

INSIGHTS

Risks and Rewards: Doing Business in Africa and Anti-Bribery Laws

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Understanding the risks associated with local corruption, and how to comply with anti-bribery laws such as the UK Bribery Act the US Foreign Corrupt Practices Act ("FCPA"¹), has become a necessary aspect of doing business internationally. As companies look for opportunities to do business in Africa, the fight against corruption will need to be an integral part of planning new ventures and transactions. With a continent as vast and diverse as Africa, one must be careful about making blanket generalizations about corruption in Africa. For example, using statistics compiled by Transparency International, one can see that some African countries, such as Ghana and South Africa, have corruption ratings that indicate they are less corrupt than the worldwide average. At the same time, the vast majority of African nations are classified as more corrupt than the worldwide average, and countries such as Nigeria, Kenya, and Zimbabwe have corruption ratings that place them among a group of the countries where corruption is most prevalent in the world. These facts led the Vice President of Botswana to state last year that "our continent has and is still suffering from the deadly disease of corruption."² In practice, the persistence of corruption in Africa means that companies seeking to do business in many African countries will confront a variety of circumstances that will challenge their ability to comply with international anti-bribery laws. In countries where corruption is rampant, it is more likely that government officials will seek some form of reward or compensation before awarding contracts, processing paperwork, providing police protection, or other official duties. While many of these requests may be explained as "the way things work"³ in certain jurisdictions, that normalcy will likely provide little to no protection from liability under international anti-bribery laws. Additionally, liability for violations of anti-bribery laws can flow from many sources, such as the acquisition of existing companies, joint ventures, and individual transaction partners. Paying attention to the large risks associated with payments to government officials in African nations will be important for any companies seeking to do business in Africa. Although the laws are different in a number of respects, both the UK Bribery Act and the FCPA provide enforcement officials in the UK and the US with sweeping enforcement tools that are designed to punish intentional companies who make payments to foreign officials in order to obtain or retain business. Under both legal regimes, companies and individuals who do business or are organized in the UK or the US could face significant civil or criminal penalties for promising or giving, directly or through a third party, something of value (no matter how low that value is) to an official in Africa in order to gain an a business

advantage. Such an advantage could take any number of forms, ranging from contract selection to tax breaks to special consideration in regards to permits or other matters. Investigations and penalties associated with violations of international laws can be very expensive, inflict significant harm to the reputations of companies and individuals, and raise the specter of imprisonment. Under the UK Bribery Act, individuals can be imprisoned for up to 10 years for violations of the law, and both individuals and entities can face monetary penalties that are not subject to any limits. Under the FCPA, individuals can be imprisoned for up to five years and be fined up to \$250,000 for violations, while entities can be penalized up to \$2 million for each violation of the FCPA. Several significant anti-bribery enforcement cases have arisen in connection with business ventures in Africa. In 2013, Weatherford International settled charges that the company had made improper payments to foreign officials in the Middle East and Africa, including allegations that a bribe was paid to an African official to renew an oil services contract, and agreed to pay \$152.6 million to the US Department of Justice and Securities and Exchange Commission ("SEC"). In 2012, after the company had already agreed to pay over \$8 million in penalties for FCPA violations in 2010, several executives from the Noble Corporation were charged by the SEC with making improper payments to officials in Nigeria in order to obtain permits for drilling rigs. Although the charges against the executive were eventually settled without the executives paying any penalties, the Noble investigation ended up spanning many years and resulted in significant costs for the company and the executives. These risks make it imperative that companies seeking to expand their business in Africa retain effective anti-bribery compliance counsel. Effective compliance advice will need to consider and plan for all stages of the new business. This means, for example, that contract language must properly account for anti-bribery compliance, that employees are properly trained about compliance requirements, that books and records are properly maintained, and that any potential partners or agents are subjected to sufficient due diligence and review for potential anti-bribery risks. Under both the UK Bribery Act and the FCPA, companies can significantly reduce their exposure to civil and criminal penalties by adopting effective compliance programs. These are complicated endeavors, and require the development and implementation of procedures that are specific to the needs of each company, but are designed to ensure that liability risks are minimized to the greatest extent possible. Put simply, anti-bribery compliance must be built in to the early stages of business planning, and companies will need to devote sufficient resources to identifying and avoiding common problems that can result in significant liability risks. As African countries continue to develop economically, their battles against corruption will only intensify. Companies that make improper payments could very well find themselves facing scrutiny and legal risks in Africa and in the UK and the US. Accordingly, companies and individuals doing business in Africa would be well served by taking compliance with anti-bribery laws very seriously.