by James M. Lord and Sarah W. Walsh

The new *Anti-Corruption Ethics & Compliance Handbook for Business*

» The new *Handbook* provides useful "best practices" guidance to organizations from the company's perspective.

» The guidance from regulators and companies is largely consistent.

» Having a robust anti-corruption compliance program is critical.

» Key components should include periodic risk assessments and third-party due diligence vetting process.

» Anti-corruption training should incorporate examples of best practices delineated in the *Handbook*.

In November 2013, the World Bank and its partners released the *Anti-Corruption Ethics and Compliance Handbook for Business* (the *Handbook*), and just prior to its release, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) announced plans to aggressively continue their pursuit of both companies and individuals who violate the Foreign Corrupt Practices Act (FCPA).

In his keynote address at the 2013 FCPA Conference, SEC Co-Director Andrew Ceresney stated, "The groundbreaking cases that we have brought have sent an unmistakable message that most companies have heard loud and clear—obey the FCPA, and ensure that your employees are sensitive to FCPA issues, or face stiff penalties and other consequences." Ceresney further stated that over the past year, the SEC recovered more than $240 million in penalties and only expects FCPA violations to become "increasingly fertile ground" due to the Dodd-Frank Act whistleblower program

Lord

through which the SEC is increasingly sourcing its own cases.[1]

At this same conference, the DOJ similarly forecasted an increase in its criminal FCPA enforcement actions. It noted that it was currently investigating more than 150 cases of potential FCPA violations and that it expected to bring "very significant cases, top-ten-quality type cases," in 2014.[2] If one examined the top ten FCPA settlement agreements in terms of total fines/penalties paid, they range from the $137 million penalty imposed on Alcatel-Lucent to the $800 million penalty imposed on Seimens.[3] The 2014 enforcement action against Alcoa resulted in total penalties of $384 million, catapulting it into fifth place in the rankings of highest FCPA penalties imposed. So, the recent pronouncement from the DOJ that it expects to bring "top-ten-quality type cases" in 2014 is significant indeed!

This pointed warning from regulators left many companies looking for additional guidance with their respective FCPA compliance efforts, and they were left asking, "How does my company know whether

our compliance program is sufficient?" and "How many anti-corruption safeguards are enough?" Now, in addition to public DOJ settlement agreements (i.e., deferred prosecution agreements and non-prosecution agreements), DOJ press releases, DOJ opinion procedure releases,[4] and *A Resource Guide to the* U.S. Foreign Corrupt Practices Act (the *Resource Guide*, jointly published by DOJ and the SEC in November 2012), companies can refer to the *Handbook*. Significantly, unlike the *Resource Guide*, which was developed by regulators, the *Handbook* was developed "by companies for companies"[5] and facilitated by three international governmental organizations: the Organisation for Economic Co-operation and Development (OECD), the United Nations Office on Drugs and Crime (UNODC), and the World Bank.

Author's Note: The cross-section of companies, non-governmental organizations (NGOs), and professional services firms that contributed to the *Handbook* may not adequately represent a cross-section of *all* companies that face anti-corruption concerns. Among the contributors are three of the "Big Four" accounting firms, four law firms (two domestic firms and two international firms), two consulting firms, seven NGOs, and nine companies. Of the nine companies, three are in the healthcare/medical device industry; three are in the engineering or construction industry; and one each in the food manufacturing, telecommunications,

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and publishing industries. These companies range in size from 3,500 to well over 150,000 employees and have offices in all corners of the globe. Despite this breadth, the best practices represented in the 12 main elements (discussed below) and corresponding case studies simply cannot speak for every industry or represent every type of organization that might be affected by FCPA issues. This echoes the refrain of both the *Resource Guide* and the *Handbook*—there is no substitution for a tailor-made anti-corruption program that is specific to the unique footprint of the respective organization.

