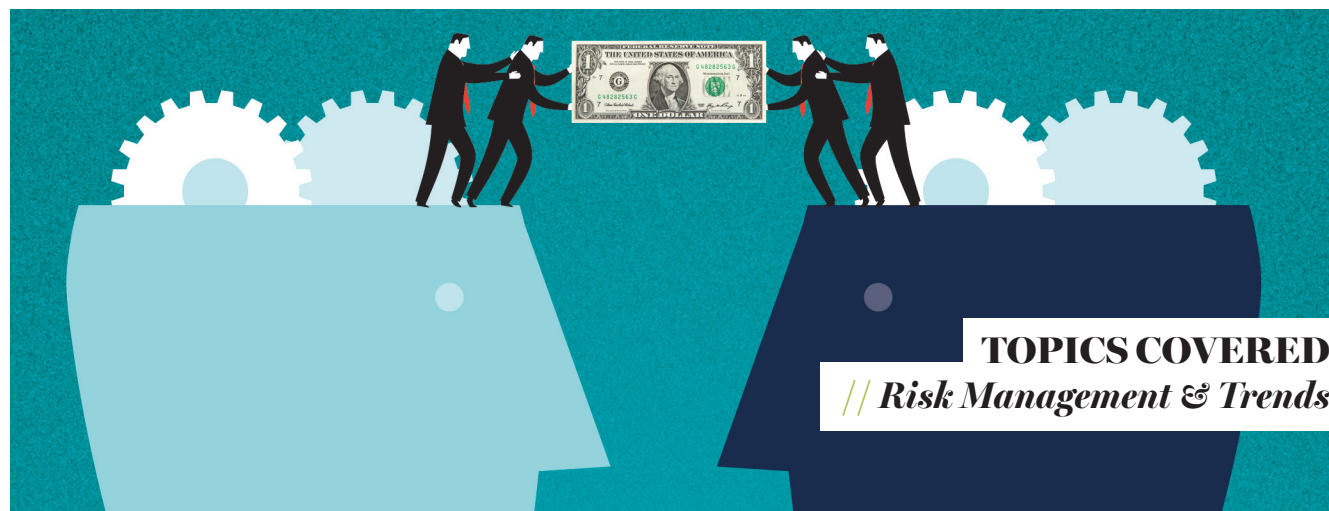


ANTI-CORRUPTION

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GETTING CREATIVE WITH BRIBERY

Traditional schemes are giving way to more complex means of corruption, highlighting the importance of a robust and proactive compliance plan

Written by Sulaksh Shah, Peter Spivack, J. Evans Rice III, and James Gargas

Newspaper headlines discussing bribery schemes typically include the usual suspects: sham consulting agreements, trips to Vegas, or gifting of Rolex watches to foreign government officials. However, how often have we scratched our heads thinking, “Now that is clever...wrong, but clever.” In this article, we will explore a couple of such creative bribery schemes with the objective of raising awareness and enhancing compliance efforts.

Creative Bribery Schemes

1. The Bearer Share Corporation

The first creative scheme to be examined is the Bearer Share Corporation (BSC). Although many are familiar with shell companies, a BSC can add additional layers of complexity and opacity to them.

The term “shell company” is commonly used to refer to a company that, while incorporated, does not have substantive business activities or assets. A BSC is a company whose owner(s) are the bearer(s) of the company's share certificates. Simply put, it is difficult, sometimes impossible, to determine the actual owner(s) of a BSC without seeing the share certificates in the possession of a particular party at a particular point in time and also validating the authenticity of the share certificates.

On a recent matter in the energy industry in Latin America, through corporate records retrieval and analysis of bank records, we identified that one of our client's business partners was a Panamanian “shell company”—a BSC—and

had a bank account in the British Virgin Islands. Since the business partner declined our client's request for additional information regarding its beneficial ownership, that portion of the business was carved out and not acquired.

In addition to the multi-layered transparency challenges presented by this scheme, it presents several anti-corruption compliance challenges. For example, such schemes heighten the risk of books and records issues inasmuch as the payer's assets may not be correctly recorded if the scheme is executed in furtherance of an attempt to create a slush fund or if the invoices between the BSC and its “customers” do not robustly and transparently describe the nature of the transactions.

Expertise in identification of BSC schemes is critical to corruption risk mitigation. Such expertise includes identifying BSCs, differentiating them from ordinary “shell companies,” and knowing how to gather information from the public domain as well as from the books and records of a payer to identify the true owners of the BSC.

As in the anti-money laundering context, it is critical for a company's compliance function to identify the true ownership of any entity receiving payment from the company. If a BSC is involved in the analysis, this task simultaneously becomes more challenging and more critical to FCPA compliance efforts.

It is also worth noting that the subject of transparency in corporate ownership is currently receiving attention in reforms being contemplated by the World Bank¹.

2. Research and Development

Another area in which we have seen a creative bribery scheme is the competitive and high-stakes world of research and development (R&D). For many corporations operating abroad in the scientific, medical, biomedical, and engineering fields, R&D is of paramount importance.

Imagine a situation in which a pharmaceutical company is facing a “patent cliff” and staring at a promising but unique research opportunity wherein a small group of persons in a specific geography possesses a genetic mutation critical to research. Local regulations stipulate that foreign firms can only perform research, and thus access the group, by partnering with a local government research institution. The lead researcher at the institution insists upon being compensated at “above market” rates.

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Benchmarking studies for similarly qualified researchers show the lead researcher's request to be out of line and compliance approves the request contingent upon the lead researcher receiving only 10 percent of the compensation requested by the pharmaceutical company's project leader. As funds for research efforts abroad are often administered through charitable entities affiliated with universities, a potential “solution” to such a problem could be (and was, in one of our recent experiences) effected by having a local subsidiary make a donation to a public university's captive foundation, which, in turn, grants a significant “bonus” to the lead researcher. The local subsidiary is immaterial to the pharmaceutical company.

Unfortunately for the lead researcher and the pharmaceutical company's project leader, the foundation's “bonus” might have been (was) identified in a proactive anti-corruption audit of the project's expenses. When the discovery was paired with information from the pharmaceutical company's compliance department regarding the rejected compensation request, the project manager was faced with some tough questions.

This situation highlights the importance of not only having strong policies and procedures, but also having robust monitoring capabilities. The importance of negotiating audit rights that cover relevant entities is also underscored.

Final Thoughts

While omnipresent, in response to a more robust enforcement landscape, corruption and bribery schemes are getting more creative and constantly evolving. Hard currency and sham consulting contracts are giving way to other, less traceable means of moving money. These possibilities highlight the importance of an anti-corruption/FCPA compliance program that is much more than a set of policies—a “paper tiger.” Rather, it should be one that incorporates training and proactive monitoring by experienced compliance personnel who can think outside the box.

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¹<http://www.reuters.com/article/2015/06/08/us-aid-worldbank-contracts-idUSKBN002D520150608>

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