

ALLEN & OVERY



Public Affairs Council: Risk, Ethics and Compliance for International Public Affairs

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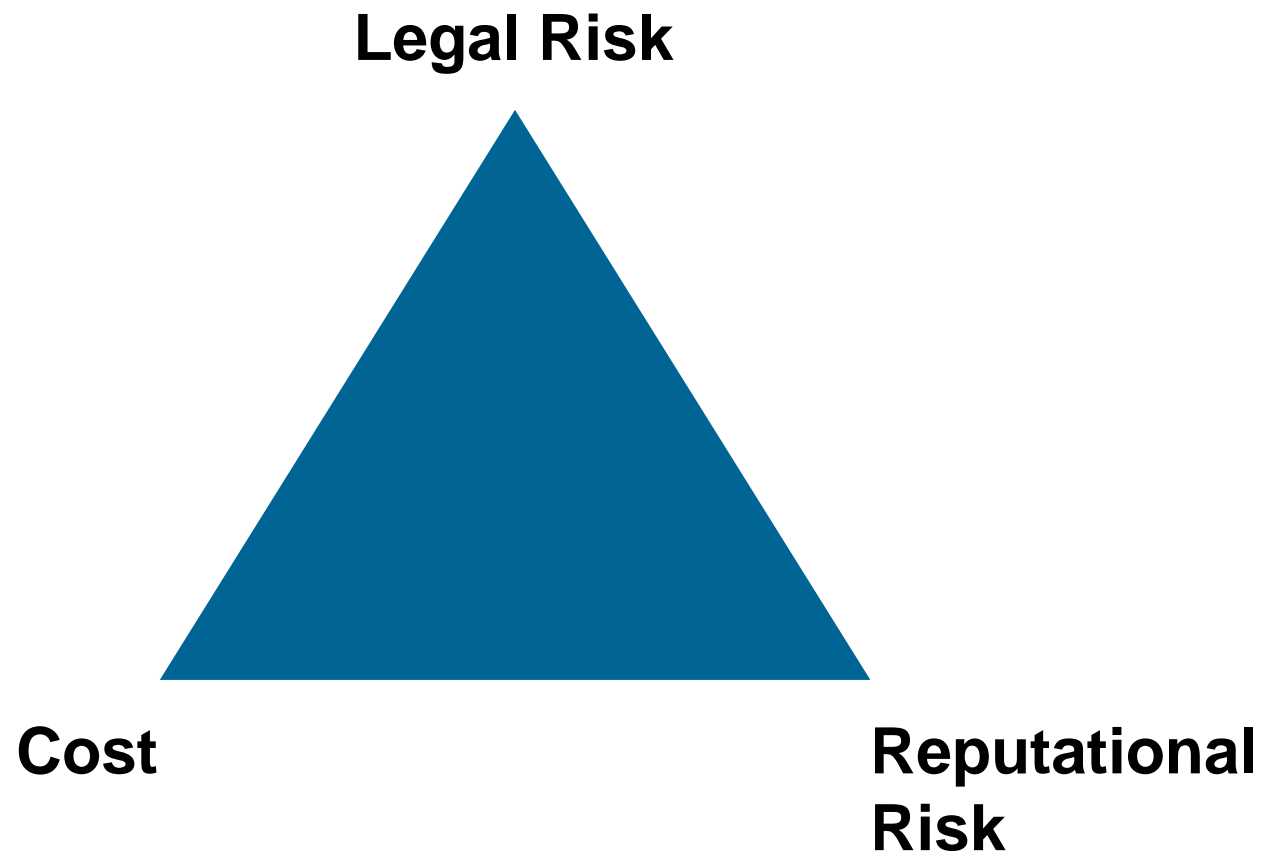
Setting the stage

