Anti-Corruption Compliance in Emerging Markets: A Resource Guide

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Multinational companies have increasingly looked to emerging markets for new business opportunities and continued growth. In many instances, these markets present opportunities for companies to increase revenues and enhance their competitive positions. Yet conducting business in many of these markets presents significant challenges that may include developing, but still inadequate, infrastructure; political uncertainty; underdeveloped rule of law; currency fluctuation; and the need for short-term capital in the hope of realizing long term return on investment.

Compounding these challenges is the reality that many emerging markets present serious corruption risks. Endemic corruption in many of these markets increases potential legal liability, creates an unlevel playing field, diverts resources, and often perpetuates deeply entrenched economic inefficiency. Corruption appears in many different forms in a variety of contexts across a number of industries, presenting a real barrier between companies and their business goals. Corrupt business activity is increasingly targeted by prosecutors all around the world. Investigations, regardless of where they originate, create potential legal liability, expose the company to reputational risk, and inflict great expense. The potential for significant fines for misconduct is real. So is the possibility of individual prosecutions, which are receiving renewed priority and emphasis in the United States and elsewhere.

This book was created as a guide to successfully navigating the corruption challenges presented by the operating environments found in emerging markets. It provides a framework to mitigate corruption risks by using programs, controls, and tools that meet common international standards and the expectations of governments worldwide. It also provides a framework for companies with anti-corruption programs in place to assess existing programs and facilitate modifications in response to evolving risks.

There is no one-size-fits-all compliance program that a company can simply adopt or pull off the shelf. This is particularly true in emerging markets. Companies must take a very close look at their operations to ensure that anti-corruption compliance controls can be effectively implemented in emerging markets to mitigate risk. Because compliance is a risk-based process, controls must be designed and implemented in reasonable proportion to available resources. Without this balance, one of two things will happen: either important risks will not be mitigated, or the efforts expended for compliance will create a burden that frustrates broader goals.
Chapter 2 discusses the widely recognized elements of an effective anti-corruption compliance program. In general, a multinational company should take a number of factors into consideration before beginning to develop or enhance its compliance program in emerging markets. Considering these factors is crucial for any compliance program, as they determine how a company can best respond to corruption risk. These considerations include: know the market, know the industry, know your business model, understand cultural issues, design and implement controls, and evaluate and adjust the compliance program.

1. **Know the Market.**

In order to design appropriate compliance controls, it is essential to understand the operating environment for each market in which a company operates or intends to operate. Regulatory, business, and corruption environments in markets may differ, particularly among those economies that qualify as “emerging.” Local business structures, regulatory frameworks, and perspectives on the rule of law inevitably impact the ability of a multinational company to identify and control local compliance risks. Analyzing these factors helps to identify structural and operational issues that present corruption risks that must be addressed. While emerging markets may be grouped together in some generic respects, each market will have unique corruption considerations that inform the assessment.

2. **Know Your Industry.**

Understanding the specific industry in which a company operates is crucial in controlling corruption risks in emerging markets. While all lawfully operating businesses must interact with government officials on some level, three general scenarios relating to the type of business being conducted provide a helpful framework to identify areas of corruption risk. Each of these categories of industry may have risks described in the other scenarios, but it is helpful to begin by focusing on the highest priority risk associated with a particular industry type.

In the first scenario, industries have governments and government-owned enterprises as customers, or engage governments as business partners. The company may be selling to government entities, and its success or failure may depend on how much revenue it can generate from government contracts or transactions. Companies in the energy and infrastructure sectors, for example, have governments as customers and generate revenue through contracts or agreements with those entities. Because these interactions are with government customers, heightened control measures are necessary.

In the second scenario, the government is a regulator of commerce, rather than a customer. Contacts typically involve business licenses; customs; interactions with police and fire departments; safety, labor and health issues; and general business regulations. The contacts tend to be low-level and may be frequent and routine. In these contexts, the risk of petty bribes is almost always present as a way to move the business process along. Controls applicable to these types of interactions include, for example, clear rules, training, cash controls, and the monitoring of expense and payment requests. Clearing customs is a common source of corruption risk in this industry scenario; industries that move large quantities of products across borders face heightened risk in customs and logistics.

The third scenario involves the sale of products that are heavily regulated by the government. Here, regulation may focus on business processes or particular products. The pharmaceutical and life sciences industry is a good example. In this sector, ensuring the production and delivery to consumers of safe and effective medicines is a priority. The interactions associated with government oversight, which is often intense, present corruption risks. Corruption risks in this sector also arise from day-to-day interactions with government physicians and
healthcare providers who may make purchasing decisions on an individual or collective basis. The volume of these interactions with these government officials, involving transfers of valuable products throughout the business process, presents unique corruption risks.

A second example of a heavily regulated industry is the financial services sector. Government interactions occur as part of the regulatory and oversight process that seeks to protect the integrity of the country’s financial system. In developing markets, financial service providers may also seek business directly from the government. Anti-corruption controls designed around the nature of the financial regulatory process are therefore appropriate and must reflect the nature and frequency of government interactions.

Understanding how a particular sector interacts with government and government officials and how transfers of value might be made to government officials will help to identify the overall corruption risk that an industry faces, and may inform the types of compliance controls needed to mitigate this corrosion risk.


The business model used by a multinational company affects the level of corruption risk and the selection of the most appropriate strategies to control it. There are several key risk differentiators.

First, companies that use a third-party distributor model to market and sell their products have a different risk profile than companies that use a direct sales force model. Appropriate corruption controls differ based on these business models. When a multinational company hires or partners with a third party to market and sell its products in a particular market, the company relies on that third party to conduct business properly. In many reported enforcement actions, multinational companies were held liable for the conduct of third parties, including distributors, that had acted on their behalf. Accordingly, a business model that relies on distributors can subject the company to heightened corruption risks and puts a premium on selection and oversight of those third parties. At the same time, companies that employ a direct subsidiary or employee model will face risks in terms of overseeing their own employees and processes. Direct control of employees requires a fundamentally different approach to compliance from that presented by the distributor model: direct control focuses on internal controls, training, and monitoring of the workforce.

A second key risk differentiator depends on whether a company uses a centralized or decentralized operating model. Companies that have historically allowed subsidiaries or remote operations significant autonomy are inherently subject to more corruption risk. A decentralized operating model works well only if headquarters can provide effective compliance oversight in an environment where other business decisions fall within the purview of the local operation. Seeking to establish compliance oversight in this otherwise local operating model often leads to resistance and challenges in implementing effective anti-corruption compliance controls. But it is imprudent to delegate compliance responsibilities to the local operating company without taking adequate confirming steps to ensure effective implementation of controls.


It is critical to understand the extent to which local cultural issues and expectations may conflict with a culture of compliance. But first, it is important to conduct a realistic assessment of the company’s own culture of compliance. The organization’s overall values and the tone of support for compliant business activities from the top of the organization and from in-country management will have a significant impact on the ability to control local corruption risks. Companies that have a strong culture of compliance and that retain or engage local employees with the same philosophy and belief system will generally fare better in confronting
local cultural corruption risks than those that do not. Senior leadership must have a firm grasp on these
cultural issues in order to accurately evaluate corruption risks in emerging markets and successfully
implement controls.

5. Design and Implement Controls.

Another key consideration in designing an effective anti-corruption compliance program is deciding where
and how compliance controls should be put in place within the company’s structure. Most companies have
specific polices or a code of conduct that prohibits corruption, or that requires certain activities or interactions
with government officials to be pre-approved. But many organizations have not taken the next crucial step:
implementing a risk-based set of controls for effective oversight of activities that raise compliance risks. For
example, employees may be informed of the code of conduct requirements but be otherwise left on their
own, or under the control of their immediate supervisors, in making decisions that involve interactions
with government officials. In these situations, it is crucial to understand the nature of risks that result from
interactions with government officials, and determine ways to address those risks. This analysis is informed
by the factors mentioned previously: the market, the industry, the business model, and the company culture.

For example, some regulatory frameworks require government officials to inspect manufacturing facilities
that produce products to be imported into a specific country. Government officials often request payment
or the provision of travel to the manufacturing site to make those regulatory inspections. These types of
activities involve travel for government officials, and create corruption risks if travel becomes a personal
benefit to the officials. Companies should therefore establish heightened controls in the form of advance
approval for those kinds of activities — beyond, for example, the individual who is proposing the benefit
and the immediate supervisor. Local legal or compliance approval may help create an appropriate control
environment, and regional-level approval may be necessary beyond a certain expenditure threshold. In some
circumstances, it may also be prudent to require the approval by senior management or legal/compliance
personnel at headquarters.

The optimal type, placement, and quantity of controls is largely driven by the context in which a company
operates, the level of the government officials with which a company interacts, and the types of relationships
or interactions a company has with those government officials. To assess the risk inherent in a given activity,
a company must identify and quantify potential transfers of value to government officials and consider the
reasons for the potential transfers. Gifts, travel, extravagant meals, jobs for relatives, and even contributions
to favored charities may be considered value that could influence the decision-making of the government
official. All of these factors determine where and by whom the review or approval should be conducted. It is
also important to review these activities and provide a mechanism that allows consistent application of this
pre-review process throughout the organization, with appropriate record-keeping and oversight.

6. Evaluate and Adjust the Compliance Program.

Continuous evaluation of the effectiveness of controls is essential to any compliance program — particularly in
emerging markets. The initial assessment and risk mitigation plan will make certain operational assumptions,
which may be appropriate when the design is completed, but may in practice fail to produce the desired
results. Accordingly, it is important to review any compliance program periodically to ensure that the controls
are achieving the desired results and any necessary adjustments are made. For example, some activities
deemed to require extensive pre-approval at the outset may, based upon actual experience, turn out to be
relatively well-controlled; here, the cost of pre-approval in terms of business interruption and work-hours

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in the review process may not be worth the effort for the level of control achieved. In some cases, requiring pre-approval of all of a company’s charitable contributions by the compliance function of the company may have seemed prudent when first implemented, but may, based on actual experience, not be worth the effort where thousands of low-level contributions were made worldwide and the circumstances under which they were made showed minimal, if any, involvement with government officials. Any adjustments along these lines must be made carefully, taking into account the potential risks of adjustments.

Decisions on how anti-corruption controls are modified over time can be facilitated by gathering data based on actual experience and monitoring specific activities and controls. Matching the intensity of the controls with the risks that are perceived in a particular activity is essential to ensure that the organization is deploying its resources both in the right areas and in ways that maintain the credibility of the compliance process. If the compliance process is viewed as an impediment to conducting efficient business activities and appears unnecessary given the assessed risk, support for compliance will diminish over time, making it much more difficult to maintain the mechanisms that mitigate critical risk, and which are expected by government regulators.

**Conclusion**

This book provides a framework for multinational companies to deal with the complexity of cross-border anti-corruption compliance in the emerging economies of the world. Developing markets present significant business opportunities, but they also introduce some of the most serious corruption risk. The factors described in this chapter provide the context for developing, implementing, maintaining, and adjusting compliance programs. Because companies and their operations are unique, compliance programs must be informed by business operations and the imperatives of specific risks.

We hope that the following chapters will be helpful to those implementing compliance programs in emerging markets and to those seeking to modify, enhance, or fine-tune their existing compliance programs.
Companies operating in emerging markets face heightened corruption risks, increased oversight, and the need to comply with an increasing number of anti-corruption laws. While the U.S. Foreign Corrupt Practices Act ("FCPA") and the UK Bribery Act are well known, an array of other anti-corruption laws apply to multinational companies. For example, Brazil, China, India, and Russia all have enacted more stringent anti-corruption laws and have begun taking steps to enforce them. In addition, forty-one countries are party to the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention, which requires criminalizing the bribery of foreign public officials and prescribes measures for the implementation of domestic legislation.

Designing an effective anti-corruption compliance program for emerging markets that meets the requirements of many different jurisdictions can be a daunting task. Executives at global companies may ask: With so many anti-corruption laws, do we need many different compliance programs to address our emerging market strategy? Will we be subject to conflicting standards in the various countries where we do business? How can we ensure proper oversight of activity that occurs in markets far from headquarters?

To address these questions, multinational companies need to consider the broad global consensus that has developed around what governments and international organizations expect of corporate anti-corruption compliance programs. While there is no one-size-fits-all program — and a company must bear in mind applicable local laws in the jurisdictions in which it operates — this global standard is now reality.

**The Global Standard**

For those seeking to design or enhance an effective anti-corruption compliance program, an appropriate starting place is the Good Practice Guidance on Internal Controls, Ethics, and Compliance, published by the OECD’s Working Group on Bribery in International Business Transactions (the “OECD Guidance”). The OECD Guidance, which is intended to help multinational companies comply with the OECD's Anti-Bribery Convention, includes 12 key elements:
1. Strong, explicit, and visible support and commitment from senior management for preventing and detecting foreign bribery;
2. A clearly articulated and visible corporate policy prohibiting foreign bribery;
3. Making compliance the duty of individuals at all levels of the company;
4. Oversight of compliance as the duty of one or more senior corporate officers, with autonomy, resources, and authority;
5. Generally applicable measures that focus on high-risk areas;
6. Ensuring the compliance of relevant third parties;
7. Financial and accounting procedures, including a system of internal controls;
8. Periodic communication and documented training;
9. Encouragement and positive support for compliance;
10. Appropriate disciplinary procedures to address violations;
11. Guidance, advice, confidential reporting, and whistleblower protections; and
12. Periodic reviews.6

In recent years, many countries around the world have articulated expectations that track these guidelines. For example, the Resource Guide to the U.S. Foreign Corrupt Practices Act (“FCPA Guide”), published by the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”), identifies “hallmarks” of an effective anti-corruption compliance program that bear a striking resemblance to the good practices set forth in the OECD Guidance.7 Authorities in the United Kingdom, Canada, Brazil, Japan, and South Africa have encouraged many of the same good practices.8 Numerous public and private international organizations, such as the World Bank, United Nations, International Chamber of Commerce (“ICC”), and Transparency International, recommend these practices as well.9

Core Components of an Effective Anti-Corruption Compliance Program for Emerging Markets

Support and Commitment from the Top. Senior management and boards of directors should create a “tone at the top” that promotes a culture of compliance. The OECD recommends “strong, explicit and visible support” for preventing and detecting foreign bribery.10 The World Bank Guidelines sum this up as “Leadership.”11

In evaluating a company’s compliance with anti-corruption laws, U.S. authorities say they will consider “whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.”12 U.K. authorities agree that “[t]hose at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable.”13

A Clearly Articulated and Visible Corporate Policy. Companies should maintain written policies, procedures, and codes of conduct that prohibit foreign bribery.14 These documents should be “clear, concise, and accessible to all employees and to those conducting business on the company’s behalf.”15 Brazilian authorities have explained, for example, that an anti-corruption code “serves to provide all agents operating on behalf or in the name of the enterprise and other stakeholders with full knowledge of the principles, values, standards and types of permissible activities and expected conduct in the enterprise.”16
Making Compliance the Duty of Individuals at All Levels of the Company. While “tone at the top” and written policies are necessary components of a compliance program, they are not sufficient. A commitment to compliance must be reinforced by middle-management and others throughout the organization. Indeed, compliance “is the duty of individuals at all levels of the company.” Under the World Bank Guidelines, “Individual Responsibility” is key. Thus, the effectiveness of an anti-corruption program depends on the commitment of everyone at the company — directors, officers, and employees alike.

Oversight by Senior Corporate Officers with Autonomy, Resources, and Authority. A dedicated compliance infrastructure should include “one or more senior corporate officers” responsible for compliance. The responsible corporate officer (or officers) “must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company’s compliance program is implemented effectively.” Indeed, Russian law now requires the designation of an officer and a department or structural unit responsible for the prevention of corruption and related offenses. According to the FCPA Guide, U.S. enforcement authorities will look at whether a “company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.” At a minimum, U.S. authorities expect that lead compliance personnel will have “direct access to an organization’s governing authority,” such as the board of directors or an audit committee. Other countries similarly expect companies to establish “direct reporting obligations to independent monitoring bodies,” which oversee “compliance with applicable standards of conduct.”

Although central oversight may create tension in a company with historically decentralized operations, an effective anti-corruption compliance program will necessarily require some involvement from the home office. This central oversight should complement, not replace, compliance measures at the local, operational level.

