Business ethics and anti-corruption world

A global bulletin on recent business ethics and anti-corruption developments

Issue 01 / August 2013

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Foreword

Welcome to *Business ethics and anti-corruption world*. In this first issue, reflecting Norton Rose Fulbright’s truly global reach, we offer analysis and updates on business ethics and anti-corruption developments from our lawyers in Australia, Canada, France, Germany, South Africa, the United Kingdom and the United States.

Norton Rose Fulbright’s global business ethics and anti-corruption team offers a one-stop global service comprising international, multi-jurisdictional compliance and investigations experience on the ground, combined with significant industry sector knowledge. Our team includes lawyers who have previously held positions in some of the world’s key regulatory bodies including the US Department of Justice, US Securities and Exchange Commission, and UK Serious Fraud Office.

In this August issue we:

- examine the unprecedented level of co-operation and information-sharing among international enforcement authorities, and the requirements this places on businesses to adopt a coordinated, multinational approach in this area
- consider the Board’s role in managing business ethics and corruption risk, providing practical guidance on strategies to implement core risk management principles
- introduce the increasingly important area of businesses’ duties as regards Human Rights
- highlight the key features of the recently published UK consultation on deferred prosecution agreements (DPA) guidance for prosecutors
- examine the recent SEC decision requiring companies to make an admission of wrongdoing in certain circumstances when settling cases and
- chart the World Bank’s emergence as an enforcement force in business ethics and anti-corruption.

In our key updates section, we summarise need-to-know global enforcement developments including a recent South African case concerning alleged irregularities in the Social Security Agency’s tender process, the Securency criminal prosecution in Australia, and the amendments to the Corruption of Foreign Public Officials Act in Canada.

If you would like to discuss business ethics and anti-corruption issues relevant to your organisation, please feel free to contact us or any of our specialist partners across our global network. Contact details are at the end of this issue.

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Co-operation among international regulators

Over the last decade, global companies have become aware of the serious risks of non-compliance with the US Foreign Corrupt Practices Act (“FCPA”). The top ten enforcement actions have occurred since 2008, and nine of them involve non-US based companies.

However, the introduction and development of anti-bribery legislation across the globe, including the UK Bribery Act, the Corruption of Foreign Public Officials Act in Canada, and the amendments to the Russian Law on Combatting Corruption, combined with increased enforcement efforts by regulators and enforcement authorities nationally and on an international basis, and cross-border information sharing between regulators, means that anti-corruption issues are now much more than simply about FCPA compliance. Co-operation among regulators internationally is now a reality: global businesses must approach anti-corruption regulation and enforcement accordingly.

In the context of FCPA enforcement, the DOJ has regularly recognized the role of international counterparts in assisting action. Since 2011, the DOJ has credited authorities in France, Germany, Greece, Hungary, Indonesia, Italy, Macedonia, Mexico, Panama, Switzerland, and the United Kingdom for their roles in enforcement actions.

In a recent speech Mythili Raman, Acting Assistant Attorney General for the DOJ Criminal Division, stated: “Through our increased work on prosecutions with our foreign counterparts and our participation in various multi-lateral fora like the OECD and United Nations, it is safe to say that we are cooperating with foreign law enforcement on foreign bribery cases more closely today than at any time in history.” In particular, the “upsurge in foreign enforcement and global co-operation ... is ... the product of hard work and strategic coordination – including face-to-face engagements that have allowed us to forge the partnerships that are essential to fight global corruption.”

She further noted that in February of this year, the DOJ, SEC and FBI “hosted about 130 judges, prosecutors, investigators, and regulators from more than 30 countries, multi-development banks, and international organizations around the world for a training course to exchange ideas and best practices on combating foreign corruption.” She also cited recent collaborations with Canada, France, Germany, Thailand, and the United Kingdom in FCPA investigations and settlements.

The UK’s Serious Fraud Office has a dedicated “International Assistance” team which deals with requests for assistance from overseas courts and prosecutors. Between 2009 and 2012, the SFO handled 120 requests for assistance from its overseas counterparts. However, there has been some recent debate between the US and UK authorities over who should bring criminal proceedings against a trader in relation to Libor-related activities. Further, the pro-US stance of former SFO director Richard Alderman does not seem to have been mirrored wholeheartedly by his successor David Green QC (at least in his announcements to the press), who has sought to reaffirm the SFO’s position as a prosecution authority and to move away from US-style negotiated settlements. While the politics of international regulatory co-operation may remain significant, cross-border co-operation is a key theme in enforcement.

In a number of cases, ‘parallel’ enforcement proceedings have risen in separate jurisdictions as a result of the same facts, sometimes as a result of regulators sharing information and co-operating in their enforcement.
methodology and strategy. Multi-jurisdictional enforcement proceedings are becoming increasingly common. Key examples include Siemens (fined by US and German regulators) and Innospec (fined by US and UK regulators). In the financial services sphere, international regulatory co-operation has led to multi-jurisdictional enforcement against a number of financial institutions arising out of the alleged manipulation of the Libor benchmark.

Enforcement outside the United States

US regulators are no longer alone in bringing anti-corruption enforcement. In recent years, regulators outside the US have been more active in enforcing their foreign bribery statutes, although the level of fines remains relatively low compared to the United States. Since 2005, countries outside the US which have brought foreign bribery prosecution actions include: Argentina, Australia, Belgium, Bulgaria, Canada, Denmark, Finland, France, Germany, Hungary, Italy, Japan, South Korea, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom. The TRACE Global Enforcement Report noted that from 2003 to 2007, non-US countries brought about 18 foreign bribery enforcement actions. However, from 2008 to 2012, that number rose to 60 enforcement actions, with the United Kingdom as the most active.6

Regulators outside the United States also continue to adopt enforcement tools which have been available to the DOJ for a number of years. The introduction into the UK of Deferred Prosecution Agreements, expected in early 2014, is a key example of the lessons which international regulators are learning from their international counterparts. In June 2013, recently-appointed SEC Chairman Mary Jo White announced a policy change, to require firms to admit guilt in the most serious enforcement cases, in a move away from the routine settlement of cases where a defendant neither admits nor denies wrongdoing. This approach brings the SEC’s policy closer to the UK, where non-admit/non-denial settlements are not available, and could be a real game changer. Because admissions in such settlements could be used in other legal proceedings, including criminal prosecutions, companies may be reluctant to enter into such settlements readily.

Comment

Increasingly common approaches to anti-corruption regulation and enforcement, such as proactive enforcement, the promotion of transparency and co-operation with regulators, and the development of increasingly flexible prosecutorial tools, together with enhanced co-operation between international regulators signals that businesses operating in global markets must pay close attention to regulatory issues in multiple jurisdictions. This includes implementing the appropriate pre-emptive compliance measures to prevent and detect issues. Cases are now being passed from one regulator to another and evidence is being shared and strategies discussed. The SFO and DOJ, for example, conduct regular meetings and have formalized their relationship in a memorandum of understanding.

