Effective Anti-Corruption Compliance in Emerging Markets: Are You Prepared?

Thursday, November 12, 2015
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12:00 - 1:30 p.m. ET

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  ▪ Anti-Corruption Compliance in Emerging Markets: A Resource Guide
Tab 1: Agenda
Effective Anti-Corruption Compliance in Emerging Markets: Are You Prepared?

Thursday, November 12, 2015
12:00 - 1:30 p.m. ET

Agenda

12:00 – 12:05 p.m. ET  Welcome and Introduction

12:05 – 1:25 p.m. ET  Presentation

Speakers:
Keith M. Korenchuk, Partner, Arnold & Porter LLP
Samuel M. Witten, Counsel, Arnold & Porter LLP
Arthur Luk, Partner, Arnold & Porter LLP
Cristian R.C. Kelly, Arnold & Porter LLP

1:25 – 1:30 p.m. ET  Question-and-Answer Session

CLE credit is pending.
Tab 2: Presentation
Effective Anti-Corruption Compliance in Emerging Markets: Are You Prepared?

Thursday, November 12, 2015
12:00 – 1:30 p.m. ET

Agenda

- Introduction: The Context of Emerging Markets Compliance
- Global Convergence in Anti-Corruption Laws
- Entering Emerging Markets
- Addressing Risks from Third Parties
Introduction: The Context of Emerging Markets Compliance

Responding to the challenge in 6 steps

1. Know the Market
2. Know the Industry
3. Assess the Business Model
4. Recognize Cultural Issues
5. Set the Controls
6. Evaluate and Modify the Approach

Anti-Corruption Compliance in Emerging Markets e-book Released Today

- Guide to navigating the corruption challenges in emerging markets
- Identifies programs, controls, and tools that meet common international standards to address emerging market risks
- Framework for companies with anti-corruption programs in place to assess and facilitate modifications
Anti-Corruption Compliance in Emerging Markets e-book Released Today

Book Chapters

• Chapter 1 - Overview
• Chapter 2 - The Framework for Compliance in Emerging Markets
• Chapter 3 - Due Diligence Considerations for Entry in New Markets
• Chapter 4 - Mitigating Risks of Third-Party Misconduct

Agenda

• Introduction: The Context of Emerging Markets Compliance
• Global Convergence in Anti-Corruption Laws
• Entering Emerging Markets
• Addressing Risks from Third Parties
Increased Convergence In International Anti-Corruption Laws

FCPA May be Best Known Anti-Corruption Instrument, but Other Instruments Have Common Features:

- 1997 Organization for Economic Co-operation and Development (“OECD”) Anti-Bribery Convention
- 2003 UN Convention Against Corruption
- 2010 UK Bribery Act
- National Laws Implementing 1997 and 2003 Conventions or Otherwise With Features Similar to FCPA

The Global Standard In Compliance Can Be Summarized By Twelve Key Elements

Elements Of The Global Standard

Element 1: Strong, Explicit and Visible Support And Commitment From Senior Management For Preventing And Detecting Foreign Bribery

Element 2: A Clearly Articulated and Visible Corporate Policy Prohibiting Foreign Bribery

Element 3: Making Compliance The Duty Of Individuals At All Levels Of The Company
Elements Of The Global Standard

Element 4
Oversight of Compliance as the Duty of One or More Senior Corporate Officers, With Autonomy, Resources, and Authority

Element 5
Generally Applicable Measures That Focus on High-Risk Areas

Element 6
Ensuring the Compliance of Relevant Third Parties

Element 7
Financial and Accounting Procedures, Including a System of Internal Controls

Element 8
Periodic Communication and Documented Training

Element 9
Encouragement and Positive Support for Compliance
Elements Of The Global Standard

- Element 10: Appropriate Disciplinary Procedures to Address Violations
- Element 11: Guidance, Advice, Confidential Reporting, and Whistleblower Protections
- Element 12: Periodic Reviews

Agenda

- Introduction: The Context of Emerging Markets Compliance
- Global Convergence in Anti-Corruption Laws
- Entering Emerging Markets
- Addressing Risks from Third Parties
Evaluating New Markets

Anti-Corruption Research

Market Risk Assessment

Preliminary Market Visit

Evaluation and Approval

Compliance and Training

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Anti-Corruption Research Preliminary Questions

- Requirements for international companies
  - Registration
  - Use of local companies
- Track records of similar companies
- Government-owned industries
- Key areas of corruption
- Local anti-bribery laws or initiatives
Preliminary Market Visit

- Legal Counsel
- Transportation and Customs Clearing Agents
- Consultants
- Regulatory Authorities
- Trade Agencies or Business Organizations
Evaluation and Approval

- Document Risk Assessment
- Retain Supporting Information
- Identify and Implement Policies and Procedures To Mitigate Risks

Implementation

- Integration into company’s compliance programs
- Training to ensure understanding of anti-corruption policies and procedures
- Implementation of internal controls to mitigate corruption risks
Agenda

- Introduction: The Context of Emerging Markets Compliance
- Global Convergence in Anti-Corruption Laws
- Entering Emerging Markets
- Addressing Risks from Third Parties

Third Party Diligence—The Basics

- The third-party oversight framework should consider:
  - how the company conducts business
  - when, where, and why it uses third parties
  - how it supervises the work of those third parties
- Addressing these questions informs the scope, intensity, resources, and organization of the controls
Steps for “Exercising Judgment”

Step 1: Evaluate the nature of the risk by type of third party

Step 2: Understand the nature of the risk presented by the specific third party

Step 3: Identify warning signs

Step 4: Resolve or mitigate warning signs

Step 5: Dealing with “Special Situations”
Resolving Warning Signs

- So the diligence identifies a warning sign. What do you do about it?
- Consider the type of warning sign and how it may be resolved:
  - Transparency issues, “What is going on here?”
  - Fact issues, “I don’t understand this situation”
  - Prior “bad conduct”
  - “People issues”
  - “Structural deal issues”
  - Qualification issues
  - Performance issues
  - Financial control issues
  - Documentation issues

Consider the results

- How do positive factors impact remaining warning signs?
- Are the unresolved warning signs significant enough to call a halt to the relationship?
- Can controls and oversight be put in place to cover “controllable risks”? 

What’s Next?

Please join us in January 2016 for the next webinar in this series, and the next five chapters of *Anti-Corruption Compliance in Emerging Markets: A Resource Guide*

Topics Covered:
- Engaging Government Officials as Consultants and Speakers
- Preventing Corruption in Gifts, Travel, and Entertainment
- Guarding Against Anti-Corruption Problems in Philanthropic Activities in Developing Markets
- Meeting the Emerging Global Standard in Mergers and Acquisitions
- Coordinating Compliance and Financial Controls

Contacts

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Tab 3: Speaker Biographies
Keith M. Korenchuk
Partner

Keith Korenchuk counsels and advises global companies on regulatory and compliance matters worldwide, with a focus on compliance program effectiveness, compliance program implementation, operations and evaluation, and related regulatory counseling and advice. He works in a wide variety of industries and sectors including consumer products, electronics, energy, financial services, life sciences, medical device, pharmaceutical, and technology.

Mr. Korenchuk provides regulatory and compliance guidance, advice, and solutions regarding:

- US and global compliance systems design, implementation, and ongoing assessment
- Compliance program evaluation under the US Sentencing Guidelines, the UK Bribery Act adequate procedures guidance, the OECD Guidelines on Internal Controls, and related national and international compliance standards
- Specific compliance program activities including codes of conduct, training program design and delivery, monitoring, and corrective action responses
- Global anti-bribery legislation, including the US Foreign Corrupt Practices Act, the UK Bribery Act, the Organization for Economic Co-operation and Development (OECD) Anti-bribery Convention, and related national implementing legislation
- Internal financial controls design, implementation and remediation to institute effective oversight of key risk areas
- Internal and government initiated investigations

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Areas of Practice
FDA and Healthcare
Anti-Corruption
US Foreign Corrupt Practices Act and Global Anti-Corruption
White Collar Defense
Healthcare
Life Sciences
Pharmaceutical/Medical Device
Korea

Education
JD, University of Virginia School of Law
BA, Phi Beta Kappa, Duke University
MPH, Harvard University

Admissions
District of Columbia
Enterprise-wide risk management systems and programs

Global, regional, and country specific codes of practice and conduct, including industry codes of conduct issued by industry associations

His work spans many business functions, including research and development, global marketing, sales and marketing, strategic alliances/acquisitions, government affairs, and procurement.

Since 2001, Mr. Korenchuk has been included in The Best Lawyers in America. He has developed, led, and implemented "hands-on" educational and healthcare programs that provide pharmaceuticals and healthcare services, teachers, school supplies, library resources, and computers to indigenous communities in South America for the past 12 years.

Prior Business Experience

Mr. Korenchuk’s prior experience includes serving as the CEO of a company that focused on pharmaceutical and healthcare sector compliance, as well as the CEO of a research and development company that focused on homeland security technologies.

Representative Matters

- Assisting a global company in implementing a revised worldwide compliance program, including program design and structure, code of conduct/policy revision, training, monitoring, auditing, investigations processes, as well as implementation assessment.
- Evaluating regulatory issues and compliance effectiveness in discrete programs and activities, including key risk areas and activities based upon a company-focused risk assessment.
- Assisting a variety of companies to evaluate and enhance their worldwide due diligence and ongoing compliance oversight of third party agents and distributors.
- Assisting companies in conducting overall compliance program evaluations for subsidiaries/functions in Europe, the Middle East, Africa, Latin America, and Asia, and assisting in remediation efforts.
- Providing assistance to the finance function of a global company to evaluate existing internal controls, and assisting in the remediation design and implementation of revised controls.
- Advising the Board of Directors of a global company on compliance program effectiveness and related governance issues.
- Conducting worldwide compliance training for the legal department of a NYSE listed company
- Conceptualizing, designing and implementing anti-corruption training for the top 1500 executives of a NYSE listed company using case studies, interactive discussion and small group settings on country specific and functional bases
- Providing assistance in the conduct of a global multi-jurisdictional investigation under the FCPA
- Providing assistance in negotiation of Corporate Integrity Agreements (CIAs) with the Office of the Inspector General (OIG) of the US Department of Health and Human Services, as well as ongoing support of CIA implementation, ongoing operation, and related OIG site visits.
- Evaluating the sales and marketing function of a newly acquired business unit for a company and providing post-closing remediation recommendations and assistance.

