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Anti-Corruption Risks: Presentation to IWPA

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Agenda

- Overview : US Foreign Corrupt Practices Act and Other Anti-Corruption Laws
- Business Considerations: Areas of Anti-Corruption Risk and Mitigating Those Risks

FCPA: The Basics

- The operative elements of a violation of the FCPA's anti-bribery provisions include:
- An offer, payment, promise to pay, or authorization of the payment of:
 - Money or “anything of value”
 - Corruptly
 - Directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office
 - To obtain or retain business, or to direct it to any person



FCPA: The Basics – Money or Anything of Value

Money or “anything of value” is a very broad concept and includes:

- Cash
- Gifts, services, and entertainment
- Travel, food, and lodging expenses
- Sponsorships or donations sought or supported by the government official
- Promise of future employment – such as for the government official or the official’s family member
- Anything else “of value” –flexible term

FCPA: The Basics – Foreign Officials

“Foreign Official” is broadly defined and includes:

- Any official or employee of a foreign government, its agencies, departments, instrumentalities (including state-owned enterprises)
- Seniority not important – can be a customs official or local regulator
- Also: (i) A political party, party official, political candidate, and (ii) official of international organization such as World Bank or regional banks
- Practice Tip: Be mindful of all “touch points” your company has with foreign governments – customs officials, regulators, forestry officials, tax officials, employees of state-owned or state-controlled companies

FCPA: The Basics – Officials of State-Owned Enterprises

- The FCPA defines “foreign official” as “any officer or employee of a foreign government or any department, agency, **or instrumentality thereof...**”
- To consider: More than 50% of the recent FCPA enforcement actions involved employees of state-owned enterprises (such as oil companies controlled by governments or government hospitals)
- U.S. court decision (2014): “An ‘instrumentality’ ... is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”

Key US Enforcement Agencies

- Department of Justice (DOJ)
 - Handles criminal and civil enforcement of the FCPA's anti-bribery provisions for domestic concerns and foreign companies and nationals
- Securities and Exchange Commission (SEC)
 - Responsible for civil enforcement of the FCPA's anti-bribery provisions with respect to issuers as well as the books and records provisions, which apply only to issuers

Good Practice Tips

- Maintain careful financial records to reduce the risk of FCPA anti-bribery violations as well as reduce the risk of other legal violations
- Have an anti-corruption policy that is provided to all employees and third parties representing the company to foreign officials, and monitor compliance
- Centralize approvals of financial interactions with government officials

Be aware: Other Anti-Corruption Laws

- The UK Bribery Act applies to any non-UK entity that carries on business in the UK
- The UK Act prohibits bribery of officials to obtain or retain business or obtain a business advantage and also prohibits commercial bribery
- Plus: Every country has its own anti-corruption and bribery laws – international treaties and foreign assistance help lead to this
- Need to be aware of possible enforcement of local anti-bribery laws in each country you do business

Area Where Anti-Corruption Risks Arise: Engaging Third Parties

- Many FCPA enforcement cases turn on the issue of third parties that make corrupt payments to government officials for a U.S. company
- Entities that use third parties can be held liable for the acts of third parties who act on their behalf when they
 - **Knew of corrupt acts** on their behalf or
 - Showed **willful blindness toward, deliberately ignored, or consciously disregarded suspicious actions or circumstances**
- Therefore important to minimize risks when selecting third parties

Minimizing the Risks of Working with Third Parties

- A review of a potential third party dealing with government officials might include the following elements:
 - Detailed questionnaire
 - References check, and an electronic search for past corruption or other illegal conduct
 - Written approval of the engagement by a senior company officer
 - Inclusion of anti-corruption clauses in any agreement
 - Ongoing anti-corruption compliance certifications
 - Periodic review to ensure compliance

Anti-Corruption Issues: Gifts, Hosting, Entertainment

- In general: Always check whether gifts, hosting, or entertainment for foreign officials are (i) legal under local law, (ii) reasonable under the circumstances, and (iii) consistent with your organization's policies
- Consider providing any benefits directly to government agencies (not to individuals)
- Ensure that the same official is not receiving repeated benefits that cumulatively present a problem
- A conservative policy would include little or no gifts, hosting, entertainment, and any policy should include strict controls on approvals

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