

**TODAY'S PROGRAM IS SPONSORED
BY:**

NAVEX GLOBAL[®]

The Ethics and Compliance Experts

NAVEX Global defends your organization from legal, financial, reputational and regulatory risk. More than 95 of the Fortune 100 and 12,500 clients around the world trust us to power their ethics and compliance programs. A partnership with NAVEX Global helps you protect your people, reputation and bottom line.

www.navexglobal.com

**Bloomberg
BNA**



Joan Meyer (Partner, Baker McKenzie LLP,
Washington, DC)

Randall Stephens (VP, Advisory Services, NAVEX
Global, Atlanta)

Howard Weissman (Of Counsel, Baker McKenzie
LLP, Washington DC)

Webinar

Recognizing and Mitigating Corruption Risks to Protect Your Business

14 June 2017





Agenda

1	Regulatory landscape	9
2	Current enforcement environment	20
3	Major risk areas	28
4	Mitigation tactics	38
5	Key takeaways	46

16 January 2017



Rolls-Royce to pay £671m over bribery claims

Voluntary payments will mean UK manufacturing giant avoids being prosecuted by anti-corruption investigators



Rolls-Royce is Britain's leading manufacturing multinational. Photograph: Rolls-Royce plc

Rolls-Royce, Britain's leading multinational manufacturer, is to pay £671m in penalties after long-running investigations into claims it paid bribes to land export contracts.

Corruption in the News
2016-2017



THE UNITED STATES
DEPARTMENT *of* JUSTICE

JUSTICE NEWS

Department of Justice

Office of Public Affairs

SHARE 

FOR IMMEDIATE RELEASE

Wednesday, December 21, 2016

Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History

Odebrecht S.A. (Odebrecht), a global construction conglomerate based in Brazil, and Braskem S.A. (Braskem), a Brazilian petrochemical company, pleaded guilty today and agreed to pay a combined total penalty of at least \$3.5 billion to resolve charges with authorities in the United States, Brazil and Switzerland arising out of their schemes to pay hundreds of millions of dollars in bribes to government officials around the world.



1

Regulatory landscape

Overview of anti-bribery laws

- Anti-bribery laws generally prohibit the offer, promise, gift of any item of value to bring about or reward the improper performance of a duty or function.
- Some anti-bribery laws also prohibit the request, receipt or acceptance of such items.
- Signatories of the OECD Convention on Combating Bribery are required to criminalise bribery of foreign public officials.
- Many countries also prohibit the bribing of private individuals and entities.



Global reach of anti-bribery laws

- Key pieces of legislation, such as the US Foreign Corrupt Practices Act and the UK Bribery Act, have a broad global reach and can directly penalize both individuals and companies.
- An offence under the UKBA is committed if either:
 - any act or omission which forms part of the offence takes place in the UK; or
 - the relevant person has a close connection with the UK – this includes being a British national or British corporate, or being a resident in the UK.
- The FCPA contains anti-bribery and accounting provisions and applies to:
 - US concerns
 - issuers (publicly traded companies and their officers, directors, employees and agents)
 - foreign persons or entities, as well as their officers, directors, employees and agents who act in furtherance of a bribe in the US (email or money transfer will suffice)

General principles

What constitutes a 'bribe'

A bribe under anti-bribery legislation covers **any item of value** to the recipient.

This can include:

- Cash and cash equivalents
- Gifts
- Charitable contributions or donations
- In-kind services
- Hospitalities, e.g., lodging, hotels, airline tickets, meals, entertainment, excursions
- Job offers to family members
- Tuition and education of children
- Business referrals



General principles

What is meant by 'business' or 'business advantage'?



- Obtaining, retaining or renewing a contract
- Obtaining regulatory approvals
- Preventing adverse government action
- Obtaining a competitor's bid
- Avoiding duties
- Reducing taxes
- Increasing profits

General Principles

'Foreign public official'

Some anti-bribery legislation has a particular focus or enhanced penalties for efforts to bribe foreign public officials.

