Balancing Act – Anti-Bribery Laws in International Business

Cliff Sosnow
Prakash Narayanan
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Setting the Stage

“… secured contracts by systematically funneling bribes through slush funds…”

“… annual bribery budget of $40 to $50 million…”

“… determined it was necessary to pay bribes to individuals… to obtain contracts…”

“… pays US$1.3B to settle corruption probes”

“… record $559 million to settle bribery and corruption charges…”

“… chairman faces seven-year prison sentence…”

• These are “real-life” instances of major multinationals involved in bribery of foreign officials.
Setting the Stage – Recent Examples

- **Siemens**
  - involved in widespread bribery of foreign officials involving 14 countries and payment of over $1.4 billion in bribes
  - resulting in investigations in the US and in Germany and fines and settlements totaling over US$1 billion.
  - Managing Board failed to implement appropriate internal controls despite internal and external warnings
  - former members of the Managing Board may face criminal charges

- **KBR (a Halliburton subsidiary)**
  - involved in payment of $182 million in bribes to Nigerian officials
  - the Chairman of KBR was aware of payments and pleaded guilty
  - possibility of 7 years imprisonment and $10.8 million in restitution payment by Chairman
  - in addition, Halliburton has agreed to pay $559 million to settle DoJ and SEC charges.
Ethics and Anti-Bribery Rules

- The quotations indicate:
  - Extent to which bribery may be ingrained and even encouraged in some corporations
  - Prosecution can result in severe monetary consequences, reputational damage and liability can extend to a personal level
- Raises issue of ethical and moral attitude towards bribery and corruption
  - Giving bribes is as objectionable as receiving it
  - Undermines good governance and economic development (as undermines efforts of governments to keep corruption low and makes public pay more for goods and services – since bribe payer compensates for bribe through increased cost of providing the goods and services)
  - Anti-bribery rules are a prime example (in the business context) of overlap between law and ethics
International Rules

• OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
  – Came into force in 1999
  – Represents the first binding convention aimed at combating bribery and corruption in international business
  – Preamble recognise that bribery raises serious moral and political concerns
  – Requires a party to prosecute nationals wherever located, if the party exercises such jurisdiction in other situations (even if there is no territorial nexus; and unless the party only exercises territorial jurisdiction)
  – Requires each signatory nation to make it a criminal offence to offer or give foreign public officials any undue pecuniary or other advantage to foreign public officials
  – Prohibits creation of off-book accounts, inadequately identifying transactions etc.

• Concerns/Comments
  – OECD Convention is not a complete response to the bribery issue and is limited in scope
  – e.g. does not deal with criminalizing acceptance of bribes
  – Does not deal with bribery of political parties (including the distinction between lobbying and bribery)
  – Grants deference to local law - allows for bribes, if permitted by domestic law (issue of is it no longer a bribe if permitted under local law?)
  – Doesn’t deal with people about to take public office
  – Doesn’t apply to subsidiaries of OECD companies operating outside OECD jurisdictions
Other International Rules

• Other International Rules exist
  – UN Convention Against Corruption (2005 – 140 signatories, including Canada)
    • Covers measures to help prevent corruption, the mandatory criminalization of corruption offences, a commitment to international cooperation in the fight against corruption, provisions to assist with asset recovery, etc.
  – Inter-American Convention Against Corruption (1997 – over 30 signatories, including Canada)
    • Covers measures setting standards for proper fulfillment of public duties, creating deterrents for bribery of domestic and foreign public officials, provisions for extradition, etc.

• Possibility of multiple international rules having different requirements
  – Basic rule for corporations – proscribe any form of bribery; create internal compliance systems; demonstrate commitment
Canadian Law - Corruption of Foreign Public Officials Act

- The Canadian legislation which implements the OECD Anti-Bribery Convention is the CFPOA
- CFPOA prohibits
  - giving or offering any advantage or benefit, directly or indirectly, of any kind to a “foreign public official”
  - in order to obtain or retain an advantage “in the course of business”
  - “foreign public official” includes a person who holds a legislative, administrative or judicial position of a foreign state or performs public duties or functions for a foreign state and official or agent of a public international organization
- Contravention results in penalty of up to 5 years in prison, or a fine (with no maximum)
The CFPOA is broad legislation that applies to any business carried on in Canada or elsewhere for profit.

