Lex Mundi
World Ready

Best Practices

Best Practices in Preventing Fraud and Corruption in a Global Business

Global business today frequently involves 1) fast-moving competition, 2) pressure on growth and financial performance and 3) the rigors of expansion into new markets worldwide. Along with these dynamics, the regulations that guide business have become far more numerous and complex. Regulatory authorities in various countries share information with each other more frequently than ever before, are increasingly aggressive about enforcement and are adamant about their expectation of accountability for business conduct around the world. This is true not only in developed countries but also in developing and emerging markets.

Lex Mundi member firms, in collaboration with their clients and with in-house counsel members of the Lex Mundi Client Advisory Council, have reviewed the growing body of global knowledge concerning how to address and prevent fraud and corruption in international business. The resulting list of best practices is based on that knowledge and on additional follow-up discussions and research materials provided by Lex Mundi member firm lawyers, who agreed that the most important aspects of preventing and avoiding fraud and corruption involve:

- Understanding the regulatory enforcement environment.
- Getting management to understand, commit to, and support anti-fraud and anti-corruption initiatives.
- Prioritizing the key risks to the company's business, brand and reputation.
- Maintaining compliance in light of the scope and complexity of global business growth.
- Obtaining expert advice when responding to compliance issues or threats.
- Educating the workforce about the risks of wrongdoing.
- Cultivating a company-wide culture of compliance.

The objective of this best practices guide is to provide practical suggestions to enable corporations and their law firm advisors to develop effective compliance programs that will avoid, detect and remedy wrongdoing, especially fraud and corruption. The guide first generally describes anti-corruption norms – as articulated in laws, conventions and codes of conduct – and considers their implications for business practices. It then discusses necessary oversight strategies, such as controls, monitoring, reporting and audits, and recommends measures for investigating and resolving compliance problems. The guide then discusses the structure of the compliance function, as well as the internal communication and education required to promote compliance. It concludes by analyzing the risk of third-party fraud and corruption and providing advice on how to avoid successor liability for anti-corruption violations.

Law Firm and Client Partnering Best Practices

- Law firms can share with clients sample codes of conduct, ethics codes, and standard policies and procedures; advise on client-specific adaptation; and provide tailored training.
- Clients can ask their outside advisers to audit their processes and procedures to ensure that key risks to the company are considered.
- In each geographic market, clients can work with local law firms to adapt or translate the codes of conduct and compliance programs to fit local conditions.

Anti-Corruption Norms

Definitions of Corruption and Fraud

Corruption and fraud are defined fairly consistently (and sometimes interchangeably) by key organizations:

Corruption is operationally defined as the misuse of entrusted power for private gain.[1] It can include a variety of conduct in both the private and public sectors.

Public corruption, for example, "encompasses unilateral abuses by government officials such as embezzlement and nepotism, as well as abuses linking public and private actors such as bribery, extortion, influence peddling, and fraud … Though corruption often facilitates criminal activities such as drug trafficking, money laundering, and prostitution, it is not restricted to these activities."[2]

Private sector bribery (also sometimes called commercial or private-to-private bribery) is an example of private sector corruption and refers to "corrupt practices within and between enterprises … [such as] when an employee accepts the advantage granted to him by a person from outside of [a] company, without informing the corporate bodies or persons."[3]

Further differentiation exists between "against the rule" corruption and "according to rule" corruption. "Against the rule" corruption is a bribe paid to obtain services the bribe receiver is prohibited from providing. "According to rule" corruption, by contrast, consists of facilitation payments, where a bribe is paid to receive preferential treatment for something that the bribe receiver is required to do by law.[4]

"'Active corruption' or 'active bribery' is defined as paying or promising to pay a bribe; 'passive bribery' is the offense committed by the [person] receiving the bribe."[5]

"Fraud is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. Fraud may also be made by an omission or purposeful failure to state material facts, which nondisclosure makes other statements misleading."[6]

US Foreign Corrupt Practices Act (FCPA)

The main foreign anti-corruption enforcement tool of the United States, the Foreign Corrupt Practices Act (FCPA), has existed for almost 40 years. The FCPA prohibits United States companies and individuals from bribing non-U.S. officials (including employees of government instrumentalities) to obtain or retain business or gain an improper business advantage. The FCPA also imposes affirmative books and records and internal controls requirements on entities that qualify as issuers under U.S. securities laws and on individuals who act on their behalf.[7]

For much of the FCPA's history, its enforcement has been modest, often averaging only a few cases per year. However, FCPA prosecutions began to increase dramatically starting in 2007, reaching a record high in 2010, with the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) bringing 74 enforcement actions combined in that year. Over the past five years, the DOJ and the SEC maintained FCPA enforcement as a high priority, initiating scores of investigations and obtaining hundreds of millions (USD) in fines and penalties.

While the $800 million USD in fines and disgorgement that Siemens paid to U.S. authorities in 2008 to settle U.S. anti-corruption charges (in addition to a similar amount paid to German authorities to settle related German charges) remains

[1] *Transparency International*, http://archive.transparency.org/news_room/faq/corruption_faq.
[2] *Handbook on fighting corruption, the US AID Center for Democracy and Governance*, Page 13 (Feb. 1999) dochas.ie/pages/resources/documents/Handbook_fighting_corruption.pdf.
[3] *International Chamber of Commerce*, http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/corruption-explained/.
[4] *Transparency International,* http://archive.transparency.org/news_room/faq/corruption_faq.
[5] Organization for Economic Co-operation and Development, OECD, 2007, Bribery in Public Procurement: Methods, Actors and Counter-Measures, Paris.
[6] http://definitions.uslegal.com.
[7] While the anti-bribery provisions of the FCPA do not apply to private sector bribery, U.S. enforcers often can use other U.S. federal laws to punish conduct, such as the U.S. Travel Act. Additionally, the laws of many U.S. states prohibit private sector bribery.

the largest to date, eight of the ten largest FCPA-related penalties ever assessed occurred in or after 2010. Further, since 2011, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, whistleblowers who alert the DOJ or SEC about FCPA violations can now collect between 10 and 30 percent of any government recovery in excess of $1 million USD.

The SEC's annual Dodd-Frank Whistleblower report for 2013 shows that the number of FCPA-related tips increased almost 30 percent, from 115 in 2012 to 149 in 2013, and will likely provide the basis for additional enforcement activity in the future.

U.S. FCPA enforcement has become increasingly focused on prosecuting individuals. In 2010, a number of individuals, including executives and other employees, faced prison sentences and multimillion-dollar penalties for FCPA violations. This trend has continued in recent years, with 12 FCPA cases initiated by the DOJ in 2013 brought against individuals. This may be in part because individuals have been more likely than corporate defendants to litigate FCPA charges.