The result for multinational companies is an increased exposure to co-ordinated international raids, investigations, and prosecutions. In cross-border enforcement scenarios, multinational companies must pay careful attention to disclosure (which may lead to disclosure in other jurisdictions), issues relating to the protection or waiver of privilege, data privacy and employment law issues, and the co-ordination of any global settlements. The common international approach is here to stay; the challenge for multinational companies is to manage their cross-border exposures efficiently and effectively.

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The board’s role in managing business ethics risk

Much has been written about the risks faced by a board in relation to Business Ethics (BE) issues: ever-increasing fines, imprisonment, derivative actions, disruption to business and reputational damage – rather less about the practical steps a board can take to manage BE risk.

Although some of the BE issues with which a board needs to get to grips may be new, the core corporate governance principles are familiar: the board’s management of BE risk comes down to it making sure it receives the right information, which it digests and interrogates properly, with the necessary internal and external expertise to provide assurance. This article breaks down these core principles and provides practical guidance on how a board can effectively manage BE risk.

Which standard?

Given the extra-territorial reach of major anti-corruption legislation, the global interactions of even the most domestic business, and the need for a consistent corporate culture, it makes sense to work to the standard of international best practice, which places ever-increasing demands on a board to proactively manage BE risk. Directors’ duties and anti-corruption legislation coalesce around similar standards that can be summarised as follows:

- a board is required to make a good faith effort to actively manage BE Risk by exercising oversight of risk management.

But what does this mean – and how can this be achieved in practical terms? The requirement can be broken down into five core principles

Core principles

- exercise oversight of BE risk management
- demand adequate information
- challenge the executive by adopting an enquiring mind approach
- investigate live issues
- test the effectiveness of risk management

Oversight: a board must exercise oversight of BE risk management

As companies’ global footprints increase, exercising oversight becomes more demanding and complex. The growing distance between the board and those on the ground can cause confusion as to what level of oversight is required. On the one hand a board cannot and should not review every risk a company faces; on the other hand as Delaware directors’ duties cases and criminal legislation show, a sustained failure to exercise oversight can lead to liability. How then does a board oversee BE risk management while balancing its other roles? Delegation to dedicated internal and external resource is crucial – as a minimum, in a large company, a Head of Anti-Corruption and Head of Investigations, both with necessary personnel below them. The amendment to the South African Companies Act 2008 reflects the need for dedicated BE risk management through mandating that all state-owned companies and listed public companies should have Social and Ethics Committees. The role of the Committee will be to monitor whether the company complies with social, ethical and legal requirements, to report to the shareholders on these matters and to bring all relevant matters to the board’s attention. Dedicated resource is critical because BE risk management is these individuals’ focus.

1 Last month Germany increased the maximum corporate fines for certain compliance offences tenfold; draft UK sentencing guidelines also published last month provide for fines of up to four times the gain derived from the crime.

The board’s role in managing business ethics risk

Oversight model

Key

- - - - Access

- - - - Reporting lines

The board’s role in managing business ethics risk

and the primary yardstick by which their success is managed. In smaller companies, BE risk management at the very least needs to be a defined part of an individual’s or various individuals’ role, with sufficient time ring-fenced for, and recognition of what, is required.

An example structure to achieve the necessary information flow and challenge mechanisms is set out above. Although requirements will differ from company to company, in any business the board must have access to relevant compliance and legal personnel, insight into the day-to-day risks the company faces, and regular consolidated information.

While a board can delegate specific actions supporting its oversight responsibility, each director must be able to competently answer the following questions:

- What are the inherent BE risks my company faces?
- What controls are in place to mitigate those risks?
- How is the effectiveness of those controls monitored?

A board member who is not in a position to answer these questions is not exercising sufficient oversight of BE risk.

Adequate information: a board must make well-informed decisions based on a clear line of sight into the business.

What type of information?
A board requires a mixture of accurate and up-to-date quantitative and qualitative information to strategically manage BE risk. While quantitative information (for example calls to whistle-blower hotlines or statistics on results of third party reviews) can help to summarise process or progress, a board must get to grips with the qualitative analysis underlying such figures: without understanding the inputs into a risk management system a board cannot judge outputs.
It must also understand risk culture and trends within the business (and globally) which do not lend themselves to numerical analysis. This means that boards are likely to be faced with information presented in an unfamiliar format and so they need to ask for assistance and training as required. Individual directors must be proactive in ensuring that they understand board papers provided to them: a failure to have or acquire such an understanding could of itself amount to a breach of their duties.

Too much information?
It is crucial that the board receives the right amount of information: the board and especially the Chairman must strike a balance between ensuring the board has enough information to understand risks and challenge the executive and it becoming so lost in the detail that it loses the necessary objectivity. A board cannot use the “information overload” excuse for failing to consider and understand the material provided to it – ultimately the directors have control over the amount of information they receive.

Practically, this means monthly consolidated reporting from the board sub-committee, ensuring escalation of important issues (especially whistle-blower reports and investigation status) and periodic evaluation of assurance reports by external advisers on the effectiveness of risk management systems (see text below).

A crucial tool in providing “mid-level” insight into the business is providing the board with case studies taken from the company’s risk assessment of high-risk areas: a board cannot assess the effectiveness of risk management at a strategic level without understanding at a granular level how risks and risk management operate.

Challenge must be proportionate: a board must also challenge the executive on inherently risky or significant transactions: a 2012 German court decision held that in either situation, having sight of the risk analysis performed by management is not enough: the board must ensure it is comprehensively briefed on the facts, understands the risk and conducts its own independent risk analysis, with the help of external advisers where necessary.4

Investigate live issues: a board must ensure proper investigation of BE issues
A board’s reaction to potential BE issues is the acid test of a company’s risk management culture. A sophisticated risk management system is of little use if the issues it identifies are not then addressed properly. A board must commit time and resource to adequately investigate potential issues and scrutinise the results of (and any remediation steps following) the conclusion of the investigation. It must fully engage with the management of live risks by understanding the details and testing the executive. As has been widely reported, Walmart was last year heavily criticised for failing to conduct an adequately independent investigation in response to an issue in its Mexican operations, and Siemens – which reached a $1.6 billion settlement with regulators – was also strongly criticised for its failure to investigate red flags. As reflected in the International Corporate Governance Network’s 2009 Statement and Guidance on Anti-Corruption Practices, shareholders are increasingly demanding that their companies have stringent policies to avoid bribery and corruption, board

Case study: Vodafone
Tamara Northcott, Vodafone’s Global Head of Anti-Bribery and Compliance, ensures that the Board receives timely information on the global programme, based on risk assessments and action plans performed by each local market. These action plans result from an annual risk assessment, which she has designed to be conducted consistently across the world in order to allow information to be consolidated. Tamara explains that this approach drives local accountability for risk, while at the same time gives a consistent methodology and ability to analyse the consolidated global impact.

