Global companies face challenges understanding and complying with the diverse anti-corruption and anti-money-laundering legislation being enacted by various countries and international conventions.

Sorting Through the CONFUSION

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Thirty-eight years after the enactment of the Foreign Corrupt Practices Act (FCPA), a continuing trend exists around the globe toward tougher anti-corruption standards by countries that have signed the proliferating network of anti-corruption conventions. The conventions, which include the Organization for Economic Co-Operation and Development (OECD) Anti-Bribery Convention, the U.N. Convention Against Corruption, the Inter-American Anti-Corruption Convention and two Council of Europe conventions, require signatory countries to introduce comprehensive anti-corruption laws, as well as to investigate and to sanction corruption.

While you may consider your business’ anti-corruption procedures sufficiently robust for the purposes of the FCPA or the U.K. Bribery Act, new foreign anti-corruption laws may pose greater challenges to supply chain leaders and compliance officers as nations begin to amend and/or tighten their legislation. Greater international cooperation under the anti-corruption conventions and in transnational investigations of money-laundering activities means executives will need to take a more mindful approach in evaluating their anti-corruption rules. As you’ll learn from this article, companies and their supply chain organizations cannot afford to relax their compliance commitments.

Varying and Broader Anti-Corruption Legislation

Many companies may be familiar with key distinctions between the FCPA and U.K. Bribery Act. For example, the U.K. prohibits the use of “grease payments” or facilitation fees to expedite transactions, while the U.S. does not. However, companies may not be familiar with the broader approach of new and emerging
anti-corruption legislation in other countries. For instance, there is no comparable provision in the FCPA and the U.K. Bribery Act to the joint liability provision established under Brazil’s anti-corruption law. This law, which took effect January 29, 2014, applies to business organizations, foundations, or associations and foreign companies with an office, branch or subsidiary in the Brazilian territory. Under the Brazilian law, the parent company, as well as its affiliated companies or subsidiaries, can be held jointly liable for any unlawful conduct. The Brazilian law is also broader than most anti-corruption legislation and includes any “acts of offering, promising, sponsoring or otherwise supporting” illegal activity in addition to actual payments or providing any undue advantage to public officials or third parties.

This law filled a significant gap in Brazilian legislation by imposing liability on both corporations and individuals for corrupt acts committed by employees or agents of the corporation. It also shifts Brazil’s focus. Prior to this law, only individuals could be punished for such violations, and there was no specific law imposing liability on a corporation. Today, there is potential strict liability for companies that participate in acts of bribery, which is another key difference from the FCPA, which requires intent.

While the FCPA requires the government to prove the engagement in illegal conduct was intended, new Brazilian legislation imposes strict liability for offenders. Brazilian prosecutors do not have to prove that a company specifically intended to violate the law. The mere fact that a bribe was paid to a public official in benefit or interest of the legal entity is sufficient to establish liability and to impose sanctions, including the loss of assets, rights or valuables. Additional sanctions under Brazilian law, however, may require a finding of fault or intent. The FCPA limits the act of bribery to foreign officials, but the new Brazilian legislation extends to local and foreign government officials.

Varying International Criminal Enforcement

There are often key differences in the manner in which countries enforce their anti-corruption legislation. And enforcement procedures may vary not only among countries, but internal and external enforcement procedures also may vary within the same country. U.S. enforcement of FCPA violations is limited to the U.S. Securities and Exchange Commission and the U.S. Department of Justice, while the U.K. enforcement of the Bribery Act is handled by the Serious Fraud Office. In other countries, however, different agencies that are impacted by the unlawful conduct (within the executive, legislative or judicial branch) in that country may potentially bring an action to enforce anti-corruption laws.

This can lead to inconsistent standards, practices and rulings, challenging foreign companies and their executives. You should also be aware that activities performed within organizations, such as procurement, make your organization more vulnerable to corruption and fraud.

