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Anticorruption Survey Spells Out Risks

More than 300 general counsel and compliance officers identify dangers across the globe

By Harvey Kelly, Tarek Ghalayini & Diane Hughes / AlixPartners LLP

In AlixPartners fifth annual global anticorruption survey, we polled more than 300 general counsel and compliance officers on the impact that corruption risk has on their businesses. Our report explores the challenges facing corporate legal departments today, and why technology and data analysis continue to play important roles in managing risk.

Key Highlights

- 93 percent of survey respondents say they expect the challenges associated with moving data across borders to increase or stay the same.
- 37 percent say their companies pulled out of or delayed an acquisition because of corruption risk.
- 31 percent say their companies have lost business during the past 12 months because of a government bribery problem – an 8 percent uptick from 2016.
- 42 percent of respondents say their companies stopped working with business partners because of corruption risk – up from 32 percent in 2016.

The Risks Persist

No countries or regions are free from corruption, but in-house counsel and compliance officers say certain regions are especially vulnerable. About 76 percent of survey respondents say doing business in high-risk regions is one of their biggest challenges.

- 67 percent say there are locations where it is impossible to avoid corrupt business practices – namely, Russia (35 percent), Africa (33 percent) and China (27 percent).
- 81 percent say corruption laws in Africa are ineffective.
- 73 percent say the same about laws in Russia.

The Role of Data

Data continues to play a critical role for companies in their efforts to investigate issues related to corruption and monitor suspicious activity.

- 67 percent of respondents say their companies use real-time monitoring for suspicious activity or behavior.
- 87 percent believe their companies are successful in using data to identify possible corruption.
- 86 percent say their industries are exposed to corruption risk, compared with 90 percent in 2016; of these respondents, 27 percent and 28 percent described this risk as "significant" in 2017 and 2016, respectively.

What Is Working and What Is Not?

Within corporate legal departments, internal audits and data analysis are reducing risk, but inadequate IT systems and the heavy volume of information that compliance officers must process present obstacles.

- 84 percent of respondents say they have reduced risk by performing internal audits.
- 87 percent report that their companies are successful in using data to identify possible corruption.
- 79 percent say the biggest obstacle to tackling corruption is the massive amount of information they must contend with.
- 73 percent say insufficient IT systems pose challenges to their ability to address risk.
- 54 percent say local data protection laws are impediments to collecting and analyzing data.

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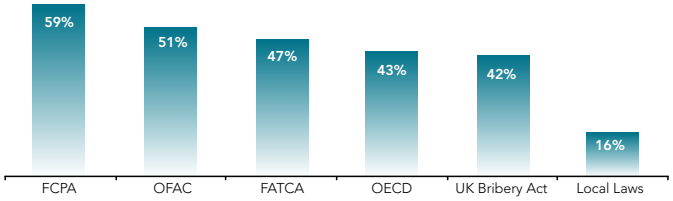
The AlixPartners survey included lots of information that was not highlighted in the summary on the previous page, such as these findings.

Among Those with a Dedicated Program, 59% of Respondents' Programs Specifically Address FCPA Laws and 51% Address OFAC Laws

Which anticorruption laws are they designed to address?



FCPA: United States Foreign Corrupt Practices Act • OECD: Organization for Economic Cooperation and Development
OFAC: Office of Foreign Assets Control • FATCA: Foreign Account Tax Compliance Act

Biggest Challenges for Compliance Programs Are Due Diligence on Third Parties, Doing Business in High-Risk Regions and Variations in Local Laws

Which represents challenges in your company's anticorruption and compliance programs?

Conducting Internal Audits and Creating Anticorruption Policies Are Viewed as Most Successful Measures to Reduce Corruption Risk

Which practices has your company implemented to reduce risk associated with corruption, and how successful have they been?

Seven Tips for Handling E-Discovery in Cross-Border FCPA Investigations

Dealing with two languages more than doubles the complexity

By Kyle Reykalin / FRONTEO

Conducting cost-effective and efficient e-discovery for Foreign Corrupt Practices Act investigations involving U.S. and Japanese companies requires a rare combination of legal, cultural and technological skills. Here are seven common obstacles, and practical tips to help e-discovery teams overcome them.

1. Bridge dissimilar legal systems. It's important to understand the differences between the two legal systems. Japanese in-house counsel are often surprised at the scope, expense and formality of the American discovery process, as well as the danger that their confidential business documents and strategies might be shared. American attorneys occasionally assume that the in-house legal departments of large Japanese corporations are familiar with uniquely American legal concepts, such as attorney-client privilege. Care must be taken to clearly explain the requirements of confidentiality, electronically stored information collection, the obligations of legal hold and other discovery concepts.

2. Know the culture and business practices. An experienced local team adds great value. They will be familiar with Japanese customs and culture, as well as the ebb and flow of FCPA cases. For example, when deciding on keywords for your data set, there are similarities across matters in the terms used in discussions of bribery or payoffs. In Japan, the practice of offering gifts or honoraria to important business partners and clients is customary and can be difficult to discern from a bribe. On the other hand, seemingly ordinary language about gifts or payments may mask illicit behaviors prohibited under the FCPA. The nuances of language are critically important, especially for developing effective search terms and evaluating results.

