

Published By

ABA Criminal Justice Section



ANTI-CORRUPTION TASK FORCE

**COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT:
A PRACTICAL PRIMER**

January 2012

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ACKNOWLEDGEMENTS

We would like to thank the generous support of the University of Chicago Law School Corporate Lab, from which this report originated. The Corporate Lab team members for the Spring Quarter—Catherine Kent, Daniel Render, and Michael Williamson—provided invaluable research and writing during the early stages of this report. The Corporate Lab Student Administrators—particularly Anthony Sexton—also provided useful comments and feedback, which were of tremendous value during the review process.

We would also like to thank the countless individuals who provided critical feedback and institutional support, effectively guiding the development of this report. These individuals include: Bob Beymer and Herb Wilgis of Microsoft; Stephen Anthony of Covington and Burling LLP; and William R. Hogan, Jr.

And last but certainly not least, we must acknowledge the tremendous support of Andrew S. Boutros and T. Markus Funk, the Co-Chairs of the American Bar Association, Criminal Justice Section, Global Anti-Corruption Task Force, and the members of the Task Force who provided extensive comments on several drafts of the report. We are deeply indebted to the Task Force for its collective support.

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EXECUTIVE SUMMARY

Purpose: The purpose of this report is to provide: (1) an overview of the Foreign Corrupt Practices Act (the “FCPA”), (2) an analysis of how the federal government—particularly the Department of Justice (the “DOJ”)—enforces the FCPA, and (3) a framework for developing effective compliance programs.

Summary: Enacted in 1977, the FCPA prohibits corrupt payments to foreign officials for the purposes of procuring or maintaining business. Today, adhering to the mandates of the FCPA is one of the most prominent issues in corporate compliance. A company that fails to take FCPA compliance seriously exposes itself to substantial risk. The ramifications of a DOJ investigation on an organization can be considerable, settlements can be costly, and an indictment can be crippling.

The FCPA has two constituent parts: (1) the recordkeeping and internal controls provisions, primarily enforced by the Securities and Exchange Commission (the “SEC”) and (2) the anti-bribery provisions, enforced by the DOJ.¹ This report focuses on compliance with the anti-bribery provisions, because they typically are the impetus for investigations and harsh penalties, which include civil fines, criminal sanctions, the loss of government contracts, and the loss of future contracts through disbarment.

To successfully prosecute an anti-bribery violation, the government generally must prove that an entity either offered or gave something of value to a foreign official for the purpose of favorably influencing such an official. The FCPA permits an exception for facilitating payments (i.e., those payments made to expedite ordinary and common actions of a foreign official, and not those payments used to procure or maintain business). It also provides two affirmative defenses. First, defendants can prove that their payments or promises were lawful under the written laws of the relevant foreign countries. Second, defendants can prove that their payments or promises were reasonable and bona fide expenditures related to (1) the promotion, demonstration, or explanation of products or services or (2) the execution or performance of a contract with a foreign government. In accordance with the FCPA’s purpose of preventing corruption, both of these defenses are construed narrowly.

Companies derive three distinct benefits by establishing effective FCPA compliance programs. First, the DOJ explicitly places independent value on whether companies have effective compliance programs in their decision whether to pursue charges of FCPA violations. Second, effective compliance programs actually prevent future FCPA violations, thus limiting companies’ exposure to liability. Third, effective compliance programs assist companies in mitigating the harm resulting from any violations that are not prevented.

Well-functioning compliance programs create these benefits by educating, monitoring, and regulating employees and the workplace. But complying with the FCPA proves to be a

¹ However, recent enforcement trends have demonstrated that the SEC and DOJ increasingly enforce all provisions of the FCPA equally.

formidable challenge for most companies, especially those that conduct extensive activities abroad. The available guidance from the government on how to comply with the FCPA's requirements and prohibitions is extremely limited. Moreover, the guidance that the government has made available is vague, disjointed, and sparse.

The three main sources that the DOJ utilizes to interpret the language of the FCPA are: (1) the United States Attorney's guidelines, (2) the United States Federal Sentencing Guidelines, and (3) the Organisation for Economic Co-operation and Development's (the "OECD") Good Practice Guidance. These sources are instrumental for understanding both how the DOJ interprets the FCPA and how it views compliance programs.

Program Recommendations and Considerations: The best source for determining how the DOJ actually assesses compliance policies is the agency's use of the deferred and non-prosecution agreements. There appear to be twelve elements commonly required by such agreements. At a minimum, these elements must be satisfied for a compliance program to be effective:

1. **Clearly Written Policy:** A clearly articulated, written, and visible corporate policy against FCPA violations.
2. **Standards Governing Certain Expenses, Payments:** Standards and policies that apply to all officers, directors, employees and third parties business associates governing:
 - (a) Gifts;
 - (b) Hospitality, entertainment, and expenses;
 - (c) Customer travel;
 - (d) Political contributions;
 - (e) Charitable donations and sponsorships;
 - (f) Facilitation payments; and
 - (g) Solicitation and extortion.
3. **Risk Assessment:** Risk assessment addressing the foreign bribery risks confronting the individual circumstances of the company including:
 - (a) Its geographical organization;
 - (b) Anticipated interactions with governmental officials;
 - (c) Industrial sector of operation;
 - (d) Involvement in joint-venture arrangements;
 - (e) Importance of licenses and permits in the company's operations;
 - (f) Degree of governmental oversight and inspection; and
 - (g) Volume and importance of goods and personnel clearing through customs and immigration.
4. **Annual Review of Policies:** Annual review and updating of compliance policies taking into account relevant developments in the field and evolving international standards.

5. **Senior Executive Responsibility:** Insistence on senior executive responsibility for oversight of the compliance program, with direct reporting obligations to independent monitoring bodies.
6. **Financial and Accounting Procedures:** Institute financial and accounting procedures “reasonably designed” to prevent books, records, and accounts to be used for the purpose of foreign bribery or concealing bribery.
7. **Training and Certifications:** Implement mechanisms designed to ensure effective communication of compliance program to all directors, officers, employees, and third-party transaction partners, including:
 - (a) Periodic training; and
 - (b) Annual certifications procedures, certifying compliance with the stated training requirements.
8. **Voluntary Internal Reporting:** Encourage voluntarily internal reporting by providing for:
 - (a) Guidance and advice on complying with the compliance program;
 - (b) Anonymous reporting, including protection for those who report breaches occurring within the company; and
 - (c) Appropriate, and discrete, response to requests.
9. **Disciplinary Procedures:** Institute appropriate disciplinary procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm caused, and steps are taken to prevent further similar misconduct, potentially including making modifications to the compliance program where necessary.
10. **Due Diligence:** Require appropriate due diligence pertaining to retention and oversight of all agents/business partners including:
 - (a) Documented risk-based due diligence pertaining both the hiring and regular oversight of agents/business partners;
 - (b) Informing agents/business partners that the company is committed to abiding by the law and its policies against bribery; and
 - (c) Seeking reciprocal commitment from their agents business partners.
11. **Contractual Provisions:** Include standard provisions in contracts with agents/business partners reasonably designed to prevent violations of anti-corruption laws including:
 - (a) Anti-corruption representations;
 - (b) Rights to conduct audits of books and records of agent/business partners; and
 - (c) Rights to terminate an agent/business partner if they breach any anti-corruption laws.
12. **Periodic Testing of Compliance Program:** Periodic testing of the compliance program to evaluate its effectiveness.

The DOJ has not provided a comprehensive guideline, containing specific ways of accomplishing these objectives; it has only provided general guidance. Our analysis of a wide variety of FCPA materials yield the following concrete suggestions for designing and monitoring an FCPA compliance program:

- (1) Conduct a risk-based assessment of the business;
- (2) Create a comprehensive and effective FCPA code of conduct;
- (3) Devise methods of policy communication and implementing these policies;
- (4) Assess the compliance infrastructure; and
- (5) Perform regular audits to gauge FCPA compliance.

Conclusion: This report demonstrates the importance of FCPA compliance programs, presents a framework for understanding and designing such programs, and provides metrics that aim to improve the efficacy of compliance programs. Designing an effective compliance program is necessarily a fact-specific, case-by-case exercise. However, this report's suggestions place companies on the right path – toward full FCPA compliance.

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I. INTRODUCTION

The Foreign Corrupt Practices Act² (the “FCPA”) has quickly become one of the most prominent issues in contemporary corporate compliance. A company that fails to take FCPA compliance seriously exposes itself to enormous risk. The ramifications of a Department of Justice (the “DOJ” or the “Department”) investigation on an organization can be considerable, settlements can be costly, and an indictment can be crippling. The criminal and civil fines levied for violating the FCPA have been severe, and the fines imposed on organizations have skyrocketed in recent times. In the fiscal year 2010, the DOJ’s Criminal Division secured \$1 billion in judgments and settlements through enforcing the FCPA—the largest amount in the history of FCPA enforcement.³ What was once a largely unenforced statute has become a powerful weapon in the DOJ’s arsenal.

Accordingly, companies and their legal counsel must institute robust, systematic compliance programs to attempt to avoid violating the FCPA. However, instituting effective compliance programs is a challenging task, because government guidance for how companies may avoid liability is limited, and when it is available it is often vague and disjointed.

The purpose of this report is threefold: first, to present a basic overview of the FCPA; second, to provide an analysis of how the DOJ enforces the FCPA; and third, to synthesize a framework, based on this analysis, for developing effective compliance programs.

This report begins by explaining the basic structure and function of the FCPA. To provide the context necessary to understand the relevance of compliance programs, it outlines the FCPA’s statutory requirements and indicates which government agencies enforce the various provisions. This report focuses on the enforcement efforts of the DOJ, because it is the agency that has recently brought some of the most substantial FCPA actions and has provided the most extensive compliance guidance.

Next, the report presents the essential components of an FCPA compliance program. It does so by presenting official government policy and analyzing various important DOJ actions.

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (1999)).

³ Department of Justice, *Department of Justice Secures More than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division*, No. 11-085 (Jan. 21, 2011), available at <http://www.justice.gov/opa/pr/2011/January/11-crm-085.html> (the total amount of judgments and settlements collected as a result of Criminal Division actions was over \$2 billion; the amount collected under FCPA actions was approximately \$1 billion).

Finally, the report discusses ways companies can assess the effectiveness of their FCPA compliance programs. This includes providing metrics that companies should consider using to judge their own program's efficacy. The report concludes by recommending some best practices for general areas of risk that can be addressed by effective compliance programs.

II. WHAT IS THE FCPA?

In 1976, the Securities and Exchange Commission (the "SEC") issued the groundbreaking "Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices."⁴ The report characterized the problem of companies making questionable and illegal corporate payments as "serious and widespread,"⁵ stating that such payments were "far more widespread than anyone originally anticipated."⁶ It indicated that over 400 United States companies were making substantial illegal political contributions and payments to foreign officials for the purpose of procuring business. The report recommended that Congress enact legislation to deal with this problem and restore the integrity of U.S. business.

In response to the SEC's report, Congress enacted the Foreign Corrupt Practices Act of 1977.⁷ The FCPA consists of two types of provisions: (1) anti-bribery provisions, and (2) recordkeeping and internal controls provisions. The FCPA is enforced by two different government agencies: the SEC and the DOJ. The SEC, with respect to FCPA violations, primarily investigates and brings enforcement actions against publicly held companies.⁸ The SEC has the authority to enforce both the anti-bribery and the recordkeeping and internal controls provisions by bringing civil charges against companies.

The DOJ has jurisdiction over both publicly and privately held companies. Generally, the DOJ's enforcement power is more expansive than the SEC's. Unlike the SEC, the DOJ can

⁴ See Seymour J. Rubin, *United States: Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices*, 15 Int. Leg. Materials 618 (May 1976).

⁵ *Id.* at 622.

⁶ *Id.* at 633.

⁷ Foreign Corrupt Practices Act of 1977, *supra*, note 2.

