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Meet David S. Huntley

Senior Executive Vice President &
Chief Compliance Officer
AT&T, Dallas, TX

See page 16

29

How to create
a culture of
trust?

William Holzhauser

33

Can
ethics be
monitored?

Robin Singh

39

Bring your compliance
program to life
through technology

Sunil Bheda

41

Built to last: Top 5
reasons your compliance
initiatives fail

Amii Barnard-Bahn

by Matthew DeCicco

Complying with corruption regulations: Best practices

- » Increased enforcement of the Foreign Corrupt Practices Act of 1977 (FCPA) in recent years has increased the necessity of implementing effective compliance programs for curbing bribery and other forms of corruption.
- » The single most important element to an effective compliance program is establishing the proper tone at the top, because it lays the foundation on which all other aspects of the program can be built.
- » Through a combination of training and awareness programs, ongoing risk assessment, conducting due diligence in all of the companies' international business agreements, and allowing for the internal reporting of issues, companies can avoid many of the legal liability issues that come with violating the anti-bribery provisions of the FCPA, even if instances of non-compliance are uncovered.
- » Internal auditors can be a powerful tool in the continuous monitoring, evaluation, and refinement of compliance programs.
- » A commitment to ethical behavior will allow for future success to result, as customers and employees alike will recognize the efforts made by a company and respond favorably.

In recent years, the U.S. government has started more heavily enforcing the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA), and the negative effects felt by companies that lack adequate compliance programs have never been more severe. From



DeCicco

the Act's inception in 1977 to 2010, cases were brought very infrequently, mainly because of the difficulty in gathering appropriate evidence to win actions. However, since 2010, almost 15 significant cases per year have been brought with substantial penalties resulting in almost all cases, usually as a result of settlements between the parties. In addition, the cases seem to be split between those brought against foreign companies and those brought against American companies, which underscores the need for companies all over the world to step up their compliance efforts. In 2016 alone, settlements under the FCPA exceeded a total of \$1.5

billion, and enforcement seems to be getting stronger with each passing year.¹ To avoid crippling financial penalties, companies need to do everything in their power to maintain compliance with the FCPA's anti-bribery provisions, and this must manifest itself in effective programs that are monitored and refined as appropriate.

When designing an effective compliance program, the single most important element is establishing the proper organizational culture—commonly referred to as the tone at the top. Without the proper buy-in from managers at the highest levels of the organizations, how can the subordinates be expected to take such an issue seriously? Organizational culture has the most pervasive effect on any control structure, because it is the single element that can influence everything else. To establish this culture effectively, it will likely be necessary to back up the attitude with actions rather than words. As such, zero-tolerance policies

toward bribery and corruption, coupled with codes of conduct and clear action steps if violations of company policy occur, should be used to get employees in line with management's expectations.² Without this first step, there is little hope for creating an effective compliance program.

Once the tone at the top has been established, companies can move on to designing and implementing the finer details with respect to their compliance programs. To allow for this process to run smoothly, a carefully planned and executed risk assessment is a necessity. There simply is no single best way to manage such complicated rules and regulations, and performing a comprehensive risk assessment is the best way to avoid wasting resources while still meeting individual organization needs. For example, if an American-based company operates in markets across South America and parts of Asia, and it is in contention for being awarded contracts that will compose a significant portion of its total revenue, then it is subject to significantly more risk than an American-based company that operates solely in parts of Western Europe. As such, investments in compliance measures need to be much more significant and focused for the former company to avoid all of the potential pitfalls of FCPA compliance. The latter company, on the other hand, may be able to get away with simple awareness programs that enlighten its employees as to the issues that could be encountered in these lower-risk countries.³

A core procedure that must be implemented in every proper compliance program is a system for training employees about the constantly present risks in international business. Without training employees, there is no real way to make a commitment to ethical business practices known, and the buy-in by lower-level employees will ultimately be lacking. Despite the best intentions of upper management, failure to follow through on the attitudes developed

with the tone at the top will be seen as hollow, and they simply will not be taken seriously. All employees should be made aware of the threats to compliance with the FCPA's anti-bribery provisions and given basic training, but companies should take care to identify particularly high-risk areas of their operations to focus more intense training efforts and avoid wasting valuable resources. This training should be required on a regular, continuous basis in all relevant areas in an effort to stop the problem before it has the potential to become serious. Furthermore, if companies operate internationally in joint ventures or other similar agreements, it would serve them well to share such efforts with their partners to minimize their risk exposure.⁴

The policies and procedures developed by the companies compose the foundation of an effective compliance program for the companies themselves, but another element is still necessary—due diligence in interactions with third parties internationally. Certain industries, countries, and business agreements lend themselves to greater risk of corruption, and companies operating in these situations must take the appropriate actions to mitigate this heightened risk. Due diligence can take many forms for companies, all with varying degrees of effectiveness depending on the particular situation. For example, if a firm operates closely in a joint-venture agreement with an international firm, then training programs like those mentioned earlier may be all that is necessary to avoid the risk of corrupt business practices. However, if a company has just recently entered an international market that is predisposed to bribery as a business practice, then it may be necessary for enhanced due diligence measures, such as the monitoring of the compliance programs of its partners and the careful vetting of relationships with new business agents.⁵ It is not enough to plead ignorance when doing business with corrupt

firms internationally, and being proactive in responding to threats to FCPA compliance can help minimize any potential legal liability that might arise.

