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An International Standard For Corporate Compliance?

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Law360, New York (May 14, 2010) -- The Organization for Economic Cooperation and Development ("OECD") recently released guidance ("Good Practice Guidance") regarding essential elements of corporate internal controls, ethics and compliance programs to combat bribery and corruption.[1]

While the Good Practice Guidance is not legally binding, its endorsement by the OECD Council and statements of support by the U.S. Department of Justice, among others, raise its significance as a benchmark for governmental authorities that enforce anti-corruption laws and therefore also for companies that operate internationally.

The Good Practice Guidance contains 12 specific guidelines for establishing compliance programs to prevent and detect bribery of foreign officials based on risk assessments tailored to particular commercial and geographic circumstances. Specifically, the Good Practice Guidance recommends:

1) visible commitment to compliance from senior management;
2) a clear and visible corporate policy prohibiting bribery;
3) related internal controls and compliance programs;
4) oversight of the compliance programs and an internal, yet independent outlet for employees to report potential noncompliance;
5) specific programs and measures in areas of particular concern, e.g. gifts, entertainment, and political contributions;
6) compliance programs and measures to prevent and detect bribery involving third parties such as agents, consultants, contractors, and joint venture partners;

7) financial and accounting procedures and internal controls to prevent bribery and hiding bribery;
8) communication of company bribery policies to directors, officers, and employees and related training,
9) measure to ensure support and observance of ethics and compliance programs;
10) appropriate disciplinary measures;
11) effective measures for (i) providing guidance to directors, officers, and employees and business partners, particularly in difficult and urgent situations, (ii) internal avenues and protection for directors, officers, and employees who want to report violations, and (iii) taking appropriate responsive action to such reports; and
12) regular review of ethics and compliance programs to enhance their effectiveness, taking into account relevant developments in the field.

The Good Practice Guidance is not the first set of anti-corruption recommendations issued by a multilateral body. In 2007, the Asia-Pacific Economic Cooperation ("APEC") organization issued a Code of Conduct for Businesses (the "APEC Code").[2]

The Good Practice Guidance exceeds the APEC Code, however, in both scope and specificity. Perhaps most significantly, the Good Practice Guidance takes the APEC Code a step further with regard to the responsibilities of companies for the actions of their agents, representatives and other third-party business partners.

The APEC Code urges corporations to "prohibit bribery in all business transactions that are carried out directly or through third parties, specifically including subsidiaries, joint ventures, agents, representatives, consultants, brokers, contractors, suppliers or any other intermediary under its effective control."[3]

By contrast, the Good Practice Guidance takes a more expansive approach to dealings with business partners, not limiting the applicability of compliance programs and measures designed to prevent and detect foreign bribery to entities under the control of the company at issue. For example, Good Practice Guidance Guideline 6 calls for companies to exercise

regular oversight of all business partners, informing them of company policies, and seeking their commitment to follow laws prohibiting bribery.

Furthermore, Guideline 11 recommends companies provide guidance to all business partners on complying with the company's policies and provide avenues to permit any and all business partners to report potential violations to internal bodies of the company.

Not only does the Good Practice Guidance exceed the APEC Code in scope and specificity, it has also garnered significantly more attention from both the business and the enforcement communities. In addition to having been adopted by the 38 countries that are parties to the OECD Anti-Bribery Convention, the Good Practice Guidance appears to have the specific support of the U.S. Department of Justice anti-corruption enforcement team.

Mark Mendelsohn, until recently the Deputy Chief of the Fraud Section of the DOJ's Criminal Division, was quoted as saying the Good Practice Guidance would arrive with the endorsement of the U.S. Government.[4] As such, the Good Practice Guidance will likely shape how the DOJ evaluates compliance programs of companies targeted or under investigation.

To date, the U.S. Government has relied on the Sentencing Guidelines Manual section entitled Effective Compliance and Ethics Program ("ECEP") in evaluating companies' anti-corruption compliance programs.[5] The DOJ takes into account the following compliance steps articulated in the ECEP in making enforcement decisions, negotiating deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs")[6]:

- establishment of standards and procedures to prevent and detect criminal conduct;
- establishment of oversight and management of the compliance program at high levels of the company;
- regular evaluation and reporting on the status and effectiveness of the program;
- communication of compliance standards and procedures to officers, directors, employees and agents;
- provision of channels and protection for internal whistleblowers; and

- creation of incentives for compliance and establishment of disciplinary measures for failing to take reasonable steps to prevent or detect criminal conduct.

The DOJ provided additional insight into what it considers FCPA compliance “best practices” by elaborating upon the ECEP compliance steps in an Opinion Procedure Release issued in 2004, wherein it set forth a dozen desired elements of an anti-corruption compliance program.[7] These elements largely mirror those contained in the Good Practice Guidance.

More recently, the U.S. Sentencing Commission voted on April 7, 2010 to amend and expand the ECEP, increasing incentives for companies to create a direct-reporting relationship between the company’s top compliance personnel and its board or audit committee, and requiring it to take reasonable steps to respond to criminal conduct once it is detected and to remedy the harm caused, including by paying restitution to identifiable victims.[8]

During a period when FCPA enforcement is at an all-time high, these recent amendments to the ECEP underscore the emphasis the U.S. Government is putting on corporate prevent-and-detect compliance and ethics programs.

