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CORPORATE COMPLIANCE

The Compliance Crystal Ball—Top 10 Compliance Trends for 2014

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It is that time of year again when we dust off the compliance crystal ball and take a look at what might be in store for 2014.

1. Executive Order 13627 Changes Government Contracting

Want a government contract in 2014 and beyond? Then pay particular attention to the groundbreaking executive order on human trafficking.

More than 300,000 companies call the world's No. 1 purchaser of goods and services—the U.S. government—a customer.[1] And only the rarest of companies is not at least somewhere in the supply chain of the government's direct suppliers.[2] It is safe to say that the compliance reality for this significant part of the global business sector will likely undergo a significant shift in 2014.

On Sept. 25, 2012, President Barack Obama signed groundbreaking Executive Order 13627 on trafficking in persons in government contracts.[3] As the president put it, ''as the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons.''

The president's objective was unambiguous: ''We're making clear that American tax dollars must never, ever be used to support the trafficking of human beings. We will have zero tolerance. We mean what we say. We will enforce it.''[4] Even a cursory reading of the order indicates that the president's statement is far from mere puffery.

What a difference a year makes. On Sept. 26, 2013, the Department of Defense, General Services Administration and NASA finally made their proposed rules implementing the executive order available for comment (note that the comment period, initially set to end on Nov. 25, was extended to Dec. 20).[5] The proposed

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[1] See Government Vendors Directory, available at http://www.government-vendor.us/.

[2] See T. Markus Funk, *The Next Compliance Frontier, Eliminating Human Trafficking from Government Contracting*, Inside Counsel (Nov. 21, 2013), available at http://www.insidecounsel.com/2012/11/21/regulatory-the-next-compliance-frontier?ref=hp.

[3] Exec. Order No. 13627 (Sept. 25, 2012), available at http://www.gpo.gov/fdsys/pkg/DCPD-201200750/pdf/DCPD-201200750.pdf. For a flow chart deconstructing the order, see http://www.perkinscoie.com/files/upload/12_18_CSR_FlowChart2.PDF.

[4] White House, remarks by the president to the Clinton Global Initiative, press release (Sept. 25, 2012), available at http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative.

[5] 78 Fed. Reg. 59317 (Sept. 26, 2013) available at http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23311.pdf; 78

 ISSN 1559-3185

rules—designed to amend Parts 22 and 52 of the Federal Acquisitions Regulation to provide additional policies applicable to *all* solicitations and contracts, including those performed in the U.S.—are squarely aimed at rooting out human trafficking in federal contracting. For example, the rules prohibit federal contractors (and their subcontractors) from engaging in a number of activities related to trafficking and forced labor, such as using misleading or fraudulent recruiting practices or destroying or confiscating an employee's identity documents. (In fact, if the contracts are to be performed overseas and the estimated value exceeds $500,000, the proposed rules require front-end contractor certification and a detailed compliance plan.)

Among the more notable features of the proposed rules is the rather exceptional requirement that the contractor must ''inform the Contracting Officer and the agency Inspector General immediately of . . . [a]ny credible information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates this policy.'' What is more, ''the Contractor shall cooperate fully in providing reasonable access to its facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance.'' The consequences of noncompliance with the proposed rules are severe, ranging from significant fines, serious criminal liability and debarment and suspension.

This, put simply, is the brave new world of government contracting. Considering the executive order's extensive reach and laudable objectives, its near-term substantive enforcement is all but certain.

2. Supply Chains Must Be Free From Forced Labor

If you are a large manufacturer or retailer in the Golden State, are you properly disclosing your efforts to eradicate trafficking and forced labor from your supply chain?

