

## Global Compliance Readiness – Legal Advisors

# U.S. Companies Could Be Implicated As China Aggressively Prosecutes Bribe Recipients – Part I

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In 1977 the U.S. passed the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits a wide array of businesses and individuals from bribing foreign officials to obtain a financial benefit in that country. It took over twenty years for the rest of the world to begin to get on board.

Over the last ten years the United Nations, World Trade Organization, the World Bank, the European Union, the Organization for Economic Co-Operation and Development (OECD), the Organization of American States (OAS), the Caribbean Communication Secretariat (CARICOM), the African Union and other international organizations have begun the process of driving these concepts through their member nations.

It has been reported that over 50 percent of all FCPA prosecutions have come in this decade. Nonetheless, as rated by Transparency International's Bribe Payer's Index, U.S. companies remain among the top ten worst payers of bribes to foreign government officials.

U.S. efforts against corruption and bribery in international trade are regularly being covered in the news, and must be taken seriously by U.S. companies. Under the new international regime, no U.S. company should consider itself under the radar anymore.

### China

Perhaps the single biggest impact has come in the midst of the fastest growing mega-economy, China. To join the WTO, China was required to enhance its existing anti-bribery laws to more closely align with international standards. It also signed on to the United Nations Convention Against Corruption.

In the past 15 years, anti-corruption laws were aimed exclusively at Communist Party officials who were the recipients of illegal bribes. Past laws were convoluted and spread through several regulations. The laws were often enforced unevenly and were frequently used more for political purposes than law enforcement.

The new laws in China are strong and impressive. Unlike other laws promulgated in the past, however, the government is aggressively prosecuting its new anti-bribery laws. In a major change beginning in 2006, anti-bribery

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enforcement efforts in the private sector are now a major government enforcement priority. (*see www.chinacsr.com/2006/09/07/711chinas-ongoing-war-against-business-corruption*)

The recent execution of the head of the Chinese Food & Drug Administration made headlines. After taking bribes in excess of \$800,000 from primarily Chinese companies to approve fake or inadequately tested drugs that resulted in the deaths or severe illnesses of many people, the leader was sentenced to death and three senior directors in the State FDA were prosecuted. Perhaps as important, however, is that the companies responsible for paying the bribes and their responsible officers, were also severely punished and the companies banned for two years from securing additional public work and approvals. The latter is a devastating blow to those companies.

In the last two years, thousands of provincial officers, managers in private and State-owned entities, administrators and even physicians within the health and human services industries, have been investigated, imprisoned, fined and terminated. It would be naive to think that these efforts have succeeded in stopping the endemic problems with corruption in the country, but it does create new problems for U.S. companies doing business in China.

### So What Does This Mean To U.S. Companies?

As mentioned, China believes that it has clearly established its intentions to clean up the Party and is now focusing on corporations. It is unprecedented for the government to punish the private pharmaceutical companies that were implicated in the drug briberies.

Chinese authorities are tracing bribe payments back from the individuals and companies implicated in their investigations to those who paid the bribes. It was reported as far back as November of 2006 that IBM had assisted a Chinese sales agent in a bribery scheme involving the former president of the China Construction Bank. The scheme involved over \$225,000. The sales agent turned IBM over to the Chinese author-

ities after he was implicated by the former bank president. (*see www.chinacsr.com/2006/11/09/841-ibm-suspected-of-bribing-chinese-bank-official*) IBM has made no comment, but the Chinese judgment named IBM explicitly and it is believed that the Chinese authorities cooperated with US authorities in this matter. The DOJ does not disclose the entities it is investigating until settlement or resolution is complete. (*www.ibm.com/investor/corporate-governance/pdf/bcg.pdf*)

"We have seen a significant increase in law enforcement of anti-corruption laws in China and an unprecedented focus by U.S. law enforcement authorities on the activities of U.S. companies in China. As a consequence, many U.S. companies currently doing business in China are aggressively reviewing their in-country activities to ensure compliance with the FCPA, as well as local law. Those who are not doing so, as well as those that are thinking of expanding into the exploding Chinese economy that continues to be laced with corruption issues, are well advised to be scrupulous in this area!" Dale Chakarian Turza is a partner in the firm of Cadwalader, Wickersham & Taft LLP. Ms. Turza is a recognized expert in international corruption laws and initiatives, including the U.S. Foreign Corrupt Practices Act, and other enforcement areas related to international trade.

As the Chinese authorities identify Chinese agents, corporations and individuals involved in bribery schemes, those entities are and will be prosecuted, whether domestic or foreign. The U.S. Department of Justice is interested in learning what U.S. companies and their agents, distributors, joint venture partners, and contracting parties are implicated by the Chinese investigations.

As a result of this increased enforcement in China, two important questions arise:

(1) How many Chinese agents will quickly implicate their U.S. partners and fully cooperate with both U.S. and Chinese authorities when faced with prosecution? The answer to that question seems all too obvious for U.S. companies.

(2) Do U.S. companies know what their Chinese representatives are up to? That is the real unanswered issue.

### The Impact

Under the FCPA, the fact that a Chinese agent, joint venture partner or independent contractor is a separate entity is no defense. Traditional U.S. independent contractor concepts do not apply to the FCPA. A U.S. business owner cannot say, "I pay them for results. How they get those results is up to them. I have no say in how they do business."

In a recent announcement, Textron was fined over \$4.5 million for bribing Iraqi officials during the Saddam Hussein era. The government based liability not on actual knowledge by the com-

pany of the actions of its Lebanese and Jordanian consultants and employees of two French subsidiaries, but on the following:

Although Textron knew of endemic corruption in the Middle East, it knew or was reckless in not knowing that illicit payments were paid in connection with all of these transactions.

This was reported in an article by Benjamin N. Gedan on [www.projo.com/news/content/TEXTRON\\_FINE\\_08-24-07\\_P06S8P3.3392ccc.html#](http://www.projo.com/news/content/TEXTRON_FINE_08-24-07_P06S8P3.3392ccc.html#)

The U.S. entity has substantial exposure to liability if its agent, partner or other representative is bribing foreign government officials for the ultimate benefit of the U.S. entity. There is an affirmative duty to investigate foreign partners, to have clear policies against violating the FCPA, to educate partners as to FCPA and anti-bribery issues, and to institute financial and other controls to prevent or identify any inappropriate activities.

In the past the U.S. targeted defense contractors because of unique sensitivities, energy companies due to the inherently corrupt countries in which they do business, and companies doing business in "red flag" countries known for extensive corruption problems, such as Nigeria. Recently, Willbros USA found additional bribery and corruption in its Nigerian operations and announced that it was divesting itself of those operations. Its management finally decided that it was not reasonably possible for the company to install adequate internal controls to prevent further illegal behavior with regard to their operations there. The threat of FCPA and international anti-corruption measures may cause other countries to re-think where they will do business.

With the rise of enforcement throughout the globe, identification of incidents of bribery is more likely to be uncovered overseas and then traced back to the often unsuspecting U.S. company. The U.S. was a major driver in developing international cooperation and enforcement in this area. The Department of Justice is involved throughout the globe in both helping countries to adapt to the new laws and concepts and with enforcement activities. China is just the beginning.

As a result, the size of the company, the industry in which it does business, the nature of its products, are no longer relevant. If a U.S. company does business internationally and its trusted and successful agent overseas is bribing, or has been bribing government officials, including officers in State-owned industries, it should expect to be caught overseas and prosecuted at least in the United States, if not in both countries.

Coming in November's issue of The Metropolitan Corporate Counsel is Part II: *The Challenge For U.S. Companies: What to Do, How To Do It, The Difficult Choice.*

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