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Global anticorruption enforcement: How the Compliance profession is evolving

- » Anticorruption enforcement around the world has surged in recent years, including outside the United States.
- » Companies around the world are prioritizing the establishment of compliance mechanisms and considering and the actual benefit of effective implementation.
- » Designing compliance programs that meet the requirements of different anticorruption laws is a challenge, but existing guidance indicates consensus on an emerging global standard for compliance.
- » Companies around the world know that how they choose to proceed is likely to increase or decrease the likelihood of them facing compliance enforcement actions in the future.
- » Companies can implement several key solutions based on the available guidance to minimize the risk of anticorruption enforcement action.

As late as the 1970s, economists described some forms of corruption as socially beneficial. After the 1977 enactment of the Foreign Corrupt Practices Act (FCPA), however, perceptions began to shift and the costs of corruption came into the equation. The FCPA enactment was a signal that the United States authorities would not tolerate certain corrupt practices as necessary to conducting international business.



Harutyunyan

In the 1990s, after conditions in the former Soviet republics facilitated corrupt practices that impacted business globally, international organizations and civil society began to speak out on how corruption distorts market mechanisms, deters domestic and foreign

investments, impedes development, and stifles business opportunities for all stakeholders. As a result, the international community as a whole, including governments, private sector stakeholders, and international organizations, became foes of corruption. Essentially, the surge in global anticorruption occurred after corruption became perceived as a costly obstacle to doing business and to sustainable economic, political, and social development.

Today, the global fight against corruption is in full swing and international anticorruption tools extend beyond the FCPA. Multilateral anticorruption instruments (e.g., treaties, conventions, and agreements) have emerged and entered into force with substantial State participation. Specifically, international anticorruption instruments

require signatories to change their domestic anti-corruption policies to adhere to standards in the agreement if their domestic laws are not already in adherence. The multilateral agreements call for direct government action through law enforcement and indirect government action through influencing private sector behavior. Influencing private sector behavior refers to articulating expectations that companies do their part in halting a range of corrupt practices. These practices include implementing effective compliance programs. At the same time, foreign anticorruption laws, such as the United Kingdom Bribery Act, allow companies to use an effective compliance program as a complete defense. If, during enforcement, more governments begin to scrutinize compliance programs and allow companies to use strong compliance programs in their defense, compliance will continue to become more important and integral to anticorruption enforcement around the world.

The current landscape of anticorruption efforts around the world is likely to affect how companies implement compliance mechanisms if they wish to avoid enforcement actions. The discussion below sets out an emerging standard—based on guidance from enforcement authorities and organizations around the world—that government have articulated regarding compliance mechanisms.

The emerging global standard companies could strive to meet

Increasingly, governments around the world are calling upon private companies to design and implement compliance mechanisms that will aid in the struggle to prevent and mitigate corruption. For companies, designing compliance programs that meet the requirements of different anticorruption laws is a challenge, but existing guidance indicates consensus on what governments expect from

compliance programs. Numerous materials issued by government bodies, international organizations, and the non-profit sector provide companies with an understanding of what governments expect from corporate compliance programs. Available guidance and expectations come from the U.S. Department of Justice, the United Nations, the OECD's Working Group on Bribery, the Asia-Pacific Economic Cooperation, the International Chamber of Commerce, the World Bank, and Transparency International. These expectations form an emerging global standard for compliance.¹

The emerging global standard for implementing compliance mechanisms includes three core components that may be categorized as follows: strong program design, good faith application, and program effectiveness. Integrating these components into compliance mechanisms could lead to substantial benefits for companies in the enforcement context, namely in terms of avoiding prosecution or mitigating penalties.

Strong program design

The first component requires companies to design a program that accounts for risk factors particular to the company, including size, business sector, the nature of the business, and locations of operation. Companies should keep their programs up to date by continuously monitoring and reassessing their risks and adapting their programs accordingly.

Good faith application

The next component requires companies to apply their programs in good faith, which begins with a company demonstrating commitment to compliance, perhaps through senior management and employee training. Senior management should articulate company standards, communicate them in unambiguous terms, adhere to

them scrupulously, and disseminate them throughout the organization. A code of ethics or other policies may also communicate concise messages accessible to all employees and third parties.

Good faith application also requires applying codes and policies in a uniform manner to all employees (and sometimes third parties), regardless of rank and including all directors and officers. Companies should also train employees on codes and policies, without exempting anyone based on status. Put differently, companies may not apply a compliance program in good faith while exempting high-level employees from the program's reach. To bolster program capability when misconduct occurs, companies should discipline carefully and in proportion to the seriousness of the violation at hand. However, to show disciplinary will, companies may need to terminate parties engaging in misconduct. Also, while disclosing the presence of corrupt individuals to the government is not ideal for companies, willingness to enforce policies and disclose the offending individuals may serve as a proxy for application in good faith.

