Mitrani Caballero
Ruiz Moreno
abogados

Anticorruption Regulation

Compliance Programmes - Guidelines approved by the Anti-Corruption Office

In the exercise of its functions, entrusted by Decree 277/18, the Anti-Corruption Office approved by means of Resolution 27/2018 (published in the Official Gazette on October 4, 2018) the "Guidelines for the best compliance with the provisions set forth in Sections 22 and 23 of Act 27,401 on Criminal Liability of Legal Entities" ("Guidelines") aimed at providing guidance to legal entities, governmental agencies, members of the judiciary and the professional community."

The Criminal Liability of Legal Entities Act (the "Act") gives legal entities the possibility of implementing compliance programmes aimed at preventing, detecting and rectifying irregularities or offences that may occur within the course of their business operations. Although adopting a compliance programme is not mandatory, it is of crucial importance for legal entities due to the following reasons:

(i) is a mitigating factor of liability to be considered by the judge at the time of determining the imposition of sanctions when the legal entity has incurred in any of the offences punished by the Act;

(ii) excludes the legal entity's criminal liability if it self discloses the offence and reimburses the benefit illegally obtained;

(iii) having an adequate compliance programme is a necessary condition for legal entities wishing to enter into contracts with the public sector.

1. Adequacy of the Programme. Design and implementation guidelines.

Both the Act and the Guidelines give the legal entity the flexibility to adopt, develop and implement a compliance programme tailor-made to its needs, with the only condition being that it be adequate.

Although Section 23 of the Act lists the elements that the compliance programme may contain, the Act establishes that the adequacy of a compliance programme will be given by virtue of the following three criteria: *risks associated to its business activity, legal entity's size and its economic capability.*

The Guidelines provide some examples of risk indicators. However, each legal entity must assess the risks associated with its business activity by considering, for example, the jurisdictions -either local or global- where it operates, the direct or indirect (through third parties acting on the legal entity's behalf) interaction with public officials, the transactions conducted through commercial intermediaries, etc.

The requirements of any compliance programme shall bear relation to the size of the legal entity and be adapted and reasonable depending on its economic capability, in such a way that the requirements shall not be the same for an NGO, an SME or a multinational company.

Bouchard 680, 12mo (C1106ABJ) Buenos Aires, Argentina.
T. +54 (11) 4590-8600 – F. +54 (11) 4590-8601 – www.mcolex.com

The assumption regarding the legal entity's size is that, the greater its economic capacity, the greater the resources the legal entity should invest in the assessment, development, implementation, control and training of its internal and external (third parties) resources.

Over 70 pages, the Guidelines provide guidance both to the private sector -in the development and adoption of a compliance programme- and to the public sector -authorities and government agencies- who shall assess the adequacy of compliance programmes under the terms of the Act.

The Guidelines emphasize the importance of evaluating, developing and implementing a compliance programme whose components are reasonable based on the characteristics of each legal entity and the business sector in which it operates. At the time of designing the programme, it is important to bear in mind a potential scenario where the legal entity is required to explain to public authorities the reasons to why the compliance programme is adequate for the legal entity.

During the development and implementation of the programme, the following steps should be considered:

- ✓ Top management's commitment (*tone at the top*: zero-tolerance to corruption and the implementation of a compliance programme
- ✓ Risk assessment
- ✓ Definition of objectives and programme plan
- ✓ Taking concrete actions to implement the plan
- ✓ Periodic monitoring and improvements when necessary
- ✓ Communication at all levels of the organization and to third parties

2. Elements of the compliance programme.

Although the Act states that only the first three elements (that we will further analyse below) are mandatory, the inclusion of the remaining elements tends to ensure the programme's adequacy, again depending on the legal entity's activity risks, size and economic capacity.

2.1 Code of ethics and compliance policies and procedures.

Adopting a code of ethics or conduct is crucial in the implementation of a compliance programme.

It is essential that the values and principles adopted by the legal entity, constitute a clear guideline for all its members -and third parties related to its business- on how to react when facing conducts which potentially constitute any of the offences contemplated in Article 1 of the Act.[1]

[1] Domestic and foreign bribery; national and transnational influence peddling; negotiations incompatible with public office; imposing liability on a public official who acts upon a personal interest, whether directly or indirectly, in any contract or transaction in which the public official is involved by virtue of his or her position; illegal exactions, which imposes liability on a public official who uses or applies for its own benefit or that of a third-party, funds unlawfully obtained; illicit enrichment of officials and public employees; and financial statements and reports containing materially false information, imposing liability for inaccuracy or misrepresentation of books and records and accounting information by a founder, director, administrator,

Bouchard 680, 12mo (C1106ABJ) Buenos Aires, Argentina.
T. +54 (11) 4590-8600 – F. +54 (11) 4590-8601 – www.mcolex.com

Prohibitions and sanctions must be clearly established for violations and events of non-compliance. Each organization can decide whether to include additional principles when facing other types of risks (for example, internal fraud, environmental damage, discrimination, etc.).

