Evaluate Your Compliance Program Using the New DOJ Metrics

BY THOMAS FOX

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Compliance Counsel Metrics

In a speech in November, Assistant Attorney General Leslie Caldwell laid out the metrics by which the Department of Justice's (DOJ) Compliance Counsel will evaluate compliance programs for companies under a Foreign Corrupt Practices Act (FCPA) enforcement action.

Any review by this Compliance Counsel necessarily means that a company has either self-disclosed or in some other way come under DOJ scrutiny. The Compliance Counsel's evaluation will be to determine if the company had an effective compliance program at the time the alleged violations took place. They are useful as tools to measure the effectiveness of your current compliance program before any violations occur.

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Board and Senior Management Roles

We begin our exploration of the new Department of Justice (DOJ) Compliance Counsel and the metrics laid out by Assistant Attorney General Leslie around the roles of a Board of Directors and senior management.

- Does the institution ensure that its directors and senior managers provide strong, explicit and visible support for its corporate compliance policies?
- Does US senior management maintain a material role in implementing and maintaining a company's overall compliance framework?

These requirements move beyond simply having the correct 'Tone at the Top' which every Board and senior management articulate. They charge those two groups in a company with a substantive role in the actual doing of compliance going forward. One of my concerns is this metric sets up Board members and senior management for prosecution under the Foreign Corrupt Practices Act (FCPA) in the new era of the Yates Memo where companies are required to investigate and turn over individuals to the DOJ for prosecution if they want to receive any credit for cooperation. Of course, the Yates Memo also articulated the DOJ's stated intention to more aggressively prosecute individuals as well.

A. BOARD ROLE

You can begin with two questions. First, does the Board of Directors exercise independent review of a company's compliance program? Second, is the Board of Directors provided information sufficient to enable the exercise of independent judgment?

Boards of Directors should take a more active role in overseeing the management of risk within a company. Now this includes having an FCPA compliance program in place and actively overseeing that function. This means if a company's business plan includes a high-risk proposition, there should be additional oversight. In other words, there is an affirmative duty to ask the tough questions. But it is more than simply having a compliance program in place. The Board must exercise appropriate oversight of the compliance program and indeed the compliance function. The Board needs to ask the hard questions and be fully informed of the company's overall compliance strategy going forward.

SOME OF THE AREAS FOR HARD QUESTIONS INCLUDE:

- Corporate Compliance Policy and Code of Conduct – Is there an overall governance document which will inform the company, its employees, stakeholders and third parties of the conduct the company expects from an employee, translated into appropriate local languages. Is there documentation of delivery and training on this or these documents?
- Risk Assessment – Has the Board assessed the compliance risks associated with its business?
- Implementing Procedures – The Board should determine if the company has a written set of procedures in place that instructs employees on the details of how to comply with the company's compliance policy. Once again, have these implementing procedures been translated as appropriate and do employees understand these procedures? Are all of the above documented?
- Training – Has the Board been trained to understand its role in an effective compliance program?
- Monitor Compliance – Has the Board independently tested, assessed and audited to determine if its compliance policies and procedures are a living and breathing program and not just a paper tiger.

There are several paths a Board of Directors can take to fulfill this duty. Obviously the full Board can be apprised of compliance issues and handle them appropriately. However this may be unwieldy or not workable if there is a large Board and the compliance function only has limited time to present a quarterly and annual report. The Audit Committee is usually considered a natural venue for the compliance function to report to as it handles issues somewhat related to compliance already. However I believe that with the convergence of the Yates Memo and this metric for the new DOJ Compliance Counsel, it is time for companies to create a Compliance Committee separate and apart from the Audit Committee. This Board-level Compliance Committee would be charged with oversight of FCPA compliance and ethics but could also be the reporting venue for anti-money laundering compliance (AML), export control compliance and all other such disciplines within an organization. Further after the Volkswagen emissions-testing scandal, not only have a robust compliance program but direct and transparent Board oversight may be the only thing stopping injury to your reputation from a competitor's illegal or unethical conduct.

