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## Another Reason to Beef Up Your FCPA Compliance Program

### *OECD Issues Anti-Bribery Guidance*

In a sign of the growing global focus on eliminating bribery, in February 2010, the Organization for Economic Cooperation and Development ("OECD") adopted specific guidelines for anti-bribery compliance. These guidelines are contained in Annex II, titled "Good Practice Guidance on Internal Controls, Ethics, and Compliance" (the "Guidance"), to the previously-adopted Recommendation for Further Combating Bribery of Foreign Officials in International Business Transactions.

The Guidance lists 12 steps that companies engaged in international transactions should take to enhance (or initiate) anti-bribery compliance. Although most of the Guidance's recommendations are not new, especially to companies with comprehensive Foreign Corrupt Practices Act ("FCPA") compliance programs already in place, it is detailed, easy to navigate, and fairly comprehensive. Until now, corporations had to identify best practices by sifting through the United States Sentencing Guidelines and the United States Attorneys' Manual to identify general corporate compliance standards, and also the various reported settlements and decisions to find more specific guidance on anti-bribery compliance.

Though the Guidance is not legally binding, it will likely influence how federal regulators view corporate compliance programs. For example, though the Department of Justice has not formally endorsed the Guidance, Mark Mendelsohn, Deputy Chief of the Fraud Section and liaison to the OECD, recently spoke at the Global Ethics Summit 2010 in New York City, where he noted that the Justice Department approves of the Guidance.<sup>1</sup>

Given the informal endorsement by the Justice Department, companies would be well-served to review whether their existing compliance program covers the 12 steps in the Guidance.

### The 12 Steps

1. Strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery;
2. A clearly articulated and visible corporate policy prohibiting foreign bribery;
3. Compliance with this prohibition and the related internal controls, ethics, and compliance programs or measures is the duty of individuals at all levels of the company;
4. Oversight of ethics and compliance programs or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;
5. Ethics and compliance programs or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas: [gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion];
6. Ethics and compliance programs or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements: (i) Properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners; (ii) Informing business partners of the company's commitment to abiding by laws prohibiting foreign bribery, and of the company's ethics and compliance program or measures for preventing and detecting such bribery; and (iii) Seeking a reciprocal commitment from business partners;
7. A system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

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8. Measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance program or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;
9. Appropriate measures to encourage and provide positive support for the observance of ethics and compliance programs or measures against foreign bribery, at all levels of the company;
10. Appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance program or measures regarding foreign bribery;
11. Effective measures for: (i) Providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance program or measures, including when they need urgent advice on difficult situations in foreign jurisdictions; (ii) Internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and (iii) Undertaking appropriate action in response to such reports; and
12. Periodic reviews of the ethics and compliance programs or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

[Click here](#) to view the complete Recommendation.

The Guidance illustrates a growing focus by the international business community on curbing bribery and other activities covered by anti-corruption legislation such as the FCPA. Companies that conduct even a minimal number of international transactions should strongly consider implementing a comprehensive FCPA compliance program in order to mitigate the substantial civil and, in some cases, criminal penalties that can arise from violating the FCPA. In light of the Guidance, companies with a FCPA compliance program already in place would be well-served to review

their programs to see what additional policies and procedures may need to be implemented or enhanced. Locke Lord Bissell & Liddell LLP's White Collar Criminal Defense and Internal Investigations Group has extensive experience advising clients on FCPA compliance matters, and stand ready to assist in developing and implementing a cost-effective and comprehensive FCPA compliance program.

**Endnotes**

- 1 See "Weil Briefing: The OECD Releases Good Practice Guidance on Internal Controls, Ethics, and Compliance to Curb Foreign Bribery." March 25, 2010. Available online at: [http://www.weil.com/files/upload/Weil\\_Briefing\\_Lit\\_Reg\\_2010\\_3\\_25.pdf](http://www.weil.com/files/upload/Weil_Briefing_Lit_Reg_2010_3_25.pdf) (accessed April 2, 2010).

**About the Authors**

Paul E. Coggins is the co-chair of Locke Lord's national White Collar Criminal Defense and Internal Investigations practice. Mr. Coggins was the United States Attorney for the Northern District of Texas from 1993-2001. He focuses his practice on white collar criminal defense, and has represented numerous Fortune 500 clients in high stakes litigation before federal courts and the SEC.

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Stacy Williams is a partner at Locke Lord. He practices complex commercial litigation and has extensive experience conducting internal and governmental investigations. He also advises clients on corporate governance and compliance matters. He has advised clients on a wide variety of criminal and civil business fraud, including matters involving the Foreign Corrupt Practices Act, antitrust, class actions, export control requirements, and Commodities Exchange Act.

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