The Foreign Corrupt Practices Act: A Practical Discussion of the Law and Compliance Programs for California Business Attorneys, Part II

Stephen F. Clayton

Stephen F. Clayton is an attorney specializing in Foreign Corrupt Practices Act matters, international commercial law, and international intellectual property law. From 1988 until 2010, he was in-house counsel with Sun Microsystems. In 2005, he became Sun's Senior Director for Anti-Corruption Compliance and was responsible for Sun's global FCPA compliance. At Sun, he developed and implemented anti-corruption programs, including the most comprehensive business-partner due diligence program in the computer sector, and conducted FCPA investigations in many countries. Since early 2010, when Sun was acquired by Oracle, Mr. Clayton has served as an independent consultant on FCPA compliance. He received his J.D. from McGeorge School of Law and his LL.M. in Asian law from the University of Washington School of Law.

Part I of this article (26 CEB Cal Bus Law Prac 107 (Fall 2011)) discussed the increasing FCPA exposure of California companies with international business, the history of the FCPA, and recent stepped-up enforcement efforts. It provided a basic review of the FCPA, including the FCPA's bribery prohibitions and its requirements for books and records and internal corporate financial controls, and summarized criminal and civil penalties and the new whistleblower program. Part II addresses FCPA compliance programs for California businesses.

FCPA COMPLIANCE PROGRAMS FOR CALIFORNIA BUSINESSES

Compliance Programs Generally

The basic purpose of an anti-corruption compliance program is to deter corrupt activity and to detect any corrupt activity that may still be occurring. In theory, a robust compliance program should eliminate corrupt activities in a company's global business. In practice, the people who engage in bribery are smart, greedy, motivated, and very good at devising schemes that are difficult to detect. A secondary but valuable purpose of a compliance program is to get credit for having a program in place in order to reduce the financial impact of violations under the Federal Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual (Nov. 2010), available at http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm.

There are a variety of sources describing what a company should include in a state-of-the-art FCPA compliance program. In late 2010, the U.S. Department of Justice resolved six cases (Panalpina, Shell, Transocean, Tidewater, Noble, and Alcatel), all of which contained a nearly identical and very specific list of 13 program elements. See, *e.g.*, *United States v Alcatel-Lucent, S.A.* (SD Fla, Feb. 22, 2011, No. 10–20907), Deferred Prosecution Agreement, Attachment C (Attachment C Compliance Program), available at http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/02–22–11alcatel-dpa.pdf. See also Fox, DOJ Guidance on FCPA Compliance Programs, available at https://www.infosecisland.com/blogview/9531-DOJ-Guidance-on-FCPA-Compliance-Programs.html, which contains links to the other cases. The Attachment C Compliance Program is the best guidance available regarding what U.S. authorities now consider to be an adequate FCPA compliance program. It sets a very high standard for companies, and many companies will need to revise their current programs to ensure that they incorporate each of the 13 elements.

Elements of an FCPA Compliance Program

The 13 elements of the Attachment C Compliance Program are summarized below, although the order of certain items has been changed to follow the sequence in which companies will normally address them.

(1) Develop an FCPA compliance program based on a risk assessment addressing the company's specific circumstances.

(2) Ensure that senior management provides strong, explicit, and visible support for and commitment to the anti-corruption program.

(3) Publish a compliance code and a clear, visible, written policy against violations of the FCPA and other anti-corruption laws.

(4) Assign one or more senior corporate executives with adequate resources and autonomy to implement and oversee the anti-corruption program and report up.

(5) Promulgate a system of compliance standards and procedures to reduce violations, with specific subpolicies on important topics.

(6) Ensure that the company has a system of financial procedures and controls to ensure accurate books and records that cannot be used to conceal bribery.

(7) Include standard provisions in contracts, including compliance undertakings, audit rights, and a right to terminate for breach of anti-corruption laws.

(8) Inform company agents and business partners of its anti-corruption standards and implement appropriate risk-based due diligence and training concerning the retention and oversight of agents and business partners.

(9) Ensure that the FCPA compliance program is communicated through periodic training of directors, employees, and business partners, and that the company receives annual compliance certifications.

(10) Establish effective systems for providing advice to directors, employees, and business partners, reporting violations to the company, and responding to reports with appropriate action.

(11) Implement appropriate disciplinary measures to address violations and employ proper remedial actions.

(12) Review the anti-corruption standards and procedures annually and update them to ensure continued effectiveness.

(13) Conduct periodic testing and evaluation of the FCPA compliance program and procedures.

In addition, a company should:

(14) Dedicate an adequate ongoing budget and sufficient human resources to enable its FCPA compliance program to be effective, and keep excellent records of everything that the company does to implement each element of its compliance program.

Examining the Elements of an FCPA Compliance Program

Reviewing the elements of an effective FCPA compliance program is important to understand the type of program that a company should have in place in order to satisfy the DOJ that the company is making a serious compliance effort and should not be prosecuted (or should be entitled to reduced penalties). In practice, the DOJ and SEC seem to give greater deference to companies that have complete, well-established compliance programs and that self-report violations, allowing them to conduct their own internal investigations and report the results. The agencies are more likely to decline to prosecute if a company with a strong program can present clear evidence that a violation was committed by a “rogue” employee who had been trained and knew the rules but broke the law anyway for personal gain. This is especially true when the company’s compliance program detected the rogue’s conduct and the company conducted a thorough investigation, undertook effective remedial action, disciplined the employee, and improved its practices.

