



# CORPORATE COMPLIANCE PROGRAMS IN A GLOBAL ENVIRONMENT:

## FORM *versus* SUBSTANCE

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Giovanna M. Cinelli  
Patton Boggs LLP  
8484 Westpark Drive, Suite 900  
McLean, VA 22102  
703-744-8075 (direct dial)  
703-744-8001 (facsimile)  
[gcinelli@pattonboggs.com](mailto:gcinelli@pattonboggs.com)



# GLOBAL ENVIRONMENT AFFECTS

- ◆ Financial Activities
- ◆ Legal Activities
- ◆ Personnel Issues
- ◆ Methods of Compliance

# GLOBAL ENVIRONMENT AFFECTS

Fundamental compliance with laws and regulations of multiple jurisdictions is the most difficult corporate governance issue facing multinational companies today.



## DIFFICULT BECAUSE

- ◆ Costs associated with compliance
- ◆ Contradictory legal requirements
- ◆ Sovereignty issues
- ◆ Foreign policy differences



## SEVERAL BASIC DECISIONS NEED TO BE MADE

- ◆ Which jurisdiction “controls” the compliance decisions?
- ◆ Will the compliance approach focus on:
  1. form over substance?
  2. substance over form?
  3. practices over procedures?



## SEVERAL BASIC DECISIONS NEED TO BE MADE

- ◆ How far will compliance extend?
- ◆ Will compliance be:
  1. centralized?
  2. decentralized?
  3. combination?

# RISKS AND BUSINESS ACTIVITIES



- ◆ Compliance programs should match legal risks associated with the company's activities
  1. Identify risks internationally
  2. Never-ending or ongoing process
  3. Expensive – Determine “when” to pay
    - Proactive
    - Reactive

# PERSPECTIVES



- ◆ Two views on compliance, especially internationally
  1. Legal-driven process
  2. Business-driven process
- ◆ Discuss pros and cons of each
- ◆ Result: Business framework with legal substance

# COMPLIANCE REVIEW TIMING



- ◆ When to address compliance issues
  1. Starting a new business
  2. Acquiring a new business
  3. Expanding operations
  4. Expanding employee base
  5. When directors or management change
  6. After litigation
  7. Whenever enforcement issues arise
  8. Whenever enforcement matters are settled
  9. Whenever any official public filing or announcements occur
  10. When auditors ask questions about violations of law



## PRACTICAL APPROACHES COMMON TO ALL COMPLIANCE SYSTEMS

- ◆ Management oversight and responsible personnel
- ◆ Coherent, straightforward compliance policies – not simplistic generalities
- ◆ Training
- ◆ Translations of policies and training
- ◆ Computer access controls
- ◆ Consistent baseline of laws applicable to business
- ◆ Written processes or practices
- ◆ Audits
- ◆ Access to and distribution of policies, practices and/or procedures

## SPECIAL ISSUES

- ◆ Bribery or “grease payments”
- ◆ Export authorizations for intangible transfers
- ◆ Intellectual property interests
- ◆ Government participation in company business
- ◆ Lawsuit jurisdiction
- ◆ When does “foreign” mean “U.S.”?

## LEGAL ISSUES TO CONSIDER



- ◆ United States: e.g., Foreign Corrupt Practices Act, Arms Export Control Act, Export Administration Act/International Emergency Economic Powers Act, Trading With the Enemy Act, Sarbanes-Oxley, Exon-Florio, Defense Production Act, USA Patriot Act; Immigration statutes
- ◆ European Union: e.g., Privacy directives, “open borders” for workers, “open” customs regulations and directives, blocking statutes (United Kingdom), common *versus* civil law system



## LEGAL ISSUES TO CONSIDER (cont'd)

- ✦ Canada: e.g., Canadian blocking statute, Canadian and provincial human rights laws
- ✦ People's Republic of China: Import requirements, technology transfer law requirements, participation requirements mandated for indigenous entities (*i.e.*, distribution network requirements)



# DECISIONMAKING

- ◆ Prioritize and triage:
  1. market-based analysis
  2. revenue based analysis
  3. “size-of-operation” based analysis
  
- ◆ Establish minimal requirements, consistent across all operations, for:
  1. technology transfers
  2. payments to third parties
  3. export/import authorizations
  4. past enforcement or litigation issues.



# DECISIONMAKING

- ◆ Choose a “leader” and remain consistent
- ◆ Avoid tying compliance to “bonuses” or other remuneration that could affect objective decisionmaking



## U.S. GOVERNMENT FOCUS

- ◆ “Successor liability” – scope and application
- ◆ Export cases:
  1. Sigma-Aldrich (Department of Commerce)
  2. Boeing/Hughes (Department of State)
  3. Computer Associates/MultiGen-Paradigm, Inc. (Department of State)
  4. Agilent/Safeco (Department of State)
  5. EDO Corporation (Department of State)

## U.S. GOVERNMENT FOCUS



- ◆ Government position:
  1. Successor liability theories apply – *caveat emptor*
  2. Liability applies to both surviving entities and purchaser
  3. “Strict liability” approach
  
- ◆ Limited carve-out for other than export matters – EDO Corporation case



## QUESTIONS AND ANSWERS