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Best practices in compliance programmes

Andrew M Levine and **Steven Michaels** of Debevoise & Plimpton offer advice on effective compliance programmes for companies trying to navigate the increasingly aggressive anti-corruption environment

Transnational anti-corruption regimes such as the US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act 2010 and similar laws have proliferated in recent times, reflecting a growing international consensus on the importance of curtailing corruption. In addition to prohibiting bribery, certain laws like the FCPA require companies to make and keep books and records that accurately and fairly reflect the transaction and disposition of assets, and to implement internal controls reasonably designed to prevent bribery in their operations. This evolving legal landscape includes increasingly aggressive legislation, regulation, enforcement and government expectations.

The web of anti-corruption laws and related business risks presents a number of compliance challenges for companies operating globally, requiring them to monitor carefully their activities and to take deliberate steps to avoid liability. Violations of these laws can lead to substantial fines, forfeitures of property and even imprisonment. Companies can reduce their risk of violations, and of related prosecutions and liability, by establishing risk-based anti-corruption compliance programmes designed to prevent, detect and remediate potential problems.

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Generally, such compliance programmes should: state clearly the company's anti-bribery and related policies, and the strong commitment of management to compliance; communicate the relevant policies and procedures to directors and officers, employees and third parties, including through periodic training; institute an anti-bribery risk management system, overseen by senior executives with appropriate resources and autonomy; offer mechanisms for confidential reporting and reliable internal investigations; provide appropriate disciplinary procedures and positive incentives; promote consultation with counsel; mitigate risks presented by third parties and by mergers, acquisitions, and other transactions; and ensure ongoing compliance and improvement through risk assessment, monitoring, audit and remediation.

This essay focuses on the development of risk-based compliance policies and procedures; monitoring and auditing of such compliance; risks posed by third parties and by mergers, acquisitions and other transactions; and the due diligence and other steps required to mitigate these risks.

Risk-based policies and procedures

An effective anti-corruption compliance programme must be integrated into all relevant business processes, transforming compliance into a routine behavior. Such a programme must be tailored to the business and its underlying risks. One size does not fit all is a touchstone in this context.

Compliance efforts should focus on the extent to which a company operates in jurisdictions presenting higher corruption risk; has direct or indirect dealings with government entities or officials, broadly construed; and is subject to material government approvals or other regulations.

Companies should promulgate and enforce clear compliance policies and procedures throughout

their operations. Written polices, including codes of conduct, standard operating procedures and detailed guidance for recurring issues, should be drafted in clear, understandable language, targeting the following goals:

- Identifying activities involving the potential conferral of money or other benefits on government officials (as well as on significant private counter-party representatives) and providing relevant guidance requiring appropriate vetting of such activities;
- Assuring all company employees understand their conduct is potentially subject not just to local laws, but to applicable transnational regimes;
- Making clear that terms such as government official and improper benefits can be defined broadly under transnational regimes, in many cases more broadly than those terms might be defined under local law;
- Instructing employees and other third parties that corruptly conveying benefits, from cash to any other thing of value, as well as promises to convey the same, are flatly prohibited;
- Assuring that red flags are identified and elevated for proper analysis;
- Conveying the risks of third-party payments to agents and others;
- Warning that practices involving conscious avoidance of risk will not be tolerated;
- Emphasising the importance of accurate books and records, as well as adequate accounting controls, including grants of authority; and
- Communicating the need to seek legal advice if any doubts arise.

Periodic training should reinforce these directives. Training should extend appropriately to all levels of the company's operations and in some circumstances to third parties. Those who regularly interact with government officials should receive targeted in-person training if at all feasible.

Transactions such as the hiring of third parties, and larger transactions such as mergers, acquisitions and joint venture activity, as well as categories of recurring spend (such as gifts, travel, entertainment and charitable and political contributions) should be governed by reasonable steps to ferret out red flags or warning signs that warrant further inquiry and, in certain cases, escalation or even cancellation of a proposed transaction. Due diligence – and a written record of it – should be required for activities involving potential payments to government officials, and, increasingly, private counter-party representatives.

