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The GlobalEthicist: Anti-corruption – what the US government expects from you

Posted by [Andrea Bonime-Blanc](#) ^[1] on Feb 20, 2013

A new guide is full of good advice on how to comply with US corrupt practice legislation

In late 2012, the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) issued a groundbreaking guide to the 1977 US Foreign Corrupt Practices Act (FCPA).

The [FCPA's resource guide](#) ^[2] is a 120-page document with a comprehensive and detailed roadmap to key elements of the FCPA including excellent hypothetical scenarios and case studies. And it provides unprecedented guidance on what U.S. regulators and prosecutors consider an effective anti-corruption compliance program.

Though 35 years old, the FCPA has been influential globally mostly in the past 15 years and especially since the adoption of the OECD anti-bribery convention of 1997. Even in the US, FCPA enforcement only began in earnest around 2006, but has been turbo-charged under President Obama and his DOJ team led by Lanny Breuer, assistant attorney-general in charge of its criminal division. Breuer has been a public and tireless advocate of greater global anti-corruption enforcement and greater US government transparency on FCPA enforcement.

Today 40 industrialised nations (including Russia) are OECD anti-bribery convention signatories. The result is that global companies now face a tangled web of possible investigations and prosecutions for alleged bribery not only by the US government but by many other nations as well. Just ask Siemens, Alcatel-Lucent, Shell, Daimler, ABB, and many others that have undergone such multinational scrutiny in the past few years.

FCPA engagement

The FCPA resource guide was issued in response to two main factors. One was the avalanche of complaints from the corporate world that many terms within the FCPA were obscure, vague, unintelligible, unfair or worse.

The other, highlighted by the ethics and compliance community (through organisations such as the Ethics and Compliance Officer Association and the Ethics Resource Centre), was a more constructive engagement with the DOJ and SEC about the critical role that organisational ethics, compliance and integrity programmes play in helping to build effective risk management and an ethical culture.

While the FCPA resource guide states that it is informal and non-binding, it does provide useful practical guidance for global companies on a number of fronts.

The first few chapters of the guide provide an excellent summary and detailed analysis of the FCPA itself – from the criminal provisions enforced by the DOJ to the civil “books and records” provisions enforced by the SEC.

The guide also provides some clarification of certain key concepts. For example, “declinations” – cases which the US government has decided not to prosecute because of various factors including company cooperation, effective compliance, etc – are addressed in greater detail than before.

Likewise, the positive consequences of “voluntary disclosure” by companies to the government of possible bribery situations are detailed and somewhat greater clarity is provided on who constitutes a “foreign official”. The use of charitable contributions as a vehicle for bribery is also addressed.

The ‘facilitation’ issue

While further guidance on what constitutes a “facilitation” payment is provided, this area continues to be fraught with confusion as many countries, notably the UK’s anti-bribery rules, outlaw this practice while the FCPA continues to allow it. Thus, harmonising a global corporation’s approach to this issue continues to be challenging.

Another area in which the guidance is helpful is in third party due diligence. The guidance is overwhelming in its insistence on global actors paying attention to third party review underscoring the criticality of due diligence in general, pre-acquisition due diligence in particular and, interestingly, the centrality of post-acquisition compliance integration.

In other words, if companies do not discover corruption and bribery through their acquisition process and acquire a company with corruption issues, these may well come back to haunt the surviving company in the shape of government investigation and/or prosecution. In such a case, the acquiring company is in danger of assuming “successor liability” for such corruption.

Scenario guide

One of the key contributions of the new FCPA resource guide is the use of helpful hypothetical scenarios and case studies which practitioners and business folks should read up on. One of these deals with FCPA jurisdictional issues. Another tackles the always tricky area of gifts, travel and entertainment for government officials – when are they legitimate business expenses and when do they become extravagant and possibly corrupt? Additional useful hypotheticals are provided in the areas of third party vetting, facilitation payments and successor liability.

Finally, the guide breaks new ground in that it provides a detailed and helpful review of what the US government considers an “effective” anti-corruption compliance programme. The key elements are:

- *Commitment from senior management and a clearly articulated policy against corruption.* A “must have” for all effective compliance and ethics programmes.
- *Code of conduct and compliance policies and procedures.* Again, a must have for all global companies.
- *Oversight, autonomy and resources.* An organisation’s ethics and compliance personnel must have sufficient resources and independence to do their jobs and the C suite and board must exercise proper oversight of the programme.
- *Risk assessment.* The need to conduct periodic ethics and compliance risk assessments to uncover potential criminal or other illegal or unethical behaviour.
- *Training and continuing advice.* To ensure concerns and issues are handled promptly and employees are well informed on what to do.
- *Incentives and disciplinary measures.* Targeting the right behaviours through a properly designed performance management and incentive system.
- *Third party due diligence and payments.* To manage the almost unmanageable risk of illegal or corrupt behaviour of all third parties.
- *Confidential reporting and internal investigations.* To allow a speak-up culture devoid of the threat or reality of retaliation.
- *Continuous improvement: periodic testing and review.* To ensure that issues that are uncovered are properly dealt with and new ones are caught and defused early on.
- *Mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration.* Criticality of knowing what you are buying and then integrating it properly into your compliance and ethical culture and practices.

Enforcement community thinking

Corporations and their internal and external anti-corruption advisers – in compliance, legal, audit, accounting, finance and business management – would be wise to become familiar with this useful resource. It is the first time that the US government has provided real detail on key sections of the FCPA and a real peek into the enforcement community’s thinking.

Even more critically, with the help of their internal and external advisers, senior leadership and boards of directors of global companies should be made aware of this document.

They should gain a thorough understanding of the pitfalls of non-compliance with the FCPA and the other anti-corruption laws through three methods. First, by properly setting the tone for integrity at the top. Second, by fully supporting internal anti-corruption and other compliance and integrity programmes. And, third, by demanding commensurate performance from all employees

and third parties.

This is the first in a new GlobalEthicist column series from [Dr Andrea Bonime-Blanc](#) [3], CEO of governance, risk, ethics, compliance and corporate responsibility management consultancy specialists GEC Risk Advisory. She is chair emeritus of the Ethics and Compliance Officer Association, a member of Ethical Corporation's editorial advisory board, and a life member of the Council on Foreign Relations. Her tweets can be found @GlobalEthicist.

Links:

[1] <http://www.ethicalcorp.com/users/andrea-bonime-blanc>

[2] <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

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