

AUDITING

ANTI-BRIBERY PROGRAMS



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CEO, IIA-Netherlands

SPONSORED BY:



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Chapter 1

WHAT IS BRIBERY?

Within the last decade, the world has changed considerably when it comes to combating bribery, including corruption.¹ Stricter legislation, often with an international impact, increasing enforcement, criminal convictions resulting in fines up to almost \$1 billion, and imprisonment of the culprits up to 15 years, have been sending shock waves through the business community.

Transparency International (TI) defines bribery as “the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal or a breach of trust.”

Bribery is a widespread phenomenon in international business transactions, including trade and investment. It raises serious moral and political concerns, hinders good governance and economic development, and distorts international competitive conditions. It is essential to recognize that cross-border bribery has enormous negative consequences for the populations of affected countries. Bribery undermines public accountability while diverting public resources from important priorities such as health, education, and infrastructure.

Global companies have legal and ethical obligations to conduct their business honestly. This requires commitment, resources, and the ongoing management of a range of risks—legal, political, and reputational—including those associated with bribery. The implementation of a comprehensive range of anti-bribery policies and management systems is fundamental to efforts to prevent and remediate bribery within organizations.

Anti-bribery programs that are fully implemented and continuously monitored can be a powerful way to protect an organization against the risk of bribery and corruption. Internal audit is well positioned to evaluate the design, implementation, and effectiveness of the organization’s anti-bribery program.

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.”

—Kofi Annan, former Secretary General of the United Nations

¹ Corruption is often linked to bribing public officials. Bribery includes corruption but also illegal transactions with other parties.

Chapter 2 of this book describes what international initiatives were taken in the past decades. Chapter 3 describes how these initiatives materialized in conventions, laws, and regulations that have an impact on both national and international organizations. In chapter 4, the design of an anti-bribery program is described, including guidelines on how to operationalize and evaluate it. To conclude, chapter 5 offers a sample program on how to audit an anti-bribery program.

Chapter 2

INTERNATIONAL INITIATIVES TO COMBAT BRIBERY

This chapter describes major initiatives from international organizations taken in the last decades. It refers to guidance issued by these bodies that many (multinational) organizations have followed to design their anti-bribery programs. This chapter helps internal auditors put anti-bribery measures into perspective.

In the mid-1970s, more than 400 U.S. companies admitted to the U.S. Securities and Exchange Commission (SEC) that they were making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. One major example was the Lockheed bribery scandal, in which officials of aerospace company Lockheed paid foreign officials to favor their company's products. To stop these practices and restore public trust in the integrity of the American business system, the U.S. Congress enacted the Foreign Corrupt Practices Acts (FCPA)² in 1977.

After its launch in 1993, TI became an important influential organization creating public awareness of the need to stop bribery around the globe. Four years later, the Organisation for Economic Co-operation and Development (OECD) addressed many of TI's concerns in the OECD Convention³ of Combating Bribery of Foreign Public Officials in International Business Transactions. In 2003, the United Nations (UN) adopted the Convention⁴ against Corruption. In 2016, the International Organization for Standardization (ISO) published its standard on anti-bribery management systems.

Organisation for Economic Co-operation and Development (OECD)

In 1997, OECD adopted its Convention of Combating Bribery of Foreign Public Officials in International Business Transactions. In 2009, the Recommendation⁵ of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted. Section X of this recommendation includes principles related to accounting requirements, external audit, and internal controls, ethics, and compliance.

² <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

³ https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

⁴ https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

⁵ <https://www.oecd.org/daf/anti-bribery/44176910.pdf>

Adequate Accounting Requirements

Member countries of OECD need to implement laws and regulations requiring adequate maintenance of books and records, financial statement disclosures, and accounting and auditing standards to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery.

Independent External Audit

Member countries should require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring bodies.

Internal Controls, Ethics, and Compliance

Member countries should encourage companies to develop and adopt adequate internal controls, ethics, and compliance programs or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance.⁶ The topics covered include the following recommendations:

- Demonstrate strong, explicit, and visible support from senior management.
- Write a clearly articulated and visible policy prohibiting bribery.
- Provide training on the ethics and compliance program to employees at all levels.
- Set up an internal and confidential whistleblower line.
- Establish disciplinary procedures to address violations.
- Perform a risk-based due diligence of new and existing business partners.

United Nations (UN)

On October 31, 2003, the General Assembly of UN adopted the Convention⁷ against Corruption. This document covers five main areas:

- Preventive measures
- Criminalization and law enforcement
- international cooperation
- Asset recovery
- Technical assistance and information exchange

The Convention covers many different forms of corruption, such as bribery, trading in influence, abuse of functions, and various acts of corruption in the private sector. The convention has been ratified almost unanimously by the members of the UN. Among the few exceptions are Chad, Somalia, Surinam, and North Korea.

⁶ <https://www.oecd.org/daf/anti-bribery/44884389.pdf>

⁷ https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

Principle 10 of the UN Global Compact⁸ says that businesses should work against corruption in all its forms, including extortion and bribery. Participants are not only to avoid bribery, extortion, and other forms of corruption, but also to proactively develop policies and concrete programs to address corruption internally and within their supply chains. The 2017 Global Compact progress report⁹ indicates that almost 10,000 companies participate. Half of them are coming from Europe. Only 400 are based in the United States.

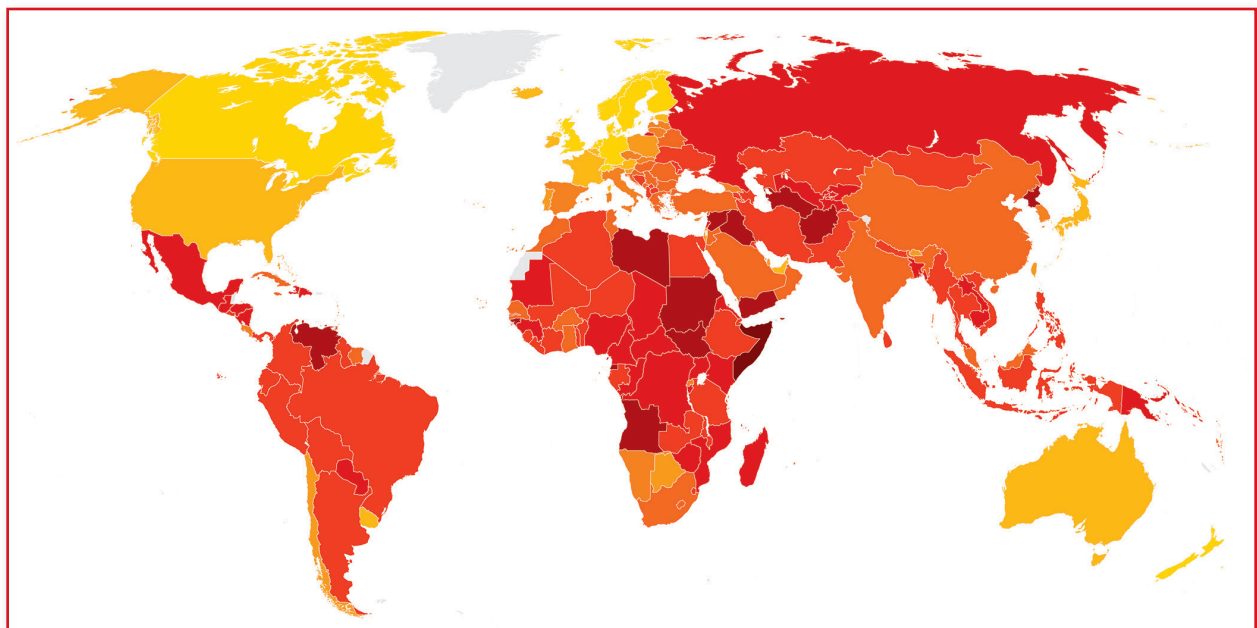
Transparency International (TI)

Having seen corruption's impact during his work in East Africa, retired World Bank official Peter Eigen, together with nine allies, set up a small organization to take on the taboo on corruption: Transparency International (TI) was established in 1993.

The anti-corruption lobbying by various chapters of TI in more than 100 countries raised the corruption issue to the world agenda. As result, the OECD adopted a recommendation to criminalize foreign bribery (see above).

In 2017, TI published its 13th Corruption Perception Index. This annual analysis generates awareness of the high-risk countries of the world. The Corruption Perceptions Index aggregates data from a number of different sources that provide perceptions of business people and country experts of the level of corruption in the public sector.

No country gets close to a perfect score in the Corruption Perceptions Index 2017.¹⁰ More than two-thirds of the 180 countries and territories in this year's index fall below the midpoint of our scale of 0 (highly corrupt) to 100 (very clean). The global average score is a paltry 43, indicating endemic corruption in a country's public sector. Top-scoring countries (yellow in the map below) are far outnumbered by orange and red countries where citizens face the tangible impact of corruption on a daily basis.



⁸ <https://www.unglobalcompact.org/what-is-gc/mission/principles>

⁹ https://www.unglobalcompact.org/docs/publications/UN%20Impact%20Brochure_Concept-FINAL.pdf

¹⁰ https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2017

TI also provides useful guidance to help organizations combat bribery in a structured way. Examples are the *Business Principles for Countering Bribery*¹¹ (see appendix A) and the comprehensive *Global Anti-Bribery Guidance*¹² that was released in 2017.

Scores

Lowest Corruption

2017 Rank	Country	2017 Score
1	New Zealand	89
2	Denmark	88
3	Finland	85
3	Norway	85
3	Switzerland	85
6	Singapore	84
6	Sweden	84
8	Canada	82
8	Luxembourg	82
8	Netherlands	82
8	United Kingdom	82

Highest Corruption

2017 Rank	Country	2017 Score
1	Somalia	9
2	South Sudan	12
3	Syria	14
4	Afghanistan	15
5	Sudan	16
5	Yemen	16
7	Equatorial Guinea	17
7	Guinea-Bissau	17
7	Korea, North	17
7	Libya	17

¹¹ https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery

¹² <https://www.antibriberyguidance.org/>

In 2013, TI published the third edition of its Business Principles¹³ for Countering Bribery to provide a framework for companies to develop comprehensive anti-bribery programs (see appendix A). These business principles are based on a board commitment to fundamental values of integrity, transparency, and accountability. Enterprises should aim to create and maintain a trust-based and inclusive internal culture of individual accountability in which bribery is not tolerated.

In October 2017, TI UK released its extensive Global Anti-Bribery Guidance.¹⁴ It is a best practice portal for companies operating internationally. It includes guidance on:

- Culture and tone at the top
- Governance and commitment
- Enabling factors
- Risk assessment
- Financial controls
- Conflicts of interest
- Political engagement
- Managing third parties
- Procurement and contracting

International Organization for Standardization (ISO)

ISO is an independent, non-governmental organization made up of members from the national standards bodies of 162 countries. ISO 37001:2016, *Anti-bribery management systems – Requirements with guidance for use*, represents a first effort at tackling bribery through the development of meaningful anti-bribery management systems. The standard was released in October 2016.

The purpose of ISO 37001 is to help prevent, detect, and deal with bribery, whether such bribery is by or on behalf of an organization or its employees or business associates. Using a series of related measures and controls, including supporting guidance, the anti-bribery management system specifies requirements for:

- An anti-bribery policy and procedures
- Top management leadership, commitment, and responsibility
- Oversight by a compliance manager or function
- Anti-bribery training
- Risk assessments and due diligence on projects and business associates
- Financial, procurement, commercial, and contractual controls
- Reporting, monitoring, investigation, and review
- Corrective action and continual improvement

ISO 37001 builds on guidance from various organizations, such as the International Chamber of Commerce (ICC), the OECD, TI, and various governments representing a global consensus on anti-bribery good practices.

¹³ https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery

¹⁴ <https://www.antibriberyguidance.org>

Conclusion

Bribery has been recognized internationally as a criminal act. Initiatives by the OECD, TI, UN, and ISO have noticeably increased awareness of the negative impacts of bribery over the last two decades. Combined with strong legislation and enforcement in various countries, multinational organizations are more willing than ever to counter foreign bribery and corruption. Guidance and tools have been developed by several international organizations to help small and large organizations. In the next chapter, the essence of the most relevant legislation is described.

Chapter 3

LAWS AND REGULATIONS WITH A GLOBAL IMPACT

This chapter describes the most important anti-bribery laws and regulations to which an organization may be exposed. Internal auditors should have a basic knowledge of the most essential elements of them to better understand the requirements and risks of noncompliance.

Following the UN Convention, this chapter covers the most relevant elements of national legislation and regulation with a global impact, in particular the U.S. FCPA, U.K. Bribery Act 2010, and the Criminal Law of the People's Republic of China. In addition, local or national laws and regulations may be applicable.

United Nations Convention against Corruption

Introduction

At its General Assembly of October 31, 2003, the UN adopted the United Nations Convention against Corruption. This Convention is one of the few legally binding international treaties. The purposes of this Convention are:

- To promote and strengthen measures to prevent and combat corruption more efficiently and effectively
- To promote, facilitate, and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery
- To promote integrity, accountability, and proper management of public affairs and public property

The Convention applies to the prevention, investigation, and prosecution of corruption and to the freezing, seizure, confiscation, and return of the proceeds of offenses established in accordance with this Convention. It addresses:

- Preventive anti-corruption policies and practices
- Public sector
- Codes of conduct for public officials
- Public procurement
- Private sector
- Criminalization and law enforcement

Many countries have developed relevant legislation based on the UN Convention against Corruption, the OECD Convention of Combating Bribery of Foreign Public Officials in International Business Transactions in 1997, and implementing the Recommendation¹⁵ of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

U.S. Foreign Corrupt Practices Act (FCPA)

Introduction

The U.S. Congress enacted the FCPA¹⁶ in 1977. The FCPA includes:

- The anti-bribery provisions that prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business
- The accounting provisions that impose certain record-keeping and internal control requirements and prohibit individuals and companies from knowingly falsifying the books and records or circumventing or failing to implement an issuer's system of internal controls

Enforcing the FCPA is a continuing priority at the Department of Justice (DOJ) and the SEC. The DOJ works regularly with the Federal Bureau of Investigation (FBI) to investigate potential FCPA violations.

In 2012, the SEC and the DOJ issued their first joint Resource Guide¹⁷ (Guide) to the FCPA. The Guide describes in detail the statutory requirements and also provides insight into DOJ and SEC enforcement practices through hypothetical examples of enforcement actions. Summaries of applicable case law and DOJ opinion releases also are included. The DOJ and SEC recognize that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs. To assist these organizations, the DOJ and SEC provided additional guidance in the Hallmarks of Effective Compliance Programs section of the Guide (appendix B).

