

A photograph showing a brown leather briefcase with a metal latch, resting on a surface next to a stack of papers and a pen. The text "JONES DAY WHITE PAPER" is overlaid on the image.

JONES DAY WHITE PAPER

THE ELEMENTS OF AN EFFECTIVE FOREIGN CORRUPT PRACTICES ACT COMPLIANCE PROGRAM

Corporations doing business overseas have a legal obligation not to make corrupt payments to foreign officials. For those companies with connections to the United States, the Foreign Corrupt Practices Act ("FCPA") imposes criminal and civil penalties that can include multimillion-dollar fines and prison terms. Likewise, legislation prohibiting foreign bribery has been or will be enacted in the 36 countries that have signed the Organisation for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Signatories include all member countries of the European Union, plus Australia, Brazil, Canada, Chile, Japan, Korea, Mexico, New Zealand, Turkey, and the United States.

An FCPA compliance program can be a tangible means of fulfilling a corporation's obligation to prevent unlawful corrupt payments in its overseas operations.¹ Such evidence of good business ethics can help a corporation avoid prosecution or reduce the penalty imposed. Indeed, the United States Department of Justice and the Securities and Exchange Commission have expressly identified the existence of a corporate compliance program as a factor to be considered when deciding whether to bring charges against a company. Similarly, federal sentencing guidelines in the United States provide for the imposition of lower fines on companies that have effective compliance programs in place.

1. Notwithstanding the passage of laws outside the United States prohibiting foreign corrupt payments, enforcement under the FCPA continues to be the primary risk faced by multinational corporations. Accordingly, compliance programs designed to address foreign bribery continue to focus on the FCPA, even though compliance with other countries' laws also must be considered.

An effective FCPA compliance program provides for the education of relevant employees; the institution of due diligence procedures in connection with pertinent business functions, such as the hiring of consultants; an emphasis on accurate financial recordkeeping; the creation of a mechanism for reporting violations; and the monitoring of high-risk activity in which corrupt payments might be made. In the event that the program is unsuccessful in preventing a corrupt payment, the existence of adequate, clear documentation will permit the corporation to demonstrate its best efforts to comply with the law.

BASELINE RISK ASSESSMENT

The first step in creating an FCPA compliance program for a particular organization is to assess the risk of noncompliance. In a business with limited overseas operations, this process may consist of nothing more than a deliberate and thoughtful consideration of the relevant issues by knowledgeable individuals in management. For a large multinational corporation, by contrast, the risk-assessment process may involve a wide-ranging internal review in which counsel collects documents, analyzes data, and interviews employees in order to obtain the relevant facts. Regardless of the scope of the risk assessment, the goal should be to identify:

- All aspects of the business that operate overseas or otherwise have dealings with foreign officials.
- All employees and agents of the organization who interact with foreign officials, such as sales representatives and government relations personnel.
- Foreign consultants and business partners with whom the organization does business, including outside counsel.
- Circumstances that may put the organization at risk of an FCPA violation, with a special emphasis on business dealings with foreign officials and instances in which foreign government approval must be obtained.
- The nature of the organization's foreign business operations and the extent to which they are subject to government control or do business directly with government entities, including state-controlled businesses.
- Existing compliance functions used by the organization to ensure that foreign corrupt payments are not made and that accounting records accurately reflect all transactions.

- Any instances of past or ongoing noncompliance with the FCPA.
- Examples of codes of ethics, compliance policies, and best practices used by other comparable businesses in the industry.

On a broader scale, the assessment should seek to understand the culture of the organization, with particular focus on the emphasis given to ethical and legal business practices.

Once this information has been gathered and analyzed, management and counsel can together determine which aspects of an FCPA compliance program are appropriate for that organization. Obviously, an organization with extensive dealings involving foreign officials will need a more robust program than an organization with comparatively few overseas operations, and vice versa. In making this judgment regarding the scope of the compliance program, management should keep in mind the two purposes of the exercise: (1) preventing and detecting violations of the law and (2) demonstrating a commitment to lawful and ethical business practices. Accordingly, the organization has a vested interest in creating a compliance program that is neither too burdensome nor too lean. A program that imposes unnecessary procedures risks being neglected in its implementation, while a program that is too sparse will not demonstrate to enforcement authorities a suitable commitment to compliance.

ASSIGNMENT OF MANAGERIAL AND GOVERNANCE RESPONSIBILITY

No compliance program will be effective without buy-in at the highest level of corporate governance. In designing an FCPA compliance program, therefore, an organization must place responsibility for its design, implementation and oversight in the hands of senior management and, as appropriate, its board or other governing body. Many organizations accomplish this goal by naming a compliance officer with a direct reporting relationship to the board's audit committee. Some organizations place the compliance function in the legal department, while others (particularly those in heavily regulated industries) create a separate corporate compliance department. Once again, the ideal structure depends on the organization's individual characteristics.