Typically, this is broadly defined under anti-bribery legislation and can include:

- Any foreign government (e.g., mayor, governor, legislator and judiciary)
- Any department, instrumentality, or agency of a foreign government (e.g., tax or customs authorities)
- A foreign state-owned or controlled entity (e.g. a state-owned bank or state-owned or controlled company like ARAMCO, MUBADALA, TAWAZUN)
- Any foreign political party and candidates for foreign office
- Any public international organization (e.g., World Bank)
- Certain members of royal families
- Any person who acts at the specific request, direction, or for the benefit of any of the above

Extra care should be taken when dealing, directly or indirectly, with any of the above

Comparison: FCPA vs. UKBA vs. Law no. 12,846/2013

	FCPA	UKBA	Brazil's Law n. 12,846
Bribery of foreign public officials	Yes	Yes	Yes
Domestic bribery	No	Yes	Yes
Extraterritorial reach	Yes	Yes	Yes, but not as broad as under the FCPA and UKBA
Failure to keep accurate books and records	Yes	No	Silent, but covered in certain existing laws
Other offenses	No	No	Yes, include other acts against the Public Administration (e.g., fraud in public tender processes, bid rigging)
Facilitation payments	No	Yes	Yes
Corporate criminal liability	Yes	Yes	No
Corporate strict liability	Only under the accounting provisions	Yes for "failure to prevent bribery"	Yes
Other corporate "sanctions"	Debarment, monitors, derivative lawsuits, etc. (applicable under other U.S. laws and legal features)	Debarment	Prohibition to receive incentives, suspension, etc.
Credit for compliance programs	Yes (U.S. Sentencing Guidelines, FCPA Guidance, etc.)	Yes (can be full defense for corporate offense of "failure to prevent bribery")	Yes (amount of credit not determined)
Credit for self-disclosure / cooperation	Yes (Principles of Federal Prosecution of Business Organizations, FCPA Guidance, etc.)	Yes, but limited	Yes (under the leniency program, fines can be reduced up to 2/3 and all other sanctions can be excluded)



ISO 37001 International Standard – Anti-Bribery Systems

Key requirements of the standard

A series of measures and controls to help prevent, detect and respond to bribery risk, among them:

1

Risk assessment

2

An anti-bribery policy, procedures, and controls

3

Governing body, senior leadership, commitment, responsibility and oversight

4

Communication and training

5

Due diligence on projects and business associates

6

Investigation procedures

7

Monitoring and review

8

Corrective action and continual improvement

Implementing the standard

- The anti-bribery program can exist within a larger compliance program
- The language used is important
- The anti-bribery risk assessment serves as the foundation for the program's scope and objectives
- Policies, procedures and controls should be "reasonable and proportionate" to the bribery risks the organization faces
- Organizations must implement anti-bribery controls where there is "more than a low risk of bribery"
- Emphasis on continued improvement

ISO 37001: Certification

Certification is Voluntary

- Some governments are considering requiring ISO 37001 certification for public contracting
- Some MDBs may also require certification

The Certification Process

- Questionnaire to determine eligibility for certification
- Documentation on requirements of ISO 37001
- On-site audit

Additional Points

- ISO 37001 certification is valid for three years, with an annual surveillance audit
- Auditors must meet 37001-specific auditor competency requirements



2

Current enforcement environment

Enforcement agencies

In the US, Department of Justice and Securities and Exchange Commission share enforcement authority:

- DOJ has criminal enforcement authority
- SEC is responsible for civil enforcement over “issuers”, officers, directors, employees and agents
- SEC generally enforces accounting provisions of the FCPA

In UK, enforcement is by the Serious Fraud Office and the National Crime Agency



SFO

serious
fraud
office

Enforcement Trends

Global

- 1 Globalization of anti-bribery enforcement
- 2 Sharing information with other country authorities
- 3 Multiplying agencies and increased inter-agency cooperation
- 4 Proliferation of new laws
- 5 Focus on individual civil and criminal liability
- 6 Focus on effective compliance programs
- 7 Enhanced enforcement tools

Enforcement Trends

UK

Enforcement against individuals

- In July 2016, four former Barclays Bank plc employees were sentenced to a total of 17 years imprisonment
- In December 2014, four former directors were sentenced to 28 years in connection to a £23m fraud

“Failure to prevent”

- Bribery Act contains an offence of a corporate failing to prevent a bribe being paid by an “associated person” (e.g. employee, subsidiary, agent or distributor)
- In the process of extending to other forms of economic crime, including tax evasion and fraud

Deferred prosecution agreements

- Companies in the UK can enter into DPAs with regulators and authorities where a prosecution is suspended provided that the corporation meets certain specified conditions.
- This typically involves the payment of a financial penalty and compensation.
- Rolls-Royce entered into a DPA in early 2017 – this involved the payment of £497m to authorities in the UK and a further £174 to US and Brazilian authorities.
- Entering into a DPA does not preclude enforcement against individuals

Enforcement Trends

U.S.

