

# Strengthening your anti-corruption compliance program

October 8, 2013

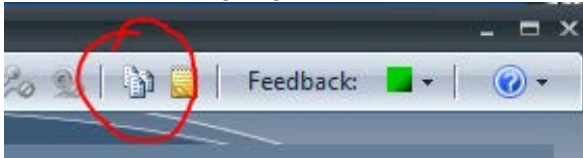


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## FCPA Enforcement On The Rise

### Oil & Gas Giant Targeted in Corruption Crackdown

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### Two U.S. traders plead guilty in Venezuelan bank bribery case

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### NETWORKING EQUIPMENT COMPANY SHARES FALL 6% AFTER DISCLOSING FOREIGN BRIBE INVESTIGATIONS

*The U.S. Securities and Exchange Commission and the U.S. Department of Justice are conducting investigations into possible violations by the Company of the U.S. Foreign Corrupt Practices Act. The Company is cooperating with these agencies regarding these matters. The Company is unable to predict the duration, scope or outcome of these investigations.*

These 52 words – one of the shortest Foreign Corrupt Practices Act (“FCPA”) disclosures on record, and buried on page 32 of Juniper’s most recent 10-Q – resulted in a **one-day loss of \$628 million** to Juniper shareholders

### SALESWOMAN CLAIMS SHE WAS TOLD TO BRIBE DOCTORS

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## With you today



**Mark McNamee,**  
**CPA, CFE, PMP**  
Partner  
Mid-Atlantic  
Leader  
Risk Advisory  
Services

### Relevant Highlights

- Leads McGladrey's national anti-corruption advisory practice.
- Advises Fortune 50 company on ongoing international anti-corruption compliance review program, serving as primary liaison with client's offices of compliance and general counsel, as well as outside counsel.
- Led several FCPA anti-bribery compliance review projects delivered during the past year – specifically in South America, Asia, and Eastern Europe.



**Rick Shriner,**  
**CISA, CFE, PMP**  
Director  
Risk Advisory  
Services

### Relevant Highlights

- Directed FCPA-focused corporate compliance reviews in Thailand, India, and Romania.
- Conducted FCPA compliance/forensic evaluation in connection with a global investigation of a European conglomerate, leading work streams for two subsidiaries in the US and Germany.
- Conducts third-party audits for purposes of cost recovery, identification of fraudulent billing, and internal controls improvement.



**Jessica Batt,**  
**CPA, CFE**  
Manager  
Risk Advisory  
Services

### Relevant Highlights

- Led various international anti-corruption compliance audits for Fortune 50 manufacturing company. Role included development of compliance audit program, ongoing communication with US and in-country teams, and identification of control weaknesses throughout several in-scope countries, specifically in Brazil and Turkey.
- Developed anti-corruption program for a large publishing and entertainment corporation.

## Today's objectives

- Obtain a general understanding of anti-corruption regulation and recent enforcement trends
- Gain a working knowledge of DOJ and SEC guidance with respect to an effective compliance program
- Understand some practical questions you should be asking to determine the state of your FCPA compliance program

## Which of the following is prohibited by the FCPA?

- A. International bid rigging
- B. Facilitated payments to speed the processing of business licenses in a foreign country
- C. Bribes to foreign government officials to win business opportunities
- D. Acceptance of gratuities by commercial organizations to expand business
- E. All of the above

# Anti-corruption regulatory landscape – FCPA

## Anti-bribery provision

Prohibits U.S. person, U.S. company or any other person in the U.S. from corruptly paying or offering to pay anything of value directly or indirectly to a foreign official to:

- Secure an improper advantage
- Influence a foreign official in his official capacity
- Induce him to violate the law
- Assist in obtaining, directing or retaining business

Proof of actual knowledge of a payment or promise to pay is not required

## Accounting provision

**Books and records component** requires companies to maintain its books and records in a reasonable level of detail.

**Internal controls component** requires that companies devise and maintain a system of internal accounting controls that can reasonably prevent and detect corrupt or unauthorized transactions

## Who is covered

The accounting provision of the FCPA applies only to public companies, but all companies must adhere to the Act's anti-bribery provisions.



