CORPORATE COMPLIANCE COMMITTEE NEWSLETTER

November 2016

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Business Law Section Spring Meeting
April 6-8, 2017
New Orleans, LA

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Message from the Chair

Dear Corporate Compliance Committee members:

2016 has been an exciting year for the Committee. In addition to robust programming at the Spring and Annual meetings, Committee members published a "Mini-Theme" in Business Law Today's June issue, with carryover articles also appearing in the July issue. We hope to make such a contribution a regular event.

Our programming this year highlights the cross-subject matter applicability of the Committee's work. Specifically, our programs at the Spring and Annual meetings were co-sponsored by the International Business Law, Banking Law, White Collar Crime, Corporate Counsel, Cyberspace Law, Health Care and Life Sciences, and Intellectual Property committees. In turn, we co-sponsored programs of the Derivatives and Futures Law, Cyberspace Law, Banking Law, Middle Market and Small Business, Anti-trust Law, Corporate Counsel, White Collar Crime, Dispute Resolution, Government Affairs Practice, Health Care and Life Sciences, Intellectual Property, and Gaming Law committees at those same meetings. I have long believed that our Committee adds great value when partnering with other substantive committees, and our track record this year confirms that.

Finally, we reconfigured our Committee's leadership for the 2016-2017 Association year. I am excited to have several new contributors as well as returning leaders. I would like to thank all these individuals for their contributions. In particular, I thank Alan Gutterman for his work reinvigorating the Committee's publications work. Alan has rotated off the Committee's lead team and has left the publications work in the very capable hands of Ted Banks and Dan Knudsen.

Thank you for your continued support and contributions.

Brian T. Sumner

Chair

Committee Meetings and Events at Section Annual Meeting

Here are highlights of Committee presentations which were presented at the Annual Meeting in September:

Program: Minimizing Third-Party Risks with Compliance and Business Ethics Contract Clauses

Chair: Margaret Cassidy, Cassidy Law

Thursday, 9/8/2016

Panel members: David Ackerman, In-House Counsel for Sound Income Strategies; Fernanda Berardi, in-house for Cummins, Ed Broeker, Quarles and Brady; Margaret Cassidy, Cassidy Law, and Thomas Coulter, LeClair Ryan discussed the challenges businesses face when drafting and negotiating "compliance and ethics" clauses. The panelists discussed why organizations need to include these clauses in contracts in order to mitigate anti-corruption, conflict of interest, fraud and other legal and ethic risks. The panel provided examples of clauses that are not effective juxtaposing those clauses against clauses that are effective in mitigating legal risks. The panelists shared particular strategies and approaches to effectively negotiate clauses as well as to employ both audits and due diligence to identify legal and ethical risks.

Program: Takeaways from DOJ Fraud Section's "FCPA Enforcement Plan & Guidance

Chair: James M. Lord, Shareholder, Inman Flynn, Denver, CO

Thursday, 9/8/2016

Panel members: Paul Pelletier, Partner, Pepper Hamilton, LLP (Washington, DC); Todd Braunstein, Head of Global Investigations, Willis Towers Watson (Arlington, Virginia); Susanna Dyer, Corporate Counsel, Vertex Pharmaceuticals (Boston, MA).

Discussion: The panel provided an overview of the FCPA Enforcement Plan and guidance and takeaways from recent enforcement actions since its release. The panel also discussed the likely impact of DOJ's enhanced FCPA resources & international cooperation; the likely impact on self-reporting and willingness of companies to identify "culpable employees;" and best practices for managing third party risk in view of the guidance.

Program: Internal Investigations Conducted and Managed Internally

Chair: Scott Lashway, Holland & Knight LLP

Friday, 9/9/2016

A panel of senior in-house counsel from leading financial services organizations, including Bank of America, Prudential, and Fidelity, along with Scott Lashway, of Holland & Knight, LLP, discussed conducting internal investigations with in-house resources, which happens regularly. The panelists began by exploring the differences, if any, between an "i"nvestigation and an "I"nvestigation when confronting allegations of wrongdoing. The discussion moved to recommended practices for the initial inquiry, including who internally is best suited to do it, how to determine when outside resources may be necessary, when to report up or out, how to establish and protect the attorney-client privilege, and considerations in investigating clients that in-house counsel may serve every day in a business-counselor relationship.

