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Expert Analysis

FCPA Guidance: A Roadmap for Best Practices for Compliance Programs

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The recent Department of Justice and Securities and Exchange Commission guidance[1] on the Foreign Corrupt Practices Act does not break new ground, but it does offer internal and external counsel, as well as ethics and compliance professionals, a user-friendly guide to the agencies' priorities.

The guidance provides insight into expectations of law enforcement and civil enforce-ment in areas including the management of gifts, travel and entertainment; interaction with foreign government officials; and relations with vendors and third-party intermediaries.

The guidance also addresses the difficult due diligence tasks companies must consider in undertaking international mergers or acquisitions. The guidance is materially a best-practices compendium for companies that face FCPA risk and exposure.

This is most evident and most valuable in the discussion of the rationale behind several instances in which both the DOJ and the SEC declined to prosecute or pursue an enforcement action against a company. The guidance's direction only comes further into focus with a few more recent FCPA declinations.[2]

One of the themes addressed compre-hensively in the guidance is compliance, and it is here that the DOJ and the SEC have been most transparent in their expectations. The guidance uses a number of anonymous case recitations, including several declinations, to illustrate what might best be described as a "do and don't" list for corporate compliance programs.[3]

Any failure to see the value in these guidance discussions and the lessons they impart would be short-sighted. The choice of samples and case illustrations is certainly not

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a matter of chance, and companies can have confidence that they are intended to be behavioral benchmarks for compliance programs.

From these illustrations, much can be gleaned about what a comprehensive and fulsome compliance program should include. There are no guarantees that if a company puts in place a specific program tailored to enforcement authority expectations, bad things will not still happen, nor that the DOJ or the SEC will simply walk away from reports of misconduct. It is reasonably clear, however, that if a company has taken certain actions and put in place certain compliance program features, the company will be on solid ground when it meets with the DOJ or the SEC and will be in the best position to seek the Holy Grail of company wishes in these circumstances: a declination.

Based on our analysis of the declinations, the additional expectations identified in the guidance, and the available and evolving case history, we have outlined the hallmark questions, compliance program essentials and investigative actions of a best practices company.

The guidance is materially a best practices compendium for companies that face FCPA risk and exposure.

COMPLIANCE QUESTIONS

What are your specific and current policies and procedures for FCPA compliance?

In the current and likely future enforcement environment, prudence dictates that companies should review their relevant policies and procedures. These reviews should be ongoing and proactive. As the guidance notes, "a good compliance program should constantly evolve."[4] DOJ and SEC investigative priorities are constantly evolving, and multinational investigations are increasing. This is not the time for compliance policies and procedures to gather dust, particularly in the FCPA space.

Outdated FCPA compliance procedures will neither address DOJ and SEC expectations, nor place your company in the best posture to uncover compliance issues internally. Companies should be the first to learn that they have a compliance issue, and they should position themselves to make the case to investigative agencies that the right policies and procedures are in effect.

Have you conducted an appropriate and updated risk assessment, and are your FCPA policies and procedures reasonably tailored to the particular risks facing your company, industry and regions of operation?

The guidance and all public pronouncements by DOJ and SEC officials have made clear that FCPA compliance programs should be tailored to meet the needs of individual companies and industries. The programs should address everything from corporate size to the type of products or services offered and the relative risk associated with the company's business locations. What program suits an energy company will be different from what suits a defense company, which will be different from what suits a pharmaceutical company. Even within a particular industry, there may be a need for a tailored approach.

An energy transportation company, for example, will have different concerns than a company providing oil field services. Regional differences play a critical role in risk

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assessment as well. For example, a pharmaceutical company operating primarily in European markets will have different concerns from one operating in Asian markets.

FCPA compliance programs are not simple, off-the-shelf commodities, but the product of compliance, audit and business professionals' collaboration. An appropriate risk assessment will better enable a company to detect and prevent corrupt activity, and government investigators will expect a company's compliance program has been crafted with an understanding of the specific risks the company faces in its markets.

Have relevant FCPA policies and procedures been revised since their original drafting, and are they designed to address the current composition of your company?

As we noted above, there is likely to be little tolerance for legacy FCPA policies and procedures that do not address the company's current business environment and holdings. For example, if there have been recent mergers or acquisitions, particularly those requiring operation in new countries and with new clients, extant compliance programs may be insufficient to address the institution's current compliance needs. This is particularly the case where local laws limit the scope and kind of due diligence that can be conducted pre-acquisition.