# Anti-corruption regulatory landscape – Other regulation to consider

## UK Bribery Act of 2010

Extends anti-corruption regulation beyond FCPA by including:

- Commercial bribery – not limited to “foreign government officials”
- Failure to prevent bribery
- Accepting bribes

Applies to any company that has a U.K. office, employs U.K. citizens, or provides any services to a U.K. organization

## Other local legislation

Varies by country, recent examples include:

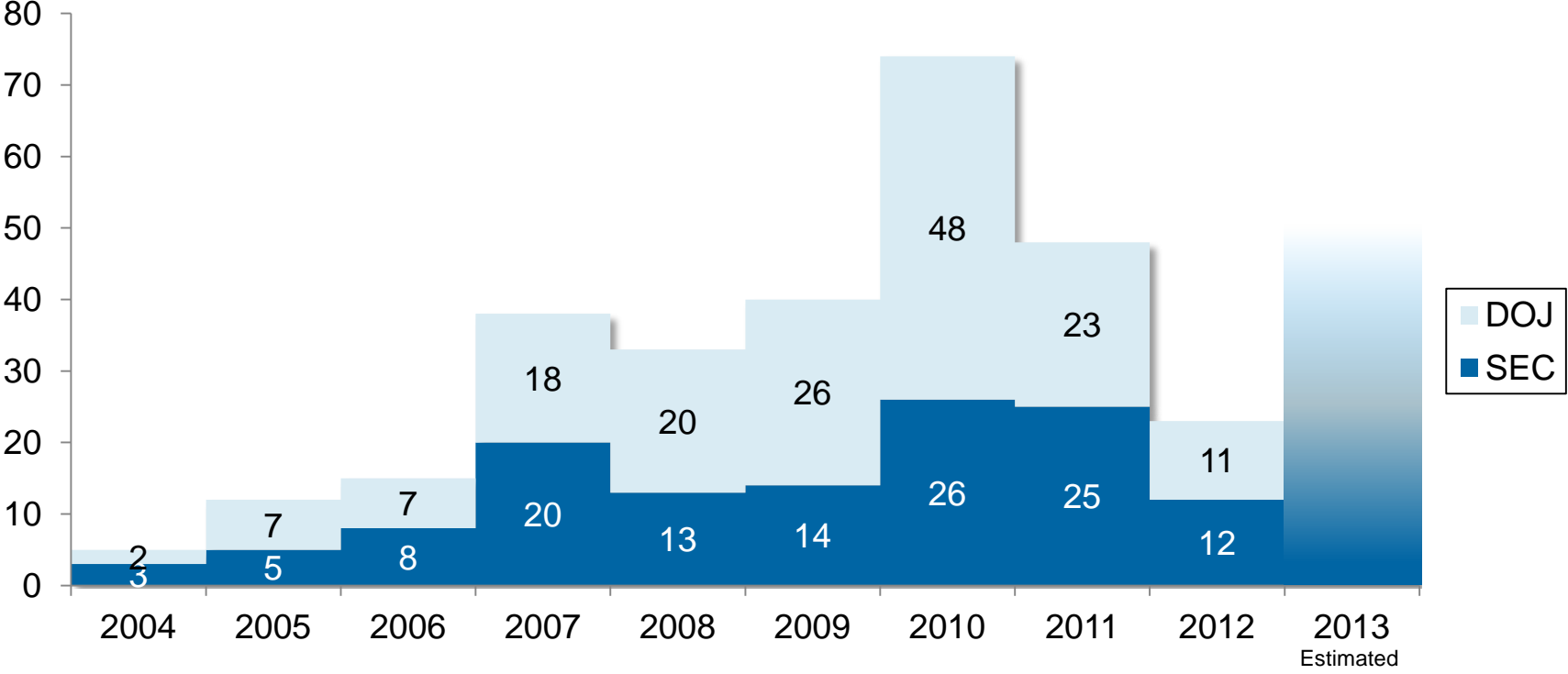
- Brazil – Clean Company Act
- China – Eighth Amendment to its Criminal Law Code

