GLOBAL ANTI-CORRUPTION REGULATORY ENFORCEMENT

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THE PROBLEM

Multi-national corporations today face challenges on a variety of corporate governance and regulatory fronts. Critical among them is the growing world-wide emphasis on investigating and prosecuting activities aimed at improperly influencing foreign government officials to obtain business.

In the United States, enforcement of the Foreign Corrupt Practices Act of 1977 (FCPA) has expanded as a result of the amendment of the Act in 1998, and renewed focus on corporate responsibility. In the post- Enron and post- Sarbanes-Oxley era, companies need to emphasize corporate governance because it is good business, and because the stakes associated with responding to regulatory and prosecutorial inquiries have never been higher.

The U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) vigorously investigate both civil and criminal FCPA violations, including those of companies with little nexus to the United States. Recently, the FBI committed additional resources out of headquarters to these investigations. In the last few years, the Fraud Section, Criminal Division, DOJ and a special unit within the SEC have conducted significant investigations resulting in indictments and settlements. These investigations have shown that enforcement authorities are bringing both large and small corruption cases, whether they be large dollar bribes by oil-related companies doing business in Asia and Africa, or small pharma bribes of hospital officials in China. The very public Siemens bribery investigation in Germany makes clear that enforcement is now a global issue. The cases detailed below reflect the breadth and trends in current enforcement.

- *Statoil ASA* – This $10.5 million settlement with an international Norwegian oil company for bribes related to Iranian oil rights reflects the U.S. Government's willingness to assert jurisdiction based on limited U.S. activity, and despite the fact that Norway had already taken action. In the future, we can expect to see the U.S. government pressure foreign governments to investigate local businesses. In those cases where the U.S. is not satisfied with the local investigation, the U.S. is likely to conduct its own investigation if there is any jurisdictional hook.
- *Baker Hughes* – A $44 million settlement resolved the criminal and SEC investigations. A subsidiary plead guilty and an onerous deferred prosecution agreement was entered into by the parent company for bribes related to Kazakhstani oil services contract. Significantly, the case also involved the use of a middleman to facilitate the corrupt payments and one of the charges included aiding and abetting the company's falsification of its records.
- Other cases have included a medical device company paying physicians at publicly owned hospitals in several European countries, payments to physician and laboratory personnel in the People's Republic of China, payments supporting the reelection of the president of Benin, payments in connection with the privatization of the Azerbaijani oil company, and a civil action by the SEC alleging a violation of the books and records and internal controls provisions of the FCPA

in connection with an estimated $200,000 in improper payments made by a fifth-tier foreign subsidiary to Indian government officials.

Increased and aggressive enforcement activity can be expected in numerous countries. In the wake of the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials and International Business Transactions entering into force in February 1999, 36 countries –- all 30 OECD members plus Argentina, Brazil, Bulgaria, Chile, Estonia, and Slovenia –- have passed implementing legislation and ratified the convention [as of April 2006]. Major European Union (EU) member states have committed to investigating and prosecuting overseas corrupt practices and have opened investigations into many well-established national companies. Similarly, the Chinese government is making headlines for investigating public officials and local and joint venture companies for potentially corrupt business practices. Oversight and investigations by Latin American governments under the Inter-American Convention Against Corruption of 1996 are beginning to take hold.

Further, cooperation between investigating governmental bodies in the U.S. and the EU –- whether at the EU or Member State level –- is increasing. Reports of allegedly improper activities in an EU member state may lead to an investigation in the U.S., even without any significant U.S. presence, and vice-versa.

As a result, companies should focus on the efficacy of their global compliance programs. Existing programs must be periodically audited to ensure that they incorporate “best practices,” especially as those practices are defined by recent prosecutions and settlements. The disruptive nature and high monetary costs conducting an internal investigation after a problem is discovered far outweighs the costs of implementing a well-designed compliance program before potential FCPA violations arise. It is important to note that although both the DOJ and SEC claim to reward voluntary disclosure, it is clear that they also consider when and why compliance programs fail in deciding on the appropriate remedy.

THE SOLUTION

Multi-national companies require a seamless web of interlinked ability to review and respond to governmental probes in all the jurisdictions where they do business. This need is acute for those companies with business establishments or significant activities in both the U.S. and Europe. Companies must synchronize and interlink updated policies and procedures that are relevant for multiple jurisdictions. They should train employees and conduct due diligence of business colleagues, such as sub-contracts, representatives, consultants and joint venture partners. Once a government inquiry is initiated, an immediate and integrated response on both sides of the Atlantic is the key to effective governance and risk management. If a problem is identified, companies must take appropriate steps immediately to determine the nature of the problem and to develop a strategy for responding to it.

OECD/FCPA GLOBAL COMPLIANCE PROGRAM: FOREIGN REPRESENTATIVES AND CONSULTANTS

The Global Compliance Program for consultants (business intermediaries –- agents, brokers, venture partners, sales teams, etc.) consists of seven basic elements:

(1) Consultant due diligence review;

(2) Development of detailed consultant engagement/hiring approval process;

(3) Drafting agreements that provide the company with maximum protection against possible OECD/FCPA violations;

(4) Identification of "red flags" and design of adequate internal controls on payments;

(5) Compliance with disclosure requirements;

(6) Education and training of personnel; and

(7) Internal audit review.

