

The US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act (UKBA), the Canadian Corruption of Foreign Public Officials Act (CFPOA) and other similar anti-corruption legislation around the world prohibits corporations and individuals from engaging in bribery and requires corporations to maintain accurate financial records. Failure to adopt effective compliance programs and procedures can result in serious reputational damage, significant fines, imprisonment for individuals, and debarment of organizations from conducting business with national and local governments.

Merely adopting a policy that simply states the requirements of the law is not sufficient. Adopting a robust program that effectively fosters a culture of compliance endorsed and promoted by the top leadership of the organization, frequently engages in thoughtful risk assessment, adopts proportional procedures based on identified risks, requires due diligence on third-party partners, promotes regular auditing, and ensures effective training and communication about the program, can reduce or prevent civil and criminal liability even when a rogue employee engages in an act of corruption or bribery.

The United States' Foreign Corrupt Practices Act

The FCPA is the most well-known of the anti-corruption legislation that has, in recent years, been proliferating around the world. The FCPA has two primary provisions, the first prohibits bribery of foreign (that is, non-US) public officials, for the purpose of corruptly influencing the official to assist in obtaining business. The second provision requires publicly traded companies to maintain accurate books and records and to adopt internal financial controls. The US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) have criminal and civil enforcement authority over the FCPA. Both agencies have highly centralized, well-funded, and dedicated units that focus exclusively on FCPA enforcement. As a result of their efforts, the US has literally collected billions of dollars in fines, disgorgements, forfeitures, and other sanctions. Many US and foreign nationals are now serving significant prison sentences as well.

A Truly Global Prohibition of Bribery

Though focused on “public” corruption outside of the United States, the FCPA has a staggering reach. The anti-bribery provision governs (i) all US Persons (citizen or resident, individual or entity), (ii) all agents or subsidiaries (whether US or foreign and whether the agency is formal or informal) of those US Persons, (iii) and all foreign persons (individual or entity) that cause, directly or indirectly, **any act** within the territorial borders of the United States that furthers any corrupt conduct in violation of the FCPA. 15 U.S.C. § 78dd-1, 2 and 3. There is no need for any of the purported offenders to have ever been in the United States, they merely need to have caused an act, even an otherwise legal one, that furthers corrupt activity.

The specific conduct prohibited under the anti-bribery provisions of the FCPA is giving or promising “**something of value**” to a “**government official**” in exchange for “**corruptly**” inducing that official to use his or her official position to “**obtain or retain business. . .**” or to obtain any “improper [business] advantage.” *Id.* The US government has successfully prosecuted cases in which the thing “of value” was as direct as a cash payment and as indefinite and vague as “an opportunity.”

Moreover, the definition of “government official” is extraordinarily broad. The DOJ and the SEC assert that this covers all levels of foreign or international government personnel (and officials of foreign political parties), from an engineer in a city planning department to the Prime Minister, and any person who works for any foreign government owned business, such as a public hospital or a telecommunications company.

Accurate Books and Records and Internal Controls

The second provision of the FCPA is often simply described as imposing a requirement for accurate books and records on publicly traded corporations. 15 U.S.C. § 78m(b)(2)(A). While this view is accurate as far as it goes, it is too simplistic. Accuracy under this provision of the FCPA is not limited to mathematical precision. The accompanying description of the transaction must describe a bribe as a bribe. In other words, this provision creates a second basis for liability for corruption for publicly traded corporations.

In addition, the FCPA “books and records” provision requires publicly traded corporations to have adequate internal controls to provide “reasonable assurances” that transactions are only executed with management’s authorization, that those transactions are accurately recorded, that access to company assets is limited to those with management’s authorization, and that the system is regularly audited. 15 U.S.C. § 78m(b)(2)(B). These controls must be able to **detect and deter violations of the FCPA**.

The Focus of Global Anti-Corruption Schemes Has Grown Beyond the Public Sector

The organic growth of global anti-corruption statutes has produced schemes that sometimes mirror the US focus on so-called public corruption—the corruption of government officials and entities—and sometimes it has produced far more all-inclusive prohibitions against corruption. In North America, there is a common focus attempting to end the corruption of public officials. Canada has its CFPOA and Mexico has its Law Against Corruption in Public Procurement (Ley Federal Anticorrupción en Contrataciones Públicas). In contrast, the United Kingdom’s Parliament chose to focus on bribery in general, prohibiting engaging in or accepting any bribe regardless of whether the recipient is a government official or a private citizen. This prohibition applies to any UK citizen or resident, and to companies formed in the UK.

