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GETTING THE DEAL THROUGH

market intelligence

Anti-Corruption

Will increased international cooperation stem corruption?

John E Davis leads the global interview panel covering anti-corruption regulation and investigations in key economies

Regulatory developments • Major investigations • 2016 trends
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John E Davis

GLOBAL TRENDS

JOHN E DAVIS OF MILLER & CHEVALIER CHARTERED

John E Davis is coordinator of Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and international anti-corruption practice group, and he focuses his practice on international regulatory compliance and enforcement issues. He has over 20 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the Securities and Exchange Commission and US Department of Justice, and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union and South East Asia. Mr Davis is a frequent speaker and trainer on FCPA issues and has written various articles on FCPA compliance and related topics.

Mr Davis has worked extensively with clients in developing and implementing internal compliance programmes, conducting due diligence on third parties, assessing compliance risks in merger and acquisition contexts, and auditing compliance processes. Additionally, Mr Davis focuses his practice on a range of issues relating to structuring and regulating international trade and investment transactions, including compliance with US export controls, the application of US and multilateral sanctions, the negotiation of joint ventures and other agreements.

International anti-corruption efforts continue to attract attention from companies, investors, governments of both exporting and host countries, and populations in general. The problems of endemic corruption are prominent factors in political crises facing countries such as Brazil and Ukraine, and in the shift of popular opinion away from entrenched regimes (for example, recently in Mexico and the Philippines and in the past in Venezuela). Even governments with less accountability to voters, such as those in China and Russia, evidence anxiety that corruption undermines their authority.

The growing concerns regarding the corrosive political and economic effects of corruption have provided a basis for several multinational conventions designed to combat corrupt payments and related issues. This started with the 1996 Inter-American Convention against Corruption, accelerated with the 1999 Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, and was expanded significantly with the entry into force of the UN Convention against Corruption in December 2005. The most important impact of these treaties was to require their signatories to adopt regulations prohibiting domestic and transnational corruption, and many countries now have laws on their books that in significant ways mirror the provisions of the law that first focused specific attention on these issues – the US Foreign Corrupt Practices Act (FCPA), enacted in 1977.

While the grand political dynamics may not concern compliance professionals on a day-to-day basis, the growth of anti-corruption regulation globally has resulted in the need to focus not just on the long and assertive reach of the FCPA, but also on a host of local laws, some of which create different compliance standards or (in the case of laws related to data privacy) may undermine key aspects of a company's compliance programme if not handled appropriately. Companies also need to assess potential liability risks in many jurisdictions, as international enforcement is on the rise.

International enforcement trends

Enforcement of anti-corruption regulations around the globe continues on an upward, if uneven, trend. Reporting on enforcement by the signatories of the OECD Anti-Bribery Convention is considered by many to be the best yardstick to measure this trend, as the OECD Convention parties include most of the major capital-exporting countries (which can be seen as funding the 'supply' side of cross-border corruption) as well as other key economies, such as Russia and Brazil.

The latest data on enforcement collected by the OECD Working Group on the Anti-Bribery Convention (covering up to the end of 2014 and released in November 2015) show that 361 individuals and 126 entities have been sanctioned under criminal proceedings for foreign bribery by 17 different Convention signatories from the Convention's 1999 entry into force to the end of 2014. In 2014 alone, 29 individuals and 15 entities were sanctioned through criminal proceedings for foreign bribery in nine different countries. At least 10 of the individuals sanctioned in 2014 received prison sentences.

Transparency International (TI) releases its own assessment of the OECD Working Group reports. The latest TI report on 'Exporting Corruption' (August 2015) provides a less sanguine outlook – it asserts that only four countries (the United States, United Kingdom, Germany and Switzerland) 'actively' enforce their anti-corruption laws, while six other countries (Australia, Austria, Canada, Finland, Italy and Norway) manage 'moderate' enforcement. TI cites nine countries with 'limited' enforcement (though at least one of these, the Netherlands, should be upgraded on the basis of its cases in the past year and a half). Most tellingly, TI notes that there is little or no enforcement by 20 Convention parties. However, this dynamic is fluid and it is likely that some of the countries criticised by TI will develop more active enforcement profiles.

Trends in international cooperation and legal assistance

International cooperation through mutual legal assistance provisions of bilateral and multilateral treaties (including, most prominently, the OECD Anti-Bribery Convention and the OAS Convention) continues to increase. The OECD's 2014 Foreign Bribery Report found that '13 per cent of foreign bribery cases are brought to the attention of law enforcement authorities through the use of formal and informal mutual legal assistance between countries for related criminal investigations accounts'.

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Many significant corporate corruption investigations feature mutual legal assistance. For example, while the Car Wash scandal in Brazil has resulted in extraordinary political and legal events in that country, including the recent impeachment of the president, the ongoing investigation shows several signs of international cooperation. Petrobras itself is under investigation by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC), and several other companies have publicly disclosed related investigations by the US authorities. In June 2015, a media report stated that the Brazilian authorities have notified the DOJ of evidence that at least four foreign companies paid bribes to win Petrobras contracts. Press reports suggest activities related to aspects of the Car Wash scandal in Portugal, Peru and Switzerland. In a speech on 14 July 2016, the Brazilian federal judge overseeing the investigation noted the importance of international cooperation, especially with regard to tracking potential proceeds of corruption.