Effective since Jan. 1, 2012, the landmark Transparency in Supply Chains Act of 2010 requires qualifying manufacturers and retailers to publicly disclose the precise nature and scope of their efforts to eradicate human trafficking, slavery, child labor and forced labor from their worldwide supply chains.[6] More specifically, this novel disclosure regime applies to all:

1. retail sellers and manufacturers;

2. with more than $100 million in annual global gross receipts; and

3. that ''do business'' in California, including companies that:

- are organized/domiciled in California;
- have California sales exceeding $500,000 or 25 percent of the company's total sales;
- own real or tangible personal property in California exceeding $50,000 or 25 percent of the company's total real or tangible property; or
- distribute employee compensation in California exceeding $50,000 or 25 percent of the company's total compensation.

Turning from scope to substance, the act requires these businesses to disclose in considerable detail—and through a ''conspicuous'' link on the homepage of their websites—their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale.[7] (Note that despite the act's clear language, many qualifying retailers and manufacturers to this day do not have the required disclosures in place.)

The California Franchise Tax Board in 2013 reportedly provided the California attorney general with the list of some 6,000 U.S. and foreign companies that, based on their tax filings, fall under the act.[8] Although Attorney General Kamala D. Harris has proclaimed that fighting human trafficking is, indeed, ''a priority for the California Department of Justice,''[9] the attorney general office's website notably states that ''while the [Act] gave the California Department of Justice enforcement authority over this requirement, no funding accompanied this authority.''[10]

Should funding issues get resolved in 2014, companies that are already required to comply with the law will be hard-pressed to explain their noncompliance to their shareholders, executives and advocacy organizations if, and when, the attorney general targets them for noncompliance.

3. OFAC Enforcement on the Rise

We expect that the Office of Foreign Assets Control (OFAC) will continue to shift its civil penalties and enforcement actions' focus away from individuals and nonfinancial institutions.

By way of brief background, OFAC implements and enforces U.S. economic sanctions imposed against targeted foreign countries and regimes (including Cuba, Burma, Iran and Syria), as well as certain individuals and entities. Its authority is pursuant to the president's national emergency powers and statutory authorities.[11] OFAC, moreover, routinely coordinates its investigative

Fed. Reg. 69812 (Nov. 21, 2013) available at http://www.gpo.gov/fdsys/pkg/FR-2013-11-21/pdf/2013-27878.pdf (extending comment period).

[6] Cal. Senate Bill No. 657 (filed Sept. 30, 2010), available at http://www.state.gov/documents/organization/164934.pdf.

[7] See generally, T. Markus Funk, *Preparing for the Next Compliance Battleground: Eliminating Trafficking, Forced Labor, Child Labor, and Slavery from Global Supply Chains*, Bloomberg Law Reports, Corporate Counsel (Feb. 21, 2012), available at http://www.perkinscoie.com/files/upload/LIT_12_3_funkanewsourceofpotentialliability.pdf; T. Markus Funk, *The Devil is in 'Where to Disclose' Supply Chain Details*, Law360 (Feb. 14, 2013), available at http://www.law360.com/articles/415030/the-devil-is-in-where-to-disclose-supply-chain-details.

[8] Dominic Fracassa, *Companies Seek Guidance on Supply Chain Enforcement*, Daily Journal (Aug. 29, 2013), available at http://www.perkinscoie.com/files/upload/09_04_2013_DJ_Article.PDF.

[9] California Department of Justice, Office of the Attorney General, https://oag.ca.gov/ (last visited Jan. 8, 2014).

[10] California Department of Justice, Office of the Attorney General, Human Trafficking Legislation, http://oag.ca.gov/human-trafficking/legislation (last visited Jan. 8, 2014).

[11] See generally, U.S. Department of the Treasury, *Sanctions Programs and Country Information*, http://

  WCR ISSN 1559-3185

and enforcement activity with other federal, state, local or foreign regulators or law enforcement agencies.

Although the sanctions imposed on U.S. companies that engage in prohibited transactions have been historically capped at $11,000, a penalty enhancement that has been in effect since 2009 increases the statutory maximum to $250,000 per violation or twice the value of the underlying transaction.

