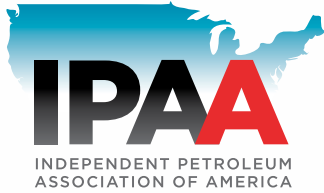


INTERNATIONAL BRIBERY LAW and COMPLIANCE STANDARDS

by **TIM MARTIN**
for Independent Petroleum Association of America





President & CEO: Barry Russell

GOVERNMENT RELATIONS

Vice President of Government Relations Lee O. Fuller

Vice President of Federal Resources & Political Affairs Dan Naatz

Vice President of Crude Oil & Natural Gas Regulatory Affairs Susan Ginsberg

Manager of Government Relations Ryan Ullman

Manager of Government Relations Matthew Kellogg

Manager of Government Relations Samantha McDonald

Manager of Government Relations Mallori McClure

Manager of Government Relations Kristen Lingley

Western Regional Representative Cortney Hazen

BUSINESS DEVELOPMENT, CAPITAL MARKETS & MEMBERSHIP

Vice President of Business Development, Capital Markets & Membership Bob Jarvis

ECONOMICS & ANALYSIS

Vice President of Economics & International Affairs Frederick Lawrence

MEETINGS

Vice President of Meetings Tina Hamlin

Director of Meetings Kim Egan

Director of Meetings Nikki McDermott

Meetings Manager Taryn Peine

Meetings & Database Manager Jennifer U. Bradley

Assistant/Registrar of Meetings Brittany Green

COMMUNICATIONS

Vice President of Public Affairs & Communications Jeff Eshelman

Director of Public & Government Affairs Nicole Daigle

Director of Communications Brendan Bradley

Manager of Public & Industry Affairs Julia Bell

EDUCATIONAL CENTER

Founding Director Doris Richardson

Director of Education Anne Ford

Associate Director Sarah Hewitt

Associate Director Jessica Thomas

ADMINISTRATION

Vice President of Administration & Membership Services Therese McCafferty

Director of Member Services LuAnne Tyler

Office Manager Vanessa Johnson

Director of Information Technology & Webmaster Kirk Friedman

Receptionist & Membership Assistant Kathleen Burke

Senior Accounting Associate Josh Compton

Copyright © 2013
Independent Petroleum Association of America

All rights reserved.

No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems, without permission in writing from the author. The only exception is by a reviewer, who may quote short excerpts in a review.



Tim Martin

Tim Martin has over 30 years of experience in the international energy sector in a variety of senior management positions. He has been a General Counsel, Special Counsel, Country General Manager, Finance Director, Commercial Manager and a Petroleum Economist. He has worked in more than 50 countries around the world and has been a senior executive in commercial, governance, operational, financial and legal positions.

Tim has advised governments, corporations & NGOs on corporate governance, transparency, international bribery law and compliance programs. He was a Director of Transparency International, Canada Inc. and the National White Collar Crime Center of Canada (NW4C), a partnership between the private sector and international law enforcement agencies on economic crime. Tim has developed, implemented & managed leading edge corporate compliance programs on improper payments, sanctions & boycott law. He has chaired the Anti-Corruption Task Force of the International Association of Oil & Gas Producers and been on the Advisory Board of Transparent Agents and Contracting Entities (TRACE). He has advised the Export Development Corporation in Ottawa, Canada on corporate compliance programs and the Canadian Department of Justice on the drafting of the Corruption of Foreign Public Officials Act.

Tim's peers have selected him as one of the International Who's Who of Oil & Gas Lawyers, and one of the International Who's Who of Commercial Arbitrators. Tim has been described as the "go to guy for energy disputes", "the best around for energy disputes", as a "true innovator" in international oil & gas law, and as "a true expert in the [oil & gas] sector". He was President of the Association of International Petroleum Negotiators (AIPN), twice voted AIPN Member of the Year and has received its prestigious President's Award and Legacy Award.

Tim also has extensive experience as an arbitrator, mediator, expert and counsel. He is the Chair of the Executive Committee and the Editorial Board of the Journal of World Energy Law & Business, a leading journal in international energy, which is published by the Oxford University Press. He is a global faculty member at CEPMLP at the University of Dundee, Scotland. Tim has spoken extensively on the subjects of corruption, corporate governance, dispute resolution, international arbitration, energy transactions, model contracts, decommissioning, and international law in North & South America, Europe, Africa, Asia and the Middle East. He has published numerous articles on international business and legal transactions, in particular in the energy sector.

