

GLOBAL ANTI-CORRUPTION RULES TAKE ON A LOCAL FLAVOR

Much attention, deservedly so, continues to be paid to the Foreign Corrupt Practices Act in the U.S. and the new U.K. Bribery Act. However, these provisions do not exist in a vacuum. The fact is, many countries have laws against bribery, extortion, fraud and embezzlement, but not all have been enforcing them. This situation is beginning to change, and the change may be coming more quickly than anticipated. The focus of this *Alert* is on recent developments in China.



THE U.S. FOREIGN CORRUPT PRACTICES ACT OF 1977 (FCPA), in broad terms, prohibits U.S. companies and citizens, foreign companies listed on any U.S. stock exchange, or any person acting while in the United States, from corruptly paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business (the Anti-bribery Provisions). The FCPA is jointly enforced by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Proof of a U.S. territorial nexus is not required for the FCPA to be implicated against U.S. companies and citizens operating around the world, and FCPA violations can, and often do, occur even if the prohibited activity takes place entirely outside of the United States. The FCPA also requires “issuers” (any company including foreign companies) with securities traded on a U.S. exchange or required to file periodic reports with the SEC to keep books and records that accurately reflect business transactions and to maintain effective internal controls (the Books and Records and Internal Control Provisions).

THE U.K. BRIBERY ACT, broadly speaking, repeals previous statutory and common law provisions in relation to bribery, replacing them with the crimes of bribery, being bribed, the bribery of foreign public officials and the failure of a commercial organization to prevent bribery on its behalf. The Act has been described as having a near-universal jurisdiction, allowing for the prosecution of an individual or company with links to the United Kingdom, regardless of where the crime occurred. Under the powers granted by the new law, prosecutors (essentially, the Serious Fraud Office) will be able to prosecute both domestic and foreign companies, providing they have some presence in the U.K. Convicted individuals could face up to 10 years in prison and both individuals and organizations face unlimited fines if found guilty of committing bribery.

Member countries of the Organization for Economic Co-operation and Development (OECD), along with Argentina, Brazil, Bulgaria and South Africa, have entered into an Anti-Bribery Convention establishing legally binding standards to criminalize bribery of foreign public officials in international business transactions. The Convention focuses on the 'supply side' of a bribery transaction. On a per-country basis, country monitoring reports make recommendations developed from rigorous peer-review examinations.

CHINA'S TOUGHENING ANTI-CORRUPTION STANCE

In the global fight against corruption, perhaps no country is more dramatically engaged than China, where opposing corruption can be a matter of life and death.¹ Stepping up the fight, effective May 1 of this year, the Chinese government amended its criminal law to prohibit bribery of foreign officials.² The amendment prohibits individuals and corporations from providing “money or property to any foreign party performing official duties or an official of international public organizations” for the purpose of “seeking illegitimate business benefits.”³

Going beyond the rules of many other countries, China’s new anti-corruption provisions proactively require:

- Mid-level to senior Communist Party officials and executives at state-owned businesses to report their investments, incomes and assets
- Officials to give the financial details of family members and any change in their personal status (to prevent officials from hiding income under the names of other people)⁴

These amendments apply to all companies organized in China; violations may result in “fines and a prison sentence of up to 10 years.”⁵

China has also called on the international community for bilateral and multilateral cooperation to prevent and fight trans-border corruption. “Anti-corruption therefore is not simply the internal affairs of a single country, but an issue that requires attention and active responses of all countries and their anti-corruption agencies,” said Chen Lianfu, director of the General Bureau of Anti-Embezzlement and Bribery with China’s Supreme People’s Procuratorate. Calling trans-border corruption a “global cancer,” he said it not only causes losses to a single country or firm, but also undermines economic development, social stability and national security at a global level.⁶