Industrywide FCPA investigations have also grown increasingly common. Indeed, multi-defendant enforcement actions are becoming the norm, with one-off actions the exception. As DOJ FCPA Chief Patrick Stokes highlighted in March 2014, this is because information from one case often leads to information regarding potential wrongdoing by other players in the same industry. The DOJ and SEC also continue to investigate companies and individuals in a wide variety of industries, including oil and gas, health care, pharmaceuticals, consumer products, extractive industries, telecommunications, medical devices, transportation, and defense. The FCPA's jurisdiction is far-reaching and has enabled U.S. enforcers to aggressively pursue foreign entities and individuals who have only limited contacts with the United States. For example, eight of the ten largest U.S. FCPA enforcement actions against entities have involved non-U.S. companies. Additionally, U.S. enforcers have extradited and criminally prosecuted multiple non-U.S. citizens in recent years, based on FCPA charges. U.S. enforcers have sent an unmistakable signal that companies and individuals who conduct business internationally and have any jurisdictional nexus to the U.S. must ensure that they comply with the FCPA.

To provide guidance to enterprises that may be subject to the FCPA, the DOJ and the SEC released a Resource Guide (the "Resource Guide") in November 2012 containing detailed information about the Act and its provisions. Companies should review the Resource Guide to familiarize themselves with the general enforcement practices of the DOJ and the SEC. A more in-depth overview of the Resource Guide has been provided by Foley Hoag LLP, Lex Mundi member firm for Massachusetts, in Appendix G.

For companies seeking to obtain clarification regarding whether a prospective course of conduct would result in FCPA liability, the DOJ has established an Opinion Procedure. To obtain an opinion, a company must submit a written request containing sufficient detail describing the proposed conduct fully and accurately. The DOJ will evaluate the proposed conduct and issue an opinion, which may be relied upon by the requestor. Though infrequently used (the DOJ has issued only eight opinions since the beginning of 2010[8]), the Opinion Procedure can be a helpful tool for companies.

A thorough overview of the FCPA has been provided in Appendix A by Bass, Berry & Sims PLC, Lex Mundi member firm for Tennessee.

UK Bribery Act and Other Key Laws

While the FCPA has long been regarded by many internationally as setting the standard for anti-corruption laws, in light of its extra-territorial application and aggressive enforcement, many other nations have adopted or enhanced anti-corruption laws. Chief among these is the UK Bribery Act ("the Bribery Act"), which took effect on July 1, 2011. While the Bribery Act has many similarities to the FCPA, including broad extraterritorial application, there are key differences. For example, the Bribery Act prohibits purely commercial bribery and includes strict criminal liability for the corporate offense of failing to prevent bribery, combined with an affirmative defense for having "adequate procedures" in play to prevent corruption. A number of other countries, such as Germany, Spain,[9] Brazil, Canada, China and Mexico, have also strengthened or escalated enforcement of their anti-corruption laws, and enforcement authorities around the world have begun sharing information more freely, increasing the likelihood of liability in multiple jurisdictions.

[8] Department of Justice, DOJ Opinion Procedure Releases, http://www.justice.gov/criminal/fraud/fcpa/opinion/.

[9] Organic Law 5/2010, of June 22, 2010, which took effect on Dec. 23, 2010, establishes an express regulation on the criminal liability of legal entities for the first time in the Spanish Criminal Code. As in the U.K. case, it is highly recommendable for companies to establish adequate procedures (*debido control*) to prevent and discover crimes that may be committed.

International Anti-Bribery Conventions

The United Nations Convention Against Corruption ("the UN Convention") is one of the most important of the international anti-corruption conventions. It was adopted by the United Nations General Assembly in 2003 and enacted in 2005, and there are now 170 countries that are parties to it.[10] The UN Convention addresses corruption in both public and private sectors on a wide array of topics, including bribery, illicit trading, money laundering and accounting standards.

The Organization for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Officials ("the Convention") is also very significant. All 34 OECD member nations, plus Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa, are signatories to the Convention, which requires the adoption and enforcement of national anti-corruption laws that meet pre-established criteria.

Other noteworthy international conventions include the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption, the African Union Convention on Preventing and Combating Corruption, and the Inter-American Convention Against Corruption adopted by the Organization of American States. The latter was the first international convention to address corruption.

As international conventions and national laws have taken root to address corruption, the regulatory landscape has significantly changed. The true impact for businesses has been a shift in emphasis from detection of corruption by public officials to enforcement of anti-corruption statutes against businesses and businesspersons. This raises the pressure on companies to better establish and demonstrate compliance.

An act of bribery in one jurisdiction may attract legal consequences halfway around the world. A practice viewed by employees in one region as normal may be corrupt according to another region's laws and regulations. Employees must, therefore, know the regulations in each jurisdiction whose laws apply and follow them. The stakes for ignorance are high: Company executives and employees may face imprisonment, companies may face stiff penalties and fines for noncompliance, or companies may be ruined entirely.

Organizations and Agencies Combating Corruption

Transparency International

Transparency International, founded in Germany in 1993, is a non-governmental organization that was developed to fight global corruption. It has a presence in nearly 100 countries and is most widely known for its annual Corruption Perceptions Index (CPI), which has been published since 1995 to highlight awareness of countries that are perceived to have a serious problem with official corruption. The organization also publishes the Bribe Payers Index (BPI), which evaluates leading exporting countries according to the likelihood that firms from each country will attempt to bribe foreign officials.

World Bank

In 1996, the World Bank launched over 600 programs designed to address global corruption. Between 1999 and 2010, the World Bank publicly sanctioned more than 400 firms and individuals for fraud and corruption and debarred consultants and contractors that it found to have engaged in corruption in connection with World Bank-funded projects.

Corporate Policies and Procedures

Corporate law departments spend a great deal of time and energy on corporate compliance, particularly reducing the risks of corruption and fraud in global business. It is a demanding task in light of rapid global expansion and the very different cultures and business practices affected by regulation. The costs associated with ensuring compliance are high, and many corporate law functions are concerned they do not have the resources or the management commitment they need.

Beyond the mammoth task of tracking and interpreting new regulations, in-house counsel have the challenge of educating the corporate workforce and its leadership about the issues and the very substantial risks. Law firms advising global companies are responding to this challenge by working alongside in-house counsel on training, auditing, reporting, investigations and other areas. All parties involved see room for continual improvement.

Most companies agree quickly on "doing the right thing," but generalities of that sort are not enough. Companies need to take time to clarify what this

[10] See http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

means in a range of business situations, contexts and cultures. Emphasizing the "letter of the law" may not be sufficient, particularly if employees do not understand it.

It is far more important to emphasize the company's core values and consistently demonstrate how corporate culture and behavior support those values. Because an internal legal department cannot possibly ensure global compliance on its own, codes of conduct, standards, processes, training and procedures help give managers and employees across the company a "script" to follow and resources to consult. All the measures adopted must be logical and consistent with the previously adopted codes of proper conduct and the internal supervision procedures that most companies already have in place.

This means that companies need to have clearly articulated corporate standards. They also need policies, an ethics code or business principles that give employees and the company's business partners clear direction about:

- Basic rules, standards and behaviors expected regardless of geography or circumstance.
- The company's fundamental values and principles.
- The company's position on bribery, corruption and facilitation payments.
- The company's rules on competition and antitrust and how they affect commercial operations and transactions.
- Policies and procedures for business entertainment and gifts.
- Policies and procedures for political and other donations or grants.
- Policies and procedures for conflicts of interest.

