

Anti-Bribery Compliance



General Guidance Notes

This sample anti-bribery policy is generically illustrative, but is neither legal advice nor a substitute for consultation with knowledgeable and qualified legal counsel. This sample policy should not be used or implemented as a corporate compliance anti-bribery / anti-corruption policy.

Anti-bribery and anti-corruption laws vary from country to country. While these laws are often fundamentally similar, their differences can be material. Therefore, great consideration should be given to engaging legal counsel in all countries where an organization does business or plans to do business to ensure compliance with all applicable laws. What is lawful in one country may be unlawful in another country.

Additionally, what are considered “best practices” for Company A may not be “best practices” for Company B, especially when the companies do business in different sovereign nations. Similarly, what are considered “best practices” for Company A in the U.S. may not be best practices for that same company operating in other sovereign jurisdictions.

To be considered “effective,” an anti-bribery/anti-corruption policy (or any other compliance policy) should not be a “cookie cutter” or a “one size fits all” policy. It must be unique not only to the organization for which it was created, but also implemented only after a thorough risk assessment pertaining to the organization’s operations in diverse nations with diverse individuals.

What follows is a generic anti-bribery compliance policy that is heavily weighted to the Foreign Corrupt Practices Act, but which contains concepts that are nearly universal – namely that bribery or other illegal means to acquire and/or to maintain business cannot be tolerated, notwithstanding local law (or lack thereof) or custom.

Warning:

This sample “policy” and its contents should not be relied upon, executed, or implemented, and no compliance policy should be relied upon, executed or implemented without a risk assessment and thorough consultation with and advice from appropriate legal counsel.

Generic Anti-Bribery Compliance Policy

Background

“Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.”¹

The Company and its management are committed to conducting global operations honestly, ethically and in compliance with all laws, wherever we do business. This particular policy focuses primarily on U.S. anti-bribery laws (i.e., those contained in the Foreign Corrupt Practices Act (FCPA)) because of the prominence and “long arm” that legislation has on our operations in the international marketplace.

The fundamentals of the FCPA’s anti-bribery provisions are similar in many respects to other global anti-corruption regulations. That is why some venues where we do business may be regulated by the FCPA as well as the anti-corruption legislation of one or more other countries.²

Consider the following: A British sales person working for a U.S. public Company in its Ottawa, Canada office often travels to Sao Paulo, Brazil to do business. Which anti-corruption law or laws may impact the way in which the salesperson does business in Brazil?

1. FCPA
2. UK Bribery Act
3. CFPOA (Canada)
4. Brazil Clean Company Act
5. All of the above
6. None of the above

The correct answer is number 5, because the laws of the four nations may impact the way the salesperson does business.

Because we are a diverse company that operates globally, this anti-bribery policy will be translated into the languages of the countries where we have a presence and/or do business. The Company expects all of its employees, and many others with whom we do business (including third-party intermediaries and other stakeholders), to become familiar with this policy and receive training on this policy.

¹ A resource Guide to the U.S. Foreign Corrupt Practices Act, p. 1.

² Examples of other anti-bribery laws and regulations include, but are not limited to, the UK Bribery Act 2010, the Canadian Corruption of Foreign Public Officials Act (“CFPOA”), the Brazil Clean Company Act 2014; and the OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions and Related Documents

This policy will be supplemented periodically to keep up with current laws and best practices, and when necessary, to address customs and laws of other countries where we do business. But this policy will never compromise the Company's commitment to lawful, honest and fair dealings with our customers, suppliers, employees and other stakeholders.

FCPA and Other Anti-Bribery Laws

The FCPA has two primary components: (i) the anti-bribery provisions, and (ii) the books and records and internal controls provisions. The latter is often referred to for simplicity as the "accounting provisions."

The FCPA is enforced by United States Department of Justice (DOJ) and the United States Securities and Exchange Commission (SEC). The jurisdictional mandates of these two enforcement bodies often overlap, and it is becoming increasingly common for them to work collaboratively on enforcement of the FCPA against business organizations and their individuals responsible for violations of the statute. However, there are also significant jurisdictional differences. The SEC typically brings civil and administrative actions against public companies (and often its employees), while the DOJ is generally authorized to enforce the criminal sanctions of the FCPA against companies and culpable employees. It is not unusual for the SEC and the DOJ to collaboratively seek and assess penalties for the same or similar misconduct, but only the DOJ can bring criminal charges.

As stated above, the fundamentals of global anti-bribery laws are often quite similar, but their differences can be material.

