

Berliner Corcoran & Rowe LLP

Anti-Corruption Compliance Practice Area

Background on anti-corruption compliance programs

Increasingly as international corruption conventions have covered the world, governments throughout the world have legislated to require effective anti-corruption due diligence programs. The regimes include, *inter alia*, the Foreign Corrupt Practices Act (FCPA) in the United States, the UK Bribery Act, Canada's Corruption of Foreign Public Officials Act (CFPOA), Australia's Criminal Code, and Brazil's Clean Company Act.

In addition, led by the World Bank Group, multilateral development banks require companies bidding on their procurement to have anti-corruption due diligence programs (also known as Integrity Control Programs).

When something goes wrong in a project, as occurs whenever you have businesses operated by human beings for profit motives, prosecutors and regulators decide where the blame lies and what, if any, criminal and/or other penalties should be imposed, review whether the business(es) involved have effective cutting-edge anti-corruption programs. The business may try to persuade the prosecutor or regulator that if any wrongdoing occurred, it was not the fault of the entity, but of one or more rogue employees. Seasoned prosecutors and regulators will scrutinize the anti-bribery compliance program and ascertain if the compliance program was comprehensive and based on the risks of the business, actually trained the key employees and third-parties involved in any incident, and whether the business has documented its program properly, and whether it has regularly updated and evolved its program. In this regard, the prosecutor or regulator will want to see what action, if any, the business took in the past when irregular activity or wrongdoing occurred. Did the business entity have an effective system to detect and investigate irregular conduct and payments and take disciplinary action for improper conduct?

The landmark decision *In re Caremark International Inc. Derivative Litigation*¹ held that corporate boards should ensure that reasonably designed systems exist to provide senior management and the board with "timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance." Otherwise, officers and directors may incur civil liability for failing to make a good-faith effort to make sure that their business has an effective compliance program.

In addition, the U.S. Securities and Exchange Commission (SEC) has found that "if an officer or director knows or should know that his or her company's statements concerning particular issues are

¹ *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959, 970 (1996). See also *Stone v. Ritter*, 911 A.2d 362, 370 (2006).

inadequate or incomplete, he or she has an obligation to correct that failure.”² An entity’s effective anti-bribery compliance program must evaluate and detect its business risks and address the potential risks in a timely matter.

Even when a business has an anti-bribery compliance program, it must “regularly review and improve [its] compliance programs and not allow them to become stale.”³ The review should include adjusting to changing needs and ways in which compliance policies and procedures can be simplified and made more efficient. The nature and frequency of monitoring depends on the size and complexity of an entity. The goals are continuous improvement and sustainability.

BCR helps businesses to prepare and monitor anti-bribery compliance programs. BCR becomes involved when irregular activity is detected and, if necessary, conducts internal investigations and helps the board determine in some cases whether a voluntary disclosure should be made. BCR also represents businesses and officers and third parties when prosecutors become involved and charge the business and/or its officials and/or third parties.

Why anti-corruption compliance programs

Large and small companies are increasingly becoming sensitive to the risks of corruption, collusion, and bribery in domestic and, especially in, international transactions. Companies doing business internationally may have incorporated measures into their policies to prevent violations of the Foreign Corrupt Practices Act, although usually there is insufficient attention until it is too late and a violation has occurred. BCR has been hired to prepare comprehensive anti-corruption compliance programs.

Not every size fits all

These programs are tailored to the needs of each particular company, depending on the size of the company, the countries where it does business, the industry in which it operates and other factors affecting the nature of the risk. We approach the development of an anti-corruption program in several stages.

Assessing the business risks

We analyze the key business issues pertinent to the corruption risk for the company. The major areas of concern include business contracts; business partners and third parties; dealing with government officials and state-owned enterprises; conflicts of interest; facilitating payments; lobbyists; and country risk.

Assessing the corruptions risks

In the next stage, we assess the corruption risks that may affect the company. Certain areas may present red flags such as unusual payment patterns or financial arrangements; unusually high

² REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 CONCERNING THE CONDUCT OF CERTAIN FORMER OFFICERS AND DIRECTORS OF W.R. GRACE & CO., EXCHANGE ACT RELEASE NO. 39, 157 (Sept. 30, 1997), <https://www.sec.gov/litigation/investreport/34-39157.txt>.

³ U.S. Department of Justice & U.S. Securities and Exchange Commission, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT ACT 62 (2015 update).

commissions; lack of transparency in expenses and accounting records; and lack of qualifications of a local joint venture partner.

Preparing an anti-corruption program

An anti-corruption program is sometimes integrated into an employee manual, but we prefer a stand-alone program that complements other programs. The anti-corruption, which may also be called an integrity compliance program, addresses various aspects of the company's business such as travel and entertainment; gifts; facilitation payments; and internal controls.

Implementation of program

The final stage includes training and communicating the program to the company's employees and the third parties with which the company works. This stage generally includes training sessions and may include internal or external monitoring.

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