Many companies find that once the core values and code of conduct are clear, it is helpful to choose "compliance champions" within the company and to partner with other organizations that share similar core values. The code of conduct should be distributed to every employee (in the local language). It should be easily accessible on the company's website, and employees should be able to ask questions and report good-faith concerns without fear of reprisal.

Practice Tip: Gifts, Travel, Entertainment and Other Things of Value

Companies often choose to provide small gifts or tokens of esteem to clients and business partners as a way to show respect or appreciation. Such business courtesies have generally not been the subject of FCPA enforcement actions. The larger and more extravagant the gift, however, the more likely it is to trigger liability under the FCPA.

Similarly, payment for extravagant travel, meals and entertainment is often scrutinized, as are trips or events with little relationship to a bona fide business purpose.

Monitoring, Controls, Reporting and Auditing

Law Firm and Client Partnering Best Practices

- Law firms can review their clients' existing controls – against the backdrop of current regulations and the clients' core businesses – to suggest elements to add or improve and advise on issues of attorney-client privilege.
- Law firms often have examples of whistleblowing and hotline programs that they can share with clients.
- Clients can seek advice from their outside law firms when reviewing their monitoring and reporting processes. Law firms working with clients on corruption and fraud issues can advise on key red flags of wrongdoing and effective monitoring approaches.

Monitoring helps the company to understand how well controlled its compliance risks are and to make informed judgments about where it should spend its resources.

It is a challenge to determine what to measure, how to do it effectively and efficiently, and how to report the results in a way that stimulates action.

Important to an effective program to prevent wrongdoing is an effective control framework. This should include internal controls such as:

- Clear written designation of authority and accountability for various issues.
- Clear lines of reporting, and well-documented mechanisms for review and approval of proposed conduct.
- Effective accounting and financial reporting procedures that accurately reflect the company's transactions, dealings and asset disposition.

It is extremely important to have written documentation of the company's controls, policies, procedures and reporting responsibilities, as well as documentation of how these policies have been evaluated for efficacy. Without evidentiary proof, a company may be unable to demonstrate the existence or adequacy of its compliance program to regulatory authorities.[10]

Additionally, in large and complex businesses it is important to have structures in place so that potential risks or compliance threats can be flagged and reported to those responsible. These structures might include:

- An internal whistleblowing policy that provides anonymity and protects the whistleblower.
- A hotline, ethics line or help line that provides employees with a safe way to raise questions and concerns and have them investigated.
- Special audit and investigative teams closely supported by the legal and finance organizations as necessary.

Those responsible for preventing fraud and corruption should conduct audits and assessments within the scope of privacy and data protection laws in conjunction with business units to ensure that anti-corruption policies are being followed and that the control framework is operating effectively. For example, there should be:

- Periodic audits or assessments to ensure that controls and policies are being complied with by employees and relevant third parties.
- Monitoring that effectively evaluates whether compliance measures are cognizant of local practical issues and consistently adhere to regulations.

Often, these types of audits and monitoring can be integrated into other periodic audit or monitoring systems to achieve greater efficiency and effectiveness.

Investigations, Disciplinary Actions and Sanctions

- An investigation or disciplinary action should be conducted in compliance with relevant laws and regulations. Failure to do so can make the compliance risk worse or raise entirely new problems. Therefore, clients should partner with experienced outside law firms that can help them navigate the often-complex legal landscape.
- Law firms often have existing relationships with regulators and know the processes and procedures associated with a governmental investigation. Accordingly, they can guide clients in developing and implementing a strategy to work most effectively with regulators when there is a possibility of an investigation.
- Consideration of local labor, privacy, data protection and other applicable law is very important in the investigation and disciplinary action processes. It is wise for clients to work with law firms that can provide advice on these and other areas of law.

The control and reporting framework serves to identify compliance risks and potential problems. Once these issues arise, the company must respond by investigating, finding the facts, analyzing the legal exposure and resolving the issues.

Increasingly, regulators expect companies to have an effective internal system to investigate and, if necessary, remedy alleged misconduct. Such investigations must be carefully tailored to the scope of the potential misconduct and evaluate possible internal corrective actions and external reporting, and should take account of the potential for collateral proceedings.

Investigations may require close coordination with other corporate functions, such as human resources. Often the needs of the business are best met by retaining outside counsel to assist with or lead the investigation. Many outside counsel have broader experience and expertise in conducting internal corporate investigations than in-house lawyers, human resources staff or audit teams. In addition to this expertise, they can bring objectivity, confidentiality, privilege and other benefits.

[10] See http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

The following recommendations are suggested for internal investigations:

- Before you start, think through the objectives of the investigation and the actions that may be taken as a result of the findings, and then plan the investigation in order to achieve the objectives.
- Determine whether the investigation should be directed by senior management or the board of directors. Investigations should be directed by leadership that is senior to anyone implicated.
- At the outset, consider the degree of legal privilege and independence desired. In many jurisdictions, investigations conducted by outside counsel will be accorded greater legal privilege and will be viewed as more independent.
- For broader investigations that may involve more than one office or jurisdiction, it is important to have access to experienced local counsel in each foreign jurisdiction at issue. It is also wise to establish a centrally controlled cross-border investigative team.
- A system to effectively gather and analyze data (within the context of data protection regulations) is important to conducting investigations and maintaining the overall control framework.
- External experts, such as forensic accountants or computer specialists, should be utilized where necessary.
- If an investigation is being handled internally, it often is helpful to have reputable external lawyers, accountants and/or consultants to provide ongoing advice and quality control and to present an overview of the investigation to comfort various constituencies.
- Throughout the process, it is important to review and discuss the specific areas of the investigation. Since investigations tend to involve enormous amounts of data passing among various companies in various countries, it is important to collect consistent information. This means agreeing on clear search terms and interview criteria with investigators.
- If the internal investigation is connected to a query from a regulatory authority, it is important to maintain a dialogue with the authority throughout the investigation, sharing information as appropriate, confirming the scope of the investigation and getting continuous input from the regulatory authority.

Responding properly to risks or issues of noncompliance is essential to an effective anti-corruption and anti-fraud program. This response typically involves disciplinary action or sanctions for the wrongdoers. Direct action must be taken, and the response should:

- Clearly demonstrate that noncompliance will not be tolerated and that breaches will be dealt with – no exceptions.
- Be consistent for particular offenses to avoid the appearance of selective enforcement.
- Have pre-established disciplinary measures and a process for breaches, such as dismissal, prosecution for fraud or bribery, recovery of assets, etc.
- Communicate breaches and their consequences to build trust in the process.

Self-Reporting

In the event that a company discovers a possible violation, it may seek to self-report to the appropriate authorities. This may be advantageous because the DOJ and the SEC consider a company's cooperation and remedial efforts when deciding whether to pursue an enforcement action.[11] Further, although regulators do not quantify in advance the benefit of self-reporting, the presence or absence of self-reporting and the level of subsequent cooperation are frequently highlighted by the DOJ and the SEC as critical factors in reaching a particular disposition. For example, in 2013, the DOJ and the SEC decided not to charge Ralph Lauren Corporation with criminal FCPA violations due to the company's prompt reporting of bribes paid by its Argentinian subsidiary to government and customs officials to improperly secure the importation of Ralph Lauren Corporation's products in Argentina.[12]

Companies that are seeking to self-report should confer with outside counsel. Many outside counsel have broader experience dealing with regulatory agencies and can bring an objective perspective to these procedures.

