

# *Raising your anti-corruption IQ*

May 2012

## **At a glance**

Regulators are pushing the compliance bar to new heights.

Know your ABAC\* ABCs.

Raise your anti-corruption IQ.

*\*anti-bribery  
and anti-corruption*

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# Introduction

*Yesterday's anti-bribery and anti-corruption (ABAC) compliance programs are yesterday's news.*

In today's vigorous regulatory environment, compliance programs predating such game-changing measures as the UK Bribery Act are not up to the challenge. The upshot for multinationals is clear: Outdated compliance programs can open compliance gaps and lead the organization away from operational strategy and into regulatory violations.

While many companies are striving to strengthen risk awareness and sensitivity, some compliance gaps remain. We will share our insights into emerging trends and patterns among these gaps and suggest strategies

for positioning your compliance program to remain in step with today's regulatory focus on fighting corruption, keeping your entity operating in a comfortable compliance niche.

The compliance gaps we have noticed cropping up with some frequency fall into the broad categories of Policies, Procedures, Resources, and Technology. Read on to enhance your understanding of how your organization can raise its anti-corruption IQ.

## Policies

**Consider standards of conduct a compliance cornerstone.** Nearly every active ABAC enforcement regime has cited a clearly articulated policy that lays out the standards of conduct to guide organizational behavior as a major building block of ABAC compliance. In our experience, organizations at the leading edge of ABAC compliance rely upon a standalone ABAC policy that does just that. Those that lack a clearly defined policy of expected behaviors should question whether their entity's compliance foundation is built on sand.

**Spell it out.** Global ABAC regulators, including the US Department of Justice (DOJ) and the UK's Ministry of Justice (UKMOJ) expect that organizations are performing formal, documented assessments of their specific bribery risks; this view is further reflected in the US Sentencing Guidelines.<sup>1</sup> The identification of potential bribery hot spots is also listed among the six principles in UKMOJ's UK Bribery Act Guidance, issued in March 2011.<sup>2</sup>

**Read risk regularly.** Companies should also operate under a policy that requires the performance of a periodic, documented, entity-level risk assessment. This can help build a thorough understanding of the regions, business units, processes, and practices that harbor bribery risk. Further, an ABAC-specific risk assessment can boost program efficiency and effectiveness by enabling the organization to align scarce compliance resources to the most crucial risk areas.<sup>3</sup>

**Set the tone at the top.** The policy should assign ownership for compliance at the senior executive level and at appropriate operational and execution levels. A clearly defined, top-tier underpinning for compliance program maintenance, communication, and monitoring functions will demonstrate to leading stakeholders and regulators that the organization views compliance as a serious matter that demands significant authority, time, and attention. Assigned compliance policy ownership will also foster ABAC policy communication, which is so crucial to the effectiveness of anonymous whistleblower hotlines and stakeholder training. Management at all levels, in fact, should champion ABAC compliance and compliance in general to cultivate a culture of compliance that is in line with regulatory expectations.

**Think locally and globally.** It is also important to adapt to local ABAC regulations within policy components such as gifts and entertainment thresholds and, if applicable, facilitation payment escalation requirements. This will keep the entity from appearing to be inappropriately lavish in its spending or in violation of local regulations. For example, a premium bottle of whiskey for a business partner might be viewed differently in London than in Central Africa. Similarly, some organizations subject to the US Foreign Corrupt Practices Act (FCPA) might permit facilitation payments based upon the FCPA's exceptions; those same payments might be allowed in only a handful of other countries, including Canada, South Korea, and New Zealand. Outside of those countries, such payments might contravene local law. Organizations can avoid compliance gaps by analyzing global variations among ABAC compliance regimes and fundamental factors such as living standards<sup>4</sup> and by adapting their policies accordingly.

<sup>1</sup> §8B2.1(c)

<sup>2</sup> <http://www.justice.gov.uk/guidance/docs/briberyact-2010-guidance.pdf>

<sup>3</sup> For additional information on a sound methodology for performing ABAC risk assessments, see *Developing a TIGHTer Approach to Corruption Risk*, May 2011, <http://www.pwc.com/us/en/forensic-services/publications/tight-methodology.jhtml>

<sup>4</sup> See one regulator's viewpoint at <http://www.sec.gov/litigation/complaints/comp18775.pdf>. In this settlement, officials referenced per capita income in Africa as a data point considered in determining the reasonableness of per diems paid to government officials.

## Procedures

### When enough is not enough.

Procedures, including detailed transaction execution guidelines, play a critical role in helping personnel carry out company policies. Many companies, proceeding on the assumption that Sarbanes-Oxley financial reporting and other controls will suffice, inadvertently overlook the importance of anti-corruption internal controls. Compliance control gaps remain an issue; we have seen numerous cases in which insufficient controls are in place for company assets, particularly cash.