**Rankings**

- *Chambers Latin America: Latin America's Leading Lawyers for Business* 2015-2016 for Fraud & Corporate Investigations
- *Chambers Global: The World's Leading Lawyers for Business* 2015 for Fraud & Corporate Investigations (Latin America-wide)

**Articles**

- Keith M. Korenchuk, Marcus A. Asner, Samuel M. Witten and Benny Spiewak "Responding to Anti-Corruption Concerns in Brazil: Considerations for the Pharmaceutical and Medical Device Sectors" *Pharmaceutical Compliance Monitor* January 2, 2014
- Keith M. Korenchuk, Marcus A. Asner, Samuel M. Witten and Mahnu V. Davar "Developing an India Strategy: Practical Considerations to Seek Opportunities and Mitigate Corruption Risks in the Medical Products Sector" *Pharmaceutical Compliance Monitor* November 1, 2013
- Keith M. Korenchuk, Marcus A. Asner and Samuel M. Witten "Responding to Anti-Corruption Compliance Challenges in China: The Way Forward in Light of the Ongoing
Investigations in the Pharmaceutical Industry" Pharmaceutical Compliance Monitor, September 26, 2013


- Keith M. Korenchuk and Silvia Valverde "Risky Business" European Pharmaceutical Contractor, Winter 2012


- Keith M. Korenchuk and Samuel M. Witten "Lessons Learned From FCPA Enforcement Action Against Medical Device Company Smith & Nephew" BNA’s White Collar Crime Report, March 9, 2012

- Keith M. Korenchuk, James P. Joseph, Samuel M. Witten and Andras Kosaras "Guarding Against Anti-Corruption Problems In Overseas Philanthropic Activities" Taxation of Exempts, November/December 2011

- Keith M. Korenchuk and Samuel M. Witten "Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties" Financial Fraud Law Report, July/August 2011


- Keith M. Korenchuk "The back of the brown envelope" Money Laundering Bulletin November 2010

- Jeffrey L. Handwerker and Keith M. Korenchuk "Healthcare reform ushers in a broad array of new enforcement tools" Rx Compliance Report Mar. 2010


Blogs

- Keith M. Korenchuk, Samuel M. Witten and Daniel Bernstein "Anti-corruption compliance: Meeting the global standard" The FCPA Blog May 1, 2014

Presentations


Keith M. Korenchuk "International Health Care Compliance Webinar- Focus on Mexico & Peru" Panelist, AdvaMed, October 4, 2011

Keith M. Korenchuk "Futures and Options Association Bribery Act Update Workshop" Arnold & Porter (UK) LLP, October 6, 2010

Marcus A. Asner and Keith M. Korenchuk "Making Compliance Programmes Fit for Purpose: What Does Good Look Like?" Serious Fraud Office, January 28, 2010

Keith M. Korenchuk "Align Clinical Compliance Programs with FCPA and Global Regulations" CBI’s Clinical Research Studies Conference, July 2009

Keith M. Korenchuk and Allison W. Shuren "Compliance Program Development and Benchmarking" CBI Medical Device Compliance Congress, June 2009

Keith M. Korenchuk and Jeffrey L. Handwerker "Massachusetts and Vermont’s New Pharmaceutical and Medical Device Manufacturer Conduct Law, and How to Comply" MA Disclosure Summit, June 2009

Keith M. Korenchuk "Compliance Takeaways from Recent Settlements" CBI Panel Presentation, June 2009

Jeffrey L. Handwerker, Keith M. Korenchuk and Daniel A. Kracov "Understanding the Forces Driving Disclosure" First Annual Summit on Sales & Marketing Disclosure for Drug, Device and Biotech Companies, March 5, 2009

Keith M. Korenchuk "Examination of Recent DDMAC Warning Letters: What You Can Learn From Other Companies' Mistakes" Examination of Recent DDMAC Warning Letters: What You Can Learn From Other Companies' Mistakes." FDAnews Conference, February 2009

Advisories


"Lessons Learned from the Recent FCPA Enforcement Action Against Medical Device Company Smith & Nephew" Feb. 2012

"Summary of the Proposed Rule to Implement the Physician Payment "Sunshine" Provisions of the Affordable Care Act" Dec. 2011
"Anti-Corruption Due Diligence in Mergers and Acquisitions" Jul. 2011
"Anti-Corruption Compliance: Special Considerations for Charitable Contributions" Jun. 2011
"Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties" Apr. 2011
"Building an Effective Anti-Corruption Compliance Program: Lessons Learned From Recent DPAs" Mar. 2011
"Heightened Scrutiny of Foreign Clinical Trials" Jul. 2010
"UK Bribery Act 2010: An In-Depth Analysis" May 2010
"Evolving Expectations on Boards of Directors and Management Teams in Corporate Compliance" May 2009
"Vermont Passes Physician Gift Ban and Disclosure Law" May 2009
"Massachusetts Finalizes Regulations on Pharmaceutical and Medical Device Manufacturer Conduct" Mar. 2009

Multimedia

Keith M. Korenchuk and Daniel A. Kracov. "VIDEOCAST: Transparency Reporting: Meeting the Challenge of PPACA and Beyond" July 23, 2010. (also available as a Podcast)
Newsletters

- FCPA News and Insights "Winter 2015" Feb. 2015
- FCPA News and Insights "Winter 2013" Feb. 2013
- FCPA News and Insights "Summer 2010" Sep. 2010
- FCPA News and Insights "February 2010" Mar. 2010
Samuel Witten helps companies develop and implement compliance programs and corrective actions related to laws such as the Foreign Corrupt Practices Act, the UK Bribery Act, US anti-trafficking laws, Lacey Act compliance, and US trade and export control laws. He represents domestic and international clients in litigation and arbitrations and in domestic enforcement and regulatory matters. A former senior US Government official, he also has extensive experience in international affairs and international law enforcement cooperation.

Mr. Witten brings to compliance issues a unique balance of experience in the public and private sectors. Before joining Arnold & Porter LLP, he served for 22 years at the Department of States, including 19 years in the State Department’s Office of the Legal Adviser, including six years as Deputy Legal Adviser (equivalent to Deputy General Counsel), the top ranking position for a career State Department lawyer. He also served as five years as Assistant Legal Adviser for Law Enforcement and Intelligence, where he supervised the US Government’s international law enforcement treaty program. As Deputy Legal Adviser, Mr. Witten supervised the State Department's legal work on international environmental issues; international law enforcement cooperation; economic and business issues (including trade and investment); human rights; Western Hemisphere affairs; and East Asian and Pacific affairs. Mr. Witten later served as Principal Deputy Assistant Secretary of State from 2007-2010.

Mr. Witten's compliance experience at Arnold & Porter includes:

- Representing a multinational company in an internal investigation concerning potential Foreign Corrupt Practices Act violations which was self-reported to the Securities and Exchange Commission and the US Department of Justice

arnoldporter.com
Teaching compliance practices through interactive training to corporate managers in programs conducted in Asia, Latin America, Europe, and Africa

Supervising audit teams for defense trade manufacturing and research facilities in the US and abroad under a US Department of State Consent Agreement

Reviewing target company internal controls on behalf of private equity investors in connection with due diligence in mergers and acquisitions and developing recommendations for improvements in internal controls

Reviewing the Latin American operations of an international pharmaceutical company in connection with a potential distributorship agreement in South America

While a senior US Government lawyer, Mr. Witten’s experience included:

- Coordinating US Department of State assistance to the US Department of Justice, FBI, and Securities and Exchange Commission in international law enforcement investigations
- Negotiating and implementing treaties for cooperation between the United States and other countries on law enforcement matters, including updating dozens of US treaties to address bribery, fraud, and money-laundering
- Testifying at the US Senate and US House of Representatives on international law enforcement issues, including serving as US Government expert witness at public hearings on the UN Convention Against Corruption and the UN Transnational Organized Crime Convention
- Helping manage a diverse group of 200 lawyers assigned to represent all aspects of the State Department’s domestic and international operations

Mr. Witten’s other assignments at the Department of State included serving as legal counsel to the Office of the Coordinator for Counterterrorism and acting as State Department counsel in international aviation and transportation matters. He has significant experience in international dispute settlement proceedings, including at the Iran-US Claims Tribunal, the Heathrow Airport User Charges Arbitration, and the International Court of Justice.

Mr. Witten’s pro bono work includes service on the Advisory Board of Kids in Need of Defense (KIND) and the Board of Advocates of Human Rights First.

Awards

- Presidential Meritorious Executive Awards for exceptional record of achievements and executive leadership 2002, 2007
- Attorney General’s Distinguished Service Award 2003
Professional and Community Activities

Professional Activity

- Adviser, American Law Institute’s Restatement Fourth of the Foreign Relations Law of the United States
- Board of Advocates, Human Rights First
- Member of Board of Governors and Past President, Washington Foreign Law Society
- Member, American Society of International Law
- Co-Chair, 2015 ASIL Annual Meeting
- Advisory Board, Kids in Need of Defense (KIND)
- Past Chair, DC Bar Association Public International and Criminal Law Committee
- Past Member of Board of Directors, Women’s Refugee Commission

Community Activity

- President, Kol Shalom Congregation, Rockville, MD
- Past Officer and Member of Board of Directors, District of Columbia Jewish Community Center
- Past Member of Board of Directors, Jewish Federation of Greater Washington

Articles

- Keith M. Korenchuk, Samuel M. Witten and Daniel Bernstein "Anti-Corruption Compliance: Meeting the Global Standard" Bloomberg BNA’s Corporate Law & Accountability Report, April 25, 2014
- Keith M. Korenchuk, Marcus A. Asner, Samuel M. Witten and Benny Spiewak "Responding to Anti-Corruption Concerns in Brazil: Considerations for the Pharmaceutical and Medical Device Sectors" Pharmaceutical Compliance Monitor January 2, 2014
- Keith M. Korenchuk, Marcus A. Asner, Samuel M. Witten and Mahnu V. Davar "Developing an India Strategy: Practical Considerations to Seek Opportunities and Mitigate Corruption Risks in the Medical Products Sector" *Pharmaceutical Compliance Monitor* November 1, 2013


- Keith M. Korenchuk and Samuel M. Witten "Lessons Learned From FCPA Enforcement Action Against Medical Device Company Smith & Nephew" *BNA’s White Collar Crime Report*, March 9, 2012
• Marcus A. Asner and Samuel M. Witten "The Lacey Act Gives Gibson Guitar the Blues" *BNA’s White Collar Crime Report*, December 7, 2011

• Keith M. Korenchuk, James P. Joseph, Samuel M. Witten and Andras Kosaras "Guarding Against Anti-Corruption Problems In Overseas Philanthropic Activities" *Taxation of Exempts*, November/December 2011

• Kathleen Harris, Andrew Varner and Samuel M. Witten "Know thy target" *The Deal*, September 30, 2011

• Kathleen Harris, Samuel M. Witten, Christopher R. Yukins and Johannes S. Schnitzer "Anti-Corruption Enforcement Controls in Government Procurement In Central and Eastern Europe Call for Redoubled Compliance Efforts" *BNA’s White Collar Crime Report, 6 WCR 680*, August 12, 2011

• Keith M. Korenchuk and Samuel M. Witten "Anti-Corruption Compliance: Avoiding Liability for the Actions of Third Parties" *Financial Fraud Law Report*, July/August 2011


• Samuel M. Witten "Ruling on Restitution to South Africa for Overharvesting of Lobsters Has Potential Implications for Illegal Taking of Natural Resources" *BNA’s Criminal Law Reporter, 88 CrL 577*, February 16, 2011

• Samuel M. Witten "Two New Law Enforcement Cooperation Treaties Adopted at International Aviation Conference in Beijing" *50 International Legal Materials 141*, 2011

**Books**


**Presentations**

• John N. Nassikas and Samuel M. Witten "Brazilian Anti-Corruption Program" Brazilian Anti-Corruption Program, Center for Latin American Issues, The George Washington University, June 3, 2015


- Samuel M. Witten "The U.S. Treaty Ratification Process: Exploring the Roles of the President and the U.S. Senate" Comparative and International Law Institute, Catholic University of America, Washington, DC, November 12, 2012


- Samuel M. Witten "Doing Business in Developing Countries: Legal Aspects of Corporate Social Responsibility" Personal Care Products Council Annual Legal and Regulatory Conference, Charleston, SC, May 11, 2012

- Samuel M. Witten "International Anti-Corruption Enforcement by the United States" Center for Latin American Issues, George Washington University, Washington, DC, May 1, 2012

- Samuel M. Witten "International and Domestic Law Aspects of International Law Enforcement Cooperation" Comparative and International Law Institute Career Panel, Catholic University of America, Washington, DC, March 27, 2012


- Samuel M. Witten "International Health Care Compliance Webinar- Focus on Mexico & Peru" AdvaMed, October 4, 2011


Advisories

- "Framework Agreement with Iran Unclear as to When and Which Sanctions Will be Lifted; Stepped Up Enforcement to Continue After Record Sanctions Fines" Apr. 2015
- "Final Anti-Human Trafficking Regulations Mean Stricter Requirements for Government Contractors and Subcontractors" Feb. 2015
- "FAR Council Extends Public Comment Period Regarding Proposed Anti-Human Trafficking Regulations" Nov. 2013
- "USAID Proposes Anti-Terrorism Screening of Award Recipients" Sep. 2013
- "D.C. District Court Rejects Challenge to SEC Conflict Minerals Rule" Jul. 2013
- "New Iran Sanctions to Take Effect July 1" Jul. 2013
- "New State Department Reporting Requirements for US Investments in Burma Take Effect July 1, 2013" Jun. 2013
- "The FCPA Guidance Road Map" Nov. 2012


"Lessons Learned from the Recent FCPA Enforcement Action Against Medical Device Company Smith & Nephew" Feb. 2012

"Compliance Deadline is Fast Approaching for California Supply Chain Disclosure Law" Nov. 2011


"Anti-Corruption Due Diligence in Mergers and Acquisitions" Jul. 2011

"Anti-Corruption Compliance: Special Considerations for Charitable Contributions" Jun. 2011

Newsletters

- **FCPA News and Insights "Summer 2015"** Aug. 2015
- **FCPA News and Insights "Winter 2015"** Feb. 2015
- **FCPA News and Insights "Summer 2013"** Aug. 2013
- **FCPA News and Insights "Winter 2013"** Feb. 2013
- **FCPA News and Insights "Summer 2011"** Aug. 2011
- **FCPA News and Insights "Summer 2010"** Sep. 2010
Arthur Luk
Partner

Arthur Luk represents corporations; directors, officers, and executives; and "Big 4" accounting firms and individual auditors in investigations conducted by the US Department of Justice (DOJ), US Securities and Exchange Commission (SEC), and Public Company Accounting Oversight Board (PCAOB), and in securities class actions and shareholder derivative suits. He also has extensive experience with complex commercial litigation in federal and state courts, including putative class actions arising out of data breaches, and in arbitrations. His clients operate worldwide in a number of industries, including banking and finance, consumer products, pharmaceuticals, private equity, real estate, and telecommunications.

