



corporatecompliance.org

Compliance & Ethics PROFESSIONAL®

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

JUNE 2018

Meet Thomas Topolski, CCEP-I

Executive Vice President,
Turner & Townsend

see page **18**

by Mark Grider

A Washington view of global anti-corruption

- » This administration remains focused on enforcement of the Foreign Corrupt Practices Act (FCPA) against both domestic and foreign companies.
- » The Department of Justice and Securities and Exchange Commission continue to prosecute these cases and have emphasized the importance of corporate compliance and creating a level playing field for businesses.
- » Companies should review their anti-corruption policies and regularly update them in response to new developments.
- » Many FCPA violations relate to dealings with third parties, so it is important to conduct thorough due diligence and understand who you are working with.
- » Strong internal controls allow companies to accurately monitor record keeping and accounting and avoid violations.

Mark Grider (mark.grider@huschblackwell.com) is a Partner with Husch Blackwell in Washington DC.

The U.S. Foreign Corrupt Practices Act (FCPA) turned 40 last year under a new administration and an increasingly global business landscape. With the changing political and business tides, understanding the



Grider

FCPA's impact on your business is crucial. In a recent speech by Deputy Attorney General Rod Rosenstein, he emphasized this importance, saying, "[i]nvestigations of corporate fraud and corruption are essential to the rule of law."¹ Of course, in the extensive global landscape in

which we find ourselves in 2018, the United States is not the only country fighting against corporate fraud and corruption. For example, the UK Bribery Act (UKBA) also seeks to combat corruption and does so in an even broader manner than the FCPA.

With these regulations in mind, and as we've discussed in an earlier article on

corporate compliance,² having the knowledge and tools in place to create a culture of compliance and lawfully and strategically navigate your company through the regulatory hurdles is essential for today's globally positioned business. Whether it's businesses specializing in technology, manufacturing, or government contracting, creating a tone from the top, embracing key corporate values, having a robust compliance program, and extending those practices to any third-party intermediaries that do business on your company's behalf are important steps a global company can take in order to ensure compliance.

Anti-corruption compliance under the new administration

Early on in the Trump administration, the Department of Justice (DOJ) Fraud Section released its new "Evaluation of Corporate Compliance Programs," the first formal document issued by the DOJ focused on corporate compliance.³ Without necessarily

introducing new standards, the evaluation created a helpful checklist for structuring a corporate compliance program. During his speech, Rosenstein suggested that DOJ would abandon its practice of changing policy via memo, noting that “[m]anagement-by-memo is an inefficient and often ineffective method of enforcing government policies.” Rather, the Deputy Attorney General indicated that current policies would be reviewed for potential inclusion in the *United States Attorneys’ Manual* as official doctrine. Rosenstein further indicated that some of the previous administrations’ FCPA policies, including the Yates Memo and the Foreign Corrupt Practices Act Pilot Program, would be included in that review.

In addition to Rosenstein’s statements, DOJ’s Principal Deputy Assistant Attorney General at the time, David Bitkower, indicated a continued importance of companies possessing an effective compliance program: “The Department has long placed emphasis when reaching corporate resolutions on the existence or lack of an effective corporate compliance program.”

It is also worth noting that on November 2, 2017, the Securities and Exchange Commission (SEC) named Charles Cain the new Chief of the Enforcement Division’s FCPA Unit. Cain had served as Acting Chief of the FCPA Unit since April 2017, replacing Kara Brockmeyer, who left the SEC last year. In a press release from the SEC announcing Cain as the new chief, Cain says of his new role, “I look

forward to building upon the important work the unit has done to combat corruption and level the playing field globally.”⁴

Recent Developments

Most recently, following its promised review of the policies surrounding the FCPA, the DOJ solidified its positions on bribery and corruption with the implementation of a revised FCPA Corporate Enforcement Policy.⁵ In late November of last year, Deputy Attorney General Rosenstein announced the revised policy to the 34th International Conference on

the Foreign Corrupt Practices Act.⁶ Rosenstein said in his announcement, “The FCPA is the law of the land. We will enforce it against both foreign and domestic companies that avail themselves of the privileges of the American marketplace.” The new policy, as further described

by Rosenstein, enables the DOJ to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing.