The remainder of this article discusses each program element in more detail.

Element (1): Company-Specific Risk Assessment

The first action a company should take is to assess its actual FCPA risk by examining where and how corruption could occur within the company. Risk varies greatly depending on how and where a company does business and the company’s attitude toward compliance. Some companies’ boards of directors and business management have a much higher tolerance for risk than others.

Many companies never perform any type of focused FCPA risk assessment for several reasons. In some companies, the FCPA risk is obvious; management may be certain that the company is at risk of being involved in bribery and does not believe that more funds should be spent to study the matter. In other companies, management may be blinded by its opinion that the company is clean and that there is no risk to assess. In still other companies, management may be afraid that if a risk assessment is performed, problems will be found that need to be addressed, and management does not want the distraction and expense. Senior management in many companies may remain oblivious to the FCPA because, in their own experience, it has never applied to their business.

A lawyer advising a company that is engaging in international business should recommend that the company perform an FCPA risk assessment. It may be prudent to have an outside lawyer conduct the assessment so that it can be performed with the benefit of the attorney-client privilege. The assessment should take into account where the company does business, how it interacts with government officials, whether government licenses and permits are needed in its business, how much oversight governments exercise over its business, its volume of government business and volume of imports and exports, and the market sectors in which it operates.

Typical areas of risk include foreign subsidiaries, joint ventures for international business, use of agents, use of lobbyists, required permits or approvals, sales through distributors and other sales channels, business in countries rated as high risk of corruption on the Corruption Perception Index (CPI) (see Part I of this article), litigation in countries known for corrupt court systems, lack of a program for due diligence on business partners, and loose controls over corporate expenses for gifts, meals, entertainment, and travel. The absence of one or more of the 14 elements of an FCPA compliance program outlined above is a risk in itself.

The risk assessment should make clear to management where the company should commit its scarce compliance resources. Without a risk assessment, a company is "shooting in the dark" and may be spending money on compliance activities that are not adding to its security or ignoring areas in which corrupt activities are common.

Element (2):
Strong, Visible Senior Management Support

Senior management must be seen to be engaged in FCPA issues and to care about ethical business activities and FCPA compliance. This is known as "tone at the top." The enforcement agencies of the U.S. and other governments want to see clear evidence that a company's top management team is committed to anti-corruption compliance efforts.

It is helpful if the CEO is a true believer in anti-corruption compliance and personally promotes the company's compliance program from the top. Often, however, the CEO, CFO, general counsel and other senior managers do not do so. Whether or not the management is enthusiastic, "tone at the top" must be conspicuous to all employees and third parties, so it should be planned, documented, and reinforced. A written record of senior management's communications on compliance, including copies of all communications, over a period of 3 or 4 years will be impressive to a prosecutor or regulator. If there are no such written records, it will be difficult to convince enforcement agencies that the appropriate tone at the top existed.

The company's FCPA subject matter expert should conduct FCPA briefing sessions and prepare memoranda for the board of directors, the CEO, the CFO, and other senior officers. The sessions should include slide presentations, talking points, and other communications designed to be given by senior management and cascaded down through the organization at periodic intervals. The content and frequency of these communications can be planned for each fiscal year. These may include videos of senior management discussing the company's policy against corruption that can be used in training sessions around the world. After a few years of well-documented execution of the plan, everyone in the company, as well as third parties dealing with the company, should believe that the management team knows the issues, sincerely wants to end company involvement in corruption, and supports the compliance program. The cost of creating an appropriate tone at the top is minimal and the benefits are extremely high.

Element (3):
Written FCPA Compliance Policy

Companies with FCPA risks must have a written FCPA compliance policy. An appropriate, company-specific policy can be created for relatively low cost and will set the tone for the entire FCPA compliance program. Many companies turn to outside counsel to provide them with a suitable policy, but an outside counsel's form is just a starting point. In the best case, senior management working with company lawyers should develop the policy. Senior management is responsible for determining the level of exposure to corruption risk that the company is willing to accept, and must also dedicate the resources needed to fund the type of anti-corruption compliance program that it decides is appropriate. When senior management has been involved from the start, the program will have legitimacy as a business program, rather than “something Legal is making us do.” The policy and the tone at the top clearly reinforce each other. When it is clear that the policy came from senior management and that management strongly supports it as part of the company’s culture, employees and other stakeholders will understand that FCPA compliance should not be viewed as a burden but rather as a means of ensuring an efficient and profitable enterprise.

An anti-corruption policy should not be a lengthy document. Four to six pages should be enough to state everything needed. A longer document will go unread and be easy to ignore. The policy should be clearly written in plain English. The program developed under the policy should include all 13 of the Attachment C Compliance Program elements.

The policy will apply to subsidiaries and foreign operations, so it should be drafted in short, simple sentences that are easy to translate. The FCPA should be mentioned specifically, but the focus of the policy should be on preventing corruption from harming the company’s global business in every country. Company employees in all parts of the world should understand that the policy is not merely a tool to impose U.S. law in their country. Basing the policy on anti-corruption laws in general should result in greater acceptance by foreign employees and business partners, as well as demonstrate to U.S. employees that they too need to be on the lookout for corruption issues.

