Anti-corruption Is No Longer Your Father's FCPA

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For decades, the U.S. Foreign Corrupt Practices Act ("FCPA") has been the driver for global corruption programs. Companies reflexively established baseline controls to address FCPA requirements, with the understanding that the FCPA stood as a legitimate benchmark for compliance and was the statute most likely to be part of an enforcement action.

There has been a discernable shift, however, in anti-corruption laws and enforcement that signal an end to the premise that a robust FCPA-focused anti-corruption program will be sufficient for global companies. Chinese prosecutions for corruption are now regular and public. The U.K. Bribery Act has been on the books for a while, with enforcement increasing. Other examples are emerging from markets that appear to be on track to developing anti-corruption measures that differ from the FCPA and other laws that have been the traditional focus of compliance programs.

This means that compliance programs have to be retooled to ensure they meet the varying requirements of the different national laws that may apply. Examples from South Korea and Brazil illustrate the point.

South Korean Anti-Corruption Legislation

On March 26, 2015, South Korea implemented the Prohibition of Improper Solicitation and Receipt of Money or Goods Act*, known colloquially as the Kim Young-ran Act (hereinafter the "Kim Young-ran Act"). The law materially changes anti-corruption restrictions a*nd prohibits improper solicitation of "public officials," to include corruption efforts that do not involve cash or other payments.

The Kim Young-ran Act broadens the definition of "public official" to include individuals in the public sector, as well as certain individuals in the private sector, including employees of media companies. Unless certain exceptions apply, the law prohibits these parties from accepting or requesting cash or gifts valued at more than one million won (approximately $900 USD). This prohibition applies regardless of whether such compensation was in exchange for favors or related to the person's official duties. The law also prohibits the improper solicitation of a public official, whether directly or indirectly through a third-party intermediary. Improper solicitation encompasses not only financial transactions, but also requests that public officials violate the law or perform acts in excess of their legal authority.

Penalties include up to three years imprisonment or a criminal fine of up to 30 million won (approximately $27,500 USD). The law also applies vicarious liability to corporations if their employees participate in corruption during the course of employment. If charged under the law, a corporation can assert the defense it took reasonable actions to prevent violations, such as through a compliance program that addressed these Korean restrictions.

Brazilian Clean Companies Act

The Kim Young-ran Act follows anti-corruption reform in Brazil last year. On January 29, 2014, Brazil's Clean Companies Act became the first Brazilian law subjecting Brazilian companies and foreign entities domiciled in Brazil to strict civil and administrative liability for bribing both foreign and domestic public officials. Under the statute's strict liability standard, Brazilian authorities do not have to demonstrate the company or its representatives acted with criminal or corrupt intent; they need only prove that a prohibited act occurred.

The Act applies to all actions by Brazilian companies, whether domestic or foreign. It further regulates the actions of non-Brazilian companies legally established in Brazil (i.e., subsidiaries, branches or offices in Brazil) as well as those determined to be de facto in Brazil, even if only temporarily, if those actions take place in Brazil. Corporate managers or parties participating in the illegal act separately face criminal liability under other existing laws.

The Act penalizes parties who engage in direct or indirect bribery of domestic and foreign public officials and related third parties. Prohibited actions include financing or otherwise subsidizing bribery, and using a third party to disguise the beneficiaries of such bribery. Companies are further banned from hindering public investigations and from defrauding the public procurement process.

Liability under the Act includes both administrative fines and judicial penalties. Administrative fines range between 0.1% and 20% of a company's gross revenue from the fiscal year prior to the fine assessment, excluding taxes. If the government cannot determine the company's gross revenue from the prior year, it will assess a fine of between R$6,000 and R$60 million between approximately $2,000 USD and $20 million USD). The Act further enables the government to publicize the adverse judgment. Companies found in violation of the Act are further subject to judicial penalties, including suspension of corporate operations, prohibitions on receiving government benefits, and dissolution of the corporate entity.

