New FCPA Resource Guide
Ten things for legal and compliance officers to consider
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The Deloitte Forensic Center is a think tank aimed at exploring new approaches for mitigating the costs, risks and effects of fraud, corruption, and other issues facing the global business community. The Center aims to advance the state of thinking in areas such as fraud and corruption by exploring issues from the perspective of forensic accountants, corporate leaders, and other professionals involved in forensic matters. The Deloitte Forensic Center is sponsored by Deloitte Financial Advisory Services LLP.
Introduction

Is the FCPA Resource Guide from the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) (the “Guide”) really new or just a compilation of existing material? Are there areas of emphasis that merit particular attention on the part of companies? Should companies be considering making further enhancements to their FCPA compliance programs as a result of the new Guide or are existing programs likely to be sufficient?

This article provides insights from Deloitte FCPA consulting specialists, accompanied by commentary from legal and compliance executives at Barrick Gold Corporation, Ford Motor Company and Zimmer Holdings, Inc. The bottom line:

“Anyone not making changes to their compliance program is not paying attention. The Guide showed us what the DOJ expects, but companies also need to show they are paying attention and making appropriate changes on their own initiative.”

Rebecca Burtless-Creps
Managing Counsel – Compliance
Ford Motor Company

Another potential justification for making changes to existing FCPA compliance programs: 70.7 percent of over 1,600 participants in a November 30, 2012 Deloitte webcast, “New FCPA Guide from DOJ and SEC: How It May Impact Your Anti-Corruption Compliance Program,” responded to a webcast polling question that they anticipate greater FCPA enforcement efforts in the wake of the new Guide.

Strengthening FCPA/anti-corruption compliance programs proactively can help to avoid having the government come knocking at your door or can put your company in a better position to show that a declination, non-prosecution agreement (“NPA”) or deferred prosecution agreement (“DPA”) is merited due to the company’s demonstrably strong – and pre-existing - compliance program.

The long awaited 120-page Guide, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, was released on November 14, 2012 by the Criminal Division of the DOJ and the Enforcement Division of the SEC.

While some commentators have expressed the view that the Guide mostly serves as an aggregation of existing material from the statute and enforcement cases, assembling that information into one place provides an invaluable resource and time saver for executives responsible for overseeing their company’s compliance with the FCPA. The Guide may also be a useful educational tool to help bring incremental focus to companies’ FCPA compliance priorities, and to help board members and operating executives understand that certain compliance activities are prudent, and indeed essential, investments. Our legal and compliance commentators, Norman Finch and Rebecca Burtless-Creps, expressed similar views about the Guide’s value:

"We find the new guide to be helpful in that it is a one-stop location for information previously made available on the FCPA and FCPA enforcement, with some additional new commentary."

Norman D. Finch Jr.  
Vice President, Associate General Counsel and Chief Compliance Officer, Zimmer Holdings, Inc.

"As a practitioner, an in-house counsel, the Guide is a very useful authoritative source."

Rebecca Burtless-Creps  
Managing Counsel – Compliance  
Ford Motor Company

The additional new commentary referred to by Norman Finch is a second key way the Guide provides value. It replaces some of the process used by legal and compliance professionals to discern the government’s thought processes and objectives (also known as “reading the tea leaves”) with some clearer written statements. As our commentator Jonathan Drimmer said:

“The Guide is valuable in helping distill much of what the anti-corruption community gleaned from past DOJ and SEC statements, settlements and opinion releases. Though it has little new substantive information, it is a very helpful document and provides insight into the decision-making process regarding government prosecutions.”

Jonathan Drimmer  
Vice President and Assistant General Counsel  
Barrick Gold Corporation

So whether you view the Guide as largely a compilation of existing material, a provider of fresh insights into prosecutors’ and regulators’ thought processes, or both, the message from these legal and compliance practitioners is that it’s a useful and valuable resource worthy of attention. We agree.
Ten things for legal and compliance officers to consider

We set out to identify key takeaways that may help legal and compliance officers to obtain executive support and drive continued, appropriate enhancements to their FCPA/anti-corruption compliance programs. We present ten things for legal and compliance officers to consider and the related actions we often recommend companies take. The specific actions appropriate for your company will vary depending on its risk profile and the current state of your compliance program.

