
[52] OECD Good Practice Guidance, *supra* note 36, at part A(8).
[53] Kaplan, Defending Your Compliance and Ethics Program: Law and Practice, Compliance and Ethics Professional, p. 40 (Jan. 2010).

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to a particular functional group, e.g., a company's law or finance departments.

In addition to training employees, companies need to consider training third parties—at least, on a risk-relevant basis. Indeed, in several FCPA enforcement actions, DOJ and the SEC have faulted companies for not deploying FCPA training for third parties.[54] The need to implement such training in many situations is evident from the facts that:

- By virtue of the general law of agency, third parties can create every bit as much FCPA liability as can employees of the principal.[55]
- Such parties may be more likely to create FCPA risks than are employees of the principal because:

1) They are often not as familiar with compliance standards and hence may know less about applicable laws.

2) To the extent that the principal has an ethical culture, they are less likely to be influenced by that than are the principal's employees.

3) They would presumably be less inhibited about creating risk to the principal than would employees, since they would identify less with the company and its stakeholders.

Additionally, beyond actual training, companies are expected to deploy other types of compliance communications. These can include e-mails from senior managers, posters, and articles in company newsletters, among other things. The relative complexity and importance of risk mitigation in this area suggests that use of a broad range of communications may be necessary to ensure that relevant employee populations understand both the "what" and "why" of anti-corruption compliance.

Finally, in addition to general anti-corruption training and communications, companies should be prepared—under the OECD Good Practice Guidance—to provide "advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's [compliance and ethics program] or measures . . . when they need urgent advice on difficult situations in foreign jurisdiction."[56] Among other things, this underscores the need for sufficient anti-corruption compliance resources.

7. Auditing and Monitoring

The Sentencing Guidelines provide that companies should, through auditing and monitoring, check for violations and also ensure that a compliance program is functioning as intended.[57] Auditing can play a key role in preventing and detecting corruption. Not surprisingly, a number of enforcement decisions have faulted companies for failing to conduct FCPA audits and assessments.[58]

Among the indicia of successful anti-corruption auditing are:

- Providing detailed guidance to auditors on both anti-corruption-specific aspects of the program to audit but also *general* risk factors that can be relevant to anti-corruption compliance.
- Auditing not only for violations of law but also of anti-corruption policy, i.e., ensuring that important procedural aspects of the program are being complied with.
- Using the risk assessment process to ensure that the most risk-sensitive locations are audited.

Monitoring is distinct from auditing in that the former occurs, more or less, in "real time," whereas the latter takes place after the fact. A common form of anti-corruption monitoring is reviewing an agent's actual performance against what is provided for in her contract. Another—specific to the life sciences industry—is attending company sponsored events at which government-employed health care providers are in attendance to determine if the event serves legitimate purposes, as opposed to being for the purpose of influencing the health care providers through lavish entertainment.

8. Reporting Suspected Violations

The Sentencing Guidelines provide that companies must have systems for employees to report suspected violations[59] and, as a general matter, the expectations for FCPA-related reporting do not differ from those regarding C&E programs generally. Indeed, in its

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[54] Securities and Exchange Commission, In re Westinghouse Air Brake Technologies Corporation, Accounting and Auditing Enforcement Release No. 2785, Feb. 14, 2008.

[55] "Principal" is used broadly here, i.e., not only limited to true principal-agent relationships but also to other types of relationships where an organization sells or otherwise acts through another organization or person.

[56] OECD Good Practice Guidance, *supra* note 36, at part A(11)(i).

[57] U.S.S.G. § 8b2.1(b)(5)(A).

[58] E.g., *Securities and Exchange Commission v. Monsanto Co.*, No. 1:05CV00014 (D.D.C) (filed Jan. 6, 2005).

[59] U.S.S.G. § 8B2.1(b)(5).

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Opinion Procedures Release, DOJ provided that the company should implement "a reporting system, including a 'Helpline'; for directors, officers, employees, Agents, and Business Partners to report suspected violations of the Compliance Code or suspected criminal conduct."[60] And the Good Practice Guidance provides that companies should have effective measures for "internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and . . . undertaking appropriate action in response to such reports."[61]

While for the most part the approach to anti-corruption reporting does not differ from that relating to other types of risk, companies do need to be mindful of the fact that the locations with the greatest anti-corruption risks tend to be those where, for cultural reasons, compliance reporting often poses the greatest challenges. Thus, companies may need to devote extra efforts to encouraging reports in such locations.

Additionally, more so than with most risk areas, those with knowledge of a suspected corruption violation may be third parties (such as agents or contract sales representatives.) For this reason, means should be found to encourage (or require) reporting from such parties. Among other things, third parties should be contractually required to report suspected anti-corruption violations to the company.

