Foreign Authorities Are Cracking Down on Corruption

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The pace of international law enforcement cooperation in the anti-corruption setting has quickened since 2009. Even so, there is a widespread perception among in-house counsel that Western regulators — including the U.S. Department of Justice and Securities and Exchange Commission — cannot easily pursue anti-corruption matters that require significant assistance from their foreign counterparts, particularly those in the developing world. This assumption is dangerous, as it can lead to poorly conceived anti-corruption risk analysis and potentially disastrous decision-making in the event of an investigation.

We found, after a review of every high-profile Foreign Corrupt Practices Act enforcement action brought by the DOJ or SEC since 2009, that in fact developing countries often offer extensive anti-corruption support and that foreign partners can instigate — and turbo charge — U.S. investigations. Even Switzerland has become a robust anti-corruption partner. To reach these conclusions, we analyzed publicly available materials, including press releases, legal commentary, news articles and information provided during FCPA seminars.

Since 2009, there have been approximately two dozen high-profile FCPA enforcement actions in which the DOJ, SEC or both publicly praised the close cooperation provided by foreign counterparts, including those in the emerging markets. Given the nature of FCPA enforcement, there are likely numerous additional matters in the pipeline in which foreign governments are assisting the DOJ or SEC. The key takeaways from our analysis are:

Developing countries often offer extensive anti-corruption support. Our review of recent cases debunks the misperception that developing-country law enforcement is unable or unwilling to aid Western anti-corruption investigations. Since 2009, the DOJ and SEC have worked closely with partners in a host of the most populated and economically vital developing countries in the world, including China (Hong Kong), Indonesia and Mexico, to name but three examples. Moreover, U.S. regulators have developed close working relationships with their counterparts in other jurisdictions that historically have been considered high risk for anti-corruption or money laundering purposes, such as Costa Rica and Panama.

These trends will accelerate for several reasons. First, corruption is now a central political issue in many developing democracies such as Brazil and Indonesia, and as this trend grows, so too will the breadth and depth of law enforcement cooperation with the West. Second, anti-corruption cooperation is often a requirement insisted upon by Western countries, as well as international organizations such as the International Monetary Fund and the World Bank, when they provide financial or technical assistance to developing nations. Third, even many nondemocratic governments, such as that of Chinese-controlled Hong Kong, are concluding that anti-corruption enforcement enhances the legitimacy of the government, and thus some measure of anti-corruption cooperation could become an area of mutually beneficial common ground in the years ahead.

Foreign partners, including those in developing and emerging countries, can instigate and expedite U.S. investigations. Our analysis of FCPA enforcement activity since 2009 reveals that a substantial number of high-profile FCPA matters pursued by the DOJ and SEC were either instigated or bolstered by foreign law enforcement. For example, the various cases resulting from the Bonny Island scandal in Nigeria all trace their roots to an investigation by French authorities. Numerous recent cases appear to have been advanced by close cooperation between U.S. regulators and their foreign counterparts, particularly those in Western Europe. This cooperation allows U.S. regulators to "piggyback" off the work of such partners by gaining access to seized documents, developing investigative leads, shortening the time needed to conduct an investigation, and reducing the number of departmental resources required to manage the initial, critical stages of an inquiry. Foreign regulators thus have been — and will remain — a critical force multiplier for the DOJ and SEC.

Switzerland is now a robust anti-corruption partner. Once upon a time, Switzerland was known as a safe haven where unscrupulous governmental officials could maintain ill-gotten gains safely shielded from the prying eyes of regulators in the United States and European Union. That is clearly no longer the case. In several major recent anti-corruption matters, Swiss law enforcement has provided critical help to its Western counterparts. In light of what is in the public domain, it is obvious that the Swiss have provided extensive assistance to U.S. regulators, likely including bank records and related financial documents. Given the central role played by Switzerland and its banks in the global financial regime, this is a major, yet underappreciated, development that greatly increases the likelihood that Western regulators can successfully pursue cases with a Swiss component.

Accordingly, in-house counsel no longer can assume that U.S. regulators will be unable to secure close cooperation from their Western European counterparts, or that governments in the developing world will stifle investigations into potential anti-corruption violations in their own countries. In-house counsel should consider the following lessons:

Think locally, act globally. Given the interconnected nature of anti-corruption enforcement, if a company has any corruption matter anywhere in the world, it runs the risk of its local challenge metastasizing into a global problem. This recognition does not mean that a company should conduct an expensive, worldwide internal investigation any time a local corruption problem emerges. However, it does mean that all of the company's anti-corruption stakeholders —worldwide — should be advised at the earliest available opportunity once a problem is discovered. Doing so will allow the company to take prudent preventative measures during the first stages of the inquiry, and prevent costly mistakes that can greatly increase the company's risk. For example, one risk often confronted by companies that discover a potential corruption problem is the possibility that one subsidiary may suspend an agent relationship while another subsidiary unknowingly continues to engage the same agent.

Monitor local anti-corruption activity. If the company has U.S. connections — and certainly if it is an issuer under the FCPA — the company should not limit its focus to the actions of U.S. regulators. It is imperative that company resources overseas stay abreast of enforcement actions pursued by local authorities, particularly any actions against direct competitors or companies that generally operate in the same space. Such foreign enforcement activities can often be the "canary in the mine" of a potential investigation that could grow to include Western regulators. Local counsel in foreign jurisdictions can serve as the company's eyes and ears, offering a robust yet targeted awareness of anti-corruption trends as they emerge.

Integrate local corruption protections into the compliance policy. Every facet of the company's anti-corruption compliance policy should include reasonable local anti-corruption protections. Although this does not mean that every local subsidiary needs its own tailored anti-corruption policy, it does mean that the company's anti-corruption program should have protections for local anti-corruption matters that are comparable to the protections built in for FCPA compliance. For example, every third-party agent should be contractually required to disclose any local anti-corruption allegations. Similarly, the company's audit rights of its agents and suppliers should be broadly drafted to sweep in local anti-corruption matters.

Maintain legal protections available under local law. Although most of the examples of recent anti-corruption cooperation have proven successful — in the eyes of U.S. regulators — in a few instances U.S. prosecutors have been stymied by local laws. Although no company ever wishes to be in a position where such defensive reliance on local law is necessary, in-house counsel should familiarize themselves with potentially helpful local laws relating to corporate governance, privacy and documents, and ensure that their in-house clients do not unwittingly sacrifice otherwise available and appropriate legal protections.

Today, global and effective anti-corruption compliance mandates an understanding that culpable activity may be pursued vigorously wherever it occurs, and by regulators acting in concert around the world.

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