Message from the Chair

Dear Corporate Compliance Committee members,

Advance registration for the Section Annual Meeting, September 17-19 in Chicago, ended on Friday, September 4, but you may still register on site. The Annual Meeting website, which has all the relevant details, can be found [here](http://apps.americanbar.org/buslaw/committees/CL925000pub/newsletter/201509/).

Our Committee is presenting or co-sponsoring several CLE programs during the course of the meeting, and we will hold a business meeting on September 18 and a joint dinner with the Cyberspace Law, Corporate Counsel, Health Law and Life Sciences, Intellectual Property, and White Collar Crime Committees the evening of September 17. If dinner tickets remain, you may purchase them at the meeting registration desk at the Hyatt. For a full schedule of our Committee’s events, please see the article below.

We are always looking for more active Committee members, so I encourage you to contribute content to this newsletter, and to develop CLE program or webinar proposals, articles, and book chapters. A strong committee has active members. If you are interested in taking on a leadership role within the Committee, I invite you to contact me to discuss your areas of interest. I am committed to finding opportunities for engagement and contribution for anyone willing to help.

I would like to introduce to you Daniel Knudsen, who participates in the Section's Leadership Diversity Outreach program and who will be working with our Committee through 2017. As you may know, the Leadership Diversity Outreach program (formerly the Fellows, Ambassadors, and Diplomats program) aims to involve underrepresented groups in the Section's activities and, to that end, pairs participants with committees matching their professional interests. I am very pleased that Daniel is joining our Committee's leadership.

I look forward to seeing you in Chicago. Thank you for your continued support of the Committee.

Best regards,
Brian T. Sumner
Chair

Annual Meeting Programs and Activities

Everyone is invited to participate in the following programs and activities involving the Corporate Compliance Committee at the Section Annual Meeting:

Program: Risky Business - Using Risk Assessments and Internal Controls to Mitigate Liability and Further Good Governance
Thursday 9/17/2015
9:00AM - 10:00AM
Regency Ballroom D, Gold Level, West Tower

Program: Foreign Agents & Partners: Blessing or Curse to International Business
Thursday 9/17/2015
10:30AM - 12:30PM
Regency Ballroom D, Gold Level, West Tower

Program: Is Your Compliance Program Like Big Foot?
Thursday 9/17/2015
2:30PM - 4:00PM
Regency Ballroom D, Gold Level, West Tower

Corporate Compliance Joint Committee Dinner
Thursday 9/17/2015
7:30PM - 10:00PM
Café Iberico
737 N. LaSalle

Corporate Compliance Committee Meeting
Friday 9/18/2015
9:00AM - 10:00AM
Picasso, Bronze Level, West Tower
Toll-free dial-in number (U.S. and Canada): (866) 646-6488
International dial-in number: (707) 287-9583
Conference code: 3199473460

Program (Co-Sponsorship): Hot Issues in Compliance—What You need to Know to Stay Out of the Government's Crosshairs
Saturday 9/19/2015
2:30PM - 4:00 PM

For further information on the programs see the articles below.

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**Corporate Compliance Committee Supports Annual Meeting Programs on Creating a Compliance Program and Antitrust Compliance Issues**

*By Ted Banks*

The Corporate Compliance Committee will present a program that asks this question: Do you have a real compliance program, or is it like "Big Foot," discussed endlessly but never seen? This program, with Ted Banks (Partner, Scharf Banks Marmor LLC, Chicago), Stephen Paskoff (President, Employment Learning Innovations, Atlanta), and Elizabeth O'Brien (Chief Compliance Officer and Chief Privacy Officer, The Trustmark Companies, Lake Forest, IL), will discuss how to create or bolster a compliance program whether you are starting from scratch, or trying to improve on an existing program. Many companies overlook several elements of the Federal Sentencing Guidelines criteria, such as incentives and auditing. While covering all of the requirements of the Sentencing Guidelines is necessary, they are not sufficient to insure an effective compliance program. Management leadership is also required so that employees can see how to model their behavior.

The Corporate Compliance Committee will also co-sponsor of the program, "Hot Issues in Compliance—What You need to Know to Stay Out of the Government's Crosshairs." Ted Banks (Partner, Scharf Banks Marmor LLC, Chicago), will present the segment "What really works in antitrust compliance?" that discusses the current position of the Antitrust Division of the Department of Justice not to follow the Federal Sentencing Guidelines in granting credit for "effective compliance programs." Nevertheless, the guidance of the Sentencing Commission should be followed. He will also discuss the importance of tailoring a compliance program to the employee demographic and the nature of the business operations. Antitrust compliance training should be aligned with the risks created by different job activities, and made relevant to the employees concerns.