Representative Matters

Investigation and Enforcement Matters

- Counsel for accounting firms and individual auditors in numerous SEC and PCAOB investigations, including in a contested PCAOB disciplinary proceeding.
- Counsel for companies in DOJ and SEC investigations regarding compliance with the FCPA.
- Counsel for companies, executives, and other employees in DOJ investigations regarding possible off-label promotion of pharmaceuticals.

Securities Litigation Matters

- *Smukler, derivatively on behalf of eBay Inc. v. Donahoe* (Cal. Super., Santa Clara Cty.)
- *In re Herald, Primeo and Thema Funds* (S.D.N.Y.)
- *In re American Capital, Ltd. Securities Litigation* (D.Md.)
- *Isser v. Bray* (Del. Ch.)

Contact Information

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601 Massachusetts Ave., NW
Washington, DC 20001

Areas of Practice

Securities
White Collar Defense
Anti-Corruption
Litigation
Data Security Breaches

Education

JD, Harlan Fiske Stone Scholar, Columbia Law School, 2003
BA, Phi Beta Kappa, Johns Hopkins University, 2000

Admissions

District of Columbia
New York

arnoldporter.com
Business Litigation Matters

- **Howe Barnes v. FNB Bank** (N.C. Super., Wake Cty.)
- **In re Juniper Derivative and Securities Actions** (N.D. Cal.)

Health insurance company in class action litigation following theft of laptops containing consumer information.

Publicly held investment company in arbitration hearing relating to fraud and indemnification claims.

Private equity fund in post-closing purchase price adjustment dispute.

Pro Bono Matters

- **United States v. Williams** (D.C. Cir. / D.D.C.) -- won pre-filing authorization for a successive Section 2255 petition and obtained reduction in sentence.
- **United States v. Turner** (D.C. Cir. / D.D.C.) -- won appeal based on a violation of the Constitution’s *ex post facto* clause and obtained reduction in sentence.
- **N.P. v. State of Georgia** (Ga. Super., Fulton Cty.) -- secured consent decree ordering increased funding for the indigent defense system in four counties in Georgia.

Professional and Community Activities

- Fellow, Leadership Council on Legal Diversity (LCLD)
- Member, American Bar Association, Section of Litigation, Professional Liability Litigation Committee

Articles


Arthur Luk "FCPA Update: Key Enforcement and Investigative Developments" Financial Fraud Law Report November/December 2012


Presentations


Advisories


"Eleventh Circuit Takes Broad View of Who Is a 'Foreign Official' for Purposes of the FCPA" May 2014

"Recent Developments in SEC Enforcement: A Review of Mary Jo White's First Year" May 2014

"Supreme Court To Reconsider "Fraud-on-the-Market" Presumption in Securities Fraud Class Actions" Mar. 2014

"Implications of Recent Developments in SEC Enforcement: A Six Month Review of Chairman Mary Jo White's Tenure" Oct. 2013

"SEC Announces New Enforcement Initiatives" Jul. 2013

"Federal Court Vacates SEC's Extraction Payment Disclosure Rule" Jul. 2013

"SEC Enters Into First FCPA Non-Prosecution Agreement" Apr. 2013

"Mary Jo White Confirmed to Chair SEC; "Bold" Enforcement Envisioned" Apr. 2013

"Supreme Court Holds Proof of Materiality Is Not Necessary to Win Class Certification" Mar. 2013

"Supreme Court Holds "Discovery Rule" Does Not Apply to Statute of Limitations for Government Enforcement Penalty Actions" Mar. 2013

"Two Recent Decisions Address Jurisdiction over Foreign Defendants in FCPA Cases" Feb. 2013

"President Issues Executive Order to Improve Cybersecurity of Critical Infrastructure; Members of Congress Reintroduce Bi-Partisan Cybersecurity Legislation" Feb. 2013


"The FCPA Guidance Road Map" Nov. 2012

"US Supreme Court Invalidates "For Cause" Removal Limits Of Sarbanes-Oxley Act" Jun. 2010

Newsletters

  - FCPA News and Insights "Winter 2015" Feb. 2015
  - FCPA News and Insights "Winter 2013" Feb. 2013
Cristian R.C. Kelly*
Associate

Cristian Kelly’s practice focuses on complex commercial litigation and government enforcement actions, including the Foreign Corrupt Practices Act, the False Claims Act, the Stark Law, and the Anti-Kickback Statute. His clients operate in a variety of industries, including healthcare, pharmaceuticals, banking, and finance.

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Areas of Practice
Anti-Corruption
Healthcare
Commercial Litigation

Education
JD, cum laude, New York University Law School 2014
BA, University of California, Los Angeles 2005

Admissions
Illinois

*Admitted only in Illinois; practicing law in the District of Columbia during the pendency of his application for admission to the D.C. Bar and under the supervision of lawyers of the firm who are members in good standing of the D.C. Bar.
Tab 4: Practice Overview
ANTI-CORRUPTION

In this climate of increased regulation and intensified enforcement, clients turn to Arnold & Porter for our insights and extensive experience in global anti-corruption investigations, defense, and compliance matters. With an experienced team of former high-level prosecutors and lawyers from the DOJ, SEC, Department of Homeland Security, and US Attorneys' Offices, as well as the UK’s Serious Fraud Office, we vigorously defend companies and individuals by anticipating and strategically responding to government investigations and enforcement actions under the US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act, and other anti-bribery laws and regulations. We also conduct internal investigations in response to potential corruption issues around the world.

We have represented global leaders in diverse industries that span electronics, pharmaceuticals, media, cosmetics, financial services, defense and aerospace, hospitality, retail, medical equipment, energy, chemicals, and insurance. Our clients' operations have taken us to more than 85 countries, and we have established relationships with local counsel should issues arise under a host country's law.

We also work with clients to minimize exposure by tailoring compliance programs to the specific cultural, structural, and systemic requirements of the organization. Our experience covers risk reviews, development of company policies to mitigate risks, and training for legal departments and business employees. We work with both domestic and foreign companies, including designing programs and training for non-US locations.

Representative Matters

- Fortune 500 telecommunications company in connection with an FCPA investigation involving company’s efforts to win contracts in China, Europe, the Middle East, and Central America. Successfully handled company’s cooperation with the DOJ and SEC, leading to declination from the DOJ.

- Multi-national media company in ongoing UK and US criminal investigations and proceedings.

- German-based firearms manufacturer in ongoing FCPA investigation being conducted by the DOJ regarding allegations of bribe payments to Indian government officials in efforts to win government contracts.

- Large computer contractor in connection with a sprawling FCPA investigation involving company’s activity in India.
South African financial institution in FCPA investigation involving alleged bribery in connection with a tender to provide payment services to South African social grant beneficiaries. Coordinating company's cooperation with the DOJ and the SEC.

Major European insurance company in an FCPA investigation involving alleged bribery to win contracts in Indonesia. Successfully handled company's cooperation with the DOJ and SEC, leading to declination from the DOJ and a favorable settlement with the SEC.

Publicly traded private equity firm in connection with an FCPA investigation involving allegations of bribery by the firm’s portfolio company as part of an effort to win contracts in Romania and Columbia.

Multiple employees of a major financial institution in connection with ongoing DOJ and SEC investigation into the company's hiring practices in China.

Individual in FIFA investigation and prosecution pending in the US District Court for the Eastern District of New York.

Employee of defense contractor in prosecution pending in the US District Court for the District of New Jersey alleging bribery in connection with construction contracts in Iraq.

Leading US biotechnology and pharmaceutical manufacturer on establishing a clinical trial in Colombia that is compliant with all anti-corruption requirements.

US automotive industry component and parts supplier on investigation issues, which include compliance reviews in China, Brazil, and Mexico.

Major pharmaceutical company in a comprehensive global compliance assessment, including reviews of operations in Asia, Latin America, and the EU.

Private equity firm in connection with evaluating possible corruption risks of potential portfolio investments and developing a full anti-corruption compliance program.

Third party marketing representatives of major oil and gas company in connection with FCPA compliance audit of activities in South America.

Large US multinational corporation in a series of internal investigations of possible FCPA violations in Latin America.

Large defense company in an internal investigation of possible FCPA violations in Africa.
Tab 5: Supporting Material
Anti-Corruption Compliance in Emerging Markets: A Resource Guide

ARNOLD & PORTER LLP
First in a Series
Keith M. Korenchuk, Samuel M. Witten, Arthur Luk, Cristian R.C. Kelly, Pedro G. Soto
arnoldporter.com
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Forthcoming in January 2016

Chapter 5: Engaging Government Officials as Consultants and Speakers

Chapter 6: Preventing Corruption in Gifts, Travel, and Entertainment

Chapter 7: Guarding Against Anti-Corruption Problems in Philanthropic Activities in Developing Markets

Chapter 8: Meeting the Emerging Global Standard in Mergers and Acquisitions

Chapter 9: Coordinating Compliance and Financial Controls
Multinational companies have increasingly looked to emerging markets for new business opportunities and continued growth. In many instances, these markets present opportunities for companies to increase revenues and enhance their competitive positions. Yet conducting business in many of these markets presents significant challenges that may include developing, but still inadequate, infrastructure; political uncertainty; underdeveloped rule of law; currency fluctuation; and the need for short-term capital in the hope of realizing long term return on investment.

Compounding these challenges is the reality that many emerging markets present serious corruption risks. Endemic corruption in many of these markets increases potential legal liability, creates an unlevel playing field, diverts resources, and often perpetuates deeply entrenched economic inefficiency. Corruption appears in many different forms in a variety of contexts across a number of industries, presenting a real barrier between companies and their business goals. Corrupt business activity is increasingly targeted by prosecutors all around the world. Investigations, regardless of where they originate, create potential legal liability, expose the company to reputational risk, and inflict great expense. The potential for significant fines for misconduct is real. So is the possibility of individual prosecutions, which are receiving renewed priority and emphasis in the United States and elsewhere.

This book was created as a guide to successfully navigating the corruption challenges presented by the operating environments found in emerging markets. It provides a framework to mitigate corruption risks by using programs, controls, and tools that meet common international standards and the expectations of governments worldwide. It also provides a framework for companies with anti-corruption programs in place to assess existing programs and facilitate modifications in response to evolving risks.

There is no one-size-fits-all compliance program that a company can simply adopt or pull off the shelf. This is particularly true in emerging markets. Companies must take a very close look at their operations to ensure that anti-corruption compliance controls can be effectively implemented in emerging markets to mitigate risk. Because compliance is a risk-based process, controls must be designed and implemented in reasonable proportion to available resources. Without this balance, one of two things will happen: either important risks will not be mitigated, or the efforts expended for compliance will create a burden that frustrates broader goals.
Chapter 2 discusses the widely recognized elements of an effective anti-corruption compliance program. In general, a multinational company should take a number of factors into consideration before beginning to develop or enhance its compliance program in emerging markets. Considering these factors is crucial for any compliance program, as they determine how a company can best respond to corruption risk. These considerations include: know the market, know the industry, know your business model, understand cultural issues, design and implement controls, and evaluate and adjust the compliance program.