Generally Applicable Compliance Measures Focused on High-Risk Areas. The OECD encourages multinational companies to implement specific anti-corruption measures in high-risk activities, and to apply such measures to “all directors, officers, and employees” and to “all entities over which a company has effective control.” In this respect, the OECD Guidance recognizes that there is no standard compliance program. An effective program, according to the OECD, “should be developed on the basis of a risk assessment addressing the individual circumstances of a company.” Common high-risk areas identified by the OECD include “gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion.”

The FCPA Guide advises companies to design a compliance program that considers risk factors such as the level of government oversight and interaction; reliance on third parties that interact with governments on behalf of the company; business strategies using mergers, acquisitions, or other business combinations; exposure to customs and immigration authorities; involvement in joint venture agreements; and the importance of licenses and permits to the operations of a business.

Similarly, under the Transparency International Principles, a corporate compliance program “should be tailored to reflect an enterprise’s particular business circumstances and culture, taking into account such potential risk factors as size, business sector, nature of the business and locations of operation.”

Since the essence of a compliance program is the prevention, detection, and remediation of wrongdoing, a company’s resources should be allocated to activities that pose the highest risk — and when a company’s corruption risk grows, the FCPA Guide notes, “that business should consider increasing its compliance procedures.”

Ensuring the Compliance of Third Parties. A compliance program should not be limited to mitigating risks presented by a company’s direct employees. The OECD recommends that a compliance program pay attention to “third parties such as agents and other intermediaries, consultants, representatives, distributors,
contractors and suppliers, consortia, and joint venture partners.” Specifically, the OECD advises multinational companies to perform documented due diligence of business partners, inform business partners of the company’s commitment to compliance, seek a reciprocal commitment, and monitor compliance.

The World Bank Guidelines echo this advice and further recommend assuring that “any payment made to [a] business partner represents an appropriate and justifiable remuneration for legitimate services performed or goods provided . . . and that it is paid through bona fide channels.” According to the World Bank Guidelines, companies should “[a]void dealing with contractors, suppliers and other business partners known or (except in extraordinary circumstances and where appropriate mitigating actions are put in place) reasonably suspected to be engaging in misconduct.” Indeed, many recently reported cases of anti-corruption enforcement against multinational companies are based on the actions of third-party agents.

Financial and Accounting Procedures, Including a System of Internal Controls. Internal controls help safeguard a company’s assets. The OECD recommends financial and accounting procedures that are “reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery.” Countries generally expect companies to maintain a robust set of internal controls. For example, Russia’s Anti-Corruption Law requires companies to have controls that prevent the falsifying of accounting records. Brazil’s Clean Company Act, when applying penalties, considers the existence of internal controls, including audits, that ensure the integrity of a company’s operations.

Internal controls are especially important where corruption risks are high. As the FCPA Guide notes, “[b]usinesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.” A robust set of internal controls can help ensure, for example, that an interaction subject to prior approval is authorized for payment only after an appropriate review.

From a compliance program perspective, integration of compliance and financial controls is essential. This means consideration and coordination of compliance approvals with the payment authorization process. Most companies use a triple-match process as an essential element of their financial controls — checking the purchase order, invoice, and confirmation of performance to ensure they match — but do not often consider the compliance approval decision. If, for example, compliance procedures require pre-approval of a consulting arrangement with a fee of $1000, finance should ensure that pre-approval is considered before authorizing payment. If the compliance approval is not factored into this procedure, there is a gap. As such, the engagement where there is a compliance-approved fee of $1000 could in fact be paid at $2000, if there is a triple-match of documentation that does not in some way incorporate the compliance pre-approval that initiated the flow of decisions. This would lead to a compliance gap that could be avoided through more effective internal coordination and oversight of compliance decisions.

Periodic Communication and Documented Training. The OECD recommends “periodic communication and documented training . . . for all levels of the company, on the company’s ethics and compliance program.” As the FCPA Guide emphasizes, a compliance program cannot be effective without adequate communication and training.

Anti-corruption training is not a one-time event. Brazilian authorities, for example, emphasize that a company should train existing employees, as well as new hires. The ICC Rules on Combating Corruption state that “key personnel in areas subject to high corruption risk should be trained and evaluated regularly.” The World Bank Guidelines likewise advise that training programs should be “tailored to relevant needs,
circumstances, roles and responsibilities." In this vein, the FCPA Guide suggests that training sessions include hypothetical situations that are specific to the trainee’s day-to-day work experiences. The ultimate goal of training and communication is to make sure that individuals understand what is expected of them and are able to incorporate compliance guidelines in their everyday activities.

Moreover, communication regarding compliance issues should not take place only in formal settings. Brazilian authorities therefore recommend “implementation of a permanent communications policy,” which could include such elements as “internal newsletters for employees; a separate space on the intranet devoted to ethics; dissemination of examples of good practices of ethical conduct; posting of pamphlets and announcements on bulletin boards; presentation of positive results obtained from the implementation of the code of conduct; and incorporation of the ethical and integrity principles and values in the organization’s mission and vision statements.” The World Bank Guidelines recommend that an organization “make statements in its annual reports or otherwise publicly disclose or disseminate knowledge about its [Compliance] Program.”

Encouragement and Positive Support for Compliance. Companies also should reward their employees for good behavior, including compliance with anti-corruption policies and procedures. The ICC Rules on Combating Corruption suggest that multinational corporations include “the review of business ethics competencies in the appraisal and promotion of management and measuring the achievement of targets not only against financial indicators but also against the way the targets have been met and specifically against the compliance with the Enterprise’s anti-corruption policy.” In this regard, the FCPA Guide recommends incorporating adherence to compliance as “a significant metric for managements’ bonuses,” “recognizing compliance professionals and internal audit staff,” and ensuring that employees can advance their careers by taking on roles in the compliance organization.

Appropriate Disciplinary Procedures to Address Violations. Just as carrots are important to an anti-corruption compliance program, so are sticks. Anti-corruption rules are effective only if they are enforced. That is why the OECD Guidance contemplates the implementation of appropriate disciplinary measures to address violations. To evaluate the credibility of a compliance program, U.S. authorities will assess whether “a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation.” As the World Bank Guidelines make clear, disciplinary measures should include possible termination and apply to “all persons involved in misconduct or other program violations, at all levels.” In the words of the FCPA Guide, “[a] compliance program should apply from the board room to the supply room—no one should be beyond its reach.”

Guidance, Advice, Confidential Reporting, and Whistleblower Protections. An effective anti-corruption program must provide resources for company employees and relevant third parties to obtain compliance information. Specific company personnel should be designated to help answer questions. An effective program should also provide mechanisms for reporting potential or actual misconduct. Indeed, in prescribing punishment for violations, Brazil’s Clean Company Act takes into account the existence of a company’s incentives for employees to report irregularities. According to the APEC Anti-corruption Code, the goal is to ensure that relevant information travels “to responsible enterprise officials as early as possible.” For this to happen, of course, employees must not fear retribution or retaliation for the good faith reporting of their concerns. The FCPA Guide thus recommends the institution of hotlines, ombudsmen, or other anonymous reporting systems.

A company’s response to a report of potential misconduct is also critical. Companies must have an infrastructure in place to respond to the report, conduct appropriate investigations, and document the response process, all in a consistent manner.
**Periodic Reviews.** A compliance program that remains static is likely to become ineffective as risks shift. Periodic reviews and assessments are therefore essential. Companies must consider, among other things, “business changes over time”, weaknesses and shortcomings that may require enhancements, “relevant developments in the [anti-corruption] field”; and “evolving international and industry standards.” The UK Bribery Act Guidance recommends benchmarking with other organizations to help assess whether best practices are being implemented.

The FCPA Guide contains some specific suggestions for periodic reviews and assessments. For example, companies may use (1) “employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas”; and (2) “targeted audits to make certain that controls on paper are working in practice.”

**Conclusion**

A convergence of expectations regarding anti-corruption compliance programs has led to a new, generally accepted compliance standard that companies must meet in executing their emerging markets strategies. Implementing and maintaining the compliance program presents a challenge due to the distances and time zones involved; local laws and customs; environments where corruption is pervasive; and local employees who may perceive that these messages and mandates are from “headquarters” and therefore only a distant, abstract requirement. Nonetheless, the common international compliance requirements and guidance reviewed in this chapter show that the key elements of an effective compliance program are common across the board.

Companies that fail to live up to this global standard substantially increase their risk exposure. The absence of an effective compliance program not only makes it more likely that improper conduct will occur, but also makes it more difficult for a company to defend itself in enforcement situations by arguing that only individual wrongdoers, and not the company itself, should be held liable.

Emerging markets present a major challenge in implementing an effective compliance program. The following chapters of this Guide address specific control elements in further detail, and focus on controlling risk areas prevalent in emerging markets.

**Chapter 2 - Endnotes**


Id.


Institute of Directors in Southern Africa, King Committee on Governance, King Code of Governance for South Africa 2009 [hereinafter, South Africa’s King Code], http://www.library.up.ac.za/law/docs/King_Code_2009.pdf;


World Bank Guidelines, supra note at 9, § 2.1.

FCPA Guide, supra note 7, at 57.

U.K. Bribery Act Guidance, supra note 8, at § 2.1.

See OECD Guidance, supra note 5, at Annex II at ¶ A2.

FCPA Guide, supra note 7, at 57.

Brazil’s CGU Guidance, supra note 8, at 31.

OECD Guidance, Annex II at ¶ A3; accord APEC Anti-corruption Code, supra note 9, at § 4(H) (“The enterprise should aim to create and maintain a trust based and inclusive internal culture in which bribery is not tolerated. Managers, employees and agents should receive specific training on the [Compliance] Program, tailored to relevant needs and circumstances.”); ICC Rules on Combating Corruption, supra note 9, at Art. 10 (“Each enterprise should consider . . . making it the responsibility of individuals at all levels of the Enterprise to comply with the Enterprise’s policy and to participate in the Corporate Compliance Programme.”); Transparency International Principles, supra note 9, at § 5.1; WEF Principles, supra note 9, at § 5.

At the national level, see Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(b)(iii); Japan’s METI Guidelines, supra note 8, at 10; Federation of German Industries, Preventing Corruption—BDI Recommendations, 6 (3d ed. 2007) [hereinafter, Germany’s BDI Recommendations], https://web.archive.org/web/20101119160951/http:/bdi.eu/BDI_english/download_content/Marketing/Flyer_Preventing_Corruption_3._Auflage_2007.pdf.

See World Bank Guidelines, supra note 9, at § 2.2.


FCPA Guide, supra note 7, at 58 (citing U.S. Sentencing Guidelines § 8B2.1(2)(B)-(C) (2011)); accord Brazil’s CGU Guidance, supra note 8, at 36; Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(e); Japan’s METI Guidelines, supra note 8, at 10; South Africa’s King Code, supra note 8, at § 6:4; U.K. Bribery Act Guidance, supra note 8, at 24.

At the international level, see, e.g., ICC Rules on Combating Corruption, supra note 9, at Art. 10; World Bank Guidelines at § 2.3; WEF Principles at § 5.1.


FCPA Guide, supra note 7, at 58.

Id.

See Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(e).

See Brazil’s CGU Guidance, supra note 8, at 36.

OECD Guidance, supra note 5, Annex II at ¶ A5.

Id. at ¶ A.

Id. at ¶ A5(ii).
For an in-depth discussion of managing risks associated with the use of third parties, see Chapter 4.

OECD Guidance, supra note 5, Annex II at ¶ A6.

Id.

World Bank Guidelines, supra note 9, at ¶ 5.5.

Id. at ¶ 5.1; accord ICC Rules on Combating Corruption, supra note 9, at Art. 3(g); Transparency International Principles, supra note 9, at § 6.2.1.4.

At the national level, see, e.g., FCPA Guide, supra note 7, at 60–61; U.K. Bribery Act Guidance, supra note 8, at 27–28; Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶¶ 2(j)(i)–(iii), 3(a)–(c).

For an in-depth discussion of compliance with regard internal controls, see Chapter 9.

OECD Guidance, supra note 5, at Annex II at ¶ A7.

See, e.g., U.K. Bribery Act Guidance, supra note 8, at 21–22; Japan’s METI Guidelines, supra note 8, at 8–13; Germany’s BDI Recommendations, supra note 17, at 11–12; Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(b)(i).


Brazil Clean Company Act, Law No. 12.846 (2013), at Art. 7 [hereinafter, Brazil Clean Company Act].

FCPA Guide, supra note 7, at 40; see also id. at 58 (noting that internal controls systems often have “built-in flexibility so that senior management, or in-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests”).


FCPA Guide, supra note 7, at 59; accord U.K. Bribery Act Guidance, supra note 8, at 29–30; Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(g); Brazil’s CGU Guidance, supra note 8, at 37, 44; Japan’s METI Guidelines, supra note 9, at 11; Germany’s BDI Recommendations, supra note 17, at 11; South Africa’s King Code, supra note 8, ¶ 6.4.4.

At the international level, see, e.g., APEC Anti-corruption Code, supra note 9, at § 4(H); ICC Rules on Combating Corruption, supra note 9, at Art. 8; Transparency International Principles, supra note 9, at § 6.4; World Bank Guidelines, supra note 9, at ¶ 7; WEF Principles, supra note 9, at ¶ 5.4.

Brazil’s CGU Guidance, supra note 8, at 37, 44.

ICC Rules on Combating Corruption, supra note 9, at Art. 8(c).

World Bank Guidelines, supra note 9, at § 7.

FCPA Guide, supra note 7, at 59.

Brazil’s CGU Guidance, supra note 8, at 31, 34.

World Bank Guidelines, supra note 9, at § 7.

See OECD Guidance, supra note 5, at ¶ A9; accord World Bank Guidelines, supra note 9, at ¶ 8.1.

ICC Rules on Combating Corruption, supra note 9, at Art. 10(l).

FCPA Guide, supra note 7, at 60.

OECD Guidance, supra note 5, Annex II at ¶ A10; accord ICC Rules on Combating Corruption, supra note 9, at Art. 10(n); Transparency International Principles, supra note 9, at § 6.3.4; World Bank Guidelines, supra note 9, at § 8.2; WEF Principles, supra note 9, at ¶ 5.3.3.

At the national level, see, e.g., U.K. Bribery Act Guidance, supra note 8, at 22; Canada’s Niko Probation Order, supra note 8, at ¶ 2(i); Japan’s METI Guidelines, supra note 9, at 9–11.

FCPA Guide, supra note 7, at 59.

World Bank Guidelines, supra note 9, at § 8.2, 10.2.

FCPA Guide, supra note 7, at 59.

See OECD Guidance, supra note 5, Annex II at ¶ A11.

See, e.g., FCPA Guide, supra note 7, at 61; U.K. Bribery Act Guidance, supra note 8, at 23; Canada’s Niko Probation Order, supra note 8, at ¶ 2(h)(ii); Japan’s METI Guidelines, supra note 8, at 10–11.

At the international level, see, e.g., APEC Anti-corruption Code, supra note 9, at ¶ 4(G); ICC Rules on Combating Corruption, supra note 9, at Art. 10(m); Transparency International Principles, supra note 9, at ¶ 6.5; World Bank Guidelines, supra note 9, at ¶ 9.3; WEF Principles, supra note 9, at ¶ 5.5.

See Brazil Clean Company Act, supra note 41, at Art. 7.VIII.

APEC Anti-corruption Code, supra note 9, at ¶ 4(G).

FCPA Guide, supra note 7, at 61.

See id.; Canada’s Niko Probation Order, supra note 8, at Appendix A, ¶ 2(b)(i); Brazil’s CGU Guidance, supra note 8, at 47.

OECD Guidance, supra note 5, at Annex 2, ¶ A12; FCPA Guidance, supra note 7, at 61–62; APEC Anti-corruption Code, supra note 9, at ¶ 4(F); ICC Rules on Combating Corruption, supra note 9, at Art. 10(c); Transparency International Principles, supra note 9, at ¶ 6.8; World Bank Guidelines, supra note 9, at ¶ 3.

At the national level, see, e.g., U.K. Bribery Act Guidance, supra note 8, at 31; Canada’s Niko Probation Order, supra note 8, at ¶ 2(d); Japan’s METI Guidelines, supra note 8, at 5–8, South Africa’s King Code, supra note 8, at ¶ 4.1.8, 7.4.3.

FCPA Guide, supra note 7, at 61.

See id. at 62; Transparency International Principles, supra note 9, at ¶ 6.8; World Bank Guidelines, supra note 9, at ¶ 3.

