COMPLIANCE WEEK

ANTI-BRIBERY & CORRUPTION

Survey Report

In partnership with

Morgan Lewis

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Survey: Tech gaps, third parties pose biggest ABAC threats

A recent survey conducted by Compliance Week and Morgan Lewis determined areas of insufficient resource support to combat bribery and corruption, along with trends in third-party due diligence.

BY ADRIANNE APPEL, COMPLIANCE WEEK

Compliance professionals surveyed regarding their anti-bribery and corruption efforts (ABAC) indicated resource support deficiencies in areas including staffing and technology.

The survey, conducted online by Compliance Week and law firm Morgan Lewis between May and June, gathered responses from 154 practitioners. The largest cohort of respondents—21 percent—represented the financial services industries, followed by technology (9 percent) and manufacturing (8 percent).

More than half the respondents (57 percent) worked at companies with fewer than 5,000 employees. About 22 percent of organizations represented in the report had under $50 million in annual revenue, 21 percent had between $1 billion and $5 billion in revenue, and 17 percent surpassed $10 billion.

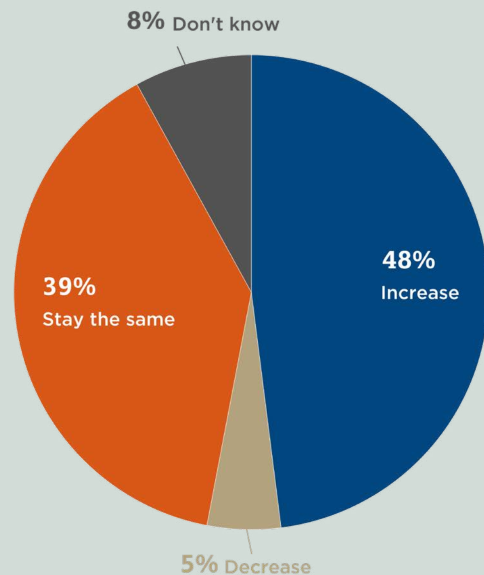
Bribery risk landscape

Nearly half the respondents (48 percent) said they expected bribery and corruption risks to increase over the next 2-3 years, while 39 percent felt it would remain the same over that period.

An overwhelming majority of practitioners (82 percent) described indirect bribery by third parties as a greater risk than bribery by internal personnel.

This response rate is in line with real-life statistics, said Morgan Lewis Partner Amy Schuh, as most alleged violations of the Foreign Corrupt Practices Act in the United States can be traced back to the activities of third parties.

Do you anticipate bribery and corruption risks to your company will increase, decrease, or remain the same over the next 2-3 years?



"The risk is significant, especially in countries where bribery is a way of life," Schuh said. In some locations, bribes are expected to be provided before seeing a doctor or enrolling a child at school.

The challenge for companies doing business in such a country is to "shift the mindset and culture" within the company to make it clear bribery is not allowed, Schuh said.

Regarding internal corruption risks, 61 percent of survey respondents said they felt mid-level employees posed the greatest threat, compared to 16 percent each for senior leadership or junior employees.

ABAC resources vary

On a scale from 1 to 5, with one being "least effective" and five being "most effective," only 14 percent of respondents graded their organization as most effective when providing financial support for their anti-bribery program. Respondents largely ranked the amount of financing devoted to anti-bribery they received as either average (26 percent) or above average (54 percent).

Regarding people power, 29 percent of respondents described their resources in the area as below average. The same percentage ranked their resource support as average.

Ranked even lower was the adequacy of technology for anti-bribery efforts, where 37 percent of respondents described support as below average and 27 percent average.

Businesses might feel they're "lagging behind" in tech resources because of new pressure by the Department of Justice (DOJ) that companies rely more heavily on data analytics in fighting corruption, Schuh said.

To that end, compliance professionals seeking further support to combat corruption should take developments at the DOJ or survey data back to their C-suite and "make a case for new resources or sharing or reallocation of resources to meet updated expectations," she said.

