

GLOBAL STANDARDS

ADAPTING TO GLOBAL STANDARDS OF COMPLIANCE

By William V. Roppolo and Isabella de la Guardia



William V. Roppolo is the Head of the Litigation and Government Enforcement Practice Group for Baker & McKenzie's Miami office.

Isabella de la Guardia is an Associate in the Miami Office's Litigation and Government Enforcement Group and a native of Panama.

Heightened Scrutiny as a Result of Recent Changes

Businesses across the world face a new reality in terms of compliance and increased regulations. Companies everywhere are adapting to the pressure from regulatory bodies as they demand more transparency and the costs of non-compliance continue to rise. This transition has come, in part, due to the United States' extraterritorial application of its laws. The U.S. trend of increased regulation and reporting is spreading globally and has slowly been taking hold throughout the world. Most countries have followed suit, enacting regulatory and legal changes in order to increase transparency and decrease corruption.



Many events in recent years have led financial institutions to conform with the ever-increasing regulatory requirements and compliance standards we see today. From the September 11, 2001, terrorist attack, which resulted in stricter standards to combat money laundering, to the collapse of large corporations like Enron, such events have prompted a need for rigorous anti-fraud controls. The global financial

crisis of 2008 also triggered the need for additional regulations, aimed at making the global financial system less vulnerable to incidents like the subprime mortgage crisis. The recent rise in the use of U.S. sanctions as a foreign policy tool has also changed the way we think of payment protocols and due diligence.

Presently, companies have an incentive to avoid fines and sanctions by establishing strong compliance programs. The way companies manage their compliance programs has changed. A comprehensive compliance program not only requires constant review, it also requires staff, as well as investment in various processes, systems, and technologies. More jurisdictions are following the United States by requiring greater transparency and reporting in order to reduce corruption.

Non-U.S. Individuals And Entities Should Be Concerned With U.S. Laws

A number of American laws apply outside of the United States. In an increasingly global world, it has become more and more popular to legislate for extraterritorial criminal jurisdiction. One example is the Foreign Corrupt Practices Act (FCPA), which for many years has been considered the most significant extraterritorial anti-corruption statute in the world. The extraterritorial component lies in that the FCPA prohibits corrupt payments to foreign public officials. Therefore, U.S. companies are not the only entities that must be concerned with FCPA compliance, but rather, all entities and individuals abroad should be aware of the legal risks that this Act presents. Another way U.S. law affects increased regulations world-wide is through the Foreign Account Tax Compliance Act (FATCA), which requires foreign financial institutions and other financial intermediaries to help prevent tax evasion by U.S. citizens and residents through offshore accounts.

Similarly, anti-money laundering laws also have expansive extraterritorial scope. After the September 11, 2001, terrorist attack, the Patriot Act added extraterritorial elements to U.S. anti-money laundering statutes, allowing U.S. jurisdiction over money laundering offenses committed by foreign individuals involving transactions occurring in whole or in part in the U.S. This includes, for example, financial institutions that maintain bank accounts in the United States. Recently, the U.S. Government has utilized FCPA, FATCA, and money laundering statutes to target conduct that may appear only tenuously connected to the United States.

The recent global football corruption scandal, provides an example of how the U.S. Government will prosecute crimes that occurred largely outside U.S. jurisdiction. In this situation, the European-based organization, operated primarily by non-U.S. citizens, is facing justice in New York, despite the fact that much of the criminal activity occurred outside the United States. United States' law enforcement may investigate anyone using dollars, its banking system, or its territory to conduct an illegal act. Many U.S. laws have a global sweep and do not require that all of the conduct occur within United States' territory, so long as there is some nexus to the United States sufficient to justify jurisdiction.

Because some U.S. laws have broad extraterritorial application, non-U.S. businesses that touch the United States in any way should conduct a thorough review and update their policies and procedures to ensure compliance with U.S. regulations. It is very difficult to avoid the U.S. financial system when doing businesses, and, in fact, many times the mere use of U.S. dollars as part of a transaction will trigger jurisdiction. Even

though not clearly evident, non-U.S. businesses should thoroughly review procedures to make sure these comply with U.S. regulations.