OECD Guidance, supra note 5, at ¶ A12.

U.K. Bribery Act Guidance, supra note 8, at 31.

FCPA Guide, supra note 7, at 62.
Summary

In an increasingly global economy, overseas markets present significant opportunities for growth. But doing business in new markets, particularly emerging markets with still-developing infrastructures, carries significant exposure to corruption risks. Essential business activities like obtaining the licenses needed to begin operations, accessing public services such as utilities, and importing and exporting goods, require interactions with foreign government officials and, accordingly, give rise to issues the company (directly or through third parties acting on its behalf) will face relating to compliance with the FCPA, the UK Bribery Act, and other anti-corruption laws. Indeed, Transparency International’s Corruption Perceptions Index confirms that a number of emerging markets have high levels of perceived public corruption. For example, out of 175 countries and territories covered by the index, Brazil ranked 69, India ranked 85, and China ranked 100.¹

The risks associated with entering new markets are illustrated by the SEC’s 2014 enforcement action against Smith & Wesson Holding Corporation. According to the SEC, the firearms manufacturer began an effort to increase its sales by entering new markets in 2007.² Most notably, in 2008, the company allegedly hired a third-party agent to help sell firearms to a Pakistani police department. Members of Smith & Wesson’s international sales staff allegedly authorized the third-party agent to provide certain police officials with guns and cash gifts, and the company ultimately received a contract. The SEC further alleged that the company’s international sales staff engaged in similar conduct in Turkey, Nepal, and Bangladesh, though these efforts were unsuccessful. In its settlement with the SEC, Smith & Wesson disgorged $128,892 in profits and interest and paid a $1.9 million fine; it also terminated its entire international sales staff. In the SEC’s press release regarding the settlement, Kara Brockmeyer, then chief of the SEC Division of Enforcement’s FCPA Unit, emphasized the risks associated with entering new markets: “This is a wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand their international sales. When a company makes the strategic decision to sell its products overseas, it must ensure that the right internal controls are in place and operating.”

This Chapter provides an overarching framework for evaluating entry into new markets and conducting the due diligence necessary to identify and mitigate the risks of public corruption. The considerations raised by this framework apply for both the opening of operations in a new market or for entering a new market through


a merger, joint venture, or another arrangement with a local operation. Subsequent chapters address risks specific to the use of third parties (Chapter 4); financial arrangements with foreign officials (Chapter 5); gifts, travel and entertainment (Chapter 6); charitable contributions (Chapter 7); and mergers and acquisitions (Chapter 8). The following steps are stated in very general terms, as each market and potential entry will have its own considerations and concerns. Some evaluations will likely be more detailed and lengthier than others because of perceived corruption risks.

**Evaluating Risks of Entry into New Markets**

**Anti-Corruption Desk Research.** After a potential new geographic market entry is identified, preliminary desk research should be conducted to assess anti-corruption risks. While the research should focus on the particulars of the market and the opportunity being considered, the following is a non-exhaustive list of questions for assessing the new market:

- Are international companies allowed to conduct business in the country?
- What is the local attitude toward investments from multi-national companies?
- Do many multi-national companies operate or invest in the country?
- What local competition is there? Is there any government regulation of competitors?
- What is the process for company registration?
- Does the country require licenses or permits to conduct business? How long is the approval process?
- What is the process for imports and exports?
- Are there any requirements that international companies use local companies to assist with the business (e.g., local companies to import/export products or to distribute them)?
- What are the key areas of corruption in the country? Is the provision of kickbacks a necessary component of doing business in the country?
- What areas of industry are government-owned?
- Are there many state-owned enterprises?
- Is it common for government officials to own or operate private businesses (e.g., customs officials owning clearing agents)?
- Are there any local anti-bribery laws or initiatives?
- How does the judicial system operate?
- Are there other regulatory or political challenges to doing business legally?
- What is the business model being proposed and how will that model be implemented in the country?

Resources that should be consulted include:

- **CPI and BPI Indices:** Review the Transparency International Corruption Perceptions Index and Bribe Payers Index for the new market. The Indices will provide a starting point for the country’s perceived corruption risk.
- **Media Sources:** Review readily available media sources to evaluate the new market. If possible, the reviewer should conduct these searches in the local language. Searches typically will include using the country’s name and key words such as “corruption,” “FCPA,” “bribery,” and “fraud” as search terms.
- **Trace Compendium:** Perform searches using the country’s name under the categories of “Nationality of Foreign Officials” and “Corporate Headquarters.” If applicable, perform a search under the “Enforcement Agency” category for the appropriate enforcement agency associated with the country.

- **Embassy or AmCham Reference:** Request information on corruption risks and the business regulatory environment from the U.S. Embassy and the American Chamber of Commerce Abroad (“AmCham”) in the new market under consideration.

- **Commercial Service Report:** If available and time permits, request a U.S. Commercial Service Report on corruption risks and the business regulatory environment for the new market under consideration.

- **Investment Climate Statement:** If available, review the Investment Climate Statement for the new market, issued by the U.S. Department of State. This report provides background regarding the overall investment climate, receptiveness to foreign investment, transparency of the regulatory system, corruption risks and anti-corruption resources.

- **Watchlist Search:** Conduct a Watchlist search using services such as Dow Jones. The search should include the name of the proposed new market and any key individuals or companies with whom the company will interact, if this information is known.

Research should identify the sectors of the country’s industries that are government-owned and anticipate areas in which the company will need to interact with the government and/or foreign government officials. In addition, research into peer companies doing business in the country, and the business model the peer companies use, may provide useful insights. The goal is to gain a preliminary understanding of the country’s local regulatory environment and its receptiveness to international companies. For each step of the research, the reviewer should retain a copy of the relevant research and notes detailing the steps taken and individuals consulted.

If warning signs are identified, the company should consider the following:

- Is it possible for the company to conduct its proposed business legally despite the warning signs?
- Is there an alternative business model that the company could utilize to conduct business legally?
- Were the warning signs disclosed from a reputable source? Is there sufficient research to confirm the accuracy of the warning signs?
- Despite the warning signs, are there any preventative measures the company can take proactively to ensure that it does not engage in corrupt activity?

**Investigative Firm Market Risk Assessment.** Following the Anti-Corruption Desk Research, if the company decides to move forward with the new market due diligence, the company should consider obtaining a risk assessment of the market conducted by an investigative firm familiar with the market. This firm may be either a local firm identified as having sufficient expertise to conduct the work, or a recognized international firm with a local presence or that has a local network with sufficient capability. The investigative firm should review information from public record sources and, if appropriate, gather information from its network of contacts related to the following inquiries:

- Local regulatory environment and stability of government
- Strength of local laws and judicial system; ability for a foreign company to adjudicate wrongdoing
- Attitude toward foreign investments
- Local restrictions on business strategy and corporate structure
■ Difficulties encountered by other companies doing business in the market and track records of similarly situated companies

■ Perceived levels of corruption and the ability for companies to operate in compliance with global anti-corruption laws

■ Risk of exposure to crimes such as fraud, terrorism, money laundering, organized crime, and other financial crimes

**Preliminary Market Visit.** Following the Investigative Firm Market Risk Assessment, a Preliminary Market Visit should be scheduled to further assess corruption risks in the new market. The Preliminary Market Visit will assess the corruption risks and determine the type of business or operating model that best serves the company’s commercial interests and best mitigates any corruption risk.

The Preliminary Market Visit should include, at a minimum, meetings with the following third parties:

■ Transportation and customs clearing agents (preferably more than one)

■ Local regulatory authorities

■ Local representative(s) from the American Chamber of Commerce and/or American embassy, or their non-U.S. counterpart(s) for non-U.S. headquartered companies

■ Local legal counsel (a branch office of an international firm or an internationally recognized and widely respected local firm)

■ Local trade agencies or business organizations

■ Real estate consultants

■ Local distributors (as necessary)

The meetings should focus on topics including:

■ Risks associated with the market and potential business models for entry

■ Process for importation and distribution of products

■ Customs fees assessed; transparency of such fees and available methods of payment

■ Transparency of local legislation

■ Penalties or unfair business practices that have an impact on international companies

■ Local anti-corruption laws and initiatives

**Evaluation and Approval.** Once the assessment processes are completed, the company should prepare a written recommendation, including detailed findings, a risk assessment, and a recommendation on whether to continue or to defer the new market entry process. The report should also include recommendations on how to control risks in the market and the proposed compliance oversight of the operations there, either regionally or through Company headquarters. A recommendation regarding entry into the new market should then be made to the appropriate decision makers within the company, who would then document their decision to approve, deny, or defer entry into the new market in light of the findings, risk assessment, and recommendation presented.
Compliance and Training. Finally, if the company pursues entry into the new market and establishes operations there, it should take steps to integrate its operations in the new market into its compliance and training program. For example, the company should ensure that employees in the new market receive and understand the company’s anti-corruption policies and procedures, and that the operations in the local markets implement the internal controls necessary to monitor compliance.

Conclusion

While the challenges of expanding into a new, emerging market are considerable, and management’s attention is often focused on the business challenges of commencing operations, it is prudent to also focus attention on understanding corruption risks and assessing how those risks can be controlled. Understanding the local environment and maintaining an appropriate compliance and oversight strategy is essential to successfully managing ongoing anti-corruption risks.

Chapter 3 - Endnotes

Summary

Nearly every multi-national company conducts business using a combination of its own employees and third parties it hires to perform essential tasks. These tasks routinely include winning government contracts or obtaining permits to conduct business. Third party agents also help companies comply with local laws and regulations, and with moving personnel and goods across borders. Use of third parties is often widespread in emerging markets, because “in-house” expertise and resources relevant to the local market are limited. But in today’s environment of heightened enforcement of anti-corruption laws, third parties may expose a company to significant liability if they act corruptly in violation of applicable law.

Under the FCPA,¹ the UK Bribery Act,² and many other anti-corruption laws, a company can be held liable not only for the corrupt actions of its employees, but also a third party’s actions, if those actions are taken on the company’s behalf. The FCPA, for example, prohibits offering or paying a bribe or something of value to a foreign government official for the purpose of “obtaining or retaining business for or with, or directing business to, any person,” including where the bribe or offer is made indirectly through a third party.³ U.S. criminal law takes an expansive view of corporate criminality, under which an agent’s criminal acts may lead to a corporate criminal conviction.⁴ The U.K. traditionally has enforced a much more narrow concept of corporate criminality, but vastly expanded criminal liability in Section 7 of the Bribery Act, so that a corporation may be held criminally responsible if it fails to have “adequate procedures” to prevent a third-party agent from bribing.

To reduce the risk of liability, companies need to be vigilant in selecting and monitoring the third parties that act on their behalf. To meet the expectations of governments worldwide, this means developing and implementing a rigorous third party due diligence procedure to properly identify, mitigate, and respond to the specific risks associated with the use of third-party agents. Effective due diligence will not only help reduce the likelihood of third parties acting corruptly, but it also will help mitigate any exposure to the parent company if the third party nevertheless acts corruptly, contrary to the company’s wishes. This chapter outlines the key legal considerations and practical steps companies can take to protect themselves from undue risks in working with third parties.
Overview of Legal Framework

There are many types of third-party actions that regularly implicate anti-corruption laws. For example, in the area of government procurement, third parties might seek to obtain lucrative contracts by offering bribes to government officials with decision-making authority over contract bidding or procurement processes. Outside of procurement, many other third parties interact on behalf of companies with government officials: regulatory agents (such as vehicle-licensing agents and visa processors), shipping agents (such as customs brokers and freight forwarders), and professional services providers (such as lawyers, accountants, regulatory consultants, travel agencies interacting with government officials, and lobbyists). Significantly, a bribe for purposes of the FCPA can include not only money but “anything of value,” which could include, for example, gifts, meals, entertainment, and travel.

The conduct of third parties has led to liability for their clients in a number of cases. For example, in September 2015, the U.S. Securities and Exchange Commission (SEC) charged Japanese conglomerate Hitachi Ltd. with an alleged violation of the internal accounting controls and books and records provision of the FCPA. According to the complaint filed by the SEC, Hitachi paid over US$10.5 million to a business partner in South Africa that it knew was the “alter ego” and “funding vehicle” for a political party. The payments allegedly related to a US$5.6 billion power station boiler contract awarded by the South African government. Hitachi agreed to pay a civil penalty of US$19 million, plus disgorgement and prejudgment interest. Notably, the SEC did not allege that Hitachi knew the precise nature of the business partner’s relationship with the political party from the outset, just that Hitachi hired the partner because of its political connection. The SEC also alleges that once Hitachi learned about the partner’s connections, it took no steps to address the added risk.

As another example of third party liability, on May 29, 2013, Total S.A. ("Total"), a French oil and gas company whose securities trade on the New York Stock Exchange, resolved parallel enforcement actions brought by the U.S. Department of Justice ("DOJ") and the SEC. U.S. authorities alleged that Total violated the FCPA by paying over US$60 million in bribes to intermediaries of an Iranian official between 1995 and 2004 as part of a scheme to obtain and retain oil rights in Iran. Similarly, on April 22, 2013, Ralph Lauren Corporation ("Ralph Lauren") resolved parallel FCPA investigations actions through a non-prosecution agreement ("NPA") with the SEC — the Commission’s first-ever NPA in a matter involving the FCPA — and a separate NPA with the DOJ. The SEC and DOJ investigations stemmed from bribes allegedly paid by Ralph Lauren’s subsidiary in Argentina ("RLC Argentina") to government officials. According to the SEC’s NPA, between 2005 and 2009 the General Manager and other employees of RLC Argentina approved over US$500,000 in payments to a customs broker to bribe Argentine customs officials in order to secure the importation of Ralph Lauren products into the country. The corrupt payments included agreements with consultants to pay bribes in exchange for contracts and nonpublic information regarding tenders, as well as payments to consultants who never performed work for the company.

U.S. corporate criminal law is especially strict: companies technically can be liable if the agent pays a bribe to help the company obtain or retain business, even if the bribe was not approved by a company employee. An individual company employee also can be held criminally responsible for the agent’s crimes if the employee knew of the agent’s deed or if she was aware of a “high probability” that the agent was bribing someone (unless the employee actually believed that the agent was not paying bribes). Thus, both the company itself and its individual employees who are supervising third parties will do well to provide oversight to ensure their agent’s activities are lawful.

Conducting appropriate due diligence as part of a robust compliance program also helps a company if a third-party agent nevertheless violates the anti-corruption laws. Federal prosecutors in the US will consider the existence and effectiveness of a company’s compliance program when deciding whether to charge the company for the wrongdoing of its agents.
Moreover, if a corporation is criminally charged, the fact that it has an effective compliance program can help mitigate the penalty under the U.S. Sentencing Guidelines. The UK Bribery Act takes things a step further. Under the Bribery Act, having an effective compliance program can serve as an affirmative defense, absolving the corporation of criminal liability altogether.

Third-party liability is of particular concern under anti-corruption laws because third parties conducting business in other countries often operate under different cultural norms and expectations, and some third parties may view illicit actions as consistent with, and even necessary for, success in local markets.

The following steps provide a roadmap, based on our experience in assisting companies worldwide in designing, implementing, and operating third party due diligence procedures, combined with our analysis of language regarding third-party reviews in recent FCPA deferred prosecution agreements (“DPAs”).

**Implementing an Appropriate Third-Party Due Diligence Procedure**

A properly designed third-party anti-corruption due diligence procedure will have a number of essential elements, all of which should be implemented for the effort to be effective.

1. The first critical step is conducting a risk assessment of how the company conducts business; how, when, where, and why it uses third parties; and how it supervises the work of those third parties.
2. Diligence procedures should be formalized in writing as a policy or procedure, and should be supported by a clear top-down instruction about the importance of following those procedures (the “tone at the top” must be clear).
3. Third parties who are “in scope” for the review need to be determined. For example, third parties that interact with government officials in known risk areas and/or working in high-risk locations for corruption typically would be good candidates for due diligence.
4. The review should be tailored to risk, varying according to the nature of the anticipated interaction with government officials.
5. The company should use contractual clauses and certifications from the third parties to formalize the commitment to compliance; employ mechanisms to provide effective oversight of third-party conduct; and, in appropriate cases, train third-party agents on company policies and procedures.
6. The company should monitor and audit the company’s payments to third parties, including in many cases the payments made by the third parties to others, to ensure that the third party’s actions comply with the company’s policies and relevant anti-corruption laws.
7. The company should document all due diligence of third parties to ensure that there is a record of consideration of risks, and should retain appropriate supporting documentation in an easily accessible database.
8. Finally, the company should consider who should actually conduct and oversee the review procedure, with decisions being made at the appropriate local, regional, and global levels. This function is typically delegated to a legal or compliance department, with adequate oversight from internal and external audit committees.

