Balancing Compliance and Culture

“Bribery risk is a function of what a business does and where a business does it. The starting point has to be how you decide on the places where you’ll do business,” Tolaini began. “If a culture’s business values are not a good match for your company’s model,” he noted, “then compliance needs to be enhanced to rebalance the risk.”

Of particular interest to the participants was the line Tolaini drew between UK- and U.S.-domiciled companies based on the different emphases they place on the types of corruption against which the authorities take a stand. “In the U.S., it’s public officials abroad,” he said. “In the U.K., it’s commercial bribery as well.”

This distinction stems from different laws governing a company’s activities in the host country: the U.S. Foreign Corrupt Practices Act of 1977 and the analogous UK Bribery Act of 2010. (Later in the discussion, the situation of non-Western parent companies operating in the United States was raised. One participant lamented how headquarters-country executives learn about anti-corruption practices during expatriate assignments but “retain no memory when they return to their home country. This highlighted the still persisting issue of different views and approaches to corruption in even advanced business cultures.”)

Ensuring Compliance

In either case, though, Tolaini’s prescription for avoiding both extraneous expense and regulatory ire is the same. The first step is to ensure that compliance policies are documented and in place. From there, the company must formalize processes that provide not only positive steps to implement those policies, but also formidable and thoroughly communicated penalties for violations. These processes must also allow for monitoring and feedback. A “whistleblower hotline” was a common tool to many of the companies represented, notwithstanding its imperfections.

“Sometimes [employees] call them just because they hate their boss,” one participant noted. “But sometimes it’s something substantive.”

After office staffs have been properly trained in these anti-corruption processes – both online and in-person, and repeated as turnover necessitates – testing becomes critical to success. A company’s compliance culture should also reflect worldwide the values of the country that regulates its anti-corruption policies. “You have to motivate individuals to work the way they work back home,” Tolaini said.

And the way U.S. business works is open to challenge, just as in any other country. DiBari cited the example of one large institution, in which senior executives denied any knowledge of the corrupt practices taking place below them, and the middle managers, who were closer to the activity, bore the brunt of the responsibility. “All too often we find that a root cause of serious enforcement issues for a company is a culture in which senior executives have made it clear that they don’t want to hear about problems.” DiBari noted, though, that under today’s enforcement policies, the senior executives responsible for cultivating that culture also are being held accountable.

He also pointed out that the current regulatory environment in the United States is focused less on companies and more on individuals at both the direct contributor and managerial levels. He referred to the Department of Justice’s 2015 Yates Memorandum, a common thread throughout the Global Risk Roundtable series, which had the effect of triggering the DOJ’s emphasis on what DiBari called “personal culpability up the chain.”

Engaging Clients and Employees

Tolaini turned to the importance of due diligence on your commercial partners. “It’s important, but the process of collecting information – say, a passport or a utility bill – is not nearly as important as an employee being sensitized to the risk that this process is aimed at mitigating. Process must not be a box-ticking exercise; employees must be thoughtful.”

Correct motivation is also key. If the penalty for missing a sales goal is worse than that for making a questionable payment – or there is little likelihood of getting caught – employees may be more likely to make the convenient choice. The company must, according to Tolaini, ensure that an individual will not be financially penalized for correct behavior.

The form such penalties take was a point of disagreement at the table. Some favored mentioning the names of culpable employees publicly and prominently, as Jack Welch did during his tenure as General Electric’s CEO. Others cited subsequent employment law disputes and considered it an ill-advised option in the current environment. Some in the latter camp agreed that it might be edifying to take real-world examples and then sanitize them into case studies for training purposes. Even the most diligent companies face the prospect that an employee will go rogue. But it is equally true that some mistakes will inevitably be made out of carelessness, and some rules might be vaguely worded.

“Most people are trying to do the right thing,” Tolaini said. “When faced with the question of ‘going for the money’ or ‘going for strict compliance,’ the right answer often is: We don’t need the business.”

Taking Action As GC

Ensuring that compliance programs adequately manage risk, while also furthering a company’s business interests, requires active participation from the general counsel’s office. “If you have an opportunity to make a big deal in Mexico, but it requires you to pay someone under the table, let that business go. Let us in legal know so we can mitigate. Process must not be a box-ticking exercise; employees must be thoughtful.”

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Another participant noted potential benefits to getting the GC involved in local deals. We might slow down the process, but we also will ensure compliance and could even augment return on investment.

Continued on opposite page
Complying with Singapore’s Fair Consideration Framework

What multinational corporations should know when expanding into Singapore

When Singapore introduced its Fair Consideration Framework (FCF), the objective was to create a forum for employers to fairly consider Singaporeans before hiring foreigners. However, it has evolved into a far more comprehensive obligation to develop a strong Singaporean core rather than relying heavily on foreign talent.