- Public affairs is increasingly “going global”
 - Companies need coverage in more and more jurisdictions
 - Consistent global messaging may require multiple offices
 - In longstanding public affairs hubs – Washington, Brussels, London, Paris – 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 reach across boundaries
- Laws apply directly to public affairs consultancies
 - Failure to comply can bring direct liability
 - Strong compliance culture provides a competitive advantage

Setting the stage (cont'd)

- 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 on-going compliance
 - Expanding into new jurisdictions
 - Acquisitions in new territories (from the perspective of public affairs firms and corporates)
- Key legal issues
 - Anti-corruption laws
 - Expansion of political law regimes
 - Regulation of political intelligence
- This presentation is intended to serve as a resource

Public affairs compliance: the Iron Triangle



Public affairs compliance, cont.

Compliance as a Brand Distinction

Key legal regimes

Key legal regimes

- Anti-Corruption Laws
- Political Law Regimes
- Political Intelligence Regulation

Anti-corruption laws

- 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 rely 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
- Note new French anti-corruption law (Sapin II)
 - Includes both anti-corruption and lobbying elements

Comparison: FCPA and UK Bribery Act

- FCPA
 - Prohibits: (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”
 - Contains limited exceptions and defenses applicable under very narrow circumstances
- UK Bribery Act
 - Prohibits paying or receiving bribes and imposes “strict liability” on companies if an associated person makes an illicit payment to obtain or retain business or a business advantage
 - Provides a full defense for commercial organizations with “adequate procedures” designed to prevent “associated persons” from engaging in bribery
 - Unlike FCPA, covers commercial bribes (i.e., to private actors) and provides no exception for facilitation payments

Risks for global public affairs functions

Touch points where FCPA and UKBA risk most likely:

- 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
- Note that non-pecuniary benefits may nonetheless constitute a bribe – e.g., taking an official to an extravagant dinner or paying for overseas travel, allowing an official to participate in a private placement of securities

Political law regimes

- Public affairs has long been highly regulated in the US, at the federal, state, and local levels
 - Lobbying laws
 - Regulation of political contributions and “pay-to-play”
 - 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, European Union, France)

