# Global Anti-Bribery and Corruption

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Introduction

In this course, we will provide an overview of anti-bribery and corruption laws--laws that apply to all of us, regardless of where we are located or whether we are in sales, marketing, executive management, finance, operations, or any other department. These laws help provide a level playing field in society--and in business--and cover a wide range of direct and indirect payments when conducting business in foreign markets.

People often say, "Hey, I don't deal with foreign officials," or "I'm not in sales and marketing, so this topic isn't relevant for me"... but that is not the case.

This topic is not about giving suitcases of cash to senior foreign officials--it is not that simple. We are in a new era of government enforcement and there are broad, and sometimes murky, enforcement theories being applied to routine business activities across a variety of industries.

That is why we need to help to spot risk and understand the anti-corruption laws and how they may relate to your specific job function, to help you and your company remain compliant.

Course Objectives

Upon completing this course, you will be able to:

- Describe how corruption impedes global economic development and how it undermines the ability to compete fairly in business
- Outline three fundamental elements of a bribery offense that can lead to prosecution of companies as well as individuals
- Identify various red flags that can be indicators of bribery
- Outline how, and to whom, you should report concerns about possible bribery and corruption

Social and Business Case for Regulation

Anti-bribery regulation is, at its core, a people issue. It greatly impacts the poor and the most vulnerable segments of society. It slows economic development for emerging countries and it magnifies the hazards of natural disasters--meaning more buildings collapse, supplies are lost, and relief efforts stymied.

The first anti-corruption law, the U.S. Foreign Corrupt Practices Act, or FCPA, was passed in 1977 in response to the damaging impact of corruption in our global society and the unfair
advantage it gave some businesses over others. Since that time, many countries have passed similar anti-corruption laws and there is a growing trend toward global enforcement.

While we will primarily focus on the FCPA due to the extensive number of enforcement actions, we will also provide a broad overview of general bribery concepts that are relevant within all regions.

- **The World Bank**—More than $1 trillion is paid globally each year in bribes.

- **OECD**—The fight against bribery and corruption demands a collective response. We need to assemble the brightest minds and keep sharing knowledge to combat this curse... especially now when corruption, coupled with growing inequality, are causing a serious loss of trust in our society and in the institutions we have built in the last 100 years. Recent studies put the cost of corruption close to $2.6 trillion a year... a fraction of this could be used as resources to create millions of jobs.

- **U.S. DOJ**—Corruption corrodes the public trust in countries both rich and poor and inflicts particular harm on emerging economies. When a developing country’s public officials abuse their power for personal gain, its people suffer. Political institutions lose legitimacy, threatening democratic stability and the rule of law, and people lose hope that they will ever be able to improve their lot. When corruption takes hold, the fundamental notion of playing by the rules gets pushed to the side, and individuals, businesses, and governments instead begin to operate under a fundamentally unfair—and destabilizing—set of norms. This undermines confidence in the markets and governments, and destroys the sense of fair play that is absolutely critical for the rule of law to prevail.

As the social and business impacts of corruption become more visible, the global community is uniting, adopting similar anti-bribery standards, and increasing government scrutiny and enforcement.

Recently, the United States enforcement authorities declared a "new era" of FCPA enforcement. What does this mean?

It means a wider net and increased scrutiny of all business activities across many sectors. Government scrutiny alone, not to mention actual enforcement actions, can cause significant business disruption, enormous cost, and harm to individuals’ and businesses’ reputations.

The new era of enforcement also means more risk that is not always intuitive or easy to spot. The best way to manage this risk is to ensure everyone understands anti-corruption basics and make certain that they can "issue spot" problems and report them.

As a first step in learning to issue spot, take a minute to familiarize yourself with the countries and industries that have experienced a number of investigations and enforcement actions on the interactive **FCPA Map**.
**Definition of Bribery**

Anti-bribery regulations have been gaining momentum since the United States first passed the FCPA in 1977. Since that time, the Organization for Economic Cooperation and Development (OECD) established standards to combat bribery.

