Anti-Corruption Update: A Global Perspective

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Topics of Discussion

• Background: The FCPA and OECD Convention of Combating Bribery

• Anti-Corruption Enforcement Update:
  – U.S.
  – Latin America
  – China
  – Germany
  – France
  – U.K.

• Compliance Tips for Global Companies
BACKGROUND: THE FCPA AND OECD CONVENTION OF COMBATING BRIBERY
History of the FCPA

• SEC investigations in mid-1970s
  – 400+ US companies made questionable or illegal payments of more than $300 million
  – Abuses ranged from bribery of high-level foreign officials to payments facilitating certain clerical duties (“facilitating payments”)
• 1977 – Congress enacted the FCPA
OECD Convention on Combating Bribery

- Adopted 1997
- 43 Current Signatories
- Signing countries agree to:
  - Establish a criminal offence of bribery of foreign public officials
    - Liability of Legal Persons
    - Sanctions – prison and fines
    - Jurisdiction
  - Enforcement
  - Accounting controls
  - Mutual Legal Assistance and Extradition
  - Monitoring and follow-up
U.S. ENFORCEMENT UPDATE
FCPA Top Ten Settlements

2. Siemens (Germany): $800 million (2008)
3. Alstom (France): $772 million (2014)
5. Teva Pharmaceutical (Israel): $519 million (2016)
6. Odebrecht/Braskem (Brazil): $420 million (2016)
8. BAE (UK): $400 million (2010)
International Cooperation

• Global cooperation on the rise
  – 150% increase in annual requests from foreign prosecutors related to bribery and corruption investigations since 2011
  – 75% increase in annual requests from the U.S. to its foreign partners

• DOJ sending prosecutor on detail to the U.K.
  – Will work with Financial Conduct Authority
  – First DOJ Criminal Division employee to work within a foreign regulatory agency on issues of white-collar crime
  – Intended to foster information exchange and greater collaboration with foreign nations
Recent U.S. Enforcement Actions

- Telia Company -- $965 million total settlement, but
  - $274 million to Netherlands
  - $208.5 million to Sweden

- Bribe Recipient sent to jail
  - Use of anti-money laundering and fraud laws
  - Guinea Minister of Mines and Geology, Mahmoud Thiam – 7 years

- Limiting the amount of disgorgement available to the SEC
  - U.S. v. Kokesh
Trump Administration—Tough or Tender?

TOUGH

• AG committed to enforcing anti-corruption laws against corporations & individuals

• SEC Chair and DOJ DAG recognize the importance of anti-corruption enforcement and U.S. partnership with domestic and foreign authorities

TENDER

• President made clear, unequivocal anti-FCPA statements

• DAG says DOJ not focused on record fines and prosecutions

• Greater effort to speed investigations, thereby saving companies money
LATIN AMERICA ENFORCEMENT UPDATE
Massive corruption probe began with a gas station network accused of money laundering in early 2014

Informant revealed comprehensive political corruption scheme
- State-run oil company Petrobras overcharged on contracts
- Surplus funds were used for campaign finance and to buy support for Worker’s Party

Results of corruption probe:
- Unprecedented cooperation among foreign governments
- “Whole pie” settlement approach
- At least $3.5 billion in fines paid to Brazil, Switzerland & U.S.
Mexico & Colombia

- Mexico’s National Anti-Corruption System effective in July 2017
  - General Law of Administrative Responsibilities
    - Imposes obligations on public officials
    - Corporate responsibility for employee actions (compliance program)
  - Federal Auditing and Accountability Law
    - Companies must cooperate
  - Coordination – National Digital Platform and Special Prosecutor

- Colombia’s National Anti-Corruption System
  - Prohibition of bribery of foreign officials
  - Incentives to self-report
CHINESE ANTI-CORRUPTION LAW AND ENFORCEMENT DEVELOPMENTS
China – Recent Developments

- President Xi’s pronouncement on tigers and flies
  - Continues to have relevance today
  - Much more aggressive investigations and penalties

- New National Supervisory Commission
  - Set to begin work in March 2018
  - Currently only a pilot program in Beijing, Shangxi and Zhejiang
• PRC Criminal Law (revised in late 2015)
  – Added new crime of bribing close relatives of current or former government officials, among other changes
  – Added fines as an additional punishment for certain crimes

• 2016 Interpretation of People’s Supreme Court and People’s Prosecutor relating to bribery
  – Expanded definition of bribery to intangible material benefits
  – Increased monetary thresholds for categories of offenses and bringing prosecutions
  – Provided mitigation circumstances and “voluntary confessions”
China: Sources of Anti-Corruption Laws

