ARNOLD & PORTER LLP

ADVISORY

March 2011

Building an Effective Anti-Corruption Compliance Program: Lessons Learned from the Recent Deferred Prosecution Agreements in Panalpina, Alcatel-Lucent, and Tyson Foods

In the last four months, nine major multinational corporations have agreed to settle cases in three separate enforcement actions brought by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) relating to alleged violations of the US Foreign Corrupt Practices Act (FCPA). The DOJ and SEC agreements in these enforcement actions have resulted in a total of nearly US$380 million in civil and criminal penalties, including fines and disgorgement of profits.

Apart from the penalties, the deferred prosecution agreements reached with the DOJ all require the defendant companies to develop, implement, and maintain corporate compliance programs with virtually identical elements to prevent, detect, and address FCPA risks and violations. The similarity among the required compliance program elements provides clear and much-needed guidance from the DOJ regarding what the US government has determined are the essential components of an adequate FCPA compliance program.[1] This Advisory outlines the key lessons learned from the analogous deferred prosecution agreements in these three recent cases.

Nine Major Companies Admit to FCPA Violations

In November 2010, Panalpina World Transport Ltd., a Swiss freight forwarding company, and six of its customers (Royal Dutch Shell, Pride International, Tidewater Inc., Transocean Inc., GlobalSantaFe Corp., and Noble Corp.) agreed to settlements with the SEC and DOJ

1 The FCPA prohibits a broad range of persons and businesses, including US and foreign issuers of securities registered in the United States, from making a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. These provisions also apply to foreign persons and companies that take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies with securities listed in the United States to meet its provisions on recordkeeping and internal accounting controls. These accounting provisions were designed to operate in tandem with the anti-bribery provisions of the FCPA and require companies covered by the law to make and keep books and records that accurately and fairly reflect the transactions of the company and to devise and maintain an adequate system of internal accounting controls.

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entailing a total of US$236.5 million in civil and criminal fines for paying US$27 million in bribes to foreign officials in at least seven countries, including Nigeria and Brazil, to expedite services for its customers.[2] The next month, in December 2010, Paris-based Alcatel-Lucent agreed to pay a total of US$137.37 million in civil and criminal fines for violations of the FCPA for actions in Costa Rica, Honduras, and elsewhere, including the payment of US$8 million in bribes to obtain or retain telecommunications contracts.[3] Most recently, in February 2011, the US food giant Tyson Foods, Inc. consented to US$5.2 million in civil and criminal fines in settlement agreements with the DOJ and SEC for its violations of the FCPA involving both direct and indirect illicit payments amounting to approximately US$100,000 made by its Mexican subsidiary to Mexican government food safety officials.

Despite the differences in the nature of the corrupt activities and the amount of the resulting fines, the DOJ required compliance programs that contained virtually identical elements to be implemented by each company in order to avoid prosecution.[4] Each deferred prosecution agreement includes an attachment with almost identical language detailing the company's agreement to:

> adopt new or modify existing internal controls, policies, and procedures in order to ensure that it maintains: (a) a system of internal accounting controls designed to ensure that [the company] makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws.[5]

After the introduction above, the agreements provide parallel templates of the key elements that must be included in an acceptable corporate compliance program. We distill and outline the key components of this model corporate compliance program based on the DOJ's guidance.

Key Elements of an Effective Corporate Compliance Program

1. Individualized Risk Assessment

The key element underlying an effective corporate compliance program is an individualized risk assessment that identifies and evaluates the key risks that the company faces with regard to bribery of foreign officials. The risk assessment that a company conducts should drive the development of all its compliance policies, procedures, and internal controls and should take into account "the foreign bribery risks facing the company," including, but not limited to, its geographical organization, the interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture arrangements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.[6] This language reflects the government's acknowledgement that while all acceptable compliance programs must share the key general structural elements outlined in the deferred prosecution agreements, the government cannot direct a one-size-fits-all compliance program for all companies, because every company faces different foreign bribery

2 Royal Dutch Shell, Pride International, Tidewater Inc., Transocean Inc., and GlobalSantaFe Corp. also entered into respective deferred prosecution agreements with the DOJ with required compliance programs identical to that required of Panalpina in its deferred prosecution agreement with the DOJ. Noble Corp. entered into a non-prosecution agreement with the DOJ that included an attachment with compliance measures identical to those in the deferred prosecution agreements of Panalpina and the five other companies in this case.

3 In addition to Alcatel-Lucent's settled complaint with the SEC and signed agreement with the DOJ, the DOJ obtained guilty pleas from three Alcatel subsidiaries for conspiracy to violate the FCPA.

4 Deferred Prosecution Agreement Attachment C, *United States* v. *Tyson Foods, Inc.,* No. 1:11-CR-00037 (D.D.C. Feb. 10, 2011); Deferred Prosecution Agreement Attachment C, *United States* v. *Alcatel-Lucent, S.A.,* No. 10-20907 (S.D. Fla. Dec. 27, 2010); Deferred Prosecution Agreement Attachment C, *United States* v. *Panalpina World Transp. (Holding) Ltd.,* No. 10-00765 (S.D. Tex. Nov. 4, 2010).

