

2016 Luxury & Fashion Industry Conference

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Baker & McKenzie New York



2016 Luxury & Fashion Industry Conference

Compliance: How are Luxury Companies Managing Their Compliance Risk?

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Global Compliance Trends

Top 5 Compliance Trends Around the Globe in 2016



Creating a
culture of
compliance



Increased
investment in
compliance
operations



Keeping pace
with a changing
regulatory
landscape



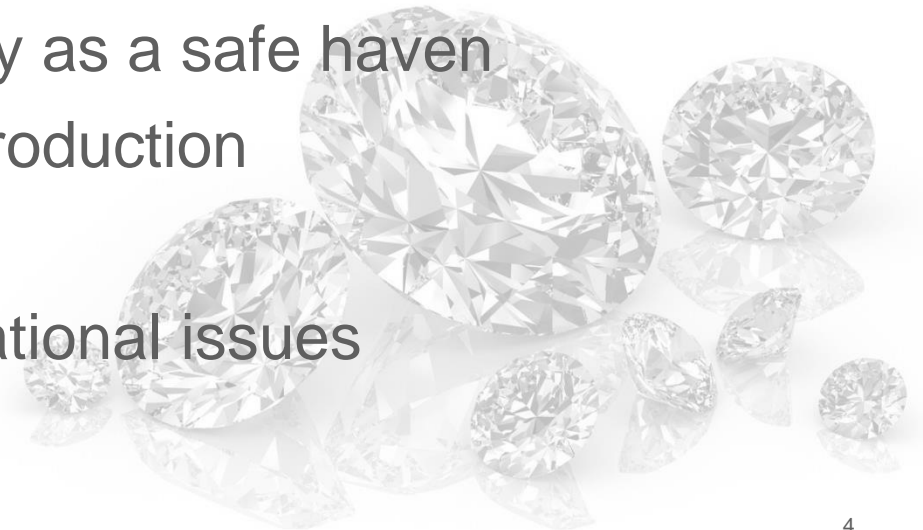
Monitoring
third party risk



Encouraging
whistleblower
activity

Compliance Risks in the Luxury & Fashion Industry

- Customs clearance and logistics
- Real estate and zoning licenses
- Gifts and hospitality
- Corruption in the supply chain
- Money laundering: Luxury as a safe haven
- Combatting counterfeit production
- Sanctions
- Human trafficking/Reputational issues





European Union

Overarching EU Compliance Trends

- Creating a culture of compliance.
- ABAC (Anti-Bribery and Anti-Corruption):
 - Framework Decision 2003/568/GAI
 - The anti-corruption package of the European Commission
- AML (Anti-Money Laundering):
 - Directive (EU) 2015/849 on preventing the use of the financial system for money laundering or terrorist financing (4th Anti-Money Laundering Directive)
 - Regulation (EU) 2015/847
 - Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies
- H&S (Health & Safety)
- Encouraging Whistleblower Activity

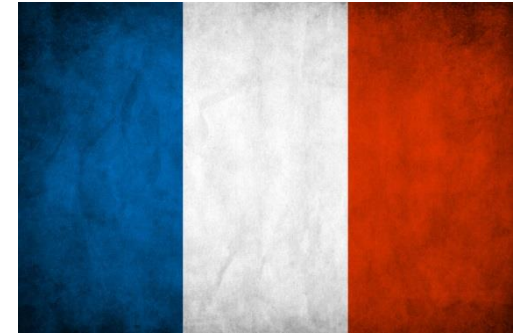


Overview of EU Anti-Corruption Trends

- Anti-corruption enforcement has seen a noticeable increase in recent years (a trend likely to continue):
 - Provision of criminal liability for both Domestic and Foreign Bribery.
 - Traditionally: only “*private to public* bribery”
 - Recent developments: also “*private to private* bribery”
 - Sanctions for both individuals and legal entities
 - Strengthening sanctioning regimes (in particular, pecuniary sanctions)



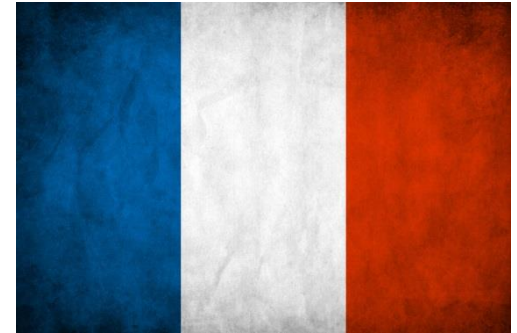
...France



French penal code

- Strong sanctions for bribery and corruption:
For individuals: imprisonment for up to 10 years and a fine up to EUR1 million
- For companies: fine of up to EUR5 million (alternatively, the amount of the fine may also be set at twice the proceeds of the offense) and, for up to 5 years debarment from public procurement, closing down the legal entity's facilities used to commit the offense, prohibition from issuing a check or using a payment card, confiscation etc.

...France



- A bill of law relating to transparency, fight against bribery and modernization of economy (the “Bill of Law”), published on 30 March 2016, was expected to introduce a new criminal settlement procedure, inspired by FCPA-type deferred prosecution agreements



...Germany



German Penal Code and German Administrative Offence Act

- When it comes to fighting corruption, Germany is amongst the best countries of the EU
- Strong sanctions for individuals who commit crimes: in aggravated cases, imprisonment for up to 10 years and daily fines (determined by the court depending on the offender's income) up to 24 months.
- German criminal law applies extraterritorially if there is a connection to Germany (i.e., if one of the participants was a German citizen or if one of the actions in connection with the bribing of a public official took place in Germany)
- No facilitation payment exception applies under German law

...Germany



German Penal Code and German Administrative Offence Act

- Companies cannot be held criminally liable under German law. However, administrative monetary fines may be imposed directly on companies if a company representative or representative body (e.g., member of the board of directors, general manager) commits a criminal or administrative offense, and the company hereby breaches a company duty or profits in an illegal manner (Section 30 of the German Administrative Offence Act).