• PRC Unfair Competition Law (2017 proposed revision)
  – Law targets commercial bribery
  – Includes bribery of third parties with ability to influence transaction
  – Acts of employees are attributed to the employer unless employer can demonstrate that the employees acted on their own
  – Increased fines

• Other laws (not exhaustive)
  – Civil Servants Law
  – Agency and Communist Party Guidelines
Lessons from GSK case in China

- Nearly 500 million USD in fines plus imprisonment of officers
- China no longer afraid to punish powerful multinationals
- New emphasis on those who give, not just those who receive, bribes
- Demonstrating corporate intent on violation by a corporate entity
- China’s investigation triggering FCPA and UK Bribery Law investigations
“One thing I know about the Germans: They like a good audit.”

- Mike Ehrmantraut, Breaking Bad
Highly active German legislator

• 5th Amendment to Act on Regulatory Offences, 26 June 2013
  – Especially: Increasing fines for violations anti-corruption laws

• Corruption Prevention Act, 20 November 2015
  – Amendment to provisions on giving/taking bribes in commercial practice, Sec. 299 German Penal Code (GPC)
  – Extended scope for bribery of public officials

• Act against Corruption in the Health Sector, 4 June 2016
• Act on Anti-Corruption Registry, 26 June 2017
• Money Laundering Act, 26 June 2017
Corporate Liability for Corrupt Behaviour - Sec. 30 ARO

Company is subject to regulatory fines if

- **Authorized person**
  - Commits act of corruption
    - While company was enriched
    - Breach of company's duty

- **Authorized person**
  - No/ineffective compliance system
    - Act of corruption by agent/employee
5th Amendment to Act on Regulatory Offences – Fines & Sanctions

• Increased fines & sanctions
  – Maximum fines for companies: from EUR 1 million to EUR 10 million
  – Maximum fines for CEOs, Managing Directors, Executive Board Members to EUR 1 million
  – Fines can be imposed on company and management cumulatively
  – Disgorgement of benefits resulting from corrupt behaviour

• Cancellation of business licence, Sec. 35 Trade Regulation Act

• Criminal liability of CEOs, Managing Directors, Executive Board Members
Criminal liability extended to

- Any foreign public officials /official of IO, when bribe is paid for specific illicit action
- Officials of European Union
- Extraterritorial cases, if giving or receiving party is German citizen
Act against Corruption in the Health Sector

Bribery in the health sector – closing a loophole

• Offer, promise or grant of a benefit to qualified healthcare practitioner
• In return for an unfair preference regarding
  – Prescription or purchase of medical or pharmaceutical products
  – Referral of patients or transmission of data on diagnosis

Sensitive business models

• Retrospective discounts for reaching certain turnover with products
• Bonuses for referral of patients
Keeping black sheep from the well*

- Banned from bidding in public tender offers exceeding EUR 30,000
- Entry cleared after 5 years since conviction
- Possibility of self-purification
  - Compensation
  - Implementation of sufficient compliance program
  - Cooperation with authorities (=> factual disclosure in damage claim proceedings?)
- Full implementation 2019
• Significant raise of fines imposed on companies
• Public pressure to strengthen enforcement authorities
• Legal uncertainty due to numerous new provisions
• Agenda of newly elected government
  - Criminal liability of legal persons (?)
NEW FRENCH ANTI-CORRUPTION LAW AND LATEST DEVELOPMENTS
France: Sapin II Law, passed December 8, 2016

• New law aimed at preventing, detecting and sanctioning
  • Applies to French groups and French subsidiaries of foreign groups: 500+ employees and generating €100+ million in revenue
  • Requires implementation a documented and updated program of measures to prevent and detect corruption in France and abroad

• Sapin II creates:
  • The Agence Française Anticorruption (AFA), authorized to police what companies have implemented in terms of necessary measures to prevent and detect corruption
  • French Deferred Prosecution Agreements (CJIP)
  • Certain whistleblower protections

• Expands scope of French anti-corruption laws
Sapin II: Penalties for failure to have a satisfactory compliance program

- Fines of up to one million Euros or for legal entities and 200,000 Euros for individuals

- Required application of a "monitoring system" (similar to those used by U.S. authorities) for up to five years*
  - Costs incurred are borne by the company
  - Failure to fully comply with the monitoring is subject to a penalty of up to two years imprisonment and a fine of 50,000 euros for individuals

