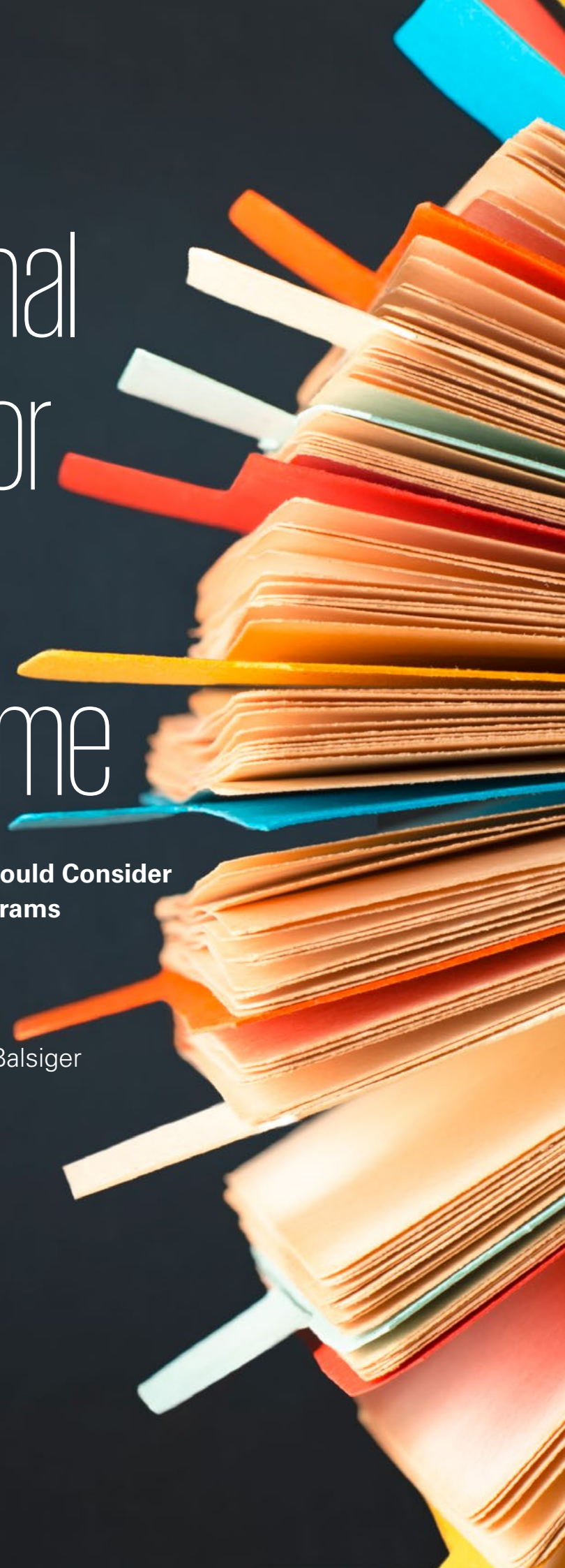




Organizational Measures for Preventing Financial Crime

**Guidance Financial Institutions Should Consider
for Effective ABC Compliance Programs**

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Financial crime poses a threat to financial institutions around the world, requiring robust internal frameworks to appropriately counter the relevant risks. While anti-money laundering measures aim to protect against the risk of financial institutions being used to leverage the proceeds of crime, financial institutions are also exposed to financial and reputational damage stemming from the misconduct of their own employees and associated third parties. At a time where financial institutions face increasing scrutiny – both from their local regulators and, potentially, those abroad – companies must have effective internal policies and procedures in place to counter those risks and evade regulatory sanctions.

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While these policies and procedures will vary from institution to institution, there are clearly factors and guiding principles that companies across the board can and should consider drawing on when creating, implementing and maintaining their financial crime risk programs.

On an international scale, there has been a development in recent years of both governmental and non-governmental authorities providing more concrete guidance on organizational measures for preventing financial crime risks. One area where this is notably the case of anti-corruption and bribery (ABC).

This development is in line with the recommendations set out by the OECD Working Group on Bribery in International Business Transactions¹, in particular Annex II – “Good Practice Guidance on Internal Controls, Ethics and Compliance”² – which articulates general good practices for internal controls, ethics and compliance programs or measures against foreign bribery.

Wolfsberg Group’s ABC Compliance Programme Guidance

In June 2017, the Swiss-based Wolfsberg Group – a non-governmental association of thirteen global firms aiding financial institutions to manage financial crime risks by publishing standards – released its “Anti-Bribery and Corruption (ABC) Compliance Programme Guidance”³, updating its 2011 Anti-Corruption Guidance paper. Recognizing that the financial services industry plays a key role in the fight against bribery and corruption, the guidance is intended to provide support in the development, implementation and maintenance of an effective ABC compliance program.⁴

The guidance focuses on corruption in the form of bribery, highlighting the importance of a risk-based approach and covering a range of internal measures for financial institutions to take in order to reduce corruption of their own employees as well as third parties conducting business on their behalf.

