

Stay out of trouble

How Morgan Stanley's effective anti-corruption risk management and compliance framework helped avert regulatory action

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1 Introduction

Continued enforcement of the US Foreign Corrupt Practices Act ('FCPA'), coupled with the introduction of the UK Bribery Act ('Bribery Act') and proposed tightening of the provisions for foreign bribery in the Australian Criminal Code mean that bribery and corruption is a topic that will not go away.

In this article, Jarrod Baker discusses a recent FCPA case development that highlights the benefits of being proactive and developing a robust anti-corruption risk management and compliance framework.

Why you need to take this seriously¹

An Australian company can be fined at least \$11 million under the Australian Criminal Code for the offence of bribing a foreign public official (i.e. the company may be liable for an act of bribery committed by an employee or someone acting on the company's behalf, regardless of whether they are an Australian resident or citizen).

The Bribery Act makes business to business bribery illegal and applies to a non-UK company if they conduct any part of their business in the UK, even if the UK part of its business is completely unrelated to the alleged bribery.

The FCPA concerns bribing of non-US public officials and not only applies to the conduct of US companies operating abroad but also to non-US companies who:

- Issue securities in the US
- Have US operations
- Have any nexus to the US that is used in the furtherance of bribes being paid anywhere in the world (including but not limited to the use of the US mail system or wire transfer via a US bank).

Jarrod Baker joined KordaMentha in November 2011 to establish the Forensic practice in our Perth office and has extensive experience in anti-corruption risk management and investigations throughout the world.

2 What a regulator looks for

When an anti-corruption regulator finds out about a bribery or corruption issue within a company, the questions driving their general lines of inquiry will likely be²:

- What did you do to stay out of trouble?
- What did you do when you found out?
- What remedial action did you take?

Giving the right answers to these questions will put you in a strong position to mitigate the fallout from a regulatory action. This was highlighted in a recent FCPA case associated with Morgan Stanley.

Garth Peterson, a former managing director of Morgan Stanley, pleaded guilty to violating the FCPA through property dealings in China. The US Department of Justice (DOJ) stated³, “*he had an obligation to adhere to the company’s internal controls; instead, he lied and cheated his way to personal profit*”. So what happened to Morgan Stanley? Both the DOJ and US Securities and Exchange Commission (SEC) declined to charge them. The regulators obviously got the right answers to their questions as the DOJ stated “[Peterson] used a web of deceit to thwart Morgan Stanley’s efforts to maintain adequate controls designed to prevent corruption”.

What did Morgan Stanley do to stay out of trouble?

According to the DOJ, they “*constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials*”. When it came to Peterson, he had been trained on the FCPA seven times and received at least 35 FCPA compliance reminders. He had signed written certifications that he would comply with the FCPA and was specifically informed that employees of state-owned enterprises in China could be deemed ‘government officials’ under the FCPA.

What did Morgan Stanley do when they found out?

The SEC stated⁴ that the company “*conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved*”.

What remedial action did Morgan Stanley take?

According to the DOJ, “*The company voluntarily disclosed this matter and has cooperated throughout the department’s investigation*”. The company also terminated Peterson’s employment in 2008.

3 Setting the right scene

The Morgan Stanley example shows the value in proactively setting the right scene by implementing a robust anti-corruption risk management and compliance framework. One can only think what penalties Morgan Stanley would have faced from the DOJ and SEC for Peterson’s actions had they not implemented such a robust framework. This also ties in with the Bribery Act providing a defence if an organisation can prove it has adequate procedures in place to prevent persons associated with it from committing bribery.

Our experience tells us there is no one answer to the complex risk management issues arising from

bribery and corruption. Rather than simply undertaking a perfunctory box ticking exercise, these issues need to be addressed with meaningful and effective policies and procedures. This makes it vital you are advised by forensic accountants, investigators and lawyers that are globally experienced in anti-corruption and can help ensure you develop and implement a framework tailored to your business needs and operations.

This is why we recommend you embark on the ‘Anti-Corruption Journey’ and address the three critical areas in your risk management and compliance framework.



4 The 'Anti-Corruption Journey' - three critical areas to combat corruption

01 Adequate procedures Develop procedures to mitigate the risk of bribery and corruption occurring within your organisation.