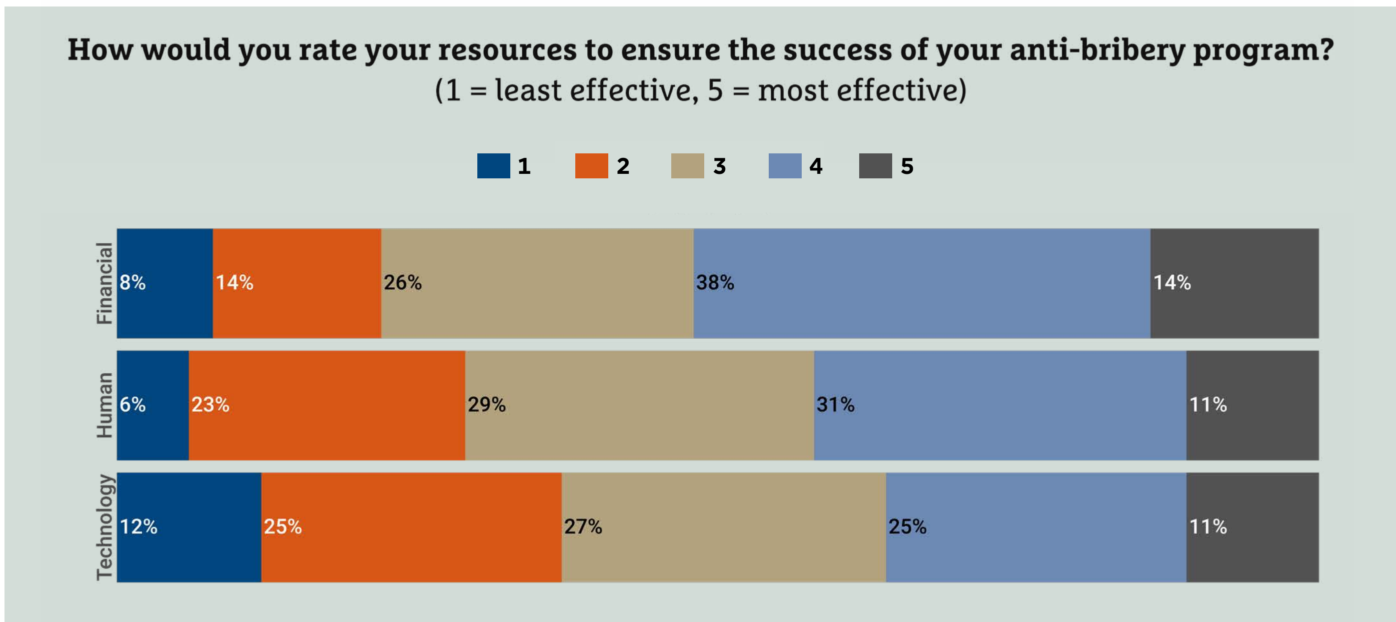
Zane Memeger, partner at Morgan Lewis, offered similar advice regarding resource support.

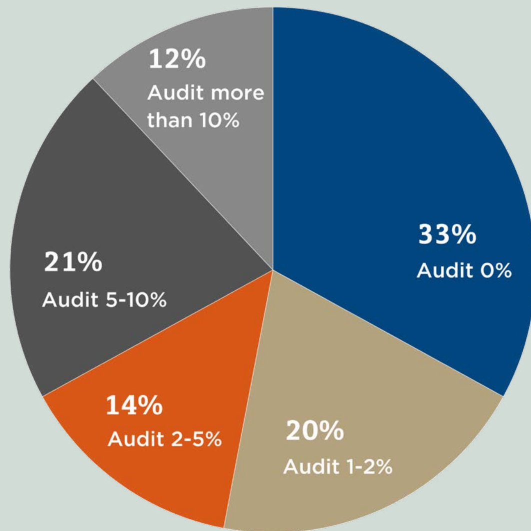
"If you are in high-risk industries, you need to make sure you have the necessary tools in place to deal with things such as third-party management," he said. "If you don't have those tools in place, the government isn't going to be accepting the excuse that it was too costly or you didn't have the resources to do it."

