

2019 Board & Audit Committee Compliance Conference

Anti-Corruption & Bribery



Odell Guyton, JD, CCEP, CCEP-I

SCCE Co- Founder

Managing Director, Klink & Company

oguyton@klink-co.com

Society of Corporate Compliance and Ethics
6500 Barrie Road, Suite 250, Minneapolis, MN 55435, United States
www.corporatecompliance.org | +1 952 933 4977 or 888 277 4977



The Global Compliance Challenge

- Cultural and country differences
- Legal and regulatory challenges
- M&A, export control laws, trade sanctions
- Post “Snowden” Privacy Concerns
- Transparency International Corruption Perceptions Index
- OECD Anti-bribery Convention
- Other US Laws: Anti-money laundering (AML), USA PATRIOT Act, OFAC, other trade restrictions
- Global Compliance program requirements & standards
 - -U.S. FCPA and UK Anti-Bribery Act
 - US FSG and Others, e.g., OECD Good Practices Guidance



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Sources of Compliance Standards

- In US, Sentencing Guidelines
- Have formed the basis for compliance programs globally
- In US, Department of Justice statements and case settlements, US Attorney's Manual—SEC developments (new whistleblowing legislation)
- Other nations' laws, e.g., Italy, U.K., India
- Prosecutions start with individual accountability
- All OECD signatories
- OECD Anti-bribery Working Group Good Practices Guidance, issued March 2010
- DOJ/SEC GUIDANCE



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Corruption is a Global Issue

- People and governments around the world are aligning to fight corruption.
- Now, in addition to the US (Foreign Corrupt Practices Act) and the UK Bribery Act, every country has and enforces its laws against bribery and corruption.
- Every country makes public and commercial bribery illegal
- The OECD (Organization for Economic Co-operation and Development) worked with experts to develop a convention among nations to criminalize bribery by requiring its signatories to pass legislation against corruption & then enforce it.



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41 OECD Signatories (Including 6 Non-OECD Countries)

AUSTRALIA	JAPAN	ARGENTINA
AUSTRIA	KOREA	BRAZIL
BELGIUM	LUXEMBOURG	BULGARIA
CANADA	MEXICO	COLUMBIA
CHILE	NETHERLANDS	RUSSIAN FEDERATION
CZECH REPUBLIC	NEW ZEALAND	SOUTH AFRICA
DENMARK	NORWAY	
ESTONIA	POLAND	
FINLAND	PORTUGAL	
FRANCE	SLOVAK REPUBLIC	
GERMANY	SLOVENIA	
GREECE	SPAIN	
HUNGARY	SWEDEN	
ICELAND	SWITZERLAND	
IRELAND	TURKEY	
ISRAEL	UNITED KINGDOM	
ITALY	UNITED STATES	



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Transparency International Corruption Index

- The Transparency International Corruption Perceptions Index (CPI) ranks more than 150 locations by perceived levels of corruption
- Possible Scores Range from 0 (highly corrupt) to 100 (very clean).

Review other ratings at:

http://www.transparency.org/policy_research/surveys_indices/cpi



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Transparency International's Corruption Perceptions Index 2016

The Best

- Denmark (90)
- New Zealand (90)
- Finland (89)
- Sweden (88)
- Norway (85)
- Switzerland (86)
- Singapore (84)
- Netherlands (83)
- Luxembourg (81)
- Canada (82)
- Australia (79)
- Germany (81)
- UK (81)

The Worst

- Somalia (10)
- Korea (North) (12)
- Sudan (14)
- Afghanistan (15)
- South Sudan (11)
- Iraq (17)
- Turkmenistan (18)
- Uzbekistan (18)
- Libya (14)
- Eritrea (18)
- Yemen (19)
- Venezuela (17)



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U.S. FCPA Anti-Bribery Provisions

- Prohibition:
 - Any act in furtherance of
 - A payment, offer, promise or authorization of ...
 - Of money or anything of value
 - To a “foreign public official”, political party, party official, or candidate (directly or indirectly through intermediaries)
 - To promote an action in order to obtain an improper advantage (quid pro quo)
 - In order to assist in obtaining or retaining business



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U.S. FCPA Anti-Bribery Provisions

- Defenses:
 - Facilitation Payment
 - Small payment to expedite a routine
 - Ministerial (non-discretionary) action or duty
 - Which the company or person is otherwise entitled
 - (permits, visas, inspections, customs clearances, etc.)
 - Bona fide expense related to promotion or execution of a contract
 - Lawful under the foreign country's expressed written law
 - Immediate threat to life or safety



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United Kingdom (UK) Bribery ACT

