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Guidebook on Best Practices in Monitoring and Supervising Effective Corporate Compliance Programs

APEC Anti-Corruption and Transparency Working Group

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Introduction

1. This Guidebook was prepared under the auspices of APEC project ACT 01 2018A: *Capacity Building Workshop for Law Enforcement Agents to Investigate Individual & Corporate Liability in Domestic & Foreign Bribery (SOM III 2019)*. The project was developed within the APEC Anticorruption and Transparency Working Group (ACTWG) under Chilean leadership.[1] Its principal aim was to enhance the technical knowledge of law enforcement agencies in APEC economies to bolster their ability to detect, investigate and prosecute individuals and corporations for their liability in cases of domestic and foreign bribery, together with the identification of different systems of monitoring and supervising effective compliance programs in APEC economies and also in non-member economies.[2]

2. The guidebook considers research material from different sources that will be identified through the different contents and the results of a Workshop addressed to law enforcement agents and the private sector, that was held in Puerto Varas, Chile in August 2019, where participants shared practical experiences in order to compile a set of best practices on combating foreign and domestic bribery, with special emphasis on monitoring and supervising effective corporate compliance programs at the domestic and international levels. A participatory methodology was applied in the workshop, to encourage an open dialogue among law enforcement representatives of various APEC economies and representatives from the private sectors. Some of the opinions and conclusions contained in the Guidebook might not necessarily represent the opinion of all APEC economies.

[1] The project was co-sponsored by the economies of Papua New Guinea, the United States, and Viet Nam.

[2] The Project considered hiring a consultant to collect research material, organize the workshop and draft the Guidebook. For that purpose, Ms Lisa Bhansali, Professor from Georgetown University and former collaborator to the World Bank, was hired, and she worked together with the P.O. and had collaboration from Ms Belen Tomic, undergraduate lawyer from the University of Chile and Ms Arsema Tamyale.

3. This document is divided into Four Sections. The First Section provides an overview of corporate compliance programs based on data obtained from APEC [3] sources and contemporary literatures, including some elements required for ensuring they are effective. The Second Section discusses formal international legal agreements related to corporate compliance that international organizations have promulgated. The Third Section highlights various approaches that some economies have used to promote and adopt corporate compliance programs based on primary data collected through diagnostic surveys completed by APEC economies and secondary data obtained from workshop discussions and other relevant research papers. The Fourth Section offers examples of select companies' approaches to adopting corporate compliance programs.

I. Corporate Compliance: Evolution, Design, and Implementation

A. Evolution of Corporate Compliance Programs

4. As the global economy has increasingly defined the progress of individual economies, the need to establish international bribery conventions, re-adjust the regulatory environment, and implement corporate compliance programs has further expanded. These measures have been evolving for the purpose of regulatory consistency and fairness in the business sector as well as in law enforcement. As a result, both internal and external oversight of corporate governance has evolved rapidly. Internal controls of corporate affairs have been overtaken by "corporate compliance initiatives". While compliance with law and regulation is not a new concept, the establishment of an autonomous department within firms to detect and deter misconduct of law and policy is somewhat new. In fact, many jurisdictions, APEC and non-APEC economies alike, still do not recognize compliance programs as part of their resolution of

[3] APEC Anti-Corruption Code of Conduct for Business (2007); APEC General Elements of Effective Voluntary Corporate Compliance Programs (2014).

bribery cases. Over the past decade, the expansion of corporate compliance programs has blossomed, with entire departments devoted to compliance emerging in many private sector firms that either work in tandem or, in some cases, on equal footing with the legal department (i.e. with both a Compliance Officer and a General Counsel).

5. Government interventions in compliance, however, do not appear to have come through the traditional levers of state or federal securities law. Instead, they seem to be channeled through prosecutions and regulatory enforcement actions. The resulting reforms are consequently not the product of a legislative process but a part of the settlement process when prosecutors, courts, and regulators are pursuing allegations or charges and/or making sentencing decisions. In such cases, the aforementioned actors evaluate whether a firm has an "effective" compliance program in place. If the firm has an effective compliance program, prosecutors have the discretion (depending on the jurisdiction) whether or not to formally charge the firm with misconduct. Thus, the potential benefits associated with having an effective compliance program have become considerable in the private sector. In response, the compliance industry has significantly developed in recent years. Nonetheless, it remains challenging for prosecutors and courts to distinguish well-designed programs from those that were merely for show, given the challenges associated with measuring effectiveness. This raises a key question: *What makes such a collection of policies, activities, and processes an effective corporate compliance program?* This guidebook intends to seek answers by considering the monitoring and supervision of such corporate compliance programs at various levels and based on diverse experiences and criteria.

6. According to much of the existing literature and practical experience, a "Corporate Monitor" can help change a corporation's corporate culture.[4] Corporate culture indeed appears to be a very important aspect regarding employees' misconduct. In most cases, this misconduct is likely to find its

[4] Global Investigations Review (GIR): The Guide to Monitorships. Edited by Anthony S. Barkow; Neil M. Barofsky; and Thomas J. Perrelli. Law Business Research Ltd., (May 2019).

roots in a flawed or dysfunctional corporate culture.[5] Thus, the underlying goal of those responsible for monitoring should be to guide the organization toward sustainable change and help it avoid repeating previous mistakes when the monitor is gone. [6] Importantly, every corporate wrongdoing may not necessarily require efforts to reform a company's culture, since sometimes causes of the misconduct are not systemic. Therefore, it is extremely important to evaluate a corporation's culture at the beginning of any monitoring efforts, not only analyzing the company's compliance program and the cultural tone at the top of the organization, but also the tone in the middle of the organization. As noted, a monitor also needs to examine any existing compliance frameworks and the organization's proposed strategies to remediate any misconduct and evaluate the employees (not only those who caused any misconduct, but also those who tried to stop it). After these aspects are assessed, the monitor can start counseling the organization through cultural change,[7] by obtaining internal buy-in on the goals and means of cultural change, particularly from the leadership of the business itself.[8]

7. Of course, many companies may not have a formal compliance program, making any efforts to tackle the challenge of changing corporate culture daunting—but it is still possible. Corporate culture follows the intentions of management, and a company's leadership should have a good communication system that trickles down to the whole company. If leaders say they have conducted capacity building, but the employees do not have any idea about the stated capacity-building program, then nothing is likely to change. Therefore,

[5] Barofsky, Neil; CIPOLLA, Matthew; Schrantz. Changing Corporate Culture in: BARKOW, Anthony; BAROFSKY, Neil; PERRELLI Thomas. Global Investigations Review (GIR). The Guide to Monitorships (2019), p. 11.

[6] Ibid, p. 12.

[7] Ibid.

[8] Ibid, p. 13.

even without compliance programs, a company's leadership can be leveraged to play an important role in ushering in culture change[9].

B. Some Elements of Corporate Compliance Programs

8. Corporate compliance is defined here as a formal program, specifying an organization's policies, procedures, and actions within a process to help prevent and detect violations of laws and regulations. Compliance programs are built to prevent misconduct, such as money laundering, bribery, and fraud and are a core part of corporate risk management, a system that seeks to provide an integrated response to all sources of risk to a business enterprise. The scope of a good compliance program, however, should aim to be broader than merely the enforcement of a specific set of laws or regulations. Compliance programs should also address corporate ethics on a wide variety of subjects as well as other standards regarding issues like reputation risk, and some of these often overlap, where, for instance, the compliance function may overlap significantly with risk management.[10]

9. Corporate compliance is a system and conceptual framework used to prevent and detect violations of law. A company does not have to have a formal program; nor does it have to have a formal compliance officer in place, especially if it is a small or medium enterprise (SME). Importantly, given a company has to comply with additional compliance programs such as environmental compliance alongside corporate compliance for bribery prevention purposes,[11] it is crucial to integrate corporate compliance with all other company compliance programs rather than it remain a standalone effort. Generally, compliance programs tend to entail the following eight elements: (i.) risk assessment; (ii.) policies and procedures; (iii.) leadership commitment/culture; (iv.) training and communication; (v.) third party

[9] Ibid.

[10] *APEC General Elements of Effective Voluntary Corporate Compliance Programs*, 2014, page 1.

management; (vi.) reporting and investigations; (vii.) incentives and disciplinary actions; and (viii.) monitoring or auditing.

10. *Objectives:* According to contemporary literature, the three most common objectives of corporate compliance programs are: (1) preventing misconduct; (2) establishing mechanisms that can detect deviant behavior, if it does arise; and, (3) aligning corporate behavior with applicable laws and regulations.[12] The following recommendations in monitoring and supervising the effectiveness of corporate compliance programs (based on the above three objectives) also tie into or are embedded within three dimensions of *integrity*:[13]

    - *Individual integrity*, which refers to the traditional understanding of integrity as honesty, appropriate behavior ("doing the right thing" according to the firm's norms and rules), or consistency between words and actions. This factor is important given that firms are composed of individuals who willingly work for the entity in return for compensation, health care, professional development, privileges, or more. Individuals within firms may have goals that differ from, or even conflict with, those of the organizations that employ them. When individual employees deviate from the rules and regulations governing their conduct within the firm, employees place both themselves and the firm at risk. An effective compliance program should seek to mitigate

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[11] Chen, Hui. "Corporate Compliance and Corruption Prosecutions." ACT Net Workshop for Law Enforcement Agencies on Effectively Using Corporate Compliance Programs to Combat Domestic & Foreign Bribery. Presentation, Puerto Varas, Chile, August 2019.

[12] APEC General Elements of Effective Voluntary Corporate Compliance Programs, 2014, OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance, 2009, https://www.oecd.org/daf/anti-bribery/44884389.pdf, OECD, Anti-Corruption Ethics and Compliance Handbook for Business, 2013, https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf, US Department of Justice Criminal Division Evaluation of Corporate Compliance Programs, Updated April 2019, https://www.justice.gov/criminal-fraud/page/file/937501/download

[13] Paine, Lynn S., Managing for organizational integrity, Harvard Business Review 72(2): 107-117, 1994, Eduard Grebe and Minka Woermann, Institutions of Integrity and the Integrity of Institutions: Integrity and ethics in the politics of Developmental Leadership (2011).

these differences in interests by better aligning the goals of firms and their employees with those of law enforcement or government regulators.

- *Organizations of integrity,* which refers to the institutionalized norms and codes of behavior (both formal and informal) that bind individual behavior and shape the context of individual honesty. Such institutions define the moral boundaries that affect individual behavior. An effective compliance program should integrate policies and other activities that aim to combat misconduct in the organization's day-to-day operations.

- *Integrity of organizations,* which refers to integrity at the organizational level. This refers to whether an organization functions according to its own rules (and those of regulators), where the institutional context, structures, and culture promote integrity and should also promote compliance by employees at all levels. The likelihood of having a well-anchored compliance culture at the organizational level is expected to increase if there is support from high-level management within the firm.

11. To fully understand corporate compliance programs and their monitoring and supervision, an in-depth and systematic analysis is required for both individual and organizational issues and the relationship between them. In other words, one should investigate the complexities generated by the interplay between an individual's choices and behavior and the context in which they operate. Consequently, one needs to consider the relationships among the individual, the organization (its structure, system, culture, and leadership), and the different systems, policies, industry-specific risks, principles, procedures, and instruments that are in place as well. However, it should be noted that the composition of corporate compliance programs may differ based on a firm's size, location, and industry-specific risks. It is also important to be aware that within any given firm, compliance programs should be dynamic and subject to

change over time to adjust to the constantly changing global (or even local) market arrangements.

12. In this context, how can one assess the effectiveness of the complex relationship between the individual contribution of compliance officers and misconduct in firms? This type of evaluation requires mapping the components of a corporate compliance program and further reviewing the performance of existing systems as a whole, instead of evaluating individual components independent of their relationship to each other and the system. Most corporate compliance evaluations have been focused on individual integrity policies such as Codes of Conduct, training, and internal investigation and sanctions. These assessments merely acknowledge the importance of the relationship and coordination between an individual's behavior, the existing policies that aim to prevent, detect, and punish unwanted behavior, and the institutions for overall effectiveness. With this in mind, some sources suggest monitoring and supervision of compliance requires to first focus on an integrity assessment to analyze the interplay among individuals, organizational structures, and mechanisms that may actually facilitate or encourage misconduct.

13. **Unbundling an integrity assessment:** As discussed above, the effectiveness of corporate compliance programs is often based on three basic objectives or dimensions of integrity.[14] Once again, these were: (i) preventing misconduct; (ii) establishing effective and timely monitoring mechanisms for detection; and (iii) aligning corporate behavior with domestic laws and regulations. The overall effectiveness of a corporate compliance program is derived from the aggregate effectiveness that a firm can achieve for all three objectives. These objectives are discussed in greater detail below.

14. **(i.) Preventing misconduct:** Corruption prevention is largely based on risk identification and mitigation within a system of appropriate measures to deter misconduct. Risk prediction is an integral part of misconduct prevention. It

[14] Soltes, Eugene, Evaluating the effectiveness of corporate compliance programs: Establishing a model for prosecutors, courts, and firms, New York University, Journal of Law & Business, Vol. 14 (2018).

encompasses a variety of predictive methods that exploit patterns found in specific industries and locations to identify the risks of misconduct and to predict future or otherwise unknown misconduct-causing factors. The predictive approach aims to capture relationships among many factors to identify misconduct risks or potential bribery associated with a particular set of conditions that impact the firm. Risk identification reviews practices, procedures, and structures within organizations and sectors (e.g. such as the construction sector) that facilitate misconduct. These analyses also assess how regulatory frameworks may facilitate any potential for misconduct, such as loopholes or gaps in the regulations in order to provide recommendations on improving corporate compliance effectiveness. In sum: while risk prevention measures make up the overall response to inhibit misconduct, risk identification is the essential ingredient for developing solid prevention measures, and an effective program should then develop instruments that hinder the risks identified. At the organizational level, the monitoring of a corporate compliance program should focus on how the firm discourages or establishes negative incentives for such misconduct as foreign or domestic bribery and promotes positive incentives for accountability and transparency. The effectiveness of a firm's compliance program is initially dependent on a number of factors, regardless of changes in corporate leadership, including the degree to which the core compliance program implementation unit and the financial-administrative units are independent and have the mandate, human capital, and resources to ensure an impactful compliance program with related polices and initiatives to prevent violations. Prevention measures at the operational level are also significant and involve the level of interface with key stakeholders such as clients, suppliers (e.g. third parties), and network partners. Key actors at this level include the employees performing the firm's primary activities and the leaders managing or supervising such "frontline" employees. These actors also shape the outcomes of compliance policies by interpreting them through certain behaviors and allocating scarce resources to support positive conduct. Through their day-to-day routines and decision-making, these employees, in effect, reflect the compliance program. Consequently, the behavior of firm employees (including third-parties and

contractor employees) is vital, given that compliance is their responsibility. Employees need to understand, apply, act, and make decisions based on the corporate compliance program and its instruments. In this regard, the lack of attention to employees' critical capacities and personal qualities can lead to a major gap in any systematic approach and thus defeat the objectives of the corporate compliance program itself. High-level management and other corporate leaders also play an important role by setting an example of compliance behavior, which should motivate employees under their supervision. For purposes of efficiency within the corporate structure, it is necessary to clearly delineate the responsibilities of the unit that designs and oversees compliance-related initiatives. Moreover, the implementation of compliance initiatives has a greater impact if they are integrated into the overall firm's business strategy. For example, the presence of strong compliance policies and preventive measures in strategic documents (as well as the verification that they are actually implemented) is a positive indicator of a growing recognition of their importance, especially if these documents include action plans with specific indicators and an allocation of tasks to responsible units, timelines, and designated budgets. Clearly, law enforcement agencies also may engage with corporate compliance programs, where such programs can be used by agencies in the following five ways:

1. *Investigation:* Given that compliance is a function that prevents and detects misconduct, there is significant information that can serve the substance of investigations as well as the investigation process.
2. *Culpability:* Information stemming from such programs may help determine whether a company is culpable. They can help law enforcement ascertain: how guilty a company is; how they should be charged; whether they should be charged in court and indicted; whether they should receive a DPA; or whether they should not face prosecution. Notably, the

existence of corporate compliance may impact how prosecutors perceive the culpability of a company.

