The Foreign Corrupt Practices Act: Government Expectations for Corporate Compliance and Cooperation

Stephen M. Byers
Tom Hanusik
Bruce Henoch

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Overview

• Current FCPA Enforcement Environment

• DOJ Pilot Program
  – Requirements
  – Recent Declinations

• Crafting an Effective Compliance Program
  – How to Educate and Regulate
  – Recent Enforcement Actions and Compliance Obligations
Current FCPA Enforcement Environment

• Greater Resources
• Increased International Cooperation
• Addition of Compliance Expert at Fraud Section
• DOJ Pilot Program: Disclosure and Cooperation
Greater Resources

• Substantial increase of resources devoted to FCPA prosecutions in 2016

• 10 new Fraud Section prosecutors

• 3 new FBI investigatory squads
Increased International Cooperation

• More than 40 countries have signed OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

• Sharing of leads documents and witnesses

• Resulting notable prosecutions:
Addition of DOJ Compliance Expert

• Who is Hui Chen?
  – Background in prosecution
    • Trial Attorney in the Criminal Division
    • AUSA in the Eastern District of New York
  – Background in Compliance
    • Compliance positions at Microsoft in Beijing, New York, and Munich, including Director of Legal Compliance for the Greater China Area.
    • Assistant General Counsel at Pfizer in the Compliance Division
    • Global Head for Anti-Bribery and Corruption at Standard Chartered Bank
Addition of DOJ Compliance Expert

• What is Chen’s role?
• Consultant to DOJ Fraud Section
  – Not there to make charging decisions
  – Provide expert guidance to prosecutors by evaluating “the existence and effectiveness of any compliance program that a company had in place at the time of the conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action, such as the implementation of new compliance measures to detect and prevent future wrongdoing.” (DOJ Press Release)
  – Develop benchmarks for evaluating corporate compliance and remediation and serve as a liaison to stakeholders
Chen’s Compliance Philosophy

- The Car Analogy: Safety Equipment + Driver Behavior
- Data Driven: Data Monitoring = Sophistication
Pilot Program Overview

- Effective April 5, 2016 for one year

- Goal: “motivating companies to voluntarily disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs.”

- Means: “providing greater transparency about what we require from companies seeking mitigation credit . . . and what sort of credit those companies can receive” if they meet the requirements.
Pilot Program Overview

• Links to compliance: “If successful, the pilot program will serve to further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations, and, consistent with the [Yates memo], increase the Fraud Section’s ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.”
Pilot Program Requirements

Mitigation Credit for companies that:

• Voluntarily self-disclose
• Fully cooperate
• Remediate
Pilot Program – Voluntary Self-Disclosure

• To qualify, voluntary disclosure must:
  – Occur “prior to an imminent threat of or government investigation” U.S.S.G. §8C2.5(g)(1)
  – Be “within a reasonably prompt time after becoming aware of the offense”
  – Include all relevant facts about violations and individuals involved
Pilot Program – Cooperation

• To receive cooperation credit a company must:
  – Timely disclose all relevant facts including re individuals
  – Proactively cooperate
  – Preserve, collect and disclose relevant documents
  – Provide timely updates and rolling disclosures
  – Coordinate with the government’s investigation
  – Provide facts re third-party entities and persons
  – Make officers and employees available for interviews
  – Provide attribution of facts to specific sources
  – Disclose documents located overseas, facilitate third-party document production, and provide translations
Pilot Program – Remediation

• Important to
  – Reducing corporate recidivism
  – Detecting and deterring wrongdoing

• “The Fraud Section’s Compliance Counsel is assisting us in refining our benchmarks for assessing compliance programs and for thoroughly evaluating an organization's remediation efforts.”

