

# Compliance & Ethics PROFESSIONAL



Vol. 7 / No. 3  
06 / 2010

A PUBLICATION OF THE SOCIETY OF CORPORATE COMPLIANCE AND ETHICS

## TOP STORIES INSIDE

- 8 You can't handle the risk
- 18 SEC announces sweeping overhaul to its investigation and cooperation procedures
- 26 Managing Ethics Risks
- 32 Prepare for stepped-up enforcement of the Foreign Corrupt Practices Act
- 38 Web 2.0 and Social Networking: New challenges to regulatory compliance
- 44 From bullets to Band-Aids: The changing role of whistleblowers

**Come to the  
2010 Compliance  
& Ethics Institute:  
A full track of sessions  
on managing  
compliance and  
ethics risks**



**Meet Angela Styles**  
Coordinator, Defense Industry Initiative on  
Business Ethics and Conduct

# The secret's out: DOJ endorses a blueprint for FCPA compliance

By Russ Berland, JD

How many of us can identify with this situation? Monica is the associate general counsel of a software company with about \$600 million in sales. The company has programmers in India and China and sells its software in the U.S. The company is planning to expand into a test market of three new countries outside the U.S. in the next year. The general counsel comes to Monica and says, "With our expansion, we probably need to get a Foreign Corrupt Practices Act (FCPA) compliance program in place. Would you check around and find out what we need to do?" Monica finds out that the Department of Justice (DOJ) enforces the FCPA. What she reads suggests that FCPA compliance programs are important to the DOJ, so she reasons that the DOJ must tell companies what they are looking for in FCPA programs. But, she cannot find guidance from the DOJ.

Monica's company and others have good reason to be concerned. They have heard the message from the DOJ clearly, "Adopt stricter standards or face an ever-intensifying wave of prosecution" in their FCPA compliance programs. As recent pronouncements from the DOJ's Assistant Attorney General Lanny Breuer and former Deputy Chief Mark Mendelsohn of the DOJ's Fraud Section make crystal clear: the DOJ is ramping up its enforcement of the FCPA. Penalties are higher, corporate managers are going to jail, more federal agents are

investigating, more attorneys are prosecuting, more investigations are ongoing, and more prosecutions are pending, the DOJ is trying new enforcement techniques, new countries are enforcing their anti-bribery laws, and companies can expect this to escalate further. So, what is a company with sales or operations outside the U.S. (like Monica's) supposed to do? According to Breuer, Mendelsohn, and others at the DOJ, companies must implement compliance programs that are effective in preventing and detecting violations of the FCPA.

What are the requirements of this FCPA compliance program that the DOJ is insisting companies must implement? The FCPA statute does not help define the compliance program and the DOJ will not say. The DOJ has never published specific guidance, which would tell companies how to build effective FCPA compliance programs. This is in contrast to the approach of the Office of the Inspector General (OIG) of Health and Human Services (HHS), which has published substantial compliance program guidance on federal criminal laws that affect health care (such as the False Claims Act, the Anti-kickback Statute and the Stark Law) for specific health care sectors, including nursing facilities, hospitals, pharmaceutical manufacturers, physicians, and durable medical equipment suppliers, among others. The contrast between the DOJ's lack of guidance and HHS OIG's abundance of it could not be any more striking.

A chapter in the U.S. Attorney's Manual (Manual) entitled Principles of Federal Prosecution of Business Organizations<sup>1</sup> states that "the existence and effectiveness of the corporation's pre-existing compliance program" is a factor in favor of not charging a corporation for the criminal acts of its employees. It is also a consideration in giving the corporation more favorable treatment in negotiating pleas and other agreements. These are big stakes and companies want to get it right. But, the Manual does not give meaningful guidance for companies that wish to implement effective FCPA compliance programs. The Manual states, "The Department has no formulaic requirements regarding corporate compliance programs." It instructs U.S. attorneys to judge compliance programs by their fruits (i.e., Do they work?). The U.S. attorneys look at whether the compliance program appears to be "merely a paper program" or if it was "designed, implemented, reviewed, and revised... in an effective manner." This is not strong guidance for an assistant U.S. attorney who is attempting to decide whether a company should be charged; nor is it helpful for the attorney or compliance professional (like Monica) who is tasked to ensure that the company has an effective FCPA compliance program in place.