B. SENIOR MANAGEMENT

1. STRONG EXPLICIT SUPPORT

Tone at the Top has been a well-worn phrase for many years so I think the DOJ is looking for more than simply statements of support. I also believe that the DOJ is now looking beyond simply an ambassador of compliance role for senior management. Now this talk of compliance and support for compliance will start to come together in real dollars being made available to a compliance department for technological solutions and head count availability.

It is incumbent that any Chief Compliance Officer (COO) must have sufficient authority and independence to oversee the integrity of the compliance program. This includes a direct reporting line to the company's Board of Directors and Audit/Compliance Committee but more importantly

SENIOR MANAGEMENT INVOLVEMENT ›

Management Oversight Committee can provide not only an additional level of support to the CCO but also triage compliance issues.

"unfiltered" access to the Board. The CCO must have a clear mandate, delegation of authority, senior-level positioning, and empowerment to carry out his/her duties. This also means a 'seat at the table' so the CCO is now a C-Suite level position in any organization.

It is absolutely mandatory that the CCO be given both the physical resources in terms of personnel and monetary resources to adequately perform the required task. Under monetary resources the CCO should have a budget independent of the General Counsel, rather than a shared budget. This also means appropriate head count for personnel resources.

2. ACTIVE SENIOR MANAGEMENT INVOLVEMENT

I suggest that a company create a Management Oversight Committee. The makeup of this committee should generally be persons who are not subordinate to the most senior officer of the department or unit responsible for the relevant transactions, which are going to be considered. I think that more than one department should be represented on the Oversight Committee. This would include senior representatives from the Accounting (or Finance) Department, Internal Audit, Compliance & Legal Departments and Business Unit Operations.

This Management Oversight Committee would review significant compliance issues over a period of one to three months. It can provide not only an additional level of support to the CCO or compliance function but also triage compliance issues for appropriate remediation. It also has the effect of keeping senior management involved in the compliance function on an oversight basis. Clearly the DOJ wants more senior management involvement and by having such a Management Oversight Committee in place, it would put senior management directly in the reporting line if an incident arises or perhaps more importantly if trends begin to develop which indicate that compliance related issues could be moving towards full FCPA violations. In other words, the Management Oversight Committee could help assist the CCO move from detection and prevention to prescription of compliance issues to prevent them from becoming full violation by delivering an appropriate risk based solution.

Taken together these two new metrics make clear that the DOJ is expecting both a Board of Directors and senior company management to take a more active role in any FCPA compliance program going forward. It also means both of these groups must actively support and promote the CCO and the compliance function with time, resources and respect. Finally all of this must be thoroughly and continuously documented.

2. POLICIES, PROCEDURES AND THEIR COMMUNICATION ›

Policies help form the basis of expectation and conduct in your company and Procedures are the documents that implement these standards of conduct.

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Policies, Procedures and Their Communication

The next area of inquiry is around the written basis for your compliance program, both policies and procedures and their communication within your organization.

- Are the institution's compliance policies clear and in writing? Are they easily understood by employees? Are the policies translated into languages spoken by the company's employees?
- Does the institution ensure that its compliance policies are effectively communicated to all employees? Are its written policies easy for employees to find? Do employees have repeated training, which should include direction regarding what to do or with whom to consult when issues arise?

A. WRITTEN POLICIES AND PROCEDURES

The written policies and procedures required for a best practices compliance program are well known and long established. As stated in the FCPA Guidance, "Among the risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments." Policies help form the basis of expectation and conduct in your company and Procedures are the documents that implement these standards of conduct.

Stephen Martin, the head of Baker and McKenzie's Compliance Consulting Practice, and his former law partner Paul McNulty, developed one of the best formulations that I have seen of these requirements in their *Five Elements of an Effective Compliance Program*. In this formulation, they posit that your Code of Conduct, policies and procedures should be grouped under the general classification of 'Standards and Procedure'. They articulate that every company has three levels of standards and controls.