3. Establish a local or regional team. An experienced provider will have processes for compliance with local data privacy laws, and may offer local hosting as well. The availability of bilingual or multilingual review attorneys in multiple regions allows for flexibility in staffing document review, privilege review and quality control phases, and obviates any concerns about data leaving the country.

> ***The concept of attorney-client privilege as we know it in the U.S. does not really exist in Japan.***

4. Take advantage of technology assisted review (TAR). The use of advanced analytics in early case assessment and in batching documents for review assignments can improve efficiency in most cases, especially those where, as mentioned above, determining keywords is difficult. We often batch documents by topic, rather than by custodian. In a competitive or antitrust investigation, for example, batching documents by product family or project, and including entire email threads and attachments, provides the reviewer with a cohesive topic, revealing important issues and events, leading to more consistent coding and quickly making reviewers knowledgeable about key topics.

5. Plan for multilanguage content. Document collections in global FCPA cases are often a mix of multiple languages: Japanese and English, and sometimes others. This is a result of normal business communication among subsidiaries, suppliers, sales channels and customers across global regions. Tools designed for English do not always work well with multibyte character sets and tokenization issues in Chinese, Japanese and Korean content. An experienced provider will have solutions for Asian language challenges, such as encoded content and support for conversation threading.

6. Minimize translation. Translation of documents increases cost and adds the risk of challenges by the opposing side. It may also invite misinterpretation of the documents. In some investigations, especially criminal matters, the government may require that all documents handed over as part of a proffer be translated into English. But in civil litigation, the court may only require translation of documents to be used as deposition exhibits, attachments to briefs or trial exhibits. In either case, conducting a first-cut review to determine relevance before translation of documents reduces the volume of high-cost translations.

7. Conduct a thorough privilege review. The concept of attorney-client privilege as we know it in the U.S. does not really exist in Japan. Thus, Japanese attorneys without experience in American litigation are not familiar with our tests for privilege and work product. Conduct a focused privilege review performed by an attorney who is well-versed in attorney-client privilege. Conduct a follow-on quality review of documents marked not privileged to catch coding errors.

Managing e-discovery in response to FCPA investigations in Japan involves a fascinating mix of legal, cultural, linguistic and technical challenges. An experienced e-discovery provider working in partnership with U.S. litigation counsel and local law departments can help foresee and avoid costly blunders.

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Much Ado About...Little?

How a 'garden variety' FCPA investigation of Walmart grabbed the spotlight

***Mike Koehler**, the self-styled FCPA Professor, founded a blog by that name in 2009. He really is a law professor at Southern Illinois University School of Law, but with all the time he spends posting and writing and speaking about the Foreign Corrupt Practices Act (FCPA), you wonder how he has time to do anything else. We spoke about the Walmart investigation – remember that one? We wondered whether it was ever going to end. It seemed like a good question to ask because the U.S. Supreme Court had just decided* Kokesh v. Securities and Exchange Commission, *which put a damper on the penalty of choice in FCPA cases – disgorgement of profits – by ruling that it is, indeed, a penalty and subject to a five-year statute of limitations. We asked him about that as well. The interview has been edited for style and length.*

When I read The New York Times front-page article in 2012 about Walmart's alleged bribes in Mexico, I thought it was going to be the U.S. equivalent of Siemens in Germany. Before I ask you about that, can you bring us up to date on Walmart's FCPA investigation? What has happened over the past five years?

I predicted very early that Walmart was not likely to be a top five FCPA enforcement action of all time.

Mike Koehler: The first point is that Walmart's FCPA scrutiny most certainly did not begin with the April 2012 New York Times article. That is one of the biggest myths in the FCPA space. It is a matter of public record, and beyond dispute, that Walmart disclosed its FCPA scrutiny in November 2011. It's now almost six years old. There have been other FCPA enforcement actions that have similarly lasted longer than five years, and Walmart's scrutiny has really followed a fairly typical path. All instances of FCPA scrutiny have what I'll call a point of entry. Walmart's point of entry was conduct in Mexico. Most FCPA enforcement actions then typically expand beyond that point of entry, and the company becomes subject to FCPA scrutiny and does internal investigations in several other countries. And that's what happened here. Anyone knowledgeable about FCPA enforcement would have recognized the April 2012 New York Times article as highly selective, as leaving out various relevant pieces of information, not talking about the law in a comprehensive and complete way. Just because a talented journalist at a leading newspaper devotes an article to an instance of FCPA scrutiny does not make that scrutiny more notable from a legal perspective.

Is any resolution in sight?

Koehler: There has been public reporting that there is perhaps an agreement in principle to resolve Walmart's FCPA scrutiny in the aggregate amount of $300 million. Now, I don't believe everything I read in the media. When it comes to the FCPA there are numerous instances of the media getting it completely wrong. But taking that report at face value, some people have expressed shock and outrage at that number because early on a $1 billion settlement figure was bantered about by some commentators. That was uninformed commentators speculating and was not based on facts.