Company management should determine whether the company will prohibit commercial corruption and what to do about facilitating payments. Matters requiring detail that may not apply to all employees—such as a due diligence program; gifts, meal, travel, and entertainment policies; expense reporting; political and charitable donations; and investigation procedures—should not be included in the policy itself, but instead should be expressed in separate plans or programs subordinate to the policy. For example, every employee needs to know that bribes are forbidden, but only a few will need to deal with the details of reporting gifts, meals, travel, and entertainment expenses for government officials.

Finally, when creating a compliance policy, it is important to keep in mind that an overly ambitious policy may be risky. The company must be capable of implementing and enforcing the policy and the programs under it successfully and consistently. Creating a policy and a series of programs that are so complex that the company cannot implement or maintain them in practice is worse than ineffective—it can create liability. Evidence that the company was tolerating violations of its own policy is a red flag, indicating possible FCPA violations, and the entire compliance program may be seen as a sham. For a public company, failure to have an adequate system of controls is a violation of the FCPA.

Element (4):
One Senior Executive in Charge of Program

It should be made clear to all employees that a designated member of the senior management team is responsible and accountable for anti-corruption compliance. If no single executive is accountable, there will likely be no functioning compliance program. Of course, the senior executive may delegate parts of the company’s compliance effort to the legal, compliance, or other departments or assign it to outside counsel. In-house counsel is less likely to be ignored by company managers if he or she is implementing the instructions of a senior corporate officer with stature and clout in the organization.

The most important question concerning this aspect of the compliance program is: Which executive should be charged with the anti-corruption role? Business people view anti-corruption compliance as a legal matter, so many executives assume that FCPA compliance should be an additional responsibility for the company’s general counsel (or its chief compliance officer, if the company has one). That may seem natural, but often the general counsel is stretched thin. Adding FCPA responsibility to an already overloaded executive may create a situation where the compliance program becomes a minor concern or an annoyance, and FCPA issues may slip through the cracks. If the general counsel does not have sufficient time to stay up to date with anti-corruption laws and to manage the program actively, and does not have the ability to hire or reassign an individual to do that work, he or she should decline the job. Note that the person in charge of company's FCPA compliance may have personal liability as a "control person" if employees or business partners violate the FCPA or if the program is underfunded and ineffective. See 15 USC §78ff(c)(2). See also 15 USC §§78dd–1(a), 78dd–2(a), 78dd–3(a), 78.

The decision regarding whom to put in charge should be based on the amount of international business that the company does and its objective assessment of its corruption risk. As a best practice, large multi-national corporations should hire an experienced full- or part-time, anti-corruption compliance expert to run the company's compliance program and to report to the executive in charge. Assigning a junior or mid-level company attorney to become the company's FCPA specialist may constitute a risk.

The decision to hire a specialist to run an anti-corruption compliance program should be risk-based. The cost of the program should be weighed against the probability and cost of possible violations, including the cost of training, cost of investigations, disruption to the organization, fines, remedial actions, cost of legal defense, imposition of monitors, bad press, and other potential expenses.

Smaller companies are also required to have a corporate executive designated as in charge and accountable for anti-corruption compliance. In most small and mid-size companies, it will be necessary to assign this role to the general counsel, chief financial officer, or chief compliance officer (if there is one). When making that decision, it is important to ensure that the individual taking on the responsibility has sufficient time available to learn the risks and responsibilities of the position so that he or she can be an active participant. If the company's risk assessment identifies serious ongoing risks, relying on an overloaded general counsel or CFO to serve as an anti-corruption officer might actually increase those risks, particularly if senior management does not think that the company has an FCPA problem.

A company can designate a senior executive as the person in charge of anti-corruption compliance and fill the role of subject-matter expert or program manager (or both) with inside or outside counsel. In-house counsel will need time to learn the anti-corruption laws, understand the company's international business and recordkeeping systems, and develop and manage the program, so it may be more efficient and cost effective to engage outside counsel to do so. Outside counsel with FCPA experience and knowledge of the company's business may run the FCPA program expending only a few billable hours a month, or the work can be done on a monthly retainer.

The qualifications and experience of any outside counsel selected to advise on international anti-corruption matters or to run a company's compliance program should be considered carefully. Experience as a federal prosecutor usually is not necessary. Former prosecutors are useful in situations where serious investigations must be conducted and may result in evidence of a violation, so that disclosure to the DOJ or SEC may be necessary. Even then, only a few former DOJ attorneys have substantial experience working on FCPA matters. The biggest problem is that most former prosecutors have little to no experience with international business or corporate management, which are relevant to most of the work that an in-house anti-corruption specialist does.

Note that it may not be essential that the person in charge of the anti-corruption program be a lawyer. An experienced international business executive with solid program management experience who actually believes in keeping the company free of corruption may be more effective than a lawyer. However, the need to have someone in charge of an FCPA compliance program cannot be fulfilled by designating an existing senior manager and giving that person no budget, no personnel support, and no time to gain expertise. If that is done, the government is likely to give the company no credit for having an adequate FCPA compliance program in place.