3. *Penalty:* Corporate compliance programs may also help law enforcement determine how penalties should be determined and how severe punishments should be.
4. *Remediation*: These programs may also help to suggest paths toward remediation by highlighting how the company has used corporate compliance programs to fix previous mistakes, so they do not happen again. For instance, this could be done by introducing monitors that make sure corrections are anchored throughout the company systems.
5. *Defense:* Corporate compliance programs can also be used as a defense mechanism to help the company walk away from any charges made.

15. **(ii.) Establishing effective and timely monitoring mechanisms for detection:** The first step when monitoring or even evaluating a corporate compliance program is to take into account that individual instruments or activities, in and of themselves, are not the key measures of the effectiveness of a compliance program as a whole. Rather, the effectiveness and sustainability of a compliance program depends as much on the synergies between the mechanisms as on the effects of each individual mechanism. For example, a code of conduct by itself would not have a great effect, a training session alone may not make a noticeable difference, and a single inspection probably would not leave a lasting impression. However, the combination of such measures does have a significant effect that is much larger than the sum of the effects of individual mechanisms. Therefore, the framework aims to assess the different integrity instruments together, with a particular focus on their synergies. The development of policies and procedures for compliance should be tailored to a firm-specific, industry-associated risk and should cover applicable legal and regulatory rules. However, an effective compliance program should go beyond narrowly applicable rules and regulations and be designed more broadly to promote a “culture” of compliance. Designing

policies and procedures to aim broadly at cultural norms, rather than simple regulatory rules suggests a *spirit and a letter of the law* approach to compliance. The creation of well-designed policies and procedures, however, is not sufficient in itself. The firm should also delegate responsibility for their implementation and ongoing management as well as revisions or updates as needed. In other words, compliance should be housed somewhere in the organization where a responsible agent has specific authority over it, along with sufficient staff to perform necessary compliance-related tasks. In addition, a balanced implementation plan needs to be defined and the commitment of all leaders ensured as they play important roles in operationalizing the core instruments. Finally, compliance programs should be continuously improved, periodically tested, assessed, and monitored internally to evaluate whether they are achieving their defined goals. Appointing an individual who has the chief responsibility for the functioning and oversight of the effectiveness of the program helps to bolster accountability. In this context, the following questions need to be taken into account:

- What is the consequence of a specific compliance instrument in terms of its effect on preventing misconduct, detection, and correction?
- Is there a system that continuously assesses and monitors whether compliance instruments are achieving their prescribed goals?
- Has the mechanism been implemented and operationalized as it was originally intended?
- Is the compliance instrument appropriate, realistic, and achievable for the targeted firm and its associated risks?
- Is the compliance instrument implementation process effective in terms of the development process through which the instrument is introduced, implemented, operationalized, adopted, and evaluated?

- Are there any instruments that harmonize the core compliance instrument within the broader firm and jurisdiction-specific law and regulations?

- Who is responsible for the various elements of corporate compliance program implementation, and how are the initiatives of numerous department/units and actors whose activities affect firm members' compliance coordinated?

- Is there a consequence for non-compliance?

- Are core compliance policies written logically, and do they clearly define and determine the target instrument objectives and expected behavior, provide guidance for the expected behavior, and have integrated enforcement and evaluation of the suggested instrument?

16. The above should highlight the comprehensive approach that is needed when assessing the effectiveness of corporate compliance programs. It should aim to review the varied circumstances that impact the effectiveness of the operationalizing integrity instruments and consider as many factors as possible that can influence the implementation of a specific compliance instrument of a particular firm. While there are internal mechanisms, processes, and actors that are fundamental for the implementation and adoption of a sound prevention policy, it is also important to identify the external factors (and actors) that can influence a firm's compliance, such as third-party contractors, local or domestic laws and regulations, and economy-specific risks that affect (positively or negatively) the sound implementation of effective integrity policies and systems.

17. **(iii.) Aligning corporate behavior with domestic laws and regulations:** Firms that operate across multiple industries, jurisdictions, or business lines face wide-ranging risks in complying with civil and criminal laws, rules, and regulations. A risk assessment attempts to ascertain which facets of the business and its operations pose the greatest risk of deviation. The assessment

provides a summary of those risks at the firm or business-unit level and assesses the likelihood that the firm could face such risks under its current operations. Risk assessment identifies the various risks employees are likely to face across different parts of the firm, allowing firms to focus resources and attention on those areas. In this context, the primary data for corporate compliance program design and implementation should ideally be obtained from risk assessment that identifies a company's specific context (i.e., political economy, broader cultural context of the society where the company is found, corporate culture, company size and organizational structure, staff competencies, etc.). Even after the creation of corporate compliance program risk assessment, there continues to remain an ongoing process of discovering, correcting, and preventing integrity-related risks.

C. Instruments to Operationalize Corporate Compliance Programs [15]

18. **Compliance Policies and Measures:** An effective compliance program should have policies and procedures that incorporate a culture of compliance into everyday operations. At a minimum, a company should have a code of conduct demonstrating a commitment to compliance. Codes of conduct ideally describe the behaviors and actions that firms seek to prevent and policies that individuals are expected to follow as employees of the firm. An effective code should address the risks identified in the risk assessment process. It should also include the standards that employees should observe when making decisions about firm policy. In the event that an alleged misconduct arises and is detected, the code should provide guidance about resolution methods. In addition, the code should be integrated into the firm's operation and corporate strategy, so it is not a stand-alone document. Finally, effective code and compliance-related policies should be accessible, and employees and management should know how to apply relevant polices to their core work.

[15] This list is not an exhaustive list, but rather, it aims to capture the most common types of instruments currently used by firms. It is also not static, given that compliance instruments form and share differences based on firm size, resource availability, and cultural context, among other factors.

19. **Training and Education:** Training serves primarily to prevent misconduct by educating individuals to understand what the firm expects regarding their action and professional behavior. It can also help employees to understand what to do if they observe misconduct by reporting it on a hotline. This type of training serves to improve detection. In addition, training and education are the most commonly used tools to operationalize compliance programs. The focus of training varies depending on the industry and risk profile of the firm but may include topics such as bribery, privacy, antitrust, and insider trading. Ideally, compliance training should be part of employee selection, given some individuals may have a higher tendency to violate rules and regulations than others.[16] For example, a firm can support the prevention of misconduct by screening these individuals out during the hiring process or early-stage employment to prevent such individuals from violating the firm's compliance by removing the possibility for them to do so from the outset. More specific tactics to screen for this propensity could include background checks and focused questioning during the interview process to assess an individual's enthusiasm for rule compliance.[17]

20. Firms can also directly test new employees' willingness to comply with regulation. Educating employees about the applicable firm rules and policies by which they are expected to abide in their professional conduct can potentially prevent and deter misconduct. Such training is conducted in various formats, including group sessions, one-on-one meetings, participatory-based learning approaches, and web-based sessions. Firms may create the training program in-house or with support from external content providers. Given the needs for training and education vary significantly among firm employees' capacity and

[16] Soltes, Eugene. Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms, New York University, Journal of Law & Business, Vol. 14 (2018); Harvard Business School, Why They Do It: Inside the Mind of The White-Collar Criminal 47–63 (2016).

[17] Michael Gottfredson & Travis Hirschi, A General Theory of Crime (1990); Robert Davidson, Aiyesha Dey & Abbie Smith, Executives' "Off-The-Job" Behavior, Corporate Culture, And Financial Reporting Risk, 117 J. Fin. Econ. 5 (2015); Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, National Bureau of Economic Research (2017).

the context they operate in, it is important to conduct a needs assessment before embarking on a long-term investment in a training program. In this regard, a needs assessment may help to prioritize and focus on training, which aims to maximize impact and cost efficiency.

21. In some contexts, however, a participatory approach may be a sustainable way of operationalizing integrity strategy. This type of approach features employee involvement and integrates analysis of possible issues related to the suggested polices before designing the integrity policy or reform. As a result of the interaction, employees have the opportunity to express their points of view, learn about other perspectives, and examine factual knowledge and subjective perceptions of the proposed policy. This approach allows for the testing of underlying assumptions and thus promotes the design of appropriate simulative approaches for implementation of the proposed integrity polices or reforms. In addition, a participatory approach is expected to facilitate the implementation of strategies and policies as stakeholders build a sense of ownership and commitment to the outcome of collaborative processes.

22. Another tool that warrants consideration is an incentives-based process for integrity policy implementation, adoption, and institutionalization. This arrangement requires an effective intervention with the targeted employees, intensive supervision and services after the implementation of the proposed compliance policy, and a focus on the adoption process during the time the employees adopted and acted on the proposed compliance instrument. The most common types of incentives-based rewards are salary increases, promotions, and one-time reward disbursements, which are used to encourage firm employees to adopt and operationalize the proposed integrity policy. This highly structured and gradual transition process serves as a bridge between individual adoption and institutionalization of the proposed integrity strategy or policy. In sum, when assessing effectiveness, rather than assessing the total amount of training, one should evaluate and test the existing design, frequency, adoption, operationalization, and incentives to stimulate receptiveness.

23. **Communication:** It is vital to communicate a corporate compliance program to employees and stakeholder groups. Human resource departments play a critical role in compliance communications. An effective way of assessing whether compliance is communicated well is to review whether a firm has a system that targets new employees to be trained in the firm's policies and whether existing employees are aware and updated of the same policies. This said, compliance communication is not as simple as sending a memo or producing a compliance training video. Having strong policies in place is a good start, but that initial work is meaningless if employees are not aware of them, making consistent, effective communication crucial to the strength of a compliance program.

24. **Third-party due diligence:** A well-designed compliance program should apply risk-based due diligence when conducting business with a third party. While the degree of appropriate due diligence may vary based on the firm's size, industry, or transaction, it is still important to assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions. It should also look into whether the company knows its third-party partners' reputations and relationships, if any, with foreign officials and the business rationale for needing the third party in the transaction. There should be a mechanism to assess whether the company engaged in an ongoing monitoring of the third-party, with updates to any documentation regarding due diligence.

25. **Adequate resources:** An effective compliance program requires a sufficient number of employees and resources dedicated to implement and operationalize the program. In this context, it is important to review the allocation and seniority of the compliance staff in the organization to ensure there is sufficient staff to audit, document, and analyze the compliance program functions and its autonomy from management, such as direct access to the board or the board's

audit committee. However, the structure, autonomy, and sufficiency of staff and resources may vary depending on the size of the organization.

26. **Mechanisms to detect deviant behavior**: Compliance programs should be built on a structure that incorporates mechanisms that detect and respond to non-compliance risks. Ideally, there should be a system that provides early warning signs that enables management or other staff to intervene before issues escalate. This early detection system should be integrated within a larger monitoring system, where data analytics are used to help detect deviations from firm policies. The focus of such monitoring (e.g. payments, third parties, conflicts of interest, contract management, etc.) varies depending on the risks the firm faces. [18] Data collection and analysis allow for proactive risk identification, which can then be targeted for further investigation.

27. **Reporting:** An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation. Aside from establishing hotlines, however, companies need to make concerted efforts to listen to employees. There should be managers who are trained on how to handle employee concerns, and they should be incentivized to take on this compliance responsibility. As a complement to training, companies should also devote communications resources to reinforce the company's culture and values to create an environment in which managers are likely to raise employee concerns

[18] This field is often referred to as "forensic data analytics." For a pragmatic discussion of how these system works, see Ernst & Young, Global Forensic Data Analytics Survey 2016: Shifting Into High Gear: Mitigating Risks And Demonstrating Returns (2016), https://www.ey.com/Publication/vwLUAssets/ey-forensic-data-analytics-survey-2016/$FILE/ey-forensicdata-analytics-survey-2016.pdf , and Aditya Misra, Proactive Fraud Analytics, Internal Auditor (Apr. 20, 2016), https://iaonline.theiia.org/2016/Pages/ Proactive-Fraud-Analysis.aspx. Monitoring systems can impose additional costs and crowd out incentives to comply. See, e.g., Donald Langevoort, Monitoring:

The Behavioral Economics of Corporate Compliance with the Law, 2002 Colum. Bus. L. REV. 71, 74 (2002); Jennifer Lerner & Philip Tetlock, Accounting for the Effects of Accountability 125 PSYCHOL. BULL. 255 (1999).

(informed by the fact that employees are the best source of information about what is going on in a given company). Finally, while it is certainly a best practice for companies to listen to their employees, particularly to help improve processes and procedures, companies should provide a safe and secure route for employees to escalate their concerns through an anonymous reporting system.

28. **Hotlines**: Hotlines should be accessible and toll-free, and they should be available in the native tongue of the person using it. This is especially relevant in cases where employees use more than one language for internal communications, where hotlines should reflect the linguistic diversity found in the company in question. [19]

29. **Anonymity:** While some foreign jurisdictions do not allow anonymous reporting, there should be a mechanism that allows an employee to make an anonymous report and put in safeguards to ensure anonymity should the reporting employee desire it.

30. **Escalation:** After a report is received through the hotline, it should be distributed to the appropriate person or department for action and oversight. This would also include resolution of the information presented, if warranted, and consistent application of the investigation process.

31. **Follow-up:** There should be a mechanism for follow-up with the hotline reporter, even if the report is made anonymously. This allows the appropriate person within an organization to substantiate the report or obtain additional information at an early stage, if appropriate. A company should quickly and efficiently investigate all hotline reports. This means firms need an investigation protocol in place so that the entire compliance function is on the same page and knows what to do.

32. **Oversight:** Ideally, the information communicated through the hotline should be available to the appropriate board committee or management committee in

[19] Hotlines as a FCPA Compliance Tool, FCPA Compliance and Ethics, 2010. Available at: http://fcpacompliancereport.com/2010/08/hotlines-as-a-fcpa-compliance-tool/

the form of statistical summaries, and an audit trail should be available to the appropriate oversight group detailing the actions taken to address concerns reported through the hotline as well as their resolution.

33. In the area of internal company investigations, it is crucial that both employees and investigators believe that the investigation is fair and impartial in order to maintain confidence that any internal investigation is treated seriously and objectively. One of the key reasons that employees may go outside of a company's internal hotline process is that they do not believe that the process is likely to be fair. Once investigation is complete, disciplinary action should be taken uniformly across the company for a violation of any compliance policy. Failure to administer discipline uniformly can destroy any vestige of credibility, which then may discourage reporting.

34. Given that importance of discipline and the manner in which it is administered is a key determinant of whether reporting occurs or not, evaluating the nature of a company's disciplinary method — specifically whether it is a rules- or values-based approach — is important.[20] A rules-based approach emphasizes the importance of internal controls on the behavior of employees and involves the use of formal and detailed rules and procedures to reduce compliance violations and prevent misconduct. By contrast, the values-based approach focuses on guidance, that is, the control exercised by employees on their own actions. This approach aims to motivate the understanding and daily application of values and to improve ethical decision-making skills through interactive training sessions, workshops, ambitious codes of values, individual coaching, etc. Empirical research on integrity suggests that the ideal approach is a combination of both the rules-based and values-based approaches that takes into account the balance of their components within one system.[21] The rules-based component constitutes the elementary legal framework and provides the

[20] Organization for Economic Co-operation and Development (OECD), *Ethics in the Public Sector: Current Issues and Practice,* Paris, see pages 12-13 (1996).

[21] Ibid.

"teeth" of the system that are essential to ensure minimal ethical behavior, while the values-based approach ensures that individuals are ethically more ambitious than simply avoiding integrity violations. The precise relative importance and the concrete shape of both approaches, however, depend on the specific economy's social, political, and administrative circumstances, as well as on the history of the organization concerned. In this context, it is important to review the management style used to manage misconduct compliance violations and the degree to which it is appropriate to a specific organizational culture.

