

Ethicast Interview featuring Joe Spinelli, Senior Managing Director, Kroll

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Kroll's Joe Spinelli on Anti-Bribery and Corruption in 2017

Ethisphere: My first question to you is how does the Anti-Bribery and Corruption report, in your view, help reshape and advance the industry?

Spinelli: I think the report itself is a great way of identifying insights into specific problematic areas that have to be addressed if your company is going to have an effective FCPA compliance program. Specific areas such as risk assessments, which always have to be the first real step to ensuring that you have an effective FCPA program, and tying those risks to your policies and procedures and the standards that are composed through FCPA compliance programs. That's something that's going to be evaluated if in fact your company ever comes under scrutiny by the Department of Justice (DOJ) or the SEC. If you fail to do that first step, then anything else is going to be an exercise in futility because the fact of the matter is you'll never get the credit and will never be construed to be an effective program. The report identifies very concisely what those are, how to go about those steps and most importantly articulating how the policies and procedures are tailored specifically to the results of the risk assessment. Once you've done that then I think you're on your way to an effective program

Ethisphere: In a nutshell it's all about identifying the risks, helping a company to spot the potential red flags and also mitigating the risks in the future. So that takes me to my next question, with respect to the report again, do you have any predictions as to how the companies involved will approach anti-bribery and corruption?

Spinelli: I think companies are going to approach anti-bribery and corruption with the idea to obtain credit for their effective programs, but also what they can do to identify the individuals that in fact were guilty of the misconduct consistent with the pilot program that came out and the Yates Memo. The Yates Memo was very clearly articulated, it's actually very timely that we are talking about the Yates Memo today of all days. The Yates Memo, however was very clear that the approach by the DOJ now is not going to be so much looking at companies as opposed to who are the culprits internally who are responsible for the misconduct. So companies now will approach this with a very fine eye towards looking at who are the individuals who paid the bribes? Who are the individuals who got us into this situation? What could we have done to preclude it by conducting the appropriate due-diligence of third parties that are involved and ensuring that we did enhanced due-diligence and also we are seeing more and more of individuals after companies conduct the due-diligence, their status changing, which necessitates the companies to do what I call **interval monitoring** to ensure that you have timely due-diligence so that you do it every six months to a year and you update your due-diligence file on the third parties that are doing business on your behalf throughout the world.

Ethisphere: A lot of companies still struggle with due diligence. We hear a lot about effective due-diligence—can it ever be achieved or perfected?

Spinelli: Well I think it all starts with the DOJ's opinion release, 08-02, which was very concise with the expectations. The expectation and the mandate for corporations were you have to risk rank your third parties into high, medium or low categories and those third parties who fall into the high risk category would require enhanced due-diligence. Well, what does that mean? It means that even if it entails boots on the ground in certain jurisdictions to ensure that those third parties are reputable and should be doing business on your behalf, that's something that's really a mandate that companies have to meet. Well what does that mean? It means that you better have the right people conducting the due-diligence. People who are fluent in the language, understand the culture of the jurisdiction in which they're doing business and be able to come to terms with being able to get the information professionally and legally because it gets a little complicated when you're in China and places like that.

Ethisphere: Exactly, because culture differs depending on the different parts of the world you are in. In different jurisdictions, integrity would have a different definition compared to the US. That takes me to my next question, with considerable uncertainty as to the direction and intensity of future FCPA enforcement in mind, what are your predictions for 2017?

Spinelli: Let's go back to April 2016 when DOJ released the fraud section of the FCPA enforcement plan and let's take look at that, which was basically detect and prosecute individuals and companies for FCPA violations. It became obvious that DOJ had made a new, firm commitment to uncovering fraud corruption internationally. What I mean by that is the FBI for instance beefed up their FCPA initiative by having additional agents allocated to do nothing more than chase potential bribery throughout the world and investigate FCPA investigations. When I was an FBI agent we had leads that served as liaisons throughout the world on behalf of the FBI. Basically they coordinated investigations, but they weren't intimately involved in the types of anti-bribery and corruption cases that we see them getting involved in today. Now there are more squads whether it's the FBI here in New York City, Washington DC, Los Angeles they beefed up all of those squads and they allocated a tremendous amount of manpower to those particular initiatives. In addition to that, DOJ has been very successful in gaining international cooperation. If you look at some of the cases that have come down recently what you'll find is that a lot of the cases were not just being investigated by the United States, DOJ and SEC, they were coordinated with authorities in Germany, Switzerland, Italy and Brazil so it's a coordinated effort. I think that has been a major component for the DOJ to get their arms around corruption internationally. Also as I previously mentioned the pilot program has also struck a nerve in the corporate world. I am a firm believer that corporate America as a whole is trying to do the right thing. I believe that they should be rewarded for their efforts. I think where the DOJ and SEC come a little bit short here is they didn't replicate the same type of compliance defense that UK Bribery Act affords companies when they meet adequate procedures, which is an effective compliance program. DOJ hasn't done that yet. Where they came up short in their pilot program in my opinion is instead of saying you may get credit if in fact you do X, Y and Z, I think they should have gone a step further and said unequivocally if in fact you have an effective program,

if you have met the criteria of A B C D and E, you've done all of that and you've spent all that money to implement a compliance program not just here in the United States, but around the world and it's centralized and it's effective and you've identified your third parties and you've done due-diligence and enhanced due-diligence when called upon, when you've done all of that if you have a rogue third party that in fact may have gone off the reservation so to speak and done the wrong thing you still can't be held accountable totally just simply because you had one bad egg. If you can show that you've done all of the aforementioned that I just alluded to and you did it proactively then you still should get full credit for having an effective program the way Morgan Stanley did and Ralph Lauren did in their cases.

