

Morgan Stanley: "With Thanksgiving"

It seems fitting that we end this series the week before Thanksgiving Day on a positive note. (Well, perhaps not so positive for Garth Peterson, but certainly one for Morgan Stanley) In an unusual move, the DOJ and SEC charged Garth Peterson with violations of the FCPA, but declined to bring any actions against Morgan Stanley. Both agencies specifically cited the following compliance practices as reasons not to bring an enforcement action against the company itself:

- **Maintaining strong internal controls:** The Justice Department credited Morgan Stanley with maintaining a system of internal controls designed "to ensure accountability for its assets and to prevent employees from offering, promising, or paying anything of value to foreign government officials." The company additionally took care to update such controls on a regular basis "to reflect regulatory developments and specific risks, prohibit bribery, and address corruption risks."
- **Frequent training on internal policies:** Morgan Stanley frequently trained its employees on its internal policies, the FCPA, and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies on at least 54 occasions. During the same period, Morgan Stanley trained Peterson on the FCPA at least seven times. In addition to live and Web-based training, Peterson participated in a teleconference training seminar in June 2006 conducted by Morgan Stanley's global head of litigation and the global head of its anti-corruption group, according to the SEC.
- **Written compliance certifications:** Morgan Stanley additionally required that each of its employees, including Peterson, provide annual written certifications that employees are adhering to Morgan Stanley's code of conduct, which includes a portion that directly addresses corruption risks and activities in violation of the FCPA.
- **Frequent FCPA-related compliance reminders:** A Morgan Stanley compliance officer specifically informed Peterson in 2004 that employees of Yongye were government officials for purposes of the FCPA. Peterson also received at least 35 FCPA-related compliance reminders. These reminders included circulations of Morgan Stanley's anti-corruption code of conduct; policies on gift-giving and entertainment; guidance on engagement with consultants; and policies addressing specific high-risk events, including the Beijing Olympics
- **Continuous monitoring:** The Justice Department further credited Morgan Stanley for its continuous monitoring practices: "Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions, and business units, and tested to identify illicit payments."
- **Conducting extensive due diligence** on all new foreign business partners and for imposing stringent controls on payments made to business partners. "Both were meant to ensure, among

other things, that transactions were conducted in accordance with management's authorization and to prevent improper payments, including the transfer of things of value to officials of foreign governments," according to the SEC. Morgan Stanley additionally required its employees, including Peterson, annually to disclose their outside business interests.

There are other instances which we can cite to in which the DOJ and SEC declined to take any enforcement actions against companies which exhibited solid compliance programs. I happen to be personally familiar with one case in particular! In March of 2010, Global Industries, Ltd. (one of the companies involved in the industry wide investigation of Panalpina) announced that "representatives of the Securities and Exchange Commission and the Department of Justice informed the Company that each agency had concluded its FCPA investigation. Neither agency recommended any enforcement action or the imposition of any fines or penalties against the Company." Both the General Counsel and I believed that the reason we received this result was due to the following reasons:

- **Historical evidence of a strong FCPA compliance program**
 - FCPA policies since 2000
 - FCPA (in person) training since 2000
 - FCPA clauses in contracts with sales agents since 1995
 - FCPA due diligence on sales agents since 2001
 - Consistent "Tone at the Top" emphasizing FCPA compliance
- **Global's internal controls identified the FCPA issues**
 - Internal controls identified issues with a freight forwarder in 2006
 - For one issue identified through the Company's internal controls, the Company stopped a payment before it was made; thereby preventing a potential FCPA violation
 - Prior to Vetco Gray, in 2006 Global identified issues and held up payment on certain of the freight forwarder's invoices
 - Audits of other freight forwarding agents identified no similar issues in other geographic areas
- **Management took prompt and effective action**
 - Immediate steps taken to preserve relevant documents
 - Immediately implemented temporary enhanced controls, which included Legal Department review of invoices from freight forwarding/customs clearance agents
 - Prompt internal investigation
 - Immediate additional FCPA training of employees
 - Sought advice from FCPA counsel
 - Disciplined several of the employees involved
 - Global senior management issued prompt reminders of FCPA policies and procedures
- **Implementation of an enhanced compliance program**
 - Yearly in-person training in dual languages: English/native language
 - Web-based training
 - Training of sales agents and logistic service providers

- Annual certification of employees, sales agents, and logistic service providers
- Compliance audits of invoices and supporting documentation
- Monthly compliance newsletter
- **Thorough investigation and cooperation with the enforcement authorities**
 - Global's audit committee decided to conduct a comprehensive investigation using independent outside counsel
 - Global management and employees cooperated fully with outside counsel conducting the investigation
 - Global cooperated fully with the SEC and DOJ in all respects
 - Global was one of four companies to self-report in the customs/freight forwarder investigation before the DOJ launched an industry-wide investigation
 - Global shared its findings from the comprehensive independent investigation with the SEC and DOJ.

Implementing a solid compliance program, and instilling a culture of compliance, can be done- at a cost which is proportionate to the size of your company. While there is no "one size fits all" program, there are certain essential elements that should be included in any compliance program to demonstrate a company's commitment to abide by FCPA mandates:

Board and Senior Management Oversight

Company Compliance Officer –direct reporting to the Board

Standards and Procedures

Code of Conduct

Detailed Policies and Procedures

Contractual Compliance (in terms and conditions of contracts)

Screening

Due Diligence of certain employees, agents, and third parties

Monitoring and Auditing

Anonymous Reporting System

Periodic Evaluation of Program

Promotion and Enforcement

Training

Enforcing through Disciplinary Action

Responding to Violations

Thank you for listening the last two weeks. I hope that you found this series beneficial in evaluating and/or improving your own Companies compliance program.

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