Tim is presently International Counsel with Blakes LLP in the Kingdom of Saudi Arabia where he can be reached at tim.martin@blakes.com. More details on Tim's experience and expertise can be found at Tim's personal website www.timmartin.ca or by contacting Tim at his personal email address tim@timmartin.ca.

Contents

Introduction	1
1. The Oil & Gas Industry & Bribery	1
2. The Development of International Bribery Law	2
2.1 The Leap from Local to Foreign Bribes	2
2.2 International Law	2
2.3 National Laws	3
3. The Bribery Provisions of Anti-Bribery Laws	4
3.1 Elements of a Bribery Offense	5
3.2 Bribe Givers: Corporations & Individuals	5
3.3 Illegal Payments: Payments That Are Prohibited	5
3.4 Bribe Takers: Foreign Officials & Others	6
3.5 Intent Required for Offense	6
3.6 Knowledge & Vicarious Liability: Payments Through Third Parties	7
3.7 Business Purpose Test: Requirement of Business Nexus	8
3.8 Exceptions & Affirmative Defenses	8
3.9 Duress & Extortion	9
3.10 Penalties for Anti-Bribery Provisions	9
3.11 Limitation Periods for Anti-Bribery Provisions	10
4. The Accounting Provisions of Anti-Bribery Laws	10
4.1 Issuers: Parties Subject to FCPA Accounting Provisions	10
4.2 Components of FCPA Accounting Provisions	10
4.3 Penalties for FCPA Accounting Violations	11
4.4 Limitation Periods for FCPA Accounting Provisions	11
4.5 UK Accounting Provisions	11
4.6 Canadian Accounting Provisions	11
4.7 Effectiveness of Accounting Provisions	11
5. Identifying High-Risk Areas	12
5.1 Countries	12
5.2 Industries	12
5.3 Employees	12
5.4 Agents	12
5.5 Corporate Entities	12
5.6 Dealings with Governments & their Officials	12
6. Managing High-Risk Areas	13
6.1 Gifts & Entertainment	13
6.2 Travel & Lodging	13
6.3 Charitable Donations & Political Contributions	13
6.4 Facilitating Payments	14
6.5 Agents	14
6.6 Employees	18
6.7 Joint Ventures	18
6.8 Mergers & Acquisitions	19
7. Transparency & Public Reporting	20
7.1 Extractive Industries Transparency Initiative	20
7.2 UN Global Compact	20
7.3 Dodd-Frank Act	20
7.4 EU Directive	21
8. Corporate Compliance Programs	21
8.1 U.S. Guidelines	21
8.2 UK Guidelines	23
8.3 Canadian Guidelines	23
8.4 OECD Guidelines	23
8.5 Integrated Compliance Programs	24
9. Conclusion	24
Appendix A: Bribery of Foreign Officials Laws Comparison	25
Appendix B: Reference Materials and Sources	26

Thank You

IPAA would like to extend its gratitude to Tim Martin for authoring this primer supplement. Through Tim's extensive experience in the fields of international bribery law, corporate governance and compliance programs, IPAA continues to build upon the International Primer starter kit that was originally released in 2002 (<http://www.ipaa.org/wp-content/uploads/downloads/2011/12/IPAAInternationalPrimer.pdf>). Mr. Martin has artfully explained how a variety of international bribery laws impact the operations of international oil and natural gas companies and has provided a concise blueprint on how they can best comply with those laws in various jurisdictions. While this primer will by no means exhaust the extent and scope of the broad subject, Mr. Martin's unique compilation will provide a valuable starting point on the key issues while also providing additional resources for further study.

Projects of this type take a considerable amount of expertise and review and the support and assistance of some expert peer reviewers have been particularly helpful in this regard. Mr. Martin and IPAA would like to thank the following individuals who took the time and care to review this primer and provide many invaluable suggestions: James G. Tillen, Partner, Miller & Chevalier Chartered; William B. Jacobson, Senior Vice President, Co-General Counsel, Chief Compliance Officer, Weatherford International; Jay Martin, Vice President, Chief Compliance Officer and Sr. Deputy General Counsel, Baker Hughes; Stuart Deming, Principal, Deming PLLC; George Brown, Partner, Reed Smith LLP; John Bray, Policy Director, Control Risks; Janet Keeping, President, Sheldon Chumir Foundation for Ethics in Leadership; and Stephanie John, Legal Counsel and Compliance Officer, Newfield Exploration Company. Mr. Martin, of course, takes final responsibility for the accuracy and the contents of the primer.

