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Insurers Cannot Assume They Are Safe From FCPA

Corruption of public officials has not been viewed as a significant problem for the insurance industry. That may change. Fighting corruption is high on the international agenda. These efforts are both evidenced and given impetus by the United Nations Convention Against Corruption ("UNCAC"), now ratified by over 100 countries. Indeed, there are now seven international anticorruption conventions, including UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

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Investigating and punishing companies paying bribes to win public business is an increasing priority of law enforcement agencies around the world.

In the United States corruption investigations and enforcement actions are at an all time high, with record penalties, orders for repayment of corruptly acquired profits, prison sentences for executives, and the imposition of independently monitored compliance programmes. Total fines were $700 million in 2006, a substantial increase from previous years. That included, for example, the payment by Vetco International Limited of $26 million in fines and penalties, a result of its subsidiaries paying $2.1m in bribes on numerous occasions to Nigerian customs officials.

There is no reason to expect that the insurance industry is immune from corrupt activities. In November 2007, for example, it was revealed that AON was undertaking an internal investigation into possible breaches of anti-bribery laws. The investigation apparently relates to allegations of bribery by energy brokers for the placement of insurance by an Indonesia state-owned oil and gas company.

What is the FCPA?

The Foreign Corrupt Practices Act ("FCPA") is a US statute that criminalizes the corruption of foreign public officials to win or keep business. It is enforced by the United States Department of Justice and the Securities and Exchange Commission.

The FCPA also requires companies whose shares are traded on an exchange in the US to maintain books and records that accurately and fairly reflect their transactions, and to maintain an adequate system of internal accounting controls.

Infringement of the FCPA can lead to civil or criminal penalties. Individuals can be jailed for up to five years. Fines in criminal proceedings can be up to twice the benefit sought by paying the bribe, and civil penalties can equal the gross amount of the benefit gained by the defendant.

Who is subject to FCPA?

Any company which conducts business internationally is likely to be at risk of a FCPA prosecution, if involved in the bribery of public officials.

The anti-bribery provisions have always applied to US citizens, residents or companies, and to issuers of securities which are registered in the United States. They apply to activities within or outside the United States, and companies are liable for the

activities of their officers, directors, employees or agents. Bribery would therefore be caught, even if carried out by foreign employees of a foreign subsidiary of a US company without any steps at all being taken within the United States.

In 1998, the FCPA anti-bribery provisions were extended to foreign individuals or companies who directly or indirectly take steps in the United States as part of a scheme to bribe a foreign public official. This could include the use of a bank account in the United States, wire transfers through the United States or lesser links such as travel or communications through the United States.

The accounting provisions apply both to issuers of US securities, and to their domestic and foreign subsidiaries. That includes subsidiaries in which an issuer has only a minority interest.

Anti-bribery provisions

The FCPA criminalises payments or giving anything of value to any foreign official with corrupt intent in order to obtain or retain business. Corrupt offers are also criminalised. Payments for health-care, education, goods or entertainment could be caught. The definition of a "foreign official" is broad.

Payments made to facilitate or expedite performance of a "routine governmental action", such as obtaining permits or licenses, are permitted, provided that they are properly documented and recorded.

The FCPA also contains specific defences. These include the legality of the payment in issue under the written laws of the country in which it is made. Reasonable expenditure incurred to demonstrate a product or to perform a contractual obligation is also permitted.

Risk areas for the insurance industry

The payment of bribes is often effected via the middleman. The machinery of (re)insurance is oiled by brokers and agents whose financial arrangements may not always be clear to the assuming (re)insurer. The (re)insurer may be exposed to anti-corruption legislation even if no-one in the organization was aware that business was procured by bribery if the broker or agent has a sufficiently close relationship to the (re)insurer.

(Re)insurers should be clear of how brokers are being paid, and ensure that transparent contractual arrangements are in place in relation to payments. Particular care will be needed in high risk countries.

The settlement of insurance claims also poses risks. For example, in some countries reinsurers may be obliged to use local insurers to place insurance. Those local insurers may deal with claims that are made, and bribes could be hidden as expenses of the settlement.

Insurance is a highly regulated industry and regulators are public officials. There is a fine line between the legitimate entertainment of regulators to maintain professional relationships and expenditure which is regarded as corruption.

FCPA enforcement increases D&O risk. Policies are unlikely to respond to fines and penalties are unlikely to be covered, but the often substantial costs of defending an action might be covered. Further, evidence of corruption is increasingly triggering class action securities claims by shareholders, and even civil proceedings seeking compensation by foreign governments and aggrieved competitors. In late July, Siemens announced that it intends to sue former executives for expenses incurred in wide-ranging corruption investigations, triggering a D&O claim of up to US$391.5 million.

Ensuring compliance

Implementing and updating an effective compliance programme is essential, as is ensuring that internal record-keeping complies with FCPA requirements. Proper due diligence is required of all business partners. These steps will also be significant mitigating factors should rogue employees or agents be involved in the payment of bribes.

Internal controls, accurate books and records and independent audit are necessary elements of a compliance programme. Typically, tests should be run on accounting data to identify anomalies and indicators of possible corruption, which should immediately be investigated.

Conclusion

Enhanced scrutiny of publicly awarded contracts around the world means that evidence of bribery and other corrupt practices by companies will increasingly be uncovered. Those paying bribes are at risk of very substantial fines, payment of the profits

made on contracts obtained by corruption, debarment from public contracts and lawsuits from competitors, shareholders and customers. Proper compliance programmes are essential.

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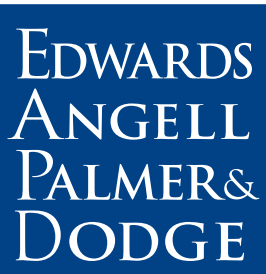

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