Challenge the executive: a board must interrogate the information provided to it and challenge the executive
A board’s involvement in BE risk management requires more than a recurring agenda item: it needs to challenge the information provided to it, test the structure of the risk management programme and satisfy itself that the risk management system works. Each director must approach BE risk with an enquiring mind: he or she cannot substitute reliance upon information provided by management for his or her own attention and examination. Failing to properly interrogate management can result in breach of directors’ duties’ and criminal liability.

3 See for example the Australian cases of ASIC v Hellicar (2012) 286 ALR 501 and ASIC v Lindberg [2012] VSC 332

4 PiKRA (January 2012)
must take account of these pressures and demonstrate that they have the correct culture and resources to address any issues that are raised.

Test: a board must gain assurance on the effectiveness of risk management

The board must be satisfied that those to whom it delegates risk-management roles are performing their roles; the unavoidable issue with delegating responsibility for risk management is that self-review has a tendency to creep in. The effectiveness of the controls environment and of the sub-board infrastructure on which the board relies must be tested and benchmarked by external advisors – just as internal accounts need to be independently verified.

Conclusion

The onus on a board to manage BE risk has many drivers. A lot of emphasis is placed on negative drivers such as directors’ duties, criminal law, and compliance with the company’s ethical guidelines and policies, yet the most successful risk management is driven by a board’s positive desire for the company to be an ethical business. Focusing on whether the form of a risk management procedure is “adequate” deflects from the substantial question of its effectiveness. As Transparency International’s recent “Raising the Bar” publication commented “typically assurance focuses on the existence of anti-corruption measures, but what is more important is whether those systems actually work.”

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Compliance officers, in-house lawyers and CSR managers will have noticed the increased publicity surrounding the issue of business and human rights (BHR) since the UN Guiding Principles on Business and Human Rights (the Guiding Principles) were unanimously endorsed by the UN Human Rights Council in June 2011. Since then, many businesses have been developing detailed, bespoke human rights policies which draw upon the guiding principles.

The Guiding Principles, formulated by John Ruggie (the former Special Representative of the UN Secretary General for Business and Human Rights), implement Professor Ruggie’s “Protect, Respect and Remedy” framework. The framework promotes the principles that: (i) states have a duty to protect against human rights abuses by third parties, including businesses; (ii) businesses have a responsibility to comply with applicable laws and respect human rights; and (iii) effective mechanisms are needed to enable victims of human rights abuses to seek redress.

A compliance officer, in-house lawyer or CSR manager looking to address an organisation’s BHR risks would be forgiven for feeling a little overwhelmed by the Guiding Principles and the plethora of other BHR guidelines and soft law initiatives. This article aims to clarify the application and effect of each of the primary soft law BHR initiatives, and summarises current BHR trends more generally, before offering a brief synopsis of how businesses should be responding to these developments.

The Guiding Principles

The broad acceptance of the Guiding Principles – including from the business community – has led to a rapid consolidation of the expectations on businesses in relation to their human rights impact. Businesses are responding to this, and to signs that regulatory requirements and investor / shareholder expectations are on the increase. The Financial Times recently reported on a study carried out by Novethic, a French research group, which showed that Europe’s largest institutional investors are filtering their investments to avoid becoming associated with businesses which are perceived to have infringed on the rights of others, denying those businesses access to around €2.3 trillion in assets. As we see a growing trend towards compliance and transparency, more and more businesses are willing to show the public what they are doing in respect of human rights.

Principle 11 of the Guiding Principles states that businesses should “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.” To meet this responsibility, businesses should have in place policies and processes appropriate to their size and circumstances. In effect, businesses need to “know and show” that they respect human rights (Commentary to Principle 15). What does this mean in practice and how should businesses address human rights risks?

Developing policies

Principle 16 states that businesses should embed their responsibility to respect human rights by expressing their commitment in a statement of policy. This can be a stand-alone human rights policy or a statement integrated into existing policies. Such policy should be aligned with other policies across different functions and countries.
As businesses find themselves being questioned by investors and other external stakeholders about their commitment to corporate responsibility, there is increasing pressure on businesses to develop and publish a human rights policy. A growing number of businesses are showing their commitment to meet this responsibility by publicising these policies on their websites, as required by Principle 16(d).

Assessing impacts / risks
Principle 17 goes on to state that businesses should carry out periodic human rights due diligence “to identify, prevent, mitigate and account for how they address their adverse human rights impacts.” This should include an assessment of actual, as well as potential, human rights impacts with which businesses may be involved either through their own activities or as a result of business relationships (Principle 18). Human rights due diligence should be initiated as early as possible when developing a new business activity or relationship, as human rights risks may be inherited through mergers or acquisitions and can be increased or mitigated when drafting contracts or agreements.

When carrying out human rights due diligence, the initial step is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business may be involved. This process should draw on internal and/or independent external human rights expertise, and involve meaningful engagement with potentially affected groups and other relevant stakeholders. Wherever in the world businesses operate, they should comply with all applicable laws and respect internationally recognised human rights (Principle 23(a)), meaning legal compliance should be considered when conducting human rights due diligence. Principle 23(b) recognises that conflicts may exist between national laws and international human rights principles, and calls on businesses to respond creatively in such circumstances in a way which seeks to honour the latter. Businesses are therefore well advised to draw on not only human rights expertise, but also to consult with their in-house and external lawyers where necessary, and particularly when faced with such a conflict.

For instance, Unilever collaborated with Oxfam to carry out a study of labour issues in its operations and supply chain in Vietnam, allowing Oxfam access to its factory in Cu Chi. With Unilever’s approval, a report was published earlier this year which revealed evidence of poor labour standards. In response, Unilever promised to change the way it operates in Vietnam and has invited Oxfam to return to the factory in two years’ time to review progress. Unilever opened its doors to demonstrate transparency and agreed to Oxfam publishing the report to stimulate a wider debate and encourage other businesses to do the same.

Another example is that of the tourism company Kuoni’s pilot project in Kenya. A report was published following a human rights impact assessment of Kuoni’s operations and business relationships in Kenya which explains the assessment process Kuoni adopted,
the outcomes of the pilot project and Kuoni’s commitment to mitigation measures.

The above examples demonstrate that businesses would do well to act now and carry out a human rights impact assessment while they still have time to take reasonable steps to avoid and mitigate risks, and show progress, rather than in the future when they could face legal claims and substantial fines.