The revised policy is now incorporated into the *United States Attorneys’ Manual*. Another big change is that the Department’s Pilot Program (designed to motivate and reward companies that voluntarily disclosed misconduct) was effectively made permanent, following an increase of voluntary company disclosures made in the first year, from 13 to 22. This permanent implementation of the Pilot Program demonstrates the Justice

As Rosenstein said in his announcement, “the FCPA is the law of the land.”

Department's efforts to crack down on companies that choose not to implement and meet compliance standards, yet it highlights a new direction toward leniency for companies that self-disclose and have robust compliance efforts in place. As Rosenstein stated during his announcement of the new policy, "The government should provide incentives for companies to engage in ethical corporate behavior. That means fully cooperating with government investigations, and doing what is necessary to remediate misconduct – including implementing a robust compliance program. Good corporate behavior also means notifying law enforcement about wrongdoing." So, for those companies that do follow strict rules and implement compliance-oriented standards, having compliance programs and being vigilant and self-disclosing will go a long way with law enforcement if trouble arises.

With Rosenstein's comments and the new policy changes in mind, it seems certain that the U.S. will continue to prosecute financial and corporate crime. Companies that remain vigilant with their compliance efforts, however, and keep a close eye on the current laws and trends should feel confident in their abilities to comply with the FCPA.

Understanding the FCPA and UKBA

The foundation of compliance is an understanding of the law. The FCPA focuses on two main provisions: anti-bribery, and accounting and record keeping. The FCPA anti-bribery provisions prohibit the offer or payment of anything of value—directly or indirectly—to a foreign official with a corrupt intent. Because the FCPA also extends to "indirect" violations, companies can violate the FCPA as a result of improper payments made by their third-party intermediaries such as dealers, distributors, or sales agents.

The FCPA's accounting and record-keeping provisions require companies whose securities

are registered on a United States exchange to maintain accurate books and records and a system of internal accounting controls to ensure that transactions are properly authorized and a reasonable accounting trail is maintained. On the other side of the pond, the UKBA prohibits both government and commercial bribery and requires adequate procedures to prevent bribery. Although the UKBA has a strict liability offense of failing to prevent bribery, having adequate procedures is a full defense for corporations.

The real impact of anti-corruption law on globalizing companies

Corruption cases can result in massive penalties for companies. In a recent example, on January 17, 2017, UK-based Rolls-Royce entered into an \$800 million combined resolution with U.S., UK, and Brazilian authorities. Over a span of almost 15 years, Rolls-Royce allegedly caused bribes worth millions of dollars to be paid to state-owned oil companies in various countries. In another case, a Texas medical device company named Orthofix International settled with the SEC for accounting violations that occurred when its third-party representatives made illegal payments to doctors at government-run Brazilian hospitals. Orthofix was required to pay over \$6 million for the violation of the FCPA accounting and record-keeping provisions.

These enforcement actions typically last for several years, and the accused company's legal and forensic accounting defense costs often equal or exceed the amount of penalty ultimately paid to settle the violation. For example, Walmart is currently undergoing an FCPA investigation by the US government, and although the investigation is not yet resolved, Walmart recently announced to its investors that it had accrued \$283 million for an expected settlement of the

prosecution. However, Walmart's previous securities filings indicate that Walmart has spent approximately \$870 million (over three times the value of the expected settlement) in defense fees and compliance program improvements during the five years it has been under investigation.

As these costly, high-profile cases suggest, corporate corruption will not be taken lightly by the U.S. government. During the Ethics & Compliance Initiative's annual conference in Washington, DC last April, Attorney General Jeff Sessions reinforced the DOJ's commitment to enforcing the FCPA and to prosecuting fraud and corruption more generally, suggesting that companies should succeed or fail on their merits—not because they bribed the right people.⁷

Although the DOJ often takes into consideration voluntary self-disclosures, cooperation, and remedial efforts by businesses, companies should carefully weigh their options before taking action. It is important to recognize that DOJ now expects organizations to conduct their own independent investigations when they suspect misconduct, and to disclose the parties involved in misconduct to DOJ, before the organization can receive any credit and abate potential culpability. Additionally, we are seeing a greater willingness by the DOJ to work with law enforcement partners in other countries to tackle corruption. Consultants, joint ventures, and dealings with third parties are frequent stumbling blocks and can result in major FCPA headaches for those that do not conduct thorough due diligence.

