




Compliance and Risk Management

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Beijing	Houston	Palo Alto	Sydney
Boston	London	Paris	Tokyo
Brussels	Los Angeles	San Francisco	Toronto
Chicago	Moscow	São Paulo	Vienna
Frankfurt	Munich	Shanghai	Washington, D.C.
Hong Kong	New York	Singapore	Wilmington



Anti-Corruption Enforcement Trends

- US DOJ
 - 130 open investigations
 - Industry-wide inquiries: pharmaceutical (new); medical device, oil and gas freight forwarding and logistics
- US SEC
 - Specialized task force
 - Focus on disgorgement of profits
- International cooperation
 - Streamlined MOUs and information-sharing agreements
 - Regular meetings regarding open investigations.

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FCPA Jurisdictional Issues

- DOJ takes a broad view of:
 - Foreign government official
 - “within the territory of the United States”
 - “means and instrumentalities of US commerce”
- SEC exerts jurisdiction over books and records, internal controls of US registrants, including foreign private issuers
- Unlitigated issues:
 - Jurisdiction over non-US subsidiaries and affiliates of US entities: many companies have settled on an “agency” theory
 - Liability of non-US parent for actions by US sub or US persons
 - Jurisdiction over non-US persons: specific connection to the US and general jurisdiction

Issues Arise in Many Ways

- Regulatory requests and investigations, including in industry-wide probes
- Competitor lawsuits, complaints
- Whistleblower hotlines
- Internal Audit reviews
- Compliance reviews / risk assessments
- External Audit reviews, annual audits
 - US Registered Public Accountants – Section 10A obligations
 - Europe – Eighth Company Directive

Voluntary Disclosures

- US and UK regulators contend that there are real and tangible benefits from disclosure, in terms of:
 - Intrusiveness of investigation
 - Nature of disposition
 - Amount of fines and disgorgement
 - Post-settlement monitoring
- Halliburton:
 - US Sentencing Guidelines fine range: \$376.8 - \$753.6 million
 - \$402 million criminal fine plus \$177 million civil disgorgement (DOJ noted “egregious” nature and extended duration of conduct)
- Baker Hughes:
 - US Sentencing Guidelines fine range: \$19 - \$38 million
 - \$11 million criminal fine, \$10 million civil fine, \$23 million disgorgement (SEC brought action for violation of prior SEC order)
- Latin Node:
 - US Sentencing Guidelines fine range \$4.2 - \$8.4 million
 - \$2 million criminal fine

Post-Settlement Remediation

- Compliance responsibilities assigned to senior personnel and proper “tone at the top”
- Enhanced policies, procedures and guidelines
- Periodic compliance training and certifications
- Hotline and/or helpline procedures
- Appropriate disciplinary procedures and compliance incentives
- Enhanced diligence and contractual terms for agents, consultants, and intermediaries
- Enhanced transactional due diligence
- Control over higher risk activities:
 - promotional expenses, travel and sponsorships
 - charitable and political contributions
 - Managing regulatory relationships
 - Addressing demands for facilitating payments
- Periodic auditing of compliance structures

Monitorships

- Formalized selection procedures requiring:
 - Independence (before and after monitorship)
 - Presentation of alternatives
 - Specific approval process
- Standardized terms
 - Duration and flexibility of term
 - No attorney-client relationship; monitor is a third party
 - Scope of monitor's work
 - Adoption of monitor's recommendations
 - Communications between monitor, corporation, Department of Justice
 - Periodic, written reports

Anti-Corruption Transactional Due Diligence

- Legal Framework
 - Successor Liability
 - Tainted Assets
 - Preparation for 'Day One' Compliance
- Procedures should be tailored to risk profile of transaction (See DOJ Opinion Release 08-02 – Halliburton Transaction)
- Basic techniques include:
 - Data room request
 - Assessment of international operations
 - Analysis of government customers; obtain contracts and agreements.
 - Analysis of regulatory relationships.
 - Specific information about third party agents
 - Sales, marketing, donations, political contributions
- Carefully consider timing and disclosure obligations

Class Actions - Member States To Watch

- Italy's new law permitting collective actions—*azione collettiva risarcitoria*—in Italian courts recently went into effect.
 - It empowers consumer groups and court-approved plaintiff classes to sue on behalf injured persons under a number of legal theories including antitrust, breach of contract, tort, and unfair competition.
- In Germany, the *Bundestag* will consider renewing the Capital Markets Model Case Act (*KapMuG*), which provides for collective litigation in securities cases and which is set to expire in November 2010.
 - Germany originally enacted the Model Case Act in November 2005 in order to manage mass securities litigation by permitting the Higher Regional Court to stay related cases pending in other courts and decide common questions of fact or law for one case—a model case—which then would be binding on the other cases.
- In Poland, the lower house of Parliament recently passed a collective action bill that allows contingency fees to claimants' attorneys. The upper house is now considering the bill.

DG COMP Collective Redress Initiative

- DG COMP is proposing collective-redress mechanisms as part of an EU-wide reform of damages actions in antitrust cases.
 - DG COMP's proposals are part of a comprehensive initiative that includes proposals to reform evidence-gathering procedures and calculating damages in antitrust cases.
 - The proposals include provisions empowering claimants to seek broad, burdensome discovery from defendants.
- DG COMP is leading the charge on collective-redress initiatives.
 - Proposals adopted by the Commission in antitrust cases likely also eventually will apply in other areas, including consumer-protection, environmental, and financial-services cases.

DG SANCO Collective Redress Initiative

- DG SANCO is proposing EU-wide reform to introduce collective litigation to enforce consumer rights.
 - DG SANCO has proposed several collective redress options and sought public comment.
 - The final structure remains uncertain, but there is a prospect for a burdensome, intrusive system fraught with many U.S. system-type problems.
 - Bottom line: the Commission appears moving toward adopting some form of collective-redress mechanisms.