Importantly, the discussion considered that there are many reasons for conducting an investigation, and not all of them are to address legal risk. Although outside counsel often jump to the legal implications of any potential wrongdoing, business clients often initially consider risk that may have more immediacy: what does this mean for my business. For the business, as the discussion tested, an initial reason to investigate is often to protect the business, identify and mitigate the risk to that business, and remediate any harm caused - as efficiently and efficaciously as possible.

Program: The DOL Fiduciary Rule - Regulating What Lies Over the Hill

Chair: David T. Ackerman, Chief Compliance Officer, Sound Income Strategies, LLC, Rye, NY

Saturday, 9/10/2016

Panel members: Susan Daley, Partner, Perkins Coie, LLP (Chicago, IL); Phillip Long, VP EB Legal Services, Branch Banking and Trust Company (Greensboro, NC); Scott Weber, Partner, Goodwin Procter LLP (Boston, MA).

Discussion: An interactive and dynamic panel discussed the Department of Labor's Fiduciary Rule. Emphasis was placed on likely impacts to business entities, applications to qualified money, best practices for compliance, and guidance for drafting the BIC exemption.

Here are articles published by Committee members:

"Bridging the Gap between Venus and Mars: Steps Contracting Companies Can Take To Mitigate Risk under the Final Sex Discrimination Regulations."

Koleen S. Kirkwood

Special Counsel, Pietragallo Gordon Alfano Bosick & Raspanti, LLP and Co-Chair of the ERISA and Employment Section of the Firm
Co-Chair of the Corporate Compliance Committeeâ€™s Risk Management Subcommittee

"Minimizing Third Party Risks with Compliance and Ethics Clauses"
Margaret M. Cassidy, Principal, Cassidy Law
Vice-Chair, Corporate Compliance Committee

"**DOJ's FCPA enforcement plan and guidance: Is it anything new?"**
James Lord, Shareholder, Inman Flynn, Chair of the Corporate Compliance Committee's Internal Investigation Subcommittee and Rebecca Felsenthal, Associate, Sideman and Bancroft

Bridging the Gap Between Venus and Mars

In June 2016, the United States Department of Labor (through its Office of Federal Contract Compliance Programs (OFCCP)) announced its Final Rule involving workplace sex discrimination. This Final Rule revises prior requirements and obligations under Executive Order 11246; and is one of a series of anti-discrimination government regulations which will lead to heightened governmental scrutiny, oversight, and potential risk and liability for companies. These regulations are the first regulations that the Department has published in the area of gender discrimination in over forty (40) years, and should signal alerts for any employer that has even minimal contracts with the government.

Increased scrutiny in this anti-discrimination area is already evidenced by numerous DOL investigations, charges, and lawsuits against companies. The potential ramifications to companies are significant and wide-ranging. However, there are practical steps that can be employed to prevent improper workplace discrimination, reduce the risks of audit, penalties, litigation, as well as to prepare contracting companies in the event that they are investigated or sued.

Read more...

Minimizing Third Party Risks with Compliance and Ethics Clauses

A variety of factors have driven organizations to include "ethics and compliance clauses" in their agreements with third parties. Generally, these clauses are designed to provide some contractual assurance to the parties that each will adhere to applicable laws and regulations and uphold ethical standards by requiring assent or certifications related to corruption, conflicts of interest, audits, investigations and other topics.

These clauses are proliferating for a number of reasons. First, government enforcement of corporate wrongdoing in the U.S. and outside of the U.S. has been aggressive over the past several years. Second, shareholder and consumer activism has increased resulting in legal action against corporations for claimed wrongdoing or consumer boycotts. Third, governments have been increasing the number and complexity of clauses in government contracts that dictate certain ethical obligations and compliance with laws and regulations. Finally, most firms now operate globally resulting in different cultural expectations when conducting business.

Read more...

DOJ's FCPA enforcement plan and guidance: Is it anything new?

On April 5, the U.S. Department of Justice announced a new Foreign Corrupt Practices Act Enforcement Plan and Guidance ("Guidance"). The Guidance purports to create a new framework under which prosecutors may offer reduced fines, deferred prosecution agreements, nonprosecution agreements, or even declinations.

Read more...