It is recommended that the code of ethics or conduct be approved by the legal entity's governing body. In organizations operating in multicultural contexts, it is preferable to adapt the code to each cultural context instead of using a single corporate code.

The Guidelines indicate that the code or compliance policies and procedures shall be applicable to all directors, managers and employees, regardless of their position or function and that they shall be correctly communicated by reliable means to the entire organization.

2.2 Compliance in bidding procedures and other interactions with the public sector.

Each legal entity must identify and prioritize risk areas based on the interaction levels of its members -or related third parties- with the public sector. The rules and procedures -whether in the code itself or in *ad hoc* policies- shall cover all relevant interaction with the public sector, with special emphasis on those of a risky nature, including the processing of permits, fundraising activities, audits and the interaction within the context of a regulated activity. The rules are expected to include a broad definition of "public official", a clear expression of zero tolerance for bribery or undue payments, the transparent intention that no act performed on behalf of the legal entity shall seek to improperly influence a public official, disincentives to discourage public officials from participating and collaborating in fraudulent acts, a clear policy on prohibitions and exceptions to granting gifts to public officials, a prohibition of political campaign contributions made on behalf of the legal entity, among others. Within medium to high risk organizations, it may be advisable for their policies to be accompanied by personalized and more intensive communication and training to the members of the organization as well as to third parties who directly interact with public officials.

2.3 Periodic training.

The Guidelines consider as a mandatory element the training of the legal entity's directors, managers and employees. Training is an essential tool which can be used to transfer knowledge on the compliance programme's elements and to raise awareness of the risks of corruption. The training shall be value oriented and shall ensure the effective understanding and internalization of the applicable rules and standards. It shall be provided to employees at all levels of the organization and must be designed and implemented using a risk-based priority approach. This implies that training should be given first or with higher frequency to individuals more likely to be exposed to incidents of corruption while performing their daily duties (for example, sales department, financial areas, procurement areas, intermediaries, etc.), always aiming at implementing an organizational culture committed with compliance with the law.

Regarding the training of third parties (suppliers, business partners, etc.), if the programme is mandatory for them, then it is advisable to use the afore-mentioned risk-based criteria here as well.

liquidator or receiver of a legal entity with the intent to conceal the commission of domestic and foreign bribery and influence peddling offences.

Bouchard 680, 12mo (C1106ABJ) Buenos Aires, Argentina.
T. +54 (11) 4590-8600 – F. +54 (11) 4590-8601 – www.mcolex.com

2.4 Internal reporting channels. Protection of complainants.

Although not a mandatory element, the Guidelines establish that in order for the programme to be effective and have credibility, it is essential that any violation to the code of ethics or conduct be detected and that the legal entity take effective action against such conduct.

It is therefore advisable that the code of ethics provides for an internal reporting channel **(compliance hot lines)** open to all employees and third parties, which can be used alternatively and complementarily to the usual channels of internal communication. In case of implementing a reporting channel, appropriate confidentiality rules need to be established in order to protect the whistle-blower's identity (this includes having a facility of anonymous reporting) and to avoid any retaliation against anyone who in good faith makes a report.

The reporting channel can be provided in-house or outsourced. It may be a dedicated phone line, an online survey, an email, etc. Whether only one channel is chosen or there are multiple options, it is essential that they be secure. An internal operating procedure should be established for handling the reports that come through the channel, from the time they are received, the responsive action taken, the handling of reports and internal investigations.

2.5 Internal investigation

The Guidelines describe internal investigations as a central element to support the well-founded application of disciplinary, criminal or civil measures, stating that, in all cases, investigations must respect the employees' rights, avoiding to affect their rights to intimacy, privacy and dignity. It is important that the internal investigation actions respond to a prior written internal protocol -duly approved by the management body- which is respectful of the aforementioned limits, has been previously communicated and, if possible, has been agreed with the involved parties (in the form of a written agreement).

