

40 Years Of FCPA: Compliance, Past And Future

By Hui Chen

Leading up to the 40th anniversary of the Foreign Corrupt Practices Act on Dec. 19, this Expert Analysis series features reflections from attorneys who have played a role in the evolution of FCPA enforcement, defense and compliance.

During the late 1990s, I worked as an in-house counsel in Europe for a U.S. Corporation. This was when the Foreign Corrupt Practices Act first came across my professional radar screen. I asked for some time at one of the regional general managers meetings to describe the concept as I knew it. After I finished my brief presentation, one of the GMs spoke up: “You mean to tell me that if I do these things,” he waved to my slide listing types of bribes, “the American FBI can come get me?”

“Well ... theoretically ... yes.” I answered with a bit of uncertainty.

“Ha! That is the most ridiculous thing I have ever heard!”

Today, I suspect few managers in multinational companies would express such sentiment out loud. Even though corporate compliance as a concept has been “codified” by the United States Sentencing Commission since 1991, compliance did not really take off as a popularized growth industry until Siemens AG’s historic \$1.6 billion global FCPA settlement in 2008. More than any other single statute, the FCPA has fueled the growth of the compliance industry. For many people, “FCPA” became synonymous with “compliance.” When I served as the compliance counsel expert at the Fraud Section in the U.S. Department of Justice, many people assumed that I only worked on FCPA cases despite our persistent effort to explain that I also worked for the two other, larger, units in the Fraud Section — Securities and Financial Fraud and Healthcare Fraud, both of which have brought large corporate prosecutions in cases such as VW and Tenet Healthcare.



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Over the last few years, I have taken some informal surveys among friends and professional acquaintances as to why the FCPA dominates the compliance landscape. Neither the frequency of corporate prosecutions nor the size of the fines suffice as answers: There is no shortage of corporate prosecutions and significant fines and penalties for money laundering, sanctions, consumer fraud, market manipulation, environmental crimes, or domestic commercial bribery. The opinions I gathered point to a basic marketing concept: FCPA compliance is easier to sell, because (1) bribery as a concept is easy to understand, (2) bribery risks touch all industries, (3) FCPA enforcement appears to reach every corner of the world, and (4) FCPA resolutions have been more explicit than others in emphasizing the role of compliance in either allowing or inhibiting the misconduct and resulting penalty. In other words, compliance is in the business of selling fear, and the FCPA scares the broadest of markets.

While I view the growth of corporate compliance as a positive development, I believe this fear-driven and FCPA-centric development path has also produced unfortunate consequences.

Let’s start with the positive: I believe the growth of corporate compliance as a profession and a corporate function has contributed to raising the awareness for sound corporate governance and against corruption. In some cases, strong compliance leadership that rises above mere compliance to focus on ethics can and have functioned as a much needed voice of reason in business deliberations, and effective compliance programs can and have produced results in preventing and detecting misconducts, as well as streamlining systems and processes. When it is done right, an effective ethics and compliance program can bring discipline to business processes, enhance employee engagement, reduce fraud and waste, and elevate morale and sense of ethics, and enhance companies’ reputation.

Unfortunately, however, most compliance programs have not measured themselves in those terms. Instead, they have defined themselves as an insurance program: the company's "get-out-of-jail-free" or at least "reduce-the-fine" card. This is hardly surprising for a function that found its earliest recognition and guidance not from field-tested studies, but from the U.S. Sentencing Guidelines, a code applicable only to convicted felons. This is like a person deciding she will start taking regular drug tests, observe nightly curfew, find gainful employment, and disassociate from criminals for no reason other than hoping to get probation should she be convicted of a crime one day. Her decision to do these things are not motivated by wanting to be a better person, and some of those actions would make no sense if her goal was to be a better person rather than to avoid jail. That is what the fear- and enforcement-driven compliance programs look like: They ask "what does the DOJ/SEC expect?" instead of "what actually works?" It is instructive that, in the year since the publication of ISO 37001, the international standard for anti-bribery management systems, in October 2016, the prevailing debates have centered around what prosecutors and regulators would think of it, rather than on what evidence is there of its effectiveness.

Another consequence of the FCPA-focused compliance is that is that this single-statute focus comes at a cost: As a nation, we have become more focused on corruption everywhere else but in our own backyard; as companies, we have compartmentalized our ethics and compliance efforts. When United Airlines paid a criminal fine and civil settlement for instituting a route to curry with the chairman of the Port Authority, the case hardly registered a blip in the compliance community. Similarly, in contrast with all the tea-leaf reading of every word out of the Fraud Section, most compliance personnel are not even aware of the existence, let alone the work, of the Public Integrity Section of the Criminal Division, which prosecutes domestic corruption. Questions such as the propriety of fundraising events being held at properties where a sitting president maintains an interest, or the lack of audit rights or due diligence in federal contracting such as WhiteFish, are not being debated in the compliance blogosphere as the ethics and compliance issues they are. Somehow, corruption in other countries have become compliance issues, whereas corruption at home are political issues. This is a distinction that appears arbitrary and irrational.

