

U.S. FOREIGN CORRUPT PRACTICES ACT

SOME REASONS WHY COMPLIANCE PROGRAMS STILL MATTER

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Companies are developing and updating their anticorruption compliance programs and spending millions of dollars conducting anticorruption compliance reviews and audits. Private practitioners, in-house counsel, forensic accountants, and investigative firms are attending anticorruption programs and conferences in record numbers. Everyone wants to know all the current anticorruption prevention, compliance, and detection tips. This article is for the companies that already know the antibribery prohibitions¹ and internal controls and accurate recordkeeping requirements² of the U.S. Foreign Corrupt Practices Act (FCPA).³ The following discussion is on those companies that already have an anticorruption compliance program. I wanted to give a short reminder for those in-house personnel who periodically train, teach, and counsel their global business unit and staff employees on anticorruption policies and procedures. It is for those in-house professionals who sometimes wonder if their company is actually preventing corrupt payments or if the effect of their compliance program is to merely document their company's concern about the issue.

So, here are five (but not all) very good reasons why your anticorruption compliance program still matters a lot.

I. EFFECTIVE PROGRAMS MITIGATE FINES AND PENALTIES

In the last few years, many companies have received record fines and penalties

¹ 15 U.S.C. §§ 78dd-1(a), 78dd(a), *et seq.* (2008).

² *Id.* §§ 78m(b)(2)(a), *et seq.*

³ 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, *et seq.* (2008).

amounting to tens of millions of dollars for engaging in conduct that violates the FCPA and local anticorruption laws.⁴ In 2007, the corporate defendant in *United States v. Baker Hughes* paid over \$40 million in fines and penalties even though the company cooperated with U.S. law enforcement authorities during the investigation. Yet, Baker Hughes had apparently not updated its compliance requirements for agent and consultant vetting, hiring, oversight, and management at the time of the misconduct to sufficiently address the company's FCPA risk in this area overseas. Previously, for another FCPA violation in 2005, in *SEC v. Titan Corporation* and its companion case *United States v. Titan Corporation*, the corporate defendant paid a combined \$28 million fine, including criminal, civil, and disgorgement, for an FCPA violation that was at the time among the highest ever imposed.

In contrast, some other companies that recently violated the FCPA hardly received any comparable penalty at all.⁵

⁴ See *United States v. Baker Hughes Services, International, Inc.*, Plea Agreement, Crim. No. H-07-129 (S.D. Tex. April 11, 2007) [hereinafter "Baker Hughes Plea Agreement"] (\$11 million criminal penalty; \$10 million civil penalty and \$24 million disgorgement). See also *SEC v. The Titan Corporation*, Civ. Act. No. 05-0411 (D.D.C. March 1, 2005) (\$15.4 million combined disgorgement and prejudgment interest/civil fine); *United States v. Titan Corporation*, Crim. No. 05-CR-0314 (S.D. Cal. February 22, 2005) [hereinafter "Titan Plea Agreement"] (\$13 million criminal fine).

⁵ See *Securities & Exchange Commission v. Delta & Pine Land Company and Turk DeltaPine, Inc.*, Exch. Act. Rel. 20214; SEC Accounting and Auditing Enforcement Release No. 2657 (July 26, 2007) [hereinafter "Delta Pine"] (\$300,000 civil fine). See also *In the Matter of Bristow Group Inc.*, Exch. Act. Rel. No. 56533 (September 26, 2007); SEC Accounting and Auditing Enforcement Release No. 2727 (September 26, 2007) [hereinafter "Bristow"] (no financial penalties).

The FCPA violations in *Securities & Exchange Commission v. Delta & Pine Land Company and Turk Delta Pine, Inc.*⁶ and related federal court administrative actions resulted in the defendants agreeing to pay a fine of only \$300,000 in order to settle the two enforcement cases in July 2007. Since the U.S.-based company had violated the internal controls and books and records provisions of the FCPA and Turk DeltaPine was accused of violating the antibribery provisions, this modest penalty seems to be more suited to an earlier era of FCPA enforcement.

Moreover, in September 2007, the corporate defendant that consented to the SEC's administrative cease-and-desist order *In the Matter of Bristow Group, Inc.* received no financial penalty whatsoever in connection with its FCPA antibribery and internal controls violations in Nigeria. This was in part because the defendant promptly investigated the suspected misconduct, timely self-disclosed the misconduct to the U.S. enforcement authorities, cooperated with authorities, and self-remediated the uncovered problems.

Thus, in *Bristow*, the hallmarks of an effective FCPA corporate compliance program were sufficiently present to enable the company to properly investigate a suspected violation and make informed determinations on self-reporting and remediation that substantially mitigated the possible DOJ and SEC fines and penalties that otherwise could have resulted. Mitigation of harsh law enforcement penalties and punishment is an understandably strong incentive for maintaining a robust anticorruption compliance program, but it is not the only incentive.

⁶ *Supra* note 5.

2. EARLY DETECTION ALLOWS EARLY COMPANY SOLUTIONS

FCPA and anticorruption policies and procedures that address a company's operational corruption risk profile will likely result in early warning or early detection of misconduct at the company. Such

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procedures will also enable a company to determine if there are compliance awareness gaps that may create an environment or setting for inappropriate behavior that could lead to a violation of company policy or applicable anticorruption laws. Companies should always be the first to know about their compliance problems so that they can be the first party to propose and implement a strategy for fixing the problem. Third-party remediation or law enforcement-mandated remediation of a company's systemic problems are usually more draconian, less workable, and not sufficiently customized to your company's issues.

3. TRUST IS VALUABLE

Companies want to be trusted by their customers, partners, business community, regulatory authorities, and investors, among many others. Customers and investors regularly entrust companies with their financial future and their most private and valuable personal information, as well as their environmental health and safety. To the extent that companies fail to have adequate internal controls and anticorruption policies that prevent misconduct, companies are susceptible to serious violations that breach that trust. A more trustworthy competitor could very easily become the more profitable competitor.

4. GOOD CONTROLS HELP KEEP THE PLAYING FIELD LEVEL

It stands to reason that if more companies operating overseas have serious and robust anticorruption programs with rigorous internal controls and highly accurate and scrutinized recordkeeping, anticorruption awareness will be heightened. Anticorruption awareness is heightened when employees and third parties are provided with tools and training that help them avoid misconduct or an appearance of misconduct. Effective anticorruption compliance programs also foster transparency and good recordkeeping, regardless of whether the company is subject to the jurisdiction of the United States or not. The competitive business development process overseas would likely become somewhat fairer, less costly, and more professional for all companies.

5. ETHICS IS FOREVER AND POSSIBLY UNIVERSAL

Many companies currently have ethics

policies, as required. Many companies also want their employees to act ethically when they are presented with an opportunity to engage in corrupt practices. Compliance programs can translate rules and procedures, but they cannot teach values. Nor do most employees or third parties always appreciate the legal nuances that underlay many procedures and policies. However, if companies could convert a compliance process into part of an ethical culture that comprehends the difference between undue influence and appropriate business engagement, companies might have fewer instances of misconduct.

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Thus, anticorruption procedures, policies, and processes should be reviewed and updated. These same procedures should be tested, while compliance program execution should be examined, and real world understanding of the processes and controls should also be audited and periodically reviewed. These actions and considerations regarding your company's current compliance program may help lead to an ethical corporate culture; and that still matters a great deal to most businesses. ■

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