

Benchmarking Fund Managers' Anti-Corruption Compliance Programmes

Fund Managers often wonder what others in the industry are doing to comply with applicable anti-corruption laws. A portfolio company under the spotlight of UK and US anti-corruption authorities can indeed put an investment firm at risk for liability, as well as the collateral consequences of devaluation, reputational damage, investigative costs, and management distraction (Client Briefings "[Q&A on the Foreign Corrupt Practices Act for Private Equity Firms](#)" and "[Q&A on the UK Bribery Act for Private Equity Firms](#)"). While there has been a great amount of speculation about the extent of the risks arising for private equity firms, hedge funds, and other investment companies under these laws, to date there have been few investigations and little definitive guidance provided by enforcement agencies. Nevertheless, unwilling to risk being the prosecution prototype, yet at the same time unhappy to forego legitimate business opportunities, firms are looking to "benchmark" their compliance programmes against industry standards.

An informal but illuminating survey of investment managers was undertaken at a recent seminar co-hosted by Clifford Chance and Bloomberg in Hong Kong, entitled "Anti-Corruption Laws: Are Your Investment Companies Vulnerable? Are You?" As part of the seminar, attended by over 100 leading funds and investment management professionals, the firm conducted a straw poll of current anti-corruption measures within the industry.

These survey results included 65 responses collated from the attendees of the seminar. The results are by no means conclusive but do offer some interesting findings.

- A large majority of the respondents (74%) have an anti-corruption programme in place within their organisation. This percentage coincides almost exactly, 74.5%, with the results of the Ethics 360 benchmarking survey conducted earlier this year, involving manufacturing, technology, energy, pharma and aerospace companies, as well as financial services firms.¹ This would indicate that despite the speculative risk to date in the investment management sector, the value of compliance is recognized to the same degree as in industry sectors that have historically been enforcement targets.
- 52% of the respondents have training set out by their compliance programme. Training is explicitly required by the Guidance provided by the UK Ministry of Justice on anti-bribery compliance and without such training, it is unlikely that the "adequate procedure" defense could be raised effectively by any firm on whose behalf bribes were paid by associated persons (Client Briefing "[Bribery Act compliance deadline of 1 July 2011 now fixed by publication of final guidance to companies](#)").
- Almost half the respondents, 46%, indicated that their firm has a compliance programme that addresses both commercial bribery, as well as bribery of public officials, but 30% were unsure if their program covered both aspects. This would reflect that the majority of those surveyed have either not yet modified their FCPA compliance programmes to incorporate the more expansive UK Bribery Act or are ineffectively communicating the scope of their program.

¹ Available at ethics360.com/benchmark.php.

- Over half of the respondents, 52%, have a method to allow employees to internally report corrupt activity anonymously. The SEC whistle blowing programme mandated by Section 922 of the Dodd-Frank Act provides an award to the whistle-blower of as much as 30% of the total monetary sanctions collected in successful SEC and related actions. (Client Briefing "[SEC Issues Final Whistleblower Rules](#)") This incentivized external reporting mechanism undermines a company's ability to internally investigate, remediate and report potential violations. Compliance programmes must take into account this pro-whistle-blowing environment and instil confidence and encourage the employees to use the internal reporting channels in the first place without fear of recriminations.
- Interestingly, only 11% of the respondents' compliance programmes authorise facilitation payments, despite their being permissible under the FCPA. This may reflect the difficulty in administering such payments, the narrowing of the exception by the US enforcement authorities, or the fact that this exception is not recognized under the UK Bribery Act. In the broader Ethics360 benchmarking survey referred to earlier, 44.5% prohibit facilitation payments under all circumstances, while 46.4% permit them if they are accurately recorded and in some cases, pre-approved.
- 65% of the respondents answered yes to the question whether their firms recorded gifts to key clients and imposed a monetary limit and 63% imposed restrictions on receiving gifts as well as giving gifts. This percentage is far below the figure given in the Ethics360 benchmarking survey and indicates a need to address more fully this issue, given the high number of prosecutions in which this issue arises.

Two final observations from the survey may be useful. The significant proportion of "unsure" answers to each question reveals issues with internal communication. The best anti-corruption programmes can still be rendered ineffective if not communicated and regularly updated for employees. Ongoing training for all employees is also important. And finally, 39% of the respondents indicated that they operated in jurisdictions where bribery was legitimate and 15% were unsure if they did. While a common practice in many countries, bribery is legal in none.

Based on the findings of this survey, here are some recommendations for anti-corruption policies (Client Briefing "[The Business Case for an Effective Compliance Program](#)"):

- Do ensure that you have a robust anti-corruption policy dealing with both public sector and commercial bribery;
- Do ensure your anti-corruption policy has the full support of senior managers;
- Do ensure that you provide adequate training for your work force and that you have a learning management system to demonstrate completion of training;
- Do ensure that you have a communications programme that clearly and concisely conveys the need to understand the policy and complete the training;
- Do ensure that your policy is regularly reviewed and updated;
- Do ensure that your policy includes company-wide publication of the designated internal channels for reporting, while emphasising that the SEC whistle-blowing bounty will not be jeopardised if the employee reports internally first;
- Do ensure that your policy deals effectively with facilitation payments, gifts and hospitality (receiving and giving).

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