To facilitate implementing these program elements, the following analytical framework is suggested.

*Risk Assessment.* The first step to implementing any due diligence review is a well-considered cost/benefit analysis and risk assessment of the hiring, retention, and oversight of third parties. In conducting this
assessment, companies should consider, among other things: (1) the types of business in which the company is engaged, (2) the markets in which it operates, (3) its contemplated interactions with government officials, (4) the types of third parties it typically uses for such interactions, (5) its internal governance structure, (6) its anticipated growth, and (7) its business plan. The goal of this risk assessment is to identify key types of interactions that create risk, the types and locations of third parties who perform work on behalf of the company, and the frequency of those interactions. A comprehensive risk assessment serves as the cornerstone of the design and operation of the third-party due diligence review procedure. It informs key program design elements, including the scope, intensity, resources, organization, and controls of the review. It need not be a lengthy or complex process to be effective.

In terms of assessing risk, another task is to evaluate certain functions of employees (and the third parties they supervise) that by their nature create incentives for the use of bribery. For example, if compensation for a particular employee is based on success fees for obtaining regulatory approvals, the employee might have incentives to bribe to ensure that such approvals are forthcoming, and may hire regulatory agents who are prone to doing the same. In other words, if the employees have incentives for misconduct, those same incentives will exist for the third parties, but the company may have less control over the third party, making the risk of corruption greater.

A key threshold question is whether the use of any particular third party is necessary to achieve the company’s business objectives or whether the actions contemplated can be handled “in house.” Performing a function “in house” frequently brings with it better oversight, more accountability, and significant cost savings. Companies should consider whether the potential liability engendered by the use of third parties is appropriate and worth the risk in each particular situation.

**Clearly Articulated Written Policies and Procedures.** Once a company conducts its risk assessment and confirms the necessity of using third parties for particular tasks, the next step is to develop and implement clear anti-corruption policies and procedures detailing the mechanisms for third-party review. These policies and procedures must be clearly communicated to all company directors, officers, and employees, as well as to actual and potential third parties. These written materials should:

- provide a framework for identifying, reporting, and resolving warning signs of corruption arising out of the third-party review;
- minimize actual corruption risks; and
- ensure that the company is partnering with appropriately qualified third parties for proper business purposes.

The risk assessment and the written policies and procedures that the company creates will drive the questions asked in the actual review process outlined below.

Most importantly, the written policies and procedures cannot simply be announced on paper. All policies and procedures must be accompanied by clear support from the top of the company. Leadership must stress that the compliance framework in general and the review of third parties in particular are essential and non-discretionary, and that there are substantial consequences for failing to follow the proper procedures. In some circumstances, third parties interacting with government employees should themselves receive training directly from the company to help ensure that they understand the policies and procedures and the consequences of non-compliance.

**Which Third Parties Are “In Scope”?** The first level of review is to determine which third parties are “in scope,” and thus subject to heightened due diligence review. In this respect, all third parties that interact (or are likely to interact) with foreign government officials on behalf of a company present corruption risks and...
should therefore be presumptively “in scope.” Certain third parties may be automatically “in scope” if they have contracts with the company over a certain monetary threshold, or because of their particular function (e.g., lobbyists, customs brokers, and procurement agents). Companies should also focus on the country or countries in which the third party operates. For example, because of endemic corruption risks in a particular country, a company may decide that all third parties operating in that country are “in scope,” even if their primary responsibilities do not include significant government interactions on behalf of the company. If the third party is not “in scope” (i.e., it is not expected to have dealings with foreign governmental authorities on behalf of the company and not otherwise subject to additional scrutiny), then companies may choose to curtail or adapt the due diligence described below or may decide it is ultimately unnecessary.\footnote{\textit{17}}

**Heightened Review for Third Parties “In Scope.”** For those “in scope” third parties, a review should follow — both in vetting for suitability and risk signs, and in overseeing their work for the company. The type, scope, and control/decision-making structure of such a review will be a highly individualized decision for each company, based on important issues of timing, manner, and the depth of review of existing third parties and new third parties. However, there are some common elements that should be present in any effective procedure.

After the initial determination of which third parties are “in scope,” the company should ask those parties some preliminary questions on a variety of relevant issues, including, but not limited to, qualification to perform the work, staffing, level of experience, references, and company history. These responses are typically provided by the third party in a written questionnaire.

The company should also conduct reference checks with other parties with whom the third party conducts business, but should not include any references who may receive compensation from the third party under review. The results of these inquiries should be thoroughly documented.

A background search for news concerning the third party’s prior conduct, as well as the conduct of the third party’s owners, officers, directors, senior management, and those executives who are principally involved in the relationship with the company, is also an essential part of the review. These searches will also assist in identifying any connections or relationships with government officials. Options for conducting these types of searches include commercial databases, the Internet, local news sources, the local U.S. or other relevant embassy, or a combination of these resources.

During any review, company personnel should be alert for the classic warning signs of corruption, such as excessive requests for compensation, substantial amounts sought in advance, payments going to the third party’s subcontractors, payment only upon “success,” or involvement of government officials in the third party or its operations. If there are still questions or unresolved warning signs, the company should always leave open the option of a further review with additional follow-up questions and due diligence review relating to actual or possible problems, which could involve further questions, a background search, and/or a site visit. The situation may also require the hiring of an outside expert to conduct a more detailed diligence review.

In the course of conducting the due diligence review, if warning signs cannot be resolved, the company may decline to begin a relationship with a new third party or may terminate its relationship with an existing third party. Companies may seek to address potential warning signs — if possible and prudent — through enhanced reporting, more training, a more robust compliance program for the third party, anti-corruption contract clauses, more auditing, ongoing monitoring, and/or other risk-mitigation strategies.

Once a third party completes the review, the company should establish a policy on how often the third party should be subject to a new review. Many companies will elect to review each third party relationship at set intervals: for example, every two to three years, or sooner if there is a fundamental change in the relationship.
**Identifying and Resolving Warning Signs.** Warning signs or so-called “red flags” may arise in connection with the due diligence exercise. Identifying and resolving these signs is critical to effective due diligence. There are four main steps in this type of due diligence.

**Step One: Evaluate the nature of the risk by type of third party.** Initially, the compliance risk presented by interacting with third parties should be assessed based on the type of third party (not, at this stage, specific third parties). The factors to consider in the evaluation include the:

- services to be provided and nature of the government interaction;
- level of discretionary authority exercised by the officials;
- frequency of the governmental interactions by the third party;
- value of the governmental interactions to a company’s business;
- locations in which the third party conducts business; and
- the extent to which the third party uses subcontractors for government interactions.

Based upon a subjective analysis of these factors, the type of third party may be classified as high, medium, or low risk, and the diligence process applied accordingly.

**Step Two: Understand the nature of the risk presented by the specific third party.** To evaluate specific third parties, consider the following factors to highlight any areas of concern:

- type of third party (large or small, services to be provided);
- results of the due diligence research (are there any “hits,” and, if so, are there any “false positives”);
- number of employees/locations (size adds to complexity and oversight issues; while smaller organizations have easier oversight, they may lack a compliance culture);
- nature and length of the proposed contract, versus audit rights (longer commitments entail greater risk; contract clauses should include strong audit and access rights);
- compliance framework (what does the compliance program of the third party look like?);
- relevant policies (are appropriate anti-corruption policies in place?);
- training (is training provided; if not should it be provided to the third party?);
- oversight of subcontractors (if subcontractors are used, what controls and oversight are in place?); and
- cooperation with “process” (has the third party cooperated with the diligence and oversight process?).

**Step Three: Identify warning signs.** Throughout the diligence process it is important to look for warning signs. This two-part process includes:

- looking for indicators that might signal a risk of corruption, or might indicate a heightened business risk; and
- looking for “positive” signs that confirm the third party’s proper conduct.
Positive and negative factors that need to be considered in any evaluation.

**Positive Signs**
- No Government Contacts
- Commercial Capability
- Experience in the Region
- Commercial Directory Listings
- Past Positive Relationship
- Favorable Business References
- Based in Low-Risk Country
- Established Facilities

**Negative Signs**
- Related to Government Official
- Government Official Referred
- Lacks Licenses or Registrations
- Lacks References
- Lacks Experience
- Primary Strength is Influence
- Incorporated in High-Risk Country
- Questionable Past

**Third-Party Characteristics**

**Positive Signs**
- Effort-based Compensation
- Concrete Deliverables
- On-budget, On-time Performance
- Interface with Qualified Staff
- Detailed Scope of Work
- Transparent Payment Process
- Accurate Documentation

**Negative Signs**
- Refuses Corruption Contract Provisions
- Excessive Compensation
- Misleading Payment Structure
- Anonymity
- Success Fee
- Subcontracting to Third Party
- False Documents
Positive Signs

- Performance Consistent with Proposals
- Accurate Documentation
- Anti-Corruption Program
- Well-Trained Employees

Negative Signs

- Becomes Target of Investigation
- Unclear or Suspicious Documentation
- Requests Backdating or Fraudulent Documentation
- Refuses to Certify Compliance
- Connection with Government or Customer Emerges
- Suspicious Expenses or Travel

Positive Signs

- Commercially Reasonable Terms
- Regular Channels
- Matches Commercial Capability
- Reasonable Compensation
- Payment in Country
- Established Banks

Negative Signs

- Third Countries or Parties
- Third-Country Banks
- Shell Companies
- Post Office Boxes
- Larger Payments During Government Interaction
- Success Fee
- Unexpected Bonuses or Loans
- Invoices Paid Too Quickly
- Requests Negotiable Currency
Step Four: Resolving warning signs. When the diligence process identifies a warning sign, how to address it becomes critical. Some warning signs may be easily resolved, while others may present real challenges to proceeding with the overall relationship. Consider the type of warning sign and how it may be resolved by evaluating the nature of the warning sign itself. Some possible approaches include:

- if the warning raises transparency issues (“what is going on here?”), consider taking steps to increase the visibility of the transaction;
- if the warning sign raises a question (“I don’t understand this situation”), seek further information to see if it “explains” the issue;
- if the warning sign consists of prior “bad conduct,” consider the nature of the misconduct and assess remediation efforts undertaken, if any;
- if the warning sign raises “people issues,” determine whether these people can be isolated from the relationship;
- if the warning sign raises “structural” deal issues, determine what can be changed to improve the situation;
- if the warning sign raises qualification issues, assess whether the third party is really qualified;
- if the warning sign raises performance issues, ask how the third party has performed in the past, and how any past failures have been remedied;
- if the warning sign raises financial control issues, consider whether the control weaknesses can be strengthened; and
- if the warning sign raises documentation issues, assess the supporting documentation to determine if it is adequate, and if not, what additional documentation should be required.

Upon completion of this analysis, ask whether any unresolved warning signs are significant enough to call a halt to the relationship. Determine if controls and oversight can be put in place to control “controllable risks.” Finally, consider the specific oversight model to be implemented, including:

- the third party’s compliance program;
- the third party’s compliance program, supplemented by specific elements of the company’s program; or
- the company’s compliance program.

Tools a Company May Use to Mitigate Corruption Risks with Third Parties. Companies should have available a number of tools to mitigate third-party corruption risks. The finance function at the company should conduct an independent review of any expenses and reimbursement requests sought by the third party prior to authorization of payment. This might include checking claims for payment against the obligations under the contract, ensuring adequate supporting documentation exists, and generally being alert for warning signs of corruption, such as unexplained charges in invoices. The company should also require annual compliance certifications.

Finally, companies should include standard anti-corruption provisions in third-party contracts. Depending on the circumstances, and as noted very clearly by the DOJ in recent DPAs, these contractual clauses could include:

- anti-corruption representations and undertakings relating to compliance with the anti-corruption laws;
- rights to conduct audits of the books and records of the third party to ensure compliance with the foregoing; and
rights to terminate an agent or business partner as a result of any breach of anti-corruption laws, and
regulations or representations and undertakings related to such matters.\textsuperscript{18}

\textbf{Monitoring and Auditing.} An important aspect of implementing a third-party due diligence procedure
is including a systematic and consistent way to monitor, audit, and review third-party relationships.

Monitoring may be built into a company’s internal controls through its finance function (i.e., a reconciliation
of expenses and reimbursement claims against contractually required documentation and supporting
documentation). In addition to the finance check, another control that many companies use is to identify a
person within the company who is designated as the point of contact with the third party and manages the
relationship between the company and the third party. This lead point of contact should have actual and
ongoing knowledge of all relevant activities of the third party on behalf of the company.

Companies also should establish a written audit plan that is based on a reasonable sample of third parties,
that considers the nature of the third parties’ activities, and takes into account the risks inherent in specific
countries or regions where corruption risks with the use of third parties are greater. This determination of
the sample size and third parties selected should be based on assumptions that are articulated in the audit
plan. The auditing function may already exist as a discrete function in a company, and, if so, auditing should
be integrated with that existing function.

Whatever the type and extent of the monitoring and auditing, the company should be sure to document its oversight
so that this monitoring and auditing process itself can be reviewed periodically to ensure effective operation.

\textbf{Oversight and Administration of the Due Diligence Program.} A successful third-party due diligence
procedure needs staff and resources to conduct the review and oversight. In determining who actually
conducts the review and administers the overall procedure, companies should consider, among other things:

\begin{itemize}
  \item the type of business involved and how it operates, with considerations including size, complexity, lines
        of business, and decision-makers;
  \item the extent to which the company is decentralized or centralized and the roles to be undertaken by
        headquarters versus regional and local operations;
  \item the role of the legal and compliance departments at various phases of the development and oversight of
        third party relationships; and
  \item whether the due diligence relating to third parties should be conducted internally or externally, and, if
        externally, at what point these external reviewers are involved in the process.
\end{itemize}

Company personnel who actually conduct this due diligence review must understand the level of risk of
relevant third parties, be specifically trained to address this risk, and understand how to raise concerns
within the company when they arise. To be effective, a review procedure must have built-in mechanisms to
ensure consistency of review across the company; a mechanism to create and maintain a complete review
“file” to document the work undertaken and the resolution of any warning signs; and appropriate oversight
of program operation by senior management regardless of how decentralized a review procedure operates.
Accountability of those conducting the review for the company is also essential for program success.

\textbf{Conclusion}
Governments have made clear in recent guidance and settlements that they expect a robust review of third
parties as part of an overall effective anti-corruption compliance program. Companies who implement a
third party anti-corruption due diligence procedure will minimize the risks that arise when working with
third parties.

While the principles stated above provide guideposts and checklists, the nature of a review must be individually
tailored to particular company risks, needs, capabilities, and markets. In this era of heightened enforcement of anti-corruption laws, inaction or failure to properly oversee third party operations is simply not an option.

Chapter 4 - Endnotes

1 The U.S. Foreign Corrupt Practices Act prohibits a broad range of persons and businesses, including U.S. and foreign issuers of securities registered in the United States, from making a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. These provisions also apply to foreign persons and companies that take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies with securities listed in the United States to meet its provisions on recordkeeping and internal accounting controls. These accounting provisions were designed to operate in tandem with the anti-bribery provisions of the FCPA and require companies covered by the law to make and keep books and records that accurately and fairly reflect the transactions of the company and to devise and maintain an adequate system of internal accounting controls.


4 A corporation can be held liable for the actions of its agents, even where the agent may have acted for mixed motives, so long as one motivation of its agent is to benefit the corporation. See United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is “whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated — at least in part — by an intent to benefit the corporation” (internal quotations omitted)).


10 U.S.S.G. § 8C2.5(f).

11 Bribery Act § 7(2).

12 The U.K. Bribery Act is likely to be interpreted even more widely in scope than the FCPA, prohibiting bribes not just to foreign officials but to commercial parties as well. See Arnold & Porter, U.K. Bribery Act 2010, supra note 2.


14 While the Bribery Act prohibits commercial bribery as well, for most companies the greater risk will be where third parties interact with government officials.