THE BIGGER PICTURE

Member countries of the Organization for Economic Cooperation and Development (OECD), along with Argentina, Brazil, Bulgaria and South Africa, have entered into an Anti-Bribery Convention establishing legally binding standards to criminalize bribery of foreign public officials in international business transactions.⁷ The Convention focuses on the ‘supply side’ of a bribery transaction. On a per-country basis, country monitoring reports make recommendations developed from rigorous peer-review examinations.⁸

The OECD’s Working Group on Bribery enforcement published cumulative data, including the number of criminal, administrative and civil cases of foreign bribery that have resulted in a final disposition, such as a criminal conviction or acquittal, or similar findings under an administrative or civil procedure.⁹

Highlights from the March 2011 enforcement data reveal:

- 199 individuals and 91 entities sanctioned under criminal proceedings for foreign bribery in 13 parties between the time the Anti-Bribery Convention was entered into in 1999 and the end of 2010
 - At least 54 of the sanctioned individuals were sentenced to prison for foreign bribery
 - A record amount of EUR 1.24 billion was imposed in combined fines on a single company for foreign bribery
- Criminal charges have been laid against more than 120 individuals and 20 entities in five countries
- Approximately 260 investigations are ongoing in 15 countries that are signatories to the Anti-Bribery Convention

Currently, on the global playing field, the most important international conventions on fighting cross-border corruption within the United Nations' framework are the UN Convention against Corruption and the UN Convention against Transnational Organized Crime. China is a signatory to both Conventions as well as a founding member of the International Association of Anti-Corruption Authorities (IAACA), headquartered in Beijing.¹⁰

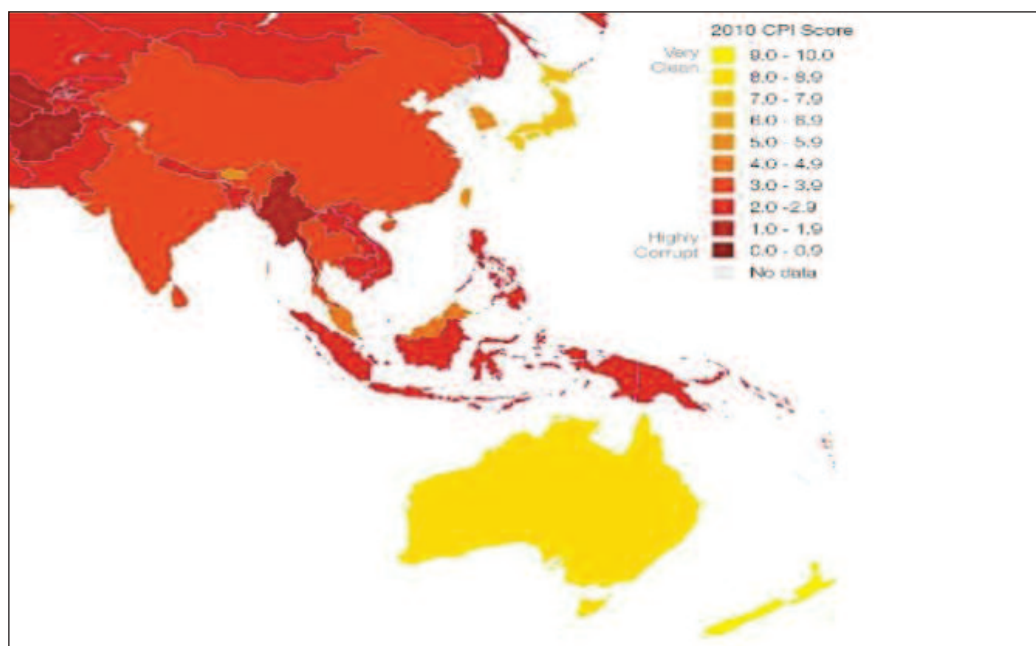
PERCEPTION OF REALITY

Regionally, it may be helpful to consider the Corruption Perceptions Index (CPI) from Transparency International which scores countries on their perceived levels of public sector corruption on a scale from 0 (highly corrupt) to 10 (very clean). It's a composite index, based on corruption-related data in expert surveys carried out by a variety of institutions.¹¹

To put this in perspective, the 2010 CPI found that nearly three quarters of the 178 countries in the Index scored below five, on a scale from 0 (perceived to be highly corrupt) to 10 (perceived to have low levels of corruption), indicating the possibility of a serious corruption problem.

