

Learning from Failure

On November 14, 2011 Tony Horwitz wrote an article titled “Tony Horwitz on the Failure of Textbook History”. In the article Mr. Horwitz stated: “My complaint is that textbooks do a fine job of communicating the facts that students need to know to pass tests. But they don't do enough to make history exciting and engaging to students”. I can usually identify with this statement when it comes to law books, cases and deferred prosecution agreements. The fact of the matter is that it is awfully hard to make international bribery and corruption exciting.... Or is it? Maybe we will write a novel...

Page 1....Recently federal agents searched the Capitol Hill office of a Louisiana congressman who was under investigation for bribery. Furthermore, newly released court papers stated that agents discovered \$90,000 in cash last year hidden in his Washington home. This might not strike you as all that unusual given the sordid past of Louisiana politicians (and I know because La. is my home state)- but consider this- the money was concealed inside various frozen food containers located in the congressman's freezer.

In all seriousness, so much of the information that compliance practitioners need to know can be gleaned from the law, the multitude of textbooks that have been published on compliance, and agency filings. It doesn't matter if they are exciting or engaging- they are required reading!

Practical Pointer for today's blog. We have spent the last two weeks dissecting cases and discussing some of lessons learned from various FCPA cases and settlements over the last several years. Now is a good time to look at the various ways in which a company can fail to take the appropriate measures to insulate itself from FCPA liability, before we proceed to address “what went right” in tomorrow's blog. In his book, **The Foreign Corrupt Practices Act Handbook “ A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners”**, Robert W. Tarun, a partner at Baker & McKenzie, LLP sums up Common FCPA Compliance Program Failures succinctly as follows:

K. Common FCPA Compliance Program Failures

Failures of FCPA compliance efforts can significantly damage a corporate program's overall effectiveness and deprive the company of salutary benefits under the Organizational Sentencing Guidelines. Multinational companies can:

- Fail to adopt and fully distribute a clear, written code of conduct or ethics policy, and more particularly, written FCPA policies prohibiting proscribed conduct and policies establishing a methodology for the identification, selection, approval, and retention of foreign agents, consultants, distributors, or other third party contractors in connection with foreign government procurement or other projects; and clear gift, travel, and entertainment policies for non-U.S. government officials.
- Fail to adequately undertake *and* document their due diligence efforts in evaluating and approving potential agents, consultants, distributors, joint venture partners, and other third parties. Decisions to decline a potential agent or consultant relationship should be memorialized in some fashion, as they can establish the company takes both the FCPA and related due diligence seriously.
- Fail to appoint company or regional compliance officers.
- Overload a compliance officer with other responsibilities.

- Fail to vet officers or key employees who are to be assigned or promoted to key positions of interface with government officials in high-risk countries; vetting should include a thorough personnel file review, interviews by the legal department, and an overall health assessment of such candidates.
- Delegate compliance to officers or employees who have no real understanding or training in FCPA requirements and issues. Similarly, companies mistakenly delegate compliance activities to persons who have an inherent conflict of interest, for example, having a marketing or project proponent undertake due diligence of proposed agents.
- Fail to make compliance a priority, with the result that, due to the press of other business matters, compliance efforts, training, and appropriate due diligence become a secondary priority.
- Fail to implement hotlines or other proper reporting mechanisms that offer no likelihood of retaliation.
- Take a “head in the sand” approach with agents, consultants, distributors, and partners and senior managers. For example, sales personnel erroneously assume that if they do not conduct due diligence on agents, consultants, and partners or if they do not conduct due diligence on agents, consultants, and partners or if they disregard facts that should prompt them to make further inquiries, they will not face any liability.
- Take a laissez-faire attitude about FCPA-proscribed conduct, with senior managers or sales personnel rationalizing that other U.S. or *foreign competitors engage in FCPA-proscribed conduct*.
- Fail to require senior management or newly hired senior managers to undertake periodic ethics and FCPA training.
- Fail to conduct FCPA training using counsel or compliance experts experienced in such matters.
- Fail to rotate senior management financial and accounting personnel out of high-risk countries.
- Fail to work closely with their outside auditors to evaluate FCPA efforts annually and to modify audit work programs, policies, and training.
- Lack experienced internal auditors who understand, are trained in, and regularly focus on FCPA issues.
- Fail to implement internal administrative and financial controls that reduce risks of improperly payments (e.g., check issuance, wire transfers, petty cash controls).
- Not adequately monitor the activities of foreign subsidiaries, distributors, or joint venture partners.
- Ignore their own compliance rules and policies due to business deadlines and time constraints, permitting senior managers or sales personnel to engage in questionable practices without advance compliance clearance or legal advice.
- Fail to translate into appropriate foreign languages their compliance codes, FCPA and ethics policies, forms, and questionnaires.
- Hire or appoint foreign nationals to run overseas operations without thoroughly training them on the specific requirements and prohibitions of the FCPA. Many foreign nationals erroneously assume they are not subject to FCPA liability.
- Fail to employ standard-form baseline contracts for foreign agents, joint ventures, sales representatives, consultants, and other contractors, or to enforce model uniform covenant, warranty, representation, and audit clauses. Random departures from the

company's standard-form foreign agent consultant or representative agreements will raise questions about a company's commitment to compliance and internal controls.

- Fail to conduct due diligence of agents, consultants, distributors, and third parties *during* the life of the contract.
- Fail in their due diligence efforts to address local law issues that may be relevant to agency or consultant agreements, partnerships, distributorships, joint venture agreements, or employment relationships.
- Fail to monitor the public disclosures of competitors that can reveal an industry-wide investigation.
- Fail to take appropriate or sufficient disciplinary actions in the wake of FCPA misconduct.
- Fail to apprise and involve boards of directors or audit committees in a timely manner in sensitive payment allegations oversight roles.
- Fail to design and undertake FCPA audit plans.
- Fail to periodically monitor and update their ethics and FCPA compliance programs. In particular, in-house legal departments fail to regularly review, reevaluate, and modify compliance programs along with agent, consultant, third party, and joint venture agreements for FCPA-related issues, developments, and best practices.

Each of these common failures can be used to evaluate your current compliance program or to use as a guide when implementing a new program. Learn from other companies failures! Tomorrow we will wrap up the series with our last post entitled "Morgan Stanley- With Thanksgiving" discussing what Morgan Stanley did right in its recent internal investigation. Stay Tuned.

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