[11] *See e.g., The Department of Justice, Principles of Federal Prosecution of Business Organizations, available at www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf; and United States Sentencing Commission, Guidelines Manual, available at http://www.ussc.gov/Guidelines/2013_Guidelines/Manual_HTML/index.cfm, regarding benefits of cooperation and self-reporting in federal prosecutions in the United States.*

[12] See Press Release, Department of Justice, Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty, (April 22, 2013), available at http://www.justice.gov/opa/pr/2013/April/13-crm-456.html.

Compliance Structure: Coordination With Other Business Functions and the Board of Directors

Law Firm and Client Partnering Best Practices

- Outside legal advisers can conduct workshops for the business units, highlighting areas where similar industries have had fraud and corruption problems and suggesting measures to reduce risk.
- It is critical for in-house lawyers to know the company's strategy and operations and take part in key management meetings in order to prevent, detect and advise on potential risks.
- In-house lawyers must often work closely with other corporate departments, such as accounting and human resources, on investigations and regulatory inquiries, with advice from expert outside lawyers.

Developing an effective compliance program is important not just because it can help prevent FCPA violations but also because it is a factor regulatory authorities consider in deciding whether to bring enforcement actions. In its Resource Guide, the DOJ and the SEC lay out the hallmarks of an effective compliance program that companies should review when establishing or updating their internal policies. In addition, the UK Bribery Act explicitly provides an affirmative defense based on the existence of "adequate procedures" to prevent and deter misconduct.

Compliance programs are typically guided by the legal and compliance functions. However, given the importance of having an effective compliance program, it is increasingly important that responsibility and accountability for various aspects of compliance also clearly include the company's other departments. Global companies should recognize that responsibility for compliance must rest, at least in large part, with the business functions. Other corporate departments, such as human resources and finance, play a critical role in implementing compliance policies, providing training, and coordinating executive officers and the board of directors.

The functions in the company that must lead and coordinate efforts to reduce wrongdoing include:

- The C-suite (particularly chief executive officer, chief financial officer and chief operating officer).
- Board of directors.
- Legal function.
- Compliance function.
- Internal audit.
- Risk management.
- Accounting, financial controls and treasury.
- Human resources.
- Corporate secretary.
- Tax.
- Corporate communications and government relations.
- Corporate strategy and development.

Lex Mundi member firms, their clients and in-house counsel agreed that programs to reduce the risk of fraud and corruption cannot be mere overlays introduced exclusively by the legal, compliance or audit functions but must be incorporated fully into business functions. Business unit leaders must be trained in fraud and corruption compliance practices, with clarification of processes and accountability. Many business units assign individuals within the unit as "compliance champions" to assist in communication and detection.

A survey on anti-corruption compliance, conducted in 2011 and 2012, found that most companies believe that they have strong anti-corruption policies in place and that their senior management expresses a strong commitment to these policies.[13] Yet, only about half of the respondents believed that people at their organizations had been penalized for violating internal anti-corruption policies, and 42 percent of the respondents reported that they never had received anti-corruption training.[14] The in-house legal team, with the help of outside advisers, can help ensure that effective measures to reduce the risks of wrongdoing are built into business elements and processes, including due diligence, corporate structure, contracts and agreements, and compensation and incentives. A useful checklist for analyzing compliance issues has been provided in Appendix B by Uría Menéndez, Lex Mundi member firm for Spain.

Areas where risk of fraud or corruption is typically greater, requiring special coordination between the

[13] *Growing Beyond: a place for integrity: 12th Global Fraud Survey, Ernst and Young*, 2012, available at www.ey.com/Publication/VWLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf.
[14] Id.

legal or compliance function and the business or corporate function, are:

- Agent and intermediary relationships, particularly related to sales.
- Commissions on sales (particularly those contingent on awarding of contracts).
- Documentation of consulting services.
- Operations or subsidiaries in emerging markets or countries that are rated low on Transparency International's Corruption Perceptions Index.
- Public sector contracts or businesses requiring government approvals and authorizations.
- Business dealings involving customs, inspections, tax, licensing and permitting authorities.
- Travel, entertainment, gifts and charitable contributions.

Communication: Promoting Compliance and Maintaining Vigilance

Law Firm and Client Partnering Best Practices

- Clients should share their compliance communication plans with outside lawyers so that the lawyers understand the clients' priorities and are able to clarify and provide advice on ambiguous areas.
- Law firms often have examples of compliance communications that can be helpful for clients looking for effective approaches.
- Outside lawyers can often effectively present the compliance risks to specific audiences in certain geographical areas.

Corporate counsel and Lex Mundi law firms work in information-heavy environments, and it can be challenging to find novel and effective ways to reinforce principles and fundamental values. But communication consistently emerges as a key to achieving compliance and reducing the risks of wrongdoing. In-house lawyers, together with colleagues at all levels, must know how to spot compliance issues and address them appropriately.

The following are recommendations for reducing the risk of wrongdoing through effective communication:

- Make sure that the communications and the overall messages about compliance are clear and concise and understood by the audience they are intended for. Use examples and situations to demystify compliance and encourage an open dialogue.
- Use multiple channels to distribute the message: print and electronic, presentations by and conversations with leadership, teleconferences, multimedia, etc.
- Repeat the messages in various ways, and keep it interesting. Avoid legal jargon, and make sure to clarify what you are talking about and why it is important.
- Make sure that the topic of compliance communication is adapted to local markets and cultures and that the examples and situations used are practical and realistic in the local setting. This is time-consuming but necessary.
- Use multiple methods to distribute the messages: business leaders, middle managers, in-house lawyers, outside lawyers, trainers, operational employees, etc.

Education and Training in a Global Corporate Setting: In-Person and Remote

Law Firm and Client Partnering Best Practices

- Clients can call on their law firms to train the in-house legal team to conduct training based on an established format.
- Law firms advising on key areas of compliance often can provide clients with information about the various training and education tools available on the market, particularly electronic or web-based modules.
- Clients can partner with law firms to conduct "dress rehearsal" types of training (for "dawn raids" by regulators, for example).

The most effective education and training programs to prevent fraud and corruption will tailor the approach to the business, its value system and the local culture. This often requires a flexible, multifaceted approach where every opportunity is taken to educate and reinforce the rules and

the values, to learn from and leverage industry experience, and to address issues and concerns. Training programs relating to antitrust compliance, such as the one attached as Appendix C, can be adapted to deliver training to prevent fraud and corruption. Appendix C has been provided by Chiomenti Studio Legale, Lex Mundi member firm for Italy.

To foster continuous improvement, many companies use a combination of external and internal resources for education and training. These can include communication programs, hands-on/in-person training sessions, webinars, online issue-specific and targeted training, email blasts, individual certifications, and top-down compliance reviews when compliance threats or breaches arise.

