

Anti-Corruption Developments To Expect In Asia

Law360, New York (April 03, 2014, 2:44 PM ET) -- Recent anti-corruption enforcement developments in Asia should serve as a call to action for international and domestic companies operating in the region. In light of these developments — which include increased enforcement of (and pressure to enforce) anti-corruption laws and an increasing amount of multinational cooperation around anti-corruption issues — companies are well advised to conduct a corruption risk assessment and evaluate their current compliance programs, including the adequacy of their internal controls, before problems arise or, worse yet, a government investigation is initiated. In particular, companies operating in countries traditionally considered “lax” in their enforcement of such laws should be aware of the growing potential in the region for increased enforcement.

Below are some of the developments to follow in 2014 that could impact companies doing business in the region:

Increased Enforcement of Anti-Bribery Laws in China

Put simply, doing business in China is complicated and, if this past year is any indication, it is becoming more complicated for foreign firms seeking to do business there. But China’s allure for economic opportunity remains bright for multinational companies. Since China joined the World Trade Organization more than a decade ago, the Chinese government has made concerted efforts to encourage foreign investment, and foreign companies seeking opportunities in the second largest economy in the world — and one of the fastest growing — have responded with ever-increasing investment. From limits on market access to what can be perceived as stifling government bureaucracy, to rampant theft of intellectual property and adulteration of products, the list of challenges and risks in China is long, complicated and growing.

One of those risks is corruption. China ranks No. 80 on Transparency International’s Corruption Perceptions Index, just after Tunisia and just before Swaziland.[1] Of the world’s top 10 largest economies, only two countries rate lower on Transparency International’s index — India at No. 94 and Russia at No. 127.

Indeed, corruption risk in China is compounded not only by its legendary bureaucracy, but also by its complex system of state-owned enterprises (SOEs). Besides making up a substantial part of the national economy, the sheer number of SOEs in China is daunting: more than 144,000.[2] Under many foreign bribery laws, including the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act, the employees at many of these SOEs may qualify as foreign officials depending on the facts and circumstances.[3] Beyond its bureaucracy and web of SOEs, the expectation of gift-giving and the focus on “guanxi” have long made China one of the most challenging markets in which to operate in terms of corruption risk.

A review of historical FCPA enforcement actions reflects this challenging and complex business environment. In just the last four years, China has been cited 26 times as a country in which corruption occurred as at least part of the basis for an FCPA enforcement action. Those 26 appearances of China in FCPA enforcement actions give it the dubious honor of being No. 2 of all countries in the world, just behind Nigeria. Clearly, China and companies doing business in China are on the radar of U.S. enforcement authorities.

Companies doing business in China are now increasingly finding themselves on the radar of Chinese enforcement authorities as well. While U.S. authorities have used the FCPA to target individuals and entities suspected of paying bribes, attacking the “supply side” of the corruption equation, China’s historical approach (with some notable exceptions) has been more focused on the government official who accepted the bribe, or the “demand side” of the equation.[4] Just last year, however, we reported on China’s increased focus on anti-corruption enforcement and, in particular, its newly issued interpretive guidance outlining instances where individuals and entities responsible for paying a bribe would be found to have violated China’s Criminal Law.

By the middle of 2013, China’s efforts to target its Criminal Law at corruption by multinational companies became evident with the Chinese government’s high-profile investigations of alleged bribery by multinational companies in the pharmaceutical sector. According to public reports, the focus of these investigations include allegations that hundreds of millions of dollars in bribes had been paid to doctors at state-owned hospitals in exchange for the prescription of specific drugs and that travel agencies had been used to facilitate bribes, which included travel, gifts, and sexual favors.[5] The sales results of targeted companies took a dramatic hit in the wake of the Chinese government’s investigations.[6]

This development marks a milestone for supply-side corruption enforcement of anti-corruption laws in China, and it should serve as a wake-up call for multinational companies doing business in China that now face an increased risk of scrutiny of their business practices by Chinese authorities. In addition, by targeting multinational companies for alleged bribery of what are considered “foreign officials” under the FCPA, China’s actions may require those companies to deal with parallel investigations into conduct also targeted by U.S. enforcement agencies. Indeed, through the U.S.-China Joint Liaison Group on Law Enforcement, U.S. law enforcement has sought to engage with Chinese counterparts in recent years,[7] and it is unclear at this juncture what result these nascent efforts will have on corruption enforcement.

As China’s campaign against corruption continues into 2014 and beyond, two factors remain to be seen: the extent to which China’s investigations observe rule of law norms expected by western companies, and how well companies are able to navigate parallel investigations by Chinese and U.S. (and possibly other) enforcement authorities. It will also remain to be seen whether U.S. law enforcement, in fact, pursues parallel investigations with Chinese authorities given rule of law, due process, and human rights issues.