2.6 Process of verification ("due diligence") of third parties

Third-parties verification processes (due diligence) will be a critical component of any compliance programme adopted by a legal entity. Legal entities are responsible for offenses against public administration and transnational bribery committed directly by individuals (legal entity's directors, officers and employees) acting on their behalf, interest or representation within the scope of their employment or hierarchical functions (doctrine of vicarious liability) and also for offenses indirectly committed by third parties (whether individuals or legal entities) that have a contractual or commercial relationship with the legal entity and have acted in its name, interest or representation. The Guidelines mention as examples of third parties to monitor, among others, joint venture partners, distributors, agents, representatives, contractors, suppliers, customs brokers, etc.

It is of vital importance to implement specific policies that will allow the legal entity to get to know the counterparties with whom it conducts its business activity (for example, their reputation, background expertise, relations with the public sector, potential conflicts of interest, etc.) and thus ensure a suitable understanding of the risks that the relationship entails. Likewise, the policies must contemplate the adequate communication of the legal entity's compliance standards to the third parties in order to require their compliance and control their performance. A policy of review and examination of third parties will be adequate if it truly serves to demonstrate that the legal entity

Bouchard 680, 12mo (C1106ABJ) Buenos Aires, Argentina.
T. +54 (11) 4590-8600 – F. +54 (11) 4590-8601 – www.mcolex.com

acted diligently, reviewing all the potential red flags and seeking in all transactions that its related parties behave with integrity and in compliance with the law.

2.7 Verification processes ("due diligence") in corporate reorganization processes.

The Act establishes that, in the event of transformation, merger, absorption, spin-off or any other corporate restructuring, the liability of the legal entity will be transferred to the surviving legal entity. Consequently, due diligence processes performed in the context of pre-merger and acquisition transactions that may result in successor liability, will be a mitigating factor of liability of the acquiring entity.

2.8 Compliance Officer

In large organizations, it is important to appoint an internal individual (compliance officer) responsible of the development, coordination and supervision of the compliance programme. In the case of smaller legal entities, the appointed individual for this role will probably have other duties as well. Within the scope of the compliance officer's specific duties are, among others, the design and implementation of compliance policies and procedures, overseeing and monitoring the compliance programme's reporting procedure, the periodic revision of the programme's adequacy in light of changes, the advice and resolution of ethical dilemmas, leadership during internal investigations and designing training programs. It is important for the organization that appoints such responsible individual to clearly state in writing, in the employment contract, job description or where appropriate, the duties entrusted to those called to fill this role.

2.9 Periodic Risk Evaluation. Monitoring and continual assessment of the compliance programme's effectiveness.

The Guidelines identify risk evaluation as a central element associated with the efficiency of the compliance programme. The standards and criteria for conducting the analysis may be set in writing, detailing how often it will be carried out and identifying those responsible for carrying it out. Likewise, it is necessary that the periodic evaluation has the clear and unambiguous support and commitment by the governing body and management and that this body gets updated with the results of the process.

According to the Guidelines, the compliance programme shall be understood as a continuous process of learning, adaptation and improvement. In this sense, periodic reviews must be carried out to verify that it sufficiently addresses the risks to which the legal entity is exposed and that the application of policies and procedures in day-to-day activity reveals positive results.

****

Our Firm has extensive experience in the implementation of compliance programmes for local and multinational companies as well as in the drafting of corporate policies, personnel training, monitoring and control activities and has a team of professionals specially dedicated to issues related to compliance of normative and anti-corruption policies.

Bouchard 680, 12mo (C1106ABJ) Buenos Aires, Argentina.
T. +54 (11) 4590-8600 – F. +54 (11) 4590-8601 – www.mcolex.com

The firm's compliance and corporate crime practice is dedicated to developing measures and procedures to prevent, detect and combat fraud, ethical misconduct, and other violations of laws and regulations governing corporate activity.

Our professionals also provide compliance due diligence and assist clients in internal and external corporate investigations in different business sectors. The firm has conducted or participated in independent investigations involving, among others, insider trading, corporate and tax fraud, money laundering, antitrust, public corruption and government contracting issues. The firm also assists clients in assessing and handling self-reporting issues, navigating through administrative, civil and criminal investigations or proceedings before public bodies, and developing and implementing anti-corruption policies, compliance plans and training programmes.

Should you have any questions or concerns, please contact us.

Bouchard 680, 12mo (C1106ABJ) Buenos Aires, Argentina.
T. +54 (11) 4590-8600 – F. +54 (11) 4590-8601 – www.mcolex.com