WRITTEN COMPONENTS OF AN FCPA COMPLIANCE PROGRAM

The precise elements of a corporation's FCPA compliance program will depend on many factors, including the locations where the company does business, the nature of its industry, and the peculiarities of its corporate and management structure. In addition to the FCPA, the local laws of the countries in which the company does business must be considered in drafting the program. For example, a U.S. company with significant operations in the United Kingdom would be well advised to consider the implications of that country's Anti-terrorism, Crime and Security Act 2001 when establishing its compliance program. Similarly, a company with operations in China should take into account that country's laws governing commercial bribery, which proscribe conduct that may not be prohibited by the FCPA. And a company doing business in France may need to account for laws that discourage anonymous reporting of corporate misconduct.

Despite these company-specific factors, the documentation for FCPA compliance programs shares many common elements. Thus, an FCPA compliance program typically will include the following.

Corporate Policy Prohibiting Foreign Corrupt Payments. The company's policy statement is the public assertion of its commitment to do business abroad without making corrupt payments. To the extent that a company already has a code of ethics or code of conduct, this policy might be incorporated into that document. The company policy should describe briefly the applicable law and set forth the manner in which the company intends to comply with it. If applicable, the policy also should state how the company will control and structure its relationships with foreign representatives, consultants, and business partners. The policy should be drafted in clear and unambiguous language that can be understood by all readers.

Internal Communications and Educational Material. A critical function of an effective FCPA compliance program is conveying to employees and agents an appropriate level of knowledge regarding the applicable law. While the company's policy will clearly state that no corrupt payments may be made, additional information and detail will need to be

communicated to individual employees and agents to permit them to comply with that policy. Accordingly, the implementation of an FCPA compliance program involves the drafting of educational material, such as:

- Summary of the FCPA.
- Frequently asked questions and answers about the FCPA.
- Presentations.

This material often will be presented in a lecture format. Meetings of executives, sales representatives or other overseas employees present a good opportunity for such training, as it can be followed by discussion and questions. Regardless of the way it is communicated, however, a well-crafted, documented training program ensures that important topics are covered while also creating a record to establish later the company's training efforts. The educational material also can include a discussion of the importance of compliance to the company's culture, recent enforcement actions against noncompliant companies, and practical advice on avoiding FCPA exposure. Some corporations have used videos and online education to communicate these messages.

Procedures and Guidance. Compliance with the FCPA ultimately requires a company's employees to know how to handle real-world situations. To accomplish that goal, a company can promulgate practical guides setting forth the conduct that it expects from its employees in certain circumstances, including:

Guide to Permissible Foreign Payments. The FCPA provides for limited circumstances in which payments may be made to foreign officials. This guidance sets forth the circumstances under which employees may pay for travel, entertainment, and gifts.

Guide for Dealing with Minor Foreign Officials. The FCPA permits minor payments to foreign officials for the purpose of expediting or securing "routine government action." This is the so-called grease-payment exception to the law's anti-bribery provisions. To the extent that a company will allow such payments to be made, a mandatory procedure should be established to govern the nature of permitted payments, approval by supervisory personnel, and accurate record-keeping for the expenditure.

Procedures and Guide to Dealing with Foreign Sales Representatives and Partners. Because the FCPA prohibits corrupt payments by third parties when made on behalf of a covered person, employees must have clear guidance when engaging a foreign representative. This guidance, therefore, describes in detail the degree to which the company will be held responsible for the actions of its foreign representatives and outlines the procedures to be undertaken prior to retaining such a representative. The procedures can include completing a due diligence checklist, obtaining opinions of counsel, incorporating FCPA provisions in relevant contracts, and identifying “red flags” that might signal inappropriate conduct by a foreign representative.

Procedures for Contributing to Foreign Charities. Recent enforcement actions have revealed the risk that foreign charitable donations will be used as a cover for corrupt payments. The company may, therefore, consider promulgating a guidance that describes the circumstances under which a contribution to a foreign charity or for a foreign charitable purpose will be permitted, as well as the due diligence and approval that must precede such a donation.

Procedures for Investigating Alleged Violations. The hallmark of a vigorous compliance program is the degree to which it responds appropriately to alleged violations. In establishing the steps to be taken in those circumstances, the program should identify the individuals responsible for overseeing the investigation (usually in the legal department), the nature of the report to be prepared as a result of the investigation, and the degree to which the report will be provided to senior management and the organization's governing body.