Since the penalty enhancement, the *number* of overall penalties imposed has declined, whereas the *size* of the penalties has increased drastically. In the four full years since OFAC instituted the enhanced penalties (2009-2012), the number of penalties imposed has averaged 23 per year, compared with 104 penalties and settlements in 2008. Further, while the total value of penalties imposed in 2008 totaled just more than $3.5 million, in 2012 the total value topped $1.1 billion (including the historic settlements with ING Bank NV[12] and HSBC Holdings Plc[13]), even though there were only 16 total penalties or settlements in 2012. As of Dec. 17, there have been 27 penalties or settlements, totaling more than $100 million for the 2013 calendar year.[14]

Financial institutions clearly have felt the brunt of the increased penalties, accounting for an increasingly larger percentage of both the total value and number of penalties and settlements imposed. The decline in the number of penalties imposed, the increase in the value of penalties and OFAC's shift of focus away from individuals and nonfinancial companies are trends we expect to continue in 2014.

4. FCPA Enforcers Get Back to Business

As enforcers of the Foreign Corrupt Practices Act and the Travel Act continue to regroup and refocus, we expect to see actions brought under both acts to be back on track in 2014.

Following some bumps in the prosecutorial road in 2012, the much-anticipated ramping up of investigations and prosecutions of individual defendants has not yet come to pass. Calendar year 2010 saw 48 enforcement actions by the Department of Justice and 26 by the Securities and Exchange Commission.

Turning to 2013, however, the DOJ filed only 16 FCPA and related enforcement actions (and announced two nonprosecution agreements and six actions that were filed in 2012 and 2011),[15] while the SEC filed eight.[16]

Although proactive investigative activities appear to have been dialed back in 2013 as prosecutors entered a regrouping phase, both the DOJ and the SEC appear poised to spring back into action on international anti-corruption efforts.

At the 30th International Conference on the Foreign Corrupt Practices Act in November, both Deputy Attorney General James M. Cole and co-director of the SEC's Enforcement Division Andrew Ceresney affirmed their commitment to aggressively enforcing the FCPA.[17] The same themes were highlighted in the remarks of Charles E. Duross, deputy chief of the FCPA Unit of the DOJ's Fraud Section, and Kara Brockmeyer, chief of the FCPA Unit of the SEC's Enforcement Division. Increased international cooperation could also spur more enforcement activity. (In 2013 the SEC, along with the DOJ and the FBI, hosted the first-ever Foreign Bribery and Corruption Training Conference for international law enforcement, which included representatives from 30 different countries.)

Further, actions on self-disclosures can be expected to increase. According to the 2013 SEC Whistleblower Report, discussed further below, the office received 149 complaints related to the FCPA in fiscal year 2013; FCPA-related claims experienced the highest year-over-year percentage growth.[18] As Ceresney put it, we can expect ''FCPA violations to become an increasingly fertile ground for Dodd-Frank whistleblowing.''[19]

Finally, as we enter 2014, all eyes will be on the U.S. Court of Appeals for the Eleventh Circuit, which is scheduled to deliver the first appellate court opinion on the much-debated definition of ''foreign official,'' in *United States v. Esquenazi* (oral arguments took place in October 2013; by way of full disclosure, Mr. Esquenazi was represented pro bono by Perkins Coie attorney and co-author T. Markus Funk and fellow Perkins Coie partner Mike Sink).[20]

5. Anti-Corruption Enforcement By Foreign Governments Ramps Up

Although the U.S. accounts for some 75 percent of the world's foreign anti-bribery actions and will almost certainly continue to lead the world in these prosecutions, other nations, including Germany, the U.K., China and India, have in recent years fortified their laws and their enforcement outlooks.[21]

The Organisation for Economic Cooperation and Development's June 2013 annual report, for example, reflects that Germany has the second most total bribery

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www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx (last visited Jan. 8, 2014).

[12] 07 WCR 475 (6/15/12).