I predicted very early that Walmart was not likely to be a top five FCPA enforcement action of all time. The reason is the nature of Walmart's scrutiny. All of the cases in the top 10 involve what I call a foreign-government-procurement type of FCPA enforcement. That's not the nature of Walmart's FCPA scrutiny. Walmart is facing FCPA scrutiny because of license, permit, certification-type issues. Let's just call that, for lack of a better word, non-foreign-government procurement. There's never been a license permit-type case in the FCPA's top 10.

Did you ever think it was going to rival Siemens in its impact?

Koehler: This was never in the Siemens-type category. Siemens was a situation where, in the words of the U.S. Department of Justice and the Securities and Exchange Commission, it had "a culture of bribery" at the highest levels of the company. Even The New York Times article stated that executives at Walmart's Mexican subsidiary were concealing conduct from corporate leaders in Bentonville, Arkansas. There was no allegation or suggestion whatsoever that executives in Bentonville were active, knowing participants. What made this story take on a life of its own is not the nature of the scrutiny, it's the nature of the company. Walmart is a divisive company that people love to love and people love to hate. From a legal perspective, and I said this from day one, this is a garden-variety type of FCPA story.

One of the things that made it a powerful story for me, as a journalist who covers the legal beat, is that you had a lawyer in Mexico who was making payments and was talking about them on the record. There was an incredible wealth of detail in this story that brought us inside an FCPA case as it was breaking in the public realm.

Koehler: There are always going to be emails and documents and real people involved in any instance of FCPA scrutiny. That doesn't make Walmart's FCPA scrutiny unique. Again, it's just that The New York Times chose to focus on Walmart's FCPA scrutiny among the many dozens, if not hundreds, of other instances that they could've focused on. You can look at these emails and documents in isolation. This is not a complete and accurate picture, a holistic view of what was happening here. Just because The New York Times reports something or posts a document on its website in isolation, that doesn't mean much of anything. If the allegations or the findings or suggestions or inferences in The New York Times article are true, one would expect to see those followed through in the DOJ and SEC enforcement action against Walmart. That hasn't yet occurred.

Even The Wall Street Journal has reported that much of what was in The New York Times article has not proven to be true or the magnitude of it was severely, significantly overblown. That's how you sell

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newspapers. That's how you win Pulitzer Prizes. I was on a panel several years ago with David Barstow [the Times reporter who shared a Pulitzer Prize for his Walmart reporting], and I was pointing out some of the holes in the article, from an FCPA perspective. His general response was, "I tell stories. I leave the law to other people." Well, when you're writing an article about a company and a company's conduct under a specific law, excuse me, you have to get the law right.

Can you give me an example?

Koehler: The FCPA contains an express facilitation payment exception. Congress specifically drafted the FCPA in a way such that payments in connection with routine governmental actions are not actionable. We can debate the wisdom of that, and that's a valid discussion to have, but it's in the law. Moreover, even accepting at complete face value everything in The New York Times article, we have conduct stretching back to 2005, 2006. It's a matter of black-letter law that there are statutes of limitations. Indeed, the U.S. Supreme Court just last week reiterated the fact that in actions, including those under the Foreign Corrupt Practices Act, there's such a thing as a statute of limitations, which impacts settlement amounts.

Again, I completely agree with you and everyone else that The New York Times article elevated Walmart's scrutiny to a very high level – created a media feeding frenzy. But that doesn't, in and of itself, make it "a big case."

Has the Walmart FCPA investigation resulted in any big changes to date?

Koehler: Big changes in what?

It does seem to have resulted in Walmart's instituting reforms on a very large scale.

Koehler: Yeah, I think it would be undisputed that Walmart's FCPA scrutiny has resulted in the company implementing some additional policies and procedures. And that has resulted in the company becoming an undisputed best practices leader in this space, regardless of whatever may or may not have happened seven to 10 years ago. Again, one can say the same exact thing regarding most companies that experience FCPA scrutiny. Most are going to learn some things, are going to devote additional resources to FCPA compliance, are going to revise policies and procedures and processes. Again, there's nothing unique about what Walmart has been doing. What is unique is Walmart's disclosure of what it's been doing. From my perspective, Walmart has been very forthright and transparent in its global ethics and compliance report that it's publicly released over the last four or five years. That's not to suggest Walmart's the only company doing those sorts of things. But not all companies necessarily disclose what they're doing to the extent Walmart has.

What lessons would you like companies to draw from all this?

Koehler: Don't fall hook, line and sinker just because a journalist writes something about the FCPA. Don't base policy positions, don't stake your reputation as some FCPA commentators have done, solely based on an article in a newspaper. Let the facts come out. The facts still haven't come out yet. We don't even have an enforcement action, but from day one people were staking positions, making policy arguments based solely on a newspaper article. That's irresponsible commentary. All companies active in the FCPA space, and adhering to best practices, already knew that doing business in China and Mexico and India presented an FCPA risk. Companies doing business in the global marketplace, adhering to best practices, already knew that interactions with licensing and regulatory officials presented an FCPA risk.