Ted Banks is a partner in the firm of Scharf Banks Marmor LLC in Chicago. He has been involved in corporate compliance for more than 35 years, and is the editor the Corporate Legal Compliance Handbook, published by Wolters-Kluwer. He teaches compliance law at the Loyola University School of Law, and serves as a compliance monitor for the Federal Trade Commission and the...
Foreign Agents and Partners: Blessing or Curse to International Business?

By James Lord and Rebecca Felsenthal

Inadequate anti-corruption compliance measures can subject a company to both civil and criminal liability for third-party corruption, as well as seriously tarnish its brand.

The greatest threat to brand owners may well be their own partners. Inadequate anti-corruption compliance measures can subject a company to both civil and criminal liability for third-party corruption, as well as seriously tarnish its brand. According to Ernst & Young's 12th Global Fraud Survey, 90 percent of Foreign Corrupt Practices Act (FCPA) cases involve third parties. For most multi-national companies, third parties are essential to their success, but simultaneously create risk in the anti-corruption area. Fortunately, there is a solution: implement an effective third-party due diligence program.

The FCPA's anti-bribery provisions prohibit corrupt payments to foreign officials with the intent to influence the award or retention of business. Regulators have made it clear that the FCPA forbids corrupt payments by third parties or intermediaries. See A Resource Guide to the US Foreign Corrupt Practices Act (the Guide). Moreover, settlement agreements have repeatedly required companies to engage in "properly documented risk-based due diligence" for their partners. See Deferred Prosecution Agreement, Panalpina World Transport (Holding) Ltd.. Companies' failure to adhere to this regulatory guidance has resulted in the imposition of enormous penalties. For example, in January 2014, Alcoa's subsidiary paid $223 million in penalties for FCPA violations resulting from the payment of millions of dollars in bribes through a London-based middleman. Similarly, Alstom S.A. recently paid more than $772 million in penalties for using "consultants" to pay bribes disguised as payments for "consulting services."

Read more...

Conducting Effective Compliance Audits

By Alan S. Gutterman

All companies, regardless of their size, business model and scope of activities, must understand and comply with a plethora of laws and regulations in diverse areas such as employment, health and safety, intellectual property, real property, tax, antitrust, finance, securities law and consumer protection. Given the complex legal environment that applies to every business organization, it is essential for companies to develop processes and procedures to conduct voluntary and self-analytical legal and compliance audits on a regular basis. In fact, a number of federal and state laws and regulations, as well as the agencies responsible for their enforcement, specifically require companies to assume responsibility for policing their own conduct and compliance and to report any potential misconduct to the appropriate authorities.

In light of this trend, internal compliance audits have taken on significant importance, and establishing adequate procedures for such audits is an essential part of the company's overall compliance program, which should include appropriate monitoring and auditing systems (e.g., periodic reviews of company business practices, procedures and policies), internal controls for compliance with standards of conduct and special legal requirements imposed on the business, and internal or external compliance audits. Just like internal investigations, compliance audits and investigations must be conducted carefully and managed by experienced lawyers and compliance professionals.
Specifically, precautions must be taken to manage the expense of the process and reduce disruption to business operations. Moreover, care must be taken in structuring and conducting routine compliance audits since there are circumstances where the results of the audit will not be eligible for protection under the attorney-client privilege.

Read more...

**Editor's Corner**

*By Alan S. Gutterman*

Welcome to our second Committee Newsletter of 2015. I am the Newsletter Editor and I'm writing to seek your contributions for future issues, which we plan to publish on a quarterly basis. We invite you to submit relatively short pieces, perhaps 300 to 500 words, on topics of interest to our members. In addition, we are open to longer articles if you are so inclined. If you have something you'd like to share, please contact me at my e-mail address below. Many thanks in advance and we hope you enjoy the information we've provided in this issue.

*Alan S. Gutterman is the Publications Chair of the Corporate Compliance Committee and can be reached at agutterman@alangutterman.com. He is the Director of the Growth-Oriented Entrepreneurship Project ([www.growthentrepreneurship.org](http://www.growthentrepreneurship.org)) and the Business Counselor Institute ([www.businesscounselorinstitute.org](http://www.businesscounselorinstitute.org)) and is also Of Counsel to Qian & Company, a California Professional Law Corporation headquartered in San Francisco. Readers interested in compliance-related materials developed and distributed by Mr. Gutterman should contact him at the address above.*

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Vice-Chair: Dave Ackerman (dacker6@pride.hofstra.edu)

**Compliance Training & Communications**

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Vice-Chair & Webmaster: VACANT
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**Task Forces**

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Vice-Chair: VACANT

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- *Technology: Dave Ackerman (dacker6@pride.hofstra.edu)
Foreign Agents and Partners: Blessing or Curse to International Business?