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BRIDGING THE GAP BETWEEN VENUS AND MARS: STEPS CONTRACTING COMPANIES CAN TAKE TO MITIGATE RISKS UNDER THE FINAL SEX DISCRIMINATION REGULATIONS

Written by: Koleen S. Kirkwood
Special Counsel, Pietragallo Gordon Alfano Bosick & Raspanti, LLP

Overview

In June 2016, the United States Department of Labor (through its Office of Federal Contract Compliance Programs (OFCCP)) announced its Final Rule involving workplace sex discrimination. This Final Rule revises prior requirements and obligations under Executive Order 11246; and is one of a series of anti-discrimination government regulations which will lead to heightened governmental scrutiny, oversight, and potential risk and liability for companies. These regulations are the first regulations that the Department has published in the area of gender discrimination in over forty (40) years, and should signal alerts for any employer that has even minimal contracts with the government.

Increased scrutiny in this anti-discrimination area is already evidenced by numerous DOL investigations, charges, and lawsuits against companies. The potential ramifications to companies are significant and wide-ranging. However, there are practical steps that can be employed to prevent improper workplace discrimination, reduce the risks of audit, penalties, litigation, as well as to prepare contracting companies in the event that they are investigated or sued.

What is the Final Rule?

Executive Order 11246 makes it unlawful for a company to discriminate on the basis of race, color, religion, sex, sexual orientation, or gender identity. The Final Rule's stated purpose is to revise outdated guidelines and align its requirements with current law and legal interpretations that have been seen in various EEOC regulations and decisions dealing with sex discrimination. It addresses a variety of sex-based barriers to equal opportunity and fair pay in the workplace, including compensation discrimination, sexual harassment, failure to provide workplace accommodations for, or other kinds of discrimination because of pregnancy, childbirth, or related medical conditions; discrimination on the basis of gender identity and transgender status; family caregiving discrimination; and stereotypes based upon gender norms such as dress and appearance. See, OFCCP webpage, Final Rule, http://www.dol.gov/ofccp/sexdiscrimination.html

Who Does It Cover and What is the Effective Date?

The Final Rule is construed broadly to apply to any business or organization that (1) holds a single federal contract, subcontract, or federally assisted construction contract or subcontract in excess of $10,000; (2) holds federal contracts or subcontracts that have a combined total in excess of $10,000 in any 12-month period; or (3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for US savings bonds and notes in any amount.[1] The Rule's stated goal is to protect millions of employees and applicants, both male and female, who work or seek to work for federal contractors or subcontractors. Given its stated intent, the low $10,000 applicability threshold, and the liberal interpretation of who constitutes 'contractors' and 'subcontractors', this regulation has widespread application.

The Final Rule took effect on August 15, 2016, although the OFCCP warns that because the regulations generally align with current law under Title VII, as interpreted by the courts and the EEOC, most contractors and subcontractors are already subject to these provisions.

[1] The term "contracting agency" means any department, agency, establishment or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts." 41 C.F.R. 60-1.3, -250.2(i) (2), - 741.2(i) (2)(2005).

Recent Trends by DOL

As can be seen in other areas of enforcement targeted by the Department of Labor, companies are facing greater challenges in terms of DOL inquiries, investigations, and potential charges and lawsuits for failing to comply with its recent anti-discrimination mandates. Many companies have already been investigated, charged, and face fines or penalties involving race discrimination, ranging from tens of thousands of dollars to multiple millions of dollars. Current cases include Norfolk Southern, Enterprise, Bank of America, and Aqualon, to name a few. Recent activity reveals that with this latest Final Rule, DOL/OFCCP scrutiny of gender-based discrimination is next on the horizon.

Recent Sex Discrimination Cases Highlighting the Costs of Non-Compliance with Executive Order 11246

Most recently (6/21/2016), Hormel's Jennie O Turkey Store, Inc. agreed to hire 53 women and pay $491,861 in back wages to 339 female job applicants denied entry-level jobs at its Willmar turkey-processing facility. The agreement was reached with the OFCCP after an extensive year-long audit and review of its hiring practices for gender discrimination, which culminated in a DOL lawsuit against the company. In a similar, but substantially larger case two years earlier, Cargill agreed to pay 2.2 million in 2014 to setting federal hiring discrimination charges at three of its meat processing plants. Cargill disagreed with the OFCCP findings, yet agreed to pay back wages to nearly 3,000 applicants seeking employment at its three plants.

Similarly, in May 2016, Gordon Food Service, Inc. was investigated and sued by the OFCCP for systematically discriminating against 926 women seeking entry-level warehouse laborer jobs. In agreements with the OFCCP, Gordon will pay 1.85 million to female applicants, hire 37 female applicants, and stop using a strength test that OFCCP found to be discriminatory.