15 See, e.g., Deferred Prosecution Agreement, United States v. Total, S.A., Crim. No. 1:13CR00239 (E.D. Va. May 29, 2013) [hereinafter Total DPA], Dkt. Entry No. 2, at C-5, http://www.justice.gov/iso/opa/resources/93920135290103746908524.pdf (“To the extent that the use of agents and business partners [third parties] is permitted at all by [the company], it will institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including . . . Properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of all agents and business partners.”).

16 The DOJ has required in connection with settling FCPA matters that companies inform all third parties of the company’s “commitment to abiding by laws on the prohibitions against foreign bribery, and of [the company’s] ethics and compliance standards and procedures and other measures for preventing and detecting such bribery.” Id.

17 Of course, simply because a third party is not “in scope” for the heightened due diligence review, the company should not ignore the possibility of corruption issues and may want to take additional steps to ensure compliance with these or other laws, including appropriate reviews and certifications.

18 See, e.g., Total DPA, supra note 15, at C-5–C-6.
Summary

Companies routinely pay for gifts, travel, and entertainment for persons outside of the company. Governments worldwide, however, have raised concerns regarding how and when gifts, travel, and entertainment can be given to government officials.

The OECD Guidance advises companies to set up compliance programs structured to prevent and uncover bribery in the areas of gifts, travel, and entertainment. Although paying for the travel of foreign officials or giving them gifts is not prohibited outright, the United Nations, World Bank, International Chamber of Commerce, and Transparency International all emphasize the need to ensure that gifts, travel, and entertainment are not used to create an inappropriate advantage as to the outcome of a business transaction. Any gifts or travel-related expenditures that companies make for their foreign official clients must be reasonable, must be made for legitimate business purposes, and must comply with local law. If expenditures do not satisfy these requirements, companies risk violating not only the FCPA, but also the U.K. Bribery Act and other anti-corruption laws of the countries in which they are doing business.

Risk of Corruption Relating to Gifts, Travel, and Entertainment

While gifts, travel, and entertainment are generally risk areas for corruption worldwide, developing markets may have an entrenched culture of gift-giving that makes compliance with anti-corruption laws even more difficult. China, for example, has a culture of guanxi, in which business relationships are built through the exchange of gifts or other favors. Because state-owned companies are prevalent in China, many Chinese business executives fall into the “foreign official” category. Companies must therefore be diligent while doing business in China to ensure that their behavior does not cross the line.

Corruption risks are not limited to pricey vacations and luxury goods; relatively inexpensive gifts and other business “perks” have been the subjects of corruption investigations as well. For example, the SEC and DOJ took issue with Eli Lilly giving spa treatments as gifts to Chinese officials, and with Pfizer providing a “point program” for Chinese government doctors to earn things like reading glasses, tea sets, and medical books.
The intent behind the giving of the gift and the circumstances in which the gift was given were of critical importance in determining whether there was a violation.9

This culture of gift-giving is, of course, not unique to China. In India, physicians commonly receive expensive practice-related items, paid conference travel, and tokens of esteem. Companies have also run into trouble for inappropriate gifts, travel, and entertainment in Russia. The SEC brought charges against Pfizer in 2012, alleging that from at least 2000 to 2005, Pfizer’s Russian subsidiary, among other Pfizer entities, provided gifts, support for domestic and international travel, and other benefits to doctors employed by the Russian government and other government officials. Pfizer settled the charges for about $60 million in fines, disgorgement of profits, and interests.10 Pfizer employees purportedly made these improper payments to obtain regulatory approvals of products, to avoid delays and penalties associated with the importation of products, and to influence doctors to prescribe Pfizer products.11

**High-Risk Areas**

Companies should be particularly vigilant with regard to two high-risk areas related to gifts, travel, and entertainment for foreign official clients, which have received recent attention: use of travel agencies and tickets to major sporting events.

**Travel Agencies**

Recent corruption scandals have revealed that some companies use travel agencies to siphon funds for improper cash payments or lavish gifts. For example, the Chinese government’s inquiry into alleged business practices in the pharmaceutical sector has focused on potential misconduct by third parties acting on behalf of the pharmaceutical companies, most notably travel agents and third-party business consultants.

IBM has faced similar allegations in China.12 An SEC complaint alleged that IBM-China used travel agencies, in at least 114 instances, to create slush funds for the travel and entertainment costs of Chinese government officials. Travel agencies issued fake invoices; included *per diem* payments and gifts in the travel package; and deviated from pre-approved travel itineraries and expenses in order to create these slush funds.13

While this problem is particularly acute in China, it has arisen in other countries as well.14 Corporate employees can disguise inappropriate expenditures as legitimate business travel—such as site visits, training workshops, or conferences—by directing travel agents to misrepresent the number of people traveling, who the travelers are, or where they are going. With the help of travel agencies, employees may also create fake events and submit falsified receipts for expenses related to travel, accommodations, or venue. Travel agencies have even reused old photos as “evidence” that the conference occurred.15

**Major Sporting Events**

The U.K. Bribery Act Guidance reassures companies, “[n]o one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix.”16 This part of the guidance focuses on private clients, advising that such expenditures may be acceptable if they are transparent and reasonable. However, where tickets or other amenities are provided to government officials, the risks of non-compliance are considerably higher.

Major sporting events like the Olympics and the FIFA World Cup pose considerable risks for companies. Indeed, the DOJ scrutinized BHP Billiton over suspected corrupt activities at the Beijing Olympics.17 Similarly, the SEC alleged that Weatherford International paid for two government officials to attend the 2006 FIFA World Cup with no legitimate business purpose.18
Building a Compliance Program to Mitigate Risk

Compliance programs in emerging markets must be structured to target risks relevant to a company’s operations, its business model, and the regions in which it operates. However, some basic guidelines apply any time a company sponsors travel, entertainment, or gifts for a government official.

Ensuring That Gift, Travel, or Entertainment Expenditures Have a Legitimate and Bona Fide Business-Related Purpose

Entertainment provided to foreign official clients must be carefully controlled. Simply handing tickets to foreign officials may be interpreted as a corrupt act. Any entertainment or leisure activity scheduled during travel that is acceptable for legitimate business reasons, such as the promotion of a product, should be a modest part of the itinerary and should not eclipse the legitimate business purposes of the travel. The FCPA, for example, includes an affirmative defense if the gift or travel was a “reasonable and bona fide expenditure” related to “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government.” The DOJ has explained that this means that providing samples or paying for travel for training programs is generally acceptable, so long as the samples and travel payments are reasonable and there is no “non-routine business” pending with the foreign government.

The OECD Guidance recommends that companies train their employees on how to deal with specific risky situations as they arise. Because a blanket compliance program may become less effective as risks shift, companies should consider whether supplemental, event-specific policies would be appropriate in certain cases.

Ensuring that Gift, Travel, or Entertainment Expenditures are Reasonable and Proportionate

The OECD Guidance recommends that companies enact explicit policies that employees can use to assess whether the expenditure they intend to make is appropriate. Whether or not such policies include strict dollar limits, expenses incurred should be reasonable and modest: economy class airfare where possible (although business class may be appropriate for a high-ranking official traveling longer distances), appropriately priced accommodations, and no leisure side-trips. Companies should not pay for spouses to accompany the official, since a gift to a friend or family member is considered a gift to the foreign official.

Gifts should be of nominal value, appropriate for the occasion, and not easily sold for cash. Assessment of whether the gift is appropriate depends on context. Further, gifts with clear marketing or promotional value, such as items bearing the company logo, are less likely to violate anticorruption law. On the other hand, jewelry and high-value gift certificates are almost certain to raise corruption issues.

Ensuring that the Expenditure Is in Compliance with Local Law

Even if gifts or expenses are expected under local social norms, this is no defense if local law is violated. Companies should ensure that they are in full compliance with the law of the foreign official’s country. If possible, the company should obtain a written legal opinion stating that the gift or travel is legal, and/or obtain permission from a government ethics officer.

Ensuring that the Transaction Is Transparent and Well-documented

All payments made for gifts, travel, and entertainment must be accurately recorded in the company’s records. Details about the giver, recipient, value, and occasion for the gift should be reported internally, which will
help the company and any third-party auditors detect patterns of gift-giving. This may be especially helpful in circumstances where one low- to moderate-value gift may not be suspicious, but where repeated gifts may be cause for concern.

Companies can institute a number of policies to increase transparency and decrease the appearance of impropriety. For example, when hosting government officials, companies should pay relevant vendors directly and not give government officials the money to pay the costs themselves. Also, companies may be wise to allow the government to select which officials to send on travel, rather than selecting specific attendees themselves. Finally, as a general matter, companies should refrain altogether from giving gifts and paying for trips while a business deal with the government is pending. Such activities may be seen as an inappropriate inducement and will raise suspicions of corruption.

Companies should ensure that transactions involving third parties acting on behalf of the company are just as transparent and well-documented as actions taken by direct company employees. The OECD advises multinational companies to perform due diligence on potential business partners, inform business partners of the company’s commitment to compliance, seek a reciprocal commitment from potential partners, and thereafter monitor compliance.33

Transparency among travel agencies in particular can be improved by using a limited number of known and trusted agents. The fewer agents that a company is working with, the better the company can perform the initial due diligence and then continue to monitor their performance and compliance with the law.34 More generally, travel agents should receive training on the company’s compliance policies and agree to adhere to the policies. Finally, the company should retain the right to audit the travel agency’s records pertaining to its work for the company and conduct regular audits for both detection and deterrence.

Ensuring that Appropriate Compliance Controls Are in Place and Effective

While clear policies are important to set the correct company expectations on how to handle gifts, travel and entertainment, the controls surrounding these policies are equally important in an effective compliance program. Which type or types of controls are used in emerging markets is a function of the level of corruption risk in a market, the nature of the company’s interactions with government officials, the frequency of the interactions, the nature of the company’s business and the size and complexity of its business.

Options for controls on gifts, travel, and entertainment cover a spectrum of levels and intensity, and may include:

- A general policy, with reliance on the financial controls the company uses for authorizing payments or employee reimbursement;
- A general policy, with reliance on the employee’s supervisor for authorizing payments or employee reimbursement, if not already required by financial controls;
- Preapproval of the interaction by the employee’s supervisor;
- Preapproval by regional management (or global management), typically based on an expenditure threshold;
- Preapproval of the interaction by local compliance or local legal;
- Preapproval of the interaction by regional compliance or regional legal, typically based on an expenditure threshold, although specific high-risk interactions may require regional approval based on the nature of the interaction, for example, where the government official is very senior;
Preapproval of the interaction by global compliance or global legal, or even the global compliance officer or general counsel, again typically in high expenditure interactions or activities, such as the involvement of a company’s senior executive.

Deciding where to place the level of controls is a function of the risks identified above, but also involves several practical factors such as the structure of the company’s compliance and legal organizations, the experience between local compliance and legal in similar matters, and the management philosophy on the relationship of local operating autonomy and regional/global oversight of business matters in general. Determining the appropriate way to implement controls is often no easy decision and the most effective approach will often evolve as the effectiveness of controls is assessed, based on the evaluation of the implementation of the chosen approach over time.

**Practical Tips for Monitoring Employee Adherence to the Compliance Program**

Companies can ensure that their employees are following internal compliance policies on gifts, travel, and entertainment by:

- Requiring pre-approval of gift, travel, and entertainment expenditures, with more expensive purchases requiring higher-level approval;
- Requiring corroborating documentation for all major expenditures before reimbursement is issued;
- Mandating that all such purchases be made on specially issued company credit cards;
- Prohibiting the use of cash by employees to pay for travel expenses of others;
- Prohibiting employee reimbursement for expenses of government officials, and requiring payments of these costs though the company vendor or procurement processes; and
- Conducting forensic audits with external auditors.

These practical compliance tips are by no means exhaustive, and should instead serve as a guide for companies as they design and implement their internal policies regarding gifts, travel, and entertainment. As the OECD Guidance recognizes, there is no single compliance program for all businesses: an effective program “should be developed on the basis of a risk assessment addressing the individual circumstances of a company.”

**Chapter 5 - Endnotes**

4. See U.K. Bribery Act at ¶¶ 26, 30; id. at Appendix A, Case Study 4.


See Warin, Diamant, & Pfennig, supra note v, at 68-69.


See id. at 24. See Warin, Diamant, & Pfennig, supra note v, at 49-50.

See Warin, Diamant, & Pfennig, supra note v, at 49-50.

See OECD Guidance, supra note i, Annex II at (A)(6).

Id.

OECD Guidance, supra note i, Annex II, at (A).
Summary

Many individuals and corporations actively support charitable causes around the world. The need to support worthwhile charitable projects in many developing markets is particularly acute due to local needs, the lack of government funding, and the lack of an adequately developed infrastructure.

Local officials in developing markets often ask multinational companies for support and funding for philanthropic activities. While support for such activities is often appropriate and worthwhile, interactions with government officials in connection with such activities can raise corruption risks under applicable anti-corruption laws, including the FCPA, when anything of value is given in expectation of a benefit in return. In this regard, the FCPA prohibits paying, giving, offering, promising, or authorizing any “payment” (which term includes “anything of value”) to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. The scope of the FCPA is not limited to payments made directly to foreign officials; it also prohibits payments to nominally charitable organizations, if those payments are made for improper purposes.

Accordingly, effective compliance controls involving charitable contributions are essential in designing and implementing an effective compliance program in developing markets.

Contexts for Anti-corruption Concerns in Philanthropy

Businesses operating in emerging markets. Anti-corruption issues may arise when for-profit businesses make philanthropic contributions: for example, where foreign officials have a direct or indirect interest in a particular charitable donation or have asked that a contribution be made to a particular charity. When something “of value” is provided and a government official receives a direct or indirect benefit, there is a risk that anti-corruption laws, including the FCPA, may be violated.

Nonprofits, NGOs, and charitable organizations operating in emerging markets. Anti-corruption issues may also arise when a charitable organization or persons acting on their behalf operates in developing markets. Violations can occur as a result of interaction with any foreign official, which may include the following:

- regulatory authorities;
customs or taxation officials;
employees of a state-controlled business or other entity (including, for example, medical personnel in a state-controlled hospital or public health service); or
any other government employees.

The foreign official’s rank is not determinative, because anti-corruption laws apply to interactions with junior as well as senior government officials. The focus is on whether the payment’s purpose is corrupt, rather than on the rank of the party receiving it.

Notably, concerns could arise in connection with conduct that is common in the cultures of many developing markets and might be expected by some foreign officials as a condition for doing business in a market. For example, corruption issues may arise whenever travel, lodging, meals, or entertainment are provided for foreign officials in interactions with charities, such as in connection with visits to facilities, meetings, and other business-related or philanthropic activities.

Special Risks in Charitable Contributions and Grant-making

Charitable contributions and grants made or offered with the intent to influence a government official improperly to obtain new, or retain ongoing, business are prohibited by the FCPA, the U.K. Bribery Act, and other anti-corruption laws. Proscribed charitable contributions can take many forms, including:

- Direct or indirect payments in support of a charitable organization, whether in the form of a donation or a grant;
- Corporate sponsorships;
- Product donations (e.g., product samples used for fundraising or distribution for disaster relief);
- Donation of office space;
- Work performed by company or foundation employees for a charity during paid work hours;
- Purchase of tickets to fundraising events; or
- Payment for advertisements, printing, product donations, or other expenses on behalf of charities.

U.S. Anti-Corruption Enforcement in Connection with Charitable Donations

In 2004, the SEC levied a US$500,000 civil penalty against Schering-Plough related to charitable contributions with corruption implications in Poland. The SEC alleged that Schering-Plough, through a local subsidiary, made payments to a Polish charitable organization in order to persuade the head of the charity—a government official—to purchase Schering-Plough’s products. Employees of the subsidiary allegedly tried to cover up the purposes of the payments by creating false documentation for the contributions and avoiding internal controls required for approval of the contributions. In this case, the charity was bona fide and not set up by a government official as a conduit for bribery. As a result, due diligence on the charitable organization itself would not have been sufficient to identify the foreign bribery risk. But had Schering-Plough implemented procedures to vet the underlying purpose of the donation, the corrupt intent might have been identified. It is worth noting that while the SEC did not allege that the US parent knew about the improper payments by the local subsidiary, it nonetheless held the US parent liable for the actions of its subsidiary.3

The DOJ also provides guidance on the FCPA implications of charitable contributions (and other payments) through opinion procedure releases issued in response to the specific inquiries of businesses and nonprofits.4 Although each opinion procedure release is explicitly confined to the facts presented in the opinion, the principles discussed are instructive for companies and their foundations in connection with international charitable giving.
In one opinion procedure release, the DOJ expressed the view that a US$10 million donation by a US energy company in South Asia for the construction of a medical facility near one of the company’s energy plants would not violate the FCPA. The company had stated to DOJ that it would make the donation via a US charitable organization and a public company in the host nation; would require certifications that “none of the funds [would] be used, promised, or offered in violation of the FCPA”; and would ensure “that none of the persons employed by or acting, on behalf of the charitable organization or the limited liability company are affiliated with the foreign government.” The company also stated that it would “require audited financial reports from the U.S. charitable organization, accurately detailing the disposition of the donated funds.” This example demonstrates that implementing safeguards and conducting due diligence on a donee can minimize the risk of FCPA violations.