**Integrating, tracking and communicating performance**

As a next step, businesses should integrate the findings from their human rights impact assessments across relevant internal functions and processes, and take appropriate follow-up actions (Principle 19). Businesses should also track the effectiveness of their response to such findings and be prepared to communicate this to external stakeholders where necessary (Principles 20-21).

**Remediation and grievance mechanisms**

Finally, Principle 22 states that where a business has caused or contributed to adverse human rights impacts, active engagement in remediation is required. To ensure that grievances are addressed early and remediated directly, businesses should establish effective operational-level grievance mechanisms for those potentially impacted by their business’ activities.

**Equator Principles and IFC performance standards**

The Equator Principles (EPs) are a risk management framework for signatory financial institutions to determine, assess and manage environmental and social risk. The revised EPs create new requirements for businesses to conduct human rights due diligence in order to qualify for financing from EP members, which include 79 of the largest financial institutions. The EPs apply to all project financing with a value of over US$10 million and to certain types of corporate loans, bridge loans and project finance advisory services. The third version of the EPs, which took effect on 4 June 2013, requires signatory financial institutions to ensure their clients comply with the detailed requirements of the International Finance Corporation Performance Standards on Environmental & Social Sustainability (IFC Performance Standards), which are intended to “fill the gaps” of host country laws and regulations on environmental and social issues. The 2012 version of the IFC Performance Standards specifically requires that human rights due diligence of the type endorsed by the Guiding Principles should be conducted in “limited high risk circumstances”.

**OECD Guidelines for Multinational Enterprises**

All OECD States are obliged to sign up to the OECD Guidelines for Multinational Enterprises, which set out principles and standards for multinational companies operating in or from OECD States. The OECD Guidelines were updated in 2011 with a new human rights chapter which is consistent with the Guiding Principles. Significantly, OECD States are required to set up national contact points (NCPs) to hear complaints against businesses alleged to have contravened the OECD Guidelines. Following the promulgation of the Guiding Principles, a finding of non-compliance by an NCP is likely to have a greater reputational impact on the business concerned, and organisations should therefore take a great deal of care when responding to NCP complaints. To date, 161 complaints have been filed with NCPs, with human rights based complaints involving issues such as child labour, labour rights, indigenous rights and the environmental impact of business operations on communities.

**The UN Global Compact**

The Global Compact is a United Nations initiative whereby businesses voluntarily sign up to adhere to ten principles of sustainable business, including respecting human rights. To date, the Global Compact has around 10,000 signatories based in over 140 countries. The Global Compact has confirmed that the need to “respect” human rights in Principle 1 reflects the second pillar of John Ruggie’s framework. This is a significant development, particularly as signatory organisations need to report annually on their implementation of the Global Compact and therefore, indirectly, the Guiding Principles.

**ISO 26000**

ISO 26000, which also draws upon the Guiding Principles, was published by the International Organization for Standardization in order to provide guidance for businesses to operate in a socially responsible way.

**Towards hard law**

Beyond this consolidation of international soft law standards, the real impact of the Guiding Principles is likely to be the stimulation of state regulation. The first foundational principle of the Guiding Principles recognises that States need to “protect against human rights abuse within their territory and / or jurisdiction by third parties” and, as reflected in the commentary, a State’s failure to do so...
may be a breach of its international human rights obligations. The second foundational principle requires that States “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”.

There are already signs that States around the world are considering the Guiding Principles when formulating policy. For example, the European Commission has called on all EU Member States to publish “action plans” on how to implement the Guiding Principles by the end of 2013. The UK action plan is due imminently, whilst a Dutch inter-departmental working group is expected to report to the Dutch parliament with an action plan in early 2014. In June 2013 the European Commission also published a guide to implementing the Guiding Principles for businesses in three sectors: (i) oil & gas; (ii) employment; and (iii) ICT.

In terms of human rights reporting, the UK government has published the final version of the draft Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013, which will require directors of UK incorporated, quoted companies to prepare an annual strategic report covering a number of issues including human rights. This is a clear step towards requiring companies to “know and show that they respect human rights” (as envisaged by the commentary to Guiding Principle 15). In the context of conflict minerals, the European Union is in the consultation phase in relation to a potential directive which will create similar reporting requirements to Section 1502 of the Dodd Frank Act in the USA, and will apply to large companies.

The Guiding Principles are also likely to impact on tort litigation, particularly in common law States, as certain obligations within the Guiding Principles may in the future be interpreted by judges as creating an objective “standard of care” owed by businesses to external stakeholders affected by their operations. The commentary to Guiding Principle 23 specifically acknowledges that conflict-affected areas pose an inflated risk of complicity in gross human rights abuses, and businesses should treat this risk as “a legal compliance issue”, as extraterritorial civil claims are increasingly being brought against businesses in their “home” state courts. This is particularly relevant to common law States with a long tradition of negligence claims against companies for their overseas activities, such as the US and UK – although the US Supreme Court in Kiobel (2013) recently restricted claims under the US Alien Tort Statute to instances where there is sufficient “closeness” (which has yet to be defined) between the event and the jurisdiction of the US.

Conclusion

The examples set by Unilever and Kuoni above demonstrate that businesses are responding to pressure from external stakeholders and the expectations of increasingly ethically minded investors and shareholders by actively assessing their human rights impacts and mitigating associated risks as envisaged by the Guiding Principles and other BHR standards. This trend is likely to continue as a growing number of businesses see the benefit of understanding and addressing risks rather than waiting for adverse human rights impacts to be identified by external stakeholders. Businesses that take such steps now will be best placed to respond to future hard law requirements as they develop.

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Disclosure provisions in the extractive industries

Transparency in extractive industries is becoming an increasingly contentious topic. In response to demands for transparency, the EU and US are putting in place legislation requiring certain extractive industries companies to report payments made to governments.

The EU perspective

Background

On 25th October 2011 the European Commission (‘the Commission’) adopted a legislative proposal1 for the revision of the Accounting2 and Transparency Directives3. The proposals are aimed at introducing mandatory country-by-country and project-by-project reporting for multinationals in the extractive (oil, gas and mining) and forestry industries of payments made to governments. The proposals, in substance, mirror the guidelines developed by the Extractive Industry Transparency Initiative (‘EITI’), which were strongly advocated under President Barroso’s EU leadership.

Following almost two years of negotiation, on 9th April 2013, EU Parliament and Council legislators agreed on the final ambit of the revised Directive. The precise wording of the Directive is still in flux, but certain details have emerged from those involved in its drafting.

Who has to disclose?

All EU listed and large privately owned extractive and forestry companies will be required to disclose. The revised Accounting Directive defines a large company as one which exceeds two of the three following criteria:

- a turnover of at least €40 million
- total assets of at least €20 million
- at least 250 employees.