1. **Know the Market.**

   In order to design appropriate compliance controls, it is essential to understand the operating environment for each market in which a company operates or intends to operate. Regulatory, business, and corruption environments in markets may differ, particularly among those economies that qualify as “emerging.” Local business structures, regulatory frameworks, and perspectives on the rule of law inevitably impact the ability of a multinational company to identify and control local compliance risks. Analyzing these factors helps to identify structural and operational issues that present corruption risks that must be addressed. While emerging markets may be grouped together in some generic respects, each market will have unique corruption considerations that inform the assessment.

2. **Know Your Industry.**

   Understanding the specific industry in which a company operates is crucial in controlling corruption risks in emerging markets. While all lawfully operating businesses must interact with government officials on some level, three general scenarios relating to the type of business being conducted provide a helpful framework to identify areas of corruption risk. Each of these categories of industry may have risks described in the other scenarios, but it is helpful to begin by focusing on the highest priority risk associated with a particular industry type.

   In the first scenario, industries have governments and government-owned enterprises as customers, or engage governments as business partners. The company may be selling to government entities, and its success or failure may depend on how much revenue it can generate from government contracts or transactions. Companies in the energy and infrastructure sectors, for example, have governments as customers and generate revenue through contracts or agreements with those entities. Because these interactions are with government customers, heightened control measures are necessary.

   In the second scenario, the government is a regulator of commerce, rather than a customer. Contacts typically involve business licenses; customs; interactions with police and fire departments; safety, labor and health issues; and general business regulations. The contacts tend to be low-level and may be frequent and routine. In these contexts, the risk of petty bribes is almost always present as a way to move the business process along. Controls applicable to these types of interactions include, for example, clear rules, training, cash controls, and the monitoring of expense and payment requests. Clearing customs is a common source of corruption risk in this industry scenario; industries that move large quantities of products across borders face heightened risk in customs and logistics.

   The third scenario involves the sale of products that are heavily regulated by the government. Here, regulation may focus on business processes or particular products. The pharmaceutical and life sciences industry is a good example. In this sector, ensuring the production and delivery to consumers of safe and effective medicines is a priority. The interactions associated with government oversight, which is often intense, present corruption risks. Corruption risks in this sector also arise from day-to-day interactions with government physicians and
healthcare providers who may make purchasing decisions on an individual or collective basis. The volume of these interactions with these government officials, involving transfers of valuable products throughout the business process, presents unique corruption risks.

A second example of a heavily regulated industry is the financial services sector. Government interactions occur as part of the regulatory and oversight process that seeks to protect the integrity of the country’s financial system. In developing markets, financial service providers may also seek business directly from the government. Anti-corruption controls designed around the nature of the financial regulatory process are therefore appropriate and must reflect the nature and frequency of government interactions.

Understanding how a particular sector interacts with government and government officials and how transfers of value might be made to government officials will help to identify the overall corruption risk that an industry faces, and may inform the types of compliance controls needed to mitigate this corruption risk.


The business model used by a multinational company affects the level of corruption risk and the selection of the most appropriate strategies to control it. There are several key risk differentiators.

First, companies that use a third-party distributor model to market and sell their products have a different risk profile than companies that use a direct sales force model. Appropriate corruption controls differ based on these business models. When a multinational company hires or partners with a third party to market and sell its products in a particular market, the company relies on that third party to conduct business properly. In many reported enforcement actions, multinational companies were held liable for the conduct of third parties, including distributors, that had acted on their behalf. Accordingly, a business model that relies on distributors can subject the company to heightened corruption risks and puts a premium on selection and oversight of those third parties. At the same time, companies that employ a direct subsidiary or employee model will face risks in terms of overseeing their own employees and processes. Direct control of employees requires a fundamentally different approach to compliance from that presented by the distributor model: direct control focuses on internal controls, training, and monitoring of the workforce.

A second key risk differentiator depends on whether a company uses a centralized or decentralized operating model. Companies that have historically allowed subsidiaries or remote operations significant autonomy are inherently subject to more corruption risk. A decentralized operating model works well only if headquarters can provide effective compliance oversight in an environment where other business decisions fall within the purview of the local operation. Seeking to establish compliance oversight in this otherwise local operating model often leads to resistance and challenges in implementing effective anti-corruption compliance controls. But it is imprudent to delegate compliance responsibilities to the local operating company without taking adequate confirming steps to ensure effective implementation of controls.


It is critical to understand the extent to which local cultural issues and expectations may conflict with a culture of compliance. But first, it is important to conduct a realistic assessment of the company’s own culture of compliance. The organization’s overall values and the tone of support for compliant business activities from the top of the organization and from in-country management will have a significant impact on the ability to control local corruption risks. Companies that have a strong culture of compliance and that retain or engage local employees with the same philosophy and belief system will generally fare better in confronting
local cultural corruption risks than those that do not. Senior leadership must have a firm grasp on these cultural issues in order to accurately evaluate corruption risks in emerging markets and successfully implement controls.

5. Design and Implement Controls.

Another key consideration in designing an effective anti-corruption compliance program is deciding where and how compliance controls should be put in place within the company’s structure. Most companies have specific policies or a code of conduct that prohibits corruption, or that requires certain activities or interactions with government officials to be pre-approved. But many organizations have not taken the next crucial step: implementing a risk-based set of controls for effective oversight of activities that raise compliance risks. For example, employees may be informed of the code of conduct requirements but be otherwise left on their own, or under the control of their immediate supervisors, in making decisions that involve interactions with government officials. In these situations, it is crucial to understand the nature of risks that result from interactions with government officials, and determine ways to address those risks. This analysis is informed by the factors mentioned previously: the market, the industry, the business model, and the company culture.

For example, some regulatory frameworks require government officials to inspect manufacturing facilities that produce products to be imported into a specific country. Government officials often request payment or the provision of travel to the manufacturing site to make those regulatory inspections. These types of activities involve travel for government officials, and create corruption risks if travel becomes a personal benefit to the officials. Companies should therefore establish heightened controls in the form of advance approval for those kinds of activities — beyond, for example, the individual who is proposing the benefit and the immediate supervisor. Local legal or compliance approval may help create an appropriate control environment, and regional-level approval may be necessary beyond a certain expenditure threshold. In some circumstances, it may also be prudent to require the approval by senior management or legal/compliance personnel at headquarters.

The optimal type, placement, and quantity of controls is largely driven by the context in which a company operates, the level of the government officials with which a company interacts, and the types of relationships or interactions a company has with those government officials. To assess the risk inherent in a given activity, a company must identify and quantify potential transfers of value to government officials and consider the reasons for the potential transfers. Gifts, travel, extravagant meals, jobs for relatives, and even contributions to favored charities may be considered value that could influence the decision-making of the government official. All of these factors determine where and by whom the review or approval should be conducted. It is also important to review these activities and provide a mechanism that allows consistent application of this pre-review process throughout the organization, with appropriate record-keeping and oversight.

6. Evaluate and Adjust the Compliance Program.

Continuous evaluation of the effectiveness of controls is essential to any compliance program — particularly in emerging markets. The initial assessment and risk mitigation plan will make certain operational assumptions, which may be appropriate when the design is completed, but may in practice fail to produce the desired results. Accordingly, it is important to review any compliance program periodically to ensure that the controls are achieving the desired results and any necessary adjustments are made. For example, some activities deemed to require extensive pre-approval at the outset may, based upon actual experience, turn out to be relatively well-controlled; here, the cost of pre-approval in terms of business interruption and work-hours
in the review process may not be worth the effort for the level of control achieved. In some cases, requiring pre-approval of all of a company’s charitable contributions by the compliance function of the company may have seemed prudent when first implemented, but may, based on actual experience, not be worth the effort where thousands of low-level contributions were made worldwide and the circumstances under which they were made showed minimal, if any, involvement with government officials. Any adjustments along these lines must be made carefully, taking into account the potential risks of adjustments.

Decisions on how anti-corruption controls are modified over time can be facilitated by gathering data based on actual experience and monitoring specific activities and controls. Matching the intensity of the controls with the risks that are perceived in a particular activity is essential to ensure that the organization is deploying its resources both in the right areas and in ways that maintain the credibility of the compliance process. If the compliance process is viewed as an impediment to conducting efficient business activities and appears unnecessary given the assessed risk, support for compliance will diminish over time, making it much more difficult to maintain the mechanisms that mitigate critical risk, and which are expected by government regulators.

**Conclusion**

This book provides a framework for multinational companies to deal with the complexity of cross-border anti-corruption compliance in the emerging economies of the world. Developing markets present significant business opportunities, but they also introduce some of the most serious corruption risk. The factors described in this chapter provide the context for developing, implementing, maintaining, and adjusting compliance programs. Because companies and their operations are unique, compliance programs must be informed by business operations and the imperatives of specific risks.

We hope that the following chapters will be helpful to those implementing compliance programs in emerging markets and to those seeking to modify, enhance, or fine-tune their existing compliance programs.
Companies operating in emerging markets face heightened corruption risks, increased oversight, and the need to comply with an increasing number of anti-corruption laws. While the U.S. Foreign Corrupt Practices Act (“FCPA”) and the UK Bribery Act are well known, an array of other anti-corruption laws apply to multinational companies. For example, Brazil, China, India, and Russia all have enacted more stringent anti-corruption laws and have begun taking steps to enforce them. In addition, forty-one countries are party to the Organisation for Economic Co-operation and Development (“OECD”) Anti-Bribery Convention, which requires criminalizing the bribery of foreign public officials and prescribes measures for the implementation of domestic legislation.

Designing an effective anti-corruption compliance program for emerging markets that meets the requirements of many different jurisdictions can be a daunting task. Executives at global companies may ask: With so many anti-corruption laws, do we need many different compliance programs to address our emerging market strategy? Will we be subject to conflicting standards in the various countries where we do business? How can we ensure proper oversight of activity that occurs in markets far from headquarters?

To address these questions, multinational companies need to consider the broad global consensus that has developed around what governments and international organizations expect of corporate anti-corruption compliance programs. While there is no one-size-fits-all program — and a company must bear in mind applicable local laws in the jurisdictions in which it operates — this global standard is now reality.

The Global Standard

For those seeking to design or enhance an effective anti-corruption compliance program, an appropriate starting place is the Good Practice Guidance on Internal Controls, Ethics, and Compliance, published by the OECD’s Working Group on Bribery in International Business Transactions (the “OECD Guidance”). The OECD Guidance, which is intended to help multinational companies comply with the OECD’s Anti-Bribery Convention, includes 12 key elements:
1. Strong, explicit, and visible support and commitment from senior management for preventing and detecting foreign bribery;

2. A clearly articulated and visible corporate policy prohibiting foreign bribery;

3. Making compliance the duty of individuals at all levels of the company;

4. Oversight of compliance as the duty of one or more senior corporate officers, with autonomy, resources, and authority;

5. Generally applicable measures that focus on high-risk areas;

6. Ensuring the compliance of relevant third parties;

7. Financial and accounting procedures, including a system of internal controls;

8. Periodic communication and documented training;

9. Encouragement and positive support for compliance;

10. Appropriate disciplinary procedures to address violations;

11. Guidance, advice, confidential reporting, and whistleblower protections; and

12. Periodic reviews.6

In recent years, many countries around the world have articulated expectations that track these guidelines. For example, the Resource Guide to the U.S. Foreign Corrupt Practices Act (“FCPA Guide”), published by the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”), identifies “hallmarks” of an effective anti-corruption compliance program that bear a striking resemblance to the good practices set forth in the OECD Guidance.7 Authorities in the United Kingdom, Canada, Brazil, Japan, and South Africa have encouraged many of the same good practices.8 Numerous public and private international organizations, such as the World Bank, United Nations, International Chamber of Commerce (“ICC”), and Transparency International, recommend these practices as well.9

Core Components of an Effective Anti-Corruption Compliance Program for Emerging Markets

Support and Commitment from the Top. Senior management and boards of directors should create a “tone at the top” that promotes a culture of compliance. The OECD recommends “strong, explicit and visible support” for preventing and detecting foreign bribery.10 The World Bank Guidelines sum this up as “Leadership.”11

In evaluating a company’s compliance with anti-corruption laws, U.S. authorities say they will consider “whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.”12 U.K. authorities agree that “[t]hose at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable.”13

A Clearly Articulated and Visible Corporate Policy. Companies should maintain written policies, procedures, and codes of conduct that prohibit foreign bribery.14 These documents should be “clear, concise, and accessible to all employees and to those conducting business on the company’s behalf.”15 Brazilian authorities have explained, for example, that an anti-corruption code “serves to provide all agents operating on behalf or in the name of the enterprise and other stakeholders with full knowledge of the principles, values, standards and types of permissible activities and expected conduct in the enterprise.”16
Making Compliance the Duty of Individuals at All Levels of the Company. While “tone at the top” and written policies are necessary components of a compliance program, they are not sufficient. A commitment to compliance must be reinforced by middle-management and others throughout the organization. Indeed, compliance “is the duty of individuals at all levels of the company.” Under the World Bank Guidelines, “Individual Responsibility” is key. Thus, the effectiveness of an anti-corruption program depends on the commitment of everyone at the company — directors, officers, and employees alike.

