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Recent changes in the anti-corruption landscape for healthcare companies

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In the past 18 months, there have been significant anti-corruption developments for companies and individuals, particularly in the healthcare sector.

Although companies and individuals operating in all industry sectors should be considering the implications of the recent developments outlined in this chapter, they are particularly pertinent to the healthcare sector. Lanny Breuer, Assistant Attorney General and head of the Criminal Division at the US Department of Justice (DoJ) noted that in some foreign countries, most aspects of "the approval, manufacture, import, export, pricing, sale and marketing of" healthcare products involve a foreign official (as defined in the US Foreign Corrupt Practices Act (FCPA)). Assistant Attorney General Breuer also observed that the "depth of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates a significant risk that corrupt payments will infect the process" (*DoJ, November 2009*).

DoJ and the US Securities and Exchange Commission (SEC) officials with day-to-day responsibility for the FCPA enforcement have taken Assistant Attorney General Breuer's comments seriously. Last summer, they launched a broadening bribery inquiry into whether healthcare companies have made illegal payments to doctors and health officials in foreign countries. The Financial Times has quoted an industry-related source as saying that the broadening probe has been designed to determine whether healthcare companies have ignored a systemic risk inherent in the global drugs business and ignored obligations under local and US anti-bribery laws.

The heightened scrutiny of the healthcare industry is not limited to anti-bribery enforcement authorities in the US. In response to the US efforts, as well as domestic pressure to reduce healthcare costs, enforcement authorities in other countries have initiated their own review of the relationships between healthcare companies and healthcare providers. Like Assistant Attorney General Breuer, anti-corruption authorities in a number of OECD member states have suggested publicly that their recent focus on healthcare companies is not a one-off or otherwise time-limited commitment but one that they intend to continue for years.

There is a degree of irony in the heightened focus on healthcare companies in the battle against government corruption. Although many healthcare companies interact thousands of times per day with medical professionals who often qualify as government officials under national anti-corruption statutes, no industry has made a greater effort through the development and implementation of industry codes of conduct to regulate relationships with government officials. Often, these industry codes go far beyond the governing statutory mandates in limiting what healthcare companies can do as they develop and market their products. However, healthcare companies are facing increasing scrutiny from anti-corruption enforcement officials in many countries and this scrutiny is unlikely to abate in the near future.

Against this background, this chapter looks at recent developments in enforcement of anti-corruption laws in relation to the following:

- Collaboration by anti-corruption authorities.
- Fines and investigation costs.
- A focus on individual prosecutions.
- New anti-corruption enforcement techniques.
- Increasing shareholder suits.
- Changes in judicial attitudes.
- New liability theories in the US and the UK.
- The impact on healthcare companies.

COLLABORATION BY ANTI-CORRUPTION ENFORCEMENT AUTHORITIES

The payment of bribes to government officials to obtain or retain business or secure some other competitive advantage has been unlawful for many years in most countries in the world. Historically, however, laws against bribery focused on domestic bribery rather than international bribery. Further, these domestic bribery laws were not always enforced.

With the coming into force in 1999 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention Against Corruption in 2003, the enactment of measures modelled on the FCPA spread quickly, including in countries that had no commitment to actual enforcement. Simultaneously, statutes allowing companies to deduct as a business expense the payments they had made to foreign government officials to achieve their business objectives began to be repealed.

Governments worldwide have begun dedicating additional resources to national anti-corruption enforcement authorities. This has been strengthened in part by several high profile government corruption cases, including the celebrated prosecution of Siemens and the start-and-stop prosecution of BAE Systems. National anti-corruption enforcement officials have begun to coordinate their efforts with their counterparts in other countries by regular telephone, email and face-to-face meetings.

