Doing Compliance: Design, Create, and Implement an Effective Anti-Corruption Compliance Program

THOMAS FOX
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COMPLIANCE WEEK
77 N. Washington Street, 4th Floor
Boston
MA 02114
Tel +1 888 519 9200
Fax +44 (0)20 7324 2373
info@complianceweek.com

ARK CONFERENCES LTD
6-14 Underwood Street
London N1 7JQ
United Kingdom
Tel +44 (0)20 7566 5792
Fax +44 (0)20 7324 2373
publishing@ark-group.com

COMPLIANCE WEEK
Editor and Publisher
Matt Kelly
mkelly@complianceweek.com

Head of Sales and Marketing
Donna Rice
drice@complianceweek.com

ARK GROUP
Head of Content Strategy
Fiona Tucker
fiona.tucker@wilmington.co.uk

Reports Content Manager
Helen Roche
helen.roche@wilmington.co.uk

Assistant Editor
Laura Slater
laura.slater@ark-group.com

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THE US Foreign Corrupt Practices Act (FCPA) has been around since 1977. However, the last ten years has seen an explosion of growth in FCPA enforcement with both the number of enforcement actions far exceeding what occurred in the first 25 years of the FCPA and fines and penalties headed into near stratospheric levels. In 2011, the UK enacted into law the UK Bribery Act, which incorporates some of the concepts present in the FCPA along with some components not included in the FCPA, such as making “private-to-private” bribery illegal. While there have not been any significant prosecutions under the UK Bribery Act to-date, the UK Serious Fraud Office (SFO) has announced that several companies and individuals are under investigation. In 2013, the Chinese government announced a massive investigation into the UK Company GlaxoSmithKline Plc (GSK) for bribery and corruption under Chinese domestic law, marking the first time Chinese authorities have investigated a western company under Chinese domestic law.

It is clear that enforcement actions against bribery and corruption are not going to go away – or even lessen – in the future. Just as the world is becoming increasingly ‘flat’ for business and commercial operations, the same is true for anti-corruption and anti-bribery enforcement. Any company that does business internationally must be ready to deal with a business environment which has these new realities. While there are several excellent books about the FCPA and anti-corruption enforcement, very few deal with the “how” of doing business in this new enforcement milieu.

This book is designed to be a one-volume work, which will provide you with the basics of how to create and maintain an anti-corruption and anti-bribery compliance program to suit any business climate across the globe. I have based my discussion of a best practices compliance program on what
the Criminal Division of the US Department of Justice (DOJ) and Enforcement Division of the Securities and Exchange Commission (SEC) set out in their jointly produced “FCPA – A Resource Guide to the US Foreign Corrupt Practices Act”, which includes FCPA Guidance on the ten “hallmarks” of an effective compliance program.

The FCPA Guidance wisely makes it clear that it is impossible to take a blanket approach to compliance: “Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. Thus, the discussion below is meant to provide insight into the aspects of compliance programs that DOJ and SEC assess, recognizing that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs. Indeed, small- and medium-size enterprises likely will have different compliance programs from large multi-national corporations, a fact DOJ and SEC take into account when evaluating companies’ compliance programs.”

This book does not discuss the underlying basis of the FCPA or any other anti-corruption or anti-bribery legislation. I have assumed the reader will have a modicum of knowledge of these laws. If not, several excellent works can provide that framework. This book is about how to do business in compliance with these laws. Like all Americans, I appreciate any list that is deca-based, so the format of 10 hallmarks resonates with me. Accordingly, I have kept this basic organization in laying out what I think you should consider in your anti-corruption and anti-bribery compliance program. In addition to presenting my own views on these areas, I also set out the views of both FCPA practitioners and commentators from other areas of business study and review.

Compliance begins at the top, what should management say and do? “Tone at the top” is a great buzz phrase, but how does a company truly get the message of compliance down through the ranks? The first chapter of this report will discuss the techniques management can use to move the message of compliance down through middle management and into the lower ranks of the company.

The backbone of your anti-bribery compliance program is set out in your written standards and controls, which consist of a code of conduct, compliance policy, and implementing procedures. Chapter 2 will discuss what should be in the written basics of your compliance program and how best to implement these controls.
Chapter 3 focuses on the chief compliance officer (CCO), whose role and function in any compliant organization cannot be overstated. Simply naming a CCO is no longer enough to meet even the minimum requirements of best practices. This chapter will review the compliance function, oversight, autonomy, and resources. One of the key areas that the DOJ will review is how a CCO is allowed to fulfill this role. Does the position have adequate resources? Does it have autonomy and support in the corporate environment? Does the board of directors exercise appropriate oversight? This section will set out how to structure your best practices for the compliance function in an organization.