Program effectiveness

The final component addresses how effective the company's program is. An effective program correlates with a strong corporate culture, because business environments involve complex risks and reputational threats. Thus, general business conduct should reflect the controls on paper. For example, in the case involving Smith & Wesson, a US firearms manufacturer, US enforcement authorities found that the company failed to devise and maintain sufficient internal controls with respect to its international sales operations. The company had a basic corporate policy prohibiting the payment of bribes, but it failed to implement a reasonable system of

controls to effectuate that policy.² Effective compliance programs are therefore measured by a company's response to misconduct rather than the absence of it. Ultimately, a program is only effective where the company expends resources to create a strong compliance program, intends to carry out the program, and ultimately succeeds despite certain challenges.

Solutions for companies that wish to meet the emerging global standard

In order to meet the emerging standard and to heed the call of public authorities, companies should consider implementing the specific solutions discussed below.

1. Recognize the distinct mandate of the Compliance function

Companies should recognize that a distinct mandate governs the Compliance function, which is designed to detect existing misconduct, remedy it, and prevent future misconduct.³ In the same vein, companies should acknowledge the inherent tension between the mandates of the chief compliance officer and the general counsel. The latter's mandate focuses narrowly on legal risks, instead of risks associated with other unethical behavior. The Legal department's mandate requires a focus on legal standards and violations of the law. By contrast, the compliance mandate is broader and requires promoting the prevention, detection, and resolution of actions that do not conform to legal, policy, or business standards.

Recognizing these differences will allow companies to distinguish between legal duties and compliance duties, which could decrease the chance of companies conflating the two sets of duties. Companies should recognize that the Compliance function is partially within the directors' fiduciary duty to protect the company.⁴ Companies should recognize

that additionally, substantive regulatory statutes, criminal laws, administrative agency guidance, best practices codes, and internal corporate rules govern the Compliance function. Companies should acknowledge that those guiding norms create a broad compliance mandate, requiring compliance professionals to detect and prevent any misconduct in violation of legal and non-legal rules.⁵

Having recognized these differences, companies should structure their compliance mechanisms to enable compliance professionals—including lawyers, accountants, systems managers, risk analysts, and investigators—to fulfill their duties across various departments.

2. Employ a senior officer with explicit authority over Compliance

To enable compliance duties to be fulfilled across the entire company, companies should employ a senior officer (i.e., a chief compliance officer, CCO) with explicit authority to supervise a Compliance department, distinct from the in-house general counsel. Specifically, companies should—through a board resolution or another unambiguous mandate—authorize the CCO to fulfill functions unique to the position, including developing, implementing, and overseeing an effective compliance and ethics program. Moreover, companies should authorize the CCO, who may or may not be an attorney, to lead independently from the Legal department and to report directly to the board of directors. This means that a company's reporting line should be structured such that the CCO function cannot report to or be performed by the general counsel.

Companies should take these steps because support for an independent and empowered CCO exists and continues to increase. For example, in the banking and pharmaceutical industries, a growing number of companies are reorganizing their Compliance functions to remove the CCO from under the Legal

department's supervision.⁶ Moreover, regulators in key industries, such as the healthcare industry, and prosecutors within and outside the United States support structuring the Compliance function as an equal and independent partner of the Legal department. The U.S. Department of Health and Human Services Office of the Inspector General (OIG) is the first U.S. agency office to clarify such a standard in its guidance. The OIG position is that an organization's Compliance Officer should neither be counsel for the provider, nor be subordinate in function or position to counsel or the Legal department, in any manner. OIG finds that separate Compliance and Legal functions reflects the independent roles and professional obligations of each function.⁷ Thus, increasing support for removing the CCO from under the Legal department and thus decreasing the likelihood of defective compliance program implementation should prompt companies to reorganize their Compliance functions outside the authority of the Legal department.

3. Equip compliance experts with adequate resources

Companies, recognizing that compliance professionals supervised by the CCO are subject matter experts fulfilling a distinct function, should provide them adequate resources to prevent compliance mechanisms from being ineffectively implemented. Companies should provide enough resources for the CCO to lead on all elements comprising the company's compliance mechanisms to ensure implementation of critical legal and non-legal elements of the compliance program. The CCO's resources should be separate from those of the Legal department, allocated specifically to compliance subject matter experts, and sufficient to fulfill the unambiguous mandate discussed above. Without an adequate budget or qualified compliance experts reporting to the CCO, the compliance program on paper

cannot transition to practice as an effective anticorruption tool. Separate resources and personnel are necessary because a company's legal experts may be ill equipped to oversee critical compliance mechanisms, such as internal reporting mechanisms. If companies do not provide adequate resources to maintain such mechanisms, they may glaze over a key non-legal component of their compliance programs, and thereby fail in their compliance obligations. Thus, companies seeking effective implementation of all compliance mechanisms should provide adequate resources to compliance professionals, who perform legal and non-legal functions.