Another item that bears watching in 2014 is whether China will take any action to enforce its still newly minted law against foreign bribery. While U.S. authorities have long pursued U.S. companies and citizens who bribe foreign officials overseas, skepticism remains whether China will enforce that law against its own companies operating abroad.[8]

Increased Anti-Corruption Efforts Within APEC

Asia-Pacific Economic Cooperation is a forum for 21 Pacific Rim member economies, which was

established in 1989 and seeks to promote free trade and economic cooperation throughout the Asia-Pacific region. In 2004, APEC leaders acknowledged the threat that corruption poses to good governance and economic growth in the Asia-Pacific region, and they formed the Anti-Corruption and Transparency Working Group (ACTWG), which China is chairing in 2014.

APEC's anti-corruption efforts have received relatively little coverage as compared to other anti-corruption regimes, such as the U.N. Convention Against Corruption (UNCAC) and the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Anti-Bribery Convention"). Nevertheless, the large volume of global commerce and exports generated by APEC member states and the ever-increasing importance of the APEC region to global business make enhancements to APEC's anti-corruption enforcement efforts notable and worth following in 2014.[9]

At the recent APEC summit held in Bali, delegates issued the Bali Declaration — Resilient Asia-Pacific, Engine of Growth.[10] Among the topics touched on in the Bali Declaration are regional anti-corruption efforts and calls for "greater collaboration among law enforcement authorities, in combating corruption, bribery, money laundering, and illicit trade." [11]

In order to meet this objective, the Bali Declaration also sets out the establishment of a new regional anti-corruption authority to be called the APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET) to "strengthen informal and formal regional and cross-border cooperation"[12] as well as to "[c]reate ethical business environments that support sustainable economic growth by strengthening ethical standards, and by encouraging private sector stakeholders to implement APEC's high standard principles for codes of business ethics." [13]

With the first ACT-NET annual meeting scheduled to be held later this year,[14] and additional meetings of the ACTWG such as the recent meeting in Ningbo, where a workshop was held last month on the recovery of the proceeds of corruption, the potential for greater enforcement efforts among APEC member states is substantial. In fact, preliminary meetings concerning the establishment of ACT-NET called for APEC member states to strengthen enforcement of UNCAC and to provide training to national law enforcement authorities on anti-corruption and anti-bribery enforcement.[15]

There are even additional meetings scheduled for later in 2014 on tracking financial flows in corruption cases and a workshop on "Combating Business Bribery." Given this concentrated activity focused on corruption in the Asia-Pacific region, developments in this area merit strict attention.

Potential for Greater OECD Pressure on Anti-Corruption Enforcement in Asia

The OECD's Working Group on Bribery adopted the Anti-Bribery Convention in November 1999. Since that time there have been periodic "phases" of evaluation of compliance with the Anti-Bribery Convention to ensure that member states are properly enforcing their respective foreign bribery laws.[16] This is one of the hallmarks of the OECD Working Group on Bribery and that evaluation process has been described by Transparency International as the "gold standard." [17]

Following a critical report, countries have often responded to working group recommendations by dedicating more resources to combat foreign bribery, increasing investigations and prosecutions, and even amending their foreign bribery laws. The most recent assessments, known as Phase 3, began in December 2009, and they are scheduled to conclude in 2014. Numerous reports have already been issued covering member countries, including Japan and South Korea, in late 2011.[18] Japan received a

particularly critical report and South Korea was encouraged to improve its efforts, too.[19] One of the developments to follow in 2014 is whether Japan and South Korea respond to such criticism with increased investigations and prosecutions in the wake of their two-year written follow-up reports.

Beyond Japan and South Korea, there are a number of Asian and South Asian countries that, while not signatories to the OECD convention, maintain “observer” status with the working group, including China, India, Indonesia, Malaysia and Thailand.[20] These countries provide updates to the working group on the implementation of anti-bribery laws domestically and are part of the ongoing dialogue on the global fight against corruption. Continuing involvement of these countries in the working group makes these nations “countries to watch” for new anti-corruption laws and increased enforcement, especially as they consider membership in the Working Group on Bribery.

With the continuing pressure on Japan and Korea to step up their enforcement efforts, and the continued involvement of major Asian and South Asian countries with the Working Group on Bribery, this region of the world will continue to be an interesting one throughout 2014.

