



LEAVING NO STONE UNTURNED

DON'T GO IT ALONE: FCPA RESOURCE GUIDE HIGHLIGHTS NEED FOR RISKS AND CONTROLS EXPERTS

November 2012 Update

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Dotted with terms like “books and records,” “internal controls,” “audit,” and “remediation measures,” the DOJ and SEC Resource Guide to the US Foreign Corrupt Practices Act practically pleads for lawyers and companies to consult Forensic Risks and Controls experts, a new specialty that combines a forensic mindset, risk management expertise, fraud auditing and investigative skills, data analysis, and experience working with lawyers and organizations before, during, and after legal crises arise.

In this update, StoneTurn Partners Jonny Frank and Simon Platt, drawing upon their experience as founders and national leaders of forensic auditing practices, identify specific provisions of the Guide that warrant consultation with forensic risk and controls experts, and how lawyers and organizations can leverage that expertise to avoid criminal prosecution, escape a government-imposed monitor, reduce criminal and civil penalties, mitigate collateral consequences sanctions, cut costs of doing business globally, safeguard brand value and corporate culture, and protect the personal reputation of board members and management.

Don't Go It Alone: FCPA Resource Guide Highlights Need for Risks and Controls Experts

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The US Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) Resource Guide to the US Foreign Corrupt Practices Act (“FCPA Resource Guide”)² is full of terms like “internal controls,” “risk assessment,” “remediation” and “testing.” These words are tools of the trade to Forensic Risks and Control Experts, a specialty that combines a forensic mindset, risk management expertise, fraud auditing and investigative skills, data analysis, and experience working with lawyers and organizations before, during, and after legal crises arise.

Forensic Risks and Control Experts serve a vital role in addressing corruption risk, both pre- and post-event. Corruption, after all, poses operational and financial reporting risk as much as it does compliance risk. Companies typically fund bribes by circumventing operational controls and often conceal them through financial misreporting, e.g. classifying the bribe as a legitimate business expense.

An effective forensic expert can help lawyers, in-house counsel, and ethics and compliance officers: avoid criminal prosecution; escape a government-imposed monitor; reduce criminal and civil penalties; mitigate collateral consequences sanctions; cut costs of doing business globally; safeguard brand value and corporate culture; and protect the personal reputation of board members and management. They can serve various roles depending upon the client and circumstances - - hands-on when advising management or management's counsel, or akin to an audit role when working for the board or in support of an independent corporate monitor or consultant.

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StoneTurn's Guide to Meeting the FCPA Resource Guide

Topic	Guidance Warranting Forensic Risks and Controls Expertise	How Forensic Risks and Controls Experts Support Counsel and Compliance Officers to Meet the Guide
Remediation	<i>"[B]oth DOJ and SEC place a high premium on... remedial efforts in determining the appropriate resolution of FCPA matters"</i> ³	<ul style="list-style-type: none"> Develop remediation plans that meet DOJ, SEC, and USSG requirements Audit design and operating effectiveness of remedial measures Operationalize enhanced policies Design preventive and detective data analytics Transfer knowledge for organization to gain self-sufficiency
Risk Assessment	<i>"DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces"</i> ⁴	<ul style="list-style-type: none"> Apply enterprise risk management principles to design, facilitate or assess the anticorruption risk assessment process
Books and Records	<i>"[M]isreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery"</i> ⁵	<ul style="list-style-type: none"> Perform substantive testing to assess adequacy and operating effectiveness of policies, procedures, and controls to ensure that transactions are being accurately recorded in the company's books and records. Assess sufficiency and completeness of documentation supporting transactions
Internal Controls	<p><i>"[T]he design of a company's internal controls must take into account the operational realities and risks attendant to the company's business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption"</i>⁶</p> <p><i>"An organization should take time to review and test its controls"</i>⁷</p>	<ul style="list-style-type: none"> Develop or implement compliance, operational and financial reporting, controls Assess design and validate operating effectiveness of controls relied upon by company to mitigate corruption risks
Compliance Programs	<i>"DOJ and SEC also consider the adequacy of a company's compliance program when deciding what, if any action to take"</i> ⁸	<ul style="list-style-type: none"> Audit design and operating effectiveness of the compliance programs against DOJ, SEC and other government criteria and leading risk management frameworks such as COSO internal controls and COSO enterprise risk management frameworks
Monitor or Independent Consultant	<p>Required if <i>"company does not already have an effective internal compliance program or needs to establish necessary internal controls"</i>⁹</p> <p><i>"[C]ompanies are sometimes allowed to engage in self-monitoring, typically in cases when the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform"</i>¹⁰</p>	<ul style="list-style-type: none"> Eliminate need for monitor by providing third party assessment over effectiveness of compliance program and internal controls Equip company with knowledge, skills and resources to engage in self-monitoring Serve as forensic expert to monitor or assist company in its relationship with monitor



