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# *International/Cross-Border Issues Roundtable*

2008 NATIONAL DIRECTORS INSTITUTE



## **INTERNATIONAL/CROSS-BORDER ISSUES ROUNDTABLE**

### **INTRODUCTION**

Foley presented the “International/Cross-Border Issues Roundtable” as part of the seventh annual National Directors Institute, hosted by Foley & Lardner LLP on March 6, 2008, in Chicago. The roundtable discussion was led by Foley Commercial Transactions & Business Counseling Partner Timothy J. Sheehan, along with Robin Johnson of Eversheds LLP, Emily McNeal of UBS Securities LLC, Dennis Wheeler of Coeur d’Alene Mines Corporation, Bruce Wineman of Aon Global Client Network, and Jack Moorman of Deloitte Financial Advisory Services LLP.

### **COMPLIANCE ISSUES IN INTERNATIONAL EXPANSION**

In order to create and maintain an ethical business culture and to ensure compliance with U.S. laws, including the Foreign Corrupt Practices Act (FCPA), a company should have its compliance plan well in place before entering a new geographic area. Depending on the circumstances, this process may require months or years of preparation.

When a U.S. multinational corporation enters a new market, there is already an expectation of a high level of compliance — and sending a strong message reinforces this reputation. However, simply implementing an off-the-shelf compliance training program is not sufficient action to achieve this objective. Instead, companies should develop programs that are tailored to the company, the industry, and the local culture. These programs should provide employees with relevant “case studies” covering such scenarios as how to deal with a bribe demand at the local airport or how to compete ethically in a marketplace where competitors may be more willing to pay kickbacks to customers.

Cultural awareness is perhaps the most important aspect of international operations, because such differences will challenge a company’s ethics in a variety of subtle and not-so-subtle ways. For example, local-country employees may have family and community relationships with suppliers and government officials, resulting in consequences of which the company is not aware.

Successful compliance training programs should be presented in the local language for greater effectiveness and should involve local “integrity leaders” who are trained in advance and made available as a resource for other employees. Training also should be provided on a continued basis to demonstrate that the company takes compliance matters seriously. As well, violations of laws should be responded to with penalties that clearly inform employees and community members that unethical practices will not be tolerated.

A whistle-blowing tool may serve as one important element of an international compliance program, but managers must understand its limitations. For example, whistle-blowing programs



are commonly underused in many cultures in which it is considered inappropriate to comment on the performance of one's coworkers. (Alternatively, employees in other cultures may misperceive a whistle-blowing program as a method for exacting revenge on someone who has wronged them.) Again, the involvement of local leaders is essential, both for educating employees about the proper use of such tools and to provide managers with alternative means of finding out what is happening on the ground.

A successful compliance program also requires home-office support in numerous respects. First, because compliance programs necessarily require paperwork, local managers should be provided adequate staffing. Second, expansion projects should be monitored by a strong financial controller who has been transferred from the home office to the field and who can recognize when "something doesn't look right." Third, companies should provide a global security system (against such threats as attacks, kidnapping, and so forth) and crisis-management procedures to let employees know that they will be protected in challenging environments.

Compliance and ethical conduct do not stop at the factory gates; companies have found that good community relations (even with nonemployees) have succeeded in making it easier to achieve compliance and also have helped companies maintain stable operations in areas affected by political and economic turmoil.

### **COMPLIANCE ISSUES IN JOINT VENTURES AND M&A**

Issues of compliance also arise when a company is contemplating an international joint-venture project or an international acquisition.

U.S. companies must train their foreign joint-venture partners (managers and employees alike) regarding acceptable conduct. This recommendation applies not only to projects in developing countries, but also to operations in Europe or other developed areas — simply because compliance issues receive greater emphasis in the United States than elsewhere.

When evaluating potential transactions, a board of directors should be concerned about the quality of information provided by international sources. Financial records and minute books may be questionable, and employee records may be doctored to conceal liabilities. While the existence of citations or warning letters may be a symptom of underlying problems, the absence of such items may indicate that someone has made payoffs to government officials.