## Why is understanding the FCPA important to you?

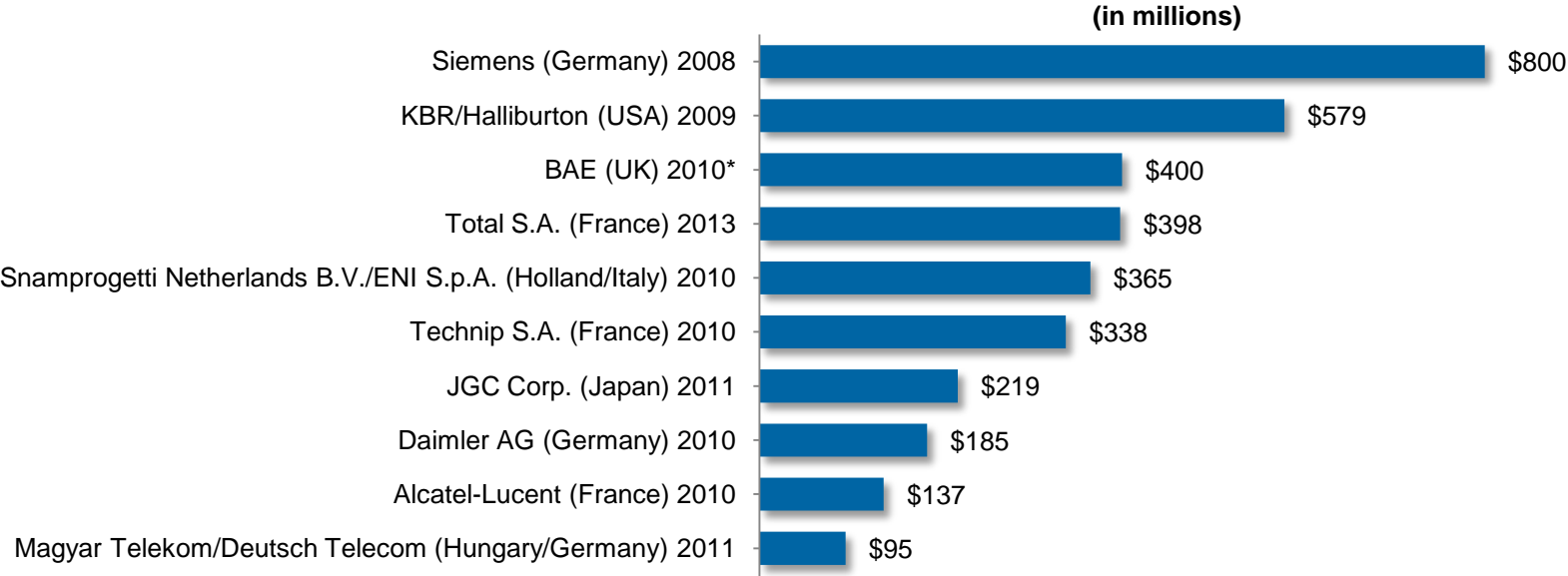
- A. Your company's sales & marketing group routinely makes trips to visit foreign countries for purposes of business development.
- B. Your supply chain depends on global vendors or agents.
- C. A prosecution under the FCPA would significantly erode enterprise value.
- D. Because doing business ethically is a core organizational principle.
- E. All of the above.



# FCPA enforcement trends 2004 – 2012



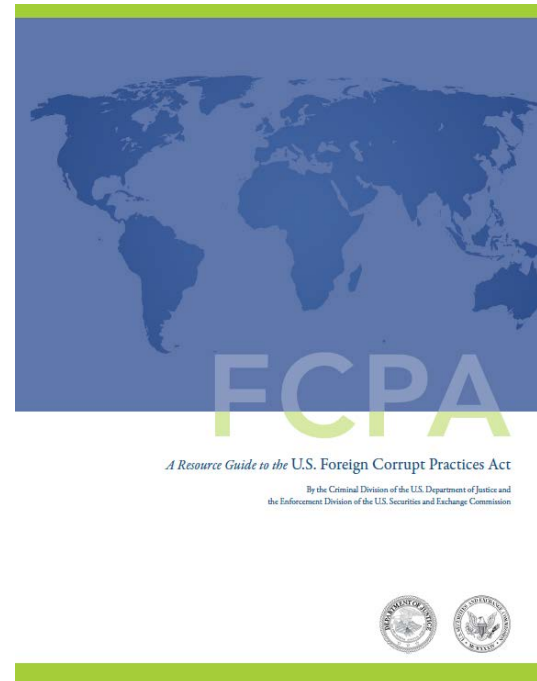
# FCPA enforcement trends – penalties



Actual costs to companies go beyond fines and penalties. Organizations also incur various fees related to investigations and ongoing monitoring.

# Complying with the regulation

- This past November, the DOJ and SEC jointly issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (“FCPA”).
- Although the guidance did not really break any new ground, it does serve to consolidate 35 years of precedent and best practices that have arisen over time.
- With respect to FCPA Compliance, the guidance identifies ten (10) “Hallmarks of Effective Compliance Programs.”