The consequences of the increasing cross-border co-operation by anti-corruption enforcement officials are reflected in the December 2008 Siemens settlement with the US and German enforcement authorities, which totalled US$1.6 billion (as at 1 November 2010, US$1 was about EUR0.7). They also can be seen in the simultaneous announcement in March 2010 by the Serious Fraud Office (SFO) in the UK and the DoJ and SEC in the US of a combined US$36 million settlement with Innospec. Other cross-border investigations are reported to be underway involving many other companies in many other countries.

The global settlements to which Siemens and Innospec agreed are just the beginning. In corruption cases, shared jurisdiction tends to be the general rule. This means that with increasing cross-border co-operation and the other developments discussed below, cross-border investigations and prosecutions will continue to occur and global settlements involving two or more countries with shared jurisdiction undoubtedly will increase over the next few years. This in turn will reduce the number of refuges from prosecution on which some companies have traditionally depended.

FINES AND INVESTIGATION COSTS

A fine or settlement of US$1 million or US$2 million for corruption was previously considered to be substantial. This is no longer true and the following settlements hugely exceeded these levels:

- The approximate US$1.6 billion combined US and German settlement involving Siemens in December 2008.
- The US$579 million US settlement involving KBR in February 2009.
- The approximate US$450 million combined US and UK settlement involving BAE Systems in February 2010.
- The US$365 million US settlement involving Snamprogetti in July 2010.
- The US$338 million US settlement involving Technip in June 2010.
- The US$137.4 million US settlement involving Alcatel-Lucent in December 2010.
- The US$106.3 million US settlement involving Daimler in April 2010.
- The US$81.8 million US settlement involving Panalpina in November 2010.
- The US$58.3 million US settlement involving ABB in September 2010.
- The US$56.1 million US settlement involving Pride International in November 2010.
- The US$48.1 million US settlement involving Shell in November 2010.
- The US$44.1 million US settlement involving Baker Hughes in April 2007.
- The approximate US$40.2 million combined US and UK settlement involving Innospec in March 2010 (including related US trade sanctions issues).
- The US$32.3 million US settlement involving Willbros in May 2008.
- The US$30 million US settlement involving Chevron in November 2007.

Other investigations of foreign bribery, which could lead to settlements of comparable magnitude, are reportedly underway.

The costs incurred by companies investigating foreign bribery are equally overwhelming, in part to respond to demands made by law enforcement officials:

- Siemens reportedly has so far incurred investigation costs relating to foreign bribery of US$850 million.
- Weatherford International reportedly has incurred costs of US$92 million relating to an ongoing investigation into foreign bribery in connection with the United Nations Oil-for-Food programme and potential trade sanctions issues.
- Innospec reportedly has incurred investigation costs of US$22.6 million.
- NATCO reportedly has incurred investigation costs of US$10.3 million relating to an international corruption case it settled with the US authorities for US$64,000 in January 2010.
- The Noble Corporation reportedly has incurred investigation costs of US$7.3 million in relating to a case it settled with US authorities for US$8.1 million in November 2010.

The damage to reputation and the business disruption caused by bribery investigations or prosecutions also cannot be ignored. Companies with a clean record may not wish to be tainted by associating themselves and doing business with companies involved in bribery scandals. Further, for healthcare companies and other companies that sell to public entities, a criminal bribery conviction could lead to debarment from government contracting, which could put some healthcare companies out of business.

FOCUS ON INDIVIDUAL PROSECUTIONS

Anti-corruption enforcement authorities in the US firmly believe that the prosecution of individuals alleged to have been involved in bribing foreign government officials is a cornerstone of their FCPA enforcement strategy.

More individuals were prosecuted in the US in 2010 for bribing foreign government officials than in any preceding year. One individual (Charles Paul Edward Jumet) was sentenced to the longest ever prison sentence imposed in an FCPA case - 87 months.

The increasing emphasis on individual prosecutions is not limited to the US. Prison terms for domestic and foreign bribery have been imposed in a number of countries over the past couple of years, including China (which has executed several Chinese government officials for accepting bribes). 148 individuals from 12 countries were sanctioned for foreign bribery from 1999 to 2009. Of those 148 individuals, 40 were sentenced to prison (*OECD, June 2010*).