The existing Accounting Directive regulates the information provided in the financial statements of all limited liability companies registered in the EEA. It is expected that an agreement will soon follow on the incorporation of the disclosure proposals into the revised Transparency Directive. This will extend the disclosure requirement to include all companies listed on EU regulated markets (e.g. London Stock Exchange), even if they are not registered in the EEA and are incorporated in a third country.

What are the penalties for non-disclosure?

As the wording of the Directive has not been finalised, the precise nature of the sanction that could be imposed is not decided. However, given the strong standard that the Directive appears to adopt, it is likely that any sanction will be severe.

What impact will the revised Accounting Directive have?

The impact of the revised Directive will be twofold:

- The requirement to disclose payments to governments will increase transparency in the operations of multinational companies in the extractive and forestry industries by allowing access to information which was not previously available and The duty to disclose will be strict. During the negotiations on the ambit of the Directive, a number of oil companies...
had campaigned that there were countries which forbid, as a matter of criminal law, the disclosure of payments to governments. However in the final revised Directive, EU lawmakers have decided to adopt a strong standard and as such it will contain no exemptions.

The Directive will now go forward to be formally agreed by member states and the European Parliament, with a vote scheduled in its plenary session in June 2013. Although the Directive follows the guidance from the EITI, once enacted, its contents will have the binding effect of EU law. This will put the EU on an equal footing with the US which also adopted disclosure requirements in July 2010 through enacting Section 1504 of the Dodd-Frank Act.

The Directive also requires that in 2015 the Commission will review the possibility of extending the disclosure requirements to other sectors such as banking, construction and telecommunications.

The US perspective

Background
On 21 July 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or “the Act”), which called for broad financial and other regulatory reforms. As part of this reform process, the SEC was directed to issue final rules requiring resource extraction issuers to file annual reports of payments to government made for the purpose of the commercial development of oil, natural gas, or minerals.

According to the SEC’s adopting release, Congress required changes to the reporting requirement “to increase the transparency of payments made by oil, natural gas, and mining companies to governments”. The “primary goal” of the increased transparency is to “help empower citizens of those resource-rich countries to hold their governments accountable for the wealth generated by those resources.” Prior to the Act, key players in extractive industries had developed the Extractive Industry Transparency Initiative (“EITI”) to help address this concern through voluntary increased transparency. Congress, apparently not satisfied with the EITI regime alone, created a disclosure regime pursuant to Dodd Frank that would support the commitment of the US government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.

On 22 August 2012, the SEC adopted Rule 13q-1, implementing section 13(q)’s disclosure requirements.

In a suit filed by the Independent Petroleum Association of America and the National Foreign Trade Council, Rule 13q-1 was set aside on 2 July 2013. The case was remanded to the SEC and Rule 13q-1 as it now stands is void. However, as the SEC remains obliged to adopt a final rule and is likely to impose many of the same payment reporting obligations on resource extraction issuers, a review of the provisions of Rule 13q-1 remains instructive.

Who was required to disclose?
Rule 13q-1 applied to all companies required to file annual reports with the SEC that are involved in the commercial development of oil, natural gas, or minerals (defined as “resource extraction issuers”). The rule required disclosure of certain payments by a resource extraction issuer, its subsidiary or entity under its control, to foreign governments or the US government for the purpose of commercial development of oil, natural gas, or minerals. The scope of activities considered “commercial development of oil, natural gas or minerals” under Rule 13q-1 included the “exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.”

It is currently anticipated that a final rule, in whatever format, will continue to apply to the same group of issuers.

What had to be disclosed, how, and when?
Resource extraction issuers were required to disclose annually any payment, whether a single payment or series of related smaller payments, that equalled or exceeded US$100,000, made directly to the US government or to a foreign government by the resource extraction issuer, its subsidiary or other entity under its control for the purpose of the commercial development of oil, natural gas, or minerals. In the annual report, issuers were required to disclose the type and total amount of payments made for each project and to each government.

The SEC defined the term “foreign government” as including a foreign national government; a department, agency or instrumentality of a foreign government; and a company majority-owned by a foreign government, including state-owned oil companies. The disclosure requirement applied to payments such as taxes, royalties, fees (including concession fees), bonuses, infrastructure improvements, and production entitlements.

Issuers were required to file their reports on a project-by-project basis. The SEC, however, left the term “project” undefined.

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5 Section 1504 of the Act added section 13(q) to the Securities Exchange Act of 1934 (“Section 13(q)”).

6 Id. (citing statement by Senator Richard Lugar, 156 Cong. Rec. S3816 (May 17, 2010)).

7 This is a distinction between the EITI and section 13(q). Whereas the EITI focuses on payments made in connection with exploration and production of oil, gas, and minerals, section 13(q) also covers payments related to processing and export.
Issuers would have been required to comply with 13q-1 for fiscal years ending after 30 September 2013 within 150 days after the end of the company’s fiscal year. For the first reporting year, a company whose fiscal years began prior to 30 September 2013 would have been permitted to file a partial year report. With the rule having been set aside, companies can expect some hiatus in time before there is an obligation to report.

Rule 13q-1 required that the reports include electronic tags, identifying:

- Total amounts of the payments, by category
- Currency used to make payments
- Financial period in which payments were made
- Business segment that made the payments
- Government that receive the payments and country in which the government is located and
- Project to which payment relates.

In most if not all respects, it is currently anticipated that these requirements will remain in any new final rule. Furthermore, Section 13(q) requires the SEC, “[t]o the extent practicable,” to make available online, to the public, a compilation of the information required to be submitted in the annual report.

The SEC rejected arguments by commentators that these annual reports should be filed confidentially and that only a compilation of the disclosed information should be made public. Instead, Rule 13q-1 called for the public filing of annual reports via the SEC’s “EDGAR” system. Although the SEC acknowledged that certain host country laws prohibiting disclosure of payment information could add billions of US dollars of costs to affected issuers, the SEC refused to adopt an exemption for countries with such prohibitions, concluding that doing so would be inconsistent with section 13(q) and could undermine the statute.

The SEC also conducted a cost-benefit analysis, estimating that the total initial cost of compliance for all issuers would be approximately US$1 billion and the on-going cost of compliance, between US$200 million and US$400 million.

**What were the penalties for non-disclosure?**

While the SEC did not specifically address penalties in Rule 13q-1, the SEC is authorized to suspend or revoke a company’s registration for failure to make required periodic filings with the SEC. Further, a “false or misleading” statement in a disclosure filing could subject the issuer to liability.

**What is the current status of SEC Rule 13q-1?**

In a suit filed by the American Petroleum Institute, the US Chamber of Commerce, the Independent Petroleum Association of America and the National Foreign Trade Council against the SEC, the federal district court set aside Rule 13q-1. The plaintiffs argued that section 13(q) and Rule 13q-1 compelled speech in violation of the First Amendment.