How we help	Value to you
Develop your anti-corruption policies and controls	Enables you to establish the necessary policies and procedures (e.g. facilitation payments, charitable contributions, gifts and entertainment, ethics hotline, investigation protocol), including accounting and financial controls that help define your anti-corruption risk management and compliance framework.
Perform an anti-corruption risk assessment on your operations	Allows you to identify where your corruption risks may lie – where you do business, with whom do you do business, how you do business.
Undertake anti-corruption awareness initiatives with your employees and third-parties	Assists you in helping your employees and third-parties understand your organisation's anti-corruption stance and what policies and procedures need to be followed.
Perform anti-corruption due diligence	Enables you to understand and mitigate the corruption risk in your third-party relationships.

02 Effectiveness Demonstrate that your organisation has gone beyond paper compliance and is monitoring the implementation and effectiveness of its adequate procedures.

How we help	Value to you
Develop and implement a review program	Allows you to assess not only if your anti-corruption compliance program is operating effectively but also enables timely identification and rectification of bribery and corruption risks not previously seen or appreciated.
Perform gap analysis	Helps you make sure better practice for your anti-corruption compliance program is followed and also identify areas for improvement.
Undertake data analytics	Enables you to conduct proactive, ongoing monitoring across your financial data to identify potential bribery and corruption 'red-flags' for appropriate follow-up.
Perform a health check survey	Helps you assess employee perceptions and awareness of applicable anti-corruption legislation and your organisation's relevant policies, procedures and controls for their specific work area and identify areas for follow-up/management attention.

03 Remediation Respond promptly and effectively in the event of a bribery or corruption incident occurring at your organisation and ensure lessons learnt are incorporated in adequate procedures.

How we help	Value to you
Conduct an investigation	Enables you to understand the potential bribery and corruption problem and promptly mitigate liability with fast, efficient and accurate fact identification.
Undertake control enhancement	Allows your anti-corruption compliance program to be appropriately updated to incorporate new risks and/or tighten controls following a problem or observation.



5 Real-life context

Using these three critical areas of the 'Anti-Corruption Journey', we examine how Morgan Stanley was able to satisfy the DOJ that it took anti-corruption compliance seriously.⁵

01 Adequate procedures

Examples of what the DOJ said Morgan Stanley were doing

The structure of the anti-corruption program

Policies and controls:

- Maintained an FCPA compliance program that both frequently trained Morgan Stanley employees and imposed a payment-approval process
- Code of Conduct included a section specifically addressing corruption risks and activities that would violate the FCPA
- Anti-corruption policy addressed the FCPA and risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment
- Provided its employees with a toll-free compliance hotline (in many languages)

Awareness:

- FCPA compliance program included live training presentations, web-based training, and additional FCPA reminders

Due Diligence:

- Conducted due diligence into potential business partners

02 Effectiveness

Examples of what the DOJ said Morgan Stanley were doing

Making sure you go beyond paper compliance

Review program and data analytics:

- Engaged in risk-based FCPA reviews intended to detect transactions, payments, and partnerships that suggested increased risks for Morgan Stanley to violate the FCPA
- Randomly reviewed selected personnel in high-risk areas
- Regularly reviewed and tested business units

Gap analysis:

- Annually conducted a formal review of each of its anti-corruption policies
- Health check survey
- Meetings between employees and compliance personnel to discuss anti-corruption risks

03 Remediation

Examples of what the DOJ said Morgan Stanley were doing

Taking appropriate action

Control enhancement:

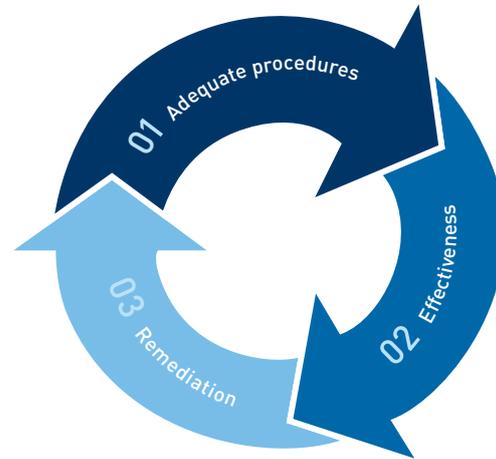
- Compliance personnel regularly reviewed and updated Morgan Stanley's compliance program and policies to reflect regulatory developments and changing risk



6 Conclusion

Aside from the ethical dilemma of engaging in corrupt conduct, the stakes are high for non-compliance. Doing nothing is simply not an option any company should consider. Pleading ignorance will not spare you a regulator's wrath.