Oversight by Senior Corporate Officers with Autonomy, Resources, and Authority. A dedicated compliance infrastructure should include “one or more senior corporate officers” responsible for compliance. The responsible corporate officer (or officers) “must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company’s compliance program is implemented effectively.” Indeed, Russian law now requires the designation of an officer and a department or structural unit responsible for the prevention of corruption and related offenses.

According to the FCPA Guide, U.S. enforcement authorities will look at whether a “company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.” At a minimum, U.S. authorities expect that lead compliance personnel will have “direct access to an organization’s governing authority,” such as the board of directors or an audit committee. Other countries similarly expect companies to establish “direct reporting obligations to independent monitoring bodies,” which oversee “compliance with applicable standards of conduct.”

Although central oversight may create tension in a company with historically decentralized operations, an effective anti-corruption compliance program will necessarily require some involvement from the home office. This central oversight should complement, not replace, compliance measures at the local, operational level.

Generally Applicable Compliance Measures Focused on High-Risk Areas. The OECD encourages multinational companies to implement specific anti-corruption measures in high-risk activities, and to apply such measures to “all directors, officers, and employees” and to “all entities over which a company has effective control.” In this respect, the OECD Guidance recognizes that there is no standard compliance program. An effective program, according to the OECD, “should be developed on the basis of a risk assessment addressing the individual circumstances of a company.” Common high-risk areas identified by the OECD include “gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion.”

The FCPA Guide advises companies to design a compliance program that considers risk factors such as the level of government oversight and interaction; reliance on third parties that interact with governments on behalf of the company; business strategies using mergers, acquisitions, or other business combinations; exposure to customs and immigration authorities; involvement in joint venture agreements; and the importance of licenses and permits to the operations of a business.

Similarly, under the Transparency International Principles, a corporate compliance program “should be tailored to reflect an enterprise’s particular business circumstances and culture, taking into account such potential risk factors as size, business sector, nature of the business and locations of operation.”

Since the essence of a compliance program is the prevention, detection, and remediation of wrongdoing, a company’s resources should be allocated to activities that pose the highest risk — and when a company’s corruption risk grows, the FCPA Guide notes, “that business should consider increasing its compliance procedures.”

Ensuring the Compliance of Third Parties. A compliance program should not be limited to mitigating risks presented by a company’s direct employees. The OECD recommends that a compliance program pay attention to “third parties such as agents and other intermediaries, consultants, representatives, distributors,
contractors and suppliers, consortia, and joint venture partners.” Specifically, the OECD advises multinational companies to perform documented due diligence of business partners, inform business partners of the company’s commitment to compliance, seek a reciprocal commitment, and monitor compliance.

The World Bank Guidelines echo this advice and further recommend assuring that “any payment made to [a] business partner represents an appropriate and justifiable remuneration for legitimate services performed or goods provided . . . and that it is paid through bona fide channels.” According to the World Bank Guidelines, companies should “[a]void dealing with contractors, suppliers and other business partners known or (except in extraordinary circumstances and where appropriate mitigating actions are put in place) reasonably suspected to be engaging in misconduct.” Indeed, many recently reported cases of anti-corruption enforcement against multinational companies are based on the actions of third-party agents.

**Financial and Accounting Procedures, Including a System of Internal Controls.** Internal controls help safeguard a company’s assets. The OECD recommends financial and accounting procedures that are “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.” Countries generally expect companies to maintain a robust set of internal controls. For example, Russia’s Anti-Corruption Law requires companies to have controls that prevent the falsifying of accounting records. Brazil’s Clean Company Act, when applying penalties, considers the existence of internal controls, including audits, that ensure the integrity of a company’s operations.

Internal controls are especially important where corruption risks are high. As the FCPA Guide notes, “[b]usinesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.” A robust set of internal controls can help ensure, for example, that an interaction subject to prior approval is authorized for payment only after an appropriate review.

From a compliance program perspective, integration of compliance and financial controls is essential. This means consideration and coordination of compliance approvals with the payment authorization process. Most companies use a triple-match process as an essential element of their financial controls — checking the purchase order, invoice, and confirmation of performance to ensure they match — but do not often consider the compliance approval decision. If, for example, compliance procedures require pre-approval of a consulting arrangement with a fee of $1000, finance should ensure that pre-approval is considered before authorizing payment. If the compliance approval is not factored into this procedure, there is a gap. As such, the engagement where there is a compliance-approved fee of $1000 could in fact be paid at $2000, if there is a triple-match of documentation that does not in some way incorporate the compliance pre-approval that initiated the flow of decisions. This would lead to a compliance gap that could be avoided through more effective internal coordination and oversight of compliance decisions.

**Periodic Communication and Documented Training.** The OECD recommends “periodic communication and documented training . . . for all levels of the company, on the company’s ethics and compliance program.” As the FCPA Guide emphasizes, a compliance program cannot be effective without adequate communication and training.

Anti-corruption training is not a one-time event. Brazilian authorities, for example, emphasize that a company should train existing employees, as well as new hires. The ICC Rules on Combating Corruption state that “key personnel in areas subject to high corruption risk should be trained and evaluated regularly.” The World Bank Guidelines likewise advise that training programs should be “tailored to relevant needs,
circumstances, roles and responsibilities.” In this vein, the FCPA Guide suggests that training sessions include hypothetical situations that are specific to the trainee’s day-to-day work experiences. The ultimate goal of training and communication is to make sure that individuals understand what is expected of them and are able to incorporate compliance guidelines in their everyday activities.

Moreover, communication regarding compliance issues should not take place only in formal settings. Brazilian authorities therefore recommend “implementation of a permanent communications policy,” which could include such elements as “internal newsletters for employees; a separate space on the intranet devoted to ethics; dissemination of examples of good practices of ethical conduct; posting of pamphlets and announcements on bulletin boards; presentation of positive results obtained from the implementation of the code of conduct; and incorporation of the ethical and integrity principles and values in the organization’s mission and vision statements.” The World Bank Guidelines recommend that an organization “make statements in its annual reports or otherwise publicly disclose or disseminate knowledge about its [Compliance] Program.

Encouragement and Positive Support for Compliance. Companies also should reward their employees for good behavior, including compliance with anti-corruption policies and procedures. The ICC Rules on Combating Corruption suggest that multinational corporations include “the review of business ethics competencies in the appraisal and promotion of management and measuring the achievement of targets not only against financial indicators but also against the way the targets have been met and specifically against the compliance with the Enterprise’s anti-corruption policy.” In this regard, the FCPA Guide recommends incorporating adherence to compliance as “a significant metric for managements’ bonuses,” “recognizing compliance professionals and internal audit staff,” and ensuring that employees can advance their careers by taking on roles in the compliance organization.

Appropriate Disciplinary Procedures to Address Violations. Just as carrots are important to an anti-corruption compliance program, so are sticks. Anti-corruption rules are effective only if they are enforced. That is why the OECD Guidance contemplates the implementation of appropriate disciplinary measures to address violations. To evaluate the credibility of a compliance program, U.S. authorities will assess whether “a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation.” As the World Bank Guidelines make clear, disciplinary measures should include possible termination and apply to “all persons involved in [misconduct or other program violations, at all levels.” In the words of the FCPA Guide, “[a] compliance program should apply from the board room to the supply room—no one should be beyond its reach.”

Guidance, Advice, Confidential Reporting, and Whistleblower Protections. An effective anti-corruption program must provide resources for company employees and relevant third parties to obtain compliance information. Specific company personnel should be designated to help answer questions. An effective program should also provide mechanisms for reporting potential or actual misconduct. Indeed, in prescribing punishment for violations, Brazil’s Clean Company Act takes into account the existence of a company’s incentives for employees to report irregularities. According to the APEC Anti-corruption Code, the goal is to ensure that relevant information travels “to responsible enterprise officials as early as possible.” For this to happen, of course, employees must not fear retribution or retaliation for the good faith reporting of their concerns. The FCPA Guide thus recommends the institution of hotlines, ombudsmen, or other anonymous reporting systems.

A company’s response to a report of potential misconduct is also critical. Companies must have an infrastructure in place to respond to the report, conduct appropriate investigations, and document the response process, all in a consistent manner.
Periodic Reviews. A compliance program that remains static is likely to become ineffective as risks shift. Periodic reviews and assessments are therefore essential."64 Companies must consider, among other things, “business changes over time”; weaknesses and shortcomings that may require enhancements; “relevant developments in the [anti-corruption] field”; and “evolving international and industry standards.”65 The UK Bribery Act Guidance recommends benchmarking with other organizations to help assess whether best practices are being implemented.66

The FCPA Guide contains some specific suggestions for periodic reviews and assessments. For example, companies may use (1) “employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas”; and (2) “targeted audits to make certain that controls on paper are working in practice.”67

Conclusion

A convergence of expectations regarding anti-corruption compliance programs has led to a new, generally accepted compliance standard that companies must meet in executing their emerging markets strategies. Implementing and maintaining the compliance program presents a challenge due to the distances and time zones involved; local laws and customs; environments where corruption is pervasive; and local employees who may perceive that these messages and mandates are from “headquarters” and therefore only a distant, abstract requirement. Nonetheless, the common international compliance requirements and guidance reviewed in this chapter show that the key elements of an effective compliance program are common across the board.

Companies that fail to live up to this global standard substantially increase their risk exposure. The absence of an effective compliance program not only makes it more likely that improper conduct will occur, but also makes it more difficult for a company to defend itself in enforcement situations by arguing that only individual wrongdoers, and not the company itself, should be held liable.

Emerging markets present a major challenge in implementing an effective compliance program. The following chapters of this Guide address specific control elements in further detail, and focus on controlling risk areas prevalent in emerging markets.68

Chapter 2 - Endnotes


6 Id.


10 OECD Guidance, supra note 5, Annex II at ¶ A1.

11 World Bank Guidelines, supra note at 9, § 2.1.

12 FCPA Guide, supra note 7, at 57.

13 U.K. Bribery Act Guidance, supra note 8, at § 2.1.

14 See OECD Guidance, supra note 5, at Annex II at ¶ A2.

15 FCPA Guide, supra note 7, at 57.

16 Brazil’s CGU Guidance, supra note 8, at 31.

17 OECD Guidance, Annex II at ¶ A3; accord APEC Anti-corruption Code, supra note 9, at § 4(H) (“The enterprise should aim to create and maintain a trust based and inclusive internal culture in which bribery is not tolerated. Managers, employees and agents should receive specific training on the [Compliance] Program, tailored to relevant needs and circumstances.”); ICC Rules on Combating Corruption, supra note 9, at Art. 15 (“Each enterprise should consider . . . making it the responsibility of individuals at all levels of the Enterprise to comply with the Enterprise’s policy and to participate in the Corporate Compliance Programme.”); Transparency International Principles, supra note 9, at § 5.1; WEF Principles, supra note 9, at § 5. At the national level, see Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(b)(iii); Japan’s METI Guidelines, supra note 8, at 10; Federation of German Industries, Preventing Corruption—BDI Recommendations, 6 (3d ed. 2007) [hereinafter, Germany’s BDI Recommendations], https://web.archive.org/web/20101119160951/http://bdii.eu/BDI_english/download_content/Marketing/Flyer_Preventing_Corruption_3_Auflage_2007.pdf.

