

ALLEN & OVERY



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Introduction

- Public affairs is increasingly “going global”
 - A public affairs presence may be required in more and more jurisdictions
 - In longstanding hubs for public affairs – such as Washington, Brussels, and London – legal and reputational scrutiny is growing
- Compliance concerns are growing in tandem
 - The need to ensure a consistent global compliance culture
 - A patchwork of national and local legal regimes
 - Many regimes, such as anti-corruption laws, reach across boundaries

Introduction

- An overview of global compliance, from the standpoint of public affairs professionals
 - Setting up a public affairs function
 - Hiring (whether in-house or consultants)
 - Ensuring ongoing compliance
- Key legal issues
 - Anti-corruption laws
 - Regulation of political intelligence
 - Expansion of political law regimes

Anti-Corruption Laws

Anti-Bribery Legislation: Everyone Should Comply

- The FCPA, UKBA and other anti-corruption regimes are sufficiently broad that organizations are almost certainly subject to some anti-corruption legislation
 - In the US, domestic legislation might also impose restrictions on businesses. US regulators increasingly relying on related laws to combat bribery and corruption
- The FCPA and UKBA comprise the most far-reaching, restrictive legislation
- Best practice is to design an anti-bribery and corruption program that is compliant with the FCPA and UKBA
 - Where the Acts differ (e.g., private bribery; facilitation payments), programs should be designed around the most restrictive provisions

Overview: FCPA Anti-Bribery Provisions

- The FCPA anti-bribery provisions prohibit: (1) a payment or offer to pay “anything of value,” directly or indirectly; (2) to a “foreign government official”; (3) in order to assist in obtaining, retaining, or directing business, or securing an unfair business advantage; (4) with “corrupt intent”
- Examples of improper payments include:
 - Bribing a judge to make a case go away
 - Bribing an official to win a contract (e.g., paying a doctor in a public hospital to purchase equipment)
 - Taking an official to an extravagant dinner or paying for overseas travel
 - Allowing an official to participate in a private placement of securities
- The FCPA carves out limited exceptions and defenses applicable under very narrow circumstances

Overview: UK Bribery Act Anti-Bribery Provisions

- The “General Offenses”
 - Prohibit “paying or receiving bribes (i.e., active and passive bribery) and “bribing a foreign public official”
- The “Corporate Offense”
 - The Bribery Act imposes “strict liability” on commercial organizations if any of the corporate’s “associated persons” make an illicit payment to obtain or retain business or a business advantage for the corporate
 - The Bribery Act provides a full defense for commercial organizations with “adequate procedures” designed to prevent “associated persons” from engaging in bribery
- The Bribery Act prohibits bribes to foreign officials, as well as commercial bribes (i.e., to private actors)
 - The Bribery Act includes no exception for facilitation payments

Risks for Global Public Affairs Functions

The following public affairs activities create touch points where FCPA and UKBA risk is most likely to occur:

- Interactions with government officials: lobbying, relationship-building; seeking permits, licenses; customs
- Gifts and entertainment: hosting public officials at meals; sporting events; conferences
- On-boarding and contractor hiring: former government officials; politically-connected individuals; and individuals with close relationships with high-ranking government officials (i.e., family members)
- Charitable contributions: potential link to public officials

How to Manage the FCPA/UKBA Risks

- Ensure policies and procedures are in place to create appropriate controls over the activities likely to trigger issues
- Conduct training to ensure global public affairs personnel and compliance personnel are aware of the risks and controls
- Ensure controls are in place for escalation of red flags to appropriate supervisors and compliance

Political Intelligence

Increased Focus on Insider Trading Globally

- Led by the US
 - **SEC and DOJ cases against hedge fund employees**
 - **SEC's Market Abuse Unit** – Dedicated enforcement team tasked with investigating large-scale insider trading networks and rings
 - **SEC Cooperation Program** – Encourages key fact witnesses to provide information; credited with helping SEC break insider trading cases earlier
 - **Whistleblower Program** – SEC whistleblower program incentivizes insiders to come forward with tips; in FY2012, SEC received 190 whistleblower tips involving insider trading allegations
 - **Blue-Collar Tactics** – Increasing use of wire taps, dawn raids, informants
- UK, HK, others also active
- Political intelligence firms potentially at risk
 - **2012** – STOCK Act
 - **2013** – Centers for Medicare and Medicaid Services announcement

What is Insider Trading?