35. **Cultivating an ethical culture:** When creating a compliance program, one needs to know the existing culture of the company and whether it is viable to create a compliance program that co-exists with the existing culture of the company. In the end, the ultimate enabling factor in operationalizing compliance polices and mechanisms, is leadership commitment. It is demonstrated by earmarking funds and staff for the implementation of a compliance program through different initiatives, as well as by high-level leaders setting an example by strictly complying to integrity policies themselves, as such modeling behavior is found to motivate employees under their supervision. Moreover, the implementation of compliance initiatives has greater impact if these are integrated into the firm's core business operations. The presence of compliance programs in strategic documents and as a legal requirement is also a positive indicator of the growing recognition of their importance, especially if these documents include implementation action plans with specific actions, allocation of tasks to responsible institutions, timelines, and budgets. Finally, compliance programs should be continuously improved, periodically tested, assessed, and monitored to evaluate whether they are achieving their prescribed goals.

II. International Organizations and Their Experience in Promoting Corporate Compliance

36. As the need to combat corruption received increasingly widespread attention, international legal mechanisms were established over the past few decades to establish a foundation for overcoming it. This framework includes the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (OECD) and the United Nations Convention Against Corruption, or the UNCAC. The UNCAC requires legal persons to be held liable for corrupt practices, as does the OECD Anti-Bribery Convention. In addition to these conventions, the World Bank's sanctions system complements international Anti-Corruption frameworks by applying additional pressure to comply through the issuing of public letters of reprimand to sanctioned parties, ordering their debarment. In addition to regular debarment, the Bank can impose conditional non-debarment and debarment with conditional release. Furthermore, over time the OECD, UNCAC and The World Bank Group have included instruments that promote the adoption of compliance programs by companies.

37. This section provides an overview of the aforementioned international conventions and their relevant stipulations on corporate compliance mechanisms.

A. Organization for Economic Co-operation and Development (OECD)

38. One of the best-known international instrument in combating bribery is the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Co-operation and Development (OECD)* (referred to as the "OECD Anti-Bribery Convention" from this point forward). The Convention was adopted in 1997 and implemented in 1999. Today it has 44 member economies, 10 of which are

APEC economies. The Convention does not attempt to cover all forms of corruption but is instead limited to addressing the bribery of foreign public officials in international business transactions and related offenses (e.g. money laundering and false accounting). More precisely, it is a criminal law agreement that focuses on criminalization and requires the parties to the Convention to ensure foreign bribery is a criminal offense and encourages international cooperation among the parties to the Convention to ensure its enforcement.

39. The second OECD source of standards on corporate compliance is the *Recommendation of the Council for further combating bribery of foreign public officials in international business transactions*[22], also known as the *Recommendation of Anti-Bribery Convention*, which was released on December 9, 2009 when the OECD marked the tenth anniversary of the entry into force of the OECD Anti-Bribery Convention. Although the Recommendation of the Anti-Bribery Convention is not binding for member states, it was adopted by the OECD to complement the Anti-Bribery Convention by dealing with areas that are not covered by the Convention, which includes prevention, detection, and reporting of foreign bribery crimes. The Recommendation of the Anti-Bribery Convention also includes two annexes:

    1. *Good Practice Guidance on the Implementation of the Convention*, which provides guidance on how to implement the Anti-Bribery Convention for member states, and

    2. *Good Practice Guidance on Internal Controls, Ethics, and Compliance,*[23] another set of guidelines and best practices —but specifically intended for the private sector.

[22] OECD. *Recommendation of the Council for further combating bribery of foreign public officials in international business transactions* (2009). Available at: https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf

[23] OECD. *Good Practice Guidance on Internal Controls, Ethics, and Compliance, Annex 2* (2010). Available at: https://www.oecd.org/daf/anti-bribery/44884389.pdf

40. The third OECD source of standards on corporate compliance is the *Monitoring and Evaluation* guidelines, mandated by Article 12 of the OECD Bribery Convention. These standards require all parties to participate in a program that systematically follows up and monitors the implementation of the OECD Bribery Convention. Article 12 also states monitoring and evaluation should take place in the OECD working group on bribery and international business transactions. The monitoring program is carried out through a series of evaluations of each economy, and recommendations are derived from these. It is through these evaluations that corporate compliance standards are then set in the OECD.

41. In the three sources of OECD standards described above, corporate compliance emerges in the following areas:

42. **1. *Defense to the liability:*** According to Convention Article 2, there is a requirement that each party have corporate liability. There is no clear description of what corporate liability should look like, however, Recommendation Annex 1B specifies two acceptable corporate liability systems or approaches: (i.) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or (ii.) The approach is functionally equivalent to the foregoing even though only the acts of persons with the highest level of managerial authority trigger it because the following cases are covered:

- A person with the highest level of managerial authority offers, promises or gives a bribe to a foreign public official;
- A person with the highest level of managerial authority directs or authorizes a lower-level person to offer, promise or give a bribe to a foreign public official; and
- A person with the highest level of managerial authority fails to prevent a lower-level person from bribing a foreign public official. For instance, this could occur due to a failure of supervision or a failure to

implement adequate internal controls or ethics and compliance programs or measures.

43. **2. *Sentence mitigations:*** The second area in which corporate compliance emerges in the three sources of OECD standards is in sentence mitigations. According to Convention Article 2, the bribery of a foreign public official should be punishable by effective, proportionate, and dissuasive criminal penalties. The range of penalties should be comparable to those applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include the deprivation of liberty sufficient to enable effective mutual legal assistance and extradition. The OECD working group evaluation of 44 member parties' implementation of Convention Article 2 revealed that 14 economies used corporate compliance programs as a mitigation factor to decide the sentence for bribery.

44. **3. *Prosecutorial discretion:*** The third area in which corporate compliance emerges in the OECD standard sources is in prosecutorial discretion. According to Convention Article 5, each party should have applicable rules and principles for the investigation and prosecution of the bribery, however, there are no clear specifications for how this system should be structured. The OECD working group evaluation of 44 member parties' implementation of Convention Article 5 revealed that 62% of the 44 economies' settlement processes and systems allowed the consideration of the existence of a corporate compliance program in a company when deciding whether to settle a case. The OECD recommendation stressed the importance of judges and prosecutors having adequate skills to evaluate the effectiveness of corporate compliance programs for settlement purposes.

45. **4. *Promotion of corporate compliance:*** The fourth area in which corporate compliance emerges in the OECD standard sources is in prosecutorial discretion. Anti-Bribery Recommendation X.C.i and X.C.vi suggest that member states should encourage companies, business associations, and other business stakeholders to develop and adopt compliance programs. They should also promote compliance programs by offering public advantage in the form of

subsidies, licenses, and procurement contracts to the companies that have corporate compliance in place. Through its monitoring and evaluation program, the OECD aims to raise awareness about corporate compliance among SMEs in particular, given that most of these companies do not have well-established programs as compared to multinational companies.

46. The *Good Practice Guidance on Internal Controls, Ethics and Compliance,* a recommendation adopted by the OECD in 2010, provided a list of principles that companies should consider as good practices for ensuring effective internal controls, ethical standards, or compliance measures for the purpose of preventing and detecting foreign bribery. Namely, they recommend that companies ensure (or at least strive for) the following:

1. Senior management should demonstrate strong, explicit, and visible support and commitment to the company's internal controls and/or ethics and compliance programs or measures for preventing and detecting foreign bribery;

2. A clearly articulated and visible corporate policy prohibiting foreign bribery should be developed and widely communicated;

3. Individuals at all levels of the company should take ownership of internal controls, ethics, and compliance programs or measures;

4. Oversight of ethics and compliance programs or measures regarding foreign bribery—including the authority to report matters directly to independent monitoring bodies like internal audit committees of boards of directors or of supervisory boards—should be tasked to one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;

5. Ethics and compliance programs or measures designed to prevent and detect foreign bribery should be applicable to all directors, officers, and

employees, and applicable to all entities over which a company has effective control, including subsidiaries, and include the following:

- Gifts;
- Hospitality, entertainment, and expenses;
- Customer travel;
- Political contributions;
- Charitable donations and sponsorships;
- Facilitation payments; and
- Solicitation and extortion.

6. Ethics and compliance programs or measures designed to prevent and detect foreign bribery should be applicable (where appropriate and subject to contractual arrangements) to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including the following essential elements:

    - Properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of business partners;

    - Informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance program or measures for preventing and detecting such bribery; and

    - Seeking a reciprocal commitment from business partners.

7. A system of financial and accounting procedures should be in place, including a system of internal controls. These procedures should be reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. Measures should be designed to ensure periodic communication and documented training for all levels of the company on the company's ethics

and compliance program or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;

9. Appropriate measures should be developed to encourage and provide positive support for the observance of ethics and compliance program or measures against foreign bribery at all levels of the company;

10. Appropriate disciplinary procedures should be established to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance program or measures regarding foreign bribery;

11. Effective measures should be established to:

    - Provide guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance program or measures, including on instances when they might need urgent advice on difficult situations in foreign jurisdictions;

    - Promote internal and (where possible) confidential reporting by and protection of directors, officers, employees, and (where appropriate) business partners who are unwilling to violate professional standards or ethics under instructions or pressure from hierarchical superiors. The same should be promoted for those (i.e. directors, officers, employees, and, where appropriate, business partners) willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and

    - Undertake appropriate action in response to such reports; and

    - Conduct periodic reviews of the ethics and compliance program or measures in order to evaluate and improve their effectiveness in preventing and detecting foreign bribery, while taking into account

relevant developments in the field and evolving international and industry standards.

47. The OECD source of standards is currently being updated to better integrate more in-depth compliance programs as a way of fighting bribery and to include them more systematically in member economies' legal structures.

48. Additionally, the OECD Working Group on Anti-Bribery has provided some technical assistance to OECD member economies to help them address corporate compliance and bribery challenges. Non-member economies do not receive TA, however, in collaboration with bilateral organizations, the OECD has provided TA to Central and South Asian economies (integrity programs that the UK supports) as well as Latin American businesses.

49. **OECD standards:** Member economies set these standards, where all 44 members came to a consensus. As part of the consultation process, both private sector and civil society actors provided input, although they did not have final say on decisions. Law enforcement agencies are encouraged to make sure they leverage their government representatives as a channel to inform the OECD on issues relevant to their work. While self-reporting has emerged as a trend and economies like the USA have been using self-reporting extensively, there are no definitive figures indicating that self-reporting has increased significantly. Based on OECD recommendations, however, it is safe to assume that the self-reporting figures are still relatively low.

50. The multi-jurisdictional environment that the OECD standards contend with raises the issue of finding ways to avoid double prosecution. Experts suggest that under this multi-jurisdictional umbrella, different economies should consult each other on their final decisions. Notably, this issue is not included in the OECD Convention, however, it may be included in a revised recommendation, expected over the next year.

B. United Nations Convention Against Corruption (UNCAC)

51. In the United Nations Convention Against Corruption (UNCAC), the focus on compliance programs is largely principles based. It does not apply compliance programs to UN contracting, but rather, offers States guidance on how to adopt the relevant actions to meet the standards set forth in the Convention.

52. UNCAC is a legally binding Anti-Corruption instrument. Over 170 economies' parties have committed to wide-ranging measures that seek to prevent corruption, criminalize bribery and other forms of corruption, strengthen law enforcement and international cooperation, establish legal mechanisms for asset recovery, and provide for technical assistance and information exchange. The responsibility of meeting the obligations of UNCAC ultimately lies with parties, however, there are several provisions relating to private sector corruption that are also of particular relevance to the business community.

53. *Liability of Legal Persons (Article 26):* This requires each party to the convention to adopt such measures as necessary and consistent with its legal principles in order to establish the liability of legal persons for participation in the offenses established in accordance with this convention. This implies the legal liability for legal entities and also legal liability of legal persons.

54. *Liability of Legal Entities:* UNCAC addresses liability of legal entities, which can be either criminal, civil, or administrative, thus accommodating disparate legal systems and approaches. At the same time, the convention requires that monetary or other kinds of sanctions that are introduced should be effective, proportionate, and dissuasive. The principle that corporations cannot commit crimes used to be universally accepted, but this changed initially in some common law systems.

55. *Private Sector Prevention:* UNCAC has the most detailed provisions for preventive measures, with extensive coverage of the ways, means, and standards for preventive measures for private sectors. Among other measures, it lists a number of good practices state parties may wish to consider that prevent and detect acts of corruption in the private sector. It promotes

standards and procedures to safeguard the integrity of private entities, such as codes of conduct and transparency provisions, and contains measures to prevent conflicts of interest, such as restricting private sector employment of officials leaving the public sector. Among other measures, the UNCAC also requires state parties to provide for effective, proportionate, and dissuasive civil, administrative, and criminal penalties as well as accounting and auditing standards for the private sector. Member states are also required to eliminate the tax deductibility of bribes. Article 11 of UNCAC outlines preventive measures relating specifically to the judiciary and prosecution services, calling on state parties to "take measures to strengthen judicial integrity and to prevent opportunities for corruption among members of the judiciary" and within the prosecution service where relevant. UNCAC also recognizes the role of civil society in the participation of fighting corruption in Article 13.

56. *Criminalization Provision:* UNCAC requires economies to criminalize various forms of corruption. Several other articles address the concepts of sanctions and remedies, and cooperation between authorities and the private sector. Criminalization provisions in Chapter III of UNCAC provide a baseline for corporate integrity, detailing corruption offenses that economies are called upon to make illegal. The criminalization provisions are:

- Bribery and embezzlement in the private sector (Articles 15, 16, 21, and 22)
- Trading in influence (Article 18)
- Abuse of functions (Article 19)
- Laundering of proceeds of crime (Article 23)
- Concealment (Article 24)
- Obstruction of justice (Article 25)

56. *Consequences of corruption:* There are two articles of the UNCAC that touch on this aspect, which are elaborated upon below.

1. *Nullify or rescind contract (Article 34):* This provision generally requires that each economy party to the Convention "take measures to address the consequences of corruption." It further declares that

"parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action." Article 34 also provides that with due regard to the rights of third parties acquired in good faith, each party should take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption.

2. *Compensation for damages (Article 35):* This article specifically provides that each party should take all necessary measures, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

57. *Whistleblower protection* (A*rticle 33):* UNCAC urges each economy to consider incorporating appropriate measures into its domestic legal system to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offenses established in accordance with this convention. UNCAC acknowledges the potentially useful contributions made by persons who observe or otherwise come into contact with corrupt practices. In such instances, protection should be considered for those making reports on acts relative to corruption offenses that are made in good faith, on reasonable grounds, and to appropriate authorities.

58. *Cooperation with law enforcement authorities (Article 37):* Parties are required to take appropriate measures to encourage persons who participate or who have participated in the commission of any offense established in accordance with the Convention to cooperate with law enforcement authorities. The specific steps to be taken are left to the discretion of parties to the Convention, that are asked, but not obliged, to adopt provisions for immunity or leniency. In light of this, the article also provides for possibilities of mitigating punishment of an accused person and granting immunity from

prosecution to a person who provides substantial cooperation in the investigation or prosecutions.

59. *Cooperation between domestic authorities and the private sector (Article 39):* This provision requires that parties consider encouraging persons with a habitual residence in their territory to report any offenses committed to the investigating and prosecuting authorities in accordance with the convention. A precedent and growing practice in many states that economies' drafters may wish to use as a model is that of placing a duty on certain private entities to report suspicious transactions to appropriate authorities. This applies to formal and informal financial institutions as well as businesses in specific sectors. Section 9 of the Public Interest Disclosure and Protection to Persons Making the Disclosures Bill (2010) authorizes the competent authority to take the assistance of police authorities in making discreet inquiries or obtaining information from the organization concerned. In practice, most departments or organizations have Central Vigilance Officers appointed who cooperate with the investigating agency (often the Central Bureau of Investigation but sometimes others). Section 18 of the Prevention of Corruption Act (1988) authorizes the investigating officer to go through relevant bank books for the investigation of a corruption case. There is no provision in law providing for cooperation between authorities and the private sector, in particular financial institutions.

