OPEN AIR BLOG

I know you've come to expect heavy criticism from me. And yes, I've been somewhat harsh six out of seven times so far. Mainly because the Guidance so far completely fails to provide actual guidance to companies, despite the name of the document.

All that changes with case study #8. It's really, really good.

The case study deals with a constantly recurring issue: "requests" for charitable contributions by local officials. It happens all the time. The cynic in me says that at the very least the official is getting a kickback. At worst, you're in a Schering Plough situation, with the charity being connected to the official, and the SEC comes calling (that case is worthy of its own post: no bribery charge, but a books-and-records violation; how exactly were they supposed to record that payment? Anyway, I digress).

How should a company deal with these kinds of "requests?" You make the donation. Call it realpolitik, call it bowing to circumstances beyond our control, call it folding like a cheap suit, but you make the payment. Try to see it as a glass-half-full situation: the community benefits, you get the contract, it's a win/win. I'm in the middle of an interesting back-and-forth in the comment section of a post on thebriberyact.com. The question is extortion versus facilitation, and whether truly extorted payments should be punished as bribes. I was thinking about the Chiquita Banana situation (terrorist group says, "pay protection or your fields will burn down," they pay, and get prosecuted).

Does this count? It's soft extortion, but I always found an undercurrent of no payment, no contract to these kinds of requests. You'd be right to criticize me for being a little hypocritical here. I'm strong on resisting facilitation payments, but I fold here at the first sign of resistance. For me, the damage of facilitation payments is the disrespect for the rule of law it engenders, and the damage to locals because they can't get services without paying. In one market, for example, a woman who gives birth can't get her baby brought to her without greasing the nurse. "Greasing the nurse" is a phrase that should be banished from the English language, don't you think? It's just wrong on so many levels. But I don't think these evils apply when you're talking about forced donations to benefit the locals.

What you have to ensure, in order to look at yourself in the mirror, is that the donations will actually benefit the locals. Hence, some due diligence is necessary. But let's look at the case study, and its recommendations.

A company (the size of the company isn't mentioned, which is unusual) exports seeds. Its potential entry into a new market is being leveraged to "request" a donation for antiretroviral drugs, The local official says if the seed company pays, it will "be a very positive factor in the Government's consideration" of the license to import seed. So far, so good. Now the official throws in another curve ball: the seed company should donate the money for the retrovirals to a local charity, who will then pay for and distribute the drugs.

What does the case study suggest?

- Make reasonable efforts to conduct due diligence. It suggests consultation with local staff and business partners that the arrangement is not only legitimate, but also that it's in conformity with local laws. The points of information it suggest you collect are a) local laws on community benefits as part of government procurement or, if no local law exists, on any official guidance on the issue, b) information about the local charity identified by the official, and c) any connections between the charity and the official.

- Adopt an internal communication plan to ensure that the transaction is transparent and doesn’t raise expectations that the license to enter the market will be granted.
- Adopt company-wide policies and procedures governing charitable contributions, with an eye toward bribery risk.
- Training and support for staff in the market on the relevant policies, including how to report potential wrongdoing.
- Trend monitoring to ensure that charitable contributions aren’t regularly routed through government officials in the market. The seed company may seek to ensure proper end-user identification, or investigate alternative methods to get the money for the drugs.
- Evaluate the charitable contribution policy during the next review of anti-bribery risk.

Yes, yes, yes, yes, yes, and yes.

Seriously, do every single one of these things. And I have absolutely nothing to add. It’s perfect.

OK, maybe one little, tiny thing. I would delete the word “internal” before communications plan in point two. The reason is that I would have an external element to that plan as well. As with a lot of things, you need to educate the market. Assuming your contributions are going to be public anyway (maybe not here, but building schools, parks, etc., which are also commonly requests, will be public events), you need a PR element to your anti-bribery efforts.

But other than that tiny little addition, I think this study is well worth the time and effort to read and implement.

Don’t worry, though. I’ve read case study #9, and it’s awful. I’ll be back to my normal critical self by week’s end.