The DOJ has twice issued opinion procedure releases regarding charitable organizations funding training or travel for foreign government representatives. In one release, the DOJ advised that it did not intend to take any enforcement action in connection with a payment by TRACE, a membership organization specializing in anti-bribery initiatives, to journalists from the People’s Republic of China to enable them to attend a TRACE-sponsored press conference in Shanghai. The DOJ noted that the payments for travel expenses fell “within the FCPA’s promotional expenses affirmative defense in that the expenses [were] reasonable under the circumstances and directly relate[d] to ‘the promotion, demonstration, or explanation of [TRACE’s] products or services.’” In another opinion procedure release, DOJ did not find any issue with an environmental nonprofit organization providing travel, lodging, and meal expenses for government representatives from regional countries to attend training courses in the US. The key fact appeared to be that the nonprofit did not seek to obtain or retain business with the regional governments.

Critically, the DOJ has emphasized that anti-corruption risks can be minimized if funding is provided directly to a government entity, rather than to an individual government official or a charity designated or suggested by the government official. In one specific case, the DOJ stated that the FCPA did not apply to a US$100,000 donation to construct an elementary school in Asia, because the money would be given directly to a government entity (as opposed to an official of that government).

**Choosing Partners and Donee Organizations to Minimize Anti-Corruption Risks**

Anti-corruption concerns arise whenever a contribution or grant is made to a charity or non-profit from which a government official may derive a personal benefit. Risks can arise, for example, if the charitable entity is connected to a government official (e.g., through a family member) or is of particular personal interest to the official.

In order to mitigate risks related to charitable donations, philanthropic giving must be undertaken under a well-structured and supervised set of policies and internal controls. Warning signs include:

- The non-US charity refuses to provide adequate documentation or suggests that the donation may only be made anonymously;
- The donation is directed to a bank account in a third country (other than a country where a grantee is based or carrying out activities);
- An officer, director, or employee of the charity has family or other ties to foreign government officials;
- A foreign government official designates the donation amount or intended recipient, or directly or indirectly requests the donation;
- The donation is made on the suggestion or understanding that it could influence government action or lead a foreign official to look more favorably on the donor;
Gifts or travel, lodging, meals, or entertainment are provided to foreign government officials in connection with charitable activities; or

The donation will be used to hire third parties who have connections to government officials or who have been identified or suggested by government officials.

**Minimizing Corruption Risks Associated with Third Parties**

The use of third parties in connection with both charitable giving and interactions with government officials requires special precautions. Companies and foundations may be held liable for the corrupt acts of third parties acting on their behalf—such as local persons, companies, agents, business partners, and consultants—when the companies knew or should have known of the corrupt acts. For example, a company could be liable under the FCPA or U.K. Bribery Act if, in connection with philanthropic activities, the third party attempts to influence a foreign government official on behalf of the company. Third-party risks are discussed in further detail in Chapter 4.

**Establishing Clear Guidance on Charitable Giving**

Clear policies are essential to reducing corruption risks in charitable giving. Regardless of whether the guidance is in a policy or procedure, in a standalone document, or in a section of a larger compilation, certain general principles should be articulated. At a minimum, the contribution should be:

- Reasonable in nature and appropriate to support the stated needs of the activity or project;
- Proper under the circumstances (i.e., in the specific situation, the contribution does not raise questions from a reputational risk perspective);
- Lawful under all applicable laws, regulations, and rules;
- Given openly and transparently with no appearance of impropriety;
- Given without expectation of reciprocity, obligation, favor, or action in return;
- Accurately recorded in the company’s books and records.

But contributions should not be made by employees on behalf of a company who then seek reimbursement from the company.

Just as importantly, the guidance should make clear that contributions should never be announced, offered, promised, or made to improperly influence any act or decision or to secure any improper advantage. This would include seeking to improperly influence government officials by making the contribution to an organization from which the official receives either a direct or indirect benefit.

Consideration should also be given to whether or not there should be further restrictions on the entities that may be the recipient of the contribution. For example, consider whether the contribution should be given only to organizations that are bona fide charities under local law. In the U.S., that would typically mean an organization qualified as tax-exempt. In other countries, the requirements vary, and in some developing markets the requirements may not be as specific. If the company implements a higher standard for qualification that does not fit the local environment, some entities may be disqualified from receiving support. But the primary purpose of these types of restrictions is to reduce the risk that personal benefits may be conferred and the risk that company funds may be wasted or diverted to causes which the company may not wish to support.

Another potential restriction on recipients is prohibiting contributions from being offered, promised, or made to individuals (as opposed to organizations). Some companies enforce this type of restriction.
to reduce potential corruption risk or to otherwise ensure company funds are properly used. Permitting direct payments to individuals increases the risk that the individual may in fact be a government official or that there is some other connection to a government official. Permitting contributions to individuals also makes it difficult to oversee use of the funds. On the other hand, this restriction sometimes impedes rapid responses to crisis situations like natural disasters, and may cause frustration locally when a disaster has occurred and time is of the essence, as is often the case in developing markets where governments may not be capable of responding quickly to urgent humanitarian needs.

Ensuring that Appropriate Compliance Controls are in Place and Effective

While clear policies on charitable contributions are important, the controls implementing these policies are equally critical to an effective compliance program. Which type or types of controls are used in emerging markets is a function of the local level of corruption risk, the nature of the company’s intended contribution, the nature of the company’s business, and the size and complexity of its business.

Options for controls on charitable contributions cover a spectrum of levels and intensities, and may include:

- A general policy, with reliance on the financial controls a company uses for authorizing a contribution and payments;
- Preapproval of the contribution by the employee’s supervisor;
- Preapproval of the contribution by local compliance personnel or counsel;
- Preapproval of the contribution by regional compliance personnel or counsel, typically based on an expenditure threshold;
- Preapproval of the contribution by regional management, typically based on an expenditure threshold and/or other indicators of high-risk (e.g., a contribution involving a government official or government interactions); and
- Preapproval of the contribution by global compliance personnel or counsel (up to and including the global compliance officer or general counsel), typically based on an expenditure threshold and/or other indicators of high risk (e.g., a contribution involving a government official or government interactions).

These control options may also be modified to require higher levels of review where it appears that governments or government officials are involved in the contribution, or are beneficiaries of the contribution. On the other hand, top-level review is not always necessary for small or routine contributions to established charities, because the attendant corruption risks are typically low.

When and how this elevated level of review is triggered is another consideration that may vary from company to company. One option is for local managers to determine whether there are corruption risks involved as the result of a government connection. Another option is to establish a committee to consider contributions and conduct adequate diligence to determine if there is a government connection. Once a government connection is discovered, a heightened review with elevated approval requirements could then be required.

Deciding how to structure controls in reviewing and approving charitable contributions is a function not only of the risks identified above, but also of several practical factors, such as the structure of a company’s compliance and legal organizations, the experience of local compliance and legal personnel handling these or similar matters, and the management philosophy on the relationship of local operating autonomy and regional/global oversight of business matters in general.

The nature of charitable giving at an organization also affects the implementation of effective controls. If there are small contributions given in high volumes, corruption risks will be relatively low; these
contributions may only require a lower level of scrutiny, oversight, and approval. Furthermore, in companies that give a high volume of small contributions, the legal and compliance organizations may find themselves overwhelmed in reviewing donations, without adding a great deal of value from a risk mitigation perspective. On the other hand, high value contributions given less frequently and involving a more complex relationship with the recipient generally require more review at a higher level, including legal or compliance personnel.

Adequate documentation of contributions is also important. In that regard, some companies require an application or proposal from the organization seeking support, particularly for contributions that are above a certain monetary threshold. The application or request would describe, for example, the organization and its history, the nature of the request, the purposes to which the contribution would be put, and the organization’s willingness to provide reports or other further documentation.

A written agreement with the recipient organization is also often required, again typically when the contribution exceeds a certain level or the project involves more complexity in its implementation beyond a simple one-time payment. Many companies consider establishing phased payments based on value thresholds; anti-corruption compliance clauses; and audit rights. Another control approach is oversight of the recipient through reporting requirements and certification of use of funds, annual reporting, and audit rights.

While the use of these enhanced provisions on recipients may vary based upon the circumstances, it is important to design the oversight so it is tailored to the nature of the interaction. It is generally good practice to include audit rights in the agreement to ensure the option of more detailed oversight in any circumstance.

Determining the appropriate way to implement controls on charitable contributions can be very fact-specific to the company, the charities it supports, and its compliance structure. For many companies, the most effective approach will evolve over time as controls are assessed and adjusted based on experience.

**Conclusion**

Charitable giving is not immune to corruption risks. Violations can occur in any company or foundation, in all industries, and in virtually any foreign country. But these risks are particularly acute in emerging markets, where there is often an expectation that multinational companies should commit significant resources to meet pressing local needs that are not addressed by local governments.

Companies that engage in corporate giving in emerging markets are encouraged to implement a robust compliance program that mitigates corruption risks and prevents corrupt payments from taking place. A compliance program can also help organizations track their program expenditures, ensure accountability among their employees, and mitigate the possibility of other control problems.

**Chapter 6 - Endnotes**

1 Ernst & Young, *Overcoming Compliance Fatigue: Reinforcing the Commitment to Ethical Growth, 13th Global Fraud Survey*, at 13 (2014) (“Nearly 20% of all global survey respondents, and 39% of CEOs, have been asked to make a charitable contribution by a customer or client.”), http://www.ey.com/Publication/vwLUAssets/EY-13th-Global-Fraud-Survey/$FILE/EY-13th-Global-Fraud-Survey.pdf.
2 See id.
4 The FCPA contemplates that DOJ may from time to time provide responses to specific inquiries by persons covered by the statute concerning the conformance of their conduct with the Department’s present enforcement policy on the substantive provisions of the FCPA. See 15 U.S.C. §§ 78dd-1(e)(1977).


Summary

In mergers and acquisitions (“M&A”), the purchasing entity (“Purchaser”) may become liable for the corrupt acts, past or present, of the target entity (“Target”). The SEC and the DOJ take the position that “when a company merges with or acquires another company, the successor company assumes the predecessor company’s liabilities[,] … and FCPA violations are no exception.” It is therefore critical for Purchasers to conduct proper due diligence in order to identify any past corrupt conduct by a Target and any corruption risks associated with a proposed M&A transaction. A merger or acquisition with underlying corruption problems can expose a Purchaser to investigations, criminal charges, fines, liability of directors or board members, unwanted media attention, and reputational harm. Existing corruption problems can also reduce the value of an otherwise lucrative transaction by reducing profits and market opportunities. In some cases, the Purchaser may be forced to abandon a proposed merger or acquisition altogether because the costs outweigh the benefits.

According to Ernst & Young’s Global Fraud Survey for 2014, nearly 40% of global survey respondents never perform forensic or anti-corruption due diligence prior to M&A transactions, and another 14% do so only rarely. The 2013 survey also found that some companies are scaling back on due diligence associated with combination transactions. For instance, the proportion of survey respondents in China reporting that pre-acquisition due diligence is rarely or never performed doubled to 50% from the 2012 to the 2013 survey, and the proportion in India increased from under 30% to over 50%. Yet government agencies continue to investigate and regulate M&A transactions for anti-corruption compliance. Accordingly, a prudent Purchaser will conduct appropriate due diligence throughout the course of any proposed M&A deal to identify enforcement risks related to a Target’s past misconduct.

Careful due diligence must include investigation of corruption and bribery risks. As a result, the appropriate scope and nature of due diligence in connection with M&A transactions will be driven by a Purchaser’s assessment of those risks inherent in the proposed transaction.

The remainder of this chapter provides an outline of diligence activities, based on preliminary due diligence and an initial risk assessment followed by a more detailed inquiry. This is merely a suggested sequencing. Purchasers may wish to collapse these steps in certain transactions and may also emphasize other issues,
depending on the sector involved, the knowledge of the company, country conditions, the structure of the target, and other considerations.

**Preliminary Due Diligence and Initial Risk Assessment**

Determining and understanding the extent of corruption and bribery risks is the first step toward deciding on the requisite intensity and depth of due diligence. Because government interactions create opportunities for corrupt payments, it is critical to assess the local regulatory environment and identify which sectors of the proposed Target’s market are government-owned or heavily regulated.

Some Targets, because they operate in heavily regulated industries such as pharmaceuticals, financial services, aerospace, defense, environmental, or resource extraction, may present heightened concerns and will warrant particularly thorough examinations of their business operations. Even Targets in industries that are not heavily regulated, however, are likely to interact often with government officials—such as customs and immigration officials, tax regulators, and product safety or registration officials—for routine business matters. Gaining comprehensive awareness of the environment in which a Target operates allows a Purchaser to make an informed initial judgment about its exposure to corruption and bribery risks.

Numerous publicly available resources can aid a Purchaser in making a preliminary assessment of potential vulnerability to anti-corruption and anti-bribery liability, and these resources can be explored even before asking questions of a prospective Target. For instance, the Transparency International Corruption Perceptions Index\(^7\) and the Bribe Payers Index\(^8\) provide corruption and bribery information about individual countries. Another resource is the Trace Compendium, which pools corruption information from various sources and is searchable by categories such as particular companies, countries, or enforcement agencies.\(^9\)

Local media sources in a Target’s operating market can also provide insight into issues of bribery and corruption related to the Target, its market, or its industry. The local U.S. Embassy or the U.S. Chamber of Commerce, unless restricted by confidentiality concerns, can often provide information relating to corruption risks and the business regulatory environment, as well as information about a particular Target, including its reputation and relationships with host government officials. An International Company Profile (“ICP”), prepared by the U.S. Department of Commerce’s Commercial Service, can also serve as a tool for due diligence. ICPs are offered in select countries to provide information regarding the financial strength and potential liabilities and risks associated with local companies. In some cases, an investigative firm may be retained to identify corruption risks associated with the proposed transaction.

In addition to searching through publicly available information, a Purchaser should of course ask clear and direct questions of the Target regarding corruption risks. Although there is no single way to manage M&A due diligence, many Purchasers approach potential Targets initially with a preliminary questionnaire to elicit information about the Target’s compliance program, if it has one, and names of individuals or organizations associated with the Target that should therefore be evaluated for corruption risks. A Target’s response to a questionnaire may serve as an indicator of a Target’s attitude toward corruption. Sample questions for a preliminary questionnaire include:

1. Are the regions or countries in which the Target operates at high risk for corruption?
2. Is the Target’s business in a sector or industry in which corruption is common?
3. Do the employees or agents of the Target regularly conduct business with government officials?
4. When and how does the Target use intermediaries or third parties whose actions could subject the firm to liability?\(^{10}\)
5. Does the Target have any previous history of bribes or facilitation payments? Is there any record of government investigations, settlements or plea agreements, or of internal investigations and audit reports?

6. What types of anti-bribery and anti-corruption compliance controls, if any, are already in place at the Target?

At this point, a Purchaser will be better informed about corruption risks associated with a proposed deal and will be able to make a threshold decision as to whether or not to proceed with the deal, and whether supplementary in-depth due diligence is warranted before closing.

**In-depth Due Diligence**

Based on the preliminary due diligence and initial risk assessment for a proposed M&A transaction, a more extensive understanding of the prevalence of corrupt acts in a Target’s operations, or more broadly its market or sector, may be necessary. Certain company documents may provide important insight into possible corruption risks, including: incorporation forms; registrations; policies and procedures; contracts, agreements, and licenses; financial records; payment records; records of gifts, entertainment, political donations, and charitable contributions; records of interactions with third-party intermediaries, suppliers, and government officials; and training and compliance materials. Just as with the questionnaire, a Target’s level of cooperation in producing the requested documents may offer a glimpse into the Target’s attitude toward bribery and corruption.

