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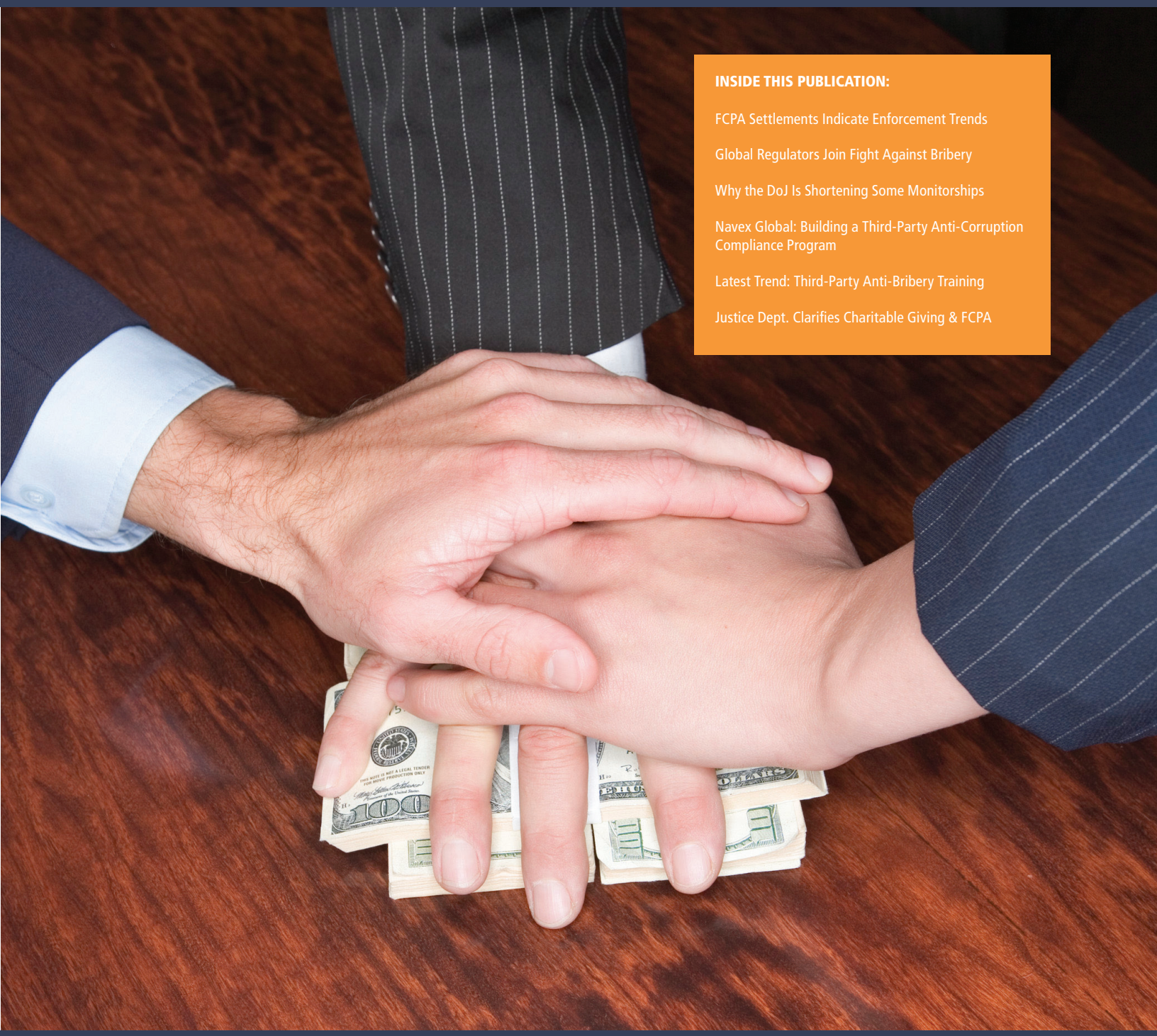

INSIDE THIS PUBLICATION:

Corruption Crackdown

Trends in Bribery and Corruption Enforcement

An e-Book publication sponsored by NAVEX GLOBAL™ The Ethics and Compliance Experts

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Inside this e-Book:

FCPA Settlements Indicate Enforcement Trends

By Jaclyn Jaeger

The Department of Justice and the Securities and Exchange Commission have settled a raft of Foreign Corrupt Practices Act cases in recent months, including agreements with Alcoa, Archer Daniels Midland, Diebold, and Weatherford International. The cases point to some important trends in FCPA enforcement: expanded cross-border cooperation and prosecutions, the emergence of the hybrid corporate monitor, and an upsurge in FCPA fines and penalties.

Taken together, the multitude of recent FCPA enforcement actions speaks volumes about how companies can avoid or minimize liability under the FCPA and reflect the latest thinking of regulators as they pursue these cases. Compliance and legal executives can also use these real-life cases in their compliance and ethics training to deter bribery and corruption practices in the workforce.

For anybody who might have thought that ratcheted-up FCPA enforcement is a passing fad, that question has been answered, says Kevin Abikoff, chair of the anti-corruption and internal investigations group of law firm Hughes Hubbard. "This is the new normal," he says.

Cross-Border Cooperation

One of the most significant developments in FCPA enforcement is the expanded scope of cross-border cooperation in FCPA investigations. "Active FCPA enforcement in the United States is now being paired with active anti-corruption enforcement around the world," says Abikoff.

John Chesley, a partner in the law firm Gibson, Dunn & Crutcher, says coordination among foreign enforcement authorities is "a train that's been moving for a while, but it's starting to see it pick up steam." Jurisdictions where the Department of Justice and the SEC are seeing increased cooperation include countries such as the United Kingdom, Germany, Poland, and others.

The SEC and Justice Department increasingly are receiving cooperation from countries that, until now, have never provided any meaningful assistance. "The Total S.A. resolution is a really good example of that," says John Buretta, a partner with law firm Cravath. In that case, U.S. law enforcement agencies reached their first coordinated enforcement action with French authorities in May 2013 that resulted in the oil and gas giant paying $398 million in an FCPA enforcement action for paying bribes to intermediaries of an Iranian government official.

In some cases, increased cooperation may prove to be beneficial for a company facing an FCPA investigation in multiple jurisdictions, because it can streamline the resolution process. Buretta cites as an example the settlement that food processing giant Archer Daniels Midland reached with the U.S. government in December for FCPA violations.

