

## **The Role of FCPA Compliance in Contractual Responsibilities**

We often discuss the impact of the Foreign Corrupt Practices Act (FCPA) on companies in relation to their third parties. Topics can include due diligence of third parties, contracting terms and conditions, and management of these relationships. However, just as all US companies are subject to the FCPA and therefore are required to implement compliance programs which meet the strictures of the FCPA, many non-US companies are required to have compliance programs in place to meet contractual requirements.

We considered the relationship of these non-US companies when we recently read the article “*Compliance Programs Redefined: Elevating Contractual Responsibilities to Their Proper Place*” by Steven Lauer, published in CCH, Corporate Governance Guide, Issue 551, March 21, 2011. Indeed when reviewing or discussing FCPA compliance programs, one part of the discussion which is often overlooking by US companies is their own contractual obligations to have such a program in place. Lauer posits that a “compliance program offers a company...a truly positive benefit” in relation to its counter-parties. While his article is not specifically FCPA focused, we found it to be an excellent perspective for companies to consider their overall compliance program.

Lauer believes that there are two general forms of contracting compliance. The first is process and the second is substantive. Process compliance encompasses all events leading up to contract execution. Substantive compliance comes into play after execution when parties are obligated to honor their respective contractual commitments.

An example of process compliance is where one contract may require a company to violate the terms and conditions of a previously executed agreement. Lauer gives the example of a company which enters into a foreign joint venture and pledges certain physical assets but the same company has previously agreed with a lender not to limit the lender’s right to encumber any company assets. A more recent example has been with BP and its attempts to enter into a business relationship with Rosneft. BP’s joint venture partners from TNK-BP, claimed that such agreement violated the terms of their joint venture agreement and successfully sued to enjoin the action in the British courts.

Under the compliance terms and conditions of a Master Service Agreement or Master Construction Agreement, it is not usual for a Company to require a Contractor to make the same FCPA terms and conditions to all of the Contractor’s subcontractors who may perform work under the Master Agreement for the Company. Failure to do so by the Contractor would violate the FCPA compliance terms and conditions of the Master Agreement. This can be problematic for a contractor initially entering the international arena and may not have FCPA compliance program in place.

Lauer acknowledges that compliance with compliance terms and conditions in an agreement are a subset of obligations which a company has to outsiders. Such outsiders can include

governmental authorities and lenders. However, contract requirements “may be the most specific and relevant on a day-to-day basis.” Therefore, from the substantive contract compliance prong, a company must ensure proper performance of its agreements and that individuals administering the agreement understand its obligations. Once again in the context of FCPA compliance, it may require a Contractor to require its subcontractors to have compliance program in place; require a Contractor to train its subcontractors employee’s on basic FCPA compliance; and to audit a subcontractor’s FCPA compliance component.

William Athanas has recently written an article advocating the proactive use of the results of a company’s FCPA compliance program, in his article “*Demonstrating “Systemic Success” in FCPA Compliance: Identifying and Maintaining Evidence to Respond to Government Investigations . . . Before They Begin.*” He makes clear that if your compliance program does not document its successes there is simply no evidence that it has succeeded. Just as this would be true in any Department of Justice investigation, it would be equally true if a Contractor is audited by its contracting counter-parties. So as always, the key is to document, document and document.

Lauer notes that an effective compliance department should not replicate other corporate functions; rather, it creates mechanisms that implement and then track the performance of those other units in respect of those activities regarding a company’s compliance with the various behavioral expectations that apply to its operations. Some of those expectations arise externally and others are created internally. FCPA compliance terms and conditions can arise from these external expectations.

Lauer ends by stating his belief that by creating an ongoing FCPA compliance-assurance mechanism a company can, among other things, strengthen its competitive posture and improve the overall ethical culture of an organization. Further these benefits will serve as more than simply a preventative; it will allow a compliance department to better realize its company’s business objective and continue the company’s revenue stream.

We believe that Lauer’s article points out some issues which are not often considered in regard to FCPA compliance. We hope his article will give you pause for thought on yet another role for your compliance department.

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