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The Complete Compliance and Ethics Manual 2023
Anti-Corruption and Anti-Bribery Compliance Programs

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Introduction and Background

Intense enforcement activity by the United States government coupled with increasing activism, legislation, and enforcement globally is keeping the organizational risk area of anti-corruption/anti-bribery in the spotlight. It stands among top legal, ethics, and compliance risks for companies doing business in regions, projects, or industries that struggle with corruption and bribery. This is a global risk area with increasing enforcement activity and new or updated legislation in a number of countries. Due to the prevalence of corrupt practices in certain regions and the serious nature of consequences for individuals and companies caught in enforcement actions, there is an almost unlimited supply of information and resources available on this topic. In this article, we will review best practices and include other highlights. To understand relevant background and to stay up to date, you should also consider accessing additional key resources provided by government, nongovernmental organizations, and others. To help avoid information overload, here are a few places you may want to start when identifying select resources for review:

- Department of Justice and Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition*, July 2020, available at https://www.justice.gov/criminal-fraud/file/1292051/download;
- UK Serious Fraud Office, Adequate Procedures and the Ministry of Justice Guidance (both are accessible at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/); and
- Transparency International, not only for the (annually) updated Corruption Perception Index (available at https://www.transparency.org/en/cpi/2020/index/nzl), but also for news, tools, and research (e.g., resources available at https://www.transparency.org/en/publications).
    - In addition, those responsible for ethics and compliance and anti-corruption programs or program elements should stay in touch with peer companies at ethics and compliance forums and follow new investigations and enforcement actions (e.g., in the US, examples can be found at https://www.justice.gov/criminal-fraud/enforcement-actions).

These efforts combined will help ensure you have the basic information you need to help identify and mitigate corruption and bribery risks through compliance program efforts.

US Foreign Corrupt Practices Act

The United States continues to show an especially strong commitment to investigating potential violations of and enforcing the United States law enacted in 1977 as the Foreign Corrupt Practices Act (FCPA). Briefly, the FCPA states that a company cannot, with corrupt intent, make an offer, promise, or payment of anything of value to a foreign government official or politician for (1) the purpose of influencing official actions, (2) inducing the official to act or omit to act in violation of the official's duty, or (3) to obtain an improper advantage.[2]

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In addition, the accounting provisions of the FCPA require issuers to have accurate books and records and an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.

The law applies to US corporations or US nationals operating anywhere in the world. As of 1998, it also applies to foreign entities that further a bribe while in the United States. The law exists to promote sound foreign policy and the operation of businesses on their merits while encouraging competition based on quality of product and services rather than by corruptly trying to buy an advantage. As stated by then-Assistant Attorney General Leslie Caldwell at the 2015 Annual Association of Certified Fraud Examiners Global Fraud Conference,

> The threats posed by international corruption cannot be overlooked. Corruption renders countries less safe and less stable. Corruption thwarts economic development, traps entire populations in poverty and undercuts credible justice systems. International corruption also inhibits the ability of American companies—and others—to compete overseas on a level playing field. Once bribery and corruption take hold, fair and competitive business practices are eliminated.[3]

The FCPA includes anti-bribery provisions and accounting provisions. Accordingly, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission share enforcement authority. The DOJ and the Securities and Exchange Commission work closely together to investigate and coordinate prosecutions.

When explaining the FCPA to an organization, there are five main elements to understand:

1. It applies to any individual, organization, officer, director, or employee, or agent acting for the organization;
2. Whoever makes the bribe or authorizes it must intend to make the foreign official misuse their position;
3. The bribe is paying or authorizing the payment of anything of value—not just money;
4. The receiver of the bribe is any foreign official, which may include candidates, party officials, and even family members of the official; and finally,
5. The payment is made in order to help an organization obtain or retain business or to direct business to a specified person or organization.

The FCPA, unlike similar laws in other countries, allows a type of small "bribe," which it calls "facilitation payments." These are defined as payments needed to expedite the provision of routine, nondiscretionary, governmental actions. Examples of facilitation payments might include payments for more quickly processing government paperwork, scheduling inspections, and obtaining permits and licenses. Facilitating payments, while allowed under the FCPA, are disfavored and are almost always illegal under the law of the country where they occur. This, in addition to their illegality under the UK Bribery Act 2010, Brazil's Clean Company Act 2014, and forewarned to be illegal under Canada's Corruption of Foreign Public Officials Act, is another reason why companies should review their policies and practices and local risk in this area and ensure the matter is addressed.