> "Active FCPA enforcement in the United States is now being paired with active anti-corruption enforcement around the world."
>
> Kevin Abikoff, Chair, Anti-Corruption Investigations Group, Hughes Hubbard

In that case, German authorities reached a parallel resolution with ACTI Hamburg, one of ADM's subsidiaries, to resolve charges that it paid bribes through vendors to Ukrainian government officials to obtain value-added tax (VAT) refunds in violation of the FCPA. As a result of ACTI Hamburg entering into a resolution with German regulators, it saved ADM from having to pay two penalties for that subsidiary, says Buretta.

All of these FCPA enforcement actions that are arising out of these high-risk jurisdictions suggest that companies reduce their FCPA risks by "applying their scarce compliance resources to their highest risk areas first," Abikoff says. In doing so, they will put themselves in a better position than if they were to "try to spread their resources evenly over the entire fabric of their business," he says.

Follow-on Cases

Another significant development in the FCPA enforcement area is the rise of follow-on investigations, in which the SEC and Justice Department will follow up on a company in high-risk areas where its competitors are found to have engaged in corrupt conduct. "I don't get the sense they're targeting industries, but they are certainly following the evidence where it leads, and that sometimes leads to other companies in the same industry," says Buretta.

An example of one recent follow-on case occurred in October, when medical-device company Stryker paid more than $13.2 million to the SEC to resolve civil charges for FCPA violations. In that case, the SEC charged Stryker with violating the FCPA after its subsidiaries in five different countries—Argentina, Greece, Mexico, Poland, and Romania—bribed doctors, healthcare professionals, and other government-employed officials in order to obtain or retain business.

Stryker is one of several in a sweep of medical-device companies to be investigated for FCPA violations. Others have included Koninklijke Philips Electronics, Biomet, Medtronic, and Smith & Nephew.

The SEC and Justice Department are "always looking at cases holistically," says Chesley. "A lot of times it's agent-specific." If one company uses an agent who engaged in bribery,

for example, and five of its competitors are using the same agent, the government likely will come knocking, he says.

Potential FCPA liability also lurks in cases where one company paid a bribe to a government official who is at the center of a government investigation, who also does business with other competitor companies, Chesley adds. "Pay attention to what is going on in your industry," he says.

When a company sees that its competitors are under scrutiny for suspected bribery issues, rather than rejoicing in their misfortunes, Chesley says, "you need to pay attention as to whether that might lead to a knock at your door."

Companies are also paying more to settle FCPA charges. In 2013, the average corporate FCPA resolution, including fines, penalties, disgorgement, and prejudgment interest, reached more than $80 million—a nearly fourfold increase over 2012, according to analysis from Gibson Dunn & Crutcher. Two of the nine corporate FCPA resolutions last year—Total and Weatherford International—join the ranks among the top ten highest FCPA settlements. Furthermore, during remarks at the International Conference on the FCPA in November 2013, Charles Duross, deputy chief of the Justice Department's FCPA unit, warned that companies should expect more significant investigations and resolutions, including "very significant cases, top 10-quality-type cases."

Compliance Monitors

Another significant development in FCPA cases in 2013 was the return of independent compliance monitors in deferred prosecution agreements—in particular, a notable surge in the use of so-called "hybrid" monitorships, where an external monitor is required for 18 months, followed by 18 months of self-reporting by the company.

"Some had suggested that monitors were falling into disfavor," says Abikoff, a compliance monitor appointed by the SEC, Justice Department, and the U.K. Serious Fraud Office. "That's proving to not at all be the case. The government is actually finding supervision through a monitor to be quite an effective way to ensure that companies provoke meaningful change in their compliance programs."

Traditionally, in FCPA cases where the Justice Department required a compliance monitor, it would be for the full three-year term of the agreement. With recent settlements, "we're seeing a lot of nuance between the agreements," says Chesley. That's because the government is "becoming more experienced at this," he says, and they're discovering that a lot of these companies "don't necessarily need a compliance monitor for the full three years."

Out of seven FCPA-related DPAs entered into in 2013, the Justice Department imposed independent compliance monitors on four companies—Diebold, Weatherford, Bilfinger, and Total. Of those companies, Total was the only one to receive a full three-year independent monitor, while the others received a hybrid monitor.

When deciding whether to impose an independent compliance monitor, the Justice Department weighs numerous factors. As demonstrated by several recent FCPA resolutions, some of those factors include the company's ability to remediate its past wrongdoing, the scope and severity of the misconduct. In the Total FCPA resolution, for example, the government made no reference to any remediation efforts.

The most important message for compliance and legal executives is that, "as soon as you enter into an FCPA matter, it's really important to start implementing more robust compliance controls immediately," says Chesley. Putting enhanced compliance controls in place just before a settlement means nothing, because the government is going to want to see how those controls work in practice, he says.

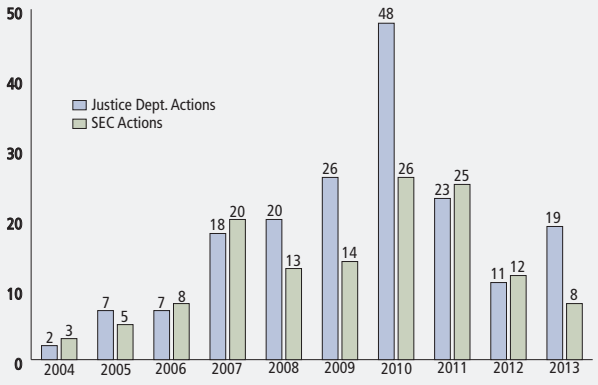
Because a typical FCPA investigation takes a couple of years, "if you implement controls at the start of a probe, you have a couple of years to show how the testing is working before reaching a resolution," Chesley adds. "Under those circumstances, you're much more likely to avoid a monitor."

Looking forward, Chesley says he expects to see more FCPA enforcement actions arising out of the Dodd-Frank whistleblower provisions. "We have not seen an FCPA enforcement case that we can point to yet," he says.

