The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment

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ABSTRACT

It is no longer safe for companies to rely exclusively on their FCPA compliance programs as a means for staying compliant with their foreign bribery obligations throughout the world. Countries have committed themselves to combating foreign bribery through international treaty obligations and newer foreign bribery laws, such as the UK Bribery Act, that have imposed tougher anti-bribery standards on companies operating on an international basis. International enforcement of these foreign bribery laws has also peaked in aggressiveness.

Companies need to tailor their FCPA compliance programs to adapt their programs to the current international anti-bribery environment. They need to look at current international guidance on anti-bribery compliance programs and make their compliance programs truly international foreign bribery compliance programs that can better protect them in a world increasingly hostile to foreign bribery.

This article will explain the major laws and international treaties governing foreign bribery and the need for effective compliance procedures in an international anti-bribery environment. This article will also explore some of the guidance provided by domestic and international authorities on procedures that should be included in an effective international foreign bribery compliance program. Finally, this article will provide a list of minimum compliance procedures, covering

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A to Z, which should be incorporated in any comprehensive international foreign bribery compliance program.

I. INTRODUCTION

On December 29, 2011, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) charged Deutsche Telekom AG, Europe's largest telecommunications company, and Magyar Telekom, Deutsche Telekom's Hungarian unit and the largest telecommunications provider in Hungary, with violations of the Foreign Corrupt Practices Act (FCPA).[1] The violations cost the companies at least $95 million.[2] The actions also added the companies to an expanding list of major international companies that the United States has pursued in its ongoing battle against foreign bribery. The battle is intensifying.

The United States once stood as a lonely soldier in the fight against foreign bribery through its enforcement of the FCPA, but now there stands a platoon of international corruption fighters armed with modern legal weaponry. This weaponry includes laws such as the new 2011 UK Bribery Act.[3] Enforcement of foreign bribery laws has also peaked in aggressiveness unlike at any time before. The last few years have seen a

1. *See* Press Release, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-mt-dt-press-release.pdf. The case involved the bribery of government and political party officials in Macedonia and Montenegro for obtaining business and shutting out competition in the telecommunications industry. *See id.; see also* Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78(a) (dd), (ff), (m) (2006 & Supp. 2010).

2. *Id.* Magyar Telekom agreed to settle the charges by paying $59.6 million in criminal penalties as part of a deferred prosecution agreement with the DOJ and $31.2 million in disgorgement and pre-judgment interest to the SEC. *Id.* Magyar Telecom's parent company, Deutsche Telekom, agreed to settle the charges by paying a $4.36 million penalty and by entering into a non-prosecution agreement with the DOJ. *Id.*; *see also* Chad Bray, *Deutsche Telekom Settles Charges*, WALL ST. J., Dec. 30, 2011, at B2. Magyar Telekom was charged for violations of the FCPA anti-bribery and accounting provisions, while Deutsche Telekom was charged for violations of the FCPA accounting provisions. *Id.*; *see also infra* notes 8-20 and accompanying text (discussing relevant FCPA anti-bribery and accounting provisions).

3. *See* Bribery Act 2010, c. 23 (U.K.) [hereinafter UK Bribery Act], *available at* http://www.opsi.gov.uk/acts/acts2010/plain/ukpga_20100023_en. The UK Bribery Act took effect July 1, 2011, three months after the UK Ministry of Justice issued guidance on compliance with the new law. *See* Press Release, UK Ministry of Justice, Bribery Act Comes Into Force (July 1, 2011), *available at* http://www.justice.gov.uk/news/bribery-act-comes-into-force.htm.

record number of enforcement actions by both the DOJ and SEC.[4] Prosecutors overseas are also pursuing foreign bribery more diligently. The Serious Fraud Office (SFO) is vowing to enforce the new UK Bribery Act aggressively.[5] In addition, the Organisation for Economic Co-operation and Development (OECD) is pressuring signatory countries to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention") to prosecute corruption vigilantly under their respective foreign bribery laws.[6] Consequently, it is a dangerous time for companies to be complacent about their foreign bribery obligations. Even the slightest misstep by a non-compliant company may result in a regulatory investigation.

With the increasingly dangerous and complex web of anti-bribery laws through which companies need to navigate, where the pitfalls are many and enforcers of the laws are tending to be more aggressive, companies need to be cautious. What must companies do to avoid trouble in this dangerous legal terrain? And will traditional FCPA compliance programs be enough to protect companies operating under foreign bribery regulations?

Today, it is no longer safe for companies to rely exclusively on their FCPA compliance programs as a means for staying compliant with their foreign bribery obligations. Instead, companies need to tailor their FCPA compliance programs to the international anti-bribery laws that apply to them. These programs must comply with the foreign bribery requirements and laws of all relevant jurisdictions where the companies do business. At first glance, this may seem like a daunting task. Fortunately, international guidance exists—guidance beyond the FCPA—that can help companies comply with international anti-bribery laws. Such guidance includes the OECD's *Good Practice Guidance on Internal Controls, Ethics, and Compliance* ("OECD Good Practice

4. *See, e.g.*, *FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited Aug. 9, 2012); *SEC Enforcement Actions, FCPA Cases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Aug. 9, 2012).

5. *See* Jonathan Russell, *The SFO Needs a Big Scalp if Bribery Act is to be Feared*, THE TELEGRAPH (July 1, 2011, 5:45AM), http://www.telegraph.co.uk/finance/comment/8609414/The-SFO-needs-a-big-scalp-if-Bribery-Act-is-to-be-feared.html.

6. *See* Press Release, OECD, OECD's Gurría Demands Stronger Enforcement in Fight Against Corruption (Apr. 20, 2010) [hereinafter Gurría Press Release]; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998) (entered into force Feb. 15, 1999) [hereinafter OECD Anti-Bribery Convention]. The OECD is an international organization, consisting of 34 member countries, aimed at coordinating domestic and international policies in furtherance of a better world economy. Information on the OECD is available at http://www.oecd.org.

Guidance"),[7] a set of international anti-bribery compliance procedures released in February 2010 that has received the endorsement of multiple international governments.

This article will explain the major laws and international treaties governing foreign bribery and the need for effective compliance procedures in an international anti-bribery environment. This article will also explore some of the guidance provided by domestic and international authorities on procedures that should be included in an effective international foreign bribery compliance program. Finally, this article will provide a list of minimum compliance procedures, covering A to Z, which should be incorporated in any comprehensive international foreign bribery compliance program.

II. FOREIGN BRIBERY LAWS

There are multiple foreign bribery laws throughout the world that prohibit the bribery of foreign officials. The relevant foreign bribery laws can be divided into two different groups: (1) major foreign bribery laws, such as the FCPA, that have been enacted by individual nations; and (2) major foreign bribery treaties between nations, such as the OECD Anti-Bribery Convention, which compel signatory nations to adopt laws in conformity with their treaty obligations.

This article will not discuss every foreign or domestic law prohibiting foreign bribery. Rather, this article aims to touch on relevant major foreign bribery laws and treaties of which companies should be aware. An understanding of these laws, and of the guidance that exists concerning them, will provide support for the procedural safeguards that companies should institute to stay compliant in a global anti-bribery environment.

A. Major Foreign Bribery Laws

Two major foreign bribery laws stand out in the anti-bribery field. One is the FCPA, the oldest and premier foreign bribery law that has served as a template for other foreign bribery laws throughout the world. The other is the UK Bribery Act, the newest foreign bribery law and one of the most far-reaching.

7. OECD, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE (Feb. 18, 2010) [hereinafter OECD GOOD PRACTICE GUIDANCE], *available at* http://www.oecd.org/dataoecd/5/51/44884389.pdf.

1. The FCPA

The FCPA became law in 1977 and establishes civil and criminal liability for the bribery of foreign government officials in order to obtain or retain business.[8] The first foreign anti-bribery law of its kind, the FCPA can be divided into accounting and anti-bribery prohibitions.[9]

The FCPA's accounting provisions require issuers—companies that have a class of securities registered with the SEC or that are required to file reports with the SEC—to maintain certain recordkeeping standards and internal accounting controls.[10] The recordkeeping standard requires that issuers "make and keep books, records, and accounts, which, in

8. *See* Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78(a) (dd), (ff), (m) (2006 & Supp. 2010)). The FCPA was created in response to a report issued by the SEC in 1976 finding that many public companies had engaged in questionable payments overseas and had falsified their accounting with respect to such payments in their books and records. *See* S. REP. NO. 95-114, at 1-2 (1977); H.R. REP. NO. 95-640, at 1-3 (1977); S. COMM. ON BANKING HOUS. & URBAN AFFAIRS, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2-3 (Comm. Print 1976). The FCPA is both a civil and criminal statute, and part of it has been incorporated into the federal securities laws. The DOJ is responsible for criminal enforcement of the FCPA and civil enforcement of the anti-bribery provisions against non-issuers, and the SEC is responsible for civil enforcement of the accounting provisions and for civil enforcement of the anti-bribery provisions with respect to issuers. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 395-96 (2010).

9. *See* 15 U.S.C. § 78dd-1(a), -2(a), -3(a), 78m(b)(2) (2006 & Supp. 2010). The FCPA was amended in 1988 as part of the Omnibus Trade and Competitiveness Act of 1988 to revise and clarify several of its provisions. Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. § 78m, 78dd-1 to 78dd-3, 78ff (2006)) [hereinafter 1988 FCPA Amendments]. The statute was again amended in 1998 to conform its provisions to the OECD Anti-Bribery Convention. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. § 78dd(1)-(3), 78ff (2006)) [hereinafter 1998 FCPA Amendments].

10. *See* 15 U.S.C. § 78m(b)(2) (2006 & Supp. 2010). The FCPA applies to any issuer that has a class of securities registered under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") or that is required to file reports under Section 15(d) of the Exchange Act and to any officer, director, employee, or agent of such an issuer or any stockholder acting on behalf of such issuer. 15 U.S.C. § 78dd-1(a) (2006 & Supp. 2010). This provision would include certain foreign companies that list stock on a U.S. securities exchange and their relevant personnel. *Id.* The relevant accounting provisions can be found in Section 13(b)(2) of the Exchange Act, requiring issuers to keep accurate books and records and to establish and maintain a system of internal accounting controls. 15 U.S.C. § 78m(b)(2) (2006 & Supp. 2010). In addition, the SEC has adopted two rules related to the accounting provisions. Rule 13b2-1 provides that "[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)" of the Exchange Act. 17 C.F.R. § 240.13b2-1 (2012). Rule 13b2-2 prohibits a director or officer of an issuer from making or causing to be made any materially false or misleading statement or omission in connection with any audit. 17 C.F.R. § 240.13b2-2 (2012).

reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[11] The internal controls provision requires that issuers create a system of internal accounting controls that provide "reasonable assurances that transactions are executed in accordance with management's general or specific authorization."[12]

The FCPA anti-bribery provisions prohibit bribery of foreign government officials for the purpose of obtaining or retaining business or directing business to other persons.[13] Specifically, the FCPA anti-bribery provisions prohibit: (1) any issuer, domestic concern, or person acting within U.S. territory, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing; (2) from using any means or instrumentality of U.S commerce "corruptly" in furtherance of; (3) an offer, payment, or promise to pay, or authorization of the giving of anything of value; (4) to (a) any "foreign official," (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any public international organization official, or (e) any other person while "knowing" that the payment or promise to pay will be given to any of the foregoing; (5) for the purpose of (a) influencing any act or decision of that person in his or her official capacity, (b) inducing that person to do or omit to do any act in violation of his lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; (6) in order to assist such issuer, domestic concern, or person acting within U.S. territory, in obtaining or retaining

11. 15 U.S.C. § 78m(b)(2)(A) (2006 & Supp. 2010). The term "reasonable detail" is defined as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78(m)(b)(7) (2006 & Supp. 2010).

12. 15 U.S.C. § 78m(b)(2)(B) (2006 & Supp. 2010). The provision specifically requires that issuers

> devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Id. Civil liability will be found with respect to violations of the accounting provisions, and criminal liability will also be found under the accounting provisions when a person "knowingly" circumvents or fails to implement a system of internal accounting controls or "knowingly" falsifies the books and records. *See* 15 U.S.C. § 78m(b)(2), (5) (2006 & Supp. 2010).

13. *See* 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2006 & Supp. 2010).

business, or directing business to any person.[14] As noted above, the anti-bribery provisions apply to any issuer and to any "domestic concern."[15] The FCPA defines a domestic concern as any citizen, national, or resident of the United States, and any corporation, partnership, or association which has its principal place of business in the United States or which is incorporated in the United States.[16]

There are two affirmative defenses to the FCPA anti-bribery provisions.[17] The first defense applies when the payment at issue is lawful under the written laws of a relevant foreign official's country.[18] The second defense allows for payments that are considered "reasonable and bona fide" expenditures, "such as travel and lodging expenses," incurred by foreign officials directly related to "promotion, demonstration, or explanation of products or services," or "execution or performance of a contract with a foreign government or agency."[19] In addition to these two defenses, there is an exception allowing for "facilitation" or "grease payments" to foreign officials for the purposes of expediting or securing the performance of "routine government action(s)," such as the processing of immigration visas.[20]

14. 15 U.S.C. § 78dd-1(a), -2(a), -3(a) (2006 & Supp. 2010). There is both criminal and civil liability for violations of the anti-bribery provisions, and the provisions have been incorporated into the federal securities laws at Section 30A of the Exchange Act. *See* 15 U.S.C. § 78dd-1(a) (2006 & Supp. 2010). The term "foreign official" means

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

15 U.S.C. § 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2006 & Supp. 2010). Issuers subject to the anti-bribery provisions are the same as the relevant issuers subject to the accounting provisions. 15 U.S.C. § 78dd-1(a) (2006 & Supp. 2010). *See also supra* note 11 and accompanying discussion.