1. The most critical way to defend against FCPA exposure is a pre-existing compliance program that is risk-tailored and risk-based

Stated differently, “cookie cutter” programs do not work, and the Guide expressly warns against a “check-the-box” approach. An effective FCPA compliance program must be designed and tailored to the specific business operations, the specific geography, and the specific areas of corruption risk. An effective program must include not only mechanisms to prevent and detect violations, but also adequate financial and accounting processes to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The Guide makes clear that an effective compliance program is a critical component of an issuer’s internal controls, and notes that the payment of bribes often occurs in companies that have weak internal control environments.

For business units expanding through mergers and acquisitions, pre-acquisition FCPA due diligence is a key part of an effective compliance program, both to identify potential FCPA exposure from past events and to identify ongoing activities that need to be stopped or more thoroughly controlled and monitored to prevent future liability. The Guide notes that the acquirer should promptly incorporate the acquired operations into its internal control systems including its compliance program. The Guide suggests companies consider training new employees, reevaluating third parties under company standards, and conducting audits on new business units where appropriate. In practice, such activities are commonly considered essential in implementing the compliance program effectively in the new business operations and in evaluating its effectiveness.

A company’s compliance program must be pre-existing and proactive to receive the full extent of mitigation credit in the form of a declination to prosecute, DPA, NPA, and reduced penalties. After-the-fact damage control and program remediation is appropriate and necessary, but not fully compelling in the eyes of the regulators. Independent program assessments can be usefully employed to validate the strength and quality of the company’s efforts and can be an important catalyst for continuous improvement and sustainability.

**Proactive actions we often recommend:**

- Independent FCPA compliance program assessment
- Global FCPA risk assessment with detailed inventory of government touch points and risk matrices by geography
- Detailed assessment of internal controls, business processes, and technology supporting FCPA compliance
- Performing detailed pre- and post-acquisition FCPA due diligence that includes interviews of key target management, analysis of country- and industry-specific risks and targeted testing of higher-risk payments and transactions
- Rolling out post-closing compliance integration procedures that include adoption of FCPA policies and controls, training of employees, agents and other third parties, and implementation of internal audit procedures
2. In the eyes of a regulator, the tone at the middle and tone at the bottom of a company will define the effectiveness of the tone at the top

The annals of corporate misconduct are littered with companies and management that failed to “walk the talk,” their award-winning vision statements, codes of conduct and anti-corruption policies launched and then abandoned. Due to the ineffectiveness of “paper programs” the Guide places strong emphasis on understanding if the stated high-level commitment of management is reinforced and implemented by middle managers and employees at all levels of the enterprise. So companies must be prepared for not only a top-down scrutiny of their culture and business processes by regulators, but also a bottom-up assessment.

Proactive actions we often recommend:
- Enterprise-wide employee pulse surveys with a particular emphasis on ethics and compliance
- Country-by-country FCPA “reinforcement training” tailored to focus on local geography and business-specific corruption risks
- Detailed employee focus groups to validate employee attitudes and awareness

3. FCPA compliance is the responsibility of a senior executive who must work to ensure adequate staffing and resources

Perhaps in response to reluctance in some industry sectors to elevate compliance to a C-Suite level of accountability, the Guide hammers home the expectation that companies assign responsibility for oversight and implementation of a FCPA compliance program at the senior executive level to someone with appropriate authority in the enterprise, adequate autonomy and independence from management, and sufficient resources – people and money – to get the job done. In this respect the Guide may reflect a bit of impatience on the part of the U.S. government with companies and industry sectors that delegate compliance down to levels that have neither the influence and independence nor the staffing and resources to be effective.