18 See World Bank Guidelines, supra note 9, at § 2.2.


20 FCPA Guide, supra note 7, at 58 (citing U.S. Sentencing Guidelines § 8B2.1(2)(B)-(C) (2011)); accord Brazil’s CGU Guidance, supra note 8, at 36; Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(e); Japan’s METI Guidelines, supra note 8, at 10; South Africa’s King Code, supra note 8, at § 6A; U.K. Bribery Act Guidance, supra note 8, at 24. At the international level, see, e.g., ICC Rules on Combating Corruption, supra note 9, at Art. 10; World Bank Guidelines at § 2.3; WEF Principles at § 5.1.


22 FCPA Guide, supra note 7, at 58.

23 Id.

24 See Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(e).

25 See Brazil’s CGU Guidance, supra note 8, at 36.

26 OECD Guidance, supra note 5, Annex II at ¶ A5.

27 Id. at ¶ A.

28 Id. at ¶ A5(ii).

At the international level, see, e.g., APEC Anti-corruption Code, supra note 9, at § 6.4; World Bank Guidelines, supra note 9, at § 6.4.4.

Brazil's CGU Guidance, supra note 8, at 37, 44.

In-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests”).

World Bank Guidelines, supra note 9, at ¶ A8.

FCPA Guide, supra note 7, at ¶ A9; accord World Bank Guidelines, supra note 9, at ¶ A10.

BACI Rules on Combating Corruption, supra note 9, at ¶ 7.3.4; World Bank Guidelines, supra note 9, at § 7.2; WEI Principles, supra note 9, at § 5.3.

FCPA Guide, supra note 7, at 59.

FCPA Guide, supra note 9, at § 3.2; accord World Bank Guidelines, supra note 9, at § 3.

FCPA Guide, supra note 7, at 59.

See Brazil Clean Company Act, supra note 41, at ¶ 7.11.

See, e.g., FCPA Guide, supra note 7, at 61; U.K. Bribery Act Guidance, supra note 8, at 23; Brazil's CGU Guidance, supra note 8, at ¶ 2(h)(ii); Japan's METI Guidelines, supra note 9, at 10–11.

At the national level, see, e.g., APEC Anti-corruption Code, supra note 9, at § 4(G); ICC Rules on Combating Corruption, supra note 9, at Art. 10(m); Transparency International Principles, supra note 9, at § 6.5; World Bank Guidelines, supra note 9, at § 9.3; WEI Principles, supra note 9, at § 5.5.

See Brazil Clean Company Act, supra note 41, at ¶ 7.12.

See, e.g., APEC Anti-corruption Code, supra note 9, at § 4(G).

FCPA Guide, supra note 7, at 61.

See id.; Canada's Niko Probation Order, supra note 8, at Appendix A, ¶ 2(b)(iii); Brazil's CGU Guidance, supra note 8, at 47.

OECD Guidance, supra note 9, at Annex II at ¶ A12; FCPA Guidance, supra note 7, at 61–62; APEC Anti-corruption Code, supra note 9, at ¶ 4(F); ICC Rules on Combating Corruption, supra note 9, at Art. 10(c); Transparency International Principles, supra note 9, at ¶ 6.8; World Bank Guidelines, supra note 9, at ¶ 3.

At the national level, see, e.g., U.K. Bribery Act Guidance, supra note 8, at 31; Canada's Niko Probation Order, supra note 8, at ¶ 2(d); Japan's METI Guidelines, supra note 8, at 5, 8; South Africa's King Code, supra note 8, at § 4.1.8, 7.4.3.

FCPA Guide, supra note 7, at 61.

See id. at 62; Transparency International Principles, supra note 9, at ¶ 6.8; World Bank Guidelines, supra note 9, at ¶ A12.

U.K. Bribery Act Guidance, supra note 8, at 31.

FCPA Guide, supra note 7, at 62.
Summary

In an increasingly global economy, overseas markets present significant opportunities for growth. But doing business in new markets, particularly emerging markets with still-developing infrastructures, carries significant exposure to corruption risks. Essential business activities like obtaining the licenses needed to begin operations, accessing public services such as utilities, and importing and exporting goods, require interactions with foreign government officials and, accordingly, give rise to issues the company (directly or through third parties acting on its behalf) will face relating to compliance with the FCPA, the UK Bribery Act, and other anti-corruption laws. Indeed, Transparency International’s Corruption Perceptions Index confirms that a number of emerging markets have high levels of perceived public corruption. For example, out of 175 countries and territories covered by the index, Brazil ranked 69, India ranked 85, and China ranked 100.¹

The risks associated with entering new markets are illustrated by the SEC’s 2014 enforcement action against Smith & Wesson Holding Corporation. According to the SEC, the firearms manufacturer began an effort to increase its sales by entering new markets in 2007.² Most notably, in 2008, the company allegedly hired a third-party agent to help sell firearms to a Pakistani police department. Members of Smith & Wesson’s international sales staff allegedly authorized the third-party agent to provide certain police officials with guns and cash gifts, and the company ultimately received a contract. The SEC further alleged that the company’s international sales staff engaged in similar conduct in Turkey, Nepal, and Bangladesh, though these efforts were unsuccessful. In its settlement with the SEC, Smith & Wesson disgorged $128,892 in profits and interest and paid a $1.9 million fine; it also terminated its entire international sales staff. In the SEC’s press release regarding the settlement, Kara Brockmeyer, then chief of the SEC Division of Enforcement’s FCPA Unit, emphasized the risks associated with entering new markets: “This is a wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand their international sales. When a company makes the strategic decision to sell its products overseas, it must ensure that the right internal controls are in place and operating.”

This Chapter provides an overarching framework for evaluating entry into new markets and conducting the due diligence necessary to identify and mitigate the risks of public corruption. The considerations raised by this framework apply for both the opening of operations in a new market or for entering a new market through
Evaluating Risks of Entry into New Markets

**Anti-Corruption Desk Research.** After a potential new geographic market entry is identified, preliminary desk research should be conducted to assess anti-corruption risks. While the research should focus on the particulars of the market and the opportunity being considered, the following is a non-exhaustive list of questions for assessing the new market:

- Are international companies allowed to conduct business in the country?
- What is the local attitude toward investments from multi-national companies?
- Do many multi-national companies operate or invest in the country?
- What local competition is there? Is there any government regulation of competitors?
- What is the process for company registration?
- Does the country require licenses or permits to conduct business? How long is the approval process?
- What is the process for imports and exports?
- Are there any requirements that international companies use local companies to assist with the business (e.g., local companies to import/export products or to distribute them)?
- What are the key areas of corruption in the country? Is the provision of kickbacks a necessary component of doing business in the country?
- What areas of industry are government-owned?
- Are there many state-owned enterprises?
- Is it common for government officials to own or operate private businesses (e.g., customs officials owning clearing agents)?
- Are there any local anti-bribery laws or initiatives?
- How does the judicial system operate?
- Are there other regulatory or political challenges to doing business legally?
- What is the business model being proposed and how will that model be implemented in the country?

Resources that should be consulted include:

- **CPI and BPI Indices:** Review the Transparency International Corruption Perceptions Index\(^3\) and Bribe Payers Index\(^4\) for the new market. The Indices will provide a starting point for the country’s perceived corruption risk.

- **Media Sources:** Review readily available media sources to evaluate the new market. If possible, the reviewer should conduct these searches in the local language. Searches typically will include using the country’s name and key words such as “corruption,” “FCPA,” “bribery,” and “fraud” as search terms.
- **Trace Compendium:** Perform searches using the country’s name under the categories of “Nationality of Foreign Officials” and “Corporate Headquarters.” If applicable, perform a search under the “Enforcement Agency” category for the appropriate enforcement agency associated with the country.

- **Embassy or AmCham Reference:** Request information on corruption risks and the business regulatory environment from the U.S. Embassy and the American Chamber of Commerce Abroad (“AmCham”) in the new market under consideration.

- **Commercial Service Report:** If available and time permits, request a U.S. Commercial Service Report on corruption risks and the business regulatory environment for the new market under consideration.

- **Investment Climate Statement:** If available, review the Investment Climate Statement for the new market, issued by the U.S. Department of State. This report provides background regarding the overall investment climate, receptiveness to foreign investment, transparency of the regulatory system, corruption risks and anti-corruption resources.

- **Watchlist Search:** Conduct a Watchlist search using services such as Dow Jones. The search should include the name of the proposed new market and any key individuals or companies with whom the company will interact, if this information is known.

Research should identify the sectors of the country’s industries that are government-owned and anticipate areas in which the company will need to interact with the government and/or foreign government officials. In addition, research into peer companies doing business in the country, and the business model the peer companies use, may provide useful insights. The goal is to gain a preliminary understanding of the country’s local regulatory environment and its receptiveness to international companies. For each step of the research, the reviewer should retain a copy of the relevant research and notes detailing the steps taken and individuals consulted.

If warning signs are identified, the company should consider the following:

- Is it possible for the company to conduct its proposed business legally despite the warning signs?
- Is there an alternative business model that the company could utilize to conduct business legally?
- Were the warning signs disclosed from a reputable source? Is there sufficient research to confirm the accuracy of the warning signs?
- Despite the warning signs, are there any preventative measures the company can take proactively to ensure that it does not engage in corrupt activity?

**Investigative Firm Market Risk Assessment.** Following the Anti-Corruption Desk Research, if the company decides to move forward with the new market due diligence, the company should consider obtaining a risk assessment of the market conducted by an investigative firm familiar with the market. This firm may be either a local firm identified as having sufficient expertise to conduct the work, or a recognized international firm with a local presence or that has a local network with sufficient capability. The investigative firm should review information from public record sources and, if appropriate, gather information from its network of contacts related to the following inquiries:

- Local regulatory environment and stability of government
- Strength of local laws and judicial system; ability for a foreign company to adjudicate wrongdoing
- Attitude toward foreign investments
- Local restrictions on business strategy and corporate structure
Difficulties encountered by other companies doing business in the market and track records of similarly situated companies

Perceived levels of corruption and the ability for companies to operate in compliance with global anti-corruption laws

Risk of exposure to crimes such as fraud, terrorism, money laundering, organized crime, and other financial crimes

**Preliminary Market Visit.** Following the Investigative Firm Market Risk Assessment, a Preliminary Market Visit should be scheduled to further assess corruption risks in the new market. The Preliminary Market Visit will assess the corruption risks and determine the type of business or operating model that best serves the company’s commercial interests and best mitigates any corruption risk.

The Preliminary Market Visit should include, at a minimum, meetings with the following third parties:

- Transportation and customs clearing agents (preferably more than one)
- Local regulatory authorities
- Local representative(s) from the American Chamber of Commerce and/or American embassy, or their non-U.S. counterpart(s) for non-U.S. headquartered companies
- Local legal counsel (a branch office of an international firm or an internationally recognized and widely respected local firm)
- Local trade agencies or business organizations
- Real estate consultants
- Local distributors (as necessary)

The meetings should focus on topics including:

- Risks associated with the market and potential business models for entry
- Process for importation and distribution of products
- Customs fees assessed; transparency of such fees and available methods of payment
- Transparency of local legislation
- Penalties or unfair business practices that have an impact on international companies
- Local anti-corruption laws and initiatives

**Evaluation and Approval.** Once the assessment processes are completed, the company should prepare a written recommendation, including detailed findings, a risk assessment, and a recommendation on whether to continue or to defer the new market entry process. The report should also include recommendations on how to control risks in the market and the proposed compliance oversight of the operations there, either regionally or through Company headquarters. A recommendation regarding entry into the new market should then be made to the appropriate decision makers within the company, who would then document their decision to approve, deny, or defer entry into the new market in light of the findings, risk assessment, and recommendation presented.
**Compliance and Training.** Finally, if the company pursues entry into the new market and establishes operations there, it should take steps to integrate its operations in the new market into its compliance and training program. For example, the company should ensure that employees in the new market receive and understand the company’s anti-corruption policies and procedures, and that the operations in the local markets implement the internal controls necessary to monitor compliance.

**Conclusion**

While the challenges of expanding into a new, emerging market are considerable, and management’s attention is often focused on the business challenges of commencing operations, it is prudent to also focus attention on understanding corruption risks and assessing how those risks can be controlled. Understanding the local environment and maintaining an appropriate compliance and oversight strategy is essential to successfully managing ongoing anti-corruption risks.

