StoneTurn Group

5 Ways To Prepare for the New French Anti-Corruption Statute


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As corporations continue to face heightened scrutiny around the U.S. Foreign Corrupt Practices Act ("FCPA") and U.K. Bribery Act (the "Bribery Act"), other countries are beginning to jump on the anti-corruption bandwagon. France is the latest nation to join the fray, finalizing a new law to fight corruption, foster transparency and modernize economic activity. Lessons learned in handling FCPA and Bribery Act violations can be extremely valuable to organizations as they navigate similar laws while conducting business internationally.

> "ONE OF THE MOST NOTABLE CHANGES IS THE CREATION OF A NATIONAL REGULATORY BODY TO PREVENT AND DETECT CORRUPTION—THE AGENCE FRANCAISE ANTI-CORRUPTION ("AFA")."

On July 9, 2016, the French Senate approved a version of Sapin II, named for minister Michel Sapin, which the French National Assembly had approved on June 14, 2016.[1] The Senate version is "friendlier" to companies.[2] Representatives of both chambers must now confer and are expected to adopt the law sometime in September 2016. It then returns to the National Assembly, which can pass the bill without the Senate's recommendations.[3]

Sapin II contains eight main articles focused on the prevention of corruption and additional protections for whistleblowers, among other topics. The law requires companies or groups, wherever located, that have operations in France and with over 500 employees and over €100 million in consolidated revenues (in total; estimated to be about 1500 companies in France) to implement measures to prevent and detect corruption in France or foreign countries related to influence peddling.

This is a big step for France, which has been criticized for being slow to implement effective anti-corruption measures. For a variety of reasons, including lack of coordination and funding, France failed to effectively enforce preceding laws.

Perhaps, one of the most notable changes is the creation of a national regulatory body to prevent and detect corruption – the Agence Française Anti-corruption ("AFA"), a 70-person agency, reporting to both the Ministry of Justice and the Ministry of Finance, with a Director appointed by the President of France and a non-renewable, six-year mandate. The move comes in response to preceding enforcement agencies that were either ineffective due to limitations placed on their authority, or on their mandates and scope of mission.[4] Another potential significant development is the introduction of a French-style deferred prosecution agreement ("DPA").[5]

The AFA will support whistleblowers, develop recommendations to various public or private

economic participants with regard to the prevention and detection of corruption, and audit public (government) entities to assist with the implementation of efficient processes to prevent and detect corruption. The AFA will also have the power to audit companies and prepare a report documenting areas of improvement and failure to comply regarding:

- Corruption risk assessment processes, including prioritization of risks and mapping to controls based on the markets and industries in which the company operates;
- Internal and external accounting controls relied upon by the company to prevent books and records from being used to conceal corrupt activities;
- Effectiveness of code of conduct and clarity of policies against corruption and influence peddling;
- Internal alert process for employees to report violations of the code of conduct;
- Vendor, client and other third-party vendor management, including corruption risk assessment and diligence;
- Quality of training of management and employees exposed to risk of corruption and influence peddling; and
- Disciplinary process to sanction violators.

Non-compliance can lead to fines against individuals and the company. In addition, the AFA can both order the company to address its deficiencies and then monitor remediation efforts.[6] Failure to properly remediate can lead to two-year imprisonment.[7]

As the French enforcement clock begins to tick loudly, external and internal counsel and compliance and regulatory officers should consider five ways in which to manage the implications:

1. Perform a Gap Analysis

Subject companies will need to assess exposure to potential corruption risks in the context of the new law – whether or not they have a pre-existing program in place, and assess whether the company has sufficient dedicated resources and budget to handle the implementation of the new law. If knowledgeable internal resources cannot be redeployed, consider hiring counsel and risks and controls experts to assist. This gap analysis should include an assessment of whether accounting procedures are designed to prevent books and records from being used to conceal corrupt activities exist and, if so, whether the procedures in practice are sufficient.

2. Conduct a Proper Corruption Risk Assessment

Begin by taking an inventory of the company's interactions with domestic and government officials (e.g., licensing agencies, customs authorities, environmental, health safety regulators, judicial officials). Then, identify the incentives and pressures (licensing, sales, government extortion) and the opportunities to misappropriate company assets to make corrupt payments (e.g., third-party agents, charitable donations, travel to conferences). Consider schemes on an "inherent basis," that is, without regard to controls that have not been audited. Assess significance, and weed out unlikely and insignificant risks.

Pay particular attention to the geographies in which the company operates. Corruption risk varies considerably by country, and the risk assessment should be based on an initial foundation, including regional risk factors.

