

TRENDWATCH



The Rising Risk of Corruption

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Christa (left), a partner with Gowlings, advises on governance and the prevention of economic crime. Formerly General Counsel and Regional Compliance Officer for Siemens, she helped establish its Canadian compliance office, and design and implement its anti-corruption program.

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Canadian companies doing business internationally are being forced to adapt to greater financial and reputational risks against a backdrop of heightened anti-corruption enforcement.

Developed countries, including Canada, who want to level the playing field for business competitors regardless of their home countries are fuelling an aggressive push to fight corruption. The *Corruption of Foreign Public Officials Act* (Canada), and similar legislation around the world, makes it a criminal offence for any Canadian person or entity to directly or indirectly make a corrupt payment to any foreign government official to obtain or retain business. While the primary focus tends to be on bribery, internationally, corruption is broadly viewed as the misuse of entrusted power for private gain and often includes a variety of improper activities such as conflicts of interest, extortion, embezzlement and fraud.

Increased whistle-blowing and the resulting media attention have helped to expand the enforcement network. International collaboration of regulators and enforcement agencies will continue to increase. This has resulted in the following trends:

1 - Enforcement actions resulting in record-setting penalties and disgorgement of profits have grown significantly;

2 - A more aggressive anti-corruption enforcement strategy has led to a greater number of prosecutions of individuals, many resulting in prison sentences;

3 - Anti-corruption enforcement actions have given rise to related law suits involving claims advanced by plaintiffs including shareholders, business partners and other governments;

4 - Further expansion of enforcement has encompassed other areas of international regulatory enforcement, such as money laundering, export control, anti-trust, and other trade and investment regulations.

Regulators and enforcement agencies continue to expand the range of theories on which they rely so that it is not just a specific act of corruption that attracts liability, such as the making of an improper payment, but also knowledge of the improper act, or failure to ensure that such improper acts are not occurring. Another example of the expanded range of theories includes the strict liability of control persons within

companies where such control persons have failed to exercise adequate supervision over the books and records of the organization.

Investigations of corruption by regulators and enforcement agencies have increased dramatically in the last few years. However, “self- investigation” is also on the rise. Faced with allegations of corruption, companies cannot afford to turn a blind eye. The conduct of internal corporate investigations will be increasingly viewed as a component of good governance, whether as part of a regular review of the effectiveness of a governance program, in response to allegations of misconduct, or as a result of regulator or enforcement agency involvement. In determining appropriate sanctions, regulators and enforcement agencies will often give significant weight to how a company responds to allegations of corruption.

What does this mean for your business? Companies and their executives are on notice. Investors and other stakeholders are increasingly watching how companies handle corporate social responsibility, of which anti-corruption efforts are an important element. Business leaders and board members are clearly responsible for managing the risk of corruption.

An essential component of a company’s effort to minimize the potential exposure to bribery and corruption risks is to establish and maintain an effective anti-corruption

compliance program. It is an important ingredient in doing business overseas successfully. A compliance program should be tailored to fit the size and organizational structure of each company. It should ensure that an anti-corruption culture is instilled throughout the company by setting the tone at the top.

An anti-corruption compliance program should address: (1) knowing whom you are doing business with before entering into business combinations and before engaging third-party agents, consultants and suppliers; (2) having a procedure in place to identify questionable payments; and (3) ensuring pre-acquisition due diligence includes corruption-related risks. An anti-corruption compliance program should be clearly communicated to employees and its enforcement should be monitored.

Companies that are competing internationally need to build an effective anti-corruption compliance program to guard against the risk of improper employee behaviour. Anti-corruption compliance programs and internal investigations are becoming vital risk management tools for companies and their boards.

Highly publicized scandals and expectations of increased government enforcement have established corruption risk as an inescapable reality. Ensure anti-corruption compliance is on the agenda in your boardroom and a part of your risk management plan.

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