Company policies should encourage self-reporting of illegal or grey-area conduct to a higher authority within the company and should prohibit retaliation against individuals who report such conduct in good faith. An effective compliance programme will also assure that performance evaluation systems reward compliance and punish non-compliance.

Monitoring and auditing of compliance

Promulgation of risk-based policies is a necessary but not sufficient characteristic of an effective anti-corruption compliance programme. A compliance programme is much more than a collection of policies; it must embody a corporate ethos with sufficient procedures and controls, including regular monitoring and auditing, to instill confidence that employees and third parties are complying with the policies.

An essential feature of successful anti-corruption compliance programmes is regular risk assessment. Such assessments should identify risks in the company's business model, especially in higher-risk jurisdictions, as well as provide relevant, current data from business units and spot checks at local subsidiaries. A company's risk-assessment programme should ensure that all business units are evaluated periodically, a task that can be coordinated with any internal audit programme. Indicators of compliance risk include: (i) the country or industry in question has had past bribery problems; (ii) a third party (such as an agent, distributor, consultant or other intermediary) or other business partner (such as an acquisition or merger target or joint venture partner) has a reputation for bribery or other illegal practices, or has refused to promise to abide by the relevant laws or warrant that it has not previously paid bribes in the jurisdiction; and (iii) a third party or other business partner has indicated that a particular amount of money is needed to get the business or has requested that the company prepare false invoices or any other type of fictitious documentation.

Companies should also regularly test the performance of officers, employees and third parties in complying with anti-bribery and related laws. Compliance at each business unit should be evaluated periodically by internal audit, compliance or other similarly-trained personnel, or by an outside auditing firm. Audits and risk assessments should be scheduled based on the size of and revenue generated by local business units, the risks of the jurisdiction and business and other reasonable resource-allocating factors.

Risks posed by third parties

Among the most acute areas of anti-corruption risk is business conducted through third parties, especially those interacting with government entities or government officials. When engaging third parties – including agents, distributors, consultants or other intermediaries – companies should conduct risk-based due diligence; properly document such relationships, including through appropriate contractual protections; and require meaningful oversight of the third party's work.

> A compliance programme is much more than a collection of policies

A company considering engaging a third party should review adequately the third party's reputation, background and performance.

For individuals retained personally or through closely-held corporations, a company should: request references, a professional resume, a complete employment history and a proposed work plan or its equivalent; contact the references and former employers; and document the diligence steps taken. The company should ask for a list of any close relatives of the third party's principals and managers who are or who have been employed by the government or who are relatives of such individuals. It should conduct a thorough business check on the third party, to verify it has experience in the area, is knowledgeable and has the appropriate degree of honesty, integrity and any other factors that would justify the retention and compensation. Further, if warranted, the company should engage the services of a private investigative company.

Local counsel should be consulted on issues affecting the ability to conduct business in the country in question. A local government may impose requirements that could pose compliance problems. Consulting with reputable local counsel can enable issues to be resolved without voiding a deal or facilitate an early exit from negotiations if a problem is insurmountable.

Companies also should be confident that the payments they plan to make to third parties are consistent with fair market value. Fees or profit-sharing provisions that do not appear commensurate with proposed services increase the risk of an anti-bribery violation. Companies should gather adequate information to support the reasonableness of any compensation and avoid any commission that appears excessive, is requested in cash, or is otherwise irregular, such as an unusually large up front payment.

Contracts with third parties, especially those that may interact with government entities or officials, should contain, absent special circumstances: (i) the scope of the third party's duties and responsibilities under the contractual arrangement; (ii) acknowledgment by the third party of its familiarity with applicable anti-corruption laws, and an agreement to comply with their terms; (iii) notification and termination rights in the event of a violation by the third party of any applicable anti-corruption law or related company policy; (iv) the third party's agreement to advise the company of any ascension by the agent or any employee or officer of the third party to an official position within the government; and (v) an agreement that, with reasonable notice, the engaging company may audit the third party in connection with the engagement.