Finally, in a case highlighting the DOL's intent to protect men from discrimination as well, the OFCCP recently investigated AmeriQual Group, LLC, a federal contractor that manufactures meals for the Department of Defense and other government agencies. After investigation, the OFCCP filed a lawsuit against AmeriQual finding the company based its work production line assignments on gender stereotypes: It placed women in "light duty" jobs and assigned men to the more labor intensive work. After conducting interviews and document production reviews, the OFCCP alleged that women were selected for table inspector jobs, where a majority of the hiring occurred, while men were relegated generally to loader and utility positions, where less hiring took place. It concluded that these practices were discriminatory and in violation of Executive Order 11246. OFCCP found that this practice affected 237 male applicants over the investigated period; noting that while there was a significantly larger male applicant pool, AmeriQual disproportionately selected women over men.

Small Contracting Businesses are not Immune from becoming Targets of the OFCCP

While some of the above mentioned companies targeted by the OFCCP are large, OFCCP's enforcement history and the low statutory threshold amount triggering these employment mandates strongly suggests the likelihood that future OFCCP investigations and attention will not be limited solely or exclusively to large companies. This is supported by the fact that there are several other cases, such as the Jennie O case, where the penalties imposed fall under $500,000.

Possible Ramifications to Companies Who Refuse to Comply with Investigation of its Employment Practices

In addition to the potential penalties and litigation costs that could result from DOL investigation, such audits and investigations in and of themselves are often extensive in scope and cost. In addition to the significant resources required to respond to an audit, the DOL also wields a heavy sword: Companies found failing to comply with its mandates can result in the Department seeking to cancel the company's current federal contracts, as well as banning the company from future federal contracting. The issue of potential contract revocation was raised by the OFCCP in its recent public admonitions against Bank of America for its alleged refusal to fully comply with its employment compliance-related requests; requests which spanned a period of multiple years of investigation, auditing, and several years of litigation and expense. *See* April 2016 decision in OFCCP v. Bank of America decision (OFCCP withstood Fourth Amendment challenges to its right to request additional data during audits or to conduct on-site reviews) *See also* United Space Alliance v. LLC v. Solis (D.D.C. No. 11-00746 (11/14/11) (NASA contractor forced to comply with OFCCP's request for additional compensation data)

Similarly, at the end of last year, Convergys' Customer Management Group felt the wrath of a DOL suit mandating that the company submit documents detailing its affirmative action plans and supporting documents for its various state facilities; noting that Convergys' continued refusal to cooperate will result in a ban on future government contracts for the company.

More Compensation Regulations Anticipated

Finally, with regard to investigation of compensation issues under the Final Rule, a joint effort is underway by the OFCCP and EEOC to allow the agencies to collect employer pay data from companies, including federal contractors, with 100 or more employees. This clearly signifies an intensified, concerted governmental effort to identify and prosecute potential pay discrimination cases.

Recommendations for Employers to Mitigate their Employment-Related Risks

Given the heightened activity in the employment compliance area, coupled with the lessons learned from recent investigations and subsequent agreements between OFCCP and Jennie O, Cargill, Gordon Food, and AmeriQual group, a number of steps can be taken to facilitate compliance with OCFFP employment mandates, as well as to reduce the risk of OFCCP investigation and prosecution. Several of these recommendations are outlined below:

1. Review and clarify your Anti-Discrimination Policy

Companies should have clear and concise anti-discrimination policies that can be readily implemented and followed. To the extent possible, these policies and procedures should incorporate the OCFFP's "Best Practices" found in the Appendix of the Final Regulations and equal employment principles found in Title 41 of the Code of Federal Regulations (CFR). As demonstrated by the Jennie O, Cargill, and Gordon cases, policies should also specify that its prohibitions against discrimination are not relegated simply to actions affecting hired employees, but extend to the hiring process itself, which has become a focus of the OCFFP. Moreover, the AmeriQual case shows that hiring policies which have a disproportionate effect on either men or women will be subject to heightened scrutiny and may warrant further explanation, documentation, and result in investigation.

2. Monitor Compliance with Company Policies and Procedures

Once in place, employers need to ensure that its organization is adhering to the terms and mandates of its own policies. Policies are only effective if they are properly implemented and followed. In many cases such as Jennie O and Gordon Foods, companies have policies that expressly state that they will not discriminate based upon gender, race, religion, ethnicity - yet in practice; managers and recruiters deviate from these policies and protocols by not always hiring, promoting, or making other employment decisions objectively and without discriminatory bias.

