



Developing an anti-fraud strategy

Rebecca Kelly considers the impact of fraud on companies operating in the Middle East, and in particular in the UAE, and highlights the need for companies to monitor and improve their compliance programs and reactive anti-fraud strategies to provide stronger protection against fraudulent activity.

The existence of an effective compliance program is no longer optional. In the current legal environment where governments have steadily increased scrutiny through an adoption of new regulations, compliance is a critical component for the success of a company, the company's employees, stakeholders, and ultimately any shareholders.

Complex cross-border fraudulent schemes are more prevalent in the Middle East, despite the intervention by worldwide regulators to increase penalties for breaches of domestic and international anti-bribery and corruption laws. Whilst the UAE does not have a

stand-alone body of legislation singularly addressing fraud, the raft of applicable legislation provides that the penalties are dealt with pursuant to the respective Penal Code which criminalises all aspects of fraud including theft, bribery, corruption, and deceit.

The increase in fraud related international investigations has alarmed companies operating in global environments, and can hinder growth as they look to the emerging markets for further expansion. Whilst there are no official government published statistics on the level of fraudulent activity within the Middle East, a recent Ernst & Young survey of 3,800 businesses operating in over 38 Middle Eastern

countries found that *“while fraud, bribery and corruption remain prevalent, strong compliance programs and ethical conduct can go hand in hand with revenue growth. Rapid-growth markets continue to be seen as a route to additional revenues. But in these markets, bribery and corruption remain a significant risk”*.

Effective, monitored, and integrity compliance programs go hand in hand with an increase in business growth, and consequently companies should be well versed in legal developments in their respective jurisdictions when it comes to mandatory reporting requirements, and consequences for non-compliance. The most significant risk is that a company is ill prepared to respond to, or undertake an internal investigation when allegations of fraud are brought to the attention of the management. Treating the allegations as mere allegations without following a prescribed response strategy may perpetrate more fraud, in turn causing the company substantially more harm, both financial and reputational.

The increase in the fraudulent activity highlights a growing trend for companies to address the consequences and their respective regulatory obligations (both within their home jurisdiction and where their products or services are sold or offered; along with where the fraud is perpetrated) to protect their company from the pressures of internal and external fraud. Fraud manifests itself in many ways and a company can be the victim of a cyber-attack resulting in the dissemination of confidential client details, through to the falsification of invoices by fraudulent employees through to bribery of foreign officials to procure a commercial advantage in the market. Regardless of the nature of the fraud, the consequences are the same, and the largest impact can paralyse a company’s ability to continue to operate.

One of the major trends in the Middle Eastern market is the reliance on government sourced work. As a direct consequence of the increased numbers of fraudulent transactions and allegations of bribery and corruption within the market, most governments have responded with increased regulatory requirements around their procurement processes. This increase ultimately leads to a more effective and competitive market, however companies that use any fraudulent means to obtain government sourced work will face stiff penalties due to the increase in regulations for government work.

SIGNIFICANT LEGAL DEVELOPMENTS IN THE UAE

As part of some recent legislative changes in the UAE, the Federal Government recently introduced the Commercial Companies Law 2015² (CCL 2015) in direct response to the need at the regulatory level to place companies under more scrutiny to improve their internal compliance programs. Prior to the enactment of the CCL 2015, companies were not legally required to

adopt any system of corporate governance (unless they were public listed companies). The CCL 2015 repeals the Commercial Companies Law 1984 and introduces accountability for company owners, directors, and shareholders in respect of corporate governance.

Companies in the UAE must comply with the CCL 2015



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updated policies and procedures aimed to mitigate risk in a changing legal environment.