- Adopted in April 2010; enacted July of 2011
- Creates criminal offense of "Failure of Commercial Organization to Prevent Bribery"
- Strict liability for Commercial Organization if "associated Person" gives bribe "to obtain or retain an advantage in the conduct of business"
- "Associated person" includes employee, agent, or subsidiary "who performs service for or on behalf of the Commercial Organization"
- Covers commercial bribery and bribery of foreign government official
- Gives SFO (Serious Fraud Office) jurisdiction over corrupt conduct by foreign Commercial Organization so long as it "carries on a business...in any part of UK"
- Convicted Organization faces an unlimited fine amount



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Current Regulatory Environment-Anti-bribery and Anti Corruption

U.S. Foreign Corrupt Practices Act (“FCPA”)/Anti-Bribery and Corruption

- Prosecutions in countries traditionally lax in prosecution of bribery and corruption, e.g., China and Mexico, have increased.
- Focus areas of regulators and prosecutors:
 - a. Mergers & Acquisitions (M”&A”) and other transactional due diligence;
 - b. Intermediary due diligence;
 - 64% of FCPA cases have involved the activities of intermediaries such as freight forwarders, consultants, accountants, lawyers; and
 - c. Travel and entertainment expenses
 - DOJ and SEC recently brought their first FCPA case that was premised solely on travel and entertainment expenses.



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What is a Bribe?

- Giving (or offering or authorizing the giving of) something of value
- To an individual
- With intent to obtain an improper benefit
- Bribes can take many forms
 - Cash
 - Gifts, Entertainment, Meals
 - Travel and events
 - Preferential hiring
 - Donations to charity



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FCPA Facilitating Payment

- What is a facilitating payment?
 - A small payment
 - To secure or expedite a routine action (*not* the awarding of a contract)
 - Made to a government official
- Companies should consider a policy that prohibits facilitating payments
 - If Company operates worldwide
 - Must comply with the laws of many different jurisdictions
 - Adoption of a single, global policy that prohibits all bribes, including facilitating payments



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Facilitating Payments – Pressure from OECD

For OECD signatories:

VI. RECOMMENDS, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

- i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;
- ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records.

Pressure to do away with facilitating payments



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“Red Flags”

- “Red Flags” are warning signs of possible corrupt payments or bribes
- Areas where red flags typically may appear include:
 - Unusual or complex contracting, sourcing, accounting, payment or billing practices
 - Travel and expenses and gifts and entertainment, particularly of government officials
 - Government officials ask company to use a particular partner or vendor



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Examples of Red Flags

- Multiple single sourced contracts to the same third party rapidly increasing in value over several months / years;
- Recurring identical amounts from the same third party;
- Unusual even dollar or high value disbursement amounts for routine odd dollar or low value purchase;
- Unusual payment methods, particularly cash or numbered account payments, payments through third countries or in third country currency;
- Payments disproportionate to the services performed at the particular location; [1]

[1] ABB Limited, global provider of power technologies, made numerous cash payments of \$120 to \$200 per day to Angolan engineers for alleged company travel while the gross annual per capita income in Angola was only \$710. (Prosecuted under FCPA in July 2004)



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Examples of Red flags

- Payments for services not performed;
 - The intermediary company is owned by a government official, a related party or by an employee dealing with the government official;
 - Same contact information for different third parties (contact person, address, telephone and or fax number, website, e-mail address ending)
-

Examples of Red flags

- Excessive miscodings to same expense account;
 - Lack of adequate supporting documentation or supporting documentation is not corresponding with the actual work performed;
 - Fraudulent supporting documentation;
 - Payments for expenses which do not make business sense;
 - Unusually high payments / pay increases for employees working with government officials; and
 - Third party has a poor reputation for integrity or has been subject to investigations regarding its ethics.
-

WHO IS A “GOVERNMENT OFFICIAL” OR ENTERPRISE ?

- **SOMEONE YOU CANNOT BRIBE!**
- **ANYONE IN THE GOVERNMENT**
- **INCLUDES STATE-OWNED ENTERPRISES**
- **INCLUDES PUBLIC INTERNATIONAL ORGANIZATIONS, E.G. WORLD BANK, WHO**
- **CANDIDATES FOR POLITICAL OFFICE**
- **POLITICAL PARTIES**
- **AND, IT IS ALSO VERY DANGEROUS TO BRIBE PRIVATE PARTIES**



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Don't Ignore Warning Signs

Covers conscious disregard or deliberately ignoring circumstances that should alert you to violations

- Company and individual employees can be held responsible
- Companies and citizens of many nations have been prosecuted, heavily fined, and punished under anti-corruption laws
- Employees can be held personally accountable if they disregard a red flag



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Gifts, Entertainment & Travel

- Gifts, business travel, entertainment, and charitable donations can be appropriate business tools
- However, gifts, business travel, entertainment, and charitable donations can be bribes if given with improper intent
- Have specific policies:
 - Strict monetary limits, approval, and documentation required for gifts, business travel, entertainment, and charitable donations
- Employees need to understand their responsibilities
- Urge employees to ask questions & get advice!



