

## **Provenance in the Supply Chain: Transparency and Accountability under the FCPA and Bribery Act**

In the October 2010 issue of the Harvard Business Review there is a Spotlight article on “*The Transparent Supply Chain*”. In this article, author Stephen New discusses the evolution in Supply Chain from opaqueness to transparency and focuses on the “quality, safety, ethics and environmental impact” of the Supply Chain on the triumvirate of companies, customers and government. New terms this information as “*Provenance*” and this is relevant both up and down the Supply Chain.

New points out that customers are becoming increasingly concerned with not only the authenticity of the goods they purchased but also the ethics of how the goods were manufactured in the Supply Chain. Companies have long been concerned with the quality of goods and services they receive from their Supply Chain vendors and tracking this information can provide assurances of high quality control. Increasingly the third prong of the triumvirate, the government, is now requesting such information and such transparency in the area of anti-corruption and anti-bribery compliance.

Under both the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, it is now critical that companies bring their Supply Chain vendors into their overall compliance programs. This message has been given renewed emphasis with the recent report in the FCPA Blog (and others) that the freight forwarder Panalpina may be close to a settlement with the Department of Justice (DOJ) over its FCPA violations. One of the major fallouts from the Panalpina case was the ripple effect through the energy industry, after the initial disclosure that Panalpina had paid bribes in Nigeria, while working as a freight forwarder to Vetco Grey. Other energy companies which had used Panalpina to bring goods and materials into Nigeria came under DOJ investigation for possible FCPA violations; these other companies were reported to include Transocean, GlobalSantaFe Corp., Noble Corp., Tidewater, Nabors Industries, Tidewater, Schlumberger, Shell and Global Industries.

In addition to the effect of the Panalpina matter, the new released UK Bribery Act Consultation Guidance specifically lists due diligence on Supply Chain vendors as a key component of its anti-bribery and anti-corruption *best practices*. Principle Six of the Guidance states, “*The commercial organisation has due diligence policies and procedures which cover all parties to a business relationship, including the organisation’s **supply chain**, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the commercial organisation does business.*” This means that due diligence should be engaged to establish whether individuals or other organizations involved in key decisions have a reputation for bribery and whether anyone associated with them is being investigated, prosecuted, or has been convicted or debarred for bribery or related offences. Consideration should be given to the risks associated with politically exposed persons where the proposed business relationship involves, or is linked to, a

prominent public office holder. Lastly, a review of Supply Chain vendors own compliance programs should be effected.

All of this brings us back to New's article and his terminology of "*Provenance*". In the FCPA/UK Bribery Act context this should be defined as full transparency and accountability in all areas of due diligence and the relationship after the contract is signed with the supplier. A company should, on a periodic basis of not less than every three years, conduct rigorous compliance audits of its operations with its Supply Chain vendors. These audits would include, but not be limited to, detailed audits of the Supply Chain vendor's books and records, with specific attention to payments and commissions to agents, consultants, contractors, and subcontractors with responsibilities that include interactions with foreign officials. This compliance audit should include interviews with employees, consultants, agents, contractors, subcontractors and joint venture partners. Lastly a review of the FCPA compliance training provided to the Supply Chain vendor should be included.

Just as *Provenance* is the new by-word in Supply Chain management in the Harvard Business Review; transparency and accountability in the area of anti-corruption and anti-bribery should have the same urgency to companies' subject to the FCPA and/or UK Bribery Act. The Panalpina case is a stark reminder of the need for continued diligence, before and after the contract is signed, in the compliance arena.

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