Jurisdiction

The FCPA applies to all companies that are required to file periodic reports with the SEC. A company need not be a U.S. company to be subject to the FCPA. The act also applies to foreign companies with American Depositary Receipts that are listed on a U.S. exchange. Officers, directors, employees, agents, or stockholders acting on behalf of such companies (whether U.S. or foreign nationals), and any co-conspirators, also can be prosecuted under the FCPA.

The law also applies to any individual who is a citizen, national, or resident of the United States or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under U.S. laws or that has its principal place of business in the United States.

Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.

¹⁵ <http://www.oecd.org/daf/anti-bribery/44176910.pdf>

¹⁶ <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

¹⁷ <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>

The Business Purpose Test

The FCPA applies only to payments intended to induce or influence a foreign official to use his or her position “in order to assist...in obtaining or retaining business for or with, or directing business to, any person.” This requirement is known as the “business purpose test” and is broadly interpreted.

As a result, many enforcement actions of DOJ and SEC involve bribes to obtain or retain government contracts. The FCPA also prohibits bribes in the conduct of business or to gain a business advantage. For example, bribery payments made to win a contract, circumvent import rules, or to evade or reduce tax payments meet the business purpose test. Therefore, these improper payments violate the FCPA.

While the FCPA does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages.

Beneficiary

The FCPA prohibits bribe payments to a “foreign official,” which is defined as: any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of 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, or for or on behalf of any such public international organization.

Therefore, bribery payments from low-ranking employees to high-level officials fall under the FCPA. It also includes those acting on behalf of the foreign government. Governments can be organized in very different ways. Many operate through state-owned and state-controlled entities, particularly in areas such as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation. Companies should consider factors mentioned in the Guide when evaluating the risk of FCPA violations and designing compliance programs. DOJ and SEC have pursued cases involving instrumentalities and use an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government.

Corporate Liability

A company is liable when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company. There are two ways in which a parent company may be liable for bribes paid by its subsidiary. First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example, when it directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be liable for its subsidiary’s conduct under traditional agency principles. The fundamental characteristic of agency is control.

Accounting Provisions

In addition to the anti-bribery provisions, the FCPA contains accounting provisions applicable to public companies. The FCPA’s accounting provisions prohibit off-the-books accounting. Company management and investors rely on a company’s financial statements and internal accounting controls to ensure transparency in the financial health of the business, the risks undertaken, and the transactions between the company and its customers

and business partners. The purpose of the accounting provisions is to strengthen the accuracy of the corporate books and records and the reliability of the audit process that constitute the foundations of our system of corporate disclosure.

Guiding Principles for Enforcement

The DOJ's Principles of Federal Prosecution of Business Organization

Whether and how DOJ will commence, decline, or otherwise resolve an FCPA matter is guided by the Principles of Federal Prosecution¹⁸ in the case of individuals and the Principles of Federal Prosecution of Business Organizations¹⁹ in the case of companies.

Nine factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

- The nature and seriousness of the offense, including the risk of harm to the public
- The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management
- The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it
- The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents
- The existence and effectiveness of the corporation's preexisting compliance program
- The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies
- Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution
- The adequacy of the prosecution of individuals responsible for the corporation's malfeasance
- The adequacy of remedies such as civil or regulatory enforcement actions

SEC's Considerations

The SEC's Enforcement Manual²⁰ published by the SEC's Enforcement Division sets forth information about how the SEC conducts investigations, as well as the guiding principles that SEC staff considers when determining whether to open or close an investigation and whether civil charges are merited.

In determining whether to open an investigation and, if so, whether an enforcement action is warranted, SEC staff considers a number of factors, including:

- The statutes or rules potentially violated

¹⁸ <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>

¹⁹ <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>

²⁰ <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

- The egregiousness of the potential violation
- The potential magnitude of the violation
- Whether the potentially harmed group is particularly vulnerable or at risk
- Whether the conduct is ongoing
- Whether the conduct can be investigated efficiently and within the statute of limitations period
- Whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct

SEC staff also may consider whether the case involves a possibly widespread industry practice that should be addressed, whether the case involves a recidivist, and whether the matter gives the SEC an opportunity to be visible in a community that might not otherwise be familiar with it or the protections afforded by the securities laws.

Self-Reporting, Cooperation, and Remedial Efforts

When starting an investigation both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters. In 2001, the SEC released a report (commonly known as the Seaboard Report) that explained the Commission's decision not to take enforcement action against a public company for certain accounting violations caused by its subsidiary. The report details the many factors the SEC considers in determining whether, and to what extent, it grants leniency to companies for cooperating in its investigations and for related good corporate citizenship.

In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, the DOJ and SEC also consider the adequacy of a company's compliance program when deciding what, if any, action to take. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. It will often affect the penalty amount and the need for a monitor or self-reporting. An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken.

Penalties and Sanctions

The FCPA provides for different criminal and civil penalties for companies and individuals. For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$2 million. Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to \$250,000 and imprisonment for

Largest FCPA Enforcement Actions of All Time

1. **Telia Company AB (Sweden):** US\$965 million in 2017
2. **Siemens (Germany):** US\$800 million in 2008
3. **VimpelCom (Netherlands):** US\$795 million in 2016
4. **Alstom (France):** US\$772 million in 2014
5. **KBR/Halliburton (United States):** US\$579 million in 2009
6. **Teva Pharmaceutical (Israel):** US\$519 million in 2016
7. **Keppel Offshore & Marine (Singapore):** US\$422 million in 2017
8. **Och-Ziff (United States):** US\$412 million in 2016
9. **BAE (United Kingdom):** US\$400 million in 2010
10. **Total SA (France):** US\$398 million in 2013

Source: FCPA Blog December 2017

up to five years. For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$25 million. Individuals are subject to a fine of up to \$5 million and imprisonment for up to 20 years.

U.K. Bribery Act 2010

Introduction

The Bribery Act 2010, which came into force in July 2011, represented a complete reform of the law on bribery in the U.K., including the introduction of a new corporate offense for organizations “failing to prevent bribery.” An organization commits the offense if an “associated person” performing services on its behalf bribes another person in order to obtain or retain either business or a business advantage for the organization.

The U.K. Ministry of Justice published guidance²¹ on procedures that commercial organizations can put in place to prevent persons associated with them from bribing. The most important parts of this guidance are included in chapter 4, which describes the elements of an anti-bribery program.

Jurisdiction

A commercial organization can be liable for conduct amounting to an offense on the part of a person who is neither a U.K. national or resident in the U.K., nor a body incorporated or formed in the U.K. In addition, it does not matter whether the acts or omissions that form part of the offense take part in the U.K. or elsewhere. So, provided the organization is incorporated or formed in the U.K., or that the organization carries on a business or part of a business in the U.K. (wherever in the world it may be incorporated or formed), then U.K. courts will have jurisdiction.

Offenses of Bribing Another Person

The Act introduces four categories of offenses:

1. Bribing another person
2. Being bribed (as the recipient of the bribe)
3. Bribing a foreign public official
4. Failure to prevent bribery

A commercial organization will be liable for prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization. The commercial organization will have a full defense if it can show that despite a particular case of bribery, it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.

Adequate Procedures

The only defense an organization can have to defend itself against an offense is to have adequate procedures in place that are designed to prevent bribery. The guidance of the U.K. Ministry of Justice includes six principles (see appendix D) intended to help an organization design adequate bribery prevention procedures:

²¹ <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

Principle 1: Proportionate Procedures

“An organization’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organization’s activities. They are also clear, practical, accessible, effectively implemented, and enforced.”

Principle 2: Top-Level Commitment

“The top-level management of a commercial organization (be it a board of directors, the owners, or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organization in which bribery is never acceptable.”

Principle 3: Risk Assessment

“The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed, and documented.”

Principle 4: Due Diligence

“The commercial organization applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organization in order to mitigate identified bribery risks.”

Principle 5: Communication (including training)

“The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces.”

Indicative List of Elements of Bribery Prevention Procedures

- The involvement of the organization’s top-level management
- Risk assessment procedures
- Due diligence of existing or prospective associated persons
- The provision of gifts, hospitality, and promotional expenditure; charitable and political donations; or demands for facilitation payments
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action, and remuneration
- Governance of business relationships with all other associated persons, including pre- and post-contractual agreements
- Financial and commercial controls such as adequate book-keeping, auditing, and approval of expenditure
- Transparency of transactions and disclosure of information
- Decision making, such as delegation of authority procedures, separation of functions, and the avoidance of conflicts of interest
- Enforcement, detailing discipline processes and sanctions for breaches of the organization’s anti-bribery rules
- The reporting of bribery, including “speak up” or “whistle-blowing” procedures
- The detail of the process by which the organization plans to implement its bribery prevention procedures; for example, how its policy will be applied to individual projects and to different parts of the organization
- The communication of the organization’s policies and procedures, and training in their application
- The monitoring, review, and evaluation of bribery prevention procedures

Source: Guidance to the Bribery Act 2010 – Ministry of Justice

Principle 6: Monitoring and Review

“The commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.”

Penalties

Individuals found guilty under the Bribery Act 2010 of bribing another person or being bribed could face penalties up to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

Differences Between the FCPA and the Bribery Act 2010

The U.K. Bribery Act 2010 is significantly broader than the U.S. FCPA and features stricter scrutiny and enhanced criminal penalties. It is important to note that U.S. companies with U.K. offices will be responsible for complying not only with the FCPA but also with the Bribery Act. Consequently, U.S. companies will need to revise their FCPA compliance programs to take into account the U.K.’s Bribery Act provisions.

Following are the key differences between the Bribery Act and the FCPA:

- The FCPA focuses on anti-corruption of foreign governmental officials, whereas the Bribery Act also covers non-governmental officials (i.e., private citizens). The Bribery Act makes any bribery illegal—not just the bribing of a foreign government official (or the attempt thereof).
- Unlike the FCPA, the Bribery Act does not have a facilitation payments defense. Under the Bribery Act, certain types of corporate hospitality are prohibited if they are “intended to subvert the duties of good faith or impartiality that the recipient owes his or her employer.”
- The FCPA has no strict liability either written directly into the statute or interpreted by judicial review. The Bribery Act creates a new strict liability of corporate offense for the failure of a corporate official to prevent bribery.
- The FCPA has criminal penalties of five years per offense. The Bribery Act has penalties of up to 10 years per offense and unlimited fines for companies that fail to implement “adequate procedures.”
- The FCPA “books and records” provisions could be used to prosecute the bribery of private individuals as well as public officials. The Bribery Act has no equivalent provision.

People’s Republic of China

The People’s Republic of China (PRC) included anti-bribery clauses in the Anti-Unfair Competition Law and the Criminal Law of the PRC.

Anti-Unfair Competition Law of the PRC

This law is formulated with a view to safeguarding the healthy development of a socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers.

The most relevant articles related to combating bribery are the following:

A business operator²² shall, in his market transactions, follow the principles of voluntariness, equality, fairness, honesty, and credibility and observe the generally recognized business ethics.

A business operator shall not resort to bribery by offering money or goods, or by any other means, in selling or purchasing commodities. A business operator who offers off-the-book rebate in secret to the other party, a unit, or an individual shall be deemed and punished as offering bribes; and any unit or individual that accepts the off-the-book rebate in secret shall be deemed and punished as taking bribes.

A business operator who resorts to bribery by offering money or goods or by any other means in selling or purchasing commodities, and if the case constitutes a crime, shall be investigated for criminal responsibility according to law; if the case does not constitute a crime, the supervision and inspection department may impose a fine of not less than 10,000 yuan but not more than 200,000 yuan in light of the circumstances and confiscate the illegal earnings, if any.

Criminal Law of the PRC

The tasks of the PRC Criminal Law²³ are to use punishment struggle against all criminal acts to defend national security, the political power of the people's democratic dictatorship, and the socialist system; to protect state-owned property and property collectively owned by the laboring masses; to protect citizens' privately owned property; to protect citizens' right of the person, democratic rights, and other rights; to maintain social and economic order; and to safeguard the smooth progress of the cause of socialist construction.

This law may be applicable to foreigners who, outside PRC territory, commit crimes against the PRC state or against its citizens, provided that this law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according to the law of the place where it was committed.

The law describes a wide variety of crimes, including the following paragraphs related to bribes:

- State personnel who take advantage of their office to demand money and things from other people, or if they illegally accept money and things from other people and give favors to the latter, are guilty of the crime of bribery.
- State personnel who, in their economic operation, accept various kinds of kickback and handling fees for their personal use in violation of state provisions are also guilty of the crime of bribery and are to be punished accordingly.

Those who commit the crime of bribery are to be punished according to the seriousness of their cases. The highest penalty applies to individuals who have engaged in bribery with an amount of more than 100,000 yuan. They are to be sentenced to more than 10 years of fixed-term imprisonment or life imprisonment and may, in addition, have their properties confiscated. In especially serious cases, those offenders are to be sentenced to death and, in addition, have their properties confiscated.

²² A business operator refers to a legal person or any other economic organization or individual engaged in commodities marketing or profit-making services.

²³ <http://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>

Other Countries

Forty-one other countries that signed the OECD convention have enacted anti-corruption legislation. OECD monitors the implementation phases.