Element (5):
Compliance Standards and Procedures
to Reduce Violations

The company's policy against corruption needs to be conspicuous. Management should foster a corporate culture in which anti-corruption compliance is viewed as part of the company's mission and way of operating. To do this, management should make the compliance standards public and promulgate them throughout the company. The anti-corruption policy should be placed online, in a readily accessible place on the company's internal and external websites.

Compliance programs under the policy should likewise be conspicuous and easily accessible to all employees who need to use them. Programs should include standards governing gifts, hospitality and entertainment expenses, customer travel, political contributions, charitable contributions and sponsorships, facilitation payments, and solicitation and extortion.

The company's policy and compliance standards should be noted in employment contracts and discussed during the hiring process. Employee performance reviews are another place to assess an employee's adherence to compliance standards. Compliance officers should work with Human Resources to develop an objective basis for reviewing managers and employees. For example, the company could make a sales manager's incentive bonus contingent on his or her having reviewed the anti-corruption program twice each year with members of his or her staff and ensuring that all staff members attend required training. The deliverables should be easily measurable and should not be difficult to achieve, but failure to achieve them should be costly. Constant reinforcement demonstrates to employees and the enforcement agencies that anti-corruption compliance is important to the company.

Although the company's compliance policy and standards should be public, just how public a company should make them depends on its individual risk assessment. If the company conducts business in countries known for high levels of corruption, the company may want to make its compliance standards more public.

Joint ventures and consortiums present another compliance issue. A U.S. company must make good faith efforts to ensure that its joint venture partners comply with the FCPA, even if the company is not the majority owner or managing partner. See 15 USC §78m(b)(6). A large U.S. company may find it difficult to convince the SEC or DOJ that it could not impose strong anti-corruption procedures in any joint venture that it entered into with a foreign company, especially a smaller company. Allowing its partner to water down anti-corruption compliance procedures could indicate that it was not acting in good faith regarding FCPA compliance.

A small U.S. company that is a minority participant in a joint venture with a large foreign company may find it impossible to insist that strict anti-corruption compliance policies are put in place and enforced. In that case, management should understand that the company may still be investigated for corrupt practices of joint venture employees. If red flags are raised during joint venture operations and the U.S. company learns that questionable transactions are taking place, it should insist that its joint venture partner and the joint venture entity take appropriate action. If its demand is refused, management should recognize that it may be necessary to withdraw from the venture, even if that results in a large financial and market loss. Companies should draft joint venture agreements with as many options as possible to provide flexibility in these difficult situations. They will have maximum leverage at the time of negotiation and little when a crisis hits.

Element (6):
Financial Controls to Ensure Accurate
Books and Records

A system of internal financial and accounting controls is one of the fundamental requirements of the FCPA. Existing accounting controls are a good starting point, but companies also need to focus on how their financial controls apply to the company's FCPA compliance program. A company will usually find that additional financial procedures are needed to track and prevent potential FCPA issues.

The finance department should be closely involved in the company's FCPA compliance program. False or inaccurate books and records represent a company's most significant risk, and FCPA violations disclosed on the company's books are the easiest ones for the SEC to prove. Carefully designed financial and accounting controls and good recordkeeping should enable the company to uncover substantive violations of the FCPA and to ensure that illegal payments are not made and records are not falsified. To accomplish this, the finance department must be involved when the company is making its FCPA risk assessment and reviewing its FCPA compliance program. This will help the company decide on an appropriate level of internal controls.

Every corporate finance system should include processes for keeping track of receipts turned in by employees and legitimate business reasons for disbursements. This is most important in the area of gifts, meals, travel, and entertainment for government officials. The finance department must ensure that the company's systems can help detect and prevent violations of the policy and the law. When the company discovers new ways that employees or partners are getting around the rules, it must make appropriate changes to its finance systems to detect and prevent the behavior in the future.

Two areas that should receive specific attention are customs and tax payments. Many FCPA cases have involved improper payments to customs officials, because many business people assume that they will be required to make facilitating payments. Tax evasion is rampant in many countries, and local management may be asked to participate in tax evasion schemes of their business partners or customers. Doing so usually involves creating or accepting false or inaccurate records and thus implicates the FCPA. The company should have a process to verify that all customs and tax payments are valid and properly accounted for.

Element (7):
Specific Contract Provisions for
FCPA Compliance

The SEC and DOJ are always interested in the actions of a company's agents and business partners, and the company should be able to show that it included appropriate anti-corruption provisions in all international contracts. What terms are appropriate depends on the level of risk involved. Unusual relationships or nonstandard agreements may constitute red flags, so the business justification for any departure from normal practices should be documented. Determining the specific language to include in an agreement should not be difficult. If the company has its own anti-corruption expert, that person should establish a set of standard terms and work with the company's business lawyers to include them in contracts. Outside counsel can also provide advice. In most situations, the company will be dealing with sophisticated international business people who understand the anti-corruption language and the reason why anti-corruption provisions must be included. A prospective partner's insistence on deleting reasonable anti-corruption compliance language from a contract constitutes a large red flag, and the company's due diligence procedures should not permit the company to execute such a contract. The most difficult area may be the company's right to audit its partner's books and to investigate its partner's business. Audit rights should be worded broadly to enable the company to conduct an appropriate and unhindered anti-corruption investigation in response to corruption allegations.

