

SEC: Local Language Essential to “Effective” FCPA Compliance

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What is the big lesson from yesterday’s \$7.4 million SEC **settlement** with Lewisville, TX-based Orthofix, the latest FCPA action involving Latin America?

The “FCPA Commentariat” will surely highlight how corruption risks are common in public procurement in countries like Mexico. FCPAméricas has written about that subject (**The Anatomy of Corruption in Public Procurement**) based on years of investigating high-level corruption in public procurements for The World Bank.

We will highlight the uncertain meaning of the term “foreign official.” In this case, the SEC considered employees of the Mexican government-owned healthcare and social services entity, Instituto Mexicano del Seguro Social (IMSS), to be foreign officials.

We will discuss the use of things like cash advances and purported trainings and promotional expenses to hide bribe payments, common schemes seen in numerous other FCPA actions like **Johnson & Johnson**. In addition, gifts and travel practices have once again created FCPA liability for a company.

We will point out a new corruption “red flag” – situations where a subsidiary’s training and promotional expenses are frequently over budget. The fact that 60% of the Mexican subsidiary’s business in this case came from IMSS alone should have, itself, also been a red flag meriting heightened controls.

And we will muse over the use of the word “chocolates” by company personnel to describe the bribes themselves. In fact, use of such creative words to describe corruption schemes is not so uncommon in Latin America. For example, for years the Argentines used the word “gnocchi” to describe fictitious government payroll accounts set up by politicians to funnel money to themselves.

These are all important points, indeed. But ***the most interesting*** thing about this settlement, a key development, is the fact that the SEC finally said what some of us already knew – ***use of local language is essential to FCPA compliance***. FCPA compliance trainings must be conducted in local languages to have an impact. FCPA policies must be translated into local languages, and done so correctly. In the settlement, the SEC did not mince its words: “Orthofix did not have an effective FCPA compliance policy or FCPA-related training” because it distributed codes of ethics and conducted anti-bribery training “only in English, and it was unlikely that [the subsidiary’s] employees understood them.”

In my own experiences with FCPA compliance, I have seen this dynamic play out over and over again. If I were not a multilingual lawyer, I would not be nearly as

effective on the ground in Latin America doing trainings, compliance reviews, third party due diligence, risk assessments, and investigations. Local language is essential to making compliance effective. No matter how sophisticated the audience, no matter if they speak English as a second language pretty well, compliance trainings have real limitations if they are not conducted in the local language. The nuances of compliance gray areas are difficult to capture. The comfort with which local personnel embrace compliance practices is hard to achieve. The gravity of non-compliance is difficult to convey. If you want to send a serious message to your overseas teams about compliance, you must communicate your policies in their language. There really is no substitute.

Before yesterday, the closest (I think) that the FCPA compliance world had come to acknowledging this essential fact was the SciClone shareholder derivative lawsuit **settlement** last year. One of the measures required in the settlement was that SciClone conduct annual trainings of its Chinese employees *in Mandarin*. When FCPAméricas **wrote about** that case last December, we made the following point: “Though FCPA enforcement has yet to require such a level of training, at the very least a company can be rest assured that it is following the highest of standards if it conducts trainings in-person and in the local language.” Now the SEC has spoken.

In fact, Orthofix will now be providing local language FCPA training to all of its employees *and* to its third parties too. Is training of all third parties a new emerging best practice? Probably, if a state-owned company represents 60% of your subsidiary’s business and you use third parties to interact with it. Future FCPA settlements are likely to give us more guidance, as they have now done on the importance of local language.

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