First, every company should have a Code of Conduct, which should, most generally, express its ethical principles. But simply having a Code of Conduct is not enough so a second step mandates that every company should have standards and policies in place that build upon the foundation of the Code of Conduct and articulate Code-based policies, which should cover such issues as bribery, corruption and accounting practices. From the base of a Code of Conduct and standards and policies, every company should then ensure that enabling procedures are implemented to confirm those policies are executed, followed and enforced.

Another way to think of policies, procedures and controls was stated by Aaron Murphy, now a partner at Aiken Gump, in his book *Foreign Corrupt Practices Act*, when he said that you should think of all three as "an interrelated set of compliance mechanisms." Murphy went on to say, "Internal controls are policies, procedures, monitoring and training that are designed to ensure that company assets are used properly, with proper approval and that transactions are properly recorded in the books and records. While it is theoretically possible to have good controls but bad books and records (and vice versa), the two generally go hand in hand – where there are record-keeping violations, an internal controls failure is almost presumed because the records would have been accurate had the controls been adequate."

John Allen, in an article in the Houston Business Journal (HBJ), entitled *Company policies are source and structure of stability*, said that written policies and procedures "are not a surefire guarantee that things won't go wrong, they are the first line of defense if things do." The effective implementation and enforcement of policies demonstrate to regulators and the government that a "company is operating professionally and proactively for the benefit of its stakeholders, its employees and the community it serves." If it is a company subject to the FCPA, by definition it is an international company so that can be quite a wide community.

ALLEN IDENTIFIED FIVE KEY ELEMENTS TO ANY WELL-CONSTRUCTED POLICY. THEY ARE:

- Identify to whom the policy applies
- Establish the objective of the policy
- Explain why the policy is necessary
- Outline examples of acceptable and unacceptable behavior under the policy
- Warn of the consequences if an employee fails to comply with the policy

Allen notes that for polices to be effective there must be communication. He believes that training is only one type of communication. I think that this is a key element for compliance practitioners because if you have a 30,000+ worldwide work force, the logistics alone of such training can appear daunting. Small groups, where detailed questions about policies can be raised and discussed, can be a powerful teaching tool. Allen even suggests posting FAQ's in common areas as another technique. And do not forget that one of the reasons Morgan Stanley received a declination to prosecute by the DOJ was that it sent out bi-monthly compliance reminder emails to its employee, Garth Peterson, for the seven years he was employed by the company.

The FCPA Guidance ends its section on policies with the following, "Regardless of the specific policies and procedures implemented, these standards should apply to personnel at all levels of the company." This means that policies are applied fairly and consistently across your company. If there is not consistent

COMMUNICATION OF WRITTEN PROGRAM ›

The communication of your anti-corruption compliance program is something that must be done on a regular basis.

application, Allen notes, “there is a greater chance that an employee dismissed for breaching a policy could successfully claim he or she was unfairly terminated.” This last point cannot be over-emphasized. If an employee is going to be terminated for fudging their expense accounts in Brazil, you had best make sure that same conduct lands your top producer in the US with the same quality of discipline.

These metrics also specifically set out that policies and procedures need to be translated into appropriate local language. This follows clear input from the FCPA Guidance, which says “it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it.” This means that training should also be in an appropriate local language so that your employees can understand their obligations under the FCPA and your company’s expectations around ethics and compliance.

B. COMMUNICATION OF WRITTEN PROGRAM

The communication of your anti-corruption compliance program is something that must be done on a regular basis to help ensure its effectiveness. The FCPA Guidance explains, “Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners.”

“Conducting effective training programs” is listed in the 2011 US Sentencing Guidelines as one of the factors the DOJ will take into account when a company accused of an FCPA violation is being evaluated for a sentence reduction. The US Sentencing Guidelines mandate, “(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.

One of the key goals of any FCPA compliance program is to train the company. But more than simply training, I believe these new metrics mandate that you demonstrate the effectiveness of your compliance training. The testing and evaluation of your FCPA compliance training program is an important aspect not to overlook. In their book, entitled *Foreign Corrupt Practices Act Compliance Guidebook*, authors Martin and Daniel Biegelman explore some techniques that can be used evaluate FCPA compliance training. They believe a general assessment of those trained on the FCPA and your company’s compliance program is only a starting point.