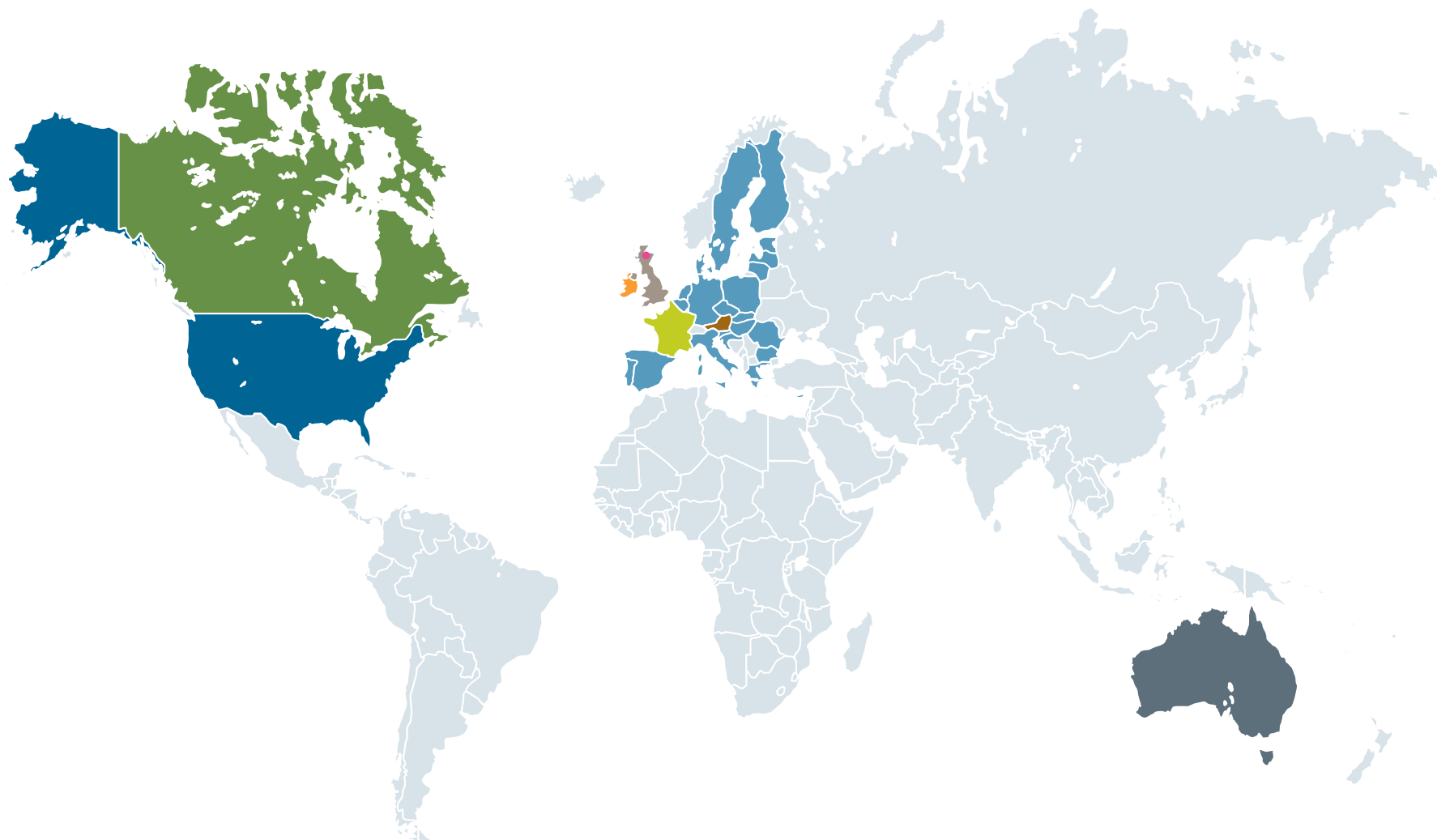
Overview: drivers of reform

- 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

Political law regimes: key points

- **Variation:** Political law varies widely by jurisdiction (federal, state, and local) and across different public entities and pension funds
- **Overlapping regimes:** A single act, such as a solicitation, may be subject to multiple laws, regulations, and policies at federal, state, local, or entity-specific level
- **Compensation/Contact:** Potential for restrictions on contacting public entities or receiving payment for solicitations
- **Know before you go:** You must know the applicable rules before government entities
- **Strict penalties:** Violations of political law regimes can result in severe penalties, which often apply on a strict liability basis:
 - *Legal violations:* financial penalties, bans on future business
 - *Breach of contractual provisions:* rescission, damages
 - *Reputational risk:* harm to brand or competitive position

Growth in lobbying regimes



Growth in global lobbying regimes

- EU: Transparency Register established as a voluntary system in 2011, number of registrations has exploded since Juncker Commission reforms prohibited Commissioners and top officials from meeting with non-registered persons
 - 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)
- UK: Recent scandals (Werritty affair, “Jobs for Generals”) provided a political impetus for UK government to pass the “Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act of 2014,” online “register” of consultant lobbyists active in 2015
- Ireland: Concerns about influence of inbound investors led to the Regulation of Lobbying Act 2015
- Scotland: New Scottish lobbying law received Royal Assent in April 2016. Similar in many respects to the Irish lobbying law, though the Scottish law only applies to communications that occur in person or through videoconference.
- France: New lobbying regime included in French anti-corruption law (Sapin II). Takes effect July 2017.

