

Covington Africa Anti-Corruption Practice  
**Africa Anti-Corruption Compliance Trends and  
Five Focus Areas for 2021**

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**2021 年非洲反腐败合规趋势和五大重点领域**

Winter 2021 2021 年冬

Anti-corruption/FCPA 反腐败/FCPA

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As we noted in a [recent client advisory](#), we have observed an upward trend in recent years in anti-corruption enforcement activity in Africa, including cross-border cooperation between African law enforcement authorities and their counterparts in the U.S. and UK. Looking ahead to 2021 and beyond, we see no reason to expect this trend to reverse.

正如我们在[近期的客户期刊](#)中所指出的，我们发现近年来非洲的反腐败执法活动呈上升趋势，包括非洲执法部门与美英执法部门之间的跨境合作。展望 2021 年及未来，我们认为这种趋势将持续下去。

While 2020 did not bring any blockbuster U.S. Foreign Corrupt Practices Act (“FCPA”) enforcement actions focused on conduct in Africa, there were several enforcement actions of note. This includes the U.S. Security and Exchange Commission’s (“SEC”) settlement with Italian oil major [Eni S.p.A.](#) involving the company’s minority-owned subsidiary Saipem S.p.A. relating to conduct in Algeria. While Eni held only a 43% interest in Saipem at the time of the relevant conduct, the SEC charged Eni with violations of the FCPA’s internal controls and books and records provisions based on its finding that Saipem had entered into a number of sham contracts with an intermediary—on which Saipem did “little or no due diligence.” This matter serves as a reminder of the importance of efforts to implement effective compliance programs in even minority-owned affiliates, particularly if the minority shareholder exercises some degree of control over the affiliate.

尽管 2020 年没有发生针对各方在非洲的行为所采取的美国《反海外腐败法》（“FCPA”）方面的任何重磅执法行动，但仍有几起行动值得注意。这包括美国证券交易委员会（“美国证监会”）与意大利石油巨头 [Eni S.p.A.](#) 就涉及该公司少数股权附属公司 Saipem S.p.A. 在阿尔及利亚的行为所达成的和解。虽然 Eni 在相关行为发生时仅拥有 Saipem 43% 的权益，但美国证监会指控 Eni 违反了 FCPA 的内部控制以及账簿记录方面的规定，依据的是其发现 Saipem 与一家中介机构签订了许多虚假合同，就此，Saipem “几乎或完全没有进行任何尽职调查”。此案表明，即使对于持有少数权益的关联机构，执行有效合规计划也是极其重要的，尤其是当少数股东对该关联机构实施某种程度的控制权时。

As a counterpoint to the Eni matter, another SEC case in the energy industry, [SEC v. Berko](#), illustrates how effective due diligence and a willingness to walk away from potentially corrupt deals can help a company avoid enforcement action. The SEC's complaint in the matter details how Asante Berko, a former executive at a global financial services company, allegedly helped to funnel bribes to various government officials in Ghana to facilitate the approval of a power plant project. Despite Berko's alleged efforts to mislead the company's compliance personnel as to the nature of various bribe payments and services provided by an intermediary, compliance personnel persisted in diligence efforts and the company ultimately decided to terminate the intermediary and not to pursue the underlying transaction. Notably, when the SEC filed its case against Berko alleging violations of the FCPA's anti-bribery provisions, it declined to pursue enforcement action against Berko's employer, noting that "[t]he firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction."

作为 Eni 案的一个反例，能源行业的另一起美国证监会案件[美国证监会诉 Berko](#) 说明了有效的尽职调查及尽力脱离潜在腐败交易的意愿能够如何帮助公司避免执法行动。美国证监会在其关于此案的起诉状中详细阐明了一家全球金融服务公司的前高管 Asante Berko 据称如何帮助向加纳的多名政府官员行贿，以促进对某电厂项目的批准。尽管 Berko 涉嫌就某中介机构提供的各类贿赂付款和服务的性质误导公司的合规人员，但合规人员仍坚持不懈进行尽职调查，且公司最终决定解聘该中介机构，同时不进行相关交易。值得注意的是，当美国证监会针对 Berko 提起诉讼，指控其违反 FCPA 的反贿赂规定时，美国证监会拒绝了对 Berko 的雇主采取执法行动，称“该公司的合规人员采取了适当的措施来防止该公司参与交易”。

In South Africa, the Commission of Inquiry into Allegations of State Capture (the “Zondo Commission”), created in 2018, has now held over 300 days of testimony focused on fraud and corruption during the administration of former President Jacob Zuma. In 2020, we saw the wide-ranging State Capture investigations begin to bear more fruit in terms of high-profile prosecutions, with none more significant than the November 2020 institution of corruption and money-laundering charges against ANC Secretary General Ace Magashule relating to an asbestos removal contract in the Free State. Aided by [recent rule changes](#) enabling Zondo Commission investigators to share evidence for use in criminal prosecutions, we expect that 2021 will see more high-profile prosecutions growing out of the Zondo Commission's work.