- More resources for enforcement authorities
- Increased global cooperation (sharing information, joint prosecutions)
- In September 2015, DOJ issued the “Yates Memorandum,” which requires DOJ prosecutors to focus more on prosecuting individuals
- DOJ indeed has been focusing more on individuals, while the SEC continues to focus on entities
- In November 2015, DOJ hired a Compliance Expert, who reviews compliance programs of companies under the DOJ investigation
- In April 2016, DOJ announced the FCPA Pilot Program, which clarifies the standards and benefits for companies who voluntarily disclose violations and cooperate
- Expanded charges (combining corruption charges with mail and wire fraud, money laundering and other criminal charges)
- SEC whistleblower bounty program continues to prime the pump
- Greater awareness (cooperating companies, media reports)
- Higher expectations for compliance programs (third party due diligence, M&A due diligence, investigations of wrongdoing and remediation)

Consequences of non-compliance

- Criminal charges, leading to imprisonment and/or fines
- Significant civil fines and disgorgement
- Extradition
- Dawn raids and investigations by authorities
- Serious harm to company reputation
- Shareholder lawsuits; decrease in stock value
- Internal investigation costs can be enormous. Recent examples:
 - Walmart: \$650+ million in 3 years
 - Avon: \$400 million in 5 years
- May lose tax incentives and other government benefits (potential suspension or debarment)
- Extremely disruptive to business

Fifa corruption probe: Swiss to extradite Venezuelan Esquivel



Rafael Esquivel (R) with Fifa president Sepp Blatter in 2004

Swiss judicial authorities have approved the extradition to the United States of Venezuelan football official Rafael Esquivel.



Consequences of non-compliance – U.S.

Siemens	\$800	2008
Alstom	\$772	2008
KBR/Halliburton	\$579	2009
Teva Pharmaceutical	\$519	2016
Odebrecht/Braskem	\$419.8	2016
Och-Ziff	\$412	2016
BAE	\$400	2010
Total S.A.	\$398	2013
Vimpelcom	\$397.6	2016
Alcoa	\$384	2008
ENI S.p.A.	\$365	2010
Technip	\$338	2010
JPMorgan Chase	\$264.4	2016
JGC Corporation	\$219	2011
Embraer	\$205	2016
Daimler	\$185	2010
Rolls-Royce plc	\$170	2017
Weatherford	\$152	2013
Alcatel-Lucent	\$137	2010
Avon	\$135	2014

NB: amounts in millions

Consequences of non-compliance – Non-U.S.

Thales SA	France	\$913m	2010
Rolls Royce	UK	\$611m	2014
Siemens	Germany	\$569m	2008
GSK	China	\$490m	2014
Siemens	Greece	\$366.1m	2012
SBM Offshore NV	Netherlands	\$240m	2014
Vimplecom	Netherlands	\$230m	2014
Man Group	Germany	\$221m	2009
Ferrostaal	Germany	\$193m	2009
Linde	Germany	\$51m	2010
Yara International ASA	Norway	\$48m	2008
BAE	UK	\$47.9m	2010
Siemens	Nigeria	\$46.5m	2010
Alstom	Switzerland	\$42.6m	2010
Saipem SpA	Italy	\$38.8m	2013
Korea Fair Trade Commission (FTC) 7 Pharma cases (2009)	South Korea	\$19m	2009
Macmillan	UK	\$18.1m	2010
Innospec Ltd	UK	\$12.7m	2010
MW Kellogg	UK	\$11.1m	2009
Willis	UK	\$11m	2010
Mabey & Johnson	UK	\$10.5m	2009



3

Major risk areas

Key Risk Areas

Underlying risk factors

- **Geographic risk:** Operations in sensitive environments
- **Business partner risk:**
 - Use of third party agents / distributors in procurement processes
 - Use of teaming arrangements / JV partners
- **Public sector risk:** prevalence of interactions with politically exposed persons throughout the supply chain
- **Contractual risk:**
 - High value and single source contracts
 - Complex tendering processes
 - Offset arrangements
- **Transparency risk:** National security considerations provide basis for lack of transparency / openness

Key Risk Areas

Common anti-corruption red flags

- Payments offered or made in cash
- Extravagant or lavish gifts or hospitality
- Over-invoicing or lack of standard invoices
- Unusual credits granted to new customers
- Managers of foreign operations have been paid unusual bonuses
- Requests for payment in a country other than the intermediary's registered headquarters, senior management offices, or where services are performed
- An intermediary lacks the qualifications, necessary experience or resources to perform the services for which it is retained
- An intermediary's refusal to certify to anti-corruption representations, warranties, and related language in agreements
- Recommendation to use intermediary coming from a Foreign Official
- Commissions or fees exceed customary rate for similar services, or unreasonably exceed rates paid for similar services elsewhere

Key Risk Areas

Use of third parties

Under the “failure to prevent” offence of the Bribery Act and in similar anti-bribery legislation, companies can be held liable for the acts of third parties even if they were not aware of their actions.