According to the OECD, as of mid-2010 another 180 individuals (more than the number sanctioned since 1999) had been charged, although their prosecutions had not yet been completed. The new bribery statute that is scheduled to enter into force in the UK in April 2011 provides even more draconian penalties for individuals convicted of bribery than the FCPA, placing individuals at risk of an unlimited monetary fine and up to ten years' imprisonment.

International collaboration in the extradition of individuals to face trial on bribery charges has increased over the past couple of years. In 2009, a US grand jury indicted Wojciech Chodan and Jeffrey Tesler for bribes reportedly paid on behalf of KBR. Both fought extradition from the UK and lost at trial court level. Immediately following Chodan's extradition to the US in December 2010, he pleaded guilty. He currently awaits sentencing. Tesler is currently fighting his extradition on appeal in the UK. Ousama Naaman, a dual Canadian/Lebanese citizen who had been an agent of Innospec, was arrested in Germany in July 2009 before being extradited to the US. He pleaded guilty to bribery in June 2010 and currently awaits sentencing.

NEW ANTI-CORRUPTION ENFORCEMENT TECHNIQUES

In addition to the increased cross-border sharing of information relating to foreign bribery, anti-corruption enforcement officials in a number of countries have been developing new techniques to discover domestic and foreign bribery. Among the most widely publicised new technique is the sting operation. Sting operations have previously been used in other types of criminal investigations, but early 2010 was the first time the US enforcement authorities used this technique in an FCPA investigation.

As part of its sting operation, a US Federal Bureau of Investigation agent masqueraded as the minister of defence of an African country and obtained agreements for the defendants' companies to pay 20% commissions to win public contracts. The operation resulted in the arrest of 22 individuals in the military and law enforcement sectors. According to Assistant Attorney General Breuer this operation has led to the largest single prosecution of individuals in the history of the DoJ's enforcement of the FCPA. Anti-corruption enforcement officials in other countries seem likely to try similar operations.

Another new technique is to reward whistleblowers. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) that was recently enacted in the US is a good example. It contains a generous bounty provision for individuals who supply the SEC with information that leads to successful enforcement of the US federal securities laws, which include the FCPA's record-keeping provisions. These provisions require public companies to keep records that accurately describe any transactions made, including any bribes paid to a foreign government official. Under the Dodd-Frank, any whistleblower who voluntarily provides original information that leads to a monetary sanction above US$1 million in an SEC proceeding for a violation of the federal securities laws is entitled to 10% to 30% of the monetary recovery in the SEC action or a related action, which would include a DoJ proceeding, assuming all prerequisites are met.

In view of the sanctions that have been recently imposed for the FCPA violations, this provision is likely to produce a surge of reports to the SEC and DoJ of overseas bribery by companies in every industry sector, and not only by disgruntled employees. The bounty provision in Dodd-Frank significantly incentivises company employees who have been involved in bribing foreign government officials to disclose their conduct and that of other company employees to obtain immunity from prosecution or a reduced penalty from the US enforcement authorities.

INCREASING SHAREHOLDER SUITS

A number of FCPA-related shareholder suits have been filed in the US in recent years. In suits such as currently pending suits brought by the shareholders of Avon, Parker Drilling and Pride International, shareholders have alleged that the companies in which they had invested did the following:

- Made false statements concerning the adequacy of the company controls against overseas bribery.
- Failed to disclose overseas bribery.
- Breached other duties to their shareholders.

The awards resulting from shareholder derivative actions can sometimes exceed the fines imposed by the DoJ and SEC for the underlying bribery. It seems likely that the number of such suits will increase over the coming years. Suits are expected to be filed in other countries as shareholders seek to recoup the losses they have suffered from a bribery scandal.