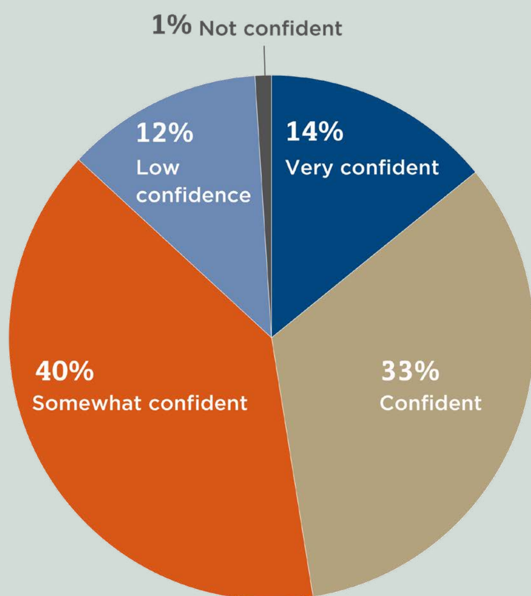
Third-party due diligence

About 60 percent of respondents said their company's primary method of conducting ABAC due diligence on third parties was to reserve enhanced due diligence for those presenting heightened risks. Almost one-quarter (24 percent) said all third parties received the same level of scrutiny, while 13 percent said no specific due diligence is conducted.

"Don't let it run on autopilot," cautioned Memeger of third-party due diligence. "… It's important to go back periodically and look at those relationships to see how they're functioning and if they have any problems that weren't disclosed to you that may alter whether you want to continue having that relationship with them."







Companies should align their due diligence refresh cycles to their level of risk, doing so either every year or every two years, Schuh advised.

"Third-party due diligence is by far the most intensive work companies have to do to end corruption," she said. The work is especially challenging for businesses that don't have centralized supply chains and haven't found exactly who their third parties are.

Regulators expect companies to know their third parties and their backgrounds. "But for companies that don't have adequate resources, they are probably not managing this well," she said.

Companies must create a master list of all vendors and note what each does and where. This list often can be pulled together from other existing resources at the company, such as finance, procurement, and sales operations, Schuh said. They may already be doing the tracking work the compliance and audit functions are looking for, she noted.

"It's a lot easier than creating something new," Schuh said.

> "Third-party due diligence is by far the most intensive work companies have to do to end corruption."
>
> Amy Schuh, Partner, Morgan Lewis

Financial controls and audits

Nearly half the survey respondents (47 percent) expressed medium to high confidence in the ability of their financial controls to catch potential books-and-records violations, while 40 percent were more uncertain. Alarmingly, 13 percent indicated low confidence.

"Following the money is critical," to identifying corruption, Schuh said.

Only 33 percent of respondents indicated they audited at least 5 percent of their highest risk third parties annually, while the same total answered zero.

"This doesn't match with the expectations of regulators who want to see appropriate auditing, including doing audits on a number of high-risk vendors that is statistically significant," Schuh said.

Tailoring the program to the level of risk being presented is "what makes a good anti-corruption program," she said. ■

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CORPORATE ENFORCEMENT POLICY

How Appetizing Will Companies Find the DOJ's New Carrots?

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CORPORATE ENFORCEMENT POLICY: HOW APPETIZING WILL COMPANIES FIND THE DOJ'S NEW CARROTS?

The US Department of Justice (DOJ) continues to try to dispel lingering skepticism over the benefits of corporate disclosure and cooperation. In remarks delivered at the beginning of 2023, Assistant Attorney General (AAG) Kenneth A. Polite, Jr. announced the first significant changes to the DOJ Criminal Division's Corporate Enforcement Policy (CEP) since the CEP was initially announced in 2017. The revised CEP provides guidance to prosecutors for how to assess and treat corporate offenders.