That probably won't be the case much longer; given that Dodd-Frank was passed in 2010, it's likely any whistleblower cases in the pipeline are still under investigation, Chesley adds. "I think we're going to start to see them very soon." ■

FCPA ENFORCEMENT TRENDS

The chart below from Gibson, Dunn & Crutcher shows how many enforcement cases the Justice Department and SEC had in the years 2004 to 2013.



Source: Gibson, Dunn & Crutcher.

Global Regulators Join Fight Against Bribery

By Jaclyn Jaeger

Foreign governments are increasingly tipping off U.S. regulators about possible bribery and corruption cases. Companies have long worried about investigations of potential violations of the Foreign Corrupt Practices Act coming from the Securities and Exchange Commission and the Department of Justice. Now enforcement agencies in other countries may be looking over their shoulders too, as international governments increasingly cooperate on attempts to root out bribery and corruption.

In separate speeches in November at the International Conference on the FCPA, Andrew Ceresney, director of the Securities and Exchange Commission's Enforcement Division, and Deputy Attorney General James Cole stressed that the number of law enforcement partners that the SEC and Department of Justice have around the world continues to grow.

"Over the past five years, we have experienced a transformation in our ability to get meaningful and timely assistance from our international partners," Ceresney said. Furthermore, the pace and extent of such cooperation with foreign agencies will only continue to grow over the coming years, he said.

The expanded scope of cross-border cooperation in FCPA investigations can be attributed, in part, to the enactment of new anti-corruption laws around the world. Brazil, for example, enacted a new anti-corruption law in August that imposes civil liability on companies that pay bribes to any government official, both domestic and foreign.

Canadian authorities significantly expanded the grounds for criminal liability for companies and their directors, officers, and employees under new amendments to Canada's Corruption of Foreign Public Officials Act. China and Russia have also passed new bribery laws recently.

"As other countries step up their efforts to combat corruption, it makes our job easier," Ceresney said. "Countries with strong anti-corruption laws are often great partners to us in combating corruption."

Information-Sharing Practices

The SEC and Justice Department are receiving cooperation from countries that, until now, have never provided any meaningful assistance. For example, U.S. law enforcement agencies reached their first coordinated enforcement action with French authorities last May which resulted in oil and gas company Total paying $398 million in an FCPA enforcement action for paying bribes to intermediaries of an Iranian government official.

"What is happening with more frequency is that when the United States goes to other countries to get assistance in enforcing the FCPA, other countries are being more cooperative in giving them information that is being held in those countries," says Peter White, a partner with Schulte Roth & Zabel. Cross-border cooperation has streamlined the way in which U.S. prosecutors conduct FCPA probes, he says.

Working closely with the U.K. Serious Fraud Office over the past several years, for example, has allowed the SEC and Justice Department "to better leverage resources and coordinate investigations," said Ceresney. In 2010, a parallel investigation conducted by U.S. and U.K. authorities resulted in chemical company Innospec paying a $40 million global settlement for violations of the FCPA.

Sharing Enforcement Practices

One way that U.S. prosecutors are succeeding in fostering global information-sharing practices is by "sharing our experience and knowledge with our foreign counterparts," said Cole. The Justice Department's FCPA Unit, for example, has been conducting training on anti-corruption enforcement in several countries around the world, including Japan, Brazil, and Mexico.

"For the first time ever, you have FBI agents going abroad and working with international authorities on anti-bribery cases," says Joseph Spinelli, managing director in the global investigations and compliance practice at Navigant Consulting and global leader of its anti-bribery and corruption-FCPA segment. Such collaboration on FCPA investigations did not exist just a few years ago to the extent it does now, he says.

Earlier this year, the Justice Department, in conjunction with the SEC and FBI, hosted the first-ever Foreign Bribery and Corruption Training Conference for international law enforcement, which included representatives from over 50 law enforcement and regulatory agencies from 30 different countries. The goal of the training course was "to exchange ideas and best practices on combating foreign corruption," said Cole.

"The conference strengthened relationships among regulators and informed international officials about the latest developments in investigative techniques and multilateral requests for assistance," said Ceresney. "The more we can foster this sort of international cooperation, the more we can be successful in prosecuting FCPA cases."

The OECD Convention on Combating Bribery of Foreign Public Officials has also helped drive increased cooperation, says James Tillen, vice chair of the international department at law firm Miller & Chevalier. "That process has been very helpful in forging connections between prosecutors in different jurisdictions," he says. "Through that, they establish relationships that make getting information and evidence from different countries much easier."

While the increased cooperation could increase the number of FCPA prosecutions, it could also cut down on the number

of simultaneous investigations by several jurisdictions, which can be a nightmare for companies, says Tillen. In some cases, either one country will take a lead in an anti-corruption case, or take a combined approach.

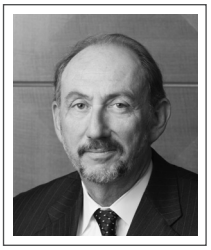
The trouble is that U.S. prosecutors don't have those close-knit relationships with every country, Tillen adds, so it could result in follow-on enforcement actions arising out of an initial pleading. "That's happened quite a few times with the Nigerian government seeking penalties and fines from companies after settling with the United States for activity that occurred in Nigeria," he says.

China, where many companies get tripped up for violating the FCPA, is another country that presents unique compliance risks for U.S. companies, especially since China has expressed its intent to step up enforcement efforts, says Tillen. "Those developments could prove significant for U.S. companies that are subject to both FCPA and Chinese law when they're facing prosecutions in both countries," he says. The United States doesn't have that same history of collaboration with China as it does with the OECD countries, "so that's something to watch," he says.

In response to increased global cooperation in anti-corruption investigations, multinational companies have begun to reevaluate the way they assess their global risks. The way multinational firms used to perform risk assessments would be to identify their highest risk countries and then formulate anti-corruption policies and procedures around that assessment.

"Now, more so than ever before, they have to do a global risk assessment in all the various jurisdictions throughout the world where they're conducting business, or having third-party intermediaries conducting business," says Spinelli.

George Terwilliger, a partner with law firm Morgan Lewis, is observing a similar change in approach. "Most large companies with well-developed compliance programs are now looking to understand what their obligations are to comply with anti-corruption laws in the countries in which they operate," he says. They're seeking to better understand not only the laws themselves, but also the enforcement environment in order to better structure their compliance programs accordingly, he says.


