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What In-House Counsel Need to Know Regarding Compliance and Enforcement of U.S. Anti-Corruption Laws: *Recent Cases Focus on Latin America*

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The United States Securities and Exchange Commission (the "SEC") and Department of Justice (the "DOJ") have devoted significant resources to the enforcement of anti-corruption laws; however, in many cases, the government's scrutiny has not been limited to the payment of bribes to foreign officials. Rather, in its investigations, the government also has considered (and likely will continue to consider) a corporation's "culture of compliance," such as the efforts of compliance personnel and in-house counsel (and, in some cases, upper management) to identify and remedy the alleged wrongdoing – as opposed to attempting to "cover it up."

For example, in March 2012, the SEC charged Biomet, Inc., a medical device company headquartered in the United States, with a violation of the Foreign Corrupt Practices Act ("FCPA"). The SEC alleged, among other things, that Biomet's subsidiaries had consistently bribed publicly-employed doctors in both Argentina and Brazil in exchange for purchases of Biomet's products.[1] Equally troubling to federal lawyers was the failure of Biomet's compliance and audit procedures to halt the illegal payments, even after such payments had been discovered by Biomet's compliance personnel.[2] In addition to retaining an external FCPA compliance consultant, Biomet agreed to pay over $22 million to settle the SEC's complaint.[3]

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Biomet is not the only corporation which has attracted the government's attention based, in part, on its own culture of compliance. In 2011, Tyson Foods, Inc., the widely-known poultry producer, faced allegations that certain payments to Mexican officials violated the FCPA. Specifically, Tyson allegedly bribed veterinarians responsible for certifying Tyson chicken products as fit for export.[4] As was the case with Biomet, the SEC faulted Tyson's internal audit and review system.[5] Even though the allegedly illegal payments only totaled approximately $100,000, Tyson agreed to settle the SEC's charges for more than $5 million.[6]

As these cases demonstrate, the U.S. government's anti-corruption campaign has focused on substantive wrongdoing (e.g., the payment of bribes to foreign officials) as well as the role of legal and/or compliance personnel in correcting the issue. This is a significant consideration for corporations and employees alike, both of which may be subject to criminal exposure and/or penalties arising out of acts (or omissions) related to the purported corruption. Therefore, as discussed in this Article, it is imperative that every corporation subject to the FCPA or other anti-corruption laws has a robust and reliable internal audit and compliance system.

Summary of the Relevant U.S. Law

In a nutshell, corporate in-house counsel must be aware of four broad areas of the law that often apply in anti-corruption (and other) investigations. First, a variety of federal statutes prohibit interference with government investigations.[7] Specifically, a corporation, its officers, directors, and/or employees could face criminal liability for obstruction of justice if: (a) there is a pending judicial proceeding; (b) the corporation has knowledge or notice of the proceeding; and (c) the corporation acted with the intent to influence, obstruct, or impede the proceeding.

Second, the federal false statements law, 18 U.S.C. § 1001, prohibits concealing or falsifying a material fact, making a materially false statement, and knowingly making or using a document containing a materially false statement. A material statement is one with the potential to influence the decision-maker interpreting the statement. This law is broad in scope and does not require that the false statement be directed at a federal official.[8]

Third, authorized by the Dodd-Frank Act, recently-enacted SEC whistleblower rules permit a substantial financial "bounty" for individuals who voluntarily provide original information that leads to a successful SEC enforcement action.[9] That the whistleblower first reports the wrongdoing internally does not preclude an SEC-granted award. Given these new incentives, in-house counsel should expect an increase in the number of SEC enforcement investigations.

Fourth, in the event of an investigation or litigation, an adequate document retention policy becomes critical. Even if a federal investigation has not been officially opened, it may be a crime to destroy or conceal documents. Similarly, once litigation is reasonably anticipated, corporate in-house counsel must institute a "litigation hold" and preserve all relevant documents.[10]

In addition to the relevant law, corporate counsel should also recognize and understand that as part of its stepped-up enforcement efforts, federal prosecutors have begun to target in-house counsel for individual prosecution, even where the corporate attorney has been engaged in good faith efforts to both protect her client (the company) and respond truthfully to government investigators.[11] This "increased pressure on corporate counsel is the result of a conscious decision by the DOJ and the [SEC] to start going after attorneys and other so-called corporate gatekeepers who they believe facilitate[] or cover[] up fraud and other white collar crimes or disrupt[] government investigations[.]"[12]

Key Pitfalls

Prior to discussing the elements of an effective internal investigation process, it is useful to recognize those major issues which most often cause significant compliance problems. For a corporation faced with credible allegations of misconduct, failing to timely respond to and investigate those allegations are hallmarks of an inadequate internal review process. A corporation also might be legally noncompliant if it does not maintain the independence of its investigation or if it fails to punish the wrongdoers. Moreover, failing to cooperate with government investigators can be a source of legal trouble, notably with respect to document collection and retention. Indeed, insufficient document retention presents a serious challenge, especially after a duty to preserve those documents attaches.