..Italy



- New offences listed in the Legislative Decree no. 231/2001
- New Anti-Corruption Law adopted in 2012
- (*In response to “Expo 2015” case*) → Law no. 69/2015: strengthening sanctions
- Right now before the Parliament: new law proposal to amend “*private to private* bribery” (disegno di legge S. 2345)
- New AML provisions



...Italy



Legislative Decree no. 231/2001

- A legal entity can incur “**criminal**” liability whenever an offence (a specific offence) is committed by individuals belonging to it:
 - Persons who represent, manage or otherwise direct – also if merely *de facto* – the activity of the company or of one of its autonomous business units (the “**Top Management**”)
 - Persons who are subject to the **direction or supervision** of the Top Management

...if they acted in the **interest** or to the **benefit** of the company.

The liability of the company is **autonomous**. It is ascertained in the context of a **criminal trial**.

...Italy



Sanctions:

system of quotas

fine range: EUR 25,800 – 1,500,000

**PECUNIARY
SANCTIONS**

**RESTRAINING
MEASURES**

CONFISCATION

**PUBLICATION
OF COURT
ORDER**

prohibition to exercise the company's business

suspension or revocation of any authorizations, licenses or permits related to the specific business activities involved by the criminal conduct;

prohibition to negotiate and enter into contracts with Administrative Authorities, with the only exception of those aimed at obtaining public services

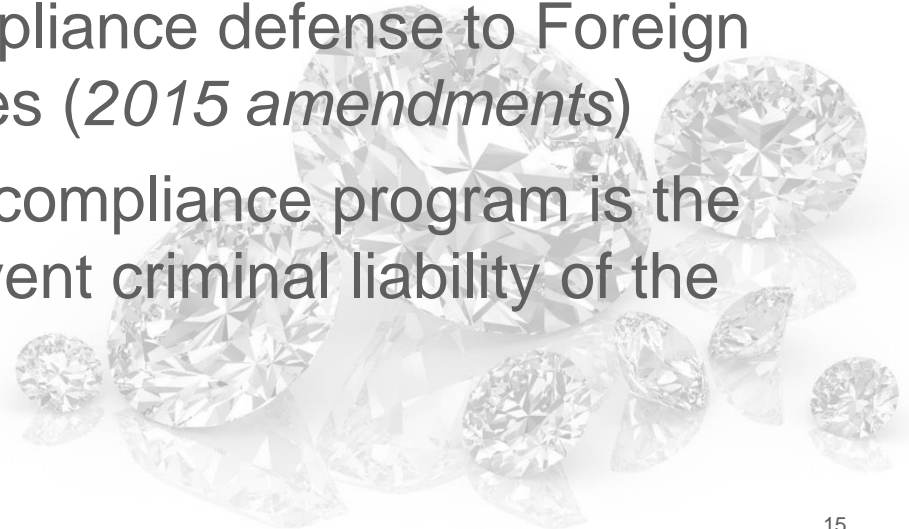
exclusion from subsidies and contributions, or revocation of any subsidies and contributions already granted to the company;

prohibition to advertise the company's goods and/or services

...Spain



- The Spanish Criminal Code has seen significant amendments since 2010, when criminal liability of legal entities for bribery and other crimes was introduced
- Spain has been the latest country, among OECD countries, to adopt a compliance defense to Foreign Corruption/Bribery charges (*2015 amendments*)
- The adoption of a robust compliance program is the only valid defense to prevent criminal liability of the legal entity