Chapter 4 covers the cornerstone of your compliance program: your risk assessment. It all begins here. A risk assessment is the road map to managing your risk. The implementation of an effective compliance program is more than simply following a set of accounting rules or providing effective training. Compliance issues can touch many areas of your business, and you need to know not only what your highest risks are, but also where to marshal your efforts in moving forward. A risk assessment is designed to provide a big picture of your overall compliance obligations and then to identify areas of high risk so that you can prioritize your resources to tackle these high-risk areas first.

Once you have designed and implemented your compliance program, the real work begins. Chapter 5 discusses the training you must provide on the compliance program and the continuing advice that must be given to your company thereafter. This means that another pillar of a strong compliance program is properly training company officers, employees, and third parties on relevant laws, regulations, corporate policies, and prohibited conduct. However, merely conducting training usually is not enough. Enforcement officials want to be certain the messages in the training actually get through to employees. The DOJ’s expectations for effectiveness are measured by who a company trains, how the training is conducted, and how often training occurs. In this chapter, you will learn how to get your message of compliance out to your employees.

Any effective compliance program will use a variety of tools to help ensure that it is followed. This means that you must employ both the carrot of incentives and the stick of disciplinary measures to further compliance, as discussed in Chapter 6 of this report. How can you burn compliance into the DNA of your company? Discipline has long been recognized as an important aspect of a compliance regime, but more is now required. In this chapter you will learn
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how to structure compliance into the fabric of your company through hiring and promotion of personnel committed to compliance, and how to reward them for doing business ethically and in compliance with the FCPA.

Chapter 7 covers third parties – universally recognized as the highest risk in any compliance program. Indeed, it is estimated that well over 90 per cent of all FCPA enforcement actions involve third parties. Therefore, it is important for an anti-corruption program to manage this highest risk. In this chapter, I will detail a five-step process for the investigation and management of any third party relationship, from agents in the sales chain to vendors in the supply chain.

In any company, your best source of information about not only the effectiveness of your compliance program, but also concerning any violations, is your own employees. This means that you must design and implement a system of confidential reporting to get your employees to identify issues, and then have an effective internal investigation of any issues brought to your attention. Your own employees can be your best defense to prevent a compliance issue from becoming a FCPA violation. In Chapter 8, you will learn about the best practices for setting up internal reporting and investigating claims of compliance violations.

Once you have everything up and running, you still need to oil and update the machine of compliance. Chapter 9 explains how you can do this through the step of continuous improvement, which is the use of monitoring and auditing to review and enhance your compliance regime going forward. A company should focus on whether employees are staying with the compliance program. Even after all the important ethical messages from management have been communicated to the appropriate audiences and key standards and controls are in place, there should still be a question of whether the company’s employees are adhering to the compliance program.

The last thing you want to bring in through an acquisition is another company’s FCPA violation for which your company must pay. In Chapter 10, you will learn how to use the mergers & acquisition (M&A) function to proactively manage compliance. Companies do not want to “buy a FCPA violation”. Effectively managing your M&A process can help you to identify risk areas in a potential acquisition and then remediate any issues in the post-acquisition integration phase. This section will provide the DOJ’s most recent pronouncements on how to avoid FCPA exposure in this key area of corporate growth.
One of the key differences between the US FCPA and UK Bribery Act is that the US law allows facilitation payments. However, in today’s interconnected world, to allow one part of your company to make facilitation payments while UK subsidiaries or others covered by the UK Bribery Act are exempt from your standard on facilitation payments can become an administrative nightmare. The concluding chapter of this report will explore what facilitation payments actually are, and in what ways the policing of your internal policy has become more difficult. The chapter will also look at some companies which have been investigated regarding their facilitation payments, and will provide guidelines for you to follow should your company decide to allow these going forward.
THOMAS FOX has practiced law for over 30 years. He has been a trial lawyer in private practice, a general counsel in the corporate world, and is now recognized as one of the leading experts on the Foreign Corrupt Practices Act (FCPA) and compliance programs relating to both the FCPA and other anti-corruption laws. He is the author of two prior award-winning books on the FCPA: Lessons Learning on Compliance and Ethics and Best Practices Under the FCPA and UK Bribery Act. He blogs daily on all things FCPA on his award-winning blogsite, The FCPA Compliance and Ethics Blog, and podcasts on all things anti-corruption on The FCPA Compliance and Ethics Report. Fox writes for a variety of anti-corruption compliance magazines and publications, and is a featured columnist for Compliance Week. He can be reached at tfox@tfoxlaw.com.
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