

Client Alert:

Action Items from the 2020 FCPA Resource Guide

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The recently released 2020 FCPA Resource Guide (“the 2020 Guide”), the first update since 2012, conveys a marked shift in the DOJ and SEC’s mentality regarding corporate compliance programs. While a well-designed FCPA compliance program may have been sufficient eight years ago, the 2020 Guide encourages compliance leaders to actively ensure that programs are functioning effectively. The compliance program must be dynamic—constantly adapting to changing circumstances and prepared to address unforeseen events, such as a sudden investigation or global pandemic. Below we highlight three areas compliance professionals should consider given the latest FCPA update.

Risk Assessments

The 2020 Guide has emphasized the need for a company to evaluate, in its risk assessments, the risk of corruption specific to its own operations. That means looking beyond financial controls to operational controls (e.g. sales, procurement, third-party management, government relations). “Effective compliance programs are tailored to the company’s specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change.”¹ There are two key aspects of this statement that compliance professionals should take action on: (1) ensuring risk assessments are dynamic, and (2) identifying gaps in controls specific to compliance with FCPA.



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First, compliance professionals should supplement baseline annual risk assessments (typically enterprisewide) with targeted, ideally real time, assessments of events that heighten the risk of corruption and bribery and make adjustments accordingly. For example, reactionary risk assessment triggering events could include mergers, acquisitions, and new joint ventures. Beyond an actual event such as these, the compliance program should include a balance of preventative and detective controls to prevent and timely detect trends and potential violations for review and escalation. The results of a trends analysis, for example, can also be considered by compliance professionals as an event that would trigger a reactionary risk assessment.

Targeted and/or ongoing risk assessments can be further enhanced with the use of data analytics. To begin, companies should aggregate and assess compliance-related data, including accounting reviews, whistleblower reports, due diligence reports and compliance news bulletins, and continuously monitor for new or changing risks in their operations.

Second, compliance professionals should regularly perform a robust gap analysis, including an evaluation of the design and operating effectiveness of the compliance controls in place to prevent and detect violations of the FCPA. The reactionary risk assessment is a tool to identify the key corruption risks at both the financial and operational level and helps determine where there are controls that are lacking or insufficient. Often company risk assessments fall short of truly evaluating the design and operating effectiveness

of the controls in place to mitigate the risk, leaving the company open to higher risk of violation.

Post-Investigation Analysis & Remediation / Root-Cause Analysis

Significantly, the 2020 Guide added a new compliance program Hallmark: "Investigation, Analysis, and Remediation of Misconduct," which reinforces the importance of holistic and swift responses to misconduct. "For a compliance program to be truly effective, it should have a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company's response, including any disciplinary or remediation measures taken."

The 2020 Guide further clarifies that an investigation is not the ending point. Root cause analysis is expected and speed is critical. Best practice is to initiate two concurrent but separate workstreams focused exclusively on fact-finding and remediation. This bifurcated approach enables compliance practitioners to avoid the distraction of the investigation and demonstrate a deep commitment to holistic corrective efforts.

To address any "systemic issues identified" per the 2020 Guide, consider:

- Document the activities that were the subject of the misconduct, including business processes, systems and controls surrounding the misconduct-related activity (ies);

- Evaluate the manner and extent to which processes, systems and controls surrounding the misconduct event are consistent with established policies, procedures and practices;
- Evaluate the impacted unit response to the misconduct resulting including assessment of changes, if any to policies, procedures and to practices associated with the “misconduct” including detection and response to “red flags.”
- Establish a detailed understanding of the internal controls associated with the misconduct event, including Internal Audit Assurance and Advisory reviews conducted.
- Report findings and observations including lessons learned and training as appropriate.

Periodic testing to assess continuous program improvement and remediation effectiveness is a fundamental government expectation. To be credible, this audit should come from an independent source. Internal audit can provide independent assurance provided it is not reviewing its own work. Counsel lacks independence because lawyers serve as company advocate.

Regardless of the type of experts reviewing remedial efforts and FCPA compliance programs, the approach should be thoughtfully designed and proactively tested; not a function developed and staffed on the fly only when misconduct is identified. Ensuring that your compliance program is equipped to effectively and efficiently respond to the vast scope of potential issues is no small task, however the provision of adequate resources and the empowerment of key

decision-makers to employ those resources is critical to the functioning of an effective FCPA compliance program.

Resources and Empowerment

When it comes to enforcement and related penalties, the 2020 Guide affirmatively states that the DOJ and SEC consider “the adequacy and effectiveness of a company’s compliance program” both at the time of the misconduct and at resolution.² A key element in determining “adequacy and effectiveness” lies in the company’s dedication of resources to the oversight and implementation of the company’s compliance program.

As a first step, compliance professionals should evaluate the company’s existing structure, team and compliance budget to confirm it is appropriately resourced based on similar organizations operating in the same industry. The roles and responsibilities should be clear and integrated into all lines of defense to ensure complete designation of ownership of all compliance risks across the company, including FCPA. Those with the responsibility to maintain an effective compliance program should have appropriate access to key decision makers, as well as empowerment and authority over the ethics, compliance and internal audit functions. Compliance professionals should also evaluate individual team members to ensure that the responsible employees have the relevant knowledge, skills, experience and training to be effective in carrying out their responsibilities.

In a crisis like the world is currently facing with COVID-19, companies are often tempted to

shift resources away from functions such as Compliance. Not surprisingly, this move inevitably leads to a more heightened risk profile, especially related to improper behavior (such as bribery and corruption). Compliance professionals should review the risk profile in light of recent events and ensure that the resources for compliance and risk management are appropriately adjusted, if needed, to ensure that the compliance program continues to be adequate and effective.

Next Steps for Compliance Leaders

The 2020 Guide makes it clear: Risk Assessment, Post-Investigation Root Cause Analysis, and Resources and Empowerment are three practical, “quick win” areas that practitioners can leverage today to best-position their organizations for long-term FCPA compliance success.

- 1 A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, page 56: <https://www.justice.gov/criminal-fraud/file/1292051/download>
- 2 A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, page 57

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