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Rebuilding Haiti: Beware of the FCPA

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On Jan. 12, 2010, late in the afternoon, an earthquake registering 7.0 in magnitude struck Haiti, with aftershocks following through the next several days. We all saw the devastation — the terrible loss of human life and the vast destruction of property and infrastructure. As it has done in the past, the world responded with rescue teams, relief efforts and financial aid tending to the immediate needs of Haiti, but rebuilding the country may take decades.

Many U.S. companies are exploring ways they can get involved in the rebuilding process — some for philanthropic reasons and others who simply view Haiti as a business opportunity. Whatever the motivation, navigating the hurdles for doing business in Haiti will be challenging. What is clear from the past few months is that maneuvering through the immigration, licensing and government system in Haiti can be frustrating and difficult and that corruption in Haiti is a reality that anyone doing business in Haiti cannot ignore.

According to Transparency International (TI), an international charity based in Germany, Haiti has one of the highest rates of corruption of the 180 countries it evaluates. TI has created a Corrupt Perceptions Index (CPI) to quantify the perceived level of corruption in a particular country, which ranges from zero (perceived to be highly corrupt) to 10 (perceived to have low levels of corruption). Haiti's CPI scores have been below 2 for the past four years.

The U.S. and Haiti have bilateral agreements and treaties in place to encourage foreign investment in Haiti, but other obstacles remain — poorly administered ports, lengthy and expensive Customs processes, red tape associated with obtaining work visas and permits, irregular supply of utilities, restrictions on owning property, poorly trained local human resources, and limited access to good financial information.

To navigate these various barriers, companies often hire consultants. These individuals often have knowledge and experience that can save companies valuable time and money, but their knowledge of working the system may also include participating in what the United States might consider to be bribes of government officials, which is prohibited by the Foreign Corrupt Practices Act.

The FCPA prohibits the bribery of foreign government officials by U.S. persons for the purpose of obtaining or retaining business. The United States Department of Justice has made FCPA enforcement one of its top priorities in recent years, and has brought more FCPA prosecutions in the last five years than in all of the previous 26 years dating back to the passage of the FCPA statute in 1977.1 Additionally, the Justice Department has begun employing the "sting operation" to target suspected FCPA violators.

Recently, 22 executives and employees of companies in the military and law enforcement products industry were indicted for conspiracy and for violating the FCPA, for allegedly offering to pay bribes to undercover FBI agents posing as foreign government officials. The sting operation is the first large-scale use of undercover law enforcement techniques to pursue violations of the FCPA, and it is also the largest action ever undertaken by the Justice Department against individuals (as opposed to companies) for FCPA violations. Use of the undercover sting technique is commonplace for federal prosecutions of drug cases but has rarely been seen in white collar cases. The decision to employ this technique to pursue potential FCPA violations marks a shift in Justice Department strategy and serves as a signal that the government is actively policing the global commerce arena.

In November of last year, Laney Breuer, the assistant attorney general of the Criminal Division, warned that corporate executives would be under the microscope for actions taken by their companies overseas. Breuer made the point that under his leadership, the Justice Department would be targeting individuals as well a companies, stating "prosecution of individuals is a cornerstone of our enforcement strategy."

With this backdrop, U.S. companies attempting to participate in the reconstruction of Haiti should be on high alert. As discussed above, the perceived risk of corruption in Haiti is very high, and the Justice Department is actively policing suspected overseas bribery cases. Thus, management should scrutinize its interactions with consultants, agents and Haitian government officials. Recent FCPA violations prosecuted by the Department of Justice include instances of:

- Consulting fees funneled to political figures — U.S. companies may knowingly or unknowingly pay corrupt government officials through seemingly harmless and ordinary expenses. Fees paid to consultants and agents should be for legitimate work performed; they are not permitted to line the pockets of a political figure who is accepting a bribe for a desired outcome;

- Travel and training costs for political figures and executives of state-owned companies — U.S. companies seeking to contract with foreign countries or government-owned companies may not misrepresent the nature or purpose of its expenses. Recent examples include companies recording business travel and training costs while actually treating management of state-owned companies and their family members to expensive vacations to unrelated destinations;

- Charitable contributions made to entities at the request or direction of foreign political officials;

- Lavish gifts presented to government representatives or their family members; and
- Labor costs paid to parties who performed no actual services

Under the FCPA, a U.S. parent company of a foreign subsidiary is held responsible for the misdeeds of the subsidiary's employees and agents, meaning that U.S. companies seeking to participate in the reconstruction of Haiti should consider the following:

1. Develop a comprehensive FCPA policy — Companies should develop comprehensive compliance problems that include controls to ensure compliance with the FCPA. Both domestic and foreign personnel should be trained to understand the requirements of the FCPA and how to report any suspected violations that they observe.

2. Insist on the right to audit — When establishing relationships with contractors, agents, or consultants doing work abroad, U.S. companies should insist on having a right to audit the other party's financial records and all supporting documentation. If the agent, consultant or contractor is reluctant to agree to such a term or refuses to allow a transparent inspection, the U.S. company should view this with caution and consider the implications.

3. Monitor compliance — It is not enough to simply screen foreign agents or consultants for integrity and reputation at the beginning of the relationship. The U.S. company must also monitor compliance with FCPA and other U.S. laws on an ongoing, regular basis. The agents represent the company, and therefore responsibility for compliance remains with the company. In addition, personnel in a foreign subsidiary may assume that certain behaviors or inducements acceptable in their country are acceptable and legal in the U.S., when they are not. Therefore, adherence to internal controls is crucial to staying out of trouble.

4. Investigate "red flags" — When suspicion arises or unusual trends are observed outside the normal course of activity, an internal investigation may be warranted. Professionals experienced in funds tracing, government investigations, and deciphering falsified financial records may assist you in determining whether an FCPA violation has occurred. Red flags are those things that alert you that something may not be right, such as:

- Success in obtaining contracts in fields or countries that well-suited competition is not experiencing similar levels of success;
- Increased levels of certain expenses that should not be increasing, i.e., an increase in labor costs when hiring freeze is in effect, or travel when no meetings are taking place;
- Increased appearance of "consulting fees" on the financial books of a foreign subsidiary; and
- Ease of navigating Customs, port authority, or other bureaucratic landscape beyond that which other subsidiaries or competitors experience.

By understanding the requirements of the FCPA, implementing appropriate compliance programs, performing periodic compliance investigations, and investigating red flags, U.S. companies can mitigate the risk of violating the law. If a violation has occurred, companies should investigate the incident(s), address the offending parties and outcomes, develop internal controls to prevent recurrence, and discuss with counsel the process of self-reporting.

Related Practices

Antitrust and Trade Regulation
Nonprofit Organizations
White Collar Crime & Government Investigations