

## COMPLIANCE: THE NEW INTERNATIONAL LAW

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The United Nations Global Compact recently celebrated its 15th Anniversary. The areas of its coverage – human rights, labor, environment and corruption – may not seem to be exceptional subjects these days. But, for compliance professionals, the Compact is significant as one of the indicators that compliance has now become more than a principle of business operation or just an aspect of national laws; it has also become part of the regime of international law. For every business operation today, compliance is not just a matter of adhering to local laws, but a necessity of following international principles.

Traditionally, international law was that set of rules (some would say a loose set at best) that governed the relations between states; private parties need not apply. But there has been an acceptance of international principles regarding people, which often involved businesses. Think about the growing acceptance in the 19th Century that slavery was wrong, which impacted both individual human rights and the way business operated (i.e., slave traders and businesses that relied on slaves). The trend can be seen with the establishment of the International Labor Organization, and with the 1948 Universal Declaration of Human Rights. International law was becoming something more than rules about borders set in 1648.

The Organization for Economic Cooperation and Development (OECD) adopted the Declaration on International Investment and Multinational Enterprises in 1976, and most recently updated it in 2011. This is “a policy commitment by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution multinational enterprises can make to economic and social progress.”<sup>1</sup> As part of the Declaration, the OECD established its Guidelines for Multinational Enterprises. These are “recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from adhering countries. Observance of the Guidelines is supported by a unique implementation mechanism: adhering governments - through their network of National Contact Points - are responsible for promoting the Guidelines and helping to resolve issues that arise under the specific instances procedures.”<sup>2</sup> The OECD recognizes that in order to promote economic development in every country, proper standards of responsible business conduct are necessary. Where there are no limits on what businesses did with regard to environmental protection, corruption, consumer protection, and corporate governance, development would be frustrated and people would suffer. Accordingly, the OECD Guidelines recommend a number of principles that business should follow, including the following:

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<sup>1</sup> OECD, Declaration and Decisions on International Investment and Multinational Enterprises, *available at* <http://mneguidelines.oecd.org/oecddeclarationanddecisions.htm> (last visited Jul. 21, 2015).

<sup>2</sup> OECD, 2011 Guidelines for Multinational Enterprises, *available at* <http://www.oecd.org/daf/inv/mne/48004323.pdf> (last visited Jul. 21, 2015).

- Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
- Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programmes.
- Refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
- Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts of matters covered by the Guidelines, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
- In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.
- Abstain from any improper involvement in local political activities.

Over the same period, the OECD recognized the corrosive effect that bribery has on economic development. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business transactions went into effect in 1999.<sup>3</sup> The OECD followed this in 2009 with Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which were aimed at the signatories of the OECD treaty, and included guidance on the importance of compliance and ethics programs.

At least part of this trend is due to some recognition of self-interest: both companies and countries function better in an environment of ethical conduct. But it also reflects a shared set of values. As Joan Dubinsky, United Nations Chief Ethics Officer has written in *Global Ethics & Integrity Benchmarks*:

Global values, including integrity, can be found in all religions, texts on more philosophy down through the ages, and in the UN Universal Declaration of Human Rights and all resulting rights-related conventions and

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<sup>3</sup> See J. Murphy, *Have the "Global Sentencing Guidelines" Arrived?*, Society of Corporate Compliance and Ethics (Oct. 2011)  
[http://www.corporatecompliance.org/Portals/1/PDF/Resources/complimentary/5271\\_o\\_OECD-Murphy%20Report.pdf](http://www.corporatecompliance.org/Portals/1/PDF/Resources/complimentary/5271_o_OECD-Murphy%20Report.pdf).

principles. Though there is significant ‘play’ in how global values (such as integrity) can be defined . . . There is little doubt that what unites us as human beings is this ethical dimension. Different cultures, nations, and societies may differ about how to prioritize specific moral values. Nevertheless, all human societies accept that a set of global values exists and that these values tend to unite – rather than divide – us.<sup>4</sup>

Fifteen years ago, these universal principles were reflected in the United Nations Global Compact,<sup>5</sup> to which there are more than 12,000 signatories in 170 countries. The Compact has ten principles in four categories, as follows:

*Human Rights* Businesses should:

- Principle 1: Support and respect the protection of internationally proclaimed human rights; and
- Principle 2: Make sure that they are not complicit in human rights abuses.

