

FCPA: OVERCOMING THE TOUGHEST ISSUES



NOVEMBER 12, 2009

Agenda

- Introduction
- Presentation
 - Hank Walther, Dept. of Justice
 - Larry Urgenson, Kirkland & Ellis
 - Elliot Leary, KPMG Forensic
 - Phil Desing, KPMG Forensic
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
- Wrap-up



Webcast Series

- www.securitiesdocket.com/webcasts



Panel



Hank Walther



Larry Urgenson



Elliot Leary



Phil Desing



Bruce Carton

FCPA: Overcoming the Toughest Issues

Securities Docket Webcast

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Topics for Discussion

- **Conducting Parallel International Investigations**
- **Third Party Due Diligence**
- **Operating in High Risk Countries**
 - Facilitating Payments
 - Cultural Considerations
 - Other
- **Proactive Continuous Monitoring**
- **Q&A**

Conducting Parallel International Investigations

- **Government Viewpoint**
 - Sharing Information
- **Best Practices and Challenges**
- **Examples**
 - Siemens
 - Other

Third Party Due Diligence

- **Due diligence on agents, distributors, and in connection with M&A activity continues to be a challenge**
 - Per the KPMG Survey* 82 respondents found performing effective due diligence on foreign agents/third parties “somewhat” to “very” challenging
 - Two of three opinion releases in 2008 address merger and acquisition due diligence matters: 08-01 and 08-02
- **The global economic crisis may increase opportunities for corruption**
 - Greater competitive atmosphere
 - Companies have fewer resources in legal and compliance while governments are adding enforcement resources.

Proactive Due Diligence

- Require 3rd party to fill out a Questionnaire that will include among other things, FCPA representations and warranties, disclosure of government affiliations, employment information, company ownership;
- Conduct media and public record searches;
- Due diligence evaluation done by company personnel;
- Agreement should contain FCPA specific language
 - **3rd party audit rights?**

Operating in High Risk Countries

- **Facilitating Payments**
- **Cultural barriers**
- **Language barriers**
- **Training employees**
- **Need for rapid implementation of compliance program**
- **Personal safety**
- **Listen to local companies but establish policy centrally**
- **Consider communicating your policy via rules, guidelines and examples.**

Operating in High Risk Countries

Facilitating payments

- **Facilitation payments are permitted as long as:**
 - **Payment to a foreign official, political party or party official for “routine governmental action” to expedite performance of foreign official’s duties of non-discretionary nature (i.e. processing payments, issuing permits);**
 - **Not intended to influence the outcome of the official’s action, only its timing;**
 - **Does not influence a decision by a foreign official to award new business or to continue business with a company.**

Operating in High Risk Countries

Facilitating payments

Recommended Procedures:

- Listen to local companies but establish policy centrally;
- Consider communicating your policy via rules, guidelines and examples to help properly guide the use of facilitating payments;
- Be aware that domestic bribery laws in other countries prohibit facilitating payments;
- It is essential:
 - To set an appropriate threshold;
 - That if these payments are allowed, they are rarely used, strictly scrutinized and carefully approved;
 - To accurately and adequately document these payments in the books and records;
 - To periodically monitoring compliance.

Proactive Continuous Monitoring

Advantages

- **Early Warning**
- **Reduce potential bad press**
- **More control over Investigation**
- **Credibility with Government and Regulators**

Implementation

- **Build controls into Accounting System;**
- **Train Internal Audit – Incorporate Red Flags into procedures**
- **Transaction Testing**
- **Data Mining**
- **Update as Necessary**

Proactive Compliance Program Assessment

- **Roles and Responsibilities**
- **Risk Assessment**
- **Policies and Procedures**
- **Due Diligence**
- **Communication**
- **Training**
- **Certification**
- **Transaction Testing**

Presenter's Contact Information

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Questions?



Thank You

Thank you for attending this webcast.

Next webcast:

December 8, 2009, 2:00 pm Eastern

**“Investigations, Accounting Fraud, and
Related Economic Damages”**