Examples include:

- A distributor or logistics company who pays a bribe to customs officials in order to move goods across borders
- An agent who gifts a Mercedes to the daughter of a foreign public official to help win a contract



Key Risk Areas

Use of third parties



Rolls-Royce entered into a settlement with UK, US and Brazilian authorities which involved a financial penalty of £671m. It was alleged that:

- an indirect subsidiary of Rolls-Royce had made commission payments to third party commercial intermediaries;
- certain employees in Rolls-Royce knew that such payments would be used to pay bribes to foreign public officials on behalf of Rolls-Royce in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, Iraq and elsewhere; and
- these bribes were paid in exchange for the foreign public officials' assistance in providing confidential information and awarding contracts to Rolls-Royce and its affiliated entities.

Key Risk Areas

Managing third party risk

Company employees **must**:

- Choose third parties with care - follow company's procedures on appropriate due diligence on all business partners
- Ensure that third parties operate to company's standards – do not assume that business partners have the same anti-bribery controls as the company
- Monitor the performance of third parties and their adherence to company's anti-bribery standards

In choosing third parties, company employees should be aware of **risk factors** – any circumstance, internal or external to the third party which can enhance the likelihood of a risk. For example:

- Interaction with public officials (broadly defined)
- Unusual payment methods or amounts
- Operation in countries with high levels of corruption
- Prevalence of off-shore company structures
- Reliance on sub-contractors or lower tier third parties

Managing third party risk

Third party screening principles:



Key Risk Areas

Gifts and hospitality

Anti-bribery authorities recognize that providing gifts and hospitality is a common and important method of building and maintaining business relationships..

However, gifts and hospitality can be used as a method of influencing decision-makers or public officials to act in an improper manner.

In 2015, the US Securities and Exchange Commission charged FLIR Systems Inc. for violating the FCPA. It was alleged that:

- Two FLIR employees took government officials in Saudi Arabia on a 20-night world tour with stops in Casablanca, Paris, Dubai, Beirut and New York and purchased expensive watches.
- The employees allegedly falsified records in an attempt to hide their misconduct.



Key Risk Areas

Gifts and hospitality

Hospitality and gifts are broadly defined

Higher risk in relation to public officials

Consider:

- Lavishness
 - Frequency and cumulative value
 - Value by itself, but also standard practice in the sector
 - Is it high enough to see it as intending to influence the recipient?
- Commercial context (e.g., immediately preceding a decision on award of contract)
- Is it linked to the demonstration or promotion of products?
- Identity and location of the recipient
- Law or internal policy applicable to recipient
- Hospitality versus gifts
- Dangers of cash gifts
- Nature of corporate hospitality
- Circumstances in which it is offered (e.g., was it requested by the recipient?)

Key Risk Areas

Charitable donations

- Similar to gifts and hospitality, the use of charitable donations can be important and legitimate for a business
- However, the use of donations should be carefully reviewed and monitored to ensure that it is not a method of funnelling payments to recipients for improper purposes
- In September 2016, Laureate Education voluntarily disclosed to the US Department of Justice that it suspected that a charitable donation may have been used for improper purposes:
 - Laureate made a \$18m donation to a charitable foundation in Turkey, allegedly believing that the donation was encouraged by the Turkish government to further a government supported public project
 - Laureate, allegedly, subsequently learned that the charitable foundation disbursed the funds at the direction of a former senior executive at Laureate's network in Turkey to a third party allegedly without Laureate's knowledge or approval
- Employees should ensure that any direct or indirect recipient of any donation are legitimate
- Employees should seek approval for any donations made on the company's behalf and ensure that the donation is clearly documented



4

Mitigating tactics

Five essential elements of corporate compliance

Baker McKenzie has distilled the key themes from the compliance program expectations of government regulators around the world into five essential elements of corporate compliance that should be present in every company's compliance program:



Common elements of effective anti-bribery programs

DOJ/SEC FCPA Guidance

- Board of Directors oversight and monitoring of ethics and compliance program
- Oversight, autonomy and resources
- Risk assessment procedures
- Code of conduct
- Anti-corruption compliance policies and procedures
- Training and continuing advice
- Third-party due diligence and payments
- Incentives and disciplinary measures
- Confidential reporting and internal investigations
- Continuous Improvement: periodic testing and review
- Due diligence for acquisitions and post-closing integration

Source: <https://www.justice.gov/criminal-fraud/fcpa-guidance>

OECD, Annex II "Good practice guidance on internal controls, ethics, and compliance"

- Risk based assessment
 - Specific risk policies (GET, Facilitation, etc.)
- Regular monitoring, assessment and improvement of risks
- Commitment of senior management
- Corporate policy prohibiting foreign bribery
- Organization wide responsibility
- Senior officer authority , resources and access to IA or the Board
- Third party or business partner due diligence
- Confidential reporting and non-retaliation
- Communication and training
- Discipline for violations
- Accurate Books and Records

Source: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44884389.pdf>

Third party due diligence questions that need to be answered

DOJ/SEC FCPA Guidance

- As part of risk-based due diligence, does your organization understand the qualifications and associations of its third party partners?
 - If there is a red flag, did you conduct more due diligence?
- Does your organization have an understanding of the business rationale for including the third party in the transaction?
- Does your organization undertake some form of ongoing monitoring of the third party relationship?
- Has your organization informed the third parties of your compliance program and commitment to ethical business practices?

Third party due diligence questions that need to be answered

DOJ's "Evaluation of Corporate Compliance Programs" (February 2017)

On Third Party Management

- **Risk-based and integrated processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?
- **Appropriate controls** – What mechanisms have existed to ensure that the contract terms specifically described the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

Third party due diligence questions that need to be answered

DOJ's "Evaluation of Corporate Compliance Programs" (February 2017)

On Third Party Management

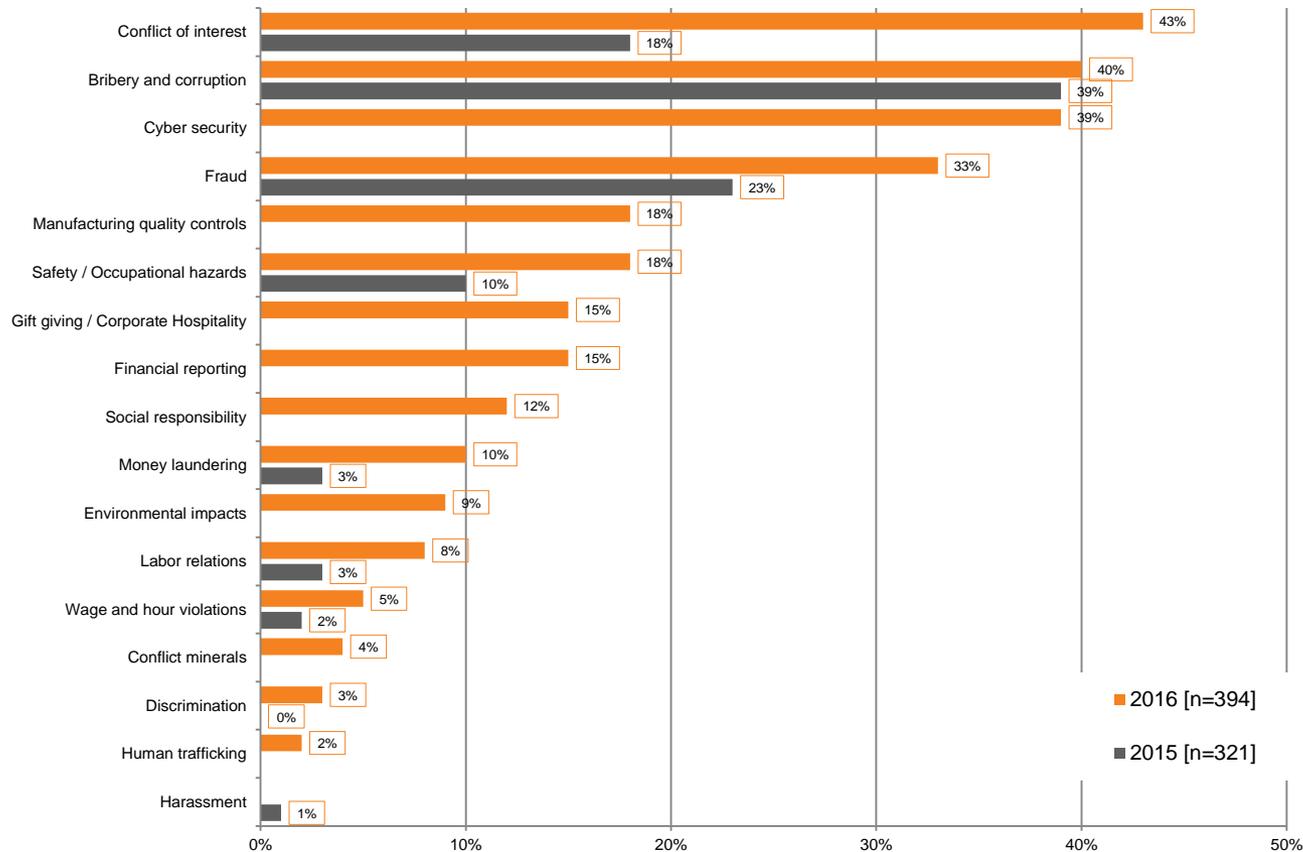
- **Management of Relationships** – How has the company considered and analyzed the third party's incentive model against compliance risks? How has the company monitored the third parties in question? How has the company trained the relationship managers about what the compliance risks are and how to manage them?
- **Real Actions and Consequences** – Were red flags identified from the due diligence of the third parties involved in the misconduct and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues?

