Government Enforcement Alert

April 2009

Financial Services Firms Face Increased Pressures on Anti-corruption Compliance

At a time when financial services firms face increasing compliance pressures on multiple fronts, yet another subject may demand attention: compliance with the Foreign Corrupt Practices Act (FCPA) and similar anti-corruption laws in force in other countries. The FCPA prohibits bribery of foreign government officials and requires U.S. public companies and their affiliates to maintain accurate books and records and effective internal controls. Over the past decade, most other developed nations have adopted similar or even broader anti-bribery laws, and many of them have recently initiated more vigorous efforts to enforce those laws. Accordingly, even though government corruption risks have been seen historically as issues for defense contractors and oil companies, the fact is that every firm doing business internationally faces the risk of violating these anti-bribery laws – whether by intentionally making an improper gift or payment, or by having an employee, sales agent or joint venture partner do so.

The new pressures to address corruption risks come from at least four potential sources:

- FINRA has identified FCPA compliance as an examination priority for 2009, and FINRA members engaged in significant business outside the U.S. should be prepared for FINRA review of their FCPA compliance efforts. See FINRA letter to member firms dated March 9, 2009: www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p118113.pdf - 2009-03-11.

- Firms regulated by the U.K.’s Financial Services Authority (FSA) will have noted a recent disciplinary action taken against Aon Limited, fining the insurance brokerage firm £5.25 million for failing to train relevant personnel as to bribery and corruption risks, and failing to conduct adequate due diligence before retaining third party representatives. See http://www.fsa.gov.uk/pubs/final/aon.pdf (and related K&L Gates analysis at: http://www.klgates.com/newsstand/detail.aspx?publication=5257#FSA).

- Accounting firms are more frequently asking their audit clients for information about anti-corruption compliance programs.

- Similarly, potential business partners are increasingly seeking information about anti-corruption compliance efforts as part of their request for proposal process.
These developments reflect the fact that FCPA enforcement continues to be a priority for the U.S. Securities and Exchange Commission and the U.S. Department of Justice, with 33 actions brought in 2008, and 38 in 2007, capped in recent months by settlements with Siemens, A.G. (which paid over $1.6 billion in fines, penalties and disgorgement in December 2008) and KBR, Inc. and Halliburton Co. ($579 million in February 2009). FCPA enforcement is expected to remain a priority under the Obama Administration. The Department of Justice has brought at least one case involving activities of international investment bankers, and has expressed an interest in the financial services area. With broad respondeat superior provisions applied in cases of this type, companies face the prospect of civil and criminal liability for the activities of their employees and agents, regardless of their level of seniority.

Outside the U.S., laws prohibiting the bribery of foreign officials are being more vigorously enforced and, in some cases, broadened. For example, the Siemens case involved not only U.S. authorities, but vigorous efforts by German prosecutors as well. The U.K. Government has published a bill to reform existing bribery laws, including the creation of a new offense for the failure to prevent bribery by a company, where the company has been negligent in its efforts to stop people working on its behalf from paying or promising or offering a bribe in connection with its business. Under the bill, adequate compliance procedures would provide a defense for the company, except in the case of misconduct by senior management.

Although U.S. law does not require companies to have an FCPA compliance program, in practice U.S. law enforcement officials now expect that every company involved in international commerce will have taken meaningful steps to prevent improper payments, and if they find a violation by a company that has failed to do so, the consequences of any violation are sure to be more severe.

How then should companies address these risks? Even though no firm can prevent every unauthorized action by its personnel or by third parties acting on the company’s behalf, a firm can significantly reduce the risk of legal liability through effective compliance efforts to assure compliance with the law. There are several steps, which are relatively simple and inexpensive, that any company operating internationally should consider.

- **Identify the points of contact between your company and foreign government officials.** Each company has a unique set of circumstances in which it deals with government officials. Understanding when and where these interactions occur – and precisely who is a government official – is the starting point for assessing the company’s corruption risks.

  - Contacts with state-owned or state-controlled companies should be included in this review, even where those companies are engaged in ordinary commercial activities. This category includes, among other things, sovereign wealth funds and government-owned banks. Under the FCPA, employees of such entities are considered to be “government officials,” and gifts, entertainment or payments to them may violate the law. See, for example, Securities and Exchange Commission v. ITT Corporation, C.A. No. 1:09-cv-00272 (RJL) (D.D.C. filed Feb. 11, 2009), [http://www.sec.gov/litigation/litreleases/2009/lr20896.htm](http://www.sec.gov/litigation/litreleases/2009/lr20896.htm)

- Consider whether your existing policies and procedures are sufficient to mitigate the risks identified. Effective compliance programs often include:

  - A prohibition of improper payments.
  - Controls over gifts and entertainment.
  - Due diligence procedures for third parties that may act on the company’s behalf, such as agents, other intermediaries, and joint venture partners.
  - Due diligence requirements in the M&A context, to assure that potential anti-corruption problems are identified and evaluated prior to any transaction.
• **Provide training to relevant company personnel.** A written policy alone is unlikely to be effective unless it is effectively communicated to employees and reinforced with periodic training that assures their understanding.

• **Monitor and audit compliance with policies and procedures.** This often includes mechanisms for reporting certain types of payments and expenditures, such as gifts, entertainment expenses, and payments to consultants; annual certifications of compliance by relevant personnel; and internal auditing of selected accounts, such as employee reimbursements, and promotional and marketing expenses.

• **Follow up on “red flags” and take remedial steps as needed.** If potential corrupt payment issues arise, companies must be prepared to take prompt action and make an appropriate inquiry into the situation. If a problem is found to exist, companies are expected to take steps both to correct it and to prevent a similar recurrence. Indeed, of the many problems targeted in the Siemens case, noted above, the most significant may have been the company’s failure to respond to repeated indications that improper payments were being made.

With regulators, auditors and business partners all directing more attention to the anti-corruption compliance efforts of financial services firms, there is an opportunity to stay ahead of the curve by re-assessing those programs now in order to assure that corruption risks are being appropriately mitigated, and that third parties inquiring about those programs do not find them to be deficient.

This is necessarily an overview; companies must address these risks in the context of their own operations. Please feel free to contact any of us if you would like to discuss a particular issue in more detail.