在南非，成立于 2018 年的“国家捕获指控”调查委员会（“Zondo 委员会”），在前总统雅各布·祖马（Jacob Zuma）执政期间，至今已针对欺诈和腐败召开了超过 300 天的证词陈述。2020 年，我们看到，范围广泛的“国家捕获”调查开始在备受瞩目的起诉案件方面取得更多成果，其中最为重大的是 2020 年 11 月针对非国大秘书长 Ace Magashule 提起的关于自由州石棉清除合同的腐败和洗钱指控。由于[近期规则的变更](#)，Zondo 委员会的调查人员能够共享用于刑事诉讼的证据，因此，我们预计 Zondo 委员会在 2021 年的工作将带来更多备受瞩目的诉讼。

Angola has also seen a flurry of recent investigative enforcement activity focused on alleged corruption and money laundering by family members and associates of former President José Eduardo dos Santos. As with the State Capture investigations in South Africa, the so-called “Luanda Leaks” scandal in Angola has drawn scrutiny from numerous foreign law enforcement authorities, including authorities in the U.S., Portugal, and the Netherlands.

安哥拉近期也进行了一系列调查执法活动，针对的是前总统 José Eduardo dos Santos 之家庭成员和关联人士涉嫌的腐败和洗钱活动。与南非的“国家捕获”调查行动一样，安哥拉的“罗安达泄密”丑闻也引来众多外国执法机构的调查，其中包括美国、葡萄牙和荷兰的机构。

The African Development Bank (“AfDB”) also has become more active in recent years in bringing suspension and debarment proceedings in relation to fraudulent and corrupt practices in AfDB-financed projects. While the World Bank remains the most active enforcer of its suspension and debarment regime among multilateral development banks, 2020 was the most active year in the year in the history of the AfDB in terms of the number of debarments. Moreover, in late 2020, the World Bank’s Integrity Vice Presidency announced a “major initiative” focused on its evaluation of corporate compliance programs in enforcement matters, an initiative that we expect will seek to incentivize companies to develop effective compliance programs.

非洲开发银行（“非开行”）近年来在针对非开行资助之项目中的欺诈和腐败行为提起暂停资格和取消资格程序方面也变得更加活跃。尽管多边开发银行中执行暂停资格和取消资格机制最为活跃的仍然是世界银行，但就取消资格的数量而言，2020 年是非开行历史上最为活跃的一年。此外，在 2020 年末，世行廉政局宣布了一项“重大计划”，重点是评估执法活动中的企业合规计划，我们预计该计划将寻求激励企业制定有效的合规计划。

Against this backdrop, companies operating in Africa are well advised to implement compliance programs that account for guidance from international enforcement authorities, even if the likelihood of FCPA enforcement is relatively low due to a lack of a meaningful nexus to the U.S. In terms of more concrete actions and considerations, we see five areas for potential focus in 2021:

在此背景下，即使由于与美国之间缺乏有意义的联系而导致出现 FCPA 执法活动的可能性相对较低，也强烈建议在非洲开展业务的公司实施符合国际执法部门之指导的合规计划。关于更为具体的行动和考虑因素，我们认为 2021 年可能会重点关注以下五个领域：

### **Make a Plan for Program Activities and Enhancements in 2021**

#### **为 2021 年的计划活动和加强而制定方案**

Anyone who spends enough time on the ground in Africa is bound to hear someone utter the phrase “we need to make a plan” when a challenging situation arises. In 2021, rather than waiting for a compliance incident to spur reactive compliance initiatives, it is more important than ever for companies to be proactive in setting and executing their compliance agendas. Here, companies should consider guidance from enforcement authorities emphasizing that compliance programs should not be static, and should aim for “continuous improvement.” But where to start? In our view, and based on recent guidance from enforcement authorities, performing an assessment of program effectiveness is the best way to identify areas in need of enhancement. While this may seem to be a daunting task at first blush, companies can employ a risk-based approach, and reasonably focus on different risk areas and jurisdictions over multiple years. Moreover, as we have noted in the past, the U.S. Department of Justice’s June 2020 update to its guidance on Evaluation of Corporate Compliance Programs (the “DOJ Guidance”) provides a very helpful evaluative framework for such an assessment exercise. We have found that the DOJ Guidance can be fairly easily translated into a series of questions in different program areas to enable a focused and efficient program assessment.