Terwilliger

For a multinational firm to resolve a cross-border bribery investigation as efficiently as possible, the first step is to identify the lead agency, says White. "Sometimes you have multiple sovereignties going after the same investigative information at the same time," he says. "To deal with that responsibly, you have to be responsive to all of them."

"There is not a simple way through that process," White adds. "The only thing you can do is to keep close track of who needs what, and try to satisfy and cooperate with all those domestic agencies."

Tillen says that requires a high level of coordination among legal teams in multiple jurisdictions to ensure that all factors are taken into account on how to conduct the investigation and how to negotiate with authorities to resolve it.

Even where many countries are not actually engaging in enforcement actions of any substance, increased monitoring activities alone have succeeded in "shaming countries into action, and that likely will continue," says Tillen. "More countries will prosecute their laws, and that will lead to more collaboration between the United States and prosecutors of other countries, and may lead to corporations facing more exposure in more countries." ■

INTERNATIONAL TRENDS

Below is an excerpt from SEC Co-director of the Enforcement Division Andrew Ceresney's keynote address at the International Conference on the FCPA.

Obviously, evidence in many FCPA cases resides in foreign countries and in many instances, it is only with the assistance of local authorities that we are able to obtain evidence necessary for us to prove FCPA violations. We are having greater success working with the international community to receive documents and other types of foreign assistance. For example, over the past several years, we have worked closely with the United Kingdom Serious Fraud Office, which has allowed us to better leverage resources and coordinate investigations. Through this relationship, we conducted a parallel investigation of Innospec, which led to a $40 million global settlement in March 2010, and we coordinated the investigation of Johnson & Johnson, which resulted in a $70 million settlement with U.S. authorities in April 2011. Similarly, just this year, the SEC and DoJ announced the first coordinated action by French and U.S. authorities in the Total case.

In fact, earlier this year, the SEC, in conjunction with the DoJ and FBI, hosted the first-ever Foreign Bribery and Corruption Training Conference for international law enforcement, which included representatives from over 50 law enforcement and regulatory agencies from 30 different countries. The conference strengthened relationships among regulators and informed international officials about the latest developments in investigative techniques and multilateral requests for assistance. The more we can foster this sort of international cooperation, the more we can be successful in prosecuting FCPA cases.

Source: SEC.

Why the DoJ Is Shortening Some Monitorships

By Thomas Fox
Compliance Week Columnist

One of the significant developments in Foreign Corrupt Practices Act enforcement in 2013 was what appears to be a subtle, yet significant, shift in the Justice Department's use of external corporate monitors under deferred-prosecution agreements.

There has been significant debate about the use of external monitors over the past few years, and in the last year the Department of Justice crafted a new form of monitorship that may help to answer some of these criticisms through a mechanism that fosters the Justice Department's goal of compliance with the terms and conditions of corporate FCPA resolutions. Mike Volkov, a defense attorney and former federal prosecutor, wrote that the "DoJ's flexibility on this issue has given it some breathing room to impose more stringent compliance requirements on companies."


Thomas Fox
Columnist

The use of an external monitor in any FCPA resolution had traditionally been for either the full term of the settlement—usually three years—or no external monitor required. Several FCPA resolutions allowed companies to self-monitor their compliance within the DPA and report to the Justice Department at regular intervals, typically annually. It was not the conduct that involved the underlying FCPA violation that appeared to be the deciding factor, but rather the company's actions during the FPCA investigation and leading up to the enforcement actions that led to the decision to require a corporate monitor or not.

In four FCPA enforcement actions over the past two years, however, the Justice Department has agreed to a monitorship of only 18 months, while the term of the DPA was three years. In February 2012, for example, medical device company Smith and Nephew entered into a three-year DPA for its FCPA violations, but was only required to install a corporate monitor for 18 months. In this matter, the company had used distributors as a mechanism for paying bribes to doctors and hospital officials to obtain sales of the company's products. Due to the company's extraordinary cooperation and extensive remediation, however, it received a 20 percent discount off the low end of the fine range as set out in the U.S. Sentencing Guidelines.

In March 2012, Biomet, a medical instruments manufacturer, also entered into a three-year DPA that included a corporate monitorship of 18 months. The Justice Department prominently cited the company's self-disclosure, extraordinary cooperation, and extensive remediation in the agreement. As with Smith and Nephew, these factors were enough to earn Biomet a 20 percent discount off the low end of the fine range.

After these two agreements to require a corporate monitor for only half the length of the DPA, the DoJ resumed its either-or dichotomy on monitors; it either required an external monitor for the entire length of the DPA or the settling company was allowed to self-monitor its progress of compliance with the DPA and report back to the Justice Department.

Two cases from last spring seemed to demonstrate what the Justice Department considered when making a decision on whether to require an external monitor. The first was the DPA with Parker Drilling. This case involved some very bad circumstances, with documented C-suite and outside counsel involvement in the bribery scheme. Yet no external monitor was required. The answer would seem to have been due to the cooperation and extensive remediation by the company during the pending FCPA investigation and enforcement action. The lack of an external monitor requirement spoke directly to the commitment of the company to compliance, and to the quality of its compliance program moving forward.

The Parker Drilling FCPA settlement can be contrasted with the resolution of the Total SA FCPA enforcement action to show the types of conduct that the Justice Department and Securities and Exchange Commission take into account when making a decision to require an external monitor. While executives at Total may not have acted as egregiously as those at Parker Drilling, its ongoing cooperation and remediation appear to have been several steps below that of Parker Drilling. For its lack of effort, Total was required to have an external monitor for both the DPA secured with the Justice Department and the civil action filed by the SEC.

Interestingly, there was little discussion by the compliance community of this shortened length of monitorship or demonstration of increased flexibility. This changed in a fairly dramatic manner, when Diebold settled an FCPA enforcement action in October through a DPA with the Justice Department and a civil complaint with the SEC that specified an 18-month requirement for an external monitor.

The bribery conduct of Diebold was longstanding and apparently well recognized in the company. Yet, after the investigation commenced, the company engaged in extensive remediation. While there was not the significant reduction off the low end of the fine range demonstrated in the Biomet and Smith and Nephew cases, the Justice Department clearly had some confidence that Diebold only needed 18 months to demonstrate its compliance with the terms and conditions of the DPA and its continued commitment to compliance.

