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RISK MANAGEMENT

Building an Effective 'Risk-Based' Compliance Program to Address International Risks, Even if You Already Have One




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U.S. regulators responsible for enforcing anti-corruption and international trade laws expect that companies engaging in cross-border business activity have ''risk-based'' compliance programs in place to address international risks. However, in practice, crafting and implementing a risk-based approach to compliance is not self-evident. Without tailoring a compliance program to a company's value chain—its operational needs, challenges, and risks—off-the-shelf policies and procedures can prove to be ineffective, inefficient and, sometimes, counterproductive. Costly investigations, penalties, and reputational damage ultimately may be the result of an approach that is not thoughtful.

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Enforcement actions by U.S. anti-corruption and trade regulators show no signs of declining. Since 2016, the U.S. Department of Justice (DOJ) has secured criminal resolutions in 17 corporate-related U.S. Foreign Corrupt Practices Act (FCPA) cases, resulting in penalties and forfeitures of **$1.6 billion** (U.S. Department of Justice, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017)). In the last year, the U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC) finalized over **600 investigations** (up approximately 10 percent from the year before) focused on both bank and non-bank entities (testimony of John E. Smith, Director of the Office of Foreign Assets Control, U.S. Department of the Treasury, House Committee on Financial Services Subcommittee on Monetary Policy and Trade (Nov. 30, 2017)). In fiscal year 2016, the U.S. Department of Commerce, Bureau of Industry and Security (BIS) completed a significant number of enforcement actions (in addition to end-use checks) resulting in the issuance of **570 warning letters, 262 detentions, and 96 seizures**

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(U.S. Department of Commerce, Bureau of Industry and Security, Annual Report to Congress for Fiscal Year 2016 (Jan. 9. 2017)). With respect to imports, the Trump administration identified trade enforcement as a major priority in its National Trade Policy for 2017 and issued an executive order aimed at increasing enforcement of collection of unpaid antidumping and countervailing duties (Exec. Order No. 13785, 82 Fed. Reg. 16719 (Mar. 31, 2017)).

Regulators will generally provide meaningful mitigation credit to a company that implements a comprehensive, risk-based compliance program even though inadvertent violations may still occur. Specifically, on Nov. 29, 2017, U.S. Deputy Attorney General Rod J. Rosenstein announced a new DOJ FCPA Corporate Enforcement Policy, which includes guidance on the implementation of a tailored, effective compliance and ethics program. DOJ. OFAC also considers the existence, nature, and adequacy of a company's ''risk-based OFAC compliance program'' in its Enforcement Guidelines (31 C.F.R. Part 501, App. A). Members of the U.S. Customs and Border Protection's (CBP) Importer Self-Assessment program (ISA), which allows importers to assess their compliance with U.S. imports laws, receive certain benefits from CBP, including treatment of participation in ISA as a mitigating factor in the event that civil penalties or liquidated damages are assessed (U.S. Customs and Border Protection, Importer Self-Assessment Handbook (June 2011)).

Below is a high-level roadmap for companies seeking to build an effective risk-based compliance program to address international risks.

Evaluating International Risk

Compliance programs should be unique to each company like shoes to feet, and therefore, require a strategic and operational evaluation and assessment of the business's international risk factors. As a general matter, these risk factors include: (i) the size and geographic location(s) of the company; (ii) the nature of its products and services as well as the end-uses and end-users of such items; (iii) global value chain exposure, including relationships with third parties, including distributors, resellers, and suppliers; and (iv) the volume of exports or imports.

Basic Elements of a Compliance Program

Generally, companies with relatively modest cross-border business activity, with the exception of companies dealing in defense articles or those working with foreign nationals in other sensitive technology areas, may be in a position to adopt a more streamlined compliance program and still sufficiently address their international risks and expectations from U.S. regulators. These basic elements are highlighted below.

Management Commitment. The tone set by management with respect to compliance is critical and can have a substantial trickle-down effect on how compliance is reinforced by the company. A strong compliance culture begins with effective communication from management, which is frequently accomplished through a written statement in a company's policies and procedures (e.g., a *Code of Conduct* or employee handbook). However, rhetorical on-paper commitment is not enough. Management should take into account opportunities to reinforce a company's commitment to compliance, such as through annual meetings or recognitions of individual employee specific accomplishments in relation to compliance objectives.