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Relationships With Third-Party Representatives

- OECD Good Practice Guidance, item 6: “agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners”
- Can interface directly with customers, including government purchasers
- Third-party misconduct could subject a company to civil, criminal and reputational liability
- Company should assure third-parties act in accordance with the company’s standards and in compliance with all applicable laws



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Due Diligence Overview

- *Before hiring someone to act on company's behalf*
 - *conduct due diligence to ensure the representative is qualified and has a reputation for integrity*
- *Before engaging in business with a third-party representative*
 - *ensure that the third-party is not making corrupt payments by conducting due diligence*
- Due diligence procedures may include asking the third-party to fill out a questionnaire, verifying this information through public sources and in many cases, conducting in-person interviews



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US DOJ:

- Individual Prosecutions- Yates Memorandum
- Gatekeeper Accountability
- Sarbanes-Oxley:
 - Sections: 404, 302, 908
- Dodd Frank Act:
 - Whistleblower Escalation and Protection;
 - Title IX, Subtitle B Section 929P(c)
- CONTROL PERSON LIABILITY:
 - SEC has unequivocal authority to bring monetary and injunctive claims against directors, officers, and other control persons for violations committed by their subordinates.



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Control Persons Liability—SEC expectations

- How do you protect yourself:
 - (1) Focus on Preventing potential violations
 - (2) Effective Compliance Program and Internal Control Environment Lay the Ground work for Strong Affirmative Defenses
 - Section 20(a) – Liability may not attach where: “the control person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.”
 - (3) A reasonable and proper system of supervision and internal control
 - (4) “Control Persons”:
 - (a) must take precautions to prevent securities violations before they happen
 - (b) must provide training, supervision, and guidance appropriate to the nature of the business
 - (c) and project the proper “tone at the top” at all times
 - (5) Control Persons must understand that misconduct will not be tolerated



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Federal Securities Law: Control Person Liability

Senior Officers and Directors are generally liable to prosecution for corporate offenses

- This has been a priority focus area for US DOJ Prosecutors
- Individuals may be prosecuted not only for consent and connivance in bribery by a subordinate, but also potentially for oversight failures
- **Under Federal Securities Law—a corporate officer in position of control who fails to adequately supervise the conduct of others may be held responsible for their actions—**
SEC: Nature's Sunshine settlement
- Dodd Frank Act:
 - Title IX, Subtitle B Section 929P(c)
 - CONTROL PERSON LIABILITY:
- SEC has unequivocal authority to bring monetary and injunctive claims against directors, officers, and other control persons for violations committed by their subordinates.



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Seaboard Facts

- The SEC was presented with good corporate behavior in Seaboard's proactive response to its discovery of misconduct.
- As a result, in the Seaboard Report, the SEC seized the opportunity to explain some factors it will use to determine how to credit companies for their affirmative efforts in connection with the discovery and remediation of misconduct. The SEC identified four major criteria:
 - self-policing/nature of the conduct
 - self-reporting
 - remediation
 - cooperation with law enforcement



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Comparison of FCPA, UKBA and BCCA

	FCPA	UK Bribery Act	BCCA (Brazilian Clean Company Act)
Bribery of foreign officials	Yes	Yes	Yes
Bribery of local officials	No	Yes	Yes
Private and/or commercial bribery	No	Yes	No
Extraterritorial reach	Yes	Yes	Yes, but only if the violation relates to the Brazilian entity
Books and Records	Yes	No	No
Other prohibited acts/Public bid rigging	No	No	Acts Against the Public Administration (e.g., fraud in public tender processes, bid rigging)
Exception for facilitation payments	Yes	No	No
Corporate criminal liability	Yes	Yes	No
Strict liability	No	Yes for "failure to prevent bribery"	Yes
Successor Liability	Yes, if target was previously subject to FCPA	No	Yes, for surviving corporations even if involved in M&A, limited to the assets transferred, effective from January 29, 2014
Other corporate "sanctions"	Debarment, monitors, DPA, NPA, derivative lawsuits, etc.	Debarment	Administrative and judicial sanctions: Publication of conviction, suspension or prohibition of activities, debarment, prohibition to received incentives, mandatory dissolution, etc. Both types of sanctions can run in parallel
Credit for compliance programs	Yes (U.S. Sentencing Guidelines)	Yes, can be full defense for corporate offense of "failure to prevent bribery"	Yes, but amount of credit not determined
Credit for self-disclosure/cooperation	Yes	Yes, but limited	Yes, under the leniency program, fines can be reduced up to 2/3 and all other sanctions can be excluded
Fines	Anti-corruption violation: up to US\$ 2 million/violation. Accounting violation: up to US\$ 25 million/violation. Twice the benefit obtained or sought	Unlimited	UP to 20% of the company's gross revenue of the previous year or up to BRL \$60 million (US\$ 25 million) if not possible to use the gross profit criteria

