Breakout Sessions – Series 4

CORPORATE CLEANUP

CREATING A CULTURE OF COMPLIANCE

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I. WHO NEEDS A COMPLIANCE AND ETHICS PROGRAM?

Everyone here. For nearly 30 years, the U.S. Sentencing Guidelines for Organizations have required corporations, partnerships, labor unions, pension funds, non-profit entities and governmental units to maintain ethics compliance programs. Other laws also require ethics compliance programs, and not just for publicly-traded companies. In fact, in 2014, the U.S. Supreme Court made clear that the Sarbanes-Oxley Act applies to employees of a public company’s private contractors and subcontractors. Recent events, including the #MeToo movement, have amplified the importance to the public, employees, customers, and shareholders of having effective, robust ethics compliance programs.

The value of Corporate Compliance Programs for companies of all sizes includes prevention, deterrence, mitigation, business and economic benefits, defense against civil suits and criminal prosecutions, and preservation and enhancement of corporate reputation. Below are several checklists to help you make sure your plan is on track or, if it is not, what you need to be looking at changing to get it on track.

II. WHAT GOT US HERE? THE UNDERLYING LAWS

A. U.S. Sentencing Guidelines For Organizations

The Sentencing Guidelines were promulgated in 1991. In 2010, the United States Sentencing Commission voted to modify them, including the provisions setting forth the attributes of an effective compliance and ethics program. Under the Guidelines, a convicted organization may be eligible for a reduced sentence if it has established an effective compliance and ethics program. Entities use the Guidelines to establish effective compliance and ethics programs, reduce the likelihood of bad corporate events, and minimize negative consequences if bad events occur.

The Guidelines set forth seven minimum “elements” of an effective compliance program: (1) establish policies, procedures and controls; (2) exercise effective compliance and ethics oversight; (3) exercise due diligence to avoid delegation of authority to unethical individuals; (4) communicate and educate employees on compliance and ethics program; (5) monitor and audit compliance and ethics programs for effectiveness; (6) ensure consistent enforcement and discipline of violations; and (7) respond appropriately to incidents and take steps to prevent future incidents.

In the wake of multiple corporate frauds at the end of the last century and the beginning of the present century, the U.S. Sentencing Guidelines for Organizations were amended in 2004. The Amendments require all entities to promote “an organizational culture that encourages ethical conduct and a commitment to comply with the law.” They emphasize that the tone of the Corporate Compliance and Ethics Program must come from the top, and require organizations to conduct risk assessments. The amended Guidelines were intended to highlight “the importance of structural safeguards designed to prevent and detect criminal conduct.”

B. Sarbanes-Oxley Act

The Sarbanes-Oxley Act (The Corporate Fraud and Accountability Act) (SOX), passed in 2002 after the cataclysmic corporate scandals that came to light in the prior year or so, created a new set of standards for all U.S. public company boards, management, and public accounting firms. SOX empowers the Securities & Exchange Commission (SEC) to create regulations to
define how public corporations comply with the law. It addresses both internal and external controls on corporate activity. SOX establishes requirements for independent oversight, requirements for external auditors, and enhanced financial disclosures, among other things. From an employment law perspective, the most important aspects of SOX are the anti-retaliation provisions. Investigations of SOX violations must be conducted by federal regulatory or law enforcement agency; member of Congress of any committee of Congress; person with supervisory authority over the employee; or a person working for the employers who has the authority to investigate, discovery or terminate the misconduct. Remedies for violation of SOX include: reinstatement; front pay if reinstatement is inappropriate; compensatory and economic damages, which may include back pay with interest, fringe benefits and emotional distress; and attorney’s fees.

The Supreme Court determined that protections under the whistleblower provisions of SOX extend to employees of the contractors and subcontractors of publicly-held companies, a group that can could potentially include lawyers, accountants, auditors, third-party administrators, and any other entity hired to perform a service. The Supreme Court’s decision highlighted the importance of robust internal compliance programs for all entities.

C. Dodd-Frank Act

Congress acted again in the corporate compliance arena in 2010 after the catastrophic collapses in the mortgage and banking industry. The Dodd-Frank Wall Street Reform and Consumer Protection Act was designed to, among other things, protect and encourage individuals who provide information to the regulators tasked with protecting the investing public and consumer borrowers. Recognizing the shortcomings in SOX’s procedural scheme, it strengthened whistleblower protections and added an incentive program for whistleblowers.