The updates outlined the DOJ's goal to provide greater clarity and incentives to companies for voluntary self-disclosure of wrongdoing and cooperation with DOJ investigations. Practitioners could easily characterize 2022 as the "Year of the Sticks," defined by a renewed focus on individual accountability as evidenced by the 250 individuals the Fraud Section convicted, the reemergence of corporate monitors, and the still-to-be-better-understood chief compliance officer certification. Given that, these "carrots" are a noteworthy effort at counterbalancing.

THE CARROTS

The Criminal Division of the DOJ has been encouraging companies to self-disclose misconduct voluntarily for years, dating back well before the announcement of the Foreign Corrupt Practices Act Pilot Program back in April 2016, which became the CEP over time. However, the lack of clarity and concrete benefits of disclosure, as well as the significant discretion that was left in the hands of prosecutors, engendered both concern and skepticism.

Recognizing that companies may be hesitant to affirmatively raise misconduct to the DOJ, the prior CEP guidance sought to provide a significant incentive for voluntary self-disclosure—the potential for a declination rather than a criminal resolution. However, the presumption that the DOJ would decline to prosecute only applied if the company had voluntarily self-disclosed the misconduct, fully cooperated in the DOJ investigation, and timely and appropriately remediated the wrongdoing, and only in the absence of certain aggravating circumstances.

Some examples of aggravating circumstances include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct [defined as significant proportionally relative to the company's overall profits]; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism."

Incentives Even Where Aggravating Factors Exist

In recognition of the importance of voluntary self-disclosure to DOJ enforcement efforts, the revised CEP seeks to provide an incentive for companies, even where aggravating circumstances exist. The revisions state that a company may still receive a declination if the company can demonstrate that it has met each of the following three factors:

- The voluntary self-disclosure was **made immediately upon the company becoming aware** of the allegation of misconduct.
- **At the time of the misconduct and the disclosure**, the company had an **effective compliance program and system of internal accounting controls** that enabled the identification of the misconduct and led to the company's voluntary self-disclosure.
- The company provided **extraordinary cooperation** with the DOJ's investigation and undertook extraordinary remediation.

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Companies facing facts and circumstances that prevent a declination do not walk away empty-handed from the revised CEP. If the above factors are met and a criminal resolution is still warranted, the new guidance permits the Criminal Division to recommend "at least 50%, and up to 75% off of the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist." Prior guidance offered a maximum of 50% off the low end. Further, in these circumstances, the DOJ generally will neither require a corporate guilty plea nor generally require the imposition of a corporate monitor.

Incentives Absent Voluntary Self-Disclosure

Voluntary self-disclosure is not the only behavior that the DOJ wants to incentivize—full cooperation and full and timely remediation are also critical components of any corporate enforcement action. Under the revised CEP, the Criminal Division will now recommend up to a 50% reduction off the low end of the US Federal Sentencing Guidelines' fine range for companies who failed to voluntarily self-disclose, but fully cooperated with the government and fully and timely remediated the issue—in other words, twice the maximum amount of a reduction available under the prior version of the CEP.

THE PERILS AND CHALLENGES OF COMPLYING WITH THE REVISED CEP

The January 17 updates are consistent with prior DOJ pronouncements and the Biden administration's more aggressive enforcement approach to corporate crime. As AAG Polite warned, "failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences." Moreover, the remarks were peppered with public policy pronouncements, reinforcing the DOJ's number one focus of holding individual wrongdoers accountable and ensuring that companies invest in compliance to prevent and detect criminal conduct from occurring in the first place.

The Company Voluntarily Self-Disclosed Immediately Upon Becoming Aware of the Misconduct Allegation

As previously outlined in the Monaco memo, the DOJ is seeking companies to voluntarily self-disclose issues "immediately upon the company becoming aware of the allegation of misconduct." In practice, rushing into the Criminal Division upon receipt of an allegation of criminal conduct is unlikely. Unlike prior standards, like "credible evidence" of illegal conduct, the mere receipt of an allegation of criminal conduct is an extremely low bar for disclosure.

