

The Role of Compliance in FCPA Enforcement

In November, Assistant Attorney General Leslie R. Caldwell announced that the Department of Justice (DOJ) had added three new squads to the Federal Bureau of Investigation's International Corruption Unit and was in the process of adding 10 prosecutors to the DOJ Fraud Section's Foreign Corrupt Practices Unit. The additional resources erased any doubt in the business community that FCPA enforcement would continue to be a high priority for the DOJ for the foreseeable future.

Perhaps more interesting was Caldwell's discussion of a single new hire: Hui Chen has experience in both the public and private sectors and was brought on board specifically to critique corporate compliance programs and to ensure the strength of these programs going forward. Andrew Weissmann, chief of the DOJ's Criminal Division Fraud Section, explained, "It can make us more adept at evaluating corporate claims about compliance....One important way to do that is to empower a robust compliance function within organizations. We can play a big role in fostering that development."

The Securities and Exchange Commission (SEC) also increased its focus on both the FCPA and on corporate compliance programs. Although the SEC's FCPA unit was formed only in 2010, it has substantially increased FCPA prosecutions over the past two years. Through March 2016 alone, the SEC brought nine FCPA enforcement actions, compared to three brought by the DOJ. Like the DOJ, the SEC has publicly discussed the importance of corporate compliance programs. Andrew Ceresney, the director of enforcement for the SEC, noted in a 2015 speech that "[t]he best way for a company to avoid...violations...is a robust FCPA compliance program. I can't emphasize enough the importance of such programs....The best companies have adopted strong FCPA compliance programs that include compliance personnel, extensive policies and procedures, training, vendor reviews, due diligence on third-party agents, expense controls, escalation of

red flags, and internal audits to review compliance."

Recent enforcement actions by the SEC and the DOJ highlight the benefits—and risks—of corporate compliance programs. Done well, compliance can be of significant benefit. But done poorly, compliance programs may bring the company additional penalties.

An Aggravating Factor

In May 2015, the SEC announced a \$25 million settlement of an enforcement action with BHP Billiton Ltd. (BHP), one of the world's largest mining companies. The SEC accused BHP of violating the FCPA by inviting government officials—primarily from Africa and Asia—and their guests to attend the 2008 Olympic Games in Beijing at BHP's expense. In addition to providing complimentary tickets to the Games, BHP allegedly paid for accommodation packages for its guests valued at as much as \$16,000 per package, which included luxury suites, spa packages, and sightseeing tours.

At the time of the 2008 Olympics, BHP had published a "Guide to Business Conduct" that technically prohibited bribery and other suspicious dealings. To further bolster its compliance program, BHP had a compliance committee structure in place. BHP required managers attending the Olympics to complete a hospitality application with detailed questions about BHP's relationship to the potential invitee. Although this was designed to screen for bribery, the investigation revealed that BHP did not meaningfully review and act on those forms.

BHP's ostensibly thorough compliance program was chastised by the SEC as an example of "check-the-box" compliance. Antonia Chion, the SEC's associate director of enforcement, explained that "[a] 'check-the-box' compliance approach of form over substance is not enough to comply with the FCPA." The government noted the superficiality of BHP's internal regulations regarding its Olympic hospitality program, and highlighted that "the company

'Check-the-box' compliance is no substitute for compliance programs—and could lead to harsh penalties.

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failed to provide adequate training to its employees and did not implement procedures to ensure meaningful preparation, review, and approval of the invitations.” The SEC cited BHP as an example of a company lacking internal controls to actually enforce its compliance program. Although the DOJ did not take action against BHP, it has since emphasized the dangers of check-the-box compliance. In 2015, Caldwell cautioned that “having written policies—even those that appear specific and comprehensive ‘on paper’—is not enough.”

A Mitigating Factor

In comparison, the government has made it clear that good compliance—even if it is implemented in response to a DOJ or SEC investigation—may result in a significant reduction in punishment. In February, the DOJ announced that it had entered into a non-prosecution agreement with two subsidiaries of PTC Inc., a Massachusetts software company. Both agencies alleged that PTC, through local business partners, arranged and paid for employees of various Chinese state-owned enterprises to travel to the United States, superficially for training at PTC’s headquarters, but actually for recreational travel to other parts of the United States.

PTC did not voluntarily self-report its violations of the FCPA, and it only fully self-reported after the DOJ discovered new incriminating evidence. Even though PTC’s delayed full cooperation was held against it, the DOJ nevertheless credited the company for strengthening its compliance programs throughout the investigation. These efforts included establishing new customer travel policies, creating a compliance team, expanding resources for compliance in China, and terminating employees involved in the allegations.

Recent Enforcement Actions

During the first quarter of 2016, the DOJ and SEC have continued to insist that companies improve compliance to remediate their FCPA violations. For example, on March 1, the DOJ announced that it had entered into a deferred prosecution agreement (DPA) with Olympus Corp. of the Americas (OCA) and its subsidiary, Olympus Latin America Inc. (OLA) in connection with the provision of improper payments to health officials in Central and South America. The scheme was designed to increase medical equipment sales and prevent local institutions from switching to the technology of OLA’s competitors. In its press release, the DOJ squarely attributed the company’s FCPA violations to poor compliance: “For years, Olympus Corporation of the Americas and Olympus Latin America dropped the compliance ball and failed to have in place policies and practices that would have prevented

the substantial kickbacks and bribes they paid.”

The DPA requires OCA to pay a \$312.4 million criminal penalty and OLA to pay a \$22.8 million criminal penalty. It also requires Olympus to retain a compliance monitor for a period of at least three years and implement the following compliance measures:

1. Enhance compliance training.
2. Maintain a confidential hotline and website to report wrongdoing.
3. Annually certify the compliance program is effective.
4. Adopt a financial recoupment program requiring employees who fail to promote compliance to forfeit performance pay.

DOJ’s Pilot Program

In an effort to make good on its promise of more transparency, the DOJ recently issued written guidance explaining its Enhanced FCPA Enforcement Plan and Guidance. The central, and perhaps most interesting, element of the written guidance is the DOJ’s one-year pilot program, which seeks to “motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.” The importance of compliance programs is prominently incorporated in the guidance.

The pilot program defines the key mitigating factors as “voluntary self-disclosure,” “full cooperation,” and “remediation.” Compliance measures taken by a company are considered under the remediation factor. Notably, a company will receive little, if any, credit unless it first self-reports and fully cooperates with the government. In this way, cooperation and self-disclosure may serve as a gatekeeper before a company earns credit from enforcement agencies for good compliance. Caldwell explains that “if a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates and timely and appropriately remediates—but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing.”

The DOJ’s pilot program confirms what previous enforcement actions showed: a company will receive substantially reduced credit for a strong compliance program unless it self-reports and cooperates, but the DOJ and SEC will punish a company more harshly for a poor compliance programs irrespective of whether it self-reports and cooperates.

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