Dodd-Frank created a new cause of action for employees who provide information to the SEC, refuse to participate, testify in proceedings or file claims based on a reasonable belief that there has been a violation of the Consumer Financial Protection Act of 2010 or any other federal law subject to the jurisdiction of the Consumer Financial Protection Bureau (CFPB).

Additional expansions of SOX contained in the Act include lengthening the filing deadline from 90 to 180 days, providing jury trials, and covering non-publicly traded subsidiaries of public companies and nationally recognized statistical ratings organizations such as Moody’s and Standard and Poor’s. Explicitly intended to encourage whistleblowing, the Act’s whistleblower bounty program provides that whistleblowers shall receive ten to thirty percent of recoveries from reported violations worth over $1 million and receive job protection and confidentiality. Whistleblowers may file a claim for retaliation up to six years after participating in an SEC investigation or three years after they discover the issue, but no later than ten years. Whistleblowers have a private cause of action in federal court, and these rights and remedies cannot be waived through an arbitration agreement with an employer signed before the dispute.

1 On February 21, 2018, the Supreme Court of the United States held that the anti-retaliation provision of Dodd-Frank does not extend to an individual who has not reported a violation of the securities laws directly to the Securities and Exchange Commission (SEC), but has only reported internally to his company. As the Court held, the statute is clear that the protection only applies to those who go to the SEC. Digital Realty Trust, Inc. v. Somers, No. 16-1276, Supreme Court of the United States (February 21, 2018).
D. False Claims Act

Enacted during the Civil War to fight fraud perpetrated by companies selling supplies to the Union Army, the False Claims Act ("FCA") includes “qui tam” provisions allowing private citizens to sue companies and individuals for defrauding the government – on behalf of the government. The FCA prohibits individuals and companies from defrauding the government. It also prohibits an employer from retaliating against an employee for reporting the alleged fraud to the government and/or acting in furtherance of the FCA. In addition to the federal FCA, several states have enacted their own false claims acts that essentially mirror the federal FCA. The FCA remains the government's primary tool to combat fraud with respect to government programs.

The FCA has been amended multiple times and, most recently, as part of the Dodd-Frank Act and the Patient Protection and Affordable Care Act. It provides that whistleblowers, or others who sue on behalf of the government, who bring successful cases are entitled to fifteen to thirty percent of the government’s recovery and their attorneys are guaranteed payment of their regular hourly fees. In addition, whistleblowers are entitled to reinstatement with the same seniority status, double back pay with interest and special damages.

1. Allegations under the FCA arise most often in the defense contracting and health care industries. The claims arise out of alleged fraudulent billing, fraud in contracting, violations of regulations and/or complying with contracts and anti-kickback. Of the nearly 800 FCA lawsuits filed in 2018, around 500 of them were in the healthcare space.

2. The FCA is a quasi-criminal act allowing for criminal prosecution and sentencing for violators, including individuals:

   a. June 2016, Acting Associate Attorney General Bill Baer delivered a speech regarding the impact of Yates Memorandum focus on individual accountability and corporate cooperation. Focus on individuals is not limited to the criminal context.
   b. Investigation into an individual’s misconduct is to proceed in tandem with the underlying corporate investigation whether the government’s investigation is prompted by a qui tam complaint or law enforcement partner or the relator actually names individual alleged violators.
   c. Corporations are expected to disclose all facts relating to individuals involved in the wrongdoing no matter how high up the corporate chain those individuals sit.

3. Required Corporate Disclosure:

   a. Corporation should report fraud early – even when not all facts have been discovered.
   b. Federal Sentencing Guidelines concept of downward departure– self-disclosure (as soon as the corporation learns of the violation and before the government does) and corporate cooperation is taken into account when determining settlement of matters for less than it would have otherwise been settled for. Impact is case specific.
4. Bars to qui tam actions by private citizens. The FCA provides for several bars to qui tam actions by private citizens: employees convicted of criminal conduct arising from their role in the violation; prior action filed by someone else; the Government is already a party to a proceeding concerning the same conduct; and the action is based on information that was previously disclosed to the public through other means.

E. Foreign Corrupt Practices Act

Since 2004, the U.S. government has dramatically increased its global enforcement of the Foreign Corrupt Practices Act (the “FCPA”). Consequently, U.S. companies and their employees doing business in other countries have been the target of criminal and civil prosecutions, huge fines, costly investigations and public disgrace as a result of violations of the FCPA.

