

CONSTRUCTION

FCPA COMPLIANCE PROGRAMS — BEST PRACTICES

On Dec. 19, 1977, four years after Watergate exposed corporate corruption, President Jimmy Carter signed the Foreign Corrupt Practices Act (FCPA) into law. This statute's anti-bribery provision makes it unlawful for a U.S. person and foreign issuers of securities to make corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. This law also mandates publicly traded companies to maintain records that accurately and fairly represent the company's transactions. Additionally, it requires these companies to have an adequate system of internal accounting controls.

In November 1991, Congress enacted the Federal Sentencing Guidelines to prevent and detect organizational wrongdoing. These guidelines articulate the elements of an organization's compliance program that is required to receive consideration for eligibility for a reduced sentence if convicted of a crime. The Federal Sentencing Guidelines require organizations to create standards to reflect government regulations and industry standards that apply to most organizations. In essence, compliance programs, when "effective," identify and define legal and ethical behavior, establish controls to alert management of potential illegal activity and significantly improve the overall performance of an organization.

The United States Sentencing Commission amended its existing guidelines in 2004. These amended guidelines clearly expressed the expectations that senior level executives of organizations should be directly involved in overseeing its compliance program, and that they would create an organizational culture that is compliant with the law. The FCPA presents additional standards that must be considered when designing and implementing compliance programs. Global organizations must now develop a program that effectively addresses laws and regulations in multiple jurisdictions, as well as industry standards. Compliance officers at global organizations are now, more than ever before, accentuating the need to review and monitor existing standards and educate employees to create a culture internally that is ethical and corruption-free, and which will include reviews of all entertainment and meals for foreign business officials, as well as facilitating payments. Training and education must be provided at all levels — from the board down to the third-party intermediaries such as consultants, agents, vendors, suppliers, distributors, and joint-venture partners - so that everyone understands what constitutes FCPA violations.

Since 2005, the Department of Justice has been brought more prosecutions than in the almost 30 years between the enactment of FCPA in 1977 and 2005. On Jan. 26, 2011, Assistant Attorney General Lanny Breuer stated, "In the Criminal Division, we have dramatically increased our enforcement of the Foreign Corrupt Practices Act in recent years. That statute, which was once seen as slumbering, is now very much alive and well. In fact, over the last two years, we have charged more than 50 individuals with FCPA-related offenses and collected nearly \$2 billion in FCPA-related fines and penalties — by far the most people charged and penalties imposed in any similar period."

Global organizations are currently seeking guidance regarding what constitutes a best practices FCPA program. Chief compliance officers and general counsels have discovered that each resolved FCPA settlement agreement imposed in the past several years contained compliance requirements that represent what constitutes a best practice FCPA compliance program.



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The Department of Justice advised that the suggestions contained in each FCPA settlement agreement should be incorporated into an organization's compliance program and should include, at a minimum, the following points:

- Promulgation of concisely articulated zero tolerance policies against violations of the FCPA and applicable foreign law including the UK Bribery Act.
- Strong leadership exhibited by senior management in providing visible support and commitment to its corporate policy against anti-corruption laws.
- The organization should develop standards and procedures, applicable to company and its parties, which pertain to gifts, entertainment, travel, political and charitable donations, facilitating payments, and solicitation and extortion.
- Organizations will conduct risk assessments in markets where it has customers who are foreign governments and also take into account location, interaction with foreign officials, industry sectors, joint ventures, licensing and permits, degree of governmental oversight, and significance of goods and personnel clearing through customs and immigration.
- Annual review and updating of the standards and procedures of the compliance program.
- The organization should designate one or more corporate executives to implement and oversee the policies, standards, and procedures of the program.
- Ensure that financial and accounting procedures are designed to produce accurate books and records, and will enjoin foreign bribery or its concealment.
- FCPA training should include training for all directors and officers, and where appropriate, employees, agents, and business partners, to ensure communication of the policies and procedures; annual certifications of compliance with the training requirements should be obtained.
- Implement a process for providing guidance to agents on anti-corruption policy violations and conduct due diligence on all agents and business partners in conjunction with the Department of Justice's Opinion Release 08-02.
- Organization should have appropriate disciplinary procedures to address violations of the anti-corruption laws and the organization's anti-corruption policies and procedures.
- Organizations should include standard anti-corruption compliance provisions in contractual agreements with third parties; and
- Conduct periodic reviews and testing of anti-corruption policies and procedures.

It is important to keep in mind that the purpose of designing and implementing an effective FCPA compliance program is not to pacify the regulators. It is one of the most critical ways for your organization to promote the values of your organization and operational excellence. Your compliance program must be a significant part of the overall business strategy and permeate the entire organization.

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