

How To Avoid The Dirty Side Of Clean Energy

Law360, New York (May 23, 2013, 12:02 PM ET) -- No industry is immune from corruption. And recent news reports suggest that the not-so-clean side of the clean energy sector may come under greater scrutiny around the world.

In February, Russian authorities announced that a contractor had embezzled over \$30 million in state funds from the hydropower company RusHydro. In January, as part of an investigation into the Italian mafia's infiltration in that country's renewable energy industry, authorities arrested five individuals, including a local mayor, and charged them with fraud and corruption in connection with the award of public contracts for wind farms in Sicily. Late last year, U.S. authorities arrested a U.S. Virgin Islands senator and charged him with bribery and racketeering for among other things, soliciting bribes amounting to \$35,000 in campaign contributions from the developers of the wind turbines at Tutu Park Mall in the Virgin Islands.

These reports serve as a sobering reminder for companies of the risks and consequences of international corruption and of the importance of implementing compliance programs to reduce the risk that improper conduct will occur in the first instance.

Overview of Anti-Corruption Laws

Most countries have domestic anti-corruption laws making bribery of their government officials illegal, but a growing number of countries also prohibit bribery of foreign officials, reflecting a growing global consensus on the need to deter and punish corruption in international commerce. The U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act 2010 and similar laws around the world prohibit companies and individuals from engaging in bribery and corruption when dealing with government officials or business counterparties.

These laws have wide application and can apply to conduct anywhere in the world. They also can result in criminal prosecution, imprisonment, fines and debarment of companies and individuals from participating in government contracts.

The FCPA

The FCPA's anti-bribery provisions prohibit U.S. companies and their foreign subsidiaries — as well as their officers, directors, employees and agents — from paying or promising to pay money or giving anything of value, corruptly, to a "foreign official" to secure any improper advantage.

This prohibition applies not only to direct payments and gifts, including services and noncash benefits, but also to payments or benefits conveyed by third-party intermediaries, such as agents, brokers, representatives, consultants or joint venture partners.

The law also applies to foreign companies that are listed on a U.S. exchange and to any person who takes an act in furtherance of foreign bribery while in the United States.

Additionally, the FCPA's definition of "foreign official" is broad, and U.S. enforcement authorities have interpreted it to include employees of government-owned or government-controlled entities, such as state-owned energy companies.

In addition to the anti-bribery provisions, the FCPA also contains accounting provisions that require issuers that trade securities or American depository receipts on a U.S. exchange to keep accurate books and records and to maintain a system of internal accounting controls sufficient to detect bribery or otherwise detect inaccuracies in the company's books and records.

The UK Bribery Act

The Bribery Act prohibits companies and individuals subject to jurisdiction from engaging in bribery in both the private and public sectors, whether the conduct be committed in the U.K. or abroad. The Bribery Act creates four substantive offenses: bribing another person, being bribed, bribing a foreign public official and failure of commercial organizations to prevent bribery.

A commercial organization can avoid liability if it establishes that it has implemented "adequate procedures" to prevent bribery, including a commitment to prevent bribery from the top-level management of a company; due diligence on persons or companies performing services on the organization's behalf; training and other communication of the company's policies and procedures; and periodic monitoring and review of the company's program.

The Bribery Act's prohibitions apply broadly to U.K. companies, U.K. partnerships and other U.K. commercial organizations; British citizens, nationals and residents; and to non-U.K. companies, partnerships and other commercial organizations that "carry on a business, or part of a business," in the U.K., a concept that is expected to be interpreted broadly.

Given these global enforcement efforts, renewable energy companies should thoroughly understand the areas of their operations that pose the greatest risk for corruption and ensure that they have adequate controls in place to reduce those risks. Companies should also be prepared to respond quickly and effectively to allegations or suspicions of improper conduct by employees or third parties acting on their behalf.

Overview of Key Risk Areas

Relationships with Third Parties, Including Local Partners

The development, financing and execution of international renewable energy projects almost always require the participation of local intermediaries and business partners. Renewables companies face legal exposure if agents, brokers, consultants, intermediaries, joint venture partners, co-investors, lobbyists or other third parties make an improper payment — at any stage of a project — and the company fails to make inquiries reasonable under the circumstances.

Third parties present unique risks because they may not be familiar with the FCPA and other anti-bribery laws and may be accustomed to "playing by local rules." Due diligence, market-appropriate compensation structures, strong contractual provisions, robust financial controls and a watchful eye can help companies minimize the risk posed by third parties.

International Marketing Activities — Travel, Meals, Entertainment and Gifts

As in other types of international energy projects — which have been the subject of numerous recent FCPA enforcement actions — marketing activities in the renewables sector necessarily involves meeting government officials and other relationship development efforts. These activities often involve a broad range of corporate hospitality.

While appropriate in many circumstances, the provision of corporate hospitality can constitute a bribe if it is conveyed with corrupt intent. As a result, companies have been held liable for paying bribes to government officials under the guise of travel, meals, entertainment, gifts and other forms of corporate hospitality. Clearly defined policies and other controls can significantly reduce exposure in this area.

Donations, Contributions and Sponsorships

Many energy projects include a requirement that international contractors provide financial support to local charitable and development initiatives. These requirements have been used to disguise the provision of personal benefits to officials and to conceal improper “quid-pro-quo.”

Companies in the renewables sector can minimize the risk presented by donations, contributions, and sponsorships by implementing policies and approval requirements to ensure that they are not provided as a personal benefit to officials or given in connection to a decision involving their business.

Acquisitions and Investments

Acquisitions and other investments present risks to renewable energy companies because the failure to conduct appropriate due diligence on counterparties can result in significant successor liability if a problem arises. Prosecutors have emphasized that they expect adequate anti-corruption due diligence in cross-border transactions. Without adequate FCPA due diligence, an acquirer could unknowingly assume significant civil or criminal liability and/or overpay for the target.

Books and Records

Even in the absence of proof that an improper payment has been made, U.S. issuers could still face liability under the FCPA if they or their controlled subsidiaries or joint ventures fail to maintain accurate books and records and an adequate system of internal controls. Payments to local partners and third parties, for example, could lead to FCPA liability if the purpose of the payments is not accurately reported in the entities’ financial statements.

Each of these risk areas can be addressed through an effective compliance program that is based on a risk assessment of a company’s operations and incorporates a strong compliance tone from the top, policies supported by controls, audit and document retention requirements, a mechanism for reporting violations, training and employee discipline.

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