White Paper

The Early Lesson from GSK

How real is your compliance program?

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The early lesson from GSK: How real is your compliance program?

Just how real is your compliance program? That is the question that you will face if you have to go in front of the Department of Justice (DOJ) to explain why your company should not be prosecuted under the Foreign Corrupt Practices Act (FCPA). But what this question really means is whether your compliance program is actually effective. Last year this question was driven home by Wal-Mart and its allegations of wide spread bribery and corruption in its Mexico subsidiary.

This year we have GlaxoSmithKline PLC (GSK) running amok with allegations that it engaged in bribery and corruption in its Chinese operations. At least GSK has not claimed that it was the ubiquitous 'rogue employee' who has caused the company such grief in China and across the globe. The FCPA Blog, in a post entitled "GSK apologizes for breaking China law", reported that the company has issued a statement that "GlaxoSmithKline said Monday some of its executives in China appear to have broken the law in the giant bribery scandal still unfolding there. Abbas Hussain, the head of emerging markets for the U.K.-based drug maker, said 'Certain senior executives of GSK China, who know our systems well, appear to have acted outside of our processes and controls which breaches Chinese law.'"

Allegations

The allegations against GSK are that it employed Shanghai Linjiang International Travel Agency and other travel agencies as a 'money platform' through which it could engage in bribery and corruption of Chinese government officials to peddle its products in China. David Barboza, reporting in the New York Times (NYT), in an article entitled "Files Suggest a Graft Case in China May Expand", said that "According to the [Chinese] authorities, Glaxo has used 700 travel and consulting firms and spent nearly $500 million on conferences since 2007. Some travel agencies helped Glaxo executives commit fraud, the government asserts." In another article by Barboza, also in the NYT entitled "Glaxo Used Travel Firms for Bribery, China Says", he said that the practice was so lucrative for the travel companies involved that "they would compete for the chance to take part." These Chinese travel companies would engage in bribery back to GSK executives to "throw business their way by offering cash, luxury travel or even hiring young women to engage in sexual activities".

The responsive by the Chinese government has been decisive. In an article in the Wall Street Journal (WSJ), entitled "Amid Bribe Probe, China Bars Glaxo Official From Leaving", reporters Jeanne Whalen, Laurie Burkitt and Chris Matthews said that four GSK executives from its Chinese subsidiary had been 'detained'. They are "Liang Hong, Glaxo's China vice president and operations manager; Zhao Hongyan, a legal-affairs director for the company; Zhang Guowei, a human-resources director; and Huang Hong, a business-development manager." Another executive, who is the GSK finance chief in China, Steve Nechelput, has been barred from leaving the country. Finally, writing in the Global Legal Report, in a post entitled "GSK legal counsel under house arrest in China"; Neasa MacErlean reported that "GlaxoSmithKline's legal counsel in China is under house arrest and constant surveillance, following accusations against the company of bribery and evasion of the tax laws."

GSK prior enforcement action

All of the above is pretty eye popping in and of itself. But consider the following about GSK, a little over one year ago, in July of 2012; GSK pled guilty and paid $3 billion to resolve fraud allegations and failure to report safety data in what the US Department of Justice (DOJ) called the "largest health care fraud settlement in U.S. history" according to its press release. The DOJ press release went on to state that "GSK agreed to plead guilty and to pay $3 billion to resolve its criminal and civil liability arising from the company's unlawful promotion of certain prescription drugs, its failure to report certain safety data, and its civil liability for alleged false price reporting practices." The press release noted that the resolution was the largest health care fraud settlement in US history and the largest payment ever by a drug company for legal violations.

You would think that any company which has paid $3 billion in fines and penalties for fraudulent actions would take all steps possible not to engage in bribery and corruption. Indeed as part of the settlement GSK agreed to a Corporate Integrity Agreement (CIA). This CIA not only applied to the specific pharmaceutical regulations that GSK violated but all of the GSK compliance obligations, including the FCPA.

In addition to requiring a full and complete compliance program, the CIA specified that the company would have a Compliance Committee, inclusive of the Compliance Officer and other members of senior management necessary to meet the requirements of this CIA, whose job was to oversee full implementation of the CIA and all compliance functions at the company. These additional functions required Deputy Compliance Officers for each commercial business unit, Integrity Champions within each business unit and management accountability and certifications from each business unit. Training of GSK employees was specified. Further, there was detail down to specifically state that all compliance obligations applied to "contractors, subcontractors, agents and other persons (including, but not limited to, third party vendors)".