CHANGES IN JUDICIAL ATTITUDES TOWARD BRIBERY

Although many judicial authorities, like many national politicians, once considered the bribery of foreign government officials as common practice, judicial attitudes towards this conduct have changed over the past few years.

For example, although UK Lord Justice Thomas ultimately accepted the sentence that was negotiated between the SFO and Innospec in March 2010, he made it clear in his sentencing remarks that the days of a slap on the wrist for overseas bribery were passing when he explained: "It is of the greatest public interest that serious criminality of any, including companies, who engage in the corruption of foreign governments... is made patent for all to see by the imposition of criminal and not civil sanctions."

NEW LIABILITY THEORIES IN THE US AND UK

The DoJ believes that a company can be held liable under the FCPA for the actions of its agents if it has not taken adequate steps to vet and control them. DoJ officials have explained that to avoid being liable for corrupt third party payments, US companies should exercise due diligence and take any necessary measures to ensure they have formed business relationships with reputable, qualified partners. Similarly, the SEC has brought a civil enforcement action under the FCPA against companies (such as InVision Technologies and Pride International) that it has deemed to have been aware of a high probability that its foreign sales agents and other representatives were making improper payments to government officials to obtain or retain business.

The Nature's Sunshine civil enforcement action in 2009 is a recent example of the control person liability theory the SEC has developed to address a perceived failure adequately to supervise company personnel to make and keep accurate books and records. The SEC brought a civil enforcement action against Nature's Sunshine, CEO Douglas Faggioli (who was COO during the period relevant to the complaint) and CFO Craig Huff after the Brazilian subsidiary of Nature's Sunshine allegedly made cash payments to customs brokers to facilitate the importation of unregistered nutritional products into Brazil.

The SEC did not allege any direct involvement by Mr Faggioli or Mr Huff in the scheme to make improper payments. Rather, the complaint alleged that they had failed adequately to supervise company personnel having day-to-day responsibility for making and keeping accurate books and records and devising and maintaining an adequate system of accounting controls. Mr Faggioli and Mr Huff eventually consented to judgments enjoining them from future violations and agreed each to pay a US$25,000 civil penalty. Meanwhile, Nature's Sunshine paid a civil penalty of US$600,000.

The UK's new Bribery Act makes companies that do business in the UK liable for bribery if a company employee, agent, subsidiary or another person performing services for or on behalf of the company makes an improper payment to further the company's business interests. That is a notable change from the previous approach in many EU member states that individuals rather than companies commit crimes. A company can protect itself from liability for bribery under the UK's new Bribery Act, however, by proving that it has adequate procedures designed to prevent associated persons from undertaking this conduct.

The new Bribery Act requires the UK Secretary of State to publish guidance on adequate procedures. Although this guidance has not yet been formally issued, in September 2010, the UK Ministry of Justice opened the consultation process by issuing procedures that it expects commercial organisations doing business in the UK to implement. This draft guidance demonstrated that companies should not expect prescriptive standards or a safe harbour formula for avoiding company liability in the UK for either overseas or domestic corruption.

Instead, the draft guidance focused on key principles that all companies should seek to embody in their anti-corruption compliance programmes:

- **Top level responsibility for the prevention of bribery.** A company's board of directors and/or owners should seek to establish a corporate culture in which bribery is never acceptable by clearly articulating the company's policy concerning public and private sector bribery, including the consequences for failing to comply with the company's anti-bribery policy.
- **Risk assessment and management.** A company should periodically undertake and update comprehensive analyses of the nature and extent of the corruption risks to which it is exposed.
- **Clear and practical policies and procedures.** A company's anti-corruption programme should include clear and practical policies and procedures to prevent those acting on their behalf from engaging in bribery.
- **Appropriate implementation.** A company's anti-corruption programme should be embedded throughout the organisation through:
  - regular training of its own employees as well as those not employed by the company but still acting on the company's behalf;
  - administrative measures linking the anti-corruption programme to the company's overall management framework (such as, the development of HR policies that encourage compliance).
- **Due diligence and management of relationships with business partners.** A company should:
  - undertake risk based due diligence on all of its business partners;
  - periodically review the performance of its business partners;
  - ensure that due diligence results are reflected in the business arrangements it makes.
- **Monitoring and review.** A company should monitor and regularly audit its anti-corruption programme with a view to implementing appropriate enhancements to improve the programme's effectiveness.

