

FRAUD & WHITE COLLAR CRIME 2021

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What every company operating in the APAC region needs to know about anti-bribery and corruption

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Across the Asia-Pacific (APAC) region, the bribery and corruption landscape is becoming increasingly complex. Companies operating throughout this region must be aware of the risks imposed by extra-territorial legislation, as well as the demanding local regulatory regimes that may conflict with cross-jurisdictional laws.

This article provides a brief overview of bribery and corruption in the APAC region, addressing the increasingly robust regulatory and enforcement measures, challenges of cross-jurisdictional coordination, the rise of the ethical business, era of the whistleblower, and impact of grass-roots activism.

Strengthened regulatory and enforcement measures

Enhanced regulatory and enforcement measures relating to anti-corruption and bribery include the introduction of vicarious liability offences for corporations, reporting obligations for financial institutions, the development of structural integrity through "E-government", and extended jurisdictions.

Vicarious liability

APAC jurisdictions are implementing more robust measures to hold corporations liable for criminal conduct by individuals. The Australian government has proposed reforms to Australian foreign bribery laws, including the introduction of an offence for corporations that fail to prevent foreign bribery.

Companies will be strictly liable for bribery committed by employees, contractors and representatives, both foreign and domestic, unless the company can demonstrate that adequate procedures to prevent such conduct were in place. The proposed maximum penalty is the greater of the following:

- AUD 22.2 million,
- If the benefit value can be determined, three times the benefit, or
- If the benefit cannot be determined, 10% of the annual turnover of the body corporate for the 12 months prior to the offence.

Role of financial institutions

Financial institutions are often abused as

intermediaries in corruption schemes, and APAC jurisdictions have recognised the importance of appropriate regulation, supervision, and associated reporting obligations for suspicious or threshold transactions.

Recently, AUSTRAC, the Australian financial intelligence body, issued an AUD 252,000 infringement notice to a money transfer business for failing to report international fund transfers between 2018 and 2019.

Within the APAC region, there is also an increased focus on financial institutions implementing 'know-your-customer' (KYC) policies and practices to combat financial crime.

Structural change – E-government

Given that bribery and corruption are caused by systemic weakness, the use of information and communication technologies (ICT), also known as "E-government", can help to strengthen both regulatory and enforcement provisions.

E-government processes have been adopted by many APAC jurisdictions. For example, in South Korea, citizens can monitor in real time the progress of applications for licences online. Additionally, Pakistan recently restricted its tax department and introduced ICT to reduce contact between tax collectors and payers.

Extended jurisdictions

Jurisdictions must also be aware of foreign corruption statutes and their extra-territorial impact, such as the U.S. Foreign Corrupt Practices Act (FCPA). Under the FCPA, the conduct of one individual is enough to bring U.S. juris-

isdiction over non-U.S. subsidiaries, resulting in an unprecedented extra-territorial extension of legal jurisdiction.

As a result of this extended jurisdiction, in 2016 alone, 30 companies from around the globe paid over USD 2.4 billion to resolve cases brought about under the FCPA. In 2019, the U.S. Securities and Exchange Commission (SEC) saw the enforcement of the FCPA against 17 companies/individuals. In 2020, eight companies were subjected to enforcement action, including Goldman Sachs Group, Inc. which agreed to pay more than USD \$1 billion to settle SEC charges. At the time of writing in 2021, three companies have been subjected to enforcement action.

APAC is quickly becoming a primary target of the FCPA. In 2015, there were approximately 115 FCPA investigations in Asia; more than double the number of investigations in any other region. There are indications that this may be due to longstanding business practices in parts of the APAC region that are in contravention of the FCPA.

For example, in Vietnam, U.S. foreign investors rely on local managers, agents, consultants and vendors to liaise with government officials. The local staff will often use bribes to attract business or sell products, which is an FCPA violation for which foreign investors are liable.

Cross-jurisdictional coordination and collaboration

Established networks

Multi-agency collaborations are tasked with combatting transnational crime (with a focus

on financial crime) and promoting international standards of regulation and enforcement. Examples include:

- The Pacific Transnational Crime Network (PTCN) – a police-led criminal intelligence and investigation entity.
- The Egmont Group of Financial Intelligence Units.
- The Asia-Pacific Group on Money Laundering (APG).