Bribery and corruption remain a top E&C concern

Which of the following ethics and compliance issues is your organization most concerned about in relation to third party misconduct?

Source: *2016 Ethics and Compliance Third Part Risk Management Benchmark Report*

(Respondents select up to three)

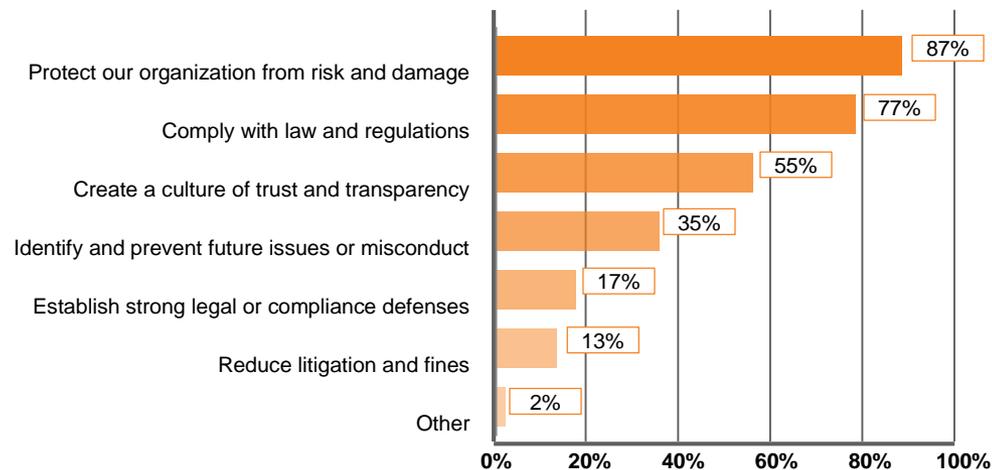


Most 3P programs are not considered high-performing

NAVEX Global's 2016 Third Party Risk Management Benchmark Report

- Findings show that although organizations are aware of the risks of a poorly performing program, fewer than 25% believe their programs are even "good"

What are your organization's top three objectives for your third party risk management program?
(Respondents select up to three)



Source: *2016 Ethics and Compliance Third Part Risk Management Benchmark Report*



5

Key takeaways

Key takeaways

- Aggressive FCPA enforcement is not going away
- Prosecution of individuals is increasing and whistleblower activity is on the rise
- In recent years, FCPA fines and penalties have increased
- Active cooperation and information sharing among enforcement authorities is continuing to increase, and the prospect of enforcement actions in multiple countries is on the rise
- As evidenced by DOJ's retention of compliance counsel and recently published compliance program evaluation guidance, having an effective compliance program is critically important to both avoiding and detecting FCPA violations and to minimizing exposure to FCPA liability if problems arise
- The indefinite extension of the DOJ's FCPA Pilot Program highlights the importance of self-disclosure, remediation and cooperation and shows that the self-disclosure calculus is becoming more complex
- Understanding and addressing third party risk is a critical initial step for anti-corruption and bribery policies and programs
- Automating third party due diligence improves all elements of anti-corruption and bribery programs

Baker McKenzie.

www.bakermckenzie.com

Baker & McKenzie LLP is a member firm of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organisations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2017 Baker & McKenzie LLP