DOJ Updates Guidance on Evaluation of FCPA Compliance Programs

By Jonathan Blaine

Corruption and bribery are two worrisome and troubling aspects of doing business globally and can prove especially so when doing business in "high-risk" jurisdictions, many of which can be found here in South-East Asia. Indeed, several ASEAN countries have recently passed legislation and taken other steps to address corruption and prevent bribery. To support this effort, many of these countries look to the U.S. and the U.K. as models for legislation and regulatory approach; especially in light of the exposure U.S. and U.K. companies have under the Foreign Corrupt Practices Act (FCPA) and the U.K. Bribery Act 2010 (UKBA), respectively.

One interesting aspect of these two guiding pieces of legislation is that they both recognize and even reward organizations that have instituted programs within their organizations specifically designed to prevent bribery and corruption. The UKBA goes so far as to hold an organization criminally liable for acts of bribery by its agents and provides an affirmative defense for organizations that have "adequate procedures in place to prevent bribery". While the FCPA does not go so far as to impose strict criminal liability on U.S. companies, it does provide that where prosecutors are assessing potential criminal liability for an organization in the context of a bribery case, they are encouraged to consider whether the organization has an adequate and efficient compliance program in place.

One challenge companies face in their attempts to create and implement anti-corruption compliance programs that meet this "adequate and effective" standard has been the lack of actionable guidance on how best to design such a program. One reason for this lack of detailed guidance is that governments recognize that a checklist of Do's and Don'ts would not necessarily prove beneficial for organizations across-the-board and would, in some cases, prove too burdensome and costly for lower risk organizations, while at the same time potentially proving inadequate in addressing the greater issues and risks faced by larger organizations. To help support these efforts both the U.K. and the U.S. periodically issue guidance as to how government watchdogs should approach assessment of company compliance programs.

To help improve the utility of guidance provided by the U.S. under the FCPA, in April 2019 the U.S. updated guidance it provides to U.S. federal prosecutors in their evaluations of corporate compliance programs.

To help improve the utility of guidance provided by the U.S. under the FCPA, in April 2019 the U.S. updated guidance it provides to U.S. federal prosecutors in their evaluations of corporate compliance programs. In this document the U.S. Department of Justice has reformulated how U.S. prosecutors will analyze the effectiveness of a corporate compliance program. The newly issued guidance appears to simplify and clarify the approach to such analysis by setting out three fundamental questions to be addressed:

1) Is the corporation's compliance program well designed?
2) Is the program being applied earnestly and in good faith?
3) Does the corporation's program work?

While these three questions are fairly broad, the updated guidance then proceeds to provide sample topics which are meant to help support the organization in addressing these three questions. Some examples of the questions/topics include:

In evaluating a program's design:

1) How the company has identified, assessed, and defined its risk profile?
2) Has the organization devoted adequate resources to address identified risks?
3) Whether the company has a code of conduct evidencing a commitment to compliance?
4) Does the company have appropriately tailored training and communications?

5) Does the company provide for anonymous and confidential reporting of bad acts?

In assessing effective implementation:

1) To what extent is senior management exhibiting a commitment to ethical standards?
2) Do the individuals charged with responsibility for the program have appropriate seniority?
3) Does the program have adequate funding and resources to be appropriately implemented?

In determining if the program works:

1) Has the program been able to identify instances of actual misconduct?
2) Was the misconduct investigated and how?
3) Were remedial measures taken to fix the problem?
4) Were the individuals involved held accountable?

These are but a few examples of the questions that need to be addressed by a properly developed compliance program. While this new guidance is not a checklist of compliance procedures, it does improve over prior guidance in assisting organizations in the development, deployment and on-going improvement of their programs. This should prove quite useful for both U.S. companies and their agents, as well as beneficial for local businesses in Thailand looking for guidance as to how to comply with developing legislation requiring that enterprises create and implement focused compliance programs. ■

Jonathan Blaine is a Director at DFDL where he heads up the firm's Regional Compliance and Investigations Practice Group. He also serves as the Head of the Thailand Tax Practice Group. He has been working in Thailand for 10 years and Asia for over 20 years. He specializes in regulatory and compliance regimes with a focus on development, implementation, investigations, and remediation. He is Co-chairman of AMCHAM's Tax Committee and is a contributor to T-AB and other publications.