### Sew up frayed pockets.

Multinationals should consider aggregated global tracking mechanisms for bank accounts and appropriately safeguard petty cash — or risk inviting off-book accounts and unauthorized disbursements. It is also important to keep in mind that, while most mainstream financial controls consider materiality of breaches in their design (by virtue of the objectives of the controls), quantitative materiality should not be a consideration for ABAC books and records internal controls, because materiality is rarely a consideration for ABAC regulators.

*Many companies, proceeding on the faulty and dangerous assumption that Sarbanes-Oxley financial reporting and other controls will suffice, inadvertently overlook the importance of anti-corruption internal controls.*

### What you can't show can hurt you.

To operate in synch with ABAC aims, it is increasingly important to maintain contemporaneous transaction documentation supporting the business purpose, nature, and extent of transactions. The absence of supporting documentation can be construed as evidence of a failure to maintain adequate internal controls or intent to disguise an improper transaction or obfuscate the paper trail.

**Douse doubt; document it.** To demonstrate for regulators the credibility of transactional supporting documentation, look beyond the traditional supporting documents (invoices, purchase orders, and bank statements) to those that can more robustly support transactions:

- Consultant reports that illustrate the delivery of value added services
- Wire transfer documentation showing details such as payee name, bank account number, and bank account location
- Internal correspondence that discusses the project's interim status
- Travel itineraries that show the full names of the persons traveling

**Who's the boss?** Some organizations have opened internal control compliance gaps because they have neglected to segregate duties. In fact, such gaps can — and frequently do — develop, despite adequate segregation of duties for mainstream financial reporting. In terms of compliance, such gaps can emerge when reporting lines obscure a clear commitment to the task at hand.

Here are two such cases:

- Proactive compliance monitoring personnel report to business units, rather than to Compliance, Legal, or Internal Audit.
- Those responsible for acquisition anti-bribery due diligence report to the head of Corporate Development, a role that might be more concerned with valuation or cash flow of an acquisition target and less attentive to ABAC risks associated with the deal; this would be of particular concern, for example, in cases involving acquisition targets that sell mostly to governmental customers in a high-risk country, because profits obtained through sales are frequently large and often more easily quantifiable for disgorgement.

**Get it in writing.** Another all too common procedural gap we have seen: the absence of standardized contracting procedures that include ABAC-relevant clauses across an organization. Some organizations have yet to promulgate procedural requirements prescribing the kinds of vendors and relationships for which contracts are required, leaving the entity without most commercial protections. Other organizations provide subsidiaries with sample language for use in contracts in an effort to cover basic anti-corruption elements, such as representations and warranties, audit rights, and termination rights upon violation of relevant anti-corruption legislation. They are often disappointed to find that their plan has not been implemented and subsidiary contracts remain devoid of such content.

## **Resources**

**Time, talent, and money.** Resource constraints can produce myriad compliance gaps. As businesses work to harmonize headcount with strategic objectives and budget constraints, the compliance organization's structure and synchronization can suffer. Compliance functionality can be hampered when authority and knowledge are overly centralized, or decentralized in a limited number of operational or geographical areas.

**Team up.** Multinationals that take compliance seriously do so through a team approach, actively involving global stakeholders across Legal, Internal Audit, Finance and Accounting, Compliance, Human Resources, Management, Security, and Operations. Recognizing that it is not enough to simply disseminate edicts from a central compliance function, companies with appropriately robust compliance programs tend to exercise greater management 'ownership' and local involvement.

**Invest in investigations.** A shortfall in funds, human capital, or other resources can also compromise efficient investigations, including those reported through companies' anonymous whistleblower hotlines. Companies cannot allow resource constraints to impede quick and thorough internal investigation of all allegations, which have new weight under the Dodd-Frank Whistleblower regulations.

**Listen up.** As with other compliance-related matters, thorough investigations typically infuse the process from beginning to end with input from relevant stakeholders, including the Audit Committee, General Counsel, Compliance, Internal Audit, Financial Reporting, Human Resources, and external experts. Similarly, investigative outcomes tend to be more favorable when stakeholders have voiced their views on the adequacy of the procedures performed and remedial actions taken.

**Courting partners and courting risk.** Multinational companies might work with thousands of business partners in numerous countries. Each of these players is integral to organizational success — and every one of them can also create a host of liabilities. Yet determining which business partners warrant due diligence can be a daunting, expensive, and flawed process. For example, some risk-ranking methodologies might deem certain professional services providers as low risk, but those rankings might be based on incomplete information, perhaps omitting the kinds of service vendors (travel agents, attorneys, tax professionals, or foreign currency vendors) often used to create slush funds or as conduits for potentially inappropriate payments. Companies that have accepted such vendors as low-risk partners should revisit their due diligence risk rating systems. Those that have not formally designed, executed, and documented due diligence procedures also court compliance gaps.

