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Foreign Corrupt Practices Act: What You Really Need to Know

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Overview

Last year, on November 14, 2012, the U.S. Department of Justice (DoJ) and the U.S. Securities and Exchange Commission (SEC) conjointly published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*¹ (Guide) to assist organizations to better understand the DoJ's and SEC's priorities in regards to the Foreign Corrupt Practices Act (FCPA). It's important to note, however, that the Guide doesn't have the force of law.

The Guide highlights the importance of an organization's compliance program to prevent and detect corrupt actions and activity.

Organizational Compliance

The Guide provides organizations with direction and guidance on an effective compliance infrastructure. Moreover, it is recognized and acknowledged, to achieve compliance, that cost and size will be important factors depending on the size of the organization.

It underscores that “*assessment of risk is fundamental to developing a strong compliance program*” and “*one-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to detriment of high-risk areas*”²

According to the Guide, hallmarks of effective compliance program should contain the following:

1. **Commitment from Senior Management and a Clearly Articulated Policy Against Corruption.** Often referred to as the “tone at the top”, the C-Suite is directly responsible for disseminating a clear message that corruption will not be accepted, nor tolerated.
2. **Code of Conduct and Compliance Policies and Procedures.** It should provide guiding principles for employees conducting business on the organization's behalf. Furthermore, specific anti-corruption policies and procedures should be developed to address the most significant risks and delineate appropriate internal controls and monitoring procedures.
3. **Oversight, Autonomy and Resources.** An appropriate senior-level individual (or group) should be responsible for the compliance program and possess the authority and autonomy to fulfill their oversight and reporting duties to the organization's governing body.
4. **Risk Assessment.** An organization's compliance program should be customized to their unique risk profile. A comprehensive risk assessment increases the efficiency and credibility to anti-corruption compliance efforts.
5. **Training and Continuing Advice.** An organization should ensure that all employees are aware of their anti-corruption policies and procedures, which can be achieved through periodic training.
6. **Incentives and Disciplinary Actions.** The organization's compliance program must be enforced unequivocally throughout the enterprise with clear punitive procedures for violators applied timely and consistently. Furthermore, positive incentives and merit-based rewards may increase the culture of compliance.

¹ FCPA – A Resource Guide to the U.S. Foreign Corrupt Practices Act: <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

² FCPA – A Resource Guide to the U.S. Foreign Corrupt Practices Act: <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>, Chapter 5, p.58

7. **Third-Party Due Diligence and Payments.** A risk-based assessment of third parties can identify those posing greatest corruption risk.
8. **Confidential Reporting and Internal Investigation.** Employees and third parties should be incited to disclose information on suspected violators in a safe, secure and confidential environment. Significant issues raised should be investigated by qualified individuals.
9. **Continuous Improvement: Periodic Testing and Review.** Organizations are encouraged to perform periodic reviews or anti-corruption audits to validate compliance and to expose existence of hypothetical violators and red flags indicating new corruption risks.
10. **Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration.** An acquiring organization is ultimately responsible for completing a thorough due diligence of a potential target company, which extends to assessing potential corrupt activity by the said target.

Final Thought

Global organizations or ones contemplating an international expansion (into new and unfamiliar territories), would be remiss if anti-corruption compliance wasn't top-of-mind. The minimal elements, listed above, should be in place to assist organizations in establishing an enterprise-wide framework to better evaluate their entity's vulnerabilities. It is essential that a thorough risk assessment be performed to identify all areas of potential risk (geographies, industries and lines of business).

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