15. 15 U.S.C. § 78dd-1(a), -2(a), -2(h)(1), -3(a) (2006 & Supp. 2010).

16. 15 U.S.C. § 78dd-2(h)(1) (2006 & Supp. 2010).

17. *See* 15 U.S.C. § 78dd-1(c)(1)(2), -2(c)(1)(2), -3(c)(1)(2) (2006 & Supp. 2010).

18. *See* 15 U.S.C. § 78dd-1(c)(1), -2(c)(1), -3(c)(1) (2006 & Supp. 2010).

19. 15 U.S.C. § 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2006 & Supp. 2010).

20. 15 U.S.C. § 78dd-1(b), -2(b), -3(b) (2006 & Supp. 2010). "[R]outine government action" means any action that is ordinarily performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services. 15 U.S.C. § 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A) (2006 & Supp. 2010). Specifically, the FCPA defines "routine government action" as "an action which is ordinarily and commonly performed by a foreign official in (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing government papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature." *Id.* Payments made to expedite any of the basic services listed above or "of a similar nature" are not

2. UK Bribery Act

Another major foreign bribery law is the UK Bribery Act. The UK Bribery Act (effective July 2011),[21] criminalizes bribery of foreign officials, bribery of domestic government officials, commercial bribery, receipt of a bribe, and failure of corporations to prevent bribery.[22]

With respect to foreign bribery, Section 6 of the UK Bribery Act makes it a crime for a person to bribe a foreign public official with the intent to obtain or retain business or a business advantage.[23] To violate Section 6, the person making the bribe must have directly or through a third party offered, promised, or given a bribe to a foreign public official, or to another person at the foreign public official's request, assent, or acquiescence.[24] The anti-bribery provisions apply to United Kingdom companies, citizens, and residents—regardless of where the bribery occurred—and to individuals or companies, irrespective of nationality, when the relevant violations occur within the United Kingdom.[25]

The UK Bribery Act also establishes criminal liability for corporations that fail to prevent bribery.[26] Specifically, Section 7 states

considered payments prohibited by the FCPA. *Id.* The facilitation payments exception is an exception only to the FCPA's anti-bribery provisions and is not an exception to the accounting provisions. *See* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP 711, 725 (2008). Issuers will be liable under the accounting provisions if they make facilitation payments without properly recording such payments in their books and records. *Id.*; 15 U.S.C. § 78m(b)(2) (2006 & Supp. 2010).

21. *See* UK Bribery Act, *supra* note 3.

22. *See* UK Bribery Act, *supra* note 3, §§ 1-7. Individuals who violate the UK Bribery Act face imprisonment for up to ten years, and individuals and corporations who violate the law face getting penalized with a fine for an unlimited amount. *Id.* § 11(1)-(3). The UK Bribery Act replaced various laws concerning bribery under the common law and the prevention of Corruption Acts 1889-1916. *See* MINISTRY OF JUSTICE, EXPLANATORY MEMORANDUM TO THE BRIBERY ACT 2010 (CONSEQUENTIAL AMENDMENTS), 2011 NO. 1441, *available at* http://www.legislation.gov.uk/uksi/2011/1441/pdfs/uksiem_20111441_en.pdf.

23. *See* UK Bribery Act, *supra* note 3, § 6(1)-(2). Section 6(5) of the UK Bribery Act defines a "foreign public official" as any individual who

> (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom . . . [or] (b) exercises a public function—(i) for or on behalf of a country or territory outside the United Kingdom . . . or (ii) for any public agency or public enterprise of that country or territory . . . or (c) is an official or agent of a public international organization.

Id. § 6(5).

24. *See id*. § 6(3). This section also requires that the relevant law governing the foreign public official not permit him to be influenced by the payment of a bribe. *Id.* A senior officer of a corporation is guilty under the law when his corporation violates the law with his "consent or connivance." *Id*. § 14.

25. *See* UK Bribery Act, *supra* note 3, § 12(1), (4).

26. *See id*. § 7.

that a commercial organization violates the law when a person "associated" with the organization "bribes another person intending to obtain or retain business" or a "business advantage" for the organization.[27] Section 7 is remarkable in that its extraterritorial reach extends to any commercial organization incorporated in the United Kingdom and to any commercial organization, wherever incorporated, "which carries on a business, or part of a business, in any part of the United Kingdom."[28] Thus, United Kingdom courts can hold accountable international corporations that do any kind of business in the United Kingdom under the failure to prevent bribery provision.[29]

The UK Bribery Act also provides an "adequate procedures" defense to liability under Section 7.[30] That is, the UK Bribery Act provides commercial organizations with a defense to liability under the failure to prevent bribery provision when organizations can "prove" that they "had in place adequate procedures designed to prevent persons associated" with them from "undertaking" in the violative conduct.[31]

B. Major Foreign Bribery Treaties

In addition to the relevant foreign bribery laws of individual countries, one should consider international treaties concerning foreign bribery. These treaties obligate signatory parties to enact laws designed to prevent foreign bribery in accordance with the treaties' provisions. These treaties represent the relevant foreign bribery laws of the

27. *Id*. An "associated" person can be any person who "performs services for or on behalf" of a commercial organization and includes any "employee, agent or subsidiary" of the organization. *Id.* § 8(1). The "capacity" in which a person "performs services for or on behalf" of a commercial organization "does not matter" and that person may be an "employee, agent or subsidiary" of the commercial organization. *Id.* § 8(2)-(3).

28. *Id*. § 7(5). Section 7(5) states that a "relevant commercial organisation" within the meaning of this provision is

> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

Id; see also id. § 12(5)-(6). This extraterritorial reach is far broader than that of the FCPA. It is uncertain how the Serious Fraud Office, the primary enforcer of the UK Bribery Act, will enforce the law and whether United Kingdom courts will uphold it. *See* Eric Engle, *I Get By with a Little Help from my Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1183 (2011).

29. *See* UK Bribery Act, *supra* note 3, § 7(5).

30. *Id.* § 7(2).

31. *Id.*

international regional unions and countries that are parties to the treaties.[32]

1. Inter-American Convention Against Corruption

The Inter-American Convention Against Corruption ("Inter-American Convention") is the first international treaty to directly address foreign bribery.[33] Passed in 1996 by the Organization of American States (OAS), the Inter-American Convention treaty commits the United States and other OAS member states in the Western Hemisphere to criminalize certain acts of corruption, establishes a set of measures designed to prevent foreign bribery, and strengthens cooperation between OAS member states in the fight against bribery.[34]

The Inter-American Convention treaty consists of 28 articles. The relevant anti-bribery provisions are contained in Articles VI and VIII.[35]

32. For example, the OECD Anti-Bribery Convention applies to OECD member and signatory countries and requires such countries to conform their foreign bribery laws to their treaty obligations. *See* OECD Anti-Bribery Convention, *supra* note 6, art. 1. When the OECD's Working Group on Bribery criticized the United Kingdom's anti-bribery laws for not being satisfactory in light of the country's obligations under the OECD Anti-Bribery Convention, the United Kingdom modernized its foreign bribery laws through the UK Bribery Act. *See* OECD, UNITED KINGDOM: PHASE 2BIS, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (2008), *available at* http://www.oecd.org/dataoecd/23/20/41515077.pdf; *see also* F. Joseph Warin et al., *The British are Coming!: Britain Changes its Law on Foreign Bribery and Joins the International Fight against Corruption*, 46 TEX. INT'L L.J. 1, 4-5 (2010).

33. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention], *available at* http:/www.oas.org/juridico/English/treaties/b-58.html. The 34 member states of the Organization of American States (OAS) at the time approved the Inter-American Convention at a third plenary session held on March 29, 1996. *Id*. The OAS is a regional organization currently comprised of 35 countries in the Western Hemisphere and was established to achieve among the member countries "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." *Who We Are*, ORG. OF AM. STATES, *available at* http://www.oas.org/en/about/who_we_are.asp (last visited Aug. 16, 2012) (discussing goals of the OAS as stipulated in Article 1 of its Charter).

34. *See* Inter-American Convention, *supra* note 33. The United States Senate approved the Convention on July 27, 2000, and President Clinton ratified it on September 15, 2000. *See* Press Release, Statement by Philip T. Reeker, Deputy Spokesman, U.S. Dep't of State Office of the Spokesman, Senate Ratification of the OAS Inter-American Convention Against Corruption (Aug. 1, 2000). In ratifying the Convention, President Clinton stated that the "[c]onvention was the first multilateral agreement against bribery to be adopted anywhere in the world" and that its adoption was a "victory for good government, fair competition, and open trade throughout [the Western] Hemisphere." *Clinton Statement on Inter-American Convention Against Corruption*, U.S. NEWSWIRE, Sep. 16, 2000.

35. *See* Inter-American Convention, *supra* note 33, arts. VI, VIII.

Article VI defines "acts of corruption" that signatories are required to criminalize and includes the solicitation or acceptance of bribes by government officials, the offering or granting of bribes to government officials, and improper acts or omissions by government officials in response to bribes.[36] Article VIII applies to foreign bribery and requires signatory countries to prohibit the offering and granting of bribes to foreign officials.[37] The Inter-American Convention is significant because it is the first multilateral treaty to address foreign bribery and applies to most countries in the Western Hemisphere.[38]

2. OECD Anti-Bribery Convention

One of the most important foreign bribery treaties is the OECD Anti-Bribery Convention.[39] The OECD Anti-Bribery Convention resulted from efforts by the United States to push for an international treaty, similar to the FCPA, which would prevent foreign bribery on an international scale.[40] The OECD adopted the OECD Anti-Bribery Convention in 1997.[41]

36. *Id.* art. VI. Such "acts" also include the fraudulent use or concealment of property derived from any of the wrongful acts and bribes, and conspiracy. *Id.* Under Article VII of the Inter-American Convention, OAS members "that have not yet done so shall adopt the necessary legislative or other measures" necessary to "establish as criminal offenses under their domestic law[s] the acts of corruption" described under Article VI. *Id.* art. VII.

37. *See id.* art. VIII. Specifically, Article VIII obligates signatory countries to

> prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another state, of any article of monetary value, or other benefit, such as a gift, favor, promise of advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.

Id.

38. *See* Giorleny D. Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 U. MIAMI INTER-AM. L. REV. 487, 489, 499 (2006-2007). Indeed, up until the time of the enactment of the Inter-American Convention, the FCPA "stood alone" as a law designed to prevent foreign bribery. *See* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 245 (1998).

39. *See* OECD Anti-Bribery Convention, *supra* note 6.

40. In the early days of the FCPA, many business owners complained that the U.S. statute had placed them at a disadvantage compared to their foreign competitors because they could no longer pay bribes necessary to secure lucrative government contracts that their foreign counterparts could. *See* Charles B. Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT'L L. 509, 517 (2010). Some domestic businesses also complained that the U.S. statute reduced profits. *See* Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 PENN ST. INT'L L. REV. 251, 256 (2006). Congress responded to these complaints through the 1988 amendments to the FCPA, calling on the

The OECD Anti-Bribery Convention requires signatory countries to enact laws designed to criminalize bribery of foreign officials.[42] Specifically, Article 1 requires signatory countries to make it a crime

> for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[43]

Article 1 also states that each signatory country shall "establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official" will be a criminal offense.[44] The OECD Anti-Bribery Convention is significant in that it has been signed and ratified by the world's leading business and trading nations.[45] As such, it reflects the foreign bribery obligations and laws of

U.S. government to pursue an international foreign bribery treaty through the OECD to level the playing field between domestic and foreign companies. *See* 1988 FCPA Amendments, *supra* note 9, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424.

41. *See* H. REP. NO. 105-802, at 13 (1998); OECD Anti-Bribery Convention, *supra* note 6. The Convention was signed on December 17, 1997, entering into force on February 15, 1999. *OECD Anti-Bribery Convention: Entry into Force of the Convention*, OECD, http://www.oecd.org/document/12/0,3343,en_2649_ 34859_2057484_1_1_1_1, 00.html (last visited Aug. 11, 2012).

42. *See* OECD Anti-Bribery Convention, *supra* note 6.

43. *Id.* art. 1.

44. *Id.* It is worth noting that, like the FCPA, but unlike most international foreign bribery laws, the OECD Anti-Bribery Convention provides for an exception for "small" facilitation payments. *See id.* at cmt. 9. Nevertheless, the OECD has recently called for an end to facilitation payments even though the OECD Anti-Bribery Convention still contains language allowing for "small" facilitation payments. Specifically, in 2009, the OECD established its *Recommendation for Further Combating Bribery of Foreign Officials*, which, among other things, called on signatory nations to the OECD Anti-Bribery Convention to end the permissibility of "corrosive" facilitation payments. *See* OECD WORKING GRP. ON BRIBERY OF FOREIGN PUB. OFFICIALS IN INT'L BUS. TRANSACTIONS, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, at 4 (Nov. 26, 2009) (amended Feb. 18, 2010) [hereinafter OECD RECOMMENDATION]. For a more comprehensive discussion on the history of the facilitation payments exception under the FCPA and OECD Anti-Bribery Convention and the recent OECD call for an end to such payments, see Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 911-19 (2011).

