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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Smaller Businesses Must Get Ready For FCPA Whistleblowers

Law360, New York (January 09, 2015, 8:52 AM ET) -- The Foreign Corrupt Practices Act, initially passed in 1977, prohibits payments (made directly or through intermediaries) to foreign government officials to assist in obtaining or retaining business. For many years, relatively few FCPA cases were brought. Then, starting in the 1990s and accelerating in recent years, large settlements involving multi-national companies began appearing in the news. That trend continues, as evidenced by Alstom SA's and Avon's recent payments of $772 and $135 million, respectively.

David Laigaie

Thus, while the government has aggressively enforced the law, that enforcement has focused on large companies. As a result, small and medium companies doing business internationally have not had to worry too much about FCPA compliance. That will change … and quick!

The Dodd-Frank Act appended a whistleblower provision to all securities laws, including the FCPA. The FCPA whistleblower program, started in mid-2011, empowers anyone with knowledge of illegal payments to bring the information to the government and to collect up to 30 percent of any resultant settlement. The U.S. Securities and Exchange Commission has already received more than 400 FCPA whistleblower tips. Unlike the SEC and the U.S. Department of Justice, whistleblowers do not limit themselves to large companies. To the contrary, every disgruntled accounts payable clerk or international sales representative — no matter the size of the company — can now initiate an FCPA investigation. As a result, smaller and medium-sized businesses must snap into FCPA compliance.

So, what should they do? Large companies spend lavishly, hire consultants, staff FCPA compliance departments, extensively train their employees, and spend millions on outside counsel to investigate potential violations. Small and medium-sized businesses do not have the resources to do this. These smaller entities must therefore design FCPA compliance programs that are both effective and efficient. This article discusses how small and medium-sized businesses can create such compliance programs.

Three Components of an Effective Compliance Program

Any effective compliance program will accommodate three basic tenets of human nature. First, most people will follow the rules as long as they understand them. Second, some people will not follow the rules no matter how well they understand them. Third, good faith effort at compliance is all that can reasonably be expected. These tenets dictate three

essential components of any effective compliance program: education; audit; and, enforcement. An FCPA compliance program that includes these components will be effective, irrespective of its cost.

Education

Every company that does business internationally should have a code of conduct that controls how its employees conduct themselves, including a prohibition on paying bribes (i.e., any form of remuneration, including gifts and entertainment) in order to keep or to maintain business. The code of conduct (or related policies) should explain the FCPA in a way that is easily understood by the employees (including using native language for foreign employees). Employees should acknowledge their receipt and understanding of the code of conduct and certify in writing that they will follow the code. Companies can create codes of conduct from scratch, or they can adapt samples that are readily available.

Having a code of conduct is not enough. Companies must also educate their employees on the code and on the FCPA. Counsel can provide such education, or to minimize expense, appropriate training materials are widely available at no or little cost. Employees must be empowered and encouraged to report past payments that concern them and to seek guidance before authorizing or making any future disbursements that raise a question. Employees must be informed (and actually believe) that senior management demands FCPA compliance even when such compliance threatens an important project or contract.

In addition to educating its employees, a company must educate itself concerning the risks it faces under the FCPA. Specifically, a company should perform a risk assessment that identifies contracts or projects that pose the biggest FCPA risks. This risk assessment should be completed at least annually. A senior manager should perform the risk assessment and his or her annual review should include an assessment of the quality of the risk assessment. The risk assessment should, at a minimum, identify all international contracts or projects that involve state-owned owned parties (e.g., state-owned oil companies, foreign government entities, state-owned hospitals or universities, etc.); involve countries where bribery is especially prevalent (e.g., Russia, China, Nigeria, Pakistan, etc.); involve agents, distributors, joint-venture partners and other intermediaries (a large majority of FCPA cases involve the use of such intermediaries); require state issued permits or approvals; or, involve the use of freight forwarders or customs agents.

Audit

All of the education in the world will not ensure a company's compliance with the FCPA, however. First, the FCPA can be tricky in its application. Even people intending to follow the law can easily go astray. Second, some people will knowingly violate the law, especially when large commissions are at stake. Companies must therefore affirmatively look for problems by performing annual compliance audits.

The audits should be weighted to focus on potentially problematic payments by, for example, including all of the projects and contracts identified through the risk assessment as well as any situations identified by employees as being potentially problematic. The audit could also include a statistically significant sample of additional contracts and projects (that were not singled out as being potentially problematic). The audit protocol need not be overly complex but must be sufficient to enable the auditor to determine whether payments implicated and/or violated the FCPA. The auditor must have significant organizational authority to be free from meddling. The audit results must be published to senior management and any questions or problems that arise from the audit must be dealt with swiftly and sufficiently.

Enforcement

Finally, companies must enforce their FCPA compliance. Questionable or improper payments must be investigated. Employees requesting, authorizing or making such payments must be punished. Wrongdoing must be reported to authorities. An audit program that does not uncover questioned or improper payments is simply not effective and must be revamped. Similarly, an employee hotline that does not generate tips about questioned payments is not working and more needs to be done to encourage employees to report concerns. Investigations into questioned payments must be unbiased and complete, without regard for any potential negative effects (e.g., loss of an lucrative contract, termination of senior executive, etc.). Punishment for wrongdoing must be swift and appropriate, with no preferential treatment for successful salespeople or senior executives. As companies who have spent millions to investigate and to settle potential suits have learned the hard way, FCPA violations are deadly serious. They need to be treated as such.

Conclusion

Small and medium-sized businesses must ready themselves for close FCPA scrutiny that will be brought on by whistleblowers. By following the steps outlined above, these entities can create and implement effective FCPA compliance programs that deter wrongdoing, uncover problems and protect the company.

—By David M. Laigaie, Eckert Seamans Cherin & Mellott LLC

David Laigaie is a member in Eckert Seamans' Philadelphia office.

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