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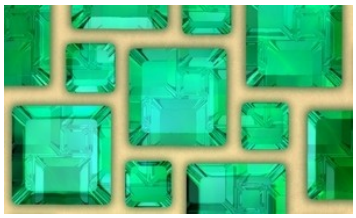
Corruption in a luxury world

Is self-reporting the answer for luxury brands tackling bribery and corruption in a global marketplace? The luxury team at Covington & Burling assess the evidence.

Luxury brands are more conscious than ever of the need to ensure robust compliance with anti-corruption legislation, in particular in the most challenging parts of the world. Anti-corruption enforcement authorities in the US and elsewhere have, in recent years, intensified their focus on tackling bribery and other forms of corruption and bringing enforcement action against global companies.



Staggering fines by US

The size of the fines that have been imposed, in particular by the US authorities, for breaches of anti-corruption laws have been staggering, and there is every sign that this trend is set to continue. There was a time when the US Foreign Corrupt Practices Act (FCPA) was the only game in town. Over the last few years, however, country after country, including the UK, has implemented ever more stringent laws against bribery and other forms of corruption. Global brands have responded to the need to tackle corruption -- and to stay in compliance with the laws of the countries in which they operate -- by devoting significant resources to devising and implementing tailored policies and procedures aimed at preventing bribery and robustly investigating and remediating instances of wrongdoing that have been uncovered.

Challenging questions

The more challenging question that has faced senior personnel within global brands and other companies is whether a particular issue that has been uncovered warrants or necessitates a self-report to one or more enforcement authorities. Anti-corruption enforcement authorities including the US Department of Justice (DOJ), the US Security and Exchange Commission (SEC) and the UK Serious Fraud Office (SFO) have tended to encourage self-reporting of potential issues even though the benefits have not always been evident. The recent case of the luxury apparel brand Ralph Lauren may provide companies with even more reason to pause for thought before deciding whether to approach the enforcement authorities voluntarily.

Under the spotlight

The DoJ and the SEC recently announced non prosecution agreements (NPAs) with Ralph Lauren Corporation relating to the bribery of Argentine customs officials to import products into Argentina without the necessary inspections and paperwork. The NPAs required Ralph Lauren to pay a fine and disgorgement of approximately $1.6 million, publicly admit and accept responsibility for the unlawful conduct, agree to implement further extensive changes to its compliance program, and submit annual reports to the DOJ detailing its remediation efforts. If Ralph Lauren is found to have breached any of the terms of the agreements it may still face the original charges in addition to new charges based on any information that may have come to light during the course of the NPAs.

Ralph Lauren targeted despite high standards

While the fine, disgorgement and conditions imposed on Ralph Lauren are relatively modest by comparison to other enforcement actions taken by the DoJ and SEC, questions have been raised as to why it was necessary to impose an NPA in a case which appears to warrant a less damaging outcome such as a non-public declination by the authorities. Ralph Lauren appears to have had in place a high standard of compliance.
It seems that it was the adoption and rolling out of its new anti-bribery policy that led to the unearthing of the issues in Argentina. The company conducted an internal investigation, uncovering improper payments and gifts of perfume, clothing and handbags to government officials, and promptly reported the matter to both the SEC and the DOJ. Ralph Lauren also adopted remedial measures, including the termination of its customs broker and the implementation of enhancements to its compliance program. It also co-operated extensively with the SEC, including the undertaking of a review of its global operations that uncovered no other violations.

Self-reporting merits unclear in UK

The merits of self-reporting in the UK are equally unclear at present. The SFO recently withdrew its longstanding guidance on corporate self-reporting and replaced it with a brief guidance note. The new guidance no longer expresses any predisposition toward a civil settlement following a self-report and in fact states that "[s]elf-reporting is no guarantee that a prosecution will not follow." It reiterates that each case will be decided on its own facts and that self-reporting will be just one of the factors that will be taken into account. It also points out that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice." The SFO also reserves the right to prosecute any unreported violations as well as provide information on violations to other enforcement bodies. This provides little reassurance or concrete guidance to companies who may be contemplating making a self-report to the SFO.

Changes ahead

The UK enforcement landscape is expected to undergo a significant change within the next year, following the recent passing into law of the Crime and Courts Act 2013. The legislation will, for the first time, enable the SFO and the UK Crown Prosecution Service to enter into Deferred Prosecution Agreements ("DPAs") with companies -- most likely from early 2014 -- to deal with certain economic crimes, including bribery, fraud and money laundering. The move by the UK government to introduce implementing legislation for DPAs reflected an acknowledgement that: (1) there was little incentive for companies to self-report due to significant uncertainty over where that process would lead and (2) the options available to UK prosecutors for tackling economic crime – criminal prosecution or civil recovery – were unduly limited. It remains to be seen whether the availability of new UK DPA mechanism will introduce more certainty into the process or any meaningful incentive for self-reporting and engaging with the UK prosecutors.
Across the globe, multi-national brands that have uncovered and remediated incidents of wrongdoing in their business will need carefully to examine the case for and consequences of making a self-report to the authorities. In this area, more than any other, there is a need for sophisticated advice, and the first port of call for many companies which find themselves contemplating a self-report to the authorities tends to be engagement with counsel who have experience and understanding of the challenges faced by the business and the expectations of the prosecutors

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