45. *See* OECD, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL PUBLIC TRANSACTIONS, RATIFICATION STATUS AS OF APRIL 2012, *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/40272933.pdf. The treaty has been signed and ratified by 39 countries, consisting of all 34 OECD member countries and 5 other countries outside of

the nations that govern the majority of the international commercial marketplace.[46]

3. United Nations Convention Against Corruption

Another major international treaty dealing with foreign bribery is the United Nations Convention Against Corruption ("United Nations Convention").[47] The United Nations Convention, adopted in October 2003, is comprised of provisions covering the prevention and criminalization of corruption, cooperation in the fight against corruption, and the recovery of assets obtained through corruption.[48] With respect to foreign bribery, Article 16.1 of the United Nations Convention requires signatory countries to adopt laws designed to prohibit the bribery of foreign public officials and officials of public international organizations.[49] In addition, like the Inter-American Convention, the

the OECD who also agreed to sign the treaty (Argentina, Brazil, Bulgaria, Russian Federation, and South Africa). *Id.*

46. *See* Lisa Miller, *No More 'This for That'? The Effect of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 8 CARDOZO J. INT'L & COMP. L. 139, 140 (2000).

47. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/422 (Oct. 31, 2003), *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [hereinafter United Nations Convention]. The United Nations is an international organization founded in 1945 after World War II that currently consists of 193 member countries. *See UN at a Glance*, UNITED NATIONS, *available at* http://www.un.org/en/aboutun/index.shtml (last visited Aug. 11, 2012). The United Nation's main purposes are to ensure peace in the world; develop friendly relations between countries; help countries fight hunger, disease, and illiteracy; and to act as a central organization for the achievement of these goals. *Id.*; *see also* U.N. Charter art. 1, *available at* http://treaties.un.org/doc/Publication/CTC/uncharter.pdf (last visited Aug. 16, 2012).

48. *See* United Nations Convention, *supra* note 47, art. 1-59; *see also United Nations Convention Against Corruption, Convention Highlights*, UNITED NATIONS OFFICE ON DRUGS & CRIME, http://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html (last visited Aug. 11, 2012). There are currently 140 signatories to the treaty and 160 parties to it. *See United Nations Convention Against Corruption, UNCAC Signature and Ratification Status as of 12 March 2012*, UNITED NAT'L OFFICE ON DRUGS & CRIME, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Aug. 11, 2012). The United States signed the United Nations Convention on December 9, 2003, and ratified the treaty on October 30, 2006. *Id.*

49. *See* United Nations Convention, *supra* note 47, art. 16. Specifically, Article 16.1 of the treaty provides that

> [e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

United Nations Convention addresses the demand side of foreign bribery and requires that signatory countries adopt laws to prohibit the solicitation or acceptance of bribes by foreign public officials and officials of public international organizations.[50] The United Nations Convention is significant because it is a major foreign bribery treaty adopted by the United Nations, the largest international organization in the world.[51]

4. African Convention on Preventing and Combating Corruption

The most recent international treaty designed to prevent foreign bribery is the African Convention on Preventing and Combating Corruption ("African Convention").[52] The African Convention entered into force on August 5, 2006, and has been ratified by 33 of 53 countries in the African Union.[53] The African Convention is similar to the United Nations Convention in that it compels signatory members to enact laws preventing and criminalizing corruption and to cooperate with each other in the fight against bribery.[54]

Id.

50. *See id*. art. 16.2.; Inter-American Convention, *supra* note 33, art. VI; *see also supra* text accompanying note 36. Article 16.2 provides that

> [e]ach State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

United Nations Convention, *supra* note 47, art. 16.2.

51. *See* United Nations Convention, *supra* note 47, art. 16.2. Nevertheless, there has been some criticism that the United Nations Convention suffers from certain fundamental weaknesses that make it a weaker treaty than it otherwise might have been. *See* Philippa Webb, *The United Nations Convention Against Corruption, Global Achievement or Missed Opportunity?*, 8 J. INT'L ECON. L. 191 (2005).

52. African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003, 43 I.L.M. 5 [hereinafter African Convention], *available at* http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited Aug. 11, 2012).

53. AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN CONVENTION ON PREVENTING AND COMBATING CORRUPTION (2012), *available at* http://www.au.int/en/sites/default/files/corruption.pdf. The African Union currently consists of 54 member states. *See Member States*, AFRICAN UNION, http://www.au.int/en/member_states/countryprofiles (last visited Aug. 16, 2012). The goals of the African Union are "[t]o achieve greater unity and solidarity" between African member states and to "accelerate the political and socio-economic integration" of the African continent. *See AU in a Nutshell*, AFRICAN UNION, http://www.au.int/en/about/nutshell (last visited Aug. 11, 2012).

54. *See* African Convention, *supra* note 52; *see also supra* text accompanying note 48.

With respect to foreign bribery, Article 4 defines one of the acts of corruption as

> the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public function.[55]

Another relevant act of corruption under Article 4 is

> the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.[56]

The African Convention is important because it is the most recent international treaty governing foreign bribery. It is also significant because it involves some of the most under-developed and corrupt countries in the world.[57]

III. THE NEED FOR EFFECTIVE COMPLIANCE PROCEDURES IN AN INTERNATIONAL ANTI-BRIBERY ENVIRONMENT

Instituting and implementing an effective compliance program containing procedures applicable on an international scale will assist companies in preventing bribery and avoiding liability when operating on an international basis. Such measures will also allow companies to mitigate—and possibly avoid—liability should foreign bribery happen within their operations.

55. African Convention, *supra* note 52, art. 4.1(a). Article 5 of the African Convention requires state parties to "adopt legislative and other measures" designed to make criminal certain acts of corruption as spelled out in Article 4. *Id.* art. 5.1.

56. *Id.* art. 4.1.(b).

57. *See* Lucky Bryce Jatto, *Africa's Approach to the International War on Corruption: A Critical Appraisal of the African Union Convention on Preventing and Combating Corruption*, 10 ASPER REV. INT'L BUS. & TRADE L. 79, 80 (2010). According to Transparency International's 2011 "Corruptions Perception Index," an index that rates countries based on how corrupt people perceive them to be, eight African Union member countries rank among the top ten percent of the most corrupt countries in the world. *See Corruption Perceptions Index 2011*, TRANSPARENCY INT'L, http://cpi.transparency.org/cpi2011/results/ [hereinafter *Corruption Perceptions Index*]. The eight African countries are Somalia, Sudan, Equatorial Guinea, Burundi, Libya, Congo, Chad, and Angola. *Id.*

A. Avoid Violations in an Increased Enforcement Environment

One of the primary reasons why a company should institute and implement an effective compliance program is to prevent bribery and avoid violating the relevant foreign bribery laws. Prevention is the best defense to liability for foreign bribery.[58] Assistant Attorney General Lanny Breuer, the DOJ's head of the Criminal Division, has stated that the DOJ's "preference" is for FCPA violations "to be prevented in the first instance."[59] In this respect, he stressed, "[T]he only way that can happen [in a company] is through a robust, state-of-the-art compliance program and a true culture of compliance."[60] Furthermore, today, more than ever, companies need to be vigilant in avoiding violations because enforcement of foreign bribery laws has increased in the United States and overseas.

1. Increased Enforcement of the FCPA by the DOJ and SEC

In the United States, the DOJ and SEC, the two enforcers of the FCPA, have vowed to become more aggressive in enforcing the FCPA.[61] DOJ Attorney General Eric Holder has called corruption a "scourge on civil society" and has stated that the DOJ would be vigorously prosecuting violations of the FCPA.[62] During a November 2010 speech, DOJ Assistant Attorney General Breuer declared that the United States was in "a new era of FCPA enforcement."[63] In 2011, Breuer subsequently stressed that "[t]he fight against corruption" was a "law

58. This is especially true in an increased enforcement environment. *See* Claudius O. Sokenu, *FCPA Compliance Issues in the Global Marketplace: New Challenges for Multinational Clients*, *in* FOREIGN CORRUPT PRACTICES ACT COMPLIANCE ISSUES: LEADING LAWYERS ON RESPONDING TO RECENT FCPA ENFORCEMENT ACTIONS, MAINTAINING AN EFFECTIVE COMPLIANCE PROGRAM, AND NAVIGATING RISK IN EMERGING MARKETS 7, 1-2 (Michaela Falls ed. 2010); *see also* Lisa Stewart Hughes, *Compliance Program Management in the Age of Globalization*, *in* ADVANCED COMPLIANCE AND ETHICS INSTITUTE 2010, 187 (PLI, Course Handbook, 2010); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 495 (2011).

59. Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, Prepared Remarks to Compliance Week 2010—5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers 3 (May 26, 2010) [hereinafter Breuer Speech], *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-2610aag-compliance-week-speech.pdf.

60. *Id.*

61. *See id.*; Sokenu, *supra* note 58, at 1-3.

62. Eric H. Holder, U.S. Att'y Gen., Remarks at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), *available at* http://www.state.gov/j/inl/rls/rm/131641.htm.

63. Lanny A. Breuer, Assistant Att'y Gen., Remarks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

enforcement priority of the United States."[64] Similarly, the SEC formed an FCPA specialty unit in 2010 to focus exclusively on FCPA violations.[65] According to SEC Enforcement Director Robert Khuzami, the unit would focus on "new" approaches to identifying FCPA violations and would be "more proactive" when conducting foreign bribery investigations.[66]

The DOJ and SEC have backed their words with action. The last four years have involved the largest FCPA cases since the FCPA's creation, including cases brought against Siemens AG,[67] involving combined penalties of $800 million, and KBR/Halliburton,[68] involving

64. Lanny A. Breuer, Assistant Att'y Gen., Remarks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html. Breuer also stated that the fight against corruption was a "personal priority." *Id.*

65. *See* Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior leaders (Jan. 13, 2010), *available at* http://www.sec.gov/news/speech/2010/spch011310rsk.htm.

66. Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, My First 100 Days as Director of Enforcement, Remarks before the New York City Bar (Aug. 5, 2009), *available at* http://www.sec.gov/news/ speech/2009/spch080509rk.htm.

67. *See* Sentencing Memorandum, United States v. Siemens Aktiengesellschaft, No. 08-CR-367-RJL (D.D.C. Dec. 12, 2008); Sentencing Memorandum, *United States v. Siemens A.S. (Argentina),* No. 08-CR-368-RJL (D.D.C. Dec. 12, 2008); Sentencing Memorandum, *United States v. Siemens Bangladesh Ltd.*, No. 08-CR-369-RJL (D.D.C. Dec. 12, 2008); Sentencing Memorandum, *United States v. Siemens S.A. (Venezuela)*, No. 08-CR-370-RJL (D.D.C. Dec. 12, 2008); Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html; SEC v. Siemens Aktiengesellschaft, No. 08-CV-02167 (D.D.C. Dec. 12, 2008); SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery, Litigation Release No. 20829, 94 SEC Docket 2869 (Dec. 15, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20829.htm. Siemens was charged with FCPA violations for engaging in a widespread and systematic practice of paying bribes throughout the world. *Id.* Siemens agreed to pay $350 million in disgorgement to the SEC and a $450 million criminal fine to the DOJ. *Id.* Siemens also agreed to pay a fine of approximately $569 million to the Office of the Prosecutor General in Germany and had previously paid a $285 million fine to this same prosecutor in October 2007, making the total amount of disgorgement and fines paid by Siemens related to the matter in excess of $1.6 billion. *Id.*

68. *See* United States v. Kellogg Brown & Root, L.L.C., No. H-09-071 (S.D. Tex. 2009); Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html; SEC v. Halliburton Company & KBR, Inc., No. 09-CV-399 (S.D. Tex. 2009); SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations, Litigation Release No. 20897A, 95 SEC Docket 570 (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897.htm. The matter involved bribery of Nigerian government officials over a ten-year period to obtain construction contracts. *Id.* Combined penalties totaled $579 million, with Kellogg

combined penalties totaling $579 million.[69] In fact, 2010 marked the biggest FCPA enforcement year in history, with 48 and 26 FCPA enforcement actions brought by the DOJ and SEC, respectively.[70] Six of the largest FCPA settlements of all time—accounting for over $1.5 billion in sanctions and penalties paid—also occurred in 2010.[71]

2. Enforcement of the Foreign Bribery Laws on the International Front

Enforcement of the foreign bribery laws has also become aggressive on the international front. The SFO, the enforcer of the UK Bribery Act, has promised aggressive enforcement of the new law.[72] SFO Director Richard Alderman has also warned companies that the SFO would be targeting bribery anywhere that the SFO finds it throughout the world.[73]

Brown & Root agreeing to pay a $402 million criminal fine to the DOJ, and its current and former parent companies—KBR, Inc. and Halliburton Company—agreeing to pay $177 million in disgorgement of profits to the SEC. *Id.*

69. *See* Thomas Fox, *With Magyar in New Top Ten, It's 90% Non-U.S.*, FCPA BLOG, (Dec. 29, 2011, 1:28 PM), http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html.

70. *See 2011 Mid-Year FCPA Update*, GIBSON DUNN, at 2 (Jul. 11, 2011), http://www.gibsondunn.com/publications/Documents/2011Mid-YearFCPAUpdate.pdf. These numbers nearly doubled from the year before and are over five times what they were five years before. *Id.* In 2009, there were 26 and 14 FCPA enforcement actions brought by the DOJ and SEC, respectively; in 2005, there were only 7 FCPA enforcement actions by the DOJ and 5 such actions by the SEC. *Id.* Nevertheless, 2011 is likely to result in fewer enforcement actions because 2011 involved a large number of trials involving defendants challenging FCPA actions, which resulted in the DOJ using a substantial amount of resources. *Id.* at 1.