Information sharing

Despite these multi-agency networks, coordination and collaboration remain complex and at times restricted. This is best exemplified in the area of information and data sharing.

Mutual Legal Assistance Treaties

Formal requests for information, by way of Mutual Legal Assistance (MLA) requests, are made pursuant to multilateral and/or bilateral treaties between signatory countries. Multilateral treaties to which APAC jurisdictions are signatories include the United Nations Convention against Corruption and the United Nations Convention against Transnational Organised Crime.

While MLA requests provide a convenient avenue for information sharing, the request processes usually suffer from lengthy delays as well as a lack of coordination and sharing of resources between agencies.

Other methods of request

As an alternative to MLA requests, alternative channels have been developed under “soft law” including action plans, resolutions and bilateral or multilateral Memoranda of

Understanding (MOU). APAC jurisdictions such as Australia, Hong Kong and Japan are signatories to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMOU).

In addition to MOUs, in 2018, the US passed the *Clarifying Lawful Overseas Use of Data (CLOUD) Act* to expedite access to electronic information held by U.S.-based global service providers.

Data protection and transfers

Although reform is occurring, many jurisdictions are conflicted in their approach to data transfer. For example, in 2018, the People’s Republic of China (PRC) enacted the International Criminal Judicial Assistance Law (ICJA), under which individuals based or working in China cannot provide assistance in foreign criminal proceedings without first obtaining approval from the Chinese government. A company therefore may be forced to choose between complying with Chinese law and being held in contempt of a foreign court.

An example can be seen in a U.S. appeals court decision, where three Chinese banks were held in contempt for refusing to comply with subpoenas in a U.S. investigation into the violation of international sanctions on North Korea, specifically the movement of tens of millions of dollars.

The rise of the ethical business

In 2015, the then Attorney-General of Singapore, VK Rajah, opined that: “[T]he enforcement of laws and regulation alone, howev-

er, is insufficient. The fight against financial crime in Singapore also requires a spirit of compliance that guides behaviour. Without the prevalence of this spirit of compliance, no enforcement regime, no matter how competent, can avoid being inundated and overwhelmed – even, perhaps, to the point of becoming dysfunctional.”

Throughout the APAC region, the public and private sectors must harness a “spirit of compliance”, helping to strengthen anti-corruption enforcement laws and improve mechanisms of investigation, and taking steps to minimise potential liabilities.

Some APAC jurisdictions incentivise the reporting of misconduct by granting immunity from prosecution. Such schemes are not entirely new and have been piloted in the U.K. and the U.S. In 2016, the U.K. Serious Fraud Office entered into its second Deferred Prosecution Agreement (DPA) in relation to bribery and corruption offences. In 2017, the DOJ under the Trump administration issued a declination letter requiring the “disgorgement of associated gains” to CDM Smith Inc., a Massachusetts-based construction firm, which allegedly paid nearly USD 2 million in bribes to Indian government officials between 2011 and 2015 in exchange for infrastructure projects.

The era of the whistleblower

The fear of retaliation remains a major deterrent for whistleblowers. Given the importance of whistleblowers, it is imperative that legal and physical protections are implemented to ensure that individuals have the necessary confidence required to come forward.

In recent years, there has been a significant positive cultural shift toward whistleblowers and the need for their protection, and enhanced whistleblower protections have been introduced in Australia throughout 2019-2020 through amendments to the *Corporations Act 2013* and passing of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*.

However, protections vary across the APAC jurisdictions. For example, in Hong Kong, the current regime offers little to no protection for whistleblowers, as there are no express whistleblowing laws.

Grass-roots activism

The rapid development of whistleblower protections would not occur without the attention of and pressure from the public. High-profile cases such as the Edward Snowden revelations, WikiLeaks scandal, Commonwealth Bank of Australia financial planning advice investigations, and Chinese pharmaceutical company bribery cases (*GlaxoSmithKline*) have all fostered public discussion, and garnered public support for legislative reforms.

Conclusion

Jurisdictions across the APAC region have taken steps to increase awareness of bribery and corruption and strengthen legal and regulatory frameworks. It is imperative for any entity seeking to work or invest in the APAC region to be well abreast of the local regulatory regime, and the rapid developments in corruption laws, both regional and foreign.