In 2003, the United Nations adopted the Convention Against Corruption (UNCAC), which established guidelines for codes of conduct for public officials, transparent and objective procurement systems, and increased accounting and auditing standards for the private sector. As of early 2013, 163 countries were parties to the UNCAC.

In 2011, the Bribery Act became effective in the United Kingdom.

Other countries are following the trend. For example, the "BRIC" nations (Brazil, Russia, India, and China) have all either proposed or enacted new anti-bribery legislation.

In this "new era of enforcement," companies who conduct business in foreign markets may have various governments scrutinizing their business activities.

In the United States, the FCPA is enforced by two agencies, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), and the law has two main provisions.

The first provision addresses the actual act of bribery, and the second provision relates to a company's books, records, and internal controls to ensure that business expenses are accurately recorded and that a company has an adequate system of checks and balances in place for business expenditures.

**Penalties for Bribes and Corruption**

The FCPA and other anti-bribery laws impose both civil and criminal penalties on individuals and business organizations. In this new enforcement era, agencies are seeking criminal penalties, including prison sentences, for individuals.

The monetary fines and penalties can be large, often in the millions or tens of millions of dollars, because enforcement agencies are seeking fines that reflect the amount of the benefit sought to be obtained by the corrupt transaction.

**Anti-Bribery Provisions**

Anti-bribery provisions generally prohibit the payment, offering, or promise of:

- Anything of value
- To a foreign official*
- To obtain or retain business
The U.K. Bribery Act and other anti-bribery laws address bribery of private persons, too. In contrast, the FCPA addresses bribery of only foreign officials.

Anything of Value

The first element of anti-bribery laws is the concept of giving "anything of value."

People can be influenced in many different ways, not just with cash payments. Government agencies understand this reality, and therefore broadly interpret the "anything of value" element.

As shown, "anything of value" is not necessarily a suitcase full of cash. In other contexts, such things as entertainment and hospitality may be a perfectly legal and a legitimate way of closing a business deal or maintaining customer goodwill.

However, such items may be valued by foreign officials in a position of influence over a business, its products, and its services, and in that situation, there is a risk for bribery and corruption.

So whether something is "of value" depends on the particular context and situation.

Even a nice, hospitable gesture that is based on goodwill and not intended to improperly influence anyone can give rise to the appearance of corruption, depending on the nature of the business relationship and the details of the hospitality. That is why it is critical to review your gifts and entertainment policy and ensure any hospitable gesture is consistent with that policy.

The key question when evaluating whether something is "of value" is the context of the situation and whether it will help influence someone in a position of authority or influence over the company’s business. Review each of the items to help you in the evaluation of whether something is "of value."

- **No Minimum Value.** It all depends on the context. A $100 gift to a foreign official can influence someone just as much as would a $1,000 gift to a different person.

- **Either Party Can Suggest It.** It does not matter if the foreign official suggests the item of value. If you feel pressure to provide it to secure or maintain the business, it is still a problem.

- **Does Not Matter Who Pays.** It does not matter whether you use your personal funds or the company's funds to pay for the item of value. If you are providing something "of value" to advance a business interest, then there is a corruption risk.

- **Cannot Give Indirectly to Third Party.** Several FCPA enforcement actions have been based on things of value indirectly provided to a foreign official, or friends or family members of the foreign official, through various third parties.
Foreign Officials

You probably already guessed that foreign government officials such as presidents and prime ministers are "foreign officials" under anti-bribery laws.

But less obvious are the employees of various government departments or agencies with discretion over licenses, permits, or other approvals your company needs to engage in business in a particular country.

The foreign official designation applies regardless of whether the person is a high-ranking or low-ranking official.

Less obvious foreign officials include:

- Tax officials
- Customs officials
- Immigration officials
- Law enforcement
- Other regulators

Even trickier is the fact that enforcement agencies view another type of person as a "foreign official."