The UK's stance on adequate procedures is similar to the US's stance in the US Sentencing Guidelines, which contain a uniform sentencing policy for persons convicted in the federal courts. The Sentencing Guidelines endorse a reduced penalty for any company that has developed and implemented an appropriate compliance policy and robust compliance procedures.

In explaining these standards, the US Sentencing Commission has said that companies should take the following into account:

- Any applicable industry practice or standards called for by applicable governmental regulations.
- The company's size.
- Any past misconduct by company employees.

Specifically, the US Sentencing Guidelines provide that a company's compliance programme should have the following characteristics:

- Clear standards and procedures that are reasonably designed, implemented and enforced, and therefore generally effective in preventing and detecting criminal conduct.
- Supportive structural components, including familiarisation with and continued oversight by the company's board and executive officers as well as day-to-day implementation by other personnel.
- An appropriate level of resources devoted to compliance.
- A clear delegation of authority to those having operational responsibility for the programme coupled with access for these individuals to high-level personnel.
- Regular training of the company's board, executives, employees and, as appropriate, agents, business partners and others acting on the company's behalf.
- Regular audits of the programme's effectiveness.
- A confidential mechanism for reporting potential misconduct.
- Effective enforcement mechanisms, including appropriate incentives for compliant behaviour and the imposition of sanctions for misconduct.
- A demonstrated commitment to appropriate remediation whenever misconduct is discovered, including the provision of restitution to identifiable victims, self-reporting to pertinent government authorities, co-operation with government authorities and the solicitation of advice on its programme from an outside professional adviser.

THE IMPACT ON HEALTHCARE COMPANIES

The enforcement trends above should reinforce the importance of every healthcare company's developing and implementing robust anti-corruption policies and procedures. The most critical need in that connection is ensuring that a company's programme takes full account of the corruption risks that it confronts. A compliance programme that has not been targeted in an appropriate manner is likely to waste resources on insignificant issues while ignoring or paying insufficient attention to much greater risks.

In undertaking and periodically updating the risk assessment that should guide every compliance programme, the following factors, among others, should be considered:

- **Where the company is doing business.** Although government officials worldwide have been known to demand or be susceptible to bribes, the risk of bribery varies significantly from country to country. A variety of organisations periodically publish country-specific corruption reports, including Transparency International, the World Bank and many national governments. However, those reports are not an adequate substitute for a risk assessment that looks in a reasonably comprehensive manner at a company's experience in individual countries.

  In addition to assessing the prevalence of bribery in the countries where a company is doing business, attention must be paid to the variances between the laws and regulations that prohibit bribery. Even if a company is fully subject to the FCPA (for example, because of its listing on the New York Stock Exchange), a compliance programme that focuses solely on the requirements of the FCPA may not be an appropriate response to the compliance risks the company faces in other countries. Unlike the FCPA, for example, the new UK Bribery Act prohibits the bribery of private sector employees as well as government officials (although, unsurprisingly, the US enforcement authorities use a variety of other laws to prosecute private sector bribery). In addition, while the FCPA allows facilitation payments (that is, payments to expedite the performance of routine government actions), the new UK Bribery Act does not allow facilitation payments under any circumstances.