**The risk also rises.** As compliance stakes escalate, so does the risk of acquiring successor liability for the prior bad acts of an acquisition target. In our experience, companies that rely on experienced professionals to perform ABAC due diligence enjoy the greatest likelihood of identifying relevant compliance risks prior to an acquisition. Armed with that knowledge, the organizations are well positioned to mitigate compliance risks and properly value acquisitions before closing. If your organization is acquisitive, consider it a must to engage specialized professionals focused on helping you identify and minimize the risk of buying a problem.<sup>5</sup> Absent the performance of ABAC-specific due diligence, a compliance gap can leave your entity prone to overvalued acquisitions, fines, penalties, and disgorgement, and even your executives prone to prison sentences. Performance of ABAC due diligence is also a fundamental planning point for developing an ABAC integration protocol to sustain compliance throughout a corporate marriage.

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**Put your best foot forward.** The proactive discovery of a bad apple, deficient control, or inappropriately recorded transaction, followed by appropriate remedial action, lessens the likelihood the entity will flag itself as a target for regulatory investigation. It can also provide the company with credible evidence that the problem is an isolated instance of departure from an otherwise robust compliance program, in the event of regulatory involvement.

We view active ABAC compliance audits<sup>6</sup> as an effective way to aggressively identify ABAC compliance breaches, as well as other compliance gaps. A recent DOJ settlement<sup>7</sup> required one entity to:

- Identify at least five of its highest-risk operating companies
- Perform ABAC compliance audits at least once every three years on those organizations

- Perform the same audits at least once every five years on other operating companies that pose corruption risk
- Include ABAC-trained professionals on the audit team
- Strongly consider interviewing appropriate on-site staff
- Develop remedial action plans when necessary
- Strive to include an analysis of the books and records of business partners (in this case, distributors) that might also present corruption risk

**Always volunteer.** Resource allocation can be a hot topic for any organization. When it comes to ABAC compliance, do not lose sight of the potential benefits of voluntarily addressing compliance gaps, especially in light of the cost and uncertainty of inaction. An ounce of proactive compliance resources is frequently worth far more than a pound of penalties.

<sup>5</sup> For insight into the regulatory perspective, see <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf>

<sup>6</sup> Audits in this context should not be confused with those performed on financial statements.

<sup>7</sup> [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/pdf/johnson.pdf](http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/johnson.pdf)

## Technology

**Technically speaking.** Technology's significant role in compliance — as potential friend and foe — warrants hands-on discussions with internal and external stakeholders to identify any compliance gaps. Information viability, storage, and use can dramatically affect the efficiency and effectiveness of organizational compliance. In addition, used properly, technological compliance components can help close other compliance gaps.

**Be smart about 'corporate intelligence'.** In today's complex world of compliance demands, it is crucial to integrate corporate intelligence procedures that help the business to analyze information available in the public domain. By weaving these procedures into buy- and sell-side due diligence efforts, business partner retention procedures, and ABAC compliance audits, multinationals can position themselves to independently evaluate compliance-relevant factors such as integrity, reputation, and performance. Organizations that have not yet adopted ways to mine the staggering amount of information available in the public domain risk fines, penalties, and the embarrassment of knowing less about the organization's business than do outside parties.

**Dote on data storage.** The challenges of disparate technological systems, largely attributable to acquisitions and fragmented growth, can plague an organization's operations, finance, and compliance functions. Storing compliance-relevant data in a logical fashion facilitates numerous compliance functions, from responding to whistleblower complaints to identifying personnel for training and selecting transactions for testing during an ABAC compliance audit. Compliance organizations that have failed to devote sufficient time to understanding how compliance-relevant data is stored can open compliance functionality gaps and unknown compliance breaches. Business leaders should consider international data privacy laws and retention policies in connection with these matters to keep from running afoul of other relevant laws and regulations.

**Banish breaches.** Companies that logically maintain data can also enlist technology to proactively monitor for compliance breaches. By creating flags within ERP systems to identify anomalous transactions, they can establish early warning systems that alert compliance staff to potential problems, and launch timely, troubleshooting investigations. For example, a flag that draws attention to a new foreign legal services vendor's disproportionate billings for expenses versus fees can grab the attention of a knowledgeable ABAC compliance specialist; this individual is then poised to scrutinize the vendor as a potential conduit for passing funds to government officials who are weighing a decision (such as litigation or a tax audit) involving a company subsidiary. Such 'real time' operations monitoring can neutralize potential hot spots before they can burn the entity and keep operations moving in accordance with the organization's risk appetite. Note that organizations that are just beginning to use proactive technology to identify spikes in service vendor invoicing might find they need to hone the tool to overlook potentially misleading, insignificant spikes that emerge, for example, when a new vendor's activity increases from zero.

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**Creating ABAC competence**

Continuous refinement is a hallmark of a mature and vigorous compliance organization. Compliance professionals should continually strive to up their IQ in these risk areas; they should consider performing compliance ‘check-ups’, always looking for opportunities for improvement.

Those in the initial phases of ABAC compliance program development might want to perform a handful of pilot ABAC compliance audits to help validate and refine their ABAC risk assessment and to efficiently focus resources on future such audits. Lessons learned from an investigation, while potentially costly, can deliver significant return on investment in the quest to develop and benefit from a well-refined compliance program.



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