Responsibility, Reporting, and Review. In addition to the management commitment statement described above, to be effective a compliance program has to be implemented in a manner that is workable within the company's business model. To do so, there should also be a dedicated point(s) of contact in the event of any questions or concerns. A helpful tool to hold employees accountable for their compliance requirements is a written certification indicating that employees have reviewed and understand the policy, often executed in conjunction with periodic training. An anonymous method by which employees can report compliance concerns should be considered as well, such as a whistleblower hotline. Providing such a channel for communication will help encourage reporting of suspected unlawful conduct and in a manner the company can review and remediate more systematically, rather than leaving employees without an outlet and otherwise to act on their own. Finally, policies and procedures should be periodically reviewed in order to keep them current (and to remind regulators that the company takes compliance seriously).

Restricted Party Screening. In order to strengthen U.S. national security and advance foreign policy goals, OFAC, BIS, and the U.S. Department of State prohibit U.S. individuals and companies from exporting or providing services to any party designated on U.S. government restricted party, export denial, or debarment lists. These lists can even include parties located in the U.S. Accordingly, at a minimum, companies should manually screen their counterparties (e.g., employees, customers, agents, distributors) on a regular basis to confirm that there are no potential matches on such lists. The U.S. government provides a helpful Consolidated Screen List tool to aid the industry in conducting screening of potential parties to regulated transactions, which is available at https://2016.export.gov/ecr/eg_main_023148.asp. Of note, due diligence on beneficial ownership of counterparties is highly recommended as OFAC guidance indicates that any entity that is 50 percent or greater owned by an identified restricted party is also considered to be restricted even if the owned party does not itself appear on the list.

Outside Counsel and Consultants. In the event a company has a modest volume of import and export activity, it may be sufficient to consult specialists or outside counsel on compliance matters selectively once a suitable compliance infrastructure has been established. For example, if a company only has a product family of two to three items and is having difficulty with determining their export control classification, a consultation with a third-party export classification specialist can help ensure that the company has classified the products correctly and considered whether U.S. government licensing or reporting obligations may apply. Finally, outside counsel can be an important resource to stay abreast of any relevant updates in anti-corruption or international trade laws that may directly impact a company's business.

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Advanced Compliance Programs

Companies with more extensive international touchpoints, particularly those in regulated or sensitive industries (e.g., aerospace, defense, pharmaceutical, and information technology), and/or engaging in business in higher risk geographies, will need to enhance and/or expand the number and nature of the elements that go into their compliance programs. For instance, regular use of non-U.S. third parties (e.g., distributors, resellers, suppliers) may warrant systematic due diligence procedures in connection with onboarding, contractual protections in written agreements, and annual compliance certifications. In addition, as a company's international presence expands, the need for in-house compliance specialists rises and manual screening in general would be upgraded with automatic screening tools embedded in a company's Enterprise Resourcing Planning (ERP) system. Finally, audits on the effectiveness of compliance processes and routine risk assessments of a company's products, operations, and customers can keep compliance programs in sync with business operations.

Key Takeaways

■ Compliance programs are not one-size-fits-all, and therefore, a company's approach to compliance must be strategic, balanced, and reflect its needs based on its international risk exposure.

■ Risk-based compliance requires a focus on areas of higher risk, such as corruption risk and trade diversion via third parties, and therefore, resources should be allocated accordingly.

■ For companies that face limitations on financial resources, the U.S. government provides valuable risk-based compliance tools to the industry, such as restricted party screening tools, guidance, checklists, and templates.

■ Effective compliance programs can identify potential violations and allow companies to consider the option of submitting voluntary-self disclosures to the U.S. government instead of facing the uncertainty of enforcement risk. In fiscal year 2016, only 1 percent of voluntary self-disclosures to BIS resulted in an issuance of administrative sanctions. U.S. Department of Commerce, Bureau of Industry and Security, How to Build an Export Compliance Program (Oct. 5, 2017).

■ In the event of a potential violation, the existence and maintenance of a comprehensive, risk-based compliance program can result in a significant reduction in any applicable penalties. Furthermore, in the event of settlement negotiations, a company may be able to negotiate with regulators to lower the amount of an impending penalty by instead investing those resources into bolstering its existing compliance program.