



APEC PERU
2016

REPORT ON SUMMARY AND CONCLUSIONS
APEC ACTWG Workshop on
Antibribery Compliance Programs and Incentives

Overview: On August 15 2016, Peru and the United States hosted an all-day APEC ACTWG Workshop on antibribery corporate compliance programs and incentives, organized by the Peruvian High Level Anticorruption Commission and the Department of Commerce. The workshop was held pursuant to the 5-year ACT strategic work program and the 2014 Beijing Declaration commitments related to the APEC General Elements of Effective Voluntary Corporate Compliance Programs.

Over 100 participants attended the Workshop, including ACTWG and other APEC representatives, prosecutors, judges and compliance experts, ABAC members and other representatives from international organizations and the business community. Expert speakers on compliance programs from Singapore, Colombia, Peru, Chile, and the United States, representing multinational businesses, law firms, law enforcement and trade agencies, gave detailed presentations during two panels in the morning session on the elements of effective corporate compliance programs and Member economy incentives for such programs. The afternoon program included an interactive breakout session of roundtables comprised of the experts and participants who shared best practices and their experience with such programs and incentives, and discussed conclusions and suggested next steps for further APEC work in this area.

The status of compliance programs in APEC economies: The participants in the Workshop recognized that APEC economies have diverse laws and cultures. International instruments such as the United Nations Convention against Corruption (UNCAC) and the OECD Antibribery Convention have resulted in more anticorruption laws and enforcement, but in some economies there is still a lack of awareness of such laws among businesses. Experts and participants noted that companies that are subject to the jurisdiction of the U.S. Foreign Corrupt Practices Act (FCPA), Sarbanes-Oxley, and the UK Bribery Act and companies in their supply chains are more likely to have corporate compliance programs than those that are not, particularly small and medium sized enterprises (SMEs). Participants reported that companies are also more likely to have some sort of compliance program when they are publicly traded on the economy's stock exchange, and when they interact with government agencies, including trade departments and export development banks. Whether the economy's legal system provides for and enforces corporate liability laws also greatly influences the adoption of compliance programs. Some economies do not have corporate liability laws, or have evidential thresholds which are difficult to discharge in order to prove corporate liability, or their corporate liability laws only cover certain offenses, such as foreign bribery, public bribery and money laundering. In some economies where the laws require certain elements of corporate compliance programs in order to qualify for mitigation or a defense to a corruption offense, for instance in Peru and Chile, compliance programs are becoming more prevalent. For example, according to a Peruvian expert, in March 2016, the Peruvian Congress approved the "Law Regulating Administrative

Liability of Legal Entities for the Commission of Active Transnational Bribery,” which the expert said provides that the legal entity that commits active transnational bribery can be exempted from liability if, prior to the commission of the crime, it adopted and implemented a prevention system appropriate to its nature, risks, needs and characteristics, consisting of supervision and monitoring measures suitable for preventing the crime or significantly reducing the risk of it being committed. However, whether a company has an effective compliance program can be refuted or disproved by the Prosecutor's office. The Peruvian law will become effective in July 2017, and there is also a regulation under development in Peru that will further clarify the elements of an effective compliance program. According to an expert from Chile, the Chilean law sets forth minimum requirements for the Chilean compliance prevention model defense, including the nomination of a Prevention Manager, with independence, power and resources within the company, and the establishment of an effective compliance program in order to prevent the commission of crime, which has to be supervised and may be certified.

Elements of effective compliance programs, international guidance: Experts reviewed the elements of effective compliance programs generally and stressed the importance of having more than just a program on paper. They noted that despite increased awareness of the importance of having effective compliance programs, companies still face challenges in implementing such programs, including ensuring compliance with rules on gifts and entertainment, dealing properly with facilitation payments, conducting due diligence on third parties, adequate training and testing, and having a strong tone at the top and corporate culture, whistleblowing mechanisms (confidentially and anonymously if permissible under local law), and adequate risk assessments, which are crucial for tailoring a successful compliance program and allocating resources. Workshop participants agreed that domestic and international guidance is essential to encourage the design and implementation of effective compliance programs, and that the more convergence there is, the better. Examples discussed include the 2009 OECD Good Practice Guidance, the U.S. Resource Guide to the FCPA, the UK Bribery Act Ministry of Justice guidance, guidance from Transparency International, other NGOs and the World Bank, the 2014 APEC General Elements of Effective Voluntary Corporate Compliance Programs (APEC General Elements), and the even broader pending International Organization for Standardization (ISO) antibribery management systems standard 37001. However, many companies (particularly SMEs) are not aware of existing guidance, or they need more specific and detailed guidance.