71. *See* Fox, *supra* note 69. The 2010 cases involved BAE Systems plc ($400 million), Snamprogetti Netherlands B.V./ENI S.p.A ($365 million), Technip S.A. ($338 million), Daimler AG ($185 million), Alcatel-Lucent ($137 million), and Panalpina, Inc. ($81.8 million). *Id.*; Roger M. Witten et al., *Anti-Corruption Enforcement Developments: 2010 Year in Review and 2011 Preview*, *in* THE FOREIGN CORRUPT PRACTICES ACT 2011, 65, 66-72 (PLI, Course Handbook, 2011); United States v. BAE Sys. plc, No. 10-CR-035-JDB (D.C. Feb. 4, 2010); United States v. Snamprogetti Netherlands B.V., No. 10-CR-460 (S.D. Tex. Jul. 7, 2010); SEC v. ENI, S.p.A. and Snamprogetti Netherlands, B.V., No. 10-cv-2414 (S.D. Tex. Jul. 7, 2010); United States v. Daimler AG, No. 10-CR-063-RJL (D.C. Mar. 22, 2010); SEC v. Daimler AG, No. 10-CV-00473 (D.C. Mar 22, 2010); United States v. Technip S.A., No. 10-CR-439 (S.D. Tex. Jun. 28, 2010); SEC v. Technip S.A., No: 10-CV-02289 (S.D. Tex. Jun. 28, 2010); United States v. Alcatel-Lucent, S.A., No. 10-CR-20907 (S.D. Fla. Dec. 27, 2010); SEC v. Alcatel-Lucent, S.A., No: 10-CV-24620 (S.D. Fla. Dec. 27, 2010); United States v. Panalpina, Inc., No: 10-CR-765 (S.D. Tex. Nov. 4, 2010); SEC v. Panalpina, Inc., No: 10-CV-4334 (S.D. Tex. Nov. 4, 2010).

72. *See* Russell, *supra* note 5.

73. *See* Carolina Binham, *SFO Chief Warns of New Global Reach*, FINANCIAL TIMES (May 23, 2011, 10:34 PM), http://www.ft.com/intl/cms/s/0/8c056ce2-8562-11e0-ae32-00144feabdc0.html#axzz1yozAWsUt; *see also* C.M. Matthews, *Alderman Warns Foreign Companies on Bribery Law*, WALL ST. J. CORRUPTION CURRENTS BLOGS (Dec. 7,

Subsequently, in November 2011, the United Kingdom obtained its first conviction under the UK Bribery Act.[74]

The OECD has also been advocating for aggressive enforcement of foreign bribery laws. Although the United States, Germany, and Italy have been proactive in prosecuting foreign bribery, OECD data reveals that many other signatory countries to the OECD Anti-Bribery Convention have failed to bring any convictions or sanctions for foreign bribery.[75] In response to the discrepancy in enforcement, the OECD has demanded stronger enforcement of the foreign bribery laws.[76] OECD Secretary-General Angel Gurría recently stated that the OECD needed to see "clearer signs that all countries are committing the political leadership and resources that effective enforcement requires" in enforcing foreign bribery violations.[77] As such, OECD countries are under increasing pressure to enforce their respective foreign bribery laws.

2011, 5:04 PM), http://blogs.wsj.com/corruption-currents/2011/12/07/alderman-warns-foreign-companies-on-bribery-law/.

74. *See* Samuel Rubenfeld, *Munir Patel, First Bribery Act Convict, Sentenced*, WALL ST. J. CORRUPTION CURRENTS BLOGS (Nov. 18, 2011, 11:36 AM), http://blogs.wsj.com/corruption-currents/2011/11/18/munir-patel-first-bribery-act-convict-sentenced/. The conviction was based on domestic bribery violations under the UK Bribery Act, as opposed to foreign bribery violations. *Id.* Nevertheless, the conviction is significant because it signals the beginning of the UK Bribery Act's enforcement. *See* Eoin O'Shea, *Opinion: First Conviction Proves Bribery Act has Sharp Teeth*, THE LAWYER, Nov. 28, 2011, *available at* http://www.thelawyer.com/opinion-first-conviction-proves-bribery-act-has-sharp-teeth/1010398.article.

75. *See* OECD WORKING GRP. ON BRIBERY, 2010 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION (2011), http://www.oecd.org/dataoecd/47/39/47637707.pdf. The OECD Working Group regularly monitors enforcement of the foreign bribery laws by the parties to the OECD Anti-Bribery Convention and, as part of its monitoring, compiles the data on enforcement of the relevant foreign bribery laws. *Id.* The OECD's Working Group on Bribery published data concerning enforcement of the foreign bribery laws by signatory countries for the first time in June 2010 and updated it in March 2011. *See Data on Enforcement of the Anti-Bribery Convention*, OECD, http://www.oecd.org/document/3/0,3746,en_2649_34859_45452483_1_1_1_1,00.html (last visited Aug. 11, 2012). The data revealed that, by the end of 2010, "199 individuals and 91 entities have been sanctioned under criminal proceedings for foreign bribery" in 13 signatory countries since the time that the OECD Anti-Bribery Convention entered into force in 1999. *Id.* In addition, the data found that "[a]pproximately 260 investigations" were ongoing in 15 signatory countries. *Id.* Nevertheless, the data also revealed that 24 of the 38 signatory parties to the OECD Anti-Bribery Convention have not brought any sanctions for foreign bribery. *Id.*

76. *See* Gurría Press Release, *supra* note 6.

77. *Id.* Transparency International has also become critical of the lack of progress in enforcement of the foreign bribery laws by signatory countries to the OECD Anti-Bribery Convention. *See* TRANSPARENCY INT'L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION, *available at* http://issuu.com/transparency international/docs/oecd_report_2011?mode=window&backgroundColor=%23222222.

With respect to international enforcement of foreign bribery laws, the United Kingdom and the OECD are now playing larger roles, but the United States has been the strongest policeman. As noted in the OECD data concerning enforcement of the foreign bribery laws, the United States has brought the most cases of foreign bribery violations.[78] Interestingly, many of these cases have focused on international companies.[79] Most of the largest cases brought by the United States for FCPA violations have been against international companies.[80] As of early 2012, nine out of the top ten largest FCPA cases ever brought by the United States have been against foreign companies.[81] This trend has caused some to surmise that the United States' focus "seems to be very much on putting pressure on non-U.S. companies to comply with global anti-corruption agreements, particularly when those companies' home countries are less than aggressive in enforcement of their own corruption laws."[82]

B. Mitigate Liability

Another reason why a corporation should implement an effective compliance program is to mitigate and possibly avoid potential liability for violations of foreign bribery laws. Although prevention is the best answer to addressing foreign bribery concerns, sometimes violations occur notwithstanding a company's best efforts to implement an effective compliance program. In such situations, the existence of the compliance program may serve to mitigate liability and penalties. In the case of the UK Bribery Act, a compliance program may serve to act as a total defense to liability.

78. *See* OECD WORKING GRP. ON BRIBERY, *supra* note 75, at 4.

79. See Phillip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING LLP, at 1 (Jan. 20, 2011), *available at* http://www.shearman.com/files/upload/FCPA-Trends-and-Patterns-Jan-2011.pdf.

80. *See* Fox, *supra* note 69.

81. *See id*. The nine international companies and their respective nationalities are: Siemens (Germany), BAE Systems (United Kingdom), Snamprogetti Netherlands B.V./ENI S.p.A (Holland/Italy), Technip S.A. (France), JGC Corporation (Japan), Daimler AG (Germany), Alcatel-Lucent (France), Magyar Telekom/Deutsche Telekom (Hungary/Germany), and Panalpina (Switzerland). *Id.* The sole United States-based company case on the top-ten list is KBR/Halliburton. *Id.*

82. Urofsky & Newcomb, *supra* note 79, at 1, 5-6. These authors note, "In the thirty-three years since the FCPA was enacted in 1977 and the twelve years the Anti-Bribery Convention became effective in February 1998, there have been very few non-U.S. prosecutions for transnational bribery." *Id.* at 6. The authors' further note, "Although a recent OECD report highlights uneven gains in this area, it is clear that the U.S. government intends to continue using its expansive view of jurisdiction under the FCPA to spur foreign governments to be more proactive—or face the consequence of seeing their domestic corporations hauled into U.S. courts." *Id.*

1. United States Attorneys' Manual

With respect to criminal liability for FCPA violations, the DOJ considers corporate compliance programs in determining whether to reduce charges or to decline charging altogether. The DOJ's *United States Attorneys' Manual* ("U.S. Attorneys' Manual") states that one of the factors that prosecutors should consider in "determining whether to bring charges" or negotiate a plea or settlement agreement for FCPA violations is "the existence and effectiveness of the corporation's pre-existing compliance program."[83] In this respect, the U.S. Attorneys' Manual states, "[T]he critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program."[84]

The U.S. Attorneys' Manual also takes into consideration the implementation of a compliance program as a remedial effort by a company after violations have been discovered.[85] In this respect, the U.S. Attorneys' Manual states that one of the factors that prosecutors should consider in deciding whether to charge a corporation or resolve a criminal case is "the corporation's remedial action, including any efforts to implement an effective corporate compliance program or to improve an existing one."[86]

83. DOJ, UNITED STATES ATTORNEYS' MANUAL § 9-28.300(A)(5), (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

84. *Id.* § 9-28.800(B). On the other hand, the U.S. Attorneys' Manual states that, if the compliance program is a "paper program," meaning that it exists merely on paper and is not enforced, such a program should not be given any credit when violations take place. *Id.* The U.S. Attorneys' Manual also states that "the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents." *Id.* § 9-28.800(A). Finally, the Manual mentions that "the existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior." *Id.* § 9-28.800(B) (citing United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983)). However, the U.S. Attorneys' Manual does state that "it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee." *Id.* § 9-28.500(A).

85. *See id.* § 9-28.300(A)(6).

86. *Id.*; *see also id.* § 9-28.900. The comment to this section states that "[i]n determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures." *Id.* § 9-28.900(B). In this respect the U.S. Attorneys' Manual states, "[A] corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur." *Id.* § 9-28.900(B).

2. Federal Sentencing Guidelines

Corporate compliance procedures are also taken into account under the Federal Sentencing Guidelines.[87] Under the Federal Sentencing Guidelines, a court should consider six factors when determining the appropriate sentence for a convicted defendant organization.[88] Four of the six factors are considered for increasing a sentence, and two of them are considered for mitigation.[89] Under the Federal Sentencing Guidelines, "[t]he existence of an effective compliance and ethics program" is one of the two factors that a sentencing court should consider in deciding whether to mitigate a sentence.[90] Thus, a corporation can use a pre-existing compliance program to seek, and in some cases obtain, a reduced sentence for FCPA violations.[91]

3. The Seaboard Report

With respect to civil liability for issuers who have violated the FCPA, the SEC's Seaboard Report provides such issuers with credit for having in place effective compliance procedures.[92] Specifically, the

87. *See* U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL ch. 8 (2010), *available at* http://www.ussc.gov/Guidelines/2010_guidelines/ToC_PDF.cfm [hereinafter FEDERAL SENTENCING GUIDELINES]. The Federal Sentencing Guidelines were recently amended in 2010. *Id.*; *see also Federal Sentencing Commission Modifies Sentencing Guidelines Pertaining to Organizations*, FCPA ALERT, (Cadwalader, Wickersham & Taft LLP, New York, N.Y.), Apr. 15, 2010, *available at* http://www.cadwalader.com/assets/newsletter/FCPA_Alert_April_2010.pdf; *US Sentencing Commission Approves Proposed Amendments to Federal Sentencing Guidelines for Organizations and Expands and Clarifies the Role of Corporate Compliance and Ethics Programs in Organizational Sentencing*, CLIENT ALERT, (Latham & Watkins LLP, New York, N.Y.), May 14, 2010, *available at* http://www.lw.com/search?searchText=us+sentencing+commission+approves+proposed+amendments.

88. *See* FEDERAL SENTENCING GUIDELINES, *supra* note 87, ch. 8, pt. A, introductory cmt. (2010).

89. *See id.* "The four factors [considered for] increas[ing] the ultimate punishment of an organization are (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice." *Id.* The two factors that are looked at for the purposes of mitigating a sentence include "(i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility." *Id.*

90. *Id.*

91. *See id.*

92. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Actions, Securities Exchange Act of 1934 Release No. 44969 (Oct. 23, 2001) [hereinafter Seaboard Report], *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; *see also* Press Release 2001-117, U.S. Sec. & Exch. Comm'n, SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion (Oct. 23, 2011) [hereinafter Evaluating Cooperation], *available at* http://www.sec.gov/news/

Seaboard Report lists certain criteria that the SEC will consider in deciding whether, and how much, to credit certain behavior by issuers.[93] One of the criteria is whether the issuer had instituted compliance procedures designed to prevent the relevant misconduct that occurred.[94] The criteria also considers why the relevant compliance procedures failed to "stop or inhibit" the relevant wrongful conduct that occurred.[95] The Seaboard Report further considers remedial actions taken by the issuer after the wrongful conduct has been discovered, including whether the issuer adopted and enforced "more effective internal controls" and compliance procedures "designed to prevent" the relevant wrongful conduct from occurring again.[96] The credit that an issuer can receive ranges from the "extraordinary step of taking no enforcement action" to "bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents" the SEC uses to "announce and resolve enforcement actions."[97]

4. *Tenaris*: The SEC's First Deferred Prosecution Agreement

Another important development with respect to civil liability mitigation for issuers is that, on May 17, 2011, the SEC entered into its first deferred prosecution agreement in *Tenaris*,[98] a matter concerning alleged violations of the FCPA. *Tenaris* involved an international steel pipe manufacturing company that allegedly bribed Uzbekistan government officials to receive contract awards from the Uzbekistan

headlines/prosdiscretion.htm. The Seaboard Report is a rare Report of Investigation under Section 21(a) of the Exchange Act, which deals with an issuer that quickly reported wrongdoing and cooperated with the SEC. *Id.* In the report, the SEC took the opportunity to announce certain criteria that it would consider in future enforcement actions to reward and take into account self-disclosure of wrongful conduct, cooperation, and the establishment of effective controls and procedures. *Id.*

93. *See* Seaboard Report, *supra* note 92, at 2-4.