In December, Weatherford settled a long FCPA investigation that also included charges of export control violations

There have now been four examples of an external monitorship at a time frame one-half of the term of the DPA. These shortened lengths have been in a variety of industries, including medical devices, ATMs, and the energy service industry.

and violations of the Oil-for-Food program. The conduct of the company had been quite serious in terms of violations of these statutes and its cooperation with the Justice Department had certainly been less than sterling, with the destruction of documents and attempts to hide company employees who were in fact witnesses, from government investigators.

Nevertheless, the company made a significant turnaround not only with its cooperation but in its attitude toward compliance. It brought in a top-notch chief compliance officer, who greatly expanded the company's compliance program and compliance function. Through these efforts, the company was able to get a shortened 18-month external monitor period.

There have now been four examples of an external monitorship at a time frame one-half of the term of the DPA. These shortened lengths have been in a variety of industries, including medical devices, ATMs, and the energy service industry. The key elements in each of these cases were not only the far-reaching cooperation by the company involved, but extensive remediation of its compliance program and function. The DPAs also point to a key feature of a "best practices" compliance program that the Justice Department has focused on recently: compliance programs that are designed to not only detect but prevent FCPA violations going forward.

Another significant point raised by the use of these shortened periods for external monitorships is flexibility. Clearly the Justice Department is responding to some of the criticisms regarding monitors over the past few years. Brandon Santos, in an article entitled "DPAs, NPAs and the Hybrid Corporate Monitor," said that "DoJ FCPA unit head Chuck Duross spoke favorably about this new approach regarding the length of external monitorships at the 2013 ACI International Conference on the Foreign Corrupt Practices Act" due to the flexibility it can bring when crafting a DPA to meet its needs and requirements in enforcement of the FCPA.

This new type of external monitorship shows the Justice Department will consider novel or at least new arguments when addressing resolutions of FCPA enforcement actions. For the attorney negotiating the terms of a DPA, creative advocacy still plays a large role. For the in-house compliance practitioner, this means that the more and greater remediation that you engage in during the pendency of an FCPA investigation, the more likely it will pay off in reduced costs at the end of the day. More than simply remediation, however, it will be the quality of your remediation which the Justice Department will judge, together with your commitment to doing business in compliance with the FCPA going forward. All of these factors should lead the compliance community to embrace this new development in the length of external monitorships. ■

Thomas Fox has practiced law in Houston for 30 years. He is now an independent consultant, assisting companies with FCPA and compliance issues. He was most recently the general counsel at Drilling Controls Inc., a worldwide oilfield manufacturing and service company. He was involved with compliance investigations, audits, and drafted policies, and he led training on all facets of compliance, including FCPA, export, anti-boycott, and commercial operations training. He was previously division counsel with Halliburton Energy Services Inc., where he supported Halliburton's software division and its largest division, then named Drilling Formation and Evaluation Division, worldwide.

Fox has the award winning Blogsite, FCPA compliance and ethics blog, and podcast, "The FCPA Compliance and Ethics Report." He has authored several books on compliance and ethics, including the bestseller, "Lessons Learned on Compliance and Ethics"; the award-winning "Best Practices Under the FCPA and Bribery Aand Bribery Act"; and the recently released "Anti-Bribery Leadership," with Jon Rydberg. He also lectures nationally and internationally on anti-corruption and anti-bribery compliance programs.

He can be reached at tom.fox@complianceweek.com.

RECENT FOX COLUMNS

Below are some recent columns by Compliance Week Columnist Thomas Fox. To read more from Fox, please go to www.complianceweek.com and select "Columnists" from the Compliance Week toolbar.

Facilitation Payments: Bribery or Business as Usual
Companies still struggle mightily when crafting policies that address the use of facilitation payments. Although the payments are exempt from Foreign Corrupt Practices Act enforcement, that doesn't mean they are completely legal. Columnist Thomas Fox examines the laws and legal decisions that apply to facilitation payments.
03/18/14

Justice Dept. Sheds Light on Charitable Giving & FCPA
Charitable giving in foreign countries has always been a thorny issue, since companies fear that it could lead to Foreign Corrupt Practices Act charges. Late last year the Justice Department provided insight on how it views the topic with an opinion release in which it addressed a scenario where it would not consider charitable giving to violate the FCPA. Columnist Thomas Fox considers the Justice Department's reasoning and what it means for FCPA compliance.
02/19/14

Building a Third-Party Anti-Corruption Compliance Program

Randy Stephens, Vice President, Ethical Leadership Group, NAVEX Global.

The recent examples of compliance program credits for Morgan Stanley and Ralph Lauren have demonstrated that, more than ever, an effective compliance program can protect a company from criminal indictment and generate bottom line benefits by helping a company avoid or reduce fines and penalties. The Foreign Corrupt Practices Act blog, a watchdog for stories related to FCPA violations, says the most expensive violations have involved bribery, corruption, and elaborate schemes to defraud company stakeholders. Much of the recent enforcement action has been focused on liability for bribery and corruption actions performed by third parties on behalf of another company. When it comes to third-party corruption, many compliance program leaders worry that they don't know where to start on a third-party compliance program and that they cannot afford the elaborate, richly funded programs that are so often profiled in the news.

Luckily, you don't have to have a legion of compliance personnel and an unlimited budget to meet standards recently outlined in "A Resource Guide to the U.S Foreign Corrupt Practices Act" (FCPA Guidance) provided by the United States Department of Justice (DoJ) and Securities and Exchange Commission (SEC).

The good news is that almost every company has some, many or all of the elements of an effective third-party compliance program. The challenge is to identify what you have. Next, document your program elements and, finally, develop and implement a work plan for addressing gaps.

Step 1: IDENTIFY AND PRIORITIZE

Identify and prioritize all of your third parties. This is not as easy as it sounds. Depending on your company's business, size, and complexity, the number of third parties could range from the hundreds to the hundreds of thousands! Cast a broad net and include anyone who represents your company, especially with foreign government officials. Don't limit your search to suppliers, agents, and distributors.

Step 2: ASSESSMENT

Now that you have identified your universe of third parties, you have to develop a process for assessing and assigning risk to each third party. The FCPA Guidance offers the "guiding principles" the DoJ and SEC have outlined for an effective third-party compliance program.