On the other hand, international cooperation can often be difficult and time-consuming. A survey by the OECD conducted in December 2015 indicated that '70 per cent of anti-corruption law enforcement officials report that mutual legal assistance challenges have had a negative impact on their ability to carry out anti-corruption work'. For companies under investigation, dealing with even the possibility of multiple investigations by different government authorities can create significant challenges related to coordination of sometimes competing government priorities, costs and the quantification of liability risks (the last especially in countries where investigators are inexperienced or not subject to effective due process).

International guidance on anti-corruption compliance programmes

The US authorities in charge of enforcing the FCPA have set out the basic elements of what they consider to be the key elements of an 'effective' anti-corruption compliance programme. The authorities initially provided this guidance through a series of annexes to specific investigation dispositions, which the agencies over time revised to add details based on issues identified by them and compliance professionals. The culmination of that effort is contained in the US agencies' 2012 publication 'A Resource Guide to the U.S. Foreign Corrupt Practices Act'. Similarly, the UK Ministry of Justice in 2011 issued guidance regarding what it considers to be 'adequate procedures' for companies to put into place to prevent bribery; these are to be used to determine whether a company has a defence against a UK Bribery Act charge that it failed to prevent bribery by an associated person.

However, international bodies have long focused on issuing their own guidance regarding the structure and key provisions of corporate compliance programmes. The OECD has led the field in this area, with its first 'Guidelines for Multinational Enterprises' issued in 1976. The seventh of these guidelines stated that companies should 'not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office'. The OECD has updated these Guidelines several times, with the current 2011 version containing more expansive language.

As part of its ongoing specific anti-corruption programme, the OECD Council issued a resolution on 26 November 2009 that focused on a number of recommendations for 'Further Combating Bribery of Foreign Public Officials in International Business Transactions'. This resolution was supplemented by two annexes – the second, which the Council adopted on 18 February 2010, is 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'. This document lists key elements of an anti-corruption compliance programme and related accounting controls.

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The UN Convention against Corruption (UNCAC), which entered into force on 14 December 2005, established in its article 12.2(b) that all of its signatories 'shall take measures' to 'prevent corruption in the private sector', including 'promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business'. The UNCAC does not define those standards, but this obligation covers the convention's 178 parties and thus essentially globalises the establishment of compliance programmes and related systems for companies operating internationally.

The International Chamber of Commerce (ICC) issued its first set of 'Rules on Combating Corruption' in 1977. The ICC updated its rules in 2011, and the current version contains specific advice on what the ICC considers to be the essential elements of a compliance programme.

Most recently, on 15 October 2016, the International Organization for Standardization (ISO) issued a new standard for 'anti-bribery management systems', called ISO 37001. The goal of this exercise was to create an internationally recognised standard for such compliance systems that would allow for certification by third-party auditors. The standard acknowledges that it is built on previous guidance from the OECD, ICC, TI and 'various governments'. The standard contains information regarding how companies can achieve the relevant ISO certification.

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Efforts to measure 'demand' for bribes

While compliance programmes are designed to constrain the 'supply' of bribe payments to public officials by businesses and their associated personnel, there is also an increasing focus on attempting to gauge and deter the demand side. Deterrence generally is handled by local laws that govern the conduct of officials, and all of the major anti-corruption conventions require their state parties to enact and enforce those laws in good faith. Because today's standards require that compliance programmes be designed to mitigate the actual risk faced by companies across the globe, there is a need for compliance professionals to follow efforts to measure the actual deterrence effect of those local laws (and, thereby, the actual likelihood that corrupt payments will be solicited in specific countries of operation).

TI remains the most cited resource for this information. Since 1995, TI's Corruption Perceptions Index (CPI) has ranked countries (168 in 2015, the latest survey) by perceived levels of corruption. Those countries ranked lower on the survey are perceived as more corrupt, and thus are considered to harbour higher demand for official corruption. (TI has also instituted a Bribe Payers Index to attempt to begin quantifying the supply side of the bribery equation – the most recent version issued in 2011 ranks 28 'leading economies'.) TI's CPI rankings are frequently used by companies, and sometimes by enforcement agencies, as measures of potential overall corruption risks in the countries ranked.

The World Bank's Enterprise Surveys provide another source of perceived levels of corruption in various countries. This source covers 139 countries, though some of the data sets on individual countries are ageing – many are over five years old and a few are now a decade old. According to the World Bank, the data is based on survey responses by over 125,000 firms worldwide. Compliance professionals may find here information that is more directly related to day-to-day operational issues, as the surveys cover responses to 12 'indicators', including the likelihood of having to make a payment or gift to obtain an operating licence, the value of a gift to an official expected to secure a government contract, or percentage of firms expected to give gifts to officials to 'get things done'.

There are also regional efforts to measure corruption demand. One example is the Latin America Corruption Survey. This survey, conducted by 14 law firms practising across the region every four years, was updated in summer 2016. The key focus of the questions is the perceived effectiveness of local anti-corruption laws. The 2016 survey found that 77 per cent of respondents region-wide stated that their relevant anti-corruption laws were ineffective, and 52 per cent stated that they believed that they had lost business to competitors that paid bribes. In addition to trends on the demand side, the survey also provides useful information for benchmarking compliance efforts; for example, the responses discuss specific types of compliance programme activities that companies operating in the region have undertaken.

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