It breaks down key elements of a solid ABC program, in particular covering

- governance (including recommendations as to the allocation of roles and responsibilities, internal reporting and independent review),⁵
- a firm-wide policy (reflecting zero tolerance for bribery and similar facilitation payments, with senior management setting the “tone at the top”),⁶
- measures to manage risks from third-party providers,⁷
- gift and business hospitality,⁸

¹ Cf. Article X(C) “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions”, OECD, 26 November, 2009 <www.oecd.org/daf/anti-bribery/44176910.pdf> (last accessed April 23, 2018).

² “Good Practice Guidance on Internal Controls, Ethics, and Compliance”, OECD, February 18, 2010 <www.oecd.org/daf/anti-bribery/44884389.pdf> (last accessed April 23, 2018).

³ “Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance”, the Wolfsberg Group, June 2017, <www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/3.%20Wolfsberg-Group-ABC-Guidance-June-2017.pdf> (last accessed April 23, 2018), (Wolfsberg ABC Guidance).

⁴ See Wolfsberg ABC Guidance (fn 3) n 1.

⁵ See Wolfsberg ABC Guidance (fn 3), n 5.

⁶ See Wolfsberg ABC Guidance (fn 3) n 6.

⁷ See Wolfsberg ABC Guidance (fn 3) n 7.

⁸ See Wolfsberg ABC Guidance (fn 3) n 9.1.

- risk assessment,⁹
- training¹⁰, and
- compliance monitoring.¹¹

An appendix further provides examples of corruption red flags that should elicit deeper due diligence or review. The Wolfsberg ABC Guidance is not the first of its kind and explicitly draws on issuances by the UK Ministry of Justice (MOJ) as well as the US Department of Justice (DOJ) and Securities Exchange Commission (SEC).¹² Below, we provide a bit more insight on what each these specifically call for.

United Kingdom: Ministry of Justice (MOJ) Guidance on the Bribery Act

In the UK, corruption in the form of bribery is prohibited by the 2010 Bribery Act. Besides the general offenses of active and passive bribery, there is a specific corporate bribery offense, holding commercial organizations accountable for failing to prevent bribery.¹³ Full exculpation ensues, however, if a company can prove that it has adequate procedures in place, designed to prevent associated persons from engaging in bribery.¹⁴

The UK government provides more detailed information about such procedures in the 2012 guidance the MOJ published in fulfilment of the relevant statutory obligation in section 9 of the Bribery Act.¹⁵

The (non-binding) guidance, whose aim is to promote the understanding of and compliance with the Bribery Act, sets forth six principles that are intended to aid commercial organizations in their financial crime management processes. These principles are:

- proportionality of procedures (ABC procedures should be proportionate to a firm's bribery risks as well as the nature, scale and complexity of its activities),¹⁶
- top-level commitment (in particular internal and external communication of commitment to zero tolerance to bribery),¹⁷

- risk assessment (periodic, informed and documented),¹⁸
- due diligence (regarding persons who perform or will perform services for or on behalf of the organization),¹⁹
- communication (including training tailored to specific risks),²⁰ and
- monitoring and review.²¹

Appendix A provides various case studies, demonstrating the application of these principles in practice.

United States: DOJ & SEC Guidance on the FCPA

In the USA, a similar set of guidance principles was published in 2012 as a result of a collaboration between the Department of Justice (DOJ) and Securities and Exchange Commission (SEC), based on the federal anti-bribery obligations set out in the Foreign Corrupt Practices Act of 1977 (FCPA).²²

The guidance highlights the following principles as hallmarks of effective compliance programs:²³

- commitment from senior management "tone at the top" and a clearly articulated ABC policy;
- code of conduct and compliance policies and procedures;
- oversight, autonomy and resources; risk assessment;
- training and continuing advice;
- incentives and disciplinary measures; and
- third-party due diligence and payments.

While there is no explicit statutory defense in the FCPA as in the UK Bribery Act,²⁴ the adequacy of a compliance program is a factor the DOJ and SEC consider when deciding if and what action is to be taken against an institution, and it may also affect the penalty imposed in the case of wrongdoing.²⁵

⁹ See Wolfsberg ABC Guidance (fn 3) n 10.

¹⁰ See Wolfsberg ABC Guidance (fn 3) n 11.

¹¹ See Wolfsberg ABC Guidance (fn 3) n 12.