They also presented various challenges under the Administrative Procedure Act (“APA”), arguing that the SEC erroneously read the statute as requiring public disclosure of the reports, it was arbitrary and capricious in declining to grant an exemption for payments made to countries that prohibit disclosure of such payments, the SEC’s cost-benefit analysis was flawed, it was required to solicit additional comments before relying on a particular set of data, and it arbitrarily declined to define the word “project.” The court did not reach the plaintiffs’ First Amendment challenge or most of their APA arguments because “two substantial errors require[d] the rule to be set aside: the SEC misread the statute to mandate public disclosure of the reports and its decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious.”

The case was remanded to the SEC, which must determine whether to appeal the decision or to revise or rewrite the rules. Rule 13q-1 as it now stands is void. However, a rule must be adopted by the SEC to implement section 13(q), and it likely will require resource extraction issuers to report to the SEC, in substantially the same form, payments made to the US government and foreign governments.

**What is the impact of the setting aside of the rule and an ultimately final rule?**

The court’s setting aside of Rule 13q-1 will no doubt provide affected issuers with more time to prepare for reporting of payments. Nevertheless, it is presently expected that those issuers who have identified themselves as resource extraction issuers can still anticipate reporting obligations in much the same format as those contained in Rule 13q-1.

With this in mind, depending on the volume of anticipated payments a particular issuer believes it will have to identify and ultimately report, resource extraction issuers will have to consider whether they should continue preparations in the short term and if so to what degree while we are waiting to see whether the SEC will appeal the court’s ruling and what form a final rule will take.  

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8 Payment would have had to be reported in U.S. dollars or the issuer’s currency, potentially requiring conversion. Rule 13q-1 outlined three methodologies for conversion. The issuer would have had to state which method it used.

9 Section 13(q) of the Securities Exchange Act 1934

10 Section 18 of the Securities Exchange Act 1934


12 Although, perhaps not publicly, perhaps with greater definition of the “project” basis upon which reports were to have been made, and perhaps with some limited country exceptions to the reporting obligations.
Developments in Canada
Canada has announced its intention to introduce new legislation mandating the disclosure of payments made by mining companies’ domestic and foreign governments. This announcement follows on from the recent initiatives as outlined above. On 14th June 2013 the Extractive Resource Revenue Transparency Working Group (‘Working Group’) released a recommended framework for Canada’s new legislative requirement.

The Working Group recommends that disclosure be required for payments made by “covered companies”, which includes the company itself, its subsidiaries and any other entities under its control. It reflects the EU and US measures as regards what should be disclosed, but also proposes the inclusion of two reporting thresholds to accommodate small and large issuers. For those companies listed on the TSX (a Canadian stock exchange) the recommended threshold is, C$100,000, while a second threshold of, C$10,000 is recommended for TSX Venture issuers.

The Working Group proposes that there should be no exemptions to the reporting requirements. The final endorsement of the framework is projected for November 2013.

What impact will these legislative measures have?
Transparency of payments to foreign governments and the resulting ability of a nation’s citizenry to hold governments accountable for those payments is the stated goal of the disclosure requirements. However, from a practical standpoint, the internal impact on the applicable industries will be multifaceted and will be administrative as well as operational.

On the administrative end, companies subject to the requirements will have to assess and most probably modify current accounting procedures or systems to efficiently and effectively comply with the reporting requirements.

Operationally those companies subject to the provisions will have to:

- Determine which aspects of their business are subject to which reporting requirements
- Determine how to define “project” in all affected areas of the company and be consistent in the definition for tracking payments
- Determine which payments within those segments are reportable to which regulators and
- Determine whether they need to report all of an amount where that amount includes some payments not subject to the reporting requirement. They will also need to consider the accurate identification of third party payments that fall within the requirements.

To be in a position to comply with these legislative provisions, companies in the applicable industries should have an initiative in place, led by a team that includes members from legal/compliance, audit, accounting, IT, and operations.

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UK prosecutors consult on guidance on approach to DPAs

Deferred Prosecution Agreements (“DPAs”) are a familiar feature of the US regulatory landscape but UK prosecutors have not had access to similarly flexible enforcement tools. DPAs are now expected to be available to UK prosecutors in early 2014.

On 27 June 2013, the Serious Fraud Office and the Director of Public Prosecutions published a draft Code of Practice (“the Code”) for public consultation setting out their approach to the use of DPAs in the UK. The draft Code includes the following key features:

- A prosecutor will apply a two-stage test in deciding whether to invite a commercial organisation to enter into DPA negotiations:
  - An evidential test that there is sufficient evidence to provide a reasonable prospect of conviction or reasonable suspicion that the commercial organisation has committed the offence and reasonable grounds for believing that a continued investigation would lead within a reasonable period of time to establishing a reasonable prospect of conviction and
  - A public interest test that the public interest would be properly served by the prosecutor not prosecuting but instead entering a DPA.

- The prosecutor has discretion to invite a commercial organisation to enter into DPA negotiations. The commercial organisation has no right to require DPA negotiations.

- Public interest factors in favour of prosecution (rather than a DPA) include conduct which is part of the established business of the company, or offences committed when the commercial organisation had an ineffective corporate compliance programme, failures to report wrongdoing within a reasonable time, and failure to report properly and fully the true extent of the wrongdoing.

- Public interest factors favouring a DPA include the adoption of a genuinely proactive approach by management including self-reporting and remedial action or the existence of a genuinely proactive and effective compliance programme.

- In the context of self-reporting, a commercial organisation must ensure that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of individuals.

- An application for court approval of a DPA must include a Statement of Facts which must give full particulars relating to each offence and must include details of any financial gain or loss.

- The prosecutor and the commercial organisation are required to agree terms of a DPA which are fair, reasonable and proportionate.

- The appointment of a compliance monitor will depend on the factual circumstances of each case. A monitor’s primary responsibility is to assess and monitor the commercial organisation’s internal controls and advise of any necessary compliance improvements that will reduce the risk of future similar offending.

- The commercial organisation is required to suggest three potential monitors and to indicate which is the preferred choice. It is the commercial organisation’s responsibility to pay all of the costs of selection, appointment and remuneration of the monitor.

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• Any financial penalty forming part of the DPA is to be broadly comparable to a fine that the court would have imposed on the commercial organisation following a guilty plea.

• Where an alleged breach of the terms of a DPA is material or the parties are unable to agree on a suitable remedy, or the court does not approve the suggested remedy, the court may order that a DPA be terminated, in which case it will be usual for the commercial organisation to be prosecuted.