 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status as of May 2017			
Country	Deposit of instrument of acceptance/approval/ratification/accession	Entry into force of the Convention	Entry into force of implementing legislation
Argentina	8 February 2001	9 April 2001	10 November 1999
Australia	19 October 1999	18 December 1999	17 December 1999
Austria	20 May 1999	19 July 1999	1 October 1998
Belgium	27 July 1999	25 September 1999	3 April 1999
Brazil	24 August 2000	23 October 2000	11 June 2002
Bulgaria	22 December 1998	15 February 1999	29 January 1999
Canada	17 December 1998	15 February 1999	14 February 1999
Chile	18 April 2001	17 June 2001	8 October 2002
Colombia	20 November 2012	19 January 2013	14 November 2012
Costa Rica	24 May 2017	23 July 2017	15 May 2017
Czech Republic	21 January 2000	21 March 2000	9 June 1999
Denmark	5 September 2000	4 November 2000	1 May 2000
Estonia	14 December 2004	12 February 2005	1 July 2004
Finland	10 December 1998	15 February 1999	1 January 1999
France	31 July 2000	29 September 2000	29 September 2000
Germany	10 November 1998	15 February 1999	15 February 1999
Greece	5 February 1999	15 February 1999	1 December 1998
Hungary	4 December 1998	15 February 1999	1 March 1999
Iceland	17 August 1998	15 February 1999	30 December 1998
Ireland	22 September 2003	21 November 2003	26 November 2001
Israel	11 March 2009	10 May 2009	21 July 2008
Italy	15 December 2000	13 February 2001	26 October 2000
Japan	13 October 1998	15 February 1999	15 February 1999
Korea	4 January 1999	15 February 1999	15 February 1999
Latvia	31 March 2014	30 May 2014	21 March 2014
Lithuania	16 May 2017	15 July 2017	3 May 2017
Luxembourg	21 March 2001	20 May 2001	11 February 2001
Mexico	27 May 1999	26 July 1999	18 May 1999
Netherlands	12 January 2001	13 March 2001	1 February 2001
New Zealand	25 June 2001	24 August 2001	3 May 2001
Norway	18 December 1998	15 February 1999	1 January 1999
Poland	8 September 2000	7 November 2000	4 February 2001
Portugal	23 November 2000	22 January 2001	9 June 2001
Russian Federation	17 February 2012	17 April 2012	16 May 2011
Slovak Republic	24 September 1999	23 November 1999	1 November 1999
Slovenia	6 September 2001	5 November 2001	23 January 1999
South Africa	19 June 2007	18 August 2007	27 April 2004
Spain	14 January 2000	14 March 2000	2 February 2000
Sweden	8 June 1999	7 August 1999	1 July 1999
Switzerland	31 May 2000	30 July 2000	1 May 2000
Turkey	26 July 2000	24 September 2000	11 January 2003
United Kingdom	14 December 1998	15 February 1999	14 February 2002
United States	8 December 1998	15 February 1999	10 November 1998

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In addition, many other countries such as the Philippines, Singapore, several members of the Commonwealth of Independent States (former U.S.S.R), and African countries have implemented anti-corruption legislation.

Conclusion

Corruption has been recognized globally as a criminal offense. Organizations should comply with the (international) legislation and legislation applicable in the countries in which they operate, including countries with far-reaching jurisdiction such as the FCPA, the U.K. Bribery Act 2010, and the PRC Criminal Law. It is in the best interests of organizations to develop an anti-bribery program to ensure compliance and minimize risk. In the next chapter, the elements of such a program are described.

Chapter 4

THE ELEMENTS OF AN ANTI-BRIBERY AND CORRUPTION PROGRAM

This chapter describes the core elements of an anti-bribery program. Such a program supports a structural way to translate the organizational values into day-to-day practices. The internal auditor should have a good understanding of both the desired organizational culture as an enabler for an effective program as well as noncompliance risks related to laws and regulations.

Organizations should develop and implement an anti-bribery program to demonstrate their ethical values and commitment to combat bribery. The organization should make it clear that bribery in any form, direct or indirect, is prohibited (zero tolerance). The program also demonstrates that an organization is making reasonable efforts to prevent the organization from paying or receiving bribes.

The program should take into account all relevant laws and regulations and additional guidance applicable in the countries in which the organization operates. The organization should ensure that it is informed of all internal and external matters material to the effective development and implementation of the program.

The program should be proportionate, taking into account the specific bribery risks that relate to the industry, the size of the organization and complexity of its operations, as well as the markets in which the organization operates.

In this chapter, we will mainly follow the structure of Business Principles²⁴ of TI (see appendix A) while input from other sources has been used when considered useful for the purpose of this report, in particular from the *Guidance to the Bribery Act 2010*²⁵ and TI's *Global Anti-Bribery Guidance*.²⁶ A full list of resources is included in the reference materials.

Tone at the Top

Those at the top of an organization are in the best position to foster a culture of integrity where bribery is unacceptable. The board of directors and senior management should be committed to fundamental values of integrity, transparency, and accountability. This includes a strong, explicit, and visible support to the anti-bribery program. The organization should aim to create and maintain a culture of individual accountability in which bribery is not

²⁴ https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery

²⁵ <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

²⁶ <https://www.antibriberyguidance.org/>

tolerated. A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, also will encourage subordinates to adhere to those standards.

Effective formal statements that demonstrate top-level commitment are likely to include:

- A commitment to carry out business fairly, honestly, and openly
- A commitment to zero tolerance toward bribery
- The consequences of breaching the policy for employees²⁷
- Protection and procedures for confidential reporting of bribery (whistleblowing)

In addition to formal statements, the board, directors, and managers should “walk the talk.”

Code of Conduct

A code of conduct is the foundation upon which an effective compliance program is built. It should be clear, concise, and accessible to all employees and to those conducting business on the organization’s behalf. It should be available in local languages, allowing all employees in foreign subsidiaries to access and understand it. In addition, it is good practice to define a specific code of conduct for suppliers. It is important that the code remains current. Therefore, it has to be periodically reviewed and updated. Hypothetical case studies could be included to provide guidance to all levels of personnel.

Risk Assessment

The purpose of a risk assessment is to help design an anti-bribery program that is proportionate to the bribery risks that the organization faces. The anti-bribery program should be tailored to reflect the organization’s particular business risks, circumstances, and culture, taking into account inherent risks such as locations of the business, the business sector, and organizational risks such as size of the organization. Potential risks also relate to transactions with foreign governments, including payments to foreign officials, use of third parties, gifts, hospitality expenses, charitable and political donations, and facilitating payments.

External risks can be categorized into five broad groups:

- *Country risk*: this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation, and a failure of the foreign government, media, local business community, and civil society to effectively promote transparent procurement and investment policies.
- *Sectoral risk*: some sectors are higher risk than others. Higher risk sectors include the extractive industries, construction, and transportation sectors.
- *Transaction risk*: certain types of transaction give rise to higher risks; for example, charitable or political contributions, licenses and permits, and transactions relating to public procurement.
- *Business opportunity risk*: such risks might arise in high-value projects; projects involving many contractors or intermediaries; or with projects that are not apparently undertaken at market prices or that do not have a clear legitimate objective.

²⁷ References in this chapter and the next include directors, officers, and management.

- *Business partnership risk:* certain relationships may involve higher risk; for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.

Internal structures or procedures may themselves add to the level of risk. Counterproductive internal factors may include a lack of a clear anti-bribery message from the top or a bonus culture that rewards excessive risk taking.

Based on the risk assessment, the scope of the anti-bribery program will be defined, focusing on the higher bribery-related risks.

Policies and Procedures

The organization has to establish policies and procedures based on the code of conduct that outline responsibilities for compliance and describe internal controls, including authorization levels and sanctions. The required policies and procedures depend on the identified bribery-related risks. These policies and procedures should be made applicable to personnel at all levels of the organization. Procedures should be linked to day-to-day operations and may include additional guidance. The format and language used should enable a good understanding at all levels of the organization.

Monitoring Compliance

An organization should assign the responsibility for the oversight and implementation of the anti-bribery program to one specific senior executive (for instance, a compliance officer). For smaller organizations, it could be assigned to the head of legal affairs or the risk management function. This individual 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. Adequate autonomy generally includes direct access to the board of directors and the audit and risk committee.

Scope of the Anti-Bribery Program

The organization should prohibit all forms of bribery, whether they take place directly or through third parties. It also should explicitly prohibit its employees from soliciting, arranging, or accepting bribes intended for the employee's benefit or that of the employee's family, friends, associates, or acquaintances. Appropriate sanctions for violations should be established and communicated. The program should address the most prevalent risk areas identified.

Conflicts of Interest

Conflicts of interest arise when the various interests, duties, or commitments that a person may have, such as family, friends, voluntary work, or political interests, come into conflict with the interests of the organization the person works for. A conflict of interest creates corruption risk when an employee or contracted third party breaches the duty due to the company by acting in regard to another interest and does not advise the company of this. This improper behavior, if serious enough, could expose the person to extortion demands or be the first step to criminal behavior, including bribery.

The organization should establish policies and procedures to identify, monitor, and manage conflicts of interest that may give rise to a risk of bribery—whether actual, potential, or perceived. These policies and procedures should apply to employees and contracted parties such as agents, lobbyists, and other intermediaries.

Interactions with Public Officials

Every organization has to deal with public officials. In principle, these interactions are considered to be normal unless they are prohibited by law or internal regulations. Policies should make it clear that employees, either directly or through an intermediary, offer or provide any payment or other thing of value to a public official to secure an improper advantage or that reasonably might be perceived as providing an improper advantage in connection with the public official's position. Therefore, policies and additional guidance should clearly describe which payments are bona fide and which are not.

The FCPA Resource Guide to the U.S. FCPA includes the following non-exhaustive list of safeguards that may be helpful to businesses in evaluating whether a particular expenditure is appropriate or may risk violating the FCPA:

- Do not select the particular officials who will participate in the party's proposed trip or program, or else select them based on predetermined, merit-based criteria.
- Pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt.
- Do not advance funds or pay for reimbursements in cash.
- Ensure that any stipends are reasonable approximations of costs likely to be incurred and/or that expenses are limited to those that are necessary and reasonable.
- Ensure the expenditures are transparent, both within the company and to the foreign government.
- Do not condition payment of expenses on any action by a foreign official.
- Obtain written confirmation that payment factors of the expenses is not contrary to local law.
- Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred.
- Ensure that costs and expenses on behalf of foreign officials will be accurately recorded in the company's books and records.

Small Bribes

Small bribe payments, also called "facilitation," "speed," or "grease" payments, are small unofficial payments made to secure or expedite the performance of a routine or necessary action to which the payer of the facilitation payment has legal or other entitlement. Examples are visa application, obtaining licenses, clearance of goods by the customs, or regulatory approvals. Small bribes can take the form of cash or gift vouchers, but they also can be in-kind, such as alcohol, perfumes, and other goods or services.

Small bribes are part of a cycle of bribery that corrodes public and business standards and provides a climate for much larger public sector bribery and state theft. The effects in countries with high levels of corruption can be widespread. In such circumstances, businesses and citizens may face daily demands for payments for essential transactions, increasing the costs of living to citizens and adding costs and uncertainties to business. Even policemen and similar officials may demand money to prevent a (high) fine or other sanctions.

Systematic use of small bribes can accumulate to substantial sums. Therefore, small bribes may be identified as a high-risk area. Recognizing that facilitation payments are bribes, the organization should prohibit them.

Political Contributions

Organizations engage with politicians to obtain benefits for the organization. Organizations may, for example, be seeking to improve the business and economic environment, create new markets and opportunities, and try to prevent or modify legislation that is not in the interest of the organization. This political engagement is, however, a significant risk area for bribery and corruption. Also, public perceptions of lobbying in the political process may cause reputational damage. The consequences of improper, negligent, or inadvertent engagement in political activities can be substantial. Political contributions can be made in various ways, including donations, loans with favorable conditions, free use of facilities or services, and support of fundraising events.

To mitigate bribery risks, the organization and its employees, agents, lobbyists, or other intermediaries should not make direct or indirect contributions on behalf of the organization to political parties, organizations, or individuals engaged in politics as a way of obtaining unfair advantage in business transactions. To be fully transparent, the organization should publicly disclose all its political contributions.

Charitable Donations, Community Investments, and Sponsorships

Many organizations are engaged in corporate social responsibility and assist charitable organizations around the world. However, what seem to be legitimate social investments, sponsorships, or contributions could be hidden bribery payments when the ultimate purpose is to improperly influence an individual or entity—especially a public official—to act or refrain from acting in a manner desired by the organization.

Donations and community investments are given without expectation of a tangible business return. However, community investments are often linked to specific contracts, providing support to project-affected communities resulting in a heightened bribery risk. Sponsorships may be seen as marketing expenses and usually are not linked to projects.

Charitable donations, community investments, and sponsorships can all be used to pay bribes. They may be used to bribe a public official or as a way to hide the trail to the ultimate beneficiary of the bribe. They also present opportunities for employees to make inflated donations or sponsorship fees and receive money back from the recipients as kickbacks. From a transparency perspective, the organization should publicly disclose all its charitable donations, community investments, and sponsorships.

Business Relationships

Every organization does business with a range of third parties. Third parties are all individuals with whom, or entities with which, the organizations has or will have a business relationship. They include partners, suppliers, contractors, agents, consultants, lobbyists, and other intermediaries. Engaging a third party entails risk because the organization can incur legal liability and reputational damage as a result of misconduct by individuals or entities acting on the organization's behalf. Also, third parties can be used to pay bribes that are not reflected in the organization's accounts. Thus the organization could be exposed to legal penalties and reputational damage for misconduct by third parties acting on behalf of operators that have a license agreement with the organization. For these reasons, a business relationship with a potential third party should only be established or amended if the resulting relationship satisfies internal integrity due diligence.

Associate Business Entities

An organization usually has a number of associated business entities; for instance, subsidiaries, pension funds, and other legal vehicles over which it exercises control. This could be based on ownership or on specific agreements between parties. The anti-bribery program should be implemented in all business entities over which the organization has effective control.

When the organization does not have effective control, it should use its influence to encourage an equivalent program in business entities in which it has a significant investment or with which it has significant business relationships. Whether or not it has effective control over a business entity, the organization should undertake properly documented, reasonable, and proportionate anti-bribery due diligence of business entities when entering into a relationship, including mergers, acquisitions, and significant investments.

The organization should perform reasonable and proportionate monitoring of its significant business relationships. This may include the right of inspection of books and records. The enterprise should document relevant aspects of the implementation of its anti-bribery program or equivalent by associated business entities.

In the event that policies and practices of associated business entities are in conflict with the principles of its own program, the organization should take appropriate action. This may include requiring correction of deficiencies in the implementation of the entity's program and the application of sanctions. Ultimately, the organization should discontinue the relationship. The organization should have a right of termination in the event that associated business entities engage in bribery or act in a manner inconsistent with the organization's program.

Joint Ventures and Consortia

The organization could be held liable for the corrupt behavior of a joint venture or other business partners. As a result, the organization's reputation may be damaged if a joint venture or other business arrangement in which the organization is participating is found to have engaged in corrupt behavior.

Where the organization is unable to ensure that a joint venture or consortium has a program consistent with its own, it should have a plan for taking appropriate action if bribery occurs or is reasonably thought to have occurred. This can include requiring correction of deficiencies in the implementation of the joint venture's or consortium's program, the application of sanctions, or exiting from the arrangement.