94. *See id*.

95. *Id.* at 2.

96. *Id.* at 4; *see* Evaluating Cooperation, *supra* note 92.

97. Seaboard Report, *supra* note 92, at 2.

98. *See* Press Release 2011-112, U.S. Sec. & Exch. Comm'n, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011) [hereinafter Tenaris], *available at* http://www.sec.gov/news/press/ 2011/2011-112.htm; *see also* Deferred Prosecution Agreement, United States v. Tenaris, S.A., (May 17, 2011), *available at* http://www.sec.gov/news/press/2011/2011-112-dpa.pdf. Tenaris agreed to pay approximately $5.4 million in disgorgement and prejudgment interest to the SEC. *Id.* In addition, the company agreed to pay a $3.5 million criminal penalty in a related non-prosecution agreement with the DOJ. *Id.*; *see also* Press Release, U.S. Dep't of Justice, Tenaris S.A. Agrees to Pay $3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (May 17, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-629.html.

government.[99] Apart from being the first time that the SEC has entered into a deferred prosecution agreement, *Tenaris* is significant because the case involves a company that was given credit by the SEC for remedial efforts following the discovery of FCPA violations, including enhancing its anti-bribery procedures.[100]

With respect to the role of compliance procedures as a basis in *Tenaris* for the SEC to enter into the deferred prosecution agreement, the SEC noted that, after the company conducted an internal review of its operations and discovered the relevant FCPA violations, it informed the SEC of its findings. The company also "reviewed its controls and compliance measures and significantly enhanced its anti-corruption policies and practices."[101] SEC Enforcement Director Khuzami emphasized that these actions and the company's "enhanced anti-corruption procedures . . . made it an appropriate candidate" for the SEC's first deferred prosecution agreement.[102] Khuzami noted, "Effective enforcement of the securities laws includes acknowledging and providing credit to those who fully and completely support [the SEC's] investigations and who display an exemplary commitment to compliance, cooperation, and remediation."[103]

5. Adequate Procedures Defense under the UK Bribery Act

The existence of effective compliance procedures can serve as a defense to liability under the UK Bribery Act.[104] Specifically, the UK Bribery Act provides companies with a defense to liability under the law's failure to prevent bribery section when the companies can establish that they had in place "adequate" compliance procedures designed to

99. *See* Tenaris, *supra* note 98.

100. *See id.* The deferred prosecution agreement was part of an initiative announced in early 2010 designed to encourage individuals and companies to cooperate and assist in SEC investigations. *Id.*; *see also* Press Release 2010-6, U.S. Sec. & Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at* http://www.sec.gov/news/press/2010/2010-6.htm.

101. Tenaris, *supra* note 98.

102. *Id.*

103. *Id.* Under the deferred prosecution agreement, the SEC agreed to refrain from prosecuting the company in a civil action if the company complied with certain undertakings. One of the undertakings required that the company enhance its procedures and controls to strengthen its compliance with the FCPA and anti-bribery practices. Another undertaking required the company to implement due diligence requirements with respect to the retention and payment of agents. In addition, the company was required to provide detailed training on the FCPA and other anti-corruption laws and require certification of compliance with the relevant anti-bribery policies. The company was also required to notify the SEC of any complaints, charges, or convictions against it or its employees related to anti-bribery or securities law violations. *Id.*

104. *See* UK Bribery Act, *supra* note 3, § 7(2).

prevent foreign bribery.[105] The important defense can be available to companies even when foreign bribery has occurred within the company's operations.[106]

IV. GUIDANCE ON AN EFFECTIVE INTERNATIONAL FOREIGN BRIBERY COMPLIANCE PROGRAM

Given the importance of instituting an effective foreign bribery compliance program, the pertinent issue that must be addressed is what procedures should be included in an international foreign bribery compliance program. The procedures should not only prevent bribery and protect companies from liability under the FCPA, but should also protect companies from the prevailing foreign bribery risks and laws associated in operating in multiple jurisdictions around the world. Although there is no formal or magic set of perfect compliance procedures that will guarantee immunity for multinational organizations, there is domestic and international guidance from certain authorities that companies can utilize in determining what procedures should be included in an international foreign bribery compliance program.

A. Domestic Guidance on Compliance Procedures under the FCPA

Several sources of domestic guidance can be used to outline procedures for instituting an effective compliance program under the FCPA. The two most important sources are the Federal Sentencing Guidelines and recent DOJ non-prosecution and deferred prosecution agreements.

1. Federal Sentencing Guidelines

As noted above, the Federal Sentencing Guidelines allow a company convicted of FCPA violations to seek a reduction in its

105. UK Bribery Act, *supra* note 3, § 7(2).

106. *Id.* The United Kingdom did not want to impose liability on companies that acted in good faith through their compliance programs. The UK Ministry of Justice has stated that the "objective" of the UK Bribery Act "is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf," and, therefore, "in order to achieve an appropriate balance," the UK Bribery Act included the adequate procedures defense. *See* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING (SECTION 9 OF THE BRIBERY ACT 2010), at 8 (Mar. 30, 2011) [hereinafter UK GUIDANCE], *available at* http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf. It further noted that the adequate procedures defense is "in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times" and that the defense was also designed "to encourage" companies "to put procedures in place to prevent bribery by persons associated with them." *Id.*

sentence when it can show that it had in place an "effective" compliance program.[107] The Federal Sentencing Guidelines spell out the procedures that should be included in an "effective" compliance program.[108]

According to the Federal Sentencing Guidelines, an organization must meet the following two critical conditions to have an "effective" compliance program: (1) it must "exercise due diligence to prevent and detect criminal conduct;" and (2) it must "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[109] The Federal Sentencing Guidelines then provide a detailed list of minimum procedures that should be included in a compliance program to meet these two critical conditions.[110] Among these procedures is a requirement that a company's "governing authority" be knowledgeable about the compliance program and exercise "reasonable oversight" over the "implementation and effectiveness" of the program.[111] Another requirement is that the company periodically communicates the compliance procedures within the organization, whether by training or otherwise.[112]

2. DOJ Non-Prosecution and Deferred Prosecution Agreements

Another source of guidance can be found in recent non-prosecution and deferred prosecution agreements between the DOJ and companies that have settled with it for FCPA violations.[113] Under these agreements, companies reaching settlements with the DOJ are generally required to ensure that they have FCPA compliance programs in place that include certain minimum procedures in them as spelled out by the DOJ.[114] These

107. FEDERAL SENTENCING GUIDELINES, *supra* note 87, at ch. 8, pt. A, introductory cmt.

108. *See id.* § 8B2.

109. *Id.* § 8B2(a).

110. *See id.* § 8B2(b).

111. *Id.* § 8B2(b)(2)(A).

112. *See id.* § 8B2(b)(4)(A).

113. Non-prosecution and deferred prosecution agreements are legal settlement instruments typically used by the DOJ whereby a company and the DOJ will enter into a contract that contains certain requirements that the company must satisfy and, in exchange, the DOJ will not prosecute or defer prosecution. Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, *in* CORPORATE COMPLIANCE AND ETHICS INSTITUTE HANDBOOK, 136-37 (PLI, Course Handbook, 2011). Specifically, under a non-prosecution agreement, no charge will initially be filed in court, but the DOJ can later file and prosecute a charge against the company if the company violates the terms of the agreement. *Id.* Under a deferred prosecution agreement, the government will file a criminal charge in court but will not prosecute the claim. *Id.* If the company abides by the terms of the agreement, the DOJ will then dismiss the charge when the agreement expires. *Id.* Likewise, if the company violates the terms of the agreement, the DOJ can prosecute the already-filed charge. *Id.*

114. *See id.* at 137.

agreements are excellent sources of guidance because they are continuously updated as the DOJ reaches newer settlements.[115]

A recent non-prosecution agreement that describes what the DOJ looks for in an effective compliance program can be found in *Armor Holdings*.[116] In *Armor Holdings*, the company agreed to adopt or modify its compliance procedures to maintain "a system of internal accounting controls designed to ensure" that the company makes and keeps "fair and accurate books, records, and accounts."[117] The company also agreed to adopt or modify its procedures so that it maintained "a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws."[118] The agreement then listed "minimum" procedures that should be included in the compliance program.[119] Among these procedures is the calling for policies governing the provisions of gifts, hospitality, and entertainment expenses.[120] Another procedure calls for the internal and confidential reporting of suspected or actual violations of the compliance program and foreign bribery laws by employees and third parties acting on behalf of the company.[121]

Many of the minimum procedures outlined in the *Armor Holdings* non-prosecution agreement can also be found in recent deferred prosecution agreements. In the recent deferred prosecution agreement in *Alcatel-Lucent*,[122] one of the largest FCPA cases ever brought against a

115. Compliance procedures contained in many of the non-prosecution agreements and deferred prosecution agreements are very similar to, and sometimes mirror, the recommended procedures in the OECD Good Practice Guidance. *See infra* notes 126-36 and accompanying discussion.

116. *See* Armor Holdings, Inc. Non-Prosecution Agreement (Jul. 13, 2011), app. B, at 1-2 [hereinafter Armor Holdings Non-Prosecution Agreement], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/armor/07-31-11armor-holdings.pdf; *see also* Press Release, U.S. Dep't of Justice, Armor Holdings Agrees to Pay $10.2 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Jul. 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/July/11-crm-911.html. The matter involved the payment of more than $200,000 in commissions to a third-party sales agent, a portion of which was passed to a United Nations procurement official to induce the official to award two separate contracts. *Id.*

117. Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 11.

118. *Id.*

119. *Id.* There were 13 recommended minimum procedures in all. *Id.*

120. *See id.* at 11-12.

121. *See id.* at 13.

122. *See* Deferred Prosecution Agreement attach. C at 69-74, United States v. Alcatel-Lucent, S.A., No. 10-20907-CR-Moore/Simonton (S.D. Fla. Dec. 27, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/02-22-11alcatel-dpa.pdf; *see also* Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html. Alcatel agreed to pay a total amount of $137 million to settle the matter with the DOJ and SEC ($92 million to the DOJ and $45 million to the SEC). *Id.; see also* Press Release

single issuer, the company agreed to adopt and modify its compliance program to include many of the same procedures contained in *Armor Holdings*. Similarly, in a recent FCPA enforcement sweep involving charges against multiple oil services companies that engaged in bribery through the freight forwarding company Panalpina, all of the oil services companies and Panalpina were required to adopt compliance programs through deferred prosecution or other agreements that included most of the procedures contained in *Armor Holdings* and *Alcatel-Lucent*.[123] For example, in the deferred prosecution agreement in the Panalpina-related case of *Tidewater*,[124] the company was required to "institute appropriate due diligence and compliance requirements pertaining to the retention

2010-258, U.S. Sec. & Exch. Comm'n, SEC Charges Alcatel-Lucent with FCPA Violations (Dec. 27, 2010), *available at* http://www.sec.gov/news/press/2010/2010-258.htm. Alcatel-Lucent was charged with violating the FCPA for paying bribes to foreign officials in Latin America and Asia. *Id.*

123. *See* Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html. The DOJ obtained more than $156 million in criminal penalties, and the SEC obtained approximately $80 million in disgorgement, interest, and penalties, rendering the total amount paid by the relevant companies involved in the Panalpina-related sweep at $236 million. *Id.*; *see also* Press Release 2010-214, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), *available at* http://www.sec.gov/news/press/2010/2010-214.htm. For the relevant Panalpina-related deferred prosecution and other agreements with the DOJ, see the following sources: Deferred Prosecution Agreement attach. C at 49-52, United States v. Pride International, Inc., No. 10-766 (S.D. Tex. Nov. 4, 2010), *available at* http://www.justice.gov/opa/documents/pride-intl-dpa.pdf; Deferred Prosecution Agreement attach. C at 51-58, United States v. Shell Nigeria Exploration and Prod. Co. Ltd., No. 10-767 (S.D. Tex. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snepco/11-04-10snepco-dpa.pdf; Deferred Prosecution Agreement attach. C at 48-54, United States v. Transocean Inc., No. 10-768 (S.D. Tex. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/transocean-inc/11-04-10transocean-dpa.pdf; Plea Agreement attach. C at 63-70, United States v. Panalpina, Inc., No. 10-765 (S.D. Tex. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-inc/11-04-10panalpina-plea.pdf; Deferred Prosecution Agreement attach. C at 67-73, United States v. Panalpina World Transp. (Holding) Ltd., No. 10-769 (S.D. Tex. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-dpa.pdf; Deferred Prosecution Agreement attach. C at 57-63, United States v. Tidewater Marine Int'l, Inc., No. 10-770 (S.D. Tex. Nov. 4, 2010) [hereinafter Tidewater Deferred Prosecution Agreement], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tidewater-intl/11-04-10tidewater-dpa.pdf; Plea Agreement attach. C at 49-52, United States v. Pride Forasol S.A.S., No. 10-771 (S.D. Tex. Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pride-forasol/12-07-10pride-forasol-plea-agree.pdf; Noble Corporation Non-Prosecution Agreement attach. B at 20-25 (Nov. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp/11-04-10noble-corp-npa.pdf.

