

# The ACR Brief

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## Sophisticated Compliance

The DOJ is not changing course on FCPA enforcement, Daniel Kahn, Chief of the DOJ's FCPA Unit, said at the Dow Jones and Wall Street Journal forum on November 15, 2017, echoing the message of the SEC, which recently elevated a long-time deputy to chief of its FCPA Unit. Former SEC officials told The Anti-Corruption Report that while there may be a winnowing of cases due to budget pressures, and a focus on more current conduct after the *Kokesh* decision, they do not expect a significant decrease in attention on the FCPA.

Enforcement may look different as compliance programs mature, however. Kahn emphasized that the department has seen the number of companies with a sophisticated understanding of compliance “go up dramatically” during his seven-and-a-half year tenure and that the staff is hearing more and more solid stories from companies about how they handled FCPA violations – a sign of advancing compliance programs.

Now that companies are getting beyond the basics, what is the next level?

1. **Commitment from Senior Management and a Clearly Articulated Policy Against Corruption.** It all starts with tone at the top. But more than simply ‘talk-the-talk’ company leadership must ‘walk-the-walk’ and lead by example. Both the DOJ and SEC look to see if a company has a “culture of compliance”. More than a paper program is required, it must have real teeth and it must be put into action, all of which is led by senior management. The Guidance states that “A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards.” This prong ends by stating that the DOJ and SEC will “evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.”
2. **Code of Conduct and Compliance Policies and Procedures.** The Code of Conduct has long been seen as the foundation of a company's overall compliance program and the Guidance acknowledges this fact. But a Code of Conduct and a company's compliance policies need to be clear and concise. The Guidance makes clear that if a company has a large employee base that is not fluent in English such documents need to be translated into the native language of those employees. A company also needs to have appropriate internal controls based upon the risks that a company has assessed for its business model. Some of the risks a company should assess include “the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments.”

3. **Oversight, Autonomy, and Resources.** This section starts with a discussion on whether a company has assigned a senior level executive to oversee and implement a company's compliance program. Not only must a company assign such a person with appropriate authority but that person, and the overall compliance function, must have "sufficient resources to ensure that the company's compliance program is implemented effectively." Additionally, the compliance function should report to the company's Board of Directors or an appropriate committee of the Board such as the Audit Committee. Overall the DOJ and SEC will "consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business."
4. **Risk Assessment.** The Guidance states that "assessment of risk is fundamental to developing a strong compliance program". Indeed, if there is one over-riding theme in the Guidance it is that a company should assess its risks in all areas of its business. The Guidance lists factors that a company should consider in any risk assessment. They are "the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs." The Guidance is also quite clear that when the DOJ and SEC look at a company's overall compliance program, they "take into account whether and to what degree a company analyzes and addresses the particular risks it faces."
5. **Training and Continuing Advice.** Communication of a compliance program is a cornerstone of any anti-corruption compliance program. The Guidance specifies that both the "DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners." The training should be risk based so that those high-risk employees and third party business partners receive an appropriate level of training. A company should also devote appropriate resources to providing its employees with guidance and advice on how to comply with their own compliance program on an ongoing basis.
6. **Incentives and Disciplinary Measures.** This involves both the carrot and the stick. Initially the Guidance notes that a company's compliance program should apply from "the board room to the supply room – no one should be beyond its reach." There should be appropriate discipline in place and administered for any violation of the FCPA or a company's compliance program. Additionally, the "DOJ and SEC recognize that positive incentives can also drive compliant behavior. These incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance program, and rewards for ethics and compliance leadership." These incentives can take the form of a part of senior management's bonuses or simply recognition on the shop floor.
7. **Third-Party Due Diligence and Payments.** Here the Guidance focuses on the ongoing problem area of third parties. The Guidance says that companies must engage in risk based due diligence to understand the "qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials." Next a company should articulate a business rationale for the use of the third party. This would include an evaluation of the payment arrangement to ascertain that the compensation is reasonable and will not be used as a basis for corrupt payments. Lastly, there should be ongoing monitoring of third parties.
8. **Confidential Reporting and Internal Investigation.** This means more than simply a hotline. The Guidance suggests that anonymous reporting, and perhaps even a company ombudsman, might be appropriate to have in place for employees to report allegations of corruption or violations of the FCPA. Furthermore, it is just as important what a company does after an

allegation is made. The Guidance states, “once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken.” The final message is what did you learn from the allegation and investigation and did you apply it in your company?

9. **Continuous Improvement: Periodic Testing and Review.** As noted in the Guidance, “
10. **Mergers and Acquisitions. Pre-Acquisition Due Diligence and Post-Acquisition Integration.**