[13] 07 WCR 939 (12/14/12).

[14] U.S. Department of Treasury, *Civil Penalties and Enforcement Information*, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (last visited Jan. 8, 2014).

[15] *FCPA and Related Enforcement Actions*, http://www.justice.gov/criminal/fraud/fcpa/cases/2013.html (last visited Jan. 8, 2014).

[16] *SEC Enforcement Actions: FCPA Cases*, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Jan. 8, 2014).

[17] DOJ, Deputy Attorney General James M. Cole Speaks at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), available at http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html; Keynote address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at http://www.sec.gov/News/Speech/Detail/Speech/1370540392284.

[18] SEC's 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, available at http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

[19] Keynote address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at http://www.sec.gov/News/Speech/Detail/Speech/1370540392284.

[20] The reply brief is available at http://www.perkinscoie.com/files/upload/13_10_Esquenazis_Reply_Brief.pdf. The opening brief is available at http://www.perkinscoie.com/files/upload/13_10_5312012_Corrected_Brief_of_Appellant_(2).pdf.

[21] For a comparison chart of anti-bribery laws, see http://www.perkinscoie.com/files/upload/LIT_12_29_AntiBriberyChart_JDance.pdf.

cases since 1999: 88 criminal cases and 9 administrative and civil cases. (The U.S., by contrast, pursued 140 criminal cases and 96 administrative and civil cases and the U.K. pursued 8 criminal cases).[22] Similarly, Transparency International rates Germany as having ''active enforcement'' of the OECD's Anti-Bribery Convention.[23] Germany, in short, is working toward joining the U.S. as the world's leaders in foreign bribery prosecutions, with the U.K. a fairly distant third.

We see foreign enforcers like the Germans continuing to step up their game, which in turn will require compliance professionals to start thinking ''beyond the FCPA.''

6. 'Carbon Copy' Prosecutions Continue To Be a Growing Global Trend

''Carbon copy prosecutions,'' a term that federal prosecutor Andrew S. Boutros and Funk first fully developed in a 2012 *University of Chicago Legal Forum* article and that has since been adopted by others as part of the international law vernacular, refers to successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations but arising out of the same facts.[24]

The four elements are:

- ♦ Jurisdiction B
- ♦ files an enforcement action
- ♦ based on charging document/guilty plea/admissions
- ♦ from jurisdiction A.

If a corporation reaches a negotiated resolution with U.S. or foreign authorities on international bribery-related charges—whether through a nonprosecution agreement, a deferred prosecution agreement or a guilty plea—there is a bona fide risk that other countries will initiate prosecutions based on the same facts as, and admissions arising out of, the initial case. Given the relative ease with which enforcers can bring such actions (as recent examples demonstrate) and increased international cooperation, we believe that carbon copy prosecutions, such as those brought against KBR, Shell, Snamprogetti/ENI, BAE Systems and Innospec Inc., may soon become the norm.

7. Conflict Minerals Rules Enforcement In Full Swing

This ''prediction'' is perhaps our least remarkable, in that companies subject to the SEC's new rules on disclosure of the use of conflict minerals (including gold, tantalum, tin and tungsten) were required to comply beginning Jan. 1, 2013.[25] For companies required to file them, the first conflict minerals reports must be filed on a new Exchange Act filing (Form SD) and are due to the SEC May 31 to report on the 2013 calendar year (and annually thereafter). The SEC estimates that 6,000 U.S. issuers will be directly affected by the new requirement to trace the conflict minerals in their supply chains. Estimates provided by public commentators responding to the rule indicate that about 28,000 suppliers could provide products to those 6,000 companies and may be asked to provide information as part of the rule's due-diligence requirement. As the first reports are being compiled, the compliance costs will be in the many billions of dollars.