However, even before allegations of wrongdoing arise, a corporation can find itself under government scrutiny for failing to have an updated and enforced written compliance policy that prescribes, among other things, when an outside, independent investigation is warranted.

Elements of an Effective Compliance Program

The most basic building block of a good compliance program is committed and responsible management. If those at the top make internal reporting a corporate priority, it is more likely that everyone else will follow suit. Accountability for the operation of the program also is essential. To that end, a high-level officer or committee should bear ultimate responsibility for the compliance program and report directly to the board of directors.

In addition to having supportive and accountable management, an effective compliance program must have clear policies and strong internal controls. Not only should the program recognize and guard against industry-specific legal risks, but it should also establish a system of internal audits and discipline for wrongdoers. A reporting "hotline" might be effective insofar as it affords employees a safe forum in which to express their concerns.

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A corporation also must keep accurate records to ensure that no ledger entries are false, misleading, or incomplete and that no accounts or assets are maintained "off the books." Moreover, employees should submit complete and accurate documentation before an expense or payment is authorized. Just as employee compliance is carefully monitored, so should the activities of third parties with whom the corporation does business; in certain cases, liability may attach even if the wrongdoer is not an internal actor.

Allegations of Wrongdoing Arise: Now What?

Again, corporations and their counsel can face legal trouble not only for the underlying fraud but, equally important, for the manner in which that fraud is investigated, reported, and remedied. Accordingly, under U.S. law and best practices, corporate in-house counsel's response to allegations of internal wrongdoing may be conceptualized as proceeding in three phases: (1) taking initial steps; (2) conducting the investigation; and (3) concluding the investigation.

Phase 1: Taking Initial Steps

First, carefully consider the scope and nature of the alleged misconduct. A violation of internal corporate procedures, while still serious, may merit a different investigative approach than would a violation of federal or state law. Moreover, an allegation of a single wrong act is inherently different from an allegation of widespread misconduct. Ultimately, management should tailor the investigation's scope to the severity of the wrongdoing.

Second, determine which actors face potential liability. In the event that there may be both corporate and individual liability, in-house counsel, as the representative of the corporation and not of individual employees, may be required to retain outside counsel. Conflicts of interest may prevent in-house counsel from jointly representing both the company and individual employees.

Third, even if hiring outside counsel is not required under the circumstances, consider whether it would be worth the investment. In addition to more easily preserving the attorney-client privilege, using outside counsel is advantageous because they are often experts in investigations, may have more resources than are available in-house, and are often perceived by government decision-makers to be independent. Of course, an internal audit led by in-house counsel may be more efficient and less expensive. Additionally, in-house counsel have greater familiarity with company employees who, in turn, may feel more comfortable sharing information with them.

Phase 2: Conducting the Investigation

As a general rule, all investigations should be conducted and perceived as fact-finding, objective inquiries. The true first step in the investigative phase is to develop a comprehensive plan. Not only must this plan identify the key issues to be investigated, but it also must set out a timeline according to which the inquiry will proceed. The timeline might be sub-divided into distinct components, including, for instance, document collection, witness interviews, evidentiary analysis, and report preparation.

As part of the overall plan, in-house counsel must identify and address the legal and ethical issues that may arise during the actual investigation. For instance, in preparing for the document collection phase of the inquiry, in-house counsel should issue a "litigation hold notice" and review both internal policies and local laws that might impact production and review of the documents. Moreover, to maintain independence, the investigators must prevent subjects of the investigation from accessing the plan or findings.

The second step in the investigative phase is to gather evidence. In-house counsel (or outside counsel if hired) must take special care when conducting witness interviews. Specifically, U.S. counsel should convey a form of the following Upjohn[13] warnings to all employee interviewees advising that: (1) counsel represents the corporation, not the employee; (2) the ensuing conversation is strictly confidential; (3) the corporation, not the employee interviewee, holds the attorney-client privilege; and (4) the corporation can disclose the interviewee's statements to third parties, including the government. Furthermore, such counsel should memorialize interviews with an eye toward preserving privilege and make available to corporate decision-makers individual witness summaries.

Phase 3: Concluding the Investigation

Once the evidence has been collected, a necessary first step is to analyze it and prepare a corresponding investigative report. The results from this report may call for remedial action, which can include both disciplining the wrongdoers and revising internal company policies if deficient.

If the corporation at issue is publicly traded in the U.S., additional responsibilities attach. First, upon learning of illegality committed by either the company or its employees, counsel must report such allegations to the company's chief legal officer and, optionally, to its chief executive officer.[14] Second, the chief legal officer must investigate the allegations and, unless he or she reasonably believes the claims are baseless, must "take all reasonable steps to cause the [company] to adopt an appropriate response."[15] Third, unless the original reporting attorney reasonably believes that the company has taken an appropriate response within a reasonable time frame, he or she must report the allegations to either a sub-committee of the board of directors or to the entire board.[16]

Although there is generally no duty to self-report potential legal violations to government authorities, voluntary disclosure may be beneficial. Self-reporting is often a factor considered by the federal investigators in deciding what indictments are warranted and what penalties should be imposed.

