

**DOJ CORPORATE ENFORCEMENT
FRAMEWORK UPDATES AND COMPLIANCE
PROGRAM BEST PRACTICES**

04

Compliance Programs

DOJ's Modified Attachment C

Stricter Expectations for the Corporate Compliance Program

Strong support and rigorous adherence, demonstrated by concrete examples



Memorialized in written compliance codes, which are the duty of all employees

Addressing the company's individual circumstances and risk profile



Assigned to senior executive(s) with adequate stature and autonomy

Periodic training and corresponding certifications, tailored to the audience



Effective and reliable processes, with sufficient resources available

Fair and commensurate with the violation, regardless of the position held



Emphasis on root-cause analysis and timely action

Well-Developed and Regularly Tested Risk-Based Compliance Programs

- In legislation, regulations, and enforcement decisions, authorities continue to increasingly emphasize the need for a **well-developed risk-based compliance program that is regularly tested, updated, and supported by sufficient resources.**
- Compliance programs should account for **global anti-corruption standards**, not just the FCPA.
- As recent U.S. enforcement actions show, **authorities will not credit companies for having internal controls if they are easily circumvented.** On the other hand, they have shown a willingness to credit the state of a compliance program after remediation following the discovery of misconduct.
- FCPA enforcement actions have also highlighted **the importance of Internal Audit and effective coordination between Internal Audit, Legal, and Compliance.**
 - Consider implementing best practices for a working relationship between internal audit, legal, and compliance.
 - Include compliance- and corruption-related areas in audit cycles.

Importance of Timely and Complete Remediation

- DOJ and SEC regularly request and review **audit reports and internal and independent assessments**.
 - Establish guidelines to keep reports strictly factual with precise wording.
 - Ensure that remedial steps are practical and workable, and there is a process to follow through on action items.
 - Have guidelines for when to involve Legal and properly label privileged and confidential documents.
- Recent enforcement actions, like CCOH, emphasize the need for companies to **fully address compliance red flags, risks, and recommendations flagged** by auditors, due diligence, complaints, and other creditable sources. Decisions to reject such findings or recommendations should be well-supported and fully documented.
- Government officials increasingly expect that compliance programs will be supported by **updated technology and automation**, with particular emphasis recently on the use of **data analytics for monitoring and testing a compliance program**.

Importance of Updated Risk Assessments

- Having a **properly developed risk assessment that is regularly updated is the backbone of an effective and efficient compliance program.**
- A **documented risk assessment procedure** should detail steps to review existing data, gather additional information, and analyze and report findings on a regular cadence.
 - **Sources of information should be broad across operations and jurisdictions.** They may include interviews, visits, surveys, due diligence files, audit reports, complaints, transaction data, compliance program testing and monitoring results.
 - However, more information may be sought for higher risk areas, in accordance with a risk-based approach.
- Compliance program policies, procedures, and controls should be designed and updated based on **risk assessment** findings.

Third Parties as Greatest FCPA Risk Factor

All 2023 FCPA resolutions involved corrupt payments made through third parties.

- **Third parties**—such as intermediaries, individuals and shell companies, agents, offshore entities, and distributors—**continue to pose the greatest FCPA risk** and feature in enforcement actions.
 - Higher-risk third parties include those interacting with government officials, distributors and resellers, and business development agents.
 - Other high-risk scenarios include: commission-based compensation; handling licensing, permits, or customs formalities; operating in jurisdictions at high risk for corruption; and engagement of subcontractors.
- **Pre-engagement diligence, compliance contract provisions, and close monitoring** can help offset the decreased transparency and control that comes with agents and intermediaries.
- Albemarle’s resolution did not include the imposition of a monitor because, in part, the company **significantly reduced its use of third parties**.

Carefully Monitor High-Risk Third Parties

Use of third parties is an inevitable part of doing business in an emerging market. Pre-engagement screening, as well as close monitoring, can help offset the decreased transparency and control that comes with using agents and intermediaries.