C. The World Bank Group

60. In contrast with the OECD and UN, the World Bank Group (WBG), which includes the International Finance Corporation (IFC) as well as other agencies, does have a specific sanctions regime in place for Borrowers that are using WBG financing to award contracts. The Anti-Corruption Guidelines of the WBG were designed to prevent and combat fraud and corruption that may occur in connection with the use of proceeds of financing from the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA) during the preparation and/or

implementation of projects supported by Investment Project Financing (IPF).[24] They set out the general principles, requirements, and sanctions applicable to private persons and/or entities that receive, are responsible for the deposit or transfer of, or take or influence decisions regarding the use of, such proceeds.[25]

61. *Legal Considerations:* The Legal Agreement providing for a Loan governs the legal relationships between the Borrower and the World Bank Group with respect to the particular project for which the Loan is made. The responsibility for the implementation of the project under the Legal Agreement, including the use of Loan proceeds, rests with the Borrower. The World Bank Group, for its part, has a fiduciary duty under its Articles of Agreement to "make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations." These Guidelines constitute an important element of those arrangements and are made applicable to the preparation and implementation of the project as provided in the Legal Agreement.

62. *Scope of Application*: The Anti-Corruption guidelines cover fraud and corruption in the direct diversion of loan proceeds for ineligible expenditures, as well as fraud and corruption meant to influence any decisions regarding how loan proceeds may be used. All such fraud and corruption is deemed, for the purpose of these guidelines, to occur in connection with the use of loan proceeds. The guidelines apply to all investment lending but not programmatic loans or counterpart funding and parallel co-financing. The World Bank's share of joint or pooled financing is covered, however, as are trust fund grants, except those of UN agencies (as they have their own Fiduciary Principles Accord).

[24] The World Bank, Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (revised as of July 1, 2016).

[25] Ibid.

63. These Guidelines apply to the Borrower and all other persons or entities that either receive loan proceeds for their own use (e.g. "end users"), persons or entities like fiscal agents that are responsible for the deposit or transfer of loan proceeds (whether or not they are beneficiaries of such proceeds), and persons or entities that take or influence decisions regarding the use of loan proceeds. All such persons and entities are referred to in these Guidelines as "recipients of Loan proceeds", whether or not they are in physical possession of such proceeds. They apply to the procurement of goods, works, non-consulting services, and consulting services financed (in whole or in part) out of the proceeds of a loan from the Bank. Additional specific requirements relating to fraud and corruption in connection with such procurement are set out in Annex IV of the World Bank Procurement Regulations for Borrowers under Investment Project Financing, dated July 1, 2016, as the same may be amended from time to time.

64. *Reporting Suspicions of Fraud and Corruption:* According to the Staff Rule 8.01, all Bank staff (including consultants) have a duty to report to their line manager or to Institutional Integrity (INT) directly, any suspected fraud and corruption that may be occurring or have occurred in any Bank financed operation.

65. *Actions by the Bank in Cases of Fraud and Corruption*: Annex IV clearly states that the World Bank has authority to sanction those determined to have engaged in fraud or corruption, and it incorporates the definitions of sanctionable conduct that are provided in the Anti-Corruption Guidelines. Annex IV also requires that all contracts include an audit clause that gives the World Bank's investigators authority to access documents related to procurement. Specifically, the World Bank requires that: a clause be included in request for bids/request for proposals documents and in contracts financed by a Bank loan, requiring bidders (applicants/proposers), consultants, contractors, and suppliers; and their sub-contractors, sub-consultants, agents, personnel, consultants, service providers or suppliers, permit the World Bank to inspect all accounts, records and other documents relating to the

procurement process, selection and/or contract execution, and to have them audited by auditors appointed by the Bank.

66. *World Bank Group Integrity Compliance Office (ICO):* In 2010, the WBG established "debarment with conditional release" as the baseline WBG sanction, requiring sanctioned companies and individuals to meet certain conditions before they may be released from sanction and are permitted to bid again on World Bank Group funded projects. In this context, an Integrity Compliance Officer (ICO) was appointed to work with these companies and individuals to develop and implement policies and procedures seeking to reduce the likelihood that they will engage in fraud or corruption in the future. In addition, the ICO monitors integrity compliance implementation by sanctioned companies (or codes of conduct for individuals). The ICO also decides whether the compliance conditions (and/or others established by the Sanctions Board or a World Bank Group Evaluation and Suspension Officer as part of a debarment) have been satisfied. In this context, the World Bank group established Integrity Compliance Guidelines consisting of 11 principles:

    1. *Responsibility*: Create and maintain a trust-based, inclusive organizational culture that encourages ethical conduct, a commitment to compliance with the law and a culture in which misconduct is not tolerated.

    2. *Leadership*: Strong, explicit, visible, and active support and commitment from senior management, and the party's Board of Directors or similar bodies, for the party's Integrity Compliance Program and its implementation, in letter and spirit.

        - *Individual Responsibility*: Compliance with the Program is mandatory and is the duty of all individuals at all levels of the party.

        - *Compliance Function*: Oversight and management of the Program is the duty of one or more senior corporate officers,

with an adequate level of autonomy and with sufficient resources and the authority to effectively implement.

3. *Program Initiation, Risk Assessment, and Reviews*: When establishing a suitable program, carry out an initial (or updated) comprehensive risk assessment relating to the potential for the occurrence of fraud, corruption, or other misconduct in the party's business and operations, taking into account its size, business sector, location(s) of operations, and other circumstances particular to the party. This risk assessment should also be reviewed and updated periodically and whenever necessary to meet evolving circumstances. Senior management should implement a systemic approach to monitoring the program, periodically reviewing the program's suitability, adequacy, and effectiveness in preventing, detecting, investigating, and responding to all types of misconduct. It also should take into account relevant developments in the field of compliance and evolving international and industry standards. When shortcomings are identified, the party should take reasonable steps to prevent further similar shortcomings, including Debarment with Conditional Release and Integrity Compliance making any necessary modifications to the program.

4. *Internal Policies*: Develop a practical and effective program that clearly articulates values, policies, and procedures to be used to prevent, detect, investigate, and remediate all forms of misconduct in all activities under a party or person's effective control.

    a. *Due Diligence of Employees*: Vet current and future employees with any decision-making authority or in a position to influence business results, including management and board members, to determine if they have engaged in misconduct or other conduct inconsistent with an effective integrity compliance program.

    b. *Restricting Arrangements with Former Public Officials*: Impose restrictions on the employment of (or other remunerative arrangements with) public officials and entities or persons

associated with or related to them after their resignation or retirement. Such restrictions on activities or employment should relate directly to the functions held or supervised by those public officials during their tenure or those functions over which they were or continue to be able to exercise material influence.

c. *Gifts, Hospitality, Entertainment, Travel, and Expenses*: Establish controls and procedures covering gifts, hospitality, entertainment, travel, or other expenses to ensure that they are reasonable, do not improperly affect the outcome of a business transaction, or otherwise result in an improper advantage.

d. *Political Contributions*: Only make contributions to political parties, party officials and candidates in accordance with applicable laws, and take appropriate steps to publicly disclose all political contributions (unless secrecy or confidentiality is legally required).

e. *Charitable Donations and Sponsorships*: Take measures within the party's power to ensure that their charitable contributions are not used as a subterfuge for misconduct. Unless secrecy or confidentiality is legally required, all charitable contributions and sponsorships should be publicly disclosed.

f. *Facilitation Payments:* The party should not make facilitation payments.

g. *Record-Keeping*: Appropriate records should be maintained regarding all aspects covered by the program, including when any payment is made for the matters or items listed in c through f above.

h. *Fraudulent, Collusive and Coercive Practices*: Particular safeguards, practices, and procedures should be adopted to

detect and prevent not only corruption, but also fraudulent, collusive, and coercive practices.

5. *Policies Addressing Business Partners*: Ensure that the party makes its best effort to encourage all business partners with which the party has a significant business relationship—or over which it has influence—to adopt an equivalent commitment to prevent, detect, investigate, and remediate misconduct. In the case of business partners that are controlled affiliates, joint ventures, unincorporated associations or similar entities, these should be encouraged to do the same, or to the extent possible, obligate them to do so. This includes agents, advisers, consultants, representatives, distributors, contractors, subcontractors, suppliers, joint venture partners, and others. In the event that facilitation payments are not eliminated entirely, in each instance the debarred party should report to the ICO the circumstances surrounding its payment, including whether it was limited to a small payment to a low-level official (or officials) for a routine action (or actions) to which the party is entitled and the payment has been appropriately accounted for.

    a. *Due Diligence on Business Partners*: Conduct properly documented, risk-based due diligence (including identifying any beneficial owners or other beneficiaries not on record) before entering into a relationship with a business partner, and on an on-going basis. Avoid dealing with contractors, suppliers, and other business partners known or reasonably suspected to be engaging in misconduct except in extraordinary circumstances and where appropriate mitigating actions are put in place.

    b. *Inform Partner of Integrity Compliance Program*: Make party's program known to all business partners and make it clear that the party expects all activities carried out on its behalf to be compliant with its program.

c. *Reciprocal Commitment*: Seek reciprocal commitment to compliance from party's business partners. If business partners do not have an integrity compliance program, the party should encourage them to adopt a robust and effective program that is adapted to the activities and circumstances of those partners.

d. *Proper Documentation*: Document fully the relationship with the party's business partners.

e. *Appropriate Remuneration*: Ensure that any payment made to any business partner represents an appropriate and justifiable remuneration for legitimate services performed or goods provided by such business partners and that it is paid through bona fide channels.

f. *Monitoring and Oversight*: Monitor the execution of all contracts to which the party is a party in order to ensure, as far as is reasonable, that there is no misconduct in their execution. The party should also monitor the programs and performance of business partners as part of the regular review of its relationships with them.

6. *Internal Controls*:

a. *Financial*: Establish and maintain an effective system of internal controls comprising financial and organizational checks and balances over the party's financial, accounting, and record-keeping practices, as well as its other business processes. The party should subject the internal controls systems—accounting and record-keeping practices in particular—to regular, independent, internal, and external audits to provide an objective assurance on their design, implementation, and effectiveness to bring to light any transactions that contravene the program.

b. *Contractual Obligations*: Employment and business partner contracts should include express contractual obligations, remedies,

and/or penalties in relation to misconduct. This includes, in the case of business partners, a plan to exit from the arrangement (e.g. a contractual right of termination) in the event that the business partner engages in misconduct.

c. *Decision-Making Process*: Establish a decision-making process whereby the decision process and the seniority of the decision-maker is appropriate for the value of the transaction and the perceived risk of each type of misconduct.

7. *Training and Communication*: Take reasonable, practical steps to periodically communicate its program, and provide and document effective training in the program tailored to relevant needs, circumstances, roles, and responsibilities, to all levels of the party. This applies especially to those involved in "high-risk" activities and, where appropriate, to business partners. Party management also should make statements in its annual reports or otherwise publicly disclose or disseminate knowledge about its program.

8. Incentives: Debarment with Conditional Release & Integrity Compliance

a. Positive: Promote the program throughout the party by adopting appropriate incentives to encourage and provide positive support for the observance of the program at all levels of the party.

b. Disciplinary Measures: Take appropriate disciplinary measures (including termination) with all persons involved in misconduct or other program violations, at all levels of the party including officers and directors.

9. *Reporting*

a. Duty to report: Communicate to all personnel that they have a duty to report promptly any concerns they may have concerning the Program, whether relating to their own actions or actions of others.

b. Advice: Adopt effective measures and mechanisms for providing guidance and advice to management, staff, and (where appropriate) business partners on complying with the party's program, including when they need urgent advice on difficult situations in foreign jurisdictions.

c. Whistleblowing and Hotlines: Provide channels of communication (including confidential channels) for persons unwilling to violate the program under instruction or pressure from hierarchical superiors, as well as for persons willing to report breaches of the program occurring within the party. The party should take appropriate remedial action based on such reporting.

d. Periodic Certification: All relevant personnel with decision-making authority or in a position to influence business results should certify in writing that they have reviewed the party's code of conduct, have complied with the program, and have communicated to the designated corporate officer responsible for integrity compliance any information they may have relating to a possible violation of the program by other corporate personnel or business partners. This should be mandated periodically and annually at the very least.

10. *Remediate Misconduct:*

    a. Investigating Procedures: Implement procedures for investigating misconduct and other violations of its program that are encountered, reported, or discovered by the party.

    b. Respond: When misconduct is identified, the party should take reasonable steps to respond with appropriate corrective action to prevent further or similar misconduct and other violations of its program.

11. *Collective Action*: Where appropriate—especially for SMEs and other entities without well-established programs but also for those larger

corporate entities with established programs, trade associations, and similar organizations acting on a voluntary basis—every effort to endeavor to engage with business organizations, industry groups, professional associations, and civil society organizations should be made. This is in aims to encourage assistance to other entities to develop programs aimed at preventing misconduct.

III. Tools and Incentives for Promoting Corporate Compliance in Some Economies

67. Several APEC and non-APEC economies have undertaken considerable reforms to adopt their legal and regulatory frameworks in order to combat corruption such as bribery in the private sector. These frameworks increasingly include recognition by law enforcement authorities of corporate compliance programs. Below there are examples from two economies a serious regulation framework and some examples of how Deferred Prosecution Agreements (DPAs) have been used differently in these economies.

A. United Kingdom[26]

68. The U.K. Bribery Act 2010 has become a frequent reference for many jurisdictions that seek to combat foreign and domestic bribery. As noted above, OECD member states have adopted much of the content of the UK Bribery Act as well as OECD norms. One especially relevant section of the U.K. Bribery Act is Section 7 "Failure to Prevent Bribery", which sets out parameters for corporate liability for corrupt activity committed by employees or associated persons.[27] Essentially, this section asserts that a commercial

[26] Wilmer Hale. "Trans-Atlantic Winds of Change for Corporate Monitorships." December 11, 2018. Available at: https://www.wilmerhale.com/en/insights/blogs/wilmerhale-w-i-r-e-uk/20181211-trans-atlantic-winds-of-change-for-corporate-monitorships

[27] Boggs, Patton Squire. *Bribery Act 2010: Section 7 Guidance,* (March 2011). Available at: https://www.anticorruptionblog.com/uk-bribery-act/bribery-act-2010-section-7-guidance/

organization would be found guilty of bribery if a person associated with the organization was found guilty of bribing another individual in order to either: *i)* obtain or retain business for their organization or *ii*) Obtain or retain a business advantage for their organization. Both the individual (i.e. employee or person associated with the organization) and the organization could face fines if found liable. This said, if an organization can prove that it implemented adequate procedures to protect against bribery, then it may receive some leniency for those efforts. Such "adequate procedures" to mitigate risk are delineated in the Bribery Act as follows:

- Proportionate procedures: An organization's procedures, which are intended to prevent bribery offenses, are developed to a degree that is proportionate to the bribery risk that the organization could potentially face.

- Top-level commitment: An organization's board of directors can demonstrate clear commitment to preventing bribery by fostering an environment that does not tolerate bribery and corruption.

- Risk assessment: An organization can demonstrate that it has conducted risk assessments that assess potential vulnerabilities to bribery, and such assessments should take place systematically.

- Due diligence: Due diligence procedures conducted by organizations should align with the various kinds and levels of risk identified. Notably, these procedures should also account for the specific risks associated with individuals employed by the organization.

- Communication: It is expected that organizations should communicate widely about and conduct trainings on bribery prevention to ensure that actors across the whole organization are aware of the issue and that its many aspects are well understood.

- Monitoring and review: An organization can and should regularly review and update its bribery prevention policies and procedures to ensure they are still appropriate.

69. In March of this year, the House of Lords in the United Kingdom undertook a review of the 2010 UK Bribery Act. In fact, observers have noted that corporate liability and the 'failure to prevent model' have been the subject of recent parliamentary discussions. Under new leadership by a former corporate monitor herself, the Director of the Serious Fraud Office (SFO) has begun providing guidance on corporate cooperation. While the SFO has also been careful to note that such guidance is largely for internal use, in the interests of transparency, portions of a redacted Operational Handbook, including considerations of cooperation, are now available to corporate entities.

70. Yet historically speaking, the U.K. experience is still evolving and quite different from jurisdictions such as the US. For example, U.K. enforcement authorities had no formal statutory power to require a company to appoint a compliance monitor until the passage of the Crime and Courts Act 2013 (CCA). Nonetheless, based on negotiations with the SFO, between 2008 and 2012, a few overseas bribery cases resulted in some form of monitorship. According to analysts, the monitors' roles were perhaps "less intrusive" than those used in the US. Nonetheless, some U.K. judges were still unconvinced with the need for a monitor. U.K. Justice Thomas noted that a monitor was an "expensive form of a probation order".