ASSESSING YOUR COMPLIANCE TRAINING ›

Five questions can be used as a starting point for assessing the effectiveness of your FCPA compliance training.

THEY LIST FIVE POSSIBLE QUESTIONS AS A STARTING POINT FOR THE ASSESSMENT OF THE EFFECTIVENESS OF YOUR FCPA COMPLIANCE TRAINING:

1. What does the FCPA stand for?
2. What is a facilitation payment and does the company allow such payments?
3. How do you report compliance violations?
4. What types of improper compliance conduct would require reporting?
5. What is the name of your company's Chief Compliance Officer?

The authors set out other metrics that can be used in the post-training evaluation phase. They point to any increase in hotline use; are there more calls into the compliance department requesting assistance or even asking questions about compliance. Is there any decrease in compliance violations or other acts of non-compliance?

While many companies have focused on the written components of a best practices compliance program, I believe these new Compliance Counsel metrics require that companies work to ensure the training is effective. It must be communicated in a manner designed to make an impression. This includes appropriate translations of the written documents and translations of your oral training presentations as well.

3. PROGRAM EVOLUTION AND INCENTIVIZING COMPLIANCE ›

The next area of inquiry involves a review of how well your compliance program evolves based upon changes in the law, facts on the ground and other circumstances.

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Program Evolution and Incentivizing Compliance

The next area of inquiry involves a review of how well your compliance program evolves based upon changes in the law, facts on the ground and other circumstances. It also looks at how well your company incentivizes the doing of compliance in your organization.

- Does the institution review its policies and practices to keep them up to date with evolving risks and circumstances? This is especially important if a U.S.-based entity acquires or merges with another business, especially a foreign one.
- Are there mechanisms to enforce compliance policies? Those include both incentivizing good compliance and disciplining violations.

