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Compliance programs pay dividends

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With the May 25 U.S. Securities and Exchange Commission decision to create a $300 million whistleblower program, companies would be well advised to expand their internal compliance programs to take advantage of Department of Justice programs to reduce criminal and civil liability for self-reporting and cooperation. The SEC action follows the Dodd-Frank regulatory law, which provides a reward for companies whose employees first report suspected wrongdoing through internal compliance. When I spoke at compliance symposiums sponsored by Dow Jones in Washington in March and the American Bar Association in New York in May, there was considerable corporate interest in such programs. Now there is new reason for greater concern.

SEC Chairwoman Mary L. Schapiro said the new rules were important to the agency because it has limited resources, and needs "to be able to leverage the resources of people who may have first-hand information about potential violations." This was the same rationale of DOJ when its Antitrust Division established a leniency program in 1978 for the first to confess and when the Criminal Division, in its 2008 Morford Memorandum, provided guidelines for deferred and nonprosecution agreements.

The 2009 Foreign Corrupt Practices Act prosecution of Siemens A.G. illustrates the savings from a company's cooperation and its agreement to retain a four-year monitor to oversee a robust compliance program. Siemens had paid more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the Americas as part of its worldwide business aggregating approximately $105 billion in revenue. Assistant Attorney General Lanny Breuer, head of DOJ's Criminal Division, described the Siemens case as "the most egregious example of systematic foreign corruption ever prosecuted by the department." Out of a total payment to the government of $1.6 billion, including disgorgement of profits and penalties, Siemens paid a fine of $450 million, when the DOJ advisory range was $1.35 billion to $2.7 billion. Breuer attributed that reduction in the category of fines to the "tremendous benefits to flow from truly extraordinary cooperation."

On a substantially lesser scale, the 2010 deferred-prosecution agreements with BAE Systems PLC and Alcatel-Lucent show the potential savings from getting the most credit from DOJ for self-reporting. In a Foreign Corrupt Practices Act prosecution, BAE was given the minimal credit, with a fine range from $360 million to $720 million, instead of the maximum credit, which would have reduced the fine range to $200 million to $400 million. When Alcatel-Lucent entered into a deferred-prosecution agreement on an FCPA prosecution, the maximum credit for self-reporting would have yielded a fine between $48.1 million and $96.2 million, in contrast to what the corporation received, which was the minimal credit, yielding a fine of $86.6 million to $173.2 million.

Corporate cooperation may also save executives from jail time. Questions were raised in Senate Judiciary Committee hearings about the adequacy of monetary penalties, instead of prison, in the Siemens case. Judge Douglas P. Woodlock, sitting in the U.S. District Court for the District of Massachusetts, accepted the government-corporate settlement of $2.3 billion for Pfizer Inc.'s off-label marketing, but not before extensively questioning the adequacy of the fine when the company's revenue was more than $48 billion with net income in excess of $8 billion in the relevant year.

The judge said: "The concern I have...is that corporations don't do things, people do things....[I]t becomes a business decision, what's it cost to pay off the government for something like this....[T]his is a case in which no human being, apparently, is going to be held responsible for substantial criminal activity by a corporation....[I]t has... become something of a cost of doing business...without ultimately giving the public what it is entitled to, which is the

satisfaction of knowing that there has been a full evaluation of the criminal responsibilities of the individual."

Such judicial concerns or congressional pressure could lead to jail terms if companies do not have an adequate compliance program. In the face of public anger at Wall Street and increased DOJ and SEC scrutiny, a company may not find a better investment than a strong compliance program.

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