The joint Department of Justice (DOJ) and Securities and Exchange Commission (SEC) 2012 FCPA Guidance came out five years ago this month. As a commentator focusing on the doing of compliance, we should pause to once again thank the government regulators and prosecutors who had a part in drafting this most remarkable of documents. I submit is the best government generated source regarding what constituted at the time (and probably still does) a best practices compliance program. For anyone interested in exploring the lessons learned about Foreign Corrupt Practices Act (FCPA) compliance programs and what the government expects to see, the 2012 FCPA Guidance is the best document you can start with.

As a ‘Nuts and Bolts’ guy I found the DOJ/SEC formulation of their thoughts on what might constitute a best practices compliance program, denominated the “Ten Hallmarks of an Effective Compliance Program”, as the most useful part of the FCPA Guidance. While the Guidance cautions that there is no “one-size-fits-all” compliance program, it recognizes a variety of factors such as size, type of business, industry and risk profile a company should determine for its own needs regarding a FCPA compliance program. But the Guidance made clear that these ten points are “meant to provide insight into the aspects of compliance programs the DOJ and SEC assess”. In other words you should pay attention to these and use this information to assess your own compliance regime.

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-talk’ 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, "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. Importantly, the Guidance made 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.

3. Oversight, Autonomy, and Resources. This section begins with a discussion on the assignment of a senior level executive to oversee and implement a company's compliance program. Equally importantly, the compliance function must have "sufficient resources to ensure that the company's compliance program is implemented effectively." Finally, the compliance function should report to the company's Board of Director 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, "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 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." 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."

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. 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.

7. Third-Party Due Diligence and Payments. 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 relationships, if any, with foreign officials." 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, "compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale." The DOJ/SEC expects that a company will review and test its compliance controls and "think critically" about its own weaknesses and risk areas. Internal controls should also be periodically tested through targeted audits.
10. Mergers and Acquisitions. Pre-Acquisition Due Diligence and Post-Acquisition Integration. Here the DOJ and SEC spelled out their expectations not only in the post-acquisition integration phase but also in the pre-acquisition phase. This pre-acquisition information was not something on which most companies had previously focused. A company should attempt to perform as much substantive compliance due diligence that it can do before it purchases a company. After the deal is closed, an acquiring entity needs to perform a FCPA audit, train all senior management and risk employees in the purchased company and integrate the acquired entity into its compliance regime.

What is the significance of these Ten Hallmarks today? Earlier this year, the DOJ released the Evaluation of Corporate Compliance Programs (Evaluation), based on these Ten Hallmarks. In April 2016, they released the FCPA Pilot Program, through which it further refined and clarified many of the specific Hallmarks from the 2012 FCPA Guidance. Indeed, in every speech since the release of the 2012 FCPA Guidance, where the DOJ has discussed its views on compliance best practices, it is always in reference to the 10 Hallmarks of an Effective Compliance Program.

While others have leveled a variety of criticism about the 2012 FCPA Guidance, they miss the essential point that for the compliance practitioner, it is an excellent resource about operationalizing compliance by putting into the business process of your organization. Here's to the Guidance at the end of age of 5. Thanks for coming into all of our (compliance) lives.

The 10 Hallmarks from the FCPA Guidance remain the foundation to operationalize a compliance program.

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