

## JUST ANTI-CORRUPTION

### Anti-bribery compliance: We need more “pioneers”



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Businesses are using data analytics, a fancy phrase for collecting and drawing new insights from large swathes of information, to speed up and improve decision making. But in the legal industry, and specifically in the field of compliance, use of data analytics is still in its

“infancy”, lawyers say.

“My sense of it is that companies hear the concept [of data analytics for compliance] and they think that is going to take a lot of money and time,” Jason Linder, a former foreign bribery prosecutor, said in an interview with GIR Just Anti-Corruption. “It’s too new to fully understand its value.”

Compliance experts said that while most companies are collecting information on their transactions, only a handful of companies are actually using the data to develop algorithms that can spot the riskiest transactions in real time.

Currently, there are not enough models or studies quantifying how useful data analytics can be for compliance programmes. Lawyers are now calling for more companies to take the helm as innovators in their use of data to reform anti-bribery efforts.

#### **Data analytics is easier and cheaper, says compliance chief**

Hui Chen, the compliance consultant in the criminal division's fraud section of the US Department of Justice between 2015 and 2017, described the current use of data by compliance programmes as “kind of

sad” at a Practising Law Institute conference on anti-corruption in April.

“I would say less than half of them [the companies that she dealt with during her time at the DOJ] had even a basic command of data,” Chen said at the conference.

When asked for a company that she believes is a leader in its use of data analytics, Chen pointed to the compliance programme of AB InBev run by its global chief of compliance, Martim Della Valle.

In 2012, AB InBev, the world’s largest brewing company, with headquarters in Belgium and Brazil, was under investigation by both the Department of Justice and the Securities and Exchange Commission for possible violations of the Foreign Corrupt Practices Act.

Della Valle in an interview told GIR Just Anti-Corruption that the US probe presented itself as an opportunity for him to reshape the company’s compliance programme, as suddenly the board of directors realised the value of investing in preventing corruption.

Della Valle said that a starting point in creating or revamping any compliance programme is finding and analysing data to identify a company’s unique risks.

“You need to know exactly where your exposure is, and it’s from there that you build any programmes, and it’s not the other way around,” Della Valle said.

In 2016, AB InBev faced a new problem. It had just bought London-based multinational brewing company SABMiller. Della Valle thought about hiring forensic auditors and investigators to create a due diligence report on the new markets the company was expanding into. But he wanted a longer-term solution than the “binder” the auditors would create that would soon go out-of-date.

He decided the company should build its own data analytics system that could not only identify current risks, but also reevaluate future potential problems as the company continued to evolve.

“We found it would be much easier and cheaper to develop a long-term solution that was a platform that would cost us a fraction of what the

alternative would have,” Della Valle said. He added that the due diligence report created by his new data analytics system cost substantially less than what was quoted by auditors.

The platform AB InBev built draws from over 30 different data sets to give each payment and vendor an aggregate risk score; the riskiest transactions are then reviewed by the compliance team. Before the new system, AB InBev would have to pick almost arbitrarily where to focus reviews of payments, perhaps looking at payments in China simply because more FCPA enforcement actions involved conduct in the country.

He said that most of the data sets come from in-house and would provide information on the terms of the contracts, whether procurement was involved and the types of services for each deal. So companies already have most of the data at their fingertips, he said, they just aren’t using it.

The US Department of Justice ultimately gave AB InBev a declination in 2016 following an FCPA investigation, while the Securities and Exchange Commission required it to pay just \$6 million to resolve related administrative charges.

### **More “pioneers” are needed**

Linder, a partner at Irell & Manella, said using data analytics, despite requiring big start-up costs, would probably save companies money in the long run. But, he said, the “proof is in the pudding.”

“We need more companies as pioneers willing to put the upfront expenditure, and be able to give real world examples as to what it prevented,” Linder said.

“The adoption of data in compliance may follow the path of the data revolution in sports,” he noted.

“At first, the use of data to evaluate players, making roster determinations, and even adjust playing styles met with extreme scepticism,” he said. “But, as the data has improved and the analytic approach bore tangible fruit, teams have adopted it, and now whole conferences are dedicated to sports data analytics, and data is used to evaluate and predict a good play, player or strategy.”

The problem is that as data analytics for compliance is in its “infancy”, companies don’t see the incentive to invest in the major start-up costs, he said.

As most compliance officers do not have data expertise, these costs would most likely include hiring a team of data scientists.

When she spoke in April about data analytics and compliance, Chen said if she was building a compliance programme from scratch, legal advice would not be a priority. “With the exception of the investigations function, I’d probably not hire a single lawyer,” she said.

Instead, she said, she would hire data scientists, engineers and behavioural scientists.

### **DOJ: We can't tell companies what data analytics they should have**

In terms of guidance on how compliance programmes should use data, there isn’t much.

In March 2017, the DOJ published a document called “[Evaluation of Corporate Compliance Programmes](#)”, which lists the types of questions the DOJ may ask when it is investigating a company’s compliance programme. However, Chen has previously [said it is a “pet peeve”](#) of hers when people call this document “guidance”, when it is merely a list of questions.

The list of questions briefly mentions data, under the section titled “continuous improvement, periodic testing and review”.

“Has the company reviewed and audited its compliance programme in the area relating to the misconduct, including testing of relevant controls, collection and analysis of compliance data, and interviews of employees and third-parties?” the document asks.

Dan Kahn, the head of the DOJ’s FCPA unit, acknowledged that data is “critical” to an effective compliance programme, but gave scant details on what the department is actually looking for.

“We make very clear that what we want is data and evidence that their compliance programme is working,” Kahn said in response to a question

about what kind of data analysis the DOJ expects from compliance programmes at a FCPA in the life sciences industry conference in June. “We can't tell a company what is an appropriate level of resources to have or the type of data analytics they should have, but it's hard to imagine that a compliance programme is effective if it is not monitoring itself.”

### **Ex-FCPA prosecutor: Don't fall behind**

Ryan Rohlfesen, a former FCPA prosecutor, said since data analytics is such a new concept for compliance, it probably will not be until the majority of companies are using it before the DOJ will begin to expect a similar level of sophistication from all businesses. Currently, Rohlfesen predicts that only a relatively small percentage of companies are testing complex data analytics for broad compliance programme use.

“When we were prosecutors evaluating compliance programmes, a key consideration was what peer companies were doing; it's better to be in the middle of the pack than far behind,” Rohlfesen said. “A company whose compliance programme is behind in using widely adopted practices is going to have an uphill battle in convincing the DOJ that the programme is adequate and that the company should receive a lesser penalty.”