

## **New ISO 37001 for Anti-Bribery Management: Leveraging Certification, Understanding Pros and Cons of the New Standard**

TUESDAY, DECEMBER 20, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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# ISO 37001 for Anti-Bribery Management

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December 20, 2016

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# Agenda

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- Background on Creation of ISO 37001
- Scope of ISO 37001
- Comparison to Existing Guidance
- Certification Process
- Potential Benefits and Shortcomings

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# BACKGROUND ON CREATION OF ISO 37001

# What is ISO?

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International  
Organization for  
Standardization

# Meetings of ISO PC 278



**1. London** (June 2013)

**2. Madrid** (March 2014)

**3. Miami** (June 2013)

**4. Paris** (March 2015)

**5. Kuala Lumpur** (September 2015)

**6. Mexico City** (June 2016)

# Composition of ISO PC 278

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- **Participation of approximately 80 experts**
- **37 P-members** (*participating member*)

- Australia
- Austria
- Brazil
- Cameroon
- Canada
- China
- Colombia
- Côte d'Ivoire
- Czech Republic
- Denmark
- Ecuador
- Egypt
- France
- Germany
- Guatemala
- India
- Iraq
- Israel
- Kenya
- Lebanon
- Malaysia
- Mauritius
- Mexico
- Morocco
- Nigeria
- Norway
- Pakistan
- Saudi Arabia
- Serbia
- Singapore
- Spain
- Sweden
- Switzerland
- Tunisia
- United Kingdom
- USA
- Zambia

# Composition of ISO PC 278

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- **19 O-members** (*observing member*)

- Argentina
- Armenia
- Bulgaria
- Chile
- Cyprus
- Finland
- Hungary
- Hong Kong, China
- Italy
- Japan
- Republic of Korea
- Lithuania
- Macao
- Mongolia
- Netherlands
- New Zealand
- Poland
- Russia
- Thailand

# Composition of ISO PC 278

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- ***External liasions***

- European Construction Industry Federation (**FIEC**)
- **IQNet**
- Independent International Organization for Certification (**IIOC**)
- International Federation of Consulting Engineers (**FIDIC**)
- Organisation for Economic Co-operation and Development **OECD** – Working Group on Bribery in International Business Transactions
- Transparency International (**TI**)
- World Federation of Engineering Organizations (**WFEO**)

# Approval of ISO 37.001

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- **Meeting in Mexico** (June 2016)
  - 5 days of meeting
  - Analysis of **540** comments
  - Last time for “substantial” changes
- **Approved with 91%** of the votes
- **Published on October 15, 2016**
- **Available (through a pay) on ISO’s website**

