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COOPERATION CREDIT

Former Prosecutor Laura Perkins Discusses the Importance of Remediation for Full Cooperation Credit

By Megan Zwiebel

Remediating an anti-corruption issue is necessary both to get a business back on track and to maximize cooperation credit in any settlement negotiations with the government. But remediating before an internal investigation is complete can be tricky business. Former DOJ FCPA Unit Assistant Chief Laura Perkins, who is now a partner at Hughes Hubbard, recently discussed the importance and challenges of cleaning up an FCPA issue while also cooperating with the government. See also "Top FCPA Officials Encourage Strong Compliance Programs and Remediation, the Defense Bar Responds" (Dec. 21, 2016).

The Benefits of Starting Remediation Early

ACR: Why is it important for a company to begin remediation while an investigation is ongoing?

Perkins: There are several reasons. One primary reason is that it is critical to stop the problem as soon as possible, particularly if an enforcement agency is involved. Enforcement authorities will want to see that the company understands that what was happening was wrong and that the company is taking steps to prevent the conduct from happening again in the future.

ACR: Are there business reasons to begin remediation immediately?

Perkins: Yes. From a business perspective, it is important to begin remediation to stop money from going out of the company without proper authorization. Whether the issue is corruption, fraud or embezzlement, corporate assets and resources are being expended in a way that the company does not want.

ACR: What are the challenges a company faces when remediating during an investigation?

Perkins: Perhaps the greatest difficulty a company faces is figuring out what to fix before it has been able to investigate and learn what is broken. If a company does not fully understand the problem, how does it start putting in place measures to stop it? While that is a valid concern, it does not overwhelm the need to start taking action. The company needs to do two things on parallel tracks: (1) figure out what the problem was and (2) start putting in place measures to prevent misconduct from happening again.

ACR: What is the biggest mistake companies make with regard to remediation?

Perkins: The biggest mistake companies make is waiting too long to start remediating. They wait for fear of some of the pitfalls, rather than thinking of ways to navigate the pitfalls. But if a company waits too long, it runs the risk of having a compliance program that isn't where it needs to be at the time of settlement and then having a compliance monitor imposed. The delay winds up hurting the company in the long run because the company has not had sufficient time to implement and demonstrate the effectiveness of its new or enhanced compliance program.

ACR: What other common mistakes have you seen?

Perkins: Another common mistake cooperating companies make is not communicating with the government enough about the remedial steps the company plans on taking. It is a mistake to not let the government know before taking major remedial steps because some of those steps may interfere with the government's investigation and thus taking those steps can negatively affect a company's cooperation credit.

ACR: What kinds of things can companies do immediately?

Perkins: There are a few fundamental things a company can do before fully understanding the problem. For example, if the issue was with a business partner, a company can stop payments to other business partners that have not been fully vetted. If the concern is with a particular contract, the company can take steps to ensure there are not problems with similar types of contracts. The company can look into whether there are reasons that type of contract led to improper activity, whether the problem exists with other types of contracts, whether a problematic sales agent or other intermediary is being used for other transactions and whether the business person in charge of the potentially improperly obtained contract worked on and had issues with other transactions, as well.

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ACR: Are there any types of remediation a company should wait to undertake?

Perkins: Remediation generally falls into two buckets: one is disciplining the people who were involved in misconduct and the other is enhancing the compliance program and policies and procedures to prevent future misconduct. There may be reasons the government would like a company to wait to do the first type of remediation, but there are not many instances where analyzing an existing program and making improvements to it would interfere with the government's investigation and thus have to wait. Additionally, by the time a company is cooperating with the government, it generally has an understanding of at least some of the causes of the problem, so lack of knowledge is not a reason for waiting to remediate. So, generally speaking, there are not a lot of situations where a company should wait to remediate.

[See "Using the FCPA Pilot Program's Remediation Requirements to Build a Best-in-Class Compliance Program" (May 18, 2016).]

Employee Discipline Without Stepping on the Government's Toes

ACR: Besides looking at the business person immediately responsible for the conduct, where else might a company look to uncover potential root causes?

Perkins: The company should look further upstream to supervisors and sales managers to see if they knew about the conduct, were influencing the decision-making process, setting unreasonable sales goals or otherwise giving the impression that improper payments were somehow necessary and acceptable to meet business objectives.

ACR: If the company finds that an employee or a manager is responsible for the misconduct, what should it do?

Perkins: The company needs to consider whether the people involved need to be moved out of their positions, disciplined in some way or terminated. The company should also consider whether other employees, whether they were involved or not, need to be retrained because sometimes anti-corruption issues are a sign that a training program is not functioning properly.

ACR: You mentioned that there might be reasons the government would want the company to wait before disciplining employees – can you explain?

Perkins: Stepping on the government's toes while it is investigating is a potential problem for a cooperating company. Disciplining employees has the potential to make witnesses unavailable for the government to interview. If the company is cooperating with the government, there needs to be an open discussion about what steps may interfere with the government's investigation.

ACR: What should a company do to avoid this conflict?

Perkins: The company can let government investigators know that it would like to discipline or terminate employees involved in misconduct and see if such discipline will harm the government's investigation in any way. The government might ask that it be given the opportunity to interview the employee prior to any disciplinary action being taken. In some rare instances, the government might ask the company to not interview an employee before the government has had a chance to interview him or her. But checking in first, and coordinating with the government, will allow the company to meet its business goal of remediating while not hurting its cooperation credit by getting in the way of the government's investigation.

ACR: Are there strategies a company can use to meet its business goals regarding employee discipline, while also getting full remediation credit?

