

Analysis on Difficulties in MNCs' Anti-Bribery Compliance Programs

By David Pan and Dali Qian

[English Summary]

When formulating and implementing a “good” Anti-Bribery Compliance Program (“ABCP”), an MNC must take the following elements into account:

- i). The company’s own business model;
- ii). The business culture and practices in the areas where the company operate its business; and
- iii). The business culture and practices in the areas where the company operate its business; and

1. Compliance Risk Assessment

The following formula is commonly used in compliance risk evaluation.

Corruption = Monopoly + Discretion – Accountability – Salary + IOR (Ignorance of the Rules) + LOD (Lack of Discipline) + LOS (Lack of Scruples) + LOG (Lack of Guts)

Based on this formula, we suggest that MNCs consider the following elements in the compliance risk evaluation:

- i). Frequency of interacting with governmental authorities in the course of business operation;
- ii). Governmental and business compliance level and culture in the places where the company operates its business;

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- iii). Whether the company is in compliance sensitive industries such as pharmaceutical, medical, auto and spare parts, real property and construction?
- iv). The business model of the company: self-sales or through agents and distributors? Any long term regular supplier and customers? Compliance level of these third parties?
- v). The scale and the composition of the sales and procurement team, management, performance review and training program for the team?
- vi). The relationship between former employees, employees and the company? The relationship between business rivals and the company?
- vii). The compliance record of the company within the country and overseas?

2. Policy Formulating

(1) Authority of local compliance officer

Though it is commonly seen in headquarters offices of an MNC that the chief compliance officer reports directly to the chief executive officer or even the board of directors, local compliance departments for example in China usually do not hold sufficient power and authority to carry out the ABCP effectively... As a solution, when structuring its local management hierarchy, an MNC may want to consider appointing the chief compliance officer in China or the Asian Pacific region as a member of China or regional leadership committee. Accordingly, the country managers or business directors are responsible for reporting compliance matters to the chief compliance officer.

(2) Support mechanism from labor manual and regulations

Unlike the governmental authorities, an employer in China does not have mandatory power to investigate and correct its employees' misconduct. Therefore, the methods of internal investigation available to an employer are limited. Moreover, an employer cannot suspend or dismiss certain employees who hold special positions like chairpersons of the trade union, unless the employer obtains consent from the relevant trade union. For these reasons, it is advisable for an MNC to devise relevant mechanisms in its labor manual and regulations to legitimately empower the company to implement the ABCP including internal investigations.

(3) Practical feasibility in implementation

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To take business gifting and entertainment as an example, an MNC in China can make a choice in formulating its policy from two different approaches:

- (i) Gifting and entertainment are absolutely disallowed; or
- (ii) Gifting and entertainment are generally disallowed, while in exceptionally limited circumstances they are allowed after they have been thoroughly reviewed by legal and compliance departments. Detailed criteria for approval and procedural restrictions should be set out to ensure the legitimacy of such exceptional gifting and entertainment.

Which approach is more practically feasible of implementing the ABCP?

(4) Internal reporting and whistleblower policy

It has been reported that more than 70% of the external investigations by governmental authorities in China were triggered by whistleblowers' reporting.

Many MNCs have set up reporting hotline for whistleblowers of compliance violations. However, a coin has two sides. On the one side, an MNC can benefit from internal reports in discovering corruption cases. On the other, the MNC sometimes suffers from wasting its resources in investigating false or malicious reports.

By weighing the pros and cons, we suggest that an MNC incorporates internal reporting policy into the ABCP with a view to establishing a complete compliance scheme. By doing so, the ABCP can prove the MNC's track record of compliance. More importantly, with such internal reporting policy, the MNC may obtain relevant information from whistleblowers ahead of the governmental authorities, which is critical for the MNC to prepare for a possible administrative investigation or even a prosecution followed by the whistleblowing.

3. Internal investigation

(1) Whether and when to initiate an internal investigation?

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The standards of initiating an internal investigation may vary case by case. Among others, the investigation purpose is one of the most important criteria in setting such a standard.

[Case Study]

Company B is a subsidiary of a U.S. based pharmaceutical MNC in China. When Company B conducted its routine quarterly audit in 2016 Q3, the auditors found some fishy expense claims made by a sales manager. It was suspected that the manager claimed certain amount of money to have bribed certain private hospitals' purchasing managers in forms of cash and gifts. The manager had left the company before the audit started. The legal and compliance department of Company B discussed with its outside counsel on the company's legal risks and liability under the FCPA and Chinese law, and whether the company should initiate an internal investigation...

After all discussions, Company B finally decided to take the following actions to show that the company has "zero tolerance" against corruption: (1) to discipline the finance manager and the superintendent of the sales manager who approved his expenses claim; (2) to issue a formal letter to the sales manager regarding the investigation with a copy to his new employer; and (3) to conduct a full review of the company compliance scheme to identify any systematic vulnerability.

(2) Participation by in-house counsel and external lawyers

	In-house Counsel	External Lawyers
Advantages	● Familiar with the company's history, structure and business-decision making process ● Conducive to an open interview with employees under investigation ● Cost saving	● More independent in eyes of governmental authorities ● Communication between the employees under investigation will have a higher chance to be shielded by attorney-client privilege ● Buffer zone between in-house counsel and employees under investigation

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Disadvantages	● Independence and credibility of the investigation results might be challenged by the governmental authorities ● The working relationship between in-house counsel and the interviewed employees could be strained, if the employees turned out innocent after confrontational interviews ● The interviews conducted might not enjoy "Attorney-Client Privilege"	● Additional cost; ● Possible hostile confrontations with the employees under investigation
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