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PERSPECTIVES

UNDERSTANDING AND COUNTERING BRIBERY RISK IN CHALLENGING MARKETS

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> TRACE

Under global anti-bribery laws, including the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, a company can face significant liability if an intermediary, agent or other business partner pays a bribe to a foreign official on its behalf. In identifying those risks, it is best practice to conduct thorough research on the specific industry and markets the intermediary operates within.

Companies have a responsibility to implement adequate safeguards and controls against bribery, including performing appropriate due diligence to identify red flags that might signal a heightened likelihood of bribery. Enforcement agencies have consistently emphasised that these safeguards should be tailored to the particular risks a company faces, with higher-risk situations warranting greater attention to ensure compliance.

For example, the extractive, construction and defence sectors are known to carry elevated risk, but the prevalence and acceptance of bribery can vary widely from one jurisdiction to another. Acknowledging these factors is a crucial early step in performing a comprehensive risk assessment of a company's activities and allocating compliance resources accordingly.

It is worth taking a closer look at country-specific risk. Already, this is a simplification: there is little reason to expect to encounter the same issues doing business in urban centres as in far-flung field operations, for example. It is common for companies to make compliance-related decisions and risk disclosures based on a country's ranking on one or more global corruption indexes, such as our Bribery Risk Matrix. But one level of third-party due diligence is not suitable for all situations, and a more tailored risk response is often required. By understanding the factors behind a country's risk score, a company can take concrete steps to adapt its strategy to the industry and market.

One way to tailor risk response is to implement specific measurements that can provide further information about corruption risk likely to arise in a given jurisdiction. Business often must deal with inefficient and overly complex bureaucracies, which can be exploited by rank-and-file civil servants to supplement their pay with 'grease' money, or facilitation payments. For this sort of situation, the most appropriate safeguards will likely involve establishing clear policies among employees and intermediaries against paying even petty bribes, communicating those policies clearly through training and promoting a culture of integrity, and supporting employees' decisions even when it looks like a project might be held up by improper demands from officials.

Being well-informed about a country's administrative efficiency can help prepare you for this sort of occurrence, as can familiarity with general expectations of the business culture. But while low-level bribery may be among the more common problems businesses face, it generally does not represent the most severe risk. The greater danger – particularly regarding third-party risk – is likely to be found in connection with high-value government contracts and concessions, combining the prospect of outsized profit with the influence of a single government decision maker.

"When dealing with governments that lack meaningful transparency or robust oversight, it becomes especially important to look closely for and follow up on possible red flags."

Bid rigging and other procurement-related corruption is not tied to simple bureaucratic inefficiency in the way facilitation payments are. Instead, this type of corruption is likely to be encouraged by a lack of transparency in government processes, along with political indifference to the hijacking of state resources. These schemes are also likely to entail the approval – tacit or otherwise

– of the highest powers in the state, perhaps even enriching the country's leaders to the point of rampant kleptocracy.

With all this in mind, we can take a more holistic and calculated view of high-risk markets. It is only by understanding where the risk comes from that one can deploy appropriate safeguards and hedges, pursuing opportunities while steering clear of the avoidable traps.

Due diligence is the key to spotting those traps before you fall into them. You should never engage an intermediary – even informally – without some degree of background inquiry. This applies even in comparatively 'clean' jurisdictions.

Additionally, understanding whether a country has any effective means of constraining high-level government abuse – a strong civil society, a free press, an independent judiciary – is critical to assessing this kind of risk.

When dealing with governments that lack meaningful transparency or robust oversight, it becomes especially important to look closely for and follow up on possible red flags. Where family relations take precedence over the rule of law, it is critical to know where your intermediaries' loyalties lie. Where financial interests are easily obscured, it is important to track exactly where your money is going.

Free press is also relevant when weighing risk – reputational screenings are valuable but carry less weight if there are no objective journalists around to report on wrongful deeds. This highlights a significant dilemma: the places of greatest risk can also be the places where information to guard against that risk is most difficult to obtain. And a full-bore independent investigation of every potential business partner and agent may not be feasible.

Particularly in such regions, you may need to enlist the cooperation of your prospective intermediaries themselves. They will be in a position to provide some of the information you need to make an informed risk assessment. At the same time, they may have an incentive to withhold relevant but embarrassing information. It is critical to follow through on the necessary inquiries, to obtain complete and forthright responses, and to recognise when something does not quite add up.

Ultimately, it is reasonable to consider whether the potential value of the project is worth the risk of involvement in a corrupt scheme. Enforcement agencies have the ability and the will to impose penalties that far outstrip the potential upside. Settlements under the FCPA routinely cost companies hundreds of millions of dollars in fines alone, to say nothing of the cost of internal investigations, including forensic accountants and lawyers. With that kind of potential exposure at stake, most companies cannot afford to turn a blind eye to corruption risk.

None of this is to say that high-risk markets must be avoided. That is not the aim of global anti-bribery laws and is not conducive to economic development in countries facing corruption risk. Instead, the best strategy is to intelligently gauge the specific risks those markets present and proceed with a reasoned, consistent plan for due diligence and ongoing monitoring. R&C

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