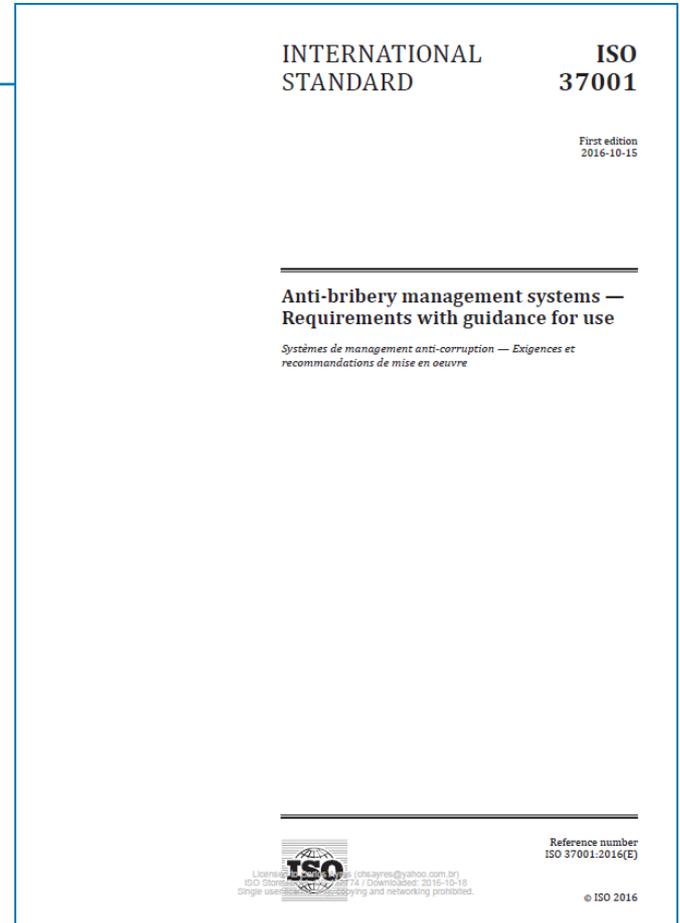


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# SCOPE OF ISO 37001

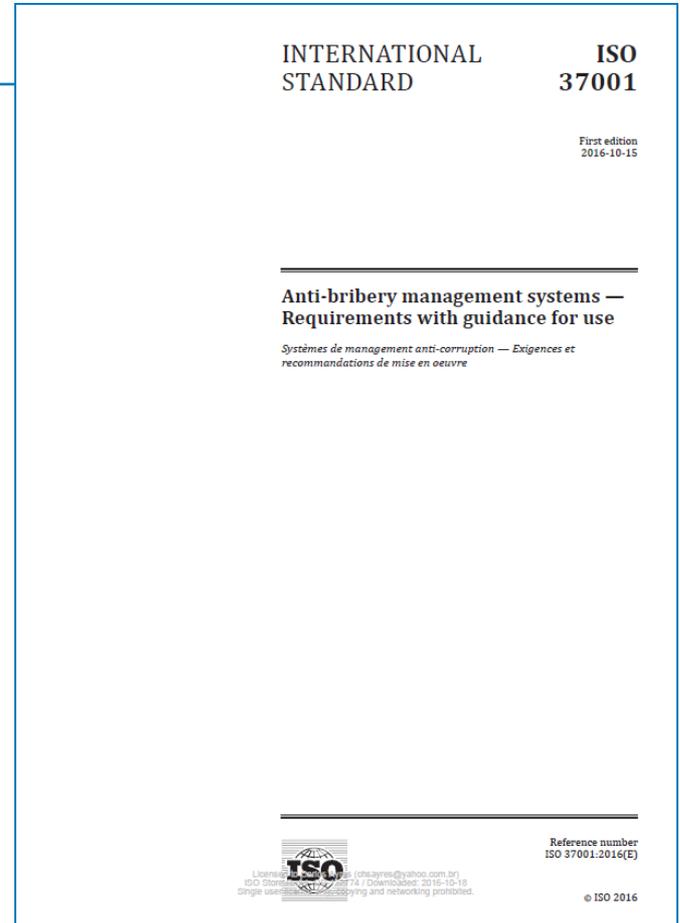
# Key Features

- **Scope:** bribery
- **Users:** all organizations (whether in the public, private or not-for-profit sectors)
- **Requirement standard**



# Key Features

- **54 pages**
- **Structure**
  - Introduction
  - 1. Scope
  - 2. Normative references
  - 3. Terms and definitions
  - 4. Context of the organization
  - 5. Leadership
  - 6. Planning for the Anti-bribery management System
  - 7. Support
  - 8. Operation
  - 9. Performance evaluation
  - 10. Improvement
  - Annex A (informative guidance)



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# COMPARISON TO EXISTING GUIDANCE

## Key Existing Guidance

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- *OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance*
- UK Ministry of Justice, *The Bribery Act 2010 Guidance*
- SEC/DOJ, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*

# How does it compare to OECD/ UK Guidance/ DOJ & SEC Guidance?

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- Scope of ISO 37001 broader than FCPA and OECD
  - Similar to the UKBA, addresses private bribery
- ISO 37001 more prescriptive than existing guidance on most issues but lacks detail for some key areas of concern
  - Risks surrounding M&A are not mentioned
  - Lack of clarity on key terms such as “more than a low risk of bribery”
- Challenge of systematizing compliance as a standard business process for a complex risk across all types of organizations
  - Does this create a paper-based, check-the-box program?

## Areas Consistent with Existing Guidance

OECD Guidance	MOJ Guidance	SEC/DOJ Guidance	ISO 37001
<b>Management's Role in Compliance Program</b>			
Companies should consider strong, explicit and visible support and commitment from senior management to the company's compliance program	Top-level management foster a culture within the organization in which bribery is never acceptable	DOJ and SEC will evaluate whether the Board and senior management has set proper tone for the company	"Top management" has responsibility for implementation of and compliance with anti-corruption program
<b>Risk Assessment</b>			
First and foremost, effective internal controls, ethics and compliance programmes should be based on a risk assessment that is regularly monitored, re-assessed and adapted according to changing circumstances.	The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.	Assessment of risk is fundamental to developing a strong compliance program. . . One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas.	When determining the scope of the anti-bribery management system, the organization shall consider the results of the bribery risk assessment