That, of course, is the other side of this kind of enforcement: the potential reputational risk that companies face just because they're under scrutiny.

Koehler: I usually respond to that issue by taking a step back and asking, "How does one even measure reputational harm, or how does one even measure a company's reputation?" On one level, if a company's reputation is bad, and has sunk because of an instance of FCPA scrutiny, you would think it would be reflected in a company's stock price. Because there was so much misinformation in the public domain regarding The New York Times story, Walmart's stock price did fall very significantly within 48 to 72 hours. Once people started to take a deep breath and realize what was really going on, the company's stock price completely rebounded.

If history is any guide, when the Walmart FCPA enforcement action is announced, whenever that is, the company's stock price is likely to go up because now it's over. You've mentioned Siemens. Did Siemens suffer any reputational damage because of its blockbuster FCPA enforcement action? Well that begs a question of how one even measures reputational damage. What we know is that a few days after that blockbuster enforcement action in 2008, the U.S. government deemed Siemens a responsible government contractor for purposes of federal government contracting. It didn't impact Siemens contracts or business with the U.S. government in any material way.

It's a long-winded way of saying a lot of people like to talk about reputational damage, but what does it really mean? Does it mean a company's stock price? Does it mean how a company is perceived? How do you even measure how a company is perceived? I could go to my local Walmart today, and I guarantee you 99.9 percent of people in that store probably aren't even aware that Walmart is under FCPA scrutiny or may not have even heard about the Foreign Corrupt Practices Act.

I want to turn now to another subject that some have predicted could have a profound effect on FCPA jurisprudence: the U.S. Supreme Court's* Kokesh *decision. What's your view?

Koehler: It will not have a profound impact on FCPA enforcement because most companies under FCPA scrutiny simply roll over and play dead. Even though the Supreme Court unanimously concluded that disgorgement is subject to a five-year statute of limitations period, what difference does that make when a company under FCPA scrutiny, to demonstrate its cooperation, agrees to waive statute of limitation defenses? Last Friday there was an FCPA enforcement action brought by the Department of Justice against The Linde Group, seeking disgorgement. And the conduct at issue took place in 2006 – in other words, 11 years prior to the enforcement action. So, in the one FCPA enforcement action brought since *Kokesh*, it had zero relevance.

It sounds like a basic point, but it's such an extremely important point: The law only matters to the extent that a defendant, whether a corporate defendant or an individual, is willing to mount a legal defense based upon the law and the facts. There are a lot of things that should impact FCPA enforcement, but they don't because the law often doesn't matter. It's a game of risk aversion. It's a game of cooperation. It's a game of how do we make this adversary who carries a sharp and big stick go away as quickly and efficiently as possible?

FCPA Enforcement Is Here to Stay

SEC may, however, soften when true criminal intent is lacking

With the DOJ's renewal of the FCPA's self-disclosure pilot program in March comes many questions, the most common being: What does the indefinite extension mean for the FCPA enforcement overall? ***McGuireWoods LLP*** *partner* ***Alex Brackett****, whose practice focuses primarily on advising and supporting corporate and individual clients in the areas of white collar criminal defense and internal investigations, shares his thoughts on how the integration of anticorruption compliance programs often aids companies in solving for more than one compliance issue, whether or not the FCPA has created an uneven playing field for U.S. companies, and what types of actions – or inactions – are most likely to result in FCPA enforcement matters. The interview has been edited for length and style.*

The U.S. is no longer alone in having laws like the FCPA.

President Trump has openly criticized the FCPA. What signals, if any, have we seen so far from the White House about its intentions toward the FCPA?

Alex Brackett: Obviously, some of the president's prior comments about the FCPA received a good deal of attention, both in the run-up to and after the election. Having looked at those and at comments that others in the administration have made subsequently, I think it's fair to say that his statements are a little bit dated. Attorney General (Jeff) Sessions' statements during the confirmation process and statements by other key officials since clearly indicate that FCPA enforcement is not something that they plan to de-prioritize. I fully expect that it's here to stay.

The administration has been critical of the SEC, which has obviously been an important and fairly aggressive FCPA enforcer. Within the SEC there has been enforcement of the FCPA that, in some respects, has pushed some boundaries in terms of theories of liability and conduct that some people have been critical of as going beyond the scope of what the FCPA is really intended to pursue. I would not be surprised to see a decline in some of the more regulatory-focused aspects of the SEC's enforcement of the FCPA, but I don't see it going away, particularly in cases where there are real indicators of individuals having acted with real criminal intent.

Many of us have been wondering what this DOJ is going to mean for white collar enforcement in general. I suspect that we're probably going to see some retrenching around crimes where you cannot show that there was true criminal intent versus some of the enforcement in areas like the FCPA, where that clear intent has not necessarily been evident.

