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White Collar Crime

The Long Reach of the Law: Practical Tips for Compliance with Anti-Corruption Legislation

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INTRODUCTION

Any company conducting business abroad is exposed to the potential application of anti-corruption legislation. In fact, in a recent survey of business executives, 63% of respondents indicated they have encountered some form of actual or attempted corruption. Increasingly, authorities have devoted significant resources to the enforcement of anti-corruption measures. This enhanced enforcement trend is reflected in the significant penalties that have been imposed on a number of companies over the last several years, including fines in the millions of dollars in addition to significant reputational and business losses.

In our September 2009 Blakes Bulletin on White Collar Crime: *Canada's Corruption of Foreign Public Officials Act: What You Need to Know and Why*, we discussed Canada's *Corruption of Foreign Public Officials Act* and the likelihood of increasing Canadian enforcement. In light of this risk, proactive business strategies for compliance are increasingly important. In this bulletin, we will discuss general business practices that a diligent company can adopt to assist in protecting itself against violations of anti-corruption law. In our next bulletin, we will discuss strategies for responding to an incident of potential corruption, should such an issue arise.

PRACTICAL TIPS FOR COMPLIANCE

1. Conduct a Risk Assessment

An important first step is to identify the corruption risks faced by your company. Once areas of risk are identified, your company can assess these risks, their likelihood and potential impact, prioritize resources accordingly, and tailor a compliance program to fit your company's needs. When assessing the risks faced by your company, consider the following:

- Does your company transact business in a country that has a reputation for corruption?
- Does your company use foreign agents or joint venture partners?
- Is an employee, foreign agent or joint venture partner of your company a foreign official or state-owned or state-controlled entity?
- Does your company transact business with a state-owned or state-controlled entity?
- Does your foreign agent, joint venture partner or local foreign office have significant discretion in respect of contracts, commissions or expenses?
- Does your foreign agent or joint venture partner contract with sub-agents, or other undisclosed individuals or organizations?

2. Develop an Internal Anti-Corruption Policy

The cornerstone of any compliance program is a clearly articulated corporate policy against corrupt behaviour. Your policy should send a strong message from senior management that corruption is not acceptable. It should also establish limitations and thresholds and provide guidance on risk areas. The following are specific proactive measures a company may also wish to include in its anti-corruption policy:

- A senior member of the company (or committee of senior members) should be appointed to oversee compliance and to act as the "Compliance Officer";
- Prior to transacting business, all government ties possessed by prospective foreign business partners should be thoroughly understood and reported to the Compliance Officer;
- Foreign agents and joint venture partners should only be used where necessary and only with pre-approval from the Compliance Officer;
- Expenses should be transparently documented, and reviewed on a regular basis; and
- Pre-approval from the Compliance Officer should be sought and obtained for any:
  - facilitation payment;
  - payment for the expenses of a foreign official;
  - gift, entertainment, travel or hospitality for a foreign official; and
  - political or charitable contribution.

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3. Train and Enforce Your Anti-Corruption Policy

Your company's anti-corruption policy is only as effective as the rigour with which it is implemented and enforced. The goal is to create a top-down attitude of compliance. All employees should receive periodic compliance training on anti-corruption laws and your company's anti-corruption policy. Be sure to document all training. Employees should also have ready access to support and advice when confronted with situations involving potential risk. A system of discipline for violations of your company's policy is also required.

4. Utilize Internal Controls to Identify and Correct Issues

Another component of an effective anti-corruption policy is a system of internal controls aimed at preventing corruption from occurring. The goal is to develop and implement internal audit mechanisms, including accounting practices, and to identify and correct issues if and when they arise. These internal controls could include the following:

- Carefully scrutinizing large or unusual payments;
- Conducting periodic audits of remote offices;
- Conducting adequate due diligence to ensure that no future liabilities will arise from the past activities of a company acquired during a merger or acquisition; and
- Implementing a whistleblower policy and/or hotline for reporting potential violations.

Finally, periodic reporting to the board of directors is recommended.

5. Best Practices for Dealing with Foreign Agents and Joint Venture Partners

Certain characteristics of a foreign business party should cause prudent companies to exercise caution when forming or renewing a business relationship. These "red flag" factors may include the following situations:

- The foreign business party has a history of violating anti-bribery laws or unethical conduct;
- Your company is conducting business in a country with a reputation for corrupt practices;
- The foreign business party is recommend by a local public official;
- Requests that payments be made in cash, to "bearer", or to accounts located outside the country in which you are doing business (for example, to safe-haven countries);
- Unusual practices or procedures that lack transparency (for example, unusual expense reports);
- Lack of experience or qualifications; and
- Requests for payments of unusually large commissions.

The best practice is to only engage a foreign agent or joint venture partner where necessary, and only with pre-approval from your company's Compliance Officer. Adequate due diligence should be conducted and documented prior to hiring a foreign agent and/or before establishing a partnership abroad to ensure the foreign agent or joint venture partner is reputable, properly qualified, and does not employ foreign officials. The following are additional best practices for dealing with foreign agents and joint venture partners:

- Thoroughly understand the government ties possessed by all foreign business partners;
- Do not delegate substantial discretionary authority to foreign agents or other high-risk individuals;
- Require all foreign agents to sign documents specifically agreeing to comply with all relevant anti-bribery laws. In particular, consider including the following representations and warranties in their contract:
  - that the foreign agent or joint venture partner (or their shareholders, directors, officers or employees) are not foreign officials;
  - that the foreign agent or joint venture partner has no undisclosed sub-agents or third parties, and will not use sub-agents or third parties without prior written permission;
  - that the foreign agent or joint venture partner will not make payments or give anything of value to a foreign official; and
  - that your company shall have the right to audit the foreign agent or joint venture partner to ensure compliance.

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6. Responding to a Potential Incident

Our next bulletin will discuss strategies for responding to a potential incident, including the following:

- The best ways to conduct an internal investigation;
- How to protect privilege when responding to a potential incident;
- If and when to self-report; and
- How to best handle inquiries from the authorities.

CONCLUSION

The proliferation of anti-corruption laws around the world requires companies to be diligent. By identifying risks associated with carrying on business internationally and developing compliance programs targeted at minimizing those risks, companies can protect themselves against violations of anti-corruption laws. An ounce of prevention can save potential significant expense and business costs associated with a prosecution under anti-corruption legislation.

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