¹² See "Wolfsberg Group Publication Statement – Guidance on Anti-Bribery and Corruption Compliance Programmes" 2017, <www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/2.%20Wolfsberg-Group-Publication-Statement-ABC.pdf> (last accessed April 23, 2018).

¹³ Cf. Bribery Act 2010 section 7.

¹⁴ Cf. *ibid.*

¹⁵ See "The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)", Ministry of Justice, February 11, 2012 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf> (last accessed April 23, 2018), (Bribery Act Guidance).

¹⁶ See Bribery Act Guidance (fn 15) p. 21.

¹⁷ See Bribery Act Guidance (fn 15) p. 23.

¹⁸ See Bribery Act Guidance (fn 15) p. 25.

¹⁹ See Bribery Act Guidance (fn 15) p. 27.

²⁰ See Bribery Act Guidance (fn 15) p. 29-30.

²¹ See Bribery Act Guidance (fn 15) p. 31.

²² See "A Resource Guide to the US Foreign Corrupt Practices Act", DOJ/SEC, November 14, 2012, <www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> (last accessed April 23, 2018), (FCPA Guidance).

²³ See FCPA Guidance (fn 22) p. 57-62.

²⁴ The FCPA recognizes two affirmative defenses: the "local law defense" – if a defendant can establish that the scrutinized behavior was legal according to the laws and regulations of the foreign official's, party official's or candidate's country – and the "reasonable and bona fide expenditures" defense – where expenses are directly related to the promotion, demonstration or explanation of a company's execution or performance of a contract with a foreign government or agency (see Section 30A(c)(1) of the Securities and Exchange Act, 15 U.S.C. § 78dd-1(c)(1), 78dd-3(c)(1)).

²⁵ See FCPA Guidance (fn 22) p. 56.

France: AFA Guidance on Sapin II

A more recent development in this regulatory trend is the guidance²⁶ provided by the Agence Française Anticorruption (AFA) on “Sapin II”²⁷, France’s new anti-bribery law that requires financial institutions to establish an anti-corruption program to identify and mitigate corruption risks. Inspired by “the best internal standards,”²⁸ it bears elements that are reminiscent of the principles in both its UK and US counterparts. It also covers the subjects of top management commitment in setting a zero-tolerance policy for corruption risk, contents, scope and form of an anti-corruption code of conduct, third-party due diligence procedures, corruption risk training and an internal monitoring and assessment system.

It also highlights the importance of an internal whistleblowing system, as a logical consequence of the ABC Code of Conduct, so that employees may report activities that may breach the company’s code.²⁹ It further provides detailed information on risk mapping – “the foundation for risk management strategy.”³⁰ The six-step risk mapping method outlined involves:³¹

- clarifying roles and responsibilities for elaborating;
- implementing and updating the risk map;
- identifying the risks inherent in the organization’s activities;
- assessing the company’s exposure to corruption risks as well as the adequacy and effectiveness of the means for mitigating those risks (this section also provides sample tables);

²⁶ “Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favoritism,” AFA, Version 12-2017 <www.economie.gouv.fr/files/files/directions_services/afa/French_Anticorruption_Agency_Guidelines.pdf> (last accessed April 23, 2018), (AFA Guidance).

²⁷ Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Sapin II).

²⁸ AFA Guidance (fn 26) p. 3.

²⁹ See AFA Guidance (fn 26) p. 10-13.

³⁰ SAFA Guidance (fn 26) p. 14-18.

³¹ See AFA Guidance (fn 26) p. 15-18.

- prioritizing and addressing “net” or “residual” risk; and finally
- formalizing and updating the risk map.

Companies’ statutory duty to implement ABC compliance programs is monitored by the AFA – the anti-bribery agency created by Sapin II – that can also fine legal entities up to EUR 1 million.³²

Significance

While the above sources of guidance are not identical, they all provide similar guiding principles as well as specific recommendations that aim to help businesses set up and maintain effective ABC compliance programs. Because they emphasize a flexible and tailored approach – versus a “tick the box” solution that may not make sense for all financial institutions – they offer financial institutions an adaptable road map for setting up internal structures and processes, helping to arm them against financial crime, in particular bribery and corruption.

Because the global financial services sector is so strongly interconnected, it is more important than ever for financial institutions to ensure compliance with all the laws and regulations under whose scope they may fall. The above sources of guidance contain elements that emerged from an international consensus on compliance best practices and should also be considered by Swiss financial institutions when it comes to creating and modifying their internal organization for financial crime risk management. The right compliance framework paired with efficient and clear processes to ensure their actual implementation and the promotion of a “culture of compliance” will not only help financial institutions minimize their exposure to financial and reputational losses from bribery and corruption, but also strengthen trust in a competitive financial services sector.

³² See Article 17(5) Sapin II.

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