The IPAA International Committee believes that the continuation of the International Primer supplements will support the mission of "providing educational and informational services to IPAA members engaged in or interested in international business opportunities." Please visit the International section of IPAA's website to view previous works: <http://www.ipaa.org/economics-analysis-international/international/>. IPAA would also like to thank the steadfast members of the International Steering Committee for their continued dedication toward addressing and contributing to some of the key international issues that could impact IPAA membership. In particular, Chairwoman, Tara Lewis of HEYCO Energy Group, and ex-Chair, Bill Schneider of Newfield Exploration, have generously donated significant energy to these endeavors over the past decade or more. The Committee has more projects planned over the next year so stay tuned and we welcome your involvement. Should you have comments or recommendations regarding future topics of interest, please do not hesitate to contact us.

Tara Lewis

Chairwoman, International Committee,
IPAA and Vice President, HEYCO Energy Group

2911 Turtle Creek Boulevard, Suite 250
Dallas, TX 75219

214.219.2998 *t*
214.522.9531 *f*

tlewis@heycoenergy.com

Frederick J. Lawrence

Staff Liaison to the International Committee and
VP of Economics & International Affairs, IPAA

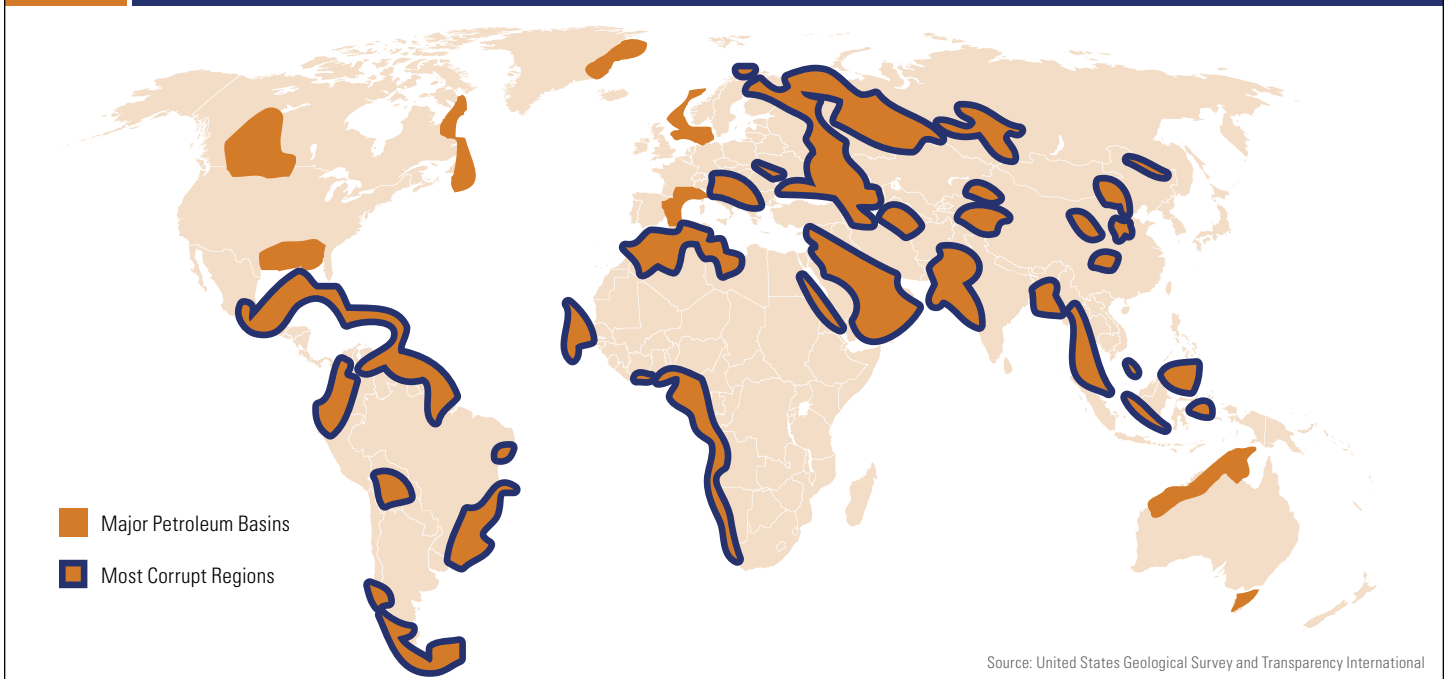
1201 15th Street, NW, Suite 300
Washington, DC 20005

202.857.4722 *t*
202.857.4799 *f*

flawrence@ipaa.org

FIGURE 1

Oil & Gas and Corruption Most of World's Oil and Gas Reserves are found in Corrupt Countries



Introduction

The international petroleum business has been investing and operating throughout the world for nearly one and a half centuries.¹ It is the most global of industries and therefore encounters the most global of business challenges, which include dealing with international compliance laws.