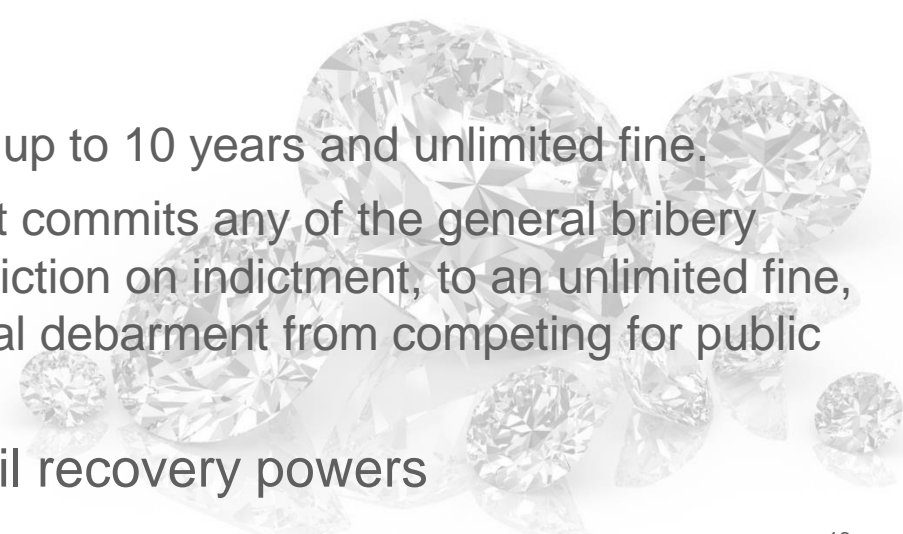


...UK



The UK Bribery Act 2010

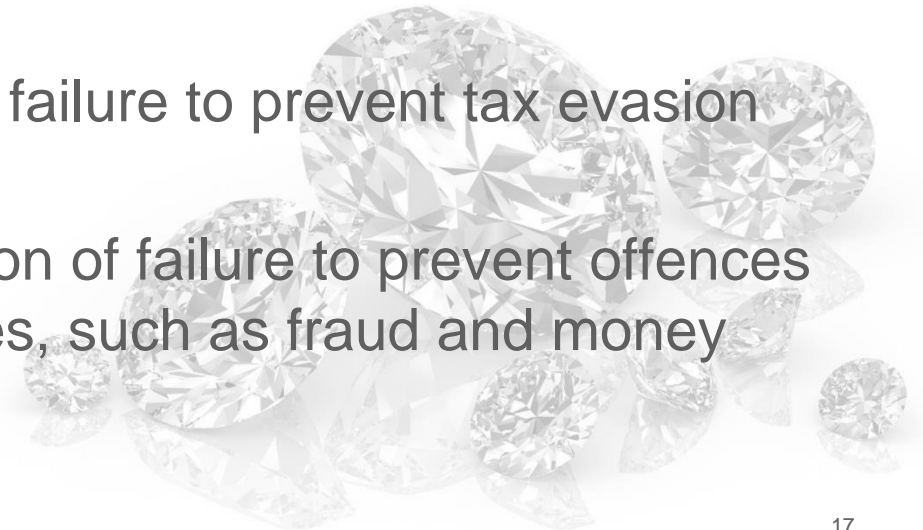
- Covers public to private and private to private bribery. General offence of bribery and specific offence of bribery of public foreign officials
- Strict liability offence of failure to prevent / adequate procedures defence
- Extra-territoriality
- Strong sanctions:
 - For individuals: imprisonment up to 10 years and unlimited fine.
 - A company or partnership that commits any of the general bribery offenses will be liable on conviction on indictment, to an unlimited fine, and to automatic and perpetual debarment from competing for public contracts.
- Serious Fraud Office (SFO) civil recovery powers





...UK

- Deferred Prosecution Agreements
- Does the reality match the rhetoric?
- Future developments – increased focus on corporate offences “*biggest shake up of corporate criminal law in a century*”:
 - Criminal Finances Bill – failure to prevent tax evasion (UK and foreign)
 - Consultation on extension of failure to prevent offences to other economic crimes, such as fraud and money laundering
- The Brexit effect

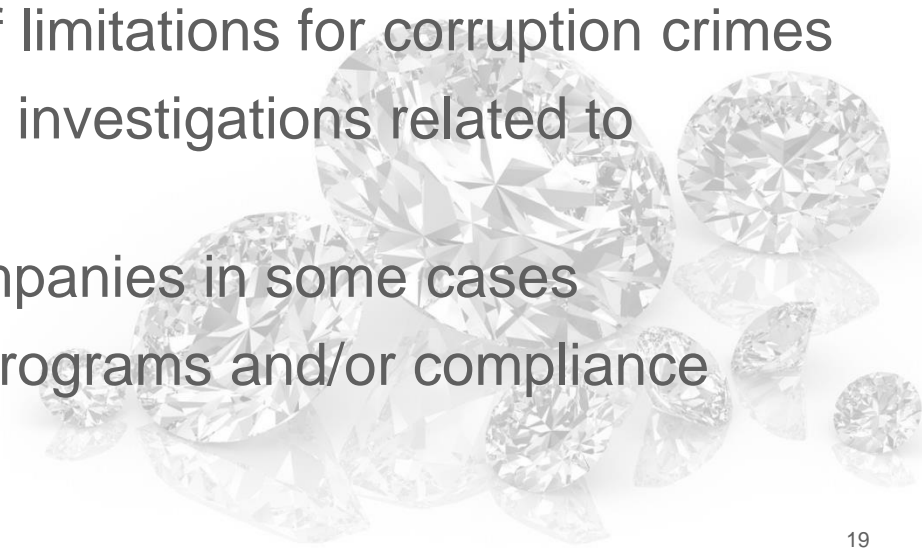


Latin America

Argentina



- In new Macri government, anti-corruption is high on the political agenda.
- Several draft bills on Criminal Legislation that include:
 - Benefits for whistleblowers on corruption investigations
 - Elimination of statute of limitations for corruption crimes
 - Acceleration of criminal investigations related to corruption schemes
 - Criminal liability for companies in some cases
 - Credit for compliance programs and/or compliance officers