8. More 'Anticipatory' Obstruction Charges Will Be Brought

Passed in 2002, 18 U.S.C. § 1519 makes it illegal to engage in activity calculated to ''impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.'' As illustrated by the federal ''honey laundering'' case against 11 high-ranking executives of Wolff GmbH brought in 2010, as well as the prosecution of David Kernell for gaining unauthorized access to then-Gov. Sarah Palin's private e-mail account (and who, thereafter, tried to rid his personal laptop of the evidence), prosecutors are beginning to realize that the powerful expansive statute is a huge advantage. The statute does not require the government to prove which specific proceeding a defendant sought to obstruct.[26]

Charges under Section 1519 continued to be filed in 2013, including the August 2013 indictment of Dias Kadyrbayev and Azamat Tazhayakov for allegedly destroying evidence related to the Boston Marathon Bombing.[27]

Employees who destroy evidence or lie to counsel conducting interviews because they fear that some federal agency might investigate their misconduct in the future may well prompt anticipatory obstruction of justice charges. Counsel performing such internal investigations are thus well advised to keep this powerful provision in mind.

9. Whistle-Blower Complaints: SEC Will Step Up, Take More Actions

In its 2013 year-end summary, the SEC Office of the Whistleblower announced that the number of whistleblower tips and complaints the commission received

[22] OECD Working Group on Bribery 2013 annual report, available at http://www.perkinscoie.com/files/upload/LIT_12_29_AntiBriberyChart_JDance.pdf.

[23] Transparency International, *Exporting Corruption Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, available at http://issuu.com/transparencyinternational/docs/2013_exportingcorruption_oecdprogre.

[24] Andrew S. Boutros and T. Markus Funk, *'Carbon Copy' Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. Chi. Legal. F. 259 (2012), available at http://www.perkinscoie.com/files/upload/12_10_Boutros_Funk_Final.pdf.

[25] T. Markus Funk, *What Are 'Conflict Minerals'—and Why Should I Care?*, Retail Merchandiser Blog (Sept. 14, 2012), available at http://blog.retail-merchandiser.com/?p=150.

[26] T. Markus Funk, *'Honey Laundering,' A Toilet Flush, and a Governor's Yahoo Account: The New Age of Anticipatory Obstruction of Justice*, The Champion at 22 (May 2011), available at http://www.perkinscoie.com/files/upload/LIT_11_06FunkFeatureMay.pdf.

[27] The superseding indictment is available at http://www.justice.gov/usao/ma/news/2013/August/KadyrbayevetalSupersedingIndictment.pdf.

  WCR ISSN 1559-3185

annually increased from 3,001 in FY 2012 to 3,238 in FY 2013. From the establishment of the whistle-blower program in August 2011 until the end of FY 2013, the office reportedly received 6,573 tips and complaints from whistle-blowers. During FY 2013, the office received whistle-blower submissions from individuals in all 50 states, the District of Columbia, the U.S. territories of Puerto Rico, Guam and the U.S. Virgin Islands and 55 foreign countries.[28]

The year-end report also announced that the whistle-blower office paid out nearly $15 million to various tipsters this year, including its largest award to date—$14 million. Whistle-blower submissions will continue to flow to the SEC, further incentivized by the potentially lucrative Dodd-Frank Act whistle-blower bounty provisions.[29] While keeping up with this many claims no doubt poses a true challenge for the SEC, we anticipate that the staff will continue to ramp up its activities in 2014.

10. Compliance Professionals Will Expand Their Expertise to Reflect Diversity of New Challenges

We see businesses seeking out compliance professionals with broader real-world compliance expertise to help them devise customized, integrated compliance programs responsive to the broad spectrum of today's domestic and foreign risks. Not only is this a more economical approach, but it is also more likely to result in robust compliance.

[28] 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, available at http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

[29] T. Markus Funk and Assad H. Clark, *The SEC Releases Whistleblower Bounty Rules—So Now What?*, 06 WCR 632 (July 29, 2011), available at http://www.perkinscoie.com/files/upload/LIT_11_07FunkClarkSECArticle.pdf.