Before entering into a joint venture, consortium, or comparable business arrangement, a due diligence should be conducted. An annual assessment must be conducted to identify the (changing) corruption risk of the joint venture. In conducting the assessment, the following may be considered:

- The general level of corruption in the country in which the joint venture operates
- The reputation of the operator of the joint venture
- The design of the operator's management system/compliance program and its effectiveness
- The group's level of influence in the joint venture
- The audits/verifications performed on the joint venture
- The corruption risks faced by the joint venture

Agents, Lobbyists, and Other Intermediaries

Agents, lobbyists, and other intermediaries act as links between the organizations and a third party. Before appointing intermediaries, the organization should undertake properly documented due diligence. Agreements with intermediaries must be in writing and sufficiently describe the relationship between the parties. Agents, lobbyists, and other intermediaries should agree contractually to comply with the organization's anti-bribery program.

The organization should contractually require its agents, lobbyists, and other intermediaries to keep proper books and records available for inspection by the organization, auditors, or investigating authorities. All agreements with agents, lobbyists, or other intermediaries require prior approval of senior management and legal affairs.

The agreed-upon compensation for an intermediary must be justifiable and proportional to the (legitimate) service rendered. Payments for services rendered may only be made against satisfactory documentation and must be accounted for. Policies and procedures and the related internal controls should ensure that no improper payments are channeled through agents, lobbyists, or other intermediaries.

Lobbyists are intermediaries who represent the organization's interests by seeking to inform or influence decisions made by individuals in the public and private sectors, including officials in the government or members of regulatory agencies. The use of lobbyists must comply with all applicable lobbying laws. In addition, lobbyists are required to disclose to the person or agency he or she is seeking to influence that the lobbyist represents the organization's interests. All contracts with lobbyists must contain provisions requiring lobbyists to provide such disclosure.

In conclusion, contracts with third-party anti-bribery provisions and a right-to-audit clause should be included in the agreement. The International Chamber of Commerce published three options for such provisions in its document *ICC Anti-corruption Clause*.

Suppliers and Contractors

Purchasing and contracting may have high bribery-related risks. Employees responsible for purchasing and contracting may receive bribes and kickbacks from suppliers and, in particular, contractors. Circumventing policies and procedures, employees working for the purchasing or contracting department can favor some suppliers and contractors at the expense of others (for instance, by excluding the competition as a potential supplier or contractor or providing sensitive information during a competitive bidding process). Bribes may be in the form of cash or other benefits, such as goods or a vacation trip paid by the supplier/contractor. Contracts should include a clause giving the company the right to apply sanctions, including termination, in the event of a violation relating to bribery.

Many organizations have a supplier code of conduct. This usually includes paragraphs on human rights, environment, health and safety issues, and integrity. The latter should include a statement indicating that the supplier or contractor must never, directly or through intermediaries, offer or promise any personal or improper advantage in order to obtain or retain a business or other advantage from a third party, whether public or private. Also, a paragraph is included stating that the supplier or contractor will not pay or accept any bribes, arrange or accept kickbacks, and not take any actions to violate, or cause its business partners to violate, applicable anti-bribery laws and regulations. Based on a risk assessment, selected suppliers should be required to confirm that they will adhere to the supplier code of conduct.

Mergers and Acquisitions

Companies acquire a host of liabilities when they merge with or acquire another company, including those arising out of contracts, misconduct, regulations, and statutes. As a general legal matter, when a company merges with or acquires another company, the successor company assumes the predecessor company's liabilities. Successor liability is an integral component of corporate law and, among other things, prevents companies from avoiding liability by reorganizing.

Mergers and acquisitions present both risks and opportunities. A company that does not conduct adequate due diligence prior to a merger or acquisition may face both legal and business risks. Inadequate due diligence misses existing bribery practices, thus exposing the new owner or combined organization to civil and criminal liability.

When the due diligence reveals bribery at the target company, the organization should report it to the local authorities. Depending on the situation, it also may be wise to disclose it to the U.S. Department of Justice and the SEC or the U.K. Ministry of Justice.

To protect the organization's interests, it is extremely important to promptly incorporate all of its internal controls, including its anti-bribery program, in the newly acquired organization. New employees should be trained and (new) third parties should be evaluated under the organization's anti-bribery program. Also, a specific compliance audit on the new entity could be considered.

Due Diligence

Risk-based due diligence is particularly important with third parties because several court cases demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions.

The following guiding principles²⁸ could be considered:

First, as part of risk-based due diligence, the organization should understand the qualifications and associations of its third-party partners, including its business reputation and relationship, if any, with foreign officials. The degree of scrutiny should increase as red flags surface.

Second, the organization should have an understanding of the business rationale for including the third party in the transaction. Among other things, the company should understand the role of and need for the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those terms compare to typical terms in that industry and country, as well as the timing of the third party's introduction to the business. Moreover, companies may want to confirm and document that the third party is actually performing the work for which it is being paid and that its compensation is commensurate with the work being provided.

Third, the organization should undertake some form of ongoing monitoring of third-party relationships. Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.

²⁸ From the Resource Guide to the U.S. Foreign Corrupt Practices Act.

To help employees raise red flags indicating potential bribes, guidance is needed—for example, the Master List of Third Party Corruption Red Flags from FCPAméricas (see appendix C).

Gifts and Hospitality

In many countries, gifts are a way to build and strengthen relationships that are essential to establish and maintain operations. These ranges from low-level gifts, such as pens with the organization's logo, to expensive items, such as gold watches. Gifts also may be in the form of theater tickets or fully paid travel to exotic locations without any obvious business purpose. Disproportional gifts are prohibited.

Bona fide hospitality and promotional or other business expenditure that seeks to improve the image of a commercial organization, to better present products and services, or to establish cordial relations is generally recognized as an established and important part of doing business and is not considered criminal behavior. Hospitality and promotional or other similar business expenditure can be employed as bribes. However, reasonable and proportionate hospitality and promotional or other similar business expenditures are not prohibited in most countries.

The organization should have a policy and procedures in place to ensure that all gifts, hospitality, and expenses are bona fide. These procedures may include authorization for receiving gifts in any form above a certain limit or of a certain type (e.g., travel expenses). The organization should prohibit the offer, giving or receipt of gifts, hospitality, or reimbursement of other expenses whenever they could influence or reasonably be perceived to influence improperly the outcome of business transactions.

Acceptance of Gifts

Policy and procedures should make clear that it is prohibited for employees and any other individual working (indirectly) for the organization to accept any gifts in cash or any other form. The exceptions, such as promotional items of limited value, should be clearly described in the code of conduct. Sometimes it is evident that declining the gift clearly would cause offense and the gift is given and accepted without an express or implied understanding that the recipient is in any way obligated by the acceptance of the gift. Guidance to the code of conduct should include instructions on how the employee is expected to act under these circumstances; for instance, how to report gifts offered, received, or rejected.

Acceptance of Hospitality

Hospitality includes food and refreshments (e.g., meals and/or drinks) and entertainment (e.g., tickets to a sporting event when the event is used for business purposes). The code of conduct should prohibit individuals working for the organization to directly or indirectly accept hospitality or any other business courtesies that could influence or be perceived to influence their business decisions on behalf of the organization, or place them in a position to derive any direct or indirect benefit or interest from a party having business dealings with the organization.

Hospitality, including meals and entertainment, may only be accepted if there are clear business reasons for participating in the event and the hospitality is customary and commonly accepted, is not excessive in value, and is given and accepted without an express or implied understanding that the recipient is in any way obligated by the acceptance of the hospitality. Travel, accommodation, and other related expenses incurred by personnel in connection with such hospitality may not be paid by the host. These must be paid for by the employee's organization.

Giving of Gifts, Hospitality, or Other Business Courtesies

The rules for accepting gifts should also apply to the giving of gifts, hospitality, or other business courtesies. Individuals working for the organization may not give gifts on its behalf, except for promotional items of minimal value normally bearing a company logo. Before giving a gift or hospitality, an employee should discuss the proposed gift or hospitality in advance with his/her manager. If in doubt, the issues also should be discussed with a compliance officer. Particular care must be taken in dealings with public officials who, under ordinary circumstances, should not be offered any gifts. The procedures governing travel, accommodation, and related expenses for public officials were discussed in a previous section, Interactions with Public Officials.

Human Resources

Maintaining a culture of integrity, including combating bribery, requires motivated and honest employees. Human resources (HR) plays an important role in establishing an effective anti-bribery program by helping to design it and recruiting and training integer employees.

During the recruitment phase, the integrity values of the organization and its anti-bribery program should be discussed openly with the applicant. The employment contract should include a clause stating that the employee will comply with the program. After 12 months, a written reconfirmation must be submitted by the employee annually.

All employees (in particular, new recruits) should be trained in the anti-bribery program. Innovative techniques, such as serious gaming, can be very effective as a learning tool and also can be used to measure knowledge and monitor participation. Specific training should be developed for employees working in areas with high bribery risk.

HR also should inform the employees about the whistleblowing procedure to raise concerns and report incidents. It should be made clear to the employees that reporting incidents or refusing to pay bribes will not cause them any adverse consequences.

HR also is responsible for communicating potential sanctions for noncompliance. Applied sanctions might be published on the intranet or by any other means to enhance awareness of the consequences of violating the policies and procedures.

Training

Training is an essential element to make the anti-bribery program effective. Employees should be required to attend periodic anti-bribery training to ensure that ethical values and anti-bribery policies and procedures of the organization are understood and implemented at all levels. Training can be provided in various ways, such as through conferences, classroom, e-learning, and serious gaming. If training is not held in a traditional classroom, additional roundtable meetings or focus groups may be set up to ensure there is a platform for interaction with colleagues.

The training is aimed to enhance employees' knowledge of the anti-bribery program and additional guidance. They will learn how to identify and deal with ethics and bribery issues that they may encounter. Through communication of the organization's zero tolerance policy on corruption, the program is intended to reduce the risk that personnel will engage in corrupt behavior and prevent civil and criminal penalties for individuals and the organization. Employees who, by virtue of their work, are particularly exposed to corruption risk should receive additional periodic anti-corruption training. Also, high-risk contractors and suppliers should receive training.

The training program should be mandatory for all employees and hired persons working under the supervision of the organization's personnel. It should be made clear that the HR function monitors the training program completion rates and evaluates the quality of the training by testing the knowledge of the participants afterwards.

The HR function is responsible for identifying and coordinating the training of personnel, including persons working in high-risk functions or areas, such as senior advisers and persons working in certain staff functions, including legal and finance; personnel with procurement, contracting, and marketing responsibilities; personnel who regularly interact with public officials, such as those responsible for obtaining licenses and permits and clearing goods through customs; and personnel working in geographic areas deemed to have a high risk of corruption.

Whistleblowing and Seeking Guidance

The purpose of hotlines, whistleblowing, or speak-up channels is to enable employees to report bribery incidents, raise concerns about potential bribery, and ask for guidance. This includes suspected wrongdoing of third parties that could have a negative impact on the organization. Many bribery scandals have surfaced due to someone blowing the whistle.

Employees should be aware that it is their duty to report any violations or concerns they may have to senior management. Suspicion and a lack of trust or fear of reprisal may be reasons why some employees do not use the formal reporting line. Also, local culture may make employees feel uncomfortable about reporting issues. In these circumstances, an anonymous hotline can be an option if permitted in the particular country. In addition, the use of an external service provider that employs local people who are familiar with potential cultural thresholds that hinder formal reporting may be helpful. The 24/7 availability of the hotline enhances its effectiveness. Hotlines also should be available for employees seeking guidance on the application of the anti-bribery program or providing suggestions for improvement of procedures and controls.

The organization should protect those who use whistleblowing or advice channels. Concerns about bribery are often sensitive, and the company should provide the option of reporting anonymously. The organization should be aware that some allegations could be false and/or malicious. Investigation of the reported incidents and concerns should be conducted by senior management who are independent of the operation (for instance, the compliance officer).

Communication

To make an anti-bribery program effective, internal and external communication is crucial because it provides essential knowledge to employees and third parties to make it work. All communications channels may be used for this purpose, including internet, intranet, social media, YouTube, etc. An animation or video explaining the essentials of the Code of Conduct can be a very effective way to communicate through social media.

Entering the dialogue with employees through focus groups and roundtable meetings with their managers can further enhance awareness of the anti-bribery program. The organization's leadership should reinforce messages with a strong tone from the top and from senior and middle management who have an important role in representing and communicating the anti-bribery program.

The organization should encourage receiving communications from and engaging with contractors, suppliers, agents, intermediaries, joint-venture partners, and other stakeholders with respect to the program. A specific suppliers' code of conduct may be developed for this purpose to be distributed to third parties and disclosed on the organization's website.

Internal Controls and Record-Keeping

The organization should establish and maintain an effective system of internal controls to counter bribery comprised of financial and organizational checks and balances over the organization's accounting and record-keeping practices and other business processes related to the program. It should maintain accurate books and records that properly and fairly document all financial transactions and are available for inspection. The organization should not maintain off-the-books accounts. It should subject the internal control systems, in particular the accounting and record-keeping practices, to regular review and audit to provide assurance on their design, implementation, and effectiveness.

Monitoring and Revision

An anti-bribery program needs to be maintained to remain effective. The organization's environment is continuously changing and creating new perspectives on risk. For example, new legislation, different expectations from stakeholders, mergers and acquisitions, and new joint ventures will change the bribery risk profile. New insights require that the adequacy and effectiveness of the anti-bribery program needs to be evaluated, followed by a revision where needed.

In addition, the organization should establish feedback supporting the continuous improvement of the program. Feedback from employees and third parties may indicate the need to update policies and procedures, additional guidance, or other elements of the anti-bribery program. The board should make an independent assessment of the adequacy and effectiveness of the program and disclose its findings in the annual report to shareholders.

Cooperation with Authorities

It is in the best interest of the organization to self-report bribery-related incidents to the authorities. It demonstrates the good intentions of the organization and also may reduce fines substantially. The organization should have a policy to disclose major bribe incidents to the authorities and to cooperate with them in connection with bribery and corruption investigations and prosecutions.

Independent Assurance

The organization should organize independent assurance on the design, implementation, and effectiveness of the anti-bribery program. The internal audit function of the organization can provide this assurance. The scope of the audit should be based on high bribery risk areas within the organization. If an internal auditor has been involved in the design or the implementation, his or her objectivity might be compromised. Under these circumstances, another person should be assigned to do the audit. In the absence of an internal audit function, assurance might be provided by a qualified external auditor. External auditors also may be contracted for third-party reviews.