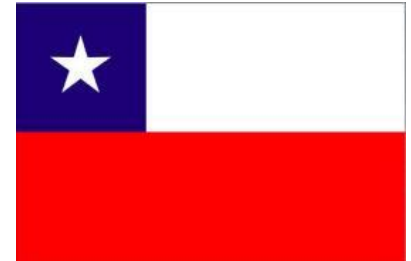


Brazil

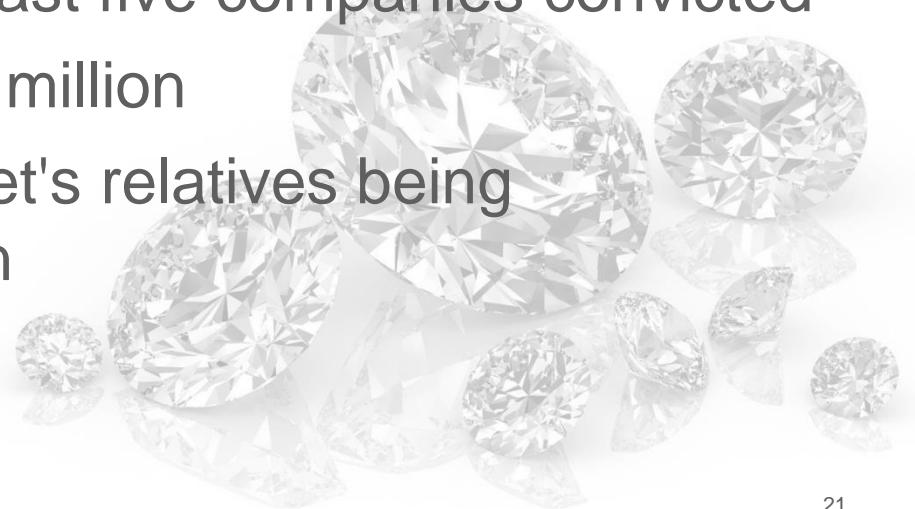


- Clean Companies Act (2014)
 - Administrative and civil liability for legal entities
 - Strict liability: employees or agent third parties
 - Show benefit or interest, but no need to prove actual knowledge
 - Penalties:
 - i. Up to 20% of the company's gross sales plus disgorgement
 - ii. Publication of the sentence, suspension, dissolution or debarment
 - Successor liability
 - Regulation to Clean Companies Act: Leniency Agreements, Compliance/Integrity Programs and criteria
- Operation Car Wash (2013) gas station used for money laundering and embezzlement
 - Federal Police and Prosecutor link money dealer to Petrobras corruption. 1,397 proceedings; 654 searches and seizures; 174 individuals interrogated; 76 arrests; 92 detentions; 112 requests for international cooperation; 70 Plea Agreements; and 6 Leniency Agreements.
- Operation Zealots. Tax court corruption investigation begun in 2015

Chile



- Chilean Law 20,393 (2009) establishes criminal liability for companies
- Includes money laundering, financing terrorism and bribery
- Strong enforcement: at least five companies convicted
- Settlements up to US\$25 million
- Current president Bachelet's relatives being investigated for corruption



Colombia



- Transnational bribery now punished by fines up to US\$40 million and debarment up to 20 years
- Obligation to adopt codes of conduct that comply with eight principles of Compliance issued by the Ministry of Companies in Colombia
- Q1 2017 for companies with foreign trade links and companies in the manufacturing, IT, pharmaceutical and oil & gas sectors
- Self-reporting leniency for businesses



Mexico



- Criminal Liability for Companies in Mexico City November 2014
 - In lieu of imprisonment, 920 days of profits
 - Gas company fined over US\$3 million in Cuajimalpa
- Constitutional Amendment on Anti-Corruption 2015
- Federal Criminal Liability for Companies June 2016
- Sistema Nacional Anticorrupción Laws July 2016
 - Administrative Liability for Companies, up to US\$6 million fines, coming July 2017
 - Credit for Compliance Programs coming July 2017
 - Self-Disclosure Programs coming July 2017
- Constitutional Amendment on Transparency 2015

Peru



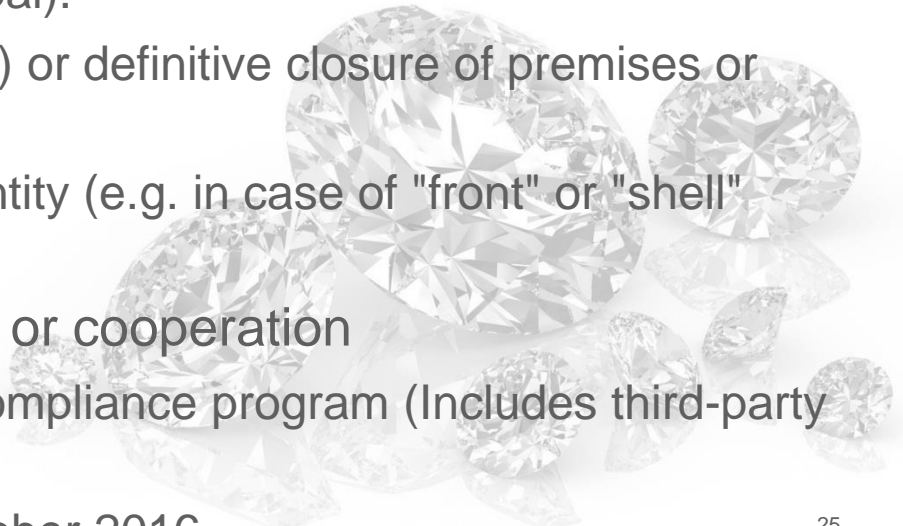
- New anti-corruption legislation
 - Law No. 30424 (April 2016) legal entity criminal liability for foreign bribery (July 2017)
 - Entities liable for transnational active bribery
 - Conviction of individual not required for entity liability



Peru



- Sanctions
 - Up to six times benefit obtained or expected, or based on annual income
 - Debarment up to 5 years
 - Cancellation of licenses, concessions, rights and authorizations (administrative or municipal).
 - Temporary (up to 5 years) or definitive closure of premises or establishments.
 - Dissolution of the legal entity (e.g. in case of "front" or "shell" corporations).
- Mitigation for self-reporting or cooperation
 - Exemption or credit for compliance program (Includes third-party implementation)
 - Regulation expected October 2016



Venezuela



- Law Against Corruption (November 2014)
 - Legal entity penalties: fines, disgorgement, debarment
 - Sanctions bribery of foreign public officials; and
 - “National Anti-Corruption Body” to accelerate investigations in corruption matters
- Very little enforcement to date: No criminal claims against multinationals (prosecution highly political)
- High risk:
 - Use of agents, consultants and other intermediaries
 - Licensing and permits, due to immense bureaucracy

United States

Notable FCPA Enforcement Developments

- Yates memo: focus on prosecution of individuals continues
- DOJ's self-disclosure pilot program: up to 50% reduction in fines and declination
- Whistleblower activity on the rise
- DOJ's Compliance Counsel: tougher look at compliance programs
- SEC's enforcement of whistleblower protection laws



How we design a compliance program?