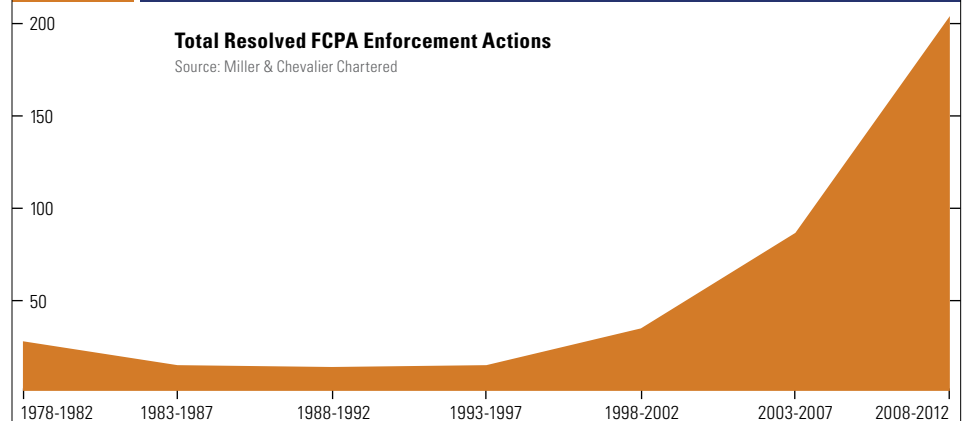
Oil and gas companies must be alert to a number of risk areas in their international operations and they need to ensure that they are compliant with the international laws that apply to them. Failure to do so can result in huge fines, significant damage to their reputation, loss of their license to operate and imprisonment of their executives. This primer focuses on an area of international compliance law that has seen significant growth in enforcement actions since it was first enacted: corruption and bribery as shown in Figure 2.

This is an area that oil and gas companies operating in foreign countries must know about and learn to successfully manage. This is true no matter what the size of the company since pleading ignorance of the law is not a valid defense. The problem for many small to medium sized enterprises is that they do not have or cannot easily access the necessary knowledge and expertise to recognize, let alone deal with, such difficult and complex issues and laws. This primer is meant to address that knowledge gap in a comprehensive but succinct manner. It explains the law and the legal standards expected of companies, how best to meet regulatory requirements, how to establish effective compliance programs and how to build those requirements into corporate decisions.

The primer reviews the treaties and conventions that set out international anti-corruption compliance law and then analyzes in greater detail the significant national laws that implement

FIGURE 2

Enforcement Actions Increase



those international obligations. The laws of three jurisdictions in particular are focused upon in this primer. They are the countries where many international oil and gas companies are headquartered: the United States, the United Kingdom and Canada. The United States is the largest and most important jurisdiction and is therefore dealt with in the greatest detail. Knowledge of the laws of all three is helpful to a company from any one of those jurisdictions given the transnational nature of the business. An important element in the analysis of international anti-corruption laws is the law and practices of the host country (i.e., where the investment is being made) and the jurisdiction where investments are passing through (for tax planning or investment protection purposes). This primer will not address all of those jurisdictions since space does not allow it, but readers need to take them into consideration in the analysis of their individual corporate compliance obligations and the jurisdictions in which they operate.

1. The Oil & Gas Industry & Bribery

The oil and gas industry has figured prominently in bribery investigations and prosecutions, primarily under U.S. law, which is the Foreign Corrupt Practices Act (FCPA), but increasingly under other countries' anti-bribery laws. This trend is driven by where its core business is located. Much of the world's oil and gas resources are located in developing countries with weak governments, opaque laws, non-existent or non-functioning institutions, non-transparent finances and corrupt officials. The nature of its business requires that it deal with all branches of government at all levels, including the executive, the legislature, the bureaucrats, the courts, and the security forces. The industry is therefore at high-risk. The map in Figure 1 shows why.²

¹ Daniel Yergin, *The Prize* (Simon & Schuster, 1991).

² The geological data comes from the United States Geological Survey and the corruption data from Transparency International.

