



Published by ASIA MENA Counsel in www.inhousecommunity.com : 21/01/2016

Anti-corruption laws in the UAE pharma and healthcare sector

In his review of anti-corruption laws in the UAE's pharma and healthcare sector, **Faizal Latheef** of **Kochhar & Co Inc.** divulges important legislation and warns on how to avoid corruption allegations.

The UAE pharma and healthcare sector has witnessed exponential growth in the recent times. This has been contributed by various factors, including increased government spending, insurance penetration and diverse investment options available in the market. However, it appears that many international companies while focused on benefiting from the market growth are oblivious on the compliance front. In terms of anti-corruption, their attention is confined to the US Federal Corrupt Practices Act (FCPA) or the UK Bribery Act and they are unaware of the anti-corruption laws in the UAE.

Anti-Corruption laws in the UAE

It is true that the UAE does not have a specific anti-corruption legislation. However, the UAE has taken many steps towards tackling corruption. There are comprehensive legislative provisions on the subject though they are scattered in many legislations, varying from UAE Penal Code (Federal Law No. 3 of 1987) to the Ministry of Health's codes of conduct. Many companies are unaware of the existence of these provisions and end up violating them. It is important to note that any such violation by a company or its employees may result in serious consequences, including substantial fines and imprisonment.

Applicability of the Penal Code

The Penal Code imposes criminal liability on an individual who offers to a public official or any other person assigned with a public office a gift or advantage of any kind, or a promise or anything of the like, in order to commit or omit an act in breach of such official's duties. The Penal Code extends the liability to an individual who mediates the bribe also.

The Penal Code provides a wider meaning to the term 'public official' and includes "any individual employed by a government ministry or a department and any individual who performs a job relating to public service by virtue of a mandate given to him by a duly authorized public official". The Penal Code, however, provides for one exception where a bribe giver or mediator may escape from the consequent liability. They may be able to exempt themselves if they inform the judicial or administrative authority of the crime before it is discovered.

The anti-corruption provisions of the Penal Code also cover 'non-public officials' (members of the board of directors of a company or a private institution, or a manager or an employee in such an entity). The Penal Code prohibits any non-public official from asking for himself or for third parties, or accepting or taking a promise or gift, to do or abstain from doing an act included in his job or in breach of his duties. It is important to note that the criminal act is assumed to be committed even if the non-public official does not intend to do such task or breach his duties. Further, the same punishment will apply if a non-public official solicits or accepts a gift or a promise after he performs an act or refrains from performing it in breach of his duties with the intention of being rewarded without any prior agreement.

The provisions of the Penal Code apply to all crimes committed in the UAE including the free zones. More importantly, the Penal Code does not make any distinction between a domestic entity and a foreign entity. This may mean that a company or an individual involved in corrupt practices in the UAE may be held liable under the Penal Code even if they are not a resident in the UAE.

There are some arguments that the UAE authorities are yet to take firm steps towards addressing corruption in the private sector. The reason supporting this argument is the lack of provisions to prosecute a person paying or offering to pay bribe to a non-public official. In case of public officials, the person offering a bribe is criminally liable, whereas the legislative provisions are silent on the guilt of a person offering a bribe to a non-public official. In spite of this, many recent measures adopted by the authorities against corruption clearly indicate that they are proceeding in the right direction. Accordingly, in all likelihood, the scope of the anti-corruption legislations will be widened to comprehensively cover the private sector.

Human resources laws

Another important legislation which includes provisions on anti-corruption is the Federal Human Resources Law (Federal Law No. 11 of 2008). The law is extensive in its scope, and not only prohibits an employee from accepting, offering or requesting bribes but also prohibits him from accepting any gifts from third parties unless they are symbolic advertising or promotional gifts bearing the name and emblem of such third party. The relevant ministry is required to nominate the organisational units which are allowed to

accept such gifts on its behalf for distributing them as per the regulations and standards adopted by the ministry. Further, a public official is prohibited from making or distributing gifts except under the name of the ministry and the organisational unit approved by the ministry. Similar restrictions are included in the Dubai Human Resources Law also (Dubai Law No. 27 of 2006).