Undertaking the 'Anti-Corruption Journey' will help you mitigate the risks and give the right answers to regulators, just like Morgan Stanley did.



About the author



Jarrod Baker
Director
Perth
Tel: +61 8 9220 9330
jbaker@kordamentha.com

Jarrod joined KordaMentha in November 2011 to establish the Forensic practice in our Perth office. His forensic accounting and corporate investigation experience, which includes over eight years working in Europe, has been gained within the 'Big 4' accounting firms as well as time spent working at the UK financial regulator (Financial Services Authority). In addition, he was previously the in-house forensic accountant at a Fortune 100 manufacturing company based in Switzerland.

Jarrod has extensive experience in the international anti-corruption regulatory environment and has worked on behalf of some of the world's largest companies in over 20 countries across the globe.

Endnotes

- 1 These are some of the key anti-corruption laws that companies located in Asia-Pacific may have to abide by. There are other international anti-corruption laws that may be applicable to a company's international operations. We suggest a company consult its legal advisor to determine what international anti-corruption laws are applicable to their business operations.
- 2 <http://tfoxlaw.wordpress.com/2010/04/10/fcpa-compliance-and-continuous-controls-monitoring-2/>
- 3 <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>
- 4 <http://www.sec.gov/news/press/2012/2012-78.htm>
- 5 <http://www.justice.gov/criminal/fraud/fcpa/cases/petersong/petersong-information.pdf>

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Our team features individuals with diverse backgrounds in accounting, audit, consulting, corporate regulation, corporate compliance, information technology and law enforcement.

Whenever factual, accounting, financial, regulatory or eDiscovery problems arise, we identify the relevant issues to deliver accurate and objective solutions.

We provide services in the following areas:

<p>Dispute analysis</p> <ul style="list-style-type: none"> ■ Independent accountancy expert witness ■ Consulting accountancy expert ■ Experts pursuant to dispute resolution clauses ■ Court-appointed referee <p>Data analytics</p> <ul style="list-style-type: none"> ■ Suspicious activity analysis ■ Data exploration ■ Process optimisation ■ Financial loss recovery 	<p>Forensic technology</p> <ul style="list-style-type: none"> ■ Computer forensics ■ eDiscovery <p>Investigations</p> <ul style="list-style-type: none"> ■ Fraud and accounting manipulation investigations ■ Employee and vendor misconduct investigations ■ Foreign bribery and corruption investigations ■ Regulatory investigations ■ Investigation review and training 	<p>Corruption and fraud risk management</p> <ul style="list-style-type: none"> ■ Development of anti-corruption risk management and compliance frameworks ■ Development of anti-fraud programs and controls ■ Fraud, corruption and ethics awareness training
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Contacts

Melbourne

Owain Stone
Partner
+61 3 8623 3410
ostone@kordamentha.com

Robert Cockerell
Executive Director
+ 61 3 8623 3355
rcockerell@kordamentha.com

Perth

Jarrod Baker
Director
+61 8 9220 9330
jbaker@kordamentha.com

Sydney

Andrew Ross
Partner
+61 2 8257 3051
aross@kordamentha.com

Nigel Carson
Partner
+61 2 8257 3080
ncarson@kordamentha.com

Brisbane

Brian Wood
Partner
+61 7 3225 4993
bwood@kordamentha.com

David Van Homrigh
Partner
+61 7 3225 4992
dvanhomrigh@kordamentha.com

John Temple-Cole

Partner
+61 2 8257 3077
jtemplecole@kordamentha.com

Alex Bell
Executive Director
+61 2 8257 3053
abell@kordamentha.com

Singapore

Matthew Fleming
Partner
+65 6593 9363
mfleming@kordamentha.com

Lily Yap
Director
+65 6593 9329
lyap@kordamentha.com

Andre Menezes
Executive Director
+61 2 8257 3023
amenezes@kordamentha.com

Paul Curby
Executive Director
+61 2 8257 3050
pcurby@kordamentha.com