On March 18, 2015, President Dilma Roussef signed a decree implementing regulations under the Act. The regulations set forth a comprehensive list of sixteen factors the government will consider when evaluating the effectiveness of a corporate compliance program for the purpose of assessing penalties. Among others, these include a commitment to compliance by corporate executives, comprehensive policies applicable to all employees, periodic training, and periodic risk assessment. The government will further consider a compliance program's provisions for accurate books and records keeping.

Comparison to the FCPA

Although the Kim Young-ran Act and the Clean Companies Act share key similarities with the FCPA, there are notable differences between these anti-corruption regimes. For example, the FCPA, Clean Companies Act, and the Kim Young-ran Act prohibit parties from offering or providing officials with anything of value in an effort to induce that official to behave in a certain manner. While the Clean Companies Act applies to both foreign and domestic bribery, the FCPA's anti-bribery provisions only apply to the bribery of foreign officials. The notion of foreign official applies expansively under both the FCPA and the Clean Companies Act, with the Clean Companies Act including even those parties who hold a public position temporarily or without compensation, and those controlled indirectly by the public authority of an international public organization. Conversely, the Kim Young-ran Act regulates only the bribery of domestic public officials. However, these public officials encompass not only officials in the public sector, but also certain groups in the private sector including journalists and media company employees.

Unlike the Brazilian Clean Companies Act and the Kim Young-ran Act, the FCPA's anti-bribery provisions contain a narrow exception for “facilitating or expediting payments.” Facilitating payments are payments made to expedite or secure the performance of routine, non-discretionary governmental action to which the payor is already entitled under the law. The Clean Companies Act, however, prohibits such payments. The Kim Young-ran Act provides for limited exceptions under which the giving of money or gifts to public officials would not be illegal under the Act, including the giving of food, money, or gifts to public officials for smooth performance of duties or per social customs, of which values do not exceed those set by Presidential Decree.

The FCPA also contains accounting and internal controls provisions not found in the Clean Companies Act or the Kim Young-ran Act. The FCPA's accounting provisions apply to U.S. and foreign public companies listed on a U.S. stock exchange and to those required to file periodic reports with the U.S. Securities and Exchange Commission. These provisions require regulated companies to keep proper records and maintain an internal accounting system to ensure accurate and non-fraudulent accounting practices and prevent the concealment of bribes. Record keeping requirements play a more limited role under the Clean Companies Act. Regulators assessing penalties under this Act will consider the sufficiency of a corporate compliance program in determining the appropriate penalty amount, and one factor under this sufficiency analysis includes whether the compliance program enables accurate record-keeping. The Kim-Young-ran Act does not include accounting and internal controls provisions.

Finally, liability differs under the anti-corruption laws. In contrast to other anti-corruption statutes, the FCPA's anti-bribery provisions require proof of corrupt intent in relation to the bribery of a foreign public official; the FCPA's accounting and internal controls provisions, however, do not require intent. The FCPA subjects regulated parties to both criminal and civil liabilities for violations. Similarly, the Kim Young-ran Act contains both criminal penalties, including imprisonment and criminal fines, and administrative fines. Under the Clean Companies Act, however, companies are subject to strict civil and administrative liability for the acts of their directors, officers, employees, and agents when such acts of prohibited conduct would benefit the company.

Similar to the FCPA, the Clean Company Act provides for successor liability in the event of merger or acquisition, including potential liability exposure for the acquired company's pre-acquisition unlawful conduct. Both the FCPA and the Kim Young-ran Act impose vicarious liability to corporations whose employees and agents participate in corruption during the course of employment.

Conclusion

South Korea's Kim Young-ran Act and Brazil's Clean Companies Act provide representative examples of non-U.S. anti-corruption laws that subject regulated parties to liability for acts not necessarily regulated by the FCPA. This means that multinational companies should assess their existing compliance programs to ensure they meet compliance expectations set forth in the FCPA and applicable non-U.S. anti-corruption laws.