To forestall such problems, companies should conduct more due diligence outside of the normal audit process and also gather information from additional sources. For example, following the collapse of a recent highly publicized international merger, it was learned that no one at the acquiring company had even spoken with the target company's major customers or suppliers regarding their previous or planned dealings with that company. Companies should obtain answers to even the most basic questions — such as, "From where is my joint-venture partner getting its money?" — and should be wary when evaluation trips center on entertainment rather



than due diligence. Recent troubles in the pharmaceutical industry also suggest that certain companies should conduct a thorough evaluation of a target's entire supply chain.

Because international transactions move quickly, companies and their home-country counsel should identify the right local advisers for the project early in the process. Some additional questioning is appropriate at this stage to ensure that the proposed local counsel has contacts and experience in the relevant country as well as to ensure that the proposed local counsel has not previously represented the target or its affiliates. Internally, companies also should keep track of the experiences of particular counsel and staff in the relevant country, because measures that help a company "climb the learning curve" in a particular region will help minimize costs and achieve business objectives sooner.

### **EXTRATERRITORIAL APPLICATION OF U.S. LAW**

Companies should be mindful of how foreign operations or acquisitions could result in violations of U.S. export laws. For example, while German law permits a company to export certain items to Iran, the acquisition of that company by a U.S. parent would risk violating U.S. laws. Alternatively, a company may be permitted to employ certain dual-use technologies in its U.S. facilities but not in its foreign operations.

Because the relevant U.S. laws and regulations are implemented by many different agencies, there is no "single source" that can provide guidance. Instead, companies should work closely with counsel to evaluate these issues before problems arise. And even if legal compliance is achievable, a company also should consider the potential shareholder and public relations implications resulting from such investments.

### **LIABILITY FOR DIRECTORS AND OFFICERS**

U.S. companies must be aware of the ways in which their own managers or directors may be subjected to liability under foreign laws. In some countries, an individual director may be personally liable for a worker's on-the-job injuries, or local managers may be held personally liable for violations of certain labor laws. Ultimately, companies should consult with experienced local counsel at the outset to ensure awareness of such potential liabilities, particularly in situations where compliance with local-country laws and regulations could result in violations of U.S. law. For example, the French requirement for prior consultation with workers' committees in mergers and acquisitions (M&A) transactions may be difficult to square with U.S. securities laws prohibiting selective disclosure of material information regarding transactions.)

Companies also should assess their own willingness to undertake compliance risks in international transactions. While some companies may be able to put a price tag on the task of establishing a compliance program following an acquisition, other companies may find compliance to be simply a "go/no-go" proposition. Even if a target company already has a



compliance program in effect, certain red flags and symptoms of noncompliance may justify terminating a deal or at least altering a deal's structure (e.g., from an acquisition to the purchase only of assets or intellectual property).

Parties may need to be increasingly mindful of the ways in which the due diligence process itself risks violating foreign laws. For example, the transmission of employee information overseas may violate European Union privacy laws. Enforcement in this context has not been strong to date, but parties should remain aware of these issues and the related situations (such as data breaches) that could result in liability.

## RESOURCES

When entering a new geographic area, companies may obtain valuable assistance and local knowledge from the relevant U.S. embassy and from the local branch of the U.S. Chamber of Commerce (whose membership is a mix of U.S. executives and local business owners).

## BOARD DIVERSIFICATION

Along with the expansion into new areas may come the addition of international members to a company's board of directors. Companies have found that even experienced local-country "directors for hire" have benefited from receiving the same training and information as new members of the company's home-office directors.

## CONCLUSION

Each company's assessment of compliance programs in international transactions ultimately requires a risk-reward assessment suited to its particular circumstances. A compliance program should not be viewed simply in negative terms; on the contrary, an effective international compliance program can help create a positive business culture and provide companies with a competitive advantage.

However, because of the range of cultural differences in attitudes toward compliance, reporting, and management in general, success requires more than just translating home-office policies into foreign languages. Instead, board members and managers first should identify their business objectives and carefully evaluate local circumstances, and then implement a comprehensive plan to harmonize a company's global objectives with local business cultures.



**FOR MORE INFORMATION**

For more information on this session or the seventh annual National Directors Institute, visit [Foley.com/ndi](http://Foley.com/ndi) or contact the moderators and panelists directly.

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