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Briefing note
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Ten Hallmarks of Effective Compliance Programs for Asia Pacific Companies: Advice from the New FCPA Resource Guide

Designing a corporate compliance program for companies operating in Asia Pacific sometimes feels like trying to fit a round hole around a square peg. No amount of pounding will smooth the edges off a thousand years of guanxi. Moreover, attempting to square the circle of western compliance to fit tightly around the peg of Asia Pacific business practices is not likely to be any more successful with regulators as it has been for mathematicians.[1]

Fortunately, perhaps recognising the impossibility of achieving a perfect compliance fit, U.S. regulators state "there is no one-size-fits-all program," in their new "Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA"). The Guide was issued on November 14, 2012, jointly by the Criminal Division of the United States Department of Justice ("DOJ") and the Enforcement Division of the U.S. Securities and Exchange Commission ("SEC").[2] In the 120-page Guide, the agencies provide a compilation of previous positions they have taken in various enforcement actions, opinion releases, and public statements, on everything from the definition of foreign official to improper gifts and entertainment. It is a useful, though lengthy, supplement to the 6-page DOJ's "Lay-Person's Guide to the FCPA."[3]

One of the Guide sections focuses on the program elements that DOJ and SEC assess during investigations. These include:

1. **Commitment from Senior Management and a Clearly Articulated Policy against Corruption.** The agencies direct that this should begin with the Board of Directors and senior executives from whom middle managers and employees will take their cues. Nothing new there, other than discouraging Boards from exempting themselves. The agencies will assess whether the senior management policy statements are communicated unambiguously, adhered to scrupulously, and disseminated widely.

2. **A Code of Conduct and Compliance Policies and Procedures.** The agencies will look for clear and concise codes that are accessible (in local languages) to all employees and those conducting business on the company's behalf. While monetary limits are recognised as one option, they are not mandated and flexibility may be necessary for unique situations. This outlook is welcome for those of us designing compliance programs in countries as financially disparate as China, for example.

3. **Oversight, Autonomy and Resources.** The responsible manager must have proper authority, autonomy from management, and adequate resources to be effective, according to the Guide. The amount of resources will depend on the company's size, complexity, industry, geographical reach, and risks associated with the business. Again, a very useful statement for companies trying to cover Singapore and Hong Kong on one end and Myanmar and Cambodia on the other.

4. **Risk Assessment.** Here the agencies really sound off against programs that focus too much on low-risk markets and transactions, which devote a disproportionate amount of time policing modest entertainment and gift-giving instead of large government bids, questionable payments to third-party consultants or excessive discounts to resellers and distributors, or that perform identical due diligence on all third-party agents irrespective of risk factors. Don't focus on the seasonal 100 HKD in the red envelope, say the regulators. Instead, look for the systemic padded receipts used to build the slush fund to pay off customs officials.

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[1] Squaring the circle is one of the great problems of Classical Geometry. Mathematicians have worked on the problem of constructing a square equal in area to that of a given circle since 1800 BC, a problem pondered by Plato, Aristotle, Dante, and Newton. In 1882, Ferdinand von Lindemann proved it was impossible with only a straightedge and compass, as Plato insisted the problem must be solved, because Pi is transcendental (not the root of any polynomial with rational coefficients). Perfect compliance would also be transcendental, but, like squaring the circle, it cannot be achieved using tools as inflexible as a straightedge and compass.

[2] http://f.datasrvr.com/fr1/012/30545/CB_-_The_Department_of_Justice_Securities_and_Exchange_Commission_Guidance_on_the_FCPA_-_15_November_2012.pdf

[3] http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf

5. **Training and Continuing Advice.** Local language training, with web-based or in-person delivery, tailored to particular jobs and situations with relevant hypotheticals, for directors, officers, relevant employees, agents, and business partners is required for an effective compliance program, advise the agencies.