By James Lord, Rebecca Felsenthal*,

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The greatest threat to brand owners may well be their own partners. Inadequate anti-corruption compliance measures can subject a company to both civil and criminal liability for third-party corruption, as well as seriously tarnish its brand. According to Ernst & Young’s 12th Global Fraud Survey, 90 percent of Foreign Corrupt Practices Act (FCPA) cases involve third parties. For most multi-national companies, third parties are essential to their success, but simultaneously create risk in the anti-corruption area. Fortunately, there is a solution: implement an effective third-party due diligence program.

The FCPA’s anti-bribery provisions prohibit corrupt payments to foreign officials with the intent to influence the award or retention of business. Regulators have made it clear that the FCPA forbids corrupt payments by third parties or intermediaries. See A Resource Guide to the US Foreign Corrupt Practices Act (the Guide). Moreover, settlement agreements have repeatedly required companies to engage in “properly documented risk-based due diligence” for their partners. See Deferred Prosecution Agreement, Panalpina World Transport (Holding) Ltd.. Companies’ failure to adhere to this regulatory guidance has resulted in the imposition of enormous penalties. For example, in January 2014, Alcoa’s subsidiary paid $223 million in penalties for FCPA violations resulting from the payment of millions of dollars in bribes through a London-based middleman. Similarly, Alstom S.A. recently paid more than $772 million in penalties for using “consultants” to pay bribes disguised as payments for “consulting services.”

As set forth in the Guide, “[b]usinesses may reduce the FCPA risks associated with third-party agents by implementing an effective compliance program, which includes due diligence of any prospective foreign agents.” Since the Guide’s publication, the Department of Justice (DOJ) has declined to prosecute both Morgan Stanley and PetroTiger, despite clear FCPA violations by their managers. The DOJ cited to the strength of the companies’ compliance programs (including their third-party due diligence process) as a reason for the declinations.

When companies evaluate the type of third parties that create risk, they often think of agents like the “middleman” or “consultants” hired by Alcoa and Alstom S.A.; however, other types of third-parties also create risk for companies, including freight forwarders, customs brokers, sales representatives, distributors, and joint venture partners:

• Freight Forwarders: Panalpina admitted that between 2002 and 2007, its foreign subsidiaries and agents had paid bribes to circumvent local import regulations in numerous foreign jurisdictions. As part of its settlement agreement, Panalpina was required to enhance its compliance program and pay over $81 million in penalties. Panalpina’s customers were also subject to investigation. For example, Shell Oil Co. and its subsidiaries entered into a deferred prosecution agreement (DPA) and were required to pay approximately $48 million in penalties related to Panalpina’s payment of bribes on its behalf.
• Customs Brokers: In 2010, New Orleans-based shipping company Tidewater Inc. admitted to reimbursing its Nigerian customs broker $1.6 million for bribes paid to Nigerian Customs officials to
Induce them to ignore regulatory requirements governing the importation of Tidewater’s vessels. Tidewater and its subsidiary paid over $15 million in penalties for FCPA violations.

- **Sales Representatives:** In April 2015, United Technologies Corporation announced that it was under investigation by the Securities and Exchange Commission (SEC) for FCPA violations involving alleged bribes paid by a non-employee sales representative relating to the sale of engines and aftermarket services in China.
- **Distributors:** In 2012, medical device company Smith & Nephew entered into a DPA with the DOJ for having violated the FCPA via improper payments made by its Greek distributor to public doctors.
- **Joint Venture Partners:** In 2010, the partners in a four-company joint venture agreed to pay criminal penalties for their role in a bribery scheme to obtain engineering, procurement and construction contracts from the Nigerian government. Although each joint venture partner owned only a 25 percent interest, they were required to pay penalties ranging from $218 million to $579 million.

There are steps companies can take to minimize the risk created by relationships with third parties, including the following:

- Ensuring the organization has a robust compliance program premised on a culture of ethics and compliance that permeates the organization and extends to its third parties;
- Implementing an effective risk-based third-party due diligence process;
- Developing effective third-party anti-corruption policies;
- Requiring third parties to provide audit rights and certify compliance with anti-corruption laws; and
- Conducting anti-corruption training for third parties.

Regulatory guidance is clear that a “properly documented risk-based due diligence” process for a company’s third parties minimizes risk and is a hallmark of an effective compliance program. One effective way to implement such a process is by using an automated third-party due diligence and data management platform that identifies applicable geographic and transactional risk factors, weights them, and classifies third parties as “very low risk” to “very high risk” based upon the weighted factors. The assigned risk category then corresponds to the appropriate level of due diligence to be conducted with respect to a particular third party. Such an automated system allows companies to comply with regulatory expectations and manage third-party risk in a cost effective manner.