Proactive actions we often recommend:
- Fresh-eyes review of compliance governance, roles, authorities, and accountability
- Verify that compliance oversight and responsibility is assigned to a member of executive management
- Consider DOJ and Office of the Inspector General (“OIG”) recommendations that compliance be independent from legal and finance staffs
- Independent assessment of compliance structure, resources, and personnel
- Include compliance oversight in the charter of the appropriate board level committee, and line-of-sight reporting relationship between the chief compliance officer and board committee chair

4. Third party compliance is essential, must be risk-based, and must include purposeful and intelligently designed auditing and monitoring

Here again, the Guide cautions against applying a “one-size-fits-all” approach to third party compliance, which, according to the Guide, serves only to dilute the quality and quantity of resources available to control and monitor third parties that pose the most significant FCPA risk.

Adequate auditing and monitoring should include proactive testing on economically significant and higher risk transactions. It should also include the periodic exercise of right-to-audit clauses, reinforcement training and communications tailored to different countries’ needs, and periodic certifications from relevant business partners.

Commentators Jonathan Drimmer and Norman Finch provide insights from their experience with third-party due diligence:

“Vetting third party suppliers on a global basis is always a challenge. In particular, the highest risk areas geographically typically are the ones where due diligence is the most challenging.”

Jonathan Drimmer
Vice President and Assistant General Counsel
Barrick Gold Corporation
“Technology is helpful, particularly when you have numerous third party partners. Having and using technology to support the due diligence and screening process can be especially important.”

Norman D. Finch Jr.
Vice President, Associate General Counsel and Chief Compliance Officer, Zimmer Holdings, Inc.

Proactive actions we often recommend:
- Comprehensive understanding of global third party business relationships, including indirect relationships
- Global risk assessment of third party relationships and activities
- Tiered due diligence and monitoring for existing third party relationships
- Defined procedures for onboarding new third party relationships
- “Right to audit” clauses and implementation of defined internal audit protocols and rhythm
- Leverage technology to establish a comprehensive corporate library of third party relationships, documentation, compliance measures, and other life-cycle documentation

5. Controlled subsidiaries, affiliates and joint ventures must be taken into account in FCPA compliance

The Guide makes clear that although the FCPA’s provisions are mainly directed at “issuers,” an issuer’s books and records include those of its consolidated subsidiaries and affiliates. Therefore, the Guide indicates that companies are responsible and will be held accountable for improper activity by or on behalf of controlled subsidiaries, affiliates, and joint ventures.

Proactive actions we often recommend:
- Include controlled subsidiaries, affiliates, and joint ventures in the enterprise’s compliance program and risk assessment process
- Include controlled entities in the internal audit cycle plan and other monitoring activities

6. Even non-controlled affiliates, joint ventures, distributors and dealers should be included in the risk assessment and compliance plan

Even with respect to minority and non-controlled interests, the Guide makes clear that companies are obliged to apply “best efforts” to influence these entities to adopt internal controls and other compliance program elements sufficient to prevent and detect FCPA violations. The Guide also makes clear that this obligation may apply to independent distributors and dealers of the company, which often are able to demand substantial volume-based discounts and rebates that can be used for improper purposes. Monitoring non-controlled third parties may be a difficult task, with many practical and structural issues that reduce a company’s ability to exercise control and dictate compliance measures. The message is nevertheless clear: these relationships must be included as part of the overarching compliance program.

Proactive action we often recommend:
- Fresh-eyes review of all non-controlled affiliates, including equity interests, board and management appointment rights, contractual rights, and other indications of ownership, control, or ability to influence
7. Financially immaterial transactions and payments may give rise to material liability, reputational harm and management distraction

Seemingly inconsequential amounts paid by or on a company’s behalf can give rise to FCPA exposure. So when designing a compliance program and establishing internal controls, companies must think broadly of where the government “touch points” reside and where any form of value may be transferred. Types of value might include: gifts, favors, travel subsidies, entertainment, charitable contributions, media per diems, political contributions and lobbying, licenses, permits, factory inspections, development and construction related transactions, tax incentives and tradeoffs, immigration documentation and temporary work visas, logistics, freight, customs and clearing of goods, document handling fees, and “other things of value.”

The FCPA does not prohibit any of these types of transactions or related payments. But it does prohibit transactions and payments made to improperly influence a foreign official to use their position to assist in obtaining or retaining business or to gain an improper business advantage. This can be a complex analysis that is often only capable of being understood by staff and managed if management implements clear enterprise-wide policies and procedures and sustained monitoring and auditing procedures.

