Top 3 International Issues Impacting Corporate Boards

What do the Congo, the U.K., Mexico and Colombia have in common? How do legal and political developments in these countries impact corporate boards in the U.S.? If these questions leave you scratching your head, you are not alone. Board members are quickly waking up to the realization that a mix of U.S., European and Latin American laws may dramatically change the way domestic companies do business at home and abroad.

Consider the Congo. A little-known provision in the Dodd-Frank Act has suddenly plucked this conflict-ravaged country from the heart of Africa and dropped it squarely in the middle of corporate America. The act's "conflict minerals" provision may soon affect how U.S. companies source and manufacture some of the most basic products sold to consumers around the world.

In the U.K., the fight against corruption now has a powerful ally in the form of the Anti-Bribery Act. Corporate compliance policies designed to satisfy the requirements of the U.S.'s Foreign Corrupt Practices Act might not go far enough to address the requirements of the U.K.'s sweeping legislation.

In a similar vein, Mexico and Columbia, two of Latin America's economic powerhouses, are in the midst of enacting broad anti-corruption initiatives. These new laws will force companies to further refine their internal compliance programs, implement new employee training and revisit how they do business in these particular jurisdictions. This article offers corporate board members a brief overview of these critical legal developments.

When the Dodd-Frank Act was signed into law last summer, few paid any attention to a provision dealing with Tin, Tantalum, Tungsten and Gold, and their derivatives, also known as "conflict minerals." Drafters of the Dodd-Frank Act added this section in an attempt to combat the violence and exploitation associated with conflict minerals in the Congo and neighboring countries. Trade in these "conflict minerals" has been directly linked to the region's dire humanitarian situation. With finalization of the provision looming – possibly in the next few months – corporate boards should prepare for the drastic changes that they may need to implement.

Companies covered by the provision will be required to file an annual report (which will also need to be published on their corporate website) indicating whether any materials used in the production of goods come from the affected region. Companies will also need to describe what steps were taken to ascertain this information. While this may sound easy enough in theory, in practice companies will have to significantly increase their due diligence efforts.

So-called "conflict minerals" are used in industries ranging from electronics to jewelry to healthcare. Because these minerals can, and often are, melted down and even mixed with other products, it may be difficult to detect their usage. In practical terms, this means that in order to comply with their reporting requirements, companies will have to carefully scrutinize their supply chains and create policies for verifying information provided by their suppliers. The SEC plans on adopting the final version of the "conflict minerals" provision in the third or fourth quarter of 2011.

From the Congo, we turn our attention to the U.K., which is in the midst of a different type of war. The U.K. Anti-Bribery Act took effect on July 1, 2011, and focuses on the fight against corruption. This act is more comprehensive than any anti-corruption law currently in place. While the law applies to corporations with a presence in the U.K., it covers corrupt conduct occurring anywhere in the world. The act requires the creation of comprehensive compliance programs by corporations with a presence in Britain. It holds individuals and corporations strictly liable for their conduct. Additionally, the act imposes unlimited fines if a corporation's anti-bribery measures are deemed inadequate.

Unlike its U.S. counterpart, the FCPA, the U.K. version provides for a private cause of action against corporations that engage in bribery. Notably, however, there is no provision for sanctioning foreign officials who receive bribes. Corporate boards should be wary that what might be considered legal under the FCPA,

such as “travel expenses,” could be penalized under the Anti-Bribery Act.

The U.K. is not alone in enacting anti-corruption laws recently. Mexico has just enacted its Federal Anti-Corruption Law. Similar to both the FCPA and U.K. Anti-Bribery Act, Mexico’s initiative applies to individuals and companies that engage in unethical behavior – whether in Mexico or elsewhere – in connection with a government contract. Suspect behavior can occur at any stage of the government contracting process, including submission of bids for permit grants. Corporations and individuals that plead guilty to engaging in corrupt activity might receive a reduction in fines.

Further south, President Santos of Colombia just announced that the country would fight corruption head on with a specific focus on water and royalty management, infrastructure and health services. The new program comes on the heels of the arrest of a number of Colombian tax officials who were engaged in a multi-million dollar fraud on the government.

We live in a complex, some would say, overregulated, world. In an effort to make a political statement, to garner favor with voters or to appease certain interest groups, rules and regulations are enacted without much thought to their impact on international trade and commerce. It may be that the Dodd-Frank Act’s conflict minerals provision will serve some greater purpose; we may need a broader anti-bribery law such as the one enacted by the U.K.; and it certainly might not hurt to have stronger anti-corruption laws in Latin America. But at what cost?

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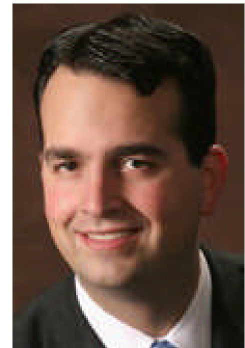

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