⁸ Although the SEC generally only prosecutes publicly held companies, it also has jurisdiction over "issuers," a category of entities that includes, but is not limited to publicly held companies. Moreover, in the *Panalpina* matter, the SEC prosecuted a foreign, non-issuer based on its conduct on behalf of, or in association with, U.S. issuers. See Deferred Prosecution Agreement, *United States v. Panalpina World Transport (Holding) Ltd.*, No. 10-CR-769 (S.D.T.X. Nov. 4, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-dpa.pdf>; Plea Agreement, *United States v. Panalpina, Inc.*, No 10-CR-765 (S.D.T.X. Oct. 26, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-inc/11-04-10panalpina-plea.pdf>.

enforce both the recordkeeping and internal control provisions and the anti-bribery provisions by bringing criminal charges. That said, the DOJ has traditionally enforced the anti-bribery provisions, although it increasingly brings charges based solely on recordkeeping and internal control provisions. For systematic and egregious violations, the DOJ will sometimes bring charges of knowing circumvention of the recordkeeping and internal control requirements. But more often it uses violations of the recordkeeping and internal control provisions as evidence in support of allegations of anti-bribery violations. This report will principally focus on the DOJ, because of its primary role in the enforcement of the FCPA provisions.⁹

A. The Recordkeeping and Internal Controls Provisions

The FCPA has been characterized as “the fountainhead of modern internal control regulation.”¹⁰ The FCPA’s Recordkeeping and Internal Controls Provisions apply only to issuers—companies with securities registered with the SEC and companies who are required to file reports to the SEC—*regardless* of whether they operate outside of the United States. Indeed, most cases brought under the recordkeeping and internal controls provisions do not involve bribery of foreign officials. Instead, they “frequently involve various other schemes by which company employees or directors seek to move money about ‘under the radar’ of the investors and/or the SEC.”¹¹

Generally speaking, both the recordkeeping and the internal controls provisions “require companies to follow generally accepted accounting principles . . . and to take steps to make sure that what is on paper reflects reality.”¹² The recordkeeping provisions require issuers to “make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.”¹³ This obligation is quite extensive, because “records” is defined broadly to include “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type.”¹⁴

⁹ See generally Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 952–53 (2009) (“Through [the DOJ and the United States Attorneys’ Offices’] unequaled power to indict corporate entities, federal prosecutors have grasped the ability to define and impose notions of what constitutes effective “corporate compliance.” As a result, compliance regulation is quasi-adjudicative in nature, and the debates that surround it are both legalistic and adversarial.”) (footnotes omitted).

¹⁰ Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. Corp. L. 267, 276 (2004).

¹¹ Lillian V. Blageff, *Foreign Corrupt Practices Reporter*, 1 Foreign Corrupt Prac. Act Rep. § 1:20 (2011).

¹² *Id.* at §1:21.

¹³ 15 U.S.C. § 78m(b)(2)(A).

¹⁴ 15 U.S.C. § 78c(a)(37).

The internal controls provisions mandate that companies comply with several procedural requirements. These provisions require issuers to:

devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.¹⁵

The government considers these factors holistically. The test for compliance with the internal controls provisions is "whether a system, taken as a whole, reasonably meets the statute's specified objectives."¹⁶

Any violation of either the recordkeeping or the internal controls provisions will give rise to civil liability,¹⁷ as long as it is not an inadvertent mistake.¹⁸ But for a company (or an individual through an aiding and abetting theory) to be held criminally liable, it must violate these provisions knowingly.¹⁹

B. The Anti-Bribery Provisions

The FCPA's anti-bribery provisions apply more broadly than the recordkeeping and internal controls provisions. The anti-bribery provisions apply not only to issuers,²⁰ but also to "domestic concerns"²¹ and foreign nationals or businesses,²² or agents thereof. Domestic concerns include any citizen, national or resident of the United States and any corporation that has its principle place of business in the United States, or is organized under the laws of any state.²³ Foreign nationals and businesses are included under the residual catchall anti-bribery

¹⁵ 15 U.S.C. § 78m(b)(2)(B).

¹⁶ See Harold Williams, Chairman, Securities and Exchange Commission, *Address to the SEC Developments Conference of AICPA* (Jan. 13, 1981), Exchange Act Release No. 17,500 (Jan. 29, 1981).

¹⁷ 15 U.S.C. §§ 78m(b)(4)-(5).

¹⁸ See Williams, *supra*, note 16.

¹⁹ 15 U.S.C. §§ 78m(b)(4)-(5).

²⁰ *Id.* at § 78dd-1(a)(3).

²¹ *Id.* at § 78dd-2(a)(3).

²² *Id.* at § 78dd-3(a)(3).

²³ *Id.* at § 78dd-2(h).

provision, which applies to “any person” that is not an issuer or a domestic concern that commits acts in violation of the provision “while in the territory of the United States.”²⁴ Notably, recipients of bribes are generally not held liable under the FCPA, even as conspirators.²⁵

There are five elements required to prove a violation of the anti-bribery provisions.

- First, an entity—an issuer, a domestic concern, or a foreign national or business acting in the United States—must act in furtherance of either (1) an offer, a payment, a promise to pay or an authorization to pay any money, or (2) an offer, gift, promise to give, or authorization of giving anything of value.²⁶
- Second, the offer, payment, promise, or authorization must be given to (1) any foreign political party or party official, (2) any candidate for foreign political office, or (3) any foreign official—defined as any officer or employee of a foreign government or public international organization acting on behalf of that government or organization²⁷—or to (4) any person that the entity knows will pass the payment offer, promise, or authorization on to any of the above.²⁸
- Third, the act must be (1) made by an issuer or a domestic concern and make use of any means or instrumentality of interstate commerce; (2) the act must be made by a national of or an entity organized under the law of the United States outside of the United States; or (3) the act must be made by any other person—a foreign national or business—inside the United States, but not necessarily using a means or instrumentality of interstate commerce.²⁹
- Fourth, the entity must act for the corrupt purpose of (1) influencing an official act or decision of that person, (2) inducing that person to do or omit doing any act in violation of his or her lawful duty, (3) securing an improper advantage, or (4) inducing that person to use his influence with a foreign government to affect or influence any government act or decision.³⁰
- Fifth, the act must be to assist the company in obtaining, retaining, or directing business.³¹

²⁴ *Id.* at § 78dd-3(a).

²⁵ See *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991).

²⁶ 15 U.S.C. §§ 78dd-1(a), dd-2(a), dd-3(a).

²⁷ *Id.* at § 78dd-1(f)(1)(A).

²⁸ *Id.* at §§ 78dd-1(a), -2(a), -3(a).

²⁹ *Id.* at §§ 78dd-1(a), -1(i), -2(a), -3(a).

³⁰ *Id.* at §§ 78dd-1(a), -2(a), -3(a).

³¹ *Id.* at §§ 78dd-1(a), -2(a), -3(a).

Companies should be aware that the DOJ has the ability to bring charges of conspiracy to violate the anti-bribery provisions of the FCPA under the general conspiracy statute.³² This is important because it is considerably easier for a prosecutor to prove conspiracy to commit an anti-bribery violation than it is to prove the underlying anti-bribery violation itself. A prosecutor only needs to prove (1) an agreement by two or more persons (2) to commit an FCPA violation (3) with knowledge of the conspiracy and by actually participating in the conspiracy, as long as (4) at least one co-conspirator commits one overt act in furtherance of the conspiracy.³³

C. Exceptions and Affirmative Defenses

The FCPA provides one exception and two affirmative defenses for the anti-bribery provisions

1. Facilitating or Expediting Payments

The FCPA's only exception allows for "facilitating or expediting payment[s]" to foreign officials for the purpose of "expedit[ing] or secur[ing] the performance of a routine governmental action."³⁴ This exception is important because it exempts from FCPA liability certain types of payments that are useful (and occasionally necessary) for doing business. Knowing which payments qualify as facilitating or expediting payments and are exempted under the FCPA allows companies to comply with the FCPA's ethical mandates while still running their businesses as efficiently as possible.³⁵ Unfortunately, the line distinguishing anti-bribery violations from exempted facilitating or expediting payments is blurry at best.³⁶

Courts have characterized expediting and facilitating payments as "'essentially ministerial' actions that 'merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.'"³⁷ These are not payments that may result in a

³² See 18 U.S.C. § 371.

³³ See *id.*

³⁴ 15 U.S.C. §§ 77dd-1(b), -2(b), -3(b).

³⁵ Even though facilitation or expediting payments are permitted under the FCPA, these payments are discouraged by the OECD Working Group on Bribery and prohibited outright under the U.K. Bribery Act, most other transnational bribery laws, and virtually all countries' local bribery laws. Therefore, this exception is not likely to be significant to many multinational corporations.

³⁶ The line is, in fact, so blurry that many FCPA policies don't endeavor to mention facilitating payments.

³⁷ *United States v. Kay*, 359 F.3d 738, 761 (5th Cir 2004), citing H.R. Rep. No. 640, 95th Cong., 1st Sess. 8 (1977).

decision to award new business,³⁸ but instead are only decisions made to expedite actions that are “ordinarily and commonly performed by a foreign official.”³⁹ These payments may include, but are not limited to: obtaining permits, licenses, or other official documents to do business in a foreign country; processing governmental papers; providing police protection, mail services, or scheduling inspections; and providing utilities services, cargo services, or protecting perishable commodities.⁴⁰ Often, but not always, these payments are *de minimis*.

A layperson not fully educated on the intricacies of the FCPA may be under the misimpression that the term “facilitating payments” includes payments that it does not. For example, a layperson may reasonably believe that offering to gratuitously pay for the construction of a country’s road infrastructure in exchange for a lucrative but related contract constitutes a facilitating payment. However, such an offer almost certainly constitutes a violation of the anti-bribery provisions. Thus, it is safer to characterize these payments as expediting payments, rather than facilitating payments.

It may be hard for a company to determine which payments qualify as expediting or facilitating payments. Consequently, companies should take special care to ensure that their compliance programs do not mechanistically approve expediting payments. Instead, programs should recognize that whether payments qualify as expediting payments is likely to be highly fact dependent. Additionally, in some cases, payments initially intended to be expediting payments may evolve into prohibited payments over time. Individuals making payments approaching the border of acceptability should be required to provide additional documentation of the transaction and seek legal advice regarding the specific transaction. Companies should also consider requiring that all facilitation payments be pre-authorized, if practicable.

Companies should be aware that, although the FCPA allows facilitating and expediting payments, the global trend in anti-corruption regulation is to ban such payments.⁴¹ The OECD made this apparent in 2009, when it recommended that the exemption of facilitation payments from anti-bribery laws be eliminated.⁴² Companies should be aware of international

³⁸ 15 U.S.C. § 77d-1(f)(3)(B).

³⁹ See *id.* at §§ 77dd-1(f)(A), -2(h)(4)(A), -3(f)(4)(A).

⁴⁰ *Id.* at § 77d-1(f)(3)(A).

⁴¹ See Robert W. Tarun, *The Foreign Corrupt Practice Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 16 (ABA 2010) (“While the FCPA may exempt facilitating payments, many foreign countries do not . . .”).

⁴² See *Responses to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments* 6 (Dec. 10, 2009), available at <http://www.oecd.org/dataoecd/7/46/40498398.pdf>. The OECD recommended the elimination of the exemption for facilitating payments for three reasons. First, facilitation payments have

developments in anti-corruption law because it is becoming increasingly important for companies to comply with the laws and regulations of not only the United States, but also those of foreign countries that exercise expansive transnational jurisdiction. One prominent example of this is the U.K. Bribery Act of 2010 (the “Bribery Act”).⁴³

The Bribery Act—perhaps the strictest of any anti-bribery law—does *not* provide an exemption for facilitating payments. Depending on how rigorously the U.K. government enforces the act—which took effect in July 2011—it may prove to be a dramatic change in global anti-corruption law.⁴⁴ This report does not explore the intricacies of complying with the Bribery Act, but companies that may be subject to the U.K.’s expansive jurisdiction⁴⁵ should take care to apprise themselves of its requirements. Generally, the Bribery Act recognizes that exemptions for facilitating payments “create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees . . . and perpetuate an existing ‘culture’ of bribery and have the potential to be abused.”⁴⁶ Thus, the Bribery Act prohibits facilitating payments.

2. Local Law

The FCPA allows for an affirmative defense for anti-bribery violations if a defendant can prove that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the *written* laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”⁴⁷ Courts have recognized that the purpose of this defense is to “acknowledge[] . . . that some payments that would be unethical or even illegal within the

proven to be major problems in developing countries. Second, facilitation payments have proven to be elements of high-level, widespread extortion schemes. Third, the distinction between banned payments and facilitating payments has proven extremely hard to define. *Id.*

⁴³ See generally Bribery Act 2010, available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>; Richard Levick, *Today’s Guidance on UK Bribery Act Launches New Enforcement Era*, Forbes (Mar. 30, 2010), available at <http://blogs.forbes.com/richardlevick/2011/03/30/todays-guidance-on-uk-bribery-act-launches-new-enforcement-era/>.