3. Overreliance and Underutilization of Other Risk Assessments

Most companies have at least some elements of an ABC program (e.g., accounting procedures to prevent

manipulation of books and records to conceal corruption, code of conduct, whistleblowing process, disciplinary process). Audit the design and validate the operating effectiveness of these elements.

Additionally, it is critical to identify the company's response to each significant risk. Responses typically include manual and automated prevention and detection controls and training of personnel. Assess whether the response, if operating as designed, is adequate. Correct deficiencies. If designed effectively, conduct audit procedures to test operating effectiveness.

4. Engage the Independent Auditors in France

It's still unclear which role the external auditors (commissaires aux comptes) will play. They may be asked to opine on the adequacy of a company's anti-corruption controls. It is hard to imagine that large public accounting firms (or at least their U.S. member firms) would welcome such a task, although, auditors of companies subject to Sarbanes-Oxley already opine on internal controls over financial reporting in the U.S. It is possible that auditors in France could issue certifications specific to the compliance of companies with the AFA guidelines, which would mitigate risk under the new statute. It is likely their role will expand, depending on how the AFA issues standards. This will, in turn, open a discussion and debate about how various regulators in other countries view French standards and how to apply their respective laws. One thing is certain: companies may want to start discussions with their auditors.

5. Anticipate Collateral Consequences

It also remains to be seen whether the AFA audit findings will be available to French prosecutors, foreign authorities or private litigants. The law appears to require professional secrecy from advisers with access to records and information. Moreover, the Senate version precludes whistleblowers from publicly disclosing allegations unless the whistleblower has exhausted other methods (e.g., reporting the misconduct to authorities). The penalties, however, will be published. Deferred prosecution agreements will be considered at a public hearing. Companies must keep in mind that foreign regulators will be watching and assessing the risk of multiple penalties for an instance of misconduct. From a U.S. standpoint, the DOJ, for example, has hinted it would take fines and actions by regulators in foreign countries into consideration on FCPA violations and would coordinate in such a way as to not create multiple sanctions for the same violations. This process is likely to expand if the French law proves to have some real bite.

Conclusion

While large companies already have compliance programs in place, they may not necessarily meet the expectations of the AFA. Additionally, companies subject to the law would be ill-advised to rely upon programs that look good "on paper," but are not put into practice.

Experience with the U.S. and U.K. regulatory environments can be very valuable for French companies. The frameworks may differ, but the risks are similar, and compliance programs that are acceptable to U.S. and U.K. regulators will likely mostly be acceptable to French regulators. Companies that consult with experts who can assist in performing gap analyses, evaluating and testing relevant internal controls, and designing anti-corruption compliance and monitoring programs, can better prepare for an audit or incident.

About the Authors

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[1] http://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy.

[2] Waitheria Junghae, *Senate Amendments Remove Bite of New French Anti-corruption Bill,* Global Investigations Review (July 24, 2016). Available at: www.globalinvestigationsreview.com.

[3] This article concentrates on the National Assembly version of the proposed law.

[4] In the case of the « Service central de prévention de la corruption » (SCPC) and « Haute Autorité pour la transparence de la vie publique ». Etude d'Impact du Projet de Loi, March 30, 2016. The new service will replace the SCPC.

[5] Surprisingly, during the debates, an amendment to the law found a middle of the road arrangement to include settlement agreements and DPAs in the U.S. style, but with a French twist, whereas the previous proposal was rejected by the Conseil d'Etat. The French Prosecutor, before an indictment against the company, can enter a "convention judiciaire," (a judicial agreement in the public interest). The process will be supervised by a judge during hearings. The company will have to pay the Treasury an amount not to exceed 30% of its average revenues over the past three years and be subject to monitoring by the AFA for a maximum of three years. (The AFA can use the services of legal, accounting and tax advisers). The management of the company, however, will not benefit from this arrangement and will still be subject to criminal charges.

[6] The National Assembly version authorizes the AFA to impose administrative fines for non-compliance. The Senate version requires the AFA to obtain an injunction from a civil court, which then has the discretion to impose a penalty for every day the company fails to implement the rules.

[7] The magistrate in charge of the AFA can issue a warning to the management of the company, ask for the commission of sanctions to order the company to address its deficiencies within a certain period of time not to exceed three years, or ask for fines to be levied against the company or the individuals who must be notified. Such fines cannot exceed €200,000 for individuals and €1,000,000 for entities.

[8] *See generally* J. Frank, *5 Ways to Meet DOJ's Heightened Compliance Expectations*, Law360.com (May 2015). Also available at: www.stoneturn.com.

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