One key indicator that everyone was looking at earlier in the spring was whether the FCPA pilot program that DOJ announced last year was going to be renewed, which it was in late March for an indefinite period. Had the administration come in and allowed that program to expire in April, that might have been a bellwether that FCPA enforcement could be on the wane. The fact that they extended, even if only to examine the program and see whether it merited having continuing life, is an indicator that we're maybe in a wait-and-see moment.

Alex Brackett *is a partner in the Richmond, Virginia, office of McGuireWoods LLP. He represents individual and corporate clients facing regulatory and criminal investigations and co-leads the firm's Strategic Risk and Compliance team. He can be reached at abrackett@mcguirewoods.com.*

How is the DOJ's recently extended pilot program working out in real life and how are you advising clients about taking advantage of it?

Brackett: There have been a number of matters resolved under it. Interestingly, the first matters were all coming out of China, which has obviously been a significant focus for FCPA investigations. There are clearly indicators that companies are taking advantage of it and DOJ does appear to be providing them some real material benefit for participation. In terms of how clients weigh their approach to making a disclosure, the best I can say is that the pilot program is another one of the many elements that we would weigh with a client when they're making a decision on whether to disclose or not. Naturally, it will depend on the facts and the circumstances, but I don't know that it's become a huge overriding factor so much as one of the many factors that you're going to look at. In part, that's because, while DOJ has outlined some very clear benefits that you can receive, the pilot program does not provide certainty. There's still a tremendous amount of discretion in DOJ, so that dilutes some of the value that clients might get out of it. They're taking a leap of faith that they're going to get a significant material benefit from their disclosure.

How do you separate the interests of individuals within a company versus your representation of the company in these matters?

Brackett: Well, in any significant white collar matter, whether it's an FCPA matter or something else, you've always got to be looking at, and being clear about, who the client is. A great way to get yourself into trouble is to launch into an investigation and lose sight of that, and lose sight of the fact that there could well be individuals who need their own counsel and who you need to be a little bit more thoughtful about how you engage with as an investigation starts.

It becomes important substantively, in terms of making sure that if there are potentially culpable individuals or people who might need counsel, that they're getting an opportunity to retain counsel and that you're not doing things in the investigation that could be problematic, for the company or for the individuals. Also, because DOJ has been so out front in recent years about the fact that they want to aggressively pursue individual prosecutions in order to send a message to potential wrongdoers, you've got a lot more awareness at the C-suite level and beyond about the potential exposure that individuals have when their company is under investigation.

Is there a way to address criticisms that the FCPA creates an uneven playing field for U.S. firms, which go to considerable lengths to comply, and foreign competitors, who have little exposure to DOJ prosecutions, without making the act unworkable?

Brackett: If you look at the track record of FCPA enforcement and what companies have been in the top 10 over the years, you will understand that not only is the reach of the FCPA incredibly extensive, but also that DOJ and SEC have done a pretty exceptional job of reaching out and

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being able to enforce it against non-U.S. companies. So I'm not sure that the track record of enforcement has demonstrated that it's creating some kind of unfair burden on U.S. companies, in terms of how they compete internationally. I do think that U.S. companies have been forced to focus on compliance investments, possibly earlier than some of their non-U.S. competitors, but we really are seeing that this has become an increasingly global norm. We are no longer alone in having anti-bribery and anticorruption laws like the FCPA.

There's no other country out there that's enforcing their anti-bribery and anticorruption laws with the same vigor that we are, but when you look at the UK Bribery Act, the Brazil Clean Companies Act, changes Canada has made to the Corruption of Foreign Public Officials Act, and even changes that are occurring in anticorruption laws and enforcement in countries like China, India and throughout Europe, you really see that, over the last decade and over the last couple years to an even greater extent, this is very clearly a focus area for countries other than the U.S. And we're starting to see enforcement in those other countries. It appears that this is simply becoming a built-in factor for any company in any country, particularly if they're going to operate across borders, that having robust anticorruption compliance programs is just a baseline expectation.

On that front, one thing that we have found with any number of our clients, in terms of how they look at the investment in compliance in that space, when you're building the control and when you're building the policies and procedures that go into a robust anticorruption compliance program, you're not just solving for the anticorruption problem. You tend to end up solving for a lot of compliance issues at the same time, because there are a lot of different legal and regulatory issues that come into play with international business that have significant commonalities and get addressed by very similar tools. In addition, when we deploy those tools, we try and be really mindful of the business needs so as not to impede the business unnecessarily. We typically find ways where we can provide them value, in terms of transparency and visibility that, while it's solving for a legal or regulatory issue, is also giving them valuable information and insight from a business perspective. Companies are increasingly viewing these investments in compliance as things that pay dividends broadly across the company and not just in solving for a legal risk.

Awareness of FCPA compliance as a necessary focus area for corporate compliance programs seems to have matured and become a given. Are there particular areas where companies continue to under-invest from a compliance perspective?