71. In 2014, the U.K. approved the use of deferred prosecution agreements (DPAs) but did not require the use of monitors. In fact, SFO staff has stated that DPAs should not be seen as a "cost of doing business" but rather apply where they can ensure greater respect and confidence in the UK's criminal justice system. For a more detailed description of the use of DPAs in the UK, see Table 1 below.

B. United States

72. Among the oldest regimes to combat foreign bribery is the Foreign Corrupt Practices Act (FCPA) of the United States, which provides an interesting

example of how to provide incentives for companies to adopt compliance programs. The relevant government agency and units within it, the US Department of Justice (DOJ), Criminal Division and Fraud Section (hereinafter the "section"), plays unique and essential role in the Department's fight against sophisticated economic crime. The Fraud Section investigates and prosecutes complex "white collar" crime cases such as financial crimes, foreign bribery offenses, procurement fraud and related domestic bribery offenses, and complex health care fraud. Examples include kickback schemes throughout the economy, routinely charging and resolving cases of both domestic and international significance. The section is uniquely qualified given its capacity and extensive experience with sophisticated fraud schemes, its expertise in managing complex and multi-district litigation, and its ability to deploy resources effectively to address law enforcement priorities and respond to geographically shifting problems. These capabilities are an essential complement to the efforts of the United States Attorneys' Offices to combat foreign and domestic bribery and other white-collar crime.

73. The section also plays a critical role in the development of department policy by implementing enforcement initiatives and advising the department leadership on such matters as legislation, crime prevention, and public education. The section frequently coordinates inter-agency and multi-district investigations and international enforcement efforts. The section assists prosecutors, regulators, law enforcement, and the private sector by providing training, advice, and other assistance. The section also participates in numerous local, regional, and international working groups often in a leadership capacity.

74. It is vital that prosecutors make informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations). Thus, a corporate compliance program should be evaluated in the specific

context of a criminal investigation. There is no clear-cut formula in assessing the effectiveness of a corporate compliance program. However, according to the DOJ there are three essential questions a prosecutor should ask:[28] (i) Is the corporation's compliance program well designed?[29] (ii) Is the program being applied effectively? And (iii) does the corporation's compliance program work in practice?[30] Each of these sections not only describes a series of aspects prosecutors need to take into account while investigating misconduct behavior within corporations but also a number of characteristics a well-designed compliance program should have.

75. According to experts familiar with the US experience, "the DOJ's interest in corporate compliance programs originated from a 1991 revision to the US federal Sentencing Guidelines, which guide federal judges to ensure consistent sentencing of convicted criminal defendants. The 1991 revision added a chapter to address the sentencing of organizational defendants and provided grounds for possible reduction in penalty if the organization could demonstrate an 'effective program to prevent and detect violations of law".[31]

76. Looking at whether a company has an effective compliance program is one of the key drivers in determining and resolving a corporate criminal case versus

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[28] By answering these three fundamental questions, investigators can better evaluate the performance of a company in the different aspects considered relevant by the criminal division when evaluating a corporate compliance program. US Department of Justice Criminal Division, op. cit., p. 2.

[29] Regarding the design of a corporation's compliance program, the DOJ's Guidance (see page 3), cites the Justice Manual, Section 9-28.800, establishing that the "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct"; in addition to this, prosecutors should examine "the comprehensiveness of the compliance program", establishing a clear message that misconduct is not tolerated and policies and procedures that ensure that the program is correctly incorporated into the company's operations and workforce. US Department of Justice Criminal Division, op. cit., citing the JM, section 9-28.800, p. 3.

[30] Ibid.

[31] Hui Chen, *US DOJ's Compliance Guidance: Take Aways for International Enforcers and Regulators*, Commentaires, Droit Americain, *Revue Internationale de la Compliance L'Ethique des Affaires*, No. 3 (Juin 2018).

forming a resolution. In this context, the United States has the following options:

- *Charge (i.e. Plea or Indictment):* This entails bringing a charge and indictment against a company.
- *Deferred Prosecution Agreement (DPA):* This refers to an agreement between the US government and a corporation, where the government agrees to halt any prosecutions of the company if the company agrees to undertake certain obligations. This would normally include an agreement to cooperate with the government investigation and prosecution with corporate agencies or employees of the company, agreements to report violations of federal law, and also to agree to take certain immediate actions that include a compliance obligation. This could be a self-reporting obligation as to the implementation of an effective corporate compliance framework as required by the government or the imposition of an independent compliance monitor. DPAs are negotiated by prosecutors with little judicial involvement. Generally, the US judiciary approves the terms without significant amendments before they are made public.
- *Non-Prosecution Agreement (NPA)*: These agreements are tailored to instances where companies have the option to enter into a plea agreement with the government. An NPA is similar to a DPA, except that the prosecutors agree not to prosecute, rather than deferring or reserving the right to do so in the future.
- *A Declination:* This mechanism refers to a new FCPA Corporate Enforcement Policy that the Department of Justice launched in November 2017 that superseded the FCPA Pilot Program announced in April 2016. The policy was incorporated into the United States Attorneys' Manual (USAM), now referred to as the Justice Manual (JM), the internal DOJ document that sets forth policies and guidance for federal prosecutors. The Policy sets forth guidelines for fulfilling self-disclosure, cooperation, and remediation factors, which is intended to encourage companies to take active steps to self-report misconduct

and address compliance shortcomings. If the company satisfies the standards set forth for voluntary self-disclosure, full cooperation, and timely and appropriate remediation, the policy presumes that the DOJ is likely to issue a declination unless there are aggravating circumstances that may warrant a criminal resolution. (This includes involvement by executive management of the company in the misconduct, a significant profit to the company from the misconduct, and pervasiveness of the misconduct within the company.) In order to qualify for declination a company is required to pay all the profits gained resulting from misconduct. If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and remediated in a timely and appropriate manner, the fraud section is likely to commit to the following:

- Recommending to a sentencing court a 50% reduction of the low end of the US Sentencing Guidelines fine range, except in the case of a criminal recidivist; and

- If a company has, at the time of resolution, implemented an effective compliance program, allowing the company to carry on without the appointment of a monitor. This said, the DOJ would likely test and assess the effectiveness of the corporate compliance program in the event that one exists.

77. If a company did not voluntarily disclose misconduct but it fully cooperates with the United States investigation and appropriately remediates, it can also get certain benefits, such as receiving up to a 25% off reduction of the US sentencing guidelines range. In order to be fully transparent, the DOJ explains the reasoning as to why a company received the declination on their website.[32] It is vital to mention that this policy was initially applicable only to FCPA violations, however, the leaders within the DOJ department announced this past year that any case that was brought into the criminal division—which

[32] Link to the website: https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations

may include (but is not limited to) securities and financial fraud cases of domestic and international significance, healthcare fraud cases, and cases involving the money laundering asset recovery section—would be equally treated with the principles underlying the FCPA corporate enforcement policy.

78. In sum, one of the greatest benefits of having this type of policy is that it gives an incentive for companies to adopt ethics and compliance programs and create solid compliance infrastructure that stimulates self-reporting. This of course benefits enforcement agencies to quickly and efficiently focus on the investigation and prosecution of the responsible employees and agents of the company.

79. **Voluntary Self-Disclosure at the Corporate at Individual Level:** When voluntary self-disclosure occurs, there are clearly considerations for the prosecution of the culpable individual(s) at both the corporate level and at the individual level. Whether engagement with the corporation has or has not facilitated the DOJ's ability to pursue additional or different cases impacts the relationship between individual- and corporate-level prosecutions. It is largely a timing issue, where sometimes the government is pursuing its investigation of wrongdoing within a corporation, and in these cases the investigation is typically focused on the identification of liable individuals. The U.S controlling law operates under the doctrine of *respondent superior,* where a company is liable for the crimes of its employees if an employee commits the crime and it also checks the scope of employee authority within the company that benefits from the wrongdoing**.** The delineation between the investigation of individuals and corporations exists because corporate crime liability is derivative of individual liability, however, there are some instances where the sequencing can be different. It may be suitable to prosecute individuals and bring individual charges first and subsequently resolve these with the company. In other cases, the DOJ may pursue an investigation of individuals and a company may self-disclose and provide information to us about investigations of individuals that may provide additional evidence to better pursue those individuals. At other times, the DOJ may be involved with a company that may substantially assist the prosecution of an individual.

Therefore, there is no one-size-fits-all way of dealing with individuals or corporate-level prosecution. There are a variety of different ways that the DOJ might sequence charges against individuals or corporations. In this context, when a company self-discloses misconduct, this has allowed the DOJ to secure additional evidence and information that is very helpful in advancing individual prosecutions or international investigations where it is difficult to secure evidence or would have taken longer. Therefore, self-disclosure, helps the DOJ to expedite investigations in many situations.

80. **The Monitoring Selection Process:** As part of a negotiated resolution with a company and a guilty plea agreement, a deferred prosecution agreement, a non-competition agreement, and in some instances, declination under the FCPA, the United States government can impose an independent compliance monitor. This arrangement has a very formal process: the government sets certain minimum qualifications that it wants the monitor to have (e.g. expertise in foreign bribery matters and designing, implementing, and overseeing corporate compliance programs that prevent FCPA violations or corruption violations). The monitor should have relevant experience in terms of subject matter expertise within the industry as well as a variety of minimum qualifications are included in the document called the "monotone attachments". This document lays out the following: what the monitor is supposed to do when s/he goes to the company; the process for evaluating the company's ethics and compliance program; and reporting and how it plans to go about conducting its monitoring of the company.

81. Once paperwork and the corporate resolution are in place, the company normally proposes three candidates that it believes are qualified to serve as the monitor. After that, interview processes are undertaken for the suggested compliance monitors, and it is determined whether they are qualified to serve and who is best positioned to carry out the mandate. The line prosecutors and the management of the US attorney's office are then tasked with selecting one candidate, and it is this individual who is referred to standing committee made up of senior DOJ leaders as well as an ethics advisor. It is they who decide whether they will accept the recommendation of the prosecution team, and this

is subsequently escalated to the deputy attorney general to evaluate whether this candidate should serve as the independent compliance monitor for a company.

82. **Compliance Program Evaluation Training**: In the United States, prosecutors' training to evaluate compliance programs is not well developed and is often limited to a briefing of corporate compliance guidelines. The presence of multinationals companies in training sessions enables the prosecutor to get a clearer picture of the challenges faced by companies based on their size or other situational issues that may arise taking into account company-specific risks.

C. Using Deferred Prosecution Agreements (DPAs)[33] to Resolve Criminal Liability in Cases of Domestic and Foreign Bribery

83. Drawing upon the experiences of the U.S and UK law enforcement authorities, many other economies' authorities have begun to adopt DPAs as a prosecutorial tool in recent years. Given that a DPA can often resolve legal matters quickly and reduce litigation costs, it is favored by both regulators and companies. Companies find these attractive given they can help avoid costly engagements of ongoing litigation and damages to their reputation.

84. In order to maximize the potential application of DPAs, it is critical to understand how they can serve law enforcement agencies prosecution activities. Clearly, any given economy that aims to integrate DPAs into its legal procedures will likely wish to adapt this measure, so it is appropriate for local contexts. It is therefore useful to understand how different economies' have employed DPAs thus far. This sub-section below provides some examples that illustrate how DPAs have differed in various economies.

[33] As previously described, a *Deferred Prosecution Agreement (DPA)* refers to an agreement between a government and a corporation, where the government agrees to halt any prosecutions of the company if the company agrees to undertake certain obligations. Notably, this does not prevent prosecution from later taking place if deemed necessary.

1. Australia's History in Using DPAs

85. Since the ratification of the OECD Anti-Bribery Convention by Australia in 1999, Australia has had only two foreign bribery convictions due to a lack of enforcement. To meet this deficiency, the Australian government implemented several reforms, such as establishing a new portfolio that handles fraud and corruption with the Australia Federal Police (AFP). Australia's main criminal law enforcement agencies in bribery cases are the AFP and the Office of the Commonwealth Director of Public Prosecutions (CDPP). Investigations and detections are generally conducted by the AFP, with prosecutions undertaken by the CDPP. While allegations of corruption are generally referred to the AFP, other agencies that may become involved due to subject matter relevance in investigation processes are the Australian Securities and Investment Commission (ASIC), the Australian Commission for Law Enforcement Integrity, Australian Criminal Intelligence Commission, the Inspector-General of Intelligence and Security, and the Office of Commonwealth Ombudsman. The CDPP is responsible for prosecuting offenders under the anti-bribery provisions of the criminal code. Mechanisms used to receive corruption reporting channels consist of public and media reporting, international bribery collaboration and self-reporting.

86. In December 2017, the AFP and the CDPP jointly released the *Best Practice Guideline: Self-Reporting of Foreign Bribery and Related Offending by Corporation.* This guideline explains the principles and processes that the AFP and the CDPP apply when a corporation self-reports conduct involving a suspected breach of Australia's foreign bribery (or related) offense. The guidelines aim to incentivize companies to self-report foreign bribery by giving them greater information about how self-reporting will be handled by the AFP and the CDPP. The guidelines operate within the framework of the Prosecution Policy of the Commonwealth and describe the public interest factors that the CDPP takes into account in deciding whether or not to prosecute a corporation that self-reports suspected foreign bribery. It further explains that if a prosecution is initiated, how the self-reporting should be taken into account by a court when sentencing the corporation. One factor that

may be considered is whether the corporation had an appropriate governance framework in place to mitigate the risk of bribery (including specific Anti-Corruption policies and processes) and the extent to which there was a culture of compliance within that framework.

87. In Australia, companies are encouraged to put effective compliance programs in place to mitigate the risk of bribery and corruption. While there are no legislative requirements to implement such programs, there are particular instruments that seek to encourage their implementation. For example, bribery of a foreign public official by a corporation is punishable by a maximum fine, which is the greater of $21 million AUD, three times the benefit obtained as a result of the bribery, or if the benefit cannot be ascertained, then it is 10% of the annual turnover of the corporation during a 12-month period. However, if a corporation has self-reported the conduct that qualifies as foreign bribery, such self-reporting may be taken into account by the court at the sentencing stage.

88. The evaluation and monitoring of a compliance program's effectiveness and existence are conducted by ASIC and ethics agencies. In this context, the Australian Security Exchange Agency established a guide that outlines principles of corporate compliance that companies are expected to adopt this year. Companies should have the elements outlined below (and if they fail to implement or adopt these, they are required to explain why they do not have them in place). Broadly, the principles are as follows:

    i. A solid foundation should be established for management;
    ii. The board should be structured in such a way that it is effective and adds value;
    iii. A corporate culture of acting ethically and responsibly should be cultivated;
    iv. The integrity of corporate reports should be safeguarded;
    v. Disclosures to market regulators and other relevant stakeholders should be made in a timely manner;

vi. Shareholders of the company should be respected;

vii. Risks should be recognized and managed; and

viii. Risks should be remediated fairly and responsibly.

89. As part of a package of reforms, the following actions have been taken:

- *Hiring of a former CDDP principal prosecutor:* The AFP has hired a former CDDP principal prosecutor to support on-the-ground investigations. This initiative has allowed AFP staff to work with an experienced prosecutor who has the know-how of the necessary elements that need to be present to prosecute foreign bribes and how to review the effectiveness of corporate compliance. This has improved and minimized the time of investigations and is hoped to also contribute to more convictions.

- *Modification of crimes legislation amendment:* The foreign bribery offense amendments include offense prevention similar to that of the UK Bribery Act. In addition, Australia has already advanced a proposed Deferred Prosecution Agreement (DPA) scheme. Under the proposed scheme, prosecutors will have the option to invite a corporation that is alleged to have engaged in serious corporate crime to negotiate an agreement comply with a range of specified conditions. In December 2017, the Australian Government introduced a bill into Parliament to make the reforms described above—namely, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill of 2017. This was referred to a parliamentary committee, which recommended that the bill be passed; however, it was not passed before Parliament was dissolved for the May 2019 election. Notwithstanding this, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 was reintroduced before Parliament and is currently with the Senate Legal and Constitutional Affairs committee.

