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Industry Takes Notice of Mounting Anti-Corruption Efforts

The oil and gas sector has hosted several anti-corruption investigations and prosecutions in the past year or so under the US Foreign Corrupt Practices Act (FCPA) -- and its companies have paid some of the heaviest fines. These have ranged from Swiss based oil services company Weatherford International's $253 million settlement of charges related to bribery in Africa and the Mideast in November, to French Total's May agreement to pay $398 million to settle charges over bribes to Iranian officials (EIF Nov 27'13).

Recent cases underscore the FCPA's expanding international reach, but more generally highlight an increased trend towards a global enforcement environment, says New York based law firm Hughes Hubbard in its FCPA Anti-Bribery Alert review of 2013. While the US remains the most proactive, more governments appear inclined to prosecute for bribery offenses by enforcing their own anti-corruption laws and regulations, and by cooperating with agencies in other jurisdictions. Brazil, Canada and the UK have all strengthened anti-corruption statutes, or undertaken significant investigations or prosecutions the past two years.

The OECD Working Group on anti-corruption is also prodding less active members like France and the Netherlands to enforce their laws more vigorously. The OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions -- the first and only international anti-corruption instrument focused on the "supply side" of the bribery transaction -- now has 40 signatories, including three oil-producing non-members: Brazil, Russia and Colombia. Governments are cooperating more closely with multilateral organizations like the World Bank -- which are in turn harmonizing anti-corruption standards and investigative practices and sharing information with each other. The World Bank has debarred 400 companies from multilateral funding of projects and contracts, which will result in cross debarments with other development banks.

The US is clearly the most active enforcer, with penalties topping $740 million between January 2012 and October 2013. Penalties on the oil industry last year alone tallied $665 million. At the same time, US regulators are interpreting the FCPA more broadly, applying maximum flexibility on what constitutes a foreign official -- which can range from senior functionaries to low level employees of state agencies and state-owned institutions. Offenses under the act include so much more than payments to win contracts. They also include payments to obtain confidential bidding information, payments to alter engineering design specifications in favor of a particular bidder, or payments to obtain preferential customs treatment. The Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) are also prosecuting parent companies for violations by far flung subsidiaries -- even when the parent professes to know nothing about what a subsidiary or third party does.

More generally, international enforcement agencies are showing increasing willingness to investigate and prosecute improper payments to individuals and entities other than foreign officials -- as in the UK Police' decision last July to investigate a deal involving Shell and Eni for possible money laundering violations in connection with their payment of $1.3 billion directly to the Nigerian government for the purchase of Oil Block 245. The investigation followed allegations from resource campaigners that the companies had used the Nigerian government as an intermediary to transfer nearly 85% of the $1.3 billion payment to a third party owned by former Nigerian Oil Minister, Dan Etete -- after the government bypassed Nigeria's Federal revenue account.

The Serious Fraud Office (SFO) appears to be moving away from its previously reactive style of doing business -- responding to self reporting and whistle-blowers -- to become more proactive: In October, it said it would scrutinize "sectors" more aggressively and consider "sweeps" of several industries including oil and gas. The UK's enactment of the Crime and Courts Act of 2013 has authorized the SFO to resolve actions of its Bribery Act through Deferred Prosecution Agreements.

In another trend, law enforcement agencies are becoming more aggressive in targeting suspect jurisdictions, says Hughes Hubbard. The US DoJ and SEC take the view that conducting business in or through suspect jurisdictions may be a red flag in itself, especially with respect to notoriously opaque banking jurisdictions like the British Virgin Islands and corruption prone countries or regions.

So what are the main lessons in these trends? More due diligence, says Hughes Hubbard and other law firms. In particular firms should strengthen diligence on business partners and third parties. Of the 12 corporate settlements involving alleged violations of the FCPA's anti-bribery provisions during 2012-13, eleven involved payment through third party agents and distributors subcontractors or other intermediaries. "Failure to appreciate the critical need for due diligence leaves a company in a position where it cannot rationally form a basis to conclude that no illegal payment was made," says the firm.

Companies should also examine the qualifications of agents and third parties and the tasks to be performed by agents. They should ensure competence for these, and the value of the tasks relative to the agent's compensation. Unusually high or undocumented commissions, fees or expenses should be carefully reviewed to determine if such payments are justified on commercial grounds. They should be particularly vigilant when government officials recommend third parties. Agents who are former government officials with close ties to current officials may pose particular risks. Finally, senior executives need to ensure compliance all the way down the chain of command.