⁴⁴ The precise effect that the Bribery Act will have on international anti-corruption law remains unclear. However, the language of the act is expansive enough to warrant that companies take significant precaution in complying with it by keeping up to date with the U.K.’s enforcement actions. See generally Robert Amaee, *Robert Amaee on U.K. Bribery Act Guidance*, FCPA Professor, 2011 WLNR 6189219 (Mar. 31, 2011).

⁴⁵ The Bribery Act’s global jurisdiction extends, *inter alia*, to any company doing business in the U.K.

⁴⁶ *Id.*

⁴⁷ 15 U.S.C. §§ 77dd-1(c)(1), -2(c)(1), -3(c)(1) (emphasis added).

United States might not be perceived similarly in foreign countries, and those payments should not be criminalized.”⁴⁸ On its face, this statement may be viewed as capitulating to corrupt nations. But in practice, the exception and the affirmative defenses have been construed extremely narrowly.⁴⁹ Additionally, the defense is statutorily limited to the *written* laws and regulations of a country. Thus, it is never a defense to claim that prohibited payments were made because “this is how business is done” in a foreign country.

In unique instances a company may reasonably believe that certain otherwise prohibited payments are legal under the written laws of a foreign nation. For example, a company may be engaging in lobbying practices that could be prohibited under the expansive language of the FCPA, and may believe that such practices are legal under foreign law and thus exempt from the FCPA. However, given the difficulty of asserting the defense, it typically has “little practical relevance in most situations.”⁵⁰ Thus, companies must not only be very confident that their actions are legal, but they must also be able to *prove* that they are legal as a matter of law.⁵¹ The FCPA, after all, provides an affirmative *defense* for payments under local law, not an *exception* – i.e., the FCPA does not require the DOJ to prove that a payment was illegal under foreign law; to exercise the defense, a defendant must prove that its actions were legal under the relevant foreign law.

The precise meaning of this defense is largely unclear. As with many of the FCPA’s provisions, the lack of caselaw creates a dearth of guidance.⁵² One aspect of the defense that seems clear is that to exercise the defense, a defendant must be able to point to a written law expressly permitting the payment in question.⁵³ Perhaps unintuitively, given our traditional

⁴⁸ *United States v. Castle*, 925 F.2d 831, 834 (5th Cir. 1991).

⁴⁹ Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 Colum. J. Transnat’l L. 365, 381 (2011) (“While these exclusions do represent as concession to the culture of bribery, they are usually construed quite narrowly . . .”).

⁵⁰ See Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 26 (2d ed., ABA 2010).

⁵¹ See *United States v. Kozeny*, 582 F. Supp.2d 535, 538 (S.D.N.Y. 2008) (“Though foreign law once was treated as an issue of fact, it now is viewed as a question of law and may be determined through the use of any relevant source, including expert testimony.”), quoting *United States v. Vilar*, No. 05 Cr. 621, 2007 WL 1075041, at *55 n.35 (S.D.N.Y. Apr. 4, 2007).

⁵² F. Joseph Warin, Michael S. Diamant, & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 Va. L. & Bus. Rev. 33, 65 (2010) (“There is little available guidance on [the] defense.”).

⁵³ See *id.*; Lauren Giudice, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 Bos. U. L. Rev. 347, 357 (2011). See also H.R. Rep. No. 100-576, at 922

presumption of innocence, defendants cannot prove the legality of their action under written law by proving an absence of illegality. Additionally, courts have recognized that the inquiry as to whether a payment is legal under written foreign law is a question of law, not a question of fact.⁵⁴ Thus, litigants may have to use expert witnesses to prove the substantive legality of a transaction.⁵⁵

Further complicating the matter, courts have indicated that the substantive legality of a transaction is not dependent on whether an individual is “relieved of criminal responsibility for his actions by a provision of the foreign law.”⁵⁶ An obvious implication of this statement is that there is no affirmative defense for payments that cannot be prosecuted in a foreign nation due to a technicality, such as the expiration of a statute of limitations.⁵⁷ However, courts have also indicated that even if the *substantive* law of a country “relieves” a defendant of liability, a defendant will still have no affirmative defense under the FCPA.

For example, in *United States v. Kozeny*,⁵⁸ the court held that a defendant could not raise an affirmative defense under the FCPA even though the laws of Azerbaijan explicitly provided that entities would not be held liable for generally prohibited bribes if they voluntarily reported the bribe after it was made.⁵⁹ The court ruled that the moment at which the legality of a payment is determined is the time of its payment: if a bribe is illegal at the moment it is paid, it will never be considered “lawful under the written laws” of a foreign nation for the purpose of raising the affirmative defense. It is irrelevant whether some subsequent action retroactively resolves the payor of liability under a country’s written law.⁶⁰ Thus, companies should never rely on any form of post-payment amnesty; they must always focus on the legality of the payment at the moment it was paid.

When the meaning or application of a foreign country’s written laws is unclear, or the laws are silent, companies must take the utmost care to verify that a payment is certainly permitted under a country’s written law before they execute such a transaction. If a company

(1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1955 (indicating that the affirmative defenses should be construed narrowly).

⁵⁴ See *Kozeny*, 582 F. Supp.2d at 538.

⁵⁵ See *id.* (“[I]n deciding such issues a court may consider any relevant material or source – including testimony – without regard to the Federal Rules of Evidence.”).

⁵⁶ *Id.* at 539.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 539–40.

⁶⁰ *Id.*

cannot determine the legality of a payment under a country's written law, it must either forgo making the payment, or assume the risk of violation. In addition to the tremendous costs of defending an FCPA violation, companies may have to employ expert witnesses to attempt to prove the legality of their payment under foreign law.⁶¹

3. *Bona Fide Business Expenditures*

An affirmative defense is also provided if “the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure . . . incurred by or on behalf of a foreign official, party, party official, or candidate.” However, the gifts or payments must be “directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.”⁶²

Needless to say, it is very hard to predict with any certainty whether a payment will be viewed as prohibited, or as a reasonable and *bona fide* business expenditure. The FCPA expressly indicates that expenditures for travel and lodging are examples of *bona fide* expenses.⁶³ Commentators have noted that such payments are “normally made when associated with product demonstrations, facility tours, or contract performance.”⁶⁴ Thus, on its face, the *bona fide* expenditures defense is broader and more generally applicable than the written law affirmative defense.⁶⁵ But again, the lack of caselaw interpreting these provisions leaves the specifics of the defense largely unclear.

There are several intuitive signals indicating that expenditures may not be *bona fide* and reasonable. These include situations where expenditures are made for family members of foreign officials and where expenditures may be considered gratuitous under the circumstances.⁶⁶ One commentator illustrated this by explaining that it is unlikely that “[a] side

⁶¹ See *id.* at 537 (explaining that “the Court held a hearing in which . . . experts testified as to their interpretations of the relevant law” to determine whether certain payments were exempt from the FCPA because they were legal under Azeri law).

⁶² 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).

⁶³ *Id.*

⁶⁴ Nora M. Rubin, Note, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany, and Switzerland*, 14 Am. U. Int'l L. Rev. 257, Fn. 86 (1996). See Tarun, *supra*, note 41, at 17.

⁶⁵ See Drew A. Harker and Chad E. Miller, *The Foreign Corrupt Practices Act and Clinical Trials: A Trap for the Unwary*, 63 Food & Drug L.J. 509, 513 (2008).

⁶⁶ See Deming, *supra*, note 50, at 24-26.

trip to a resort en route to a corporate location, or payment for the travel of a foreign official's spouse," would be considered *bona fide*.⁶⁷ In fact, this type of expenditure is a prime example of an improper payment. But, importantly, less egregious payments may also fail to satisfy the defense. For example, in *Metcalf & Eddy, Inc.*,⁶⁸ the DOJ found that a company violated the FCPA when it allegedly overpaid a foreign official's estimated per diem allowance and covered the entirety of the official's expenses.⁶⁹ Thus, *Metcalf & Eddy* indicates that the DOJ will look unfavorably on companies that pay foreign officials' expenses *carte blanche*.

In an abundance of caution, individuals and companies attempting to comply with the FCPA should never assume that an expenditure will satisfy the *bona fide* expenditures defense. Again, companies must recognize that to absolve themselves of liability, they must *prove* that their payments are reasonable and *bona fide* under the FCPA. Thus, companies must exercise sound judgment when providing business accommodations, and must make an effort to ensure that all transactions are transparent and properly documented.⁷⁰

D. Penalties

1. Civil and Criminal Fines and Sentences

Violation of the FCPA can result in stiff civil and criminal penalties for both individuals and entities. An entity that violates the anti-bribery provisions may be faced with a criminal fine of up to \$2 million per violation.⁷¹ Individuals who violate the provisions may face up to five years in prison, a fine of \$250,000, or both.⁷² An entity that violates the recordkeeping and internal controls provisions may be assessed criminal fines of up to \$25 million.⁷³ Individuals violating these recordkeeping provisions may be faced with sentences of up to twenty years in

⁶⁷ Tarun, *supra*, note 41, at 17.

⁶⁸ *United States v. Metcalf & Eddy, Inc.*, No. 99 Civ. 12566 NG (D. Mass. 1999).

⁶⁹ *See id.* *See also* Tarun, *supra*, note 41, at 17 (citing *Metcalf & Eddy* as evidence of his claim that the *bona fide* expenditures defense "does not give companies *carte blanche* to pay travel expenses for government officials").

⁷⁰ *See id.* at 26–27.

⁷¹ 15 U.S.C. §§ 78dd-2(g)(3), -3(e)(3), 78ff(c)(3).

⁷² *See id.* at § 78ff(a). *See also* 18 U.S.C.S. § 3571 (West 2011) (Under the Alternative Fines Act, an individual violating the FCPA may be fined \$250,000 or up to twice the amount of the pecuniary gain from the offense).

⁷³ 15 U.S.C. § 78ff(a).

prison, fines of up to \$5 million, or both.⁷⁴ Civil actions brought against individuals and entities by the DOJ under the FCPA are subject to a penalty of \$10,000.⁷⁵

The actual calculation of a criminal penalty, whether a fine or a prison sentence, is based on factors enumerated in the advisory United States Federal Sentencing Guidelines⁷⁶ (the “Guidelines”) used to determine the culpability of an offending individual or entity. Factors that are particularly relevant to FCPA compliance programs include the history of prior violations, and any steps taken to prevent violations.⁷⁷

When aggregated, these penalties can be overwhelming, even for a large company. Several recent fines have totaled over \$400 million. For example, in 2010, BAE Systems plead guilty to conspiring to defraud the United States, to make false statements concerning its FCPA compliance efforts, and to violate the Arms Export Control Act and International Traffic in Arms Regulations. As a consequence, BAE Systems was assessed a \$400 million criminal fine.⁷⁸ In 2008, Siemens paid a combined total of more than \$1.6 billion in fines, disgorgement, and other payouts due to anti-corruption charges brought in various countries, which included over \$800 million to United States authorities under the FCPA.⁷⁹ And in 2011, Lindsey Manufacturing was the first company to be convicted by a jury on FCPA violations.⁸⁰ Judge Matz of the U.S. District Court for the Central District of California threw out the convictions and dismissed the indictment in Lindsey Manufacturing due to government misconduct.⁸¹ Nevertheless, had the convictions proceeded to sentencing, Lindsey’s CEO and CFO, who were

⁷⁴ *Id.*

⁷⁵ *Id.* at §§ 78dd-2(g)(1)(B), (2)(B). *See id.* at §§78dd-3(e)(1)(B), (2)(B); *Id.* at §§ 78ff(c)(1)(B), (2)(B).

⁷⁶ *See* U.S.S.G. § 8A1.1 (making the Guidelines applicable to all organizations for felony and class A misdemeanor offenses).

⁷⁷ *See id.* at § 8A1.2.

⁷⁸ Department of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine* (Mar. 1, 2010), available at http://fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/6874/BAEsystemsfcpa.pdf.

⁷⁹ Department of Justice, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines* (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

⁸⁰ Nathan Koppel, *A Criminal First: Company Convicted of Foreign Bribery*, Wall St. J. (May 11, 2011), available at <http://blogs.wsj.com/law/2011/05/11/a-criminal-first-company-convicted-of-foreign-bribery>.

⁸¹ *See United States v. Aguilar*, No. Cr. 10-01031(A)-AHM, 2011 WL 6097144, Order Granting Motion to Dismiss (C.D. Cal., Dec. 1, 2011). The Court threw out the convictions and dismissed the indictment due to several findings of government misconduct—including, *inter alia*, committing Brady violations and making material misrepresentations to the Court—despite affirming that “the Lindsey Defendants are [not] entitled to a finding of factual innocence.” *Id.* at 40.

also convicted as individuals, would have been “face[d] maximum prison sentences of 30 years.”⁸²

2. Loss of Government Contracts

Fines are not the only penalties resulting from FCPA violations by entities. There are significant collateral consequences when the government enforces the FCPA against a company, either through a non-prosecution agreement, a deferred prosecution agreement or an indictment. These include ineligibility to receive export licenses, and suspension and debarment from the securities industry.⁸³ But for many industries, the most catastrophic of these is suspension or debarment from contracting with the United States government.