Overview of the *Handbook*

The stated purpose for the *Handbook* was to address the concern that "a myriad of existing international principles for business can be confusing, especially for small and medium-sized enterprises with limited resources." The *Handbook* attempts to define, from the perspective of companies, best practices in anti-corruption compliance. It is divided into three main sections, followed by an annex. The first section contains a brief overview of the existing international legal framework for combating corruption. This includes two international accords and four regional level instruments that support criminalizing a variety of corrupt practices, and in some instances, aim to hold not only the corrupt organization, but certain legal persons liable for criminal conduct.[6]

The second section provides an overview on the importance of risk assessment from the

perspective of how to better understand risk exposure and the best practices to minimize exposure. This section outlines how to: (1) establish a risk assessment process, (2) identify certain risk factors, (3) rate inherent risks, (4) identify and rate mitigating efforts, (5) calculate the residual risk, and (6) develop an action plan moving forward.

Arguably the most practical guidance to companies is the third section. The authors compare the principles set forth in six recognized business instruments on anti-bribery[7] and distill from those instruments 12 "main anti-bribery elements." This section then illustrates each of those elements in practice through one or more real-life case studies.

The annex includes both a chart comparing the 12 main elements against all eight business instruments referenced in the *Handbook* and a sample compliance checklist for companies to consider upon review of their own anti-bribery programs.[8]

The 12 main anti-bribery elements

What follows are the 12 main anti-bribery elements, along with a select summary of best practices as excerpted from the case studies.

Support and commitment from senior management for the prevention of corruption:

- ▶ Leadership needs to demonstrate a strong, visible, active commitment to the anti-bribery program.
- ▶ The board and CEO should be fully engaged in the process and foster a culture of compliance with the company's anti-corruption policy.

Developing an anti-corruption program

- ▶ Develop a program with the consultation of the company's employees that is tailored to the organization's size and specific industry risks and requirements.
- ▶ Clearly prohibit bribery of any nature, ensuring proper internal controls and auditing mechanisms are in place to monitor compliance.
- ▶ Examples of best practices include a global code of conduct containing simple and straightforward language applicable to all employees (including at subsidiaries) in all countries where the company operates that incorporates real-life compliance examples into the Code.

Oversight of the anti-corruption program

- ▶ The board has responsibility for oversight of the compliance program and the CEO is responsible for seeing that the program is implemented effectively.
- ▶ Senior officers should be assigned to oversee the program and be provided with an adequate level of autonomy and sufficient resources, and report periodically to the board of directors or other supervisory body on the success of the program.

Clear, visible, and accessible policy prohibiting corruption

- ▶ Establish a clearly articulated and visible policy that prohibits bribery in any form, carried out either directly or through third parties.
- ▶ The policy should provide guidance on the meaning and scope of the prohibition against bribery, particularly with respect to "high risk" aspects of the company's business operations.

Detailed policies for particular risk areas

- ▶ Develop policies and procedures to address the most high-risk and prevalent forms of bribery.

- Ensure that all gifts, entertainment, and hospitality are reasonable, and that bona fide business expenses cannot be perceived as intending to improperly influence the outcome of business transactions; and ensure that management is involved in the approval process and that the process is well-documented.
- Ensure that charitable or political contributions and sponsorships are transparent and not used as a subterfuge for bribery.
- Prohibit facilitation payments since such payments are illegal under laws of most countries.
- Closely monitor and regulate actual and potential conflicts of interest.
- Examples of best practices include using web-based approval systems for gift and entertainment expenses; separating the "leisure" part of "foreign delegation" trips from the business component; and drafting well-defined policies that prohibit reimbursement of unreasonable or unnecessary expenses or cash reimbursements.

Application of the anti-corruption program to business partners
- Prohibit bribery in all business transactions that are carried out through third parties, subsidiaries, joint venture partners, agents, representatives, consultants, brokers, contractors, suppliers, lobbyists, and other intermediaries.
- Where the company has effective control over a third party, it should implement its compliance program with respect to that third party; and where it lacks "effective control," it should undertake well-documented risk-based due diligence prior to entering into a relationship with the third party, and encourage the

third party to implement an equivalent compliance program.
- Require third parties to certify they will be anti-corruption compliant and to provide audit rights to the company; and include a provision in the contract allowing for termination of the relationship if the third party violates the company's anti-corruption policy.
- Examples of best practices include requiring third parties to complete a questionnaire; using risk-assessment, business justification, and red-flag checklists to identify the opportunities and incentives for corruption; training third parties on the company's code of ethics and anti-corruption policy; ensuring third parties understand their contractual requirements as it relates to anti-corruption compliance; and conducting random audits of third party records.