At some point, the company may need to conduct an investigation of a business partner or may need a business partner's cooperation when investigating its own employees. Because FCPA investigations often center on the conduct of business partners, the business partner's cooperation will be necessary to allow the company to conduct a thorough investigation of an alleged FCPA violation. Any failure of a business partner to cooperate fully with an investigation should be specified in the contract as good cause for termination.

Even with a contractual provision that permits the company to conduct broad anti-corruption audits and investigations, an agent or partner may not cooperate. An investigation probably cannot be forced on the other party, but having appropriate contractual provisions in place will demonstrate that the company took FCPA compliance seriously. The company should recognize that it might need to terminate its relationship with the recalcitrant partner, even at the risk of significant financial harm to the company.

It is not unusual for U.S. companies to agree that the law of the other party's country will govern an international contract. In that event, mentioning the FCPA in the contract might annoy foreign partners who might consider it overreaching to import U.S. law into the contract. A way to avoid this is to use the specific compliance language of the FCPA in the contract without actually referring to the FCPA. Moreover, the local law of the partner's country should have anti-corruption provisions similar (or even more strict) than the FCPA. Local law is also useful because it may allow penalties to be included in the contract that would not be enforceable under U.S. law.

The company can use its contract application process and its methods for contract negotiation to impress on prospective agents and business partners that anti-corruption compliance is an extremely important business consideration for the company. Agents and business partners need to know that any violations on their part will damage the business relationship and may result in a variety of penalties, including termination of the relationship. To the extent possible, the company should consider including penalties short of termination so that it can apply pressure without ending the relationship. Penalties could include making a partner who is in breach ineligible for marketing incentives, special discounts, or financing; restricting the partner's territory; or eliminating the partner's exclusivity rights. If senior management has previously created the right tone at the top, it will be much easier to impress business partners that anti-corruption compliance is important to the company and cannot be bargained away.

The company must also take care to comply with local law when imposing any contractual sanctions. The contract may be clearly worded, but local law and public policy may restrict what can be done or include protections for local companies involved in international distributorships.

Element (8):
Risk-based Due Diligence and Oversight of Business Partners

Lawyers and business people often do not understand that FCPA due diligence is not optional. The enforcement agencies generally consider an anti-corruption compliance program that does not include an appropriate level of due diligence inadequate. In the FCPA context, "due diligence" means conducting a background investigation of an applicant or potential partner that is sufficient to give the company reasonable assurance that that party is not involved in, or likely to become involved in, corrupt activities. That means that no red flags were found or that any red flags the company did find have been resolved in the due diligence process.

The first step in a due diligence program is to determine how many third parties the company has contracted with, who they are, why they are being used, and whether they deal with any government. Many companies have no idea how many third parties they deal with because they have never had any reason to assemble that information. Different parts of the company may each have authority to contract and deal with third parties, and records may be kept in inconsistent ways throughout the company.

The specific level of due diligence that is adequate depends on the risk presented. There is a lot more FCPA risk in setting up distribution channels in Russia or Vietnam than in Canada or France. The CPI is a valuable tool; merely doing business in a country with a poor CPI rating is a red flag. A company would be hard pressed to explain to the DOJ why it did not perform due diligence on intermediaries in Russia. Due diligence must take into account corruption risk and be adequate to find relevant facts. One size does not fit all.

Due diligence involves a variety of techniques, including, *e.g.*, questionnaires completed by prospective partners, background checks, interviews, media and database checks, consultations with third parties to obtain reliable local information, use of forensic accountants to review books and records, site visits to the offices of prospective partners, and affidavits by company employees accountable for selection of the prospective partner. The scope of adequate due diligence will vary from industry to industry, country to country, the nature of the company's relationship with its prospective partner, and how the relationship fits into the company's business model. Reasonable risk assessments that the company makes will determine the scope of due diligence needed for specific partners.

Companies with thousands of third party agents and partners should designate a program manager to take charge of the due diligence program and to be responsible for carrying it out systematically. The company should also designate a small group of individuals (by name or by position) who will be accountable for determining that due diligence has been completed on any new business partner before a contract is signed. They must be trained because they will be required to certify in writing that the due diligence process has been followed, all necessary materials have been reviewed, and no red flag or other evidence of corruption has come to their attention. Clear accountability and complete recordkeeping is important so that the company will be able to show that due diligence on a specific partner was properly done if asked by an enforcement agency years after the fact.

Due diligence should be completed before the company enters into any contractual relationship with a third party. As part of oversight of third party relationships, due diligence should also be performed periodically throughout the relationship, either at the time of renewal of the contract or at intervals that should not exceed 3 years. The frequency of ongoing due diligence review should be based on the perceived corruption risk. If a red flag is detected at any time during the relationship or a tip is received concerning the partner, the company should undertake further investigation using the prior due diligence as a starting point.

Due diligence programs cost money. Outside investigator fees range from a few hundred dollars to over $10,000 per party investigated. Many companies do an internal investigation using questionnaires, direct inquiries to the prospective partner, written recommendations from employees, and Internet searches of open source materials. Doing that in a programmatic manner is much better than conducting no due diligence at all, but an informal review is not likely to be adequate in high-risk circumstances. Even a routine "check the box" due diligence process will require dedicated, knowledgeable internal resources as well as external costs.