Perkins: Companies need to keep in mind that when the government says it wants employees involved in misconduct to be disciplined, that does not always mean that employees have to be fired. It is a common misunderstanding that the government will not look fondly on anything short of termination. There are obviously instances where termination will be necessary given the seniority of the employee, the extent of involvement in the misconduct or an inability to rehabilitate that person within the company. But there are other instances where some other form of discipline – such as docking pay, withholding a bonus, training or some combination of those things – would be entirely appropriate.

"Employee Discipline for Anti-Corruption Issues: Predictability and Consistency in the Face of Inconsistent Laws (Part One of Three)" (Nov. 1, 2017); Part Two (Nov. 15, 2017).

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Strategies for Communicating With the Government

ACR: How should a company approach conversations with the government about remediation?

Perkins: Those conversations are most effectively approached by making sure the government understands the company's concerns with remediation from a business perspective, not just from a cost perspective. The company should explain how its business works, where it is located, the sectors it operates in and who its customers are.

It is also helpful to explain the company's relative size. If it is a smaller company, that is a very important thing for the government to understand when assessing the remedial steps the company is taking. The prosecutor shouldn't be comparing the steps a 2,000-employee company is taking to those a Fortune 100 company should take just because the company did not provide this context.

A company should also make an effort to help the prosecutors understand its risk profile, such as whether it operates in high-risk jurisdictions, frequently interacts with government officials or has significant customs risks. Those are the types of things that inform a company's decision to put certain remedial measures in place, and explaining them to prosecutors will help the government understand why the remedial measures the company has put in place are appropriate.

ACR: Why is it important to give that context?

Perkins: For a medium-size or smaller company, setting the table is very important, as it ensures that the company is not held to a standard it doesn't have the resources to meet. Companies are afraid to go to the government and say, "Look, we're small." Many of the "best practices" in the compliance space are set by large companies with significant resources, which can make a smaller company afraid to say that those best practices aren't necessary or appropriate for their company. But if that is really the case, and the company has fully evaluated the options with an eye toward building an effective program, I think it is important to explain that to the government. I have had companies come in and say that they are putting in place programs and controls that are probably excessive and that doesn't necessarily help them.

ACR: What questions should the company expect from the government?

Perkins: The company should expect fairly detailed questions about the impact of any changes they have made to their policies or procedures. For instance, if the company says it put in place a new whistleblower hotline, it should be prepared to answer questions such as: "How many calls have come in through the new hotline? How many languages can calls be taken in? What are the nature or subject matter of the calls that have been received? If any calls related to corruption, what did the company do about them?" If the company has gotten to the point where it has tested the effectiveness of any of remediation it has undertaken, that is very helpful information to share with the government.

ACR: Who should be involved in discussions with the government about remediation?

Perkins: It is helpful for prosecutors to meet the people at the company who were involved in making the changes or improvements to the compliance program. If there is a new CCO or CECO, it is good to bring that person in to speak with prosecutors. Doing so shows the company takes the issue seriously enough to send its senior executives. It also shows that people at the company – not just its outside counsel – are up to speed on the new program and that the person in charge at the company knows and understands the new program.

See our two-part series on how to answer the question "There's a problem, now what?": "Philip Urofsky of Shearman Explains the Logistics of Self-Reporting" (Sep. 14, 2016); and "Richard Smith of Quinn Emanuel Discusses Framing Voluntary Disclosure to Minimize Cost and Maximize Credit" (Mar. 15, 2017).

Confidentiality, Training and Risk Assessments

ACR: Generally, both the company and the government have an interest in keeping an investigation confidential while it is ongoing. How can a company remediate effectively while maintaining that confidentiality?

Perkins: Ten years ago, when a company was remediating, it was putting in an entirely new compliance program, which would be a big tell that an investigation was ongoing. Hopefully now, companies are evaluating their policies and procedures on a regular basis so any remediation will consist of more subtle adjustments that will be less of a risk to the confidentiality of the investigation.

In a situation where a company does have to institute some major changes to its compliance program, the fact of the investigation is probably already well known among employees because of the interviews and data collection involved in the investigation. So, protecting confidentiality shouldn't be too large of a concern, as the existence of the investigation is likely already well known around the company.

ACR: Training is a fairly simple place to start the remediation process. What does the government think of this form of compliance upgrade?

Perkins: Training alone is not enough. For example, training on an ineffective policy is a waste of time. Additionally, if there are gaps in the company's internal controls, training does not fix that. Training can only be one piece in the remediation puzzle but there are a lot of other pieces that need to be in place, as well.

That said, training is a necessary piece of the overall remediation picture. If a company has policies and procedures, but no one understands them, those policies and procedures are not going to be effective.

ACR: What role should global risk and program assessments play in the remediation process?

Perkins: That depends on the size of the problem. If the issue is that a sales manager in one country hired a third party that engaged in corruption, and the company's finance structure is highly localized, it may make sense to confine any assessments to that country. However, if whistleblower reports are coming in from multiple locations and involve different employees engaged in similar misconduct, a broader assessment might be warranted.

This is an area where I have seen companies stumble in the past. If the issue is small and localized, the government will not necessarily expect the company to perform a large, global review. The government will expect the company to have considered whether the problem is really localized or whether it is more extensive, but once the company has concluded that the problem is not likely to be systemic and thus company-wide remediation isn't warranted, the government will likely say "Okay."

[See "A Conversation With Jeff Johnson of Cargill About Risk Assessments" (Mar. 30, 2017).]