European lobbying regimes: EU, UK, Ireland

EU	UK	Ireland
<ul style="list-style-type: none"> – Broad definition of lobbying (including indirect/grassroots campaigns) and no de minimis exception – Registered lobbyists subject to Code of Conduct – Registrants must disclose topics lobbied, estimated expenditures attributable to lobbying, percentage of time individuals spend on these efforts 	<ul style="list-style-type: none"> – Only applies to third-party lobbyists (not in-house) – Similar to LDA definition of “lobbying” but more narrow definition of covered official (Minister of the Crown, Permanent Secretary, and potentially special advisors covered) – Must register before making contact or payments for lobbying – Quarterly reports must disclose clients, but not details of communications 	<ul style="list-style-type: none"> – Irish Lobbying Act one of the broadest lobbying laws in Europe, applying to broad range of public decisions (including public procurement) and public officials (including local government, special advisors) – Single lobbying contact is sufficient to trigger registration, in-house also required to register (except very small firms) – Triennial updates must disclose clients, officials lobbied, and subject matter

Other global lobbying regimes

Canada	Australia	Brazil
<p>Lobbying regulated at the federal, provincial, and local levels</p> <ul style="list-style-type: none"> – While in-house lobbyists may be covered (e.g., under the federal regime), the focus is on third party lobbyists – Recent Toronto lobbying law broadest yet, covers procurement lobbying contacts with low thresholds 	<p>Regulated at federal and provincial levels</p> <ul style="list-style-type: none"> – Federal regime focused on third party lobbyists – More expansive regimes recently adopted by New South Wales, Queensland 	<p>Lobbying permitted, and does not trigger registration or reporting</p> <ul style="list-style-type: none"> – Certain types of contacts with public officials may implicate the Administrative Improbability Act

U.S. Political law: gift and entertainment rules

- Gift and Entertainment rules restrict giving gifts to public servants at the federal, state, and local levels
 - *Gift* is usually defined broadly, to include anything of value, such as meals, beverages, travel, pens, watches, items provided at a conference, tickets to a baseball game or the theater, golf and similar entertainment, or marketing or promotional items
 - Penalties for violating gift laws can be severe, and may include civil fines, loss of business, and other sanctions
 - Even where a gift is allowable, jurisdictions may impose other restrictions, such as:
 - Pre-approval requirements
 - Restricting the time in which reimbursement is permissible
 - Reimbursement must be provided to the entity itself, and not the employee
 - Caps on total expenses and per diem limits
 - Limits on the types of expenses that may be paid (e.g., limits on the provision of collateral entertainment, such as golf outings)
 - Triggering lobbying laws and additional reporting requirements or restrictions
- Contractors are regularly required to certify as to compliance with rules

U.S. Federal campaign finance law

- Individuals are permitted to contribute to political candidates and Political Action Committees (“PACs”), subject to dollar limits
 - Corporations may not make such contributions, but may establish PACs
- Both individuals and corporations can give unlimited amounts to “Super PACs,” which are prohibited from coordinating with candidates
- Proliferation of new fundraising vehicles, including “dark money” vehicles such as 501(c)(4) organizations
- Strict limits on foreign contributions and involvement of foreign persons in PACs
 - Potential for foreign contributions in context of ballot measures

Political intelligence

- Global focus on insider trading
- 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
- UK, HK, others also active
- Political intelligence firms potentially at risk
 - 2012 – STOCK Act
 - 2013 – Centers for Medicare and Medicaid Services announcement

Political intelligence: 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

Political intelligence: SEC insight

“Government employees routinely possess and generate confidential market-moving information. When political intelligence firms like Marwood Group obtain information from government employees, they must take the necessary steps to prevent the dissemination of potentially material nonpublic information obtained in the course of their research.”