*Labour Standards* Businesses should uphold:

- Principle 3: the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in employment and occupation.

*Environment* Businesses should:

- Principle 7: support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

*Anti-Corruption*

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

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<sup>4</sup> Joan Elise Dubinsky & Alan Richter, *The Global Ethics & Integrity Benchmarks*, Policy Innovations (Mar. 11, 2009), <http://www.policyinnovations.org/ideas/innovations/data/000088>.

<sup>5</sup> United Nations Global Compact, *available at* <https://www.unglobalcompact.org/what-is-gc> (last visited Jul. 21, 2015).

At the same time as this global development was taking place, individual countries were also establishing standards for corporate compliance. While there were certain areas of disagreement (such as whether encouragement of anonymous reporting of wrongdoing was a good idea), the amount of similarity between the programs is remarkable.

In the United States, the Federal Sentencing Guidelines<sup>6</sup> established guidelines for how organizations can demonstrate that they used due diligence to promote a culture of compliance and ethics by:

- Establishing standards and procedures based on risk;
- Having knowledgeable management, with board oversight;
- Using senior officers to direct the compliance program, with sufficient resources to do it right;
- Having procedures in place not to senior employees likely to violate the law;
- Conducting effective, practical training of board members, management, other employees, and agents, based on their roles and responsibilities;
- Making sure that there is an anonymous, confidential method to report wrongdoing;
- Establishing a system for auditing and periodic evaluation of the compliance program;
- Creating a system and incentives and discipline connected to compliance;
- Responding appropriately to violations; and
- Conducting periodic risk assessments and adjusting the program accordingly.

Australia established a Standard on Compliance Programs, AS 3806-2006,<sup>7</sup> which has similar requirements:

- Commitment
  - Commitment by the governing body and senior management to effective compliance that permeates the whole organization.
  - The compliance policy is aligned to the organization's strategy and business objectives, and is endorsed by the governing body.
  - Appropriate resources are allocated to develop, implement, maintain, and improve the compliance program.

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<sup>6</sup> United States Sentencing Commission (USSC), *Guidelines Manual* (Nov. 1, 2014), available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf>.

<sup>7</sup> The International Standards Organization (ISO), also has a standard for Compliance Management Systems, ISO/PC 271, and it is similar to the Australian and other standards. However, ISO, rather than promoting the widespread distribution of its standards, bizarrely makes its standards very expensive, so it will not be reprinted here.

- The governing body and senior management endorse the objectives and strategy of the compliance program.
- Compliance obligations are identified and assessed.
- Implementation
  - Responsibility for compliance outcomes is clearly articulated and assigned.
  - Competence and training needs are identified and addressed to enable employees to fulfil their compliance obligations.
  - Behaviours that create and support compliance programs are encouraged, and behaviours that compromise compliance are not tolerated.
  - Controls are in place to manage the identified compliance obligations and achieve desired behaviours.
- Monitoring and measuring
  - Performance of the compliance program is monitored, measured, and reported on.
  - The organization is able to demonstrate its compliance program through both documentation and practice.
- Continual improvement
  - The compliance program is regularly reviewed and continually improved.

In competition law (antitrust), there has been a growing acceptance of certain basic rules, such collusion among competitors is bad. Principles that were once confined to North America and Europe are now a common feature of almost every national law.<sup>8</sup> The International Chamber of Commerce has released an Antitrust Compliance Toolkit<sup>9</sup> that provides guidance on the key aspects of antitrust compliance, with 11 chapters as follows:

1. Compliance embedded as company culture and policy
2. Compliance organization and resources
3. Risk identification and assessment
4. Antitrust compliance know-how
5. Antitrust concerns-handling systems
6. Handling internal investigations
7. Disciplinary action
8. Antitrust due diligence
9. Antitrust compliance certification
10. Compliance incentives
11. Monitoring and continuous improvement

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<sup>8</sup> See T. Banks & J. Murphy, *The International Law of Antitrust Compliance*, 40 DENVER J. INT'L. L. & POLICY 368 (2012).

