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ACC's CLO THINKTANK EXECUTIVE REPORT

“FCPA ENFORCEMENT- SUCCESS STRATEGIES”

This Executive Report provides an overview of discussion results from ACC's CLO ThinkTank session titled “FCPA Enforcement- Success Strategies” held in San Francisco on April 4, 2008. ACC's CLO ThinkTank sessions are designed to provide a forum for CLOs who wish to exert greater leadership in their companies, at the bar, in the courts, and in the halls of government on emerging issues of greatest concern. Following is summary information on key topics and takeaways and discussion point highlights identified by these CLO thought leaders.

ThinkTank participants included the following legal leaders:

- Mike Holston, Executive Vice President, General Counsel & Secretary, Hewlett-Packard
- Susan Blount, Senior Vice President & General Counsel, Prudential Financial, Inc.
- Larry Boyd, Senior Vice President, General Counsel & Secretary, Ingram Micro Inc.
- Jim Carter, Vice President & General Counsel, Nike, Inc.
- Karen Cottle, Senior Vice President, General Counsel & Corporate Secretary, Adobe Systems
- Hilary Krane, Senior Vice President & General Counsel, Levi Strauss & Company
- John Page, Vice President, General Counsel & Secretary, Golden State Foods
Bruce Sewell, Senior Vice President, General Counsel, LCA, Legal & Corporate Affairs, Intel Corporation
- Lauren Seeger, Executive Vice President, General Counsel & Secretary, McKesson Corporation
- Larry Thompson, Senior Vice President, General Counsel & Secretary, PepsiCo, Inc.

KEY TOPICS

Below is a list of key topics selected by the CLOs present as most interesting and discussed during this CLO ThinkTank session:

- **Auditing FCPA Compliance**
- **Training**

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- **HelpLines- Tracking and Resolving Reports**
- **Mergers and Acquisitions; Due Diligence**
- **Investigations and Self-Reporting**
- **Role of Outside Auditors**
- **Third Parties; Business Partners**

KEY TAKEAWAYS

Thought leaders participating in this session described a number of ideas and practices. Listed below are some top themes and takeaways. Ideas on additional issues are described in the Discussion Highlights section below.

- **Internal audits of compliance with FCPA policies and internal controls can help serve training and defense purposes.** Participants described practices for auditing compliance with FCPA policies and how these audits can enhance overall training initiatives and be helpful in connection with preparing a defense to allegations of FCPA violations.
- **Training can be made more powerful by regionalizing programs and incorporating marketing flare and corporate culture to help enhance the potential for training to resonate with employees around the world.** Participants described various approaches for creating training modules (web-based, video and in person) that are more regional in flavor and nature. One participant also shared the importance of creating FCPA training that is animated (rather than dry) and includes a marketing flare to help grab and keep employees' attention and hopefully enhance overall understanding of corporate FCPA policies.
- **Due diligence and auditing practices in connection with mergers and acquisitions vary.** Participants described a range of practices including a two-step approach for conducting FCPA-related due diligence (first phase occurs pre-acquisition; second, more detailed phase occurs as part of integration with value systems following acquisition), and a general diligence approach that places newly acquired entities on the company's audit schedule.
- **Critical decision factors for self-reporting include timing and triggers.** Participants discussed the benefits of self-reporting and the importance of having a credible belief that there has been a violation and the need for professional judgment. They discussed views on whether there is a *de minimis* test for self-reporting and views on timing—whether to report early to provide a heads up that there may be a situation, the company is investigating, and will come back with more information; or, whether to hold on reporting until the company has sound internal documents providing the framework of the potential concern and the company's approach to investigate.

DISCUSSION HIGHLIGHTS

AUDITING FCPA COMPLIANCE

Auditing/Dual Purpose- Training and Defense: One participant described a practice that includes conducting FCPA-targeted audits to help assess compliance with the organization's FCPA policies. The audits include a review of records, expenses, donations and structure for approving payments. The audits are a tool to help identify and improve training opportunities and initiatives relating to FCPA and also as a defense mechanism to show diligence in implementing FCPA compliance programs.

Auditing/Auditing to Policies and Internal Controls: One participant described how auditing FCPA compliance begins with reviewing relevant policies and internal controls, and asking questions such as: Are payments receiving the scrutiny that is required? Are charitable contributions properly authorized?

Auditing/Challenges Include Sight Lines into Third Parties: Participants described challenges associated with reviewing operations of third parties. Participants discussed how including contract provisions that allow the organization to conduct audits of third party business operations could be helpful.

TRAINING

Training/Corporate Culture Plays a Role: One participant noted a need for training on FCPA to be ‘marketed’ well within the company with some amount of pizzazz to help ensure policies and procedures are understood. If the company’s corporate culture includes a focus on marketing and key corporate meetings include a certain style of delivery that helps reach the employee base, following this same cultural approach in developing and delivering training programs on FCPA can help ensure that training is presented so that it is being understood.