Over the past year, the IT industry has come under particular scrutiny, as it often deploys large numbers of foreign workers to undertake work on client projects in Singapore. This model is regarded especially unfavorably by Singaporean authorities, since long-term jobs and skills are not developed locally. As a result, a number of IT consultancy companies have been placed on a watch list, and they will likely have to adjust their model to develop a strong Singaporean population going forward.

It is important for multinational corporations to be aware of the FCF’s strict requirement that employers intending to hire foreigners first advertise the position on a dedicated government job bank for at least 14 days. If the employer does not find a suitable Singaporean for the position, it may then hire a foreign national. The employment pass (EP) application has to be consistent with the job advertisement and list the advertisement ID.

The Ministry of Manpower (MOM) prefers all new positions to be advertised via its job bank. However, there are some exemptions from the advertising requirements:

- Firms with 25 or fewer employees
- Employees earning a fixed monthly salary of SGD 12,000 or more
- S Pass (skilled workers) and Work Permit (unskilled workers) applications
- Short assignments of up to one month only (EP is not renewable, and the holder may not apply for a new EP for a period of three months after the expiry of the previous one)
- Jobs to be filled by intracompany transferees (ICTs)

Unfortunately, the ICT route is not a reliable option because the MOM’s preference is for companies to advertise all positions and consider Singaporeans first. In practice, the MOM requires a high standard of proof that the candidate’s experience and job position are within the exemption’s required definition of “manager,” “executive” or “specialist.” In many cases, the MOM rejects seemingly strong cases on this basis, and it is then necessary to advertise on the job bank and reapply for the EP, which results in significant delays.

The MOM has its own criteria for assessing whether or not a company has an acceptable proportion of Singaporeans compared to the industry average. However, the MOM has not issued any specific guidelines on their ratio expectations. More recently they have mentioned that it is undesirable for foreign professionals to outnumber Singaporeans, so companies with more than half of their population on EP are likely to be looked at closely.

This year the MOM is actively scrutinizing companies with a large foreign population and a Singaporean core that is weaker than the industry norm (especially if it is less than the foreign population). Such companies are now also being assessed on their commitment to hiring and developing Singaporeans and their importance to Singapore’s economy and society. Those companies not doing well under these criteria are likely to be referred to the Tripartite Alliance for Fair and Progressive Employment Practices for assessment. Around 250 companies have already been placed on a watch list, which means they have six months to improve their HR policies and strengthen their Singaporean core. If no progress is made during that period, work pass privileges may be suspended.

Once a company has been placed on the watch list, the EP process takes much longer than usual as the MOM scrutinizes the applications to see if Singaporeans have been fairly considered for the job. As part of this process, the MOM will ask for additional information regarding any Singaporeans who have applied for the job, whether or not they have been interviewed, and why they have not been interviewed or chosen. The MOM will also ask for wider information regarding Singaporeans who have left the company in the past six months and the level of training and support provided to Singaporean employees. Therefore, it is essential to keep comprehensive HR records in respect to recruitment, training and promotion.

While multinational corporations usually need foreign talent for key roles and regional coverage, it is essential to hire and promote Singaporeans as far as possible. This may be difficult to achieve if there are few Singaporeans with the right skills and experience applying for the jobs. However, it is important for international companies to not merely rely on internal transfers to Singapore but also to formulate concrete plans for the successful hiring and training of Singaporeans in order to ensure a good ratio and avoid being placed on the watch list.

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Global Risk

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“I told [the CEO] we would save $150,000 a year” by ensuring compliance in this manner, he said. “We saved a million.”

Culture Is Not Absolute

“Paying government officials off isn’t an intention to break the law” in many countries, one participant observed. “It’s part of the culture of those countries – simply how business is done.”

In one participant’s experience, foreign government officials often use cultural misunderstanding as a ruse to shake down foreign businesses. “Sometimes they just want to see if you’ll pay them,” the GC said.

Tolaini noted that this type of corruption need not be an envelope stuffed with cash. “Official bribery in UK terms refers to any offer or benefit aimed at obtaining influence,” he said. Perversely, this could conceptually cover a social good that does not necessarily benefit the official directly. He cited the example of a transaction that would not be advanced until the parties to the transaction agreed to pay for a new soccer pitch and five new roads in the host municipality. This type of benefit needs careful managing to ensure it does not fall foul of the authorities.

The broad point is that cultural disconnects are a common occurrence, and they are as diverse as the individuals attempting to do commerce across borders. As Norman observed, each variation has its own set of potential pitfalls.

“There are so many risks that, to integrate them all into a single anti-corruption policy, the cost becomes infinite,” he said. “So you have to choose carefully: The solution is to keep guidance simple and practical and ensure the issues and dilemmas can be aired.”