Chapter 5

HOW TO AUDIT AN ANTI-BRIBERY PROGRAM

Organizations face high reputational and financial risks related to bribery. Therefore, it is very likely that the internal auditor will be required to perform audits in this area. Relevant guidance from The IIA is included in appendix E.

This chapter describes a “how-to-audit” approach to evaluate the design of an anti-bribery program and its effectiveness. This sample audit program is designed to be used for the anti-bribery program as a whole. Parts of it can be used to be included in any audit program with another specified scope; for instance, project management, contracting, procurement, or HR.

This sample audit program covers the elements described in chapter 4. It can be used as a template and should be tailored to the needs of the organization. An anti-bribery audit program should take into account the identified bribery risks. The application of this audit program should be proportionate to these risks.

A wide range of auditing techniques may be applied in performing the audit, including:

- Research
- Review of (internal) documentation
- Interviews
- Surveys
- Transaction testing
- Analytical testing
- Data analytics
- Observation

Sample Audit Program

1. Values and Tone at the Top

- 1.1 Evaluate the organization’s values for clarity. Do they include a commitment to carry out business fairly, honestly, and openly?
- 1.2 Determine that the board and senior and middle management demonstrate their anti-bribery commitment by ethical leadership and strong, explicit, and visible support and behavior.
- 1.3 Evaluate the clarity of the zero tolerance commitment towards bribery.
- 1.4 Determine if the values are adequately communicated through the intranet, internet, and/or other means to employees, suppliers, and other stakeholders.

2. Code of Conduct

- 2.1 Ensure that the organization's values are translated into the code of conduct.
- 2.2 Determine that the code of conduct is clear, concise, and accessible to all employees, (sub) contractors, suppliers, agents, and others conducting business on the organization's behalf.
- 2.3 When relevant, evaluate that translations and separate codes (e.g., for suppliers) are available.
- 2.4 Determine if the code of conduct is communicated through the intranet, internet, and/or other means to all relevant parties involved.
- 2.5 Determine that additional specific guidance is provided to employees and others, including (hypothetical) cases and expected behavior.
- 2.6 Determine that all employees and (high-risk) agents, other intermediaries, and suppliers receive training to understand the code of conduct.
- 2.7 Determine that employees annually confirm in writing that they adhere to the code of conduct.

3. Structure of the Anti-Bribery Program

- 3.1 Ensure that the anti-bribery program includes:
 - The organization's values
 - A zero tolerance statement
 - Codes of conduct for employees, suppliers, and other relevant stakeholders
 - Risk assessment
 - Policies and procedures, including whistleblowing and sanctions
 - Scope
 - Monitoring and continuous improvement

4. Risk Assessment

- 4.1 Determine that a specific risk assessment has been made for the (external) bribery risks the organization faces, including but not limited to:
 - Country risk
 - Sectorial risk
 - Transaction risk
 - Opportunity risk
 - Partnership risk
- 4.2 Determine that the risks are reassessed periodically.
- 4.3 Determine that the program is periodically adapted based on changes in risk perception.
- 4.4 Evaluate the process that ensures proportionality of anti-bribery measures (i.e., focus is on the high-risk areas).
- 4.5 Ensure that internal risk factors (e.g., inappropriate tone at the top or impact of bonus schemes on behavior) are taken into consideration.

5. Policies and Procedures

- 5.1 Determine that the responsibilities for setting up and maintaining anti-bribery program, policies, and procedures are assigned to the compliance officer who has a direct reporting line to the CEO.

- 5.2 Determine that policies and procedures exist outlining the responsibilities for compliance with internal rules, such as the code of conduct and laws and regulations.
- 5.3 Determine that the policies and procedures cover the high-risk bribery areas identified in the risk assessment.
- 5.4 Determine that specific policies and procedures have been tailored for the needs of different stakeholders.
- 5.5 Determine that these policies and procedures are clearly communicated to and understood by employees, agents, suppliers, and other relevant stakeholders.
- 5.6 Determine that effective controls exist that monitor compliance with anti-bribery policies and procedures.
- 5.7 Determine that violations are properly reported by management to the compliance officer.
- 5.8 Evaluate the effectiveness of the whistleblowing procedures.
- 5.9 Evaluate the effectiveness of the follow-up on reported violations and concerns by the compliance officer.
- 5.10 Determine that sanctions are applied as intended.
- 5.11 Determine that violations and applied sanctions are clearly communicated to employees using the intranet or other means.

6. Scope

Conflicts of Interest

- 6.1 Determine that employees and relevant third parties are required to disclose in writing any (potential) conflicts before recruitment or appointment and inform the organization timely of any changes.
- 6.2 Determine that the board and senior and middle management annually report in writing if they have any (potential) conflicts of interest or not.
- 6.3 Review available outside resources (e.g., Chamber of Commerce, social media) for indications that reported (potential) conflicts of interest are complete.
- 6.4 Determine that employees receive training to recognize (potential) conflicts of interest.
- 6.5 Determine that employees are encouraged to discuss (potential) conflicts of interest with their management.
- 6.6 Verify that the compliance officer and HR follow up on reported conflicts of interest.

Interactions with Public Officials

- 6.7 Determine that policies and procedures clearly prohibit employees from offering or providing any payment or other thing of value—either directly or through an intermediary—to a public official to secure an improper advantage with the public official's position.
- 6.8 Test compliance with the policies and procedures by reviewing payments (related) to public officials, in particular:
 - Overall reasonableness of the payments
 - Travel and entertainment expenses
 - Payments directly to the public official, rather than the supplier

- Advance funds payment to the public official
- Payment of expenses without adequate supporting document
- Purchased gifts

6.9 Determine that required approval was obtained for selected payments.

Small Bribes

- 6.10 Determine that policies and procedures clearly prohibit employees from paying small bribes, including paying out of their own pockets.
- 6.11 Determine that employees who can be expected to receive demands for small bribes receive adequate training, including case studies.
- 6.12 Review a sample of expense reports for items that indicate (hidden) small bribes or without supporting documentation.

Political Contributions

- 6.13 Determine that policies and procedures prohibit political contributions by the organization in any form, such as:
- Donations
 - Favorable lending conditions
 - Discounted fees or rates for products, services, or loans
 - Sponsorship of an event or publication
 - Free or discounted use of facilities or services
 - Supporting fundraising events
- 6.14 Determine that these policies are communicated clearly to and understood by employees.
- 6.15 Analyze accounting data for items indicating political contributions.
- 6.16 Use search engines to browse the internet and social media for indicators that the organization is involved in political engagement.

Charitable Donations, Community Investments, and Sponsorships

- 6.17 Determine that policies and procedures clearly define what charitable donations, community investments, and sponsorships are permitted.
- 6.18 Ensure that clear selection criteria have been established to accept charitable donations.
- 6.19 Ensure that due diligence is conducted for all recipient organizations.
- 6.20 Determine that clear procedures indicating authorization levels exist and are being followed.
- 6.21 Analyze accounting data to identify outgoing payments to charitable organizations.

7. Business Relationships

Associated Business Entities, Joint Ventures, and Consortia

- 7.1 Obtain a list from legal counsel indicating all the organization's associated business entities, including subsidiaries, joint ventures, consortia, and other legal vehicles.
- 7.2 Verify that due diligence was performed and documented for all third parties involved in existing and new associated business entities, joint ventures, consortia, and other legal vehicles.

How to Audit an Anti-Bribery Program

- 7.3 Verify that all the organization's (associated) business entities, including subsidiaries, joint ventures, consortia, and other, have been included in the bribery risk assessment.
- 7.4 Determine that the organization's code of conduct and anti-bribery program have been implemented effectively in the entities over which the organization has control.
- 7.5 Determine that the board and senior management actively promote adherence to the values of the organization, its code of ethics, and anti-bribery program to the associated business entities over which it has no control.
- 7.6 Determine that the codes of ethics and anti-bribery programs used by associated entities over which the organization has no control are consistent with those of the organization.
- 7.7 Review (internal and external) audit reports of the effectiveness of the anti-bribery program.

Mergers and Acquisitions

- 7.8 Determine that the due diligence includes a bribery risk assessment and that it was conducted prior to the closing of the deal.
- 7.9 Determine that identified bribe payments and practices, if any, have been reported to the proper authorities immediately after they surfaced.
- 7.10 Verify that a plan was executed to bring the targeted company to the desired level of compliance with the organization's values, code of conduct, policies and procedures, and other elements of the anti-bribery program.
- 7.11 Test the effectiveness of the communication to and the training of the new employees.
- 7.12 Verify that the internal controls of the target company are aligned with those of the organization.

Agents, Lobbyists, and Other Intermediaries

- 7.13 Obtain a list with all known agents, lobbyists, and other intermediaries from legal counsel.
- 7.14 Verify that a proper due diligence was carried out and documented prior to signing the agreement for each of the third parties.
- 7.15 Evaluate if the level of training provided to third parties was adequate in relation to the related risks.
- 7.16 Determine that third parties are encouraged to use the organization's whistleblowing mechanism to report concerns and incidents.
- 7.17 Perform data analytics on the general ledger, procurement, and vendor records to identify (potential) agents, lobbyists, and other intermediaries.
- 7.18 Investigate the list compiled above with the list received from legal counsel.
- 7.19 Discuss mismatches with legal counsel and the compliance officer.
- 7.20 Verify that signed agreements with all identified exist and are approved according to the authorization limits.
- 7.21 Verify that each agreement includes a clause that the third party will comply with the organization's anti-bribery program and that this compliance is reconfirmed in writing annually.
- 7.22 Verify that each agreement has a right-to-audit clause.
- 7.23 Based on the risk assessment, determine if there is a need to do an audit of the third party.

- 7.24 Select a number of payments to third parties to identify that these are adequately supported by documentation, in line with the contract, and properly authorized.
- 7.25 Ensure that payments to third parties are properly described and allocated in the accounting records.

Suppliers

- 7.26 Evaluate the procedure to approve new suppliers and contractors.
- 7.27 Select a number of new suppliers and contractors and verify that the procedure was followed.
- 7.28 Take a sample of high-volume suppliers and high-amount contracts to verify that an adequate due diligence was conducted, taking into account bribery risks.
- 7.29 Review the agreements with high-risk suppliers and contractors to determine that they agree to comply with the organization's anti-bribery program and that this compliance is reconfirmed in writing annually.
- 7.30 Verify that all suppliers and contractors have confirmed in writing that they will abide with the suppliers' code of conduct.
- 7.31 Review the bonus schemes with suppliers for clarity.
- 7.32 Ensure that the bonus schemes are complied with and that bonuses are paid to the organization directly.
- 7.33 Evaluate with legal counsel that penalty clauses in agreements with suppliers and contractors are reasonable and could not be used as an illegal vehicle to funnel funds to the other party.
- 7.34 Determine that all payments of major penalties paid are justified and properly authorized.

Gifts and Hospitality

- 7.35 Determine that policies and procedures make it very clear to employees to what level they give or accept gifts and hospitality offers, including entertainment and travel.
- 7.36 Verify that employees understand the policies and procedures and comply with them.
- 7.37 Verify that employees dealing with third parties who are the most likely to be offered gifts in any form report received gifts according to the policies.
- 7.38 Verify that these gifts do not exceed the maximum value.
- 7.39 Verify that all accepted gifts that deviate from the policies and procedures have been approved by the appropriate level.

8. Human Resources

- 8.1 Verify that HR is involved in the design and the maintenance of the anti-bribery program.
- 8.2 Ensure that HR includes the organization's values and code of conduct in the organization's profile used in published vacancies.
- 8.3 Ensure that HR, to the extent legally possible, checks on the criminal background of applicants.
- 8.4 Ensure that HR discusses the anti-bribery clause in the labor agreement requiring that employees annually conform conformance with the anti-bribery program with the candidate.
- 8.5 Take a sample of old and new labor agreements to ensure that (re)conformation exists and is filed.

9. Training

- 9.1 Determine that HR set up an adequate training program for all employees, including a tailor-made program for employees with a higher exposure to bribery.
- 9.2 Determine that HR has an effective system that monitors participation in the trainings.
- 9.3 Ensure that the required knowledge of the participants is tested at the end of the training and at regular intervals afterwards.
- 9.4 Determine that HR evaluates the effectiveness of the training.
- 9.5 Ensure that ineffective trainings are redesigned.
- 9.6 Ensure that there is an adequate follow-up procedure for employees that structurally reject or postpone invitations to follow the training.

10. Whistleblowing and Seeking Guidance

- 10.1 Determine that the whistleblowing procedure is clear and made available in all languages spoken in the countries where the organization has operation.
- 10.2 Verify that reporting (suspected) bribery incidents can be done anonymously, unless local laws and regulations prohibit this.
- 10.3 Ensure that the whistleblower is protected against reprisal.
- 10.4 Evaluate if the whistleblowing procedure is adopted when needed to local circumstances.
- 10.5 Ensure that the hotline operators are familiar with the local culture.
- 10.6 Ensure that the whistleblowing procedure is available on the internet and intranet sites of the organization as well as relevant social media and other means.
- 10.7 Discuss with the compliance officer the nature of incidents reports and the outcome of his or her investigations.
- 10.8 Discuss with the compliance officer what were the lessons learned and what corrective measures have been taken, both toward the culprit as well as revision of policies and procedures.
- 10.9 Verify that identified bribes are disclosed to all employees, including the sanctions by the compliance officer or HR.
- 10.10 Ensure that the compliance officer informs the whistleblower (anonymously) about the outcome of the investigation and praises him or her for using the hotline.

11. Communication

- 11.1 Verify that the organization's values, code of conduct, and anti-bribery program are disclosed on the organization's internet, intranet, and YouTube channel.
- 11.2 Verify that changes to the organization's values, code of conduct, and anti-bribery program, if any, are clearly communicated to employees and third parties.
- 11.3 Ensure that the website includes a FAQs section for bribery issues and that this section is regularly updated, based on questions asked and concerns raised.
- 11.4 Ensure that the use of the hotline to raise concerns and report incidents relating to bribery is promoted on the intranet, internet, and other media.
- 11.5 Verify that reported incidents and related sanctions are being communicated to employees, suppliers, contractors, and other relevant stakeholders.

12. Internal Controls and Record-Keeping

- 12.1 Test if controls mentioned in procedures are effectively implemented.
- 12.2 Test that authorization procedures have been followed, in particular for large cash transactions, cross-border payments, gifts, hospitality expenses, and for expense reports of employees that have a high bribery exposure.
- 12.3 Use data analytics to identify unusual items for further investigation.
- 12.4 Verify that these types of expenses are properly recorded in the accounting systems, including the nature of the transaction.

