



# Remote Control

Anti-corruption laws toughen up with stricter legislation from beyond Chinese borders

By Richard Kimber

**T**HE LAST 18 MONTHS TO TWO years has seen marked changes in compliance obligations and the regulatory landscape for foreign invested companies operating in China, and especially for US investors.

The Foreign Corrupt Practices Act (FCPA) has been around since the 1970's; but 2010 saw increased activity in the form of prosecutions and enforcement actions, with fines totaling USD1.7bn, signaling an increasing need for companies who are operating in China to update and properly document their operational procedures or, when looking to acquire or merge with Chinese owned businesses, to engage in detailed due diligence. China has begun to figure more prominently in FCPA investigations as foreign direct investment increased over this period, especially in the western provinces.

The introduction of whistleblower legislation in the United States also increased the need for head offices to conduct on-going corporate compliance audits of their China operations. The traditions of gift giving, incentive payments and Chinese New Year year-end bonuses as well as the use of third party agents could all be problematic and fall foul of the new legislation.

## Here Come the Brits

With the advent in July 2011 of the UK Bribery Act, the need for a general manager or director of local Chinese operations with a UK parent company to be pro-active in corporate compliance will also arise. The Bribery Act comes into force just as this article is published on 1 July 2011, and it requires companies to update and audit their present internal controls and compliance procedures.

The UK Act prohibits the giving of bribes or financial inducements to a third party - whether a governmental official or a private individual. It also focusses on the action itself rather than the intention behind it, by defining an improper action as being the

giving of a bribe or the taking of a bribe. The UK act's jurisdiction extends to UK nationals or residents, and companies or organisations that are established in the UK or that conduct some of their business in the UK. The UK Bribery Act's jurisdiction would also extend to prosecution of the UK Head Company for bribery actions committed by its PRC subsidiaries, which will cause sleepless nights for in-house counsel and the head company's board of directors.

The Bribery Act differentiates from the FCPA in that it can only bring criminal proceedings; however, an individual found criminally liable can be subjected to up to ten years imprisonment and unlimited fines, with similar fines levied on the employing corporation.

## Prevention is Better...

The UK Act also contains a new corporate offence, failing to prevent bribery by an "associated person" of the company. This could include employees, subsidiaries, agents, contractors and JV partners. This is akin to a "strict liability" corporate offence which can only be defended by demonstrating that "adequate procedures" as outlined below, were in place to prevent the act of bribery.

The UK Ministry of Justice has published official guidance on the new Act which is divided into six principles or preparations that a company should put in place to ensure compliance with the UK Act: Proportionate Procedures; Top Level Statement of Commitment (of bribery prevention); Risk Assessment; Due Diligence in respect of Third Parties; Communication and Training of Staff; and Monitoring and Review Procedures

The lesson for all companies conducting operations in China, especially if subsidiaries or affiliates of US or UK headquartered companies, is that detailed compliance programmes will need to be instituted. Regulatory compliance is here to stay.

This will mean that there will be an increased need for specific on-going employ

to make staff aware what type of conduct is permissible – and what is not. Companies will have to ensure that they have included specific terms in employee contracts to cover restraint of trade, trade secrets, bribery and financial inducement issues.

Proper financial records will need to be kept detailing expenditure which is related to marketing and business development. Internal compliance manuals will need to be updated and prepared in order to spell out the limits of authority for each management position in an organisation, as will the reporting requirements where suspected breaches of the compliance manuals are discovered.

Additional steps, in the form of notices and signed undertakings, should also be obtained from local third party suppliers who deal with the PRC local operations, so that they are fully aware of what conduct is not permissible and so that the company concerned can easily demonstrate that corporate governance procedures, record keeping and reporting systems are in place and can be brought into action if there is a suspected breach of the regulations.

Where companies are also considering entering into JVs in China, they will need to spell out compliance obligations to their Chinese partners or insist that the Chinese side give certain specific undertaking in their joint venture agreements. Companies that are considering M&A transactions in China will also have to investigate the principals and management of the Chinese target company to determine if the principals have ties to the Chinese government, and if so in what form. **SBR**

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