Enacted in 1977, the Foreign Corrupt Practices Act makes it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person, while in the United States.

The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm, if they order, authorize, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions. Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an “issuer,” a “domestic concern,” or a foreign national or business.

An “issuer” is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A “domestic concern” is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States, or that is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce including telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken outside the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

A foreign company or person is subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.
U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

The FCPA prohibits paying, offering, promising to pay, or authorizing to pay or offer money or anything of value. “Anything of value” includes: monetary bribes; stock; entertainment; gifts; discounts of products or services not readily available to the public; charitable donations; offer of employment; assumption or forgiveness of debt; payment of travel expenses; and personal favors.

The FCPA prohibits making a payment to a third party or intermediary, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term “knowing” includes conscious disregard and deliberate ignorance. Intermediaries may include agents, distributors, consultants and joint venture partners.

The FCPA prohibits any corrupt payment intended to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to induce a foreign official to use his or her influence improperly to affect or influence any act or decision. The FCPA does not require that a corrupt act succeed in its purpose. The offer or promise of a corrupt payment can constitute a violation of the statute.

The prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A “foreign official” means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. Therefore, officials or managers of “state owned enterprises” or “SOE’s” are foreign officials.

The FCPA prohibits payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person. This includes payments to a foreign official to lower corporate taxes and custom duties to gain unfair competitive advantages.

There is an exception to the anti-bribery prohibition for payments to facilitate or expedite performance of a “routine governmental action,” i.e., “grease payments.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country. “Routine governmental action” does not include any decision by a foreign official to award new business or to continue business with a particular party.

However, such payments may violate the accounting provisions of the FCPA if not accurately reported. Further, the anti-corruption laws in many countries (e.g., the U.K., Germany, and Italy) do not provide for an exemption for facilitating payments and, therefore, a U.S. company may violate international anti-corruption laws by complying with the FCPA facilitating payments exemption.

A person charged with a violation of the FCPA’s anti-bribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country. Local custom or practice is insufficient to support this defense. Additionally, companies may provide
“payments” to foreign officials in connection with demonstrating a product or performing a contractual obligation. For example, U.S. companies can pay for the reasonable travel expenses of foreign officials for travel to the United States to meet company personnel; inspect products or a manufacturing facility; and execute a contract.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.

Criminal penalties may be imposed for violations of the FCPA’s anti-bribery provisions as follows: corporations and other business entities are subject to a fine of up to $2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. Under the Alternative Fines Act, these fines may be actually significantly higher – the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. Fines imposed on individuals may not be paid by their employer or principal.

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to $10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the anti-bribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

Under guidelines issued by the Office of Management and Budget (OMB), a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.
Conduct that violates the anti-bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor that alleges the bribery led to the defendant winning a foreign contract. Further, lawsuits may be filed by shareholders of the corporation for the breach of fiduciary duties by directors and officers who fail to prevent or detect FCPA violations.

F. Some Other Federal Statutes With Whistleblowing/Anti-Retaliation Protections

There are many federal laws and a myriad state laws that protect whistleblowers, including the federal Fair Labor Standards Act, Title VII and other federal discrimination statutes, Patient Protection and Affordable Care Act, Clean Air Act, Clean Water Act, Toxic Substances Control Act, Occupational Safety and Health Act, and Railroad Safety Act.

Additionally, and especially in the past two years, legislatures and municipalities are taking the initiative to enact additional protections. A robust, continuously-improving culture of compliance is essential to ensuring your entity is in the best position to effectuate those protections and defend itself in the event of rogue conduct by an employee.

G. #MeToo Movement

The #MeToo movement was started in 2006 by Tarana Burke. On October 15, 2017, actress Alyssa Milano shared on Twitter a friend’s suggestion that “women who have been sexually harassed or assaulted” write “Me too” in the wake of the Harvey Weinstein revelations earlier that month. The #MeToo hashtag instantly went viral. In the nine days following Milano’s tweet, the #MeToo hashtag garnered 1.7 million tweets across every continent. Eighty-five countries had at least 1,000 #MeToo tweets. In the first 24 hours following Milano’s tweet, Facebook reported 12 million posts by 4.7 million users.

