Anti-Corruption Risk Assessments in the New Era of Enforcement


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Trends in Anti-Corruption Enforcement
Anti-Corruption Enforcement

GLOBAL enforcement is on the rise.

- In the past four years, US prosecutors have enforced the FCPA to the tune of $4.1 billion.
- In response to international pressure, Canada is increasing enforcement of its anti-corruption law.
- The UK Bribery Act became effective on July 1, 2011.
- China and the US are increasing cooperation and beginning to establish a framework for information sharing and enforcement; China enacted its own foreign bribery law.
- Germany, Spain and other EU countries are increasing enforcement.
- Asia and Latin American countries have been slower to enact tough, new anti-corruption laws and begin aggressive enforcement programs.

Risk of anti-corruption multi-jurisdictional, “piggy-back” actions is growing.

FCPA: Enforcement Trends

Aggressive FCPA enforcement has resulted in corporate mega-fines:

- Total criminal fines for 2011 fell to $508 million (from $1.6 billion in 2010).
- Justice Department resources devoted to FCPA criminal trials and reduction of staff attorneys to supervise ongoing investigations.
- Fines will increase significantly in 2012 with major investigations in high-tech sector, pharma and medical device companies, aerospace, global retail businesses, and logistics industry.
- Justice Department/FBI will continue using aggressive investigative tactics - consensual recordings, ambush interviews, undercover officers, informants, search warrants and wiretaps, and possible wiretap.
- SEC Dodd-Frank whistleblower bounty program will increase number of credible complaints, investigations and prosecutions.
Enforcement at a Glance: Increase in Actions

DOJ Emphasizes FCPA Individual Prosecutions

- Congress has criticized Justice Department for failing to prosecute individuals for criminal FCPA violations.
- The Justice Department and the SEC have responded and increased number of individuals charged.
- In December 2011, eight individuals from Siemens (six former officers and two third-party agents) were indicted in SD New York for bribing Argentine government officials.
- SEC has brought separate individual civil actions against individuals for FCPA violations (seven in Siemens and three in recent Magyar Telecomm action).
- Justice Department is using corporate cooperators to bring FCPA criminal cases against individuals (Innospec and Latin Node officers were charged based on corporate cooperation).
Eight of the top ten monetary settlements in FCPA history were reached in 2010.

**FCPA Enforcement at a Glance: Prison Sentences**

<table>
<thead>
<tr>
<th>Name</th>
<th>Sentence</th>
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<tbody>
<tr>
<td>Jorge Granados, CEO Latin Node</td>
<td>46 months</td>
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<tr>
<td>Robert Antoine, Director Haiti Telco (2010)</td>
<td>48 months</td>
</tr>
<tr>
<td>Juan Diaz, Owner Third party consultant to Haiti Telco (2010)</td>
<td>57 months</td>
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<tr>
<td>Douglas Murphy, President American Rice, Inc. (2002)</td>
<td>63 months</td>
</tr>
<tr>
<td>Carlos Rodriguez, VP Terra Telecomm</td>
<td>84 months</td>
</tr>
<tr>
<td>Albert Jack Stanley, CEO and Chairman, KBR (2009)</td>
<td>84 months</td>
</tr>
<tr>
<td>Charles Paul Edward Jumet, President, Ports Engineering Consultants Corporation (2009)</td>
<td>87 months</td>
</tr>
<tr>
<td>Joel Esquenazi, Pres. Terra Telecomm (2009)</td>
<td>180 months (15 Years)</td>
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FCPA: Whistleblower Bounty

- Whistleblower Bounty program offers rewards of 10 to 30 percent of any settlement over $1 million. SEC’s Whistleblower Office opened on 8/12/2011.
- SEC regulations have been adopted (pending appeal).
- SEC estimates it will receive 30,000 complaints a year; 1-2 credible complaints each day.
- Whistleblowers have incentives (but are not required) to file complaint internally with company and wait for 120 days before filing with SEC.
- Companies will increase self-reporting to pre-empt whistleblowers.

UK Enforcement

- UK now categorised as having "active enforcement" of the OECD Anti-Bribery Convention. *(Transparency International Progress Report – Enforcement of the OECD Anti-Bribery Convention 2010.)*

- UK ranked a strong second to the US. *(TRACE’s Global Enforcement Report 2011.)*

- Cases involving overseas corruption: two in 2008; two in 2009; four in 2010; and five (so far) in 2011.

- SFO currently have 50 corruption cases under investigation or prosecution.
“Partnerships like the one we have with the Serious Fraud Office are critical to our transnational approach to combating foreign bribery, and we intend increasingly to rely on our foreign partners in future cases.”