Training/Using Practical Examples; Regional Flavor: Participants described developing training tools (online training modules, videos, etc.) that included regional flavor to help make the training more real for the employee base. One participant described having regional teams and including video clips within the training that show people from various regions and regional music and dance. Another participant described creating a video training tool that was viewed by around 25,000 employees around the world and incorporating regional components to help create a closer-to-real training experience.

Training/Stratifying Training Requirements: One participant described stratifying training requirements and having three different levels of training on FCPA policies: a base level that everyone receives training on; a second level for active sellers; and a third level designed for individuals whose job responsibilities include interactions with foreign governments.

Training/Tracking Who Completes Required Training: Participants discussed policies requiring completion of training programs and practices for tracking who completes required training. One participant described hearing of a company practice that includes having the CEO send an email to those individuals who don’t complete required training; if training isn’t completed within a reasonable time following the email, the matter gets escalated.

HELPLINES; REPORTS OF CONCERNS

HelpLines/Training on Use; Challenges: One participant described the need to educate and encourage employees to use these tools to report concerns. The participant also described challenges in implementing helpline programs in certain countries (such as France and Germany)—particularly if the helplines are designed to allow for anonymous reporting.

HelpLines/Resolving and Closing Matters: One participant described a process that generally involves assigning matters received via the company’s helpline to either the legal function or the human resources function for investigation and resolution. These functions then report relevant resolutions to the company’s audit committee on a periodic basis.

HelpLines/Business Reports on Complaints Received: One participant described implementing a practice that incorporates within business and regional review sessions a component reporting out on numbers of complaints received. Participants asked whether this type of metric might create incentives for people not to want to report data on number of complaints. The participant shared that the organization’s experience has not been to see a downward trend in reporting numbers of complaint as a result of this open information sharing; instead, the reports went up.

HelpLines/Tracking and Metrics: Another participant described tracking who is handling the reports and how reports are handled and closed (including turn around time). Reports are prepared on a quarterly basis for the company's compliance committee and include information on call volume, nature and severity of matters, highlighting internal controls implications and describing various 'buckets' of reported concerns.

HelpLines/Publicizing Discipline: Participants discussed practices for publicizing disciplinary actions taken to address compliance infractions, and views on the importance of publicizing actions so that employees know there are consequences to improper actions. One participant described a practice that includes reporting on disciplinary statistics but not publishing the specifics of the matter or who action was taken against. Another participant described a practice that includes publishing actions taken for serious infractions. Another participant described that the company is in the process of considering publicizing internally disciplinary actions because people don't generally know about disciplinary measures undertaken when the measures fall short of termination. Participants also discussed challenges presented by some slander laws around the world and related tension with publicizing to help share information on consequences.

MERGERS & ACQUISITIONS DUE DILIGENCE

Mergers & Acquisitions/Due Diligence-Two Stages: One participant described conducting two phases of FCPA-related due diligence in connection with mergers and acquisitions: one phase in connection with completing the transaction and another phase in connection with integrating the acquired entity into the company's value system.

Mergers and Acquisitions/Due Diligence- Who Conducts: Participants discussed staffing needs for conducting due diligence and pros and cons of performing due diligence using internal staff or hiring a consultant. One participant noted challenges associated with hiring outside consultants because of a need for those performing the due diligence to know the company's business. Another participant described a practice that includes using ex pats when possible to conduct due diligence.

Mergers and Acquisitions/Due Diligence-Outside Counsel: Participants described a range of practices for using outside counsel as part of the due diligence process. One participant described a practice that includes a preference for using the same outside counsel the company uses in the United States if that law firm has an office overseas. Another participant described experiencing pushback if a law firm other than a local law firm is utilized and the need for familiarity with local requirements.

Mergers and Acquisitions/Integration: Participants discussed approaches for achieving integration. These include using a SWAT-team approach and using a regular business integration team. One participant described a practice that includes putting a transition team in place before the transaction closes and using the team for a certain period of time following closing (sometimes for up to a year) to help achieve integration. The participant noted that this practice is also helpful in countering government pushback because of the transition team approach.

Mergers and Acquisitions/Audits: One participant described a practice that includes placing acquired companies within the audit cue for business entities. The acquired companies are audited using the same protocols and procedures used for other business entities within the company.

INVESTIGATIONS; SELF-REPORTING

Investigations; Self-Reporting/Challenges in Seeking Counsel; Expense: Participants described challenges in connection with investigating potential FCPA compliance allegations. These include the expense of the investigation (e.g., document translations, law firm expenses, language and translation issues for conducting interviews, etc.). In addition to expenses associated with investigations, participants

also discussed cultural challenges associated with conducting an investigation—notion that employees that may be interviewed may have difficulty understanding the need for the investigation and may be part of the culture that created the need for the investigation in the first place.