Monitoring a third party's performance is also vital. This scrutiny may include auditing of expenses, invoices and third-party payments, and watching for any candidacy or appointment to a political party or government position. It is essential to understand the work actually being performed by third parties, including that it is consistent with the fees paid and to ensure third parties are aware of applicable laws and company expectations.

Due diligence in M&A and other transactions

Another critical area of anti-corruption risk is that presented by mergers, acquisitions, or similar deals. The first goal is accurate assessment of potential risks and a transaction's true value. With due diligence in hand, a company can mitigate its risk appropriately.

Buy-side firms that do not undertake effective due diligence incur a heightened risk of liability for a target's pre-transaction violations. If a target's business is based significantly on bribery, the deal has also likely been overpriced and may not be viable at all. Pre-transaction due diligence also helps companies to identify past problematic conduct and thus prevent such conduct from recurring post-transaction.

Among the key steps are: (i) assessment of the target's business and the countries in which the target operates, including whether the business is in a sector in which a few government officials may have disproportionate influence (for instance, defence, resources extraction, sale of state assets and registration of pharmaceuticals); (ii) evaluation of the risk profile of persons associated with the target, such as whether any manager has been accused of unethical or criminal conduct; (iii) review of the target's external and internal audit reports, as well as any similar business records; (iv) identification of dealings with government entities and officials; (v) interviews of key employees of the target who may have had contact with officials able to influence the target's business; and (vi) assessment of the target's anti-corruption compliance policies, procedures and controls.

Appropriate representations and warranties should also be sought in connection with such transactions, providing confidence that the target or seller has not violated anti-corruption laws or alternatively that it has disclosed such violations. If these representations are not provided, the reasons for this should be documented and investigated. If an indemnity is unavailable or provides no real protection, buy-side companies should be even more vigilant in conducting sufficient due diligence.

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A tailored compliance programme

The anti-corruption legal terrain continues to evolve, as do the associated best compliance practices. This guide provides insight into risk-based practices designed reasonably to ensure compliance with the anti-corruption laws of various jurisdictions and to meet the expectations of government regulators around the globe. Although tailoring a compliance programme to a company's genuine needs is an ongoing process that requires cooperation and resources from many functions within the organisation, the dividends in value generated and in losses, costs and disruption avoided are well worth the expenditure.

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Andrew M Levine is a litigation partner in the New York office of Debevoise & Plimpton, who focuses his practice on white-collar criminal defence and internal investigations. He regularly defends companies in criminal, civil, and regulatory enforcement matters, and has conducted numerous investigations throughout the world. Levine frequently advises companies on compliance matters, including on the US Foreign Corrupt Practices Act, and the assessment and management of risks presented by potential mergers, acquisitions, and other transactions. In 2013, Levine was recognised as a Rising Star by the *New York Law Journal* and recently was named in *Global Investigation Review's 40 Under 40* list of the world's leading investigations lawyers. Levine is a co-editor-in-chief of the firm's *FCPA Update* newsletter and has published widely on various anti-corruption topics.

Before joining Debevoise in 2006, Levine served as Deputy Counsel to the Independent Inquiry Committee into the United Nations Oil-for-Food Programme, led by Paul A Volcker.

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Steven Michaels is a counsel in the firm's litigation department, whose practice focuses on matters involving compliance with the US Foreign Corrupt Practices Act and related statutes and regulations, and internal investigations as a member of the firm's white collar and regulatory group. He has worked on matters in these areas, involving more than two dozen major US and non-US corporations, and has handled disputes concerning facilities and public works in the United States, Argentina, the Bahamas, Bolivia, Brazil, the Cayman Islands, Ghana and Venezuela. Michaels is the executive editor of the firm's *FCPA Update* newsletter.

Before joining Debevoise in 1996, Michaels served for more than 11 years in various capacities in the Department of the Attorney General in the State of Hawaii, including as first deputy attorney general and solicitor general.