

INTERNATIONAL BRIBERY: FCPA UPDATE 2011



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41123960

International Bribery: FCPA Update 2011

Publisher: Mary Ellen Fox

Executive Editor: Jodine Mayberry

Production Coordinator: Tricia Gorman

Managing Editor: Phyllis Lipka Skupien, Esq.

Chief Copy Editor: Jennifer McCreary

Graphic Artists: Ramona Hunter, Katie Pasek

Andrews Publications

175 Strafford Avenue

Building 4, Suite 140

Wayne, PA 19087

877-595-0449

Fax: 800-220-1640

www.andrewsonline.com

Customer service: 800-328-4880

(ISBN 978-0-314-94697-3)

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LETTER FROM THE EDITOR

In an age when everyday business has become global, the United States has taken the lead in trying to control corruption worldwide. In 1977 the U.S. passed the Foreign Corrupt Practices Act, and the Justice Department and Securities and Exchange Commission are ramping up their enforcement efforts.

With the Justice Department and SEC imposing over \$1.5 billion in penalties in 2010, no company can afford to ignore the growing risk of agency enforcement actions. And with federal agencies pursuing companies that are not based in the United States or listed on a U.S. exchange, these trends are something all corporations should watch.

Moreover, companies doing business internationally are now faced with new whistle-blower provisions in the Dodd-Frank financial reform law that encourage employees to report alleged corruption to the government.

2011 portends more government regulatory proceedings and an increase in the cost of doing business overseas, rough waters in an already turbulent economic environment. There is growing concern about the United States' FCPA enforcement activity, the increased cost of settlements, the role of cooperation with the government, liability for corporate officers and the definition of "facilitation payments," an exception to the general rules forbidding bribery.

This Westlaw Journal special commentary issue features expert analysis on the FCPA by legal and corporate compliance professionals. These experts examine the law, the increased enforcement efforts against bribery, and how corporations and their individual officers can prepare for the new era of governmental scrutiny.

Please see our Westlaw Journals newsletters for continuing coverage of developments in the law and related analysis.

Phyllis L. Skupien, Esq.

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Evaluating Your FCPA Compliance Program In Light of Dodd-Frank

By Ed Rial and Kevin Corbett

Deloitte Financial Advisory Services LLP

The Dodd-Frank Wall Street Reform and Consumer Protection Act contains a number of corporate-governance-related provisions that will apply to most U.S. public companies. One important component of the law is its whistle-blower provisions, which provide a mechanism for the Securities and Exchange Commission to grant rewards of up to 30 percent of monetary sanctions imposed over \$1 million for providing the SEC with "original information" that leads to successful enforcement actions. The SEC has already established a fund of about \$452 million for potential payments to whistle-blowers¹

In light of the recent record-breaking Foreign Corrupt Practices Act fines and penalties, whistle-blowers may seek to report violations directly to the SEC in pursuit of monetary rewards that could potentially reach tens or even hundreds of millions of dollars.

Because Dodd-Frank's whistle-blower provisions will likely fulfill one of its intended purposes and result in more SEC-initiated inquiries and investigations, companies exposed to corruption risk should consider whether their anti-corruption programs are designed to address their specific risks and serve to effectively prevent, detect and monitor potentially corrupt activities.

This article will discuss some of the key considerations in formulating and implementing an effective and practical anti-corruption compliance program, taking into account efficiencies that may be realized through the use of assessment and monitoring technologies.

RISK ASSESSMENT

Effective anti-corruption compliance programs have at their core a comprehensive risk assessment. Successful risk assessments are designed to identify potential corruption risks associated with a company's business model, business partners, business relationships, use of agents and consultants, and overall strategic plans. The risk assessment should consider not only the



REUTERS/Jim Bourg

FCPA but also local anti-corruption laws with which the company's international operations must comply.

Foreign enforcement authorities' increasing interest in pursuing corruption cases, bolstered by the enactment of sweeping legislation (such as the U.K. Bribery Act), has raised the stakes for local company operations. Risk assessments can serve as the foundation of an effective anti-corruption compliance program and help a company prioritize and mitigate its corruption risks through the efficient allocation of limited compliance resources.

Generally, a common hurdle in performing risk assessments is the availability of information from decentralized operations necessary to understand and evaluate their specific corruption risks. Obtaining such information can be laborious and time-consuming; using a well-designed online survey can greatly expedite the collection and analytical process, providing a single database of information where individual and aggregate responses can be risk-ranked by location, business unit or function.

In sum, a thorough risk assessment will signal the company's commitment to understanding its specific corruption risks and assist in building a customized program designed to address those risks. These are two factors government authorities generally consider when determining whether to pursue an enforcement action or assess fines and penalties for violations.

RISK MANAGEMENT

Establishing and maintaining an effective compliance program can be expensive, requiring that companies identify and implement practical solutions providing the necessary program coverage within reasonable budget constraints. This balancing effort is complicated by the current aggressive enforcement environment and the view that companies need to do more and be proactive in managing corruption risk.

Moreover, the costs of investigations, fines, penalties and reputational damage will invariably far exceed the short-term savings realized from a less than adequately funded compliance program. Accordingly,

Whistle-blowers may report violations directly to the SEC in pursuit of monetary rewards that could reach the hundreds of millions of dollars.

companies should consider establishing an anti-corruption risk management plan that fully leverages the risk assessment process and identifies short-, medium- and long-term program goals.