The company must maintain accurate records of all due diligence; database tools will therefore be needed and will vary depending on the number of the company's third party agents and partners. A number of investigating and consulting companies have developed specific software programs for automating the due diligence process. These programs are extremely useful and cost-effective when the company is dealing with a large number of third parties.

Many companies divide their agents and partners into two or more categories and apply different levels of due diligence to the categories based on the company's perception of risk. The highest-risk group usually includes categories such as joint ventures in high-risk countries, intermediaries who deal with government customers in high-risk countries, commissioned agents, lobbyists, and resellers who are permitted to receive extraordinary additional discounts in competitive situations. If the company operates in a country with a reputation for corruption or in a high-risk industry, or if its main customers are foreign governmental entities, a higher level of due diligence must be performed.

FCPA due diligence has become an industry of its own in the past several years. Several vendors now can provide fast online reviews of hundreds of international databases to look for red flags. Actual private investigation work based on a company's needs and budget is available from providers around the world. Some providers can also handle the recordkeeping and administrative part of the process.

Depending on the level of risk and the availability of trained in-house resources, a large part of the due diligence effort may be done by the company itself. The usual starting place for any due diligence is to have the party under investigation complete an information questionnaire for internal review by the company. The information on this questionnaire should be incorporated by reference into the contract so false information can be used as grounds for termination. In addition to hiring investigators, information about potential business partners can be acquired by contacting the U.S. Commercial Service at local U.S. embassies, which can provide detailed reports for a fee.

Finally, as part of ongoing oversight, a company should require its business partners to certify in writing on a regular basis that they understand the FCPA, have completed necessary training, have reviewed their employees' conduct and business, and have not seen any red flags, and that the information that they provided in the past remains correct and complete. The certification can be done on a one-page form and will be good evidence that the company is taking its duty of oversight seriously.

Element (9):
Communicating the Program Through Periodic Training

An anti-corruption compliance program without a robust training component is inadequate. Many managers do not understand the FCPA and do not understand why paying bribes outside the U.S. or falsifying corporate records is a felony. Foreign employees and business partners also may lack an understanding of the law and how it may apply to citizens of their own country. Without training, they cannot be expected to understand the risks or their duties.

Anti-corruption training programs usually include written materials and periodic training sessions, either online or in person, or both. Effective training should use real-world examples of what goes on in the company, the industry, and the countries where the company does business. Trainers should employ case studies drawn from actual problems faced by the company in the past, as well as problems that are likely to occur in the future. After an employee's initial training on hiring, periodic follow-up sessions and online reminders are needed to reinforce the company's anti-corruption policy.

Records of all training should be kept, in a manner that allows easy retrieval. In the future, the company may be called on to prove that specific employees actually received training and to furnish the date and content of that training. The company should therefore have a process for recording all training data and should retain that information. A good practice is to have each employee sign an acknowledgement stating that he or she completed each instance of training, reviewed the compliance materials, and understands his or her FCPA compliance responsibilities.

Many different kinds of training are currently available. In-person training remains the gold standard and, when done properly, is the most effective method. People tend to pay more attention to a live presentation, and live presentations allow employees and business partners the opportunity to ask questions and solidify their understanding. A live training session can include discussions of specific issues that employees are facing. In-person training with dialogue not only helps the individuals attending to understand the policy and their duties, but can also alert the company to the types of problems that employees and business partners in specific locations are experiencing. The company can thereby adjust its compliance program and training sessions to match the reality of its business operations.

Although in-person training may be best, it can be expensive in employee time and travel cost, and trainers must have a high level of expertise. In the past 5 years, FCPA training has become increasingly automated. Online and computer-based training programs can reach thousands of geographically diverse employees and partners at relatively low cost. Online programs have also become more flexible and effective. Providers will customize a training program for the client for a fee. Online training can present much of the same material as an in-person session and may even allow questions to be submitted and answers given.

Training sessions should be focused on specific audiences. Depending on the company's overall risk profile, a general presentation for all new hires should be short but broad in coverage. Presentations for the board of directors and the CEO's staff should also be short and should concentrate on higher level policy considerations and the attendees' duties. Training for groups such as the international legal and finance, internal audit, and international sales management teams should be longer and include real-life examples of red flags seen in the industry.

An effective training program must also be risk-based. Employees and business partners working in or with countries that are known for serious government and business corruption should receive detailed training that focuses on country-specific issues. Employees in high-risk market segments such as governmental sales or services, health care, and education should also receive more thorough training. Every employee who might see a red flag should understand the basics of the FCPA and the risks that being involved in corruption presents to the company. Employees should also understand that any failure to report suspicious activity or to cooperate fully in an investigation might result in disciplinary action.

Companies should consider which manager or department should present the in-person training. Many companies delegate anti-corruption training to the legal department, and it is often provided by a lawyer familiar with a particular region or country. When anti-corruption training is included as part of a larger session, such as a quarterly or annual sales team training, a presentation by a lawyer may be a signal to the audience to pull out their smart phones and check e-mail. It is much more effective for in-person anti-corruption training to be given by respected senior business managers. Those managers, however, must understand the details of the company's compliance program and be able to answer questions.

The company should obtain certifications from their senior managers annually that they have complied with training requirements. Certifications help keep management aware that the company's anti-corruption program is important.

