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Preventing corruption in multinational corporations: A very different game, Part 2

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Identity-based compliance: A new approach for foreign corruption prevention

Last month, in Part 1 of this series, we reviewed the five reasons why achieving foreign compliance is often a strange or difficult undertaking for a Western multinational company. In Part 2 of this series on global compliance, we discuss the unique compliance risk represented by foreign corruption.

One of the greatest challenges for Western corporate compliance professionals is preventing employees in foreign countries (where corruption is generally a larger risk than here at home) from engaging in corrupt business practices. Many Western countries, including the US and UK, have enacted tough laws that make it a crime to bribe foreign government officials. Still, in many countries, corruption is a common, accepted (and, indeed, indispensable) practice among local companies, people, and government officials. This is especially true in the developing world.

The US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act are just two examples of laws that make it a crime for a person or a corporation to make payments of money or something else of value to a foreign government official for the purpose of obtaining some desired action or outcome. In the last decade, US authorities have dramatically increased FCPA investigations, prosecutions, and penalties. According to the FCPA Blog, 27 companies paid about $2.48 billion to resolve FCPA cases in 2016, making it the biggest enforcement year in FCPA history.

The FCPA and related laws are big challenges for compliance professionals working in Western multinational companies. With economies sluggish across much of the developed world, Western multinational companies are entering the promising and often corruption-wracked markets of the developing world in search of growth, resources, and new opportunities.

Foreign corruption is relatively easy to define but difficult to prosecute, because the prohibited actions usually occur in foreign countries where Western anti-corruption officials have no authority to investigate. Prosecutors focus on financial information in the company's required securities filings. There are several elements that must be in place in order for a particular transaction or illegal relationship to be investigated by Justice Department and Securities and Exchange Commission prosecutors under the FCPA:

- The giving of value by a publicly traded company. The payment can be almost anything of value—money, securities, vacations, a job for the children of a connected official. Since the FCPA is based upon violations of U.S. securities law, the company must participate in the US securities market, but needn't be U.S.-domiciled.

- A payment to a government official (or his/her family) who personally retains the thing of value.
- The resultant desired action by the government official. The action must be something that the government official would not normally do, such as granting customs clearance for a prohibited shipment or issuing a business license to a company that does not meet the normal qualifications for licensure. “Grease payments” — the speeding up of a normal official act, such as the expedited processing of a passport application—do not constitute bribery. The FCPA has been criticized for many reasons. Enforcement actions never go to trial, invariably settling without significant findings of fact and law. With almost no substantive case law built up around vague statutory language, a “violation” is almost whatever federal prosecutors say it is. Companies that must comply with the FCPA also compete with companies based in countries — China comes immediately to mind — that either do not have foreign anti-corruption laws or that selectively enforce the anti-corruption laws that they do have. How do Western companies do business in the developing world, compete with companies from other countries, and still comply with anti-corruption laws? Western multinational corporations have, to date, taken two approaches to the challenge of foreign anti-corruption laws:
- **Attempt to circumvent the laws by paying bribes through intermediaries**. This is the failed approach taken by the giant French industrial group, Alstom SA (now a part of GE), which in 2014 paid a record fine of $772.3 million for bribing government officials around the world to secure lucrative contracts. According to the *Financial Times*, Alstom tried to hide its bribery scheme by hiring consultants who acted as the conduits for bribes to government officials. Company financial records revealed the code names of some of the “consultants,” which included “Mr Geneva,” “Mr Paris,” “London,” “Quiet Man,” and “Old Friend.”
- **Conduct global anti-corruption training for employees**. This training, created and conducted by Western compliance professionals (usually lawyers and HR professionals) for non-Western employees, comes in two varieties.
    - *Rational approach*. Early attempts to influence employee attitudes about corruption took a rational route: educating employees about (a) behaviors that constituted corruption and (b) the consequences they and the company should expect if they were caught and prosecuted for corrupt acts. The notion was that these employees would assess the risks of getting caught and conclude, rationally, that the risks outweighed the potential benefits. This approach hasn’t proven very effective in the places where corruption is a big problem. Non-US employees see this as American law, and the foreigners sent there to explain it, as an imposition of Western cultural values on a society that has its own, well-developed — and quite separate — value system.
    - *Values-based approach*. More recent anti-corruption training has attempted to prevent corrupt acts by appealing not to a law (which for some people — especially to people living outside the U.S. — seems an abstraction) but to an employee’s own values. This approach is potentially more impactful than the rational approach among people living and working in Western cultures, for reasons we will discuss later. The values-based approach, however, has one profound limitation. It is created by people from the developed world based on the erroneous assumption that employees in the developing world share their values. In places where corruption is a problem, many employees don’t know any other way of doing business and thus don’t necessarily *personally* see anything wrong with corrupt business practices.

Most Western multinational companies recognize that foreign anti-corruption programs haven’t had much, if any, impact on employee behavior in the places where corruption risk is highest. However, many companies carry on with the costly and largely ineffectual programs in the mistaken belief that, if the company is ever prosecuted by federal authorities for foreign corrupt practices, they can mitigate fines and other penalties by showing that they had at least made a good faith attempt to address the problem with training. This belief, however, is not supported by prosecution trends and the literature of FCPA compliance.