- The elements of an insider trading case are:
 - The purchase or sale of securities
 - while in possession of information that is
 - material and
 - nonpublic
 - in breach of a duty of confidence and
 - with fraudulent intent.
- The elements of proof are the same in civil enforcement actions and criminal prosecutions; the DOJ must, however, prove that the defendant acted “willfully,” while the SEC need only demonstrate that the defendant acted “recklessly”
- The federal securities laws also prohibit an insider with material, nonpublic information from “tipping” outside persons

How to Manage Insider Trading Risks

- Especially hard to do in the context of political intelligence firms
 - Nothing inherently illegal about information gathering and analysis
 - But there is a risk with potential market moving information
- Ensure policies and procedures contemplate insider trading and the use of political intelligence firms
- Train on insider trading issues
- Encourage employees to escalate issues

Expansion of Political Law Regimes

Overview

- Public affairs has long been highly regulated in the US, at the federal, state, and local levels
 - Lobbying laws
 - Regulation of political contributions
 - Gift and entertainment regimes
 - Post-employment (“revolving door”) rules
- As public affairs goes global, the regulation of public affairs is increasingly going global as well
 - New scope, regulatory scrutiny for laws in jurisdictions with established regimes (US, Canada, Australia)
 - New regimes in jurisdictions where lobbying was unregulated or lightly regulated (UK, Ireland, Europe)

Overview: Drivers of Reform

- The OECD has followed success in anti-bribery efforts with an ongoing “Transparency and Integrity in Lobbying” initiative
 - Reviewed “state of play” of lobbying regulation in member states
 - Recommended principles of strong lobbying regulation, called on countries to adopt lobbying laws
- Transparency International report on lobbying in Europe
 - Concluded that “unfair and opaque” lobbying laws constitute a “key corruption risk” facing Europe, called for more transparent lobbying regimes
- Political law regimes are also often driven by scandals

European Union Lobbying Regime

- The EU Transparency Register
 - Applies to attempts to lobby the European Commission or European Parliament
 - Council of EU not covered
- Established in 2011 as a voluntary regime
 - Originally, registered parties received only minor benefits, such as the ability to apply for passes to the European Parliament
 - A number of entities with significant presence in Brussels were not registered

European Union Lobbying Regime

- Juncker Commission Reforms
 - Reform program by recently-appointed European Commission
 - New policy that Commissioners, their political staff (i.e., Commissioner's Cabinets) and top EU officials (i.e., all Directors-General) may only meet with lobbyists that have registered in the Transparency Register
 - Registration becoming a practical necessity
 - Over 1,500 new registrations since policy adopted (including Nissan International, the US Chamber of Commerce, Credit Suisse Group, HSBC, Goldman Sachs, Lazard Asset Management, and Starbucks Coffee)
 - Streamlined “alerts and complaints process”
 - Other technical reforms (e.g., changes to staff cost reporting)

European Union Lobbying

- Registration
 - Very broad definition of lobbying
 - Covers direct communications with EU bodies
 - Covers “indirect” efforts to influence the EU, including grassroots campaigns and statements to the media
 - Very limited exceptions (and no *de minimis* exception)
 - Registered lobbyists subject to Code of Conduct
- Key disclosures for registered entities
 - Subjects of lobbying efforts (EU policies, initiatives, etc.)
 - Total number of individuals engaged in EU lobbying, and the percentage of time they spend on such efforts
 - Estimate of annual costs attributable to EU lobbying activities, such as staff costs, office expenses, media costs, etc.

United Kingdom Lobbying Law

- Recent scandals provided a political impetus for reform
 - Werritty affair
 - “Jobs for Generals”
- Government passed the “Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act of 2014” (“Lobbying Act”)
 - Established an online “register” of consultant lobbyists, which became effective March 2015
 - Administered by the independent Registrar, and a staff of two

United Kingdom Lobbying Law

- Definition of “lobbying” under the Lobbying Act is similar to definition of “lobbying contact” in US LDA (communication with covered government official relating to any exercise of government authority), but scope of the proposed legislation is significantly more narrow than the LDA
- Much more narrow definition of covered official (Minister of the Crown, Permanent Secretary, and potentially special advisors covered)
- Only applies to third-party lobbyists (“consultant lobbyists”) and does not apply to in-house government affairs/lobbyists

United Kingdom Lobbying Law

- Registration required *before* any lobbying communications are made or payments received for lobbying
 - To register, an entity must submit basic information about the registrant, including:
 - Names of all partners, directors, company secretaries and shadow directors
 - Client information
- Registered entities must submit quarterly reports
 - These include information about each client on whose behalf the registrant engaged in lobbying during the period, or from whom the registrant received payment
 - No requirement to disclose details of lobbying communications

Irish Lobbying Law

- Irish President Michael Higgins signed the Regulation of Lobbying Act 2015 (“Irish Lobbying Act”) into law in March
- The Irish Lobbying Act appears to be one of the broadest lobbying laws in Europe
 - The law applies to a very broad range of public policy measures, from legislative matters to public procurement
 - The making of a single lobbying contact appears to be sufficient to trigger registration
- Unlike in the UK, businesses that lobby on their own behalf are required to register (except very small firms)
- The law comes into effect September 1, 2015, with both registration and the first lobbying report due by January 21, 2016

Irish Lobbying Law

- Which Communications Are Covered: Any communication relating to public policy matters, public procurement, or legislation
- Which Public Officials Are Covered: The Irish Lobbying Act applies to communications with designated public officials, including:
 - Ministers and Ministers of State, legislators, MEPs for constituencies in Ireland (it is unclear if this applies to matters pending before the European Parliament), members of local authorities, special advisors, and certain civil servants
- Registration Requirements: Required to include, among other information, details about the registrant, information about clients, the identity of public officials contacted, the subject matter of such contacts (updated three times a year)

Questions?

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