



Risks in the Regulatory Environment

Global Business Necessitates the Lens of Global Compliance

By Stefanie J. Fogel and Katrina A. Hausfeld

Government regulators worldwide are increasingly demonstrating a readiness to investigate and to prosecute potential violations of anti-corruption, fair competition antitrust laws, trade sanctions, and data protection and data privacy laws, among others, and the accompanying implementing regulations. In both the United States and the European Union it is now expected that companies will have compliance programs in place to recognize, prevent, and address corporate wrongdoing and malfeasance, even when a company's operations take place outside these jurisdictions in venues where local custom argues that bribery is part of the normal course of business. Companies that fail to identify, prevent, or report regulatory violations are increasingly facing substantial penalties and fines, criminal and civil litigation, and reputational harm. In light of this regulatory environment, how should a compliance-minded global company evaluate the strengths and the weaknesses of its compliance program and ensure its effectiveness without alienating its lead business teams?

Collaboration between legal and business teams is critical to establishing priorities and practical solutions. Priorities are best established through a comprehensive risk assessment focused on understanding a company's legal and regulatory risks, the controls in place to prevent potential violations, and the likelihood that these controls would detect potential violations. The legal and regulatory risk must be evaluated in the context of a business' corporate structure, its key business objectives and strategy, and the adopted business model on both the global and local levels.

While an effective risk assessment necessarily requires the foundational input of the business that completes the assessment, it should ideally be led by counsel to ensure that the process is protected by some form of

privilege. When conducting an assessment that touches multiple jurisdictions, counsel should be aware that the existence, scope, and application of attorney-client privilege may vary from country to country. Taking care to protect all applicable privileges in the relevant jurisdictions limits the possibility that vulnerabilities discovered during a risk assessment may need to be disclosed in a later governmental investigation or inquiry.

To assess a company's risks accurately, first the company should identify the specific laws and regulations, foreign and domestic, that the business must follow and the potential effect of such laws and regulations. The breadth, scope, and variation among such laws can differ widely across jurisdictions and need to be taken into account during an assessment process. Once a company has identified the applicable laws and regulations, the company's existing policies and procedures should be evaluated to ensure that they align with those laws and regulations and to confirm whether the company has sufficient controls in place to detect a violation.

It is also critical to understand how a company's existing policies and procedures comport with the cultural norms and business practices of the local markets in which the business operates. Thorough interviews of upper management and key personnel across a company's offices and business units should be conducted to help identify both the depth of employees' knowledge regarding the company's policies and procedures and the practical difficulties that the business may face implementing those policies and procedures locally. Targeted questionnaires or self-assessment surveys can also help identify gaps in employees' knowledge of a company's policies across business units or jurisdictions. Third-party partners' knowledge of and compliance with a company's policies and procedures, as well as the applicable laws, should also be assessed since under many laws, such as the U.S. Federal Corrupt Practices Act and the U.K. Bribery Act, a company may be held liable for acts committed by its third-party partners, as well as its own employees. These partners would include distributors, agents, importers, exporters, retailers, wholesalers, or consultants, among others.

Any gaps in a company's policies, procedures, or controls identified during a risk assessment should then be prioritized according to the likelihood that the



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gaps could lead to potential violations as well as their gravity and the maturity of the controls already in place. In a multi-jurisdictional setting, an assessment must determine the reviewing legal and corporate culture “non-negotiables” in detail while simultaneously evaluating the cultural norms and sensitivities of the local business environment. A company should then take appropriate steps to revise compliance policies and procedures to address the identified risks and gaps, based on their severity, consistent with industry benchmarks and regulators’ guidance, taking into account the practical realities of local business practices and the corporate culture, to reduce the risk of malfeasance or unethical behavior.

The newly revised policies, procedures, and compliance expectations should be communicated clearly to all employees and third-party partners. A company should also create and implement a training plan with customized training materials to address the highest risks and gaps identified by a risk assessment. Clear guidance should be provided about when and where local variances are acceptable to conform to the local customs, as well as the limits that must be observed both to retain the overarching corporate culture and legal requirements. Communications with employees, as well as third parties, regarding the implementation of the revised compliance policies and procedures should be sensitive to local customs and cultural mores to avoid being perceived locally as irrelevant, inapplicable, or even insulting. Collaboration with local business-unit leaders is imperative to ensure that the revised policies, procedures, and training address these sensitivities.

Finally, to ensure that the compliance tools are used effectively and successfully, a global compliance program needs clear and robust support from corporate leadership, at both the global and local levels. Local business-unit leaders are in the best position to observe the everyday application of the revised compliance policies, spot potential issues, and bring them to the attention of the legal and compliance

team to address before problems escalate. Without support from key players within a company and a “tone from the top,” even the best laid compliance plans will be ineffective.

A strong global corporate compliance program is never static. Just as the regulatory environment in which a company operates is consistently changing and evolving, so too must a company’s compliance policies and procedures continually be assessed and adapted to new laws and regulations and local business practices. Annual, comprehensive risk assessments are integral to helping companies continue to identify enforcement trends proactively and to gauge the greatest risks facing a business to predict and to prevent regulatory violations. 