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Hui Chen: Anti-bribery compliance easier for smaller companies

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Hui Chen

Hui Chen, an independent compliance consultant, says smaller businesses should find it easier to follow anti-bribery laws, but unfortunately many of them have made it harder than necessary by wasting resources on trying to mirror the compliance programmes of much larger companies.

“I think where small companies run into trouble is when they have been made to believe that they need some complicated and burdensome compliance system that may not be necessary,” Chen said in an interview with GIR Just Anti-Corruption.

She describes some of the common pitfalls she saw small companies fall into during the two years she served as the compliance consultant in the criminal division's fraud section of the US Department of Justice between 2015 and 2017. She was the first to fill this new position, and the DOJ has yet to hire a replacement.

Spotlight on small companies

In 2014, the US Securities and Exchange Commission settled foreign bribery charges with Massachusetts based firearm producer Smith & Wesson for \$2 million. At the time, Kara Brockmeyer, then chief of the SEC enforcement division's Foreign Corrupt Practices Act unit, described the action as a “wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand their international sales.”

Brockmeyer said at a later conference “going forward, the unit will focus on small and medium-sized companies that venture into the international market.” Another small company, Hyperdynamics, settled soon after.

For a long time there have been criticisms that the FCPA puts smaller companies at a disadvantage. During a congressional hearing about the act in 1986, Senator Mack Mattingly, a

Republican in Georgia, said: “The small businessman simply can’t afford to abide by that law... a small businessman cannot afford, in many cases, the required separate accounting procedures or to monitor, with certainty, the activities of the necessary foreign agents.”

In interviews with GIR Just Anti-Corruption, several defence lawyers have voiced concerns about the difficulties small companies face complying with the FCPA, even suggesting the DOJ should publish specific guidance.

Recent academic papers too have highlighted a disproportionate effect foreign bribery enforcement has on smaller businesses. For example, a Stanford University study titled “The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis” (<https://academic.oup.com/jla/advance-article/doi/10.1093/jla/lay001/4952051>) says “the combination of fixed costs and added exposure for small businesses may make them more hesitant to expand into risky markets, thereby advantaging the established, larger firms with a presence in those places.”

However, Hui Chen, who served as a senior compliance officer for large corporations such as Microsoft, Pfizer and Standard Chartered Bank argues this should not be the case. She believes smaller companies can more easily comply with the FCPA than bigger ones.

“I think smaller companies actually have an easier time complying with anti-bribery laws. Because at the end of the day all the law requires of you is to not bribe and keep accurate

books and records,” Chen says.

‘Fixed’ costs?

The Stanford University study describes the cost of setting up an effective compliance programme as a ‘fixed’ expense.

“Many of the costs of hiring outside counsel to design compliance programs and those of setting up an accounting system to comply with FCPA requirements may be to a considerable degree ‘fixed,’ in the sense that they do not rise proportionately with the size of the company undertaking them,” the study says.

Chen says although she heard this concept frequently during her time at the DOJ, it makes little sense to her.

“How to ensure accurate books and records depends on the complexity of the company's books and records, and that in turn depends on the size and nature of the company's operation,” Chen says. “I do not see how that could be ‘fixed’ across the board.”

However, another study titled “How do auditors respond to FCPA risk?” (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127265) found that smaller companies may pay disproportionately higher audit fees compared to big companies because they are considered riskier. The barriers small companies face in entering international markets makes them more likely to resort to foreign bribery, the report said.

Establishing expensive compliance programmes is in most cases unnecessary for small companies, Chen said. The FCPA only requires companies to keep accurate books and records and not bribe foreign officials. It does not require a company to have a particular compliance system in place.

“The statute most certainly does not require anyone to hire outside counsel to design programmes. In fact that is often a recipe for failure,” Chen says.

Where many small firms run into trouble with complying with the FCPA, Chen says, is when they hire lawyers or compliance consultants who overcomplicate and overestimate the needs of their company.

In her time as compliance counsel, Chen said that certain lawyers would tell a company: “You have to buy this very expensive system to do everything just like a company like GE would do.’ A small 100-person company does not need the same thing as a 100,000 or 200,000 person company. Your small retail shop does not need the same system as Walmart.”

Chen says companies need to ask themselves two questions if they are setting up a compliance programme: first, is this sustainable and affordable; and second, does this programme make sense for the particular company and industry?

Guidance?

A Resource Guide to the US Foreign Corrupt Practices Act, jointly published by the DOJ and the SEC in 2012, acknowledges that small and medium sized companies will have to adapt their anti-bribery programmes to their company's needs. "[W]hen it comes to compliance, there is no one size fits all program," the guide says.

The DOJ also published in March 2017 a document called "Evaluation of Corporate Compliance Programs" (<https://www.justice.gov/criminal-fraud/page/file/937501/download>), which lists the types of questions the DOJ may ask when it is investigating a company's compliance programme. However, Chen says it is a "pet peeve" of her's when people call this document "guidance".

"Everything in there was a question that either begins with a 'how' or 'what' so I don't see how that could possibly be considered guidance," Chen says.

Chen says she wanted it to be clear that this document was not a checklist for companies to figure out if their compliance programme is effective.

"Guidance tells people what to do, but questions invite them to think for themselves," Chen says. "What I have seen, which saddens me, is when they turn this into some sort of checklist."

Overall, Chen said it is not the DOJ's responsibility to issue guidance on complying with the FCPA because prosecutors should not tell companies how to run their business.

“For the same reason, if I had children I would not want to get child rearing guidance from a probation officer,” Chen joked.

Where small companies run into trouble

Chen cited a lack of sophistication as the common culprit for small companies getting themselves caught up in a foreign bribery scheme.

Companies that do well selling their products in the US may then try to expand their services across borders. “Unfortunately,” Chen says, these companies “lack the sophistication of knowing what is on the horizon.”

“They will say, ‘ok well we did well in this part of the world so why don't we go over to country X and do business,’ which is a nice thought. But this is a situation where they don't have the sophistication [to understand] what happens when you enter into market X and the kind of obstacles that come up,” Chen says.

Expanding into foreign markets may require smaller companies to rely more on third-party agents, which can be a huge risk.

“Smaller businesses may be more vulnerable to liability, due to the fact that their foreign operations tend to be more dependent on third party contractors, over whom they exercise less control,” the Stanford study says.

Ultimately, if a company keeps a transparent account of its transactions and is aware of what differentiates their product or service from their competitors, Chen says, then the company should have no problems with foreign bribery.

“If you want to run a good business you should actually keep an accurate set of books, and two, you should know what your business is about,” Chen says. “What is it about what you are actually selling that is distinguishing you from your competitors. If you can't come up with either one of those, then that's when you resort to bribes.”

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