5 In this Advisory, language inside quotation marks refers to wording that is identical in each of the deferred prosecution agreements cited above.

6 The list of potential foreign bribery risks in each deferred prosecution agreement varies slightly, reflecting the different risks that each company faces. For example, the Tyson Foods agreement includes only the "geographical organization, interaction with governments, and industrial sector of operation," whereas the Alcatel-Lucent agreement includes all the potential risks listed above.

risks. An individualized risk assessment will help to ensure that a company's corporate compliance program is tailored to the specific risks it faces and will also help to identify changes needed in the compliance program as the company grows, expands operations, moves into different markets, or otherwise faces different foreign bribery risks.

2. Commitment from Senior Leadership

A successful anti-corruption compliance program requires a strong tone from the top of the company regarding the importance of strict compliance procedures. All the deferred prosecution agreements in the cases above have emphasized that "strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code" is essential to the compliance program. In addition, senior management should "take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery by personnel at all levels of the company."[7] These "appropriate measures" from senior management necessarily must entail adequate funding and resources for compliance programs and adequate support for the compliance program described herein.

3. Explicit Written Policies and Procedures, Ethics Policy, and Internal Controls

An effective compliance program requires strong written policies and procedures against violations of the FCPA and other anti-corruption laws. These policies and procedures, including internal controls and ethics policies, must be explicit as well as "clearly articulated and visible" within the company. These policies and procedures must cover not only violations of the FCPA but also "other applicable foreign law counterparts worldwide."[8]

According to the DOJ, these policies and procedures must also include explicit standards and procedures to "reduce the prospect of violations of the anti-corruption laws and [the company's own] compliance code." Each settlement requires that company standards and procedures discuss the company's policies toward "gifts; hospitality, entertainment, and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion." These standards and procedures must apply to "all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of [the company] in a foreign jurisdiction, including but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners[9]…to the extent that [these third parties] may be employed under [the company's] corporate policy."[10]

The companies are also required to develop a "system of financial and accounting procedures, including a system of internal controls" specifically designed to avoid and address violations of the books, records, and accounts provision of the FCPA. These financial and accounting procedures and internal controls should be "reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery."

4. Effective Communication and Training

Effective communication of, and periodic training on, the company's compliance policies and procedures to all directors, officers, employees, and, "where necessary and appropriate,"[11] third parties is an essential component of the compliance programs in the deferred prosecution agreements. Therefore, directly-hired employees as well as applicable third parties must not only know about the company's relevant anti-corruption policies and procedures, but understand them as well. The DOJ has further required

7 The Tyson Foods agreement leaves out the words, "by personnel."

8 The Tyson Foods deferred prosecution agreement refers only to "applicable counterparts (collectively, the 'anti-corruption laws')" whereas the Alcatel-Lucent and Panalpina agreements refer explicitly to "applicable foreign law counterparts (collectively, the 'anti-corruption laws')."

9 Throughout this Advisory, all references to "third parties" incorporates this expansive definition. The DOJ refers to these third parties collectively as "agents and intermediaries."

10 The Tyson Foods agreement omits the final phrase, "to the extent that agents and business partners may be employed under [the company's] corporate policy."

11 The Tyson Food deferred prosecution agreement does not include this limiting phrase here or generally elsewhere in its agreement.

annual certification by all directors, officers, employees,[12] and where necessary, third parties, to "certify[] compliance with the training requirements."

5. Designated Compliance Infrastructure

In addition to communication and training, the agreements all require the company to develop a dedicated compliance infrastructure that includes designated responsibility to "one or more senior corporate executives [of the company] for the implementation and oversight of [the company's] anti-corruption policies, standards, and procedures."[13] This compliance officer must have "direct reporting obligations to independent monitoring bodies, including internal audit, [the company's] Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy."

The agreements additionally emphasize that the compliance infrastructure must include a system for "guidance and advice to [the company's] directors, officers, employees, and, where necessary and appropriate, agents and business partners [third-parties], on complying with [the company's] anti-corruption compliance policies, standards, and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction in which the company operates."[14] This necessarily entails dedicating staff to the issue of anti-corruption compliance and providing them training and resources to be able to provide this guidance and advice.

Finally, this compliance infrastructure must also include a system for "[i]nternal, and where possible, confidential reporting by, and protection of, directors, officers, employees, and, where necessary and appropriate, agents and business partners [third parties]," who are "willing to report breaches of the law or professional standards or ethics," which might include corrupt activities within the company, "suspected criminal conduct, and/or violations of [the company's] compliance policies, standards, and/or procedures." Additionally, the infrastructure must allow reporting by and protect individuals who are "not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors." A related and necessary component is an effective system to respond to either type of report and "undertak[e] appropriate action in response to such reports," which should include an explicit policy of non-retaliation.

6. Enforcement and Disciplinary Guidelines

The agreements all contemplate that violations of a compliance program must carry serious consequences. In this respect, each deferred prosecution agreement requires standards to be established through well-publicized, "appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws and [the company's own] compliance code, policies, and procedures[15] by [any of the company's] directors, officers, and employees." This enforcement system must include procedures that ensure that (a) "where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct," and (b) "appropriate steps are taken to prevent further similar misconduct."