Potential Inclusion of Anti-Corruption Provisions in the Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership (TPP) is a multilateral trade agreement currently being negotiated among 12 countries (generally bordering the Pacific Ocean). The TPP is focused on eliminating trade barriers such as tariffs on goods and services.[21] The TPP has received a fair amount of media coverage regarding the secrecy surrounding its negotiations — as is typical of trade negotiations — as well as the controversy surrounding certain provisions discussing intellectual property rights.

In addition to discussions on trade barriers and tariffs, however, the TPP will also attempt to harmonize regulatory oversight and compliance among member states.[22] Uniform anti-corruption and anti-bribery compliance requirements are potentially part of this harmonization, the effect of which could put additional pressure on these countries to enforce their foreign corruption laws.

Free trade agreements entered into by the U.S. generally contain provisions regarding anti-corruption compliance. Such provisions typically include prohibitions on solicitation of bribes, prohibitions on bribery of domestic or foreign officials, enforcement standards and procedures, as well as whistleblower protection.[23] These protections generally follow similar provisions in UNCAC and the Anti-Bribery Convention, though with even less recourse for underperformance or nonperformance.

Although the exact content of the TPP is not public at this time,[24] nongovernmental organizations such as Transparency International have urged parties negotiating the TPP to include in the agreement provisions regarding anti-corruption and anti-bribery and, in some cases, language that is stricter than that included in typical U.S. FTAs.[25] Given the scope of the TPP and the major trading partners involved, international companies should pay close attention to any emphasis on anti-corruption and anti-bribery enforcement that emerges in public drafts and comments.

Conclusion

Asia remains a dynamic area presenting tremendous opportunity to multinational businesses, along with substantial risks, including corruption risk. For a variety of reasons, countries individually, bilaterally and multilaterally have sought to address the risk of corruption in international business transactions. With so much at stake and progress moving unevenly, companies will want to follow the aforementioned areas of anti-corruption developments closely.

In the meantime, companies are well advised to conduct a corruption risk assessment and evaluate their current compliance programs to ensure that their risks are minimized, their reputations are protected, and their chance of being the target of an enforcement investigation is substantially reduced.

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[1] Transparency Int'l, Corruption Perceptions Index 2013, available at <http://www.transparency.org/cpi2013/results>.

[2] Xinhuanet, China Focus: China pledges further reforms for state-dominated sectors (Oct. 24, 2012), available at http://news.xinhuanet.com/english/indepth/2012-10/24/c_131928023.htm.

[3] See, e.g., 15 U.S.C. § 78dd-1(f)(1)(A) (defining “foreign official” as, inter alia, “any officer or employee of a foreign government or any department, agency, or instrumentality thereof”); UK Bribery Act Section 6(5)(b) (defining “foreign public official” as, inter alia, “an individual who ... exercises a public function ... for any public agency or public enterprise of that country or territory (or subdivision)”); see also Dep’t of Justice and Sec. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 19-21 (Nov. 14, 2012).

[4] See, e.g., China Ex-Housing Official Probed for Corruption, Xinhua Reports, Bloomberg News (Jan. 5, 2013), available at <http://www.bloomberg.com/news/2013-01-05/china-ex-housing-official-probed-for-corruption-xinhua-reports.html>; Jonathan Kaiman, Chinese anti-corruption drive nets official with 47 mistresses, The Guardian (Jan. 5, 2013), available at <http://www.guardian.co.uk/world/2013/jan/05/chinese-corruption-crackdown>; Andrew Jacobs, Chinese Officials Find Misbehavior Now Carries Cost, The New York Times (Dec. 25, 2012), available at <http://www.nytimes.com/2012/12/26/world/asia/corrupt-chinese-officials-draw-unusual-publicity.html?pagewanted=all>; but see David Barboza, China Sentences Rio Tinto Employees in Bribe Case, The New York Times (March 29, 2010), available at http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?pagewanted=all&_r=0.

[5] <http://online.wsj.com/news/articles/SB10001424127887324886704579052713021635516>.

[6] See, e.g., <http://www.reuters.com/article/2013/09/18/us-china-pharma-sales-analysis-idUSBRE98H07620130918>; http://www.nytimes.com/2013/10/24/business/international/glaxosmithkline-earnings-hit-by-slumping-china-sales.html?_r=0. It is worth noting that allegations of bribery were not limited to international drug companies; several domestic Chinese companies also were forced to respond to public allegations of bribery and to face the resulting impact on sales growth. See

<http://www.reuters.com/article/2013/09/18/us-china-pharma-sales-analysis-idUSBRE98H07620130918>.