Member economy incentives: Participants discussed APEC Member economy incentives to encourage companies to have effective corporate compliance programs. Participants agreed that clear laws providing for corporate liability and vigorous enforcement of such laws, including by increasing resources and dedicated personnel to investigate and prosecute cases globally and expanding relationships with foreign law enforcement, are strong incentives for implementing effective corporate compliance programs. Experts explained that several economies, including Chile and more recently Peru, have relatively new laws on corporate liability which include provisions on compliance programs, and provide for defenses or the mitigation of penalties where certain conditions are met. The U.S. FCPA also requires companies to put in place internal accounting controls. Another example of a government incentive is the establishment of a whistleblower award program, such as that of the U.S. Securities and Exchange Commission (SEC). Experts discussed how the U.S. Department of Justice (DOJ) may take into account compliance programs

in deciding whether to prosecute a case against a company or issue a declination (e.g. Morgan Stanley) or in determining the extent of penalties or type of resolution. Credit for voluntary disclosure and cooperation with law enforcement were also forms of incentives in certain economies, including the United States and Australia, that could result in decreased penalties or a declination of charges. Outreach and education on the benefits of compliance programs is also important. For example, Australia provides on-line training for companies on its anti-bribery laws and steps that businesses can take to help promote compliance, and Indonesia shared the example of a board game that it uses in dialogue with stakeholders on compliance related issues. Transparency and publication of the results of enforcement actions, including by the media, assist in educating businesses on the importance of compliance and raising awareness of the anticorruption laws and consequences of engaging in bribery.

Assessing compliance programs: Participants recognized that in economies with new laws on corporate liability and compliance programs, judges and prosecutors need more guidance, training and experience in assessing compliance programs. Further work could be done on sharing best practices. For example, in assessing corporate compliance programs in the United States, the DOJ looks for a strong compliance culture and tone at the top, independence of the compliance function, a serious risk assessment, a code of conduct, auditing and internal controls, adequately compensating and promoting compliance personnel, and the qualifications of such personnel. The DOJ has recently hired a compliance consultant to advise on the adequacy of compliance programs when companies try to prove their effectiveness. In Chile, the burden of proof is on the prosecutor to prove the adequacy of a compliance program, not the company. Experts discussed how in some systems like Chile and Peru (described above), a third party certification of compliance programs is allowed. However, an expert explained that in Chile, the real value of the certification has yet to be determined, since even a certified compliance program can fail, in which case the company can be liable. Similarly, a Peruvian expert explained that according to Peruvian law, certification of the prevention model does not automatically exempt the company from liability; it is a legal defense mechanism of the company which will have to be considered by the prosecutor or judge at the time of assessing the model. The expert also explained that the recent Peruvian law further provides that the State has the duty of publicizing the new law, which necessarily includes training of operators of the justice system, especially judges and prosecutors.

Suggestions to consider for future work: The Workshop experts and participants made several suggestions for future APEC ACTWG work on compliance programs and incentives, including:

- Further educating businesses in the APEC region on the importance of having effective compliance programs and the elements of such programs. While international guidance exists, Member economies could do more at the local level.
- Increasing Member economy outreach and dissemination of guidance on compliance programs, including the APEC General Elements, particularly to SMEs.
- Increasing transparency on Member economy rules on the acceptance of gifts and entertainment, as well as facilitation payments, so that companies know what is permissible under local and international laws and regulations.

- Encouraging companies to improve training efforts, including by highlighting key facets of effective compliance programs, such as the importance of meaningful communication of the program and training to employees, and using innovative new methods such as videos.
- Increasing the focus on senior management liability for failure to have an effective compliance program.
- Adopting corporate liability laws in Member economies which are consistent with UNCAC and OECD conventions, and training on the enforcement of such laws.
- Considering possible future work exploring best practices and guidance for enforcement agencies on how to assess the adequacy of corporate compliance programs.
- Developing joint discussions and work between enforcement and business community representatives, possibly with the APEC SME Working Group, and other stakeholders on compliance programs and incentives.
- Examining other ways to improve antibribery corporate compliance programs and incentives with a view to preventing, detecting and responding appropriately to corruption.

A few concise points about the success and outcomes of the Workshop on Antibribery Compliance Programs and Incentives were also included in the ACT Lima Report and deliverables for consideration by Senior Officials regarding appropriate inclusion for the 2016 Ministerial (AMM) and Leaders (AELM) summit statements.