Compliance Requirements

“ *If your company is caught breaking the law, the sanctions assessed will be **much greater** for companies without a compliance program at all, or that prosecutors consider ineffective. Not to mention that an effective compliance program will make it less likely that your company breaks the law in the first place!* ”



Common Features

- The law varies by jurisdiction.
- A multinational company, operating in multiple countries, shall comply with different national requirements.
- Basic ingredients:



***ADEQUATE
INTERNAL
PROCEDURES***

***EFFECTIVE
IMPLEMENTATION***

Enforcement authorities' assessment

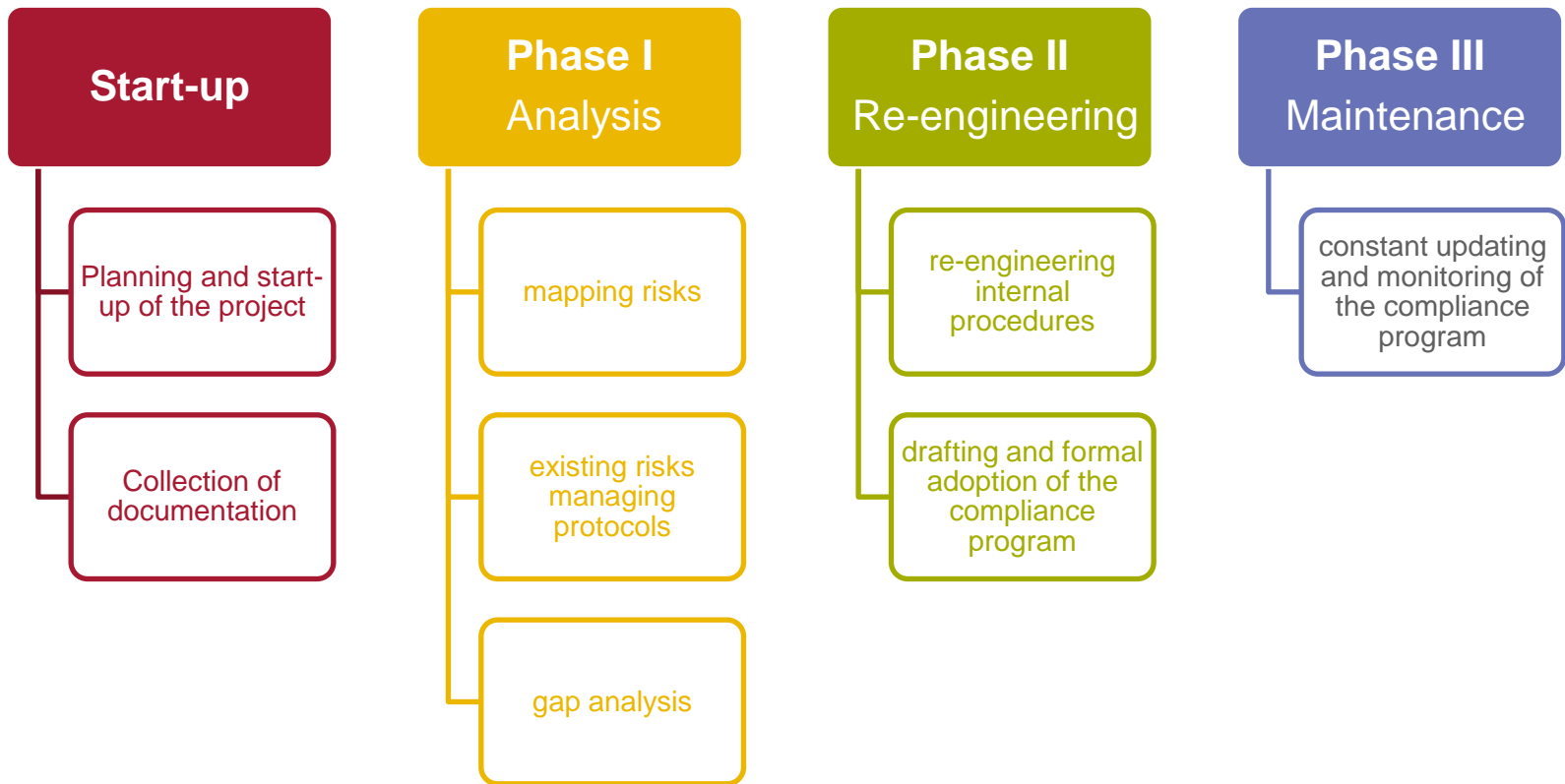
Three key questions:

1. Is the program well designed?
2. Is it applied in good faith? and
3. Does it work?

Enforcement authorities will look at the *concrete* adequacy and effectiveness of the compliance program.

The compliance program must be tailored to fit the individual risks and structure of the Company.

Planning Stages



1) Start-up



Building up the **team**: Who ask to?



Collecting documentation and other relevant **information**



Preparing and sharing the **action plan**

2) Analysis



Conducting **interviews**



Analyzing the company's **existing protocols and procedures**



Verifying **previous downfalls**



gap analysis must deliver a truthful outcome

3) Re-engineering

Problem n°1: building local procedures that will be valid also from a global perspective, and *vice versa*.

Problem n°2: building a program that can be concretely implemented.