This other type of person is employed by a state-owned or state-controlled enterprise--commonly referred to as an SOE.

What Is an SOE?

An SOE is generally a profit-seeking enterprise that operates like a private business but where the government holds an ownership interest or exerts some level of control over the business enterprise.

Enforcement agencies consider SOEs (including some of the world’s largest companies) to be "instrumentalities" of a foreign government and thus its employees to be "foreign officials."

Utilities, airlines, telecommunications, oil and gas, and healthcare are all examples of the types of organizations that may be considered government departments, agencies, or businesses, and so may be SOEs such that employees would be viewed as "foreign officials" by the enforcement agencies. Identifying this type of "foreign official" is not easy, as they often appear and act as private businesspeople rather than government employees.

The following five factors can help you and your company to determine whether a particular entity may be an SOE:

- The foreign state’s characterization of the entity and its employees
The foreign state’s degree of control over the entity

The purpose of the entity’s activities

The circumstances surrounding the entity’s creation

The foreign state’s extent of ownership, including level of financial support of the entity, such as special tax treatment or subsidies

Review each of the topics below to see additional risks of the customer conference and learn how this precise scenario has triggered FCPA scrutiny for other companies.

- **Relevant SOE Employees.** It is usually not necessary for a team of people to attend a customer or user conference. Only the relevant employee should attend.

- **Only Employees.** It is difficult to obtain visas to enter a country, and a business trip offers a legitimate reason for travel; however, be aware that some customers may use the trip as an excuse to bring the entire family. It is not appropriate to pay for family members to travel and attend the conference.

- **Travel and Hotel.** It is best to pay travel expenses directly to the service provider rather than providing a stipend or relying on a travel agency. Seldom will it be reasonable to pay first-class airfare for the customers, or pay for the priciest hotel or most expensive suite.

- **Meals and Entertainment.** It is permissible to sponsor some fun activities. However, be aware that the cumulative effect of providing more things “of value” may be viewed as an attempt to improperly influence the “foreign officials” to use their discretion in your company’s favor. It is seldom reasonable to provide expensive alcohol or meals, or to provide expensive tickets to entertainment events.

When planning any business event that involves people who may be employees of an SOE, not to mention more traditional “foreign officials,” it is a good practice to have compliance professionals review the attendee list, the travel arrangements, and the agenda for the event.

## Obtaining or Retaining Business

The third element of the FCPA and other anti-bribery statutes concerns obtaining or retaining business.

The most obvious situation is where a businessperson directly gives something of value to a foreign official in order to obtain or retain a specific contract. However, enforcement agencies take a much broader view and they look at anything of value given to a “foreign official” that gives a company an improper advantage over other businesses.

What this means is that FCPA risk may be present in everyday business tasks. How so?
Clearing company product through ports of entry or exit, paying taxes, and obtaining licenses or permits to do business are all common activities that provide a point of contact with "foreign officials" and present a risk for violations of FCPA and other anti-bribery statutes. In fact, many of the recent enforcement actions concern these everyday business tasks. What does this mean for you?

It means you should review what foreign licenses, permits, certifications, or other government approvals are needed for you to do your job, and what other regulations or points of contact exist between you, your company, and any "foreign officials."

You should report these points of contact to the appropriate compliance professionals within your company, so the risk can be proactively managed and minimized.

It is also important to note that the FCPA, and other anti-bribery statutes, cover unsuccessful attempts at obtaining or retaining business. In other words, it is not the end result that matters; it is the act of trying to improperly influence a foreign official by offering something of value.

**Third Parties**

The FCPA and other anti-bribery laws prohibit not only direct payments to a "foreign official" in connection with a business purpose, but also payments to any person while knowing that all, or a portion, of anything of value will be provided to a foreign official. This is the so-called third-party payment provision.