The DOJ for many years has actively enforced the U.S. Foreign Corrupt Practices Act, with more cases brought in the past few years than in the prior few decades. Recent years have brought signs of increased enforcement of national anti-corruption laws in other countries as well. Among other countries, the United Kingdom has stepped up its enforcement against both companies and individuals who make or offer bribes to gain or retain business. Notably, the UK Parliament recently (and belatedly) enacted the Bribery Act 2010 (“the UK Act”).[9]

In addition to other offenses, the UK Act creates a new corporate level offense for organizations, holding them strictly liable for failing to prevent bribes being paid by persons performing services for or on behalf of the organization. However, the Act provides a defense if an organization had “adequate procedures” in place to prevent bribery. The U.K. Ministry of Justice has yet to publish guidance regarding what compliance program elements will satisfy the “adequate procedures” standard (the guidance is expected this summer).

Given the United Kingdom's membership in the OECD and participation in the creation of the Good Practice Guidance, the forthcoming U.K. guidance can be expected to draw significantly from the Good Practice Guidance. If this occurs, the Good Practice Guidance as well as the various standards endorsed (whether formally or in practice) by U.S. and U.K. enforcement authorities will form a coherent picture and very well could serve as the basis for an emerging common global standard. From the perspective of companies doing business internationally, this should be a desirable outcome.

The Good Practice Guidance likely will also impact debarment considerations by international financial institutions (IFIs). The World Bank and other IFIs currently debar companies found to have to have violated the fraud and corruption provisions of their various guidelines regarding procurement.

When determining whether (and perhaps also how soon) to remove a debarred company from the debarred entity list, the World Bank takes into consideration the existence and quality of the company's anti-corruption compliance program. World Bank authorities recently indicated that they will use the Good Practice Guidance as a reference point (although perhaps not the only reference point) when evaluating whether a debarred company's compliance program is sufficient to merit a reduction in the term of debarment.

Under a recently announced agreement, the major international financial institutions (including the World Bank, as well as the African, Asian, European and Inter-American development banks) will respect and collectively implement individual debarment decisions. As such, if an IFI removes an entity from its debarment list by virtue of its anti-corruption compliance program, other international financial institutions are likely to remove that entity as well.

The OECD also is trying to create positive compliance incentives. The Recommendation, which contains the Good Practice Guidance, calls on countries to consider introducing "carrots" to encourage companies to adopt robust anti-corruption compliance policies.

For example, the Recommendation calls on "government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits."[10]

Given the increased enforcement of anti-corruption laws across the globe and the rise of cross-border enforcement actions, the potential relevance of the Good Practice Guidance to corporate compliance efforts is high. Coupled with its potential ties to positive compliance incentives, such as IFI debarment standards and securing public advantages from government entities, the Good Practice Guidance may have a harmonization effect among national and international anti-corruption enforcement agencies' standards for corporate compliance programs.

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[1] On Feb. 18, 2010, the Council of the OECD adopted Annex II to the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions ("the Recommendation"), which was adopted on Nov. 26, 2009 (available at www.oecd.org/dataoecd/11/40/44176910.pdf). Annex II is entitled the Good Practice Guidance on Internal Controls, Ethics and Compliance ("the Good Practice Guidance").

[2] See Complementary Anti-Corruption Principles for the Public and Private Sectors, document 2007/SOM3/012attB1rev1, Asia-Pacific Economic Cooperation (July 3, 2007).

[3] See id. at Section 4(a).

[4] See David Hechler, Roided Up Enforcement: DOJ Unit That Prosecutes FCPA to Bulk Up 'Substantially,' available at www.law.com/jsp/cc/PubArticleCC.jsp?id=1202444478279&Roided_Up_Enforcement_DOJ_Unit_That_Prosecutes_FCPA_to_Bulk_Up_Substantially (Feb. 25, 2010).

[5] See Federal Sentencing Guidelines Manual, §8B2.1.

[6] Another tool available to companies developing or reforming compliance programs in light of FCPA "best practices" are the actual FCPA-related DPAs and NPAs negotiated by the U.S. Government and companies. These agreements often have an appendix that lays out specific guidance to the company

at issue regarding the core elements of an acceptable compliance program. However, these core elements represent a starting point for a company, not an end goal. Companies must tailor their compliance programs via a risk assessment that takes into account their particular circumstances and risk profile.

[7] See Foreign Corrupt Practices Act Review Opinion Procedure Release No. 04-02, Department of Justice, available at www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf (July 12, 2004).

[8] See Proposed Amendments to the Sentencing Guidelines, 75 Fed. Reg. 3534-35 (Jan. 21, 2010).

[9] The Bribery Act 2010 was passed by the British House of Commons, House of Lords, and received Royal Assent on April 8, 2010.

[10] See OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, § X(C)(vi).