Although the FCPA was enacted in 1977, well over 50% of all its enforcement actions have occurred since 1998. Enforcement continues to intensify and reach all industries. In a November 19, 2014, speech, then-Assistant Attorney General Caldwell states that "thanks to the expertise and knowledge we have acquired over the years,

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we are now able to investigate FCPA cases much more quickly. We also are better equipped to prosecute individuals who are actually making corrupt payments, as well as intermediary entities hired to serve as conduits for bribes. And now we also are prosecuting the bribe takers, using our money laundering and other laws."[4] The consequences of noncompliance with the FCPA have, in fact, included criminal and civil fines, reduced stock price, disqualification from government contracts, costly government monitoring of future actions, civil litigation, damaged reputation, and delayed filings necessary for business continuity.

Global Perspective

While the FCPA has been the more widely known and enforced anti-corruption measure, corruption is increasingly being addressed through enactment or updating of laws, increased frequency and quality of international investigations and prosecutions, and by more robust looks at risk and compliance by businesses and nonprofit organizations around the world. The last decade has seen the increased public outrage over corruption and public demand for enactment of additional laws and agreements intended to bring about change. In the past, businesses may have considered paying bribes as a necessary, if not legitimate, way of conducting business in many countries. In fact, bribes were sometimes even treated as tax deductible. Businesses were nearly unregulated in this practice, as governments of those countries affected by bribery were relatively unconcerned with fighting corruption of public officials. However, following the enactment of the FCPA, legislators, executive branch leaders, and global businesses pushed to level the playing field and expand efforts to fight corruption globally. In addition, those who suffer the effects of corruption are more often raising protest and getting support for change. People have access to more information, are aware there are options and improvements within reach, and they are tired of seeing funds for vital infrastructure improvements siphoned off and projects never finished. As we have seen multiple examples of recently, people around the world are protesting their denial of basic necessities, abuse of human rights, and other social ills that corruption perpetuates.

While the FCPA has been the most often enforced anti-corruption law to date, when designing or evaluating your anti-corruption program, it is important to consider the UK Bribery Act and the existence and implications of other newer laws, global treaties, and other local laws of the many jurisdictions with which a global company will interact. Additionally, in this risk area, as with others, continuously monitoring for new laws and anticipating changes in the law and enforcement practices is a necessity. This practice should be part of your ongoing risk assessment (i.e., understanding how external factors affect your risk). While many of the global agreements and laws have origins in the FCPA, there are differences among them, and it is best to be aware of the differences among the laws and seek compliance with all applicable anti-corruption measures.

Today, governments, businesses, and individuals are increasingly recognizing that corruption, including bribery in any form, threatens society by hampering sustainable development, creating and perpetuating poverty, defeating fair business practices, and undermining the marketplace. The work of the Organisation for Economic Co-operation and Development (OECD) led to creation and multinational ratification of a key global anti-corruption agreement. The OECD has provided a forum for decades to bring together leaders committed to democracy and the market economy to share policy and address concerns through shared experiences and deep analysis of data.

In 1997, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [5] was signed, and then came into force in 1999.[6] The OECD Convention on Combating Bribery outlaws bribery of foreign officials, makes no exception for facilitating payments, and contains a books and records provision. The convention additionally requires countries to hold those individuals or companies who offer or pay bribes accountable. Additionally, signatory countries must implement the convention in an effective and enforceable way. The convention leaves room to recognize that there may be necessary differences in how

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the goal is accomplished in each county's implementing legislation. The focus of the obligations imposed by the OECD convention is on results. The convention also obligates countries to cooperate with other countries in investigation of corruption, address corporate liability for bribery, and impose sufficient penalties for violations such that the conduct will be effectively deterred.

While the OECD has no authority to implement the convention, it does not merely offer an agreement for signature and stop there. Rather, it provides for self-analysis as well as mutual evaluation of all parties' compliance with the convention and progress. Much of the evaluation work is carried out by the OECD Working Group on Bribery, which produces annual reports on progress as well as other specialized reports.[7] When countries sign the convention, they are agreeing to participate as assessors and also be the subjects of assessment. The OECD also supports business by providing helpful resources and tools, which can be accessed at http://www.oecd.org/corruption/bydate/. Part of the mission of the OECD is publication and sharing of information, and as a result, additional, up-to-date helpful information and guides can often be found on the OECD website.