Risk-Based Due Diligence

For myriad financial and flexibility reasons, companies are relying more and more on third parties. The recent waves of FCPA enforcement actions demonstrate that third parties are often the source of inappropriate payments under the FCPA. The FCPA Guidance makes it clear that a risk-based due diligence process will be considered when assessing the effectiveness of a company's compliance program. Luckily, "… the degree of appropriate due diligence may vary based on industry, country, size, and nature of the [third-party] transaction, and the historical relationship with the third party …" So one size doesn't have to fit all, but you need to have some level of documented risk-based due diligence commensurate with your risk.

What Does Risk-Based Due Diligence Look Like?

Qualified third parties: The obligation is on the company to make sure that it understands the qualifications and responsibilities of third parties it engages. FCPA Guidance states that "the degree of scrutiny should increase as red flags surface."

What are some issues which might be considered "red flags?"

- Industry
- Corruption Index for the country in which the third party is operating
- Large size or sensitive nature of the transaction
- No history of past relationship with the third party
- Abnormally high commission or compensation
- Lavish gifts and entertainment expenses
- Third parties making unexpected, unreasonable or illogical decisions

» Unusually smooth processing of matters where the individual does not have the expected level of knowledge or expertise

Business rationale for using the third party: The company should understand why a third party is needed for the engagement and ensure that the third party has reasonable expertise and compensation for the engagement. A best practice utilized by many companies is to have a business sponsor assigned to each third party.

Step 3: RISK MITIGATION AND ACTION STEPS

Once you have identified all of your third parties, you need to ensure that you are managing your program and mitigating your risks. This is going to require some level of due diligence for each third party and watching for red flags or risks which need to be mitigated. This means checking multiple sanction or watch lists, adverse publicity, and knowing the principals of the third party and the possibility that they may have relationships with foreign officials, etc. This may be done in-house if you have a limited number of third parties, but a preferable approach in cases where you engage either a large number of third parties or third parties who are spread globally is to use an automated provider who can swiftly and completely conduct the appropriate level of due diligence on all of your third parties.

What event might trigger a risk that needs to be mitigated or addressed?

» On-boarding new relationships

» Screening existing relationships

» Alerts:

- Change of control
- New adverse media
- Change in sanctions list presence

Step 4: ONGOING MONITORING AND AUDITING

The FCPA Guidance explicitly states that one guiding principle of third party due diligence is that "companies should undertake some form of ongoing monitoring of third-party relationships."

So even if you have a third-party program it can't be a "one and done" process. Even if your due diligence did not turn up any red flags or issues with your existing or newly on-boarded third parties, you can't close the book. Things change. With any effective compliance program, one of the critical factors is regular monitoring and auditing to ensure that nothing new has arisen which might change the risk profile.

Consider:

» Regular updating of previous due diligence

» Ensuring that the contract provides for audit rights, and exercising audit rights when appropriate

» Providing or ensuring that the third party is receiving periodic training on anti-bribery and your company's policies on anti-bribery and corruption, gifts and entertainment, and accurate record-keeping

Conclusion

An effective third-party compliance program for every company does not require a huge budget or a large staff and a sophisticated, mature program. You do, however, need to have a program in place that is reasonable for the level and types of risks your company faces in its dealings with third parties. You have to start with identifying the size and scope of your third-party universe. Then conduct a risk assessment and a risk-based due diligence process.

Regularly follow up and monitor your third parties and your third-party compliance program to ensure that you are catching and addressing any new risks.

Above all, seek third-party expertise when you can, document your process, and have a compliance work plan to address any gaps you may currently have. Having a third-party compliance program in place, however basic and recently-implemented it might be, can still offer some element of defense in the event of a compliance failure by one of your third parties; having no program at all, however, will offer no protection. The sooner you start and the more closely you follow the guiding principles of the FCPA Guidance, the stronger and more legitimate your defense. ■

Latest Trend: Third-Party Anti-Bribery Training

By Jaclyn Jaeger

Companies are becoming more insistent that third parties they do business with provide their employees with anti-corruption training, and they want more say in exactly how that training is conducted.

The move is part of a shift where companies are increasingly turning the guidelines they have traditionally provided to third parties on anti-corruption and anti-bribery compliance into guardrails that are a condition of doing business.

Microsoft, for example, announced late last year that as of January 2014 all of its business partners worldwide must certify that they're in compliance with Microsoft's Anti-Corruption Policy for Representatives and must further provide anti-corruption training to all their employees who resell, distribute, or market Microsoft products or services.

Companies such as BT Group, Cisco, and IBM have also made compliance training a requirement for third parties, such as resellers and joint-venture partners, if they want to do business with the companies. "I expect to see it more and more as a best practice," says Randy Stephens, vice president of Advisory Services at Navex Global.

Traditionally, anti-corruption and anti-bribery training of third parties has been a weakness for many compliance departments. According to an anti-bribery and corruption benchmarking report conducted by Compliance Week and Kroll Advisory Solutions, for example, 47 percent of 260 ethics, compliance, and audit executives polled said they conducted no anti-corruption training with their third parties at all.

The move to demand anti-corruption training for third parties comes as many companies that face investigations or charges of violating the Foreign Corrupt Practices Act are finding the trouble comes not from actions of their own employees, but from actions of those at a third party they are affiliated with.

The Department of Justice and the Securities and Exchange Commission, for example, are investigating Microsoft for potential violations of the FCPA, the *Wall Street Journal* reported. The agencies are reportedly investigating allegations as to whether Microsoft partners paid bribes to government officials in several countries, including China, Russia, Pakistan, Romania, and Italy, in exchange for contracts.

In response to the allegations, Microsoft's Vice President and Deputy General Counsel John Frank, says, "We take all allegations brought to our attention seriously, and we cooperate fully in any government inquiries. Like other large companies with operations around the world, we sometimes receive allegations about potential misconduct by employees or business partners, and we investigate them fully, regardless of the source."

"In a company of our size, allegations of this nature will be made from time to time," says Frank. "It is also possible there will sometimes be individual employees or business partners who violate our policies and break the law. In a community of 98,000 people and 640,000 partners, it isn't possible to say there will never be wrongdoing."

"Our responsibility is to take steps to train our employees, and to build systems to prevent and detect violations, and when we receive allegations, to investigate them fully and take appropriate action," Frank adds. "We take that responsibility seriously."