Indictment alone can lead to a suspension of doing business with the United States government.⁸⁴ Debarment and suspension are technically not penalties for bad conduct; they are supposed to be tools to protect the Government from engaging with irresponsible contractors.⁸⁵ Nonetheless, “[s]uspension and debarment are powerful weapons at the Government’s disposal.”⁸⁶ When the government suspends or debars an entity, generally all of the entity’s constituent divisions are banned from contracting with the entire executive branch of the government.⁸⁷ This can have “devastating consequences” for a company; “some have likened [it] to the death penalty.”⁸⁸ The “shock and infamy of suspension or debarment” can drive contractors out of business, especially if they are small companies or are heavily reliant on government contracts.⁸⁹ Also, companies should keep in mind that violating the anti-bribery provisions of the FCPA may result in suspension or disbarment in foreign countries. This is especially true with regard to multilateral lending institutions around the world.⁹⁰

⁸² See Koppel, *supra*, note 80.

⁸³ Tarun, *supra*, note 41, at 28 (footnotes and citations omitted).

⁸⁴ *Id.* (footnotes and citations omitted).

⁸⁵ If debarment and suspension were penalties, their use in response to only an indictment would raise more significant due process concerns than they already do.

⁸⁶ Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including A Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 Pub. Cont. L. J. 547, 578 (2009).

⁸⁷ See 48 C.F.R. §§ 9.406-1(b)-(c), 407-1(b)-(c).

⁸⁸ Canni, *supra*, note 86, at 579 (quotations and citations omitted).

⁸⁹ See Christopher R. Yukins, *Suspension and Debarment: Reexamining the Process*, 13 Pub. Procurement L. Rev. 255, 256 (2004).

⁹⁰ See Deming, *supra*, note 50, at 686.

Companies should be aware of their dependence on government business when conducting risk calculations regarding FCPA compliance. This is especially true when a company's business-plan is heavily reliant on government work. Some industries are heavily based on interacting with federal programs such as "the Defense Department procurement programs, the Commodity Futures Trading Commission, and the Overseas Private Investment Corporation."⁹¹ In such cases, any FCPA violation can provide the government with the bludgeon of cutting off business relationships with a company, which may dramatically devalue or even destroy it.

E. Opinion Procedures

The application of the FCPA's anti-bribery provisions to many business situations is not always clear. Given the inherent vagueness of the anti-bribery prohibitions and their affirmative defenses, companies may find themselves in situations where they believe they are conducting a legitimate business practice while still worrying about potential liability. Congress recognized this, and, as a result, the FCPA includes opinion procedure provisions.

Under the opinion procedure provisions, an issuer or domestic concern may request an opinion of the DOJ indicating whether it intends to bring enforcement actions for specific business conduct.⁹² This process essentially allows companies engaging in what they believe may be risky business practices to present "certain specified, prospective—non-hypothetical—conduct"⁹³ to the DOJ for the purpose of receiving an opinion similar to a declaratory judgment.⁹⁴ Unlike a declaratory judgment, however, the DOJ's written opinion does not affect anyone other than the petitioning party and the Department.⁹⁵ Additionally, the opinions do not list the name of the requesting party.⁹⁶

⁹¹ *Id.* (footnotes and citations omitted).

⁹² 15 U.S.C. §§ 78dd-1(e), -2(f).

⁹³ 28 C.F.R. § 80.1.

⁹⁴ See 28 C.F.R. § 80.6 (the request must "be specific and must be accompanied by all relevant and material information bearing on the conduct" relevant to the opinion sought, including all the "circumstances of the prospective conduct"). See generally 28 C.F.R. § 80 (outlining the FCPA Opinion Procedure).

⁹⁵ 28 C.F.R. § 80.10 (In any opinion procedure action "there shall be a rebuttable presumption that a requestor's conduct, which is specified in a request, and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department's present enforcement policy, is in compliance with those provisions of the FCPA.").

⁹⁶ The DOJ's Opinion Procedure Releases ("Releases") do not usually identify the name of the Requestor, but the DOJ reserves the right to do so. In some instances, the Releases have identified the Requestor by name.

Importantly, making a request for an opinion may instigate the DOJ to conduct any independent investigation it deems necessary under the circumstances.⁹⁷ Thus, companies should carefully weigh the potential reward of receiving the DOJ's blessing of a transaction with the risks that result from increased DOJ scrutiny. This scrutiny may not be limited to the business practices specified in the opinion action. It may put the entire company under the microscope of the DOJ.

III. FUNDAMENTAL COMPONENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

As explained above, the penalties for violating the FCPA can be substantial. Further, the applications of the FCPA's prohibitions are often vague. Thus, companies engaging in business abroad should rightfully be wary of the significant risks posed by the FCPA. Avoiding FCPA violations is, indeed, vital. Crafting an effective compliance program should be a top priority for companies that engage in business within the scope of the FCPA's prohibitions.⁹⁸

This section will begin by explaining the purposes and values of creating an FCPA compliance program. Next, it will provide a brief overview of the components of compliance programs. And finally, it will examine four primary sources that are essential to consult when crafting an FCPA compliance program.

A. The Purposes of a Compliance Program

There are three primary benefits of FCPA compliance programs. First, there is independent value in a company maintaining a comprehensive—and practical—FCPA compliance policy. The DOJ factors compliance programs into its decision whether to bring charges against a company, because such programs “deter wrongdoing and generate ethical norms within the firm.”⁹⁹ Thus, the sufficiency of a company's compliance policy may influence whether the DOJ decides to bring charges against a company. Further, if the DOJ pursues charges, a company with an effective compliance program will be more likely to receive lenient treatment from the DOJ, both informally and when the Government calculates sanction amounts. In contrast, a company that maintains a “paper program” —one that formally exists but is not actually enforced—will not convince the DOJ to give a company the benefit of the doubt in the event of a violation.¹⁰⁰

⁹⁷ *Id.* at § 80.7.

⁹⁸ Companies should note that an effective compliance program will also insulate it from liability under other foreign law, such as the Bribery Act.

⁹⁹ See Baer, *supra*, note 9, at 959 (Implementing “paper programs” may, in fact, be worse than having no program at all).

¹⁰⁰ See, e.g., *United States v. Innospec Inc.*, 1:10-cr-00061-ESH (D.D.C. Mar. 5, 2010), available at <http://www.justice.gov/criminal/pr/documents/03-18-10innospec-information.pdf>. Innospec is a

Second, effective compliance programs prevent FCPA violations, thus protecting companies from exposure to liability. This benefit is distinct from how the DOJ judges compliance programs. The DOJ's evaluation of a program is, after all, moot if the program is effective at preventing violations (and resulting DOJ scrutiny) in the first place.

And third, effective compliance programs help companies mitigate any harm resulting from FCPA violations. A well-functioning compliance program ensures that transactions are properly documented, and that the company detects and remediates any FCPA violations after they occur. This allows companies to disclose, or to evaluate whether it is appropriate to disclose, violations to government authorities and to effectively cooperate with the DOJ to mitigate any potential harm. This report will examine how the DOJ evaluates the adequacy of FCPA compliance programs and synthesize a framework for developing an effective FCPA compliance program.

B. The Facets of a Compliance Program

A compliance program is a company's first line of defense against FCPA liability. Compliance programs accomplish their general purposes by executing policy-setting and investigatory functions.¹⁰¹ Specifically, compliance programs are aimed at both educating officers and employees about their obligations, as well as monitoring and regulating their performance under the FCPA. The educational aspect includes offering practical guidance to employees and managers on how to avoid violating the FCPA. The monitoring and regulating aspects require the implementation of programs, which "should include a code of conduct, gifts policy, training policy, political and charitable contributions policy, delegation of authority policy, and accounting policies regarding the proper recording of transactions."¹⁰²

These policies may be disseminated in a variety of ways. For example, a company may choose to incorporate its FCPA compliance policy as a part of the employee code of business

company that had in place a comprehensive paper FCPA compliance policy, but apparently failed to act in accordance with it. As a result of its violations, the DOJ ordered Innospec to pay over \$60 million in disgorgement and fines. The company held liable in both the US and Europe. The full Innospec FCPA compliance policy is available at:

http://www.innospecinc.com/assets/_files/documents/feb_10/cm__1267008126_Foreign_Corrupt_Practices_Act_.pdf.

¹⁰¹ See generally Baer, *supra*, note 9, at 960–61.

¹⁰² See Margot Cleveland *et al.*, *Trends in the International Fight Against Bribery and Corruption*, 90 J. Bus. Ethics 199, 218 (2009).

conduct and ethics or maintain a freestanding FCPA compliance policy manual.¹⁰³ Regardless of the format, it is of the utmost importance that the official written policy be broadly supported by upper management and competently implemented.

C. Sources of Guidance in Crafting a Compliance Program

The three main sources that the DOJ utilizes or otherwise references to inform and supplement the language of the FCPA are the United States Attorney's Manual, the United States Federal Sentencing Guidelines, and the Organization for Economic Co-operation and Development (the "OECD") Convention.¹⁰⁴ Each source offers lengthy lists of factors relevant to creating effective FCPA compliance programs. Yet, companies attempting to comply with the FCPA cannot only look at the official policies and general recommendations of the DOJ. Crafting compliance policies by relying on the text of the Principles, the Guidelines, and the OECD Guidance can only take an organization so far. To ensure complete compliance, organizations must keep up to date with how the DOJ interprets and enforces the provisions of the FCPA.

1. Principles of Federal Prosecution of Business Organizations

The section of the United States Attorney's Manual relevant to charging corporations—entitled *Principles of Federal Prosecution of Business Organizations* (the "Principles")—is one of the most important sources of formal DOJ policy regarding charging corporations under the FCPA.¹⁰⁵ The Principles require prosecutors to apply "the same factors in determining whether to charge a corporation as to they do with respect to individuals," which include "the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches."¹⁰⁶ But the Principles also recognize that prosecuting business organizations is a unique endeavor that entails unique concerns. These unique concerns come in the form of special prosecutorial duties and considerations.

¹⁰³ Notably, because FCPA compliance programs require a significant amount of detail, it is often impractical for companies to incorporate them into their code of ethics. Further codes of ethics are difficult to amend (particularly under the public disclosure requirements of Sarbanes-Oxley), and thus a compliance program stylized as a freestanding document is generally preferable.

¹⁰⁴ The OECD Convention does not represent DOJ policy, but has been referenced by the agency as an appropriate source of guidance.

¹⁰⁵ See *Principles of Federal Prosecution of Business Organizations*, United States Attorneys Manual, Title 9, Ch. 9-28.000, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

¹⁰⁶ *Id.* at 3.

The Principles state that prosecutors have a duty to protect economic and capital markets, to protect those who compete in these markets through lawful means, and to generally protect the American public from corporate misconduct.¹⁰⁷ The Principles also enumerate specific factors that prosecutors must consider when determining whether to bring charges or enter into agreements with organizations. These factors include:

- The nature and seriousness of the offense, including risk of harm to the public and any policies governing the prosecution of corporations for specific types of crimes;
- The pervasiveness of wrongdoing within the corporation, including managerial complicity;
- The organization's history of similar misconduct;
- The corporation's disclosure of wrongdoing and willingness to cooperate;
- The existence and effectiveness of the corporation's compliance program;
- The corporation's remedial actions, including efforts to implement or improve effective corporate compliance programs, to replace management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with government agencies;
- The harmful collateral consequences of charges or agreements, including those to investors and the public;
- The adequacy of personal prosecution as opposed to organizational prosecution; and
- The adequacy of non-criminal remedies.¹⁰⁸

Many of these factors are particularly relevant to instituting an FCPA compliance program. Indeed, the Principles explicitly provide some guidance regarding the impact of compliance programs on the DOJ's decision of whether to bring FCPA charges.

The Principles indicate that compliance programs are specifically relevant in the DOJ's evaluation of four general contexts: (1) the pervasiveness of wrongdoing within the corporation; (2) the history of a corporation's conduct; (3) whether a corporation should be eligible for a reduced sanction because of voluntary disclosures; and (4) whether a corporation has taken significant remedial actions to deter future violations. Finally, the Principles also require prosecutors to independently consider the sufficiency of a company's compliance program.