**Chapter 3 - Endnotes**

Summary

Nearly every multi-national company conducts business using a combination of its own employees and third parties it hires to perform essential tasks. These tasks routinely include winning government contracts or obtaining permits to conduct business. Third party agents also help companies comply with local laws and regulations, and with moving personnel and goods across borders. Use of third parties is often widespread in emerging markets, because “in-house” expertise and resources relevant to the local market are limited. But in today’s environment of heightened enforcement of anti-corruption laws, third parties may expose a company to significant liability if they act corruptly in violation of applicable law.

Under the FCPA, the UK Bribery Act, and many other anti-corruption laws, a company can be held liable not only for the corrupt actions of its employees, but also a third party’s actions, if those actions are taken on the company’s behalf. The FCPA, for example, prohibits offering or paying a bribe or something of value to a foreign government official for the purpose of “obtaining or retaining business for or with, or directing business to, any person,” including where the bribe or offer is made indirectly through a third party. U.S. criminal law takes an expansive view of corporate criminality, under which an agent’s criminal acts may lead to a corporate criminal conviction. The U.K. traditionally has enforced a much more narrow concept of corporate criminality, but vastly expanded criminal liability in Section 7 of the Bribery Act, so that a corporation may be held criminally responsible if it fails to have “adequate procedures” to prevent a third-party agent from bribing.

To reduce the risk of liability, companies need to be vigilant in selecting and monitoring the third parties that act on their behalf. To meet the expectations of governments worldwide, this means developing and implementing a rigorous third party due diligence procedure to properly identify, mitigate, and respond to the specific risks associated with the use of third-party agents. Effective due diligence will not only help reduce the likelihood of third parties acting corruptly, but it also will help mitigate any exposure to the parent company if the third party nevertheless acts corruptly, contrary to the company’s wishes. This chapter outlines the key legal considerations and practical steps companies can take to protect themselves from undue risks in working with third parties.
Overview of Legal Framework

There are many types of third-party actions that regularly implicate anti-corruption laws. For example, in the area of government procurement, third parties might seek to obtain lucrative contracts by offering bribes to government officials with decision-making authority over contract bidding or procurement processes. Outside of procurement, many other third parties interact on behalf of companies with government officials: regulatory agents (such as vehicle-licensing agents and visa processors), shipping agents (such as customs brokers and freight forwarders), and professional services providers (such as lawyers, accountants, regulatory consultants, travel agencies interacting with government officials, and lobbyists). Significantly, a bribe for purposes of the FCPA can include not only money but “anything of value,” which could include, for example, gifts, meals, entertainment, and travel.

The conduct of third parties has led to liability for their clients in a number of cases. For example, in September 2015, the U.S. Securities and Exchange Commission (SEC) charged Japanese conglomerate Hitachi Ltd. with an alleged violation of the internal accounting controls and books and records provision of the FCPA. According to the complaint filed by the SEC, Hitachi paid over US$10.5 million to a business partner in South Africa that it knew was the “alter ego” and “funding vehicle” for a political party. The payments allegedly related to a US$5.6 billion power station boiler contract awarded by the South African government. Hitachi agreed to pay a civil penalty of US$19 million, plus disgorgement and prejudgment interest. Notably, the SEC did not allege that Hitachi knew the precise nature of the business partner’s relationship with the political party from the outset, just that Hitachi hired the partner because of its political connection. The SEC also alleges that once Hitachi learned about the partner’s connections, it took no steps to address the added risk.

As another example of third party liability, on May 29, 2013, Total S.A. (“Total”), a French oil and gas company whose securities trade on the New York Stock Exchange, resolved parallel enforcement actions brought by the U.S. Department of Justice (“DOJ”) and the SEC. U.S. authorities alleged that Total violated the FCPA by paying over US$60 million in bribes to intermediaries of an Iranian official between 1995 and 2004 as part of a scheme to obtain and retain oil rights in Iran. Similarly, on April 22, 2013, Ralph Lauren Corporation (“Ralph Lauren”) resolved parallel FCPA investigations actions through a non-prosecution agreement (“NPA”) with the SEC — the Commission’s first-ever NPA in a matter involving the FCPA — and a separate NPA with the DOJ. The SEC and DOJ investigations stemmed from bribes allegedly paid by Ralph Lauren’s subsidiary in Argentina (“RLC Argentina”) to government officials. According to the SEC’s NPA, between 2005 and 2009 the General Manager and other employees of RLC Argentina approved over US$500,000 in payments to a customs broker to bribe Argentine customs officials in order to secure the importation of Ralph Lauren products into the country. The corrupt payments included agreements with consultants to pay bribes in exchange for contracts and nonpublic information regarding tenders, as well as payments to consultants who never performed work for the company.

U.S. corporate criminal law is especially strict: companies technically can be liable if the agent pays a bribe to help the company obtain or retain business, even if the bribe was not approved by a company employee. An individual company employee also can be held criminally responsible for the agent’s crimes if the employee knew of the agent’s deed or if she was aware of a “high probability” that the agent was bribing someone (unless the employee actually believed that the agent was not paying bribes). Thus, both the company itself and its individual employees who are supervising third parties will do well to provide oversight to ensure their agent’s activities are lawful.

Conducting appropriate due diligence as part of a robust compliance program also helps a company if a third-party agent nevertheless violates the anti-corruption laws. Federal prosecutors in the US will consider the existence and effectiveness of a company’s compliance program when deciding whether to charge the
company criminally. Moreover, if a corporation is criminally charged, the fact that it has an effective compliance program can help mitigate the penalty under the U.S. Sentencing Guidelines. The UK Bribery Act takes things a step further. Under the Bribery Act, having an effective compliance program can serve as an affirmative defense, absolving the corporation of criminal liability altogether.

Third-party liability is of particular concern under anti-corruption laws because third parties conducting business in other countries often operate under different cultural norms and expectations, and some third parties may view illicit actions as consistent with, and even necessary for, success in local markets.

The following steps provide a roadmap, based on our experience in assisting companies worldwide in designing, implementing, and operating third party due diligence procedures, combined with our analysis of language regarding third-party reviews in recent FCPA deferred prosecution agreements (“DPAs”).

### Implementing an Appropriate Third-Party Due Diligence Procedure

A properly designed third-party anti-corruption due diligence procedure will have a number of essential elements, all of which should be implemented for the effort to be effective.

1. The first critical step is conducting a risk assessment of how the company conducts business; how, when, where, and why it uses third parties; and how it supervises the work of those third parties.

2. Diligence procedures should be formalized in writing as a policy or procedure, and should be supported by a clear top-down instruction about the importance of following those procedures (the “tone at the top” must be clear).

3. Third parties who are “in scope” for the review need to be determined. For example, third parties that interact with government officials in known risk areas and/or working in high-risk locations for corruption typically would be good candidates for due diligence.

4. The review should be tailored to risk, varying according to the nature of the anticipated interaction with government officials.

5. The company should use contractual clauses and certifications from the third parties to formalize the commitment to compliance; employ mechanisms to provide effective oversight of third-party conduct; and, in appropriate cases, train third-party agents on company policies and procedures.

6. The company should monitor and audit the company’s payments to third parties, including in many cases the payments made by the third parties to others, to ensure that the third party’s actions comply with the company’s policies and relevant anti-corruption laws.

7. The company should document all due diligence of third parties to ensure that there is a record of consideration of risks, and should retain appropriate supporting documentation in an easily accessible database.

8. Finally, the company should consider who should actually conduct and oversee the review procedure, with decisions being made at the appropriate local, regional, and global levels. This function is typically delegated to a legal or compliance department, with adequate oversight from internal and external audit committees.

To facilitate implementing these program elements, the following analytical framework is suggested.

**Risk Assessment.** The first step to implementing any due diligence review is a well-considered cost/benefit analysis and risk assessment of the hiring, retention, and oversight of third parties. In conducting this assessment, companies should consider, among other things: (1) the types of business in which the company is engaged, (2) the markets in which it operates, (3) its contemplated interactions with government officials,
(4) the types of third parties it typically uses for such interactions, (5) its internal governance structure, (6) its anticipated growth, and (7) its business plan. The goal of this risk assessment is to identify key types of interactions that create risk, the types and locations of third parties who perform work on behalf of the company, and the frequency of those interactions. A comprehensive risk assessment serves as the cornerstone of the design and operation of the third-party due diligence review procedure. It informs key program design elements, including the scope, intensity, resources, organization, and controls of the review. It need not be a lengthy or complex process to be effective.

In terms of assessing risk, another task is to evaluate certain functions of employees (and the third parties they supervise) that by their nature create incentives for the use of bribery. For example, if compensation for a particular employee is based on success fees for obtaining regulatory approvals, the employee might have incentives to bribe to ensure that such approvals are forthcoming, and may hire regulatory agents who are prone to doing the same. In other words, if the employees have incentives for misconduct, those same incentives will exist for the third parties, but the company may have less control over the third party, making the risk of corruption greater.

A key threshold question is whether the use of any particular third party is necessary to achieve the company’s business objectives or whether the actions contemplated can be handled “in house.” Performing a function “in house” frequently brings with it better oversight, more accountability, and significant cost savings. Companies should consider whether the potential liability engendered by the use of third parties is appropriate and worth the risk in each particular situation.

**Clearly Articulated Written Policies and Procedures.** Once a company conducts its risk assessment and confirms the necessity of using third parties for particular tasks, the next step is to develop and implement clear anti-corruption policies and procedures detailing the mechanisms for third-party review. These policies and procedures must be clearly communicated to all company directors, officers, and employees, as well as to actual and potential third parties. These written materials should:

- provide a framework for identifying, reporting, and resolving warning signs of corruption arising out of the third-party review;
- minimize actual corruption risks; and
- ensure that the company is partnering with appropriately qualified third parties for proper business purposes.

The risk assessment and the written policies and procedures that the company creates will drive the questions asked in the actual review process outlined below.

Most importantly, the written policies and procedures cannot simply be announced on paper. All policies and procedures must be accompanied by clear support from the top of the company. Leadership must stress that the compliance framework in general and the review of third parties in particular are essential and non-discretionary, and that there are substantial consequences for failing to follow the proper procedures. In some circumstances, third parties interacting with government employees should themselves receive training directly from the company to help ensure that they understand the policies and procedures and the consequences of non-compliance.

**Which Third Parties Are “In Scope”?** The first level of review is to determine which third parties are “in scope,” and thus subject to heightened due diligence review. In this respect, all third parties that interact (or are likely to interact) with foreign government officials on behalf of a company present corruption risks and should therefore be presumptively “in scope.” Certain third parties may be automatically “in scope” if they have contracts with the company over a certain monetary threshold, or because of their particular function.
(e.g., lobbyists, customs brokers, and procurement agents). Companies should also focus on the country or countries in which the third party operates. For example, because of endemic corruption risks in a particular country, a company may decide that all third parties operating in that country are “in scope,” even if their primary responsibilities do not include significant government interactions on behalf of the company. If the third party is not “in scope” (i.e., it is not expected to have dealings with foreign governmental authorities on behalf of the company and not otherwise subject to additional scrutiny), then companies may choose to curtail or adapt the due diligence described below or may decide it is ultimately unnecessary.47

**Heightened Review for Third Parties “In Scope.”** For those “in scope” third parties, a review should follow — both in vetting for suitability and risk signs, and in overseeing their work for the company. The type, scope, and control/decision-making structure of such a review will be a highly individualized decision for each company, based on important issues of timing, manner, and the depth of review of existing third parties and new third parties. However, there are some common elements that should be present in any effective procedure.

After the initial determination of which third parties are “in scope,” the company should ask those parties some preliminary questions on a variety of relevant issues, including, but not limited to, qualification to perform the work, staffing, level of experience, references, and company history. These responses are typically provided by the third party in a written questionnaire.

The company should also conduct reference checks with other parties with whom the third party conducts business, but should not include any references who may receive compensation from the third party under review. The results of these inquiries should be thoroughly documented.