The Panama Papers And Its Implications

The recent Panama Papers leak will have global implications for companies across the globe including the financial services sector. On April 3, 2016, news spread that an anonymous source leaked 11.5 million confidential documents, belonging to the Panama-based law firm Mossack Fonseca, concerning offshore accounts and shell companies. While seeing a person's or entity's name identified in the Mossack Fonseca firm's papers does not necessarily imply wrongdoing, some of the media coverage has perhaps left that misimpression. This raises issues not only for the parties identified in the Panama Papers as having offshore accounts holding potentially illegal proceeds, but also for the Panamanian services sector as a whole and the regulatory and compliance implications these may have on such entities. Financial services firms cannot be complacent regarding their obligations related to determining beneficial ownership, know your customer standards, and general due diligence.

a. Global Regulations on Information Sharing The Organization for Economic Co-operation and Development (OECD), an international economic organization consisting of 35 member countries, has been quick to react. On April 14, 2016, the OECD submitted new proposals for broadening and accelerating implementation on automatic exchange of information. The goal is to strengthen transparency by providing for automatic exchange of non-resident financial account information amongst the regulatory bodies of all 135 member countries of the Global Forum on Transparency.

On May 11, 2016, the OECD and Global Forum on Transparency announced that Panama, as well as Bahrain, Lebanon, Nauru, and Vanuatu, are committed to sharing financial account information automatically with other countries beginning September 2018. With these new commitments 101 jurisdictions have pledged to implement information sharing in accordance with the Common Reporting Standard developed by the OECD, the United States not being one of these countries.

b. Panama's Commitment to Transparency New stricter regulations are also being implemented in Panama. Panamanian President, Juan Carlos Varela, stated that the Panama Papers' revelations were a "rare opportunity" for his government to strengthen transparency of its financial system. Also commenting on the Panama Papers issue, Vice-President of Panama, Isabel de Saint Malo, stated that "the world must work together to fight the challenge of systematic tax evasion that deprives taxpayers across the world of as much as \$200bn each year." She also stated that for this reason Panama is setting up an independent commission, to evaluate our financial system, determine best practices, and recommend measures to strengthen global financial and legal transparency. Vice-President de Saint Malo mentioned that this step follows a series of reforms aimed at promoting greater financial transparency and stressed that, since assuming office in 2014, President Varela has implemented new "know your client" regulations and continues to develop a robust treaty network that allows for the exchange of legal and corporate information.

c. Not Only Panama's Problem Despite the name, the Panama Papers are not primarily about Panama. The name stems from the fact that the documents come from a single law firm based in Panama, but the problem of disguised ownership of funds, money laundering, and tax evasion remains a global pandemic. The Panama Papers leak will have implications not only for Panama, but also for many other countries that will be forced to strengthen their compliance and regulatory institutions in an effort to avoid becoming a haven for money launderers and tax cheats. As stated by the Trade Union Advisory Committee to the OECD "the case of Panama is not isolated . . . The Panama [P]apers expose the need for a tougher rating system by the Global Forum: A more stringent approach leaving no room for complacency on transparency over beneficial ownership and requesting full compliance with relevant Global forum standards."

d. FinCEN The Panama Papers may have also played a role in the Financial Crimes Enforcement Network's (FinCEN) recent release of its final rule on Customer Due Diligence (CDD). On May 11, 2016, FinCEN published a final rule on customer due diligence containing explicit requirements to identify and verify the identity of beneficial owners of legal entity customers. Since covered financial institutions are not presently required to know the identity of beneficial owners, FinCEN introduced this rule to address this weakness and assist law enforcement in financial investigations, help prevent evasion of financial sanctions and improve the ability of financial institutions to assess risk, facilitate tax compliance and advance U.S. compliance with international standards. Financial institutions have until May 11, 2018, to comply with the items codified in the CDD rule, which FinCEN states were already "existing expectations." As demonstrated, the Panama Papers will force regulators across the globe to coordinate efforts around money laundering, tax evasion, corruption and other financial crime topics.

OFAC As Another Tool To Compel Compliance

Individuals and entities abroad should also be aware of the Treasury Department's Office of Foreign Assets Control (OFAC) trade sanctions as yet another tool in the U.S. Government's international arsenal. OFAC implements its sanctions program under the International Emergency Economic Powers Act (IEEPA). While

many OFAC sanctions are directed at countries, such as Iran and Cuba, OFAC sanctions can also apply to entities and individuals. Being designated on the OFAC list means United States' citizens and permanent residents, are prohibited from engaging in transactions with the designated entities and individuals and are required to block any assets that are under their control. OFAC can impose penalties against any organization or entity that conducts or facilitates transactions with those associated with individuals or entities on the OFAC sanctions listings. In sum, being on the OFAC list is the equivalent of commercial death.

On May 5, 2016, OFAC designated 68 entities and several individuals from a powerful Panamanian family involved in the duty free industry, and which employs thousands of people in Panama and the Central American region. The designation allegedly outlines a network of international companies related to the group that were purportedly being used to launder drug profits. The designated group is considered one of the most powerful economic groups in Panama, particularly in the Free Zone. In this case, the recent OFAC designation could jeopardize the jobs of more than six thousand people who are employed by the group and may even affect the economic growth that is expected in the country as a whole.