— Lanny Breuer, Assistant Attorney General, Nov. 4, 2010
FCPA v. UKBA: Territorial Effect and Punishment

<table>
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<tr>
<th>FCPA</th>
<th>UK Bribery Act</th>
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<tr>
<td>Conduct within the US by anyone</td>
<td>Conduct (including omissions) within the UK by anyone</td>
</tr>
<tr>
<td>Conduct outside of the US if by an issuer of US Securities or a “domestic concern” (e.g. a company organized under US law or having its principal place of business in the US) – or anyone acting on its behalf, foreign persons who commit an act in the United States in furtherance of a subject act are also covered</td>
<td>Conduct (including omissions) outside of the UK by persons (natural and legal) with a close connection to the UK, if that conduct would form an offence if committed in the UK. If a commercial organization “carries on a business or part of a business in the UK” then may be prosecuted for “failing to prevent” bribery even if the bribery occurs entirely outside of the UK.</td>
</tr>
<tr>
<td>Up to 5 years prison sentence for bribery, 20 years for accounting offences</td>
<td>Up to 10 years prison sentence – accounting offences may be prosecuted under other Statutes</td>
</tr>
<tr>
<td>Criminal fine for entities up to $2m for bribery or $25m for violation of accounting provisions, or twice the benefit sought, and debarment; for individuals, fines of up to $100,000 (bribery) or $5 million (accounting offences)</td>
<td>Unlimited fine; additionally Serious Crime Prevention Orders, Confiscation Orders, Winding up proceedings, debarment, director disqualification and regulatory/disciplinary action</td>
</tr>
<tr>
<td>Civil penalties up to $10,000 per bribery violation or $500,000 per corporate accountancy violation</td>
<td>Civil Recovery Orders – no criminal conviction required (lower threshold of proof)</td>
</tr>
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</table>

General Risk Factors in Energy and Utility Industries

- Governments play a significant role in the industry:
  - Concessions and auctions;
  - Regulation, licensing and permitting.

- Resources are often located in undeveloped countries which have weak political and social institutions.

- Energy and utility industries have history of corruption and are very lucrative.

- New energy and resource industries are heavily subsidized by governments and ripe for corruption.
Specific Risks

- The oil and gas industry is – and has been – the focus of enforcement agencies.
- Industry operates in countries known for corruption risks.
- Many foreign governments are involved in oil and gas industry through state-owned enterprises and joint ventures.
- Oil and gas industry relies on network of third-party agents and consultants who assist companies in local countries.

Anti-Corruption Enforcement in the Oil & Gas Industry
### Basic Elements of Risk Assessment

- Learning about the risks. Interviewing key corporate players who know about business operations.
- Review as much documentation (code of conduct, existing compliance infrastructure, and financial controls)
- How does company identify risk?
- What is role of board? Structure for assessment?
- What is role of senior management?
- Who is responsible for identifying and responding?
- How is compliance perceived?
Basic Elements of Risk Assessment

- Geographical locations
- History of corruption in industry
- Nature and Extent of Government interactions
- Use of Third Party agents, lobbyists and consultants
- Procedures for Mergers and Acquisition due diligence
- Procedures for Joint Venture due diligence
- Policies for Gifts, Entertainment, Meals and Travel
- Charitable contributions – community support and activities
- Hiring of persons related to government officials

Global Corruption Risks

CORRUPTION PERCEPTIONS INDEX 2011
Major Risk Factors for Corruption

**How much does your business depend on:**
- Government sales;
- Dealings with state-owned enterprises;
- Regulatory approvals, visas, and inspections/audits;
- Hiring of third party agents and consultants.

**Do you have an existing policy:**
- To conduct due diligence of third party agents and consultants;
- To conduct due diligence of prospective target company to acquire or joint venture partner;
- To prospectively approve expenses for gifts, meals, entertainment and travel.

Gifts, Meals and Entertainment

**Does company use gifts, meals and entertainment to promote products and services?**

- Do they provide to government officials? What controls are in place?
- What are existing policies and practices?
- Is there a pre-approval process?
- How are expenses recorded on financial books?
Anti-Corruption Policies and Procedures

The company should implement specific policies for:

- Gifts, hospitality, entertainment, and travel expenses;
- Political contributions, charitable donations and sponsorships;
- Facilitation payments, solicitation and extortion.

Train, Train, Train: Train of Fools

Critical to design, implement and document extensive training program.

Communication and education are keys to compliance.
### Basic Elements of Compliance Program

- Training program for anti-corruption compliance, including:
  - (a) training of all directors and officers, and, where necessary and appropriate, employees, agents, and business partners;
  - and (b) annual certifications, certifying compliance with the training requirements.

- Internal controls to identify and prevent bribery:
  - Internal audits must be supplemented with forensic audits since internal audits hinge on “materiality” and may not catch bribery schemes.
  - Every expenditure of money where bribery may occur should have specific controls and management procedures to prevent bribery (e.g. gifts and hospitality, review form for certain amounts and review by compliance and legal offices).

### Designing an Anti-Corruption Program

- Risk-based - identify and assess the risks: one size does not fit all (even within a single business.)

- Establish policies to address risks.

- Communicate and implement policies internally:
  - tone from the top;
  - measures to ensure buy-in.

- Policies should be appropriate to:
  - the nature of the risks faced;
  - the size of your business and the availability of resources.