4. Foster an ethics-based approach to compliance

In addition to altering their structural approach to compliance, companies should encourage ethical behavior as part of their approach to compliance. Although ethics and compliance are not synonymous, the two can work together to maximize the effectiveness of compliance mechanisms. Companies should focus on an ethics-based approach to compliance to maximize program effectiveness, particularly when it comes to preventing misconduct. To promote ethical behavior, companies should weave elements of ethical business conduct into the corporate infrastructure, into all company processes over time, and into compliance mechanisms. Companies should thus align formal compliance structures, including processes, policies, and training programs, with consistent value-based ethics to inspire members of the organization to behave in a manner consistent with both high ethical standards and compliance programs.

5. Increase collaboration between the CCO and other departments

To promote ethical behavior while implementing compliance mechanisms,

companies should increase collaboration between the CCO as an authoritative decision-maker with other departments, including Legal, Ethics, Human Resources, and Internal Audit. Leaders across departments can shape and nurture an ethical culture, which may in turn impact employee morale and retention. Alignment and consensus are essential to avoiding cross-departmental tension, organizational chaos, and employee confusion.⁸ Thus, increased collaboration could impact how the company as a whole weaves ethical behavior into the corporate infrastructure.⁹ Integrating collaboration into the implementation of compliance mechanisms could provide solutions to compliance challenges through increased input on various matters, including matters of business conduct and integrity throughout the company.

Companies could capitalize on collaboration between the Compliance department and other departments to strengthen ethical culture and close ethical culture-related implementation gaps. On a broad level, collaborative implementation efforts across departments enable information sharing, trust building, and collective strategic planning. Enabling these practices provides two subsequent benefits. First, the compliance subject matter experts could disseminate credible messages on the company's compliance mechanisms and ethical codes throughout the company. Second, decreased potential animosity between departments would allow for a uniform stance on ethics and compliance to crystalize throughout the company. Thus, collaboration among departments could result in more effective implementation in the aggregate.

6. Take a stance against lawful but unethical conduct

When implementing compliance mechanisms, companies should also pay particular

attention to situations where lawful behavior is adverse to the company's commitment to compliance. Adverse behavior may include one or a combination of the following behaviors: violations of the code of ethics, behavior inconsistent with the compliance program, or behavior that is publicly unpopular. Lawful behavior at odds with the company code or programs is undesirable, because it runs afoul of a complete ethical attitude and the company's system-wide emphasis on compliance and ethics. Moreover, it may carry reputational consequences for the company and expose the company to potential scandal.

Compliance professionals, led by the CCO in the independent structure described above, are responsible for implementing the company's code and compliance mechanisms and for making difficult decisions to prevent lawful but unethical behavior from occurring within the organization. Relying on compliance professionals to prevent such behavior will benefit companies, because it will decrease the likelihood of reputational damage. It will also account for shifts in public opinion, which is an important part of the business-related rationale for implementing compliance mechanisms. Compliance professionals are experts in identifying risks and managing them. They should thus be tasked with helping spot the risks that come with shifts in public opinion and guiding decisions to advance the company's interests in an ethical manner.¹⁰

Conclusion

Although the expectation to implement compliance mechanisms has been clearly articulated, companies around the world face a novel question when it comes to how exactly they must approach compliance mechanisms. Currently, no well-defined legal obligation to follow a particular course of implementation exists. At the same time, a company's implementation of compliance

mechanisms is likely linked to regulatory obligations or potentially defending itself during enforcement. Ultimately, companies establish compliance mechanisms as legal risk management tools, tools to increase long-term business growth, or as both. No matter the underlying reasons, companies around the world are prioritizing the establishment of compliance mechanisms. The pertinent question thus becomes the extent to which companies may actually benefit from their chosen mechanisms through effective implementation. If clear laws and regulations with specific implementation requirements increase, companies that have prioritized effective implementation will be well positioned to address them. Companies seeking a thorough approach to implementing compliance programs could benefit from the proposed solutions in this article. *

The findings, interpretations, and conclusions expressed herein are solely those of the author and do not necessarily reflect the view of her employer or any other organization.

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