*Otherwise,
it will be just PAPERWORK.*



4) Maintenance



The game can start only when an independent
Supervisory Body shows up!
The players of the Supervisory Body must have:

- ✓ independence
- ✓ spending powers

To be effective, the compliance program shall be based on solid foundations...



Baker McKenzie's 5 Elements of Corporate Compliance

A global template for multinational companies:

Leadership

Risk Assessment

Standards and Controls

Training and Communication

Monitoring, Auditing and Response

1. Leadership

- Strong support from **senior management**.

What we recommend:

- **open line of communication** between the compliance team and **the board** about the implementation of the company's compliance program;
- **ensure board level accountability** for the effectiveness of the compliance program;
- make sure central compliance **communicates with those in the field**;
- place compliance officers in **high-risk markets**;
- conduct **periodic board training** and provide **reports on hot topics** in compliance and risk management.

2. Risk Assessment

- Formal processes for **periodically assessing** the compliance risks everywhere, particularly in higher risk regions.
- Identifying ‘Sensitive Activities’ and mapping ‘Risks’.

What we recommend:

- conduct **annual risk assessments**;
- scrutinize **new business partners** and **third-party agents**;
- **update** your policies and procedures based on enforcement trends;

3. Standards and Controls

- **Company's Policy / Code of Business Conduct.**
- The importance of doing business in an **ethical** way.

What we recommend:

- establish **stringent protocols for screening** business partners and third parties;
- conduct **background checks** on business partners in high-risk markets;
- establish **internal controls** to ensure accounting records are accurate;
- provide clear guidelines for **gift giving and hospitality.**

4. Training and Communication

- Periodic and consistent training (seminars, webinars, video conferencing, online self-testing...) for employees on relevant laws, regulations, corporate policies and prohibited conduct.

What we recommend:

- develop an **annual, risk-based training plan**;
- provide **live** compliance training for country managers;
- train the **right people** (e.g. high-risk markets directors, sales employees...);
- develop your training to address a broad range of **global issues**.

5. Monitoring, Auditing and Response

- These are key components that enforcement officials look for when determining whether companies maintain adequate **oversight** of their compliance program.
- Monitoring and Auditing work in tandem.

What we recommend:

- establish a **regular monitoring system** to spot problems and address them;
- require **country managers** to complete regular compliance reports;
- **pay attention to what employees say** during training;
- **regularly test** your compliance program to verify its effectiveness;
- establish protocols for **internal investigations, whistleblowing** and **disciplinary action**;
- **remediate** problems **quickly**.

Whistleblower Programs

Overview

- An effective whistleblower program is a key component of an effective compliance program that, when successfully implemented, allows a company to:
 - Quickly uncover possible misconduct
 - Immediately suspend any potential or actual criminal activity
 - Discipline and, if necessary, remove from its employ individuals who have engaged in, or otherwise condoned, criminal activity or other unethical conduct
 - Ensure its compliance training addresses those areas where the risk of misconduct is high
 - Enhance its compliance program to better address such high-risk areas

Sarbanes Oxley Whistleblower Program

- The Corporate and Criminal Fraud Accountability Act of 2002 (“Sarbanes Oxley”)
 - Enacted following the corporate accounting fraud scandals in early 2000s
 - As a result of the treatment whistleblowers in these scandals received, the law includes minimum standards for whistleblower programs and protections for whistleblowers
 - Requires publicly traded companies to create internal and independent “audit committees” which are then required to establish procedures for employees to file internal whistleblower complaints and that protect the confidentiality of employees who report alleged misconduct
 - Prohibits retaliation against whistleblowers who provide truthful information to a law enforcement officer about the commission or possible commission of any federal offense

Dodd-Frank Whistleblower Incentives

- Enacted in 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) builds on the Sarbanes Oxley whistleblower requirements and allows whistleblowers who provide the SEC with original information about securities violations to obtain between 10% to 30% of any monetary sanctions in excess of \$1 million recovered against a company
 - Reports may be submitted anonymously under certain conditions
 - Does not require internal reporting prior to going to the SEC, but implementing regulations attempt to incentivize such internal reporting by providing increased awards under certain circumstances (e.g., voluntarily participating in internal compliance and reporting systems)

Dodd-Frank Whistleblower Incentives (cont'd)

- Includes anti-retaliation protections for whistleblowers who report possible securities laws violations by prohibiting, directly or indirectly, their discharge, demotion, suspension, threatening, or harassment for undertaking any lawful act
- Also prohibits actions that impede whistleblower communications with the SEC including “enforcing, or threatening to enforce, a confidentiality agreement” with respect to such communications
- Was recently interpreted by the SEC to limit the scope of employee confidentiality agreements signed prior to interviewing employees as part of an internal investigation



