

The Art of FCPA Compliance in China

Legal Alert
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Over the last year, the Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) together closed more than 50 enforcement actions under the Foreign Corrupt Practices Act (FCPA) against businesses engaged in commercial activity beyond the borders of the United States. Those investigations netted fines and penalties of nearly \$2.5 billion—the most substantial transfer of corporate wealth under the auspices of the FCPA in any year since its inception. Another 17 senior officers and directors were charged individually with federal offenses or faced civil fines, while a host of other employees lost their jobs as a result of their involvement in suspect business transactions abroad. And we now know that the greatest number of enforcement actions across the history of the FCPA program have arisen in connection with business activities in China, surpassing Nigeria, the next most common venue, by a considerable margin.

It should be unmistakable, then, that understanding FCPA compliance and enforcement in the vast and evolving Chinese market is vital not only to business success, but to the personal livelihood of those who may be held accountable for the legitimacy of transactions abroad. And the attraction to new markets in China and throughout the Pacific Rim brings within that heightened risk profile the many small- and mid-cap companies seeking to engage in the region, but lacking controls specifically designed to confront the unique challenges those markets present.

Is Your Company at Risk?

The recent set of enforcement investigations involving business in China highlights a number of specific compliance concerns that business ventures would be well advised to confront when entering that and similar markets. Third-party agents and consultants remain by far the greatest corruption risk when doing business in China. Under the FCPA, corrupt payments and benefits provided by third-party intermediaries, often without the

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knowledge of the company, may nonetheless be imputed to the company. Thus, recent FCPA enforcement actions have focused on a host of indirect things of value provided to prohibited officials, including the sponsorship of domestic and international travel for business meetings, speakers' fees, false expense claims, payments made through third-party travel agents and meeting organizers, and use of other off-books funding mechanisms to provide entertainment and other benefits to officials with the perceived authority to provide a business advantage. Consequently, any outside actors retained in connection with the in-country enterprise, including joint-venture partners and supply chain participants, hired consultants, distributors, placement agents, freight forwarders, or other local agents should be a central focus for deep-dive due diligence and continual monitoring after any such relationship is established.

Recent actions also make evident that businesses must vet their own hiring practices to ensure that applicants are not favored based on familial or other connections with government officials. Similar caution must be taken concerning the issue of purely charitable donations. In this, it is inadequate that no government official receives a personal benefit as a result of the charitable gift; it can be enough to give rise to a potential violation that the official influenced or suggested the recipient. Sound internal controls must minimize the likelihood that government functionaries can propose recipients for corporate charitable largesse. And of course rigorous and well-considered training programs are a core component of any appropriate compliance regime, which must be thoroughly documented in the event a company finds itself facing government scrutiny in the future.

China's Own Corruption Crackdown

The United States of course is not alone in its focus on anti-corruption enforcement concerning business dealings in China. The current Chinese legal landscape, which includes several overlapping sources of law and enforcement, leads to its own heightened enforcement risks. Under President Xi Jinping, the Chinese government has undertaken a sustained and truly massive anti-corruption campaign of its own, aimed at eradicating corruption or its appearance at all levels of the official apparatus, from "tigers" to "flies." Since August 2012, over 180 senior government officials and 1700 lower-level officials and individuals have been investigated, expelled, arrested, or sentenced for corruption-related conduct, involving the misuse or misappropriation of \$910 million in funds and assets by government officials sentenced in that three-year period. And because many violations of Chinese anti-corruption and commercial bribery laws may constitute violations of the FCPA as well, a company doing business in China or with Chinese-based entities must be particularly attuned in its compliance program to the whole host of in-country legal risks at issue.

The Need for Proper Compliance and Response Strategies

In transnational business matters, instituting an intelligent compliance and enforcement program and persistently watching for changes in the relevant regulatory and business environments can be a matter of corporate life and death, a road to safety or to ruin. Hence,

anti-corruption compliance is a subject of inquiry that can on no account be neglected.

Should information concerning potential non-compliant behavior surface, it is also critical that a company and its counsel initiate an investigation and assess a disclosure strategy based on the risks involved. And if a government agency seeks to obtain information concerning corporate activities in China or any foreign business dealings, it becomes all but essential that the subject of those inquiries obtain quality legal counsel to provide advice on how best to proceed.

GSB's Long-Standing History in China Combined with Decades of White Collar and Government Investigations Experience

Founded 50 years ago in the Pacific Northwest, with offices in strategic locations along both U.S. coasts and in Beijing, Garvey Schubert Barer (GSB) brings particular experience to the representation of transnational business practices in China and other Asian markets. GSB is currently one of only 11 U.S. law firms officially recommended and approved by the Chinese government for representation in transactions with Chinese entities. In 1979, Stan Barer, one of the firm's founding partners, assisted in negotiations to resume shipping relations between the U.S. and the People's Republic of China following a 30-year hiatus. Similarly, GSB's white collar and government investigations attorneys include former senior federal officials and prosecutors with substantial trial experience, who represent business entities and individuals in all manner of compliance and enforcement proceedings. The firm's representations cover virtually all industries and the full range of white collar services, from investigations through trial and appeal. Our attorneys are available to assist with any questions regarding these or related subjects, wherever you may be located.

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