

### ***Jon Jordan Renews the Call for a Compliance Defense to the FCPA***

Yesterday I witnessed true greatness. In the final at Wimbledon, Roger Federer won his record seventh singles title, equaling Pete Sampras and William Renshaw for this record number of titles. He did this while beating Andy Murray, a Scot who the entire United Kingdom had embraced as its own throughout the Tournament and especially in the finals. So congratulations Roger, you certainly wear it well.

We recently saw the entry of a new voice for the addition of a compliance defense as an amendment to the Foreign Corrupt Practices Act (FCPA). This voice was Jon Jordan, Senior Investigations Counsel with the US Securities and Exchange Commission's (SEC) FCPA Unit, a national unit within the SEC specializing exclusively on FCPA and foreign bribery matters. Jon's ideas appeared in a law review article, entitled "The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act" found in Volume 17, No. 1, Fall 2011 edition of the Stanford Journal of Law, Business & Finance.

Jon had previously published two other law review commentaries on the FCPA, one on facilitation payments, found in the University Of Pennsylvania Journal of Business Law, and a second on trends towards greater accountability in the international fight against bribery under the FCPA and UK Bribery Act, published in the New York University Journal of Law and Business. I reviewed his article on facilitation payments in a prior post, entitled "*The End is Nigh for Facilitation Payments – Get Ahead of the Breeze*". Recognizing that although Jordan works for the SEC, the Commission has disclaimed any and all responsibility for the statements made in the articles by Jordan. The views expressed in Jordan's articles are those of himself and do not necessarily reflect the views of the SEC, the SEC's FCPA Unit, or any of his other colleagues on the staff of the SEC.

Jordan's thesis is that the US should adopt a compliance procedures defense similar to the Adequate Procedures defense available to UK entities under the UK Bribery Act. He argues that such a defense would be a good policy for companies who are seeking to do the right thing by instituting a minimum best practices compliance program from the ravages of a rogue employee who violates the FCPA. Such a compliance program should consist of minimum best practices which Jordan articulates but can be specified by "relevant government authorities, including the United States Department of Justice (DOJ)."

Prior to articulating his thoughts on what should constitute a compliance program which would be acceptable to the DOJ, Jordan sets out three requirements for such a defense to be considered. First is that a company must establish that it had an adequate compliance procedures program in place during the time of the violative conduct. Second is that a company must establish that it has satisfactorily implemented an adequate compliance procedures program because, as Jordan correctly notes, "adequate compliance procedures are useless without proper implementation." Jordan suggests that this could be done in a couple of different ways; through a senior officer's

certification or through document, document and document the implementation and execution of the company's compliance program. The third and final prong is that the company did not know or should not have known about the violative conduct at issue. This would mean that there was no corporate knowledge of the relevant conduct "rising to the headquarters or senior management level" nor were there any 'red flags or other warning signs that should have alerted them to the wrongful conduct."

Jordan lists the components of what he believes are the minimum requirements of an adequate compliance program. He includes 11 elements in his plan. They will not be new or unusual for the compliance practitioner as he has drawn them from FCPA enforcement actions, DOJ Opinion Releases and the UK Ministry of Justice's Six Principles of Adequate Procedures. They are as follows.

1. A clearly articulated policy against the violations of the FCPA and other relevant non-US anti-bribery and anti-corruption laws.
2. The compliance procedures should apply to all officers, directors, employees and outside parties acting on behalf of the company.
3. Senior corporate officials should be assigned for the implementation and oversight of the compliance program.
4. The compliance program must be effectively communicated to all officers, directors, employees and outside parties acting on behalf of the company.
5. There should be a system in place so that all officers, directors, employees and outside parties acting on behalf of the company can report violations of anti-corruption laws without fear of retribution.
6. There should be appropriate disciplinary procedures in place to address violations of anti-corruption laws.
7. There should be appropriate due diligence and oversight of all agents, business partners, third parties and any other outside parties acting on behalf of the company.
8. There should be appropriate compliance terms and conditions in all contracts with agents, business partners, third parties and any other outside parties acting on behalf of the company, including a certification of compliance with anti-corruption laws.
9. The compliance procedures should be developed on the basis of a risk assessment.
10. There should be periodic testing and review of the company's compliance procedures.
11. There should be financial and accounting procedures, including internal controls, designed to ensure maintenance of accurate books and records.

I found Jordan's article very interesting and certainly a welcomed new addition to the debate regarding amending the FCPA to add a compliance defense. It is also very interesting the SEC would allow an employee, even acting on his own, to publish such a paper, given the DOJ's vehemence in resisting this change. So kudos to Jon Jordan and a big congratulations shout out to Roger Federer.

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