The FCPA and the UK Bribery Act (UKBA) share many key similarities (e.g., their global reach, as well as the possibility of criminal fines and imprisonment). But material differences between these laws exist as well (e.g., the UKBA's prohibition of commercial bribery between private parties, and its standard of "strict liability" against a commercial organization for its failure to prevent bribery). The FCPA generally does not criminalize commercial bribery not involving foreign officials.³

Brazil has legislated its own version of anti-bribery/corruption laws that have some similarities to the FCPA and the UKBA. But unlike the American and British laws, the Brazilian Clean Company Act 2014 has no criminal sanctions.⁴

For purposes of illustration, see the anti-bribery comparison chart found at the end of this policy.

It is therefore incumbent upon every employee engaged in global commerce to reach out to our legal department [or Compliance personnel] with questions or concerns about the legality of business transactions, and to get help to navigate between the various anti-bribery and anti-corruption laws that affect our cross-border businesses.

Compliance with such laws and regulations are particularly important since the Company and its subsidiaries conduct business in emerging markets in which (i) government officials are frequently engaged in commercial and financial activities for their own accounts, (ii) corruption and related problems are common, and (iii) legal standards and enforcement policies are developing, but are often unclear and inconsistently applied. In such circumstances, special vigilance is important to ensure compliance with anti-corruption and related legislation. It is crucial that competitive

³ It should be noted that U.S. state and federal law have many other statutes that may criminalize non-FCPA forms of bribery.

⁴ It should be noted that other statutes in Brazil may govern misconduct not criminalized by the Clean Company Act.

pressures in such environments do not undermine our commitment to ethical conduct and compliance with all applicable laws.

Reading and being familiar with this anti-corruption policy is essential, but is only part of the obligation of every employee and stakeholder subject to the policy. The Company will provide periodic and mandatory training (in local languages) on this policy to ensure compliance with applicable laws. All employees, including those individuals involved in the Company's governance, will be required to receive anti-bribery compliance training.

Our Anti-Bribery Policy Provisions

Scope of the Policy:

This Policy applies to all directors, officers and employees of the Company and of each domestic and foreign subsidiary, partnership, venture or other business association that is effectively controlled by the Company, directly or indirectly. It is also the Company's policy to educate our stakeholders and others with whom we do business of the Company's commitment to compliance with all laws and best practices involving avoidance of bribery and corruption.

Anti-Bribery:

The FCPA prohibits Company employees (as well as third-party intermediaries, such as sales agents, joint venture relationships, distributors, business partners and certain other stakeholders) from corruptly offering, promising, authorizing or paying anything of value to any foreign official, any foreign political party or official thereof, or any candidate for foreign political office, in order to influence the official for the purpose of obtaining or retaining business, or securing some other improper advantage.

Accounting; Books and Records and Internal Controls:

The FCPA also requires that the Company maintain a system of internal accounting controls and make and keep accurate books and records which, in reasonable detail, fairly reflect transactions and dispositions of assets. False, misleading or incomplete entries in such records or in other documents are prohibited as a matter of Company policy and may be violate law. No undisclosed or unrecorded fund or account may be established for any purpose.

A system of accounting controls shall be maintained that provides reasonable assurances that (i) transactions are executed in accordance with management authorization; (ii) transactions are recorded so as to permit preparation of accurate financial statements and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management authorization; and (iv) appropriate auditing functions are conducted.

Definitions

Foreign Official is an officer or employee of a non-U.S. government (or any department, agency or instrumentality thereof), or a "public international organization" or any person acting in an official capacity for or on behalf of any such government (or department, agency or instrumentality thereof) or public international organization. Public international organizations include such organizations as the International Monetary Fund and the European Bank for Reconstruction and Development. Note that foreign officials also include employees of government owned or controlled commercial entities, such as government owned/controlled energy companies.

The term **corruptly** is used in the FCPA, but is not precisely defined. It generally means that the offer, promise, authorization or payment must be intended to induce the recipient to misuse his or her official position in order to wrongfully direct business to the payer, or to obtain preferential treatment or otherwise secure an improper advantage. More simply stated, the word corruptly connotes an evil motive, bad purpose or intent to wrongfully influence the recipient.

Knowledge under the FCPA is broader than “actual” knowledge, and its meaning may vary depending upon which provision of the statute the word is used. In order to violate the FCPA’s anti-bribery provisions, an individual must “know” that the corrupt payment is being offered. Under the FCPA, knowledge exists when a person is aware that a “result is substantially certain to occur” or a person has a “firm belief that such circumstance exists.” Conscious disregard, deliberate ignorance and willful blindness will not avoid liability. Note that the books and record provisions of the FCPA contain no knowledge requirement. Thus, even unintentional, immaterial misstatements can potentially create liability.