The draft Code does not provide guidance relating to the protection or waiver of legal advice privilege in the context of self-reporting, and there is no guidance as to the expected outcome of self-reporting other than the fact that it will be taken into account in the application of the public interest test (i.e. there is no gliding scale of leniency). The draft Code omits any express guidance concerning the extent to which the UK prosecutors might share information with foreign regulators arising at the negotiation stage of DPAs or within the Statement of Facts. However, the draft Code reaffirms that the development of the criminal law applicable to commercial organisations and the extension of enforcement options available to UK prosecutors continues to be a key part of the government’s policy concerning white collar and economic crime.

The consultation closes on 20 September 2013.

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New SEC Exception to No Admit, No Deny Policy will raise the stakes of some settlements

The US Securities and Exchange Commission’s (“SEC”) recent decision to require companies in settlements to make an admission of wrongdoing in certain circumstances will cause companies to think more carefully about entering such settlements and how they interact with the SEC going forward. Significantly, admissions made in a SEC settlement could be used as evidence in a criminal prosecution or other litigation against the company, its officers, and its directors.

On June 18, 2013, SEC Chairman Mary Jo White said at the Wall Street Journal’s CFO Network Event that she had reviewed the SEC’s policy and practice of allowing companies to settle while neither admitting nor denying wrongdoing and that the SEC is “going to in certain cases be seeking admissions going forward.” She added: “Public accountability in particular kinds of cases can be quite important, and if you don’t get [the admissions], you litigate them. What kinds of cases are those? To some degree it turns on how much harm has been done to investors, how egregious the fraud is.”

Both Chairman White and SEC Enforcement Division co-directors Andrew Ceresney and George Canellos have emphasized that the “no admit, no deny” option would remain a frequently used tool for the SEC, but that for certain cases, an admission would be required. Ceresney and Canellos provided additional detail in an internal email to the Enforcement Division staff, explaining that such cases might include:

- ‘misconduct that harmed large numbers of investors or placed investors or the market at risk of potentially serious harm’
- ‘where admissions might safeguard against risks posed by the defendant to the investing public, particularly when the defendant engaged in egregious intentional misconduct’ or ‘when the defendant engaged in unlawful obstruction of the commission’s investigative processes.’

Prior to this announcement, the SEC had a blanket policy of allowing companies to pay fines and disgorge profits to settle enforcement actions without admitting or denying any wrongdoing except where the company was convicted of criminal charges based on the same conduct. This tool allowed companies to settle the actions against them without providing additional evidence to support criminal or other civil liability.

In future cases where the SEC applies its new loosely defined exception, the admissions it obtains could provide the basis for a criminal prosecution of the company and anyone else involved in an alleged misconduct, give rise to shareholder derivative suits against directors, or private securities fraud litigation against the company. This greatly increases the potential burden of a settlement on companies and those who act on their behalf. By adding an admission as a potential requirement of settlement, the SEC has greatly increased its leverage in settlement negotiations for the short term. Companies are likely to be much more willing to agree to more burdensome

1 Where the SEC Action Will Be: Mary Jo White on What Changes She Expects at the Securities and Exchange Commission, WALL ST. J. (June 23, 2013), http://online.wsj.com/article/SB10001424127887323893504578555990184592624.html?KEYWORDS=Mary+Jo+White; Alison Frankel, Should Defendants Fear New SEC Policy on Admissions in Settlements?, REUTERS (June 19, 2013), http://blogs.reuters.com/alison-frankel/2013/06/19/should-defendants-fear-new-sec-policy-on-admissions-in-settlements/, and SEC Enforcement Division co-directors Andrew Ceresney and George Canellos have emphasized that the “no admit, no deny” option would remain a frequently used tool for the SEC, but that for certain cases, an admission would be required. Ceresney and Canellos provided additional detail in an internal email to the Enforcement Division staff, explaining that such cases might include:

- ‘misconduct that harmed large numbers of investors or placed investors or the market at risk of potentially serious harm’
- ‘where admissions might safeguard against risks posed by the defendant to the investing public, particularly when the defendant engaged in egregious intentional misconduct’ or

3 Frankel, supra note 1.
settlements as long as admissions are left off the table. The true long-term impact of this change in policy will depend on factors such as who is required to make an admission and what is required to be admitted. If the SEC allows a few companies to admit to lesser acts of wrongdoing such as negligence, it is less likely to lead to additional liability than if it requires many companies to admit to intentional conduct.  

See Frankel, supra note 1.

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The World Bank Group’s emergence in enforcement

The World Bank Group (“Bank”) conducts business in 187 member countries and lends nearly $60 billion per year. The Bank has recently emerged as a major player in the anti-corruption enforcement realm, publicly stating that the fight against corruption is essential to overcoming global poverty and boosting growth and opportunity. The Bank’s Integrity Vice Presidency (“INT”) is an independent unit within the institution responsible for investigating companies financed by the Bank that are suspected of engaging in fraud and corruption-related activities. The INT focuses its anti-corruption efforts on situations involving: high-risk sectors, projects, and countries; evidence of systemic corruption; allegations that pose a critical reputational risk to the Bank and where there is need for immediate deterrence; and fact patterns that...
involve large sums of money in high-volume contracts.\(^1\)

The INT has five administrative sanctions at its disposal: Public Letter of Reprimand; Debarment; Conditional Non-Debarment; Debarment with Conditional Release; and Restitution.\(^2\) Since 2010, the INT has also pursued Negotiated Resolution Agreements with the private sector. These agreements, which require an admission of wrongdoing, the implementation of compliance measures, and co-operation with the investigation, are a means for companies to avoid the costs and negative publicity associated with lengthy investigations. Additionally, the INT operates a Voluntary Disclosure Program for companies not already under investigation that want to pre-emptively notify the Bank about misconduct. In exchange for making disclosures and enrolling in the program, the INT promises immunity from debarment and works with the member companies to manage the release of information to national authorities.

The Bank is currently involved in nearly 100 investigations spanning forty countries. Accordingly, the INT has placed increased emphasis on co-operation between the Bank and other enforcement bodies, recognizing that many investigations into corrupt activity span multiple countries. In furtherance of its efforts, the Bank has also signed 26 memoranda of understanding with national authorities and development organizations around the world.\(^3\)

Independently, the Bank is unable to subpoena documents or conduct searches. However, the Bank can, and does, share its information and findings with governmental bodies to facilitate investigations and prosecutions relating to suspected wrongdoing. In turn, authorities such as the US Department of Justice and UK Serious Fraud Office also share information with the Bank relating to improper payments involving Bank projects.

Currently, the Bank is engaged in a “stock-taking exercise” to determine the effectiveness of the current sanctions system.\(^4\) As part of this process, the Bank is actively collecting feedback from all external stakeholders—including private sector actors, country officials, and other international organizations—to be used in developing recommendations for the Bank’s Audit Committee, which is charged with instituting any necessary reforms to the system. The initial consultation period runs through September 30, 2013.

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3 Integrity Vice Presidency Annual Report, supra note 1, at 5.