Pervasiveness of Wrongdoing

When evaluating the pervasiveness of wrongdoing within the corporation, the Principles specifically state that it may be inappropriate for the government to hold a

¹⁰⁷ *Id.* at 1.

¹⁰⁸ *See id.* at 3-4.

corporation liable for isolated or small numbers of actions by its employees, “particularly [corporations] with a robust compliance program in place.”¹⁰⁹ The Principles emphasize that the corporation’s management oversees the actions of the corporation’s employees, and thus management is “responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged.”¹¹⁰ Referring to the United States Sentencing Guidelines, the Principles state that “Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense.”¹¹¹ In evaluating pervasiveness, compliance programs are relevant in determining when any wrongdoing can be fairly attributed to the actions of a corporation’s management and the culture it has fostered.

History of Conduct

Similarly, the Principles state that a history of wrongful conduct is relevant in the DOJ’s determination of how to resolve cases. The DOJ will look unfavorably on organizations that have “not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it.”¹¹² However, it should be noted that unenforced compliance programs—so-called “paper programs”—would not constitute evidence weighing against a finding of pervasiveness or a negative history of conduct. Indeed, “history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs.”¹¹³

Voluntary Disclosures

The DOJ’s determination of whether a corporation deserves a lessened sanction due to voluntary disclosures also takes the effectiveness of corporate compliance programs into consideration. The DOJ “encourages corporations, as a part of their compliance programs, to conduct internal investigations and to disclose . . . relevant facts to the appropriate authorities.”¹¹⁴ The DOJ may reward corporations for employing effective compliance programs and specifically states that “prosecutors may consider a corporation’s timely and voluntary disclosure in evaluating the adequacy of the corporation’s compliance program and its management’s commitment to the compliance program.”¹¹⁵

¹⁰⁹ *Id.* at 5–6.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 6, quoting U.S.S.G. § 8C2.5, cmt. 4.

¹¹² *Id.* at 6.

¹¹³ *Id.* at 6.

¹¹⁴ *Id.* at 14.

¹¹⁵ *Id.* at 14.

Remedial Actions

An area of specific concern for corporations is whether they can take remedial measures to influence the DOJ's decision to bring charges of FCPA violations. When looking at a corporation's remedial measures in response to FCPA violations, the DOJ assesses many factors, several of which take corporate compliance programs into account. The factors that the DOJ looks at when evaluating the remedial measures of a corporation are:

- Whether the corporation appropriately disciplined wrongdoers, even if they are at the highest level of seniority;
- Whether the corporation is focused on "the integrity and credibility of its remedial and disciplinary measures" rather than on the protect of wrongdoers;
- Whether the corporation has paid restitution in advance of a court order, so long as the restitution constitutes evidence of the corporations acceptance of responsibility given the circumstances; and
- Whether a corporation has quickly recognized flaws in its compliance program and has made efforts to improve the program.¹¹⁶

In considering these factors, the DOJ looks for corporations to take meaningful actions to "ensure that such misconduct does not recur."¹¹⁷ The Policies state that "corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated."¹¹⁸

Independent Focus on Compliance Programs

Finally, the Policies dictate that prosecutors should focus specifically on the existence and effectiveness of corporate compliance programs in place at the time of any FCPA violations. In section 9-28.800 of the Principles—entitled "Corporate Compliance Programs—the DOJ explains how it evaluates corporate compliance programs and how the existence of effective or ineffective compliance programs affects its decisionmaking. The Principles state that the existence of a compliance program is not sufficient to insulate an organization from liability.¹¹⁹ However, the DOJ "encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own."¹²⁰

¹¹⁶ *Id.* at 17.

¹¹⁷ *Id.* at 16-17.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 14.

¹²⁰ *Id.* at 14.

A prosecutor's central inquiry is "whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation."¹²¹ This inquiry is not formulaic. Instead, the Policies suggest that prosecutors look at a variety of factors. These factors can be divided into three categories according to their focus: (1) the existence and design of the program; (2) the administration of the program; and (3) the misconduct in question. The factors, divided into their respective categories, are:

1. The Existence and Design of the Program

- (a) Whether a compliance program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees;
- (b) Whether the compliance program is designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business;
- (c) The comprehensiveness of a compliance program; and
- (d) Whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct.¹²²

2. The Administration of the Program

- (a) Whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives;
- (b) Whether a compliance program is being applied earnestly and in good faith;
- (c) Whether a compliance program "works";
- (d) Whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner;
- (e) Whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts; and

¹²¹ *Id.* at 15-16.

¹²² The Principles ask the following exemplary questions: "[D]o the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law." *Id.* at 15, citing, for e.g., *In re Caremark Int. Inc. Derivative Litig.*, 698 A.2d 959, 968-70 (Del. Ch. 1996).

- (f) Whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it.

3. The Misconduct In Question

- (a) The extent and pervasiveness of the misconduct in question;
- (b) The number and level of the corporate employees involved in the misconduct;
- (c) The seriousness, duration, and frequency of the misconduct;
- (d) Whether a corporation has taken remedial actions, “including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned”; and
- (e) The promptness of any disclosure of wrongdoing to the government.¹²³

These factors are not exhaustive, and are often overlapping, but they provide insight into how DOJ prosecutors conduct investigations and determine whether to bring charges under the FCPA. Importantly, the factors place an emphasis on the effective administration of a program. The Policies explicitly dismiss the value of “paper programs,” and emphasize that a program should be customized to ensure compliance in the specific context in which the organization operates.

2. The United States Federal Sentencing Guidelines

The Principles are not the only source of authority that should guide corporate compliance practices. The United States Federal Sentencing Guidelines (the “Guidelines”) specifically encourage the establishment of effective compliance programs by mandating that “[t]wo factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.”¹²⁴ Under the Amended November 2010 Guidelines, the government may now significantly reduce fines and other sanctions if an organization takes reasonable steps “to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents.”¹²⁵

The Guidelines indicate in general terms how the government will evaluate compliance programs when considering whether to mitigate fines or sanctions. They define effective compliance programs functionally, by placing an emphasis on the results of a program – that is,

¹²³ See generally *id.* at 14–16.

¹²⁴ U.S.S.G. § 8 Introductory Commentary (2010).

¹²⁵ U.S.S.G. § 8A.1 Commentary 3(k) (2011). See also Deming, *supra*, note 50, at 646.

whether it is “reasonably designed, implemented and enforced so that [it] is generally effective in preventing and deterring criminal conduct.”¹²⁶ Again, there is no clear formula. An effective compliance program consists of evidence that an organization “exercise[s] due diligence to prevent and detect criminal conduct; and otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”¹²⁷ To achieve due diligence and the promotion of such an organizational culture, the Guidelines *minimally require*:

- The organization to “establish standards and procedures to prevent and detect criminal conduct.”¹²⁸
- The “organization’s governing authority . . . be knowledgeable about the content and operation of the compliance and ethics program and . . . exercise reasonable oversight”¹²⁹
- “High-level personnel of the organization . . . ensure that the organization has an effective . . . program”¹³⁰
- “Specific individual(s) within the organization . . . be delegated day-to-day operational responsibility for the . . . program . . . [and] shall report periodically . . . on the effectiveness of the . . . program.”¹³¹
- “To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority”¹³²
- The “organization . . . use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known . . . has engaged in illegal activities or other conduct inconsistent with an effective . . . program.”¹³³
- The “organization . . . take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the . . . program . . . by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities,”¹³⁴ to “members of the governing authority, high-level

¹²⁶ U.S.S.G. § 8B2.1(a). See also T. Markus Funk, *Corporations Benefit From Sentencing Guidelines Amendments . . . In Four Easy Steps*, American Bar Association, Criminal Justice Section, Global Anti-Corruption Task Force, available at <http://www2.americanbar.org/sections/criminaljustice/Pages/funk.aspx>.

¹²⁷ *Id.* at § 8B2.1(a)(1)–(2).

¹²⁸ *Id.* at § 8B2.1(b)(1).

¹²⁹ *Id.* at § 8B2.1(b)(2)(A).

¹³⁰ *Id.* at § 8B2.1(b)(2)(B).

¹³¹ *Id.* at § 8B2.1(b)(2)(C).

¹³² *Id.*

¹³³ *Id.* at § 8B2.1(b)(3).

¹³⁴ *Id.* at § 8B2.1(b)(4)(A).

personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents."¹³⁵

- "The organization . . . take reasonable steps . . . to ensure that the organization's . . . program is followed, including monitoring and auditing to detect criminal conduct."¹³⁶
- "The organization . . . take reasonable steps . . . to evaluate periodically the effectiveness of the organization's . . . program."¹³⁷
- "The organization shall take reasonable steps . . . to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation."¹³⁸
- "The organization's . . . program . . . be promoted and enforced consistently throughout the organization through appropriate incentives to perform in accordance with the . . . program; and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct."¹³⁹
- "After criminal conduct has been detected, the organization . . . take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's . . . program."¹⁴⁰
- And in doing all of the above, "the organization . . . periodically assess the risk of criminal conduct and . . . take appropriate steps to design, implement, or modify each [above] requirement . . . to reduce the risk of criminal conduct identified through this process."¹⁴¹

This lengthy list of factors demonstrates that all effective compliance programs must have certain minimum standards in the eyes of the DOJ. Further, none of the factors rely on the existence of a written compliance program. Again, the DOJ's focus is primarily on the efficacy of a compliance program. The DOJ reinforces this by stating that in determining whether an organization has complied with the above standards, the DOJ should consider "(i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) [recurrence of] similar misconduct."¹⁴²

¹³⁵ *Id.* at § 8B2.1(b)(4)(B).

¹³⁶ *Id.* at § 8B2.1(b)(5)(A).

¹³⁷ *Id.* at § 8B2.1(b)(5)(B).

¹³⁸ *Id.* at § 8B2.1(b)(5)(C).

¹³⁹ *Id.* at § 8B2.1(b)(6).

¹⁴⁰ *Id.* at § 8B2.1(b)(7).

¹⁴¹ *Id.* at § 8B2.1(c).

¹⁴² *Id.* at § 8B2.1 cmt. 2(A).

3. The OECD Convention and Guidance

Finally, another source of authority that should guide effective FCPA compliance practices is the OECDs Convention, to which the United States is a signatory. The OECD Convention requires member states to criminalize the bribery of foreign public officials in generally the same way the FCPA does.¹⁴³ The OECD's Good Practice Guidance on Internal Controls, Ethics, and Compliance (the "OECD Guidance") is important because it has been strongly endorsed by the DOJ. Recently, United States Attorney General Eric Holder designed the document "state-of-the-art guidance" and "encourage[d] companies to use it as a benchmark in their own compliance programs."¹⁴⁴

The OECD Guidance recommends that organizations create effective compliance programs by assessing their bribery risks based on their individual circumstances—such as their geography, industry, size, type, and legal structure.¹⁴⁵ These "circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness" of a compliance program.¹⁴⁶ The OECD Guidance recommends the following fourteen measures to prevent and detect bribery:

- Establishing "strong, explicit and visible support and commitment from senior management to the company's [compliance program]"
- Creating "a clearly articulated and visible corporate policy prohibiting foreign bribery."
- Requiring "compliance with this prohibition and the related internal controls . . . [to be] the duty of individuals at all levels of the company."
- Ensuring that the "oversight of [compliance programs], including the authority to report matters directly to independent monitoring bodies . . . is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority."
- Creating "[a compliance program] . . . designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all

¹⁴³ The OEDC Convention requires parties "to make it a criminal offense under their national laws for any person to intentionally offer, promise, or give any undue pecuniary or other advantage, directly or through intermediaries, to foreign public officials in order to obtain or retain business or to obtain any other improper advantage." Deming, *supra*, note 50, at 310, *citing* OECD Doc. DAFFE/IME/BR(97)20, art. 1, para. 1, *reprinted in* 37 I.L.M. 1 (1998).

¹⁴⁴ Timothy J. Coleman and Paul Lomas, *Bribery and Corruption Compliance: the Playing Field Levels*, 245 N.Y.L.J. 75 (Apr 20, 2011).

¹⁴⁵ See *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex II. (Feb 18, 2010), *available at* <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

¹⁴⁶ *Id.*

entities over which a company has effective control . . . on, *inter alia*, the following areas: (i) gifts; (ii) hospitality, entertainment and expenses; (iii) customer travel; (iv) political contributions; (v) charitable donations and sponsorships; (vi) facilitation payments; and (vii) solicitation and extortion.”