Ministry of Health Codes of Conduct

Over a period of time, the Ministry of Health has published several Codes of Conduct to be followed by stakeholders in the pharma and healthcare sector to ensure probity. These include codes for medical practitioners other healthcare professionals and administrative staff. There are strict provisions in these codes to tackle corruption, and include prohibition on promotion or supply of specific medicines or devices; prohibition on receiving financial benefits, gifts or hospitality; prohibition on offering unethical rebates to vendors; and restrictions in having direct or indirect commercial interests in organisations providing pharma or healthcare services.

“Many companies are unaware of the existence of these provisions and end up violating them. It is important to note that any such violation by a company or its employees may result in serious consequences, including substantial fines and imprisonment”

Faizal Latheef



Definition of 'bribe' and facilitation payments

It is interesting to note that the above mentioned legislations do not provide a uniform definition for the term 'bribe'. The Penal Code does not mention 'bribe' anywhere in it, and refers to "any gift or benefit, or a promise for the same". On the other hand, the Federal Human Resources Law defines 'bribe' as "any amount of money or a particular service, or anything of material or moral value offered to a government employee that i) accelerates any work that the employee is required to do in the normal course of his duties, or ii) leads to the employee's failure to do an assigned work, or iii) leads the employee to mediate with another employee to finish an application or take any procedure in violation of the existing legislations".

An important aspect to consider here is the inclusion of the wordings - 'accelerates any work that the employee is required to do in the normal course of his duties' - under the

definition. This makes it amply clear the intention of the authorities to alleviate the practice of 'facilitation payments' (or 'grease payments') from the market. This is of particular significance to those multinational companies coming under the purview of the FCPA. The FCPA provides for certain exceptions where facilitation payments are considered legal, whereas the UAE law does not consider any such exceptions.

Employer's liability for an employee's action

It is possible that a company may be held liable for its 'inaction' irrespective of whether it was aware of the bribery act in question. A typical scenario is where an employee pays, or offers to pay bribe to a public official without the company's knowledge. It may not be possible for the company to escape from liability in view of the principle of 'vicarious liability' enshrined under the Commercial Companies Law (Federal Law No. 2 of 2015) and the Civil Transactions Law (Federal Law No. 5 of 1985).

In accordance with the Commercial Companies Law, a company shall be held liable for the actions of its senior employees, if such employee commits violation of any laws in the course of their duties. The company shall also be liable to indemnify third parties for any damages caused by such employees. Likewise, the senior management shall be liable to the company, its shareholders and third parties for any damages caused resulting from fraud, misuse of power, violation of laws, or an error in management. Further, a company shall have civil liability under the Civil Transactions Law for the actions of its employees.

Restrictions on business courtesies

In addition to the legislative provisions and codes mentioned above, the authorities have issued various circulars including a myriad of restrictions aimed at alleviating corrupt practices. These include restrictions on inviting public officials for meals, sponsorship of public officials for events, organising educational events etc.

Interestingly, none of the above legislations or codes prescribe the 'benchmark' for business courtesies extended by a company to a public official or a third party. Therefore, it is advisable that the companies exercises due caution in such circumstances. Certain key factors, including value of the courtesies offered, purpose of the offers, frequency of such offers and intended beneficiaries should be carefully considered prior to taking any decision in this regard. For all practical purposes, it is better to avoid extending business courtesies benefitting an individual employee exclusively (e.g. personal unbranded gifts or entertainment vouchers).

Conclusion

The UAE is a signatory to the United Nations Convention against Corruption, adopted by the UN General Assembly in 2003. It ranks 25 out of the 175 countries included in the Corruption Perceptions Index 2014 published by Transparency International (first among Arab countries). The authorities have realised the importance of tackling

corruption in attaining sustained economic growth and are taking comprehensive steps in this direction. Therefore, it is highly critical that all the stakeholders in the pharma and healthcare sector take necessary safeguards to ensure compliance.

Email: faizal@kochhardubai.com

Website: www.kochhardubai.com

www.kochhar.com