The Dodd-Frank Act whistleblower provisions provide enormous incentives to company insiders and third parties to report FCPA violations to regulators, since whistleblowers are eligible to receive up to 30 percent of any settlement -- and FCPA settlements typically range from the tens to hundreds of millions of dollars. The stakes are simply too high to ignore the risks posed by third parties. A company’s failure to implement an effective third-party due diligence process will likely result in FCPA exposure, and could result in the company and/or its managers and executives facing criminal and civil liability. Fortunately, cost-effective third-party due diligence data management platforms are available to assist companies with their third-party due diligence and with properly documenting that process. Consequently, should regulators come knocking due to the rogue act of some third party, the company should be able to demonstrate through its data management platform that it did all the right things and hopefully avoid liability.

Want to learn more about this topic? If you are attending the Section Annual Meeting, be sure to check in on the program covering the issues mentioned in this article that is scheduled for Thursday, September 17th from 10:30AM - 12:30PM in Regency Ballroom D, Gold Level, West Tower.
* James Lord, who chairs the Internal Investigations sub-committee of the Corporate Compliance Committee, is a partner with Sideman Bancroft LLP in Denver CO, where his practice is concentrated on white collar criminal defense, False Claims Act and qui tam/whistleblower defense, internal investigations, corporate governance and compliance issues, regulatory training, brand protection, and asset recovery and repatriation. He can be reached at 415-392-1960 or jlord@sideman.com. Rebecca Felsenthal is an associate with Sideman Bancroft LLP in San Francisco CA, where her practice is focused on litigation and appeals and the representation of business entities in connection with brand protection issues, trademark enforcement, and a range of civil litigation matters. She can be reached at 415-392-1960 or rfelsenthal@sideman.com.
Conducting Effective Compliance Audits

By Alan S. Gutterman*

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In light of this trend, internal compliance audits have taken on significant importance, and establishing adequate procedures for such audits is an essential part of the company’s overall compliance program, which should include appropriate monitoring and auditing systems (e.g., periodic reviews of company business practices, procedures and policies), internal controls for compliance with standards of conduct and special legal requirements imposed on the business, and internal or external compliance audits. Just like internal investigations, compliance audits and investigations must be conducted carefully and managed by experienced lawyers and compliance professionals. Specifically, precautions must be taken to manage the expense of the process and reduce disruption to business operations. Moreover, care must be taken in structuring and conducting routine compliance audits since there are circumstances where the results of the audit will not be eligible for protection under the attorney-client privilege.

A variety of techniques can be used to complete the compliance audit process and those persons involved in conducting the audit often follow many of the procedures that are normally used when conducting a due diligence investigation in the transactional context. Accordingly, questionnaires should be prepared and disseminated to various departments within the company, including sales and marketing, accounting and finance, human resources and legal. The information collected from the questionnaires should always be supplemented by conversations with officers and employees responsible for functions that impact significant operations, as well as discussions with outside consultants and professionals. If the company has already opened offices and facilities in foreign countries to conduct sales or manufacturing, questionnaires should be circulated to local managers and follow-up interviews should be conducted. In addition to questionnaires and interviews, information regarding the company and its business processes can be obtained by reviewing business plans and disclosure documents prepared for distribution to investors, material contracts and written policies and procedures and through inspection of the company’s facilities and observation of managers and employees carrying out their day-to-day job responsibilities.

Specific steps that should be taken include assembling the audit team and briefing the members on the goals of the audit and the relevant laws and regulations; collecting and reviewing background information about the company’s business and legal environment; establishing the scope of the audit and identifying the key issues to be covered by the review (e.g., changes in compliance procedures necessitated by changes in applicable laws and regulations); collecting and reviewing material contracts and other documents (e.g., policies and procedures); collecting information via questionnaires, inspections and interviews; reviewing the existing compliance policies and procedures and assess the company’s overall compliance environment; conducting searches of public records to verify registrations
and recordings; and, finally, analyzing the information to reach a determination regarding the level of compliance and make suggestions for remediation.

Compliance audits should not be “one time” events. Rather, a consistent schedule of periodic compliance audits needs to be built into every legal compliance program. Depending on the size of the company, the audit may cover all functions of the business, or separate audits of particular functions or business units may be performed in order to preserve scarce resources. Companies should also consider conducting “unscheduled” audits to be sure officers and employees are diligently maintaining records and procedures on a day-to-day basis and not simply waiting until a prearranged audit period to get things in order. Companies must also monitor the effectiveness of remedial actions during the periods between formal audits.

* See below for information on Mr. Gutterman. Additional materials on Compliance Audits prepared by Mr. Gutterman are available in Business Transactions Solutions, A Westlaw Next Legal Solution, and from the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org) (search the Library of Resources on “Compliance” on the site). Please contact Mr. Gutterman directly at agutterman@alangutterman.com with any questions.