• Requirements:
  – Implementation of effective compliance program (8 factors)
  – Appropriate discipline of employees and supervisors
  – Any additional steps that demonstrate recognition of seriousness, acceptance of responsibility, and implementation of measures to reduce the risk of repetition including identification of future risks
Pilot Program - Credit

• Cooperation and remediation *without* voluntary self-disclosure =
  – “at most a 25% reduction off the bottom of the Sentencing Guidelines fine range”

• Disclosure, cooperation and remediation =
  – Up to 50% reduction off bottom of range
  – No monitor if compliance program implemented
  – Consideration of declination of prosecution
    • Seriousness of the offense, executive involvement, significant profit, history of non-compliance, any priors
Pilot Program – Recent Declinations

• In re HMT LLC (September 29, 2016)

• In re NCH Corporation (September 29, 2016)

• In re Johnson Controls, Inc. (June 21, 2016)

• In re Akamai Technologies (June 6, 2016)

• In re Nortek (June 3, 2016)
Building an Effective Compliance Program

• Why is it so important?
  – Stop FCPA violations before they start
  – Detect violations that occur
  – Considered in charging decisions and resolution
  – Possible sentencing reduction
Government Guidance on Compliance

  Joint DOJ-SEC publication ("FCPA Resource Guide")
  - Available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf


- **US Sentencing Guidelines, Chapter 8**
  - Available at http://www.ussc.gov/guidelines/2016-guidelines-manual

- **SEC and DOJ enforcement actions**
  - SEC enforcement actions available at https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml
Compliance Program Specifics

Ten categories set out in the DOJ/SEC FCPA Resource Guide:

1. Commitment from senior management and clearly articulated policy against corruption
2. Code of conduct and compliance policies and procedures
3. Oversight, autonomy and resources
4. Risk assessment
5. Training and continuing advice
6. Incentives and disciplinary measures

(continued . . .)
Compliance Program Specifics

7. Third-party due diligence and payments
8. Confidential reporting and internal investigation
9. Continuous improvement: periodic testing and review
10. Mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration

Overriding Focal Point
Effective internal controls that prioritize accounting controls
1. Commitment From Senior Management and Clearly Articulated Policy Against Corruption

• Tone must be set from the top. The Board, executive members and upper-management must embody a culture of compliance.

• High-level commitment must be reinforced and implemented by middle-managers and employees of all levels

  – DOJ specifically look at the culture of the company and whether management implicitly or explicitly encourage employees to engage in misconduct
  – Must not be mere “paper program”

• Must be communicated in unambiguous terms that criminal conduct will not be tolerated

[U.S.S.G § 8b2.1(b)(2)-(3); FCPA Resource Guide at 57; USAM 9-28.800]
A written **Code of Ethics** is the foundation of the compliance program. As DOJ has repeatedly noted in its charging documents, the most effective codes are:

- **Clear**
  - Use language that everyone understands
  - May necessitate versions in different languages
  - Define expectations

- **Concise**

- **Accessible at all times**

- **Regularly updated**

[U.S.S.G § 8b2.1(b)(1); FCPA Resource Guide at 57-58]
3. Oversight, Autonomy and Resources

• **Compliance team make-up should reflect its prominent role**
  – Include senior management
  – Incorporate all relevant departments (human resources, operations, accounting, sales, legal)
  – Members must be qualified and experienced enough to understand and identify potential risks
  – Members should be adequately compensated and promoted as compared to others in the company

• **Broad access and authority**
  – Regular communications with the Board of Directors and Senior Executives
  – Authority to pursue investigations
  – Allocation of resources to sustain the compliance program
  – Autonomy to ensure real oversight

• **Documentation**
  – All aspects of the program (planning, implementation, evaluation) should be documented and preserved

4. Risk Assessment

• Tailor the program to specific risks. There is **no one-size-fits-all solution**:
  – Conduct risk assessments and craft compliance program to meet those risks
  – Consider the scale of the company, industry sector, business partners and whether they are based in high-risk countries, dealings with foreign governments and history of corruption.
    • Document the risk assessment
    • Prioritize risks that are most likely to occur, escalate and lead to dire consequences

• Repeat risk assessments often
  – Annually is usually sufficient
  – But change in the law or change in business profile should trigger reassessment ([U.S.S.G § 8b2.1(b)(1), FCPA Resource Guide at 57-58])

5. Training and Continuing Advice

- **Checklist of Considerations**
  - Consider a mix of in-person and web-based instruction
  - Attendance is mandatory and must be documented
  - Executive-level involvement in presentation
  - Use real-life examples and case studies
  - Clearly explain consequences of violations
  - Reserve time for questions and answers
  - Provide an avenue for follow-up questions and ongoing advice
  - Highlight hotline and other reporting mechanisms
  - Repeat training more often for higher-risk departments and regions
  - Pay attention to on-boarding, especially for acquisitions and JVs
  - Consider including key agents and business partners
  - Thorough documentation of training and participation

