# Insights from US anti-bribery enforcement

RICHARD ALBERT

& NIALL O'HEGARTY

Turning up the heat on businesses claimed to be engaged in foreign bribery is quite the rage in international law enforcement circles. Perhaps spurred by the Organization for Economic Co-operation and Development's March report describing Canada's anti-bribery efforts as "lagging," Canadian authorities have now joined the trend, as evidenced by the June conviction of Niko Resources Ltd. for violating the *Corruption of Foreign Public Officials Act*, and the RCMP anti-corruption unit's reportedly nearly two dozen ongoing investigations.

In recent years the U.S. has also seen a drastic increase in prosecutions under its *Foreign Corrupt Practices Act* (FCPA). The experience of U.S. companies subject to this wave may yield some valuable insights for Canadian lawyers and businesses, particularly in implementing anti-bribery compliance programs.

Like its Canadian counterpart, the FCPA prohibits companies from offering anything of value to foreign officials in order to obtain or retain business. For years after its 1977 enactment, the law was a backwater, but that has changed dramatically. In 2008 alone, U.S. authorities brought as many enforcement actions as in the three years from 2004 through 2006. In 2010 they more than doubled the 2008 total, including eight of the 10 largest FCPA settlements ever, and total penalties exceeded US$1.6 billion. In the words of one top U.S. Department of Justice (DoJ) official, "we are in a new era of FCPA enforcement; and we are here to stay."

> "[I]dentifying the elements of a program is one thing; the harder part is implementing it and making it work effectively.

This flurry underscores the importance of a well designed compliance program for any business engaged in significant international activity. The biggest value of such a program is in avoiding behavior likely to result in law enforcement interest in the first place. Further, although no program can be perfect, when misconduct does occur, it will likely be revealed earlier and thus contained. Finally, having such a program enables a company and its senior managers to mitigate the legal consequences of any failure.

Most elements of an effective anti-bribery compliance system are common to any well-designed compliance program. Many are found in publicly filed plea or deferred prosecution agreements between the DoJ and companies subject to enforcement proceedings. Key elements include:

- clear written policies against violations of bribery laws;
- ongoing support for such policies from senior management, including evaluating manager performance based on compliance;
- clear standards governing business gifts, travel, entertainment, donations and facilitation payments;
- ample compliance personnel reporting directly to senior management or the board of directors;
- financial control procedures designed to ensure accurate recordkeeping and detect misuse of funds;
- effective anti-bribery training for relevant employees;
- a due diligence program for third parties conducting business on the company's behalf;
- periodic audits of anti-bribery compliance; and
- effective mechanisms for employees to report potential violations without fear of retaliation.

Of course, identifying the elements of a program is one thing; the harder part is implementing it and making it work effectively. But experience assessing the compliance failures associated with both significant FCPA violations and with less serious but still damaging misconduct has yielded some hard-won insights. They include:

- a focus on countries with the most significant endemic corruption problems, where the majority of foreign bribery issues arise;
- a focus on areas where the financial stakes to the business from interaction with government — from, for example, bureaucratic delays or permit denials — are potentially highest;
- limiting the use of "agents" to conduct business on the company's behalf;
- avoiding rules or procedures that are overly restrictive or cause excessive delay — they will be circumvented, creating further problems;
- training new employees right away — lengthy training delays are often associated with problem incidents;
- translating pertinent rules, policies and training programs into the native language of relevant personnel;
- calibrating the amount of due diligence conducted by third parties to location-based and functional risk;
- when a third-party contractor is itself subcontracting out significant relevant work, ensuring that due diligence is conducted on the subcontractor.

Above all, it is critical to promptly investigate any allegations of potentially improper conduct and take immediate steps to remediate problems found. Where appropriate, conducting an internal investigation, under the supervision of counsel to maintain privilege, can provide great advantage from a legal standpoint and provide important information needed by the business.

Canadian companies should also note that because other countries' foreign bribery laws, like the FCPA, will often impose liability on a company for corrupt payments by a broadly defined category of "agents," many companies will not do business with companies lacking their own robust compliance programs. Thus, a compliance program upgrade may be required to compete for valuable relationships with companies seeking to limit their own exposure.

Implementing a proper anti-bribery compliance program takes significant money, time and effort, but, in today's climate, it's nothing compared to the costs of not having one. ■

*Richard Albert, a partner at Morvillo, Abramowitz, Grand, Iason, Anello and Bohrer, P.C. in New York, focuses his practice on white collar criminal and regulatory defence. Most recently, he participated in a three-year court-ordered compliance monitorship of a company convicted of FCPA violations. Niall O'Hegarty is a senior associate at the same firm, focusing primarily on white collar criminal and regulatory defence, including matters related to the FCPA. He is a graduate of Osgoode Hall Law School.*