# Defining an “effective compliance program”

## Ten Hallmarks

- ✓ Commitment from senior management and a clearly articulated policy against corruption
- ✓ Code of conduct and compliance policies and procedures
- ✓ Oversight, autonomy, and resources
- ✓ Risk assessment
- ✓ Training and continuing advice
- ✓ Incentives and disciplinary measures
- ✓ Third party due diligence and payments
- ✓ Confidential reporting
- ✓ Continuous improvement and review
- ✓ Mergers and acquisitions: Pre-acquisition due diligence and post-acquisition integration

Source: *A Resource Guide to the U.S. Foreign Corrupt Practices Act*

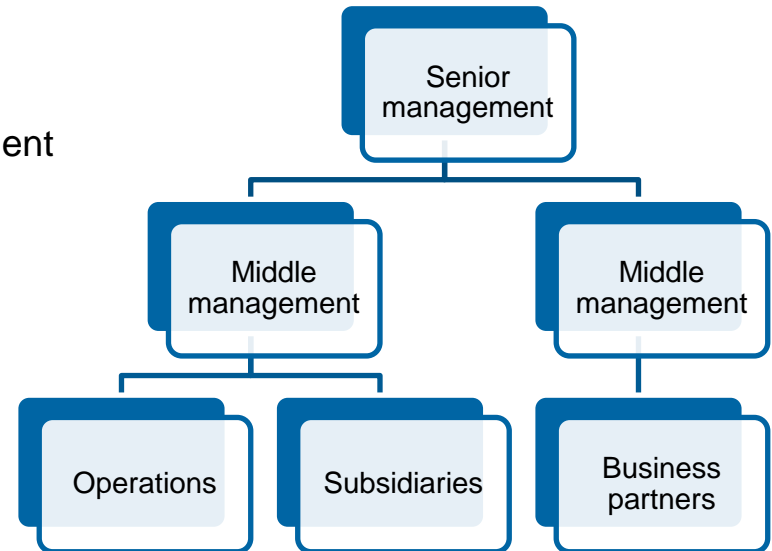
# Hallmarks of an effective compliance program

- ✓ Commitment from senior management and a clearly articulated policy against corruption

Tone-at-the-top goes beyond the development and distribution of an anti-corruption policy. Top executives, as well as senior and middle management, must continuously demonstrate a “culture of compliance.”

When evaluating the effectiveness of your compliance program, the DOJ and SEC begin with senior management to determine if:

- Clearly articulated anti-corruption policies exist
- Such policies have been effectively communicated throughout the organization.
- Senior management has strictly complied with the policies.



Ask  
yourself:

*Is senior management setting an unambiguous example? Does mid-level leadership set the same tone as executive leadership? Is our compliance framework simply a “paper program,” or does it serve to create and support a culture of compliance?*

# Hallmarks of an effective compliance program

- ✓ Code of conduct and compliance policies and procedures

## Code of conduct

- Often considered to be the foundation upon which corporate compliance is built.
- Should be made available to all employees, as well as those acting on behalf of the company.
- Important to translate the Code of Conduct to all languages in which operations exist.
- Periodically review and update the Code to account for business changes.

## Policies and procedures

- Types of policies necessary vary depending on the size, structure, and complexity of the organization, as well as the corruption risks it faces.
- Common policies for companies with corruption risk include:
  - Payments to foreign officials; facilitation payments
  - Travel, entertainment, and gift expenses
  - Charitable donations