Responding to Third-Party Fraud and Corruption Risk

Law Firm and Client Partnering Best Practices

- A number of law firms have developed reporting procedures that clients can use when they need to gather more information about their third-party relationships in order to control risks. Clients can partner with their law firms to follow best practices in this developing area.
- Managing third-party corruption risk has only recently become a major compliance concern. Outside law firms can meet with corporate counsel and business management to review typical issues and problems and suggest effective ways to address them.

Experts agree that managing third-party corruption risk is one of the most difficult challenges for businesses today. Depending on the third party and the nature of its involvement, it is important to conduct due diligence, negotiate written agreements that include specific representations and warranties, and implement other means of financial controls.

Employees in certain areas may assume that third parties can be used to do what the company or its employees would never consider doing themselves. Communications, training and other actions are important to change such attitudes.

As noted by Lucinda A. Low of Steptoe & Johnson LLP, Lex Mundi member firm for USA, District of Columbia,

> Under the U.S. Foreign Corrupt Practices Act (FCPA), the corrupt practices of a third party can lead to criminal responsibility on the part of a principal. "Third parties" include individuals or companies in almost any type of relationship with the principal, including an agent, representative, consultant, distributor, joint venture partner, contractor, broker, finder, or a professional service provider.
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> The principal can be legally responsible for corrupt practices committed by the third party in the course of the business relationship not only if the principal has actual knowledge of the third party's practices, but if the principal is willfully ignorant of those practices. Such "head in the sand" behavior can include the failure to address any "red flag" that may arise during the course of the relationship.
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> Under the FCPA, principals are expected to conduct pre-engagement due diligence on a prospective third party (which can be tailored to the level of risks presented by the third party), and to eliminate or adequately mitigate any red flags that may arise. Such red flags may be addressed in a variety of ways, including further due diligence, by contractual safeguards against improper practices, or other means that are responsive to the particular factual issues presented.
>
> But the responsibilities of principals do not stop with engagement. Principals are expected to maintain oversight of the activities of a third party, and to respond to any red flags that are presented during the course of performance or during termination of the relationship. To that end, not only are companies well advised to develop systems and procedures to help manage these risks (and to document the prophylactic steps taken), but relevant personnel should be trained to recognize red flags, how to respond to them, and where to go for assistance in dealing with them.[15]

A useful resource for identifying anti-corruption risks related to third parties has been provided in Appendix D by Steptoe & Johnson LLP, Lex Mundi member firm for USA, District of Columbia.

[15] Lucinda A. Low, Steptoe & Johnson LLP.

Avoiding Successor Liability for Anti-Corruption Violations

Many anti-corruption problems arise during mergers, acquisitions, and joint ventures. Because an acquirer may be liable for violations committed by its target under anti-corruption laws such as the U.S. FCPA, corporate counsel are increasingly insisting on anti-corruption due diligence. While discovering unexpected FCPA violations during due diligence can cause major headaches for the acquirer, it is far superior to facing FCPA exposure. Examples of significant cases that highlight the importance of avoiding successor liability include:

- Halliburton (2008) – Halliburton sought to acquire a U.K.-based company, but, as a result of certain legal restrictions inherent in the bidding process, was unable to obtain sufficient information to conduct FCPA-related due diligence in advance of closing. As a result, Halliburton submitted a request for an opinion from the DOJ regarding post-acquisition FCPA liability, promising to implement a rigorous post-closing due diligence plan if it were to successfully acquire the U.K. target company. In opinion No. 08-02, the DOJ agreed to certain assurances, contingent upon Halliburton implementing a host of rigorous post-closing diligence and disclosure procedures the company had proposed. The opinion is significant because it sets out a detailed post-closing plan providing guidance regarding the DOJ's expectations in cases involving successor liability.
- eLandia/LatinNode (2009) – After eLandia International acquired LatinNode, it discovered potential FCPA violations related to LatinNode's past operations in Central America and the Middle East. After conducting an internal investigation, eLandia disclosed these violations to U.S. enforcers and agreed that LatinNode would pay a fine of $2 million. As a result of LatinNode's FCPA-related problems, eLandia determined that the $26.8 million it had paid for LatinNode was $20.6 million over LatinNode's actual fair market value.
- RAE Systems (2010) – Parent company RAE Systems entered into joint ventures in China with two Chinese companies through a foreign holding company. Both joint ventures engaged in business dealings with Chinese government agencies and departments. Although RAE discovered during due diligence that one of the Chinese companies had previously engaged in improper payments to Chinese officials, it failed to adequately put an end to the practice. RAE also failed to discover that the other Chinese company had likewise previously engaged in improper payments to Chinese officials. When these practices persisted, RAE self-disclosed to the government and agreed to pay $3 million in fines and disgorgement, in addition to adopting stringent internal controls, to resolve FCPA claims against the parent company related to the joint ventures.
- Pfizer/Wyeth (2012) – Wyeth entered into a settlement agreement with the SEC for FCPA violations attributable to corrupt payments made in China, Indonesia and Pakistan. However, the DOJ decided not to prosecute Pfizer, which had acquired Wyeth in 2009 for Wyeth's improper pre-acquisition conduct, noting Pfizer's extensive post-acquisition compliance and remedial efforts.

Recommended steps for conducting anti-corruption due diligence has been provided in Appendix E by Bass, Berry & Sims PLC, Lex Mundi member firm for Tennessee.

Conclusion

An effective anti-corruption program deters the risk of wrongdoing, positively affects corporate culture, improves the company's relationship with regulatory authorities and provides the company with options for remedial measures should they need to be undertaken quickly.

> "By taking a strong stance on promoting transparency and fighting corruption, companies not only mitigate reputational risk, but they also live up to their responsibility as corporate citizens and can take an active part in the emerging solutions to some of the greatest issues facing the world today."
>
> **Cobus de Swardt**
> Managing Director
> Transparency International

ACKNOWLEDGEMENTS

Lex Mundi thanks the member firms listed below, in-house counsel and members of the Lex Mundi Business Crimes and Compliance Practice Group, who contributed to the development of these best practices. Lex Mundi extends a special thank-you to Anthony Mirenda and Shrutih Tewarie at Foley Hoag LLP for their significant contributions in updating these best practices.

Member firm for USA, Massachusetts: *Foley Hoag LLP*

Member firm for USA, Tennessee: *Bass, Berry & Sims PLC*

Member firm for Italy: *Chiomenti Studio Legale*

Member firm for Germany: *Noerr LLP*

Member firm for USA, District of Columbia: *Steptoe & Johnson LLP*

Member firm for Spain: *Uría Menéndez*

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APPENDIX INDEX

The attached appendices were authored by the Lex Mundi member firms noted below.

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APPENDIX B
Corporate Structure and Compliance: 10 Questions to Ask That May Have Implications for Groups of Companies With Compliance Issues

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APPENDIX C
10 Tips for Training Your Workforce on Competition Compliance

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Summary of the November 2012 FCPA Resource Guide

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APPENDIX A

The FCPA at a Glance

Though the FCPA has been around for decades, it was not heavily enforced until recently and therefore had relatively little attention from executives, general counsel and compliance officers. If you or your company is engaged in international business – whether directly or through agents, JVs or subsidiaries – you need to be aware of the FCPA.

