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FCPA Compliance: Tone At The Top, Train At The Bottom

Law360, New York (October 19, 2010) -- The current international anti-corruption focus of the U.S. Department of Justice, the U.S. Securities and Exchange Commission and other government prosecutors is here to stay, according to all indications. The last two years have seen an unprecedented increase in the number of prosecutions under the Foreign Corrupt Practices Act, and a dramatic increase in the size and scope of the prosecutions.

With the imposition of criminal sanctions into the billions of dollars in 2010 alone, and the United States government's demonstrated focus on prosecuting individuals as well as entities, now is the time to ensure that companies doing business overseas have stringent FCPA compliance procedures in place. Such compliance programs serve a dual function. They not only help prevent situations that could give rise to criminal and civil penalties, they also can demonstrate lack of bad intent and minimize the damage if such a situation arises.

It is common for companies to use third-party agents to interact with foreign governments, for example to obtain permits, licenses and visas. These agents can be a troublesome area for U.S. companies operating overseas. How can a company make it clear to its employees and to the world that bribes and improper payments are absolutely prohibited? We suggest a two-pronged approach: create a vigilant tone at the top, and train at the bottom.

Tone at the Top

Companies should establish strict policies and procedures clearly stating that bribes and improper payments are not permitted. In addition to making internal and external express statements of the company's intent to comply with the FCPA and other anti-bribery laws, companies should consider establishing policies requiring that:

- the company conduct due diligence investigations of all third-party agents (gather

information, obtain references, background checks, etc.) prior to doing business with those agents.

- third parties must sign a contract with the company allowing the company to inspect the agent's books and records.

- all third-party payments for commissions and facilitation be subject to a rigorous approval process, including the identification of specific individuals at the company who are authorized to approve such payments and the proper method of accounting for them.

- the company must provide regular training and certification of its work force in FCPA and other anti-corruption laws.

- the company provide a meaningful way for its employees to report perceived corruption, such as through the placement of "drop boxes" at various work sites and/or establishment of hotlines.

- policies be created, specifically tailored to the company's industry and business model, on topics such as gifts, entertainment, political contributions, charitable contributions, travel, commissions, meals, etc.

While the implementation of vigilant compliance programs and internal controls may be expensive on the front end, they may save millions of dollars in the end and provide a valuable tool to defend against FCPA or fraud allegations from private plaintiffs and from the government.

Train at the Bottom

Even the most meaningful and well thought out compliance program will not be effective if company employees do not understand it or do not comply with it. We recommend that companies invest in training their sales force and other "ground zero" employees. Such training will help prevent problems from occurring in the first place, and will also be closely examined by the U.S. government if the company finds itself the target of an FCPA investigation.

In-person training, conducted in the employees' native language by persons they feel comfortable with will likely be the most effective way to express the company's position regarding bribery and corruption and to explain the relevant policies and procedures.

To have a meaningful and effective program, the key is to tailor the training to the audience as much as possible, allow for anonymous questions and make the employees aware of the reporting mechanisms for potentially improper conduct. Brainstorming sessions on the topic of fraud and risk assessment are often an effective way to create dialog and convey the proper approach to common trouble areas.

Companies should also consider offering regular refresher training and may want to implement an annual anti-fraud/anti-bribery certification program with an accompanying training.

In addition, employees should be aware that the company monitors compliance with its anti-corruption and FCPA programs. Though a company's anti-corruption and FCPA compliance programs may include audit procedures unknown to line and sales personnel, employees should be aware that compliance programs are ongoing. The existence and effectiveness of such programs may serve to deter noncompliance as well.

Conclusion

The company should take every opportunity to remind its employees of its position on bribery — through corporate messaging and training. Compliance with the laws, both foreign and domestic, should be part of the corporate culture.

The truth of the matter is that noncompliance is becoming far too costly a wager to make. In response to the question, "How can we compete overseas if we can't make payments like everyone else does?" the answer should consistently be, "We have to follow the law. It is not a defense to say that everyone else is doing it."

This is the U.S. government's answer to the question, and it should be your company's answer, too.

--By Catherine Salinas (pictured), Carlton Fields and Karen Fortune, Habif Arogeti & Wynne LLP

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