As a result, companies need to periodically conduct audits of their employment policies and procedures to ensure that employees making employment-related decisions are not circumventing the language and intent of the policies themselves. If instances of employee noncompliance are discovered, such employees should be disciplined. Finally, the results of an audit should be evaluated to ensure that its policies and procedures are effective in achieving its goal of providing equal opportunity and fair pay in the workplace.

3. Conduct Training and Communicate Company Policies and Procedures

In addition to ensuring that a company has a clear, effective anti-discrimination policy that it is following, the company must take affirmative steps to actively train and communicate these policies and procedures to its employees. Such policies and procedures must be consistently and systematically communicated throughout the company, as well as to third parties. Company executives, employees, and third parties need to undergo training in this employment area. Employees must also be provided with the opportunity to raise questions or concerns on employment issues such as hiring, compensation, and leave of absence when they believe such employment decisions were not based upon legitimate, non-discriminatory reasons.

Employees responsible for rendering employment-related decisions such as executives, human resource professionals, recruiters, and hiring managers should periodically receive additional training and communications to remind them of company policies and procedures. Finally, the training should be accessible, easy to understand, and effective in communicating the antidiscrimination message. Such training can be done either by live or *via* computer-based training.

4. *Implement a mechanism for employees and human resources personnel to raise their issues, as well as an investigative process for addressing employment issues that are inconsistent with company policy and procedures*

If an issue arises with compensation or a hiring decision, employers should have a defined method or procedure in place to allow the company to properly investigate the matter. Employees should know where to go and what to do in the event that they believe they have been discriminated against based upon the company's employment actions or decisions.

Also, once such claims are properly validated, the company should have some type of investigative protocol involving a neutral party to address concerns and take appropriate actions where necessary to rectify the unfair or discriminatory situation.

5. ***Standardize Aspects of Hiring, Compensation, and Leave***

Companies should also utilize a standardized, objective application process to eliminate the potential for hiring managers to independently render biased hiring decisions that violate the new regulations. Contracting companies should consider using compensation formulas and salary ranges based solely upon performance and experience levels, so that jobs of similar duties and responsibilities are in the same salary grade with similar opportunities for additional compensation and bonuses. As with other employment-related areas, compensation decisions need to be periodically reviewed to ensure, for example, that pay disparities do not exist. Finally, the leave process should be consistent and well communicated in its terms, once leave is requested. Terms of the leave policy should also be communicated periodically to all employees, as well as specific correspondence and communications made to affected employees.

6. Document Decisions and Compliance with Policies

Documentation of employment practices and issues serves several critical roles. It forces employers to discuss and subsequently justify in writing that their decisions provide equal opportunities for all employees and fair play in the workplace. Secondly, if audited or investigated, such documentation provides key support for their employment decisions at the time when such decisions were made that can also be utilized in an individual employee lawsuit or in response to OFCCP inquiries into more systemic employment practice failures.

Conversely, companies should also require its employees to certify that they are complying with company employment policies and procedures. Such certification encourages employee accountability for workplace equality and can also be used to illustrate an employer's good faith efforts to achieve compliance with its employment mandates.

Conclusion

In light of the US Government's increasing focus on investigating and prosecuting businesses for employment practices which may violate their anti-discrimination mandates, companies who wish to continue doing business with the government must review, analyze, and be vigilant about their employment policies and practices, including compliance with the latest regulations dealing with sex discrimination. Equally, if not more importantly, such companies need to be ready, willing, and able to demonstrate their compliance with such regulations if and when the OFCCP comes knocking at its door.

Minimizing Third Party Risks with Compliance and Ethics Clauses: The Bad, the Ugly and the Good

Written by:
Margaret M. Cassidy, Principal, Cassidy Law

I. Overview

A variety of factors have driven organizations to include "ethics and compliance clauses" in their agreements with third parties. Generally, these clauses are designed to provide some contractual assurance to the parties that each will adhere to applicable laws and regulations and uphold ethical standards by requiring assent or certifications related to corruption, conflicts of interest, audits, investigations and other topics.

These clauses are proliferating for a number of reasons. First, government enforcement of corporate wrongdoing in the U.S. and outside of the U.S. has been aggressive over the past several years. Second, shareholder and consumer activism has increased resulting in legal action against corporations for claimed wrongdoing or consumer boycotts. Third, governments have been increasing the number and complexity of clauses in government contracts that dictate certain ethical obligations and compliance with laws and regulations. Finally, most firms now operate globally resulting in different cultural expectations when conducting business.

