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Anti-bribery programs: A web of ethical and legal dilemmas

- » All companies, whether public or private, are challenged to prevent bribery from becoming a part of their system.
- » Many developing countries are still struggling to set the right legislation for anti-bribery mechanisms, but international practices sometimes are not the best fit for their legislative and cultural systems.
- » In countries that have developed legislative structures, companies are looking to expand their presence in economies that are plagued with regulatory pressures.
- » The new ISO 37001 anti-bribery standard provides organizations with a detailed framework to implement an effective anti-bribery program.
- » An entity looking to achieve a certification in ISO 37001 will not only build a stronger bond towards its stakeholders, but will also gain a competitive advantage in the market.

Bribery has become a key concern for organizations and state-level governments. Bribery features as the second highest median loss (\$200,000¹) per scheme in an organization. It is interesting to note that the statistics provided by ACFE in

their report show that organizations lost more than twice as much if they lacked anti-fraud controls.² Bribery legally is comprised of two categories:

- ▶ Official bribery refers to corruption of a public official. This is generally prosecuted as a criminal act.
- ▶ Commercial bribery refers to the corruption of a private individual to gain a commercial or business advantage. This can be prosecuted as a criminal act and a civil action.

The complication drives in when one has to evaluate if the “giver” or “receiver” has given/received something which is in “kind” and not cash. This gets even more complex when one has to evaluate a future promise provided by one of the parties to reap some benefits of their relationship. The complexity keeps on increasing with conflicts of interest and the like. The complexity keeps on growing and makes it all the more difficult to prove the following elements of crime, which generally the judicial systems tend to look for:

- ▶ giving or receiving
- ▶ a thing of value
- ▶ with intent to corruptly influence
- ▶ a business or a private decision

This makes anti-fraud measures imperative, and that is why the International



Singh

Organization for Standardization (ISO) has come up with the ISO 37001 standard.³

Comprised of the national standards bodies of its 163 member countries, the ISO develops and publishes international standards. To date, the ISO has developed some 20,000 voluntary international standards on a vast range of different topics. Its aim is to help organizations establish, implement, and maintain an anti-bribery compliance program drawing on global anti-corruption best practice.

A new standard for compliance programs

The primary aim of ISO 37001 and other anti-bribery frameworks is to help organizations establish an anti-bribery management system to prevent bribery by the organization itself, by organizations within its supply chain, or by its staff or personnel. The bribery the standard seeks to prevent could be either for the organization's benefit or in relation to its activities. The ISO standard itself is quite flexible and can adapt to a range of different organization types and sizes. This includes large organizations, small- and medium-sized enterprises (SMEs), public and private-sector organizations, and non-governmental organizations (NGOs).

The ISO standard is designed to be used by any organization in any country, because it aims to strengthen an organization's approach to compliance by improving policies, procedures, and controls. It emphasizes business operations, makes use of a risk-based approach, and outlines various mandated procedures and controls. Subsequently, it helps organizations to better respond to and understand their operating context with

strong internal mechanisms, regardless of what the specifics of that context might be. This lends the standard both flexibility and versatility.

The fact that the standard can theoretically be implemented in any context is a key advantage because, in today's globalized economy, companies commonly have operations spread out across the globe in different jurisdictions. Adopting the standard at an organizational level facilitates uniform compliance, no matter the jurisdictions in which a company operates.

To prevent bribery, the ISO standard mandates a number of different controls, standards, and procedures. These include:

- ▶ A clear anti-bribery policy, along with procedures and controls in support of that policy;
- ▶ Top management and leadership commitment to and responsibility for enforcing the standard;
- ▶ Senior-level oversight;
- ▶ Anti-bribery training for management, staff, and personnel;
- ▶ Risk assessments;
- ▶ Due diligence on projects and business associates;
- ▶ Reporting, monitoring, investigation, and review; and
- ▶ Corrective action and continual improvement.

However, although the ISO standard does offer guidance to help organizations fully understand the concept of bribery, it does not provide an independent definition

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of the term. This is because bribery is defined by a country's own national laws and, therefore, the definition of bribery inevitably varies between countries. For example, the Foreign Corrupt Practices Act does not see facilitation payments as bribes. However, the UK Bribery Act considers facilitation payments as illegal. In comparison, in the Middle East, the big booming oil economies charge a fee to expedite the process. This shows that countries may have various definitions of what can or cannot be considered as a bribe.

Using the ISO standard to measure a compliance program

Although there are numerous practices that exist to measure a compliance program or an anti-bribery and corruption program, an ISO standard is treated as a gold standard for an organization. With any type of compliance program, including ISO 37001, it is key to have established metrics that allow you to measure the effectiveness of a compliance program. Well-constructed metrics facilitate performance improvement, effectiveness, efficiency, and appropriate levels of internal control. The sources are a very important element of these metrics, such as:

- ▶ Regulatory sources, including laws, regulators, etc.
- ▶ Non-regulatory sources, including policies, guidelines, etc.; and
- ▶ Other sources, which should ideally incorporate international leading practices relevant to the standard that is being measured as well as cost/risk/benefit analysis, when appropriate.