Ethisphere: It's hard to monitor every third party, let's say the companies acquired and they bring on their third parties it's hard to keep track of every possible third party out there, right?

Spinelli: I take exception to that one. If you look at the case law that's involved it's incumbent on the company that's purchasing the other company in merger and acquisition situations to ensure that one, they have an effective program and they're not inheriting potential FCPA liability and also that they have done sufficient third party due-diligence so you're not inheriting that party also. The government will scrutinize you as the acquirer to ensure that you have taken all the steps necessary before you make and finalize that purchase to make sure that they are in good shape.

Ethisphere: Now that they have a more centralized, coordinated approach it's easier for them to scrutinize and take a different direction ...

Spinelli: Absolutely. I wrote an article in New York Law Journal not too long ago on that very issue; mergers and acquisitions and what the expectations are for companies. What are the DOJ and SEC looking for? They're looking for exactly what I just said, they want to make absolutely certain that they've done their homework, done a full gap analysis of whatever FCPA compliance program was in existence at the company they acquired, what kind of risk ranking did they do for the third parties, did they use a portal like Kroll has or did they use some instrument that risk ranks a large population to decipher where your potential high risk liability will be with third parties and then what kind of third party due-diligence did you do and who did it? What kind of expertise did you have with the individuals who actually did it?

Ethisphere: So you put all of that into perspective for us and I think this takes me to another question, which is why should Compliance Officers continue to place emphasis on FCPA programs?

Spinelli: The obvious answer is to mitigate potential fines, all you have to do is open a newspaper any day of the week and you'll see companies getting hit with huge fines for not getting done all that we discussed today. I think it goes beyond that, it goes beyond just the money. What it really comes down to is reputational damage. That's something you never give back.

Ethisphere: It's hard to rebuild that.

Spinelli: The sad thing is quite frankly, Siemens has one of the best compliance programs in the world right, but if you say Siemens what do people think? It's the largest fine ever paid to the government for FCPA vulnerability. That's really what it comes down to. Compliance officers stay up at night, why? They want to make sure they have an effective program, they want to make sure they've done their due-diligence, that it's implemented, they want to make sure they're auditing and monitoring their program on a continuous basis to show that if in fact it's scrutinized that it really is effective, they're disciplining offenders, they're incentivizing those who do adhere and do comply to the program, their third parties are being trained and guess what, certify annually that they've taken that training and understand it. There's contractual arrangements with third parties, the right to conduct audits of their books to make sure they're not in fact creating slush funds for payments, illegal payments, that there are additional third parties. All of that plays into it and that's what keeps Compliance Officers up at night.

Ethisphere: Can you share some best practices that you've seen? What do you think would work to allow Compliance Officers to sleep?

Spinelli: I think ensuring that your anti-bribery and corruption programs integrated into all areas of your business is the first step. That's really what I think it comes down to—Constantly evaluating risk. You go into different businesses throughout different parts of the world and the risks change. What it necessitates is a continuous risk assessment, not just done once and say okay, it's done, but every six months or year looking at where your business has been taken. Looking at emerging markets, making sure that you've identified that are to those particular markets, making sure that when you go into different geographical locations - high risk geographical locations - different countries and you start doing business there that you're absolutely certain that your risk assessments are being conducted and where you have to amend and change your policies and procedures. That's equally as important because again to be construed to have an effective program all the aforementioned has to be done. There are no short stops and shortcomings, this has to be done properly. I would also, by the way, and I can't accentuate efficiently, the need for integrated monitoring of the third parties.

Ethisphere: I remember you mentioned that earlier, can you talk a little more about that?

Spinelli: We have done so many different enhanced due-diligence investigations around the world. Probably 30, 40 countries and we do a good job of it, but companies think that's the end all and it's not. What we have found are many instances where six months or a year from now that same third party that we initially did due-diligence on the status of that individual has changed. Now that individual has become a foreign official, now that individual has become part of the government, which we looked at in the first place. If you don't do interval monitoring and you don't look at that due-diligence status of that third party then you're going to potentially put yourself at risk and that's the type of thing we're talking about.

Ethisphere: This is great, I like that idea of interval monitoring. I will continue with this, I know at our Global Ethics Summit the Anti-Bribery and Corruption report will be released and we will also have a panel featuring Kroll, do you have any takeaways you anticipate our audience leaving with after your panel?