As a result, firms, from Fortune 50 companies to small non-profits, are responding to these forces by including compliance and ethics clauses in their contracts to mitigate the risk of a third party exposing a firm to accusations of illegality or unethical practices. Additionally, entities that have been prosecuted by the government may be mandated to include these clauses as part of a settlement with the government.

These clauses can be a force for good by contractually requiring legal compliance and ethical behavior. However, the clauses can also be bad news for the parties when not drafted in a way that actually addresses applicable laws and ethical behavior. This can turn ugly for the parties when trying to enforce the poorly drafted clause, enforce audit requirements, or when attempting to respond to burdensome due diligence required by the clause.

II. Bad Clauses

Ethics and compliance clauses can be "bad" for several reasons. First, a clause may be overly broad. For a simple example, consider a clause designed to prevent corrupt behavior that "prohibits employees from providing anything of value to a government official." It is simply too broad. Read literally an employee married to a government official would be prohibited from giving her government official spouse a birthday gift.

Second, "bad" clauses misstate or ignore the law. The above example demonstrates this as well because in some instances the law does permit giving items of value to a government official. In the United States, for example, people and, at times, organizations may make campaign contributions to candidates for political office. The above clause as written would prohibit this lawful activity.

Third, a clause can be "bad" for the contracting parties when it requires one of the parties to follow the code of conduct, policies and procedures of the other party especially when the code of conduct, policies and procedures are not shared between the parties. From both a logistics and knowledge perspective, it is challenging to make another organization follow the internal policies and procedures designed for another entity.

III. Ugly Clauses

Bad is one thing but sometimes these ethics and compliance terms and conditions can get down right ugly. For example, organizations often include clauses giving a right to audit a business partner. When these audit clauses fail to define scope of the audit; when an audit is triggered; who conducts the audit; who pays for the audit; and what happens if there are audit findings, it is an ugly situation that often causes disputes when the audit clause is exercised.

Similarly, when a party is required to disclose matters it either considers confidential, like internal investigations or confidential legal settlements, it gets ugly when one party refuses to make these types of disclosures and the other party insists on having the information. Likewise, requiring a business partner to disclose personal conflicts of interests such as whether any of its board members or employees have business or personal relationship with a government official; or asking a business partner to disclose organizational conflicts of interest such as its other clients or the work it is doing for other clients also can also turn ugly.

These types of disclosures or certifications may require a firm to either reveal matters that it considers confidential or require it to conduct extensive due diligence to verify the request without the means to conduct such expansive diligence.

IV. Good Clauses

The "bad" and the "ugly" compliance and ethics clauses can expose an organization to increased costs of negotiations by requiring more time to negotiate or by requiring extensive due diligence to respond to representations. Failing to comply with these compliance and ethics clauses may propel parties toward breach for issues that are only tangential to performance of the contract. Or, it may result in a party making representations, warranties and certifications that it simply cannot make just to reach agreement. The bad and ugly clauses can also breed distrust and frustration between contracting parties on issues that are not germane to performance.

With a little bit of thought; creativity; legal analysis; collaboration across business functions; and earnest negotiation parties may avoid the bad and the ugly and be left with the good – protecting their reputation and avoiding legally non-compliant or unethical behavior.

Creating good ethics and compliance terms and conditions really starts before an organization even receives a contract with these clauses. It starts with a firm reviewing its internal legal compliance and ethics controls to determine what it will actually be able to agree to in ethics and compliance clauses. That is an organization should understand which business functions in the organization actually "own" the legal compliance requirements that are likely to appear in contracts. For example, using the "no gifts to government officials" clause as an example, an organization should understand whether it has policies and procedures to monitor its own gift giving to enable compliance with anti-corruption laws and if so, how does it manage these requirements.

Once these compliance controls are identified the business unit that owns the compliance controls should work with lawyers to assure that the organization has properly defined the legal requirements that are driving the compliance requirements. Lawyers should not only appreciate U.S. laws and regulations when determining its compliance obligations but should consult with local counsel in the countries where the contract will be executed to make sure to understand each countries' laws. In addition to looking to the laws of other countries for guidance on drafting ethics and compliance clauses, if competitors have settled accusations of illegal conduct, review the settlement terms to determine if it required changes to contractual language and, if so, include the adapted language in contracts with third parties.