The #MeToo movement captured 24/7 media attention and resulted in dramatic consequences for a number of high-profile celebrities and executives and their employers. Take for example former Senator Al Franken (D-Minn.), one of the primary officials who fought to introduce legislation limiting the enforcement of arbitration agreements for Department of Defense contractors in instances of sexual harassment and workplace discrimination (the Franken Amendment). Franken resigned from the Senate in the midst of a media scandal in late 2017 after at least eight women publically accused him of sexual harassment and assault, stemming back over a decade.

In the wake of the #MeToo movement, pension funds and other large investors have demanded disclosure of corporate investigation processes and settlement costs and publication of information about policies to protect workers and to promote diversity. In addition, allegations of sexual harassment and discrimination have been subjected to heightened scrutiny and attention that extends beyond the nature of alleged conduct. For example, several recent shareholder derivative actions have alleged board members breached their fiduciary duty by covering up gender discrimination and sexual harassment by executives or otherwise failed to timely and appropriately respond to harassment claims. These lawsuits allege, among other things, that such failures have exposed the companies to lawsuits and regulatory action, adversely impacted their reputations, profits and ability to hire and retain top talent.
As a result, many companies are re-examining their investigation procedures and escalation protocols in handling complaints of this nature. Companies are more likely to engage an outside, independent investigator when investigating complaints, particularly those involving high-level personnel. Companies are also more likely to engage an outside public relations or crisis management expert consultant, and to have that consultant on board, and a protocol established, even before receiving a complaint. At the same time, companies are less likely to insist that the attorney-client privilege be maintained at all costs on their investigations, although they are still likely to conduct their investigations so as to preserve the option to maintain the attorney-client privilege (and work product protection). In many instances, boards of directors or company investors may even insist upon disclosure of harassment allegations and related investigations.

In addition, state and local governments have passed laws requiring training of employees on sexual harassment and providing additional protections to victims of sexual harassment, including prohibitions on pre-dispute arbitration and extending statutes of limitations for such claims. In addition, companies are under increasing pressure to avoid any actions that would cloak claims of sexual harassment with confidentiality, including confidential settlement agreements. In acknowledgment of the recent sexual misconduct allegations and the confidential settlements in connection with those allegations, Congress added a new section 162(q) to the Internal Revenue Code as part of the Tax Cuts and Jobs Act. The new section prohibits companies from deducting costs related to sexual assault and sexual harassment settlements that are subject to nondisclosure agreements.

III. BEST PRACTICES FOR CREATING AN EFFECTIVE CORPORATE COMPLIANCE AND ETHICS PROGRAM

An effective Corporate Compliance and Ethics Program must start from Executive Management and flow throughout the organization. “Tone at the top” is an essential feature of an effective program. Corporations should identify a Chief Compliance and Ethics Officer and establish a designated and extended compliance organization, which includes procedures for reporting, monitoring, training, control, accountability and assessing risk. The Chief Compliance and Ethics Officer should ensure the compliance risk is understood and managed, the organizational compliance obligations are part of the corporation’s fabric and there is a strong corporate culture of social and ethical responsibility. A robust compliance program should include codes of conduct, financial governance, financial reporting and disclosure principles, and internal control policies. While there are no “one size fits all” solutions in this area, companies should consider a separation of compliance and legal functions to allow the Compliance and Ethics Officer to maintain impartiality and independence to assess potential liability issues.

A. A Checklist: What to Include in your Compliance and Ethics Program

1. Statement of Corporate/Organizational Values
2. Code of Conduct

IMPORTANT POINTER: The law about what is acceptable and what violates the law in Codes of Conduct and associated processes and procedures is changing rapidly, so be sure to evaluate your program and get advice regularly on whether your Code complies with current law. The SEC has been particularly vigilant about examining Codes, employee
handbooks, and settlement/separation/restrictive covenant and other agreements for language that could be interpreted as discouraging employees’ direct communications with the government. Along those lines, be sure to eliminate language that prohibits or limits employees from discussing the subject matter of internal interviews without prior Legal Department authorization, or that precludes employees from providing documents or data to the government.