According to a Microsoft spokesman, "anti-corruption training is fairly common among most, if not all, IT vendors with their partner communities." If partners have not provided training on anti-corruption laws, however, they either must agree to do so, or must participate in training that Microsoft will make available to them, the company stated. Microsoft's Partner Network Disclosure Guide did not specify what specific course material will be provided to partners, or what the potential costs might be.

BT's Training Requirement

Aside from Microsoft, other companies across industries and across geographies are also now requiring their third parties to undergo anti-corruption training, including London-based telecommunications giant BT Group.

Similar to Microsoft, BT Group also provides training to its third parties on the company's anti-bribery and anti-corruption policies and practices if they do not currently have training in place. "In some cases, the third parties themselves would have good evidence of the training they have in place for anti-corruption and bribery," says Bruno Jackson, director of compliance operations at BT Group.

Cisco also has a firm requirement that third parties ensure employees get anti-corruption training that meets with the networking equipment maker's standards. Cisco "requires our channel partners, distributors, and sales-supporting consultants to complete anti-corruption training." Cisco provides the training, which is available in multiple languages, as an online course.

Then there are other companies that promote third-party anti-corruption training as a strong recommendation rather than a full-on requirement. Oracle, for example, states on its Website that, prior to executing a distribution agreement, the company "strongly encourages" its partners to confirm their understanding of Oracle's business ethics practices by taking its anti-corruption training and passing a short skill assessment.

Siemens "invites" its third parties to take part in the company's training sessions, which are conducted by compliance

officers. "We are mainly focused on anti-corruption, anti-trust, data protection, facilitation payments—all kinds of conduct that can strongly effect us in terms of reputation and financial risks, and in terms of values," says Claudia Maskin, regional compliance officer for German engineering giant Siemens, Argentina.

Many compliance executives say just getting third parties to voluntarily commit to a company's principles of ethics and compliance can be a challenge, never mind making it a requirement. "The most challenging part is the preliminary stage of making the business partners aware that they have to fulfill their anti-corruption obligations," says Deborah Luchetta, compliance officer and head of legal for Mercedes Benz Argentina, a subsidiary of Daimler.

Maskin agrees that the first step is getting third-party affiliates to understand the risks. "Sometimes when a global company does business in a high-risk region—such as Argentina—local business partners aren't always aware of the broader reputational and financials risks posed to a company that is found in violation of anti-corruption laws," she says.

Getting Due Diligence Started

Third-party liability is "only going to bedevil compliance officers even more in the coming years," says Stephens. As a result, companies that are not yet requiring their third parties to take anti-corruption training cannot afford to do nothing at all. "Do something," he advises.

Many compliance executives agree that third-party risk mitigation done right starts with the initial screening process. For example, Siemens has embedded into its business processes a "business partner compliance tool," an automated process that ranks business relationships by risk category. "We perform a very deep analysis," says Maskin.

The type of information Siemens analyzes includes former incidents of litigation, relationships with foreign government officials, whether the potential business partner has been charged with corruption in the past, and other red flags. Integrated into the compliance tool is a standard set of due-diligence questions, based on whether the business relationship is categorized as low, medium, or high risk.

BT similarly employs a thorough inspection process before bringing any business partner on board, says Jackson. One way BT achieves that is by subscribing to various third-party databases that automatically scan potential business partners against government watch lists and alerts BT whenever it comes across an entity that has been associated with corrupt activity in the past, he says.

The depth of the due diligence questions posed to a third party "depend on the risk profile of each business partner," says Jackson. Those categorized as high risk—such as the 350 agents BT engages with—go through an "enhanced due diligence" process, which involves a "deep dive to find out everything we can about those particular individuals," he says. "At times, we won't get into relationships if we're not comfortable about the risks or exposure."

Many companies still regard third-party risk mitigation as an "all-or-nothing approach," says Stephens. "They think they have to do the same level of due diligence around every single third party. That's not the case." ■

TRAINING AND CONTINUING ADVICE

Below is an excerpt from the FCPA Resource Guide in which the Department of Justice and the Securities and Exchange Commission discuss the importance of anti-corruption training:

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, the Department of Justice and the Securities and Exchange Commission will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents, and business partners.

For example, many larger companies have implemented a mix of web-based and in-person training conducted at varying intervals. Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies.

Regardless of how a company chooses to conduct its training, however, the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language. For example, companies may want to consider providing different types of training to their sales personnel and accounting personnel with hypotheticals or sample situations that are similar to the situations they might encounter.

In addition to the existence and scope of a company's training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company's ethics and compliance program, including when such advice is needed urgently. Such measures will help ensure that the compliance program is understood and followed appropriately at all levels of the company.

Source: The FCPA Guidance.

Justice Dept. Clarifies Charitable Giving & FCPA

By Thomas Fox
Compliance Week Columnist

Charitable giving in foreign countries has always been a thorny issue for companies, since they fear that the giving could give way to allegations of violating the Foreign Corrupt Practices Act. This difficulty can be compounded when a company is designing and implementing a full corporate social responsibility strategy.

The FCPA forbids firms from making charitable contributions directed by foreign officials as a way to win or keep business. Late last year the Department of Justice shed some light on the topic when it issued its only opinion release of 2013 in which it addressed a scenario where it would not consider an act of charitable giving to raise potential FCPA violations.

In addition to providing significant information to the compliance practitioner for charitable donations going forward, I believe the opinion release will provide guidance to U.S. companies, which desire to have a corporate social responsibility component in a foreign country.

A CSR component can take many forms, including a U.S. company acting as a funding angel for indigenous start-up businesses, and training of locals to be more than simply employees and contractors to a U.S. company, but also training in how to set up and run a business. Clearly if a local workforce is to become skilled it will need specific training. The CSR can also include funding of local charities, organizations, or projects such as buying computers for a local school.

Thomas Fox
Columnist

Many U.S. companies, however, fear running afoul of the FCPA by engaging in such activities. For instance, particularly in the energy industry, skilled training is delivered at a much higher level here in the United States than in, say, Africa. This means that officials, employees, or others involved in national oil companies need to come to the United States for training, with all the attendant expenses. Many companies, however, fear such activity will run afoul of the FCPA and draw scrutiny from the Department of Justice. Yet such activity benefits not only the U.S. company that provides it but the U.S. government in general and the overall positive perception of American business. This perception is not something to be discounted.