United Nations Convention

Further highlighting the multi-national nature of anti-corruption efforts, it is not surprising that the United Nations began work on a coordinated global approach to the criminalization of bribery and prevention of corruption. After two years of negotiations, on October 31, 2003, the United Nations General Assembly adopted the United Nations Convention against Corruption (UNCAC).[8] The UNCAC is legally binding and requires members to prevent and criminalize corruption, cooperate with international investigations, recover assets, and collaborate to improve information exchange. While the UN has no enforcement authority, members are required to comply, and monitoring is a key part of the convention. The UNCAC is built on the earlier work of the FCPA and the OECD, but the UNCAC is broader, covering not only bribery of foreign government officials but also addressing corruption in its many forms. The UNCAC addresses domestic bribery and encourages criminalization of commercial bribery (such as was later embodied in the UK Bribery Act 2010). The additional scope of the UN convention would be covered by preexisting additional laws in many jurisdictions.

The impact of treaties on global companies means that when doing business in countries that have ratified such a treaty, there may be implementing laws or implementing laws may be under consideration. At a minimum, the UN signatory countries should be monitored for new developments in law and enforcement. With 140 signatories, there is a very high likelihood that global companies will be doing business in numerous signatory countries. Agreement on implementation of monitoring compliance with the agreement could also bring renewed interest and forward progress by member nations in implementing anti-corruption laws.

UK Bribery Act

The UK Bribery Act 2010 criminalizes making, receiving, or offering corrupt payments to both public officials and private parties anywhere in world. It also prohibits the payment of small bribes or facilitation payments paid to expedite the performance of routine government services. The act includes expansive applicability to individuals and organizations, and it criminalizes a broad range of activities.

The UK Bribery Act specifically prohibits:

- offering, promising, or giving a bribe to another person;
- requesting, agreeing to receive, or accepting a bribe from another person;

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- bribing a foreign public official; and
- the corporate offense for failure to prevent bribery.

A company will be held strictly liable where an "associated person" performing services on its behalf bribes another person to obtain or retain business or a business advantage for the company. "Associated person" is broadly defined. A defense may be available if the company can prove it had "adequate procedures" in place designed to prevent bribery from being committed by those performing services on its behalf. The government has published guidance on what constitutes "adequate procedures."[9]

The UK Bribery Act has a wide jurisdictional applicability. The government may prosecute bribery committed by a person in the UK or outside the UK by a British citizen or person closely connected with the UK. The corporate offense of failure to prevent bribery applies to UK-incorporated entities and to entities outside the UK that conduct business in the UK. The UK Bribery Act also increased the maximum penalty for certain offenses from seven to 10 years imprisonment, with an unlimited fine.

French Sapin II Law

France instituted this new anti-bribery law in 2017. Not only does it reinforce the criminality of bribery within and outside of France, like the FCPA and UK Bribery Act, it includes extraterritorial reach for bribery violations. The law recognizes the role of whistleblowers and provides protections for them.

The Sapin II law requires businesses to institute anti-bribery programs. These programs must include assessment of bribery risks and education of relevant staff involved in activities in which bribery is likely to occur. It also requires that businesses implement controls, such as a whistleblower channel and monitoring, to prevent bribery or quickly identify and address it should it occur.

Brazil's Clean Company Act

More recently, Brazil has passed the Clean Company Act 2014. This act creates civil and administrative liability on Brazilian companies for both domestic and foreign bribery. International companies with a presence in Brazil are within the scope of the act if they engage in bribery in Brazil. The Clean Company Act is broad in that it prohibits direct and indirect bribery (or attempt) of Brazilian public or foreign public officials.

The prohibited acts include giving or offering of bribes as well as the giving of any financial or other support to the bribe activity or participating in its concealment. The use of third parties to execute or assist the bribe scheme is also outlawed. Additionally, the law forbids bid-rigging and fraud in the public procurement process, all issues with which Brazil has struggled. Finally, the law also prohibits government investigations. The potential fines for violation of the law range up to 20% of the responsible company's prior year's gross revenue (taxes excluded). There is the potential for fines to be reduced for companies that have implemented effective anti-corruption compliance programs.

Canadian Corruption of Foreign Public Officials Act

The Corruption of Foreign Public Officials Act (CFPOA) saw virtually no enforcement in its first ten years (since 1999). The act was amended 2013 by the Fighting Foreign Corruption Act in an effort to improve poor enforcement. Among the amendments was expanded jurisdiction, to include prosecution of Canadian individuals and companies, regardless of where the activity took place. A provision to address accurate books and records was also added. The amendment also increased criminal penalties and gave notice that the facilitation payments exception was being eliminated, but no effective date was placed on the change to facilitations payments portion

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of the law. In addition, the law removed the "for-profit" restriction and gave the Royal Canadian Mounted Police the exclusive right to charge violations of the CFPOA.

These amendments largely brought the CFPOA in line with the FCPA and the UK Bribery Act. Canada has been increasing active investigations and prosecutions with many cases under investigation since the amendment.

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