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Criminal and Civil Penalties	<p><i>"DOJ focuses its analysis on the U.S. Sentencing Guidelines in all of its resolutions, including guilty pleas, DPA, and NPAs"</i>¹¹</p> <p><i>"SEC can obtain the equitable relief of disgorgement of ill-gotten gains and pre-judgment interest and can also obtain civil money penalties"</i>¹²</p>	<ul style="list-style-type: none"> Apply accounting principles to quantify net profits and victim loss to calculate fines, disgorgement and restitution
Collateral Consequences	<p>Debarment authorities consider <i>"whether the contractor has effective internal control systems in place, self-reported the misconduct in a timely manner, and has taken remedial measures"</i>¹³</p>	<ul style="list-style-type: none"> Providing independent third party assurance over effectiveness of compliance program, internal controls and remedial measures
Third Parties	<p><i>"Companies should undertake some form of ongoing monitoring of third-party relationships"</i>¹⁴</p>	<ul style="list-style-type: none"> Assess, develop, or implement third party audits Develop data analytics and other procedures to monitor third parties and detect high-risk third party transactions
Mergers and Acquisitions	<p><i>"A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks"</i></p> <p><i>"DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program"</i>¹⁵</p>	<ul style="list-style-type: none"> Evaluate target's compliance program and internal controls Conduct forensic audit procedures to search for red flags of past misconduct Assess financial impact of suspicious transactions, both on the business and deal terms Design post-deal integration and audit plan
Training	<p><i>"DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been com-municated throughout the organization, including through periodic training..."</i>¹⁶</p>	<ul style="list-style-type: none"> Provide training and coaching for finance, internal audit and business personnel Provide specific anticorruption training to in-country accounting personnel, as first level of defense

¹ Jonny Frank, a partner in the New York office of StoneTurn Group served as a Federal prosecutor for 12 years and as a PwC partner for 14 years, where he founded and led Fraud Risks & Controls. He simultaneously taught Strategic Fraud Management, Criminal Investigations, and International Criminal Law at the Yale School of Management, Fordham University, and Brooklyn Law School. Simon Platt co-founded StoneTurn in 2004 after more than 23 years with Deloitte & Touche in the UK and US and is the Firm's Managing Partner, resident in the Boston office. He led Deloitte's Forensic Audit Assistance Program and was the National Practice Leader.

² The resource guide is available online on the DOJ and SEC websites at <http://www.justice.gov/criminal/fraud/fcpa> and <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>, respectively.

³ FCPA Resource Guide at 54

⁴ Id. at 59

⁵ Id. at 39

⁶ Id. at 40

⁷ Id. at 62

⁸ Id. at 56—57

⁹ Id. at 71

¹⁰ Id. at 71

¹¹ Id. at 68

¹² Id. at 71

¹³ Id. at 70

¹⁴ Id. at 60

¹⁵ Id. at 62

¹⁶ Id. at 59