13. Monitoring and Revision

- 13.1 Ensure that the compliance officer jointly with senior management periodically review the adequacy and effectiveness of the anti-bribery program and revise it where needed.
- 13.2 Discuss if concerns raised and lessons learned from incidents are used as input for the monitoring and revision process.
- 13.3 Ensure that revisions of the anti-bribery program have been clearly communicated to all employees and relevant third parties.
- 13.4 Ensure that the compliance officer and senior management report the outcome of the monitoring and revision process to the board.
- 13.5 Ensure that the annual report to stakeholders includes the board's independent assessment of the adequacy of the anti-bribery program.

14. Cooperation with Authorities

- 14.1 Ensure that a policy exists that requires reporting major bribery incidents to the relevant authorities.
- 14.2 Verify that this policy has been followed for all major incidents.

15. Independent Assurance

- 15.1 Determine that adequate resources have been made available to audit the high bribery risk areas, either internally or externally.
- 15.2 Ensure that only qualified external auditors are contracted.
- 15.3 Ensure that planned audits actually have been done.
- 15.4 Review the reports and look for patterns that should be brought to the attention of the compliance officer and senior management.
- 15.5 Verify that audit findings have been adequately followed up.

Appendix A

TRANSPARENCY INTERNATIONAL: BUSINESS PRINCIPLES FOR COUNTERING BRIBERY

BUSINESS PRINCIPLES FOR COUNTERING BRIBERY

A MULTI-STAKEHOLDER INITIATIVE LED BY TRANSPARENCY INTERNATIONAL

Transparency International is the global civil society organisation leading the fight against corruption. Through more than 90 chapters worldwide and an international secretariat in Berlin, we raise awareness of the damaging effects of corruption and work with partners in government, business and civil society to develop and implement effective measures to tackle it.

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FOREWORD

More than ever, the risks from bribery are a major concern for enterprises, whether they are confronted with demands for bribes, faced with competitors acting corruptly, or undermined by employees violating their codes of conduct.

Since the Business Principles for Countering Bribery were first published in 2003, the environment has changed considerably. The advent of stricter domestic and foreign bribery laws and increasing enforcement, the imposition of record fines, and the threat of criminal penalties for company directors and employees have been sending shock waves through the business community. Furthermore, pressures are mounting from socially responsible investment funds and indices, which are applying anti-bribery criteria to their screening procedures. As regulators and stakeholders become less tolerant of lapses, responsible companies increasingly understand that they must undertake continuous efforts to ensure that they identify and mitigate the risks of bribery effectively.

To assist companies in the design and implementation of effective anti-bribery policies, Transparency International (TI) and Social Accountability International joined forces to launch the Business Principles for Countering Bribery in 2003. The development of the Business Principles was achieved through a multi-stakeholder process with the cooperation of a Steering Committee drawn from business, academia, trade unions, and other non-governmental bodies. Although its composition has changed over the years, the Steering Committee has remained closely involved in efforts to disseminate and maintain the Business Principles.

The Business Principles have become a major platform for TI's private sector activities. They have also influenced a wide range of anti-bribery standards and initiatives. In the past decade, the Business Principles have been translated into more than 10 languages and used extensively by the Transparency International network in its work with the business community. They have also informed a number of Transparency International's key research tools.

This third edition reflects recent developments in anti-bribery practice and incorporates changes to the original text based on the experience gained since an earlier revision in 2009 and feedback from a public consultation in recent months. The Steering Committee has contributed its valuable knowledge and expertise to this process.

Consultations, field testing, and workshops have enriched the Business Principles and the supporting suite of tools over the years. There is more understanding today than ever before of what constitutes an effective anti-bribery programme, but bribery and corruption remain a major challenge.

Transparency International believes that integrity is good for business and we hope that the Business Principles will continue to be a reference for enterprises as they strive to develop stronger and more effective anti-bribery programmes, resulting in a higher and more uniform standard of practice worldwide.

Cobus de Swardt,
Managing Director, Transparency International
October 2013

STAKEHOLDER DEVELOPMENT

This third edition of the Business Principles for Countering Bribery was produced by Transparency International with the input and guidance of a multi-stakeholder Steering Committee. The contents of the Business Principles reflect the views of the Steering Committee and not necessarily those of its individual members on particular topics.

The first edition of the Business Principles for Countering Bribery, published in 2003, was drafted with the original members of the Steering Committee and subjected to field tests and a public consultation. In 2009, the Business Principles underwent minor updates. This is the third edition of the Business Principles for Countering Bribery. Changes were formulated taking into account input from the Steering Committee and comments received during a public consultation.

STEERING COMMITTEE MEMBERSHIP

Corporate members

- BP plc
- HSBC
- Norsk Hydro ASA
- PricewaterhouseCoopers
- Sanlam
- SGS
- Shell International

Non-corporate members

- The Conference Board
- European Bank for Reconstruction and Development
- International Federation of Consulting Engineers

- International Federation of Inspection Agencies
- Social Accountability International
- Supplier Ethical Data Exchange (SEDEX)
- Trade Union Advisory Committee to the OECD
- Transparency International (Chair)
- United Nations Global Compact

Chair

Cobus de Swardt, Managing Director, Transparency International
Secretariat
Susan Côté-Freeman

1. INTRODUCTION

The Business Principles for Countering Bribery were originally developed through an extensive multi-stakeholder process involving companies, non-governmental organisations, and trade unions as a tool to assist enterprises to develop effective approaches to countering bribery in all aspects of their activities.

Enterprises should develop and implement an anti-bribery programme as an expression of broader ethical values and corporate responsibility. But an anti-bribery programme must focus on effectively countering the risk of bribery. Risk exposure may vary among different industries and specific companies, but no enterprise can be certain that it will be free of risk. Not only does an effective anti-bribery programme help mitigate this risk, it also strengthens reputation, builds the respect of employees, raises credibility with key stakeholders, and supports an enterprise's commitment to honest and responsible behaviour.

The Business Principles aim to provide a framework that can assist enterprises in developing, benchmarking or strengthening their anti-bribery programmes. The Business Principles reflect a high, yet achievable standard of anti-bribery practice. They apply to the bribery of public officials as well as private-to-private transactions.

The Business Principles were originally published in 2003 and underwent a first revision in 2009. The 2013 revision is part of a periodic review process carried out with the input of the Steering Committee to ensure that the Business Principles remain current in light of changing anti-bribery laws and evolving corporate practice.

The primary focus on bribery is maintained in this edition, but the Business Principles now include clauses and revised language on topics such as risk assessment, conflicts of interest, cooperation with authorities, facilitation payments, lobbyists, and communication and reporting to reflect the importance of these matters in up-to-date anti-bribery practice and to achieve closer alignment with other leading codes and legal instruments such as the United Nations Convention Against Corruption.

Bribery

The offering, promising, giving, accepting, or soliciting of an advantage as an inducement for an action which is illegal or a breach of trust.

2. THE BUSINESS PRINCIPLES

- The enterprise shall prohibit bribery in any form whether direct or indirect.

- The enterprise shall commit to implementing a Programme to counter bribery. The Programme shall represent the enterprise's anti-bribery efforts including values, code of conduct, detailed policies and procedures, risk management, internal and external communication, training and guidance, internal controls, oversight, monitoring, and assurance.

These Business Principles are based on a Board commitment to fundamental values of integrity, transparency and accountability. Enterprises should aim to create and maintain a trust-based and inclusive internal culture of individual accountability in which bribery is not tolerated.

3. DEVELOPMENT OF A PROGRAMME FOR COUNTERING BRIBERY

- 3.1 The enterprise should develop a Programme that clearly and in reasonable detail, articulates values, policies and procedures to be used to prevent bribery from occurring in all activities under its effective control.
- 3.2 The enterprise should design and improve its Programme based on continuing risk assessment.
- 3.3 The Programme should be consistent with all laws relevant to countering bribery in each of the jurisdictions in which the enterprise transacts its business.
- 3.4 The enterprise should develop the Programme in consultation with employees, trade unions or other employee representative bodies and other relevant stakeholders.
- 3.5 The enterprise should ensure that it is informed of all internal and external matters material to the effective development and implementation of the Programme, and in particular emerging best practices including engagement with relevant stakeholders.

4. RISK ASSESSMENT

- 4.1 The Programme should be tailored to reflect the enterprise's particular business risks, circumstances and culture, taking into account inherent risks such as locations of the business, the business sector, and organisational risks such as size of the enterprise and use of channels such as intermediaries.
- 4.2 The enterprise should assign responsibilities for oversight and implementation of risk assessment.

5. SCOPE OF THE PROGRAMME

The Programme should address the most prevalent risks of bribery relevant to the enterprise, but at a minimum should cover the following areas.

- 5.1 Conflicts of interest
 - 5.1.1 The enterprise should establish policies and procedures to identify, monitor and manage conflicts of interest which may give rise to a risk of bribery—actual, potential or perceived. These policies and procedures should apply to directors, officers, employees and contracted parties such as agents, lobbyists, and other intermediaries.
- 5.2 Bribes
 - 5.2.1 The enterprise should prohibit all forms of bribery whether they take place directly or through third parties.

- 5.2.2 The enterprise should also prohibit its employees from soliciting, arranging or accepting bribes intended for the employee's benefit or that of the employee's family, friends, associates, or acquaintances.
- 5.3 Political contributions
 - 5.3.1 The enterprise, its employees, agents, lobbyists, or other intermediaries should not make direct or indirect contributions to political parties, organisations, or individuals engaged in politics as a way of obtaining unfair advantage in business transactions.
 - 5.3.2 The enterprise should publicly disclose all its political contributions.
- 5.4 Charitable contributions and sponsorships
 - 5.4.1 The enterprise should ensure that charitable contributions and sponsorships are not used as a subterfuge for bribery.
 - 5.4.2 The enterprise should publicly disclose all its charitable contributions and sponsorships.
- 5.5 Facilitation payments
 - 5.5.1 Recognising that facilitation payments²⁹ are bribes, the enterprise should prohibit them.
- 5.6 Gifts, hospitality, and expenses
 - 5.6.1 The enterprise should develop a policy and procedures to ensure that all gifts, hospitality, and expenses are bona fide. The enterprise should prohibit the offer, giving or receipt of gifts, hospitality, or expenses whenever they could influence or reasonably be perceived to influence improperly the outcome of business transactions.

6. PROGRAMME IMPLEMENTATION REQUIREMENTS

The following section sets out the requirements that enterprises should meet at a minimum when implementing the Programme.

- 6.1 Organisation and responsibilities
 - 6.1.1 The Board of Directors or equivalent body should demonstrate visible and active commitment to the implementation of the enterprise's Programme.
 - 6.1.2 The Chief Executive Officer is responsible for ensuring that the Programme is carried out consistently with clear lines of authority.
- 6.2 Business relationships
 - 6.2.1 General

The content of the following General section applies to all business entities.

 - 6.2.1.1 The enterprise should implement its Programme in all business entities over which it has effective control.
 - 6.2.1.2 Where the enterprise does not have effective control it should use its influence to encourage an equivalent Programme in business entities in which it has a significant investment or with which it has significant business relationships.

²⁹ Facilitation payments: Also called "facilitating," "speed," or "grease" payments, these are small unofficial payments made to secure or expedite the performance of a routine or necessary action to which the payer of the facilitation payment has legal or other entitlement.

- 6.2.1.3 Whether or not it has effective control over a business entity, the enterprise should undertake properly documented, reasonable and proportionate anti-bribery due diligence of business entities when entering into a relationship including mergers, acquisitions, and significant investments.
- 6.2.1.4 The enterprise should avoid dealing with business entities known or reasonably suspected to be paying or receiving bribes.
- 6.2.1.5 The enterprise should perform reasonable and proportionate monitoring of its significant business relationships. This may include the right of inspection of books and records.
- 6.2.1.6 The enterprise should document relevant aspects of the implementation of its Programme or equivalent by associated business entities.
- 6.2.1.7 In the event that policies and practices of associated business entities are in conflict with the principles of its own Programme the enterprise should take appropriate action. This can include requiring correction of deficiencies in the implementation of the entity's Programme and the application of sanctions.
- 6.2.1.8 The enterprise should have a right of termination in the event that associated business entities engage in bribery or act in a manner inconsistent with the enterprise's Programme.
- 6.2.2 Joint ventures and consortia
 - 6.2.2.1 Where the enterprise is unable to ensure that a joint venture or consortium has a Programme consistent with its own, it should have a plan for taking appropriate action if bribery occurs or is reasonably thought to have occurred. This can include: requiring correction of deficiencies in the implementation of the joint venture's or consortium's Programme, the application of sanctions, or exiting from the arrangement.
- 6.2.3 Agents, lobbyists, and other intermediaries
 - 6.2.3.1 The enterprise should not channel improper payments through agents, lobbyists, or other intermediaries.
 - 6.2.3.2 The enterprise should undertake properly documented due diligence before appointing agents, lobbyists, or other intermediaries.
 - 6.2.3.3 All agreements with agents, lobbyists, or other intermediaries should require prior approval of management.
 - 6.2.3.4 Compensation paid to agents, lobbyists, or other intermediaries should be appropriate and justifiable remuneration for legitimate services rendered.
 - 6.2.3.5 Agents, lobbyists, and other intermediaries should agree contractually to comply with the enterprise's Programme and be provided with appropriate advice and documentation explaining the obligation.
 - 6.2.3.6 The enterprise should contractually require its agents, lobbyists, and other intermediaries to keep proper books and records available for inspection by the enterprise, auditors, or investigating authorities.
- 6.2.4 Contractors and suppliers

- 6.2.4.1 The enterprise should conduct its procurement practices in a fair and transparent manner.
 - 6.2.4.2 The enterprise should take steps to identify its contractors and suppliers.
 - 6.2.4.3 The enterprise should assess the risk of bribery in its contractors and suppliers and conduct regular monitoring.
 - 6.2.4.4 The enterprise should communicate its anti-bribery Programme to contractors and suppliers and work in partnership with major contractors and suppliers to help them develop their anti-bribery practices.
- 6.3 Human resources
 - 6.3.1 Human resources practices including recruitment, promotion, training, performance evaluation, remuneration and recognition should reflect the enterprise's commitment to the Programme.
 - 6.3.2 The human resources policies and practices relevant to the Programme should be developed and undertaken in consultation with employees, trade unions, or other employee representative bodies as appropriate.
 - 6.3.3 The enterprise should make it clear that no employee will suffer demotion, penalty, or other adverse consequences for refusing to pay bribes even if such refusal may result in the enterprise losing business.
 - 6.3.4 The enterprise should make compliance with the Programme mandatory for employees and directors and apply appropriate sanctions for violations of its Programme.
- 6.4 Training
 - 6.4.1 Directors, managers, employees, and agents should receive appropriate training on the Programme.
 - 6.4.2 Where appropriate, contractors and suppliers should receive training on the Programme.
- 6.5 Raising concerns and seeking guidance
 - 6.5.1 To be effective, the Programme should rely on employees and others to raise concerns and violations as early as possible. To this end, the enterprise should provide secure and accessible channels through which employees and others should feel able to raise concerns and report violations ("whistleblowing") in confidence and without risk of reprisal.
 - 6.5.2 These or other channels should be available for employees to seek advice on the application of the Programme.
- 6.6 Communication and reporting
 - 6.6.1 The enterprise should establish effective internal and external communication of the Programme.
 - 6.6.2 The enterprise should publicly disclose information about its Programme, including the management systems employed to ensure its implementation.
 - 6.6.3 The enterprise should be open to receiving communications from and engaging with stakeholders with respect to the Programme.