Understanding how various third parties (such as agents and representatives) can expose the company--and even yourself--to enforcement scrutiny is important to recognizing and managing risk.

Third parties include not just individuals, but also independent businesses, such as distributors and joint ventures--anyone that can help contribute to the businesses' success.

There is nothing wrong with engaging third parties to assist with business development in a foreign country. Third parties are often necessary to help understand the local business culture and practices. But third-party help also poses a risk if it means that the third party is offering money or anything of value to foreign officials to help secure business.

Many of the recent enforcement actions against companies and individuals are based on the conduct of various third parties.

Companies and individuals can be responsible for third-party actions when they have actual knowledge of improper payments to foreign officials, OR they are aware of various red flags stemming from the third party but they fail to investigate or act upon the red flags.
The FCPA and other anti-bribery laws do not allow you to "stick your head in the sand" to avoid actual knowledge of improprieties.

Many of the recent enforcement actions concern third-party agents who were given payments and broad, vague parameters with respect to their services. In those situations, you cannot "bury your head in the sand" to escape liability. If the transaction occurs in a country with a reputation for corruption, you need to understand well the agent or representative’s qualifications, experience, and reputation before entering into a relationship.

Using third parties in a foreign country can pose an enforcement risk, and therefore you need to be able to spot third-party red flags.

- **Necessary Services.** Are the services of the third party even necessary? Did the company seek out the third party, or visa versa?
- **Sufficient Experience.** Is the third party qualified to perform the services, or is the third party relying solely on its relationships with "foreign officials" to assist the company?
- **High Fees.** Are the fees or commissions requested by the third party unusually high as compared to others?
- **Unusual Payment Terms.** Is the third party requesting unusual payment terms, such as payment to an account outside his or her home jurisdiction, or several smaller payments rather than one aggregate payment?

### Books, Records, and Internal Controls

In addition to anti-bribery provisions, the FCPA also contains a provision requiring certain companies to maintain accurate books and records and to have reasonable and sufficient checks and balances in place—so-called internal controls—concerning business expenditures. What does this mean?

It means a company should keep books and records that accurately reflect how the company is spending money. In other words, a company’s expenses should be accurate for purposes of financial reporting and transparent to any outside auditor.

Likewise, a company should also have a system of internal checks and balances to ensure that corporate money is being spent properly.

The books and records provision is separate from a bribery offense and operates independently, meaning you or your company can be scrutinized under the books and records provision, regardless of whether or not there is a direct bribery offense.
In fact, many of the recent enforcement actions concern the books and records and internal controls provisions, since these violations are often easier to spot and prove than bribery violations.

You may be asking, "How do books and records and internal controls relate to me and my job?" Here is how...

If you incur any business-related expense OR assist in approving or processing expense reimbursements or invoices from any company-related personnel (employee or third party), you must ensure there is an adequate description of the expense, including the business purpose, people involved, date of expense, supporting documentation, etc.

As a guideline, anyone preparing financial statements for the company or any outside auditor should be able to view the expense entry, its description, and supporting documentation, and understand the business purpose for the expense. If that is not possible, then the expense is not transparent and there is an enforcement risk.

The FCPA requires publicly traded companies to set up and maintain an accounting system that tightly controls and accurately records all payments or distributions of assets. For example, it is a violation to book an expense paid to a third party as a consultant fee when the person did not perform any consulting services. The intent is to prohibit slush funds, which are frequently used to make illegal payments, and to prohibit the falsification of payments and expenses. Notably, many of the recent enforcement actions concern accounting violations, since those violations are easier to discover and prosecute than bribery.

### How Can You Help?

You can help by questioning any general expense descriptions and requesting more transparency. These are examples of general, vague descriptions that caused problems for other companies:

- Commissions and consulting fees
- Sales and marketing expenses
- Rebates or discounts
- Service fees
- Miscellaneous expenses

If you see any of the following:

- General, vague expense descriptions
- Lack of expense documentation
- Lack of oversight for expenditures that can cause FCPA risk
- Lack of oversight for third parties
Please do your part and report the information to the appropriate compliance professionals as outlined later in this course.