# Areas with Additional Requirements under ISO 37001

OECD Guidance	MOJ Guidance	SEC/ DOJ Guidance	ISO 37001
<b>Employment Procedures</b>			
Companies should consider appropriate measures to encourage and support the compliance program as well as appropriate disciplinary procedures	N/A	DOJ and SEC will consider whether a company has appropriate disciplinary procedures and recognize that positive incentives can also drive compliance	In addition to discipline and incentives, due diligence required for employees during hiring/ promotion processes
<b>Training</b>			
Companies should consider measures designed to ensure periodic communication, and documented training for all levels of the company	The commercial organization communicates its bribery prevention policies and procedures throughout the organization through internal and external communication, including training, proportionate to the risks it faces	DOJ and SEC will evaluate whether a company has taken steps to communicate relevant policies throughout the organization, including through periodic training for all relevant employees and, where appropriate, agents and business partners	The organization shall provide adequate and appropriate anti-bribery awareness and training. Anti-bribery training and training on the organization's policies must be provided to business associates acting on behalf of the organization that pose "more than a low risk"

# Areas with More Requirements under ISO 37001

OECD Guidance	MOJ Guidance	SEC/ DOJ Guidance	ISO 37001
Facilitating Payments			
<p>Programmes should cover . . . . . . facilitation payments</p>	<p>Prohibited under UKBA</p>	<p>The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action.</p>	<p>Although facilitation payments are often regarded as different in nature to, for example, a bribe . . . They are illegal in most locations and are treated as bribes for the purpose of this International Standard, and therefore should be prohibited by the organization's anti-bribery management system</p>

## Areas with Fewer Requirements under ISO 37001

OECD Guidance	MOJ Guidance	SEC/ DOJ Guidance	ISO 37001
Applicability of Internal Controls to Affiliates			
N/A	N/A	The FCPA requires issuers with a 50% or less stake in a subsidiary or joint venture company to use its influence in good faith to cause the company to maintain a system of internal controls. If a company is the majority owner, it must ensure the maintenance of internal controls	Only applies internal controls provision obligations to controlled affiliates and make efforts with respect to uncontrolled affiliates when the uncontrolled affiliates pose "higher than a low risk of bribery"
M&A Due Diligence			
N/A	N/A	DOJ and SEC take into account whether companies conduct effective FCPA due diligence on their acquisition targets as demonstrating commitment to compliance when evaluating any potential enforcement actions.	N/A

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# CERTIFICATION PROCESS



# Certification Process

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# POTENTIAL BENEFITS AND SHORTCOMINGS



# UK

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- Effectiveness of standards
  - BS270001 regarding Information Security
  - Are the ISO 37001 standards identifiable and measurable?
- Corporate risk profiles and risk tolerances
  - Effect on susceptibility to new standards
  - Effect on corporate engagement
  - Resources and capability to implement
    - Annual/ Bi-annual certification
    - Tone from the top

# UK

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- Integrity of the implementation of the standards
  - Who checks the checkers?
  - Conflicts of interest?
- What do the ISO 37001 standards add?
- Prosecutors' view of ISO 37001
  - David Green, Director of SFO
  - Hui Chen, Compliance Counsel Expert, U.S. Department of Justice

# Brazil

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- Will not shield companies
- May be included as a requirement of leniency agreements
- Discussions at governmental level about potential incentives for certified companies participating in public procurement

# US

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- Certification of Companies Facing Investigation
  - Would not shield companies facing investigation by the agencies
    - Investigations are fact-specific – company would still have to prove that its program was implemented effectively and continued to involve a rogue employee
    - Recently confirmed by DOJ’s Chief of the Criminal Division’s Fraud Section, Andrew Weissmann, during recent conference
  - Cases where compliance program was not sufficiently implemented
    - Johnson Controls
    - Nu Skin
    - BHP Billiton
  - However, engaging a third party with a ISO 37001 certification may help in demonstrating due diligence did not raise red flags

# US

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- Watermark for compliance programs continually rising
  - As a result of enforcement actions, the DOJ/ SEC often articulate new expectations for companies' implementation of their compliance programs
  - ISO 37001 may not address subsequent best practices
  - When certification is issued, already out-of-date because company's risks, personnel, and program constantly changing

# Contact Information

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