- 6.6.4 The enterprise should consider additional public disclosure on payments to governments on a country-by-country basis.
- 6.6.5 In the spirit of greater organisational transparency and accountability to stakeholders, the enterprise should consider disclosing its material holdings of subsidiaries, affiliates, joint ventures, and other related entities.
- 6.7 Internal controls and record keeping
 - 6.7.1 The enterprise should establish and maintain an effective system of internal controls to counter bribery, comprising financial and organisational checks and balances over the enterprise's accounting and record keeping practices and other business processes related to the Programme.
 - 6.7.2 The enterprise should maintain available for inspection accurate books and records that properly and fairly document all financial transactions. The enterprise should not maintain off-the-books accounts.
 - 6.7.3 The enterprise should subject the internal control systems, in particular the accounting and record keeping practices, to regular review and audit to provide assurance on their design, implementation, and effectiveness.
- 6.8 Monitoring and review
 - 6.8.1 The enterprise should establish feedback mechanisms and other internal processes supporting the continuous improvement of the Programme. Senior management of the enterprise should monitor the Programme and periodically review the Programme's suitability, adequacy, and effectiveness and implement improvements as appropriate.
 - 6.8.2 Senior management should periodically report the results of the Programme reviews to the Audit Committee, Board, or equivalent body.
 - 6.8.3 The Audit Committee, the Board, or equivalent body should make an independent assessment of the adequacy of the Programme and disclose its findings in the Annual Report to shareholders.
- 6.9 Cooperation with authorities
 - 6.9.1 The enterprise should cooperate appropriately with relevant authorities in connection with bribery and corruption investigations and prosecutions.
- 6.10 Independent assurance
 - 6.10.1 Where appropriate, the enterprise should undergo voluntary independent assurance on the design, implementation, and/or effectiveness of the Programme.
 - 6.10.2 Where such independent assurance is conducted, the enterprise should consider publicly disclosing that an external review has taken place, together with the related assurance opinion.

APPRECIATION

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Appendix B

FCPA - HALLMARKS OF EFFECTIVE COMPLIANCE PROGRAMS

This section is taken from chapter 5, “Guiding Principles of Enforcement of the Resource Guide to the U.S. Foreign Corrupt Practices Act.”

Hallmarks of Effective Compliance Programs

Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. Thus, the discussion below is meant to provide insight into the aspects of compliance programs that DOJ and SEC assess, recognizing that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs. Indeed, small- and medium-size enterprises likely will have different compliance programs from large multinational corporations, a fact DOJ and SEC take into account when evaluating companies’ compliance programs.

Compliance programs that employ a “check-the-box” approach may be inefficient and, more importantly, ineffective. Because each compliance program should be tailored to an organization’s specific needs, risks, and challenges, the information provided below should not be considered a substitute for a company’s own assessment of the corporate compliance program most appropriate for that particular business organization. In the end, if designed carefully, implemented earnestly, and enforced fairly, a company’s compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately.

Commitment from Senior Management and a Clearly Articulated Policy Against Corruption

Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a “culture of compliance” and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business. A well-designed compliance program that is not enforced in good faith, such as when corporate management explicitly or implicitly encourages employees to engage in misconduct to achieve business objectives, will be ineffective. DOJ and SEC have often encountered companies with compliance programs that are strong on paper but that nevertheless have significant FCPA violations because management has failed to effectively implement the program even in the face of obvious signs of corruption. This may be the result of aggressive

sales staff preventing compliance personnel from doing their jobs effectively and of senior management, more concerned with securing a valuable business opportunity than enforcing a culture of compliance, siding with the sales team. The higher the financial stakes of the transaction, the greater the temptation for management to choose profit over compliance.

In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.

Code of Conduct and Compliance Policies and Procedures

A company's code of conduct is often the foundation upon which an effective compliance program is built. As DOJ has repeatedly noted in its charging documents, the most effective codes are clear, concise, and accessible to all employees and to those conducting business on the company's behalf. Indeed, it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it. When assessing a compliance program, DOJ and SEC will review whether the company has taken steps to make certain that the code of conduct remains current and effective and whether a company has periodically reviewed and updated its code.

Whether a company has policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures will also be considered by DOJ and SEC. These types of policies and procedures will depend on the size and nature of the business and the risks associated with the business. Effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks.

Among the risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments. For example, some companies with global operations have created web-based approval processes to review and approve routine gifts, travel, and entertainment involving foreign officials and private customers with clear monetary limits and annual limitations. Many of these systems have built-in flexibility so that senior management, or in-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests. These types of systems can be a good way to conserve corporate resources while, if properly implemented, preventing and detecting potential FCPA violations.

Regardless of the specific policies and procedures implemented, these standards should apply to personnel at all levels of the company.

Oversight, Autonomy, and Resources

In appraising a compliance program, DOJ and SEC also consider whether a company has assigned responsibility for the oversight and implementation of a company's compliance program to one or more specific senior executives within an organization. Those individuals 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. Adequate autonomy generally includes direct access to an organization's governing authority,

such as the board of directors and committees of the board of directors (e.g., the audit committee). Depending on the size and structure of an organization, it may be appropriate for day-to-day operational responsibility to be delegated to other specific individuals within a company. DOJ and SEC recognize that the reporting structure will depend on the size and complexity of an organization. Moreover, the amount of resources devoted to compliance will depend on the company's size, complexity, industry, geographical reach, and risks associated with the business. In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.

Risk Assessment

Assessment of risk is fundamental to developing a strong compliance program, and is another factor DOJ and SEC evaluate when assessing a company's compliance program. One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective. A \$50 million contract with a government agency in a high-risk country warrants greater scrutiny than modest and routine gifts and entertainment. Similarly, performing identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks. DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low-risk area because greater attention and resources had been devoted to a higher risk area. Conversely, a company that fails to prevent an FCPA violation on an economically significant, high-risk transaction because it failed to perform a level of due diligence commensurate with the size and risk of the transaction is likely to receive reduced credit based on the quality and effectiveness of its compliance program.

As a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits. The degree of appropriate due diligence is fact-specific and should vary based on industry, country, size, and nature of the transaction, and the method and amount of third-party compensation. Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs. When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.

Training and Continuing Advice

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. For example, many larger companies have implemented a mix of web-based and in-person training conducted at varying intervals. Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies. Regardless of how a company chooses to conduct its training,

however, the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language. For example, companies may want to consider providing different types of training to their sales personnel and accounting personnel with hypotheticals or sample situations that are similar to the situations they might encounter. In addition to the existence and scope of a company's training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company's ethics and compliance program, including when such advice is needed urgently. Such measures will help ensure that the compliance program is understood and followed appropriately at all levels of the company.

Incentives and Disciplinary Measures

In addition to evaluating the design and implementation of a compliance program throughout an organization, enforcement of that program is fundamental to its effectiveness. A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation. Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences. DOJ and SEC recognize that positive incentives can also drive compliant behavior. These incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance program, and rewards for ethics and compliance leadership. Some organizations, for example, have made adherence to compliance a significant metric for management's bonuses so that compliance becomes an integral part of management's everyday concern. Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and internal audit staff. Others have made working in the company's compliance organization a way to advance an employee's career. SEC, for instance, has encouraged companies to embrace methods to incentivize ethical and lawful behavior:

[M]ake integrity, ethics, and compliance part of the promotion, compensation and evaluation processes as well. For at the end of the day, the most effective way to communicate that “doing the right thing” is a priority is to reward it. Conversely, if employees are led to believe that, when it comes to compensation and career advancement, all that counts is short-term profitability, and that cutting ethical corners is an acceptable way of getting there, they'll perform to that measure. To cite an example from a different walk of life: a college football coach can be told that the graduation rates of his players are what matters, but he'll know differently if the sole focus of his contract extension talks or the decision to fire him is his win-loss record.

No matter what the disciplinary scheme or potential incentives a company decides to adopt, DOJ and SEC will consider whether they are fairly and consistently applied across the organization. No executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted. Rewarding good behavior and sanctioning bad behavior reinforces a culture of compliance and ethics throughout an organization.

Third-Party Due Diligence and Payments

DOJ's and SEC's FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program.

Although the degree of appropriate due diligence may vary based on industry, country, size and nature of the transaction, and historical relationship with the third party, some guiding principles always apply.

First, as part of risk-based due diligence, companies should understand the qualifications and associations of its third-party partners, including its business reputation and relationship, if any, with foreign officials. The degree of scrutiny should increase as red flags surface.

Second, companies should have an understanding of the business rationale for including the third party in the transaction. Among other things, the company should understand the role of and need for the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those payment terms compare to typical terms in that industry and country, as well as the timing of the third party's introduction to the business. Moreover, companies may want to confirm and document that the third party is actually performing the work for which it is being paid and that its compensation is commensurate with the work being provided.

Third, companies should undertake some form of ongoing monitoring of third-party relationships. Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.

In addition to considering a company's due diligence on third parties, DOJ and SEC also assess whether the company has informed third parties of the company's compliance program and commitment to ethical and lawful business practices and, where appropriate, whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments. These can be meaningful ways to mitigate third-party risk.

Confidential Reporting and Internal Investigation

An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation. Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken. Companies will want to consider taking "lessons learned" from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.

Continuous Improvement: Periodic Testing and Review

Finally, a good compliance program should constantly evolve. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale.

According to one survey, 64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs. An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines. Although the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability.

Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks. Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business's profitability and reputation, as well as potential civil and criminal liability.

In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target's value and negotiate for the costs of the bribery to be borne by the target. In addition, such actions demonstrate to DOJ and SEC a company's commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government, cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company. When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.

FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.

FCPA - Hallmarks of Effective Compliance Programs

For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys.” As a result, the improper payments continued, and the issuer was held liable for violating the FCPA’s internal controls and books and records provisions.

Appendix C

THE MASTER LIST OF THIRD-PARTY CORRUPTION RED FLAGS

To help its audience prepare employees to recognize red flags, FCPAméricas has prepared this comprehensive list of common red flags of corruption.

Reputational Risk

- The transaction or the third party is in a country known for widespread corruption, as measured by the Transparency International Corruption Perceptions Index or other similar indices.
- The third party has a history of improper payment practices, such as prior or ongoing formal or informal investigations by law enforcement authorities or prior convictions.
- The third party has been subject to criminal enforcement actions or civil actions for acts suggesting illegal, improper, or unethical conduct.
- The third party has a poor business reputation.
- Allegations that the third party has made or has a propensity to make prohibited payments or facilitation payments to officials.
- Allegations related to integrity, such as a reputation for illegal, improper, or unethical conduct.
- The third party does not have in place an adequate compliance program or code of conduct or refuses to adopt one.
- Other companies have terminated the third party for improper conduct.
- Information provided about the third party or its services of principals is not verifiable by data, only anecdotally.

Government Relationships

- The third party has a family relationship with a foreign official or government agency.
- The third party has a business relationship or association with a foreign official or government agency.
- The third party previously worked in the government at a high level, or in an agency relevant to the work he/she will be performing.
- The third party is a company with an owner, major shareholder, or executive manager who is an official.
- There is rumor that the third party has an undisclosed beneficial owner.

- A government official requests, urges, insists, or demands that a particular party, company, or individual be selected or engaged, particularly if the official has discretionary authority over the business at issue.
- The third party makes large or frequent political contributions.
- The third party conducts private meetings with government officials.
- The third party provides lavish gifts or hospitality to government officials.
- The third party insists on dealing with government officials without the participation of the company.

Insufficient Capabilities

- The third party is in a different line of business than that for which it has been engaged.
- The third party lacks experience or a “track record” with the product, service, field, or industry.
- The third party does not have offices or a staff, or lacks adequate facilities or staff, to perform the work.
- The third party has an unorthodox corporate structure.
- The address of the third party’s business is a mail drop location, virtual office, or small private office that could not hold a business the size that is claimed.
- The third party is not expected to perform substantial work.
- The third party has not been in business for very long or was only recently incorporated.
- The third party has poor financial statements or credit.
- The third party’s plan for performing the work is vague and/or suggests a reliance on contacts or relationships.

Type and Method of Compensation

- The third party requests an unusual advance payment.
- The fee, commission, or volume discount provided to the third party is unusually high compared to the market rate.
- The compensation arrangement is based on a success fee or bonus.
- The third party offers to submit or submits inflated, inaccurate, or suspicious invoices.
- The third party requests an invoice to reflect a higher amount than the actual price of goods provided.
- The third party’s invoice vaguely describes the services provided.
- The third party requests cash, cash equivalent, or bearer instrument payments.
- The third party requests payment in a jurisdiction outside its home country that has no relationship to the transaction or the entities involved in the transaction—especially if the country is an offshore financial center.
- The third party requests that payment be made to another third party or intermediary.
- The third party proposes the use of shell companies.
- The third party requests that payments be made to two or more accounts.

The Master List of Third-Party Corruption Red Flags

- The third party shares compensation with others whose identities are not disclosed.
- The third party requests an after-award services contract that it does not have the capacity to perform.
- The third party requests that a donation be made to a charity.
- The third party refuses to properly document expenses.
- The third party pressures the company to make the payments urgently or ahead of schedule.
- The third party requests a large up-front payment.
- The third party requests payment arrangements that raise local law issues, such as payment in another country's currency.