6. **Incentives and Disciplinary Measures.** This element is not usually mentioned on its own, but the agencies singled it out in this Guide to highlight how compliance is reinforced when personnel are rewarded for ethics and compliance leadership, and disciplined for misconduct.

7. **Third-Party Due Diligence and Payments.** The Guide sets forth three guiding principles for due diligence of agents, consultants and distributors:
   - Understand the parties' qualifications and associations
   - Understand the business rationale for including them in the transaction
   - Undertake on-going monitoring, including periodic updates, audit rights, training and compliance certifications.

Two and a half pages are devoted to a hypothetical regarding third-party vetting.

8. **Confidential Reporting and Internal Investigation.** The Guide indicates that not only should the reporting mechanism allow for confidentiality it should also protect against retaliation. The process for investigation should be efficient, reliable, properly funded, and documented. Suspicions are aroused if there are no reports at all.

9. **Continuous Improvement: Periodic Testing and Review.** The agencies promise that they will give "meaningful credit to thoughtful efforts to create a sustainable compliance program." They go on to assert that undertaking proactive evaluations before a problem strikes can lower the applicable penalty range. In support, the agencies list, later in the Guide, circumstances in which they have declined prosecutions including a situation where a bribe was stopped before it was paid. [5]

10. **Mergers and Acquisitions: Pre-Acquisition Due diligence and Post-Acquisition Integration.** This final piece of advice is presented as a clear warning of the risks in these transactions, both legal and business. Even if pre-acquisition due diligence is not possible, DOJ has required significant post-acquisition procedures and the Guide refers to the most onerous of conditions which were set forth in the Halliburton Opinion Procedure Release No. 08-02. [6] The Guide provides examples of successful mergers and acquisitions compliance programs, as well as unsuccessful ones.

In the Guide, the agencies emphasise that effective compliance programs are tailored to the company's business, there are no "formulaic requirements," and a "check-the-box" approach may be inefficient and ineffective in the agencies' view. Moreover, in recognising the global marketplace, the agencies state that although the focus of the Guide is on the FCPA, "given the existence of anti-corruption laws in many other countries, businesses should consider designing programs focused on anti-corruption compliance more broadly." [7]

Accordingly, Asia Pacific companies looking for guidance in designing their compliance program should draw some comfort from the outlook expressed in the Guide. To paraphrase the agencies, "in the end, if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program — [no matter where it is located] – will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately." [8]

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[4] Note that having a compliance program is not a defense to criminal prosecution. In a statement immediately following publication of the Guide, a DOJ official said that allowing such a defense would encourage companies to create "basic cookie-cutter programs that don't mitigate FCPA risks." Lanny Breuer, Assistant Attorney General, Criminal Division, at Federalist Soc'y Nat'l Lawyers Convention Nov.16, 2012.

[5] Id. at 77-78.

[6] U.S. Dept. of Justice, FCPA Op. Release 08-02 (June 13, 2008), available at http://justice.gov/criminal/fraud/fcpa/opinion/2008/0802. pdf. The stringent deadlines agreed to in the Halliburton release were thought to have been replaced by more relaxed requirements such as those in the 2011 Johnson & Johnson settlement, as well as the 2012 settlements in the Nordam, Data Systems & Solutions, and BizJet cases. These Deferred Prosecution and Non-Prosecution Agreements used language such as "as quickly as practicable" and "promptly" in terms of getting training in place and conducting FCPA-compliance audits without specific time deadlines, taking into account surrounding circumstances. The August 2012 settlement with Pfizer, however, seemed to mark a trend back to deadlines, requiring post-acquisition audits, training and integration within one year of the acquisition.

[7] Id. at 63 and n. 309. citing 10 sources of international guidelines, including the Asia-Pacific Economic Cooperation, APEC Anti-corruption Code of Conduct for Business (2007) available at http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~/media/ Files/Groups/ACT/07_act_codebrochure.ashx.

[8] Id at 57.