Mona Clayton
Partner
Miami, FL
+1 305 347 3510
mona.m.clayton@us.pwc.com

Martin Whitehead
Partner
São Paulo, Brazil
+55 (11) 3674 2141
martin.j.whitehead@br.pwc.com



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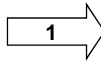
Comparative Compliance Requirements

Compliance Elements	Sentencing Guidelines	OECD	Tenaris NPA	J&J DPA
Third-Party Risk-Based Due Diligence	✓	✓	✓	✓
➢ Standard Anti-Corruption Contract Terms			✓	✓
➢ Heightened Review for New Third-Parties & Red Flags				✓
Periodic Anti-Corruption Training	✓	✓	✓	✓
➢ Annual Training & Compliance Certifications			✓	✓
➢ Risk-Tiered Training Program				✓
Articulated Policies & Procedures	✓	✓	✓	✓
➢ Policies for Gifts, Hospitality, Travel, etc.		✓	✓	✓
➢ Specific Gifts, Hospitality & Travel Restrictions				✓
Senior Official(s) Oversee Program	✓	✓	✓	✓
➢ Chief Compliance Officer				✓
➢ Business Segment & Regional Compliance Leaders				✓
Mechanism for Guidance & Reporting	✓	✓	✓	✓
➢ Review & Response by Standing Committees				✓
➢ Toll-free Helpline & Electronic Complaint Form				✓
Audit & Monitoring for Compliance Effectiveness	✓	✓	✓	✓
➢ Risk-Tiered "FCPA" Audits				✓
Encourage Compliance & Discipline Violations	✓	✓	✓	✓
Institute Internal Controls	✓	✓	✓	✓
Compliance Tone at the Top	✓	✓	✓	
Acquisition Anti-Corruption Due Diligence				✓

How Can Your Company Protect Itself?

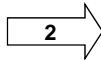
Develop and implement a robust & effective compliance program

System of Internal Controls



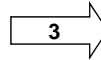
Designed to Limit and Control Risks

Designate Compliance Officer & other compliance infrastructure



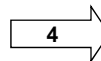
Charged with Managing Compliance Programs including foreign bribery, money laundering, trade restrictions

Employee Training & Communications Program



Tailored to the Responsibilities of the Employee

Independent Testing of the Overall Compliance Program



Designed to Evaluate the Integrity and Effectiveness of the Program



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How Internal Audit Can Recognize Red Flags

- A. Review and testing of processes and controls relating to on-boarding and engagement of intermediaries and other third parties to ensure that the due diligence and vetting process has been complied with.**
- B. Review and testing of processes relating to travel and entertainment of foreign government officials**
 - 1. Is there a legitimate business purpose for the expense?
 - 2. Does the expense appear reasonable?
 - 3. Was the approval for the expense and the expense itself documented?
 - 4. Are there any “pleasure activities”?
 - 5. How were the expenses funded and documented?
 - 6. What about spousal travel?



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Employee Training & Communications

- Identify who needs FCPA/anti-bribery training;
 - Include “helpers” and witnesses
- Determine which delivery methods work best for various employee segments. Format and frequency can usually be determined by employee’s risk exposure;
- Use ongoing communications to reinforce message



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Risk Assessments

- Determine which corporate function is best positioned to conduct a comprehensive FCPA risk assessment.
- Decide if FCPA risk assessment should be conducted in conjunction with other compliance risk assessments or as a stand alone review.
- Create list of business segments, employees & third parties that should be targeted during the assessment, as well as the specific questions that will best gauge their risk exposure.



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Monitoring and Internal Controls

- Monitor third-party sources on emerging corruption risk trends.
- Develop a good understanding of the procedures and controls that relate directly to FCPA.
- Consider using computer assisted auditing techniques for sample selection and testing (i.e. samples with duplicate payments, rounded amounts and unusual payment patterns).



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Auditing Procedures

- Conduct an FCPA risk assessment as part of audit planning to identify areas most vulnerable to the risk
- Prioritize high-profile or new jurisdictions for in-person audits
- Evaluate countries where you operate, particularly entries into new jurisdictions.
- Train senior people throughout the company about FCPA and how to spot hidden ways in which money can be passed through third-parties.



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Third-Party Screening

- Identify existing third-party relationships across regions and businesses of the organization.
- Develop standardized due diligence screening for new third-parties.
- Ensure local application of due diligence screening processes.
- Establish an ongoing monitoring and training process for existing third-party relationships.



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Contractual Safeguards

- Identify parties and transactions requiring contractual protections;
- Develop standard contract language for use across the organization;
- Implement standard language as applicable and with local counsel approval.



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Questions

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