Unusual Circumstances

- The third party refuses to agree to comply with the FCPA, U.K. Bribery Act, equivalent applicable anti-corruption legislation, anti-money laundering laws, or other similar laws and regulations.
- The third party refuses to warrant past compliance with the FCPA, U.K. Bribery Act, equivalent applicable anti-corruption legislation, anti-money laundering laws, or other similar laws and regulations.
- The third party refuses to execute a written contract, or requests to perform services without a written contract where one is sought.
- The third party insists that its identity remain confidential or that the relationship remain secret.
- The third party refuses to divulge the identity of its beneficial owners, directors, officers, or other principals.
- The third party refuses to answer due diligence questions.
- The third party refuses to allow audit clauses in contracts.
- A suggestion by the third party that anti-corruption compliance policies need not be followed.
- A suggestion by the third party that otherwise illegal conduct is acceptable because it is the norm or customs in a particular country.
- Suspicious statements by the third party such as needing payments to “take care of things” or “finalize the deal.”
- The representation is illegal under local law.
- The alleged performance of the third party is suspiciously higher than competitors or companies in related industries.
- A third party guarantees or promises unusually high rates of return on the promotional services provided.
- The third party requests approval of a significantly excessive budget or unusual expenditures.

Appendix D

SIX PRINCIPLES FROM THE GUIDANCE ON THE BRIBERY ACT 2010 THE BRIBERY ACT 2010 – GUIDANCE: THE SIX PRINCIPLES

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.

A series of case studies based on hypothetical scenarios is included in Appendix A to the six principles. These are designed to illustrate the application of the principles for small, medium and large organisations.

Principle 1 Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented, and enforced.

Commentary

- 1.1 The term ‘procedures’ is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation’s anti-bribery stance, show how it will be maintained, and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented. Further guidance on implementation is provided through principles 2 to 6.
- 1.2 Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.
- 1.3 The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.
- 1.4 Bribery prevention procedures may stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation’s stated anti-bribery policy objectives across all of the organisation’s functions.
- 1.5 The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

Procedures

- 1.6 Commercial organisations’ bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:
 - Its commitment to bribery prevention (see Principle 2)
 - Its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)

- An overview of its strategy to implement its bribery prevention policies
- 1.7 The procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:
- The involvement of the organisation's top-level management (see Principle 2).
 - Risk assessment procedures (see Principle 3).
 - Due diligence of existing or prospective associated persons (see Principle 4).
 - The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
 - Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
 - Governance of business relationships with all other associated persons including pre and post contractual agreements.
 - Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
 - Transparency of transactions and disclosure of information.
 - Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
 - Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.
 - The reporting of bribery including 'speak up' or 'whistle blowing' procedures.
 - The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.
 - The communication of the organisation's policies and procedures, and training in their application (see Principle 5).
 - The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

Principle 2

Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Commentary

- 2.1 Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

Procedures

- 2.2 Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include (1) communication of the organisation's anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Internal and external communication of the commitment to zero tolerance to bribery

- 2.3 This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:
- A commitment to carry out business fairly, honestly and openly
 - A commitment to zero tolerance towards bribery
 - The consequences of breaching the policy for employees and managers
 - For other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)
 - Articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
 - Reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
 - Key individuals and departments involved in the development and implementation of the organisation's bribery prevention procedures
 - Reference to the organisation's involvement in any collective action against bribery in, for example, the same business sector

Top-level involvement in bribery prevention

- 2.4 Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation's size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multi-national organisation the board should be responsible for setting bribery prevention policies, tasking

management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, top-level engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
- Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons, etc.
- Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies.
- Specific involvement in high profile and critical decision making where appropriate.
- Assurance of risk assessment.
- General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.

Principle 3 Risk assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commentary

- 3.1 For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand-alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.
- 3.2 Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term 'due diligence'. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

Procedures

- 3.3 Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size, activities, customers or markets, usually reflect a few basic characteristics. These are:
 - Oversight of the risk assessment by top level management.
 - Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.

- Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
 - Due diligence enquiries (see Principle 4).
 - Accurate and appropriate documentation of the risk assessment and its conclusions.
- 3.4 As a commercial organisation's business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation's domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

Commonly encountered risks

- 3.5 Commonly encountered external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:
- *Country risk*: this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
 - *Sectoral risk*: some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
 - *Transaction risk*: certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
 - *Business opportunity risk*: such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
 - *Business partnership risk*: certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.
- 3.6 An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:
- Deficiencies in employee training, skills and knowledge
 - Bonus culture that rewards excessive risk taking
 - Lack of clarity in the organisation's policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
 - Lack of clear financial controls
 - Lack of a clear anti-bribery message from the top-level management

Principle 4

Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Commentary

- 4.1 Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.
- 4.2 The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

Procedures

- 4.3 As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally or by external consultants. A person ‘associated’ with a commercial organisation as set out at section 8 of the Bribery Act includes any person performing services for a commercial organisation. As explained at paragraphs 37 to 43 in the section ‘Government Policy and section 7’, the scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship. So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.
- 4.4 Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.
- 4.5 ‘Due diligence’ for the purposes of Principle 4 should be conducted using a risk-based approach. For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct

interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged ‘associated’ persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious. Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

- 4.6 A commercial organisation’s employees are presumed to be persons ‘associated’ with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

Principle 5

Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Commentary

- 5.1 Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation’s procedures and to the organisation’s commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation’s procedures and deal with any bribery related problems or issues that may arise.

Procedures

Communication

- 5.2 The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.
- 5.3 Internal communications should convey the ‘tone from the top’ but are also likely to focus on the implementation of the organisation’s policies and procedures and the implications for employees. Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated

persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called 'speak up' procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

- 5.4 External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation's behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal The Bribery surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associate persons, or to the general public.

Training

- 5.5 Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.
- 5.6 General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.
- 5.7 It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.
- 5.8 Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning and other web-based tools. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

Principle 6

Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Commentary

- 6.1 The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

Procedures

- 6.2 There is a wide range of internal and external review mechanisms which commercial organisations could consider using. Systems set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will help provide insight into the effectiveness of procedures designed to prevent bribery. Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform continuing improvement of anti-bribery policies.
- 6.3 Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations' practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.
- 6.4 In addition, organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures. Some organisations may be able to apply for certified compliance with one of the independently-verified anti-bribery standards maintained by industrial sector associations or multilateral bodies. However, such certification may not necessarily mean that a commercial organisation's bribery prevention procedures are 'adequate' for all purposes where an offence under section 7 of the Bribery Act could be charged.

Appendix E

GUIDANCE FROM THE INSTITUTE OF INTERNAL AUDITORS

The Definition of Internal Auditing states the fundamental purpose, nature, and scope of internal auditing:

Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes.

The following selection of the *International Standards for the Professional Practice of Internal Auditing* is the most relevant for auditing anti-bribery programs:

Standard 1210 – Proficiency

Internal auditors must possess the knowledge, skills, and other competencies needed to perform their individual responsibilities. The internal audit activity collectively must possess or obtain the knowledge, skills, and other competencies needed to perform its responsibilities.

Interpretation:

Proficiency is a collective term that refers to the knowledge, skills, and other competencies required of internal auditors to effectively carry out their professional responsibilities. It encompasses consideration of current activities, trends, and emerging issues, to enable relevant advice and recommendations. Internal auditors are encouraged to demonstrate their proficiency by obtaining appropriate professional certifications and qualifications, such as the Certified Internal Auditor designation and other designations offered by The Institute of Internal Auditors and other appropriate professional organizations.

Standard 2000 – Managing the Internal Audit Activity

The chief audit executive must effectively manage the internal audit activity to ensure it adds value to the organization.

Interpretation:

The internal audit activity is effectively managed when:

- *It achieves the purpose and responsibility included in the internal audit charter.*
- *It conforms with the Standards.*

- *Its individual members conform with the Code of Ethics and the Standards.*
- *It considers trends and emerging issues that could impact the organization.*

The internal audit activity adds value to the organization and its stakeholders when it considers strategies, objectives, and risks; strives to offer ways to enhance governance, risk management and control processes; and objectively provides relevant assurance.

Standard 2100 – Nature of Work

The internal audit activity must evaluate and contribute to the improvement of the organization's governance, risk management, and control processes using a systematic, disciplined, and risk based approach. Internal audit credibility and value are enhanced when auditors are proactive and their evaluations offer new insights and consider future impact.

Standard 2110 – Governance

The internal audit activity must assess and make appropriate recommendations to improve the organization's governance processes for:

- Making strategic and operational decisions.
- Overseeing risk management and control.
- Promoting appropriate ethics and values within the organization.
- Ensuring effective organizational performance management and accountability.
- Communicating risk and control information to appropriate areas of the organization.
- Coordinating the activities of, and communicating information among, the board, external and internal auditors, other assurance providers, and management.

Standard 2120 – Risk Management

The internal audit activity must evaluate the effectiveness and contribute to the improvement of risk management processes.

Interpretation:

Determining whether risk management processes are effective is a judgment resulting from the internal auditor's assessment that:

- *Organizational objectives support and align with the organization's mission.*
- *Significant risks are identified and assessed.*
- *Appropriate risk responses are selected that align risks with the organization's risk appetite.*
- *Relevant risk information is captured and communicated in a timely manner across the organization, enabling staff, management, and the board to carry out their responsibilities.*

The internal audit activity may gather the information to support this assessment during multiple engagements. The results of these engagements, when viewed together, provide an understanding of the organization's risk management processes and their effectiveness. Risk management processes are monitored through ongoing management activities, separate evaluations, or both.

Standard 2130 – Control

The internal audit activity must assist the organization in maintaining effective controls by evaluating their effectiveness and efficiency and by promoting continuous improvement.

Standard 2200 – Engagement Planning

Internal auditors must develop and document a plan for each engagement, including the engagement's objectives, scope, timing, and resource allocations. The plan must consider the organization's strategies, objectives, and risks relevant to the engagement.

Standard 2201 – Planning Considerations

In planning the engagement, internal auditors must consider:

- The strategies and objectives of the activity being reviewed and the means by which the activity controls its performance.
- The significant risks to the activity's objectives, resources, and operations and the means by which the potential impact of risk is kept to an acceptable level.
- The adequacy and effectiveness of the activity's governance, risk management, and control processes compared to a relevant framework or model.
- The opportunities for making significant improvements to the activity's governance, risk management, and control processes.

REFERENCE MATERIALS

Asia-Pacific Economic Cooperation

Anti-Corruption Code of Conduct for Business

DOJ and SEC

Hallmarks of Effective Compliance Programs

Resource Guide to the FCPA

FCPAméricas

The Master List of Third Party Corruption Red Flags

The Institute of Internal Auditors

Auditing Anti-Corruption and Anti-Bribery Programs

The International Professional Practices Framework

International Chamber of Commerce

ICC Rules on Combating Corruption

ISO

ISO 37001: Anti-bribery management systems

OECD

Convention of Combating Bribery of Foreign Public Officials in International Business Transactions

Good Practice Guidance on Internal Controls, Ethics, and Compliance

Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions

Partnering Against Corruption Initiative (PACI)

Principles for Countering Bribery

Transparency International

Business Principles for Countering Bribery

Corruption Perceptions Index 2016

Global Anti-bribery Guidance

Incentivising Ethics

U.K. Ministry of Justice

Guidance on the U.K. Bribery Act 2010

United Nations

Convention against Corruption

United Nations Global Compact

The Ten Principles

World Bank

Integrity Compliance Guidelines

WEBSITES

The list below will lead you to practical examples (elements) of anti-bribery programs.

ABB

https://library.e.abb.com/public/66c02032a6ea44a4b5de62f9e4ba314d/Supplier%20Code%20of%20Conduct_V2.1.pdf

ABInBev

<http://www.ab-inbev.com/content/dam/universaltemplate/abinbev/pdf/cg/corporategovernancelanding/AB%20InBev%20Global%20Anti-Corruption%20Policy%202015.pdf>

BHP Billiton

https://www.bhp.com/-/media/bhp/documents/aboutus/ourcompany/code-of-business-conduct/160310_codeofbusinessconduct_english.pdf?la=en

BT

<https://www.btplc.com/Purposefulbusiness/Ourapproach/Ourpolicies/Giftsandhospitalitypolicy.pdf>

The Coca Cola Company

<http://www.coca-colacompany.com/our-company/suppliers/supplier-code-of-business-conduct>

ING

<https://www.ing.com/About-us/Compliance/Zero-Tolerance-Bribery-Statement.htm>

L'Oreal

<http://loreal-dam-front-resources-corp-en-cdn.brainsonic.com/ressources/afile/3450-517ba-resource-ethics-charter-o-ethics-every-day-usa.pdf>

Philip Morris

https://www.pmi.com/resources/docs/default-source/pmi-sustainability/ungc_report_2016_.pdf?sfvrsn=b19c81b5_2

Pirelli

https://www.pirelli.com/mediaObject/corporate/documents/common/governance/program/Pirelli_Compliance_Program_Anti-Corruption_EN/original/Pirelli_Compliance_Program_Anti-Corruption_EN.pdf

Shell

<https://s03.static-shell.com/content/dam/shell-new/local/global-content-packages/corporate/sgbp-english-2014.pdf>

Statoil

<https://www.statoil.com/content/dam/statoil/documents/ethics/statoil-anti-corruption-compliance-program.pdf>

Unilever

https://www.unilever.co.uk/Images/4394-cobp-code-policies-booklet-external_tcm1252-484237_en.pdf

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AUDITING ANTI-BRIBERY PROGRAMS

Within the last decade, the world has changed considerably when it comes to combating bribery. Stricter legislation, often with an international impact, increasing enforcement, criminal convictions resulting in fines up to almost \$1 billion, and imprisonment of the culprits up to 15 years, have been sending shock waves through the business community. Global companies have legal and ethical obligations to conduct their business honestly.

Readers will learn:

- The importance of combating bribery
- Initiatives from leading global organizations
- Impacts of national laws on global operations
- The elements of a structured anti-bribery program
- How to audit anti-bribery measures

This report introduces the concepts of bribery and corruption and the need to stop it. Anti-bribery programs that are fully implemented and continuously monitored can be a powerful way to protect an organization against the risk of bribery and corruption. Internal audit is well positioned to evaluate the design, implementation, and effectiveness of the organization's anti-bribery program.

ABOUT THE AUTHOR

Hans Nieuwlands, CIA, CGAP, RA, is the CEO of IIA–Netherlands. He has more than 20 years of internal audit experience leading internal audit functions for several industries, including the financial sector, utilities, and retail. He is a recognized speaker on various topics, including culture, sustainability, and quality assurance.



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