[U.S.S.G § 8b2.1(b)(4)-(5)(c); FCPA Resource Guide at 59]
6. Incentives and Disciplinary Measures

- “A compliance program should apply from the board room to the supply room—no one should be beyond its reach.”
  - Establish appropriate and clear disciplinary procedures
  - Apply reliably, promptly, and commensurate with violation
  - Consider publicizing disciplinary actions internally
  - Consider external scrutiny

- **Incentivize good behavior**
  - Reward in evaluation, promotion and bonuses
  - Make ethics and compliance adherence and leadership an evaluation metric, especially for management

[U.S.S.G § 8b2.1(b)(6)-(7); FCPA Resource Guide at 59-60; USAM 9-28.800]
7. Third-Party Due Diligence and Payments

“Risk-based due diligence is particularly important and will also be considered by DOJ and SEC in assessing the effectiveness of a company’s compliance program.”

• Guiding principles:
  – Understand qualifications and associations
    • Business reputation, connection to foreign officials
  – Understand and verify the business rationale
    • Contract terms, payment terms, verify work performed
  – Ongoing monitoring
    • Updated due diligence, audits
  – Commitment to compliance with company policies
    • Contract terms, certifications, training

[FCPA Resource Guide at 60-61]
8. Confidential Reporting and Internal Investigations

- Create a confidential hotline for employees to report concerns and suspicions of wrongdoing
  - Ensure they are comfortable reporting and don't fear retaliation
  - Create a follow-up protocol

- Be prepared with an incident response framework
  - Document allegation and reporting circumstances
  - Investigate allegations

- Determine appropriate response
  - Assemble a response team
  - Preserve relevant evidence
  - Document investigative steps
  - Treat violations consistently for employees who may be involved at all levels
  - Pinpoint weaknesses in compliance program and plug holes

[FCPA Resource Guide at 61; USAM 9-28.800]
9. Continuous Improvement: Periodic Testing and Review

• “While 67% of general counsel say their company is subject to compliance under the FCPA, 64% of those say there is room for improvement in their FCPA training and compliance programs.”

(Corporate Board Member/FTI Consulting 2009 Legal Study, Buckle Up. Boards and General Counsel May Face a Bumpy Ride in 2009, at 5)

• A good compliance program should constantly evolve:
  – Conduct internal monitoring for effectiveness
    • Frequency depends on size and scope of company
  – Consider surveying employees to measure compliance culture
  – Update when weakness are uncovered
  – Evaluate effects of shifts in business model, nature of customers, relevant markets and industry standards
  – Engage third-party auditors

[U.S.S.G § 8b2.1(b)(5); FCPA Resource Guide at 62-63]
10. Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

- Mergers and Acquisitions present both risk and opportunity and this demands effective FCPA due diligence
  - **RISK**
    - Acquiring company may assume risks and liabilities
    - Inadequate due diligence can allow course of bribery to continue
  - **OPPORTUNITY**
    - With due diligence, company can evaluate more accurately target’s value and negotiate for costs of the bribery to be borne by the target
    - Conduct post-acquisition due-diligence if pre-acquisition due-diligence is not possible.
      - DOJ’s Opinion Procedure Release NO. 08-02 explains procedures for companies to be rewarded if post-acquisition due diligence is the only option.

[U.S.S.G § 8b2.1(b)(6)-(7); FCPA Resource Guide at 59-60]
An effective compliance program must have sufficient internal controls to prevent violations. As such, an organization must:

- Establish internal controls for potential pitfalls:
  - Cash dealings
  - Expense authorization and reimbursement
  - Gifts, travel and entertainment, and charitable contributions to government officials

- Conduct thorough backgrounds checks for all employees, vendors and customers

- Prioritize accounting controls
  - Ensure transparent and accurate record-keeping to detect aberrations
  - Regularly audit the books
  - Organize and preserve all supporting documents in a manner that is accessible to internal and external auditors

[Section 13(b)(2)(B) of the Exchange Act; FCPA Resource Guide 40-41]
Recent Enforcement Actions

• In re Socieded Quimica Y Minera De Chile (“SQM”) (January 13, 2017)- Chilean-based chemical and mining company agreed to pay more than $30 million to resolve parallel civil and criminal cases finding that it made improper payments to Chilean officials. (Deferred Prosecution Agreement)