任何在非洲工作或生活过一段时间的人必定都听到过别人在具有挑战性的情况出现时说“我们需要制定一个方案”。企业要主动制定和实施合规事项，而非被动等待合规事件来刺激形成合规计划，对此，2021年比以往任何时候都更为重要。在此，公司应考虑执法机构的指导，即强调合规计划不应是静态的，而应致力于“持续改进”。但是从何开始？我们认为，根据执法机构近期的指导，对计划有效性进行评估是确定需要加强之领域的最佳方法。尽管乍看之下这似乎是一项艰巨的任务，但公司可以采用基于风险的方法，并合理地关注多年以来的不同风险领域和管辖范围。此外，正如我们曾指出的，美国司法部2020年6月更新了其关于《企业合规计划评估》的指南（“美国司法部指南”），此次更新为该等评估活动提供了非常有用的评估框架。我们发现《美国司法部指南》可以相当容易地转化为不同计划领域中的一系列问题，从而有助于实施有针对性且高效的计划评估。

As they develop annual plans, companies should also consider significant legislative or regulatory changes in areas that may affect the operation of their anti-corruption compliance programs. For example, multi-national companies that operate in Africa are increasingly facing a patchwork of laws governing whistleblowing, and data privacy laws such as South Africa's Protection of Personal Information Act may affect core aspects of anti-corruption compliance programs such as diligence on third-parties and prospective employees, and the collection of personal data in internal investigations.

在制定年度方案时，公司还应考虑可能会影响实施其反腐败合规计划的领域的重大立法或监管变化。例如，在非洲开展业务的跨国公司越来越多地面临有关举报的零散法律，且南非的《个人信息保护法》等数据隐私法律可能会影响反腐败合规计划的核心方面，例如对第三方和潜在员工的尽职调查，以及内部调查中对个人数据的收集。

Finally, in an era where compliance officers are being asked to do more with less and to simplify and streamline compliance procedures, undertaking focused efforts to find synergies and efficiencies between different compliance areas is a must. For example, because diligence on business partners is a pillar of anti-corruption, anti-money laundering, sanctions, and human rights compliance programs, among others, but compliance programs in these areas often develop on multiple tracks, so organizations may benefit from consolidating diligence efforts, training programs, and risk assessment exercises across functions and disciplines.

最后，在一个要求合规官做到事半功倍并精简和简化合规程序的时代，必须集中精力确定不同合规领域之间的协同作用和效率。例如，由于对业务合作伙伴开展尽职调查是反腐败、反洗钱、制裁和人权合规计划等的一个重要部分，但这些领域合规计划的制定通常涉及多个方面，因此企业可以获益于整合不同职能和学科的尽职调查、培训计划和风险评估活动。

### **Conduct an In-Depth Risk Assessment of Africa Operations**

#### **对非洲业务运营进行深入全面的风险评估**

Based on enforcement authority guidance, as well as our experience handling enforcement matters before DOJ and other enforcers, we have observed a recent trend of enhanced expectations for anti-corruption risk assessments. Among other points, the DOJ Guidance instructs prosecutors to consider whether periodic risk assessments are limited to a “snapshot” in time or based upon “continuous access to operational data and information across functions,” and also whether periodic risk assessments have led to “updates in policies, procedures, and controls.” The reference to “continuous access to operational data and information across functions” signals an increased focus on leveraging technology and data in compliance programs, a theme that comes through several times in the updated Guidance.