[7] See, e.g., Press Release, The White House, “U.S. - China Joint Statement” (Jan. 19, 2011) (“The United States and China welcomed progress by the U.S.-China Joint Liaison Group on Law Enforcement Cooperation (JLG) to strengthen law enforcement cooperation across a range of issues, including counterterrorism. The United States and China also agreed to enhance joint efforts to combat corruption through bilateral and other means.”), available at <http://www.whitehouse.gov/the-press-office/2011/01/19/us-china-joint-statement>; David Luna, Director for Anticrime Programs, Bureau of International Narcotics and Law Enforcement Affairs, U.S. Dep’t of State, Remarks at U.S.-China Anticorruption Working Group Meetings and Anti-Bribery Roundtable (July 26, 2011) (“Working together, the U.S. and China can set an example in leading efforts to prevent and combat corruption and bribery internationally including through the APEC Anticorruption and Transparency Working Group (ACT), the G20 Anticorruption Working Group, and processes related to the UNCAC and UNTOC, and other multilateral fora – while strengthening integrity and promoting responsible governance across the region.”), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2011/07/20110726170720su0.5604931.html#axzz2tjNGY9TL>; see also Press Release, U.S. Dep’t of State, “U.S.-China Joint Liaison Group on Law Enforcement Cooperation” (Dec. 19, 2012) (“The JLG has evolved into a wide-ranging forum focused on global law enforcement concerns shared by the United States and China, such as cybercrime, corruption, intellectual property violations, drugs, and repatriation of illegal immigrants and criminal fugitives.”), available at <http://www.state.gov/r/pa/prs/ps/2012/12/202280.htm>.

[8] See also Stella Dawson, “Governments backsliding on prosecution of foreign bribery by companies: report” (Oct. 8, 2013), available at <http://www.reuters.com/article/2013/10/08/us-corporations-bribery-report-idUSBRE99706G20131008>.

[9] A copy of this document is available on the homepage of the APEC Anti-Corruption and Transparency Working Group at <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Anti-Corruption-and-Transparency.aspx>.

[10] A copy of the Bali Declaration is available at http://apec.org/Meeting-Papers/Leaders-Declarations/2013/2013_aelm.aspx.

[11] See Bali Declaration at ¶ 17(f).

[12] Id.

[13] U.S. Dep’t of State, 21st Annual APEC Economic Leaders’ Meeting Fact Sheet (Oct. 8, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/10/215195.htm>.

[14] To be held at a date yet to be determined in 2014. See APEC Anti-Corruption and Transparency Working Group, *supra* note 9.

[15] See Proposed Initiative: APEC Anti-Corruption and transparency Network Meeting, at 2-3 (Sept. 18-19, 2013) available at http://mddb.apec.org/Documents/2013/ACT/NET/13_act_net_003.pdf.

[16] See Country monitoring of OECD Anti-Bribery Convention, available at <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

[17] Fritz Heimann, et al., Transparency Int'l, Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery, at 2 (Oct. 7, 2013), available at http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd.

[18] Copies of these reports are available at <http://www.oecd.org/japan/japan-oecdanti-briberyconvention.htm> and <http://www.oecd.org/korea/korea-oecdanti-briberyconvention.htm>.

[19] See Press Release, OECD Working Group on Bribery, "Serious Concerns Remain over Japan's Enforcement of Foreign Bribery Law, Despite Some Positive Developments" (Jan. 12, 2012) available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/seriousconcernsremainoverjapansenforcementofforeignbriberylawdespitesomepositivedevelopments.htm>; Press Release, OECD Working Group on Bribery, "Korea making notable progress on fighting foreign bribery; further improvements needed, says OECD" (Oct. 19, 2011), available at <http://www.oecd.org/newsroom/koreamakingnotableprogressonfightingforeignbriberyfurtherimprovementsneededsaysoecd.htm>.

[20] OECD Working Group on Bribery Annual Report 2013, available at <http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm>.

[21] Lydia Depillis, "Everything you need to know about the Trans Pacific Partnership," Wash. Post, (Dec. 11, 2013) available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/11/everything-you-need-to-know-about-the-trans-pacific-partnership/>.

[22] Id.

[23] Letter from Nancy Boswell (President and CEO of Transparency International USA) to Ambassador Michael Froman (U.S. Trade Representative) (August 10, 2010) available at <http://www.gbdinc.org/Document%20Library.html> (Document No. 129).

[24] See Outlines of the Trans-Pacific Partnership Agreement, Office of the U.S. Trade Representative, available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

[25] See Letter from Nancy Boswell, *supra* note 23; Trans-Pacific Partnership (TPP) Agreement Principles, U.S. Business Coalition for TPP, available at <http://www.tppcoalition.org/TPP%20Coalition%20Principles.pdf>.