Canada has jurisdiction when the offence is committed in whole or in part in Canada or there is a “real and substantial” link between the offence and Canada.

- *e.g.* A Canadian corporation may be liable for the actions of an overseas subsidiary if there is a “real and substantial connection” between the offence that occurred overseas and the Canadian corporation, such as the Canadian corporation directing the subsidiary to make the illegal payments.

There are certain exceptions:

- If the payment is permitted under domestic law.
- If the payment is of “reasonable expenses incurred in good faith” directly related to the promotion of products and services or performance of a state contract.
- If the payment is a “facilitation payment”, i.e. a payment to expedite or secure performance by a foreign official of an act of a routine nature e.g. issuance of a permit or license to do business, processing of official documents, provision of police protection, etc.

*Blakes*
CFPOA - Concerns

• Certain concerns regarding CFPOA (as per OECD / TI; some of which government recognizes in its annual report to Parliament – but unclear as to what changes to legislation, if any will arise from this)
  – Not a complete response to the OECD Convention –
    • e.g. does not address accounting requirements;
    • does not apply the nationality jurisdiction (i.e. doesn’t apply to Canadian nationals wherever they reside (e.g. outside Canada), unlike other countries’ legislation that makes this clear
  – CFPOA Tax inspectors are prohibited from reporting suspicions of bribery (based on confidentiality) (Canada is the only OECD country to do so)
  – Weak enforcement regime, perhaps due to criminal burden of proof (US has civil and administrative penalties, in addition to criminal penalties)
• The US equivalent legislation is the Foreign Corrupt Practices Act, which is similar to Canadian law, although more rigorously enforced (as demonstrated by Siemens, KBR, etc.) and also more detailed (e.g. has accounting provisions, applies nationality jurisdiction, has a voluntary disclosure program, knowledge that payment will be used for a bribe is also a violation)
• Canada appears to be moving towards more rigorous enforcement
  – RCMP created an International Anti-Corruption Unit in 2008 with offices in Ottawa and Calgary
  – In January this year, Niko Resources, a Calgary based oil Co. with assets in South Asia disclosed that it was being scrutinized by RCMP’s for allegedly bribing senior govt. officials in Bangladesh.
Practical Compliance Tips

• Review and develop internal audit mechanisms, including accounting practices to identify unusual payments, systems to raise ‘red flags’, whistle-blower policies, a code of business conduct
• Send strong message from top management that corruption and bribery is not acceptable
• Conduct adequate due diligence when selecting an agent / partner in connection with overseas activity
• Consult local counsel on legality of payments
• Lobbying is different from bribery – both are intended to influence opinion, but bribery involves giving advantages or benefits as consideration
• Consider joining organizations such as TRACE (non-profit organization that pools resources to provide anti-bribery compliance solutions)
Conclusions

- Anti-bribery legislation is a prime example of law reflecting ethical considerations
- Ethical behaviour also makes good business sense
  - Loss of reputation
  - Criminal and civil penalties
- Recognise moral and ethical aspects as well as legal implications of actions
- Bribery of foreign public officials is an offence in Canada and number of other countries, and bribery of domestic public officials is an offence in most countries
- Anti-bribery and anti-corruption laws in Canada and elsewhere are broad and far-reaching and enforcement of these laws is increasing
- Accepting the ethical and moral dimensions is crucial to providing appropriate guidance from senior management and developing strong internal guidelines
QUESTIONS?

Cliff Sosnow
cliff.sosnow@blakes.com
613 788 2233

Prakash Narayanan
prakash.narayanan@blakes.com
416 863 2907