- Creating “[a compliance program] designed to prevent and detect foreign bribery applicable . . . to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners [“business partners”] . . . including, *inter alia*, the following essential elements: (i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners; (ii) informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s [compliance program]; and (iii) seeking a reciprocal commitment from business partners.”
- Maintaining “a system of financial and accounting procedures . . . reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery.”
- Enacting “measures designed to ensure periodic communication, and documented training for all levels of the company, on the company’s [compliance program].”
- Taking “appropriate measures to encourage and provide positive support for the observance of [compliance programs] at all levels of the company.”
- Establishing “appropriate disciplinary procedures to address . . . violations, at all levels of the company, of laws against foreign bribery”
- Maintaining “effective measures for . . . providing guidance and advice to directors, officers, employees, and . . . business partners, on complying with the company’s [compliance program], including when they need urgent advice on difficult situations in foreign jurisdictions.”
- Maintaining “effective measures for . . . internal and where possible confidential reporting [for those] not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for [those] willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds.”
- Maintaining “effective measures for . . . undertaking appropriate action in response to such reports.”
- Conducting “periodic reviews of [compliance programs], designed to evaluate and improve their effectiveness . . . taking into account relevant developments in the field, and evolving international and industry standards.”¹⁴⁷

These standards, though not the official policy of the DOJ, and not cited in U.S. court opinions, have been endorsed by top DOJ officials as best practices that inform should effective FCPA compliance programs.

¹⁴⁷ *Id.*

4. DOJ Actions and Opinions: Changes in Enforcement

Companies attempting to comply with the FCPA should not limit themselves to official policies and general DOJ recommendations. Crafting compliance policies by relying on the text of the Principles, the Guidelines, and the OECD Guidance can only take an organization so far. To ensure complete and substantively meaningful compliance, organizations must keep up to date with how the courts interpret, and how the DOJ enforces, the provisions of the FCPA.¹⁴⁸

The DOJ exercises a considerable amount of discretion in deciding whether to bring criminal charges against an organization under the anti-bribery provisions of the FCPA. The DOJ not only enjoys substantial—and, in the eyes of some, excessive—prosecutorial discretion,¹⁴⁹ but also benefits from a general lack of judicial precedent interpreting the statutory provisions of the FCPA.¹⁵⁰ Since its enactment in 1977, the FCPA has remained largely unchanged as a statute and there have been remarkably few cases interpreting its application.¹⁵¹ As a practical consequence, the DOJ often ends up being the final arbiter of the meaning of the FCPA's statutory provisions through its use of prosecution deferral agreements and no-action letters, which are sometimes referred to as “diversion agreements.”¹⁵²

The lack of caselaw interpreting the FCPA predictably creates a dearth of guiding precedent. Thus, organizations must keep abreast of enforcement actions by keeping themselves updated on the government's public announcements and disclosures,¹⁵³ while also staying

¹⁴⁸ The SEC also has the power to enforce FCPA provisions against publically traded companies. Traditionally, the SEC has enforced the books and records and internal controls provisions of the FCPA, although the DOJ has become more active in enforcing these provisions, but typically only for systemic and egregious violations.

¹⁴⁹ See *Principles of Federal Prosecution of Business Organizations*, United States Attorneys Manual, *supra*, note 105 (“In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law.”) (emphasis added).

¹⁵⁰ See generally Foreign Corrupt Practices Act of 1977, *supra*, note 2.

¹⁵¹ There has been a recent trend, however, of increased enforcement of the FCPA, which may lead to an increase in FCPA cases being brought in court as opposed to being settled through non-adjudicatory alternatives. See generally Section I.

¹⁵² See generally Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 Rev. Litig. 439, 451 (2010) (“Diversion, in the form of non-prosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”), however, punishes a culpable corporation while at the same time escaping the potential consequences of a full-scale prosecution.”).

¹⁵³ The DOJ maintains a database of all public FCPA enforcement actions at: <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html>.

current on FCPA news and commentary.¹⁵⁴ Typically, congressional amendments to the FCPA and changes in official DOJ policy will not be the most common indicators of changing enforcement strategies. For example, there was no major statutory or official policy change predicated the watershed action brought against Siemens in 2008, despite the \$450 million criminal fine being the largest FCPA enforcement action at the time it was announced.¹⁵⁵

Additionally, the government has been using more aggressive investigative techniques in FCPA investigations. Evidence of this is the government's recent undercover investigation in what is commonly referred to as the "Shot Show" sting operation. The operation was lauded by the DOJ as "the largest single investigation and prosecution against individuals in the history of the DOJ's enforcement" of the FCPA.¹⁵⁶ Organizations should interpret the undercover operation as proof that the DOJ is beginning to use more traditional law enforcement techniques to strictly enforce the FCPA. As a consequence, organizations should increase their efforts to ensure that their compliance programs are comprehensive. Programs must not only demonstrate a good faith effort to comply with the FCPA, but they must also be effective in preventing any violations.

Both the above-mentioned Siemens action and the "Shot Show" undercover sting operation should serve as notice to companies that the DOJ is increasingly stepping up FCPA enforcement and is taking its anti-corruption policies more seriously. However, the Siemens action, in particular, should also serve as a reminder of the global nature of the campaign against corruption. Siemens was held accountable for bribery by the United States and German governments, but also entered into a settlement with the World Bank Group following its investigation of the companies corrupt practices in Russia.¹⁵⁷ Moreover, more and more nations are bringing companion – and even successive duplicative actions to U.S locations. This trend in

¹⁵⁴ Two particularly good sources of FCPA-related news are (1) the FCPA Blog, which is run by various contributing practitioners and academics (publicly available at: <http://www.fcablog.com/>) and (2) the FCPA Professor, which is run by Mike Koehler, a leading expert on the FCPA and other anti-corruption laws and initiatives (publicly available at <http://www.fcprofessor.com/>).

¹⁵⁵ See *Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations*, Dept. of Justice, Dec. 15, 2008, available at <http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html>.

¹⁵⁶ *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme*, Dept. of Justice, Jan. 19, 2010, available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>.

¹⁵⁷ See *Siemens Settlement Agreement, Fact Sheet*, The World Bank Group, available at http://siteresources.worldbank.org/INTDOII/Resources/Siemens_Fact_Sheet_Nov_11.pdf. As part of the settlement, Siemens committed \$100 million to support global anti-corruption efforts. See, also, Siemens Integrity Initiative, available at <http://www.siemens.com/sustainability/en/core-topics/collective-action/integrity-initiative/index.php>.

what one practitioner has coined as “carbon copy” prosecutions is an important development that companies will be facing into the foreseeable future.¹⁵⁸

As foreign governments continue to prioritize anti-corruption efforts—such as the United Kingdom has done with the passage of the UK Bribery Act in 2010¹⁵⁹—organizations must maintain strict anti-bribery compliance policies to ensure that they will not be held liable for their business practices either within or outside of the United States.

IV. EFFECTIVE COMPLIANCE PROGRAMS FROM THE DOJ’S PERSPECTIVE

Designing compliance programs is an especially difficult process because such programs are often scrutinized only after a violation has occurred. That is to say, the DOJ is never prospectively evaluating and critiquing a company’s FCPA compliance program, unless it is already investigating the company for potential violations. Thus, the DOJ ordinarily does not laud the compliance policies of companies who are successfully avoiding violations. The guidance coming from the DOJ primarily arises from critiques and criticisms of compliance programs that have failed. This guidance is limited, but is the best information that companies have to inform the development and implementation of their FCPA compliance programs.

This section first discusses the process of how compliance programs are evaluated generally. This discussion provides the reader with a conceptual understanding of how compliance programs are viewed by prosecutors. Next, this section presents the twelve factors of an effective compliance program, which are based on an analysis of the DOJ’s actual treatment of programs. Last, this section also examines additional context-specific factors that may be relevant to similarly situated companies, and may provide further insight into the DOJ’s evaluation process.

A. Generally

Prosecutors are lawyers, not auditors. Whereas auditors typically question the processes and the results of a compliance program, “the lawyer’s view emphasizes process.”¹⁶⁰ Thus,

¹⁵⁸ See generally, *The Globalization of Anti-Corruption Law*, FCPA Professor Blog (Aug. 16, 2011), available at <http://www.fcpaprofessor.com/the-globalization-of-anti-corruption-law> (summarizing the ABA’s 2011 Annual Meeting Presidential Showcase Panel in Toronto and explaining that “[AUSA Andrew S.] Boutros also pointed out an increased trend in what he termed ‘carbon copy’ prosecutions, a phenomenon where foreign authorities rely on the factual findings emerging out of U.S. enforcement actions to vindicate the local laws of their own jurisdiction—often the site of the bribe payment or bribe receipt”).

¹⁵⁹ See generally *Bribery Act 2010*, *supra*, note 43.

¹⁶⁰ See *Cunningham*, *supra*, note 10, at 308.

when prosecutors reevaluate the efficacy of FCPA compliance programs they will undoubtedly be concerned with the systematic decisionmaking and monitoring processes that companies have put in place to prevent violations. Prosecutors understand that for large companies, no compliance system can provide absolute assurance of non-violation. But they will, at minimum, require companies to demonstrate that they have planned, implemented, and enforced compliance programs that utilize thought out and extensive procedures.

Although prosecutors will likely emphasize the role of process in a compliance program, they undoubtedly will also consider the results of a compliance program. Prosecutors investigating potential FCPA violations must assess the effectiveness of compliance programs after they have failed to prevent violations. Unfortunately for companies that find themselves in violation of the FCPA, it is reasonable to assume that prosecutors may suffer from hindsight bias—they may assign “higher probabilities to actual outcomes than would have been assigned based on expected outcomes.”¹⁶¹ This means that companies should ensure that their compliance programs not only prevent violations, but that they also, as appropriate, focus on assisting prosecutor’s investigations of conduct that has already occurred.

Understanding the perspective and institutional function of a prosecutor will help a company develop a compliance program that is looked favorably upon by the DOJ. Under the current FCPA enforcement regime, companies have an incentive to institute compliance programs that assist prosecutors in their investigative inquiry by (1) emphasizing the role of process as a preventive mechanisms, and (2) instituting after-the-fact investigatory programs and policies that will foster cooperation with prosecutors.¹⁶² These, however, are broad characteristics of effective compliance programs. The DOJ itself has identified several specific characteristics essential to an effective compliance program.

B. DOJ Treatment of Compliance Programs

The best source for DOJ treatment of compliance policies can be found in deferred and non-prosecution agreements. The DOJ first enumerated their required elements of an effective compliance program in the 1999 Consent and Undertaking in the case of *United States v. Metcalf & Eddy*.¹⁶³ The elements in *Metcalf & Eddy* still offer some guidance to companies attempting to formulate effective compliance programs.¹⁶⁴ Since 1999, however, various agreements with the

¹⁶¹ *Id.* at 309.

¹⁶² See Baer, *supra*, note 9, at 999.

¹⁶³ Civ. Act. No. 99CV-12566-NG (D.M.A. Dec. 29, 1999), *supra*, note 68.

¹⁶⁴ In *Metcalf & Eddy*, *supra*, note 68, the DOJ articulated the nine elements necessary for an effective compliance program. These elements were: (1) creating a clearly articulated corporate policy against FCPA violations; (2) assigning one or more senior officials to implement and monitor the compliance policy; (3) establishing and maintaining a committee to review business with foreign

DOJ have elaborated upon the original *Metcalf & Eddy* elements, and in some cases have added new considerations.

