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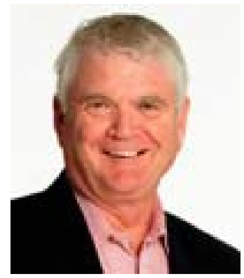
Feature

Organizations Charged Heavy Fines for Bribery and Corruption

Time to revisit your Ethics Program



David Ray, BA, JD,

Recent events indicated that it is time for companies to revisit or, in some cases, implement an ethics and compliance program. Calgary's Niko Resources Ltd. (Niko) was fined $9.5 million dollars under Canada's Corruption of Foreign Public Officials Act (CFPOA). Niko was also placed under a Probation Order with strict provisions to report any criminal investigation against it or its employees to the RCMP, report every 12 months on implementation of compliance programs and provide two independent follow up reviews. It is also required to implement a number of compliance initiatives including assigning responsibility to one or more senior executives. The sentencing came at a time when Niko shares dropped 3.7 per cent. So what was Niko's offence? It turns out that six years ago, two of its Bangladesh employees bought a Land Rover for a government minister and paid for his trip to an oil and gas show in Calgary.

The CFPOA was passed in 1998 but there were no resources provided for enforcement until ten years later when the Federal Government came under pressure from other countries that were members of the Convention for the Organisation for Economic Co-operation and Development (OECD) protocol. Fifteen RCMP officers were hand-picked and an annual budget of $3.1 million was established for investigation and prosecution of bribery. Since Niko's conviction, the names of other Canadian companies that are on the RCMP investigation list are trickling out. The UK recently passed their Bribery Act and it will affect Canadian companies registered in or doing business in the UK. Their Act provides for strict (automatic) criminal liability and includes offences of failing to prevent bribes and has penalties of up to 10 years imprisonment. The Act does, however, provide for a defence where a company has "adequate procedures" to prevent bribery.

One of the complicating factors in bribery cases is that, even though it may offend our Canadian ethical standards, the Comprador system practiced in many countries in the Middle East for hundreds of years said that if I hire you to do buying on my behalf, I can pay you a lower wage on the understanding that you will make it up from suppliers. Ethics is more like Jell-O than concrete. In a poll of any representative group on issues such as abortion, right to die or capital punishment, people would come down on both sides of the argument and both sides would say they have the ethical high ground. Another complicating factor in these cases is that senior management may not have condoned or even been aware of the bribery.

Another case that recently hit the news was the allegations that Sino-Forest Corporation misrepresented the size of its forest assets. The allegations resulted in a cease trade order by the Ontario Securities Commission, the resignation of its CEO and a loss of $4.1 billion in market capitalization.

So what are the expectations on a corporation to have an appropriate program in place? The UK Act gives some excellent insight into six steps that a company can take to avoid a violation and the resulting consequences. The first is to ensure that procedures are in place that are proportionate to the level of risk. The company must avoid an "It can't happen here" attitude and

Feature

be realistic about what could go wrong. The procedures must also include a business strategy for implementation and enforcement. The second step is top-level commitment from the board and senior management level. This should include a code of conduct and regular sign off by all employees together with an audit process to show that they are completed. It should also include an investigation and enforcement provision and consequences for breaches. The third step is a risk assessment to identify the company's exposure. These assessments should be ongoing, built into change management plans, realistic and proportionate to the nature and extent of the company's business including the consequences of third party involvement in the business processes.

The fourth step is due diligence procedures to identify and mitigate the risk of bribery or other criminal acts. The fifth is communication and training both internally and externally to ensure that employees, contractors and other parties are aware of the requirements and provide for a method of reporting potential breaches. This should include a whistle blower line to facilitate reporting. The last step is to provide for a process to monitor and review the effectiveness of the program.

No organization wishes to come under public or law enforcement scrutiny for allegations of bribes or other criminal activity, but the implementation of an effective and "living" ethics and compliance program can deter these events and can assist with a response if allegations are made.

David Ray, BA, JD, is a consultant specializing in security and investigations based in Calgary and can be reached by email at dave-ray@shaw.ca.