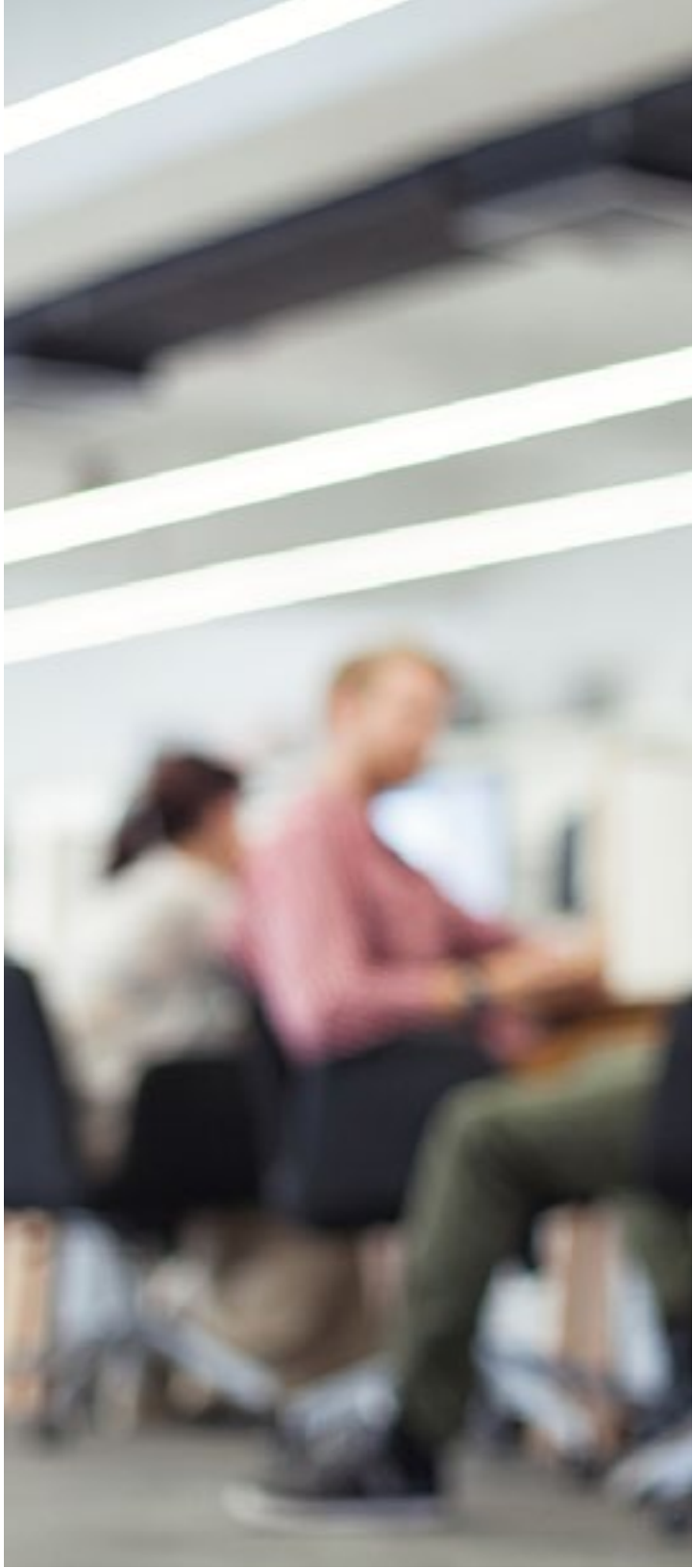
A. COMPLIANCE PROGRAM EVOLUTION

I think most compliance practitioners understand how a risk assessment fits into the design and creation of a compliance program. Yet Caldwell's remarks drive home that risk assessments are not a one-time exercise and while she did not remark on the frequency of how often they should be performed, I think the more often the better. However, as a Chief Compliance Officer (CCO) or compliance practitioner, you do not need to perform a full forensic risk assessment to meet the metrics Caldwell has articulated.

Nonetheless, if there is one thing that I learned as a lawyer, which also applies to the compliance field, it is that you are only limited by your imagination and the same is true for risk assessments. You might try assessing other areas annually, through a more limited focused risk assessment, literally while staying at your desk and not traveling away from your corporate headquarters.

SOME OF THE AREAS THAT SUCH A DESKTOP RISK ASSESSMENT COULD INQUIRE INTO MIGHT BE THE FOLLOWING:

- How are the risks in the C-Suite and the Boardroom being addressed?
- What are the FCPA risks related to the supply chain?
- How is risk being examined and due diligence performed at the vendor/agent level? How is such risk being managed?



- Is the documentation adequate to support the program for regulatory purposes?
- Is culture, attitude (tone from the top), and knowledge measured? If yes, can we use the information enhance the program?
- Disciplinary guidelines – Do they exist and has anyone been terminated or disciplined for a violating policy?
- Communication of information and findings - Are escalation protocols appropriate?
- What are the opportunities to improve compliance?

There are a variety of materials that you can review from or at a company that can facilitate such a Desktop Risk Assessment. You can review your company's policies and written guidelines by reviewing anti-corruption compliance policies, guidelines, and procedures to ensure that compliance programs are tailored to address specific risks such as gifts, hospitality and entertainment, travel, political and charitable donations, and promotional activities.

B. INCENTIVES IN YOUR COMPLIANCE PROGRAM

Caldwell's second metric is around compliance discipline and incentives. In her remarks Caldwell inquired, "Is discipline even handed?" and then went on to add, "The department does not look favorably on situations in which low-level employees who may have engaged in misconduct are terminated, but the more senior people who either directed or deliberately turned a blind eye to the conduct suffer no consequences. Such action sends the wrong message – to other employees, to the market and to the government – about the institution's commitment to compliance."
I think most folks understand the need to discipline employees who may have violated the FCPA or otherwise engaged in bribery and corruption. However, many CCOs and compliance practitioners do not focus as much attention to compliance incentives. I have developed six core principles for incentives, adapted from an article in the Spring 2014 issue of the *MIT Sloan Management Review* entitled "Combining Purpose with Profits", and reformulated them for the compliance function in an anti-corruption compliance program.