  In addition, the Proceeds of Crime Act 2002 (POCA), the UK's primary anti-money laundering statute, imposes special reporting and other requirements on repatriation to (as well as movement through) the UK of criminal property. This includes any funds that can be traced to the payment of a prohibited bribe in an overseas location. Failing to comply with the POCA requirements is itself a criminal act, which may be deemed to have been committed even if it is determined, after a full investigation, that no bribery actually occurred in the UK or overseas.

- **The nature of the company's activities.** In addition to focusing on where the company is doing business, a company's compliance programme must take account of the nature of the company's activities from one country to the next. The government officials in a particular country having responsibility for new drug approvals may be may be above reproach. However, this may not be true of local customs clearance officials, municipal officials who handle requests for zoning changes or local tax authorities. Whether the company is manufacturing locally or operating simply as an importer (directly or through one or more local distributors) is relevant, as are many other factors.

- **A company's use of agents and other intermediaries.** Many bribery convictions and settlements have involved agents and other intermediaries, including in some instances company distributors. This underscores the importance of a company performing appropriate due diligence on those acting on the company's behalf. A healthcare company's agents and intermediaries may be involved in a wide variety of activities, including the following:

  - obtaining permits, licences or other government approvals;
  - clearing products through customs;
  - gathering information;
  - conducting clinical trials.

  A company's compliance procedures should include specific guidance concerning the due diligence that should be completed before entering into an agreement with an agent or intermediary. They also should include guidance for monitoring these arrangements once in place.

- **Other individuals who are working for the company or are purchasing the company's products.** Healthcare providers who develop and test products or provide consulting services to a company often also purchase the company's products. That means, among other things, that any payment or other benefit that the company confers on these individuals carries some risk of being deemed to involve an impermissible *quid pro quo* (that is, providing a benefit to the healthcare provider in exchange for the purchase of the company's products rather than those offered by competitors).

  The company compliance programme should include a variety of safeguards against this risk. If the company pays a healthcare provider to conduct a study, for example, care should be taken to ensure that the study serves a legitimate scientific purpose. Similarly, advisory boards and consultancies should provide verifiable value that can be shown through documentary evidence. Further, the amount paid for any engagement must not exceed the fair market value for such an engagement in the particular country.

  In addition, care should be taken to ensure that such engagements are not controlled or significantly influenced by those having responsibility for the sale of the company's products. Scrupulous compliance with local rules governing engagements with healthcare providers is also essential. Clear records should be made and retained describing why a particular engagement occurred. Relying on the recollection and co-operation of company personnel who may or may not be employed by the company five or ten years in the future is no substitute for written documentation and other issues prepared before the particular engagement is approved.

- **Compliance with industry codes.** The Eucomed Code of Ethical Business Practice (Europe), the Prescription Medicines Code (UK) and the PhRMA Code on Interactions With Healthcare Professionals (US) are just three examples of the codes that healthcare companies have developed and implemented around the world to govern interactions

between healthcare companies and healthcare providers. Healthcare companies are advised to take these industry codes into account when developing their compliance programmes.

Compliance with applicable industry codes does not necessarily protect a company against a bribery charge. However, it generally reduces the risk of an allegation being made. By contrast, failure to comply with an industry code can substantially increase risks that accompany activities such as the following:

- selection of investigators;
- corporate hospitality;
- charitable and political contributions;
- support for conference attendance and the location of company-sponsored events.

- **Communicating a high-level commitment to bribery prevention.** An appropriate tone at the highest levels is essential to any effective compliance programme. If the company's leaders do not have detailed knowledge about the company's compliance programme or fail to repeatedly communicate their commitment to the programme, employees develop a casual attitude towards compliance. Responsibility for communicating a company's commitment to compliance cannot be left to the company's compliance officers, auditors and attorneys. The company's CEO and sales executives must take personal responsibility for making clear that compliance is part of the company's business strategy.

