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CHECKLIST:

Best Practices for Creating a Robust Anti-Corruption Compliance Program

The most effective way to avoid costly violations under the Foreign Corrupt Practices Act (FCPA) is to implement an effective anti-corruption compliance program. An effective compliance program should contain the following elements:

A. Conduct a Baseline Risk Assessment

- *Country Risks:* Identify all aspects of the business that operate overseas or otherwise have dealings with foreign officials or state owned enterprises and identify the reputation for corruption of the countries in which the organization does business
- *Business Sector Risks:* Identify the risk of corruption inherent in the industry sector in which the organization does business. Sectors such as pharmaceuticals, oil and gas, defense/arms, and telecommunications have a greater risk
- *Transactional Risks:* Identify all employees and agents who interact with foreign officials and the types of transactions they engage in. Risks are greater where employees and agents make political or charitable contributions, obtain licenses and permits, or engage in transactions related to public procurement
- *Business Partnership Risks:* Identify foreign consultants and business partners with whom the organization does business. Identify proposed joint ventures and mergers and acquisitions
- *Business Opportunity Risks:* Identify business circumstances that may put the organization at risk of an FCPA violation such as high value projects, projects involving many intermediaries or projects not undertaken at market price
- *Compliance Risks:* Identify and compare existing compliance functions used by the organization against best practices to ensure that foreign corrupt payments are not made and that accounting records accurately reflect all transactions. Also, identify any instances of past or ongoing noncompliance with the FCPA

- *Proportionality Risks:* Determine how the compliance program must be tailored in proportion to the risk – one size does not fit all

B. Assign Managerial and Governance Responsibility

- Senior management
- Board, audit committee or other governing bodies
- Compliance officer
- Legal department

C. Establish Corporate Policies

- Explicit prohibition of bribery in all forms
- Policies regarding the provision of gifts, political and charitable contributions, and bona fide hospitality or promotional expenses
- Global code of ethics and business conduct
- Clear accounting and recordkeeping policies
- Hiring policies to screen individuals with corrupt backgrounds
- Compensation policies rewarding compliance
- Disciplinary policies correcting or punishing noncompliance

D. Communication to and Training of All Stakeholders

- Summary of the FCPA, other anti-corruption laws, and company policies
- Frequently asked questions and answers about the FCPA and other applicable laws
- Training presentations with questions and answers and tests
- Publish specific conduct guides to applicable stakeholders
- Guide to Permissible Foreign Payments (if any)
- Guide for Dealing with Minor Foreign Officials.
- Guide to Hiring and Dealing with Foreign Sales Agents and Partners
- Procedures for Contributing to Foreign Charities

- Procedures for Investigating Violations
- Procedures for Proper Accounting and Recordkeeping
- Procedures for M&A due diligence
- Communicate policies and provide training to intermediaries
- Publish ethics policy on the Company's website and social media sites
- Include ethics statement in the Company's annual report and other financial or shareholder reports

E. Obtain Certifications of Compliance

- Receipt of anti-corruption policies, procedures and training
- Annual or periodic certification of compliance with anti-corruption requirements
- Training test results

F. Develop Intermediary and M&A Due Diligence Checklists

When engaging an intermediary such as an agent, distributor, or consultant, or when entering into an acquisition, merger, joint venture or other business partnership, the Company must perform thorough due diligence. Robust due diligence includes research, questionnaires, interviews, background checks, references and the like, and should involve:

- Background information regarding the Third Party, including its name, address, telephone number, facsimile number and email address, if any
- The identification of the Third Party's owners and other significant business affiliations
- Information regarding the Third Party's government relationships, including those relationships held by its owners, partners and shareholders
- The Third Party's legal qualifications to do business in the country in which the work is to be performed
- Relevant financial information, including requested remuneration and a comparison of that remuneration to the going market rate and
- References (both from other reputable foreign companies and from local institutions)

The U.S. Justice Department has identified "red flags," which may indicate the potential existence of a Foreign Corrupt Practices Act problem. These "red flags" include:

- The third party has a history of improper payment practices
- The transaction or the third party is in a country where there is widespread corruption
- The transaction or the third party is in a country that has a history of bribes and kickbacks
- The transaction or the third party is involved in or with an industry that has a history of Foreign Corrupt Practices Act violations
- The third party refuses to agree to comply with the Foreign Corrupt Practices Act
- The third party has a family or business relationship with a government official
- The third party has a poor business reputation
- The third party insists that its identity remain confidential or refuses to divulge the identity of its owners
- A government customer recommends or insists on use of a particular intermediary or consultant
- The third party does not have offices or a staff
- The third party does not have significant experience
- The third party insists on unusual or suspicious contracting procedures
- The fee or commission to be paid to the third party is unusually high
- The payment mechanism to be utilized is secretive or unusual
- The third party submits inflated or inaccurate invoices
- The third party requests cash or bearer instrument payments
- The third party requests payment in a jurisdiction outside its home country that has no relationship to the transaction or the entities involved in the transaction
- The third party asks that a new customer be granted an excessive credit line
- The third party requests unusual bonus or special payments
- The third party requests an unusual advance payment

G. Include Contract Provisions for Third Parties

Companies should incorporate contract provisions relating to FCPA compliance into all contracts with third party intermediaries. Contract provisions should include:

- Specific language setting forth the duties or services of the intermediary
- Specific language setting forth the compensation for the intermediary
- Specific certification language stating that the intermediary has the qualifications necessary to perform the services
- Specific language setting forth restrictions on the intermediary's ability to hire subcontractors, make third party payments and assign the contract to other third parties
- Language certifying compliance with the FCPA, other relevant anti-corruption laws, accurate recordkeeping procedures and the Company's ethics and FCPA compliance program
- Specific language requiring the intermediary to provide periodic reports and certifications of compliance with anti-corruption requirements
- Specific language permitting the Company to audit and review the records of the intermediary
- Specific language stating that the intermediary will cooperate with all internal or external investigations, interviews, or audits regarding the services provided
- Specific language in the indemnification provision relating to anticorruption law violations
- Specific language in the termination provision permitting termination for anti-corruption violations
- Language requiring the intermediary to disclose any violations of the contract or anti-corruption requirements

H. Develop Reporting Mechanisms for Anti-Corruption Violations

- Confidential reporting and investigations
- Anonymous – but comply with foreign data protection laws
- Hotline or web-based reporting capability
- Non-retaliation and whistleblower protections

I. Conduct Periodic Compliance Reviews

- Review all FCPA policies and procedures
- Maintain a list of individuals in high risk positions regarding the FCPA
- Interview and obtain written certification from individuals in high risk positions
- Ensure that individuals in high risk positions do not have a history of violating or disregarding the law or company policy
- Review the company's compliance with procedures that govern relevant business transactions
- Assess the sufficiency of employee training
- Conduct periodic audits of accounting and recordkeeping practices
- Provide periodic reports to senior management regarding the company's compliance efforts

J. Develop Internal Investigation Procedures

- Select investigation team of objective investigators including internal and external resources.
- Establish procedures for the preservation of evidence, including electronic evidence
- Protect the attorney-client privilege as many countries do not recognize in-house counsel privilege
- Determine the proper scope of the investigation – should it be limited to the specific suspected violation or should it be expanded to include all similar business transactions by similar individuals in similar circumstances?
- Review the anti-corruption laws of foreign countries in which the potential violations have occurred
- Review foreign data protection laws, employment laws, and discovery “blocking” statutes
- Determine if and when to self-disclose suspected violations to the DOJ or SEC
- Take quick and decisive action to stop and correct any violations

K. Document FCPA and Anti-Corruption Compliance Efforts

- Communication and training materials
- Attendance at training sessions
- Certifications of compliance
- Due diligence efforts
- Hotline calls or other complaint mechanism usage
- Regular compliance reviews
- FCPA internal investigations

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