The FCPA can be summed up in two general sets of provisions:

(i) **Anti-bribery** – these provisions prohibit directly or indirectly offering anything of value to any foreign official for the purpose of corruptly influencing the decision of that official to do anything that assists the offeror in the obtaining or retaining of business or an unfair business advantage. U.S. enforcement authorities interpret key provisions of the statutory language quite broadly. For example, a "foreign official" can include employees of government instrumentalities, such as employees of a state-owned electric company, or physicians and other health care workers that are part of government-run health care facilities. "Anything of value" can include cash, gifts, travel, meals, entertainment, charitable donations and offers of employment to relatives. Actions that U.S. enforcers have interpreted as "gaining an unfair business advantage" include corrupt efforts to reduce customs duties and tax payments. Local culture and customs are no defense.

(ii) **Books and records** – these provisions require companies that qualify as issuers under U.S. securities laws to "make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." There is no materiality requirement. Additionally, companies must maintain a system of internal compliance controls that "provides reasonable assurances" that transactions are executed in accordance with GAAP.

The penalties that can be imposed for FCPA violations are severe and can include:

(i) **For companies** – felony convictions, criminal fines of up to $2 million for each bribery violation or up to $25 million for each books-and-records and internal-controls violation, disgorgement, denial of export licenses, and debarment from doing business with the U.S. government. Companies will often be required to submit to an independent compliance monitor.

(ii) **For individuals** – felony convictions, imprisonment for up to five years for each bribery violation or up to 20 years for each books-and-records and internal-controls violation, criminal and civil fines, disgorgement, and debarment.

Companies and individuals also face substantial defense costs and the loss of reputation associated with being criminally charged under an anti-bribery statute. While there is no private right of action under the FCPA, companies can face shareholder suits stemming from the FCPA-related conduct.

Application of the FCPA Worldwide

"The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm."[16] Specifically, the law applies to any U.S. "issuer" or "domestic concern," as well as to any foreign company or person who "causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States."[17]

U.S. enforcers have interpreted these jurisdictional provisions broadly, bringing enforcement actions against entities with only attenuated connections to the U.S. For example, U.S. enforcers have "established jurisdiction using wire transfers between foreign bank accounts that are cleared through correspondent accounts in the U.S."[18] After establishing jurisdiction, U.S. enforcers have also successfully sought extradition of non-U.S. nationals to the U.S. for prosecution.

The FCPA's expansive reach and severe consequences, combined with the U.S. government's aggressive enforcement, require companies that engage in international business to take notice. An effective anti-compliance program and prompt internal investigations of problems can significantly reduce FCPA exposure, both by avoiding or catching potential problems early on and by demonstrating to enforcement authorities that a company is serious about its anti-corruption efforts. When dealing with the FCPA, the proverbial ounce of prevention can be worth a pound of cure.

[16] United States Department of Justice, A Resource Guide to the U.S. Foreign Corrupt Practices Act http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.
[17] *Id*.
[18] Mauro M. Wolfe, *Does the US Government Have Limitless Jurisdiction Enforcing the FCPA?*, available at http://www.martindale.com/members/Article_Atachment.aspx?od=299343&id=1055878&filename=asr-1055918.pdf.

APPENDIX B

Corporate Structure and Compliance:

10 Questions to Ask That May Have Implications for Groups of Companies With Compliance Issues

Conduct Standards

1. Must the standards of conduct regarding corruption, bribery, fraud, etc., be the same across an international group of companies or should they vary depending on the legal requirements and accepted practices in the different jurisdictions where the group companies are present? Frequently, conduct standards in an international environment may need to be tailored to address different cultural and religious backgrounds and diverse legal frameworks.

Codes of conduct, compliance programs and expenses associated with them

2. Who should approve them at the level of the parent (senior management, chief executive officer, board of directors, etc.), and how should approval be documented?
3. Should the subsidiaries adhere to the codes of conduct and compliance programs approved by the parent, and how should adherence be documented?
4. Should minority shareholders in subsidiary companies have a say regarding the codes of conduct and compliance programs adhered to and implemented by the subsidiary and the expenses associated with them?

Compliance structure and reporting

5. Should a chief compliance officer be appointed or can other officers take on compliance responsibility?
6. To whom should the chief compliance officer (if any) report (audit committee, chief executive officer, chief legal counsel)?
7. To whom should the chief compliance officer in group companies report (board of directors of the subsidiary and/or chief executive officer, chief compliance officer, audit committee of the parent)?
8. Is it acceptable for compliance functions to be performed at the level of subsidiaries with minority shareholders by officers employed by the parent company rather than by employees of the subsidiary, or does it trigger any concerns (independence, conflicts of interest, etc.)?
9. How does the compliance function relate to the control and internal audit functions, and is any interaction required?

Intragroup circulation of compliance information

10. Are there legal restrictions affecting the reporting of compliance-related information by group companies in an international environment (personal data protection legislation, etc.)?

APPENDIX C

10 Tips for Training Your Workforce on Competition Compliance

An antitrust compliance program will be successful if it prevents antitrust infringement both at the EU level and in other jurisdictions where the company does business and if it facilitates the early detection of violations that do occur with the possibility of reducing any fines and minimizing claims for damages in private lawsuits. This can be achieved only by educating the company's representatives at all levels, making everyone aware of areas where sensitivity to antitrust issues are needed and by advising them to seek advice from counsel where appropriate.

The following guidelines may help to educate your workforce to comply with antitrust laws:

(1) **Develop a general antitrust compliance policy for the company by clearly explaining what constitutes an antitrust violation and what specific types of behavior are prohibited.** Remember, however, that the compliance program must not only avoid actual violations of antitrust laws but also avoid permitting the development of files, records, documents, statements or conversations that might create the appearance of an antitrust violation.

(2) **Tailor the compliance program to the company's business, organization, personnel and culture.** A tailored program takes into account factors such as the particular issues likely to be faced by the company, the various jurisdictions in which the company operates, its market position in its industry sector, the antitrust risk levels associated with its industry sector, and the internal structure of a group or company.

(3) **Establish compliance standards and procedures to be followed.** If necessary, this may include adopting a code of conduct.

(4) **Include in the program a clear statement of the company's commitment to comply with the antitrust laws.** Establish a set of practical do's and don'ts written in simple, readily available language that every employee can understand.

The following is an example of a do's and don'ts list:

- Don't make an agreement with your competitors to stay out of each other's markets.
- Don't discuss prices with your competitors.
- Don't exchange information that affects prices.
- Don't participate in any meetings with competitors that might result in discussions of business practices and tactics, customers, costs, and prices, and be especially on guard at all times at trade association meetings.
- Don't join forces with some of your competitors to the disadvantage of a select few competitors or customers.

If you have particular market power, add:

- Don't purposely set prices below a measurable amount with the intention of bankrolling a mission to drive out a competitor or discourage a new entrant.
- Do not tie the sale of one product to another.
- Use exclusive dealing arrangements only if they are justified and necessary for your business.
- Charge all customers the same price unless the cost of serving them is different.
- Consult with lawyers who specialize in antitrust law when specific problems or questionable activities occur.

