

Leadership and Due Diligence: The Road to FCPA Compliance



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U.S. President Dwight D. Eisenhower once said you do not lead by hitting people over the head—that's assault, not leadership. The parallel might be made that the vast number of compliance laws and regulations will not alone cause businesses to be compliant with the Foreign Corrupt Practices Act (FCPA).

Justifiably, much has been stated and written about the actions taken by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission's (SEC) enforcement of the FCPA. In a July 2007 article entitled "The FCPA Enforcement Explosion Continues: Nine Enforcement Actions in 2007 and Approximately 100 Active Investigations," Gibson, Dunn and Crutcher LLP presented statistics supporting what might be considered exponential growth when they chronicled FCPA enforcement activity during the period of 2003 to 2007. Specifically, DOJ and SEC FCPA actions increased from two in 2003 to 15 in 2006; through the middle of 2007, there were nine new actions initiated. Through various sources, the firm also identified approximately 100 other companies that had opened FCPA investigations in 2007.

In addition to the increases in FCPA enforcement activity, the criminal and civil penalties for companies and individuals violating the FCPA have also grown in a corresponding and dramatic fashion. As illustration, in February 2007, three wholly owned subsidiaries of Vetco International Ltd. pleaded guilty to criminal charges relating to the anti-bribery provisions of the FCPA and agreed to pay fines amounting to US\$26 million. In April 2007, Baker Hughes Services International, Inc. settled both criminal and civil enforcement actions with the DOJ and the SEC and agreed to pay combined fines totaling US\$46 million.

The spike in FCPA enforcement activity and sanctions according to a December 1, 2005, Inside Counsel magazine article by Michael T. Burr, was attributed in great part to confluence of the government's increased focus on corporate accounting and governance practices post-Enron and Sarbanes-Oxley, as well as tighter cross-border dealings dictated by the anti-money laundering provisions of the USA Patriot Act and U.S. Commerce and State Departments' export control regulations. It was further stated in the article that as a result of the broader regulatory mandates and increased resources at the DOJ, SEC, and Commerce Department and the tougher due diligence and disclosure mandates companies now face, pressure is rising to squeeze any hint of impropriety out of international business dealings.

The emphasis on enforcement activity relating to the FCPA has created a corresponding reaction by international corporations to ensure that they and their subsidiaries are not willing or unwilling participants in transactions that violate the FCPA. Many corporations have taken proactive steps to ensure that their organizations are compliant with accounting, governance, and anti-money laundering laws and regulations. Further, the army of private security and investigation consultants as well as accounting and law professionals, together with internal corporate security, risk, legal, information technology, and human resources practitioners, has utilized the array of tools to red flag and combat potential FCPA violations. Most notably, the focus has been on knowing and understanding compliance issues, ensuring appropriate accounting and recordkeeping practices, anti-bribery plans, testing and monitoring, due diligence, and training.

While all of the above factors are critically important in the fight to reduce the potential for corrupt activity, all too frequently the emphasis is on the arsenal of compliance tools. The Committee of Sponsoring Organizations of the Treadway Commission (COSO) noted that the core of any business is its people—their individual attributes, including integrity, ethical values, and competence—and the environment in which

they operate. Our experiences validate this proposition by the COSO and would suggest that there are two anti-corruption components that are paramount to ensuring that a company does not end up on the dubious list of FCPA violators.

The first component is lodged in a term we constantly hear in business, and for that matter, in just about all walks of life. The term is “leadership.” Without strong executive leadership, the culture essential to growing and maintaining a comprehensive and effective anti-corruption and anti-bribery corporate environment, is near impossible. Board members, the CEO, and other top executives must set the tone through active participation and by clearly communicating to corporate business leaders and all members of the organization that paying bribes, in any form, will not be an accepted business practice. This sets the cornerstone for workable compliance and governance, policies, practices, and procedures to which a company must adhere to be compliant with the FCPA. Without the strong messaging from the top of the organization, there can be no assurance that your company will not be the next Vetco or Baker Hughes.

Once the organizational mission, purpose, goals, objectives, and most importantly, values have been communicated from the top of the organization, then the focus can shift to what is the second most important element—knowing your business partners. Failing to conduct a thorough due diligence on business partners, whether they be an individual company, joint venture, partnership, contractors, and/or consultants, is just not good business practice. Violation of the FCPA is a serious offence punishable with serious monetary fines and injunctions. Not only do companies and individuals suffer the financial repercussions, but a company’s business reputation can be seriously tarnished.

The problem can be avoided when companies implement measures to comply with the FCPA. With the strong executive leadership and anti-corruption communications noted above and by conducting thorough due diligence on all business partners, other management compliance programs can follow and be developed to ensure more effective compliance. Compliance Program Managers should ensure that the due diligence is comprehensive and includes past business practices, personal investments, and the relationships between the potential partners and foreign government officials. Companies should take serious note of the business climate of the country in which the business is to be conducted, to include the stability of the government, crime, terrorism, social unrest, human rights abuses, and the country’s relationship with the U.S. government.

By recognizing that the core of any business is its people, it naturally follows that corporate leadership and individual contact with and knowledge of business partners are critical components to ensuring a company is more likely to be compliant with the FCPA.



For more information, call, email or visit us online.

877.230.9082

rcc-contactus@kroll.com

www.kroll.com