Continuing its groundbreaking approach, the UK also introduced a new crime: the **corporate offense of failing to prevent bribery**. Such Section 7 liability has a **global reach** for any company that “carries on a business, or part of a business, in any part of the [UK],” wherever it is based. See Bribery Act 2010, c. 23, § 7. Section 7 criminalizes the failure to have a sufficient compliance program to combat bribery and is triggered if any person associated with the business (employed or otherwise) engages in an act of bribery, anywhere in the world, with the intent to benefit the company.

The broader UK approach has begun to have a significant impact on the US view of corrupt conduct and will likely influence other jurisdictions as well. For example, now that the UK Bribery Act has introduced the idea of prosecuting both commercial bribery and public corruption, in the US, the DOJ has expanded its own anti-corruption reach through the Travel Act. 18 U.S.C. § 1952.

The Travel Act prohibits traveling in interstate or foreign commerce for the purpose of distributing the proceeds of unlawful activity, including violations of state laws prohibiting commercial bribery. *Id.* There have already been several celebrated prosecutions of US persons and foreign nationals under the Travel Act, subjecting them to criminal liability in the US for both corrupting public officials and private persons. Following suit, SEC FCPA Unit Chief Kara Brockmeyer emphasized that commercial bribery not accurately reported and described in the financial documents of a public corporation can qualify as a books and records violation.

Effective Compliance Should Provide One Solution To Address All Corrupt Conduct

Although the global growth in new anti-bribery regimes and enforcement can be daunting, the message is clear: **establish a simple program prohibiting all forms of bribery and sufficient controls to detect efforts to violate that prohibition**. To accomplish this holistic approach, companies should focus on the similarities of the enforcement regimes, not the distinctions. While the formal statutes differ, **the focus of enforcement is usually the same: prosecute corruption in all of its forms**.

To be viewed favorably by the US, Canadian, and UK law enforcement authorities, anti-corruption compliance policies must clearly prohibit bribery in all its forms, warn of criminal sanctions applicable to individuals, and impose clear employment sanctions for violation of the anti-corruption policy. But, that is not enough, indeed limiting a policy to these topics can be counterproductive. Most law enforcement agencies will view a policy that merely states what the law is, without creating a culture of compliance or a system of internal controls as a “paper tiger.” Such an acknowledgement of the law without controls, audits, and enforcement from the top leadership, will be used as a weapon by the prosecution in any enforcement action in the US or the UK.

The guidance provided by the US and the UK consistently state that **commitment, direction, and control from the very top of the organization** is the first critical requirement for an effective compliance program. Second, any effective program must be based on a regular and evolving **assessment of risk**, based on the industry, product, or service in question, the geographic location of customers, and critical self-assessment of controls and personnel. This risk assessment should inform the adoption of procedures that are proportionate to those risks, and those procedures should evolve as new risks are uncovered or failures in controls are detected.

Ongoing **monitoring and auditing** of those procedures are likewise an important process to incorporate in any effective compliance program, as such, programs can only remain effective if they evolve. Authorities also highlight the importance of conducting effective **due diligence** on third-parties, including agents, intermediaries, and customers. Merely requiring third-parties to “promise” to comply with anti-corruption laws is rarely sufficient. Finally, key to any effective program is effective **communication** about the policy (again from the top leadership of the organization) and ongoing **training**.

Useful information about the US, Canadian, and UK government’s view of what constitutes an effective compliance program is available at: <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>, <http://www.international.gc.ca/crime/corruption.aspx>, and <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

Dentons professionals from around the world, steeped in anti-corruption compliance, criminal and civil defense, and in conducting effective, on-site investigations, would be pleased to help develop a single solution for your corporation, assess your existing solution, or assist you in responding to national enforcement inquiries.



Maxwell Carr-Howard

Dentons US LLP

+1 816 460 2440

maxwell.carr-howard@dentons.com

© 2014