Additional Guidance

Risk Assessment

Our Company’s anti-bribery compliance efforts will be judged in part by the adequacy of the risk assessments that we perform on a daily basis. Risk of bribery and other corrupt practices may differ depending upon the location of our business activities, as well as the companies and individuals with whom we do business. Our business units work closely with our legal department [and Corporate Compliance department] in making these risk assessments. Some of the areas of concern are as follows:

Transactions Involving Government Officials

- Payments, including hospitalities and gifts, to government officials may be made only in compliance with this policy and any procedures implemented pursuant to this policy. Prior to any such payment being made to an official, the legal department [or Compliance department] must determine that such payment complies with the FCPA and local law. Such payments must be accurately recorded and are subject to regular review by the Company.
- Retaining a government official (as an agent, lobbyist, consultant, etc.) may be permissible in very limited circumstances, but must be handled with great caution. Such relationships must be structured so that they meet the requirements of the FCPA and local law. No such relationship may be negotiated without the input and approval of the legal department [or Compliance department].
- Similar caution must be exercised where a potential employee or agent is affiliated with an organization which could be deemed to be a government instrumentality, has a familial relationship with a government official or was previously engaged in government service. If you face any of these circumstances, you should consult the legal department [or Compliance department].

Transactions with Intermediaries and Partners

Payments to all third-party intermediaries or partners where such intermediaries or partners subsequently make illegal payments pose great danger to the Company and violate of this Policy. In order to minimize this risk, the

Company requires that an investigation be conducted of the intermediaries and partners with whom the Company intends to do business when any “red flags” or other suspicious circumstances are believed to exist. The legal department will work with you in performing a due diligence investigation tailored for new intermediaries, as well as for retaining existing intermediaries. Such investigations may include a review of reputation, expertise, experience and past performance of potential intermediaries or partners; their connection, if any, to government officials; the reasonableness of the proposed payment arrangements under the circumstances; and the business purpose for entering into the transaction. In certain situations, it may be necessary to hire private investigators to verify the reputation, credibility and financial stability of an intermediary or partner.

Red Flags When Dealing with Intermediaries

If there are “red flags” that raise questions or concerns about the intermediaries, then there is a duty to inquire. In an intermediary situation, typical issues that may trigger red flags include the following non-exhaustive list of concerns:

- Is the relationship of the intermediary to the governmental entity or contracting party?
- Is the intermediary him/herself a government official or closely related to a government official?
- Is the intermediary’s company owned in part by a government official or his/her family?
- The size of the payment to the intermediary - does it seem excessive?
- Is the payment excessive in light of payments made by the Company elsewhere for similar services?
- Is the payment excessive in light of local custom or local law for legitimate services?
- The nature of the payment to the intermediary - why is the intermediary being paid, and for what services?
- Has the intermediary made comments to the effect that a particular amount of money is needed in order for him to “get the business,” “make the necessary arrangements,” etc.?
- Are there strong indications that business in that country can only be done by bribing officials?
- Is it legal for the intermediary to act as such in that country and with relation to that contract?
- Are the services of the intermediary really necessary, or were they suggested merely to provide cover for a prohibited payment?
- What is the method and manner of the payment to the intermediary?
- Will the payment be all or partly in cash or a bearer instrument?
- Will the payment be made partly to another person or company?
- Will the payment be made in a country other than the one where the services were rendered?
- Has the intermediary requested any false documentation (e.g., false invoicing or failure to report the payment to host country fiscal authorities)?
- What is the reputation of the intermediary? And is that reputation for honesty and effective service?
- Are there business references available to confirm the expertise, experience and integrity of the intermediary?

If you are aware of any such “red flags” involving an intermediary, contact the legal department [or Compliance

department]. Pursuant to Company policy, further investigation may be required before contracting with the intermediary. No such investigation should be undertaken without the prior approval of the legal department [or Compliance department]. Certain standard provisions designed to ensure compliance with the requirements set forth in the FCPA and which have been developed by the legal department shall be included in all such agreements.

Charitable Contributions and Support for Social Projects

Monetary and other contributions to charities, social projects and funds, including schools, educational funds and infrastructure projects, should be handled with caution because they can be conduits for corrupt payments. In order to minimize this risk, the Company requires an appropriate investigation be conducted into such charities and projects. Any such contributions require prior approval of the legal department.

Hospitalities and Gifts

Under certain circumstances and consistent with the standards of the FCPA, certain hospitalities such as transportation, accommodations, meals, entertainment and nominal gifts may be extended to government officials. All such hospitalities and gifts must (i) have a clear business purpose which is directly related to the Company's commercial objectives; (ii) be reasonable in amount and bona fide; and (iii) be offered only in connection with the promotion, demonstration, or explanation of the Company's products or services or the execution or performance of a contract with a non-U.S. government or agency thereof.