A background search for news concerning the third party’s prior conduct, as well as the conduct of the third party’s owners, officers, directors, senior management, and those executives who are principally involved in the relationship with the company, is also an essential part of the review. These searches will also assist in identifying any connections or relationships with government officials. Options for conducting these types of searches include commercial databases, the Internet, local news sources, the local U.S. or other relevant embassy, or a combination of these resources.

During any review, company personnel should be alert for the classic warning signs of corruption, such as excessive requests for compensation, substantial amounts sought in advance, payments going to the third party’s subcontractors, payment only upon “success,” or involvement of government officials in the third party or its operations. If there are still questions or unresolved warning signs, the company should always leave open the option of a further review with additional follow-up questions and due diligence review relating to actual or possible problems, which could involve further questions, a background search, and/or a site visit. The situation may also require the hiring of an outside expert to conduct a more detailed diligence review.

In the course of conducting the due diligence review, if warning signs cannot be resolved, the company may decline to begin a relationship with a new third party or may terminate its relationship with an existing third party. Companies may seek to address potential warning signs — if possible and prudent — through enhanced reporting, more training, a more robust compliance program for the third party, anti-corruption contract clauses, more auditing, ongoing monitoring, and/or other risk-mitigation strategies.

Once a third party completes the review, the company should establish a policy on how often the third party should be subject to a new review. Many companies will elect to review each third party relationship at set intervals: for example, every two to three years, or sooner if there is a fundamental change in the relationship.

**Identifying and Resolving Warning Signs.** Warning signs or so-called “red flags” may arise in connection with the due diligence exercise. Identifying and resolving these signs is critical to effective due diligence. There are four main steps in this type of due diligence.
Step One: Evaluate the nature of the risk by type of third party. Initially, the compliance risk presented by interacting with third parties should be assessed based on the type of third party (not, at this stage, specific third parties). The factors to consider in the evaluation include the:

- services to be provided and nature of the government interaction;
- level of discretionary authority exercised by the officials;
- frequency of the governmental interactions by the third party;
- value of the governmental interactions to a company’s business;
- locations in which the third party conducts business; and
- the extent to which the third party uses subcontractors for government interactions.

Based upon a subjective analysis of these factors, the type of third party may be classified as high, medium, or low risk, and the diligence process applied accordingly.

Step Two: Understand the nature of the risk presented by the specific third party. To evaluate specific third parties, consider the following factors to highlight any areas of concern:

- type of third party (large or small, services to be provided);
- results of the due diligence research (are there any “hits,” and, if so, are there any “false positives”?)?
- number of employees/locations (size adds to complexity and oversight issues; while smaller organizations have easier oversight, they may lack a compliance culture);
- nature and length of the proposed contract, versus audit rights (longer commitments entail greater risk; contract clauses should include strong audit and access rights);
- compliance framework (what does the compliance program of the third party look like?);
- relevant policies (are appropriate anti-corruption policies in place?);
- training (is training provided; if not should it be provided to the third party?);
- oversight of subcontractors (if subcontractors are used, what controls and oversight are in place?); and
- cooperation with “process” (has the third party cooperated with the diligence and oversight process?).

Step Three: Identify warning signs. Throughout the diligence process it is important to look for warning signs. This two-part process includes:

- looking for indicators that might signal a risk of corruption, or might indicate a heightened business risk; and
- looking for “positive” signs that confirm the third party’s proper conduct.
Positive and negative factors that need to be considered in any evaluation.

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<tr>
<th>Positive Signs</th>
<th>Negative Signs</th>
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<tr>
<td>No Government Contacts</td>
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<tr>
<td>Commercial Capability</td>
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<td>Past Positive Relationship</td>
<td>Lacks Experience</td>
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<tr>
<td>Favorable Business References</td>
<td>Primary Strength is Influence</td>
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<td>Based in Low-Risk Country</td>
<td>Incorporated in High-Risk Country</td>
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<tr>
<td>Established Facilities</td>
<td>Questionable Past</td>
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<th>Positive Signs</th>
<th>Negative Signs</th>
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<td>Refuses Corruption Contract Provisions</td>
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<td>Concrete Deliverables</td>
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<td>On-budget, On-time Performance</td>
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<td>Interface with Qualified Staff</td>
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<td>Subcontracting to Third Party</td>
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<tr>
<td>Accurate Documentation</td>
<td>False Documents</td>
</tr>
</tbody>
</table>
Positive Signs

- Performance Consistent with Proposals
- Accurate Documentation
- Anti-Corruption Program
- Well-Trained Employees

Negative Signs

- Becomes Target of Investigation
- Unclear or Suspicious Documentation
- Requests Backdating or Fraudulent Documentation
- Refuses to Certify Compliance
- Connection with Government or Customer Emerges
- Suspicious Expenses or Travel

Positive Signs

- Commercially Reasonable Terms
- Regular Channels
- Matches Commercial Capability
- Reasonable Compensation
- Payment in Country
- Established Banks

Negative Signs

- Third Countries or Parties
- Third-Country Banks
- Shell Companies
- Post Office Boxes
- Larger Payments During Government Interaction
- Success Fee
- Unexpected Bonuses or Loans
- Invoices Paid Too Quickly
- Requests Negotiable Currency
Step Four: Resolving warning signs. When the diligence process identifies a warning sign, how to address it becomes critical. Some warning signs may be easily resolved, while others may present real challenges to proceeding with the overall relationship. Consider the type of warning sign and how it may be resolved by evaluating the nature of the warning sign itself. Some possible approaches include:

- if the warning raises transparency issues (“what is going on here?”), consider taking steps to increase the visibility of the transaction;
- if the warning sign raises a question (“I don’t understand this situation”), seek further information to see if it “explains” the issue;
- if the warning sign consists of prior “bad conduct,” consider the nature of the misconduct and assess remediation efforts undertaken, if any;
- if the warning sign raises “people issues,” determine whether these people can be isolated from the relationship;
- if the warning sign raises “structural” deal issues, determine what can be changed to improve the situation;
- if the warning sign raises qualification issues, assess whether the third party is really qualified;
- if the warning sign raises performance issues, ask how the third party has performed in the past, and how any past failures have been remedied;
- if the warning sign raises financial control issues, consider whether the control weaknesses can be strengthened; and
- if the warning sign raises documentation issues, assess the supporting documentation to determine if it is adequate, and if not, what additional documentation should be required.

Upon completion of this analysis, ask whether any unresolved warning signs are significant enough to call a halt to the relationship. Determine if controls and oversight can be put in place to control “controllable risks.” Finally, consider the specific oversight model to be implemented, including:

- the third party’s compliance program;
- the third party’s compliance program, supplemented by specific elements of the company’s program; or
- the company’s compliance program.

Tools a Company May Use to Mitigate Corruption Risks with Third Parties. Companies should have available a number of tools to mitigate third-party corruption risks. The finance function at the company should conduct an independent review of any expenses and reimbursement requests sought by the third party prior to authorization of payment. This might include checking claims for payment against the obligations under the contract, ensuring adequate supporting documentation exists, and generally being alert for warning signs of corruption, such as unexplained charges in invoices. The company should also require annual compliance certifications.

Finally, companies should include standard anti-corruption provisions in third-party contracts. Depending on the circumstances, and as noted very clearly by the DOJ in recent DPAs, these contractual clauses could include:

- anti-corruption representations and undertakings relating to compliance with the anti-corruption laws;
- rights to conduct audits of the books and records of the third party to ensure compliance with the foregoing; and
- rights to terminate an agent or business partner as a result of any breach of anti-corruption laws, and regulations or representations and undertakings related to such matters.18

Monitoring and Auditing. An important aspect of implementing a third-party due diligence procedure is including a systematic and consistent way to monitor, audit, and review third-party relationships.

Monitoring may be built into a company’s internal controls through its finance function (i.e., a reconciliation of expenses and reimbursement claims against contractually required documentation and supporting documentation). In addition to the finance check, another control that many companies use is to identify a person within the company who is designated as the point of contact with the third party and manages the relationship between the company and the third party. This lead point of contact should have actual and ongoing knowledge of all relevant activities of the third party on behalf of the company.

Companies also should establish a written audit plan that is based on a reasonable sample of third parties, that considers the nature of the third parties’ activities, and takes into account the risks inherent in specific countries or regions where corruption risks with the use of third parties are greater. This determination of the sample size and third parties selected should be based on assumptions that are articulated in the audit plan. The auditing function may already exist as a discrete function in a company, and, if so, auditing should be integrated with that existing function.

Whatever the type and extent of the monitoring and auditing, the company should be sure to document its oversight so that this monitoring and auditing process itself can be reviewed periodically to ensure effective operation.

Oversight and Administration of the Due Diligence Program. A successful third-party due diligence procedure needs staff and resources to conduct the review and oversight. In determining who actually conducts the review and administers the overall procedure, companies should consider, among other things:

- the type of business involved and how it operates, with considerations including size, complexity, lines of business, and decision-makers;
- the extent to which the company is decentralized or centralized and the roles to be undertaken by headquarters versus regional and local operations;
- the role of the legal and compliance departments at various phases of the development and oversight of third party relationships; and
- whether the due diligence relating to third parties should be conducted internally or externally, and, if externally, at what point these external reviewers are involved in the process.

Company personnel who actually conduct this due diligence review must understand the level of risk of relevant third parties, be specifically trained to address this risk, and understand how to raise concerns within the company when they arise. To be effective, a review procedure must have built-in mechanisms to ensure consistency of review across the company; a mechanism to create and maintain a complete review “file” to document the work undertaken and the resolution of any warning signs; and appropriate oversight of program operation by senior management regardless of how decentralized a review procedure operates. Accountability of those conducting the review for the company is also essential for program success.

CONCLUSION

Governments have made clear in recent guidance and settlements that they expect a robust review of third parties as part of an overall effective anti-corruption compliance program. Companies who implement a third party anti-corruption due diligence procedure will minimize the risks that arise when working with third parties.
While the principles stated above provide guideposts and checklists, the nature of a review must be individually tailored to particular company risks, needs, capabilities, and markets. In this era of heightened enforcement of anti-corruption laws, inaction or failure to properly oversee third party operations is simply not an option.

Chapter 4 - Endnotes

1 The U.S. Foreign Corrupt Practices Act prohibits a broad range of persons and businesses, including U.S. and foreign issuers of securities registered in the United States, from making a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. These provisions also apply to foreign persons and companies that take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies with securities listed in the United States to meet its provisions on recordkeeping and internal accounting controls. These accounting provisions were designed to operate in tandem with the anti-bribery provisions of the FCPA and require companies covered by the law to make and keep books and records that accurately and fairly reflect the transactions of the company and to devise and maintain an adequate system of internal accounting controls.


4 A corporation can be held liable for the actions of its agents, even where the agent may have acted for mixed motives, so long as one motivation of its agent is to benefit the corporation. See United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is “whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated — at least in part — by an intent to benefit the corporation” (internal quotations omitted)).


10 U.S.S.G. § 8C2.5(f).

11 Bribery Act § 7(2).

12 The U.K. Bribery Act is likely to be interpreted even more widely in scope than the FCPA, prohibiting bribes not just to foreign officials but to commercial parties as well. See Arnold & Porter, U.K. Bribery Act 2010, supra note 2.


14 While the Bribery Act prohibits commercial bribery as well, for most companies the greater risk will be where third parties interact with government officials.

15 See, e.g., Deferred Prosecution Agreement, United States v. Total, S.A., Crim. No. 1:13CR00239 (E.D. Va. May 29, 2013) [hereinafter Total DPA], Dkt. Entry No. 2, at C-5, http://www.justice.gov/iso/opa/resources/9392013529103746998524.pdf (“To the extent that the use of agents and business partners [third parties] is permitted at all by [the company], it will institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including: . . . Properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of all agents and business partners.”).

16 The DOJ has required in connection with settling FCPA matters that companies inform all third parties of the company’s “commitment to abiding by laws on the prohibitions against foreign bribery, and of [the company’s] ethics and compliance standards and procedures and other measures for preventing and detecting such bribery.” Id.

17 Of course, simply because a third party is not “in scope” for the heightened due diligence review, the company should not ignore the possibility of corruption issues and may want to take additional steps to ensure compliance with these or other laws, including appropriate reviews and certifications.

18 See, e.g., Total DPA, supra note 15, at C-5–C-6.