SEC Whistleblower Program

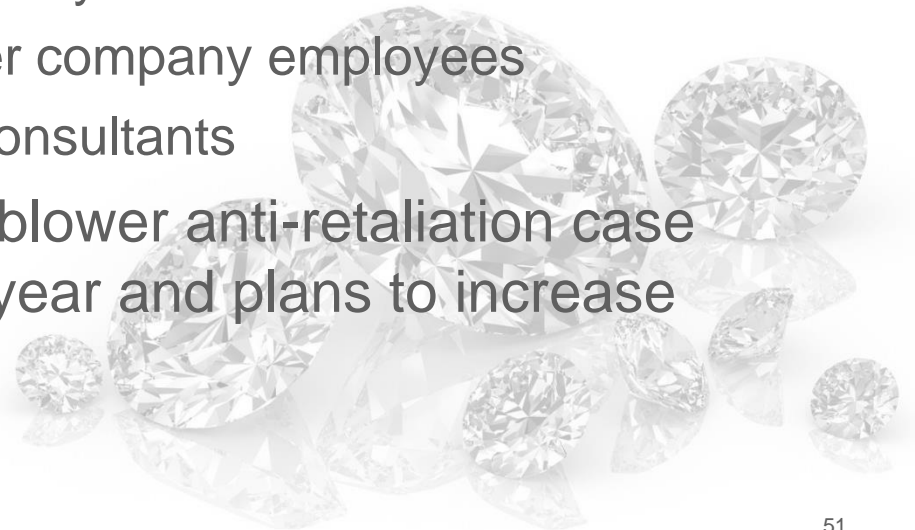
- Settlements: The SEC’s Office of the Whistleblower has obtained more than \$504 million in sanctions over six years.
- Whistleblowers have taken home about 20 percent of this money—more than \$107 million in awards.
- Tips: In the past six years, the whistleblower office has received more than 14,000 tips from all 50 states, DC, and 95 foreign countries. Last year alone, it got nearly 4,000 tips.

The whistleblower program
“has had a transformative impact on the agency.”

Andrew Ceresney, SEC Enforcement Director

SEC Whistleblower Awards

- SEC announced its largest award ever, over \$30 million, to a whistleblower living in a foreign country
- First award provided to a compliance and audit professional
- SEC published aggregate characteristics about the whistleblowers who have received awards to date
 - 80% raised concerns internally first
 - 40% were current or former company employees
 - 20% were contractors or consultants
- SEC brought its first whistleblower anti-retaliation case under Sarbanes Oxley this year and plans to increase enforcement



Building a Whistleblower Program

- Building an effective whistleblower program will involve
 - Ensuring your standards of conduct are published, widely disseminated, and the subject of regular training
 - Building the reporting structure and apparatus
 - Developing intake and screening protocols
 - Communicating and training personnel on the program
 - Establishing monitoring and auditing procedures to continually assess the program's performance
 - Creating a culture of trust in which voluntary, good faith reports are encouraged

Build the Reporting Process Structure

- An effective whistleblower program will provide multiple means of reporting potential misconduct, but at a minimum employees should be able to report potential misconduct via:
 - Email
 - Telephone
 - Ground mail
 - Fax
 - Internet or website links
- These should be checked, and reports processed, on a daily basis
- If possible the telephone should be staffed (a number of reputable outside vendors offer such services)

Build the Reporting Process Structure (cont'd)

- Companies often retain a third party technology vendor to assist with implementing software to manage the intake of reports
- Each report should be logged and tracked and promptly addressed in accordance with investigation procedures
- It is important that technology and staff are able to receive reports in multiple languages (e.g., the primary countries of operation for the corporation)
- A best practice is to designate at least one compliance professional within the company to serve as a dedicated manager of the whistleblower reporting program

Establish a Process for Screening Reports

- Reports should be received directly by the lead compliance professional (or designee) – if intake of reports conducted by outside vendor reports should go to this person prior to any sorting or other assessment of the report
- The compliance department should classify the concern or allegation according to its risk level and prepare a preliminary report
- The classification analysis should distinguish high-risk misconduct allegations from other allegations, high-risk allegations will typically include:
 - Anti-corruption (anti-bribery, anti-money laundering, kickbacks, and any other anti-corruption related crimes)
 - The release of proprietary information
 - Cyber intrusions and other computer network crimes

Establish a Process for Screening Reports (cont'd)

- Financial crimes perpetrated against the company by third parties
 - Financial crimes perpetrated against the company committed by company employees
 - Misconduct allegations involving company directors, officers, or senior management
- Reports should be submitted to the appropriate company department for assistance in conducting an inquiry or investigation (e.g., HR, Internal Audit, or Legal)
- Keep documentation for follow up on reports, including explanations as to why follow up was not necessary in some cases (e.g., report is irrelevant, spurious, lacks credibility, no identifiable information provided or can be obtained)

Training on Program and Related Processes

- All employees should receive training on how to make reports to the whistleblower hotline, the company's process for responding to such reports, and how the company manages the whistleblower program
- Third party's business partners should be included in the whistleblower training program if possible
- Have in place a forceful non-retaliation policy that accompanies your whistleblower reporting program and ensure that all company personnel receive training on it
- Specialized training should be provided to managers and supervisors on how to respond to whistleblower complaints, including how to prevent retaliation and how to identify and respond to any attempts at harassment or retaliation targeted at a perceived or known whistleblower

Conduct Awareness Campaign

- Raise awareness of the whistleblowing program and its related processes through an internal awareness campaign utilizing company-wide communications such as emails, videos, and banners
- Post public notices providing whistleblower reporting mechanisms
- Prominently display information on internal and external facing portions of company website
- Include a statement on the whistleblower program and contact information prominently in the Code of Conduct
- Include whistleblower program information in contracts with third party business partners

Monitor the Program's Performance

- Track and regularly review statistics on the program in order to monitor its effectiveness and identify compliance program enhancement needs – recommended tracking statistics include:
 - Number of matters opened on an annual basis and
 - The categories of misconduct alleged
 - Outcome of the matter including associated discipline and whether any compliance program enhancements and/or training followed as a result
 - Average length of time matters remain outstanding



Monitor the Program's Performance (cont'd)

- Test and audit the reporting system to make sure it works and continuously improve the system based on findings (e.g., additional training or enhancements to compliance policies and procedures)
 - Did an increase in reports follow training
 - Assess the substantiation rate of reports received
 - Ensure reports categorized appropriately
- Regularly, at least annually, report to the board of directors and/or audit committee on these findings and subsequent enhancements to program