基于执法机构的指导，以及我们在处理由美国司法部和其他执法机构负责之执法事项方面的经验，我们发现相关部门近期对反腐败风险评估的期望呈增加的趋势。《美国司法部指南》的其中一点是，指示检察官考虑定期风险评估是否仅限于时间“快照”还是基于“对不同职能之运营数据和信息的持续访问”，以及定期风险评估是否已经引起“政策、程序和控制措施方面的更新”。《美国司法部指南》提到“对不同职能之运营数据和信息的持续访问”，表明越来越重视合规计划中技术和数据的利用，该主题在更新的《指南》中多次出现。

For companies operating in Africa, meeting these expectations likely means going beyond desktop anti-corruption risk assessments that are folded into broader enterprise risk management or typical “risk register” exercises, and instead conducting more searching and data-driven assessments that explore the specific corruption risks that front-line employees in Africa face on the ground. While the anti-corruption risk landscape on the continent is broad and varies by jurisdiction and sector, we continue to see companies grappling with significant anti-corruption risks arising from [local content requirements](#) and economic empowerment transactions with local shareholders, corporate social responsibility programs, host community relations, interactions with police and physical security issues, foreign exchange regulations, and public procurement.

对于在非洲开展业务的公司而言，满足这些期望可能意味着不再仅仅是具有包含于更广泛的企业风险管理或典型的“风险登记表”活动中的桌面反腐败风险评估，而是进行更多的由搜索和数据驱动的评估，以探索非洲一线员工实地面临的具体腐败风险。尽管非洲大陆的反腐败风险环境相当广泛，且因司法辖区和行业的不同而不同，但我们仍不断看到，企业面临大量源于以下各项的反腐败风险：[本地内容要求](#)和与当地股东间的经济赋权交易、企业社会责任计划、东道国社会关系、与警方的沟通往来和人身安全问题、外汇监管、以及公共采购。

Even for mature and well-resourced compliance programs, conducting in-depth risk assessments in all these areas in a single exercise may be unrealistic, so companies are well advised to take a risk-based approach to identifying areas to prioritize (e.g., issues that have come up in past investigations, or in newly acquired operations that have not been fully integrated). It is also the case that in a number of the risk areas outlined above, companies are well served by developing specific policies, controls, and targeted training programs, with targeted risk assessments providing the platform to launch such enhancements.

即使对于成熟且资源充足的合规计划，想要一次在所有这些领域进行深入全面的风险评估，可能也不太现实，因此，强烈建议公司采取基于风险的方法来确定重点领域（例如，在过去的调查中或在尚未完全整合的新收购业务中出现的问题）。同样，在上文所述的许多风险领域中，公司可以采取的有利做法包括制定具体的政策、控制措施和针对性的培训计划，以及开展针对性风险评估来提供平台实施相应的加强。

## Assess Your Program's Resiliency Against COVID-19 and Other Disruptions

评估您的计划在应对新冠疫情和其他中断事项方面的弹性

As we have [previously noted](#), the COVID-19 pandemic and responses, including social distancing and stay-at-home orders, bring to the forefront numerous challenges for compliance programs that rely on face-to-face contact and getting compliance professionals on the ground in business operations. Given the persistence of the pandemic and significant shifts from more traditional work environments, we believe that it is useful for companies to ask a series of questions to assess whether their programs are “crisis proof.” This includes exploring and assessing specific compliance risks caused by crises such as COVID-19 (e.g., supply chain disruptions), whether sufficient crisis management plans are in place, and whether there are sufficient program resources in place to respond to crises.

如我们[之前已经指出的](#)，新冠疫情及其应对（包括关于保持社交距离和留在家中的命令），给业务运营中依赖于面对面联系和要求合规专业人员实地工作的合规计划带来了众多挑战。考虑到新冠疫情可能持续一段时间以及传统工作环境发生重大转变，我们认为有用的做法是，公司提出一系列问题来评估其计划是否能够“防范危机”。这包括探索和评估由新冠疫情等危机引起的特定合规风险（例如供应链中断），以及是否具备充分的危机管理计划，和是否有足够的计划资源来应对危机。

## Ensure Appropriate Remediation

确保适当的补救

In an article we recently published in [Global Investigations Review's 2020 Europe, Middle East, and Africa Investigations Review](#), we explored best practices in remediation in internal investigations in Africa, focusing on some of the unique challenges of effective remediation in Africa. Looking forward to 2021, we believe that companies operating in Africa are well advised to put effective remediation at the top of their compliance agendas. This means focusing not only on effective remediation in specific cases, but developing robust and collaborative processes for [effective internal investigations](#), remediation, and “root cause analysis” going forward. Recent experience teaches us that enforcement authorities' expectations with regard to effective remediation continue to heighten, while at the same time effective remediation is more important than ever in helping companies avoid adverse consequences in enforcement actions (e.g., the imposition of an independent compliance monitor) and adverse collateral commercial consequences (e.g., termination of business relationships on account of compliance concerns). Against this backdrop, creating sound processes to ensure efficient and effective remediation is an area where companies are wise to invest.

