

Human Resources' Role in FCPA Compliance

Increased Responsibility with Increased Enforcement

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Enacted in 1977, the FCPA prohibits bribes to foreign officials with the intent to obtain or retain business. The two main parts of the FCPA are anti-bribery and accounting provisions. Ultimately, the basis for any FCPA prosecution turns on the actions of a company's employee(s). Now more than ever it is important for human resources professionals to become vigilant partners in FCPA compliance. The provisions of the act are stringent and require strict adherence. Moreover, the whistleblower provision of the Dodd-Frank Act of 2010 provide financial incentives for employees to report FCPA violations and protection against retaliation for those that do. Importantly, employees providing "original" information to the government can be considered as participating in protected conduct.

The past year has seen the Department of Justice and the Securities and Exchange Commission aggressively enforce the FCPA, obtaining criminal indictments at record pace. D. Michael Crites of Dinsmore & Shohl provided an in-depth look at the FCPA and the recent enforcement efforts. [HERE](#) (*Foreign Corporate Practices Act: Is Your Company Prepared for the New Era of Increased Enforcement?*) After the closely watched trial of *U.S. v. Noriega*, Assistant Attorney General Lanny Breuer stated:

Foreign corruption undermines the rule of law, stifling competition and the health of international markets and American businesses. As the prosecution shows, we are fiercely committed to bringing to justice all the players in these bribery schemes--the executives who conceive of the criminal plans, the people they use to pay the bribes, and the companies that knowingly allow these schemes to flourish.

In *U.S. v. Noriega*, decided in early May 2011, Lindsey Manufacturing became the first American company to be convicted under the Foreign Corrupt Practices Act. After only one day of deliberations, a jury found the company's CEO and CFO guilty of several FCPA violations for their roles in an alleged bribery scheme involving Mexican government officials. At trial, the Department of Justice presented evidence that the Company used a Mexican sales representative to act as an intermediary to obtain contracts from Mexico's state-owned utility company. While sentencing is set for September 2011, the CEO and CFO face a maximum sentence of 30 years in prison and significant fines.

In this era of zero tolerance, employers who do business abroad or use agents/joint ventures in foreign countries need to ask themselves: "What does our FCPA compliance policy look like? Does it need updating? Do our employees understand it? When did we last train on our policy?" There is no better time for companies to evaluate their approach to FCPA compliance to comport with best practices than now, in conjunction with the government's step up in enforcement

At a minimum, employers with employees in the international marketplace should consider the following recommendations to develop a proactive approach to FCPA compliance:

1. **Be (and stay) aware.** Even if employers understand the basics of the FCPA framework, the law is rapidly developing and pitfalls are inherent. For example, in the recently decided Lindsey Manufacturing case, the company filed a motion to dismiss, arguing that the state-owned utility

company involved was not an "instrumentality" of the foreign government, thus the employees of the company could not be "foreign officials" under the FCPA. However, in denying the motion, the court actually expanded these definitions, finding that the state owned corporation indeed qualified as an "instrumentality" under the FCPA and its employees as "foreign officials." Such a broadened definition will certainly be used in impending prosecutions.

Further, companies often fail to realize that FCPA liability attaches through the misconduct of third parties. Foreign agents, suppliers, distributors, intermediaries, joint ventures, and chain vendors of a U.S. company all can attach liability. In this era of heightened enforcement, all signs indicate that third party liability will be a focus for prosecution. Employers must stay up to date with FCPA developments and keep their employees informed along the way.

2. Have an FCPA compliance policy. No more excuses -- a clearly articulated anti-corruption and anti-bribery policy that demands compliance with the FCPA is a must for any company with dealings abroad. Employers should ensure that their policy sets out a procedure whereby employees can report concerns and that establishes a protocol for due diligence background checks of foreign affiliates.
3. Train on the compliance policy. Developing a FCPA compliance policy is just the beginning. Companies must perform consistent training on that policy. In a February 2011 settlement with the DOJ and SEC, a major food company agreed to pay \$4.2 million dollars to resolve charges related to FCPA violations. As part of the deferred prosecution agreement, it acknowledged its responsibility for the actions of its subsidiaries, employees and agents who made improper payments to government-employed veterinarians inspecting its chicken processing plants in Mexico.

As part of that agreement, the company also agreed to "implement mechanisms designed to ensure that the policies, standards and procedures regarding the anti-corruption laws are effectively communicated to all directors, officers, employees, and where appropriate, agents, and business partners." The agreement continued: "these mechanisms shall include...periodic training for all directors, officers, and employees, and...agents and business partners; and...annual certifications...certifying compliance with the training requirements." Why wait for a federal investigation, charges and fines to implement such safeguards? Effective FCPA compliance programs should engage front line managers and human resources professionals who train and certify employees on the company's anti-corruption policy and commitment to FCPA compliance.

Not only the existence of an FCPA compliance program, but the overall effectiveness of that program, are key factors reviewed by the DOJ when it considers whether to charge a company with FCPA violations. In this era of heightened enforcement, an effective program, coupled with consistent employee training and awareness, minimizes risks for violations, employee whistle-blowing and government prosecution.