Once an organization has conducted this background review of its compliance processes and controls and has gathered information that may be responsive to ethics and compliance clauses, attorneys should work with the business function to create a "due diligence" library. The "due diligence" library should include the "evidentiary" support for ethics and compliance clauses that appear regularly: are any employees government officials; does the firm have a gift policy; has the firm settled government investigations; does it have a conflicts of interest policy; or does it prohibit retaliation.

Additionally, the "due diligence" library should also include standard language that business folks may use to replace "bad" or "ugly" terms and conditions. Again, using the audit clause as an example, attorneys should draft an audit clause that includes precise delineation of scope; when an audit may occur; who will pay for the audit; and how will findings be addressed. A "due diligence" library will allow business teams to more quickly find answers to common ethics and compliance clause questions and will also free up lawyers from having to engage in time consuming internal discussions to determine if the organization can compile requested information or comply with the clauses.

After receiving an RFP or contract that includes ethics and compliance clauses, there are some additional steps that can be taken to get "good" clauses. First, if the RFP or contract is a government contract requiring representations and certifications, don't fear re-writing or tailoring clauses to reflect the compliance controls that actually exist. It is far better to tell the government that representations and certifications are limited to certain persons in the organization, certain divisions in the organization or to a subsidiary and not the parent or sibling entities than it is to just agree and hope the government does not audit the representations and certifications. Depending on the clause, with the U.S. Federal Government, for example, may consider inaccurate representations or certifications to be "false statements" worthy of investigation and prosecution under the False Claims Act.

Second, if one of the parties is insisting on particular language and particular representations and certifications for the ethics and compliance clauses, understand why they are so insistent. Are they subject to a deferred prosecution agreement or non-prosecution agreement that mandates the particular clause? If so, work with them to provide them the disclosures or language needed to meet the government's requirements.

Third, in negotiations, when a party is trying to force its compliance and ethics regime onto its business partner, if each party has an effective compliance and ethics regime, push back on accepting the compliance and ethics requirements of the other party. However, appreciate that each business partner will need to actually see support that the other party actually has an effective ethics and compliance program. Then, be prepared to provide information about policies, procedures, helpline calls and other aspects of managing an ethics and compliance program.

Or, if one of the negotiating parties is a small entity and does not have an effective ethics and compliance program and the other party is a large business partner trying to force its program on the small entity, the small entity should consider agreeing to adhere to the larger parties ethics and compliance program. It's good medicine for a small firm without an ethics and compliance program to rely on the program of its large business partners. Further, there are laws and regulations that actually require large business partners to assist its smaller business partners with compliance. But, before agreeing to the large business partner's requirements, the small business should insist on knowing what the requirements are and then determine if it can actually execute the requirements.

Fourth, when it comes to audit clauses that so many organizations now include in their contracts, its good business to "do onto others as you would have them do unto you." Do not make it an audit free for all by failing to include limits on the time and place of the audit; limits on the scope of the audit; no clarity on what triggers an audit or who pays. Instead, negotiate earnestly to put precise requirements around the audit terms. And, should the agreement include an audit clause, it should be exercised, for should a contract have an audit clause, yet the firm never conducts an audit, the clause will not impress the government if one of the parties attempts to use it to show the government it had controls to manage its third parties from engaging in illicit behavior.

V. Conclusion

Ethics and compliance clauses should not hold up deals; should not increase negotiation costs or cause frustration between the parties. Instead, organizations need to craft practical, legally appropriate clauses, representations and certifications to assure business partners are complying with the law and making ethical decisions.

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MORE ON CORPORATE GOVERNANCE

BY JAMES LORD, REBECCA FELSENTHAL

DOJ's FCPA enforcement plan and guidance: Is it anything new?

On April 5, the U.S. Department of Justice announced a new Foreign Corrupt Practices Act Enforcement Plan and Guidance ("Guidance"). The Guidance purports to create a new framework under which prosecutors may offer reduced fines, deferred prosecution agreements, nonprosecution agreements, or even declinations.

1. Intensifying investigative resources and strengthening coordination with foreign counterparts

The Guidance announces its focus on "intensifying its investigative and prosecutorial efforts" by adding 10 prosecutors and three squads of FBI special agents dedicated to FCPA enforcement. Moreover, DOJ promises increased coordination with foreign counterparts. Rather than reveal new efforts, these pronouncements simply reflect DOJ's existing priorities. For example, earlier this year, DOJ demonstrated the success of cooperation with foreign counterparts when it announced a settlement with VimpelCom Limited, the world's sixth-largest telecommunications company. The settlement required VimpelCom to pay criminal penalties in excess of $230 million to the DOJ and over $230 million to Dutch prosecutors, as well as to disgorge over $375 million to be divided between the SEC and the Public Prosecution Service of the Netherlands.