Brackett: If you went back a decade, you could likely have found lots of companies with an international business risk profile that may not even have had a policy in place or may not even have addressed bribery or corruption in their code of conduct, if they even had a code of conduct in place. Now it's fairly difficult to find a business of any real sophistication that operates across borders that doesn't have a code of conduct and doesn't have policies and procedures that address these issues. In most cases, they are also taking other steps to control for those risks through things like personnel training and making sure that they've got robust financial controls. The baseline has improved significantly in terms of some of those core aspects of what you would expect to see in a compliance program.

At the same time, as companies are maturing in their awareness levels and are maturing in their commitment to and investment in compliance, the expectations placed upon them by law enforcement and regulators will mature and evolve as well. They have the lucky prerogative for them of being able to keep moving the goalposts, which they do in order to continue to push that evolution towards where the baseline should be and what companies need to invest in. A couple of things that we are consistently recommending to clients and that, at times, can be challenging to get clients to commit to or make the necessary investment in, are things like having a true third-party due diligence program that's functional and robust, and is designed well, adequately resourced and is something that gets paid attention to and periodically revisited and revised.

Third-party risk is really at the heart of most FCPA enforcement matters. It's at the heart of FCPA compliance efforts. If you're engaging with lots of third parties and are failing to do true due diligence on them, then the rest of your program is really imperiled because you're just inviting a tremendous amount of risk into your operations.

The other area that we often see as a fairly significant blind spot or weak point for clients in their compliance programs is building anticorruption and other compliance focuses into their post-acquisition due diligence and compliance integration processes when they enter into new acquisitions, whether it is buying certain assets or business lines from a company, or buying an entire company. Clients are increasingly good at pre-acquisition due diligence, and there's a good awareness of the need to include a compliance focus in that. What they don't always do as good a job of is following up on the things that they learned about in pre-acquisition due diligence.

There can be a bit of exhaustion once you hit the closing date and they won't always invest in that next step, which is to take a really close post-closing look at what it is you've bought, the red flags that came up in the pre-acquisition due diligence and then being willing to invest in a true integration process. Often that new acquisition is integrated into the business from an operational perspective, but it also needs integrating from a compliance perspective. The new operations that you've acquired, and the resources and personnel within them, need to understand the compliance expectations placed on them and the policies and procedures that apply to them. They need to have received training, be subject to an adequate level of oversight, and understand things like hotline reporting obligations and mechanisms. It is critical to ensure that the things that you're pushing down to them fit for that new organization. They may have previously operated under a different type of code or different policies or different oversight. Their operations might be different or their locations might be different. There might be cultural challenges that are different. It's not always simple to just send over a copy of the policies and procedures and code and say this now applies to you and you're going to do annual training and leave it at that. You really need to make sure that it fits, that the message has been received, and that the controls are in place and are working.

At the end of the day, when you look at FCPA enforcement matters, there is always a significant number of them where the problems that resulted in the enforcement action were either a failure to adequately vet, understand and oversee the third parties that you were inviting into your house, or a similar failure to adequately vet and integrate a new acquisition into your business. Those are where problems often arise, fester and turn into enforcement matters.

Is there anything else that we should be bringing to the forefront related to FCPA for our readers?

Brackett: One thing I might add is, just in terms of anticipating where FCPA enforcement is heading, I think it's important to keep in mind the long tail on these matters. Like many white collar matters, these are not cases that develop quickly. They tend to be multi-year investigations and sometimes can stretch on beyond five years or more. This new administration is coming into a situation where they've got a fairly extensive pipeline of cases at different levels of development, and I don't think it's realistic to expect that many of those cases are going to go away. Because of that long tail, we're going to continue to see cases that started years ago mature and result in enforcement actions. Time will really tell if there's going to be a significant impact or curtailment in this area. We're really not going to know for some fairly significant period of time in all likelihood. I just don't see this curtailing in any significant fashion anytime soon. I could obviously be proven wrong, but that's just my prediction.

ACC and Dubai Join Forces on Anticorruption Program

Goal is to train in-house counsel active in the Middle East

By James A. Merklinger / Association of Corporate Counsel (ACC)

There is no doubt that 2016 was a record-setting year in the history of the enforcement of the Foreign Corrupt Practices Act. The nearly $2.5 billion in settlements that companies paid to resolve FCPA cases dwarfs the previous year's figure of $133 million. However, nearly absent from the books last year were incidents in the Middle East.

With the exception of the Embraer FCPA settlement accounting for violations in Saudi Arabia (in addition to other countries outside the Middle East), and a General Cable Corp. payment for alleged violations in Egypt (again, among other nations), none of the other 25 companies that paid the U.S. government to resolve FCPA matters had alleged violations in Middle Eastern nations. Incidents in China led the way, followed by violations in Latin America.

FCPA enforcement has slowed so far in 2017, in large part due to the new administration and resulting leadership changes at the U.S. Department of Justice. However, even among actions in the year's first quarter (all of which were in January), none were related to the Middle East.

