

# ORANGE COUNTY BUSINESS JOURNAL

## Practical Issues in Implementing an FCPA Compliance Program Across Multiple Countries

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All U.S. companies operating abroad need an “effective” compliance and ethics program<sup>1</sup> to prevent, detect and remediate violations of the U.S. Foreign Corrupt Practices Act (FCPA), which generally prohibits bribery of foreign officials by U.S. companies. By now, lawyers and executives at multi-nationals recognize that the FCPA exists, that U.S. companies need an anticorruption compliance program and that the costs of not having such a program can be significant. Since Siemens paid \$1.6 billion (the largest fine to date) to resolve charges with regulators,<sup>2</sup> many other companies have been hit with multi-million dollar penalties.<sup>3</sup> While the need is well-known, many companies fail to appreciate the practical difficulties of implementing an effective compliance program across multiple countries.

One all too common approach is to seek an “off-the-shelf” program that can be rolled out immediately in all locations. An instant compliance program appears to provide protection, ease of implementation and, most especially, relatively low cost. However, to be effective, an FCPA compliance program must be reasonably designed to address and mitigate the specific risks associated with a company’s business operations.<sup>4</sup>

The first challenge of implementing a compliance program in multiple countries is assessing the specific risks the organization faces, which are a function of the corruption environment in the countries of operation,<sup>5</sup> the legal and political environment, the nature of the company’s operations and the size of the business, among other factors. Unique features of operational life in a particular country must be taken into account. For example, in-country logistics may be a significant issue in some countries (due to taxes levied and inspections at state-border crossings) and not in others. Similarly, countries like China have a significant number of state-owned entities, which results in more frequent interaction with foreign officials and increased FCPA risk.<sup>6</sup>

Once the risk analysis is complete and program design has begun, a second major challenge arises, which is finding the balance between accounting for market-specific conditions and having an appropriate level of uniformity across the enterprise. The elements of an “effective compliance program”<sup>7</sup> must be present in every international operation’s program. However, the details are likely to vary from country to country. For example,

procedures for conducting due diligence on third-party intermediaries (TPIs)<sup>8</sup> will be required for all international operations. How that diligence is conducted will necessarily vary among countries, based on such factors as the availability of criminal records, local privacy laws and whether reference checks are commonly used. Thus, while some variations among procedures in different countries are inevitable, the amount of variation is not limitless nor without consequence. U.S. regulators will view variations skeptically.

The third, and perhaps most serious challenge, is moving from the design to the implementation phase of program development. Even a well-designed program can flounder due to practical difficulties, which will often require significant resources. Among the factors that contribute to such difficulties are:

► **Language.** Procedures, training materials, job aids and other compliance materials must be in the local language. Absent careful translation, details and nuance can be lost or confused.

► **Geography.** Training for companies with geographically dispersed operations presents difficult logistical issues, increasing the time and resources needed to achieve training targets.

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► **Communications Infrastructure.** Many companies increasingly rely on technology for training and recordkeeping. Not all countries have the communications infrastructure to support such tools, necessitating alternative solutions.

► **Culture.** Cultural norms can have a significant effect on program implementation. For example, whether employees will use a hotline to report violations may be a cultural issue. In addition, company efforts to prevent bribery will be, in some countries, a profoundly counter-cultural effort.

► **Resistance.** Some level of resistance to compliance program implementation should be expected. In some companies, there is an almost reflexive negative reaction to any new mandate from headquarters, a reaction that can be especially powerful when foreign growth is achieved through acquisitions.

There are few simple answers in implementing a functional and effective anticorruption compliance program across international operations. Recognizing that such a program must be flexible to adjust to different risk profiles is a starting point. Moreover, implementation is a process, not an event — constant monitoring and adjustment of the initial implementation are important

components of a compliance program.

<sup>1</sup> See, U.S. Dept. of Justice, U.S. Attorneys' Manual §9-28.300 (2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrn.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrn.htm) (considering "existence and effectiveness of the corporation's pre-existing compliance program" in determining whether to charge a corporation); U.S. Sentencing Comm'n, U.S. Sentencing Guidelines §8B2.1 (2013), available at <http://www.ussc.gov/guidelines-manual/2013-ussc-guidelines-manual> (considering effectiveness of corporation's compliance program to reduce culpability score).

<sup>2</sup> U.S. Sec. and Exch. Comm'n, *SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina*, (Dec. 13, 2011), <http://www.sec.gov/news/press/2011/2011-263.htm>.

<sup>3</sup> See, e.g. U.S. Sec. & Exch. Comm'n, *SEC Charges Total S.A. for Illegal Payments to Iranian Official*, (May 29, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006> (paying \$398 million to settle SEC and DOJ charges).

<sup>4</sup> See FCPA Criminal Div. of the U.S. Dep't of Justice & the Enforcement Div. of the U.S. Sec. & Exch. Comm'n, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 59* (2012) [hereinafter *Resource Guide*].

<sup>5</sup> See Transparency International, 2012 Corruption Perceptions Index, available at <http://cpi.transparency.org/cpi2012/>.

<sup>6</sup> The broad definition of "foreign official" includes employees working at state-owned entities. 15 U.S.C. § 78dd-1(f)(1)(A) ("'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof....").

<sup>7</sup> *Resource Guide* at 57-62.

<sup>8</sup> *Id.* at 60 (TPIs carry significant risk—they "are commonly used to conceal the payment of bribes to foreign officials in international business transactions.").