As set out in a recent Department of Justice opinion release, a partner with a U.S. law firm, who requested the opinion, represents an undisclosed foreign country in various international arbitrations, referred to as "Foreign Country A" in the release. This business relationship has enabled the law firm to bill Foreign Country A more than $2 million throughout the past 18 months; it is further anticipated that in 2014, the fees on matters for Foreign Country A will exceed $2 million. During the course of representation, the lawyer has become a personal friend of a foreign official who works in Foreign Country A's Office of the Attorney General.

This foreign official's daughter suffers from a severe medical condition that cannot effectively be treated in Foreign Country A or anywhere in the region. The physicians treating the foreign official's daughter have recommended that she receive inpatient care at a specialized facility located in another foreign country. The lawyer who requested the opinion reports that the treatment will cost between $13,500 and $20,500 and that the foreign official lacks financial means to pay for this treatment for his daughter. The requestor has proposed to pay the medical expenses of the daughter of this foreign office.

The attorney made the following representations in submitting the request for an opinion release.

- The requestor's intention in paying for the medical treatment of the foreign official's daughter is purely humanitarian, with no intent to influence the decision of any foreign official in Foreign Country A with regard to engaging the services of the law firm, requestor, or any third person.
- The funds used to pay for the medical treatment will come from the requestor's own personal funds. The requestor will neither seek nor receive reimbursement from the law firm for such payments.
- The requestor will make all payments directly to the facility where the foreign official's daughter will receive treatment. Her father will pay for the costs of his daughter's related travel.
- Foreign Country A is expected to retain the law firm to work on one new matter in the near future. Requestor is presently unaware of any additional, potential matters as to which Foreign Country A might retain his law firm. However, if such a matter develops, the requestor anticipates that Foreign Country A would likely retain the law firm given its successful track record and their strong relationship.
- Under the law for Foreign Country A, any government agency, such as the Office of Attorney General, that hires an outside law firm must publicly publish a reasoned decision justifying the engagement. It is a crime punishable by imprisonment under the penal code of Foreign Country A for any civil servant or public employee to engage in corrupt behavior in connection with public contracting.

In addition to the representations made by the lawyer, there was also information presented which showed that the foreign official and requestor have discussed this matter transparently with their respective employers. Both the government of For-

eign Country A and the leadership of the law firm have expressly indicated that they have no objection to the proposed payment of medical expenses. Additionally, the attorney has provided a certified letter from the attorney general of Foreign Country A that represents the following:

- The decision by the requestor to pay for or not to pay for this medical treatment will have no effect on any current or future decisions of the Office of the Attorney General in deciding on the hiring of international legal counsel.
- In the opinion of Foreign Country A's attorney general, the payment of medical expenses for foreign official's daughter under these circumstances would not violate any provision of the laws of Foreign Country A.

In its analysis, the Justice Department noted that "A person may violate the FCPA by making a payment or gift to a foreign official's family member as an indirect way of corruptly influencing that foreign official. However, "the FCPA does not per se prohibit business relationships with, or payments to, foreign officials." Rather "the department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal." (Citations omitted.)

While that statement provides insight into the department's thinking, I found the meat of the analysis to be the following line of the opinion release: "The facts represented suggest an absence of corrupt intent and provide adequate assurances that the proposed benefit to foreign official's daughter will have no impact on requestor's or requestor's law firm's present or future business with Foreign Country A." While the Justice Department had previously recognized that charitable giving does not necessarily violate the FCPA, the opinion release had several factors that are worth highlighting for the compliance practitioner.

- **No role in obtaining or retaining business:** The foreign official involved does not play any role in the decision to award Foreign Country A's legal business to law firm.
- **Full transparency:** Both the requestor and foreign official informed their respective employers of the proposed gift, and neither has objected.
- **The gift is not illegal under local law:** The attorney general of Foreign Country A has expressly stated that the proposed gift is not illegal under Foreign Country A's laws. This is further reinforced by Foreign Country A's public contracting laws, which require transparent reasoning in contracting for legal work and criminally punish corrupt behavior.
- **Direct payment to third-party provider:** The lawyer will pay the medical provider directly, ensuring that payments will not be improperly diverted to the foreign official.

I believe that the opinion release demonstrates once again that there is significant room for creative lawyering in the realm of FCPA compliance. Obviously the Justice Department responded favorably with its final decision that it would not prosecute under the facts presented to it. For the compliance practitioner, there are several important lessons beyond simply noting that you are limited only by your legal imagination.

First, and foremost, transparency rules the day. The lawyer and foreign official openly discussed this issue with their employers and superiors. One or both of them went to the attorney general of the country in question and sought an opinion on the legality of the payment of medical expenses so there was visibility at the highest levels of the undisclosed foreign country's government in addition to confirmation that the gift was in fact legal under the laws of the country involved. Another important point is that the foreign official in question did not have decision-making authority over the law firm obtaining or retaining business. Finally, the direct payment to the third-party provider is always a critical element that should not be overlooked.

I understand and appreciate that this opinion release is limited to the facts and circumstances of the given case, but it nonetheless gives compliance practitioners excellent continued guidance on how to think through charitable donations under the FCPA. ■

Thomas Fox has practiced law in Houston for 30 years. He is now an independent consultant, assisting companies with FCPA and compliance issues. He was most recently the general counsel at Drilling Controls Inc., a worldwide oilfield manufacturing and service company. He was involved with compliance investigations, audits, and drafted policies, and he led training on all facets of compliance, including FCPA, export, anti-boycott, and commercial operations training. He was previously division counsel with Halliburton Energy Services Inc., where he supported Halliburton's software division and its largest division, then named Drilling Formation and Evaluation Division, worldwide.

Fox has the award winning Blogsite, FCPA compliance and ethics blog, and podcast, "The FCPA Compliance and Ethics Report." He has authored several books on compliance and ethics, including the bestseller, "Lessons Learned on Compliance and Ethics"; the award-winning "Best Practices Under the FCPA and Bribery Aand Bribery Act"; and the recently released "Anti-Bribery Leadership," with Jon Rydberg. He also lectures nationally and internationally on anti-corruption and anti-bribery compliance programs.

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