我们最近在[《全球调查评论》的《2020年欧洲、中东和非洲调查评论》](#)中发表了一篇文章，探讨了非洲内部调查中最佳的补救做法，重点关注的是在非洲实施有效补救措施面临的一些独特挑战。展望2021年，我们强烈建议在非洲开展业务的公司将有效的补救措施作为其合规事项的重中之重。这意味着不仅要关注特定情况下的有效补救，而且接下来还要就[有效的内部调查](#)、补救和“根本原因分析”建立稳健协作的流程。近来的经验告诉我们，执法部门对有效补救的期望不断提高，同时，在帮助公司避免执法行动中的不利后果（例如，设置独立的合规监察员）和不利的附带商业后果（例如，出于合规考虑而终止业务关系）方面，采取有效补救比以往任何时候都更为重要。在这种背景下，建立合理的流程以确保有效实际的补救是公司的明智之举。

## Pay Attention to Anti-Money Laundering Risks

### 关注反洗钱风险

In recent years, DOJ increasingly has used anti-money laundering (“AML”) statutes to target individuals involved in cross-border corruption schemes. Between 2012 and 2019, DOJ brought enforcement actions against 57 individuals for money laundering connected to bribery, including a number of cases targeting individuals allegedly involved in corruption schemes in Africa. Moreover, while the FCPA’s jurisdictional reach is undoubtedly long, U.S. criminal AML statutes may in some respects reach even further than the FCPA, including to transactions that touch the U.S. banking system and “promote” the violation of foreign anti-corruption laws. Recent court decisions have affirmed the extensive extra-territorial reach of the U.S. AML laws, concluding that illicit wire transfers from one foreign jurisdiction to another are within the reach of the U.S. AML laws if they pass through the U.S. correspondent banking system. Moreover, [recent amendments to the U.S. AML laws](#) establish a new criminal offense for, under certain circumstances, concealing, falsifying, or misrepresenting that senior foreign political figures or their family members or associates are the source of funds in a transaction.

近年来，美国司法部越来越多地利用反洗钱法来打击参与跨境腐败活动的个人。2012年至2019年期间，美国司法部对57名涉嫌参与贿赂相关洗钱活动的个人采取了执法行动，其中多起案件针对的是涉嫌参与非洲腐败活动的个人。此外，FCPA的管辖范围无疑很宽泛，但美国刑事反洗钱法规在某些方面甚至可能比FCPA的管辖范围更为广泛，包括其能够管辖触及美国银行系统并“促进”违反外国反腐败法的交易。近期的法院判决确认了美国反洗钱法律广泛的域外管辖效力，判决认定，如果通过美国代理银行系统从一个外国司法管辖区向另一外国司法管辖区进行非法电汇转账，则属于美国反洗钱法律管辖的范围。另外，[最近对美国反洗钱法的修正案](#)确立了一种新的刑事犯罪，针对的是某些情形下隐瞒、歪曲或不实陈述外国高级政治人物或其家庭成员或关联人士是交易资金来源的情况。

With the UK’s Proceeds of Crime Act also having extra-territorial reach, companies operating in Africa with exposure to the U.S. or UK financial systems increasingly need to be focused on AML risks in addition to anti-corruption risks. For example, in the context of investment transactions, while the rules of successor liability may limit an acquiring company’s liability under anti-corruption laws for pre-acquisition bribery, if the company receives financial benefits from such bribery going forward (e.g., revenue from tainted government contracts or the ability to exploit an extractive concession) it may be dealing in the proceeds of crime. Understanding the reach of applicable AML laws is critical in such cases to enable the company to assess the risk of enforcement action and craft appropriate remedial measures.

由于英国的《犯罪所得法》也具有域外管辖效力，因此除了反腐败风险外，在非洲经营业务并触及美国或英国金融体系的公司还越来越需要关注反洗钱风险。例如，在投资交易背景下，虽然继受人责任规则可能会限制收购方公司在反腐败法下关于收购前贿赂的责任，但如果该公司今后会因此类贿赂获得财务利益（例如，来自腐败政府合同的收入或利用提取特许权的能力），则其可能正在处理犯罪所得。在这种情况下，了解适用的反洗钱法律的管辖范围至关重要，这使公司能够评估执法行动的风险并制定适当的补救措施。

\* \* \*

If you have any questions concerning the material discussed in this client alert, please contact the following members of our [Africa Anti-Corruption Practice](#):

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