- W*histleblower legislation*: This law requires the private sector to establish a whistleblowing channel.

90. **Prosecutions in Australia:** Prosecutions in Australia at least partly rely on the Telecommunication Intersection Act and Device Act in order to gather sufficient information (and evidence) that can lead to conviction. In the event

that a case does not proceed to prosecution, one option to advance the case is to leverage other methodologies like DPA and civil remedy resolution (among others) instead of criminal resolution.

2. DPAs in Canada

91. DPAs came into force in Canada in September of last year, and, much like other DPA regimes, a remediation agreement is a voluntary agreement between a prosecutor and an organization accused of committing an offense. Agreements would set an end date, which is a deadline by which the terms of the agreement should be met by the organization and would need to be presented to a judge for approval. Before approving a remediation agreement, the judge would need to be satisfied that the agreement is in the public interest and the terms of the agreement are fair, reasonable, and proportionate. A DPA is defined as a voluntary agreement negotiated between an accused and the responsible prosecution authority. In the Canadian prosecutions model, prosecutors are independent of law enforcement. They work closely with law enforcement agencies in carrying out their prosecutorial mandate, but they are independent. Canada's federal system that consists of federal jurisdictions and provincial jurisdictions create conditions where there exist prosecutors in provincial jurisdictions with their own mandates. At the federal level, there are prosecutors who handle foreign bribery and fraud cases against the federal government. Under federal jurisdiction, foreign bribery is investigated by the federal police, or the Royal Canadian Mounted Police (RCMP). To promote DPA, public prosecutors collaborated with the RCMP to implement many educational efforts and outreach on how the DPA works in Canada. In Canada, DPA is only available for corporations—not for individuals—and is intended to cover most accounting crimes such as foreign bribery, robbery, corruption, fraud, breach of trust, and other similar offenses.

92. Canadian courts apply the "identification doctrine" whereby only the controlling mind of the corporation could engage its criminal liability for offenses requiring proof of intent. In 2004, the Parliament of Canada adopted an Act to Amend the Criminal Code (Criminal Liability of Organizations)

(Bill C- 45). This Act sought to broaden corporate criminal liability and, for that purpose, amended the Criminal Code, making organizations accountable for offenses committed by a senior officer (i.e. a representative who (i) plays an important role in the establishment of the organization's policies; (ii) is responsible for managing an important aspect of the organization's activities; or (iii) is, in the case of a corporation, either a director, CEO or CFO). While the US adopted the vicarious liability approach, which extends the offense doctrine of *respondeat superior*[34] to criminal law, the concept of *respondeat superior* makes corporate criminal liability a realistic prospect in situations where employees of a corporation are involved in criminal activities. In the UK, in the absence of a strict liability corporate defense, the so-called identification principle is used to determine whether the offender was a "directing mind and will" of the company and is a significant evidential hurdle to establishing corporate liability.

93. The objective of the DPA model entails the following:

- *Denunciation*: to denounce an organization's wrongdoing and the harm caused by it;
- *Accountability:* to hold the organization accountable for its wrongdoing;
- *Respect for the law:* to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;
- *Voluntary disclosure:* to encourage voluntary disclosure of the wrongdoing, however, voluntary discloser is not a mandatory requirement to entering in to DPA;
- *Reparation:* to provide reparations for harm done to victims or to the community;
- *Reduction of negative consequences:* to reduce the negative consequences of the wrongdoing for persons (e.g., employees, customers,

[34] *i*.e. *respondeat superior:* an employer has responsibility for the acts of its employees and agents.

pensioners, and others) who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

94. The Canadian DPA regime has three broad components:

1. *Qualifying Provisions:* In order for the prosecutor to enter into negotiations for a remediation agreement, the following conditions should be met:
   - There is a reasonable prospect of conviction with respect to the offense;
   - The impugned conduct did not cause serious bodily harm or death or injury to defense or security and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;
   - Negotiating the agreement should be in the public interest and appropriate in the circumstances; and
   - The Attorney General should consent to the negotiation of the agreement. The director of public prosecutions should approve the DPA submitted by filed prosecutor.
2. *Negotiation and the Content of the Agreement:* Prosecutors are expected to consider a number of factors when deciding whether to negotiate a remediation agreement, including:
   - The circumstances in which the offense was brought to the attention of investigative authorities;
   - The nature and gravity of the offense and its impact on any victim;
   - The degree of involvement of senior officers of the organization;
   - Whether the organization has taken disciplinary action, including termination of employment, against any person involved;

- Whether the organization has made reparations, or taken other measures to remedy the harm caused and to prevent the commission of similar acts or omissions;
- Whether the organization has identified or expressed a willingness to identify any person involved in related wrongdoing;
- Whether the organization — or any of its representatives — was convicted of an offense or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar conduct; and
- Whether the organization — or any of its representatives — is alleged to have committed any other offenses; and any other factor that the prosecutor considers relevant.

3. *Judicial approval and supervision:* In Canada, there is judicial oversight over DPAs that require judicial approval once (only the DPA has been negotiated) whereas the United Kingdom requires judicial approval at two stages, once at the commencement of negotiations between the prosecutor and the accused organization. The reason for the approval before entering into the DPA is to make sure that the DPA is likely in the public interest and that the proposed terms are fair, reasonable, and proportionate. In contrast, the US model does not require judicial approval, but they are registered with the court for enforcement in the event of a breach.
4. *Process for DPA Negotiations:* The investigation of cases is handled by the police but is subsequently passed to prosecutors, as the police do not have the authority to negotiate a DPA. Cases are typically passed to prosecutors if there is sufficient evidence, and charging decisions are made once the investigation is completed by prosecutors. Finally, in addition to the filed prosecutor, the director of public prosecutions should approve DPA proposed by the filed prosecutor.

   Once the offense is brought to the attention of a prosecutor, a company's records regarding prior convictions or whether they have previously

entered into DPA before either in Canada or abroad is verified, as is the availability or presence of a compliance program and whether the misconduct was self-reported or not upon its discovery (even though the latter is not a prerequisite to carry out a DPA). It is up to the prosecutor to assess those circumstances and decide the seriousness of the offense. If the offense is serious, it goes to trial and proceeds with charges; if the offense is not serious enough, however, it may be resolved with a DPA. The level of involvement of senior officers in misconduct is often relevant in order to assess who was responsible for the decisions in question. What's more, the higher up the person is in the corporate ladder, the less likely he or she meets the necessary requirements for the DPA process to be invoked.

In such cases, a company's cooperation is vital, given that DPAs are not available for individuals. Once the objective of the DPA model is achieved, a DPA goes ahead and the corporation should develop a notice with the prosecutor that is subsequently sent to victims. (This is a unique feature of the Canadian DPA.) In addition, in this system, a victim's input actually plays an important role in the approval of DPA in court.

5. *Mandatory and Optional Contents.* The prosecutor does not have the discretion to negotiate the mandatory contents, and these should be in the agreement. Among the most significant of the mandatory contents include reporting to the prosecutor on the implementation of the terms of agreement; penalties; ongoing cooperation; and acknowledgment of wrongdoing, while the optional contents include the existence of compliance programs and independent monitoring. Importantly, it is not mandatory to impose a compliance program within the DPA, nor is it mandatory to impose independent monitors. The judicial approval process is carried out by the court, which conducts its own assessment accounting for the impact of the case on the public interest as well as the agreement and subsequently decides whether or not to approve it. The approval process then takes into account victim and back statements, and victims play a role in the approval of DPA in court. Once it is approved,

then the corporation can fulfill its obligations under the DPA, and prosecutors can begin to carry out the proceedings if the corporation has complied with all the terms.

95. **Finding and notifying victims:** Legislation does not give prosecutors details on how to find and notify victims, but the DPA negotiations with corporations require the corporate defendant to cooperate in this regard. The onus is, however, on law enforcement agencies to do their own due diligence to identify victims, as do prosecutors. In Canada, there are a number of nonprofit organizations that represent victims; therefore, prosecutors should be open to receiving tips from various groups. In such cases, however, prosecutors should do their own due diligence to vet the claims made in such tips before reporting them to the court.

96. **Self-Reporting in Canada:** Given that Canada has not yet negotiated agreements that include self-reporting, there is not much experience to relate, however, there has been massive outreach on self-reporting to corporations, which has been well received among corporate counsel in Canada. It is clearly still a work-in-progress, however, to clarify where concerned parties can go if they want to cooperate and self-disclose. The goal is for the investigative agency to set forth expectations with regard to the level of cooperation.

3. DPAs in Singapore

97. Established in 1952, the CPIB is an independent Anti-Corruption agency with the mandate to investigate both public and private sector corruption. Besides carrying out enforcement functions, the CPIB also undertakes corruption prevention and outreach work for a more comprehensive approach towards fighting corruption. Based on statistics released by the CPIB, the majority of corruption cases investigated by the CPIB involved private sector individuals, which in turn also constitutes the majority of individuals prosecuted in court. The CPIB has also produced a Practical Anti-Corruption Guide for Businesses in Singapore (PACT), a 4-step guidebook for companies looking for practical steps to prevent corruption and the guidebook is available free of charge on the

CPIB's website.[35] The framework provides four practical steps relevant to prevent corruption that include:

1. *Pledge:* Publish Anti-Corruption policy or codes of conduct with a commitment from the top.
2. *Assess*: Conduct regular risk assessments on key business functions and close possible gaps early.
3. *Control & Communicate:* Establish a robust reporting or whistle-blowing system and reinforce Anti-Corruption messages regularly.
4. *Track:* Tracking of Anti-Corruption system and conduct regular reviews to detect changes in the operating environment and new stresses on the system.

98. The CPIB published The Singapore Standard ISO 37001 on anti-bribery management systems that provides guidance on corporate compliance programs. It is a voluntary standard designed to help companies establish, implement, maintain, and improve their anti-bribery compliance programs. It includes a series of measures that represent globally recognized anti-bribery good practice that companies can implement. The following are some benefits from the adoption of SS ISO 37001:

- It can assist a company in implementing an anti-bribery management system, or in enhancing its existing controls, with the potential to reduce corporate risk and costs related to bribery;
- It may help provide assurance to company management, owners, funders, customers, and other business associates, that the company has implemented internationally recognized good practices on anti-bribery controls; and
- In the event of an investigation, it can help to provide evidence to prosecutors or courts that the company has taken reasonable steps to prevent bribery.

[35] Singapore's Anti-Corruption Guide for Businesses can be found at: https://cpib.gov.sg/pact

99. DPAs were introduced on October 28, 2018, just a month after the Canadian DPA. The Attorney General's Chambers of Singapore handles the prosecution of cases investigated by the CPIB. Before the DPA came into effect in Singapore, the Public Prosecutor could only exercise prosecutorial discretion to administer a conditional warning to offenders. The conditional warning requires an offender to remain crime-free for a specified period, and if the offender successfully does so, then no prosecution is initiated. However, if the offender commits a new offense, then the offender can be prosecuted for both the initial offense and the new offense. While the DPA is backed by criminal legislation, the conditional warning is not. In creating the DPA regime, the Singapore Parliament noted that prosecution of corporate entities may harm innocent shareholders and employees of the company disproportionally. Singapore's DPA permits a company to enter into an agreement with the Public Prosecutor to defer or avoid prosecution on the condition that the company complies with specific terms in relation to its conduct and/or monitoring arrangements. If the company fails to observe the terms of the DPA, the Public Prosecutor may apply to the Singapore courts to have the DPA set aside and proceed to prosecute the company. The Public Prosecutor may consider entering into a DPA with a corporate offender if the following statutory requirements are fulfilled:

- A*pplicability:* DPAs may only be entered into by companies, partnerships or associations, and not by individuals.
- S*cheduled offense:* The offense committed by the entity should be one of the scheduled offenses, which includes bribery, money-laundering and other financial crimes.

100. In addition to the statutory requirements, the Public Prosecutor should also consider the following:

- *Evidentiary test satisfied:* There should be a reasonable prospect of a conviction in the case.

- *Public interest test:* An assessment of whether it is in the public interest to offer a DPA instead of prosecution should be made, where the following factors are reviewed among other relevant factors: the seriousness of the offense committed; the pervasiveness of offending in the company; the impact of a conviction on the company; the degree of self-reporting that the company has engaged in before the investigation was initiated; and whether the company has committed similar offenses previously.

101. Before the DPA can take effect, the High Court has to approve the terms of the DPA, and can only do so if the following statutory requirements are satisfied:

- The DPA is in the interests of justice, and
- The terms of the DPA are fair, reasonable, and proportionate.

102. The public is not allowed to attend DPA hearings. Once the DPA is approved, it and its terms are published in the Government Gazette.

4. Instruments to Promote Self-Reporting: NPAs and DPAs

103. Although Non-Prosecution Agreements (NPA)[36] and Deferred Prosecution Agreements (DPAs) frequently impose robust self-evaluation and reporting requirements that can be challenging and costly to meet, virtually all companies strive for self-reporting, rather than corporate monitorships due to the relative predictability, lack of disruption, and cost of self-reporting arrangements. There is no blueprint for avoiding a corporate monitor beyond staying out of the investigative spotlight in the first place, but several recent NPAs and DPAs have included language that lends insight into the considerations that may sway enforcement agencies toward or away from an independent monitor requirement. Between 2016 and the present, there have been 17 agreements that imposed a compliance monitor, 21 agreements that

[36]As previously mentioned, *Non-Prosecution Agreement (NPA)* are similar to DPAs in that they are tailored to instances where companies have the option to enter into a plea agreement with the

required self-reporting, and at least 26 agreements that imposed neither requirement. Deciphering an agency's decision to impose a monitor in lieu of self-reporting can be like "reading tea leaves" for anyone but the parties involved, but DOJ has recently made a handful of express statements in NPAs and DPAs that begin to shed light on at least some of its monitoring decisions. Of the 17 agreements imposing monitors from 2016 to present, for example, three have included an express emphasis on DOJ's perception that the companies' compliance programs were underdeveloped and/or only recently adopted. One of these agreements, DOJ's January 2017 DPA with Sociedad Química y Minera de Chile ("SQM"), imposed an independent compliance monitor for a period of two years, with the possibility of a one-year extension,[37] noting that although the company has taken a number of remedial measures, the company is still in the process of implementing its enhanced compliance program, which has not had an opportunity to be tested. The company has therefore agreed to the imposition of an independent compliance monitor for a term of two years to diminish the risk of reoccurrence [sic] of the misconduct.

104. Both the US Department of Justice and the Securities and Exchange Commission continue to regularly impose monitorships and self-reporting obligations that range from one to five years. The terms most commonly imposed fall into three main categories: (1) traditional corporate monitorships; (2) self-reporting; and (3) a hybrid of monitorship and self-reporting[38].

105. The above raises the question of how best to use corporate monitorships. A "corporate monitor"—which may also be an independent monitor, a compliance officer, or an independent examine—is essentially tasked with overseeing the company's compliance program and whether it is in accordance with the applicable laws and regulations in a particular jurisdiction.[39] The

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government. The main difference between NPAs and DPAs is that in NPAs the prosecutors agree not to prosecute, rather than deferring or reserving the right to do so in the future as with DPAs.

[37] *https://www.gibsondunn.com/2018-mid-year-npa-dpa-update*.

[38] Ibid.

[39] *https://www.gibsondunn.com/2018-mid-year-npa-dpa-update*.

individual is tasked to ensure that the company institutes proper policies and procedures to promote compliance according to its own plan (or one that has been accepted by law enforcement as part of a resolution to an investigation), such as a case involving domestic and/or foreign bribery, among other misconduct.

106. An independent compliance monitor is frequently used as part of NPAs or DPAs, or a settlement (or other types of administrative agreements). The reasons for including a corporate monitor may be that law enforcement has evaluated a compliance program and determined it is "underdeveloped" or that the alleged misconduct goes beyond the beginning of an investigation (i.e. this has been the case with companies like Alstom, Siemens, and BP, among others).[40]

107. In navigating corporate monitorships, firms such as Gibson Dunn have referenced the 2018 Memorandum by Assistant Attorney General Brian A. Benczkowski (hereinafter the "Benczkowski Memorandum"), the stated purpose of which was to "further refine the factors that go into the determination of whether a monitor is needed, as well as to clarify and refine the monitor selection process". This included balancing all sorts of issues such as the benefits of a monitor for the corporation against the cost of the potential impact on a company's operations (e.g. the type of misconduct that was involved, the extent or persuasiveness of misconduct, and whether it was approved or facilitated by any senior management).

