

### ***McNulty's Maxims, the Deepwater Horizon and FCPA Internal Controls***

I often write about what I call Paul McNulty's three maxims of a Foreign Corrupt Practices Act (FCPA) compliance program: 1) *What did you do to prevent it?*; 2) *What did you do to detect it?*; and 3) *What did you do to remedy it?* I had generally thought that the internal controls component of a minimum *best practices* FCPA compliance program applied to maxim number 2, detection. However, in a recent guest post regarding internal controls entitled "*Controls to Prevent Violations of Anti-Bribery Laws*", my colleague Henry Mixon explained that "A specific focus is needed to ensure there are control procedures in place to ensure compliance with" maxim number 1, prevention.

This concept was driven home in a December 15, 2011 article in the Houston Chronicle by reporter Jennifer Dlouhy, entitled "*Blowout preventers fall short, report says*". This article discusses a 136 page report by the National Academy of Engineering and National Research Council ("the Report") on the Deepwater Horizon disaster. One of the findings of the report was that the industry's trust in blowout preventers, as they are currently designed and utilized, is misplaced. The Report noted that there were several studies which had questioned the reliability of blowout preventers to do what it was designed to and provided several technical reasons for this finding.

For those of you not in the oil and gas industry a blowout preventer is a piece of equipment which is designed to be the last line of defense if the well blows by cutting through the pipe and blocking the oil or gas from escaping upwards and being ignited by the drilling rig. Generally, it has to be activated by someone or some automatic control system to take its *preventative* action. In other words, it is not viewed as a detection device but as a prevention device.

This article specifies that the design of blow out preventers is as the name implies to *prevent* an accident. I was reminded that the FCPA and UK Bribery Act require a specific focus on preventive controls. While there should be detect controls as well if your company only has detect controls, your compliance program does not meet the minimum *best practices*. In his recent post Henry Mixon focused on the use of internal controls to *prevent* bribery and corruption.

Some examples of this use of internal controls which can be preventative controls are the following:

1. Petty Cash disbursements should be reviewed by more senior management before rather than reconciled after the fact of disbursement.
2. Controls are needed over
  - a. movement of inventory because bribes can be made through mechanisms other than cash.
  - b. gifts, entertainment, hospitality, political contributions, and charitable contributions.
3. An effective Delegation of Authority such as the requirement of dual signatures for handwritten checks.

4. Offline processing and maintenance of key information related to vendors and disbursements.
5. Employees, both contract and permanent, require controls in payroll processing to ensure employees' statuses as current/former, or a relative of a, Government Official, is identified in pre-hire diligence and that effective oversight is established regarding the hours actually worked, the type of work performed, and the compensation paid.
6. Vendor master file controls to ensure no vendors are paid unless there has been appropriate due diligence performed.

The Report on the Deepwater Horizon disaster makes clear that the energy industry must find a way to *prevent* a similar event in the future. The lessons from McNulty's maxims also make it clear that for a *best practices* compliance program, you must have sufficient preventative controls in place to prevent bribery and corruption. Henry Mixon details some of the specific reasons that internal controls can be used as prevention control and the specifics on how to do it.

If your compliance program only uses internal controls to detect after-the-fact violations, you may need to call Paul McNulty and have him represent you. Then you may well be in the position of having McNulty call the Department of Justice and self-report a FCPA violation. I am relatively sure that such a call is not one that you would like to make, or have counsel make on your behalf.

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