

The United States Foreign and Corrupt Practices Act (FCPA) makes it illegal for a US citizen, a US-based or US-listed company, or foreign persons acting in the US, to attempt to bribe foreign officials (including making gifts or charitable contributions) with the goal of gaining a business advantage. It is also illegal for a company to use an agent or a third party to make or offer such a prohibited payment.

## Anti-Corruption Practices Survey 2011 – Cloudy with a chance of prosecution?

# Growing focus on corrupt activities

by Chris Rowland

The increased focus on preventing corrupt activities is not confined to the United States. The United Kingdom Bribery Act of 2010 expands the criminality of bribery beyond acts involving government officials to include bribery between private entities. It also covers bribery that takes place anywhere in the world, including domestically. Unlike the FCPA, the UK Bribery Act does not provide an exemption for facilitation payments.

The 1 July, 2011 start of enforcement of the UK Bribery Act of 2010, with its own extraterritorial reach and implications for businesses and individuals in the Cayman Islands and elsewhere, is also leading many companies to re-evaluate their anti-corruption efforts, even if they have extensive policies and procedures to comply with legislation such as the FCPA.

The UK Bribery Act applies to all companies, including US companies, that do business in the United Kingdom, and many believe the US Department of Justice (DOJ) will align with many of the guidelines and principles in the UK legislation. Given these significant new provisions, companies will likely need to review their anti-corruption programs and compare them with the official guidance provided for the UK Bribery Act.

In addition, the Cayman Islands Anti-Corruption Law 2008 (ACL), which came into force in 2010, is gaining momentum and exposure locally and is bringing the focus of bribery and corruption firmly into the minds of those operating businesses in the Cayman Islands – or at least it should be.



Prosecutions and fines under the FCPA have also increased dramatically in recent years. While in 2004 the DOJ and Securities and Exchange Commission (SEC) had only five enforcement actions, that number rose to 40 actions in 2009 and 74 in 2010. The size of

penalties has also increased. Eight of the ten largest FCPA-related settlements occurred in 2010 with penalties ranging from US\$56 million to US\$800 million<sup>1</sup>. The DOJ is now enforcing FCPA requirements more vigorously, including using sting operations such as those traditionally used in federal drug busts and organised crime prosecutions.

In October 2011, David Baines, the chairman of the Cayman Islands Anti-Corruption Commission, a quasi-investigative body set up pursuant to the ACL, released information regarding complaints made to the Commission and noted that 26 complaints of corruption had been received and that 13 investigations were on going at that time.

Achieving compliance with anti-corruption legislative requirements such as those contained in the Cayman Islands ACL, the UK Bribery Act and the FCPA, has become an increasing concern and requirement for companies – particularly those with global operations. As noted above, the number of enforcement actions and the size of the related penalties have increased dramatically over the last several years, affecting companies and industries from all around the world.

While many of the cases highlighted in the media in recent years involve well known multi-national companies (eg Siemens AG and BAE Systems) there are many other cases involving individuals and lesser known companies. Companies who provide services to or contract with governments or government organisations should pay particular at-

tention to the legislative requirements in the jurisdictions where they operate, as should those companies operating in industries where it is perceived there may be a greater risk for corrupt practices.

### Importance of an effective anti-corruption program

According to the US DOJ, companies implementing effective anti-corruption programs are much less likely to incur substantial penalties levied for FCPA violations. In addition, the costs to companies of investigating and defending FCPA allegations can be significant. Investigation costs can often run into the tens of millions of dollars based on the size of the matter. The investigative costs are generally driven by the need to review huge volumes of electronic documents and transactional data, both at the company and at third parties, as well as by the need in many cases to investigate activities over several years and in countries beyond the original country in question.

When a corruption case is settled, regulators may appoint a monitor to oversee the company's compliance activities, which have been revised to address the deficiency. The regulator selects the monitor, typically a private lawyer, but the company bears the cost, which can easily escalate to many millions of dollars in the case of a large corporation.

If a company can demonstrate to the SEC and the DOJ that it has a robust compliance programme and responded appropriately once it discovered the corrupt activity, the government will sometimes simply close their file without bringing a case.

In addition to these direct financial benefits, companies gain a less easily quantifiable but potentially even more valuable dividend. Companies with a strong programme designed to prevent corrupt activities among its employees and third parties may avoid the potential damage to their reputation and disruption to their business if such acts were to occur and become widely known.

Designing and implementing an effective program to prevent corrupt activities has become more important to companies than ever before. The United States and other governments have implemented tougher anti-corruption requirements and are aggressively enforcing them. At the same time, many companies are now more exposed than before to potential corrupt activities as they expand their operations into emerging markets.



### Survey findings

The Deloitte Forensic Center recently surveyed 276 executives to assess how companies are managing their efforts to prevent corrupt practices in their operations around the world and to ensure compliance with the various legislative requirements. The findings revealed that while almost 90 per cent of respondents said their company had an anti-corruption policy, only 29 per cent were very confident that their company's anti-corruption program would prevent or detect corrupt activities.

This low level of confidence indicates that many companies may need to evaluate and upgrade their anti-corruption efforts. The survey results have provided several areas of focus for companies in relation to their anti-corruption programmes and activities. These include:

- Lack of consistent due diligence and monitoring of third parties – the activities of third parties, and the management of these relationships, were seen as the greatest corruption risk, a finding which will potentially lead to greater third party due diligence and ongoing monitoring of third parties to ensure compliance with a company's anti-corruption requirements;
- Lack of stand-alone anti-corruption policies – only 45 per cent of the companies surveyed had a stand-alone anti-corruption policy while the remaining companies had a policy that was part of a broader code of conduct. In Deloitte's experience, anti-corruption issues may not receive adequate attention unless they are addressed by a policy specifically focused on corruption.
- Infrequent anti-corruption audits – although

roughly 80 per cent of executives said their company conducted internal audits of its foreign operations to identify corrupt activity, only 32 per cent said these audits were conducted annually or more often. Also, Deloitte has found some companies rely on their standard internal audits, which may not be sufficient. Companies should consider conducting procedures specifically designed to identify corrupt activity.

- Increased corruption risk in emerging markets – global companies face a greater potential for corrupt activities as they expand into major emerging markets, such as Brazil, Russia, India and China (BRIC countries). Fifty-five per cent of executives said their company was extremely concerned about the potential impact on their business of corruption in China, while 43 per cent said the same about Russia, 39 per cent about India, and 26 per cent about Brazil. Further, these concerns are growing. Half of the executives said their company was more concerned today about corruption risk in China than it was three years ago, while 42 per cent of executives said their concerns had grown in India, 38 per cent in Russia, and 33 per cent in Brazil.

Although most companies have anti-corruption policies and programmes, few executives are very confident in their effectiveness. At many companies, more work may need to be done to develop stand-alone anti-corruption policies, to regularly conduct special anti-corruption audits, to perform due diligence on and monitor third parties, and to manage the increased corruption risk in major emerging markets. Companies that evaluate the strengths and weakness of their anti-corruption programmes and take steps to address their deficiencies can reap substantial benefits and avoid the potential cost of penalties and litigation.

The need for vigilance and compliance should be considered as important to local businesses providing services in the Cayman Islands as it is to those companies who operate globally as part of financial services industry. Enhancing anti-corruption programmes will not only make it less likely that a company becomes the subject of a prosecution, but equally important it will also help to safeguard its hard-earned reputation.

### END NOTES

<sup>1</sup> 2010 Year-End FCPA Update, Gibson Dunn



### BIO: AT A GLANCE

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