

Top 10 Compliance Trends For The New Year

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Now that 2013 has wrapped up, it is that time of year again when we dust off the compliance crystal ball and take a look at what might be in store for 2014:

1. Executive Order 13627 on Trafficking in Government Contracts — Enforcement Begins

Over 300,000 companies worldwide call the world's No. 1 purchaser of goods and services — the U.S. government — a customer, and countless more are in the direct supply chain of these government contractors. For 2014, it is not difficult to spot the government contracts pig in the compliance python. Indeed, the compliance reality for these companies will likely undergo a seismic shift in 2014, thanks to the groundbreaking Executive Order 13627 on Trafficking in Government Contracts. More specifically, every company providing any goods or services to any branch of the U.S. government will have to ensure that their supply chain is free from trafficking.

On Sept. 26, 2013, proposed rules to implement the executive order, reflecting the government's "zero tolerance policy" when it comes to "trafficking in persons, the procurement of commercial sex acts, or the use of forced labor," became available for public comment. The proposed rules put the onus on the contractor to proactively identify and report potential misconduct, and further include unusual provisions requiring contractors and subcontractors to agree in advance that they will "cooperate fully" with federal authorities. The range of adverse consequences for failing to comply with these requirements, moreover, is extensive, ranging from suspension and significant fines to criminal liability and debarment. Considering the executive order's extensive reach and laudable objectives, its near-term substantive enforcement is all but certain.

2. Compliance with California's Transparency in Supply Chains Act of 2010 Finally Required

In 2013, the California Attorney General reportedly received a list of some 6,000 companies that, based on their tax filings, fall under the landmark Transparency in Supply Chains Act of 2010. The act requires qualifying manufacturers and retailers to publicly detail — through a "conspicuous" link on their websites — their efforts to eradicate human trafficking, slavery, child labor and forced labor from their worldwide supply chains.

While Attorney General Kamala D. Harris has publicly stated that fighting human trafficking is, indeed, a priority, her office's website advises that no funding accompanied the act's enforcement authority. Should the

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funding issues be resolved in 2014, companies to which the law applies will be hard-pressed to explain their noncompliance to the government, as well as to their shareholders, customers and advocacy groups.

3. OFAC Civil Enforcement Continues to Shift Away from Individuals and Nonfinancial Companies

Since the penalties that the Office of Foreign Assets Control can impose on companies that violate U.S. economic sanctions against targeted foreign countries and regimes and certain individuals and entities increased in 2009, the number of overall penalties imposed has declined, whereas the size of the penalties has increased.

In 2008, there were 104 penalties (or settlements), totaling \$3.5 million. In 2012, by contrast, there were only 16 penalties, but the total value topped \$1.1 billion (including the historic settlements with ING Bank and HSBC Holdings). As of Dec. 3, 2013, there have been 25 penalties, totaling over \$100 million for 2013. Further, financial institutions have been subject to an increasingly larger percentage of both the total value and number of penalties as OFAC shifts its focus away from individuals and nonfinancial companies. We expect these trends to continue in 2014.

4. Foreign Corrupt Practices Act and Related Enforcement Regains Momentum

While 2010 saw 48 FCPA and related enforcement actions by the U.S. Department of Justice and 26 by the U.S. Securities and Exchange Commission, to date in 2013 the DOJ has filed only 15 enforcement actions (and announced six actions that were filed in 2012 and 2011), and the SEC has filed eight. Though the much-anticipated ramping up of international bribery-related investigations and prosecutions has not yet come to pass, particularly with respect to individual defendants, both the DOJ and SEC are poised to spring back into action. Both Deputy Attorney General James M. Cole and Co-Director of the SEC's Enforcement Division Andrew Ceresney this year unambiguously affirmed their commitment to aggressive enforcement.