Internal controls and record keeping
- Maintain an effective system of internal controls with accessible, transparent books and records, including prohibiting the use of "off the books" accounts.
- Conduct regular independent audits of internal controls to assure effectiveness and of company books and records to detect any suspicious transactions.
- Examples of best practices include segregation of duties of those in a finance role; requiring multiple signatures and/or various levels of approval on payments exceeding a defined dollar threshold and/or falling into certain specified categories (e.g., commission payments to agents or travel and entertainment expenses for government officials); and the establishment of specific financial controls for the disbursement of petty-cash payments.

Communication and training

- Establish and maintain effective means to communicate facts relating to the company's anti-bribery program and ensure periodic internal and external communication about updates and changes to the program.
- Provide documented anti-corruption training to all directors, executives, managers, employees and agents tailored to their duties and responsibilities, and, as appropriate, to contractors, suppliers, and employees of joint venture partners and subsidiaries.
- Examples of best practices include conducting targeted in-person training of key personnel (e.g., senior site managers and regional controllers) utilizing a "train the trainers" methodology; incorporating real-life scenarios and hypotheticals into the training, as well as quizzes; and conducting the training in the local language of the trainees.

Promoting and incentivizing ethics and compliance

- Human resource practices, including recruitment, promotion, training, performance evaluation and recognition, should clearly reflect the company's commitment to an anti-bribery program.
- Ethics and compliance should be an integral part of the company's strategic plan.
- An example of best practices includes incorporating compliance and ethics objectives into performance evaluations and compensation decisions.

Seeking guidance—Detecting and reporting violations

- Provide secure, confidential, and accessible channels (e.g., toll-free hotline and/or web-based service) through which employees can report in their native language violations and/or suggest improvements to the program in confidence and without fear of retaliation.
- Create global awareness of the company's whistleblower policy, including the availability of the hotline, through such methods as emails, intranet postings, company newsletters, and poster campaigns.
- Communicate to all personnel that they have a duty to report suspected violations and provide a list of designated contacts to whom they can report a concern.
- Communicate to employees the outcome of an investigation (where appropriate and legally permissible) and/or messages learned from matters investigated that feature sanitized versions of cases.
- Report to the governance committee (e.g., Audit Committee of the Board) on policy awareness efforts and incident reporting processes and trends.

Addressing violations internally and externally with authorities

- If potential misconduct is identified, the company should promptly and carefully investigate internally to ascertain the veracity of the allegations and to understand whether there appeared to be any violations of law, without alerting any potential wrongdoers to the investigation.
- Consider self-reporting the violation to authorities and encouraging appropriate cooperation with investigating and prosecuting authorities.

Periodic reviews and evaluations of the anti-corruption program

- Establish feedback mechanisms and internal processes supporting the continuous improvement of the program.

- Review and update risk assessments of the program periodically and when necessary to meet changed circumstances.
- Senior management should implement a systemic approach to monitoring the program, including for effectiveness in preventing, detecting, investigating, and responding to allegations of misconduct, and report its findings to board.
- Consider retaining an independent third party to periodically audit the program.
- An example of best practices includes, as a component of a company's monitoring program, a self-assessment by senior management of the level of compliance with the company's anti-corruption compliance program.[9]

What the *Handbook* means for companies

Notably, the 12 main elements discussed in the *Handbook* are largely consistent with the "hallmarks of an effective compliance program" in the DOJ/SEC *Resource Guide*. The FCPA *Resource Guide* identifies three central questions when analyzing an effective compliance program:

1. Is the company's compliance program well designed?
2. Is it being applied in good faith?
3. Does it work?

In addition to the above questions, the FCPA *Resource Guide* considers the following factors: commitment from senior management and a clearly articulated policy; a compliance department with oversight, autonomy and adequate resources; appropriate third party due diligence; an accessible corporate code of conduct; appropriate risk assessment; employee incentives, including rewards and disciplinary measures; a means of confidential reporting and conducting internal investigations; and periodic testing, review, training and continuing advice.[10]