- **COMPLIANCE INCENTIVES DON'T HAVE TO BE ELABORATE OR NOVEL**
  The first point is that there are only a limited number of compliance incentives that a company can meaningfully target. Evidence suggests the successful companies are the ones that were able to translate pedestrian-sounding compliance incentive goals into consistent and committed action
- **COMPLIANCE INCENTIVES NEED SUPPORTING SYSTEMS IF THEY ARE TO STICK**
  People take cues from those around them, but people are fickle and easily confused, and gain and hedonic goals can quickly drive out compliance incentives. This means that you will need to construct a compliance function that provides a support system to help them operationalize their pro-incentives at different levels, and thereby make them stick. The specific systems which support incentives can be created specifically to your company but the key point is that they are delivered consistently because it signals that management is sincere.

6 CORE PRINCIPLES FOR INCENTIVES ›

It's more important than ever that you demonstrate tangible incentives for your employees to gain benefits, both financial and hierarchical, through doing business ethically, in compliance with your own Code of Conduct and most certainly in compliance with the FCPA.

- **SUPPORT SYSTEMS ARE NEEDED TO REINFORCE COMPLIANCE INCENTIVES**
  One important form of a supporting system for compliance incentives is to make the incentives visible. As stated in the FCPA Guidance, "Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and internal audit staff. Others have made working in the company's compliance organization a way to advance an employee's career."
- **COMPLIANCE INCENTIVES NEED A "COUNTERWEIGHT" TO ENDURE**
  Goal-framing theory shows how easy it is for compliance incentives to be driven out by gain or hedonic goals, so even with the types of supporting systems it is quite common to see executives bowing to short-term financial pressures. Thus, a key factor in creating enduring compliance incentives is a "counterweight", that is any institutional mechanism that exists to enforce a continued focus on a nonfinancial goal. This means that in any financial downturn compliance incentives are not the first thing that gets thrown out the window and if my oft-cited hypothetical foreign Regional Manager misses his numbers for two quarters, he does not get fired. So the key is that the counterweight has real influence; it must hold the leader to account.
- **COMPLIANCE INCENTIVE ALIGNMENT WORKS IN AN OBLIQUE, NOT LINEAR, WAY**
  If you want your employees to align around compliance incentives, your company will have to "eschew narrow, linear thinking, and instead provide more scope for them to choose their own oblique pathway." This means emphasizing compliance as part of your company's DNA on a consistent basis — "the intention being that by encouraging individuals to do "good," their collective effort leads, seemingly as a side-effect, to better financial results. The logic of "[compliance first], profitability second" needs to find its way deeply into the collective psyche of the company."
- **COMPLIANCE INCENTIVE INITIATIVES CAN BE IMPLEMENTED AT ALL LEVELS**
  Who at your company is responsible for pursuing compliance incentives? If you head up a division or business unit, it is clearly your job to define what your pro-social goals are and to put in place the supporting structures and systems described here. But what if you are lower in the corporate hierarchy? It is tempting to think this is "someone else's problem," but actually there is no reason why you cannot follow your own version of the same process.

Obviously this list is not exhaustive. Yet it is now more important than ever that you demonstrate tangible incentives for your employees to gain benefits, both financial and hierarchical, through doing business ethically, in compliance with your own Code of Conduct and most certainly in compliance with the FCPA. It is also a requirement that such actions must be documented so they can be demonstrated to the DOJ Compliance Counsel if they come knocking and look to employ the metrics which Caldwell has laid out for us all.

4. THIRD PARTY MANAGEMENT ›

With all the awareness of FCPA enforcement actions, third parties still present the highest risk of an FCPA enforcement action.

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Third Party Management

Caldwell also mentioned that well-known compliance risk; third parties. Even with all the awareness of FCPA enforcement actions, third parties still present the highest risk of an FCPA enforcement action.