• In re Las Vegas Sands Corp. (April 7, 2016)- casino and resort company agreed to pay $9 million to settle SEC charges that it failed to properly authorize or document millions of dollars in payments to a consultant facilitating business activities in China and Macao. In January 2017, the casino agreed to pay an addition $7 million to resolve a DOJ investigation into the same conduct. (Deferred Prosecution Agreement)

• In Re Biomet (January 12, 2017) - Warsaw, Indiana-based medical device manufacturer agreed to pay more than $30 million to resolve SEC and Justice Department investigations into the company’s anti-bribery violations in Brazil and Mexico (Deferred Prosecution Agreement)
In re SQM (January 13, 2017)
## In Re Biomet (January 12, 2017)

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<tr>
<th>Compliance Failures</th>
<th>Compliance Remediation Requirements</th>
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<tr>
<td>Improperly recorded books and payments</td>
<td>Retain independent consultant for 2 years to:</td>
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<td>Active concealment of improper payments</td>
<td>Evaluate internal controls, record-keeping and financial reporting policies</td>
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<td>Insufficient internal accounting controls</td>
<td>Assess Board of Directors’ and senior management’s commitment to and effective implementation of FCPA compliance program</td>
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<td>Senior employees knew of problematic relationship and failed to stop it</td>
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A Common International Standard?

• International Organization for Standardization recently promulgated ISO 37001, Anti-bribery Management Systems

• Has been getting a lot of attention but reactions are mixed

  – Universal standard is good, BUT

  – Persuasive value with enforcement authorities is completely unclear
Contact Information

Bruce Henoch, Vice President
Orbital ATK
Bruce.Henoch@OrbitalATK.com
703.406.5028

Tom Hanusik, Partner
Crowell & Moring LLP
thanusik@crowell.com
202.624.2530

Stephen M. Byers, Partner
Crowell & Moring LLP
sbyers@crowell.com
202.624.2878
Bruce Henoch is the Vice President for International Law at Orbital ATK, a $4.5 billion aerospace and defense company in Dulles, VA. Bruce manages all of the company’s international legal affairs, including anticorruption compliance, economic sanctions, governance and regulatory compliance for the company’s international LLCs and joint ventures, ITAR/EAR, M&A, disputes, and employee matters.

Prior to Orbital ATK, Bruce worked in the satellite industry for many years, including as U.S. General Counsel for Inmarsat and Stratos Global. His government experience includes the Chief Counsel’s office of the National Telecommunications and Information Administration, and he began his legal career as an associate at Arnold & Porter.
Tom Hanusik is a partner in Washington D.C. and co-chair of Crowell & Moring’s White Collar & Regulatory Enforcement Group, which Law360 named a "White Collar Group of the Year" in 2012 and one of ten "FCPA Powerhouses" in 2013.

Tom's practice focuses on white collar defense, SEC Enforcement, FINRA Enforcement and internal investigations. He defends publicly traded and privately held companies, senior executives, board members and politicians during internal and government investigations, criminal and civil trials, regulatory enforcement actions, and appeals. Tom has over twenty years of trial and appellate experience. He also leads teams conducting internal investigations on behalf of companies, boards of directors and board committees, as well as advising corporate clients on remedial measures, compliance programs and training. Tom's recent engagements include representing institutions and executives in matters involving alleged violations of federal securities laws including financial fraud, insider trading, FCPA and Section 5 violations, AML requirements, federal and state tax offenses, public corruption and violations of U.S. export controls and sanctions regulations.
Stephen M. Byers is a partner in the firm’s White Collar & Regulatory Enforcement Group and serves on the group’s Steering Committee. Mr. Byers’ practice involves counseling and representation of corporate and individual clients in all phases of white collar criminal and related civil matters, including: internal corporate investigations; federal grand jury, inspector general and congressional investigations; and trials and appeals.

Mr. Byers’s practice focuses on matters involving procurement fraud, foreign bribery, trade secrets theft, computer crimes and cybersecurity, and antitrust conspiracies. He has extensive experience with the Foreign Corrupt Practices Act, the Economic Espionage Act, the Computer Fraud and Abuse Act, and the federal False Claims Act and qui tam litigation. In addition to defense of government investigations and prosecutions, Mr. Byers has represented corporate victims of trade secrets theft and other offenses.

sbyers@crowell.com
202.624.2878