OECD/FCPA compliance requires consistent and successful performance of all the above mentioned seven elements of the global program. Of course, this program would have to be tailored to cover specific issues as they arise. Personnel responsible for performing the tasks of compliance should be given the appropriate guidelines to ensure that each consultant agreement is handled according to standard procedures. All personnel should be aware that OECD/FCPA compliance hinges both on recognition of problems as they arise and efficient resolution of those problems. Below are more detailed recommended guidelines covering aspects of the due diligence review for consultants.

Consultant Due Diligence Review

A company should conduct an investigation each time a new foreign intermediary is proposed. Appropriate compliance personnel, working with project management, should use their business and in-country contacts to assess the qualifications and reputation of a proposed individual and entity, and should also contact both U.S. and foreign government agencies to assess the official view on a proposed consultant's qualifications and reputation for ethical business practices. The results of the investigation should be put into writing and incorporated into a package of information on the proposed consultant that should be circulated to each company employee in the consultant hiring cycle.

The following areas of information regarding a consultant should be investigated:

a) The detailed terms of the agreement as proposed by the consultant and how those terms compare to other consultant agreements used in the same country or other, similar countries;

b) The consultant's reputation in local business and financial circles; all of the consultant's past and present clients (if possible, references should be obtained);

c) The consultant's business organization and operations, including:

1) any affiliated businesses;

2) the consultant's offices and number of employed staff; and

3) a listing of sales contracts on which the consultant currently and previously worked.

d) Whether any principal, employee, or relative of the consultant also holds either a full- or part-time position with the foreign government or any state-owned company, and, if so, the title and job description for the position;

e) Any past experience with the consultant by the company or other company affiliates;

f) Issues of local law in the consultant's country that may affect the terms and conditions that will be included in the consultant's agreement; and

g) The company personnel's own assessment of the consultant, based on face-to-face meetings.

The following is a list of some possible official sources for information on consultants:

a) An International Company Profile (ICP) (formerly "World Traders Data Report"), which can be obtained from the U.S. Department of Commerce, and provides information on the consultant's business reputation, trading and credit references, and commentary from in-country foreign commercial service personnel on the consultant's background and suitability for use;

b) Contact with the U.S. Embassy in the foreign country, to discuss the potential representative's bona fides and local law/policy requirements with the Embassy's commercial and military attaches;

c) Contact with the State Department and Commerce Department desk officers for the country in which the consultant will be employed; and

d) Contact with the foreign government's embassy, to confirm the consultant's reputation and standing, if possible, with the embassy's commercial and military personnel, and to review any local law/policy requirements governing the use of agents.

Any use of the above sources during the course of an investigation should be fully documented with a memorandum to the file (and a copy of any ICP) and the package of information on the consultant supplemented accordingly. Although the offices listed above may not be able to provide substantive information on a consultant in all instances, the fact that the offices were contacted shows evidence of the company's due diligence in seeking to comply with the OECD/FCPA.

Preparation of Agreement

Each consultant agreement should be drafted to provide the company with the maximum amount of protection against violations of the OECD/FCPA.

1. The legal department should draft the following clauses into each consultant agreement:

    a) A representation by the consultant of FCPA compliance;

    b) A representation by the consultant of compliance with the foreign country's local laws;

    c) A representation that the consultant presently is not, and during the life of the agreement will not become, an employee of the foreign government;

    d) An agreement that payment of a commission will be disclosed as required to both the U.S. government and the purchasing foreign government;

    e) An agreement by the consultant to certify upon payment of any commission, or periodically certify under a retainer agreement, that compliance with the FCPA has been and will be maintained; and

    f) An integration clause.

2. If the legal department is at any time uncertain as to the requirements of local law with respect to a consultant's agreement, the opinion of local counsel should be obtained.

Consultant Information Package

1. Each consultant information package supporting an agreement with a new consultant, before presentation of the package to company management for review and approval, should contain the following elements:

    a) The consultant's due diligence report;

    b) A complete description of the services to be required from the consultant and an analysis of whether the compensation is reasonable;

    c) A complete description of how the consultant was selected, including whether anyone required use of the particular consultant;

    d) A clear and concise statement of the proposed agreement's financial terms, including a statement on where and in what form the consultant will receive compensation;

    e) A statement by the legal department, identifying any legal issues under U.S. or foreign law raised by the proposed agreement;

    f) The period of performance;

g) A detailed justification for hiring the consultant and any alternatives to the hiring strategy; and

h) Whether access to classified information will be required.

2. When there is a proposed renewal of an agreement, the information package should also incorporate a history of the company's relationship with the consultant, including the following:

a) A statement of how long the consultant has been retained by the company;

b) The consultant's performance record;

c) Information on whether the consultant performs work for other company divisions or groups;

d) A payment history for the consultant; and

e) A copy of the consultant's last executed agreement.

