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Using Technology To Avoid FCPA Fines

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The Right Software Can Make All The Difference

On Nov. 29, 2017, the U.S. Department of Justice announced a new policy for enforcing the Foreign Corrupt Practices Act against corporations. Under the policy, corporations that timely detect, disclose and remediate FCPA matters will be unlikely to face prosecution. Even if such a case is prosecuted, the DOJ will seek only minimal penalties.

“We expect the new policy to reassure corporations that want to do the right thing,” Deputy Attorney General Rod J. Rosenstein said in a speech announcing the policy. “It will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals.”

But don't take that to mean companies should relax their vigilance around compliance. In the last two years, the DOJ has obtained resolutions in 17 FCPA cases against corporations, resulting in penalties and forfeitures of over \$1.6 billion. These include the recent case in which Swedish telecom Telia Company AB agreed to pay \$274 million to the U.S. as part of a global resolution of \$965 million.



A new policy that has been enacted for enforcing the FCPA may significantly impact the way FCPA violations are handled within corporations. The more prompt these violations are handled, the better.

The DOJ's new policy provides a blueprint for companies to avoid such fines. But a core requirement of the policy is that a company has in place an effective program that can root out potential violations and enable it to swiftly ascertain and disclose to the DOJ all relevant facts about the individuals involved in the wrongdoing.

For a large corporation, that is not always easy to do. Evidence of FCPA violations could lie hidden in emails, electronic documents and other files that could be stored anywhere across a company's operations, and sometimes even in a mix of languages.

It is a problem that can be addressed only with the right technology. And, for a growing number of corporations, the right technology for compliance investigations is the same technology their outside counsel have already been using for e-discovery review.

How E-Discovery Software Helps

When a company's compliance team has reason to suspect unlawful FCPA activity, time is of the essence. E-discovery software provides the sophisticated search and analytics tools that can help them quickly root out the relevant facts and either corroborate their suspicion or rule out wrongdoing.

Let's say, for example, there is suspicious activity within a particular office. Compliance staff can collect all the emails and other electronic records for that office and then use these tools to scan for evidence. If the investigation turns up questionable activity, the company may deepen its probe, refer it to outside counsel or work directly with the DOJ.

Two additional strengths that some e-discovery platforms bring to compliance investigations is that they are

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cloud-based and able to process and search data in multiple languages. This means that compliance staff have access to the platform from anywhere, can easily load data from anywhere, and can search across all the languages in which the company does business.

A Case Study

One company that is using e-discovery technology in this way is a multinational medical device manufacturer that uses a leading e-discovery platform to expedite investigations of anti-bribery and other compliance issues in its offices in Asia, Europe and elsewhere.

Like many corporations, the company has a hotline to receive tips of potential anti-bribery violations. These tips are directed to regional compliance staff in offices across the company's Asian and European regions. Staff also initiate inquiries on their own.

In the past, the company's standard procedure was to collect emails and other electronic files from the appropriate custodians and then search through it all for evidence of suspicious activity. However, the company had trouble finding technology that would do this both efficiently and effectively.

The company finally found the right technology in a cloud-based e-discovery platform it had used for litigation matters. It has now adopted the platform as the standard application for all its compliance investigations worldwide.

Now, for each new investigation, the regional office sets up a new site within the platform dedicated to that matter. It can have a site up and running within an hour. Then, using the platform's automatic loading and processing capabilities, custodian data specific to the country is exported from the company's

Exchange servers in the United States and loaded into the site. From there, regional staff use the platform's search and analytics tools to look for evidence of the alleged impropriety. If the initial search turns up evidence warranting further inquiry, a local law firm is engaged to review the data in more depth and determine how to proceed.

For the company, a key feature of the e-discovery platform is that its own staff can control the process, without having to wait for a third-party vendor to process and load data. An entire investigation—from when the initial tip is received to when it is either closed or referred out—often takes no more than two weeks.

Features that Enhance Investigations

While an e-discovery platform can be a highly effective internal investigation tool, there are specific features to look for that can further expedite an investigation:

- Automated case creation, so the company can quickly set up investigation sites as needed without requiring third-party involvement.
- Automated processing and loading, so the company can load its own data into the platform and rapidly start into review.
- Robust and intuitive search capabilities, so that compliance staff can easily hone in on key information.
- Visual analytics such as timelines and relationship maps, enabling investigators to identify and explore patterns in emails and other data.
- Integrated batching, export and production capabilities to easily deliver documents to outside counsel or government investigators.

For FCPA cases, a critical capability is multi-language document handling.

This is because the emails and documents under scrutiny could be in any of a variety of languages or even contain multiple languages within a single document.

More Effective Compliance Through Technology Use

The key takeaway from the DOJ's new FCPA enforcement policy is that corporations have a greater incentive than ever to adopt strong compliance programs that include rapid and thorough responses to suspicious internal activity.

As it turns out, the same technology that corporations and litigators already use to quickly get to the core of a litigation matter is equally adept at helping in-house counsel and compliance staff get to the nub of an investigation. The same sophisticated search and analytics tools that let litigators explore documents, patterns and timelines are equally useful for compliance professionals to identify or rule out suspicious activity.

Given the DOJ's policy, this could make the difference in whether a corporation is prosecuted and what penalties it would face.



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