108. As per the Benczkowski Memo from the US Department of Justice, a "qualified candidate" for a monitorship is defined to have a background, education, experience, and reputation, as well as the requisite expertise and ability to behave objectively and independently with the support of adequate resources.[41] The company certifies that there are no conflicts of interest or

[40] Ibid.

[41] https://www.gibsondunn.com/2018-mid-year-npa-dpa-update

affiliations with the monitor candidate for approximately two years, following the monitorship.[42]

109. **Responsibilities of a monitor:** The work of the monitor includes: (i) reviewing the ethics and compliance program; (ii) conducting analysis and preparing studies that can be tested; (iii) reviewing documents and policies; (iv) interviewing employees to better assess ethical culture; (v) making on-site inspections and observations, including recommendations for improvements; and, (vi) reviewing both internal as well as external risks as part of the reports presented to law enforcement authorities.

110. It is important to note that there are some issues that concern the private sector with regard to independent monitors, among them the cost involved. In recent years, there has been an increasingly adversarial, as opposed to cooperative, relationship between corporations and their monitors. Some corporations would prefer to avoid having an independent monitor, and opt instead for self-reporting. In reality, the best practice for both parties is to work collaboratively for an entity that is under a monitoring program. While there may be some indirect costs, these may not be as important as the positive working relationship, according to experts.[43] Direct cost certainly would include monitorship fees, which often can exceed millions of US dollars, however, these direct costs can be reduced through the improved use of internal resources and assigning support staff to the monitor as liaisons, etc.

111. Experts have also noted that compliance monitors may find themselves with potential pitfalls in the corporate relationship. For example, the monitor should not attempt to "reinvestigate" the misconduct that led to the resolution of the case, which included the monitorship. Ultimately, a monitor's report should provide some insight into the company's compliance program based on the work performed and methodology used, including supporting evidence. Of

[42] Ibid.

[43] Ibid.

course, it is important that the company itself also acknowledges these issues and agrees with the monitor as to a timeline for implementing any recommendations.[44]

Table 1: Summary of Deferred Prosecution Agreements: Key Differences Globally

Economy	Underlying Legal Framework	Comments
United States	DPAs date back more than 25 years to the 1994 settlement between public accounting firm of Arthur Anderson and the DOJ that included an agreement to forego prosecution of the organization due to its "unprecedented cooperation". During the subsequent period, the DOJ formalized the requirements for the use of these agreements in its United States Attorneys' Manual (ss9-22.000). The SEC's approach to DPAs is set out in its Enforcement Manual (s6.23). The United States Attorneys' Manual of the DOJ permits consideration of deferred prosecution of corporate criminal offenses because of collateral consequences and discusses plea agreements, deferred prosecution agreements, and non-prosecution agreements in general. In 1997, DOJ established general guidelines for US Attorneys to consider when deciding whether to use pretrial diversion, but they were designed more for individuals than corporations, and allowed for inconsistent application. In 2008, DOJ issued new guidelines on the selection, scope of duties, and duration of monitors. Memorandum from Craig S. Morford, Acting Deputy Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations. Under this new policy, the Deputy Attorney General would approve the appointment of monitors. DOJ's first effort to define its expectations of corporate compliance programs was published in November 2012, as part of the FCPA Resource Guide, a joint publication with the US Securities and Exchange Commission, laying out legal issues related to enforcement of the Foreign Corrupt Practices Act. The DOJ repeated many of these original Ten	DPAs originated in the US. DPAs can be used for a broader type of offenses but are mainly used for FCPA offenses, health and safety, and environmental offenses. The US adopted the vicarious liability approach, which extends the offense doctrine of *respondeat superior* to criminal law. The concept of *respondeat superior* (which indicates that an employer has responsibility for the acts of its employees and agents) makes corporate criminal liability a realistic prospect in situations where employees of a corporation are involved in criminal activities. In this context, the US DPAs applies both to organizations and individuals. In the United States, the use of DPAs in a corporate criminal case is completely within the discretion of federal prosecutors. DPAs are negotiated by prosecutors with little judicial involvement. Federal, state, and county prosecutors are authorized to enter into a DPA, and individual prosecutors may have significant autonomy.

[44] Firm of Gibson Dunn citing F. Joseph Warin, Michael Diaman & Veronica Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, University of Pennsylvania Journal of Business Law (2011).

	Hallmarks in the 2017 Guidance and provided insight into the manner in which the department judged the effectiveness of corporate compliance programs in the context of an active investigation or enforcement cycle. The 2019 Evaluation Guidance further expanded Ten Hallmarks. It seeks to better harmonize the guidance with other department guidance and standards while providing additional context to the multi-factor analysis of a company's compliance program. In the US model, most of the process occurs between the putative defendant and the prosecutors in an extra-judicial way. While the final agreement requires judicial approval, judges have little scope to reject such endorsement. Under the Speedy Trial Act, U.S federal courts are required to begin a trial within 70 days of when a defendant is charged or makes an initial appearance. Yet, under § 3161(h)(2), a speedy trial can be delayed for any period during which the prosecution is deferred by the government pursuant to a written agreement such as a DPA with the defendant (with the approval of the court) for the purpose of allowing the defendant to demonstrate its good conduct. When determining whether to charge a corporation, prosecutors should consider: • The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; • The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management; • The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; • The corporation's willingness to cooperate in the investigation of its agents; • The existence and effectiveness of the corporation's pre-existing compliance program; • The corporation's timely and voluntary disclosure of wrongdoing; • The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace	

	responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; • Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution; • The adequacy of remedies such as civil or regulatory enforcement actions; and • The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.	
United Kingdom	In February 2014, the UK introduced DPAs under the provisions of Schedule 17 of the Crime and Courts Act 2013. A Code of Practice for Prosecutors was published jointly by the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS) on 14 February 2014 after a public consultation. DPAs can be only applied to offenses that are specified in the section 45 and Schedule 17 Crime Courts Act 2013, which include conspiracy to defraud, cheating the public revenue and statutory offenses covering fraud, bribery, VAT, money laundering, theft, and others. In the absence of a strict liability corporate defense, the so-called identification principle is used to determine whether the offender was a "directing mind and will" of the company and is a significant evidential hurdle to establishing corporate liability. In this context, DPAs apply merely to organizations. In UK, the court is expected to consider the proposed DPA on its merits, focusing in particular on two main questions: firstly, whether resolution by way of a DPA rather than a prosecution would be in the interests of justice; and secondly, whether the terms of the DPA are "fair, reasonable and proportionate". Under UK Serious Fraud Office policy, a company would only be invited to enter DPA negotiations if there were full cooperation with the SFO's investigations. Under such agreements, penalties could include: (1) a financial penalty; (2) compensation to aggrieved parties; and (3) continuing cooperation with respect to prosecutions of individuals. The SFO's first DPA, with Standard Bank in 2015, was a textbook example of new owners self-reporting wrongdoing by the previous regime. The	The terms of a DPA involving a company can have an important impact on the criminal and civil liabilities of individuals. Under a DPA in the UK, a prosecutor charges a company with a criminal offense but proceedings are automatically suspended if the DPA is approved by the judge. Under the UK Serious Fraud Office policy, a company would only be invited to enter DPA negotiations if there were full cooperation with the SFO's investigations. Only "designated prosecutors," including the Serious Fraud Office and Director of Public Prosecutions (in England and Wales), have the power to enter into a DPA. The UK prosecutor is required to secure the Crown Court's approval, on two separate occasions, in the discussions with the prosecutor to satisfy the court that the DPA entered into is in the interests of justice and is fair, reasonable, and proportionate. The first hearing is to be held in private, after negotiations commence but before the terms of the DPA are agreed. Once the terms are agreed upon, the prosecutor should then proceed to a final hearing during which the Court

	reported criminality took place overseas, and understandably there were no individual prosecutions in the UK. In May 2019 the SFO published a five-page Corporate Co-operation Guidance. The Guidance defines cooperation as "providing assistance to the SFO that goes above and beyond what the law requires" and details practices that companies should consider when upholding material and giving it to the SFO. It further suggests companies to consult with it before taking steps such as interviewing potential witnesses and suspects. Private prosecutions plays key role in England and Wales's legal system and are increasingly popular in relation to fraud and offenses connected to financial crime. Private prosecutions are those started by private individuals or entities not acting on behalf of the police or any other enforcement or prosecuting authority. As regards scope, private prosecutions can be used for any offense, including fraud, and Proceeds of Crime Act 2002 offenses. The benefits private prosecutions are because cases can be brought to court faster than many civil proceedings or police investigated criminal matters. In addition, they permit an individual or firm to take control of cases, and the potential criminal punishments are often simple and so a strong deterrent to further wrong-doing. However, in the case of private prosecution, fines are paid to the economy in question not to the complainant and there are significant difficulties to a successful case due to The Director of Public Prosecutions (DPP) can take over proceedings at any stage, and decide to discontinue the prosecution. Proceedings can be challenged by defendants on several grounds, including for abuse of process, commonly on the basis that a prosecution is driven primarily by an improper motive or is being conducted unfairly. In addition, there is higher disclosure duties, they are more than civil proceedings and need to be under continual review. In relation to prosecution costs, a private prosecutor should be able to recover these from the Central Funds, even when the defendant is acquitted (section 17 of the POA 1985).	should again consider whether the terms of the DPA are in the interests of justice and are fair, reasonable, and proportionate. Only then is the DPA approved. The court may reject the DPA at either stage. Judicial involvement and sanctioning of a DPA is seen as critical in the UK system and is one of the central differences to the US procedure.
Canada	On September 19, 2018, deferred prosecution agreements (DPAs) became available to resolve corporate offenses in Canada under the Criminal Code and the Corruption of Foreign Public Officials Act. DPA is available to resolve criminal charges against	Canadian courts apply the "identification doctrine" whereby only the controlling mind of the corporation could engage its criminal liability for offenses requiring proof of

	corporations, partnerships, and other forms of business organizations without registering a criminal conviction. DPAs are negotiated by the prosecution and the accused and are subject to judicial approval. The reason for the approval before entering into the DPA is to make sure that the DPA is likely in the public interest and that the proposed terms are fair, reasonable and proportionate. Offenses subject to resolution through a Remediation Agreement include bribery of public officials, both domestic and foreign, fraud, municipal corruption, insider trading, private bribery (secret commissions), money-laundering, and other offenses (listed at the end of this article). Competition offenses such as price-fixing, bid-rigging, and misleading advertising are notably absent from the Remediation Agreement regime.	intent. In Canada, there is a judicial oversight over DPAs that requires judicial approval once, whereas the United Kingdom requires judicial approval at two stages. The UK model may also facilitate increased judicial involvement in the terms of the agreement itself, as Canadian courts, after being presented with a remediation agreement fait accompli.
Australia	On 6 December 2017, the government proposed the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 into Parliament. If the Bill is passed by the Parliament, the Bill would establish a deferred prosecution agreement (DPA) scheme in Australia. The intention of the DPA scheme (the first of its kind for Australia) is to encourage self-reporting of misconduct by corporations to assist in addressing some of the challenges inherent in detecting, investigating and prosecuting serious corporate crime. The scheme also aims to offer corporations the opportunity to reduce the time, cost, and uncertainty connected with drawn-out investigations and prosecutions. Under the scheme, the Commonwealth Director of Public Prosecutions (the CDPP) can invite a corporation that has engaged in serious corporate crime to negotiate an agreement to meet specified conditions.	The bill was referred to a parliamentary committee, which recommended that the bill be passed, however, it was not passed before Parliament was dissolved for the May 2019 election.
France	In December 2016, France introduced conventions judiciaire d'intérêt public (CJIPs), which are similar to DPAs, under Sapin II Law. In November 2017, French prosecutors entered into their first CJIP. Under a CJIP, the company does not have to plead guilty, although the company may need to agree to a statement of facts and the legal significance of those facts. CJIPs can only be entered into by an entity, not by an individual and can only be used for certain specific offenses (including bribery and corruption). In addition, CJIPs require judicial approval and an	

	entity may withdraw from a CJIP within 10 days of the judge's approval. If the company fails to abide by the terms of the CJIP, the prosecution can resume.	
Singapore	The Singapore Parliament passed the Criminal Justice Reform Act in 2018. This Act introduced a DPA framework into Singapore's Criminal Procedure Code. Prior to the introduction of DPAs, the Public Prosecutor could only exercise prosecutorial discretion to administer a conditional warning to offenders. The conditional warning specifies that the Public Prosecutor's discretion not to prosecute is contingent upon the recipient's fulfillment of certain conditions, typically to stay crime-free for a period of between 12-24 months and/or to pay a sum of money as compensation or restitution to the victim. Traditionally, conditional warnings were used in minor criminal offenses involving youths or in a community/domestic context as a means of diverting such cases from the criminal justice system. While the DPA is backed by criminal legislation, the conditional warning is not. A Singapore DPA permits a company to enter into an agreement the Public Prosecutor to defer or avoid prosecution on the condition that the company complies with specific terms. If the company fails to observe the terms of the DPA, the Public Prosecutor may apply to the Singapore courts to have the DPA set aside, and then proceed to prosecute the company. The Singapore DPA regime applies to various offenses, including corruption, money laundering, and receipt of stolen property. There are no statutory limits on the amount of financial penalties that can be imposed. During the second reading of the bill in the Singapore Parliament it was stated that Singapore is unlikely to publish prosecutorial guidelines for DPAs, in order to avoid such guidelines from becoming a tool in manipulating the criminal justice system to escape punishment.	The Singapore DPA regime appears to be substantially similar to the UK model, but also adopts facets of the US model. For instance: Applicability: DPAs may only be entered into by companies, partnership or associations, and not by individuals. Significant fiscal and other penalties: The terms of a DPA may include significant financial penalties, disgorgement of profits (and provision for how this money should be used), compensation to victims, requirements to implement enhanced internal controls and other compliance measures, the imposition of an independent compliance monitor who reports to the Public Prosecutor, and a prohibition against further offenses for the duration of the DPA. Court approval of DPA terms: The terms of a DPA needs to be approved by the Singapore High Court. The Court should consider whether the proposed DPA is being entered in the interests of justice, and the terms are fair, reasonable, and proportionate. Once approved by the Court, a DPA can be published, and made accessible to the public. However, under the Singapore DPA framework, the Court retains the discretion to postpone or redact publications of any public notices of a DPA entered into, varied or expired, if the Court is satisfied that it is expedient "in the interests of justice, public safety, public security or propriety, or for other

		sufficient reason" to do so.
Malaysia	The Malaysian Government proposed amendments to the Malaysian Anti-Corruption Commission Act of 2009 that makes corporations liable for the corrupt practices of its associated persons. The amendments are set out in the Malaysian Anti-Corruption Commission (Amendment) Bill of 2018 (hereinafter "bill") that was tabled for first reading in the Malaysian Parliament on 26 March 2018 and is slated to become effective on 1 June 2020. The corporate liability provisions are modeled on the Bribery Act in the United Kingdom. For instance, it criminalizes commercial organizations (which includes Malaysian companies and foreign companies conducting any business in Malaysia) if an associated person corruptly gives any gratification with intent to obtain or retain business, or an advantage in the conduct of business, for the commercial organization. The bill seeks to enhance Malaysia's efforts against corruption arising from commercial transactions. The bill is expected to promote better corporate governance and legal compliance in Malaysia by requiring corporations to take an active role in preventing corruption.	For those interested in reviewing the Malaysian experience with DPAs, it is important to clarify that the corporate liability clause under Section 17A is not a DPA *per se*, but a commercial organization can be absolved from criminal liability only if it has in place adequate procedures in line with the Minister's Guidelines to prevent persons associated with the commercial organization from committing corruption offenses.
Indonesia[45]	Indonesian government has enacted The Supreme Court of Indonesia No. 13 of 2016 on Case Handling Procedures for Corporate Crimes. It serves as a guideline for law enforcement officers in handling criminal cases with a corporation or its management as the perpetrator; fills in the legislative gap in the criminal procedure law for cases related to corporations; and promotes the effectiveness and optimization of handling criminal cases with a corporation or its management as the perpetrator (Article 2). The Supreme Court Regulation provides guidelines for judges in sentencing corporations by establishing three assessment criteria that are provided for in the Article 4 as follows: a. The Corporation was able to gain profit or benefit from the crime or the crime is perpetrated for the interest of the Corporation; b. The Corporation acquiesced to the crime to occur; or c. The Corporation failed to take necessary measures for prevention, to prevent a wider impact and to ensure compliance with provisions of the	

[45] This information was provided by Indonesia.

	prevailing laws in order to prevent a crime from occurring. Article 4 of the Supreme Court Regulation further regulates whether corporations are able to demonstrate that they have conducted adequate prevention procedures in the avoidance of criminal offenses. Indonesia is currently promoting Anti-Bribery Management System (ABMS) in the private sectors as one of 11 action plans of the National Strategy of Corruption Prevention, with an aim to encourage the private sector to provide the adequate prevention procedures as stipulated in the aforementioned regulation. The private Sectors in Indonesia are being encouraged to provide AMBS by implementing ISO 37001, UK Bribery Act, Foreign Corrupt Practices Act (FCPA) guidelines or KPK's Corruption Prevention System Guideline for Corporations. This regime answers the legitimacy of law enforcers in convicting corporations, as well as providing legal certainty for corporations.	

