

SPECIAL SECTION: **FCPA**

Fighting Corruption Should Be a Government, Corporate and Global Effort

More emphasis should be placed on incentivizing compliance

By Iohann Le Frapper / Association of Corporate Counsel (ACC)

Last year was the biggest enforcement year for Foreign Corrupt Practices Act cases handled by the fraud section of the U.S.

Department of Justice's Criminal Division. The year also illustrated an unprecedented level of multi-jurisdictional deferred prosecution agreements involving not only the DOJ, but also (among others) the Brazilian, United Kingdom and Dutch authorities. There is also a relatively recent pattern associated with these settlements, where the total fines paid by companies are split among the relevant public authorities included in the settlements. The Vimpelcom, Rolls-Royce and Odebrecht/Braskem cases are examples of this trend.

Now all eyes are on the direction of FCPA enforcement for 2017. Enforcement patterns remain unpredictable, but FCPA violation risks are as high as ever, and include legal, reputational and financial consequences.

Although much attention is paid to corporate "bad actors" violating the FCPA and similar anti-corruption statutes worldwide, it's crucial to remember that rooting out corruption must start at the corporate level. It is corporate "good actors" who set the tone at the top with oversight of the ethics and



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compliance program by the board of directors and senior management, both of whom promote an unequivocal culture of integrity. This means that specific allegations of wrongdoing are investigated and are voluntarily disclosed to the public authorities in jurisdictions where companies have incentives to seek more lenient settlements.

Companies demonstrate responsible business conduct by forming partnerships that enable the private and public sectors to work together. There is a clear pattern of successful collective actions specific to industry sectors or at the country level, as well as project-specific integrity pacts where the various stakeholders,

such as the supply chain, NGOs, local authorities and communities, form alliances to mitigate corruption and related reputational risks.

In November 2016, the Association of Corporate Counsel (ACC), a global legal association that represents more than 42,000 in-house lawyers in 85 countries (and where I serve as chair of the board), submitted a letter on this subject to the Organisation for Economic Co-operation and Development's (OECD) Working Group on Bribery. ACC encouraged the OECD to promote incorporating compliance incentives and settlement mechanisms into anti-bribery laws.

In the letter, ACC outlined the role of corporate compliance systems in preventing, detecting and remediating misconduct. It urged governments to view the private sector as a true partner in preventing and uncovering corruption. This applies to the FCPA, the UK Anti-Bribery Act and other regulations.

In its discussion about incentivizing corporate compliance systems, ACC urged governments considering these programs to look at current compliance guidelines in order to achieve greater harmonization across jurisdictions. According to the *ACC Global Census Report* of more than 5,000 in-house lawyers in 73 countries, nearly two-thirds (62 percent) of all in-house lawyers have cross-border work re-

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sponsibilities. As such, keeping up with a myriad of regulations is a huge part of the in-house lawyer's job (and one that can – and should – be streamlined). In fact, in Europe, where I have spent much of my career, an astounding 86 percent of in-house lawyers have cross-border work responsibilities. The in-house bar believes that smart, uniform guidelines are preferable, as they enable in-house lawyers to consistently advise their companies, easing understanding and compliance.

The letter to the OECD also stated the ACC members' view that settlement mecha-

nisms are “especially valuable in encouraging their companies to report violations,” and that they offer clear guidance on the benefits of self-reporting. In a global economy, fighting transnational corruption requires a more consistent and harmonized approach by governments as multijurisdictional settlements become a pattern.

Critics have argued that permitting compliance incentives impedes effective enforcement of the laws in question, but the evidence contradicts this position. The four countries that Transparency International ranked as

the most active in enforcing anti-bribery laws (Germany, Switzerland, the U.S. and the UK) all have such incentives. This suggests, ACC explains, “that incentivizing corporate compliance systems does not act as an impediment to anti-bribery enforcement.”

When it comes to public and private efforts to fight corruption, the whole is truly greater than the sum of its parts. Thus, the in-house bar, and all legal and compliance professionals, should encourage mechanisms that champion preventative and collaborative approaches.