Element (10):
Effective Systems for Providing Advice, Responding to Questions, and Reporting Violations

For a program to be effective, the company needs to have some way of providing advice to, and responding to questions from, employees and management. Often, these functions will be performed by a designated FCPA expert, which in some companies may be outside counsel. The company training program and website should clearly point employees and management to this person for responses to urgent questions or advice on potential red flags.

An anti-corruption compliance program must include internal processes that permit employees, contractors, business partners, and even third parties to report violations of the FCPA or concerns that suspicious conduct may be occurring. In public companies, the structure for reporting should already be in place under the company's Sarbanes-Oxley compliance program or other programs for reporting violations of law or company policy, such as claims of sexual harassment. For a company's general reporting program to include FCPA compliance effectively, the company must make sure that the individuals receiving the reports are able to recognize basic FCPA issues and red flags. For example, every allegation of false or inaccurate corporate records should always be tagged as a potential FCPA case and routed to the company's FCPA expert. Employees and business partners must be made aware of the reporting system. The details of the reporting system should be reinforced in every training session, posted conspicuously on the company's website, mentioned in its policies and programs, and communicated in other ways.

Many employees may be reluctant to report the activities of their fellow employees, managers, or business partners. Employees often do not understand that what they need to report are red flags, *i.e.*, any activities, statements, or documents that make them suspicious that a violation may have occurred or be occurring. Employees often believe that they need to have fully developed proof before they report activity that might implicate another person. The company's training program should emphasize that employees are not expected to develop evidence or investigate on their own before making a report. An employee's job is simply to report red flags. The compliance team will investigate employee allegations and determine whether a violation has in fact occurred, or will bring in outside specialists to conduct the investigation. Company policy should emphasize that all employees, contractors, and business partners are required to cooperate fully with any internal or external investigation and that the failure to do so will result in their discipline or termination.

A reporting system only works if individuals are encouraged to use the system and are convinced that they will not be subject to retaliation. The program should allow for anonymous reporting, either by telephone or in writing, and generally should assure individuals who make reports that their identities will be protected. It is common for the hotline to be outsourced to an external service provider. The hotline should be able to receive calls in many languages, so that employees or partners everywhere the company does business can use them. Reporting systems should also allow written reports to be made, *e.g.*, by e-mail, because some employees may feel more comfortable making a written report.

In addition to using a hotline, companies should encourage employees to report questionable conduct to designated senior managers—in many companies, to the employee's own supervisor or, if the employee suspects that the supervisor will retaliate or do nothing, to the next level up. For conduct that constitutes an FCPA red flag, however, this is not the best practice. Company management may call a meeting to discuss the reported conduct, but that can tip off perpetrators and make a subsequent investigation very difficult. If an employee is suspicious that corruption may be occurring, it is easier for the company to conduct a thorough independent investigation if the employee does not report it to anyone based in the employee's own country. The U.S. parent company should inform all employees, contractors, and business partners that anti-corruption compliance is extremely important and that any suspicion of corruption or falsification of records should be reported to regional legal counsel, the head of the company's anti-corruption compliance program, or other designated U.S.-based senior officer.

Employees often believe that any information they report to anyone within their management chain will not be kept confidential and will come back to harm them. They may believe that any ensuing investigation could result in a person losing his or her job or contract and that a person who suffers harm will retaliate against them. If employees think there is any chance that their report could be disclosed to the local business team, they will not report. An anonymous reporting system can help overcome the fear of retaliation, but it may be difficult for a company to take action based on a single anonymous report, unless the report is extremely detailed.

When information is received, the company should take each report seriously and follow up in an appropriate manner. A full-scale independent investigation using outside counsel may not be warranted in every case. The head of the company's anti-corruption compliance program or FCPA expert should normally undertake follow-up. He or she will be in the best position to determine whether there is sufficient evidence to expand the scope of the investigation and involve outside counsel. A written record of every report and the actions taken to follow up should be made and the company's established investigation procedures should be followed, based on information contained in the report. Any remedial action should be completed and recorded properly.

Companies may be concerned that employees or others might make reports directly to U.S. authorities under the Dodd-Frank whistleblower legislation. See 15 USC §§78u–6—78u–7. One of the best ways to lower the odds of that happening is for the company to have its own established reporting and investigation procedures. If the availability of an internal process is communicated to employees and employees know that the company will take their reports seriously, they may be more likely to report internally rather than to the government.

Element (11): Appropriate Disciplinary Measures and Remedial Actions

Human resources departments usually disapprove of mandated lists of potential disciplinary actions. They instead prefer to be allowed to base discipline on the specific circumstances of each violation of law or company policy. A good compromise for the company may be a policy stating that a violation of its anti-corruption policy constitutes serious misconduct and may result in disciplinary action up to and including termination. Such a policy informs employees that a violation is serious and will allow the company to take disciplinary action on a case-by-case basis, considering the specific facts of each case. Nonetheless, when violations occur, the company should impose real penalties or else the enforcement agencies are likely to conclude that the company's anti-corruption program lacks sharp teeth.