TRACE International, which measures bribery risk by country, tracked a decrease in bribery risk in nearly all Middle Eastern nations between 2014 and 2016. The lowest-risk nation, the United Arab Emirates (UAE), held steady in this time period, with a risk figure of 39 out of 100.

Most other nations, from Bahrain to Qatar to Jordan and even high-risk Yemen (score of 93), had drops in bribery risk between 2014 and 2016. Only Saudi Arabia, Lebanon, Iran and Afghanistan moved in the opposite direction. The most drastic change was in Saudi Arabia, which moved 12 points in the direction of higher bribery risk, from 51 to 63.

Despite these isolated increases in bribery risk by country, it appears that corruption incidents are decreasing for the Middle East as a whole. Nevertheless, companies must remain aware. Of current FCPA investigations, the largest category by industry is the oil and gas services field, which is of course a prominent sector operating in the Middle East.

For in-house counsel whose businesses have a presence in the region, collaboration on issues of such significance is key. The large presence of multinational companies in the region means that in addition to the FCPA, companies must remain mindful of laws such as the UK Bribery Act and anticorruption statutes originating in Australia, Brazil and other nations.

Recognizing the importance of the Middle East as a global business hub, ACC joined in May with Dubai's Legal Affairs Department (LAD) to announce collaboration on a groundbreaking in-house credentialing program. The training curriculum will be developed by ACC with a group of leading general counsel from the UAE and the broader Middle East region. There will also be an international contingent participating.

The training will focus on the core competencies attributed to successful in-house counsel as well as the effective and efficient management of a law department, including how to demonstrate the department's value. In addition, in-house lawyers may select from electives related to specific practice areas, such as employment law, intellectual property and anti-corruption – the exact focus of the FCPA. Certification will highlight global best practices for working in a corporate law department.

The ACC and the LAD program will serve the needs of Dubai's diverse legal population working on cross-border matters, touching on laws from around the world. Thus, while the FCPA could be a focus for companies that do business in the United States, in-house counsel in Dubai will also look to the UK Bribery Act and other global statutes to provide their legal teams with the most up-to-date information on fighting bribery and corruption.

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DOJ Pilot Program Measures Up in First Year

The tone is cooperative, but companies are warned to self-disclose

By Karl H. Schneider & Sarah Hyser-Staub / McNees Wallace & Nurick LLC

The Foreign Corrupt Practices Act's antibribery provisions affect every U.S. company that transacts business internationally. The FCPA prohibits companies from corruptly offering money (or anything of value) to foreign officials in an effort to obtain or retain business. To minimize the risk of foreign bribery, it behooves company counsel to monitor FCPA enforcement trends and to ensure that front-line personnel are in the best possible position to recognize and report violations.

Recent trends suggest that the U.S. Department of Justice and the Securities and Exchange Commission will continue to expand FCPA enforcement. This past year, the Criminal Fraud Section of the DOJ more than doubled the number of prosecutors in its FCPA unit, and the Federal Bureau of Investigation added three new squads of special agents dedicated to bribery investigations. These measures coincide with federal law enforcement's increased coordination with their foreign counterparts and a global crackdown on corruption.

The biggest news in FCPA enforcement came in April 2016, when the DOJ announced a one-year pilot program designed to "promote transparency and accountability" in FCPA prosecutions. Under the pilot program, companies have the option of self-disclosing and remediating FCPA violations in exchange for reduced fines and penalties and even declination of criminal prosecution. To receive mitigation credit, companies must self-disclose "within a reasonably prompt time after becoming aware of the offense" and "prior to an imminent threat of disclosure or government investigation."

The burden of demonstrating timeliness rests with the company. Prosecutors consider whether the company made a full or partial disclosure (i.e., whether it laid out all the known relevant facts, or whether it spun, embellished or withheld information in an attempt to protect itself or one of its principals). Law enforcement also expects cooperation for the duration of the investigation and any resulting prosecution.

A significant aspect of this cooperation includes launching an internal investigation and implementing a corporate compliance program (or overhauling an apparently ineffective one). Because the resources available to conduct intensive internal investigations inevitably vary, the company bears the burden to demonstrate good faith and transparency based upon its financial condition and available resources. Also, the company must disgorge all profits gained from the misconduct. (Notably, however, the U.S. Supreme Court recently ruled in *Kokesh v. Securities and Exchange Commission* that the penalty of disgorgement is subject to a five-year statute of limitation. While *Kokesh* was not an FCPA enforcement action, the ruling is arguably applicable in those cases as well. This means that the government may only require disgorgement in cases where it initiated its prosecution within five years of the date the claim accrued.)

By all accounts, the first year of this pilot program was a success. In November 2016, Assistant Attorney General Leslie Caldwell said that, although exact numbers could not be provided, "anecdotally, we've seen an uptick in the number of companies coming in to voluntarily disclose potential FCPA violations." The DOJ is officially reporting that the pilot program resulted in five declinations. However, commentators have identified 15 additional FCPA cases that were resolved without enforcement in 2016 and six more cases in the first few months of 2017. Although these "unofficial" declinations may be the result of lack of evidence or jurisdiction, these numbers are nevertheless unprecedented. The reported average number of declinations in prior years was around 10.