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UK: Tchenguiz & Anor and Rawlinson and Hunter Trustees S.A. & Ors v Director of the Serious Fraud Office (Defendant) and Akers & Anor (Respondents) [2013] EWHC 2297 (QB)

Earlier this year, the UK Supreme Court held that advice given by accountants did not attract legal advice privilege. More recently, the High Court has held that litigation privilege could not be claimed in respect of reports produced by accountants, Grant Thornton, in the context of the SFO's disastrous investigation into dealings between Vincent and Robert Tchenguiz ("the Tchenguiz Brothers") and Icelandic bank Kaupthing.

The SFO's investigation into the Tchenguiz Brothers was abandoned in 2012 and the Tchenguiz Brothers have since brought proceedings against the SFO seeking damages of around £300 million for financial losses and reputational harm alleged to have been caused by the investigation and related arrests.

The background to the High Court's judgment is complex, but in essence, the Joint Liquidators for certain companies in which the Tchenguiz Brothers had beneficial interests had commissioned five reports from Grant Thornton to assist them in various ways in connection with the liquidation of these companies. The SFO had seen and relied upon these reports in deciding whether to investigate the Tchenguiz Brothers and had taken detailed notes of their contents which were later adduced in evidence in open court. The Tchenguiz Brothers claimed that it was necessary that the reports be released to them for the purposes of disposing fairly of their claims against the SFO. The Joint Liquidators opposed the application on the grounds that the reports were protected by litigation privilege.

The High Court allowed the Tchenguiz Brothers' application, finding that the five reports were not protected by litigation privilege because they were not produced for the dominant purpose of being used in aid of or obtaining legal advice from a lawyer about actual or anticipated litigation. In brief, the Judge found that the reports were produced for multiple purposes, including ascertaining the financial position of the insolvent companies and assessing possible litigation, none of which satisfied the dominant purpose test. Additionally, none of references in the evidence to "potential" causes of action and "possible" claims satisfied the necessary threshold of litigation having to be reasonably in prospect. While the outcome is not unexpected and appears to preserve the status quo with regard to the test for litigation privilege, it is worth noting the very careful approach taken by the Judge to determining whether the "dominant purpose" test was met, including how anxiously he scrutinised the evidence put forward by the Joint Liquidators to determine the purpose of each report.

Although not strictly necessary, the Court went on to consider whether, had the reports at any time been the subject of litigation privilege, such privilege had been lost because information in them was now in the public domain (through disclosure of the SFO's notes). On the facts before him, the Judge decided that the reports themselves were not in the public domain and so no confidentiality in them had been lost. In doing so, he appeared to accept the Joint Liquidators' submission that disclosure of documents to the SFO in response to the service of a notice pursuant to section 2 of the Criminal Justice Act 1987 does not automatically lead to any wider loss of privilege.

Jehan-Philippe Wood
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South Africa: Allpay Consolidated Investment Holdings (Pty) Ltd v The Chief Executive Officer of the South African Social Security Agency 2013 JDR 0579 (SCA)

The South African Supreme Court of Appeal overturned an order by the High Court which declared invalid the South African Social Security Agency’s tender process in the award of a contract to Cash Paymaster Services to operate a social security payment system. The Appeal Court also ordered that the award of the tender to Cash Paymaster Services not be set aside due to the prejudice it would cause to the recipients of social grants.

Allpay were criticised by the Appeal Court for not producing proper evidence of the corruption they had insinuated and for basing said insinuation on mere suspicion. The court held that it is prejudicial to the judicial process if cases are adjudicated on innuendo and suggestion without any proper evidential basis. Furthermore, the court commented that it was unfair, if not improper, to allege corruption by innuendo and suggestion. A litigant who alleges conduct of this nature must do so in an open and forthright manner to allow the accused a fair opportunity to respond. Confidence in the court process is built on transparency and this requires the grounds upon which cases are argued and decided to be openly ‘ventilated’.

Allpay had described “irregularities” in the tender process which were dismissed by the Appeal Court as having no impact on the lawfulness of the award of the tender. A shareholder of Cash Paymaster Services, an American company, is reported in the press to be under investigation by the SEC, as a result of Allpay’s insinuation of corruption.

Kate Solomon
Associate, Johannesburg

Australia: Securency/Notes Printing Australia

The first prosecutions in Australia for foreign bribery commenced in July 2011, despite the fact that this offence had existed since 1995. Committal hearings began in August 2012 and are ongoing.

Securency, Note Printing Australia, and nine former senior executives were charged with offences under the Australian Criminal Code for bribing foreign public officials or conspiring to commit foreign bribery in Vietnam, Indonesia, Nepal and Malaysia between 1999 and 2005 in order to secure contracts to produce polymer bank notes. At the time of the alleged bribes, Securency was jointly owned by the Reserve Bank of Australia (RBA) and a UK company and Note Printing Australia was, and still is, a wholly owned subsidiary of the RBA. In July 2012, Securency’s former CFO pleaded guilty to false accounting offences. He has been sentenced to a suspended six-month term of imprisonment for concealing commissions paid to a Malaysian agent.

The Securency/NPA case was rejected without investigation when a whistle-blower first approached the Australian Federal Police (AFP) in 2008. Securency self-reported wrongdoing to the AFP the following year and prosecutions followed. This led to criticism of the AFP and other agencies in the OECD’s Phase 3 Report Australia’s implementation of the OECD Anti-Bribery Convention in October 2012.

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Zoë Justice
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Canada: Amendments to Corruption of Foreign Public Officials Act

On June 19, 2013, broad amendments to Canada’s Corruption of Foreign Public Officials Act (CFPOA) came into force. The CFPOA implements Canada’s obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The two most significant changes are the creation of a “books and records” offence and the eventual elimination of the facilitation payments exemption. Non-governmental organizations and charities will also be significantly affected by the CFPOA’s expanded scope of application.

The new “books and records” offence effectively brings Canada’s anti-corruption regime more closely in line with the US Foreign Corrupt Practices Act (FCPA) and will make prosecutions much easier for enforcement officials. The repeal of the current exemption for facilitation payments, once this amendment is brought into force by the Federal cabinet, will bring the CFPOA more closely in line with the UK Bribery Act, which has no such exemption, but will place the CFPOA out of step with the US FCPA, which currently exempts facilitation payments.

Other amendments to the CFPOA include broadening the definition of “business” to include any business, profession, trade, calling, manufacture or undertaking, whether or not for profit; shifting from a “real and substantial connection” test to a nationality test for purposes of extending jurisdiction to prosecute Canadian citizens, permanent residents, and businesses organized under federal or provincial laws wherever they are in the world; increasing the maximum penalty to 14 years imprisonment; and specifying that the Royal Canadian Mounted Police alone can lay charges under the Act.

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