At the company level, the FCPA focus has help to drive the compartmentalization of compliance. For a corporation to conduct its businesses ethically and to comply with laws and regulations, anti-foreign-bribery cannot and should not be the sole or dominant compliance concern: domestic bribery, defrauding customers, manipulating markets, polluting the environment, collusion with competitors, cheating on quality tests, insider trading, sexual harassment, money laundering, violations of privacy, are among the issues to be attended to. Today, however, you find all these areas of compliance falling into separate departments and functions in companies, with little coordination to address common root causes. When company employees say: "I know about FCPA, but no one told me I couldn't lie to customers," we have a problem of compartmentalized ethics and compliance. Employees are so overwhelmed by different departments telling them different things that the basic messages of "Don't Lie; Don't Cheat; Don't Steal" simply got lost. There is little coherency to the fragmented do's and don'ts, and the result is at best confusion and at worst resentment.

Finally, one of the worst results of the fear-mongering approach to FCPA compliance is an ironically corrupting trend in the anti-corruption industry. There are FCPA conferences always, every day of the week, many of them "pay-to-play": speaking slots for sale as sponsorships. Nonprofit organizations purporting to advocate against corruption supporting their causes by courting corporate donors and awarding stamps of approval, purchased, again, through corporate sponsorships. Certification organizations that do not disclose their methodology or measures of effectiveness, or their rate of noncertification to fee-paying customers. Earlier this year, Transparency International stripped its U.S. affiliate of its credentials. The vendor-packed board of the U.S. affiliate, its exclusive focus on foreign rather than domestic corruption, and its open arms to corporations that have had known bribery issues have all been noted in the public scrutiny leading to and as a result of the discreditation. While I was heartened by the decision, I am also cognizant that some of the same concerns have been expressed about the parent organization itself as well.

So, where do, and should, ethics and compliance go from here, as the FCPA matures into middle age?

First, the international trend started and propelled by FCPA enforcement is not to be dismissed. As the lead enforcer, the U.S. plays a leadership role in anti-corruption enforcement, and its opinions are valued and actions emulated: Witness the development of deferred prosecution agreements in various countries, even against the grain of local legal traditions. I hope and believe that the global trend is marching toward more robust and accountable corporate governance, including anti-corruption. With the growing enforcement of the U.K. Bribery Act, the French Sapin II, and works such as that of the Brazilian prosecutors and controller general and the Indonesia Commission for the Eradication of Corruption, anti-corruption will hopefully not remain the crusade of solely American prosecutors. As companies begin to confront the prospect of multijurisdictional risks, perhaps that would encourage companies to focus on the risks at the core — lying, cheating, stealing — rather than the minimum standards of one country’s sentencing criteria.

Second, we need to recognize corruption in our own home, and fight it as much as we do elsewhere. U.S. state and federal prosecutors can and should become more aggressive about pursuing domestic bribe payers. U.S. civic organizations need to be more vocal about the role of corporations in domestic corruption. I hope the newly constituted U.S. affiliate of Transparency International will, like all other local affiliates of the organization elsewhere, focus on promoting transparency at home. This would bring greater consistency and credibility to all the stakeholders: We need to turn from the U.S. telling others not to bribe to the U.S. working with others to address a challenge shared by all.

Third, I am confident in the commitment of the prosecutors in the Fraud Section in continuing to hold corporate compliance programs to a data-driven, evidence-based approach in demonstrating effectiveness. As the Fraud Section’s “Evaluation of Corporate Compliance Programs” has made clear, the days of counting numbers of “tone from the top” messages, training completion rates, and financial controls are gone. What is expected today are measurements of effectiveness: assessments on what your employees believe to be the tone from the top, and data on reduction in breaches accomplished by your trainings and controls. It is in the professional nature of prosecutors to demand evidence, and adjectives such as “robust” and “strong” cannot substitute actual measurements and data on success.

Fourth, I urge the Department of Justice to continue funding and supporting the role of compliance counsel expert, not only to serve the Fraud Section, but for the benefit of federal law enforcement. Throughout my tenure, there was tremendous interest in my services outside of the Fraud Section, from the U.S. attorney’s offices to other government departments and agencies. Bringing the realities of day-to-day business ethics and compliance, through persons knowledgeable about both compliance and disciplined in evidence-based approach, can only benefit the federal government’s efficacy in reducing corporate malfeasance.

Finally, instead of looking to sentencing criteria of convicted felons and minimum standards of regulators, focusing on a single statute or listening to the hysteria from the vendor community, companies need to look into their own organization and people for your values and beliefs, and let everything you do reflect those values and beliefs. Identify your values, define the picture of success, measure against that picture, and continuously improve, in ways that are consistent across the board for all stakeholders, in all aspects of your business conduct. When your employees share your values and your vision, they will be fueled by passion when they come to work everyday. When your customers believe and support what you stand for, they will be loyal to you and buy what you sell.

Hui Chen is an ethics consultant. She was the U.S. Department of Justice Fraud Section’s first-ever compliance counsel expert from November 2015 to June 2017. She was involved in the Fraud Section’s corporate matters during that time, and authored the “Evaluation of Corporate Compliance Programs” document released in February 2017.

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