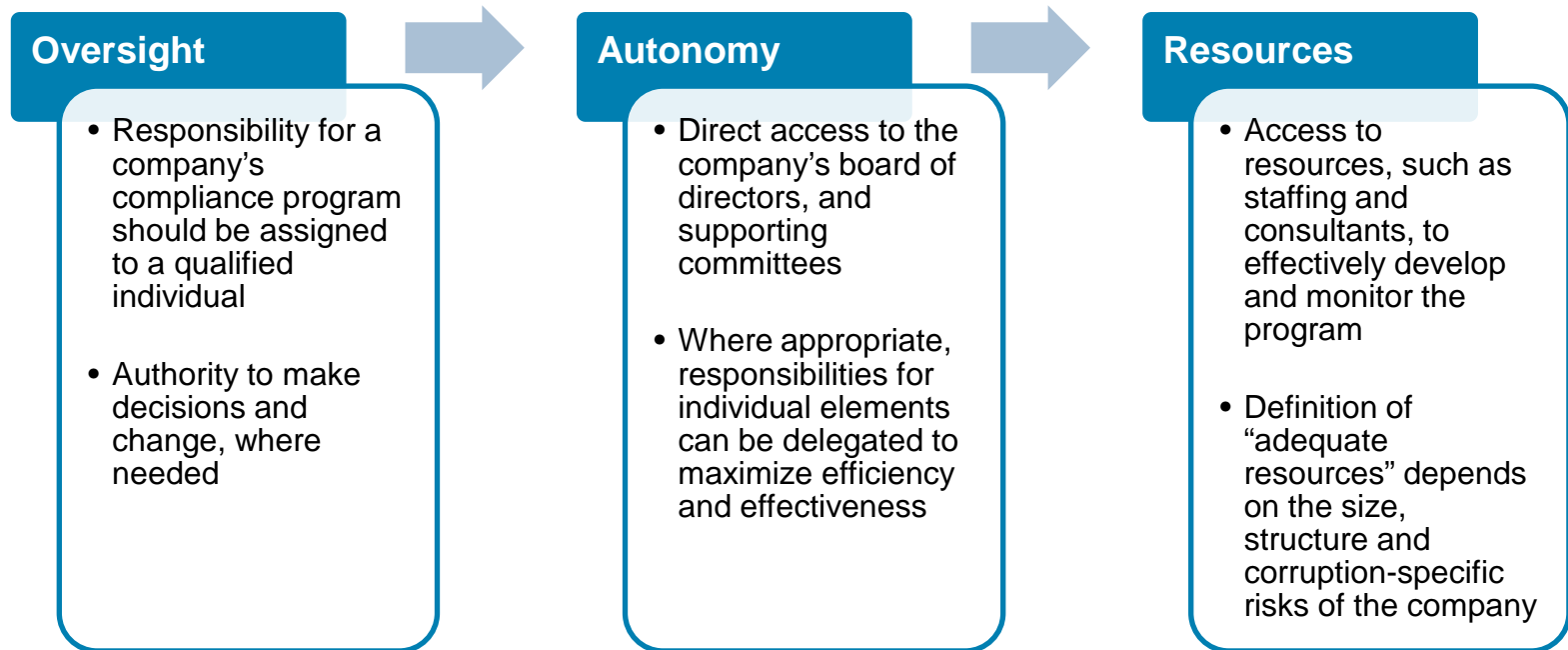
Ask  
yourself:

*Do we have a code of conduct and related compliance policies and procedures? Is our code clear, concise, and accessible to all employees in their local language? Do our policies adequately address our high-risk transactions and relationships?*



# Hallmarks of an effective compliance program

- ✓ Oversight, autonomy, and resources



Ask  
yourself:

*Have we assigned responsibility for compliance to specific senior executives? Does our program's owner have direct access to the organization's board or audit committee? Are the resources allocated to compliance proportionate to the operations of our organization?*

# Hallmarks of an effective compliance program

## ✓ Risk assessment

“One-size-fits-all” compliance programs are generally ineffective, and perhaps even counter-productive. The DOJ and SEC give meaningful credit to companies that implement a comprehensive risk-based compliance program in good faith.

A corruption risk assessment is perhaps the most significant hallmark and is designed to focus your program on key corruption risk factors, and allows your organization to address its corruption risk proportionately. Put another way, a risk-based approach allows you to optimize your resources and prioritize your corruption risks.

In a recent non-prosecution agreement, the DOJ outlines the following information that should be identified and assessed in a corruption-focused risk assessment:

- Geographical organization
- Interactions with various types and levels of government officials
- Industrial sectors of operation
- Involvement in joint venture arrangements
- Importance of licenses and permits in the company's operations
- Degree of governmental oversight and inspection
- Volume and importance of goods and personnel clearing through customs and immigration

Ask  
yourself:

*Is our compliance program a “one-size-fits-all” approach? Do I understand our high-risk transactions and business relationships?*

Our organization has conducted a corruption-specific risk assessment.