IV. Private Sector Approaches to Adopting Corporate Compliance Programs: Some Notable Examples

112. Today, corporations are increasingly using compliance programs as a *preventive* mechanism independent of any investigation. Some representatives from the private sector were invited to share their experience in adopting corporate compliance programs at the workshop. From their presentations, we could learn that many private companies face barriers in adopting such programs. This is largely due to the associated costs of compliance programs, where most corporations find it difficult to balance these costs with profits, and costs can be especially prohibitive for smaller, family-owned businesses. [46] Aside from costs, compliance programs require great and consistent effort and are difficult to implement.[47] One of the main challenges

[46] Chen, Hui, and Eugene Soltes. "Why compliance programs fail and how to fix them." *Harvard Business Review* 96, no. 2 (2018): 115-125.

[47] Sierra, Susana. "Corporate Compliance Programs and Challenges to the Private Sector: Seeking to Meet Expectations." *ACT Net Workshop for Law Enforcement Agencies on Effectively Using Corporate Compliance Programs to Combat Domestic and Foreign Bribery.* Presentation, Puerto Varas, Chile, August 2019.

of implementing these programs is incorporating Anti-Corruption and anti-bribery behaviors and practices into day-to-day operations with the objective of creating a "culture of compliance". Notwithstanding, these challenges, several private sector actors have implemented such programs and have attempted to create compliance cultures throughout their organizations. The examples below illustrate how a few of these corporations have applied different strategies in implementing effective corporate compliance programs.

5. Compliance in Chile's Retail Sector[48]

113. Falabella is a Chilean company which offers a number of services, including serving as a multi-format retailer, with financial services and as a commercial real estate developer. Falabella provides an interesting example based on how it has embraced many of the compliance activities discussed in this Guidebook. Falabella includes more than 110,000 direct employees throughout the world, with reported net revenue of US$14.5 billion in 2018. It operates businesses in seven economies throughout Latin America and supports operations in China and India. Its approach to preventing corporate criminal liability through the use of compliance programs includes the following six aspects:

1. ***Legal and Compliance Strategy:*** At a strategic level, the main outcome of Falabella's corporate compliance programs is to model or shape behavior. All activities related to compliance—including advising the board, writing a contract, litigating a case or implementing a compliance program—are directed to result in modeling the corporation´s behavior and its associated organizations' behavior. The Legal and Compliance Strategy takes into account Falabella's three aspects of its identity as an organization (i.e. (i) its legal entity (or entities); (ii) its business identity;

[48] Smith, Gonzalo. "The Use of Corporate Compliance Programs to Prevent Criminal Liability: Private Sector Experience from Chile, Falabella S.A." *ACT Net Workshop for Law Enforcement Agencies on Effectively Using Corporate Compliance Programs to Combat Domestic and Foreign Bribery*. Presentation, Puerto Varas, Chile, August 2019.

as well as (iii) its status as a form of societal organization that connects with the community at large on several and different levels).

2. ***Legal and Compliance Structure:*** Given the three different aspects of *Falabella's* organization (i.e. its status as a legal entity, a business, and a societal organization), the Legal and Compliance strategy impacts its structure by demanding the following positions as well as requiring that they all work together.

    - Because of its status as a legal entity, it has a Vice Presidency of Corporate Legal Matters;
    - Given its business, it has a Vice Presidency of Legal Operations; and
    - Because it also serves as a form of societal organization, it has a Vice Presidency of Governance, Ethics, and Compliance.

    Reporting lines: In order to protect the independence of judgment of legal and compliance professionals, all lawyers practicing law or professionals within the Legal & Compliance structure in *Falabella's* organizations report directly within this structure. This applies all the way up to the Vice President of the entire organization (who reports to the CFO and Board of Directors) and means that no business manager can hire or fire members of our Legal and Compliance structure without the consent of the head of the Legal and Compliance Office.

3. ***Legal and Compliance Process:*** The first step in the legal and compliance process is risk identification, assessment, and management. Based on this risk assessment, a behavioral modeling program is designed and implemented. Once it is implemented, continuous monitoring occurs in order to identify areas for improvement and to ensure that these are then integrated into the program. Programs for behavior modeling ensure that the following best practices and principles are incorporated into the subsequently described elements:

- *Decisión* (i.e. decision): This is important to have from the bottom-up and not only from the top.
- *Dirección* (i.e. direction): Direction is crucial to the final outcome of the program
- *Dedicación* (i.e. dedication): The compliance program has to be implemented by professionals who have the know-how.
- *Deliberación* (i.e. deliberate action, not chance): Any actions taken should be well-informed, and [who?] should follow up on their enforcement.
- *Dotación* (i.e. resources): Resources need to be allocated to program creation, implementation, and continuous improvement of the program.

The above should be integrated into or applied to the four types of elements of behavior modeling programs:

a) **Regulatory elements,** where the expected behavior is determined. Regulatory elements of behavior modeling programs are the rules, whether internal or external, that governs expected behavior. Internal rules serve to explain the expected behavior and set out the consequences of not following them.

b) **Communication elements,** where the expected behavior is transmitted. Communication elements of Falabella's behavior modeling programs are designed to "put the word out there" about what the company expects. They include the following types of communication actions: advertising to achieve "brand recognition" that something is important to the organization; raising awareness about why something is important; training in which actual content or knowledge is conveyed; and conducting simulations or mock situations to make sure the expected behavior is happening.

c) **Execution elements,** of *Falabella's* behavior modeling programs make a program exist in reality (and where the expected behavior is made real, not merely on paper). For example: Processes and controls specifically designed for compliance purposes exist; Ethics & Compliance Officers are hired, and Committees established; and vendor and partner due diligence is regularly conducted.

d) **Control elements** aim to ensure the quality of the program through, for instance, continuous auditing of programs and periodic revisions as needed and/or every three years at the maximum.

4. ***Legal and compliance challenges:*** This aspect of Falabella's corporate compliance strategy points to the trend that crime prevention has been a long-standing public duty that is now shifting to the private sector. The challenges of this shift include that: the private sector is limited in its legal means to prevent these crimes (especially with regard to labor law and privacy restrictions); unresolved issues emerge regarding intrusive measures by authority and attorney-client privilege (i.e. privileged communications, redacted reports, etc.); lack of coordination between governmental agencies as to what compliance functions and programs should entail or set out to achieve; the difficulty in trying to achieve a consistent approach with all public organizations; and a general unwillingness of governmental agencies to publicly announce their compliance priorities.

5. ***Legal and Compliance Suggestions:*** This aspect of Falabella's strategy highlights that although criminalization of corruption is not new, what is new is the introduction of institutionalized liability by corporations and the means to ameliorate or prevent institutional consequences. This new approach to fighting corruption seems to be working much better than the approach that merely prohibits individual conduct that constitutes corruption. Because corruption is often a two-sided story, economies

could presumably improve their success in the fight against corruption if some form of institutional responsibility and compliance obligations also existed in the public sector.

6. China's State Development & Investment Corporation[49]

114. The State Development & Investment Corporation (SDIC) is the largest state-owned investment holding company in China. It was established in 1995, employs a workforce of approximately 45,000, and reported gross revenue of US$15.48 billion in 2017.[50] Recently, according to the SDIC, law enforcement authorities have been actively promoting compliance, including adopting legislation. President Xi Jinping has also called for strengthening compliance systems in overseas operations of state enterprises. In addition to pronouncing legal measures, China has provided support for enterprises to adopt and comply with such legislative norms. This engagement has led to increased awareness among enterprises, which serves as an important step toward a broader sense of compliance among state companies. Several different actors were engaged in this process; among them were: the National Development and Reform Commission, the Ministry of Foreign Affairs of the People's Republic of China, the Ministry of Commerce, the People's Bank, the State-Owned Assets Supervision Administration Commission of the State Council (SASAC), and the All-China Federation of Industry and Commerce. These various entities have jointly released the "Guidelines for the Compliance Management of Overseas Operations of Enterprises", which apply to both state-owned and private enterprises. They include seven essential elements that should be taken into account by companies: i. thorough identification of all compliance requirements; ii. Organizational structure; iii. Constitution of rules; iv. Operating mechanism; v. risk prevention and control; vi. Continuous improvement; and vii. Construction of culture.

[49] Zhaogang, Zhang. "Compliance and Anti-Bribery – China Enterprise Practice." *ACT Net Workshop for Law Enforcement Agencies on Effectively Using Corporate Compliance Programs to Combat Domestic and Foreign Bribery, SDIC."* Presentation, Puerto Varas, Chile, August 2019.

[50] See SDIC website: https://www.sdic.com.cn/en/about/A0201index_1.htm

115. The above guidelines were designed for enterprises to better comply with local, national, and international laws and regulations in their business operations, with the ultimate aim of effectively preventing and managing risks associated with compliance. It outlines specific responsibilities for directors, supervisors, and other individuals at the management level and requires enterprises to appoint a Head of Compliance and a Compliance Committee. Chinese and international companies seeking to form joint ventures with, invest in, or acquire Chinese companies should adopt the provisions highlighted in the guidelines in order to strengthen compliance systems and optimize management.

116. In this context, the State Development & Investment Corporation (SDIC) has created a compliance management system based on SASAC's Regulatory Requirements. It has integrated compliance as a cornerstone of its operations. The compliance program currently comprises four principles: comprehensiveness, accountability, inter-operability and objective independence. The program aims to foster a culture of compliance and requires the following:

- Compliance with laws; regulations; professional codes; enterprise constitutions, rules, and regulations; and international treaties and conventions, etc.
- Ensuring the compliance program is applicable to all of the company's departments, entities, and staff
- Risk management
- Regular and systematic monitoring and review processes
- Training for all actors within a company
- Establishing legitimate whistleblowing and reporting channels
- Creating investigation and accountability mechanisms

117. Additionally, the SDIC has set up a a compliance committee consisting of SDIC's management, General Counsel, and Legal Affairs and Compliance Department. The committee meets periodically to promote top-down communication and to review the design of corporate compliance programs. It

also periodically evaluates risk assessments and regulations and seeks out new ways to maintain the effectiveness of their compliance systems.

7. Australia's BHP[51]

118. BHP has 30,000 employees and is largely located in Australia, North America, and South America, with a marketing hub in Singapore. The compliance program is focused where higher risks are identified for the company. BHP compliance programs began as a result of an investigation by the US. Department of Justice under the FCPA for providing inducements, hospitality and gifts to foreign officials. In this context, BHP established a compliance program with 10 hallmarks:

1. Commitment from senior management and a clearly articulated policy against corruption.

2. A code of conduct and compliance policies and procedures, which clearly articulates the company's policy against corruption. Ideally, the policy should be written clearly and simply and should be interactive with realistic examples so people can relate and easily understand. It is also easily available on the company's portal.

3. The compliance program is an oversight system with built-in accountability mechanisms. Significantly, the compliance officer has independence and sufficient resources to implement the program.

4. Risk assessment is a fundamental part of the program, and BHP has just established a new internal risk assessment that aims to give them a road map to comply with Chilean law 20.939. The risk assessment is designed to identify an ongoing review of changes to international compliance laws, and it has an in-built annual reassessment reminder

[51] BHP stands for Broken Hill Propriety Company Ltd, the name under which it was incorporated in 1885. Leinen, Leigh Ann. "Creating and Overseeing a Dynamic Corporate Compliance Program." *ACT Net Workshop for Law Enforcement Agencies on Effectively Using Corporate Compliance Programs to Combat Domestic and Foreign Bribery*. BHP, Presentation, Puerto Varas, Chile, August 2019.

in BHP's internal system. This system reminds employees to conduct a review of each assessment; however, reassessments are done only if there is a modification in laws of the host or if there is any escalation of risk that is relevant to BHP business.

5. Targeted training and continual advice are crucial components to increase the effectiveness of the program.

6. Incentives and disciplinary measures are in place to promote the compliance program.

7. Third-party due diligence and payments is another key component. BHP launched the Global Contract Management System (GCMS) in October 2018 to manage its third-party suppliers' lifecycle and contract management practices. This requires that vendors insert their information into the GCMS platform, and the system then uses data algorithms to flesh out possible risks. The GCMS enables streamlined and standardized processes to improve compliance controls and provide better insights into their suppliers' activities. The challenge with the system was that BHP over-assessed the risks, and a modification was done to focus only on risk assessments, depending on the number of services delivered by the vendor, risk associated with the vendor, and in consultation with regional staff. The GCMS has allowed integrating suppliers' activities in compliance controls system and also integrates risk-weighted due diligence information from the media and beneficial ownership. This has led to an improved sourcing and contract management experience through the implementation of an intuitive system. It has also increased productivity through automation, streamlining, and standardization of processes globally.

8. Confidential reporting and internal investigation are another integral component, which allows employees to report without fear of retaliation.

9. It is expected that systems should be continually improved through periodic testing and review. In BHP's case, this was done by integrating data from BHP's SAP analytical cloud system and the GCMS database, enabling BHP to filter data and continuously monitor possible risks and program effectiveness. This has helped to focus on relevant vendors and trace issues before they escalate. BHP has designated a monitoring team with a role focused on continuous improvement.

10. In the event of mergers and acquisitions, an essential component of the program is to conduct pre-acquisition due diligence and integrate it with post-acquisition due diligence.

119. Finally, an important component of BHP's experience is establishing a practice of identifying "Lessons Learned" and how to address high-risk situations. BHP recommends the following four principles when taking on these challenges:

- Persistence: Never give up;
- Patience: Anticipate that things tend to take longer than expected and expectations need to be managed;
- Perfection: Aim high and remove opportunity for corrupt demands; and
- Pro-active: Promote engagement with government officials, customers, communities, suppliers, and internal actors who may still be somewhat cynical about compliance, since collaboration incentivizes integrity.

Conclusions

120. Through a review of various corporate compliance legal frameworks and practices (*de jure* and *de facto*), we can see many similar features. However, the circumstances that bring about a compliance program may also vary, such as a program resulting from a deferred prosecution agreement (DPA) or a sanction by law enforcement after an investigation which requires such a program, including follow-up monitoring. If APEC law enforcement agencies are to consider corporate compliance programs in their investigations,

prosecutions, and sanctioning of misconduct, it is clear that private (and public) sector actors both need guidance and clear expectations. No corporate compliance program is equivalent to a "free ride" or freedom from prosecution, but they can help law enforcement agencies and private actors alike in strengthening the capacities of both, as well as an economy's business environment, to combat foreign and domestic bribery.

121. Ultimately, it is up to each APEC economy to choose, where appropriate, perhaps like a menu, the regulation or practice of the different experiences offered in this Guidebook.

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