TABLE 1

RANK	SECTOR	SCORE
1	Public Works Contracts & Construction	5.3
2	Utilities	6.1
3	Real Estate, Property, Legal & Business Services	6.1
4	Oil & Gas	6.2
5	Mining	6.3
6	Power Generation & Transmission	6.4

The *Bribe Payers Index*³ published by Transparency International (TI) ranks 19 business sectors according to the perceived likelihood of companies from those sectors to pay bribes abroad. The business sectors most at risk are listed in Table 1.

As indicated in the above table, the construction and public works sector stands out as the business sector most at risk for paying bribes. The oil and gas industry falls into the next group most at risk. This high-risk profile has resulted in resource companies being successfully prosecuted for bribery infractions at a significant level as shown in Figure 3.⁴

The oil and gas industry is therefore at great risk in its global operations for breaching anti-bribery laws that can result in large fines and incarceration of its executives. Companies in this sector therefore need to understand the risks around corrupt activities, the laws that attempt to prevent them, and learn how to effectively manage that risk and prevent the breach of those laws. It starts with understanding how bribery laws developed.

2. The Development of International Bribery Law

2.1 The Leap from Local to Foreign Bribes

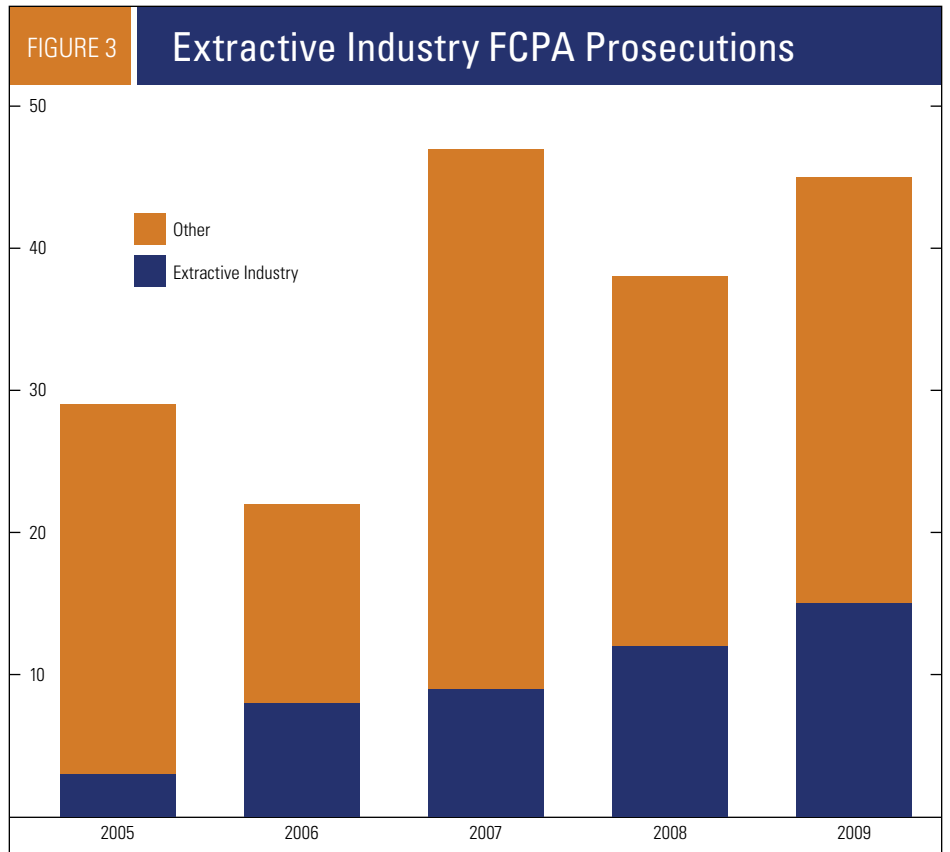
Bribery and corruption have been with mankind since time immemorial. Governments, starting with the earliest civilizations, have enacted bribery laws to prevent and punish it. Those laws historically dealt with acts of bribery and corruption of domestic public officials within a country's boundaries.⁵ That situation was abruptly changed with the enactment of the *Foreign Corrupt Practices Act* (FCPA) in the United States:

In 1972 the Democratic National Committee headquarters located at the Watergate complex in Washington,

3 *Bribe Payers Index Report 2011* available at Transparency International website: www.transparency.org. Sectors are scored on a scale of 0-10, where a maximum score of 10 corresponds with the view that companies in that sector never bribe and a 0 corresponds with the view that they always do. The rankings have been reversed to show the worst sectors first.