- **Developing a structure and assigning day-to-day responsibility for preventing bribery.** There are many ways to structure accountability for an anti-corruption programme. An anti-corruption programme is most effective when one high-level individual, preferably at a senior officer level, has overall responsibility for the programme. Even if a company has a compliance committee, tasking one person on the committee with overall responsibility creates a clear channel of communication to the company's senior officers and board, including the board's audit committee. Other individuals should be given appropriate assignments to oversee compliance on a day-to-day basis. This could include local compliance officers, division heads, business unit managers and sales team supervisors.

  Regardless of how oversight is structured, those tasked with day-to-day monitoring of compliance should have access to adequate resources to do their jobs. That includes having appropriate decision-making and/or disciplinary authority, as well as direct reporting access to someone who can assist with potential problems or difficult decisions.

- **Embedding the company's compliance programme.** Making an anti-corruption compliance programme part of a company culture requires the joint efforts of many company components, from management to audit to legal to human resources. All company employees who can affect the company's compliance risks must be appropriately trained, regardless of their location.

  A company also must consider whether any of its other company policies or procedures may foster improper behaviour under anti-corruption laws. Tying most of the compensation of members of a company's sales team to sales volume may create, for example, an incentive for certain individuals to "make the sale at any cost". This is particularly true in countries characterised by endemic corruption. Performance evaluations and compensation plans should take into account an individual's compliance with a company's compliance policy and reward those who demonstrate good judgment in challenging situations. Human resources and managers should emphasise to new employees that non-compliance will not be tolerated.

- **Monitoring and refining a company's bribery prevention programme.** As times change, compliance also must change. A company's risks must be periodically assessed, and changes made to the compliance programme. Regular in-person training sessions with employees are a good opportunity to engage in frank discussions about what is going well and what challenges employees are facing. Once those dealing with these issues on a daily basis understand the importance of compliance, they often can provide excellent ideas for developing effective policies and procedures.

  In addition, regular monitoring of compliance will help to spot potential issues before they become a problem. For example, paying for a government official's meal at a modest restaurant may be acceptable on a one-off basis. It is very likely to be inappropriate, however, if done frequently.

- **Responding to reports of non-compliance.** Regardless of the excellence of a company's anti-corruption programme, the real test of a company's compliance commitment is in dealing with problems that arise. Responding to reports with the appropriate level of seriousness shows commitment to compliance. Importantly, business unit managers should understand the importance of elevating anti-corruption concerns to the next level, as appropriate.

- **Avoiding legacy liability.** A substantial percentage of the bribery prosecutions that have been launched over the past several years have involved "legacy" liability, that is, liability for corrupt behaviour by an acquired company that was not discovered before the acquisition was made. Although the SFO in the UK has suggested a willingness to consider protecting companies from legacy liability when the corruption is discovered through pre-acquisition due diligence and the acquiring company alerts the SFO to the problem before the transaction has closed, the US enforcement officials have not shown a comparable willingness. The US authorities instead advised acquiring companies that suspect corrupt behaviour to use other mechanisms to protect themselves, including delaying the acquisition until corruption problems have been fixed and creating an escrow account to cover appropriate penalties.

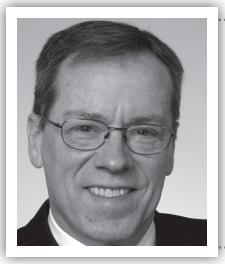
Although developing, implementing and periodically refining a company's compliance programme takes time and resources, the costs of actual or perceived non-compliance can far overshadow a

company's compliance investment. These costs include the costs of doing the following:

- Addressing non-compliant behaviour.
- Dealing with government enforcement authorities.
- Paying civil and criminal fines.
- Covering with the costs of shareholder claims.

A bribery conviction also can lead to debarment from government contracting, imposition of an expensive external compliance review and imprisonment for individuals. In addition, those investigated or prosecuted for corruption can face suits from shareholders and competitors. Importantly, a company's efforts over decades to develop a reputation for ethical behaviour can be ruined by one widely publicised instance of corrupt behaviour.

CONTRIBUTOR DETAILS



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