Under the UKBA, a corporation can now be held liable for failing to prevent an associated person (i.e., any person or entity performing a service for or on behalf of the company) from bribing another. It is worth noting that the UK Serious Fraud

Office has, to date, only successfully secured minimal convictions under the corporate offense in the UKBA. In February 2016, Sweett Group PLC, a UK-based construction and professional services company, was convicted for the offense of failing to prevent its subsidiary from paying bribes on its behalf in the United Arab Emirates. Additionally, although the UKBA does not include an accounting and records provision similar to the FCPA, proper accounting and records maintenance requirements are contained in numerous other UK laws. Finally, as of September 30, 2017, UK-based and overseas companies may be held criminally liable if they fail to prevent their associated persons from facilitating domestic or overseas tax evasion under the Criminal Finances Act 2017, which roughly parallels the UKBA.⁸

If you are a UK company or do business there, understanding the reach of the broader UKBA is imperative, especially because the UKBA has a compliance defense for companies with "adequate procedures." Understanding whether your company's procedures provide this level of adequate protection is critical.

Practical compliance tips for global companies

According to Rosenstein, "[c]ompliance programs promote [the Department of Justice's] primary goal, which is to deter wrongdoing." So what do you need to know to further your company's compliance efforts? The following includes some useful, practical tips and recommendations for corporate compliance:

- ▶ Review your company's anti-corruption policies and update them regularly in response to new developments.
- ▶ A compliance checklist should be put in place consistent with the company's anti-corruption policy.

- ▶ Conduct annual compliance training and education on the corporate anti-corruption policy for key personnel.
- ▶ Because third parties often become a source of violations, it is important to use local agents/suppliers with strong experience and a good track record of compliance that have positive and long-standing relationships with government agencies. Additionally, DOJ expects organizations to “risk rank” third parties and have enhanced due diligence conducted for high-risk third parties.
- ▶ Require effective control measures in your company’s dealings with “associated persons” and agents. For example, agreements with third parties should state that they will avoid any act that would violate relevant laws (FCPA/UKBA). Also, make sure that third parties are clear about the scope and authority they have, before the start of the relationship.
- ▶ Investments and acquisitions should be viewed as potential traps for violations, and the company should conduct thorough due diligence on the front end. Proper due diligence protects your company from losses arising from the prior bad acts.
- ▶ Revise any company policy allowing for “facilitation payments,” an exception permitted by the FCPA but not recognized under the UKBA.
- ▶ Place a strong emphasis on accurate record keeping and accounting—everything must be properly recorded. Receipts

must be obtained for payments made to government agencies.

The importance of creating a culture of compliance

This article provides the broad strokes of the FCPA and UKBA and their current and anticipated application to the global corporate world. However, there are many technicalities and stumbling blocks that companies can encounter, resulting in violations, however inadvertent, of the FCPA, UKBA, or other local anti-corruption laws.

Although following the practical tips provided above will help keep your company in the clear, experienced legal counsel can further minimize your company’s legal exposure when dealing with foreign governments and state-owned businesses. *

Husch Blackwell associates Charles Fleischmann and Sarah Zimmerman served as co-authors of this article.

1. Program on Corporate Compliance and Enforcement: “Deputy Attorney General Rod Rosenstein Keynote Address on Corporate Enforcement Policy” *Compliance & Enforcement*, October 6, 2017. Available at <https://bit.ly/2qkNkro>
2. Mark Grider: “The I.C.E. Method: Understanding the Symbiotic Relationship” *Ethisphere*, March 2017. Available at <https://bit.ly/2JvMv77>
3. United States Department of Justice: “Evaluation of Corporate Compliance Programs.” Available at <https://bit.ly/2IEphmk>
4. U.S. Securities and Exchange Commission: “Charles Cain Named Chief of Foreign Corrupt Practices Unit” November 2, 2017. Available at <https://bit.ly/2m1Ru7W>
5. United States Department of Justice: “USAM Insert, 9-47.120 – FCPA Corporate Enforcement Policy.” Available at <https://bit.ly/2nDlJuT>
6. United States Department of Justice: “Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act” November 29, 2017. Available at <https://bit.ly/2Aedkuu>
7. United States Department of Justice: “Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference” April 24, 2017. Available at <https://bit.ly/2pef3lz>
8. The National Archives: “Criminal Finances Act 2017.” Available at <https://bit.ly/2pd3a44>