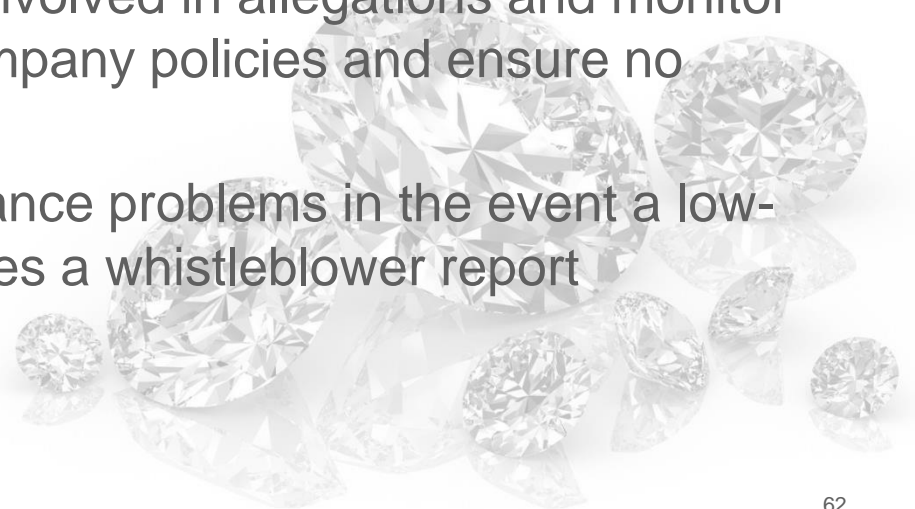


Encourage Voluntary Reporting

- After implementing the program encourage whistleblowers to report early and internally
 - Make sure that reporting is easy and user-friendly, but secure and confidential; limit access to reported information
 - Alternative reporting channels should be available, easily accessible, and properly explained (independent of regular business reporting channels)
 - Consider incentives for whistleblowers who come forward and leniency for whistleblowers involved in improper activities
 - Ensure transparency around compliance with country specific employment and data protection laws

Encourage Voluntary Reporting (cont'd)

- Promptly respond to credible allegations with discipline and other appropriate remediation, consistent with local law
- When possible, return to the impacted parties with the results of the inquiry and thank them for utilizing the whistleblower reporting mechanism
- Check in with individuals involved in allegations and monitor future compliance with company policies and ensure no retaliation has occurred
- Timely document performance problems in the event a low-performing employee makes a whistleblower report



Local Law Challenges

Overview

- Many countries have local laws that will impact implementation of a whistleblower program
- Key challenges will center around the following considerations:
 - Data privacy that impacts the sharing of information obtained via the whistleblower program without an employee's consent
 - The use of information obtained through an anonymous source
 - Employee rights applicable at all stages of an investigation
 - A general fear in some countries of malicious and/or anonymous reporting and a desire for prompt destruction of outdated or unfounded reports

Questions?

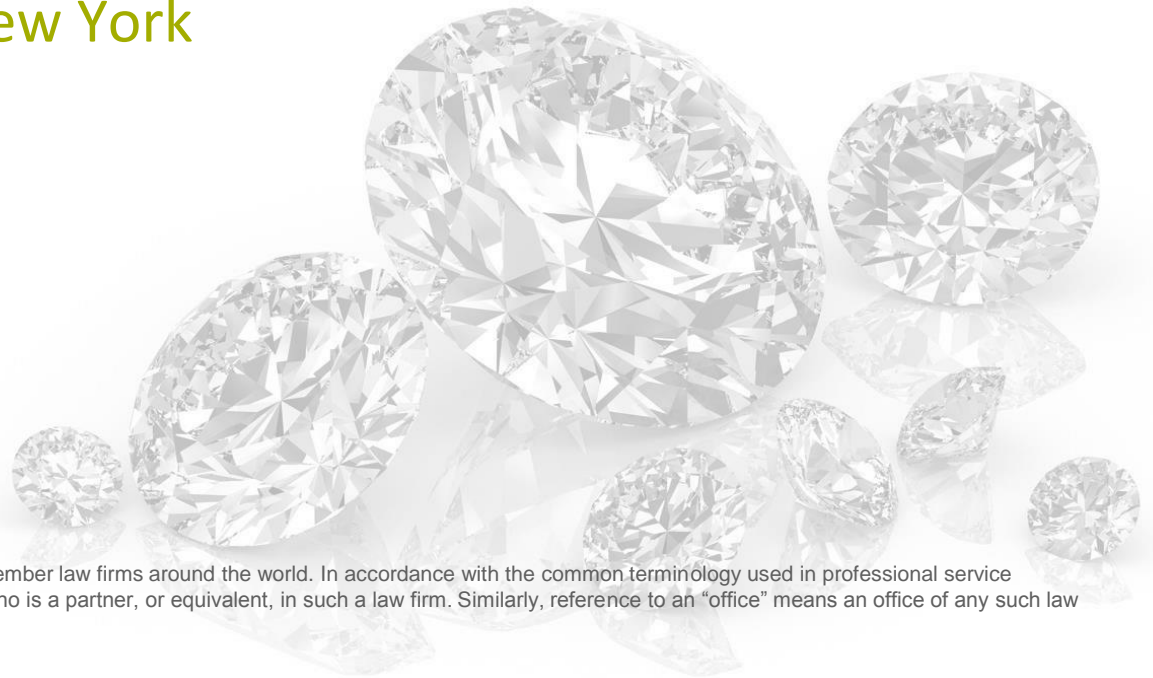


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