3. Corporate/Organizational Policies & Procedures
4. Compliance Hotline or Ethics Help Line
5. Training
6. Consistent enforcement
7. Periodic certification
8. Anonymous ethical cultural surveys
9. Periodic risk assessments and correction action to fill the gaps
10. Routine ethical messaging and recognition of ethical conduct by business leaders and employees
11. Inclusion of assessment of legal compliance and ethical conduct in performance evaluations and tie the assessment to compensation

B. A Checklist: How to Get the Word Out Internally

1. Employee orientation
2. Messaging through posters, brochures and wallet cards
3. Intranet
4. Compliance Hotlines/Ethics Help Line
5. Training
6. Corrective/Remedial Action (and publicizing when appropriate)
7. Annual Code Certifications

C. Compliance and Ethics Programs Add Value

1. Support company’s commitment to ethical conduct important to all stakeholders
2. Enhance corporate social responsibility profile for company
3. Strengthen defense of employment claims for Code of Conduct violations and standing in the court of public opinion

IV. A CHECKLIST: BEST PRACTICES FOR CREATING A ROBUST ANTI-CORRUPTION COMPLIANCE PROGRAM

The most effective way to avoid costly violations under the FCPA is to implement an effective anti-corruption compliance program. An effective compliance program should contain the following elements:

A. Conduct a Baseline Risk Assessment

- **Country Risks**: Identify all aspects of the business that operate overseas or otherwise have dealings with foreign officials or state owned enterprises and identify the reputation for corruption of the countries in which the organization does business.

- **Business Sector Risks**: Identify the risk of corruption inherent in the industry sector in which the organization does business. Sectors such as pharmaceuticals, oil and gas, defense/arms, and telecommunications have a greater risk.

- **Transactional Risks**: Identify all employees and agents who interact with foreign officials and the types of transactions they engage in. Risks are greater where employees and agents make political or charitable contributions, obtain licenses and permits, or engage in transactions related to public procurement.

- **Business Partnership Risks**: Identify foreign consultants and business partners with whom the organization does business. Identify proposed joint ventures and mergers and acquisitions.

- **Business Opportunity Risks**: Identify business circumstances that may put the organization at risk of an FCPA violation such as high value projects, projects involving many intermediaries or projects not undertaken at market price.

- **Compliance Risks**: Identify and compare existing compliance functions used by the organization against best practices to ensure that foreign corrupt payments are not made and that accounting records accurately reflect all transactions. Also, identify any instances of past or ongoing noncompliance with the FCPA.

- **Proportionality Risks**: Determine how the compliance program must be tailored in proportion to the risk – one size does not fit all.

B. Assign Managerial and Governance Responsibility

- Senior management

- Board, audit committee or other governing bodies
• Compliance officer
• Legal department

C. Establish Corporate Policies
• Explicit prohibition of bribery in all forms
• Policies regarding the provision of gifts, political and charitable contributions, and bona fide hospitality or promotional expenses
• Global code of ethics and business conduct
• Clear accounting and recordkeeping policies
• Hiring policies to screen individuals with corrupt backgrounds
• Compensation policies rewarding compliance
• Disciplinary policies correcting or punishing noncompliance

D. Communication to and Training of All Stakeholders
• Summary of the FCPA, other anti-corruption laws, and company policies
• Frequently asked questions and answers about the FCPA and other applicable laws
• Training presentations with questions and answers and tests
• Publish specific conduct guides to applicable stakeholders
• Guide to Permissible Foreign Payments (if any)
• Guide for Dealing with Minor Foreign Officials.
• Guide to Hiring and Dealing with Foreign Sales Agents and Partners
• Procedures for Contributing to Foreign Charities
• Procedures for Investigating Violations
• Procedures for Proper Accounting and Recordkeeping
• Procedures for M&A due diligence
• Communicate policies and provide training to intermediaries
• Publish ethics policy on the Company’s website and social media sites
E. Obtain Certifications of Compliance

- Receipt of anti-corruption policies, procedures and training
- Annual or periodic certification of compliance with anti-corruption requirements
- Training test results

F. Develop Intermediary and M&A Due Diligence Checklists

When engaging an intermediary such as an agent, distributor, or consultant, or when entering into an acquisition, merger, joint venture or other business partnership, the Company must perform thorough due diligence. Robust due diligence includes research, questionnaires, interviews, background checks, references and the like, and should involve:

- Background information regarding the Third Party, including its name, address, telephone number, facsimile number and email address, if any
- The identification of the Third Party’s owners and other significant business affiliations
- Information regarding the Third Party’s government relationships, including those relationships held by its owners, partners and shareholders
- The Third Party’s legal qualifications to do business in the country in which the work is to be performed
- Relevant financial information, including requested remuneration and a comparison of that remuneration to the going market rate and
- References (both from other reputable foreign companies and from local institutions)

The U.S. Justice Department has identified “red flags,” which may indicate the potential existence of a Foreign Corrupt Practices Act problem. These “red flags” include:

- The third party has a history of improper payment practices
- The transaction or the third party is in a county where there is widespread corruption
- The transaction or the third party is in a country that has a history of bribes and kickbacks
- The transaction or the third party is involved in or with an industry that has a history of Foreign Corrupt Practices Act violations
• The third party refuses to agree to comply with the Foreign Corrupt Practices Act
• The third party has a family or business relationship with a government official
• The third party has a poor business reputation
• The third party insists that its identity remain confidential or refuses to divulge the identity of its owners
• A government customer recommends or insists on use of a particular intermediary or consultant
• The third party does not have offices or a staff
• The third party does not have significant experience
• The third party insists on unusual or suspicious contracting procedures
• The fee or commission to be paid to the third party is unusually high
• The payment mechanism to be utilized is secretive or unusual
• The third party submits inflated or inaccurate invoices
• The third party requests cash or bearer instrument payments
• The third party requests payment in a jurisdiction outside its home country that has no relationship to the transaction or the entities involved in the transaction
• The third party asks that a new customer be granted an excessive credit line
• The third party requests unusual bonus or special payments
• The third party requests an unusual advance payment

G. Include Contract Provisions for Third Parties

Companies should incorporate contract provisions relating to FCPA compliance into all contracts with third party intermediaries. Contract provisions should include:

• Specific language setting forth the duties or services of the intermediary
• Specific language setting forth the compensation for the intermediary
• Specific certification language stating that the intermediary has the qualifications necessary to perform the services
• Specific language setting forth restrictions on the intermediary’s ability to hire subcontractors, make third party payments and assign the contract to other third parties

• Language certifying compliance with the FCPA, other relevant anti-corruption laws, accurate recordkeeping procedures and the Company’s ethics and FCPA compliance program

• Specific language requiring the intermediary to provide periodic reports and certifications of compliance with anti-corruption requirements

• Specific language permitting the Company to audit and review the records of the intermediary

• Specific language stating that the intermediary will cooperate with all internal or external investigations, interviews, or audits regarding the services provided

• Specific language in the indemnification provision relating to anticorruption law violations

• Specific language in the termination provision permitting termination for anti-corruption violations

• Language requiring the intermediary to disclose any violations of the contract or anti-corruption requirements

H. Develop Reporting Mechanisms for Anti-Corruption Violations

• Confidential reporting and investigations

• Anonymous – but comply with foreign data protection laws

• Hotline or web-based reporting capability

• Non-retaliation and whistleblower protections

I. Conduct Periodic Compliance Reviews

• Review all FCPA policies and procedures

• Maintain a list of individuals in high risk positions regarding the FCPA

• Interview and obtain written certification from individuals in high risk positions

• Ensure that individuals in high risk positions do not have a history of violating or disregarding the law or company policy
• Review the company’s compliance with procedures that govern relevant business transactions
• Assess the sufficiency of employee training
• Conduct periodic audits of accounting and recordkeeping practices
• Provide periodic reports to senior management regarding the company’s compliance efforts

J. Develop Internal Investigation Procedures

• Select investigation team of objective investigators including internal and external resources.
• Establish procedures for the preservation of evidence, including electronic evidence
• Protect the attorney-client privilege as many countries do not recognize in-house counsel privilege
• Determine the proper scope of the investigation – should it be limited to the specific suspected violation or should it be expanded to include all similar business transactions by similar individuals in similar circumstances?
• Review the anti-corruption laws of foreign countries in which the potential violations have occurred
• Review foreign data protection laws, employment laws, and discovery “blocking” statutes
• Determine if and when to self-disclose suspected violations to the DOJ or SEC
• Take quick and decisive action to stop and correct any violations

K. Document FCPA and Anti-Corruption Compliance Efforts

• Communication and training materials
• Attendance at training sessions
• Certifications of compliance
• Due diligence efforts
• Hotline calls or other complaint mechanism usage
• Regular compliance reviews
V. NAVIGATING THROUGH A CORPORATE SCANDAL

A. The Possible Consequences of a Corporate Scandal
  - Your company could collapse
  - Executives could receive criminal charges or jail time
  - Career ending for top management
  - "Break the Bank" fines and penalties
  - Extraordinary civil litigation costs
  - Damage to reputation and fallout on business

B. The Key is Leadership
  - Take action that shows real corporate commitment – don’t just “talk the talk”
  - Top management must lead by example
  - Recognize and reward ethical conduct
  - Punish and publicize rogue behavior outside company guidelines as appropriate