GOVERNMENT PROCUREMENT

Sourcing work from the government or government related entities is very important in the Middle East. Any individual working for a government department, regardless of seniority would be deemed to be ‘foreign official’ for the purpose of the FCPA³ and the UK Bribery Act⁴, and a ‘public official’ for the purpose of

by July 1, 2016 and the need for mandatory corporate governance policies and procedures are the responsibility of the board of directors of all UAE Companies. With the enactment of the new Insolvency Law and other key regulations aimed to improve overall governance within the UAE, the focus of the regulators is to improve the accountability in companies to ensure compliance with regulatory controls. The most effective mechanism to ensure compliance will always be with the adoption of

Fraud can paralyse a company’s ability to continue to operate



domestic legislation. Both the FCPA and UK Bribery Act have wide extra territorial jurisdiction and will, in certain circumstances, govern the conduct of companies based throughout the gulf. Therefore not only would the consequences for non-compliance with the procurement process within the UAE affect a company's ability to undertake work, it also may give rise to a breach of the anti-bribery provisions of the FCPA or the UK Bribery Act and criminal penalties within the UAE pursuant to the Federal Penal Code.

In the UAE, government procurement is heavily regulated, and companies must adhere to these regulations in relation to fraud, anti-bribery, and corruption. Whilst there are no stand alone anti-bribery laws, the penalty for breaching the procurement laws will give rise to a criminal offence⁵

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so companies should clarify with each government department they tender to what the procurement rules are that govern the procurement process. Both Federal and Emirate based government bodies in the UAE have regulations governing procurement with private sector suppliers. By way of example, if we look at Abu Dhabi, any company considering business with an Abu Dhabi government entity must comply with the Procurement Law⁶. Specifically, there are regulations and guidance concerning the requisite standard for business ethics and it makes clear that only the *highest levels of ethics and transparency are acceptable* and that contracts will not be awarded on the basis of any form of bribery or special treatment. In addition, in the case of fraud, deceit or bribery by a supplier, the government entity is entitled to cancel the contract, confiscate the performance bond (which is usually 10 percent of the contract price) and claim compensation. Similar provisions are also set out when dealing with Dubai government entities⁷, and when dealing with the Federal government suppliers will be prohibited for periods over three years if fraud takes place during any Federal government award of contracts.

Similarly, suppliers who are "*convicted of a felony or misdemeanor*" may also be struck off from the government suppliers list for a period of not less than three years. Companies that second their staff to government entities must also be aware of the specific government employment laws that apply. In Dubai for example, the Dubai Government Human Resources Management Law⁸ may apply in certain circumstances. Employees must not involve themselves in any decision or process that would directly or indirectly influence the success of a contractor or supplier from which they or a relative might obtain a direct or indirect benefit. Employees must also not release any confidential information or indeed seek any advantage from released information obtained in the course of their duties.

OVERALL APPROACH TO RISK MITIGATION

Understanding the regulatory framework in both the jurisdiction the company is operating in – as well as the jurisdictions where the products and services are offered, is the key to minimising the risk associated with bribery and corruption. It is a tried and tested formula for companies, when operating in foreign jurisdictions that lack effective controls or regulations in respect of criminalizing fraudulent behaviour, to adopt higher standards of internal compliance as the risks of fraud remain one of the highest compliance concerns. As emerging markets governments develop and increase their regulations to force companies to comply, those companies already operating at a higher standard will have a head start.

Compliance programs assist by fostering a culture of ethics and integrity which improve overall compliance and avoid regulatory and criminal liability. Companies that work with governments should also be aware of the additional expectations and the consequences of potentially being barred from contracting with the government. 🚫

1. See <http://emergingmarkets.ey.com/fraud-and-corruption-the-easy-option-for-growth/> accessed 11 October 2015
2. Federal Law (2) of 2015 Concerning the Commercial Companies (repealing in its entirety Federal Law (8) of 1984)
3. US Legislation – Foreign Corrupt Practices Act (1977)
4. UK Bribery Act (2010)
5. See UAE Federal Penal Code (3) of 1987 as amended
6. See Abu Dhabi Law No. (6) of 2008 and the accompanying Manual
7. See Dubai Law No. (6) of 1997 (as amended)
8. See Dubai Law No. (27) of 2006



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