**U.K. Bribery Act**

The U.K. Bribery Act (UKBA) went into effect in 2011 and is similar to the FCPA, but broader in scope in three general areas. Review each of the points below to see the general differences.

- **Private AND Public Bribery.** The U.K. Bribery Act applies to improper payments in the private sector, as well as improper payments to “foreign officials.”

- **receivers AND Bribers.** The U.K. Bribery Act covers both the giver of an improper payment, as well as potentially covers the recipient of the payment. The FCPA, in contrast, focuses only on the person giving or intending to give the bribe.

- **No Facilitation Payments Exception or Hospitality Defense.** The U.K. Bribery Act makes NO exception for facilitation payments or reasonable business expenses. Please note: This is largely a distinction without a practical difference. In the United States, facilitation payments are allowed under the FCPA, yet several enforcement actions involve payments that could arguably be classified as such. In the U.K., facilitation payments are not allowed under law, but they generally are not prosecuted.

In this new era of enforcement of bribery and corruption laws, more countries will pass anti-bribery laws. For example, Brazil, Russia, and China have recently passed anti-bribery laws. And India has also introduced new anti-bribery legislation.

Moving forward, many countries realize they need to adopt what is becoming a universal anti-bribery standard in order to decrease corruption and compete in the global economy.

**Red Flags**

Different regions and industries give rise to different bribery methods based on common business situations. The key to avoiding bribery or the perception of bribery is to be aware of the common risk factors present in your industry or business region.

Bribes can be demanded and paid in different ways throughout the world. Review each item below to get a sense of how people pay bribes and how to spot red flags.

- **Agent**
  - Has no apparent business use
• Has personal links with officials
• Resistant to formal written agreements
• Refuses to allow client to examine books and records
• Appears able to bypass bureaucratic hurdles very easily
• Wins contracts with products and/or services that are not competitive

● Agent Payment
  • Cash payment demanded
  • Paid in a different country from where business activity occurred
  • Payment is split into smaller fees and deposited into multiple accounts for the same agent

● Marketing
  • Request for services or procurement includes specifications that clearly favor one vendor in particular
  • Frequent hospitality and travel for foreign officials
  • Requests by foreign officials for special favors, such as donations or sponsorships connected to the foreign official

● Purchasing and Contracting
  • Extravagant hospitality and gifts
  • Close relationships with vendors such as vacationing with them or providing other things of value
  • Breach of decision-making process or controls outlined in the procurement process
  • Lack of documentation of key meetings and/or contract evaluation and decision

Policy and Reporting

The most effective way to manage risk for bribery violations is to train, audit, self-report, and voluntarily partner with government agencies when there is a problem. If you know, or even suspect, a violation, you must report it. We need your eyes and ears to help us correct problems early on and build an effective compliance program.

We will not tolerate any actions or behaviors designed to obtain an unfair business advantage over others. Such actions and the appearance of impropriety harm our business, as well as society, and will be subject to discipline, including termination.
Please seek guidance from our compliance professionals whenever an issue arises. Anti-bribery and corruption laws are quickly evolving, so do not make quick decisions without the benefit of counsel.

No one will experience retaliation for reporting a violation or suspected violation of our policies, and we will promptly conduct an investigation into the suspected violation of our policies.

Please take some time now to review our policies on this topic.

Summary

By understanding the basic provisions of anti-bribery regulations and being on the lookout for various red flags, we should be able to minimize situations that could give rise to bribery or corruption.

Accurate and transparent accounting, regular risk assessments, and monitoring subsidiaries, agents, and other third parties will also significantly reduce the risk of violations and help us maintain an ethical and very transparent organization.

Questions?

Feel free to ask questions about this topic by emailing legalteam@emtrain.com