The FCPA in Emerging Markets: Evaluating Risks of Bribery and Corruption

I am attending the Ethisphere Global Ethics Summit this week in New York City. It is presented by Ethisphere and Thomson Reuters. This post will be first of several based upon the comments of the panelists. In today's posting we will discuss some of the issues faced in emerging markets, regarding anti-bribery and anti-corruption.

The panelist listed several characteristics that appear across the spectrum in emerging markets. These markets usually have a large and multi-leveled bureaucracy which can make many demands for permits, licenses and other types of governmental approvals. In opening any new business in an emerging market there are usually multi-governmental touch points where bribes can be demanded. Due to these factors there is a culture of small time, almost daily corruption in many emerging market which can often impact the attitude of employees.

Another issued touched upon was that many US companies may have a lack of a full understanding of just whom it is doing business with when it goes into an emerging market. This includes not only the catch-phrase of "Know Your Customer" but also "Know Your Agent" and "Know Your Supply-Chain Vendor". As the FCPA applies to foreign government and their representatives, a key issue in transactions in emerging markets is just who your customer is or who they might be. In countries such as China, the reach of the government is so great that it extends to most commercial enterprises. This means that a US company may be dealing with an agency or instrumentality of a foreign government and not appreciate that fact.

Douglas Nairne, Global Head of World Check discussed some of the difficulties US companies face when attempting to perform due diligence on a foreign business representative or supply chain vendor in an emerging market. It is often difficult to obtain information similar to that available in the US or other western country. Many times public records are not available online so that a much more lengthy and detailed search protocol is required. This can significantly lengthen your due diligence process. The situation can also exist where certain records are simply not in the public realm. Lastly is the issue of the quality of the records. Many times, such records are not updated on any type of regular basis, such as annually. This is particularly true for corporate filings which may list officers and directors so this can also present problems.

Cheryl Hug, an Ethics and Compliance Officer for Hewlett-Packard discussed some of the cultural sensitivities that a US company must demonstrate in emerging markets. Initially, she stated that US companies must train their US employees who will relocate to or work with the emerging markets on such cultural sensitivities. She also indicated that it was important to understand how to deal with your company's service providers in such an environment. Lastly she spoke to a theme of "reverse colonialization". She said that when discussing compliance and ethics with those in emerging markets, she attempt to stay away from citing to the FCPA but uses the broader terms of anti-corruption and anti-bribery. Otherwise it may sound like the rich, western nation is simply imposing its values on the former colony.

There was a lengthy discussion of when a US company should walk away from a transaction in an emerging market. Mark Mendelsohn, partner at Paul, Weiss stated that he viewed transactional due diligence as more "art than science". He suggested that there is no perfect answer to this question but each deal should be evaluated by a variety of factors, which if they exist should cause your business to walk away from a proposed transaction. The first factor was that the business is not sustainable absence real or perceived corruption. The second was if the cost to remediate any bribery situation is so great that it destroyed the business value of the transaction. The third factor was lack of full information which would allow a reasonable risk based analysis.

A related topic was that of joint ventures. Deirdre Stanley, General Counsel for Thomson Reuters, discussed the issue of knowing who you joint venture partners actually were. This is to ensure that you had no government officials who might be receiving anything improper under the FCPA. She also stressed key components were transparency in joint venture governance and strong contractual anti-bribery and anti-corruption terms and conditions.

The group emphasized however that the problems were manageable if you have time to navigate this bureaucratic system but if you need something done in a hurry or at the last minute you are subject to being squeezed for money. So good business planning is a definite key. Your company should go into any venture in an emerging market with its eyes open and with a robust business management plan in place.