9. Discipline

The OECD Good Practice Guidance provides that companies should have "appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery."[62] The Sentencing Guidelines provide that a compliance program "shall be promoted and enforced consistently throughout the organization through . . . appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct."[63] Generally, this means ensuring that discipline is a) sufficiently rigorous and fair; and b) meted out for the culpable *failure to prevent and detect* violations, as well as for committing violations. Additionally, as a matter of good practice, the disciplinary standards should be publicized appropriately.

Discipline is, of course, a critical part of any compliance program, both because it is a key factor in motivating compliance and because, in any program review by the government, weakness in this area can be readily detected by the government and seen as signaling a lack of good faith. For this reason, companies should ensure that FCPA violations—not only violations of law but also of applicable policy—are reviewed by appropriate personnel to ensure rigor and consistency.

Additionally, discipline for culpable supervisory lapses is probably more important for FCPA compliance than most other areas, given the extent to which FCPA violations are often the result of "willful blindness." Ensuring that such discipline is meted out where appropriate requires, among other things, that company investigators be trained to include supervisory lapses within the scope of their investigations.

10. Incentives

The Sentencing Guidelines provide that a C&E program "shall be promoted and enforced consistently throughout the organization through . . . appropriate incentives to perform in accordance with the [C&E] program."[64] This generally entails both creating appropriate incentives for employees to follow the standards of the program and refraining from creating incentives for misconduct.

In the anti-corruption compliance realm, these expectations can be met in various ways. One example is providing significant accountabilities in finance departments (such as through job descriptions or certifications) for ensuring that anti-corruption controls are being implemented. Another is taking measures to protect those on the front lines who adhere to company anti-corruption efforts in trying circumstances, i.e., who follow policy even where there is

[60] Opinion Procedure Release, *supra* note 35, at 2.

[61] OECD Good Practice Guidance, *supra* note 36, at part A(11)(ii).

[62] OECD Good Practice Guidance, *supra* note 36, at part A(10).

[63] U.S.S.G. § 8B2.1 (b)(6)(B).

[64] U.S.S.G. § 8B2.1(b)(6).

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loss of business. Still another is having a plan for recognition of positive contributions to the anti-corruption compliance program—such as through mention in communications from senior managers.

11. Third-Party Considerations

Because many FCPA cases have involved bribes paid by third parties—such as agents and distributors—third-party measures play an important role in anti-corruption compliance programs. Indeed, the OECD Guidance provides that companies should have:

> "ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representative distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements:
>
> i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
>
> ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery[65]; and
>
> iii) seeking a reciprocal commitment from business partners. [66]

Among other things, this aspect of anti-corruption compliance requires strong controls—for instance, to ensure that a third party business representative may not be retained unless the due diligence has been conducted; that the anti-corruption contractual undertakings have been agreed to by the third party; and, in some instances, that requirements concerning periodic anti-corruption certifications or other forms of monitoring are current. Additionally, other aspects of third-party anti-corruption compliance—concerning training and reporting suspected violations—are addressed elsewhere in this chapter.

Finally, a company's due diligence acquisition and joint venture formation checklists should sufficiently address anti-corruption issues (both risks and the contents of the anti-corruption policy, if any).

12. Assessments

Program assessments can play a particularly important role for FCPA compliance programs. A compliance assessment is distinguished from an audit in that the former tends to be more qualitative than the latter; i.e., rather than checking to see whether a compliance process has been followed, an assessment tends to a) measure the quality or impact of (all or part of) a compliance program, and b) determine if anything is missing from the program.

DOJ and the OECD have emphasized the importance of program assessments to achieving and maintaining program effectiveness—the former by, among other things, a 2010 speech by the attorney general calling on companies "to change the tone at the top, *to re-evaluate their compliance programs and internal controls*, to find ways to encourage a culture of compliance."[67]; the latter in a provision of the Good Practice Guidance stating that companies should conduct "periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards."[68]

Assessments are sometimes conducted by external parties, and from an independence and expertise perspective an external assessment is generally preferable to an internal one. However, there are valuable self assessment activities that a company can undertake, as well:

- use of surveys to assess perceptions of the strength of the Company's commitment to prevent corruption;
- deployment of focus groups or interviews to determine what the user experience has been with anti-corruption policies and processes; and
- development of a self assessment set of questions to be delivered as part of anti-bribery compliance training.

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[65] OECD Good Practice Guidance, *supra* note 36, at part A(6)(ii).

[66] OECD Good Practice Guidance, *supra* note 36, at part A(6)(iii).

[67] http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html.

[68] OECD Good Practice Guidance *supra* note 36, at part A(12).

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