Allegations can sometimes be vague or can include the names of employees and even senior executives just for affect or impact. Internal investigation teams have a responsibility to fully understand the nature of the allegation through intake and initial assessments before they can make informed decisions about the credibility and import of the allegation and even who might be involved in the alleged misconduct, all of which should occur prior to disclosure. It will be interesting to watch just how "immediate" DOJ's expectations are.

Requirement to Demonstrate the Existence of an Effective Compliance Program at the Time of the Misconduct and at the Time of Voluntary Self-Disclosure

In order to benefit from the DOJ's revisions, companies faced with aggravating factors are now required to demonstrate that their compliance program was effective at both the time of the misconduct and at the time of the disclosure—a potentially insurmountable hurdle for companies faced with an aggravating factor. It is arguable that the presence of an aggravating factor could by definition mean the company lacked an effective program at the time of the misconduct.

Companies will be well served to ensure that they have a strong "speak up" culture, coupled with a robust reporting and investigations process, which enables immediate escalation of allegations regarding criminal misconduct to its legal and/or compliance-led investigations team to ensure timely assignment of the investigation to qualified resources who can adequately and timely investigate the allegations.

Is It Feasible to Be "Extraordinary"?

As part of his remarks excerpted above, AAG Polite noted that companies must provide "extraordinary" cooperation and remediation if they hope to qualify for a declination in the face of aggravating circumstances, under the new policy. "Extraordinary" goes above and beyond the expectations of "full" cooperation and remediation as outlined in the prior CEP—and the expectations for "full" cooperation are not a low bar. The DOJ is no longer looking for "gold standard cooperation"—they want companies to go platinum. What that means remains unclear.

As outlined in the prior and revised CEP, to receive credit for "full cooperation" many criteria must be met: companies are expected to disclose "all non-privileged facts relevant to the wrongdoing at issue" on a timely basis; disclosure is expected to be "proactive" rather than "reactive," and facts relevant to the investigation should be voluntarily provided "even when [companies are] not specifically asked to do so;" all relevant documents—as well as "information related to their provenance"—are expected to be collected, preserved, and disclosed; and companies are expected to "mak[e] company officers and employees who possess relevant information available for [DOJ] interviews."

There is no bright line in the revised policy for when cooperation goes from just "full" to "extraordinary," but it will invariably include all the above aspects and more. In his remarks, AAG Polite suggested a few actions that prosecutors highly value, focused on individuals, that may help tip the scale toward "extraordinary": immediate individual cooperation, with individuals available for interviews and allowing for the collection evidence from hard-to-get sources, such as personal electronic devices; and testifying at a trial or providing information that leads to additional convictions.

To be sure, there are potential perils associated with trying to achieve "extraordinary cooperation" credit. For example, the DOJ is expecting companies to provide to it documents from foreign countries that may have challenging or prohibitive privacy or blocking statutes, and for those who cannot legally do so, it is placing the onus on those companies to explain why, articulate what steps they have taken to facilitate the document production, and problem solve for the government on how the company may obtain access to such documents.

In addition, the DOJ has stated that failure to retain, collect and produce business records residing on personal devices or in ephemeral messaging applications may evidence a failure to cooperate. The Monaco memo promised future guidance to companies on how to accomplish this demanding and potentially impossible task; that guidance is still forthcoming.

Further and importantly, companies risk the potential for others, including plaintiffs in shareholder derivative suits or individual defendants, to claim the company waived the attorney-client privilege as a result of its "extraordinary cooperation" with the DOJ, which could have a significant follow-on impact to the company.

Given the DOJ's opaque "we know it when we see it" guidance regarding what constitutes "extraordinary cooperation," companies and boards may not find this carrot particularly appealing. A key consideration for companies will be whether their "extraordinary cooperation" comes at a price long term—what may help a company secure this brass ring may hurt it in future shareholder derivative and other follow-on litigations.

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So, as always, the decision to self-disclose and parameters around cooperation will continue to present thorny issues for companies and their boards. The question remains, of course, whether companies and their boards will find these carrots appetizing.

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