Documents that many Purchasers seek during either the initial phase of reviewing a Target or in the context of in-depth due diligence include:

1. Code of conduct or business ethics;
2. Employee handbook;
3. Consolidated list of company offices and manufacturing and sales locations;
4. Information on sales models (e.g., direct selling, sales representatives, and/or distributors), including:
   a. Countries in which third-party sales and representatives and distributors are authorized to operate; and
   b. Any plans to add countries;
5. Anti-corruption policy and procedures (addressing payments to government officials and private parties), including:
   a. Anti-corruption training materials;
   b. Government official interaction request and approval forms;
   c. Charitable contribution and sponsorship request and approval forms;
   d. Political contribution request and approval forms;
   e. Gift / hospitality / travel / entertainment request and approval forms;
   f. Model anti-corruption clauses for contracts with local companies or third parties;
   g. Third-party questionnaires and approval forms (used to review third parties who may be asked to act on the company’s behalf);
   h. Business partner questionnaire and approval forms, including business reference forms; and
   i. Petty cash or reimbursement policies;
6. Employee discipline / remediation policies that may be relevant to corruption reporting and disciplinary actions;
7. Internal reporting mechanisms, including any whistleblower protections or policies;
8. Model sales and/or distributor contracts;
9. Policies and procedures for procurement of services by third parties who interact with government officials on behalf of the Target (including customs and product registration agents) and how the Target oversees such services;

10. Any information about allegations or investigations of corruption and company actions at any time with respect to:
   a. Current or past employees of the Target or any related company or individual;
   b. Current or past third parties acting on the Target’s behalf in dealing with government officials; and
   c. Current or past sales agents or distributors; and

11. Any other policies and procedures for payments to third parties, including any internal financial controls for disbursement to persons acting on behalf of the company.

For high-risk M&A transactions, it can be especially useful and illuminating to engage an outside forensic accounting firm to prepare a comprehensive anti-corruption accounting review of a Target in a proposed M&A deal. A forensic accounting firm can glean information about a Target’s business processes, internal controls, and compliance environment by reviewing and analyzing a sampling of transactions or accounting records, such as vendor files and travel and entertainment expense reports. Based on the findings of its review, the forensic accounting firm can offer recommendations with respect to financial controls and necessary remediation measures.

In some cases, proper due diligence may warrant a site visit and face-to-face interviews of key personnel to evaluate a Target’s familiarity with and willingness to comply with global anti-corruption and anti-bribery laws post-closing. Site visits and interviews can contribute significantly to the final determination of whether or not a proposed M&A transaction is, in fact, beneficial to a Purchaser by providing an opportunity for first-hand exposure to a Target’s anti-bribery and anti-corruption culture.

**Final Determination of Whether to Proceed with Proposed M&A Transaction**

Following the completion of proper and thorough due diligence, the Purchaser will have at its fingertips a summary of all the corruption issues spotted, and how they were or can be mitigated or remediated. With this information in hand, the Purchaser will be able to formulate its best judgment regarding corruption risks related to the Target and the proposed transaction. At this stage, it is critical that all assessments and recommendations be communicated effectively to senior management before the Purchaser officially decides to move forward with a proposed M&A transaction.

**Closing the M&A Transaction**

Once the decision has been made to proceed toward closing a deal, the Purchaser can further protect itself by obtaining representations and warranties in the transaction agreement specifically relating to the Target’s compliance with relevant anti-corruption and anti-bribery laws. The clauses included in a transaction agreement may be tailored to the particular Target and the information reviewed during due diligence.

In addition, proper due diligence must extend beyond the closing of a deal. For starters, any historic or ongoing corruption issues should be remediated as quickly as possible, prioritizing key risks that have been identified. The Purchaser should also ensure that the Target implements an appropriate compliance program that will continue to operate post-deal. This could be the Target’s original compliance program (if it is adequate), the Purchaser’s program, or modification of the Target’s existing program.
Proper pre-deal due diligence may be stymied by, among other things, legal restrictions, reluctant disclosures by Targets, and time constraints during a hostile takeover. Government agencies may therefore, in some cases, grant a Purchaser a post-closing grace period or other consultation with regulators. However, Purchasers should not rely too heavily on the possibility of a grace period, as enforcement agencies tend to take a case-by-case approach in granting respite. Thorough risk assessment and proper due diligence have no substitute.

**Conclusion**

Without proper risk assessment and due diligence, a Purchaser can inadvertently buy a Target’s bribery and corruption problems, exposing the Purchaser to liability if such problems are not resolved before the transaction is consummated. Once the risks inherent in a proposed M&A transaction are identified and understood, a Purchaser has a variety of tools to manage those risks. Different M&A transactions may require utilizing different tools. But all tools are useful in case a corruption issue arises down the road; government authorities will likely be more lenient with a Purchaser that took all reasonable precautions. Effective due diligence is likewise critical to maintaining a Purchaser’s reputation and earning the confidence of investors.

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3. Id.
4. Id.
5. For instance, three FCPA settlements in 2011 were associated with prior violations by recently acquired subsidiaries. Id.
10. For a more in-depth analysis of third-party due diligence, see Chapter 4, *Anti-Corruption Compliance: Mitigating Risks of Third Party Misconduct*.
11. See Wilkinson, supra note 6, at 12.
12. See Harris, Korenchuk, Varner, & Witten, supra note 6.
13. For instance, DOJ issued Opinion Procedure Release No. 08-02, in which it announced that it would not take any enforcement action against Halliburton during a 180-day period following the purchase of a foreign oil drilling company with extensive foreign government relationships—provided that Halliburton followed its proposed post-closing plan and disclosed the results of its investigation at prescribed times. The DOJ, however, reserved the right to prosecute enforcement actions for violations that were not disclosed or in which Halliburton officials knowingly engaged. See Department of Justice Opinion Procedure Release, No. 95-01, January 11, 1995, http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.
14. In Opinion Procedure Release No. 08-02, the DOJ explicitly noted that its decision to provide Halliburton with a grace period before taking any enforcement action was based on the unique circumstances of the case.
Summary

Effective corporate anti-corruption compliance programs should be accompanied by financial controls that are adequate to ensure the lawful expenditure of its funds. In addition to the general need for any well-run company to maintain control of its accounts, the FCPA, for example, requires “issuers” to keep accurate books and records and to maintain a system of internal accounting controls; the U.K. Ministry of Justice recommends “[f]inancial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure”; and the OECD’s Good Practice Guidance on Internal Controls, Ethics, and Compliance emphasizes the importance of maintaining “a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery.”

For all multinational companies, effective compliance means authorizing and making payment only for compliant interactions, and implementing controls to achieve that goal. Activities subject to prior compliance approval should be paid for only after a finance review is completed to ensure the payment is consistent with the compliance approval. These requirements are particularly important in emerging markets, which are often remote from headquarters, where resources for oversight may be limited, and whose local personnel may not have experience in implementing robust controls.

Inadequate internal controls remain a key vulnerability for multinational companies operating in emerging markets—and an area of focus for enforcement agencies. For example, life sciences company Bio-Rad and construction/drilling firm Layne Christensen both settled FCPA enforcement actions involving inadequate internal controls in the fourth quarter of 2014. While a comprehensive discussion of internal control requirements is beyond its scope, this chapter addresses key concepts relevant to anti-corruption compliance.

Examples of Problems Resulting from Inadequate Financial Controls

A lack of adequate internal controls may enable corrupt conduct to occur, with ensuing liability for companies doing business internationally. The consequences of a lack of effective controls are illustrated particularly vividly in the SEC’s enforcement actions against York International (2007), Nature’s Sunshine Products (2009),...
and Weatherford International (2013). While these cases involve U.S. enforcement, the lessons learned on the essential links needed between compliance and financial controls apply to all multinational companies.

**York International**

In 2007, the SEC filed charges under the FCPA against York International for, among other things, paying over $500,000 to a third party for the purpose of bribing officials from the United Arab Emirates. In its Deferred Prosecution Agreement (“DPA”), York acknowledged using a third party to make kickback payments in connection with the sale of humanitarian goods to Iraq under the Oil for Food program, describing such payments on its books as “commission” and “consultancy” payments, even though no bona fide services were performed. These generic-sounding categories of payments (“commissions” and “consultancy payments”) were used without adequate oversight by company officials to ensure that they were appropriate and lawful. The SEC also alleged that York devised elaborate schemes to conceal kickback payments of over $7.5 million for contracts on certain commercial and government projects in the Middle East, India, China, Nigeria, and Europe. In its complaint, the SEC analyzed the breakdown in internal controls as follows:

While York International had corporate policies in place to address some of these issues, the company delegated significant responsibilities to heads of geographic regions, such as the Vice-President in the Middle East, for creating compliance controls and ensuring compliance with relevant laws, such as the FCPA. Although York International knew of endemic corruption problems in the Middle East, in particular, it appeared to take on faith, without adequate confirming steps, that the Vice President was exercising his duties to manage compliance and control issues. …

With respect to the so-called “consultants” who submitted fake invoices without performing bona fide services, no due diligence was done. … The fake invoices from the purported consultants likewise did not adequately specify services. These contracts and invoices were false. [Had York audited the contract files], it would have been immediately apparent that the consultancy arrangements were a sham. It is clear that local finance personnel did not provide an independent internal control function, but rather acquiesced in questionable practices and documentation without critical review.

York International was ordered to pay over $12 million in fines and to retain an independent compliance monitor.

**Nature’s Sunshine Products**

The SEC’s enforcement action against the U.S. company Nature’s Sunshine Products (“NSP”) provides another example of a breakdown in internal controls. The SEC’s civil complaint alleged that when Brazilian regulators reclassified many of NSP’s products as medicines, NSP’s Brazilian subsidiary made a series of cash payments to local customs officials to import these products. The Brazilian subsidiary allegedly recorded these payments as “importation advances.” The SEC’s complaint alleged that this conduct violated the FCPA, as well as the antifraud, issuer reporting, books and records, and internal controls provisions of the federal securities laws because, among other reasons, “NSP’s books and records did not fairly and accurately reflect the Cash Payments and their purpose, and the fictitious supporting documentation falsely characterized the Cash Payments as lawful payments to brokers to import legal product.”

The complaint also alleged that two company executives violated the books and records and internal controls provisions of the securities laws in connection with the Brazilian cash payments. Notably, the SEC did not allege that either of the executives who were simultaneously charged paid, knew about, or authorized the bribes. The SEC’s case was based solely on the executives’ inaction and failure to put in place adequate
internal controls at foreign subsidiaries to assure compliance with the anti-bribery, books and records, and internal controls provisions of the FCPA.

Weatherford International

The coordinated federal enforcement action against Weatherford International provides a more recent example of the potential consequences of inadequate internal controls. Weatherford, a multinational oil and gas service company with operations in a variety of countries with high corruption risks, was prosecuted in relation to numerous corrupt acts that occurred between 2002 and 2011. In 2013, Weatherford entered a DPA with the federal government, which included a corporate compliance and monitoring program. Three of Weatherford’s subsidiaries pleaded guilty to criminal FCPA violations. Weatherford and its subsidiaries also agreed to pay more than $250 million in penalties.

In its DPA, Weatherford acknowledged that it knowingly failed to establish effective corruption-related internal accounting controls designed to detect and prevent corruption-related violations. Specifically, Weatherford failed to:

- Conduct corruption-related due diligence on business transactions;
- Conduct corruption-related due diligence on third parties, including partners, distributors, consultants, and agents;
- Understand third-party ownership and qualifications;
- Evaluate the business justification for third-party retention;
- Require adequate documentation supporting third-party payments, such as invoices and purchase orders;
- Effectively evaluate business transactions and joint ventures; and
- Maintain an effective accounting control system over gifts, travel, and entertainment, including verification that such expenses were reasonable, bona fide, and properly documented.

By failing to devise and maintain adequate internal controls, Weatherford was unable to prevent a variety of noncompliant behaviors by various actors in a number of different settings. In its DPA, Weatherford acknowledged that:

- In exchange for government contracts in Africa, employees of a Weatherford subsidiary established and operated a joint venture with two local entities controlled by foreign officials and their relatives, which did not contribute capital, expertise, or labor to the joint venture, but nonetheless received hundreds of thousands of dollars;
- Employees of a Weatherford subsidiary funneled bribes to a foreign official in Africa through a third-party consultant, using sham invoices for nonexistent services, so the official would renew an oil services contract;
- Employees of a Weatherford subsidiary awarded improper “volume discounts” to a distributor of Weatherford products in the Middle East with the understanding that these discounts would be used to create a slush fund for bribing local officials; and
- Managers of a Weatherford subsidiary signed agreements to pay a 10 percent kickback to Iraqi officials on contracts awarded through the UN Oil for Food Program, and concealed the kickbacks from the UN by inflating contract prices by 10 percent.

In its complaint, the SEC further alleged that:

- Weatherford provided unjustified travel and entertainment to officials of a state-owned Algerian company, including a trip to the 2006 FIFA World Cup, the honeymoon of one official’s daughter, and a religious trip to Saudi Arabia for an official and his family that was improperly recorded as a donation;
Weatherford’s subsidiary in Italy misappropriated more than $200,000 in company funds, some of which was improperly paid to Albanian tax auditors;\(^2\) and Weatherford employees created false accounting and inventory records from 2002 to 2007 to hide illegal commercial sales to Cuba, Syria, Sudan, and Iran.\(^2\)

In summary, these cases illustrate not only government expectations as to the robustness of controls, but also the pitfalls for companies that fail to use them.

**Elements of Effective Internal Controls**

As reflected in these three examples, lack of transparency in accounting—including misclassification, mischaracterization, vague descriptions, and lack of detailed support for expenses—can foster corrupt practices among in-country personnel and allow bribes to remain undetected by corporate leadership. For issuers, this can lead to costly violations of the books and records provisions of the FCPA, and for all multinational companies it can create liability under other applicable anti-corruption laws.\(^2\)

A company’s financial control plan must, of course, be tailored to its structure and must address the specific risks that arise in connection with its business operations. There is no “one size fits all” framework to address risks in internal controls. The goal is to create a system of controls appropriate to the company, educate all relevant employees (including in the finance function and in management), monitor their performance, and make adjustments to the plan as necessary.

At a high level, an effective financial control plan will generally:

- Require adequate supporting documentation to be maintained for all transactions;
- Code expenses in the correct general ledger account;
- Ensure sound business reasons and bases exist for all journal entries;
- Limit access to and responsibility for journal entries to specific personnel with the appropriate authority;
- Accurately and reliably report and record all accounting records, expenditures, expense reports, invoices, vouchers, gifts, business entertainment expenses, and any other business records;
- Record expenses in accounts where the transactions belong, based on the business purpose and nature of the expenses;
- Never record expenses in an incorrect account even if the department incurring the expense has exceeded (or expects to exceed) its budget for a particular expense line item; entries must be accurate and faithful to their true purpose;
- Consistently review internal payment requests and expense reports prior to approval;
- Ensure that expense reports contain:
  - all supporting documents;
  - all required approvals;
  - all expense receipts related to the expenses claimed; and
  - documentation addressing specific aspects of anti-corruption compliance, such as hosting or providing gifts to government officials;
- Provide compliance personnel with education and training on identifying corruption warning signs in finance documents (e.g., round values and vague descriptions);
- Require all employees to submit accurate and truthful documentation for credit card expenses prior to reimbursement by the company;
- For cash advances, ensure that receipts are reconciled and that information is recorded concerning (i) the requester, (ii) approvals, (iii) the business purpose, and (iv) goods or services to be purchased; and
Create general ledger codes for compliance-sensitive accounts (e.g., hosting government officials, engaging government officials for speaking or consulting engagements, giving gifts to government officials, and making charitable or political contributions), train employees on the appropriate use of these accounts, and ensure payments are actually recorded in proper general ledger accounts.

The following are some particular considerations for effective internal controls in areas common to many companies:

**For expense report review:**

- Prohibit subordinates’ use of supervisor signature stamps.
- Before any expenditure is incurred, verify that the individuals involved in submitting or approving an expense report transaction have the necessary authority under the company’s delegation of authority policy to do so.
- Prohibit subordinates from submitting expenses for reimbursement or for payment on behalf of their supervisors where those supervisors then approve the expense reports or vendor payment requests.