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Although the *Handbook* expands upon some of the guidance in the *Resource Guide*, the two guides generally agree on what companies should strive for in terms of best practices. Furthermore, both guides use scenarios to demonstrate permitted and prohibited practices; however, the *Handbook* goes beyond the hypotheticals as presented in the *Resource Guide* (presumably drawn from regulatory enforcement actions) and pulls from real-life case studies from a company's perspective. In that sense, the *Handbook* is a nice compliment to the *Resource Guide*.

In its introduction, the *Handbook* contains a disclaimer that it "is not intended to create new standards or represent any form of legally binding requirement for businesses." Notwithstanding this disclaimer, now that a best practices manual (developed "by companies for companies") exists, could a company face enhanced regulatory scrutiny for failing to implement the best practices recommended by its peers in the *Handbook* if one of its employees runs afoul of the FCPA? Since the *Handbook*'s place within FCPA guidance is still so new, it remains to be seen precisely how the DOJ and SEC will interpret a company's use (or disregard) of the

Handbook. Where the guidance in the *Handbook* is consistent with that in the *Resource Guide*, it appears to define both regulatory and private-sector expectations in terms of best practices. However, where the *Handbook* provides inconsistent guidance, it may be precarious for companies to follow the *Handbook* and ignore the *Resource Guide*. For example, the *Handbook*'s suggestion that "the level of risk tolerance or risk appetite" of a particular company should be a key determinant of whether a corruption risk response is needed seems a bit at odds with the *Resource Guide*'s premonition that "[a]s a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures .... When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company analyzes *and addresses* the particular risks it faces."[11]

Conclusion

Although the *Handbook*'s impact is not yet clear, it is a tool that every organization facing FCPA risk should review in conjunction with the *Resource Guide*. Adherence to (and conducting training on) the *Handbook*'s 12 main anti-bribery elements, together with the *Resource Guide's* Hallmarks for an Effective Compliance Program, can better equip a company in developing a robust compliance program that hopefully will keep regulators from knocking on their door. ✳

1. Andrew Ceresney, Co-Director of the Division of Enforcement, SEC: Keynote Address at the International Conference on the Foreign Corrupt Practices Act. November 19, 2013 in Washington, DC. Available at http://1.usa.gov/Q6FBbq
2. Charles E. Duross, Deputy Chief of the Fraud Section, Department of Justice: Address at the International Conference on the Foreign Corrupt Practices Act. November 18-21, 2013 in Washington, DC.
3. *See* http://1.usa.gov/1idWa07
4. *See* http://1.usa.gov/1iiUpKQ
5. *See Handbook* pgs. 6-7.
6. On an international scale, these instruments include the United Nations Convention Against Corruption (est. 2005 with 168 parties) and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (est. 1999, with 40 states parties). On a regional level, the framework also includes the: Inter-American Convention Against Corruption; African Union's Convention on Preventing and Combating Corruption; Council of Europe's Criminal Law Convention on Corruption; and European Union's anti-corruption policy.
7. Those instruments include: (1) Anti-Corruption Code of Conduct for Business (APEC: Asia-Pacific Economic Co-operation), (2) Business Principles for Countering Bribery (TI: Transparency International), (3) Good Practice Guidance on Internal Controls, Ethics and Compliance (OECD: Organisation for Economic Co-operation and Development), (4) Integrity Compliance Guidelines (World Bank), (5) Principles for Countering Bribery (PACI: World Economic Forum Partnering Against Corruption Initiative); and (6) Rules on Combating Corruption (ICC: International Chamber of Commerce).
8. The eight instruments referenced in the *Handbook* include the six identified in note 1, *supra*, as well as the Multi-National Enterprise Guidelines and the UN Convention Against Corruption, the two international frameworks identified in Section 2 of the Handbook.
9. See *Handbook*, Annex 2—Sample Compliance Assessment Checklist.
10. See http://1.usa.gov/1uqCRWO
11. *Id*. at 59 (emphasis added).

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