Once the key pieces of the compliance program have been established, the next piece that should be considered by companies involves the concept of internal reporting. By nature, internal reporting will only take effect once the other components fail, but nonetheless, it can save companies a lot of headaches in the period following non-compliance with the FCPA's anti-bribery provisions. In evaluating companies that are being prosecuted under the FCPA, the Department of Justice heavily takes into consideration efforts to remedy the situation through adequate disciplinary procedures and accountability. In that way, internal reporting can significantly boost the chances of avoiding the harsh penalties brought in FCPA cases. If there is a system in place for employees to report suspected issues of noncompliance with rules and regulations regarding bribery and corruption, and that system is actually used to quickly and responsibly handle these rogue employees, then it is clear that a good-faith effort is being made to comply with the FCPA.⁶ This type of built-in accountability is so critical to compliance programs because it further proves upper management's commitment to the cause, and without it, this commitment may merely be seen as a shallow promise.

After implementing the appropriate policies and procedures discussed above, the next critical step is the ongoing monitoring and evaluation of the overall program. An excellent way to

ensure this process is taken seriously is to hire internal auditors, as they generally specialize in such skills. In-house legal staffs might be limited in their abilities to properly evaluate the effectiveness of a compliance program with

Generally, the auditors will use a targeted risk assessment-based approach that will have them heavily scrutinize those areas that are most susceptible to corruption and fraud risk.

such a complex set of regulations, but this is simply not the case for internal auditors. Through their consulting work, they have significant experience in the area of assisting in the design and implementation of internal controls relevant to all areas of a company's operations. In this

case, they can use their experience to bring thorough testing procedures that allow them to identify weak points in the established compliance programs and recommend improvements. Generally, the auditors will use a targeted risk assessment-based approach that will have them heavily scrutinize those areas that are most susceptible to corruption and fraud risk. Agreements with the governments in other countries will be closely looked at, as will the agreements made with agents in other countries. Employee expense reports, bank reconciliations, and even petty cash activities will be examined for any evidence of something going awry in the compliance process. In addition to being a detective measure, internal auditors can also be utilized as a preventive measure. Verifying agreements and gifts with government agencies for proper compliance with the anti-bribery provisions seems like such a simple step, but the particular expertise of the internal auditors can help ensure it is taken seriously every time and that the effectiveness of the system is not compromised.⁷

In evaluating the effectiveness of their compliance programs, there are several metrics that companies should measure their program against. First, the scope of the program must be assessed to determine it covers all of the most susceptible transactions, including gifts, loans and advances, travel and entertainment, and charitable contributions, among others. In addition, it should cover all members of the organization, no matter how high their position is, and it should even apply to third parties that the organization acts through as well. Next, it should be free of any ambiguity in the policies it establishes so that everyone's expectations are clear and on the same page. Ambiguous wording can compromise the entire program, and all of the effort and investment put into it can be wasted as a result. The program should be appropriately implemented and communicated throughout the organization, not merely expressed as some ideal the company would like to reach. Support and reporting mechanisms, as mentioned earlier, should be abundant and available to all concerned employees to avoid issues going undetected. Finally, audits of the entire control structure can be conducted to determine the system's overall effectiveness in curbing abuse by determining the frequency of violations and how the system responded to such instances.⁸ By consistently raising the standards they are holding themselves to, companies can truly realize a culture built on a foundation of ethical behavior and realize the benefits of their efforts.

By following the broad guidance discussed above and continually refining the policies

Most obviously, the instances of non-compliance with the anti-bribery provisions of the FCPA will be limited, and their legal liability with respect to such actions will be minimized.

and procedures put in place to deter corrupt business practices, companies can expect several important benefits to result. Most obviously, the instances of non-compliance with the anti-bribery provisions of the FCPA will be limited, and their legal liability with respect to such actions will be minimized. Furthermore, with the possibility of abandoning traditional enforcement methods by the government remaining, private compliance efforts will be necessary to avoid the other, more hidden costs associated with bribery, such as a ruined public image and the degradation of relationships with customers.⁹ In addition, employee satisfaction can remain at a high level, as employees see their moral values reflected in their organizations' actions, and the foundation for a sustainable business model will be established for future success, all because the companies made a concerted commitment to ethics.¹⁰ *

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3. Peter Unger and Mark Radke, "The New FCPA Guidance" *The Financial Executive*, 2013;29(2):57-59.
4. See note 2 above.
5. See note 3 above.
6. Salen Churi, David Finkelstein, and Joe Mueller, "Complying with the Foreign Corrupt Practices Act: A Practical Primer" *American Bar Association*, 2012. Available at <http://bit.ly/amer-bar>
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10. Philip Nichols: "The Business Case for Complying with Bribery Laws" *American Business Law Journal*, 2012;49(2):325-368.

Matt DeCicco (mdecicco@student.sjcnj.edu) is a graduate student at St. Joseph's College in Patchogue, New York.