Spinelli: I'd like to think that they would walk away with additional knowledge of what best practices are to having an effective compliance program, they would have a thorough understanding of what the expectation is regarding risk assessments. Keep in mind that DOJ in 2011 alone came out with three very important decisions and actions; Alcatel Lucent, Tyson Foods, Maxwell technologies if you look at the back of the appendix of all three of those opinions you'll find exactly and very concisely articulated what the DOJ wants in a risk assessment. That's all open for discussion at summits like this, I think that's something that invaluable. I think also what would be a great interest is what kind of investigation really needs to be conducted today as opposed to the past. Now the focus can't just be on the big picture, right now if you're going to get credit for an effective FCPA investigation you've got to look at the individuals that are involved, you have to be able to identify them and you better be able to point what they did and how they did it to the government to get full credit because I can tell you unequivocally that when the government comes in and you sit across the table from them the first thing they're going to ask is who was involved and how high up was in the individual in your company involved in this particular misconduct. That's also going to be critical on how much credit you get. Also something to take into consideration when you go to these summits, DOJ now has a compliance counsel. What is she there for? Well, she's very good at what she does and she's been very clear on articulating what her expectations are for an effective compliance program and she is going to work with prosecutors at DOJ and she is going to be very specific to them as to her opinion whether or not they had an effective program and if they did everything they could do proactively to enjoin potential corruption. When she is done with her assessment she is going to make that recommendation to the DOJ or SEC, while decisions around what would entail and what that expectation might be is something I would hope would come out of this conference because I think that would be invaluable to any company.

Ethisphere: Absolutely and for our audience to be able to engage and ask questions they need that type of platform to talk more about it.

Spinelli: Interaction. I just did a big FCPA conference in Miami in January and basically spoke at it for two days and there were only 50 people there and the ability to interact and ask questions and actually participate in exercises was invaluable, it was like a case study after case study. By the way, I believe the training part, the best way to train as far as FCPA goes, and it's a funny story, is first of all I like to video it so you have evidence if the government comes in that you actually did it. I take it a step further, I go back to my friends in the FBI and I bring them in. The ones who are now friends of the FCPA different squads and I bring them in and let them participate in the actual training. We've had a couple of instances where the company we were doing work with to basically build a program were under scrutiny by the government and the first question they asked was do you conduct training here. Oh yea we conduct training, and we videoed it and by the way you have to recognize some of the people

who did the training for us. They your people, that has a very unique way of basically mitigating any potential problems from the inception. It shows what great lengths you went to have an effective program.

Ethisphere: It's more than just a narrative, you're actually allowing them to practice and interact going back to your initial point.

Spinelli: Here's the situation, X, Y and Z did this and they come to you and you're the Compliance Officer, what action do you take? Does it require an investigation? Does it need to be done under privilege? Will you disclose at the end of your investigation to the government, when do you do that, should you do that? All of this plays into basically having a program and also a mindset as to how to deal with FCPA vulnerability.

Ethisphere: Now my final question to you based on what you said, you were at the FCPA conference, I'm curious to know what type of questions did you get at that conference?

Spinelli: I got quite a few actually. Mostly people were concerned about how do I go about protecting my organization? It comes to the amount of time that your Compliance Officer, he or she, can honestly devote to the compliance function. What I see too often you have a General Counsel who serves a Compliance Officer who doesn't have adequate time to devote to compliance. I see Compliance Officers not being too high up in the chain and not having a seat at the table when there are board meetings and high level management meetings, that's something the government looks at because that sends the wrong message as to where the organization mindset is in relation to compliance. I see many questions about how do I show the government that I was serious about compliance. I go back to very basic requirement that I have when I tell people if you're going to implement a program you have to incentivize people to do the right thing. You also have to punish them if they don't; no promotions, no bonuses, you failed to be compliant you don't get a bonus, you don't get a promotion. That's part of the criteria for your evaluation at the end of the year, that's how serious we are about compliance.

Ethisphere: It's not only about incentivizing, but it's also about teaching them a lesson.

Spinelli: It's also about discipline. It's one of the major component of any compliance program, you have to discipline those who don't in fact adhere to it and you have to show that you've done it and how do you do it? I think the greatest discipline you can give somebody is in the pocket. That's really what it comes down to.

Ethisphere: Joe it's always a pleasure to talk to you. It's great that we had a chance to catch up on FCPA. Before I wrap up is there anything else you want to add?

Spinelli: First of all I enjoyed this and I'm passionate about it and I love working with companies and doing what I possibly can because I want to reiterate it as much as I can, I am a firm believer that corporations that are out there right now are trying to do the right thing, they're looking for direction, they're looking for help, they want to make sure that they're dotting their I's

and crossing their T's, they want to make sure that they're not the next big headline in a newspaper because they value their reputation and they want to make sure that they have the right culture in their organization. It's not about money, it's about pride and wanting to be part of an organization that's fully compliant. I hope that there's other people out there that feel the same as I do, which is that the vast majority are good solid people, good corporate citizens. We are just making sure they don't get exposed to a wrong, potential problem because they didn't know how to avoid it.

Ethisphere: Kroll does a good job at that.

Spinelli: Well thank you.