*CONTINUED ON PAGE 12*

But, a non-U.S. group, the Working Group on Bribery in International Business Transactions (Working Group on Bribery) for the Organization for Economic Co-operation and Development (OECD),<sup>2</sup> has arrived with meaningful guidance on building an effective FCPA compliance program. The OECD is an international economic organization of 30 countries, which began in 1948 to help administer the Marshall Plan in the reconstruction of Europe after World War II. The U.S. joined this group in the 1960s and was a signatory to the OECD Anti-bribery Convention, which became effective in 1999. So far, 38 countries have ratified the Anti-bribery Convention, which requires the countries to put in place national anti-bribery laws (similar to the U.S.'s FCPA), to enforce those laws, and to implement recommendations of the OECD Working Group on Bribery to combat bribery. In November 2009, the OECD Working Group on Bribery recommended that each ratifying country should encourage "companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery."<sup>3</sup> Rather than following the DOJ's example of requiring anti-bribery compliance programs but then not telling companies what should be in those programs, the OECD Working Group on Bribery published the "Good Practice Guidance on Internal Controls, Ethics, and Compliance" in February 2010.<sup>4</sup>

The OECD Guidance describes the elements of an effective anti-bribery compliance program for companies operating in the 38 ratifying countries, including the U.S.

The DOJ appears to be accepting the OECD Guidance. Regarding the Working Group on Bribery's recommendations, U.S. Secretary of State Hillary Rodham Clinton stated, "the United States fully supports the OECD's anti-corruption agenda."<sup>5</sup> Mendelsohn, the chief FCPA prosecutor for the DOJ, recently told compliance professionals at the Global Ethics Summit 2010 that the OECD Guidance is arriving in the U.S. with the endorsement of the U.S. government. Mendelsohn sits on the Working Group on Bribery as the U.S. representative.

Although the DOJ does not give out official guidance for FCPA compliance programs, the OECD Guidance appears to draw heavily from DOJ's internal work product. Many recent Deferred Prosecution Agreements (DPAs) with the DOJ over alleged FCPA violations have contained a "Compliance Undertakings" appendix. That appendix lists requirements of an FCPA compliance program, which DPA recipients must put in place. Not only is there overt similarity between the DPA requirements and the OECD Guidance, but even the wording of phrases is identical in both documents. For example, both documents require the implementation of "a system of financial and accounting procedures, including a system of internal [accounting] controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts." The OECD Guidance adds the word "accounting" to "internal controls" while the DPA appendix leaves it out, but otherwise the phrases from the two documents

are identical. Such striking similarities cannot be coincidental.

The OECD Guidance contains a preface and 12 specific instructions for companies to implement effective anti-bribery compliance programs. The preface suggests each company should base its program on a risk assessment of its bribery risks and the individual circumstances of the company. Each company should regularly monitor and re-assess its risks and circumstances in order to adapt its program for continued effectiveness. Also, the anti-bribery program should be interconnected with the company's general ethics and compliance program. The 12 instructions are:

- Have senior management give strong, explicit and visible support to the anti-bribery program.
- Have a clearly articulated and visible corporate policy prohibiting bribery of foreign officials.
- Make it the duty of every individual at every level of the company to comply with the anti-bribery program.
- Have one or more senior corporate officers (who have sufficient independence, resources, and authority) be in charge of the anti-bribery program and have the responsibility to report on matters directly to the Audit Committee or similar board committee.
- Design the program to prevent and detect bribery of foreign officials. The program applies to all directors, officers, employees, subsidiaries, and other entities under the company's control. The program should address gifts, hospitality, entertainment, customer travel and expenses, political contributions, charitable donations, facilitation payments,

what happens when employees are solicited for bribes, and what to do when employees or the company face extortion.