A company can show its commitment to properly managing corruption risk with a reasonably staffed compliance unit that establishes a well-reasoned and realistic plan that addresses the more serious risks through, for example, immediate in-country compliance audits, implementation of additional anti-corruption controls (such as central approval for third-party retention and payments) and focused training.

GAP ANALYSIS

Although anti-corruption compliance programs should be tailored to address a company's particular risks, there is a clear benefit to comparing its compliance procedures against leading industry practices and norms to help identify deficiencies and other improvement opportunities. Companies can use such a "gap analysis" to fine-tune and/or reprioritize their compliance efforts.

For example, third-party due diligence may include a variety of procedures calibrated to the risk presented in a particular relationship. Third parties who do not typically interact with foreign government officials may require less diligence than those who serve as sales intermediaries with government agencies.

Decisions regarding how third parties are grouped and how levels of diligence procedures are performed can benefit from an understanding of how peer companies are addressing similar issues and whether any consensus has been reached regarding leading practices. Periodically assessing and updating anti-corruption compliance programs sends a clear message to enforcement authorities that the company is serious about its compliance efforts.

MONITORING

Companies should consider taking steps to enhance or develop an on-going, consistent monitoring program that proactively seeks

to identify suspicious transactions and investigates red flags and deviations from normal practices. Attributes of a successful anti-corruption monitoring program will typically include transaction testing, due diligence procedures and contract reviews. A robust and continuous monitoring program may serve as a good control procedure to help prevent or detect a corruption problem.

Investments in data analytics and automated solutions to help identify transactions with certain risk attributes can also be important elements of an anti-corruption compliance program. Such focused analytics can be very helpful in identifying potential control weaknesses and narrowing the scope of transactions for review. Accordingly, these tools can help reduce overall compliance costs and play an important role in a company's efforts to manage and mitigate corruption risk.

TRAINING

While most companies have incorporated some form of anti-corruption training into their compliance programs, tailoring the training to reflect information learned during

The risk assessment should consider not only the FCPA but also local anti-corruption laws with which the company's international operations must comply.

the risk assessment process can increase its effectiveness. Training can address risks that are unique to particular regions (such as local law requirements) or other risk factors such as recent acquisitions (bringing in new employees unfamiliar with the company's compliance program) or a surge in government contracts won.

Conversely, changed circumstances resulting in a lower risk profile in certain operations or locations may enable companies to move from a comprehensive, live training program to one that is computer-based. In either event, training that emphasizes the company's values, tone at the top and commitment to non-retaliation for whistle-blower reports made in good faith can send

a clear message that the company takes its compliance obligations seriously.

WHISTLE-BLOWER SYSTEMS

While some individuals may be motivated to report potential violations simply because it is the right thing to do, the opportunity to receive multimillion-dollar rewards will likely lead to a surge in FCPA-related complaints. By September 2010, only two months after Dodd-Frank was enacted, the SEC was reportedly receiving at least one tip per day alleging foreign bribery violations.² Companies should consider exploring new ways to encourage employees to make complaints internally so management can investigate allegations in an orderly matter, addressing wrongdoing and self-reporting the conduct to regulators if appropriate.

Companies may consider offering guarantees of non-retaliation for allegations made in good faith, offering employees multiple and simple ways to raise anonymous allegations, and making more frequent and more timely communications to whistle-blowers and others that allegations will be taken seriously and investigated.

TONE AT THE TOP

One of the most important aspects of a compliance program is the tone set by company leaders and the overall culture for compliance within the organization. A

company that promotes a culture of doing the right thing and solving problems openly will likely be better positioned to deal with potential Dodd-Frank ramifications than those with a poor or indifferent tone at the top.

Companies may want to emphasize an "open door" policy, encouraging employees to discuss matters with their supervisors, managers, or compliance, ethics or human resources personnel. Companies may also wish to implement or increase the frequency of periodic employee surveys to evaluate the degree of employee support for the compliance program, gauge its effectiveness and elicit suggestions for program improvements.

Addressing each of the areas discussed above can help companies mitigate the risk of FCPA violations and put them in a better position to learn of, investigate and address potential corruption issues in a timely manner. A strong compliance program not only provides internal benefits, but it also may help a company facing a government investigation. Regulators will generally consider the effectiveness of a company's anti-corruption program in deciding whether to bring charges or determining appropriate fines and penalties for wrongful conduct.

A strong compliance program may also enable a company to avoid the appointment of a costly outside monitor to evaluate its

post-settlement compliance efforts, typically for a period of two or three years.

With the passage of Dodd-Frank, companies vulnerable to corruption risk should consider re-evaluating and refining their anti-corruption programs to determine if they are adequately assessing, managing and monitoring risk. Information obtained through comprehensive risk assessments can serve as the foundation for practical risk management strategies that may incorporate technology solutions and efficiencies that enable companies to "do more with less."

Maintaining a comprehensive and customized anti-corruption program, with strong support from company leaders, can

better position companies to identify and react to potentially corrupt acts and help them avoid or mitigate the consequences of violations.

NOTES

¹ SEC, ANNUAL REPORT TO ON WHISTLEBLOWER PROGRAM (October 2010), available at http://www.sec.gov/news/studies/2010/whistleblower_report_to_congress.pdf.

² Posting of Joe Palazzolo to Corruption Currents blog, <http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day/> (Sept. 30, 2010).



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