Likelihood of Prosecution

Even if allegations of corporate misconduct have merit, a criminal prosecution is not a foregone conclusion. In-house counsel and other corporate officers can take actions to reduce the chances an indictment will be brought.

For example, to decide whether to indict a corporation, the DOJ is obligated to consider the Principles of Federal Prosecution of Business Organizations, authored by then-Deputy Attorney General Mark Filip.[17] In addition to considering these factors, prosecutors weigh the sufficiency of the evidence, the likelihood of success at trial, and the adequacy of non-criminal approaches to punishment.

Nine key factors merit special attention:

(1) The pervasiveness of the alleged wrongdoing within the corporation. Both management's complicity and the total number of employees engaged in the conduct

are considered under this factor.

(2) Whether the corporation voluntarily disclosed the wrongdoing and the extent of its cooperation with the government to rectify the harm.

(3) The extent to which the corporation attempted to improve existingcompliance programs, institute organizational change, and convey a strong message that wrongdoing will not be tolerated.

(4) The existence and effectiveness of the corporation's pre-existing compliance program.

(5) The seriousness of the corporation's offense, the risk of harm to thepublic, and the policy goals that would be served by a prosecution.

(6) The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it.

(7) The disproportionate harm that an indictment might cause to innocent and uninvolved third parties.

(8) Whether the alleged wrong can be redressed by directly prosecuting responsible individuals rather than the entire corporation.

(9) The availability of non-criminal punishments, like fines and sanctions.

Ultimately, even though wrongdoing may have occurred, in-house counsel and other corporate officers may lower the risk of prosecution by, for example, considering the merits of cooperating with the government by disclosing the purported wrongdoing (second factor), improving compliance programs once the wrongdoing is discovered (third factor), and maintaining a robust compliance program (fourth factor).

Conclusion

The U.S. anti-corruption enforcement landscape is evolving and the cooperation between U.S. and foreign authorities has fueled enforcement actions. In addition, incentive-based mechanisms have come to the forefront of the enforcement paradigm. Whether the Dodd-Frank Act's whistleblower provisions or the "cooperation credit" factor, legal incentives are designed to encourage the disclosure of wrongdoing so that it may be rectified. Moreover, enforcement agencies are incentivizing the speedy resolution of claims of wrongdoing by offering corporations non-prosecution agreements in exchange for substantial monetary settlements (and, in some instances, monitorship programs).

Despite all this, anti-corruption enforcers have continued to prosecute individual wrongdoers, including in-house counsel. In this enforcement environment, a corporation's response to allegations of internal fraud is critically important to protecting against criminal liability. Accordingly, corporate officers and especially in-house counsel have a vital interest in establishing and maintaining a robust compliance program. ❑

1 Complaint at 4-8, SEC v. Biomet, Inc., No. 1:12-cv-00454 (D.D.C. Mar. 26, 2012).

2 Press Release, U.S. Securities and Exchange Commission, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), available at http://www.sec.gov/news/press/2012/2012-50.htm.

3 Id. Note that this amount also settles the criminal charges brought against Biomet by the Department of Justice.

4 Press Release, U.S. Securities and Exchange Commission, SEC Charges Tyson Foods with FCPA Violations (Feb. 10, 2011), available at http://www.sec.gov/news/press/2011/2011-42.htm.

5 Id.

6 Id. Note that this amount also settles the criminal charges brought against Tyson Foods by the Department of Justice.

7 See, e.g., 18 U.S.C. § 1519 (2006) (proscribing the destruction, alteration, or falsification of records in federal investigations); 18 U.S.C. § 1512 (proscribing witness tampering); 18 U.S.C. § 1510 (proscribing the obstruction of criminal investigations); 18 U.S.C. §§ 1503, 1505 (proscribing the obstruction of judicial or administrative proceedings).

8 For instance, liability can attach for false statements made on documents routinely submitted to the government or for statements made to private employers who later transmit the information to the government.

9 Press Release, U.S. Securities and Exchange Commission, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2011), available at http://www.sec.gov/news/press/2011/2011-116.htm.

10 See, e.g., Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). This standard has also been applied in criminal cases.

11 Ian Thomas, Feds Ignore Lessons of GSK Obstruction Case, Attys Say, LAW360 (June 8, 2012), available at http://www.law360.com/articles/343834/print?section=legalindustry.

12 Id.

13 Derived from Upjohn Co. v. United States, 449 U.S. 383 (1981).

14 17 C.F.R. § 205.3(b)(1) (2011). Note, however, that if counsel believes reporting to the chief legal officer or chief executive officer would be futile, counsel can report the allegations directly to the board of directors. Id. § 205.3(b)(4).

15 Id. § 205.3(b)(2) (2011). Instead of initiating an investigation, the chief legal officer may report the allegations directly to the company's "qualified legal compliance committee," if one exists. Id. For the requirements of a "qualified legal compliance committee," see id. § 205.2(k).

16 Id. § 205.3(b)(3)(i), (iii).

17 See Memorandum from Mark Filip, Deputy Attorney Gen. to Heads of Dep't Components, United States Attorneys (Aug. 28, 2008), available at http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf.

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