- Does the institution sensitize third parties, like vendors, agents or consultants, to the company's expectation that its partners are also serious about compliance?

A. MANAGEMENT OF THE RELATIONSHIP

Management of third party relationships continues to be a source of trouble and heartburn for many companies. As Caldwell noted in her remarks, the management of a third party relationship, "means more than including boilerplate language in a contract. It means taking action – including termination of a business relationship – if a partner demonstrates a lack of respect for laws and policies. And that attitude toward partner compliance must exist regardless of geographic location."

While the FCPA Guidance itself only provides that "companies should undertake some form of ongoing monitoring of third-party relationships". Diana Lutz, writing in the White Paper by The Steele Foundation entitled *Global anti-corruption and anti-bribery program best practices*, has noted, "As an additional means of prevention and detection of wrongdoing, an experienced compliance and audit team must be actively engaged in home office and field activities to ensure that financial controls and policy provisions are routinely complied with and that remedial measures for violations or gaps are tracked, implemented and rechecked." But as Caldwell noted it is a more encompassing "sensitization" to anti-corruption compliance that is needed. There are several ways for you to do so.

B. RELATIONSHIP MANAGER FOR THIRD PARTIES

I believe that as a starting point for the management of a third party, your company should have a Relationship Manager for every third party with which your company does business. The Relationship Manager should be a business unit employee who is responsible for monitoring, maintaining and continuously evaluating the relationship between your company and the third party.

SOME OF THE DUTIES OF THE RELATIONSHIP MANAGER MAY INCLUDE:

- Point of contact with the Third Party for all compliance issues
- Maintaining periodic contact with the Third Party
- Meeting annually with the Third Party to review its satisfaction of all company compliance obligations
- Submitting annual reports to the company's Oversight Committee summarizing services provided by the Third Party
- Assisting the company's Oversight Committee with any issues with respect to the Third Party

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Just as a company needs a subject matter expert (SME) in anti-bribery compliance to be able to work with the business folks and answer the usual questions that come up in the day-to-day routine of doing business internationally, third parties also need such access. A third party may not be large enough to have its own compliance staff so I advocate a company providing such a dedicated resource to third parties. I do not believe that this will create a conflict of interest or that there are other legal impediments to providing such services. They can also include anti-corruption training for the third party, either through onsite or remote mechanisms. The compliance practitioner should work closely with the Relationship Manager to provide advice, training and communications to the third party.

C. OVERSIGHT COMMITTEE

I advocate that a company should have an Oversight Committee review all documents relating to the full panoply of a third party's relationship with the company. It can be a formal structure or some other type of group but the key is to have the senior management put a 'second set of eyes' on any third parties who might represent a company in the sales side. In addition to the basic concept of process validation of your management of third parties, as third parties are recognized as the highest risk in FCPA or Bribery Act compliance, this is a manner to deliver additional management of that risk.

After the commercial relationship has begun the Oversight Committee should monitor the third party relationship on no less than an annual basis. This annual audit should include a review of remedial due diligence investigations and evaluation of any new or supplemental risk associated with any negative information discovered from a review of financial audit reports on the third party. The Oversight Committee should review any reports of any material breach of contract including any breach of the requirements of the Company Code of Ethics and Compliance. In addition to the above remedial review, the Oversight Committee should review all payments requested by the third party to assure such payment is within the company guidelines and is warranted by the contractual relationship with the third party. Lastly, the Oversight Committee should review any request to provide the third party any type of non-monetary compensation and, as appropriate, approve such requests.

AUDIT ›

A key tool in managing the affiliation with a third party post-contract execution is auditing.

D. AUDIT

A key tool in managing the affiliation with a third party post-contract execution is auditing. Audit rights are a key clause in any compliance terms and conditions and must be secured. Your compliance audit should be a systematic, independent and documented process for obtaining evidence and evaluating it objectively to determine the extent to which your compliance terms and conditions are followed. Noted fraud examiner expert Tracy Coenen described the process as (1) capture the data; (2) analyze the data; and (3) report on the data, which is also appropriate for a compliance audit.