During the implementation stage, there should be some objective metrics that provide insight into an organization's progress toward meeting a specific goal or milestone in the implementation of an anti-corruption policy.

Metrics are key to the overall success of a compliance program, so it is worth spending the time and energy to come up with the right metrics.

It is also very important to categorize these matrices and their applicability. One size cannot fit all, and thus, ideally, some metrics should be focused on the effectiveness of the program and some separate metrics should focus on the efficiency of your

program. The bottom line is that every line item needs to be objectively quantified irrespective of the subjectivity of the matter (e.g., the number of calls to the corporate hotline, the percentage of employees who complete their trainings, or the number of lawsuits filed against the organization).

Thus, subjective measurements should be avoided, because they are inherently problematic. With metrics that can be objectively measured, it is easy to benchmark your program against specific standards. Numerical metrics can be particularly advantageous in this sense, allowing for trend and statistical analysis to see how the implementation of your compliance program is progressing and how the program is performing once it is established and running. With subjective measurements, this becomes unfeasible. Metrics are key to the overall success of a compliance program, so it is worth spending the time and energy to come up with the right metrics. Some of the key

questions in a matrix could surround the following subjects:

- ▶ Is the program consistent with all laws relevant to countering bribery in each of the jurisdictions in which you operate?
- ▶ Is the program evolving? (i.e., do the investigation/compliance reviews tie back to the regulatory risk register and subsequently to the program?)
- ▶ How is the program managed, and how does it tie up with the jurisdictional exceptions where the business entities operate?

Not only will the questions provide a useful overview of compliance status, but they can also help an organization to correlate risk assessments, prioritize risk, and provide valuable management information for both process improvement and quality improvement.

Defining the maturity of an anti-bribery compliance program

This is a very touchy subject because the set-up period in the life cycle of a compliance program requires patience and perseverance. Management will not see a measurable output for the amount of input that requires so many resources, employees, and budget. Compliance programs do not mature overnight, but rather take time to develop and become entrenched. A program in its implementation phase will likely be relatively inflexible and will only see minimum levels of compliance, as it likely doesn't have anticipator capacity at this point. As the program matures, it will become more flexible, proving itself able to learn from, provide management with a tangible output, and adapt to different regulatory scenarios. Staff and personnel in the program will also become more knowledgeable, and the program will generally become more

integrated with other units. As the program matures, gains in efficacy and efficiency can be expected.

The maturity should never be looked at in isolation, but rather in the context of the business and its growth. After all, a Compliance department is a cost center and needs to justify its existence. Some of the elements in a mature compliance program could incorporate:

- ▶ Technical and business tools are used to enhance an organization's competitive advantage;
- ▶ Budgeted resources are maximized, because tasks are better planned and coordinated;
- ▶ The program has maximum flexibility and is "anticipatory" in the sense that it can anticipate and respond to needs;
- ▶ Staff and personnel can assist government regulators in setting standards and policies; and
- ▶ Business relationship with third parties are enhanced.

Implementing the value of compliance

A compliance program or an anti-bribery program can be a valuable resource for companies seeking to develop and implement an anti-bribery standard and curb any criminal/unethical conduct that might exist. Frameworks, including the ISO 37001, can help organizations that operate outside the jurisdictions of the U.S., UK, or Europe to respond to allegations of bribery and corruption. By implementing a compliance program that adheres to ISO 37001 in the jurisdiction, a company can empower local staff to stop perpetuating acts that can lead to demands for bribes and protect their organizations in the ever-changing regulatory environment.

ISO 37001 is being developed as a requirements standard, meaning that it will, at some point, be capable of independent verification. It will therefore be possible for a third party to verify whether or not a company

is adhering to the standard, and an organization may even be able to become certified in compliance. This enhances the enforceability of the standard in a global context and increases its overall value to private enterprise.

For example, a US company operating in Zimbabwe—a jurisdiction characterized by very high levels of corruption at all levels of government—could choose to implement a compliance program in accordance with the ISO standard to prevent local employees from paying bribes to officials. Local staff would be empowered to reject requests for bribes on the grounds that they could lose their jobs if they were to pay out the bribe money and that the company could lose its certification.

In this context, the implementation of a compliance program would also help to mitigate the risks of bribery and corruption in the supply chain. As part of a compliance program, the aforementioned US company operating in Zimbabwe could require that all

of its suppliers become ISO 37001 certified. This would offer the organization protection from the risks of bribery and corruption at all levels.

Conclusion

By adhering to this standard and demonstrating that they have done so, companies can in turn increase their own value. ISO 37001 adherence provides assurance to management, investors, employees, customers, and other stakeholders that an organization is taking steps to prevent bribery risk and clear evidence that an organization has taken reasonable steps to stop bribery. *

1. Association of Certified Fraud Examiners (ACFE): Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Study, Executive Summary. Available at <http://bit.ly/acfe-2016-GFS>
2. ACFE: The Staggering Cost of Fraud infographic. Available at <http://bit.ly/cost-of-fraud>
3. ISO 37001 Anti-bribery management systems. Available at <http://bit.ly/anti-bribe>

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