

Fraud Investigation and the UK Bribery Act

We were recently introduced to Fraud Examiner Expert Tracy Coenen, in her book “*Expert Fraud Investigation: A Step-By-Step Guide*” she details the steps a company should go through in performing a fraud investigation. Coenen provides the ‘nuts and bolts’ on how conducting an investigation can be a powerful tool to help corporations ferret out fraudulent practices within their organization. Her book gives the examiner the specific steps to take when fraud is suspected and how to proceed forward throughout the investigation to conclusion. In addition to the book as a useful tool for the fraud examiner, Coenen also provides the lay person with a general discussion of the types of corruption schemes a company may face and how best to prevent them. Coenen lists bribery; kickbacks; extortion; conflict of interests; and related party transactions as examples of corruption which can involve a payment to obtain an advantage, receive preferential treatment, or force certain preferential actions.

Many compliance and ethics practitioners have long understood that these types of schemes are illegal under the Foreign Corrupt Practices Act (FCPA) in connection with foreign governments and foreign governmental officials, but many FCPA compliance practitioners in the US may not have focused on these types of schemes when they involve private, non-governmental actors, outside the US. However, with the upcoming April 1, 2011 effective date of the UK Bribery Act, such practitioners may well be served to revise their company policies to take into account that the UK Bribery Act prohibitions apply to private actors equally as well as governmental officials. Based upon this difference in the public actor v. private actor distinction between the FCPA and UK Bribery Act, this post will review the different types of corruption schemes that Coenen outlines in her book.

Bribery

While most FCPA practitioners understand that a payment to confer a benefit may be enough to be classified as a bribe, such practitioners may not focus on other, more subtle, forms of bribery than simply bags of cash. These can include bid-rigging where inside information is passed to a vendor to allow said vendor to unfairly win an allegedly open bid, or where the bid winner has been secretly pre-determined in what is advertised as an open and fair bidding process. Bid-rigging can extend to the collusion between certain employees of a purchaser-company and vendor, where such employees purchase more goods or services than the company would need. Bid-rigging can also be found where alleged non-winners, in an apparently open bidding process, later appear as subcontractors on a project.

Kickbacks

Kickbacks occur when a company overpays for goods or services and then remits all or part of the overpaid amount back to the perpetrator. This can be affected by the person in charge of the overall bidding process. However it can extend down into any other employees involved in the approval process such as employees in production,

engineering or quality control. So, similar to bribery, there can be more subtle forms of kickbacks and such forms can include the substitution of inferior components into an overall product while charging the higher price to the end-user purchaser. Kickbacks can also include irregularities in pricing and quality throughout a project. Even if inferior quality goods are not substituted, an irregular price can inflate the cost of goods paid for by a company.

Extortion

Extortion is in many ways the mirror image of bribery. Whereas with a bribe, something of value is given to obtain a benefit, with extortion, a payment is demanded. While such demand can be made to obtain a benefit, such as to allow a company to go forward in a bidding process; extortion can also be made to prevent injuries to persons and damage to physical facilities. While not nearly as common as bribes, there are cases where extortions have been made and money paid based upon the threats.

Conflict of Interest

Many people do not think of conflicts-of-interest when considering a corruption scheme. Nevertheless if an employee, executive, or owner of a company has an undisclosed interest in an entity with which his company is doing business, the situation can present a conflict of interest. In the conflict of interest scheme, the employee, executive, or owner may be able to influence the company decision making process to send business to the other entity. This conflict of interest may be broader than simply directly involving an employee, executive or owner. It can extend to wives, children or other family members who stand to benefit from any such undisclosed interest.

Related Party Transactions

Coenen points out that many people do not consider transactions with third parties as part of an overall fraud scheme. However if the third party transactions are not conducted in an arms-length manner, this may well be indicia of an overall fraud scheme. Problems can arise when the related parties have a special advantage in doing business with a company and when that special advantage harms the company through increased costs, decreased revenue or other concessions. In addition to the types of schemes listed in the categories above, Coenen lists several different types of such transactions. They include:

- Extending credit to a company which would not otherwise be so entitled;
- Writing off accounts receivables with no legitimate business reason;
- Doing business with a small or one-man shop with no physical assets or simply a post office box for an office;
- Engaging in consulting agreements where no substantive work is done for payments received;
- A consultant who engages in extensive 'market research' in foreign countries with little to no tangible work product; and

- Concealing the existence of direct or indirect ownership in entities with which a company is doing business.

Although the focus of Coenen's book is the investigation of fraud, in all of its forms and permutations, she does give several pointers to assist in the prevention of fraud. These will be familiar to the FCPA practitioner and include ongoing monitoring program of both accounts and transactions, through robust internal controls. Coenen recommends an anonymous reporting hotline through which employees can alert management of such activities without fear of supervisor retaliation. But Coenen ends by noting the most important form is that management set the correct 'Tone at the Top' that such fraudulent activity within the company will not be tolerated.

Any US company operating internationally will be subject to the UK Bribery Act therefore the time has come to consider the changes required to its overall compliance program to meet the UK Bribery's Act proscription against bribery and corruption of private actors. Tracy Coenen's book is an excellent starting point for the FCPA practitioner to begin to enlarge a FCPA compliance based program to meet this challenge. We commend it to you for your consideration.

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