Due diligence obligations are a regular tripwire for companies when they expand into new countries and markets, and therefore due diligence must be multi-faceted. The guidance includes a notable amount of discussion regarding a company's FCPA obligations in the merger and acquisition context. Merger and acquisition due diligence cannot be simply about whether a potential transaction will grow the business. Due diligence must consider any potential challenges or problems the new business and its markets may bring to your company. Thus, merger and acquisition due diligence must include specific FCPA tests and reviews.

"A good compliance program should constantly evolve."

Further, it is important to consider the degree to which post-merger or acquisition due diligence may be required in circumstances where pre-acquisition intelligence is limited. Due diligence must also anticipate integrating new operations into the existing compliance regime, and include appropriate training, audit and review of the new venture's personnel and operations.

Have you thought proactively about your client base? What potential client groups or markets pose the greatest risk?

Risks vary not only by industry and region, but by market and client base. Certain customer relationships are more prone to FCPA risk than others. For example, pharmaceutical companies must be cognizant that most of their markets are in countries with some form of government supported health care, meaning the majority of their interaction with potential clients will be with people who are government officials. Energy sector companies looking to enter joint ventures or partnerships with state-owned energy companies must be prepared to look closely at their "partners." Companies that import substantial product into countries with significant corruption risks must look closely at "expediting" payments. Agents and other third-party contractors must be carefully and fully vetted and required to endorse company FCPA policies and procedures. The FCPA is not the only

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compliance area in which companies must think about their markets and clients,[5] but it holds some of the gravest risks for failure to do so.

Is your compliance department adequately and intelligently staffed? Do training programs reach all necessary personnel?

Although numbers are not sufficient, adequate staffing is a good start to ensuring the establishment and maintenance of an effective compliance program. Compliance is a cost center, but it is a necessary one. Personnel with responsibility for internal management of FCPA compliance need to be experienced in the relevant areas. In addition, staffing should be local as well as central, as compliance cannot be managed competently remotely.

Finally, all responsible personnel need to be trained. Training programs must be in place, and the training must be focused, routine and monitored. Training should be accessible and available in all pertinent languages. Though it was likely not the only reason, the DOJ's decision to not prosecute Morgan Stanley in connection with allegedly substantial FCPA misconduct by a senior official had much to do with the documented scope, penetration and value of anti-bribery training at the company.[6]

Compliance is a cost center, but it is a necessary one.

Are the compliance chain of command and lines of report established, intelligent and transparent?

There are few more damaging admissions by an institution under prosecution or enforcement review than a failure by the relevant staff to respond properly to concerns about misconduct. Companies must have clear and published procedures for identification and reporting of misconduct. Relevant management, business, compliance and audit functions must each know their responsibilities and be integrated into the compliance model. The best compliance programs often involve direct reports to the board or audit committee. Compliance must be elevated and not buried in a general counsel's portfolio.

COMPLIANCE PROGRAM ESSENTIALS

In line with earlier admonitions, there is no single compliance model applicable to every circumstance. Companies must adapt their compliance programs to fit their business and their markets. There are, however, certain fundamental elements echoed throughout the guidance which are common to all effective compliance programs. We have identified the following:

- An appropriate risk assessment, periodically updated, which underlies and informs the anti-bribery compliance program.
- Clearly articulated and written corporate policies against violations of the FCPA and related anti-bribery laws, which communicate a "tone at the top" of commitment to anti-bribery compliance.
- Written compliance standards and provisions which effectuate the corporate policies and are intended to limit the prospect of FCPA violations.
- Identification of senior officers with authority over the compliance program, and clear lines of report from them to the chief executive, the board or the audit committee of the board.

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- Communication of the compliance standards to all necessary and responsible personnel through periodic training and related certifications to reflect completion of that training. The standards must be accessible.
- Transparent procedures for reporting potential misconduct internally, and clear and written prohibitions against any retaliation for those who report the misconduct.
- Established disciplinary procedures for addressing violations of the compliance standards, and a record which demonstrates the company's willingness to impose discipline where appropriate.
- Due diligence requirements and procedures for use with respect to vendors, agents and business partners.
- Due diligence requirements and procedures for business mergers and acquisitions that integrate FCPA review into the process.
- Standard contract and agreement language which includes anti-bribery representations and undertakings by all vendors, agents and business partners, as well as the principals of entities which are being acquired or merged into the existing enterprise.
- Periodic testing and review of the compliance program to update and improve its effectiveness, in light of the changing or evolving business model and the regulatory landscape.

BEST PRACTICE ACTIONS AND RESPONSES TO POTENTIAL MISCONDUCT

There are few more damaging admissions by an institution under prosecution or enforcement review than a failure by the relevant staff to respond properly to concerns about misconduct.