C. Investigating the Allegations
  - Determine who should conduct the investigation
  - Be cautious of privilege issues, particularly with in-house attorneys
  - Determine scope of investigation

D. How to Communicate to the Inside and Outside World

  Whistleblowing Employee
  - Regular follow-up regarding progress of investigation and explain the outcome of investigation
  - Follow up with employee and his/her supervisor about any further issues
  - No retaliation!
  - No differentiation in documenting performance or in frequency of evaluations/reviews
• Special treatment of whistleblower is not required

• Any employment action taken against whistleblower must be supported by a legitimate business reason, be well documented and should be taken only after thoughtful analysis of comparators – with advice of legal counsel

Externally

• Media

• Social networking

• Consider using outside consultants/crisis communicators

E. Managing a Company’s Reputation

Preparation is Key

• Analyze your vulnerabilities

• Develop an issues management framework

• Prepare rapid response protocol to handle attacks on multiple fronts

• Engage and communicate with employees

• Create core messages and repeat both internally and externally

• Explore, create and leverage digital and social medical channels/content

Key Imperatives

• Communicate inside out by starting with employees, key stakeholders and local media

• Talk to people you care about. Don't disappear

• Own the solution to the crisis

• Show you care by being responsible and credible

• Respect the 24-hour news cycle but balance speed with accuracy

• Put the right face on the crisis

• Take actions to demonstrate the company “gets it” and be prepared to make changes until you get it right

• Prepare to move forward quickly
• Know when to stop talking and let the dust settle

F. Don’t Forget the Lessons Learned

• Identify what went wrong
• Take ownership
• Implement measures to fill gaps in controls
• Enforce consistently
• Perform periodic risk assessments and fixes as needed
Corporate Cleanup: Creating a Culture of Compliance

Presenters
Margaret H. Campbell (Atlanta) and Tracie L. Childs (San Diego)

Moderator
John Gerak (Cleveland)

Who needs a corporate compliance program?

- All of us
- Federal requirements extend to virtually all entities:
  - Public
  - Private
  - For-profit
  - Non-profit
What laws drive the requirement?

- U.S. Sentencing Guidelines
- Sarbanes-Oxley
- Dodd-Frank
- False Claims Act
- Foreign Corrupt Practices Act
- Myriad of additional federal and state laws, including FLSA, Title VII, OSHA, Railway Safety Act, Patient Protection Affordable Care Act, Clean Air Act, Clean Water Act, and Toxic Substances Control Act

What is required?

- A Code of Conduct or Ethics
- Specific provisions for a process to make and address reports of violations
- Protection from retaliation
- Robust, continuously-improving culture of compliance
What else do we have to do to create a robust, continuously-improving culture of compliance?

- Walk the talk
- Establish the “Tone at the Top”
- Don’t forget the “Tone at the Middle”
- Accessibility, transparency, commitment
- Assessment
- Training and accountability
- Proof that it is working

What is the legal case for a Culture of Compliance?

- Potential civil liability for the entity, including debarment from government contracts
- Potential criminal liability for individual actors
What is the business case for it?

- Violations can be existential threats to the entity; investment is required to ensure the continued viability of the entity
- Protects the company even if an individual commits a violation
- Regulators require it and are enforcing vigorously

What is the business case for it?

- Shareholders (and their counsel) are looking for potential issues with it
- The public is judging entities and individuals based on what becomes public about it
What are the practical realities (and costs) of not doing it?

- Extensive and expensive investigations
- Threatened and actual litigation from employees
- Government prosecution
- Shareholder suits
- Reputational damage

How has the landscape changed, and what are the drivers for that?

- Office of the Whistleblower at the SEC – the driver for other agencies
- #MeToo
- #TimesUp
- High-profile litigation and precedent-setting decisions
Recap: How do we implement or improve a compliance policy and procedure that will withstand these challenges?

| Ensure buy-in from the top (including the Board), and assign responsibility |
| Make the written Code clear and accessible |
| Provide a hotline |
| Assess current program and procedures for gaps and opportunities – regularly |

Recap: How do we implement or improve a compliance policy and procedure that will withstand these challenges?

| Make changes and publicize them |
| Communicate to and train employees regularly |
| Ensure a robust investigative and response process |
| Culture is what you enforce; enforce compliance |
| Maintain, and utilize a checklist |
Questions?

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