Recent deferred and non-prosecution agreements are especially helpful when crafting an FCPA compliance policy. This is especially true because of the dramatic increase in FCPA enforcement since 2009, which has provided a larger sample size of data. In 2004, the DOJ charged only two individuals with FCPA violations and collected \$11 million in criminal fines. In 2009–2010, by contrast, the DOJ charged over 50 individuals and collected nearly \$2 billion.¹⁶⁵ An analysis of recent enforcement actions reveals both (1) *current* insight into the DOJ's baseline requirements for effective FCPA compliance programs and (2) substantial *consistency* in what it looks for in these minimum requirements. Specifically, based on our analysis of DPAs and NPAs, we have found that twelve elements are commonly required. At a minimum, these elements must be satisfied for a compliance program to be considered effective:

1. **Clearly Written Policy:** A clearly articulated, written, and visible corporate policy against FCPA violations.
2. **Standards Governing Certain Expenses, Payments:** Standards and policies that apply to all officers, directors, employees and third parties business associates governing:
 - (a) Gifts;
 - (b) Hospitality, entertainment, and expenses;
 - (c) Customer travel;
 - (d) Political contributions;
 - (e) Charitable donations and sponsorships;
 - (f) Facilitation payments; and
 - (g) Solicitation and extortion.
3. **Risk Assessment:** Risk assessment addressing the foreign bribery risks confronting the individual circumstances of the company including:
 - (a) Its geographical organization;

contractors; (4) implementing clear procedures to prevent the delegation of discretionary authority to individuals with a propensity to engage in illegal activities; (5) implementing clear procedures to ensure that the company forms business relationships with reputable and qualified business partners for the purposes of doing business in foreign jurisdictions; (6) communicating the standards and procedures of the compliance program through regular training; (7) implementing appropriate disciplinary mechanisms; (8) instituting a reporting system that protects whistleblowers from retribution; and (9) requiring foreign business contracts to include prohibitions on FCPA violations. *See id.*

¹⁶⁵ Assistant Attorney General Lanny A. Breuer of the Criminal Division Speaks at the Franz-Hermann Bruner Memorial Lecture at the World Bank, *The Cypress Times*, May 25, 2011, available at http://www.thecypresstimes.com/article/News/National_News/ASSISTANT_ATTORNEY_GENERAL_LANNY_A_BREUER_OF_THE_CRIMINAL_DIVISION_SPEAKS_AT_THE_FRANZHERMANN_BRUNER_MEMORIA_LECTURE_AT_THE_WORLD_BANK/45876.

- (b) Anticipated interactions with governmental officials;
 - (c) Industrial sector of operation;
 - (d) Involvement in joint-venture arrangements;
 - (e) Importance of licenses and permits in the company's operations;
 - (f) Degree of governmental oversight and inspection; and
 - (g) Volume and importance of goods and personnel clearing through customs and immigration.
4. **Annual Review of Policies:** Annual review and updating of compliance policies taking into account relevant developments in the field and evolving international standards.
 5. **Senior Executive Responsibility:** Insistence on senior executive responsibility for oversight of the compliance program, with direct reporting obligations to independent monitoring bodies.
 6. **Financial and Accounting Procedures:** Institute financial and accounting procedures "reasonably designed" to prevent books, records, and accounts to be used for the purpose of foreign bribery or concealing bribery.
 7. **Training and Certifications:** Implement mechanisms designed to ensure effective communication of compliance program to all directors, officers, employees, and third-party transaction partners, including:
 - (a) Periodic training; and
 - (b) Annual certifications procedures, certifying compliance with the stated training requirements.
 8. **Voluntary Internal Reporting:** Encourage voluntarily internal reporting by providing for:
 - (a) Guidance and advice on complying with the compliance program;
 - (b) Anonymous reporting, including protection for those who report breaches occurring within the company; and
 - (c) Appropriate, and discrete, response to requests.
 9. **Disciplinary Procedures:** Institute appropriate disciplinary procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm caused, and steps are taken to prevent further similar misconduct, potentially including making modifications to the compliance program where necessary.
 10. **Due Diligence:** Require appropriate due diligence pertaining to retention and oversight of all agents/business partners including:
 - (a) Documented risk-based due diligence pertaining both the hiring and regular oversight of agents/business partners;
 - (b) Informing agents/business partners that the company is committed to abiding by the law and its policies against bribery; and
 - (c) Seeking reciprocal commitment from their agents business partners.

11. **Contractual Provisions:** Include standard provisions in contracts with agents/business partners reasonably designed to prevent violations of anti-corruption laws including:
 - (a) Anti-corruption representations;
 - (b) Rights to conduct audits of books and records of agent/business partners; and
 - (c) Rights to terminate an agent/business partner if they breach any anti-corruption laws.
12. **Periodic Testing of Compliance Program:** Periodic testing of the compliance program to evaluate its effectiveness.¹⁶⁶

Additionally, among FCPA proceedings brought in 2011 by the DOJ, there are a few instances where the DOJ required *additional* elements for certain defendants for seemingly contextual reasons specific to those defendants' situations and the nature of their FCPA violations.

In *United States v. Maxwell Technologies*,¹⁶⁷ the DOJ, in addition to the minimum twelve elements, also required defendant Maxwell's senior management to provide "strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code."¹⁶⁸ This additional requirement reflected the nature of Maxwell's violation. In the deferred prosecution agreement, Maxwell admitted to taking part in a bribery scheme in which it paid nearly \$3 million to an agent to be distributed to Chinese foreign officials, in return for securing contracts that profited Maxwell.¹⁶⁹ Maxwell's management within the United States discovered these payments and, rather than end the bribery scheme, "tacitly approved" of it, concealed the payments, and subsequently the scheme grew even larger. Furthermore, during the relevant time periods, Maxwell reclassified the amounts paid as bribes as a "reduction in revenue."

In *United States v. JGC Corp.*,¹⁷⁰ the DOJ imposed an even harsher additional requirement on the defendant JGC's FCPA compliance program – mandating that it retain an "independent

¹⁶⁶ See, e.g., *United States v. Maxwell Technologies, Inc.*, No. 3:11-CR-00329-JM (S.D. Cal. Jan. 31, 2011); *United States v. Tyson Foods, Inc.*, No. 1:11-CR-00037-RWR (D.D.C. Feb. 10, 2011); *United States v. JGC Corp.*, No. 4:11-CR-00260 (S.D. Tex. Apr. 6, 2011); *United States v. Converse Technology, Inc.* (Apr. 7, 2011); *United States v. DePuy, Inc.*, 4:11-CR-099 (D.D.C. Apr. 8, 2011). *The foregoing are all available at* <http://www.justice.gov/criminalfraud/fcpa/cases/2011.html>.

¹⁶⁷ No. 3:11-CR-00329-JM (S.D. Cal. Jan. 31, 2011).

¹⁶⁸ *Id.* at 30.

¹⁶⁹ See *Id.*

¹⁷⁰ No. 4:11-CR-00260 (S.D. Tex. Apr. 6, 2011).

compliance consultant,” subject to DOJ approval, responsible for overseeing its FCPA compliance program for at least two years and given substantial authority to do so.¹⁷¹ As with *Maxwell Technologies*, this burdensome requirement reflected the nature of JGC’s FCPA violation, which the DOJ considered substantial.¹⁷² During a ten-year period from 1994–2004, JGC and its co-conspirators participated in a scheme to pay tens of millions of dollars in to numerous Nigerian government officials to secure billions of dollars of business related to a project. The DOJ found that JGC’s officers, employees, and agents acted “willfully . . . in furtherance of the authorization, promise, and payment of bribes to Nigerian government officials pursuant to the scheme.”¹⁷³

In *United States v. DePuy, Inc.*,¹⁷⁴ the DOJ imposed several specific and stringent due diligence and training requirements on the defendant Depuy’s parent company, Johnson & Johnson.¹⁷⁵ These additional requirements reflect both the nature of Depuy’s operating environment in countries like Greece, where corruption is extremely prevalent,¹⁷⁶ and the sector-specific risk in industries like healthcare, where the party receiving the bribe has great discretion. In this industry, doctors and healthcare providers have broad discretion over prescribing medication. Johnson & Johnson’s representatives acknowledged that they provided cash, laptops, and excessive travel expenses to healthcare providers to incent these providers to prescribe Johnson & Johnson medication.¹⁷⁷ As part of the deferred prosecution agreement with the DOJ, Johnson & Johnson agreed that it “will identify no less than five [Johnson & Johnson] operating companies that are high risk for corruption because of their sector.”¹⁷⁸ Based on this agreement, companies operating in similar industries—namely where the counterparty to the transaction has substantial discretion over the allocation of funds and decisionmaking ability—should be on notice to design their compliance program to take this industry specific risk into account.

¹⁷¹ *Id.* at 49.

¹⁷² *Id.*

¹⁷³ *Id.* at 28–29.

¹⁷⁴ 4:11-CR-099 (D.D.C. Apr. 8, 2011)

¹⁷⁵ *Id.* at 33–37.

¹⁷⁶ Gardiner Harris, *Johnson & Johnson Settles Bribery Complaint for \$70 Million in Fines*, N.Y. Times (April 8, 2011), available at <http://www.nytimes.com/2011/04/09/business/09drug.html>.

¹⁷⁷ Deferred Prosecution Agreement, *United States v. Depuy, Inc.*, No. 11-CR-099, 25 (D.D.C. April 8, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf>.

¹⁷⁸ *Id.* at 34

Yet, even in these deferred and non-prosecution agreements, the DOJ's guidance often remains broad and the DOJ has repeatedly cited a list of minimum elements necessary for effective FCPA compliance programs, enumerated in deferred and non-prosecution agreements, it's still unclear what the DOJ envisions in the actual wording of compliance policies. For example, as one practitioner recently pointed out, it is still unclear what the proper amount an employee may spend at dinner with a government official as part of a bona fide business expense.¹⁷⁹

In sum, the DOJ does not provide a definitive blueprint for companies in designing effective FCPA compliance programs. However, an analysis of the DOJ's approach to FCPA violations reveals substantial consistency in its expectations. It appears that all compliance programs must adequately cover at least the above-mentioned twelve minimum elements to be considered effective, and that in certain circumstances, companies may be required to include additional elements based on factors specific to that company.

V. METRICS FOR AN EFFECTIVE COMPLIANCE PROGRAM

Many DOJ diversion agreements lay out the features of an effective compliance program without actually specifying the metrics or methods for compliance analysis. For example, the deferred prosecution agreement between Johnson & Johnson and the DOJ required Johnson & Johnson to implement "periodic testing of the compliance code, standards, and procedures designed to evaluate their effectiveness in detecting and reducing violations of anticorruption laws and Johnson & Johnson's compliance code."¹⁸⁰ However, the DOJ did not mandate specific ways of accomplishing these objectives; it only provided general guidance. Our analysis yields the following concrete suggestions for designing and monitoring an FCPA compliance program.

A. Risk-Based Assessment of a Business

The adequacy of a company's FCPA compliance program will depend largely on company-specific factors, such as industry, size, and geographic reach. Thus, a critical step in compliance program analysis is to perform a company-specific risk assessment. Companies should create a summary of:

1. Business areas at greatest risk of corruption (i.e. those requiring significant foreign discretionary or regulatory approval);
2. Geographic locations of corruption risk;

¹⁷⁹ See Ryan McConnell *et al.*, *What Does Effective FCPA Compliance Look Like?*, Law.com (Apr. 21, 2011), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202490068578>.

¹⁸⁰ Deferred Prosecution Agreement, *United States v. Depuy, Inc.*, *supra*, note 177.

3. Specific employees and agents of the company working in these areas; and
4. Most importantly, foreign consultants and business partners with whom the company does business.¹⁸¹

By identifying these four general factors, a company can focus the substance of their compliance program on specific business and geographical areas that pose the most significant level of FCPA risk.

The process of identifying foreign areas of risk should be conducted with the underlying focus on identifying areas where decisionmakers have significant discretion, specifically over the decision whether to engage in business (or allow companies to engage in business through the granting of licenses, permits, patents, etc.). Business areas that have highly formalized decisionmaking processes and are subject to significant oversight are, as a general matter, less susceptible to corruption than business areas that are heavily reliant the informal choices of decisionmakers.

Companies should also identify specific points of contact between themselves and foreign officials, including:

1. Points of contact between foreign officials and any operating companies; and
2. Points of contact between foreign officials and any outside parties acting on behalf of the company, including agents, consultants, representatives, distributors, teaming partners, and joint venture partners.¹⁸²

The anti-bribery provisions of the FCPA prohibit the influence of foreign officials, and thus the most prominent points of risk in any project or transaction necessarily involve either direct or indirect contact with foreign officials. Identifying precisely (1) which situations foreign officials are necessarily involved in and (2) which contexts foreign officials may be influential in will help companies to identify and regulate risky interactions.

Finally, to gauge specific levels of FCPA risk, companies should be generally aware of the culture of corruption in the geographical or national context they are working in. They can do this by conducting independent research or by referencing an index, such as Transparency

¹⁸¹ Alarna Carlsson-Sweeny, *Beyond Reproach: Achieving Best Practice in FCPA Compliance*, Practical Law Company, Dec. 4, 2009, available at <http://corporate.practicallaw.com/2-500-8453?source=relatedcontent>.