- A. True
- B. False
- C. I'm not sure

# Hallmarks of an effective compliance program

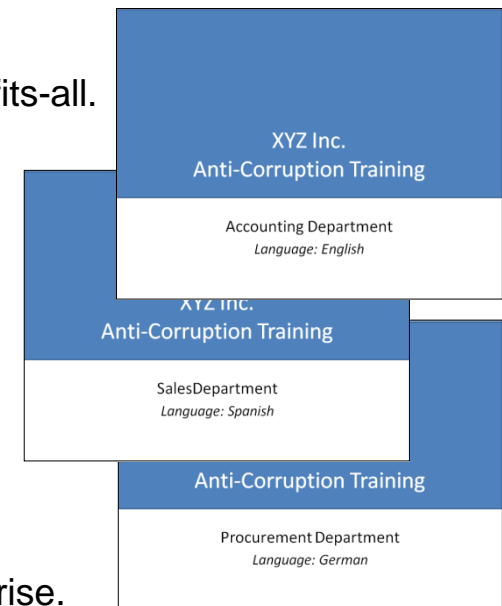
## ✓ Training and continuing advice

The DOJ and SEC evaluate the extent to which a company trains its personnel on the topic.

Similar to the corruption risk assessment, training should not be one-size-fits-all. Instead, a risk-based approach should be taken to ensure individuals receive training that is:

- Specific to the high-risk transactions within their organizational area, roles and responsibilities.
- Delivered in the local language.
- Inclusive of real-life case studies and examples.

In addition to training, employees and agents should be made aware of avenues available to obtain guidance when questionable circumstances arise.



Ask  
yourself:

*How effective is the communication of relevant policies and procedures throughout our organization? Is training developed in a risk-based manner and delivered in the local language?*

# Hallmarks of an effective compliance program

## ✓ Incentives and disciplinary measures

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In an investigation, the DOJ and SEC evaluate the extent to which a company has created incentives and disciplinary procedures, and whether each has been ***fairly and consistently applied***.

### Incentives

- Evaluations and promotions
- Annual performance metrics
- Rewards for enhancement of the compliance program
- Recognition for ethical behavior

### Disciplinary measures

- Performance improvement plans
- Termination
- Publicizing disciplinary measures (where allowed by law)

Ask  
yourself:

*Do we recognize employees for ethics and compliance leadership? Is our company consistent with respect to its disciplinary actions?*

# Hallmarks of an effective compliance program

## ✓ Third-party due diligence and payments

Risk-based due diligence procedures and management of your third-parties, including agents, consultants, and some vendors, is crucial to demonstrating an effective compliance program.

### Third-party procedures

Thorough understanding of the third-party's qualifications, its business reputation, and any potential relationships with foreign officials.

Knowledge of rationale for incorporating the third-party into the applicable business transaction.

Ensuring services to be performed are included in the contract terms.

Determination that compensation for services performed is competitive and transparent.

Monitoring of relationships through revalidation and market testing, exercising audit rights, and requiring annual recertification of the third-party's understanding and compliance with the FCPA.

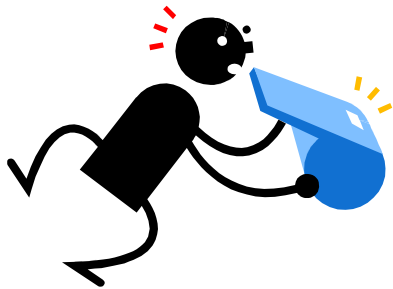
Ask  
yourself:

*Do we know our vendors? Do we understand the business need for including third-parties in various transactions? Are we performing ongoing monitoring of third-party relationships?*

# Hallmarks of an effective compliance program

## ✓ Confidential reporting

Whistleblower programs providing employees and other third-parties the ability to anonymously report suspected violations of policies have become the norm for most organizations. Equally important is the development of reactionary procedures, specifically with respect to:



- Funds available to conduct the appropriate investigation.
- Roles and responsibilities of various departments and individuals to investigate allegations, including consideration for engaging outside counsel and other consultants.
- Documentation requirements for procedures performed and results, including disciplinary measures taken.
- Actions taken as a result of lessons learned. Examples include evaluation of internal controls and enhancement of training programs with respect to specific allegations or transactions.