124. Tidewater Deferred Prosecution Agreement, *supra* note 123, at 62-63.

and oversight of all agents and business partners," a requirement also mandated under *Armor Holdings* and *Alcatel-Lucent*.[125]

B. International Guidance

Outside of domestic guidance on compliance procedures under the FCPA, there is international guidance on procedures that should be considered in a compliance program. The most noteworthy source is recent guidance provided by the OECD.

1. OECD Good Practice Guidance

The best source of guidance on procedures that should be included in an international foreign bribery compliance program can be found in the OECD Good Practice Guidance.[126] The OECD Good Practice Guidance, released in February 2010, has been hailed by OECD Secretary-General Angel Gurría as "the most comprehensive guidance ever provided to companies and business organisations by an international organisation" on the issue of foreign bribery procedures.[127] The OECD Good Practice Guidance is also the first and only set of anti-bribery compliance procedures to have received the endorsement of multiple international governments.[128] As such, the recommended

125. *Id.*; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 13; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 73. There are two other good sources of guidance by the DOJ on what it views to be certain minimum procedures that should be included in an effective compliance program. These sources outdate the amended Federal Sentencing Guidelines and the relevant non-prosecution and deferred prosecution agreements discussed in this article, but are worth mentioning. One of these sources is the consent agreement in the 1999 civil case of *United States v. Metcalf and Eddy, Inc.* *See* Complaint, United States v. Metcalf & Eddy, Inc., No. 1:99CV12566 (D. Mass. Dec. 14, 1999); Consent and Undertaking of Metcalf & Eddy, Inc., at 2-5, *available at* http://corporatecompliance.org/Content/NavigationMenu/Resources/ComplianceBasics/MetcalfEddy.pdf. In *Metcalf & Eddy*, the DOJ provided what it considered to be minimum components of an effective FCPA compliance program for the first time. *Id.* The other source of guidance is the DOJ Opinion Release No. 04-02. *See* DOJ Opinion Procedure Release, No. 04-02 (Jul. 12, 2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf. In the opinion release, the DOJ found a requestors' compliance program to have contained "significant precautions against future violations of the FCPA" and appeared to have supported the relevant procedures under the compliance program as outlined in the release. *Id.* at 2-3.

126. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7. The OECD Good Practice Guidance was adopted as an "integral part" of the OECD Recommendation and became Annex II to the OECD Recommendation. *Id.*; *see also* OECD RECOMMENDATION, *supra* note 44, at 1.

127. *See OECD Calls on Businesses to Step Up their Fight Against Bribery*, OECD (Mar. 3, 2010), *available at* http://www.oecd.org/document/5/0,3746,en_21571361_44315115_44697385_1_1_1_1,00.html.

128. *See id.*; *Recent Top DOJ Official Shares Insights into FCPA Policies, Enforcement Strategies, Public-Private Cooperation and Role of the OECD*, THE METRO.

procedures in the OECD Good Practice Guidance are important because they go beyond the procedures recommended for any specific foreign bribery law and are intended to be used on a global scale to comply with foreign bribery laws throughout the world.

The OECD Good Practice Guidance contains 12 best practices and procedures that should be implemented in a compliance program.[129] One of the practices states that a compliance program should contain "a clearly articulated and visible corporate policy prohibiting foreign bribery."[130] Another practice calls for financial and accounting procedures designed to ensure the maintenance of accurate books and records so that they cannot be used to conceal foreign bribery.[131]

The OECD Good Practice Guidance has generally been endorsed by the signatories to the OECD Anti-Bribery Convention.[132] The OECD Good Practice Guidance has also received the support of the United States. Mark Mendelsohn, the former Deputy Chief of the DOJ's Fraud Section at the time that the OECD Good Practice Guidance came out, indicated during a February 2010 speech that the DOJ approved of the OECD Good Practice Guidance.[133] In addition, Assistant Attorney General Breuer echoed support for the OECD Good Practice Guidance. During a May 2010 speech, Assistant Attorney General Breuer stated that he considered the guidance to be a "benchmark" for what should be included in an effective compliance program and urged domestic companies to consider tailoring their existing compliance programs to incorporate the guidance.[134] Given this support, some have opined that

CORP. COUNSEL, Aug. 2, 2010, at 12-13, *available at* http://www.metrocorpcounsel.com/articles/12831/recent-top-doj-official-shares-insights-fcpa-policies-enforcement-strategies-public-p (interviewing Mark F. Mendelsohn of Paul, Weiss, Rifkind, Wharton & Garrison LLP).

129. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 1.

130. *Id.*

131. *See id.* at 2.

132. *Id.*; *see also* Joseph Murphy & Donna Boehme, *Commentary: OECD Good Practice Guidance on Internal Controls, Ethics and Compliance*, 1840 PLI/CORP 243, 249 (2010). The OECD Good Practice Guidance is part of the OECD Recommendation. *See* OECD RECOMMENDATION, *supra* note 44.

133. *See* Melissa K. Aguilar, *OECD Anti-Bribery Guide as Path to FCPA Compliance*, COMPLIANCE WK., Mar. 30, 2010, at 2.

134. Breuer Speech, *supra* note 59, at 5. Breuer stated:

> If you haven't read the OECD Guidance yet, read it . . . [a]nd then think about how you might tailor the Guidance to your organization . . . [a]nd know that, as you do, the [DOJ's] Criminal Division cares about all the things you might be considering—'tone from the top' support, encouragement of a culture of compliance that rewards ethical behavior and establishes whistle-blowing mechanisms, senior-level oversight and direct-reporting lines, periodic reviews and re-evaluations to test and ensure program effectiveness, appropriate disciplinary mechanisms, and extension of anti-corruption policies to third-party agents and business partners, to name a few.

the DOJ may end up using the OECD Good Practice Guidance as a framework in evaluating pre-existing compliance programs.[135] In this author's opinion, the DOJ may already be doing so given that many of the compliance procedures mandated in recent DOJ non-prosecution and deferred prosecution agreements appear to mirror most, if not all, of the procedures contained in the OECD Good Practice Guidance.[136]

2. UK Guidance

The United Kingdom's Ministry of Justice, on March 30, 2011, provided another international source of guidance concerning procedures that companies should institute to prevent violations of the UK Bribery Act.[137] The guidance, entitled "*Guidance about Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with Them from Bribing*" ("UK Guidance"), provides guidelines for what the Ministry of Justice considers "adequate procedures" for purposes of meeting the "adequate procedures" defense to the UK Bribery Act's failure to prevent bribery section.[138]

Under the UK Guidance, a company's compliance program should be governed by six primary guiding principles.[139] The first guiding principle provides that a company's program and procedures should be "proportionate" to the bribery risks that it faces and that the procedures should be "clear, practical, accessible, effectively implemented and enforced."[140] A second principle stresses that the procedures should provide for a "top-level management" commitment to the prevention of foreign bribery.[141] The third principle states that companies should assess the "nature and extent of its exposure" to potential external and internal bribery risks so that the companies may address them

Id.

135. *See* Aguilar, *supra* note 133, at 1; Steven A. Tyrell, *The OECD Releases Good Practice Guidance on Internal Controls, Ethics, and Compliance to Curb Foreign Bribery*, *in* EIGHTH ANNUAL DIRECTORS' INSTITUTE ON CORPORATE GOVERNANCE (PLI, Course Handbook, 2010).

136. *See supra* notes 113-25 and accompanying discussion.

137. *See* UK GUIDANCE, *supra* note 106.

138. *Id.*; *see also* UK Bribery Act, *supra* note 3, § 7(2).

139. *See* UK GUIDANCE, *supra* note 106, at 6, 20.

140. *Id.* at 21. To meet this principle, the UK Guidance recommends that an "initial assessment of risk" across an organization be undertaken and that the procedures be formulated to take into account the assessed risk. *Id.* The language contained within the first principle of the UK Guidance also provides an "indicative" but "not exhaustive" list of topics that an organization's procedures "might embrace depending on the particular risks" that it faces. *Id.*

141. *Id.* at 23. In this respect, the second principle recommends that senior management "foster a culture" within the corporation that bribery is "never acceptable." *Id.*

accordingly.[142] A fourth principle calls for due diligence over persons "who perform or will perform services" on behalf of the corporation in order to avoid or reduce the risk of bribery.[143] The fifth principle stresses that the relevant anti-bribery procedures should be communicated throughout the corporation, whether by training or otherwise.[144] Finally, a sixth principle calls for monitoring and review of the relevant anti-bribery procedures to ensure that they are effective in preventing bribery.[145]

3. Transparency International Business Principles for Countering Bribery

Another source of international guidance on compliance procedures can be found through Transparency International. Transparency International is a leading international non-governmental organization in the fight against corruption and foreign bribery.[146] Transparency International has published guidelines—*Business Principles for Countering Bribery* ("Transparency Business Principles")—which are designed to help companies develop and implement anti-bribery compliance programs.[147]

The Transparency Business Principles state that companies "shall prohibit bribery in any form whether direct or indirect" and "shall commit to implementing" an anti-bribery compliance program "to counter bribery."[148] The Transparency Business Principles provides guidance on the development, scope, and implementation of an anti-bribery compliance program.[149] Among other things, it states that political or charitable contributions should not be used as an avenue to

142. *Id.* at 25.
143. *Id.* at 27.
144. *See id.* at 29.
145. *See* UK GUIDANCE, *supra* note 106, at 31. The UK Guidance states that its recommendations are not intended to be "prescriptive" and that the guidance is not intended to be a "one-size-fits-all" document. *Id.* at 6.
146. *See About Us*, TRANSPARENCY INT'L, http://www.transparency.org/about_us (last visited Aug. 16, 2012). Transparency International's goal is to ensure a "world free of corruption." *Id.* Transparency International is known for its "Corruptions Perception Index," which rates countries based on how corrupt people perceive them to be. *See Corruption Perceptions Index*, *supra* note 57. The 2011 Corruption Perceptions Index listed New Zealand, Denmark, Finland, Sweden, and Singapore as the five least corrupt countries in the world. *Id.* By contrast, the index listed Somalia, North Korea, Myanmar, Afghanistan, and Uzbekistan as the five most corrupt countries in the world. *Id.* The United States ranked 24th out of 182 countries. *Id.*
147. TRANSPARENCY INT'L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY (2d ed. 2009) [hereinafter TRANSPARENCY BUSINESS PRINCIPLES].
148. *Id.* at 6.
149. *See id.* at 7-14.

obtain a business advantage.[150] The principles also stress that senior management should be responsible for implementing and carrying out the anti-bribery compliance program.[151]

V. MINIMUM COMPLIANCE PROCEDURES, COVERING A TO Z, THAT NEED TO BE INCLUDED IN A COMPREHENSIVE INTERNATIONAL FOREIGN BRIBERY COMPLIANCE PROGRAM

There are essential procedures that should be included in a comprehensive international foreign bribery compliance program. The compliance program should contain procedures recommended under both domestic and international guidance designed to prevent and detect foreign bribery.[152]

The comprehensive international foreign bribery compliance program should use best practices in: (1) developing a compliance program, such as designing procedures based on a risk assessment of the foreign bribery risks that a company faces; (2) writing policies and procedures in the compliance program itself, such as procedures governing the due diligence of third party agents acting on behalf of the company; and (3) monitoring and reviewing the compliance program, such as periodic reviews of the program to evaluate its effectiveness. Thus, the compliance program should involve best practices from the inception of the program to the monitoring of the program after it has been formalized. Furthermore, for the compliance program to be effective, it needs to address foreign bribery concerns consistent with the relevant anti-bribery laws in all jurisdictions that the company operates.[153]

Although an analysis of every anti-bribery law is beyond the scope of this article, an analysis of the guidance on compliance procedures provided through the OECD Good Practice Guidance, UK Guidance, Transparency Business Principles, and domestic guidance on the FCPA, can provide a minimum set of procedures that should be included in any

150. *See id*. at 8.

151. *See id*. at 9. Transparency International has also published a "Guidance Document" to the Business Principles. *See* TRANSPARENCY INT'L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: GUIDANCE DOCUMENT (2004). The Guidance Document is a comprehensive guide to the Transparency International Business Principles that is intended to help companies implement and review their anti-bribery compliance programs. *See id*. at 4.

152. For a list of what this author believes to be essential procedures that should be involved in an FCPA compliance program, or what this author calls the "Eleven Commandments" of an effective FCPA compliance program, see Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 60-65 (2011).

153. *See* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 7.

international foreign bribery compliance program. Notably, any compliance program also needs to account for the subjective risks and laws affecting that particular company. This article provides only a minimum list of procedures that should be included in a given company's international foreign bribery compliance program.

A. Risk Assessment of Foreign Bribery Risks

One of the first steps a company should take in developing an international foreign bribery compliance program is to conduct a risk assessment to address the individual circumstances and specific foreign bribery risks facing the company.[154] One of the most important considerations is the geographical organization of the company and the locations of its operations.[155] The more corrupt the country in which the company conducts business, the higher the risk of foreign bribery occurring.[156] Another important foreign bribery risk concerns the industrial sector involved in the company's operations.[157] Some industrial sectors, such as the oil and gas sector, are more prone to foreign bribery.[158]

Once the relevant foreign bribery risks have been identified, the company should develop and tailor its compliance policies and procedures, including a system of internal controls, to effectively address the identified risks.[159] As such, the compliance policies and procedures

154. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 1; UK GUIDANCE, *supra* note 106, at 25; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 7; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-2,C-3.

155. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 1; UK GUIDANCE, *supra* note 106, at 26; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 7; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-3.

156. *See* sources cited *supra* note 155; *see also Corruption Perceptions Index*, *supra* note 57 (listing the most corrupt countries in the world).

157. *See* sources cited *supra* note 155.

158. *See* UK GUIDANCE, *supra* note 106, at 26. Other risk factors that a company should consider in conducting a risk assessment include: (1) interactions between the company and foreign government officials; (2) the company's involvement in business partner or joint venture arrangements; (3) the "importance of licenses and permits in the company's operations"; (4) the "degree of governmental oversight and inspection" over the company's operations; (5) the volume and importance of goods clearing through customs in a foreign country; and (6) the volume and importance of personnel clearing through immigration in a foreign country. *See id*.; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-3.

159. *See* sources cited *supra* note 154.

developed should be "proportionate to the bribery risks" that the company faces and to the "nature, scale and complexities" of the company's operations.[160] After the initial risk assessment, the foreign bribery risks facing the company should be "regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness" of the compliance program.[161]

B. Clear and Articulate Policy

The compliance program, and the policies and procedures within it, should provide a "clearly articulated and visible corporate policy" prohibiting foreign bribery.[162] The policy should be "memorialized in a written compliance code" and should clearly, and in reasonable detail, articulate all of the relevant procedures designed to prevent foreign bribery from occurring through any activities under the company's effective control.[163] The policy should include clearly articulated procedures related to the FCPA's anti-bribery, books and records, and internal control provisions, as well as to the relevant foreign anti-bribery laws governing the company.[164]

C. Strong, Explicit, and Visible Support and Commitment from Senior Management

Senior management in a company should provide "strong, explicit, and visible support and commitment" to the company's compliance program.[165] Senior management should include the highest-level

160. UK GUIDANCE, *supra* note 106, at 21.

161. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 1; *see also* UK GUIDANCE, *supra* note 106, at 25; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(c).

162. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 1; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-1; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-1; *see also* UK GUIDANCE, *supra* note 106, at 21; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 7.

163. Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-1; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-1; *see also* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 7.

164. *See* Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-1; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-1.

165. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 1; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-2; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-1; *see also* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 9; UK GUIDANCE, *supra* note 106, at 23; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(2).

officials of the company and, ideally, involve the board of directors and chief executive officer.[166] The commitment by senior management should involve communications by senior management of the company's "anti-bribery stance" and of the company's compliance program.[167] Senior management should also be involved and have some responsibility over the development of relevant policies and procedures in the compliance program.[168]

D. Compliance Applies to all Levels of the Company, Including Third Parties Acting on Behalf of the Company

Following the relevant compliance program procedures should be the "duty of" and apply to individuals at "all levels of the company" and to outside and/or third parties acting on behalf of the company.[169] In this respect, the compliance program should apply to all directors, officers, and employees.[170] The compliance program should also apply to all "outside parties acting on behalf" of the company in a foreign jurisdiction, including "agents, intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners" used or employed by the company.[171] The compliance program should further apply to all such individuals and entities over which the company has "effective control," including subsidiaries.[172]

E. Oversight of Compliance Program by Senior Executives

A company should assign one or more senior corporate executives or officers responsibility for oversight of the compliance program.[173]

166. *See* UK GUIDANCE, *supra* note 106, at 23; TRANSPARENCY INTERNATIONAL PRINCIPLES, *supra* note 147, at 9; *see also* Murphy & Boehme, *supra* note 132, at 257.

167. UK GUIDANCE, *supra* note 106, at 23.

168. *See* UK GUIDANCE, *supra* note 106, at 23-24; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(2).

169. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-2; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-2.

170. Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-2; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-2.

171. *See* sources cited *supra* note 170.

172. TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 9.

173. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 9; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(2); Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-4; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-3.

The relevant senior executives should have direct reporting obligations to independent monitoring bodies, such as the board of directors, or any pertinent committee of the board of directors such as an internal audit committee.[174] The senior executives should also have an "adequate level of autonomy from management" and the necessary resources and authority to maintain such autonomy.[175] A type of senior executive that could fulfill the relevant oversight responsibilities is the company's chief ethics and compliance officer.[176]

F. Prevent and Prohibit the Making of Improper Gifts

Gifts can be illegal or can be perceived to be illegal when they have any kind of influence in obtaining or retaining business. In *United States v. Mercator Corp.*,[177] a bank acting as an advisor to the Kazakhstan government violated the FCPA by gifting two snowmobiles to a senior Kazakhstan government official who had the ability to influence whether the bank obtained or retained business from the government. *Mercator* illustrates how improper gifts, even small ones, can easily land a company in hot water.[178]

A compliance program should include procedures that scrutinize gifts to ensure that they are not bribes designed to obtain or retain business.[179] In this respect, the compliance program should prohibit the offer or receipt of gifts "whenever they could affect or be perceived to affect the outcome of business transactions and are not reasonable and bona fide."[180]

174. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-4; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-3.

175. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 60; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-3.

176. *See* Murphy & Boehme, *supra* note 132, at 259-63.

177. *See* Press Release, U.S. Dep't of Justice, New York Merchant Bank Pleads Guilty to FCPA Violation (Aug. 6, 2010), *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-909.html; United States v. Mercator Corp., No. 3:03-CR-404 (WHP) (S.D.N.Y. Nov. 23, 2010).

178. *See United States v. Mercator Corp*., No. 3:03-CR-404.

179. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; UK GUIDANCE, *supra* note 106, at 22; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, at C-3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-2.

180. TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8.

G. Prevent and Prohibit Improper Hospitality, Entertainment, and Expenses

Like payment of gifts, the payment and receipt of hospitality, entertainment, and expenses raise anti-bribery concerns when such expenses potentially influence the outcome of a relevant business transaction. A company's compliance program should, therefore, explicitly scrutinize and prohibit the offer or receipt of hospitality, entertainment, and expenses between the company and foreign officials to ensure that such expenses are not used to improperly obtain or retain business.[181]

H. Prevent and Prohibit Improper Customer Travel

Customer travel is another problematic area. The FCPA provides an exception for reasonable and actual expenditures for travel and lodging if such expenditures are directly related to the promotion and demonstration of products and to the execution or performance of a contract with a foreign government or agency.[182] However, what happens when the customer travel involves travel, or "field trips," to non-business related entertainment destinations such as Disney World or Las Vegas?

In *UTStarcom*,[183] the DOJ and SEC alleged that a company had violated the FCPA after the company had paid approximately seven million dollars for 225 foreign trips by employees of a Chinese state-owned company that were supposedly for training purposes. According to the allegations, the company paid employees to travel to popular tourist destinations including Hawaii, Las Vegas, and New York City for training at the company's facilities.[184] However, the company had no facilities at these locations nor did it conduct any training at them.[185]

181. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; UK GUIDANCE, *supra* note 106, at 22; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 2.

182. *See* 15 U.S.C. § 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2006 & Supp. 2010); *see also supra* note 19 and accompanying discussion.

183. *See* Press Release, U.S. Dep't of Justice, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009) [hereinafter UTStarcom Press Release], *available at* http://www.justice.gov/opa/pr/2009/ December/09-crm-1390.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Cal. Telecom Co. with Bribery and Other FCPA Violations (Dec. 31, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/ lr21357.htm; SEC v. UTStarcom, Inc., No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009).

184. *See* sources cited *supra* note 183.

185. *See* sources cited *supra* note 183.

Rather, the "true purpose for providing these trips was to obtain and retain lucrative telecommunications contracts."[186]

UTStarcom illustrates why customer travel should be scrutinized to ensure that such travel is not for the improper purpose of obtaining or retaining contracts from foreign government officials.[187] In this respect, a company's compliance program should include procedures designed to examine all planned and paid customer travel to make sure that such travel is for proper purposes in accordance with the foreign bribery laws.[188]

I. Prevent and Prohibit Improper Political Contributions

Political contributions are another problematic area when they are made to a foreign official, candidate for foreign political office, or foreign political party for the purpose of influencing any act or decision of that person in his or her official capacity or future official capacity. An international foreign bribery compliance program should include procedures designed to prohibit political contributions that influence the act or decision by any relevant individual or political party in assisting the company to obtain or retain business.[189] The procedures should require an exercise of due diligence over all anticipated political contributions to make sure that the contributions will not be directed to individuals or political parties that are or will be in a position to award the company business or help it retain business. A good procedure that could serve to deter the making of wrongful political contributions would be a requirement that the company publicly disclose all of its political contributions.[190] Such transparency would deter a company, or individuals acting on behalf of the company, from making any suspicious contributions.

186. *See* UTStarcom Press Release, *supra* note 183.

187. *See* sources cited *supra* note 183.

188. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at C; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, add. at C-2.

189. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; UK GUIDANCE, *supra* note 106, at 22; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, add. at C-3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at C-2.

190. *See* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8.

J. Prevent and Prohibit Improper Charitable Contributions

Similar to political contributions, charitable contributions raise anti-bribery concerns when paid as a way to help the company obtain or retain business. For example, in *Schering-Plough*,[191] the SEC charged a company with violations of the FCPA's accounting provisions when it found that the company's Polish subsidiary had made donations to a charitable foundation led by a Polish government official to induce that official to purchase the company's pharmaceutical products for his region's health fund. The SEC alleged that the company's procedures for detecting FCPA violations were inadequate because "they did not require employees to conduct any due diligence prior to making promotional or charitable donations to determine whether any government officials were affiliated with [the] proposed recipients."[192]

A compliance program should include procedures designed to ensure that charitable contributions are not made for the improper purpose of obtaining or retaining business in contravention of the foreign bribery laws.[193] The procedure should include an exercise of due diligence over all anticipated charitable contributions to ensure that such expenditures will not be directed towards organizations affiliated with government officials who may help the company obtain or retain business.[194] A good procedure that could serve to deter the making of wrongful charitable contributions would be a requirement that the company publicly disclose all of its charitable contributions.[195]

K. Prevent and Prohibit Improper Sponsorships

Sponsorships also raise anti-bribery concerns when paid to help the company obtain or retain business. A compliance program should therefore include procedures designed to ensure that sponsorships are not used to improperly obtain or retain business in violation of the foreign bribery laws.[196] Such a policy would include procedures mandating that due diligence be conducted over any anticipated sponsorships to ensure that they are not affiliated with any foreign official or political party in a position to help the company obtain or retain business.

191. *See* In re Matter of Schering-Plough Corp., Exchange Act Release No. 49838, Accounting and Auditing Enforcement Act Release No. 2032, 2004 WL 1267922 (Jun. 9, 2004). The SEC found that the company had improperly recorded these payments in its books and records. *Id*. at *3.

192. *Id*. at *3.

193. *See* sources cited *supra* note 181.

194. *See* In re Schering-Plough, *supra* note 191.

195. *See* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8.

196. *See* sources cited *supra* note 181.

L. Prevent and Prohibit Facilitation Payments

Among the most controversial types of payments involving the foreign bribery laws is facilitation or "grease" payments designed to expedite or secure the performance of routine government actions, such as the processing of permits or visas.[197] As previously noted, the FCPA provides an exception for facilitation payments for violations of the anti-bribery provisions.[198] The language within the OECD Anti-Bribery Convention also allows for "small" facilitation payments.[199] However, the prevailing international view on such payments is that they are illegal.

Since the enactment of the FCPA, almost none of the other enacted foreign bribery laws have provided an exception for facilitation payments.[200] The same is true of the relevant foreign bribery treaties, with the exception of the OECD Anti-Bribery Convention.[201] Even the OECD has recently changed its attitude with respect to its tolerance for facilitation payments. In 2009, the OECD called on signatory nations to the OECD Anti-Bribery Convention to end the permissibility of what it called "corrosive" facilitation payments.[202] In 2010, the OECD Working Group on Bribery issued a report on the United States criticizing its foreign anti-bribery policies regarding facilitation payments.[203] Indeed, there are currently only five countries—including the United States—which provide an exception for facilitation payments under their relevant

197. 15 U.S.C. § 78dd-1(b), -2(b), -3(b) (2006 & Supp. 2010).

198. *See id.*; *see also supra* note 20 and accompanying discussion.

199. OECD Anti-Bribery Convention, *supra* note 6, at cmt. 9. Commentary 9 provides: "Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning" of the anti-bribery provision of the OECD Anti-Bribery Convention "and, accordingly, are also not an offence." *Id.*

200. *See* TRACE INT'L INC., TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (2009) [hereinafter TRACE SURVEY].

201. The Inter-American Convention, United Nations Convention, and African Convention are silent on the issue of facilitation payments, which suggests that they do not provide an exception for these types of small bribes. *See* Inter-American Convention, *supra* note 33; United Nations Convention, *supra* note 47; African Convention, *supra* note 52. The OECD Anti-Bribery Convention appears to be the only foreign bribery treaty that addresses (and allows for) an exception for "small" facilitation payments within its provisions. *See* OECD Anti-Bribery Convention, *supra* note 6, at cmt. 9.

202. *See* OECD RECOMMENDATION, *supra* note 44, at 4.

