

An Integrated Approach To Anti-Corruption

Law360, New York (September 09, 2011, 5:36 PM ET) -- The accelerating pace of international anti-corruption regulations presents multinational companies with newly available benefits as well as significant challenges due to the unprecedented complexity of enforcement. The benefits of systemic adoption of anti-corruption measures include a level playing field leading to innovation and efficient use of assets.

The consequences of enforcement also include government investigations, significant fines, ongoing monitoring, adverse publicity and criminal penalties. Paradoxically, one of the most effective responses to the emerging and undefined regulatory and enforcement climate is also the simplest: Combine a principles-based perspective on anti-corruption regulations with fact-specific execution at the level of inquiry.

A principles-based perspective on anti-corruption initiatives focuses on the simplicity of the majority of regulations such as the U.S. Foreign Corrupt Practices Act: Do not bribe foreign officials and keep company records that permit monitoring of transactions. The fact-based approach to execution at the inquiry level (a phrase that comprises recurring inquiries such as internal audit as well as pre-transaction due diligence and corporate investigations) permits companies to respond to the specific circumstances of each matter and draw upon the judgment and experience of internal auditors and investigators.

Consideration of the principles of anti-corruption regulations enables companies to plan specific inquiry-level procedures to address the fundamental anti-corruption issues of interest to regulators, shareholders and the public. A further benefit to combining an anti-corruption principles perspective with an investigations-level approach is the ability to reverse the process to identify potential larger anti-corruption implications of individual inquiries. Although this approach has implications for prevention of bribery and the establishment of an anti-corruption culture, the focus of this article is on investigations of past activities.

The Unprecedented Complexity Of Anti-Corruption Enforcement & Context

The anti-corruption landscape is shifting at an accelerating rate driven by regulatory changes from individual countries, multilateral organizations and nongovernmental organizations. Examples include:

In July 2011, the United Kingdom's Bribery Act went into effect. It is expected to cast a wider global net of inquiry compared to the FCPA because of its broad reach over any entity with a "demonstrable business presence" in the U.K.

In June 2011, the Taiwan parliament passed a bill making bribe-paying illegal. Giving kickbacks will be punishable on conviction by a maximum three-year jail term and a fine of up to \$17,200 U.S. dollars.

In June 2011, U.S. securities regulators began working with U.K. prosecutors to investigate whether Goldman Sachs Group Inc. and other financial firms violated bribery laws in dealings with Libya's sovereign-wealth fund. While no payment was made in the Goldman case, the bank's actions still fall under the FCPA since the law bans U.S. companies from offering bribes to foreign government officials or employees of state-owned companies.

In May 2011, the U.S. Securities and Exchange Commission approved rules expanding the ability of whistleblowers to report securities law violations, including FCPA violations, and claim cash rewards under the Dodd-Frank Act. This expansion will likely cause a significant increase in the number of tips reporting FCPA violations, as well as the size of subsequent cases, fines and rewards.

In March 2011, the United Nations Organisation for Economic Cooperation and Development (OECD) announced a new initiative to improve its anti-corruption tools and reinforce their implementation. As of April 2009, the OECD Anti-Bribery Convention commits 38 signatory governments to establish bribery of foreign public officials as a criminal offense.

In February 2011, the legislature of the People's Republic of China passed Criminal Law amendments including the criminalization of giving property to foreign (non-PRC) government officials and officials of international public organizations for the purpose of seeking an illegitimate commercial benefit.

In January 2011, Transparency International and The World Economic Forum Partnering Against Corruption Initiative concluded the public consultation phase on a draft Framework for Voluntary Independent Assurance of Corporate Anti-Bribery Programmes setting forth 22 specific control objectives to permit independent assurance under International Standard on Assurance Engagements (ISAE) 3000.

In November 2010, G-20 released an Action Plan including a common approach to building a global anti-corruption regime based on principles in the United Nations Convention Against Corruption.

In 2010, the United States filed 83 enforcement actions involving bribery of foreign officials overseas, up from 31 in 2009.

The increasing and evolving scope of enforcement is complicated by the rapid pace of political change in many sensitive areas. Corrupt regimes are increasingly cash-strapped due to international isolation and are reported to have increased their demands for payments from foreign companies. In other countries, new regimes may have limited experience with combating bribery or a shortage of experienced public officials, which may lead to opportunities for corruption.

The Integrated Approach

The basis of most anti-corruption regulation (from the U.S. to the PRC) is simple: don't bribe foreign officials and maintain company records to permit monitoring of transactions. The simplicity of the core principles mandates the use of judgment to determine whether a specific transaction is actually a bribe as there may be uncertainty as to the definition of the recipient (who is a "foreign official?"), the permissibility (is it a "facilitating payment?") and even the nature of the transaction (is the alleged bribe in the form of cash, goods, entertainment or other benefits?).

Some regulators have not provided definitions, others have issued clarifications, and others are in the process of preparing guidance. The emergence of case law addressing those topics is affected by the uncertainty inherent in the specific issues in dispute and the timing of judicial processes.

The need for judgment requires experienced practitioners who have necessarily honed their skills prior to the current surge in anti-corruption regulation and enforcement. To identify the right team and approach, the company can ask: "what is the underlying business problem to be solved?" If the potential bribery issues surfaced from a hotline tip regarding a specific individual, an employee misconduct investigation may be warranted. If the bribery issues are critical to an upcoming acquisition, a due diligence team is needed.

If bribery allegations regarding the industry as a whole surfaced in the media, a systemic corporate investigation may be the best approach. Each of these approaches contemplates a unique professional skill set and approach that has been refined through experience. By combining a principles-based perspective on anti-corruption compliance with these practitioners' task-based approaches to execution at the inquiry level, companies can target a specific business need (such as pre-transaction due diligence or an employee misconduct investigation) within a framework of anti-corruption compliance.

Reversing the Approach to Identify Anti-Corruption Issues in Specific Business Problems

Companies may embark on specific inquiries that did not originate from an anti-corruption initiative but, nonetheless, surface bribery or internal control failures that have anti-corruption implications. An employee misconduct investigation into missing inventory may raise questions regarding whether the goods (or cash from their subsequent sale) are used for bribes. Due diligence by a potential acquirer (or a private equity firm seeking to invest) may uncover indicia of bribery. A corporate investigation into potential travel expenses fraud may uncover improper payments to foreign officials. Allegations or indicia of bribery may also surface during recurring internal audits or management's analysis of supply chain issues or employee turnover.

By linking these individual inquiries with the foundational perspective on anti-corruption, companies can identify whether there are potential obligations and opportunities to advance their overall anti-corruption culture. These individual inquiries may result in reporting obligations to regulators and independent auditors, as well as the need to discipline, terminate or cooperate in the prosecution of employees. Other anti-corruption opportunities arising from specific inquiries may include amendments to company policy, expansion of substantive testing of existing controls, addition of new controls and training for employees.

Conclusion

The complexity and uncertainty of increased anti-corruption regulation and enforcement challenges companies to include consideration of bribery during recurring tasks such as internal audits as well as specific inquiries such as pre-transaction due diligence and corporate investigations.

The simplicity of the core principles of most anti-corruption regulations — do not pay bribes and maintain company records to permit monitoring of transactions — can be addressed through integration of a principles-based perspective on anti-corruption regulations with a task-based approach to execution at the inquiry level. Internal audits, due diligence and corporate investigations can be planned to include specific inquiry-level procedures to address fundamental anti-corruption issues while drawing on the judgment and experience of internal auditors and investigators.

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