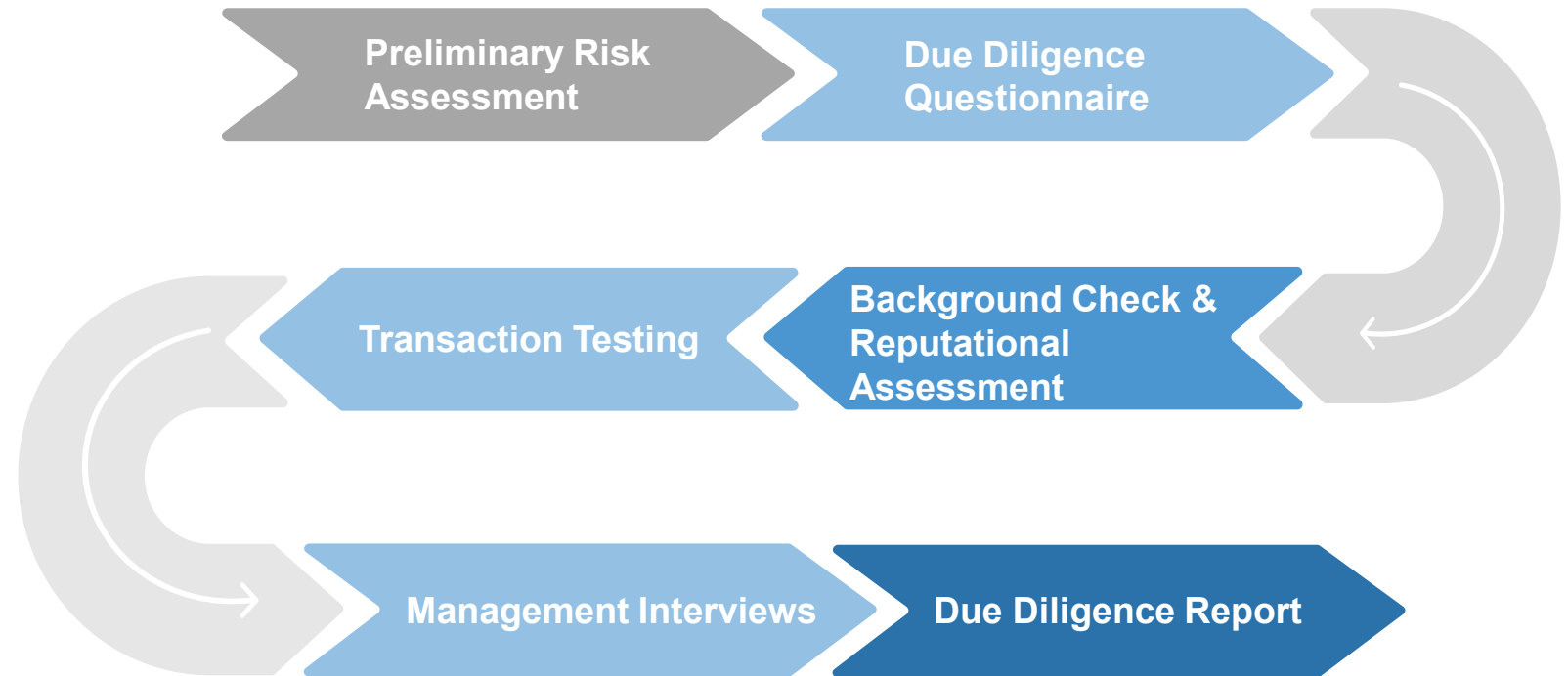
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- Identify the specific functions ***prone to corruption*** that are handled by third parties.
- Involve ***Legal and Compliance*** in contract negotiations and drafting to ensure that services are specifically and accurately described.
- Establish an efficient control (e.g., Finance) that can assess whether the services have actually been rendered and whether prices are reasonable in light of those services and in line with market rates.
- Ensure that ***rebates, credit notes, and other payments*** provided to the third party are made to the contracting entity, including identifying any offshore arrangements.
- Understand whether discounts or profit margins of intermediaries are ***passed on*** to end-customers by reviewing publicly available tender materials or conducting audit reviews.
- Conduct ***function-specific training*** for employees working with third parties and with end customers.
- Include ***audit rights*** in third-party agreements.
- Use a risk-based approach to periodically select third parties for an ***audit review***.

Ensure Proactive Disclosure, Cooperation, and Remediation

- **After voluntary disclosure, ensure full cooperation, including:**
 - Sharing facts developed in the company's internal investigations;
 - Providing translations of key documents in foreign languages; and
 - Facilitating the authorities' requests to interview current and former employees in the U.S. and foreign subsidiaries.
- **Present extensive remediation plan and the actions taken up to date, including:**
 - Root-cause analysis of the misconduct;
 - Significant investments in compliance personnel, testing, and monitoring across the company; and
 - Enhanced compliance program designed, implemented, and enforced to detect effectively FCPA and other anti-corruption law violations.

Overview of M&A Compliance Due Diligence Steps



GIBSON DUNN