Global Investigations in an International World: Managing Investigations in the Face of a Proliferation of New Anti-Bribery Laws and Cooperation Among Governments

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OVERVIEW OF INTERNATIONAL ANTI-BRIBERY LAWS
Short History of Laws Against Foreign Bribery

- 1977: Enactment of U.S. Foreign Corrupt Practices Act
- 1988-1995: Growing public attention to official corruption
- 1995-2003: International Anti-Corruption Conventions

International Conventions

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<tr>
<th>Adopted</th>
<th>Name</th>
<th>Effective</th>
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<tr>
<td>1996</td>
<td>Organization of American States</td>
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<td>1997</td>
<td>OECD</td>
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<td>1998</td>
<td>European Union (Criminal)</td>
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<td>2003</td>
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<td>2003</td>
<td>United Nations</td>
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OECD Anti-Bribery Convention (1997)

- Requires signatories to criminalize bribery of foreign public officials
- It is a “supply side” convention, prohibiting only the payment of bribes
- Signatories must assist one another and honor extradition requests
- Penalties for transnational bribery must equal penalties for domestic bribery; corporate violators must face criminal or “proportionate and dissuasive non-criminal” sanctions
Trends: International Enforcement
Signatory Nations to the OECD Anti-Bribery Convention

UN International Convention Against Corruption (2003)

• 182 parties to the convention
• Obligations of signatories include:
  – Criminalizing both paying and accepting bribes
  – Criminalizing both public and private sector bribery
  – Criminalizing money laundering
  – Prohibiting trading in influence and illicit enrichment
  – Giving victims private rights of action
  – Cooperating internationally on investigations and prosecutions
  – Facilitating recovery of funds or assets paid as bribes

International Enforcement and Cooperation

• International enforcement
• Increased cooperation between U.S. law enforcement and foreign law enforcement
• Increased information sharing
FCPA Elements and Enforcement

- Two primary FCPA elements:
  - Anti-bribery provisions
  - Accounting provisions
    - Books and records requirements
    - Internal controls requirements
- DOJ and SEC share enforcement authority
  - DOJ has criminal, some civil enforcement authority
  - SEC responsible for civil enforcement over “issuers,” officers, directors, employees, agents

FCPA Anti-Bribery Provisions: Elements of a Violation

- No issuer, domestic concern, person with a U.S. nexus
- May corruptly
  - Take any action in furtherance of payment or a promise, offer, or authorization of payment
  - Of a bribe or anything of value
  - Directly or indirectly (with “knowledge”)
  - To a foreign official
  - To obtain or retain business or improper advantage

Liability for Bribery by Third Parties

- Covered entities may be liable for bribery by a third party, if the entity:
  - Authorized the payment
  - Paid the third party “while knowing” there is a “high probability” that the payment will pass through to an official
  - Failed to investigate third party risks and ignored “red flags”
  - Hired a third party who was likely to pay
U.K. Bribery Act

- **Reach:** UK citizens or persons with a “close connection” to UK, including companies that “carry on business” in UK
- **Bribery Prohibitions:** Active and passive bribery involving anyone in public or private sphere, and bribery of foreign public officials
- **Failure to Prevent Bribery:** Strict liability on companies if an associated person bribes another person intending to retain a business advantage for the company (unless the company can show it had adequate procedures in place)
- **Penalties:** Up to 10 years imprisonment for individuals and unlimited fines for individuals and corporations

France’s Anti-Corruption Law: SAPIN II

- Enacted in November 2016
- Expanded Jurisdiction
- New Anti-Corruption Authority
- Compliance Program Requirement
- Whistleblower Protections
- Introduction of the DPA

Brazil’s Clean Company Act: Overview

- Entered into force on January 29, 2014
- Prohibited Acts under the Statute include:
  - Providing an undue advantage, directly or indirectly, to a public agent (including local and foreign officials)
  - Making use of third party or entity to conceal interests or identities
  - Engaging in various types of fraud in connection with public tenders/contracts
  - Hindering or interfering with investigations/audits by public agencies, entities or agents
  - Supporting performance of wrongful acts under the Statute
- **Sanctions**
Brazil’s Clean Company Act: Key Aspects

- Applies only to legal entities (not individuals)
  - No corporate criminal liability
- Strict liability
- Successor liability
- Settlement agreements
- Credit for compliance
- Lack of accounting provisions

China’s Anti-Corruption Law: Key Aspects

- A variety of statutes, administrative regulations, and internal Chinese Communist Party (CCP) guidelines
- The People’s Republic of China Criminal Law criminalizes the bribery of Chinese state personnel, foreign public officials, officials of public international organizations, and employees of private entities with something of value in order to receive an improper interest
- The PRC Criminal Law was amended in August 2015 to:
  - Punish the bribery of immediate relatives of State Work Personnel
  - Levy fines upon individual bribe givers
  - Change bribe thresholds from specific monetary amounts to undefined ranges (e.g., “relatively large,” “large,” and “extremely large”) and to punishable circumstances (e.g., “relatively serious,” “serious,” or “extremely serious”)
  - Raise the standard for bribe-givers who self-report to be escape punishment
- Anti-Unfair Competition Law (AUCL) prohibits commercial bribery, including bribery of employees of SOEs

CONSIDERATIONS IN INTERNATIONAL INVESTIGATIONS
Considerations – Conducting the Internal Investigation

- Scope of the investigation
- Travel/time zones
- Language barriers
- Cultural differences
- Whistleblower regimes
- Data sources

Considerations – Conducting the Investigation

- Attorney-client privilege
- Privacy/data protection laws
- Interviews
- Labor protections
- Ethics rules
- Non-disclosure agreements and the SEC Whistleblower Program

Considerations – Assessing Exposure

- Jurisdiction
- Undeveloped case law
- Corporate criminal liability
- Mens rea standards
- Role of the judiciary
Considerations – Dealing with Governments (Disclosure)

• Local regulatory requirements
• Money laundering laws
• Credit for voluntary disclosure?
• Cascading disclosures

Considerations – Dealing with Governments (Investigation Phase)

• Credit for cooperation?
• Blocking statutes, bank secrecy laws
• Compelled testimony (United States v. Allen)
• Requests for privilege waivers

Considerations – Dealing with Governments (Behaving Badly)

• Coercive investigative tactics
• Media leaks
• Immature agencies
• Bias against foreign companies
Considerations – Dealing with Governments (Negotiating a Settlement)

- Plea negotiations?
- Strategies for parallel sets of negotiations
- DPAs and NPAs
- Duplicative penalties/offsets

Considerations – Remediation

- Labor protections
- Local norms
- Management challenges in execution

Considerations – Other

- Identifying, working with local professionals
- Border searches
- International travel by employees
- Media environment