> ***The FBI added three squads of agents dedicated to bribery investigations.***

According to communications made public by the DOJ, the five reported pilot program declinations involved Nortek, Inc., Akamai Technologies, Inc., Johnston Controls, Inc., HMT, LLC and NCH Corporation. Each of these cases involved bribes paid in China or, in HMT's case, China and Venezuela. Each of the companies made complete and prompt disclosure of the illicit conduct, cooperated fully with the investigation, terminated all culpable employees (including high-level executives), severed business relationships with the responsible subsidiary or foreign business, disgorged all profits obtained from the bribes and, in the Johnson Controls case, paid a civil fine.

In March 2017, the DOJ announced that the pilot program would remain intact for the foreseeable future. Although the tone of the pilot program is cooperative, the Fraud Section has warned that "[i]f a company opts not to self-disclose, it should do so understanding that in any eventual investigation that decision will result in a significantly different outcome …"

Companies would be wise to heed this warning and take advantage of the mitigation credit available. As Acting Assistant Attorney General Kenneth Blanco recently cautioned at the ABA's annual White Collar Crime Conference in March, considering the growing multinational efforts at combatting corruption, there is "nowhere to run, baby, nowhere to hide."

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No Free Pass Under Trump

Individuals who think they can do what they want without having to worry about FCPA enforcement should think again

By John Filar Atwood / Wolters Kluwer Legal & Regulatory U.S.

U.S. Department of Justice officials have gone out of their way recently to emphasize that enforcement of the Foreign Corrupt Practices Act is alive and well under the new administration. Perhaps in response to concerns that President Donald Trump is reportedly no fan of the FCPA, both Acting Assistant Attorney General Kenneth Blanco and Acting Principal Deputy Assistant Attorney General Trevor McFadden said in recent public remarks that the DOJ continues to vigorously investigate and enforce FCPA violations. Worth noting in McFadden's comments is that the prosecution of individuals remains a DOJ priority.

In a speech at the 19th Annual Conference on the FCPA in April, McFadden indicated that Attorney General Jeff Sessions has stressed the importance of individual accountability for corporate misconduct. Consequently, the DOJ's fraud unit continues to prioritize prosecutions of individuals who have willfully violated the FCPA, he said.

McFadden also noted that in 2016, 17 individuals were charged with or pleaded guilty to FCPA violations. Looking back 10 years, prosecutors in the DOJ's FCPA unit have convicted more than 100 individuals for FCPA violations or related criminal offenses, he added.

Wally Dietz, co-chair of the FCPA practice group at Bass, Berry & Sims, pointed out that the recent rise in individual prosecutions can be traced back to the September 2015 release of the Yates memo. "There is some debate about whether the Yates memo actually was a change in DOJ policy or simply an announcement of what the policy had been over the past several years," Dietz said in an interview with Wolters Kluwer. "The one thing about the Yates memo that may have made a difference is the requirement that individual prosecutions be considered as a part of any resolution."

The attorney general's assistants vouch for his commitment.

In a report on 2016 FCPA enforcement trends, which tracked actions at both the DOJ and the Securities and Exchange Commission, Dietz and a colleague counted 27 individual prosecutions in 2016, including 10 guilty pleas and 15 settlements. That compares to just four criminal guilty pleas and two individual settlements in 2015, according to the report.

Dietz indicated that FCPA attorneys are watching this area closely. "There is a debate in the FCPA bar about how strongly the DOJ can prosecute individuals and make the case stick beyond a reasonable doubt," he said. There have been problems with individual prosecutions in the past, he noted, so not many individual cases go to trial.

At the moment, there are more cases with the potential to go to trial, and FCPA attorneys are eager to see if the government can prove its case, Dietz said. "The problem for individuals and companies is that the threat of prosecution is so significant and so severe that most will try to resolve the issue by an agreed-upon settlement," he added.

While the rising number of prosecutions and record fines might be alarming to some industry participants, McFadden assured attendees at the recent conference that the DOJ is not chasing every possible infraction. "The Fraud Section and the FCPA unit's aims are not to prosecute every company we can, or to break our own records for the largest fines or longest prison sentences. Our aim is to motivate companies and individuals voluntarily to comply with the law," he said.

One critical way that the DOJ has tried to improve voluntary compliance is through its self-disclosure pilot program, which was started in April 2016. Under the recently extended program, companies that voluntarily self-disclose FCPA misconduct, fully cooperate and engage in appropriate remediation may be eligible for a declination or a reduction in penalties and fines. Partly thanks to the pilot program, the number of times that the DOJ declined to prosecute rose from five in 2015 to 12 in 2016.

Dietz cautioned that cooperation still does not guarantee credit, but he believes that the DOJ is demonstrating through the rise in declinations that it is possible to self-report and have no prosecution at all.

"The DOJ is also trying to show very clearly in some of these resolutions that if you do cooperate, if you do self-disclose, you will get the discounts," he added.

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