- Make the program applicable to third parties and other business partners, so long as it is appropriate and consistent with the company's contracts. Document risk-based due diligence of the hiring and oversight of business partners. Inform business partners that the company is committed to anti-bribery and inform them about the company's anti-bribery compliance program. Ask for an anti-bribery commitment from each of its business partners.
- Have a system of financial and accounting procedures designed to keep fair and accurate books, records, and accounts. These internal controls should ensure that the company's finances cannot be used for bribery of foreign officials and that any financial transactions to bribe those officials cannot be hidden.
- Have periodic communications and documented training about the anti-bribery program. These should reach employees at all levels of the company and should also extend to subsidiaries.
- Encourage and provide positive support for employees to comply with the anti-bribery program.
- Discipline violations of anti-bribery laws and the anti-bribery program. This discipline and enforcement of the program should apply to all levels of the company.
- Provide guidance and advice to directors, officers, employees and business partners on complying with the company's anti-bribery program.

This includes their urgent requests for advice when they are facing difficult situations in other countries (such as solicitations or extortion). Provide a method for confidential reporting for potential violations of anti-bribery laws or the anti-bribery program. When a report of a potential violation comes in, take appropriate action in response.

- Regularly reassess the anti-bribery compliance program to evaluate and improve its effectiveness. Among other things, this should take into account new developments in the area and evolving standards.

So, can Monica rely on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance when DOJ investigators come to ask questions about her company's country manager in India and his relationship with local tax officials? Will the prosecutors find that her company's FCPA compliance program was effectively designed when it was based on the OECD Guidance? The answer should be Yes. Of course, in order to receive credit, Monica's company would have to be effective in implementing the design according to the risks and circumstances identified in their risk assessment. The program still has to work. But, in all likelihood, the OECD Guidance will be used by leading companies around the world and will soon become the de facto best practices standard for anti-bribery and FCPA compliance programs. As a signatory to the OECD Anti-Bribery Convention, the U.S. has agreed to implement the recommendations of the Working Group on Bribery, including the

OECD Guidance. U.S. officials from the Secretary of State to the chief enforcer of the FCPA have endorsed those same recommendations. And, the OECD Guidance parallels and borrows from the DOJ's own work product in crafting requirements for companies that have self-disclosed violations of the FCPA. It seems that it would be difficult for an assistant U.S. attorney prosecuting a case against employees of Monica's company to decide the company's FCPA compliance program is defective, if it was rationally designed and truly implemented based on the OECD Guidance. In other words, Monica can take the OECD Guidance to the general counsel and confidently state, "This is what the company needs to do to have an effective FCPA compliance program." ✦

#### Notes:

- 1 Title 9, Chapter 9-28 of the United States Attorneys' Manual. Available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/title9.html](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.html)
- 2 More information available at [http://www.oecd.org/document/5/0,3343,en\\_2649\\_34859\\_35430021\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/5/0,3343,en_2649_34859_35430021_1_1_1_1,00.html)
3. The full text of the "Recommendation for Further Combating Bribery of Foreign Public Officials" may be found at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.
- 4 Found at <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.
- 5 OECD press release dated September 12, 2009: [http://www.oecd.org/document/35/0,3343,en\\_2649\\_34487\\_44232739\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/35/0,3343,en_2649_34487_44232739_1_1_1_1,00.html)

**Editor's note:** Russ Berland is co-leader of Stinson Morrison Hecker LLP's Corporate Accountability practice in Kansas City. He is a former chief compliance officer for BearingPoint and has extensive hands-on experience in building practical and effective legal compliance programs for multinational businesses. He may be contacted by e-mail at [rberland@stinson.com](mailto:rberland@stinson.com) or by phone at 816/691-3180.