Proactive actions we often recommend:
• Detailed country-by-country policies, directives and procedures covering any interactions with government employees, as well as the retention of agents, and accompanying segregation of duties and documentation approvals
• Periodic independent assessments and transaction testing in local country locations
• Local country internal control and process “walk-throughs” and documentation

8. The ultimate test for an FCPA compliance program is “Does it work?” and companies must be prepared to prove that it does

Here the Guide refers to a “common-sense and pragmatic” approach to evaluating the adequacy of a company’s pre-existing compliance program with a focus on understanding whether the program actually works in the real world. This does not mean engaging in an exercise of futility in asking whether the program worked in preventing the violation at issue – obviously in many cases the violation will have occurred despite the existence of the compliance program. What it means is asking whether the other hallmarks of program effectiveness, such as ongoing risk assessment, early detection, investigation, and remediation, were in place as part of the chronology of events and a pre-existing program, and whether prevention measures are evidenced more broadly across the company, sufficient to allow a regulator to conclude that the present violation was, in effect, an isolated occurrence.

Proactive actions we often recommend:
• Periodic independent compliance program assessments, health checks, and gap analyses, both on an enterprise basis and in key areas of compliance risk
• Internal “fire drills” and incident simulation to track and monitor the company’s response
• Multi-year data and trend analyses
9. Privately held companies should be on notice that they also have FCPA risk exposure

Privately held companies, non-SEC regulated and non-issuers, often are surprised to hear that they have exposure to FCPA liability similar to their public company counterparts. The Guide should leave no doubt that privately held companies may be held accountable for FCPA violations to the same extent as their public company counterparts, leveraging other U.S. federal statutes such as the Travel Act, anti-money laundering laws, and mail and wire fraud provisions. What this means as a practical matter is the need for adoption and maintenance of the same level of strong internal controls and other compliance program elements in the area of anti-corruption.

Proactive action we often recommend:
- Independent benchmarking and assessment of anti-corruption control environment and compliance programs against public companies with similar industry, gross revenue and geographic risk profile.

10. The U.S. government will continue to apply expansive jurisdictional concepts in order to enforce the provisions of the FCPA globally

A single international or interstate text message, email, or wire transfer can ensnare both domestic companies and persons for actions that occur wholly outside the U.S. In other words, a U.S.-based executive who does not directly participate in a bribery scheme but is knowingly blind to communications (even email or text messages) in furtherance of a scheme may be called to account. Similarly, foreign nationals and companies who may have “aided and abetted” or acted as an agent of a U.S. issuer or domestic concern may also be held liable in the U.S. legal system and therefore cannot take comfort in situations where improper actions and schemes occur geographically outside of the United States.

Proactive action we often recommend:
- Include in the enterprise anti-corruption compliance program and risk assessment any employees, agents, contractors and other third parties with direct or indirect interactions with government employees, regardless of whether direct U.S. reporting relationships exist.
Conclusion and recommended action

Our recommendations to specific clients will depend upon their FCPA risk profile and the current state of their compliance program. As a general matter, it would be wise for entities with potential FCPA compliance risks to study the new DOJ and SEC Guide and for legal and compliance officers, as well as other senior executives and board members, to consider the issues highlighted above. Some high-level questions that can help to get the discussion going are:

- Do we have documentation, ready to be provided to the DOJ and SEC if needed, showing our compliance program to be well-designed, tailored to our company’s risk landscape and operating effectively?
- Do we really understand our risk profile across the globe and how have we conducted a risk assessment to develop our profile?
- Have we commissioned an independent assessment of our compliance program to provide an objective view of its effectiveness and to identify potential areas for improvement?

In many cases the answers may reflect some limitations, hesitation, or uncertainty, suggesting a potential opportunity to improve certain aspects of the compliance program. If the answers to these and other probing questions are consistently “yes,” your next request might be, “Show me!” Even for legal and compliance officers, the old proverb applies, “Trust, but verify.”

Deloitte Forensic Center

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