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PERSPECTIVES

RENEWING THE CALL FOR A COMPLIANCE DEFENCE TO THE FOREIGN CORRUPT PRACTICES ACT

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One of the most dramatic and important developments in US law enforcement over the past decade has been the rise of investigations and enforcement actions by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) for violations of the Foreign Corrupt Practices Act (FCPA). Consequences to corporations for alleged violations of the FCPA have similarly escalated; in addition to disgorgement of profits, the US government has extracted unprecedentedly high penalties from FCPA violators in recent years. Indeed, the 10 highest-cost FCPA enforcement actions – all of which were resolved within the past six years – settled for amounts ranging from $152.6m (Weatherford International, in 2013) to $800m (Siemens, in 2008 – the oldest action on the list, and still the most costly). These settlements exclude, of course, the costs of lengthy internal investigations and corporate compliance measures (commonly in the tens of millions), and the loss of goodwill that results from the public airing that inevitably accompanies allegations of corporate corruption.

This flurry of enforcement activity has wrought drastic change on the compliance landscape for transnational corporations, which devote significant resources to promoting FCPA compliance among their thousands of employees and contractors operating in international fora. In particular, internal compliance, reporting and mitigation systems have

grown significantly more robust in past years as companies seek to prevent corrupt practices and – when issues of noncompliance arise – to ferret them out and terminate them. Even so, the lack of binding guidelines for framing compliance programs and the lack of assurances that robust programs will reliably mitigate the DOJ's decisions to bring criminal charges leave corporations in a state of uncertainty: despite pouring millions into meaningful compliance regimes and sincere efforts to comply with the law, corporations are no more certain than they were 30 years ago that the actions of one, or a few, rogue employees will not bring debilitating criminal liability upon an entire entity.

Many – including former leadership within the DOJ – have called for clearer guidelines and exemption from prosecution for companies that have effective compliance programs in place. Even so, the rhetoric from the DOJ and SEC has remained the same: there will be no compliance defence, such a defence would allow companies to evade prosecution through 'paper' compliance programs, and compliance defences would result in messy and distracting expert battles about the quality of compliance programs at issue. This continued resistance to a compliance defence in light of a completely changed FCPA playing field is short-sighted. The DOJ and SEC have strong interests in promoting self-policing within companies and turning them into corporate partners. Where corporate compliance programs are functioning as they should – i.e., internally identifying employees who are operating outside of the bounds of company policy and extinguishing and mitigating illegal practices – companies should be rewarded with indemnification from the actions of those outsider employees, not punished with the threat of criminal and/or civil charges for actions that they took substantial steps to prevent.

The value to DOJ and SEC of a robust compliance plan

Despite what Charles Duross, former DOJ FCPA Unit Chief, described in September 2013 as an "embarrassment of riches" in reference to the government resources being diverted to DOJ's FCPA unit, DOJ still does not have the capacity to launch and sustain multiple international investigations without the internal assistance (and labouring oar) of the investigated companies themselves. Furthermore, the DOJ and SEC rely heavily on self-reporting to identify FCPA violations. Although these agencies cite a declining percentage of self-reported cases, this may be due in part to the government's significantly increased enforcement efforts. In the aggregate, from 2004 to 2014, of approximately 111 corporate FCPA enforcement action resolutions, 65 or nearly 60 percent of them have involved voluntary disclosures. In short, the government has a strong interest in incentivising companies to establish meaningful internal compliance mechanisms and to self-report violations as they arise. In order to do

this effectively, however, the government must offer clear guidance on how to structure such programs and assurances that self-disclosure will not result in charges against the companies themselves.

Current compliance program benefits are insufficient

The DOJ and SEC would argue that they encourage self-policing, and that corporate compliance policies are a factor both in charging decisions, and in sentencing. Indeed, "the existence and effectiveness of [a] corporation's pre-existing compliance program" is one of the nine factors listed in the United States Attorneys' Manual for charging decisions against corporations (USAM 9-28.300.5), and then-Assistant Attorney General Ronald Weich indicated in a letter in connection with a June 2011 House FCPA hearing that this had led to declinations in cases where "[a] company provided information to [DOJ] about the parent's extensive compliance

policies, procedures, and internal controls, which the parent had implemented at the relevant [noncompliant] subsidiaries". Furthermore, the US Sentencing Guidelines provide for consideration of whether a company had "an effective compliance and ethics program" when deciding sentencing. (US Sentencing Guidelines Manual, Section 8B2.1 (2010)). However, as put by former Attorney General Michael Mukasey when testifying before Congress on behalf of the Chamber of Commerce in June 2011, "such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a prosecution, or both. There is no guarantee that a strong compliance program will be given the weight it deserves". The government can do more to eliminate the opacity in its decision-making *before* indictment, and before wrongdoing even occurs, to assist companies with implementing effective compliance measures, and to promote transparency from them when violations occur. Binding guidelines and a compliance defence would go a long way toward achieving these goals, and toward turning multinational corporations into ethical partners.

The UK Bribery Act 'adequate procedures' defence

Other nations have already implemented corporate compliance defences to their anti-bribery laws and provide a model for an FCPA compliance defence. The United Kingdom's Bribery Act 'adequate procedures' defence, in particular, has been promoted by scholars and practitioners alike as a reasonable model for the United States. (See, for example, The Economist article, 'Bribery Abroad—A Tale of Two Laws', published 17 September 2011). The UK Bribery Act is relatively new, effective only as of 1 July 2011, and its sweep is somewhat broader than that of the FCPA in that it prohibits improper payments not only to 'foreign officials', but also to domestic officials, and any kind of commercial bribe (although SEC FCPA Chief Kara Brockmeyer did signal at the American Conference Institute's 30th International Conference on the FCPA in November 2013 that the SEC will not hesitate to charge companies for ancillary commercial bribery). The Bribery Act imposes strict liability on corporations that violate its terms. (Ministry of Justice, The Bribery Act 2010: Guidance 15 (2011)). It also states, however, that a "commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing". As the UK Ministry of Justice has stated in its Bribery Act guidance, "[t]he objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf".

The Ministry of Justice further published guidelines for crafting compliance plans, which follow six key principles: proportionality, top-level commitment, risk assessment, due diligence, communication

and training, and monitoring and review (Guidance at 20-31). This guidance, which is flexible and not prescriptive, is – along with the 'adequate procedures' defence, intended to "encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them". (*Id*. at 8). This is precisely the kind of defence that should be implemented in the United States to reward ethical corporations that have engaged in good-faith efforts to comply with the law. The US DOJ and SEC published similar guidance in 2012, which emphasised analogous principles for compliance programs under the FCPA, but these were expressly non-binding. And without the availability of a complete defence during liabilities assessment, corporations have no assurance that even rigorous compliance programs will protect them from entity-level criminal liability.

Conclusion: a compliance defence is necessary and viable

It is time to reconsider the need for either an administrative or a statutory compliance defence. The government's focus on stemming corporate corruption has also raised the stakes for transnational corporations with ties to the United States. The costs of internal investigations and compliance efforts are higher than ever before, and yet – as the DOJ and SEC acknowledged in their 2012 FCPA Resource Guide – "no compliance program can ever prevent all criminal activity by a corporation's employees". Rather than continue to toe the anti-compliance defence line of a decade ago, the DOJ and SEC should acknowledge this changed landscape and give ethical companies that implement strong compliance programs assurance that they will not be punished for those occasional, inevitable acts by rogue employees who violate otherwise effective corporate policies. CD

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