

Compliance

Navigating Political and Anti-Corruption Risks

By Tom Firestone

Imagine that you are a director of a large, publicly listed American industrial, engineering, and services company that is doing business in an emerging market, Oceania (to recall a certain George Orwell novel). Your company has encountered the following situations:

- One of your most valued local business partners has been charged with fraud and money laundering. He claims that the charges are politically motivated because of his financial support for the democratic opposition to the local authoritarian regime. However, the local government says that he has, in fact, been behind a massive scheme to defraud the government through inflated charges on government contracts. How do you determine if the charges are legitimate? Can you continue doing business with the local partner?

- For the past three years, you have been supplying state hospitals pursuant to a contract negotiated with the Ministry of Health. After a recent election, a new administration has come to power and is promising to recover funds allegedly stolen by the previous administration through kickback schemes in state contracts. Are your contracts at risk? Do you need to put in place additional compliance controls? Do you need to investigate the circumstances under which the contracts were awarded?

- Following a recent economic downturn in Oceania, you suddenly begin receiving a large number of vague allegations of corruption through the Oceania OpCo whistleblower hotline. The complaints are directed at expat employees from the neighboring country of Eastasia, a political and economic rival to Oceania. How thoroughly do the allegations need

to be investigated? Can the investigations be truncated given that they appear to involve local employees abusing the hotlines to prevent foreign competition? Do you need to limit the number of expat employees in order to prevent compliance from turning into a battleground for competing national factions?

- The minister of transportation has been calling your local country director, requesting contributions to various social and educational projects administered by a nongovernmental organization run by the minister's spouse. The US government has recently provided a substantial anti-corruption aid package to Oceania and has offered to help US companies rebuff any extortion demands by local government officials. Do you seek the intervention of the local US Embassy? Or will that only make your local operation a target for retaliation? If you do not seek US Embassy assistance, how do you stop the extortion demands?

- You have determined that one of the contracts that your local operation won from the Ministry of Health was obtained through bribery. You have decided to make a disclosure to the US Department of Justice (DOJ) or the US Securities and Exchange Commission (SEC). Should you also disclose to the Ministry of Justice of Oceania? Are they likely to leak information? Oceania has a poor record on human rights, and you have concerns that if you disclose to local law enforcement, local employees could be arrested and mistreated. What do you do if Oceania has a statute criminalizing the failure to disclose "serious crimes," including "acts of large-scale corruption" by local government officials?

You will not find answers to any of these questions in any compliance guidance issued by the DOJ or the SEC. Rather, reliable answers require a thorough and nuanced understanding of and feel for local politics that can only be developed over time through regular observation of the local political situation. For this reason, the most effective compliance programs integrate political analysis. As a practical matter, this means:

- including political risk analysis in anti-corruption risk assessments and third-party due diligence;
- requiring compliance officers to stay abreast of political developments in the countries they are responsible for;
- ensuring integration and regular communication between government relations and compliance functions;
- maintaining regular contact with relevant US government agencies to understand their views of and policies toward countries of operation;
- requiring outside counsel to demonstrate adequate knowledge of local political conditions before embarking on an investigation in a foreign country; and
- hiring outside political consultants on an as-needed basis.

Such measures will help companies prevent problems before they arise, and manage them effectively, both at the local level and with the US government, if they do arise.



Tom Firestone is co-chair of Baker McKenzie's North American Government Enforcement practice and a member of the firm's Global Compliance and Investigations Steering Committee.