The guidance provides a very valuable measure of what appear to be the most common features of DOJ and SEC FCPA investigations resulting in a declination. Hewing to these prescriptions does not guarantee a beneficial result for a company that finds itself under investigation, but it does put the company in a good position to make credible arguments in support of lenient treatment. Review of the anonymous matters featured in the guidance, coupled with more recent declinations, establish several of the benchmarks below.

- The company discovered or learned of the potential misconduct through its compliance and internal controls program. The company can say it identified potential misconduct through the normal functioning of its compliance and audit programs, which is a powerful argument in support of the efficacy of those programs.
- The company voluntarily disclosed the potential misconduct prior to enforcement authorities learning of the matter. The decision about whether, when and under what circumstances to make a voluntary disclosure to government enforcement authorities is not a simple one. Nevertheless, it is clear voluntary disclosure is almost certainly a prerequisite to a successful argument for a declination.
- The company undertook a thorough internal review and investigation. Once potential misconduct has been uncovered, enforcement authorities will expect that a company seeking a declination will have completed a thorough internal review and investigation. It is not enough to uncover and disclose misconduct. A company needs to answer the broader questions of what happened, why

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it happened and who was responsible. DOJ and SEC FCPA attorneys are experienced and skilled practitioners. They can tell if an investigation has been real and consequential, and whether legitimate questions have been answered.

- The scope and duration of the potential misconduct was modest. A fulsome and effective compliance program should uncover misconduct and act in many instances as an early warning device which prevents greater harm, both to organizational goals and the financial bottom line. Isolated and rogue misconduct is far more likely to earn DOJ and SEC forbearance than misconduct which is rampant or systemic and long-lasting. Companies can point to the identification of smaller, isolated issues as an indicator of the effectiveness of their compliance procedures.

Companies must adapt their compliance programs to fit their business and their markets.

- The company took quick and decisive action to stop the potential misconduct. The company, consistent with its legal and other obligations, should establish that it has expeditiously corrected the problem or program deficiencies that enabled the misconduct, and that all responsible company employees have been disciplined appropriately. This should include a clear explanation of what has been fixed and how, and the specific discipline imposed. The DOJ and the SEC need to believe that the problem will not recur, because any systemic issues have been addressed, and the responsible employees have been retrained or are gone.

A BEST-PRACTICES BENCHMARK

There is no magic bullet companies can use to avoid potential FCPA issues. Moreover, when FCPA problems do arise, there is nothing that can guarantee a declination from the enforcement authorities. There are, however, certain well-proven steps companies can take to reduce the potential for FCPA problems, and to minimize the likelihood that any problems that do arise will result in an enforcement action or a prosecution. This is particularly important in light of the DOJ and the SEC's increased focus on FCPA in recent years.

The guidance provides companies with a best practices benchmark, useful for both continuous maintenance and improvement of compliance programs, and for dealing with interactions with enforcement authorities. The guidance does not break new legal ground, but it is an important road map to help guide companies in a challenging international marketplace.

NOTES

[1] U.S. Dep't of Justice, Criminal Division & U.S. Sec. & Exchange Comm'n, Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

[2] In January 2013, the DOJ and the SEC each notified 3M Co. that they concluded their investigations into possible FCPA violations by the company's Turkish subsidiary without taking action against the company. 3M Co., Annual Report (Form 10-K), at 107-08 (Feb. 14, 2013), *available at* http://www.sec.gov/Archives/edgar/data/66740/000110465913010881/a13-1203_110k.htm. Additionally, in 2012 and 2013, respectively, the SEC and the DOJ notified Nabors Industries that they concluded their inquiries into the company's transactions with Panalpina without taking action against the company. Nabors Industries Ltd., Current Report of Material Events or Corporate Changes (Form 8-K), at 1, *available at* http://www.sec.gov/Archives/edgar/data/1163739/000110465913012117/a13-5515_18k.htm.

[3] *See* Guidance at 77-79.

[4] *Id.* at 61.

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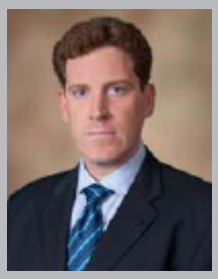
[5] *See, e.g.,* Currency and Foreign Transactions Reporting (Bank Secrecy) Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of 31 U.S.C., 12 U.S.C., and 18 U.S.C.); International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (2013).

[6] Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-crm-534.html; Press Release, U.S. Sec. & Exchange Comm'n, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud, No. 2012-78 (Apr. 25, 2012), *available at* http://www.sec.gov/news/press/2012/2012-78.htm.



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