(5) **Make sure that your employees understand the importance of consulting counsel.** Even if they have been given a general overview of antitrust law and the issues, employees must understand that antitrust law is very fact-specific and that there is no substitute for a lawyer who knows antitrust law and works based on the detailed facts unique to the company's situation. To ensure compliance with antitrust laws, a company must have a proactive law department that is dedicated to practicing preventive measures.

(6) **Put in place an active risk management plan.** A compliance program needs to be dynamic because an agreement or conduct might, on analysis, be considered compatible with competition law, but over time it may become critical or illegitimate. Active risk management of the company's compliance program will allow for monitoring of all agreements and conduct necessary for assessment of compatibility with competition law. Moreover, risk management will also permit checking the company's market position in its areas of activities, so every time a triggering market share threshold is met the company will be in a position to adopt all the necessary measures to avoid abusing its dominant position.

APPENDIX C CONTINUED

(7) **Implement the program by putting in place an active training process for employees.** The training process should include in-person training sessions by knowledgeable counsel and can be supplemented by video and Internet training tools. The training should be as practical as possible, including case studies drawn from the company's experiences. The instructions should also address the consequences of antitrust violations, both for the company and its managers and employees.

The following tools may be very useful:

- Role-playing interactive simulations.
- Compliance handbooks.
- Online training programs.
- Antitrust news updates.
- Quizzes and certificates of completion.
- Databases to track compliance training.

(8) **Ensure senior management commitment and leadership of the program.** Participation by top management shows that compliance with the antitrust policy is fundamental for the company. A culture of competition must begin at the very top of the company. Senior management must value competition and must be clear in making that commitment known to employees.

(9) **Monitor the effectiveness of the policy.** Take reasonable steps to ensure that the compliance policy is followed, including auditing to evaluate the effectiveness of the program and possibly detect violations at an early stage. Audits are an invaluable tool for identifying competition law violations (external lawyers conducting periodic audits can generally protect findings under attorney-client privilege). Audits should be conducted regularly and unannounced.

(10) **Provide incentives for compliance and impose disciplinary measures for violations.** Encourage reporting of possible misconduct and have a system in place to facilitate reporting of possible wrongdoing. For example, have a means for employees – anonymously and confidentially – to report suspected conduct and seek guidance about the legal implications of their own conduct. If, despite your efforts to ensure that the firm is complying with antitrust laws, the company is nevertheless the object of an antitrust investigation or complaint, make sure you have a policy to deal with antitrust procedure and to handle dawn raids.

APPENDIX D

Common Corruption Risks in Third-Party Relationships

Set out below are some of the most common issues that arise in third-party relationships that involve dealings with government. These issues do not necessarily preclude a relationship but are party- or transaction-specific issues that are ignored at the principal's peril. Unless otherwise indicated, these issues pertain to the full range of third-party relationships.

The third party…

1. …is related to a key government official with discretionary authority over the company's business in the host country (it's all in the family) or is a close business associate of a key government official (the *consigliere*).
2. …has a non-transparent ownership structure, often involving multiple layers or companies and offshore entities, so you can't determine who ultimately owns it or benefits financially from it, or is reputed to have "silent partners" or "straw men" (*prestanombres*) holding an interest on behalf of a key government official.
3. …salts away most or all of its money in offshore jurisdictions known to maintain bank secrecy or that are tax or money-laundering havens (and there are still lots of them out there).
4. …prefers cash (a non-traceable instrument).
5. …likes to deal in lump sums and resists detailed accounting, either of time/activities or expenditures or other reasonable oversight measures.
6. …requests or produces inaccurate documentation, including over-invoicing, under-invoicing, misdescribing supporting documents or anything similar.
7. …insists on a success fee or requires extra funding (agents/partners) or a higher discount (distributors) to "overcome obstacles," "get the business done," make the third party whole for "unanticipated extra expenses" or something similar.
8. …relies primarily on influence to get things done or regularly offers inside information, particularly if it lacks the background and qualifications your industry normally looks for in third parties.
9. …supports the favorite charities of the spouse of the head of state (or it could be the political party) or habitually provides lavish gifts or entertainment.
10. …is not permitted by local law to engage in the relationship or requires secrecy regarding the relationship, without any legitimate business reason for such secrecy.

APPENDIX E

Tips to Avoid Successor Liability Under the FCPA

Companies contemplating acquiring or merging with other firms should consider taking at least the following steps during due diligence to decrease the risk of acquiring FCPA or other corruption-related liability:

- Determine the jurisdictions in which the target has operated during at least the previous five years and understand the anti-corruption laws that apply in those jurisdictions.
- Interview the target's executives, as well as its compliance, internal audit, accounting and sales personnel, regarding the company's anti-corruption compliance efforts and its awareness of the FCPA and other applicable anti-corruption laws.
- Review the target's anti-corruption policies; internal controls; compliance program (including anti-corruption training programs and certifications); and any past reports, allegations or investigations related to corruption.
- Review the target's third-party agreements, due diligence files (if any) for third-party agents and course of dealings with third-party agents to ensure they are consistent with the FCPA and other applicable anti-corruption laws.
- Conduct searches of news databases and governmental debarment lists and check business references for indications of anti-corruption risks posed by the target or its employees.
- Conduct a forensic review of data room financials and the audit report for the past five years.
- Include representations and warranties in the merger agreement relating to FCPA and anti-corruption compliance.

APPENDIX F

What Is the UK Bribery Act 2010?

The UK Bribery Act 2010 came into force on July 1, 2011. Guidance has been published by the Ministry of Justice that provides some detail of the implementation of the Act, including the new strict liability corporate offense of failing to prevent bribery.

The Act replaces all previous law on bribery in the U.K. It widens the law in several ways:

- It extends the definition of bribery.
- It extends the territorial reach to include offenses arising outside the U.K.
- It includes a new offense based on vicarious liability for directors/senior managers.
- It introduces a corporate offense of failing to prevent bribery.

The Act also increases the punishment for convictions for a bribery offense by increasing the maximum imprisonment sentence to 10 years and allowing for unlimited fines.

What are the offenses?

The Act creates four new offenses:

- Offering, promising or giving a bribe.
- Requesting, agreeing to receive or accepting a bribe.
- The corporate offense of failing to prevent a bribe being paid.
- Bribing a foreign public official (which overlaps significantly with the offense of offering, promising or giving a bribe but with a different test for whether a payment amounts to a bribe).

It should be noted that the first three offenses extend to include bribing both public and private persons.

The definition of "bribe" in the context of the Act extends to include any financial or other advantage intended to induce or reward improper performance of a function or an activity. This clearly extends to include gifts and corporate hospitality that are excessive in the business context. Of particular importance, the Act, unlike the U.S. Foreign Corrupt Practices Act, does not include an exemption for facilitation, or "grease," payments unless such payments are permitted or required by written law in the territory concerned.

Who can be liable?