- Andrew Ceresney, Former Director of Enforcement

*Compliance:
Tools, techniques, and best practices*

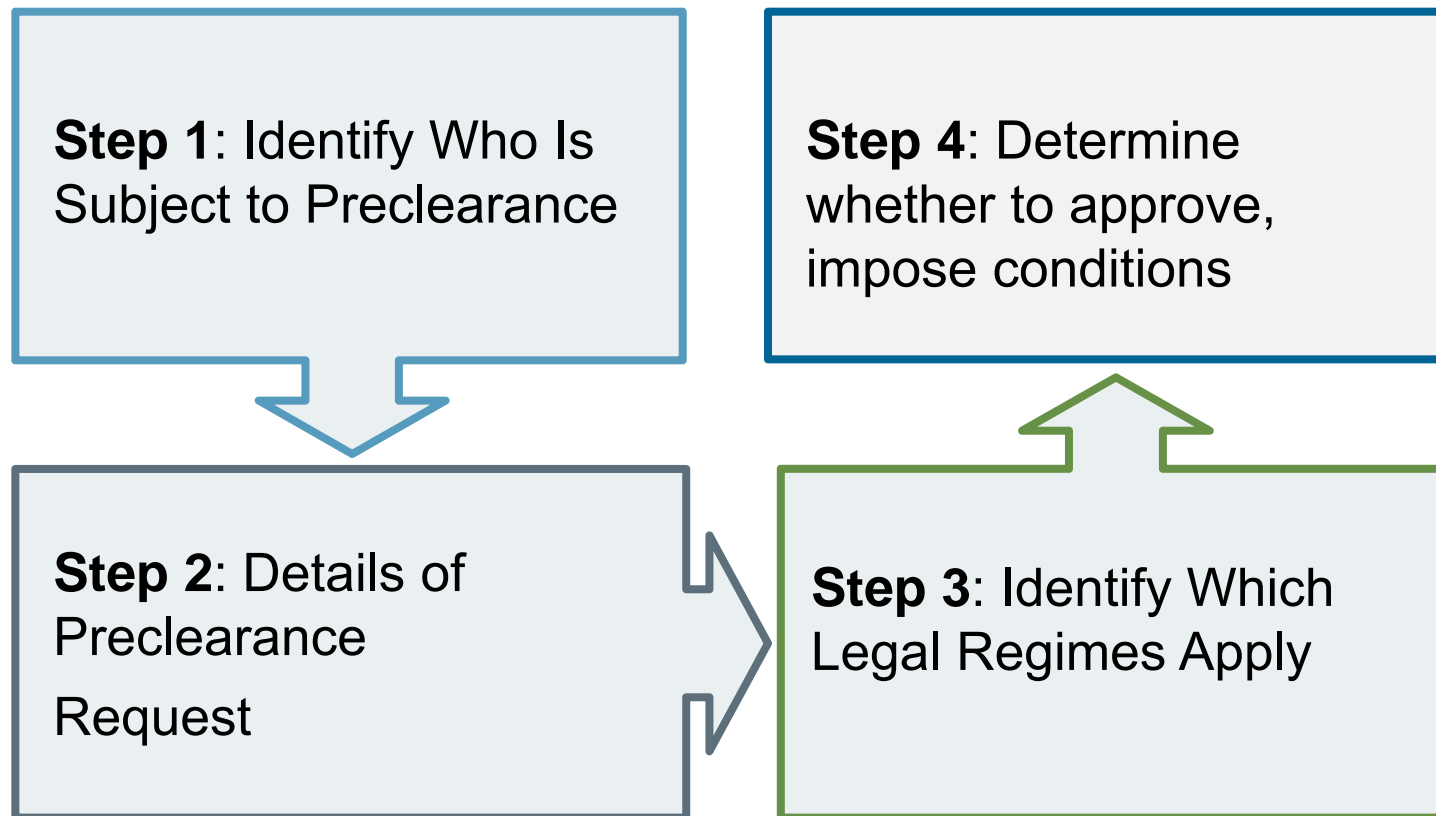
Compliance methods

Compliance Toolkit

- Bright-line rules
 - “No gifts and entertainment to government officials”
- Pre-clearance policies
 - Before engaging in a covered activity, obtain advanced approval from legal/compliance
 - May be centralized/decentralized, formal/informal
- Regular notifications and trainings (often tailored to specific risks)
- Periodic certifications regarding compliance
 - Particularly useful as reminders, and for geographically/culturally diverse firms
- Regular testing and monitoring
 - Some rules are more amenable to monitoring than others/keep privacy concerns in mind
- Reporting and recordkeeping procedures with regard to each of the foregoing
 - “If it isn’t documented, it didn’t happen”