<sup>9</sup> ICC Antitrust Compliance Toolkit, *available at* <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/> (last visited Jul. 21, 2015).

In Canada, the Competition Bureau in June 2015 released a Bulletin on Corporate Compliance Programs,<sup>10</sup> the section headings of which again show a very familiar structure:

- 2 The Importance of Compliance . . .
  
- 4 Basic Requirements for a Credible and Effective Corporate Compliance Program
  - 4.1 Management Involvement and Support
  - 4.2 Risk-based Corporate Compliance Assessment
  - 4.3 Corporate Compliance Policies and Procedures
  - 4.4 Training and Education
  - 4.5 Monitoring, Verification and Reporting Mechanisms
  - 4.6 Consistent Disciplinary Procedures and Incentives for Compliance
  - 4.7 Compliance Program Evaluation

Similarly, in anticorruption compliance, more countries are adopting similar rules. In Brazil, implementation of the Clean Companies Act<sup>11</sup> also contained compliance guidance:

- Adoption of compliance program may be mitigating factor;
- Program must be risk-based;
- Establish internal controls;
- Consider size of the company, structure and industry, jurisdiction, and interaction with government entities;
- Tone at the top, and the importance of gaining the commitment of upper management;
- Establishing standards and codes of ethics and conduct for employees, managers, and third-party vendors;
- Providing channels for the reporting of irregularities;
- Conducting training at appropriate intervals;
- Arranging specific procedures intended to prevent fraud and corruption in the context of bidding for government contracts;
- Adequate due diligence in mergers, acquisitions, corporate restructurings and in dealings with third parties;

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<sup>10</sup> Bulletin on Corporate Compliance Programs, *available at* [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/\\$FILE/cb-bulletin-corp-compliance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf) (last visited Jul. 21, 2015).

<sup>11</sup> For a copy of the original language version, *see* Brazilian Clean Company Act 2014, Business Anti-Corruption Portal, *available at* <http://www.business-anti-corruption.com/resources/compliance-quick-guides/brazil.aspx> (last visited Jul. 21, 2015).

- Providing the Chief Compliance Officer the needed independence and authority to oversee the program;
- Establishing disciplinary measures for violations.

What this shows is that there is a large consensus about both the subjects of compliance programs and the methodology to achieve compliance. Much of the local enforcement is based on international conduct, such as bribery of government officials or money laundering. And the enforcement is not limited to conduct that occurs within national borders. The U.S. has been particularly aggressive in prosecution of companies for violations of the Foreign Corrupt Practices Act<sup>12</sup> or the Sherman Act, even if the specific conduct occurred outside of the United States. The U.K Bribery Act<sup>13</sup> basically reaches any type of bribery (not limited to bribery of government officials) conducted by any company that does business in the U.K.

Companies that do business in more than one country are supporters of these global standards. First, it is more efficient for a company to have a global standard of conduct than to have different rules in every country. Second, where global companies compete with local companies, or companies based on other countries, they want everyone to play by the same rules. US companies have long complained about being subject to a higher standard of conduct than was imposed on their competitors, particularly with regard to the FCPA. Third, executives of those companies are starting to be more concerned about personal liability. So, it is in their own self-interest (not to mention the company's business interest) to adhere to international standards of conduct.

Finally, it should be noted that regardless of cultural differences about things like gifts and bribes, certain aspects of human nature are the same everywhere. People want (and deserve) respect. Employees everywhere want to be proud of their company, and they will work harder when they are. In contrast, a company that fails to follow accepted standards of compliance and ethics may escape liability in the short term, but eventually will pay the price.

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<sup>12</sup> U.S. Department of Justice, *Foreign Corrupt Practices Act (FCPA)*, <http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last visited Jul. 21, 2015).

<sup>13</sup> Bribery Act 2010, *available at* [http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga\\_2010023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_2010023_en.pdf) (last visited Jul. 21, 2015).