¹⁸² *Id.*

International's Annual Corruption Perceptions Index (the "CPI"), which ranks the level of corruption of 180 countries.¹⁸³

B. Assessment of FCPA Code of Conduct

Analysis of the above-detailed written policies pertaining to FCPA compliance is another essential step in compliance program analysis. "A company's code of conduct provides a window into the company's overall compliance program."¹⁸⁴ Written FCPA policies are necessary preconditions to implementing an effective compliance program. Although the DOJ is primarily focused on whether a written compliance program is actually being enforced, the scope and specificity of written FCPA policies are positive indicators of a strong compliance program. The more thoughtful, organic, and process-driven the FCPA-related policies are, the more the DOJ will favor them.

1. Scope

An effective compliance program must be expansive in scope. It must address all of the riskiest transactions, and it must regulate them with the specificity required to adequately prevent and monitor illegal payments or offers. A complete FCPA compliance program will have specific FCPA-related policies on:

1. Gifts and bribes;
2. Travel and entertainment;
3. Facilitating payments;¹⁸⁵
4. Employees acting through third parties;
5. Third-party transaction partner due diligence;
6. Approval authority;
7. Charitable contributions;
8. Accounting for facilitating payments and agency fees;
9. Petty cash; and
10. Loans and advances.¹⁸⁶

¹⁸³ *Corruption Perceptions Index 2010*, Transparency International, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010.

¹⁸⁴ See McConnell, et al., *supra*, note 179.

¹⁸⁵ Although, as previously mentioned, many FCPA compliance programs will consciously omit policies on facilitating payments. Companies do this because most employees will open themselves up to significant liability by attempting to interpret and follow a facilitating payments policy. The risks of including a policy that may expose a company to FCPA liability far outweigh the potential benefits resulting from any facilitating payments.

¹⁸⁶ See McConnell, et al., *supra*, note 179.

Additionally FCPA standards and procedures must apply to all company officials and employees that could expose it to liability. Not even the highest levels of management should be exempt. The DOJ has specifically indicated that universal coverage of FCPA programs is not only to directly prevent violations, but also to encourage managers and directors to embrace a corporate culture where compliance policies are respected and enforced. Specifically, the FCPA appliance program apply to all:

1. Directors;
2. Officers;
3. Employees; and
4. Outside parties acting on behalf of the company in a foreign jurisdiction, including but not limited to: (a) Agents, (b) Consultants; (c) Representatives, (d) Distributors, (e) Teaming partners; and (f) Joint venture partners.¹⁸⁷

2. Specificity

It is difficult to abstractly describe the required level of specificity for FCPA programs, because they are inherently context-specific. However, there are several practices that are typically essential to an effective FCPA policy. A sufficiently specific FCPA policy must:

1. Defines key terms;
2. Provides illustrative examples of appropriate versus unlawful activity; and
3. Includes methods for detection of improper behavior.¹⁸⁸

Additionally, each policy with respect to a particular action should state:

1. Whether the action is prohibited absolutely;
2. The circumstances, if any, under which the action may be permitted;
3. Whether prior approval is required before the action is taken;
4. Whether such approval must be obtained from management, the compliance function, or the legal department; and
5. Required documentation procedures.¹⁸⁹

C. Methods of Policy Communication and Implementation

¹⁸⁷ Deferred Prosecution Agreement, *DePuy Inc.*, supra, note 177, at 31.

¹⁸⁸ McConnell, et al., supra, note 179.

¹⁸⁹ *Id.*

The existence of a written program alone will not satisfy the DOJ. Prosecutors always inquire whether a company's compliance program is being adequately enforced—that is, whether it is a “paper program.” Companies should primarily focus on the actual implementation of their compliance program, but they should also ensure that the communication and enforcement of a program is transparent and obvious. The existence of various channels for communication, implementation, and enforcement of a company's FCPA policies also indicate a robust compliance program.

1. Communication

The DOJ requires that companies effectively communicate their FCPA compliance programs to all employees. This includes ensuring that “the policies, responsibilities, and lines of communication are clearly established.”¹⁹⁰ Mechanisms to ensure effective communication of FCPA policies, standards and procedures include:

1. Mandatory, periodic training for all directors, officers, and employees;
2. Annual certifications certifying compliance with the training requirements;¹⁹¹
3. Messaging in all communication channels with staff, including regular newsletters and town-hall style meetings held on other topics; and
4. Creating a compliance culture demonstrating support for compliance efforts.¹⁹²

2. Implementation

A company must have in place appropriate disciplinary procedures to address any violations of the anticorruption laws and the company's compliance code by any wrongdoer, including senior management. Disciplinary procedures must focus not only on the specific deterrence of future bad conduct by any wrongdoer, but also must focus on general deterrence to prevent similar misconduct by any agent of the company.¹⁹³

¹⁹⁰ See Blageff at §1:27 (“Companies that take their compliance programs seriously tend to make sure that the policies, responsibilities, and lines of communication are clearly established. The key to early handling of actual and potential problems is for information to flow quickly to people who have an assigned responsibility for dealing with them.”).

¹⁹¹ Deferred Prosecution Agreement, *DePuy Inc.*, supra, note 177, at 31.

¹⁹² Carlsson-Sweeny, supra, note 181.

¹⁹³ See *Cases and Enforcement Actions*, 3 Foreign Corrupt Prac. Act Rep. § 33:57 (2010) (referring to *Securities and Exchange Commission v. Alliance One International, Inc.*).

One aspect of effective enforcement is ensuring that contractors are aware and formally bound to a company's FCPA policies. Thus, agreements, contracts, and renewals thereof with all agents and business partners should contain as standard provisions:

1. Anticorruption representations and undertakings related to compliance;
2. Rights to conduct audits of the books and records of the agent or business to ensure compliance; and
3. Rights to terminate an agent or business partner as a result of any breach of anticorruption laws, regulations, or related representations and undertakings.¹⁹⁴

This concept of establishing contractual duties with agents can also be extended to directors, officers, employees, and third-party agents. All such individuals that have contact with foreign government officials should be required to certify annually that they have not engaged in behavior that violated the FCPA or the company's compliance policies.¹⁹⁵

D. Assessment of Compliance Infrastructure

An aspect of the DOJ's inquiry into whether a written compliance program is actually effective is to ask whether a company has established the compliance infrastructure necessary to monitor and enforce its FCPA policy. This infrastructure is not limited to providing education and oversight. There must be mechanisms in place to ensure that employees feel it is safe to report FCPA violations or suspicious transactions. Also, any oversight or investigations must be properly documented and recorded so that in the case of a violation a company is able to minimize any liability it may face by fully cooperating with the DOJ.

1. Availability of Reporting and Support Mechanisms

An effective compliance program includes mechanisms for making and handling reports and complaints related to potential violations of anticorruption laws and regulations. Standard reporting mechanisms should include:

1. Reasonable access to an anonymous toll-free hotline;
2. Reasonable access to an anonymous electronic complaint form, where anonymous reporting is legally permissible;¹⁹⁶

¹⁹⁴ Deferred Prosecution Agreement, *DePuy Inc.*, supra, note 177, at 32.

¹⁹⁵ Carlsson-Sweeny, supra, note 181.

¹⁹⁶ Deferred Prosecution Agreement, *DePuy Inc.*, supra, note 177, at 34.

3. An established process for referral, review, and response of reports by a standing committee that includes internal audit, legal, and compliance personnel; and
4. A system in place for employees to receive urgent advice when confronting potential violations in foreign countries.

These mechanisms represent generally applicable reporting procedures necessary for an effective compliance program. Companies should consider the overall sufficiency of their reporting requirements by evaluating the risks and incentives of reporting FCPA violations or suspicious practices for employees at all levels of the company. This is necessarily a contextual inquiry that each company must make individually.

2. Responsibility for Compliance Oversight

The DOJ has emphasized the importance of having at least one member of a company's senior management responsible for the enforcement of policies, standards, and procedures. Their emphasis is because "[m]any FCPA compliance problems can be traced back to a company's failure to define roles and make individuals accountable for ensuring compliance."¹⁹⁷ Thus, responsibility for the implementation and oversight of compliance policies, standards, and procedures should be assigned to one or more senior corporate executives:

1. A Chief Compliance Officer with the authority to report matters directly to the company's Board of Directors and significant experience with compliance with the FCPA, including its anti-bribery, books and records, and internal controls provisions, as well as other applicable anticorruption laws and regulations.¹⁹⁸
2. Heads of compliance within each high-risk business sector and geographic region, with responsibility for overseeing the company-wide compliance program within that sector or region and obligations to report directly to the Chief Compliance Officer and Audit Committee.¹⁹⁹

E. FCPA Auditing

There is no shortage of guidance on how to effectively conduct a general compliance audit.²⁰⁰ However, there are several factors specific to the FCPA that companies should focus

¹⁹⁷ *The Elements of a Compliance Program*, 1 Foreign Corrupt Prac. Act. Rep. § 20:1 (2011).

¹⁹⁸ Deferred Prosecution Agreement, *DePuy Inc.*, *supra*, note 177, at 31.

¹⁹⁹ *Id.* at 32.

²⁰⁰ See, e.g., John F. Olson, *How to Really Make Audit Committees More Effective*, 54 Bus. Law. 1097, 1106 (1999) (outlining ten rules for effective audit committees).

on. First, a company should identify divisions of their operations that are high risk for corruption based on:

1. Sector and location;
2. High degree of interaction with government officials;
3. The existence of internal reports of potential corruption risk; and
4. Financial audit results.

The company should conduct random periodic audits of the divisions that are particularly high risk based on the factors above. These periodic audits ("FCPA Audits") should be conducted with the goal of detecting violations of anticorruption laws and regulations.²⁰¹

1. Frequency

The frequency with which companies perform FCPA Audits should be directly based on the risk-assessment calculated above. Companies should perform FCPA Audits designed to detect violations of anticorruption laws and regulations:

1. For high-risk operating companies, at least once every three years; and
2. For other operating companies that pose corruption risk, no less than once every five years.²⁰²

The DOJ will always look favorably on increased auditing, so companies should try to surpass the minimum required frequencies. Further, companies must ensure that their auditing practices remain effective over time by reviewing the list of high risk operating companies annually and update it as necessary.²⁰³

2. Process Considerations

Finally, companies should ensure that their audit practices are subject to rigorous process standards. As explained above, the DOJ will look favorably upon compliance practices that are process-intensive. The more well thought-out and rigorous a company's auditing procedures are, the more likely the procedures will be (1) actually effective at preventing FCPA violations and (2) deemed sufficient by the DOJ. Some examples of basic process standards are:

1. All compliance measures should be thoroughly documented.

²⁰¹ See Deferred Prosecution Agreement, *DePuy Inc.*, supra, note 177, at 34 (describing the required procedures for risk assessments and audits).

²⁰² *Id.*

²⁰³ *Id.*

2. A technology-enabled strategy using audit analytics can provide continuous auditing, examine every transaction rather than just a sample, and flag transactions that require further investigation.²⁰⁴
3. Results of FCPA audits and reporting should be used to improve anti-corruption policies and procedures and determine aspects of training and communication.

VI. CONCLUSION

FCPA compliance is a central challenge for modern companies transacting business cross-borders. As this report demonstrates, the stakes are enormous. The criminal and civil fines imposed on violators have been severe; recently the fines imposed on organizations have skyrocketed, and there is no indication the DOJ is going to slow its escalating enforcement actions.

The lack of clear guidance offered by the DOJ exacerbates the challenges companies face. Yet, companies are not without recourse. The main way that companies can minimize their risk is through instituting effective compliance programs. These programs are comprised of systematic procedures instituted to efficiently and effectively prevent violations of the FCPA.

This report squarely takes on the challenge of establishing effective compliance programs. Firstly, the report provides companies with an analysis of how the DOJ enforces the FCPA. Secondly, this report creates a framework, based on this analysis, for developing effective compliance programs. Specifically, this report offers suggestions for creating and monitoring such a program through assessing the following areas: company-specific risks, the company's code of conduct, the methods of policy communication and implementation, and the compliance infrastructure.

In the abstract, the solution seems simple. If you can detect a violation, you can likely prevent it. But in reality, it is often difficult to detect violations before they occur. Therefore, improved metrics and benchmarking cannot entirely solve the problem of undetected violations.

Nevertheless, having a strong framework in place makes infractions and resulting liability less likely to occur. It is also likely to reduce the scope of damages if a violation occurs by allowing for a company to promptly and effectively disclose violations and cooperate with the DOJ. In this era of increased risk exposure for FCPA violations, companies must do

²⁰⁴ Peter Millar, *Making FCPA Compliance Sustainable*, Business Finance, May 2, 2011, available at <http://businessfinancemag.com/article/making-fcpa-compliance-sustainable-0502>.

everything they can to minimize their liability. The recommendations offered by this report guide companies in the right direction: toward efficient and effective FCPA compliance.