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Six Ways a Board can Manage FCPA Risk

by Joel M. Cohen and M. Jonathan Seibald

Increased enforcement of the Foreign Corrupt Practices Act ("FCPA") over the past decade has alerted corporate officers and directors to the need to take action to mitigate the risk that their companies will be charged with bribing foreign government officials. With the United Kingdom's far-reaching Bribery Act 2010 (the "Bribery Act") set to go into effect in April 2011, the need for corporate management to develop strong anti-bribery compliance programs is greater than ever.

Many board members understandably are asking how these two statutes differ. In addition to prohibiting bribery of both public and private sector employees, and prohibiting receiving bribes, the Bribery Act creates a distinct, strict liability offense of corporate failure to prevent bribery. Under this offense, a company will violate the Bribery Act if persons or entities providing services on its behalf pay bribes, including facilitation payments, with the intent to obtain a business advantage for the company. Additionally, unlike the FCPA, which contains three exceptions or defenses, the only statutory defense to corporate failure to prevent bribery under the Bribery Act is that the company had "adequate procedures" in place to prevent bribery.

How does a board member ensure that the company's policies and procedures comply with these different statutes, either of which can readily be applied against most companies given their broad jurisdictional reach? Fear not: there are general principles that apply to developing compliance programs consistent with both statutes. In recently issued draft guidance, the UK Ministry of Justice set out six principles to guide companies in developing these "adequate procedures" to prevent bribery. These principles are consistent with what US regulators enforcing the FCPA look for, and officers and directors would be wise to consider them in developing their companies' anti-bribery compliance programs.

1. **Risk Assessment.** Companies must develop procedures to ensure that that they are aware of the specific bribery risks they face in the industries and markets in which they operate. All companies should ensure that those performing such risk assessments are "adequately skilled" to do so. The draft guidance also suggests using a combination of internal data (such as audit reports and customer complaints) and external data (such as publicly available information on bribery issues in particular industries or jurisdictions) in performing these assessments.

2. **Top-Level Commitment.** Senior management, including directors and high-level executives, must establish a culture within their companies in which bribery is considered unacceptable. To accomplish this, management should: (i) issue a written "zero tolerance policy" toward bribery; (ii) communicate to employees and business partners the penalties and other consequences of violating the company's anti-bribery policies; (iii) be personally involved in the development of a code of conduct and in that code's publication and dissemination throughout the company; and (iv) appoint a senior employee to oversee the development of the anti-bribery program.

3. **Due Diligence.** Companies should employ due diligence policies and procedures covering all parties to a business relationship, including suppliers, intermediaries, agents, and joint venture partners. Due diligence should include inquiring into whether the party has a reputation or has been prosecuted for bribery or related offenses, and into whether the party has its own anti-corruption measures in place. Due diligence should also include consideration of the specific corruption risks posed by a particular business opportunity. Counterparty due diligence is especially important in light of the increased number of bribery cases involving the use of intermediaries.

4. **Clear, Practical, and Accessible Policies and Procedures.** Companies should promulgate and maintain "clear, practical, accessible and enforceable" policies and procedures prohibiting bribery. Such policies might include: (i) a strategy for integrating the anti-bribery prohibition into the company's decision-making processes; (ii) guidance on gifts and entertainment, and political and charitable contributions; (iii) information on applicable anti-bribery laws and regulations; (iv) guidance on proper actions in response to extortion or blackmail; (v) details on the company's commitment to whistleblower protections; and (vi) information on relevant anti-corruption programs in the company's industry. Companies should also issue codes of conduct that detail the required standards of employee behavior and that are part of the employment contract.

5. **Effective Implementation.** Management should ensure the effective implementation of these policies; "paper compliance" is insufficient. An implementation strategy should address: (i) who bears responsibility for implementation and monitoring; (ii) ways in which the company will communicate the policies internally and externally; and (iii) the development and roll-out of anti-bribery training, including a detailed timetable. Companies should also consider requiring that business partners participate in anti-corruption training or at least attest that they will comply with all relevant anti-corruption laws and regulations.

6. **Monitoring and Review.** Companies must institute mechanisms for ongoing monitoring and review of their compliance with anti-bribery policies and procedures. These mechanisms may include: (i) internal "checks and balances," such as financial controls, incident management procedures, and whistle-blowing vehicles such as anonymous hotlines; (ii) triggers for mandatory risk assessment and compliance program reviews; and (iii) external verification of the effectiveness of anti-bribery policies.

By following these six principles, corporate officers and directors will reduce the likelihood that their employees or business partners will pay or receive bribes. Almost as important, adherence to these principles will likely mitigate any punishment the company will receive if an improper payment violating either the FCPA or the Bribery Act is found to have occurred. To be sure, some practitioners are developing a greater understanding of differences in the expectations of US and UK regulators that affect more nuanced elements of a successful anti-corruption policy applicable to both statutory regimes. These six core principles remain equally applicable under both statutes, however.

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