- CEOs, Presidents, Managing Directors, Executive Board Members and Managers can all be held individually liable

* Up to three years if required by the Anti-Corruption Agency or up to five years if required by a judge
Companies subject to the Sapin II Law must undertake the following measures in conformity with French law:

- conduct a risk mapping exercise
- implement internal or external accounting controls
- adopt a code of conduct
- Implement procedures to check the integrity of customers and direct suppliers as well as intermediaries
- setting up an internal sanctions policy with respect to the code of conduct
- set up an internal whistle-blowing mechanism
- initiate an anti-corruption training with regular follow-up.
- Internal control procedures to assess the efficiency of the compliance programme
France: Sapin II Law in force since June 1st 2017

- French companies have a 6-month delay to be in compliance with Sapin II
- 1st part of the Guidelines on the Sapin II Law from the AFA to be released in the course of October 2017 with an open public consultation
- Inquiries and investigations from the AFA will start as from January 2018
U.K. ANTI-CORRUPTION LAW AND ENFORCEMENT DEVELOPMENTS
U.K.: Strengthened Enforcement by SFO

- $800 million global settlement with Rolls-Royce (Jan. 2017)
  - $605 million to Serious Fraud Office
  - $170 million to Department of Justice
  - $25.6 million to Ministério Público Federal

- Paid bribes in at least twelve countries in exchange for confidential information or contract awards

- Potential for future prosecution of 30+ individuals

- Enforcement potentially weakened if subsumed by National Crime Agency
"XYZ" – small/medium size company exporting to Asian markets.
- Personnel engaged in large-scale bribery to secure contracts in Asia in 2004-2012.
- “ABC” (parent) implemented enhanced compliance programme in 2011 – uncovered matters not previously known to ABC.

XYZ self-reported to SFO and offered full & candid assistance.

DPA approved. Terms included fine of £325,000 and disgorgement of £6.2 million.
- Court mindful of XYZ’s means.
- Prosecution of XYZ personnel underway.
Criminal Finances Act 2017

- Creates new corporate criminal offences of failure to prevent facilitation of tax evasion.
  - Failure to prevent facilitation of UK tax evasion (s. 45)
  - Failure to prevent facilitation of foreign tax evasion (s. 46)

- Can only be committed by a “relevant body” – corporate body or entity anywhere in the world.
• Offences similar and require:
  – Criminal tax evasion by a taxpayer;
  – Criminal facilitation of the tax evasion by an individual acting on behalf of the “relevant body”; and
  – If above satisfied, the “relevant body” will be liable, subject to the defence of having either:
    • Put relevant safeguards in place; or
    • It not being reasonable in the circumstances to expect the “relevant body” to put relevant safeguards in place.
Bribery Act 2010

• Re-drafting of anticorruption legislation.

• Bribery offences include promising/offering/giving a financial advantage in following cases:
  – To bring about the improper performance of a relevant function or activity by another, or to reward such improper performance.
  – Knowing or believing that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

• Applies to bribes given outside UK, or to activities with no connection with the UK.
Separate specific offence of bribing foreign official.

Failure to prevent.

- Commercial organisation is guilty if a person associated with it bribes another person.
- Offence can be committed in the UK or overseas.
- Defence if – on balance of probabilities – organisation can show it had in place adequate procedures designed to prevent bribery.
COMPLIANCE TIPS
Essential Elements to Compliance Program

• Tone at the top – commitment from senior management and clearly articulated policy against corruption
• Code of conduct, compliance policies & procedures
• Oversight, autonomy, and resources
• Risk assessment
• Training and continuing advice
• Incentives and disciplinary measures
• Third-party due diligence
• Confidential reporting and internal investigation
DOJ’s new compliance counsel recently identified four criteria for evaluating the effectiveness of a compliance program:

- **Addressing Risk** – Does the compliance program demonstrate thoughtful design to address current risks?
- **Active Compliance** – How operational is the program (not a paper program)?
- **Coordination** – How well are stakeholders working with each other?
- **Resources** – How well is the program resourced?
Third parties remain one of the top risk areas for companies conducting business abroad.

Best practices include:
- Due diligence on potential third parties
- FCPA compliance certification
- Continuous monitoring of third party transactions
- Auditing third party for compliance
DOJ continues to emphasize importance of effective anti-corruption due diligence in deal context

DOJ/SEC urge the following:

- Pre-acquisition due diligence
- Post-acquisition compliance integration
- Anti-corruption training
- FCPA audits
- Disclosures to government
The Sales Personnel See...
Prosecutors See...
QUESTIONS
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