Compliance approach: preclearance

Basic Elements of a Preclearance System



Responding to violations

Steps to Take If You Suspect a Violation

- Conduct an internal review
- During the review, ensure that violations are not on-going
- Promptly seek to redress the violation, if possible
 - Lobbying – make all required registrations/reports
 - Gifts/entertainment – determine whether to obtain reimbursement
 - Pay-to-play, political contributions – determine whether to obtain return of the contribution
- Consider the HR implications
- Determine implications for on-going business activities (license applications, contracts)
- Develop a media strategy
- Understand sources of liability (contracts, civil fines, criminal fines), liability range
- Consider need for self-reporting, attempt to obtain leniency
- Consider whether there was a breakdown in the compliance program (internally or utilize outside counsel) and move swiftly to address any gaps

Managing FCPA/UKBA risks

- Ensure policies and procedures are in place to create appropriate controls over the activities likely to trigger issues
- Understand the risks posed by particular jurisdictions
 - Overall corruption and political climate
 - Extent of business operations in that jurisdiction
- 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

Managing lobbyist registration risks

- Perform a “risk assessment” of your lobbying exposure
 - Limited exposure: consider pre-clearing contacts with public sector entities
 - Significant exposure:
 - Review specific requirements of each regime, and consequences of failure to comply
 - Group clients/targets into “**red**” “**yellow**” and “**green**” categories based on jurisdiction
- Put in place a process to make required certifications, registrations and reports as needed (including time and expense tracking)

Managing gifts and entertainment risk

- Make sure that your gift law policy is sensitive to the issues discussed above
 - Many companies choose to pre-clear all potential gifts because of the level of variation in gift laws
- Provide risk-based training to employees who regularly meet with public sector employees
- Consider restrictions when planning events (e.g., educational events, conferences)
- Consider issues when negotiating contract terms with public sector entities

Managing insider trading risks

- Especially hard to do in the context of political intelligence
 - 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

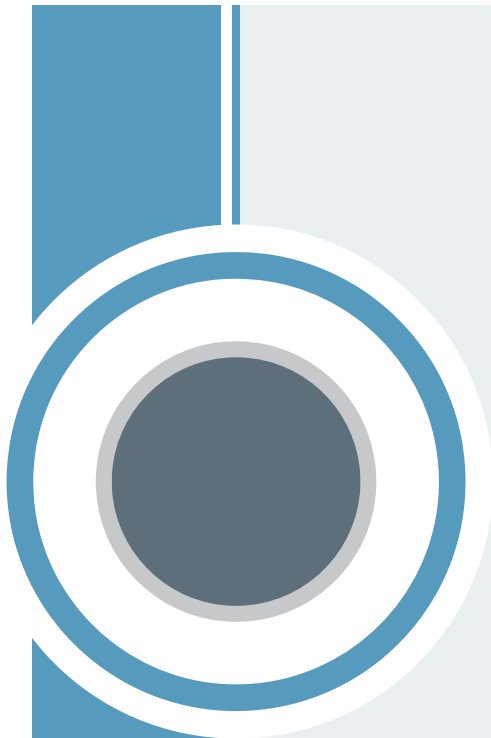
Case studies

Case study: new acquisition



U.S.-based public affairs firm
acquires a small lobbying firm based
in Brussels, with an office in Paris

Case study: new market



U.S.-based Fortune 500 company enters a new market, decides to add public affairs capacity in that market

Questions?

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