Increased international cooperation and whistleblower tips are also expected to spur on enforcement activity. Finally, as the year comes to a close, all eyes are on the Eleventh Circuit, which is scheduled to deliver its highly anticipated opinion in United States v. Esquenazi on the much-debated definition of "foreign official." (By way of full disclosure, Mr. Esquenazi was represented pro bono by Perkins attorney and co-author T. Markus Funk and Perkins attorney Mike Sink)

5. Non-U.S. Anti-Corruption Enforcement (and, in Particular, German Enforcement) on the Rise

While the United States continues to lead the world in foreign anti-bribery actions, other nations, including Germany, the U.K., China and India, have begun to fortify their laws and beef up enforcement activities. The OECD's June 2013 Annual Report, for example, reflects that Germany has the second-most total foreign bribery cases since 1999 (97 cases, compared to 236 U.S. cases). Similarly, Transparency International rates Germany as having "active enforcement" of the OECD's Anti-Bribery Convention. Germany, in short, is working toward joining the United States as a leader in foreign bribery prosecutions. We see foreign enforcers like those in Germany continuing to step up their enforcement game, requiring compliance professionals to think "beyond the FCPA."

6. "Carbon Copy" Prosecutions the "New Normal"

"Carbon copy prosecutions"[1] are successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same set of operative facts. Corporations that reach negotiated resolutions with U.S. or foreign authorities on international bribery-related charges face a bona fide risk that other countries will initiate their own carbon copy prosecution(s). Given increased international cooperation and the relative ease with which enforcers can bring such actions, we believe that carbon copy prosecutions will, in 2014, become an increasingly familiar aspect of anti-corruption enforcement.

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7. Conflict Minerals Rules Enforcement in Full Force

This “prediction” is perhaps our least remarkable, in that companies subject to the SEC’s new rules on disclosure of the use of conflict minerals in their supply chains required compliance beginning Jan. 1, 2013. The first conflict minerals reports, moreover, are due to the SEC on May 31, 2014, to report on the 2013 calendar year (and annually thereafter). Compliance costs will be in the many billions of dollars as the first reports are being compiled by the estimated 6,000 issuers directly affected.

8. “Anticipatory Obstruction of Justice” Charges Gain Traction

As illustrated by the “honey laundering” case, prosecutors are beginning to realize the advantage of anticipatory obstruction of justice charges under 18 U.S.C. § 1519, which requires no proof of which specific federal proceeding a defendant sought to obstruct. The use of these once-obscure charges continued in 2013, including the indictment of Dias Kadyrbayev and Azamat Tazhayakov for allegedly destroying evidence related to the Boston Marathon Bombing.

Counsel performing internal investigations are well-advised to keep Section 1519 in mind (and may want to begin advising interviewees of the same as part of their standard Upjohn warnings), as employees who destroy evidence or lie out of a fear that, someday, some federal agency might investigate their misconduct may well find themselves facing anticipatory obstruction of justice charges.

9. Increased SEC Action on Whistleblower Complaints

In its 2013 year-end summary, the SEC Office of the Whistleblower announced that the number of whistleblower tips it received increased from 3,001 in the 2012 fiscal year to 3,238 in the 2013 fiscal year. These tips, moreover, came from individuals in all 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands, as well as 55 foreign countries. Further, the office advised that it paid out nearly \$15 million to various tipsters this year, including its largest award to date — \$14 million. Whistleblower submissions will undoubtedly continue to flow in, further incentivized by the Dodd-Frank Whistleblower bounty provisions, and we anticipate that the SEC will accordingly continue to boost its related enforcement activities in 2014.

10. Compliance Professionals Will Expand their Subject-Matter Expertise

Falling under the category of broader predictions, we see businesses seeking out compliance professionals with broader real-world compliance expertise to help devise customized, integrated compliance programs responsive to the spectrum of today’s domestic and foreign risks, as touched on above. Not only is this a more economical approach, but this is also more likely to result in robust compliance.

In United States v. Esquenazi, referenced in this article, Mr. Esquenazi was represented pro bono by Perkins attorney and co-author T. Markus Funk and Perkins attorney Mike Sink.

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[1] A term federal prosecutor Andrew S. Boutros and co-author T. Markus Funk first fully developed in a 2012 University of Chicago Legal Forum article.

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