**For vendor payment management:**

- Approve payments to vendors only if an account for the vendor is established in the accounting system.
- Maintain a central file to collect and organize vendor information, approval forms, and bidding documents.
- Use a “do not pay” list for disqualified vendors.
- Enforce policies and procedures regarding the addition, change, or deletion of vendors in the company’s accounting system.
- Prohibit subordinates’ use of supervisor signature stamps to indicate approval of internal payment requests or to authorize payments to vendors.
- Ensure employees obtain and document approvals of purchase orders and requests for vendor payments.
- Minimize discretionary purchasing authority, and require employees to follow the company’s formal purchase order process whenever possible.
- Ensure a triple match exists (purchase order, invoice, and authorization of receipt service) before authorizing payment.

**For interactions that receive prior approval through a compliance-designed process:**

- Ensure that purchase order requests include a compliance approval identification so that a purchase order may not be issued without compliance approval.
- Before payments are authorized, ensure that finance personnel check not only that compliance pre-approvals have been obtained, but also that details of the compliance pre-approvals (budget, details of spending, event details, etc.) are verified to ensure payment is consistent with specific compliance pre-approvals.
- Ensure documentation supporting payment includes signed agreement; proof of attendance for events; proof of service for services; payment receipt or invoice; and confirmation that the services were received from the business owner.

**For interactions with government officials:**

- Ensure all interactions with government officials that are preapproved through compliance process are only authorized for payment only if supporting documentation is consistent with compliance preapproval.
- Any travel, lodging, meals, or entertainment for government officials must be supported by an approved form.
Ensure that hosting expenses are reasonable in value.
Do not engage in a pattern of frequent hosting.
Do not host spouses or family members of a government official.
Do not include non-business activities (e.g., tourist trips).
Do not reimburse the official in cash or a cash equivalent.
Approve only expenses for travel that are (1) actually incurred, (2) for the period of time necessary for travel to and from the event, and (3) supported by receipts.

Additional Controls:
- Prevent employees with long-outstanding cash advances from receiving expense reimbursements, receiving further cash advances, and maintaining or obtaining corporate credit cards.
- Limit the number of cash-only transactions and require formal recordkeeping of all cash reimbursements or petty cash disbursements.

Conclusion

Conducting business in emerging markets presents many challenges, including ensuring adequate financial controls. While many companies may focus on basic finance as part of their operations in a country, there is often not enough attention given to the necessary anti-corruption compliance controls. Compliance and financial controls must be coordinated to ensure that interactions subject to a compliance preapproval process are paid for only if the pre-approval details match the supporting documentation presented at the time of the request for payment.

Chapter 8 - Endnotes

3 Specifically, the accounting provisions of the FCPA require issuers on U.S. exchanges to (1) “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of . . . assets”; and (2) maintain systems of internal controls sufficient to assure management’s control, authority, and responsibility over the company’s assets. 15 U.S.C. § 78m. “Issuers” include domestic and foreign companies whose securities are listed on a U.S. exchange or who are otherwise required to file periodic reports with the U.S. Securities and Exchange Commission. See U.S. Department of Justice & U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act at 10-11 (2012), http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf (citing 15 U.S.C. §§ 78l, 78o(d)). The accounting and recordkeeping provisions apply to all payments, not just to sums that would be “material” in the traditional financial sense. See id. at 39.
4 In 2014, Bio-Rad agreed to pay the SEC and DOJ a combined $55 million. Press Release, Securities and Exchange Commission (Nov. 3, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364. The government alleged that Bio-Rad failed to implement adequate internal controls, which allowed its subsidiaries in Russia, Vietnam, and Thailand to make improper payments to foreign officials. Id. Specifically, subsidiaries allegedly “made excessive payments disguised as commissions to foreign agents with phony Moscow addresses and off-shore bank accounts.” Id. “The agents had no employees and no capacity to perform the purported services for Bio-Rad, and were retained primarily to . . . help the company win bids for government contracts.” Id. In addition, “Bio-Rad’s Singapore subsidiary sold products at a deep discount to Vietnamese distributors, who passed through a portion of it as bribes.” Id. Bio-Rad also “acquired a company in Thailand and failed to uncover a pre-existing bribery scheme in which Thai agents received inflated commissions that were partially used for improper payments.” Id. Similarly, the SEC alleged that “Layne [Christensen's] lack of internal controls allowed improper payments to government officials in multiple countries to continue unabated for five years.” Press Release, Securities and Exchange Commission (Oct. 27, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857. The company allegedly made improper payments to tax officials, customs officials, police, and border patrol agents in Africa. Id. The company paid approximately $5 million in penalties and disgorgements.
7 See Complaint, supra note 5, at ¶¶ 30-44 (describing various bribery schemes).
8 Id. at ¶¶ 47-51.
10 Id. at ¶ 23.
Id. at ¶¶ 63-64.

See id. at ¶¶ 67-69 (alleging violations by the company’s controllers).


Deferred Prosecution Agreement, supra note 13.


See Deferred Prosecution Agreement, supra note 13.

Id. at A-4.


Id.

Id.

Beyond corruption concerns, if a company has an accurate assessment of how much money is being spent on which types of expenses, then it can make sure those monies are being spent wisely and effectively.
Introduction

Companies operating in emerging markets sometimes retain qualified government officials to provide services such as consulting or speaking. In some circumstances, particularly in developing markets, these services are necessary and can serve a company's legitimate business needs. For example, a well-known and highly qualified professor at a public university may have knowledge about technical issues that is needed from a consulting perspective, or an internationally-acclaimed physician who works in a public medical school may be hired to discuss research and development in her area of expertise. However, these types of engagements pose a heightened corruption risk because they (1) involve employees of public institutions who therefore are considered government officials, (2) involve compensation or other benefits, (3) may be subject to restrictions imposed by local law, and (4) raise the possibility of conflicts of interests. This chapter discusses the risks associated with engaging government officials and suggests steps to mitigate risk resulting from such engagements.

A threshold issue that must be considered before engaging a government official is whether local law or relevant professional codes permit the payment of compensation to the government official (as opposed to a payment to the foreign government). In many countries, it is unlawful to compensate officials who make appearances or provide advice that is ordinarily part of their normal duties. If the work requested from the official is part of her ordinary duties, a paid engagement will likely not be appropriate.

Second, in developing markets, the law on private engagement of government officials may be not as clear as in more developed economies. Steps should be taken to determine the local regulatory environment, and it is prudent to consult with local counsel if local law is unclear or does not address the issue dispositively.

Third, the nature of the engagement and the relationship of the government official to the company’s activities should be carefully considered. If the proposed engagement involves a government official who has decision-making authority or influence over issues relating to a company’s operations, corruption risks are likely to be significant, and proceeding with the engagement is rarely appropriate. On the other hand, it may be appropriate to engage a public official to provide technical advice or educational information—for example, clinical healthcare information.
Assuming these questions are answered and the engagement is in fact appropriate, another consideration is whether it might be better from a compliance perspective to engage the government entity rather than the individual official directly. Contracting directly with the government will reduce the compliance risks, but will not eliminate them completely. Many of the considerations discussed in this chapter also apply where a government entity is engaged.

In some industries such as healthcare, pharmaceuticals, and life sciences, the practice of retaining government officials may be more common because many healthcare professionals work in government-owned healthcare facilities and may therefore be considered government officials. The qualifications of the healthcare professional, the nature of the engagement, and the clinical or scientific information to be provided must be evaluated closely.

The following sections discuss ways in which to mitigate compliance risks when engaging government officials in developing markets.

Assessment of Need

One of the threshold questions for a company considering the engagement of a government official is whether the engagement is needed for legitimate purposes and whether the company can articulate an adequate and appropriate business justification. If not, there is a risk that the engagement may be sought or undertaken for a corrupt purpose. For example, some companies require the person proposing the engagement to complete a written needs assessment and obtain pre-approval from the legal or compliance department. The written needs assessment should document compliance with the following criteria:

A. Consultants or speakers may be engaged or compensated only if they provide advice, information, or services for which the company has a legitimate business need.

B. While the company may provide information to a consultant or speaker, the interaction between the company and the consultant or speaker must consist, in substantial part, of the consultant providing advice, information, or services to the company.

C. The number of consultants or speakers used in any project must not exceed the number reasonably needed to obtain the desired advice, information, or services.

Typically, a company employee who proposes a consultant or speaker engagement is responsible for ensuring that the engagement is carried out in accordance with the applicable needs assessment(s), approvals, and company policies.

Selection and Retention of Consultants and Speakers

Another way to reduce compliance risks is to demonstrate and document that the government official being retained is qualified to perform the engagement. The decision on the selection and retention of consultants or speakers should therefore be based on objectively defined criteria that are directly related to the purpose of the engagement, including the reputation and standing of the speaker or consultant in the area of expertise needed, the knowledge and experience of the speaker or consultant regarding the particular topic on which the person is to be engaged, the past record of the speaker or consultant for objectivity, and whether the person or persons proposing the engagement have complied in the past with company policies and procedures. The individual’s written or oral communication skills are also a relevant consideration in deciding whether he or she is appropriate for engagement.
For speakers, another relevant consideration is the topic of the speech. For example, it generally would not be appropriate for compensation to be paid on a topic directly related to government policies or procedures that could impact the company’s operations, or that describe processes that are otherwise part of the official’s ordinary duties. It may be appropriate, though, to compensate some speakers on professional or technical topics such as engineering or medicine. For example, a respected physician could be compensated for speaking on new developments in the treatment of a particular disease, or a researcher could talk about the development of a chemical process and its impact upon a particular manufacturing practice.

Finally, company employees proposing or evaluating a consultant or speaker must have the relevant expertise to evaluate whether the particular government official under consideration meets the above criteria.

**Written Agreement and Compensation**

Another way to reduce compliance risks is to require that the company and the government official enter into a written agreement before any payment is made. The written agreement, which should provide a clear and transparent record of the purpose and nature of the engagement, can help minimize concerns about corrupt intent. The agreement, at a minimum, should:

A. Describe the specific nature of the services to be provided; the scope of work and deliverables; any fees to be paid; and the compliance obligations of the consultant or speaker.

B. Require compliance with all applicable laws and codes.

C. Require any consultant or speaker to disclose any relationship with the company, including any specific disclosures that are externally imposed on the consultant or speaker based on his/her governmental affiliation, or other relevant regulatory authorities.

D. Justify the use of the government official for the specific event or program, using a reasonable and transparent methodology correlated to actual need (e.g., geography, expertise, and/or expected composition of attendees).

E. Compensation of consultants and speakers should be based on an analysis of fair market value. Where applicable and relevant, a pre-set rate structure table developed by the company, or specified by applicable laws and codes, may be used.

The company employee responsible for the consultant engagement should ensure that fees are not paid until the work product has been delivered and accepted pursuant to the terms of the written agreement, and all supporting documentation has been provided to the company. The proponent of a speaker program should be responsible for ensuring that fees are not paid to a speaker unless and until the speaker completes the speech and submits all necessary program forms.

**Consultant Services**

The individual responsible for engaging a government official as a consultant should identify any work product that is to be generated, ensure that the work product conforms to the terms of the written agreement, accept and retain the work product in a manner that is easily retrievable for audit purposes, and maintain (or provide to legal, compliance, or finance) a copy of the completed file for the engagement.

The responsible individual should retain all records and documents associated with engaging the consultant, including needs assessments; written agreements for meetings and programs; any invitations, agendas, moderator’s guides, presentation materials, and other related records; any work product generated pursuant
to the engagement; documentation of the use or application of the work product generated pursuant to the engagement; and documentation of logistics and associated expenses.

**Speaker Engagements**

Once a qualified government official is selected to serve as a speaker for a company-organized program, the arrangement should be memorialized in a written agreement. If necessary, the speaker should be appropriately trained. Speaker training must address compliance with company policies and applicable laws and codes. In many instances, a government official may be compensated for participating in a speaker training session and reimbursed for associated expenses.

A company representative should be present at a program to help ensure that the content of the presentation complies with applicable laws and codes.

At the conclusion of each program, the company representative should ensure that all attendees and the speaker complete a participant registration/attendance form. The company representative is responsible for ensuring that the registration/attendance form and all program-related documentation are forwarded to the appropriate person charged with recordkeeping.

**Meeting Locations, Meals, Expenses, and Entertainment**

In engaging government officials as speakers or consultants, companies must avoid inappropriate transfers of value in the form of excessive travel arrangements, hotel stays, entertainment, or meals. For example, convening a meeting at a luxurious resort may undercut the legitimacy of the engagement itself or create the appearance of impropriety. Furthermore, if the engagement does not reasonably need to be held in a distant location, the personal benefit associated with travelling to a desirable destination could be viewed as improper.

In conjunction with a consulting or speaking engagement, it is generally permissible to arrange and pay for reasonable accommodation, transportation, and meals incurred by a consultant or speaker in the course of an engagement. However, the company should avoid organizing, or otherwise providing or paying for, any entertainment or recreation to government officials.

To reduce compliance risks, certain safeguards should be used when selecting a location for a meeting or program or when providing travel to government officials who are engaged as consultants or speakers. The proponent of each speaker or consultant engagement with a government official should be responsible for ensuring that the venue and circumstances of any meeting or program are conducive to the consulting services, and that activities related to the services are the primary focus of the meeting. Some companies require other levels of approvals—for example, by supervisors, legal counsel, or compliance personnel.

To reduce compliance risks, the venue and circumstances of any meeting should be conducive to the activities that are the primary focus of the meeting. For example, programs should occur in venues suited to informational communication, such as conference rooms; company-sponsored programs should generally be held at company sites or nearby venues. Resorts or luxury hotels should be avoided, as well as locations that are known for their entertainment value or are considered extravagant.

The geographical location should also be considered. Organizing a company-sponsored program or consultant meeting that takes place outside of the home country of the company affiliate organizing the program should be avoided, unless (1) most of the invitees are from outside the affiliate’s home country; (2) given the countries of origin of most of the invitees, it is more appropriate from a travel, expense, and convenience perspective...
to hold the event in another country; and/or (3) given the location of the relevant resource or expertise that is the subject matter of the event, it is more appropriate from a travel, expense, and convenience perspective to hold the event in another country. Evaluating the location using these considerations will help reduce the risk that visiting the foreign location itself could be construed as a reward to the official.

While in many instances a company may arrange and pay for reasonable lodging incurred by a government official in the course of the provision of services to the company, limits on the length of stay are recommended. The number of nights of accommodation paid by the company should be limited to those needed for the particular engagement. For example, if a meeting lasts late into the afternoon (or return travel the same day is otherwise not feasible), paying for accommodation for that night would be justified; if a meeting begins early in the morning, paying for accommodation for the previous night would be justified in many situations. The company should not pay for accommodation, transportation, meals, or other expenses of a spouse or guest of the consultant or speaker.

Providing personal benefits to a government official through first-class or business-class travel may also raise compliance issues. Some companies take the position that the class of travel should be in accordance and consistent with the same standards applicable to company employees. In that context, business-class travel may be allowed for intercontinental flights if that is the company’s general policy. The primary consideration is whether the type of travel is necessary under the circumstances or is meant to provide a personal benefit to the official.

In addition, a company may also arrange and pay for a government official’s meals in the course of the official’s provision of services, if company policy and local law allow. Meals offered or provided to government officials should be reasonable and modest. Adhering to these standards will reduce the appearance of impropriety and the perception that the meal is intended to improperly influence the government official.

**Review and Approval**

In some situations, it may be acceptable for the proponent of a consultant engagement or a speaker program to be responsible, either directly or in his/her capacity as supervisor, for ensuring that the engagement or program is proper. Given the risks involved in this type of activity, however, many companies find it prudent to require heightened review. The level and type of review may vary and may include senior business approval, as well as compliance and/or legal review. The depth of review often depends on the activity authorization processes a company uses for other activities and the amount of spending involved in the engagement. Legal and/or compliance review can occur at the country, regional, or headquarters level, depending on the size of the company, the nature of the engagement, and the way in which the company manages other corruption risks.

**Conclusion**

Engaging government officials to provide consulting services or serve as a speaker presents particular challenges in emerging markets. Corruption risks are high in many circumstances, particularly if government officials are providing services that are otherwise part of their area of responsibility. In the rare circumstances where such an engagement is appropriate, inherent corruption risks can be mitigated by taking the proper steps to justify, document, and conduct the engagement as outlined in this chapter.
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