Regular FCPA Compliance Review. Monitoring the effectiveness of a company's efforts is a critical component of any compliance program. These procedures, therefore, detail the steps to be taken in conducting a regular FCPA compliance review. The steps that the compliance officer or other designated individual would be directed to take could include: (a) reviewing all FCPA policies and procedures; (b) maintaining a list of individuals in sensitive positions to whom the FCPA is likely to be of particular relevance; (c) interviewing and obtaining written certification from individuals in sensitive positions; (d) ensuring that individuals in sensitive positions do not have a history of violating or disregarding the

law or company policy; (e) reviewing the company's compliance with procedures that govern relevant business transactions; and (f) assessing the sufficiency of employee training.

Written Certification by Relevant Employees and Foreign Representatives. Employees who are identified as likely to face FCPA-related issues can be required to certify in writing that they have been advised of the company's policies regarding foreign corrupt payments and that they will abide by those policies. Likewise, foreign agents, representatives, consultants, and other business partners may be asked to provide a similar written certification. Company policy should state whether these certifications will be required annually or only at the initiation of a relationship. In circumstances where the risk of corrupt practices is extremely high, corporate policy might also require a personal interview by counsel in addition to this written certification. Naturally, documentation of the interview should be maintained along with the completed certification.

Due Diligence Checklists. The company's procedures, as described above, should require employees to undertake a due diligence process before entering a relationship with either a foreign representative or a foreign business partner. In order to formalize the process and to ensure that all relevant information is considered, the company can promulgate a checklist to be completed as part of the due diligence. Because the relevant information to be obtained from a representative differs from the due diligence to be undertaken when entering a joint venture or other business transaction, two checklists may be appropriate. Of course, corporate policy should make clear that large corporate transactions — for example, the acquisition of a company with foreign operations — will require a separate due diligence process that exceeds a simple checklist.

Sample FCPA Contract Provisions. When the company enters a relationship with a foreign representative or business partner, contractual provisions may be appropriate to acknowledge the applicability of the FCPA and ensure that all parties will abide by the law. In promulgating an FCPA compliance program, a company can include sample contracts or contractual language, provided employees are given appropriate direction regarding when to involve company lawyers in negotiating such agreements.

Reporting Mechanism for Violations. As a practical matter and, often, as a matter of law, employees must be given adequate opportunity to report violations and to do so anonymously if they wish. For companies subject to the Sarbanes-Oxley Act of 2002, this anonymous reporting requirement also must be extended to third parties. In order to facilitate such reporting, corporations often establish an anonymous telephone hotline or use an internet-based mechanism for anonymous communications. Organizations should note, however, that such anonymous reporting could create legal troubles in jurisdictions outside the United States. In France, for example, the law strongly discourages anonymous whistleblowing, relying instead on assurances of confidentiality. This particular conflict was resolved in part in November 2005 when the French Data Protection Agency issued guidelines applicable to corporations legally required to facilitate anonymous reporting under U.S. law.

Helpline. Employees who are expected to implement the company's FCPA compliance program will need guidance from individuals knowledgeable in the law and the organization's policies. Accordingly, an FCPA compliance program should have a mechanism in place to put such employees in contact with attorneys in the legal department or others capable of providing well-considered and accurate advice on a timely basis. Often this requires little more than identifying the contact person's telephone extension in educational and policy documents.

DOCUMENTING THE COMPANY'S FCPA COMPLIANCE EFFORTS

All compliance efforts should be documented carefully in order to permit the company to prove later that it implemented a rigorous program in practice, rather than just on paper. To that end, the corporation should maintain comprehensive records of educational materials, attendance at training sessions, certifications of compliance, due diligence efforts, hotline calls, and regular compliance reviews. Any FCPA internal investigations also should be documented and preserved.

DISCIPLINARY STANDARDS AND PROCEDURES

A compliance program will not be deemed effective unless violations are consistently and appropriately punished. Therefore, when implementing an FCPA compliance program, management must make certain that company policy clearly identifies the consequences to employees and agents – including the most senior officers in the organization – if they violate the law or company policy. Just as important, the organization must ensure that these disciplinary standards are actually applied, so that enforcement authorities cannot later contend that violations were tolerated or even encouraged.

CONCLUSION

The documentation described above is a broad outline of what an FCPA compliance program should include. Some organizations, for example, may require specialized policies and procedures beyond the scope of this general discussion. Regardless, all business organizations with overseas operations should implement and follow a written compliance program that explicitly delineates the procedures that it will undertake to ensure compliance with the FCPA and other laws prohibiting foreign corrupt practices.

ADDITIONAL INFORMATION REGARDING THE FCPA

Jones Day *White Papers* discussing the FCPA and recent developments under the law include:

- “2006 Update on Transnational Antibribery Laws: The United States Foreign Corrupt Practices Act, International Conventions, and Recent Enforcement Actions”
- “The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations.”

Both of these documents are available on the Jones Day web site at www.jonesday.com.

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