7. Implementation of Policies Governing Third Parties

To the extent that a company uses third parties, the company must "institute appropriate due diligence and compliance requirements pertaining to the retention and oversight" of all third parties. The company should also inform relevant third parties of the company's "commitment to abiding by laws on the prohibitions against foreign bribery and of [the company's] ethics and compliance standards and procedures and[16] other measures for preventing and detecting such bribery," and endeavor to obtain a

12 In the Panalpina case, the DOJ required annual certification only by management employees, whereas in Tyson Foods and Alcatel-Lucent, the DOJ required annual certification by all employees.

13 The Tyson Food agreement reads "oversight of compliance with policies, standards, and procedures regarding the anti-corruption laws." The Panalpina agreement omits the word "anticorruption."

14 The wording in the Tyson Food agreement is slightly different, stating "on an urgent basis on difficult situations in foreign jurisdictions."

15 The Tyson Food agreement instead, here and elsewhere, employs the language, its "compliance and ethics program."

16 The Tyson Foods agreement is in the disjunctive here.

"reciprocal commitment" from its third parties reflecting that they understand and accept the company's third party compliance program. The company should also include standard provisions in its agreements and contracts (including renewals) with third parties "that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws; (b) rights to conduct audits of the books and records of the [third party] to ensure compliance with the foregoing; and (c) rights to terminate [a third party] as a result of any breach of anti-corruption laws, and regulations or representations and undertakings related to such matters."

8. Monitoring and Auditing

An essential component of a compliance program is ongoing monitoring and auditing of the compliance policies and procedures to ensure that they are indeed effective at preventing and detecting foreign bribery. This monitoring and auditing should be directed toward the company's key risk areas, as identified by an ongoing, individualized risk analysis, and metrics should be developed, used, and revised as necessary to measure and ensure that the compliance program is effective. Finally, a company should regularly audit its own books and records, as well as the books and records of its covered third parties.

9. Periodic Review and Testing

The final component of an effective compliance program is "periodic review and testing of its anti-corruption compliance code, standards, and procedures,"[17] including "internal controls, ethics, and compliance programs." This review should be "designed to evaluate and improve their effectiveness in preventing and detecting violations of anti-corruption laws and [the company's] anti-corruption code, standards and procedures." The DOJ's agreements for all the companies listed above require a review at least once a year to consider "relevant developments in the field and evolving international and industry standards," and "update and adapt [the standards, procedures, internal controls, ethics, and compliance programs] as necessary to ensure their continued effectiveness."

Increase in FCPA Enforcement Also Increases the Importance of Compliance Programs

The enforcement actions against Panalpina et al., Alcatel-Lucent, and Tyson Foods are recent cases within a larger trend of a significantly stepped-up FCPA enforcement effort by the DOJ and SEC in the past few years. The DOJ Criminal Division has substantially increased its FCPA enforcement staff and the SEC has created a new, specialized enforcement unit, both of which have played a major role in significantly more vigilant FCPA enforcement. DOJ Criminal Division Assistant Attorney General Lanny Breuer noted that over the past two years, the DOJ has "charged more than 50 individuals with FCPA-related offenses and collected nearly US$2 billion in FCPA-related fines and penalties—by far the most people charged and penalties imposed in any similar period."[18]

Although the DOJ and SEC have brought cases against some of the largest companies in the world in recent years, smaller companies have also been investigated and fined. FCPA violations can arise in any company, large or small, in all industries, and involving business within virtually any country. A robust compliance program is therefore essential for any company operating in the global marketplace to prevent corrupt payments from taking place. In addition to preventing, identifying, and responding to future FCPA and other anti-corruption violations from occurring, a compliance program can help companies keep better track of their assets, ensure accountability among their employees, and mitigate the possibility of other control problems arising within a company.

While a corporate compliance program certainly does not absolve a company of liability for past actions, the DOJ has made clear that remedial actions taken by a company,

17 The Tyson Foods agreement omits the word, "anti-corruption."

18 Speech given by DOJ Criminal Division Assistant Attorney General Lanny A. Breuer on January 26, 2011, *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html.

including the implementation or improvement of an effective compliance program, are to be considered in determining the treatment to afford a violator of the FCPA.[19] The DOJ has also explicitly affirmed that it will look beyond the written policies of a company's compliance program to understand whether it is a truly effective program or simply a "paper program."[20]

Conclusion

US enforcement authorities have provided a clear and consistent roadmap in three recent enforcement actions as to the components of anti-corruption compliance programs necessary to address US enforcement concerns. As a result, companies subject to the FCPA are well advised to develop and implement such programs proactively. The elements outlined above provide a roadmap that, if followed, will enable companies to meet government expectations on compliance through an effective program that prevents, detects, and responds to potentially improper conduct.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys.

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19 US Attorney's Manual: Principles of Federal Prosecution of Business Organizations (9-28.300A.6.), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300.

20 US Attorney's Manual: Principles of Federal Prosecution of Business Organizations (9-28.800), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800.