The provision of any such hospitalities and gifts should be infrequent since the cumulative effect of regular hospitalities or gifts may create the appearance of improper conduct. In addition, hospitalities and gifts may not be lavish or extravagant. No hospitalities should be extended or gifts given to family members or relatives of government officials without the prior approval of the legal department [or Compliance department]. It is usually advisable that the Company pay for hospitalities itself, rather than reimbursing the recipient. Further, such hospitalities and gifts must be permitted under local law and should conform to generally accepted local customs.

Our employees are required to consult with the legal department [or Compliance department] before proceeding to assume responsibility for payments which would fall within this category of permissible expenses.

Facilitation or "Grease" Payments

In very limited circumstances, facilitation or "grease" payments (less than \$100) may be made to low-level government officials to expedite the performance of routine, non-discretionary government action(s). Such payments are specifically exempt from the FCPA, but nonetheless may violate local law. Any such payment must be accurately and fully recorded in the Company's books and records and reported to the Legal Department.

Documentary Accuracy

The Company requires that documents prepared to evidence a transaction accurately reflect the parties, the payment arrangements and the purposes of the transaction. Documents prepared by other parties to a transaction should be carefully reviewed by the legal department to ensure that the Company's standards are met.

Internal Controls

Compliance with the Company's accounting and internal control procedures is mandatory. Of particular significance are the following:

- **Record Keeping**
All accounting records, expense reports, invoices, vouchers, records of gifts, business entertainment or other expenditures, and contracts or agreements must be accurately and completely reported and recorded. False or misleading documentation will result in immediate disciplinary action, and could result in an employee's civil and/or criminal liability. No Company funds or assets may be used for any unlawful, improper or unethical purpose. All Company financial books and records must be maintained in accordance with applicable accounting and auditing standards.
- **Support for Expenses**
Requests for expense reimbursements must be approved in accordance with Company policy. Supporting documentation, including original receipts, invoices or other relevant documents, for the expense reimbursements must be filed with the expense reports and maintained for a reasonable period of time established by policy from the Company's accounting department. Such documentation must state (i) description of the expenditure; (ii) purpose; (iii) identification of the recipient; (iv) amounts involved, and (v) manner of payment.
- **Wire transfers**
The practice of transferring funds to the off-shore accounts of employees, intermediaries, consultants and third-party vendors is not permissible unless the recipient provides proper supporting documentation and the transactions are authorized by the legal department.
- **Petty Cash**
All petty cash accounts must be maintained with strict controls to ensure their use is limited to proper purposes and that each use is appropriately documented. No undisclosed or unrecorded Company funds may be established for any purpose. Any amounts paid from such accounts should be properly supported as described above, and accurately recorded and reflected in the accounting records.

Comparison Chart: FCPA UKBA Brazil's Law			
	FCPA	UK Bribery Act	Brazil's Law n. 18,846
Bribery of foreign officials	Yes	Yes	Yes
Bribery of local officials	No	Yes	Yes
Extraterritorial reach	Yes	Yes	Yes, but not as broad as in the FCPA and UKBA
Books and Records	Yes	No	No
Other prohibited acts	No	No	Yes, include acts against the Public Administration (e.g., fraud in public tender processes, bid rigging)
Exception for facilitation payments	Yes	No	No (prohibited in Brazil)
Corporate criminal liability	Yes	Yes	No
Corporate strict liability	Only under the accounting provisions	Yes for "failure to prevent bribery"	Yes
Corporate fines	Anti-bribery violation: up to US \$5 million per violation / Accounting violation: up to US \$25 million per violation. Twice the benefit obtained or sought	Unlimited	Up to 20 percent of the company's gross revenue of the previous year or up to US \$60 Million (around US \$25 Million) if gross revenue cannot be determined
Other corporate "sanctions"	Debarment, monitors, derivative lawsuits, etc. (applicable under other U.S. laws and legal features)	Debarment	Prohibition to received incentives, suspension, etc.
Credit for compliance programs	Yes (U.S. Sentencing Guidelines, FCPA Guidance, etc.)	Yes (can be full defense for corporate offense of "failure to prevent bribery")	Yes (amount of credit not determined)
Credit for self-disclosure / cooperation	Yes (Principles of Federal Prosecution of Business Organizations, FCPA Guidance, etc.)	Yes, but limited	Yes (under the leniency program, fines can be reduced up to 2/3 and all other sanctions can be excluded)