GSK's Code of Conduct (entitled "One Company One Approach") states quite clearly, "The GSK attitude towards corruption in all its forms is simple: it is one of zero tolerance, whether committed by GSK employees, officers, complementary workforce or third parties acting for or on behalf of the company. Accordingly, we must never make, offer to make, or authorise any improper payments or provide anything of value to any individual, or at the request of any individual, for the purpose of influencing, inducing or rewarding any act, omission or decision to secure an improper advantage, or obtain and retain business."

In its Code of Practice for Promotions and Customer Interactions, there is a detailed procedure laid out for any sponsorship of a corporate event, conference or travel. This procedure requires that "The Scientific Engagement Operating Practice "Congress Sponsorships" must be followed for sponsorships of scientific and medical congresses (conferences) at international and local (country) levels". Further, if there is a grant a specific procedure must be followed.

The company has a Third Party Code of Conduct, which states:

Third Parties shall conduct their business in an ethical manner and act with integrity. The ethics elements include the following statement:

> **1. Business Integrity, Reputation and Fair Competition**
> Corruption, extortion and embezzlement are prohibited. Third Parties shall not pay or accept bribes or participate in other illegal inducements in business or government relationships.
>
> Third Parties should never communicate externally about GSK's prospects, performance or policies nor disclose inside Information which would affect the price of GSK securities without proper authority. Third Parties are forbidden from making any public posting of confidential or proprietary information related to any aspect of GSK's business.
>
> Third Parties shall conduct their business consistent with fair and vigorous competition and in compliance with all applicable anti-trust laws. Third Parties must strictly adhere to the letter and spirit of the Competition laws in all jurisdictions. Third Parties shall employ fair business practices including accurate and truthful advertising.

According to the GSK Code of Conduct, all of this is to be backed up by "a Global Ethics & Compliance team which is responsible for providing oversight and guidance to ensure compliance with applicable laws, regulations, and company policies, as well as fostering a positive, ethical work environment for all employees." The Code of Conduct also states that “GSK has an active system of internal management controls to identify company risks, issues and incidents with appropriate corrective actions taken. Our Risk Management and Compliance Policy provides the framework for these internal controls, to ensure significant risks are escalated to the proper levels of senior management.”

Frankly I don’t know how much clearer a company can state that we will not engage in bribery and corruption. But the problem for GSK seems to be that none of the above was effective because the company did not follow its own stated protocols.

Steps to take

If your company has Chinese operations, what should you do about now? In another WSJ article by Chris Matthews, entitled “Western Companies Sweat as Glaxo Probe Unfolds”, he warns that “The rapidly unfolding bribery probe by Chinese authorities into the U.K. drug maker has alarmed Western companies with business there that are accustomed to highly-publicized corruption crackdowns on Chinese officials, but who see the Glaxo matter as new territory, China watchers said. The push against Glaxo could signal that a new anticorruption push in China could now also include foreign companies.” I would suggest that a review of your sales operations is in order, as in immediately. Matthews quoted Joe Warin, a partner at Gibson Dunn & Crutcher LLP, who said, “In particular, companies should examine relationships with travel agencies and event-planning companies, which have long been an “Achilles heel” in China”. The first thing that you should check on is to see the spend that you have with any Chinese travel agencies. You should then match up all receipts and other documentation with all costs to see if there is anything out of line.

However, you should also look at your own employee base. Regarding a company’s own employees, Matthew quoted Jerome Cohen, co-director of New York University School of Law’s U.S.-Asia Law Institute, for the following, “This is a fairly obvious warning that companies need to conscientiously scrutinize the activities of their employees there”. Remember the Eli Lilly FCPA enforcement action brought by the Securities and Exchange Commission (SEC) late last year? The bribery scheme which got Lilly into trouble in China involved its own employees, who inflated their expense accounts and used the extra money to pay bribes to secure sales.

It is clear that companies should follow Matthews’ advice that “multinationals need to scour their operations in China to limit their vulnerability to future investigations.” Now is the time to begin your own investigations because you certainly do not want to be like GSK and find out about allegations that your employees engaged in a multi-year, multi-million dollar bribery and corruption scheme through a public pronouncement from the Chinese Public Security Ministry.

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