- Individuals can be prosecuted for any of the first three offenses. So an employee could be liable for receiving a kickback for allocating a contract or for paying such a kickback.
- A company can be prosecuted for any of these offenses, if a senior manager was the "directing mind and will" behind the offense. The Act includes the strict offense, under which the company will be guilty if it fails to prevent a bribe being paid on its behalf. It can, however, escape liability if it can show that it had adequate systems in place generally to prevent bribery.
- Company directors will themselves commit an offense if they give or receive a bribe. In addition, if the company is found guilty of giving or receiving a bribe, its directors will be liable if they are found to have "consented or connived" in the offense.

Extraterritorial application

An individual who or an organization that pays or receives a bribe in the U.K. is caught by the Act even if they have no other connection with the U.K.

The Act does not apply to acts committed abroad by individuals unless they are connected with the U.K. (e.g., by being a British citizen or ordinarily resident in the U.K.). Except in relation to the corporate offense, the Act does not apply to acts committed abroad by an organization unless it is incorporated or formed in the U.K.

In relation to the corporate offense of failing to prevent bribery, it does not matter where the bribery takes place. The offense will be committed if the organization is incorporated or formed in the U.K., wherever it carries on business; or if the organization carries on business or part of a business in the U.K., wherever it is incorporated or formed.

APPENDIX F CONTINUED

General recommendations

While there is no one-size-fits-all approach to anti-bribery compliance, the U.K. Ministry of Justice has outlined six principles for commercial organizations to use as a guide when developing their own anti-bribery policies and procedures. Having such policies and procedures in place may allow a company to escape the corporate liability offense of failing to prevent bribery:

- Develop **clear, practical, accessible procedures** that are **proportionate** to the bribery risks faced by your organization and to the nature, scale and complexity of the activities you undertake. Ensure that these procedures are **effectively implemented and enforced**:
- Take steps to ensure that a **strong anti-bribery culture** is established throughout your organization, from the **top down**.
- **Periodically** assess the nature and extent of your organization's **exposure to potential external and internal risks** of bribery, and ensure that the assessment process is **informed and documented**.
- Develop and apply **due diligence** procedures to business relationships with persons who perform or will perform services for or on behalf of your organization.
- Ensure through **internal and external communication, including training**, that your anti-bribery policies and procedures are embedded and understood throughout your organization.
- **Monitor and review** your anti-bribery policies with internal checks and balances. External trigger events that should prompt a review, such as government changes, corruption convictions or negative press reports, should also be identified.

APPENDIX G

Summary of the November 2012 FCPA Resource Guide

In November 2012, the U.S. Department of Justice released its guidance regarding the Foreign Corrupt Practices Act ("FCPA"), consisting of a 120-page Resource Guide ("the Guide") to the U.S. Foreign Corrupt Practices Act along with a two-page "Fact Sheet." Acknowledging the significance of a broad-based and growing international anti-corruption effort, the Guide includes references to both other countries' laws and international compliance best practices from intergovernmental and nongovernmental organizations.

Although much of the guidance walks through established DOJ and SEC positions and practices, the Guide does, through the use of real-world examples and detailed hypotheticals, provide more concrete direction than was previously available. The guidance reminds companies of:

- **The jurisdictional reach of the FCPA:** Extending not only to (1) issuers (including their officers, directors, employees, agents and shareholders); (2) domestic concerns (and their officers, directors, employees, agents and shareholders); and (3) persons and entities that act while in the territory of the United States but, importantly, also (4) any coconspirators or aiders or abettors who are not operating at all in the United States but who have assisted a company in violating the FCPA.
- **The breadth of the FCPA:** Someone may violate the FCPA without knowing the identity of the recipient of a bribe. A statement such as "pay whomever you need to" is enough, according to the Guide, to violate the FCPA even if no bribe is ultimately paid or even offered.
- **Definition of "foreign official":** The Guide emphasizes a multifactor analysis of individual facts and circumstances, highlighting, for example, that a foreign government instrumentality may exist even when the government does not own or control a majority of the shares if it has significant influence over the operations of the entity.

The Guide also provides additional guidance on a number of key areas.

- **Gifts and entertainment expenses:** The Guide emphasizes that enforcement will focus on whether gifts and entertainment involve an improper purpose – are the gifts of modest value and given in an open and transparent manner, are they properly recorded, and are they a reflection of esteem or gratitude rather than an effort to influence a decision? The Guide confirms that small tokens and items of nominal value (e.g., cab fare, reasonable meals and entertainment expenses, company promotional items) alone generally are not enough to prompt enforcement action.
- **Facilitation payments:** The Guide acknowledges that payments to further routine governmental action that involves nondiscretionary acts remain lawful under the FCPA. The Guide does, however, recognize that such payments are often unlawful under other countries' laws (including, most important, the U.K. Anti-Bribery Act) and affirmatively discourages such payments, advising companies to work to eliminate them.
- **Mergers and acquisitions:** The Guide places a significant emphasis on the importance of due diligence. Companies should conduct due diligence prior to an acquisition to the greatest extent possible, and if effective diligence is not possible prior to the acquisition, it should be done as quickly as possible after acquisition in order to try to protect the successor company. Nevertheless, the Guide indicates that an enforcement action may still be brought against the predecessor company even if it exists now only in its new form as a subsidiary of the acquirer. Although acquiring a company that was not previously subject to the FCPA does not make the FCPA apply to the target retroactively, an acquirer should make sure to implement effective compliance controls and training to ensure that there is no unlawful activity following the acquisition.
- **Compliance programs:** Not surprisingly, the Guide does not endorse any compliance program "safe harbor." Instead, the Guide emphasized a practical approach to giving credit to compliance efforts, first looking to determine whether the compliance program is well-designed and done in gone faith and whether it works. The Guide acknowledges that there may be a violation of the FCPA even in the face of a well-designed, good-faith compliance program and highlights one recent prominent example where, finding an effective enforcement program, the government declined to undertake enforcement action against a company and instead prosecuted only an individual. The Guide highlights the government's expectation that an effective compliance program will include:

APPENDIX G CONTINUED

- A commitment from senior management and a clearly articulated policy against corruption.
- A code of conduct and policies and procedures that are accessible to all employees (i.e., translated into local languages as necessary).
- Oversight, autonomy and adequate resources for the compliance team.
- Comprehensive risk assessments.
- Accessible training (again, in the local language).
- Incentives and disciplinary measures.
- Third-party due diligence of intermediaries and of mergers and acquisitions.
- Confidential reporting mechanisms and internal investigation resources.
- A commitment to continuous improvement.

- **Self-disclosure:** Finally, the Guide emphasizes the potential benefits to be gained by self-disclosure and cooperation. As expected, the DOJ and SEC were unwilling to quantify the potential benefit from self-disclosure, but the Guide highlights particular examples, especially in the merger and acquisition context, where such disclosures helped companies avoid or mitigate enforcement actions. Beyond those examples, the Guide does not provide any more concrete response that might quiet the chorus of questions regarding whether there is a real benefit to self-disclosure. That said, aggressive government enforcement resulting in massive penalties, coupled with the recently enacted whistleblower bounty provisions creating significant financial incentives for reporting, provides powerful incentives for self-disclosure.