EFFECTIVE ANTI-CORRUPTION COMPLIANCE PROGRAMS[*]

Martin J. Weinstein
Robert J. Meyer
Willkie Farr & Gallagher LLP
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Washington, DC 20006

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I. Introduction

Any company subject to the U.S. Foreign Corrupt Practices Act ("FCPA")[1] that conducts business overseas should implement an anti-corruption compliance program. Although the FCPA does not explicitly require a compliance program, the accounting and internal controls provisions of the FCPA do mandate safeguards to ensure the appropriate disposition of corporate assets and the accurate recording of transactions.[2] U.S. issuers, as well as covered entities or organizations that contract with the U.S. government, may also be required to implement some aspects of an FCPA-related compliance program under other laws.[3] Furthermore, in the current enforcement environment, it is increasingly likely that improper payments and accounting irregularities will eventually be discovered. This is the consequence of several developments, including international anti-corruption initiatives,[4] increased cooperation among regulators,[5] changes in U.S. law—paving the way for more aggressive enforcement techniques,[6] and a recent upsurge in foreign anti-corruption legislation.[7]

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[1] Or any other similar anti-bribery statute, such as the U.K. Bribery Act.

[2] 15 U.S.C. § 78m(b).

[3] *See, e.g.*: Sarbanes-Oxley Act of 2002, Pub, L. No. 107-204, § 406, 116 Stat. 745 (July 30, 2002) (requiring issuers to disclose whether they have adopted a code of ethics for senior financial officers and, if not, to explain the reasons for not having done so); Federal Acquisition Regulations, 48 C.F.R. § 3.1002 (requiring certain government contractors to have a written code of business ethics and conduct, an employee business ethics and compliance training program, and an internal control system).

[4] The most well-known and well-monitored of these initiatives is the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43 ("OECD Convention"), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_documents&docid=f:td043.105.pdf (last visited Dec. 20, 2012).

[5] *See, e.g.*: U.S. Department of Justice ("DOJ") Office of Public Affairs, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations, available at http://www.justice.gov/opa/pr/2011/April/11-crm-446.html (last visited Dec. 20, 2012) (where the DOJ acknowledged the assistance of Greek, Polish, and British authorities in its investigation); United Kingdom, Press Release, "Serious Fraud Office, Directors of ALSTOM Arrested in Corruption Investigation Following Raids on Nine Properties" (March 24, 2010) (describing cooperation between U.K. and Swiss authorities); Ewing, "Trio Arrested in H.P. Case on Kickbacks," New York Times (April 15, 2010) (describing cooperation between German and Russian authorities).

[6] E.g., the 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") led to the U.S. Securities and Exchange Commission ("SEC") adopting whistleblower rules (on May 25, 2011). Among other things, these rules provide for monetary awards to any whistleblower who voluntarily provides original information that leads to an enforcement action resulting in sanctions exceeding $1m. On August 21, 2012, the SEC announced its first whistleblower bounty ($50,000). On November 15, 2012, the SEC announced that it had logged 3,001 whistleblower tips, including 115 FCPA-related complaints.

[7] Including anti-bribery statutes in Brazil, China, Germany, India, and the U.K., among others.

While an anti-corruption compliance program does not immunize a company from liability for the conduct of its officers, employees, or agents, it can certainly reduce the likelihood that such individuals will violate the law and expose the company to legal risks. A robust compliance program will also assist a company in detecting and remediating improper conduct if it occurs. Moreover, if a violation is ever alleged, the existence, nature, and extent of a compliance program is a significant consideration for regulators in deciding whether to bring an enforcement action[8] and for courts in determining penalties.[9] In addition, in certain jurisdictions, such as the United Kingdom, the existence and adequacy of an organization's compliance program may provide the organization with a complete defense to certain allegations.[10]

II. Recent Emphasis on Compliance Programs, Audits, and Investigations

The DOJ and the SEC have recently emphasized the importance of effective anti-corruption compliance programs in enforcement matters involving Pride International, Tyco International, and Morgan Stanley.

A. Pride International

On November 4, 2010, the DOJ and SEC charged Pride International and its subsidiary, Pride Forasol, with FCPA violations in connection with approximately $800,000 in bribes paid directly and indirectly to government officials in Venezuela, India, Mexico, Kazakhstan, Nigeria, Saudi Arabia, the Republic of the Congo, and Libya.[11] The bribes were allegedly paid to extend drilling contracts, obtain the release of drilling rigs and other equipment from customs officials, reduce customs duties, extend the temporary importation status of drilling rigs, lower various tax assessments, and obtain other improper benefits.[12] Pride International entered into a deferred prosecution agreement ("DPA") with the DOJ to resolve the charges against it.[13] Pride Forasol

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[8] "Principles of Federal Prosecution of Business Organizations," 9 U.S.C. § 9-28.800 (Aug. 28, 2008) (the "Filip Memorandum"), 9 U.S.C. § 9-28.800(B) (noting that, by examining the corporation's compliance program, the prosecutor may "make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation").

[9] United States Sentencing Commission, *Guidelines Manual*, § 8B2.1 (2010).

[10] Under the U.K. Bribery Act, the only affirmative defense available to an organization that is charged with the strict liability offense of "failure by a commercial organization to prevent bribery" requires the organization to demonstrate that it had in place "adequate procedures" to prevent bribery. Bribery Act, 2010, c. 23, § 7(2) (Eng.), available at http://www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1 (last visited Dec. 20, 2012).

[11] *See United States v. Pride International, Inc.*, No. 4:10-CR-00766, Information (S.D. Tex. 2010).

[12] *Id.*

[13] *United States v. Pride International, Inc.*, No. 4:10-CR-00766, Deferred Prosecution Agreement (S.D. Tex. 2010).

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