Investigations; Self-Reporting/To Whom: Participants discussed critical decisions associated with self-reporting, including to whom to report the matter: state U.S. Attorney or DOJ Headquarters, plus reporting to the SEC.

Investigations; Self-Reporting/Considerations when Foreign Government is Investigating: Participants discussed considerations when a foreign government is investigating and how this may impact a self-reporting decision within the United States. One participant expressed a view that a report from the company would be better than having a U.S. agency receive a report of an investigation from a foreign government. Participants described how the U.S. and the foreign government may cooperate on the investigation and how involving a credible third party in conducting the investigation can be helpful in satisfying U.S. government concerns and may enable them to undertake a reviewing role rather than conducting a separate investigation.

Investigations; Self-Reporting/Triggers: Participants discussed views on triggers for self-reporting. Among the self-reporting triggers discussed is the need for a credible belief that there has been a violation. Participants discussed the importance of professional judgment. Is there a *de minimis* test? One participant described a view that whether a matter is small or large may not control; an approach might be to self-report and say that a matter was discovered, it's small and not systemic and here is what the company has done to address it. This approach enables the company to address the concerns that may exist when the instant matter doesn't appear to be a big problem, but if the next one that comes along is—what happens if the prior instance wasn't reported?

Investigations; Self-Reporting/Timing: A key challenge discussed: at what point is a matter ripe to self-report? One participant described a view from prior experience in private practice that the government is receptive to an early phone call—saying 'I'm on it, we'll give you what we find when we're further into our investigation.' Another participant described how an important factor in assessing what the government may do is the extent to which the government could rely on the investigation (so, the time taken to ensure the investigation was independent and handled properly is important and can be persuasive). This view includes the notion that having sound internal documents in advance of self-reporting can be helpful, but also includes concerns about what might happen if the government was to discover the allegations while the internal process is underway but before the company actually places a call to self-report.

Investigations; Self-Reporting/Tension: Participants discussed questions regarding costs and benefits of self-reporting: Does it benefit the company and/or shareholders to self-report—especially in light of the high costs of conducting investigations? If the company does everything it's supposed to do and continues to do that in the future, what is the benefit of self-reporting? What is the 'credit' for self-reporting? One benefit might be that, by getting the dialog going by self-reporting, can start to get a better sense of what the government's 'threshold line' is—so, even if the cost-benefit ratio doesn't work for the instant matter, the information on the 'line' might help for the next one.

Investigations; Self-Reporting/Hard to Close Matters; Subpoenas Instead of Meetings Present Concerns: Participants discussed difficulties in closing matters out—how it's hard to close cases even if they do not appear to be major. Another concern is that once a company self-reports a matter, the next step on the government side may be to send a subpoena rather than to set a meeting with the company to engage in a dialog regarding the potential matter.

ROLE OF OUTSIDE AUDITORS

Role of Outside Auditors/Addressing Requests for Reports: Participants discussed experiences with extent of roles of and requests from outside auditors in connection with investigations and reports. One participant described a situation where the auditor requested the internal investigation report but the law department was able to negotiate providing information without turning over the report in order to retain privilege.

Role of Outside Auditors/Request for Investigation Work Plan & Consult with Outside Counsel: A request to view the investigation work plan and to speak with the outside lawyer on point to help investigate the matter was discussed. Participants discussed how auditors appear to want to have a handle on the overall approach and receive information to help get a handle on the fact that the company is doing the right thing and may be less interested in being involved in the nuts and bolts of the FCPA investigation.

THIRD PARTIES; BUSINESS PARTNERS

Third Parties/Third Party Payment Policy: One participant described having a third party payment policy and practices that include disclosing third party payments within the reporting process of the company's regional CFOs. The company's third party diligence practices include: requiring evidence that the work was done, that there is no indication that payment was for an improper purpose.

Third Parties/Training: Participants discussed to what extent a company might 'put tentacles' into third party partners. Challenges associated with training were discussed: a concern is that if the company trains a third party partner, then it might be held responsible for them; however, if the company ignores them then there can be a concern regarding anti-corruption and compliance practices. One participant noted that the company's practices include training on FCPA compliance for larger third party partner relationships.

Third Parties/Contract Clause with Expectations on Compliance: Participants discussed challenges that may exist if a company has a large number of third party business arrangements. One approach for a company with a large number of reseller agreements includes inserting a clause that recites the company's expectations for compliance and indicates a right to terminate the contract if the reseller violates those expectations.

Third Parties/Contract Clause with Monitoring Rights: A challenge to consider: should agreements with third parties include a right to monitor or audit compliance with FCPA policies? What happens if the monitoring rights are preserved in the agreement but the company doesn't act on them?

Third Parties/Challenges re: Minor Ownership Position and Access to Records: What happens when a company has a minor ownership position in a joint venture and has reason to believe that a problem may exist but cannot get access to records? What happens if the local court denies the company access to the joint venture company's records?