Every public company should make it clear that employees who falsify corporate records will be fired, no matter who they are or what position they hold. Beyond recordkeeping issues, the company should take special care to ensure that its disciplinary policy complies with local law. Many countries, especially in Europe, have laws and administrative processes that, from an

American point of view, make it difficult to actively investigate or terminate employees. Even if the employee intentionally violates company policy, it may be difficult to discipline him or her in a manner that American management would consider appropriate. For example, in Poland, any disciplinary action must be taken within a short period of time, *e.g.*, within as few as 30 days, after the company becomes aware of the misconduct. This allows very little time for the company to conduct an investigation. Slovakian law requires disclosure of evidence of corruption to the prosecutor's office—which can inhibit the process from even starting. In Germany, the company works council must be notified of any investigation, and employees who are interviewed by investigators have a right to have a works council representative present during any interview.

When termination is not warranted or permitted, penalties that may be effective are to demote or transfer the responsible individuals, place a letter of reprimand in their permanent files, revoke eligibility for bonuses or incentives, or reduce pay. Such actions may be considered constructive dismissals, however, and thus must be taken in compliance with local law, otherwise terminated employees could be reinstated after a court action and given full back pay or even damages.

Element (12):
Annual Review and Update of
Anti-Corruption Standards

Compliance programs must be reviewed and updated on a regular basis to ensure that they are effective. It is especially important to update FCPA programs because there have been dramatic changes in FCPA awareness and enforcement in the past decade. A compliance program that was "state of the art" 5 years ago is likely to be mediocre today. The company needs to establish a process to learn from new cases and guidance, its own internal investigations, and the examples of other companies, and to make needed adjustments annually.

Five years ago, it was possible to keep up with the literature in the FCPA field. Now there is a glut of information. As a best practice, the company's FCPA team, including inside and outside counsel, the chief compliance officer, the company's FCPA expert, and appropriate business managers, should monitor developments regularly and incorporate updates into the company's FCPA policy and programs. In addition to numerous FCPA blogs, a large amount of FCPA compliance material is available on Internet websites of law firms, consultants, and other groups where ideas and best practices are discussed.

Element (13):
Periodic Testing and Evaluation of
the Compliance Program

An FCPA compliance program cannot be established but then left unattended. Companies must take action to confirm that their reporting system, due diligence process, gifts, meals, and entertainment processes, and other components of their FCPA program actually work. If the company is doing business in countries with high levels of corruption but no reports or allegations are ever made, the company should question why, and the system must be tested to ensure that it is operating in a way to actually detect red flags and violations.

In addition, a strong compliance program should be analyzed and tested regularly and compliance procedures should be monitored. The company should have written evidence that all contracts have appropriate FCPA clauses; that training has taken place; that written compliance certificates have been submitted regularly by managers, key employees, agents, and business partners; that financial controls designed to monitor disbursements have been effective; and that due diligence procedures have been consistently followed and all red flags cleared.

Compliance should be monitored by direct observation, by supervision of the program, and by testing the controls. One increasingly common way of testing controls is to conduct FCPA audits. The audits are intended to stress-test the FCPA procedures by picking standard processes and high-risk transactions at random to see how various aspects of the compliance program are being implemented. A well-designed FCPA program audit will look at a wide range of issues, including due diligence, third party engagement, expense reports, travel records, and any cash transactions and money flow. FCPA audits should include in-depth interviews with employee participants and third parties as well as reviews of records. They should also include audits of a sample of business partners. Audits, as well as periodic testing of compliance procedures, should be integrated with the company's compliance program from the start.

Element (14):
Adequate Budget and Human Resources

Dedicating an adequate budget and sufficient human resources to manage the FCPA compliance program effectively is extremely important. The senior executive in charge of the program should have sufficient resources to maintain autonomy. Company management and employees tend to view programs with no budget or dedicated employees as shams. An underfunded, understaffed compliance program will be seen as evidence that the company is not taking FCPA compliance seriously.

The funding and headcount must be adequate for the company and its risk. Small, midsize, and large companies each have different needs and different abilities to pay. A program for a small company with 40 to 50 business partners will be on a much smaller scale than a program for a Fortune 100 company with 10,000 or more partners. Companies that do business in high-risk countries or that have other red flags have higher risks and need a program that recognizes and addresses their specific risks.

All employees working on FCPA matters need not be at the same location and need not all report to the person in charge of the program. However, they need to understand that they are working as part of a team and that it is part of their job to ensure that the FCPA program is successful. An important reason for appointing one senior executive to be accountable for the program and to have individual liability for violations is that the executive will insist on a adequate budget and enough people to do the job—if only to protect himself or herself from becoming the subject of an enforcement action.

The company's legal or compliance department will usually not have the funding to run a robust partner due diligence program. Partner due diligence is often seen as a local country or regional cost of doing business, and the cost of due diligence varies greatly from country to country. It is sensible to allocate the cost for the due diligence program to the sales units and to make sales personnel responsible for some of the administration. Partner due diligence can be made part of the application process, and the sales units are in the best position to conduct oversight of partners in the field. However, the sales units should not have all the decision-making power. The due diligence program is a compliance program, and sales personnel involved need to be trained and understand that for this part of their job, they are part of a compliance team.

CONCLUSION

California companies that are engaged in exporting or other cross-border business, along with their counsel, need to be familiar with the FCPA and understand how it can impact their business. When a company has its initial meeting with the DOJ or the SEC, the agency attorney's first question will be, "Tell me what happened." The second question will be, "Explain to me how you secured and preserved all the relevant data." The third question should be, "Tell me about your company's compliance program." The company and its senior management have complete control of how persuasive that compliance program story will be.