THE 2010 CORRUPTION PERCEPTIONS INDEX

Regionally, it may be helpful to consider the Corruption Perception Index (CPI) from Transparency International which ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians.*



*Adapted from Corruption Perceptions Index 2010 Results. Copyright 2010 Transparency International: the global coalition against corruption. Used with permission. For more information, visit <http://www.transparency.org>.

WHAT'S COMING

When stronger local country enforcement is combined with greater cross-border cooperation, we know that anti-corruption enforcement actions will continue to grow at an accelerated rate for the foreseeable future.¹² This means that building and maintaining an effective compliance and ethics program will help an organization manage its risk of liability by preventing fraud and corruption in the first instance, and identifying and remediating misconduct when it does occur – making it worth its weight in gold. The most successful efforts may well involve

risk managers and corporate legal teams working together to implement robust prevention and response procedures.

Implementing such programs as the rules continue to change, especially in developing markets where certain types of corruption may have been regular and customary, may be **the** corporate governance challenge of the 21st century.

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¹ “Former China Mobile Official Sentenced [to death, with a possible commutation to Life in Prison] in Bribery Case,” NYT:

http://www.nytimes.com/2011/07/23/business/global/china-mobile-executive-sentenced-to-death-over-bribes.html?_r=1, July 22, 2011.

² “Anti-corruption websites pop up in China,” CNN, <http://www.cnn.com/2011/WORLD/asiapcf/06/26/china.corruption/index.html>, June 27, 2011.

³ <http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/china/initiatives/public-anti-corruption-initiatives/>, CHINA Country Profile, Public Anti-Corruption Initiatives.

⁴ The new rules stop short of requiring that the incomes and assets of Chinese officials be made public.

⁵ <http://corporatelaw.jdsupra.com/post/9418380996/compliance-corruption-china-foreign-bribery-act>, *Compliance and Corruption in China: Foreign Bribery Provision of the PRC Criminal Law*, August 26, 2011.

⁶ These comments were made during an interview at a seminar of the International Association of Anti-Corruption Authorities (IAACA). “China calls for closer int’l cooperation on fighting trans-border corruption” http://news.xinhuanet.com/english2010/china/2011-07/06/c_13967554.htm, July 06, 2011.

⁷ http://www.oecd.org/document/21/0,3746,en_2649_37447_2017813_1_1_1_37447,00.html.

⁸ http://www.oecd.org/document/24/0,3746,en_2649_37447_1933144_1_1_1_37447,00.html.

⁹ Beginning in June 2010, and updated as recently as March 2011, cumulative enforcement data was collected and published.

http://www.oecd.org/document/3/0,3746,en_2649_37447_45452483_1_1_1_37447,00.html.

¹⁰ http://www.iaaca.org/AboutIAACA/BriefIntroduction/201103/t20110316_513122.shtml.

¹¹ http://www.transparency.org/regional_pages/asia_pacific/resources/surveys_and_indices#cpi.

¹² Since 2007, the U.S. Public Company Accounting Oversight Board (PCAOB) and the Securities and Exchange Commission have been in discussions with their Chinese counterparts on a bilateral agreement that would enable the PCAOB to conduct inspections of auditing firms in China. Recently, both the PCAOB and Chinese authorities have committed to accelerating their efforts to reach an agreement, including a joint PCAOB-SEC delegation that met in Beijing in July with representatives of China’s Ministry of Finance and the China Securities Regulatory Commission (CSRC) to discuss issues relating to auditing oversight. “PCAOB, SEC to Meet with Chinese Officials on Auditing Oversight,” July 7, 2011, <http://www.journalofaccountancy.com/Web/20114328.htm>.