2. FCPA pilot program

The Guidance announces implementation of a FCPA pilot program, whereby companies can become eligible for mitigation credit by: (1) voluntarily self-disclosing the criminal conduct; (2) fully cooperating, including disclosing the involvement in the criminal activity by the corporation's officers, employees, or agents; (3) taking appropriate remedial action, including disciplinary measures against those employees identified as responsible for the misconduct, as well as against those "with oversight of the responsible individuals;" and (4) disgorging profits.

A company is eligible for *partial* credit (up to 25% reduction in fine) where the company fully cooperates and engages in appropriate remediation, but does not voluntarily disclose. Where a company satisfies all pilot program requirements, the company may receive *further* credit (up to a 50% reduction in fine).

"Full cooperation" as defined by the Guidance is onerous, requiring:

- Proactive (not reactive) and timely disclosure of all relevant facts, including those related to third-party, employee, officer, or agent involvement in the criminal activity;
- Identifying opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;
- Providing timely and ongoing updates on the company's internal investigation;
- Making present and former officers and employees available for interviews;
- Attribution of facts to specific sources(where attribution does

not violate attorney-client privilege);

- Disclosure of overseas documents;
- Facilitation of third-party production of documents and witnesses from foreign jurisdictions (unless legally prohibited); and
- Providing translations of relevant documents upon request.

Most unnerving is DOJ's failure to commit to declining prosecution for companies that comply with all of the above factors. The Guidance provides: "Where those . . . conditions are met, the Fraud Section's FCPA Unit *will consider* a declination of prosecution." This lack of commitment by DOJ is puzzling given that prior to the announcement of the new pilot program, companies that had complied with the Guidance's milestones were already eligible for similar or even greater rewards. For example, in 2012 Morgan Stanley received a declination after voluntarily disclosing FCPA violations by a former managing director, cooperating in DOJ's investigation, and implementing a compliance program. Moreover, even though VimpelCom had not made a voluntary disclosure, DOJ awarded a 45% reduction off of the bottom of the Sentencing Guidelines fine range (rather than the 25% reduction available thru the pilot program) and declined prosecution.

What does the Guidance mean for companies?

While the Guidance doesn't change DOJ's prior approach to FCPA violations, it does provide greater transparency about its analysis: prompt remedial action is essential to minimize a company's liability, as are self-reporting and full cooperation.

The Guidance also echoes the Yates Memo's message that a critical component of a company's cooperation is identification of all culpable individuals and all facts relevant to proving their culpability. A company that self-reports must be prepared to provide this information to DOJ, but must balance the possible reward of mitigation credit against potential risk. Last year, in *Shell Oil Co. v. Writt*, the Texas Supreme Court held that statements made to the DOJ about the criminal liability of an employee in a company's FCPA investigation report were absolutely privileged and therefore could not subject the company to defamation liability. 464 S.W.3d 650 (Tx. 2015). In so holding, the court reasoned that the "evidence [was] conclusive that when Shell provided its internal investigation report to the DOJ, Shell was a target of the DOJ's investigation and the information in the report related to the DOJ's inquiry." Under the Guidance, however, statements made by companies in their investigation reports to DOJ may not be protected by the absolute privilege, because the Guidance requires companies to make their disclosures "prior to an imminent threat of disclosure or government investigation."

Conclusion

The Guidance is explicit in its intent and purpose, providing:

[T]his pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement. Such voluntary self-disclosures thus promote aggressive enforcement of the FCPA and the investigation and prosecution of culpable individuals.

Despite the risks, it appears that companies are electing to implement the procedures mandated by DOJ, lest they risk attracting unwanted attention. Deputy Attorney General Sally Yates, in her May 10th speech before the New York City Bar Association, noted that companies are making "real and tangible efforts to adhere to our requirement that they identify facts about individual conduct, right down to providing what I'm told are called 'Yates Binders' . . . that contain relevant emails of individuals being interviewed by the government." According to DAG Yates, this new approach is helping to "steer officers and employees in their organizations toward best practices and higher standards." While such change is admirable, so too would be more certainty for companies that opt to self-report. DAG Yates only promised that "equilibrium will return" and "a new normal will exist." For companies trying to make tough decisions, that time can't come soon enough.

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