AS A BASELINE I WOULD SUGGEST THAT ANY AUDIT OF A THIRD PARTY INCLUDE, AT A MINIMUM, A REVIEW OF THE FOLLOWING:

- The effectiveness of existing compliance programs and codes of conduct
- The origin and legitimacy of any funds paid to Company
- Books, records and accounts, or those of any of its subsidiaries, joint ventures or affiliates, related to work performed for, or services or equipment provided to
- All disbursements made for or on behalf of Company
- All funds received from Company in connection with work performed for, or services or equipment provided to, Company.

IF YOU WANT TO ENGAGE IN A DEEPER DIVE YOU MIGHT CONSIDER EVALUATION OF SOME OF THE FOLLOWING AREAS:

- Review of contracts with third parties to confirm that the appropriate FCPA compliance terms and conditions are in place.
- Determine that actual due diligence took place on the third party.
- Review FCPA compliance training program; both the substance of the program and attendance records.
- Does the third party have a hotline or any other reporting mechanism for allegations of compliance violations? If so how are such reports maintained? Review any reports of compliance violations or issues that arose through anonymous reporting, hotline or any other reporting mechanism.
- Does the third party have written employee discipline procedures? If so have any employees been disciplined for any compliance violations? If yes review all relevant files relating to any such violations to determine the process used and the outcome reached.
- Testing for gifts, travel and entertainment that were provided to, or for, foreign governmental officials.
- Review the overall structure of the third party's compliance program. If the company has a designated compliance officer to whom, and how, does that compliance officer report?
- How is the third party's compliance program designed to identify risks and what has been the result of any so identified?

TYING IT ALL TOGETHER ›

In addition to monitoring and oversight of your third parties, you should periodically review the health of your third party management program.

- Review a sample of employee commission payments and determine if they follow the internal policy and procedure of the third party.
- With regard to any petty cash activity in foreign locations, review a sample of activity and apply analytical procedures and testing. Analyze the general ledger for high-risk transactions and cash advances and apply analytical procedures and testing.

E. TYING IT ALL TOGETHER

In addition to monitoring and oversight of your third parties, you should periodically review the health of your third party management program. Diana Lutz and her colleague Marjorie Doyle, in an article entitled "Third Party Essentials: A Reputation/Liability Checkup When Using Third Parties Globally", gave a checklist to test companies on their relationships with their third parties, which is as follows:

- Do you have a list or database of all your third parties and their information?
- Have you done a risk assessment of your third parties and prioritized them by level of risk?
- Do you have a due diligence process for the selection of third parties, based on the risk assessment?
- Once the risk categories have been determined, create a written due diligence process.
- Once the third party has been selected based on the due diligence process, do you have a contract with the third party stating all the expectations?
- Is there someone in your organization who is responsible for the management of each of your third parties?
- What are "red flags" regarding a third party?

The robustness of your third party management program will go a long way towards preventing, detecting and remediating any compliance issue before it becomes a full-blown FCPA violation. As with all the steps laid out in these metrics, you need to fully document all steps you have taken so that any regulator, and specifically the DOJ Compliance Counsel, can test your metrics. Caldwell's remarks around the metrics reviewed may not have been anything new but she has laid out what the new Compliance Counsel will be reviewing and evaluating so you understand what will be expected from your company's compliance program. You should also use these metrics to conduct a self-assessment on the state of your compliance program.

ABOUT THE AUTHOR

THOMAS FOX

Thomas Fox has practiced law in Houston for 30 years. He is now an Independent Consultant, assisting companies with anti-corruption and anti-bribery compliance and international transaction issues through his company Advanced Compliance Solutions. He writes and lectures across the globe on anti-corruption and anti-bribery compliance programs.

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IF YOU HAVE ANY QUESTIONS:

OFFICE
2255 Carling Ave.
Suite 500
Ottawa, Ontario
K2B 7Z5 Canada

EMAIL
sales@i-sight.com
media@i-sight.com
support@i-sight.com

PHONE
1-800-465-6089
1-613-244-5111

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