The Value of International Organizations

Varying rules and procedures require closer monitoring and further training to ensure that third parties are compliant with relevant anti-corruption laws. As of December 30, 2014, 41 countries, including all 34 OECD member countries, have ratified or acceded to the OECD Anti-Bribery Convention. The OECD focuses on the supply side of a bribery transaction. Because the majority of corruption cases are linked in some way to the use and retention of third parties, especially agents and representatives, companies should look to enhance or refine due-diligence policies in this area. Companies looking to expand into offshore markets should be aware of the need for measures to address inconsistent approaches regarding anti-corruption policies, because there may be inconsistencies even within the same country.

The international conventions also require signatory countries to:

• Criminalize money laundering related to transnational corruption.
• Properly maintain books and records related to international transactions.
• Freeze and confiscate assets related to transnational bribes.
• Prohibit any deductions for payments related to prohibited payments.
• Take preventive measures with respect to both the public and private sector to prohibit transnational bribes.
• Establish codes of conduct for public officials, public reporting, transparent public procurement and codes of conduct for public officials.
• Establish measures to prevent...
money laundering, including policies such as Know Your Client and Customer Due Diligence by financial institutions.

The anti-corruption network requires signatory countries to provide relief to victims of corruption by allowing them to rebid procurement contracts, enjoining the corrupt actors from implementing tainted contracts and obtaining damages. In the mid-1990s, for example, the Brazilian government awarded a contract for a surveillance project for use in curbing the trafficking of illegal narcotics. The contract was rebid after allegations that prospective French defense industry representatives offered substantial bribes to influential Brazilians to secure the contract. The allegations resulted in nullification of the prior award, and eventually Raytheon Company obtained the contract.

In an effort to bring the issue into the open, the OECD Working Group on Bribery publishes reports on its monitoring of the implementation of conventions by signatories. Transparency International, a nongovernmental organization that monitors and publicizes corporate and political corruption in international development, proactively discusses the adherence by countries and signatories of international anti-corruption standards.

The Next Steps

Among the general public, global business community and major political leaders, there is a growing intolerance toward corrupt practices. Today, the threat posed by corruption to peace and security is especially relevant in Africa, the Middle East and certain areas in Latin America, because corruption makes it easier for insurgents to operate and grow. While several African and Middle Eastern countries have enacted legislation and strengthened enforcement to counter terrorism, tougher anti-corruption legislation and anti-money-laundering legislation in other jurisdictions is needed. International organizations often are well-suited to evaluate a country’s national effort to fight corruption.

Knowing what options are available to adequately and effectively handle corrupt behavior and how corporate decisions may affect other jurisdictions is half the battle, especially in cases where the outcomes are uncertain or exposure to personal criminal liability is at stake. Complex jurisdictional issues should be addressed through a global lens because the solutions may be beyond the narrow vision of one country’s national interest, or decisions may have strong repercussions on a global scale, particularly in the war against terrorism and terrorist financing.

Because money laundering investigations are increasingly cross-border and jurisdictions face different challenges in fighting corruption, a multi-disciplinary, cooperative and collaborative approach is necessary. There are many sophisticated ways of diverting or misappropriating funds in the procurement process — corruption is rarely limited to straightforward bribery. Law enforcement agencies sometimes lack the tools or procedures necessary to prevent or detect hidden and often complex methods of corruption, such as the skills necessary to detect corrupt behavior in contact management. We believe it’s imperative that laws facilitate and reward whistle-blowing and provide safeguards against actions to dissuade victims or others aware of corruption from coming forward and revealing masked irregularities that project the image of legitimate operations.

Finally, new technologies have become a vital tool in standardizing processes in the global supply chain and making procedures more transparent. The e-procurement systems used in Mexico and Korea to prevent and control corruption in public procurement are good examples. According to Transparency International, Sao Paulo’s e-procurement system has proved to be instrumental in detecting possible corrupt behavior and money-laundering activities. The Brazilian system allows for the systematic collection of data related to contract, prices and bidders.

Many terrorist groups have gained prominence in recent years, and a pressing concern is any actual or attempted cooperation among the groups. Leslie Caldwell, assistant attorney general for the criminal division of the U.S. Department of Justice, describes the fight against corruption as “a necessary enforcement action to protect our own national security interests and the ability of our U.S. companies to compete on a global scale.” Further coordination with regional and global partners is clearly needed to achieve stronger global security and global justice for all.

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