- Document your procedures and policies.

- Include a process for due diligence on third parties.

- Communicate procedures to associated persons and counterparties.

- Periodic, risk-based review of approved third parties.

- Periodic review and revision of procedures.

- Contractual protections.
The Critical Building Block: Tone at the Top

- The company should issue a clear and visible corporate policy against corruption violations.
- Demonstrate a strong commitment from senior management.

Playing Well With Others: Third Parties

Play At Your Own Risk
### Risk: Third Parties

A covered entity may not make payments to *any other person*, **knowing** that the payment or promise will be passed on to a foreign official.

**Knowledge means...**
- Actual knowledge;
- Awareness or suspicion that an event is likely to occur;
- Avoiding knowledge of corrupt acts through willful blindness.

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### Proving Criminal Intent – Bourke Decision

- Second Circuit affirms Bourke’s criminal conviction for FCPA conspiracy, Travel Act and False Statements.
- Court affirms judge’s “head-in-the-sand” jury instruction and sufficiency of evidence.

**Knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact.**
Risk: Third Parties - RED FLAGS

A company must investigate all red flags involving agents, joint venture partners, brokers, consultants, distributors, professional service firms, etc.

- Red flags are facts and circumstances that raise questions about the possibility of an FCPA violation and require further investigation.
- Red flags include (but are not limited to):
  - Transactions in high risk countries;
  - Objection to anti-compliance contractual provisions;
  - Unusual payment arrangements: request for cash payments, excessive commission rates, payment to offshore accounts;
  - Known affiliation with corrupt officials;
  - No significant experience relevant to the business.

Anti-Corruption Process For Third Parties

- Conducting adequate risk-based due diligence;
- Ensuring there is a good business case;
- Ensuring appropriate contractual protections are in place;
- Ensuring your agent has good books and records;
- Conducting face-to-face training on your policies;
- Having appropriate approval, oversight and monitoring processes.
Third Party Agents

Consultants, Agents, and Distributors

- How much does company rely on third parties? What, if any, due diligence process exists? Documentation of process? Approval of agents?

- What is business case for each? What specific services? How is compensation set? Comparison to market? How are payments made?

- Do contracts include anti-corruption compliance assurances? Right to audit agents’ books? Termination rights? Monitoring rights?

- Certifications and participation in training programs?

Due Diligence Screening of Third Party Agents

Screen the Initial Terms of Relationship with Third Party

- Develop a Different Screening Procedures for Review of Individual Transactions.

- Do not over-standardize procedure. Need to tailor to individual circumstances in each country based on risk.

- Need to conduct background check to determine (5-10 year history) to determine if:
  a) ties to foreign government officials and employees; or
  b) existence of any pending or prior investigations of bribery or other malfeasance.

- Create written package and record of review and approval process to demonstrate compliance.
**Contractual Requirements**

- Compliance with relevant anti-corruption laws and your policies.
- Appropriate reps, warranties and undertakings:
  - no owners/employees are public officials or closely related with officials;
  - no investigations or convictions for fraud or bribery;
  - bribes have not been paid or offered and will not be.
- Right to audit books and records requirements.
- Obligation to maintain proper books, records, internal controls.
- Ability to conduct reviews.
- Ability to suspend or claw back payments in event of breach.
- Termination in event of breach.
- Involve legal/compliance early on in process.
- Complete contract before agent or contractor begins work.

**Risk: Mergers & Acquisitions**

"Buying an FCPA violation"
Acquiring company can be held liable for FCPA violations which occurred prior to the acquisition.

**NOTE:** Not only may liability be inherited for a company's past action, but a firm may be liable for ongoing corruption even if there is no direct evidence that the company or its officers knew of the corrupt acts.
Risk: Mergers & Acquisitions

- **Alliance One:**
  $4.2 million fine and $10 million disgorgement for pre-acquisition FCPA violations.

- **Saipem:**
  $240 million fine for conduct of an acquired subsidiary of ENI, Snamprogetti, where the FCPA violations occurred over 2 years prior to the acquisition.

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Risk: Mergers & Acquisitions

**To limit exposure, the acquiring company must:**

- conduct a due diligence review
  
  **AND**
  
  adequately respond to red flags.

- Due diligence is not a legal defense but it can minimize risk of liability when coupled with compliance commitment.
## Merger and Acquisitions and Joint Ventures

### Basic Due Diligence Procedures

- Due diligence procedures for potential acquisitions;
- Documenting due diligence;
- Contractual provisions to protect company against past anti-corruption violations;
- In joint venture context, company may not have ability to impose consistent anti-corruption program;
- Create written package and record of review and approval process to demonstrate compliance.

## Due Diligence of Target Companies

### Basic Risk Assessment
(countries of operation, industry, extent of foreign government interactions)

### Overall Compliance Structure

### Prior History of Bribery or Internal Investigations

### Internal Controls

### Use of Third Party Intermediaries

### Anti-Corruption Training

### Employee Discipline/Hot-Line Reporting

### Assessment and Review Procedures
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