The ability to place individuals and entities on a list such as OFAC gives the U.S. power to pressure foreign nations and individuals into enforcing stricter anti-money laundering and anti-corruption laws. For example, some of the members from the OFAC designated group owned most of the duty free stores at Panama's International Airport, Tocumen, S.A. Yet, since being placed on the OFAC list, Tocumen S.A.'s manager has stated that Tocumen, S.A. cannot have someone renting space at the airport without knowing who the ultimate beneficiary is. Tocumen S.A.'s manager also stated that the entity will terminate its relationship with these companies and intends to suggest to the Board of Directors that Tocumen, S.A. introduce stricter know your customer policies in its future concessions.

U.S. law enforcement, by imposing sanctions on trade restrictions, affects the level of compliance, regulations, and know your customer criteria that other countries will choose to implement. The OFAC designation is yet another factor instigating Panama to scrutinize its citizens and industries more heavily. Proactive companies will want to assess their risks and establish measures to effectively respond to allegations of corruption or, even better, prevent violations from occurring in the first place.

Recent Enforcement Actions Offer Lessons For Compliance

As the OFAC and futbol cases described above indicate, one of the most significant changes in the current global regulatory environment is the willingness of U.S. regulators to project enforcement authority outside the U.S. There are many recent instances where U.S. authorities reach beyond its borders to enforce its laws elsewhere across the globe.

This year, the sixth biggest FCPA enforcement action in history took place when an Amsterdam-based company, and its wholly-owned Uzbek subsidiary admitted to paying more than \$114 million in bribes to a government official in Uzbekistan. The Dutch company agreed to pay a \$795 million penalty, consisting of \$230.1 million to the DOJ, \$167.5 million disgorgement to the SEC, and \$397.5 million to Dutch prosecutors. Regardless of the tenuous connection to the U.S., the information was brought in the Southern District of New York, charging the parties with conspiracy to violate the antibribery books and records provisions of the FCPA and violating FCPA's internal control provisions.

Similarly, on July 25, 2016, the Securities and Exchange Commission issued a press release stating that South American-based airline, agreed to pay over \$22 million to the DOJ and SEC to settle civil and criminal cases related to FCPA offenses due to improper payments it authorized to union officials in Argentina. The airline is not a U.S. company, and the alleged violations did not take place in the U.S. Yet, this did not prevent the DOJ from charging the airline in Miami with one count of violating the FCPA books and records provisions and another of violating the internal controls provision of the FCPA. The airline paid a \$12.75 million penalty to the DOJ, and \$9.44 million to the SEC in order to resolve these claims. According to the accusations, executives of the airline's predecessor company, signed a sham \$1.15 million consulting agreement requiring the consultant to study airline routes, but instead of providing services transferred the money to Argentine labor union officials. The airline entered into a three year deferred prosecution agreement with the DOJ, requiring the company to retain an independent corporate compliance monitor for at least 27 months.

Individuals may also be investigated and criminally prosecuted for FCPA violations if they fail to address red flags. Over the past years, the focus has extended from corporate entities to individuals. Individual targeting in FCPA prosecutions will increase even more with the Department of Justice's pilot program, effective April 5, 2016. According to the program, in order to qualify as a "voluntary self-disclosing entity" and receive mitigation credit, the company must disclose all relevant facts, including any individual involvement in FCPA violations. The program is designed to incentivize companies to disclose FCPA violations and point the finger at company officers in exchange for leniency to the entity. The potential for individual criminal liability should incentivize corporate executives to implement more oversight and due diligence regarding the company's operation.

Furthermore, since 2009, the U.S. has been taking enforcement actions to combat tax evasion by means of offshore structures to hide the identity of the ultimate beneficiary in Switzerland and elsewhere. Since then, the

Justice Department has criminally charged more than 100 individuals evading taxes by holding offshore accounts and nearly 50 individuals, mostly foreigners, who assisted them. As a result, more than 54,000 individuals have also come forward to disclose offshore accounts through the Offshore Voluntary Disclosure Program and other voluntary disclosure programs, paying more than \$8 million in penalties.

Conclusion

The world of compliance is changing and becoming more and more globally integrated. As the long-arm of the U.S. Government continues to compel compliance around the world, companies will have an incentive to preempt any possible enforcement actions by implementing strong compliance programs. Based on recent events and enforcement actions, vigilant companies - U.S. or otherwise - would be wise to take steps to reassess their risks and minimize vulnerabilities.