203. *See* OECD, UNITED STATES: PHASE 3, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 22-24 (2010), *available at* http://www.oecd.org/dataoecd/10/49/46213841.pdf.

foreign bribery laws.[204] Furthermore, most countries, including the United States, outlaw facilitation payments under their own domestic bribery laws.[205]

In this author's view, companies need to prohibit these payments even though the FCPA provides an exception for them. The reason for such prohibition is that facilitation payments are illegal under most of the domestic and foreign bribery laws in the world.[206] An international foreign bribery compliance program needs to include procedures that prohibit any facilitation payments, no matter how small the amount.[207]

M. Prevent and Prohibit Payments made through Solicitation and Extortion

Payments involving certain kinds of solicitations, such as the solicitation for bribes, are illegal under most international anti-bribery and criminal laws. The same can be said regarding extortion payments. As a result, a company's compliance program should include procedures designed to ensure that employees, or third parties acting on the company's behalf, do not make improper solicitation or extortion payments.[208]

204. *See* TRACE SURVEY, *supra* note 200, at 2. The UK Bribery Act, for example, outlaws facilitation payments.

205. *See id.*; Thomas Fox, *End of Grease Payments Coming*, CORP. COMPLIANCE INSIGHTS, Apr. 5, 2010, at 3; Melissa Aguilar, *New OECD Stance on Facilitation Payments*, COMPLIANCE WK., Dec. 18, 2009; 18 U.S.C § 201 (2006) (U.S. domestic bribery statute).

206. See sources cited *supra* note 205. For an in-depth discussion on the FCPA's facilitation payments exception, the history behind it, the OECD's recent calls for the end to facilitation payments, and the need to prohibit the making of such payments as a best practice in a global anti-bribery environment, see Jon Jordan, *supra* note 44.

207. *See* Jordan, *supra* note 44. Guidance on the relevant foreign bribery procedures tends to support this recommended procedure. The OECD Good Practice Guidance and the relevant DOJ non-prosecution and deferred prosecution agreements do not explicitly state that a company should prohibit facilitation payments, but they suggest that a company's compliance program should include compliance procedures designed to address and govern facilitation payments. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 12; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 59, and Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 70. The UK GUIDANCE explicitly recognizes facilitation payments as being illegal under the UK Bribery Act and calls for procedures designed to address the issue of improper facilitation payments. UK GUIDANCE, *supra* note 106, at 18, 22. Likewise, the Transparency International guidance calls for procedures prohibiting facilitation payments. TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8.

208. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 8; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 3; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 2.

N. Due Diligence and Compliance Requirements Pertaining to the Retention and Oversight of Third Parties Acting on Behalf of the Company

A company should also institute due diligence and compliance requirements concerning the retention and oversight of third parties acting on its behalf, including agents and "intermediaries, consultants, representatives, distributors, contractors, suppliers, consortia, and joint venture partners."[209] A company should properly document the due diligence that is conducted when it hires such third parties.[210] Moreover, a company should document oversight conducted over third parties after they have been hired.[211] Finally, a company should inform third parties acting on its behalf of the company's "commitment" to abiding by foreign bribery laws and the company's compliance program and obtain a reciprocal commitment by the third parties that they will do the same.[212]

O. System of Financial and Accounting Procedures and Internal Controls to Ensure Accurate Books, Records, and Accounts

A company needs to ensure that it has a "system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery" or hiding such bribery.[213] A company should make sure that its books and records "properly and fairly document all financial transactions."[214] The company should also subject its "internal control systems, in particular the accounting and recordkeeping practices,

209. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; *see also* UK GUIDANCE, *supra* note 106, at 27-28; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 10-11; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 3; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 6-7; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 5.

210. *See* sources cited *supra* note 209.

211. *See* sources cited *supra* note 209.

212. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 3; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 6-7; and Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 5; *see also* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 9-11.

213. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 4; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 3; *see also* UK GUIDANCE, *supra* note 106, at 22; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147.

214. TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 13.

to regular review and audit to provide assurance on their design, implementation and effectiveness."[215]

P. Communication and Training on the Compliance Program

A company needs to ensure that all levels of the company—including within the company's subsidiaries—have received periodic communication and training on the compliance program.[216] All levels of the company include officers, directors, and employees of the company, and, where appropriate, third parties who act on behalf of the company.[217] This training should be documented through annual certifications showing that relevant training requirements have been met.[218]

Q. Disciplinary Procedures to Address Violations of the Foreign Bribery Laws and Compliance Program

A company needs to institute appropriate disciplinary procedures designed to address violations of the foreign bribery laws and the company's compliance program.[219] The Federal Sentencing Guidelines also recommend that disciplinary measures be undertaken for failing to prevent and detect criminal conduct.[220] Such disciplinary procedures are necessary to serve as both a deterrent and remedial factor concerning potential or actual foreign bribery concerns affecting the organization.

215. *Id.*

216. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; UK GUIDANCE, *supra* note 106, at 29-30; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 12; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(4) (2010); Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 4-5; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 4.

217. *See* UK GUIDANCE, *supra* note 106, at 29-30; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 12; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 4-5; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 4.

218. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 2; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 4-5; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 4.

219. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 3; UK GUIDANCE, *supra* note 106, at 22; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 9, 12; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(7); Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 3; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 6; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 6.

220. *See* FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(6).

R. Positive Support for Observance with the Compliance Program

A company should also institute "appropriate measures to encourage" and provide positive "support" for the observance of the compliance program and procedures intended to prevent foreign bribery.[221] One of the ways that a company can promote support for observance of the compliance program is to provide "appropriate incentives" to individuals within the company that fully observe the program.[222] Although compliance with the program and the foreign bribery laws should be expected within a company, given the risks involved in doing otherwise, this procedure calls on a company to proactively provide positive support and incentives to support and encourage compliance with the program.[223]

S. Prevent Reoccurrence of Misconduct

The company should "implement procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct" and to ensure that further similar misconduct never happens again.[224] The measure would involve assessing, and making modifications to, the compliance program after misconduct has occurred to ensure that the program is effective.[225]

T. Provide Guidance on Compliance Program

The company should establish a system through which it can provide guidance and advice to officers, directors, employees and, where appropriate, third parties acting on its behalf, in conformity with the

221. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; Armor Holdings Non-Prosecution Agreement, *supra* note 116, app. B, at 1; Tidewater Deferred Prosecution Agreement, *supra* note 123, attach. C, at 2; and Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, attach. C, at 2.

222. FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(6).

223. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 2; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(6). With respect to this procedure, FCPA compliance experts Joseph Murphy and Donna Boehme stress that "[t]he message here is not that employees should be rewarded for not breaking the law . . . [r]ather, the focus is on the compliance program and providing 'positive support' for managers and employees to show compliance and ethical leadership." Murphy & Boehme, *supra* note 132, at 271. Murphy and Boehme note, "This language is consistent with one of the best practice steps in the field at some leading companies that link compensation to ethical and compliance leadership criteria." *Id.*

224. Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 3; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 62; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 73; *see also* FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(7).

225. *See* FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(7).

compliance program.[226] Guidance from the company should be available at all times, including when individuals need "urgent" advice concerning difficult situations in foreign jurisdictions.[227] A company should have a compliance official or company counsel available 24 hours per day, seven days per week, to provide such urgent guidance when needed.[228] In high-risk foreign jurisdictions, reliable local counsel can also be made available by the company to provide guidance as needed.[229] The company should also respond to relevant requests for guidance and undertake further appropriate action as necessary.[230]

U. Internal and Confidential Reporting of Suspected or Actual Violations of the Compliance Program or Foreign Bribery Laws

For a compliance program to be effective, a company needs to rely on individuals within the company, or acting on its behalf, to raise concerns about suspected or actual violations of the compliance program or foreign bribery laws.[231] A company should therefore provide an internal and confidential reporting mechanism for suspected or actual violations of the compliance program and foreign bribery laws.[232] A company should also protect individuals who report suspected wrongdoing from potential retaliation.[233] A company should further respond to any reports of suspected or actual violations and undertake whatever appropriate action necessary to address the relevant conduct.[234]

226. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 4; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 12; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 61; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 72.

227. *See* sources cited *supra* note 226.

228. *See* Murphy & Boehme, *supra* note 132, at 273.

229. *See id*.

230. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 3; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 13; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 62; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 73.

231. *See* TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 12.

232. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 4; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 13; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 61; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 72; *see also* UK GUIDANCE, *supra* note 106, at 29; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 12; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(5).

233. *See* FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(5).

234. *See* OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 4; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 13; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 62; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 73.

V. Monitoring and Review of Compliance Program

The company should monitor and conduct periodic reviews and tests of its compliance program and procedures "to evaluate and improve their effectiveness in preventing and detecting" violations of the compliance program and the foreign bribery laws.[235] The purpose of the monitoring and review is to make sure that the compliance program is working and to make improvements when necessary.[236] The periodic reviews and tests should also take into account "relevant developments in the field, and evolving international and industry standards."[237] In this respect, the compliance program and procedures should be evaluated and changed, if necessary, to adapt to a changing business and legal environment.[238]

W. External Verification of Compliance Program Effectiveness

Beyond the periodic monitoring and review of the compliance program, the company should obtain external verification of the compliance program's effectiveness.[239] Having an outside party review the compliance program periodically is a best practice in the anti-bribery field that can further assure that a compliance program is working effectively.[240] To conduct a truly independent review, the individuals subject to the review—usually managers overseeing the compliance program—should not be able to influence the review's outcome.[241]

X. Anti-Bribery Provisions in Contracts with Third Parties

A company should include standard provisions in agreements and contracts with third parties acting on its behalf "that are reasonably

235. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 3; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 14; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 63; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 74; *see also* UK GUIDANCE, *supra* note 106, at 31; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 14; FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(5)(B), (c).

236. *See* UK GUIDANCE, *supra* note 106, at 31.

237. OECD GOOD PRACTICE GUIDANCE, *supra* note 7, at 3; Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 14; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 63; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 74; *see also* UK GUIDANCE, *supra* note 106, at 31.

238. *See* UK GUIDANCE, *supra* note 106, at 31.

239. *See id*.; TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 14.

240. *See* Murphy & Boehme, *supra* note 132, at 278.

241. *See id.*

calculated to prevent violations" of the foreign bribery laws.[242] Such provisions should include anti-bribery representations and undertakings relating to compliance with the foreign bribery laws.[243] The provisions should also provide the company with the right to conduct audits of the books and records of the third parties to ensure that such parties are complying with foreign bribery laws.[244] The provisions should further provide the company with the right to terminate the third parties when there has been a violation of the foreign bribery laws or of the anti-bribery representations and undertakings made with respect to compliance with the foreign bribery laws.[245]

Y. Due Diligence of Personnel Overseeing the Compliance Program

A company should use "reasonable efforts," including exercising due diligence, to ensure that individuals overseeing the compliance program have not themselves engaged in illegal activities or conduct inconsistent with the compliance program.[246] A company should not have unscrupulous or unethical individuals overseeing the program. Although the ramifications of having such unqualified individuals govern the compliance program is obvious, the procedure is notable because it is one of the main procedures recommended in the Federal Sentencing Guidelines.[247]

Z. Due Diligence over Personnel Hired or Posted in Positions Involving a High Risk for Bribery

A company should conduct due diligence over personnel hired or posted in positions involving a high risk for bribery.[248] A position may be considered high risk because its duties involve activities that are more precarious in nature, such as procuring foreign government contracts.

242. Armor Holdings Non-Prosecution Agreement, *supra* note 116, at 13; Tidewater Deferred Prosecution Agreement, *supra* note 123, at 63; Alcatel-Lucent Deferred Prosecution Agreement, *supra* note 122, at 73-74.

243. *See* sources cited *supra* note 242.

244. *See* sources cited *supra* note 242.

245. *See* sources cited *supra* note 242. These procedures go a step further than due diligence and compliance requirements pertaining to retention and oversight of outside parties acting on behalf of the company, as recommended in Part V.N., and are procedures that have been particularly stressed in recent DOJ non-prosecution and deferred agreements. *Id.*; *see also supra* notes 209-12, and accompanying discussion. The Transparency International Business Principles recommend similar procedures with respect to "agents" and "intermediaries." TRANSPARENCY BUSINESS PRINCIPLES, *supra* note 147, at 11.

246. FEDERAL SENTENCING GUIDELINES, *supra* note 87, § 8B2.1(b)(3).

247. *See id.*

248. *See* UK GUIDANCE, *supra* note 106, at 28.

The position may also be high risk because it is located in a country where bribery is prevalent, such as Somalia. Whichever the case, the company should conduct due diligence over individuals entering or being posted in high-risk positions to ensure that such individuals have a clean record and are qualified to carry out their obligations. The company should consider incorporating such due diligence into its recruitment and human resources functions.[249]

VI. CONCLUSION

In the current global anti-bribery era, it is dangerous for companies to be relaxed or complacent about their foreign bribery compliance obligations. Countries and regions throughout the world have committed themselves to combating foreign bribery through treaty obligations such as the African Convention and the United Nations Convention. Furthermore, many countries now have laws designed to prosecute foreign bribery and root out corruption.

Enforcement of the foreign bribery laws has also been more aggressive. The OECD is pressuring countries to be more vigilant in enforcement. In addition, the United States is continuing to pursue companies, both domestically and abroad, that have engaged in foreign bribery in violation of the FCPA.

Companies need to adapt to the current international anti-bribery environment and tailor their compliance programs accordingly. The days when companies can exclusively rely on their FCPA compliance programs are long gone. There are newer foreign bribery laws, such as the UK Bribery Act, and greater global enforcement efforts that mandate companies to have a more expansive view of their compliance obligations. Furthermore, with the international community providing recent guidance on compliance, such as through the OECD Good Practice Guidance, it is possible for companies to implement compliance programs that meet their international foreign bribery obligations. Therefore, companies need to consider the international guidance, and the procedures recommended in this article, and modify their compliance programs accordingly to make their programs true international foreign bribery compliance programs. Companies that do so will find themselves better protected in a world increasingly hostile to foreign bribery.

249. *See id.*