Ask  
yourself:

*Does our program provide for truly anonymous hotlines? Do we have an efficient and consistent process for investigating allegations? Do all of our employees know how to report a concern?*

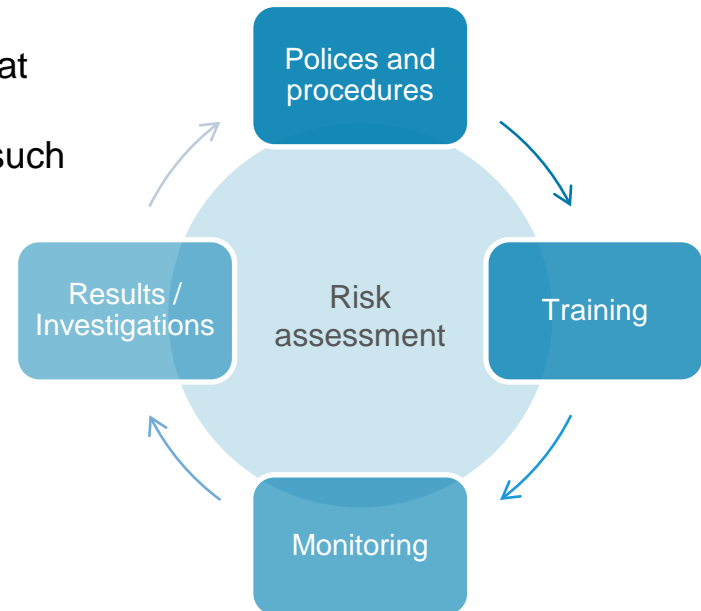
# Hallmarks of an effective compliance program

- ✓ Continuous improvement and review

Compliance programs cannot be effective without evolving with the organization. In recent investigations, significant consideration has been given to violators who can prove that they were proactive in performing risk-based reviews of its compliance program, and implementing change based on such monitoring activities.

Tools to use to effectively monitor your program:

- Internal audits of process areas
- Focused compliance audits
- Data analytics
- Employee surveys



Ask  
yourself:

*What is actually being done differently, as a result of allegations and identified weaknesses? Have we improved our business practices based on lessons learned from our anti-corruption program?*



# Hallmarks of an effective compliance program

- ✓ Mergers and acquisitions: Pre-acquisition due diligence and post-acquisition integration
- 

The SEC and DOJ consider pre-acquisition due diligence to be advantageous for several reasons:

- Identifies potential unenforceable contracts and increases the accuracy of the target company's valuation.
- Reduces the likelihood that payment of bribes will continue post integration.
- Potential violations can be addressed prior to integration and in a more cost-effective manner.
- Demonstrates the acquiring company's commitment to its culture of ethics and effectiveness of its compliance program.

Alternatively, should pre-acquisition due diligence not be possible, it is equally important for the successor company to perform the necessary procedures post-acquisition.

Ask  
yourself:

*Do our pre-acquisition due diligence and post-acquisition integration approaches adequately consider corruption risk? If not practical during due diligence, have we considered a thorough post-acquisition FCPA due diligence process?*

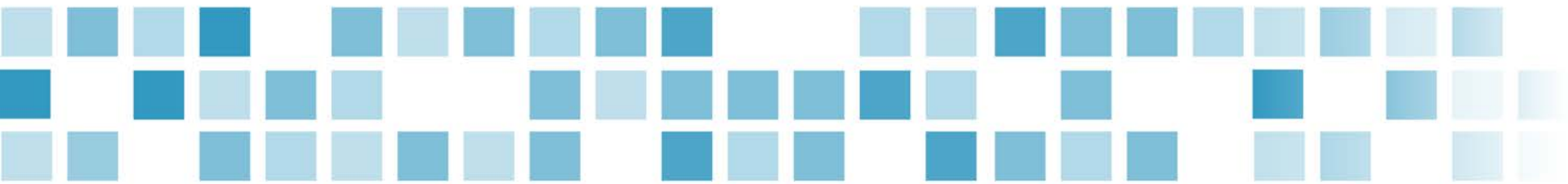
## How would you rate the effectiveness of your anti-corruption compliance program?

- A. We don't have a program
- B. Slightly effective, but needs a lot of work
- C. Fairly effective, we have room for improvement
- D. Very effective, we're a leading organization with respect to anti-corruption

## Key concepts to keep in mind

Your compliance program should be...

- **Tailored** to your unique business environment, resources and operations
- **Adaptable and evolve** over time
- **Process-centric** (e.g., formal third-party due diligence), as well as **resilient** (e.g., ongoing dialogue about risks, customized training)
- **Monitored** with good faith effort to assess the design and effectiveness of its various elements
- Evidence that senior management has a **demonstrated commitment** to combating bribery and corruption (i.e. conducting business differently as a result)



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