Internal Payment Controls

Finance personnel or other personnel responsible for the payment of consultants must examine closely any "red flags" relating to the payment of consultants that raise possible OECD/FCPA issues. Some "red flags" to examine include:

1. Requests for payment that are out of proportion to those provided in the agreement;

2. Requests for payment for purposes not provided for in the agreement;

3. Requests that payment be made to third parties;

4. Requests for payment in a form or to a bank or business location not set out in the agreement;

5. Payments that are drawn from other than the correct accounts; and

6. A lack of documentation supporting a payment request.

Financial personnel should be certain to examine periodically consultant payment histories, because irregularities in the payment of consultants often are not detectable on a day-to-day basis. All payments should be made in conformity with agreement terms. Any identified irregularities in payment should be referred to the legal department for resolution.

Each commission paid should be accompanied by a representation, to be acknowledged by the consultant, that no monies will be used in violation of the OECD/FCPA or local laws. Such representations should be obtained on a periodic basis from consultants receiving retainer payments.

Protocols, Procedures, Education, and Training

Marketing and management personnel should receive periodic training on the requirements of OECD/FCPA compliance. The training and procedures should be updated as new "risks" are identified. The education program should include instruction in recognizing issues implicating OECD/FCPA compliance. The program should also reinforce each participant's understanding of the proper procedures for reporting and resolving OECD/FCPA issues arising from the retention of consultants. Employees should be instructed to contact the company's law department should any "red flags" arise.

Internal Audit Review

The company's internal auditors should conduct reviews of both foreign commission agents and foreign retainer consultants. The written report summarizing the results of each review should be placed in the consultant's file.

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GLOBAL COMPLIANCE CHECK LIST

In the current environment, it is increasingly evident that an effective compliance program –- one that is consistently updated to acknowledge new trends and developments –- is not only a cost-effective way to manage a company's exposure, but that its absence is glaring to regulatory authorities in the event of enforcement activity. Furthermore, once a problem is identified, companies must evaluate the need for aggressive internal oversight and, if necessary, internal investigations. Companies should consider the following questions when putting a proper Global Anti-Corruption Regulatory Enforcement Strategy in place.

1. Have you established a compliance and ethics model that incorporates the OECD Treaty requirements as implemented by local law in the countries where you do business?
2. Do your company's compliance procedures reflect other local law issues? Are they current?
3. Does your company have internal controls and programs in place to ensure compliance? Are those controls periodically updated as new risks are identified because of the nature of your business or because of developments in enforcement activity?
4. Does your company have a dedicated compliance function with an effective monitoring system in place for FCPA/OECD, anti-trust, export control and other compliance issues faced by multi-national organizations?
5. Do your corporate procedures worldwide include a mechanism to bring problematic issues immediately to the attention of the legal department for analysis and where appropriate to ensure that any inquiry that is conducted is privileged?
6. Does the compliance function have the ability to go directly to the Board of Directors or the Audit Committee when necessary?
7. Does your company have appropriate policies concerning document retention and litigation freezes in connection with potential suits, government inquiries, and internal investigations?
8. Have you developed policies and procedures concerning payment of attorneys fees for employees under investigation?
9. Does your company conduct compliance training and education programs for employees, agents, and consultants? Are these programs tailored to respond to specific issues in each geographic location?
10. Does your company have proper internal accounting controls to ensure the accuracy of books, records, payments, accounts, invoice standards and audits –- are there financial audit reviews in place to identify large and frequent payments in cash, payments of large commissions/bonuses, reimbursements of poorly documented expenses, cross-checks for unusual credits granted to new customers, etc.?
11. Does you company have up to date disciplinary procedures to address violations of the compliance and ethics programs?

12. Is there a reporting system –- helpline, reporting tools, interview and complaint procedures, including confidential, anonymous submissions –- that lets employees easily bring attention to potential FCPA/OECD violations and other criminal conduct?
13. Do all corporate contracts and business agreements include anti-corruption law provisions and consequences for misconduct?
14. Does your company have policies in place that address the propriety of sponsoring foreign officials on seminars, training, and other trips?
15. Does your company have strict gift policies in place as far as gifts, awards, and contributions to foreign officials/governments?
16. Does your company have strict procedures for contributing to foreign charities and nationalization programs?
17. Does your company have a crisis management team and well developed and documented procedures for investigating alleged violations?
18. Do you have procedures in place to perform appropriate due diligence in evaluating business partners and potential acquisitions?
19. Have you analyzed the nature of your influence and control over subsidiaries and investments and their effect on your books and records in designing your compliance program?

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CHRONOLOGY OF ANTI-CORRUPTION MEASURES

1977 Foreign Corrupt Practices Act

1996 Inter-American Convention against Corruption

1997 European Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union

1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

1998 Council of Europe Criminal Law Convention on Corruption

1998 FCPA amended by the International Anti-Bribery Act

1999 Council of Europe Civil Law Convention on Corruption

2002 Sarbanes-Oxley Act

2003 African Union Convention on Preventing and Combating Corruption

2003 EU Council Framework Decision on Combating Corruption in the Private Sector

2003 United Nationals Convention against Corruption