4 Lucinda A. Low, Thomas K. Sprange, and Milos Barutciski, "Global anti-corruption standard and enforcement: Implications for energy companies," *Journal of World Energy Law & Business*, July 2010, Vol. 3, No. 2 at p. 167.

5 A. Timothy Martin, "The Development of International Bribery Law," *Natural Resources & Environment*, (Fall 1999) Vol. 14, Issue 2 at p. 97.



D. C., was burglarized. The Senate formed a select committee the next year to investigate the burglary and found that many U.S. corporations had made illegal contributions to Richard Nixon's Committee to Re-Elect the President. ... After very little debate in either the House or Senate, both Houses unanimously approved the Committee's bill on December 7, 1977, and President Carter subsequently signed it into law on December 19, 1977. The Foreign Corrupt Practices Act was thus born. This law was the first of its kind in the world. A new era of global bribery prevention had begun. The United States, like no other country before it, had decided to make the payment of bribes to foreign officials illegal and imposed rigorous recordkeeping requirements on U.S. companies and their overseas subsidiaries to ensure that bribes could not be hidden. However, when the dust settled and the United States surveyed the global landscape, it found itself standing alone.⁶

The United States subsequently attempted to change international bribery law on a multilateral basis throughout the 1970s and 1980s; first at the United Nations (U.N.) and then at the Organization for Economic Cooperation and Development (OECD). Nothing resulted from those early efforts.⁷ That began to change in the mid 1990s with the ratification of a series of multilateral treaties and conventions that dealt with transnational bribery.

2.2 International Law

For reasons such as increasing recognition that corruption hinders global economic growth and the failure of multilateral organizations to improve the situation in developing countries, several international conventions that combat corruption were ratified. Those conventions include:

- Organization of American States: Inter-American Convention Against Corruption (OAS Convention)⁸
- Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)⁹
- Council of Europe: Criminal Law Convention Against Corruption¹⁰ and Civil Law Convention on Corruption¹¹ (CoE Conventions)
- African Union: Convention on Preventing and Combating Corruption (African Convention)¹²
- United Nations: Convention Against Corruption (U.N. Convention)¹³

The first anti-corruption treaty was the OAS Convention in 1996. Despite it not being the first such convention, the OECD Convention in 1997 has had the most significant impact on the development of international bribery law because of the economic size of its signatory countries. The U.N. Convention in 2003 is now starting to have an influence because of the global impact of the U.N., in particular with a number of unique provisions in the convention. The United States

8 Inter-American Convention Against Corruption (Mar. 29, 1996), available at <http://www.oas.org/juridico/english/Treaties/b-58.html>.

9 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Dec. 17, 1997), available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

10 Criminal Law Convention on Corruption (Jan. 27, 1999), Council of Europe, European Treaties, ETS No. 173, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>.

11 Civil Law Convention on Corruption (Nov. 11, 1999), Council of Europe, European Treaties, ETS No. 174, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

12 African Union Convention on Preventing and Combating Corruption (July 11, 2003), available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.

13 United Nations Convention against Corruption, U.N. Doc. A/58/422 (Dec. 9, 2003), available at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

6 Martin, *supra* note 5 at p. 97-98.

7 Martin, *supra* note 5 at p. 99.

and Canada have ratified the OAS Convention. The United Kingdom has not. The United States, the United Kingdom and Canada have ratified the OECD Convention and the U.N. Convention.

The OECD Convention is focused on the supply side of bribery; i.e., the person who promises or gives the bribe, as opposed to the foreign public official who receives the bribe.¹⁴ Thirty-four OECD member countries and six non-member countries—Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa—had adopted the OECD Convention as of December 2012. It requires signatory countries to prohibit the bribery of foreign public officials in the same way that they prohibit the bribery of their domestic officials. The main provisions of the OECD Convention are very similar to the FCPA with some notable differences, such as the lack of an express exception for “facilitating” payments.¹⁵ The OECD has recently requested signatory countries to eliminate such payments.¹⁶ The United States is now the only country with such an exception. The United Kingdom does not have such an exception and Canada changed its law to eliminate this exception. One of the most significant mechanisms in the OECD Convention is a mandatory peer review/monitoring process that is conducted by the OECD Working Group on Bribery, which reviews countries’ implementation and enforcement of their national laws to ensure that they are in compliance with the convention. This has forced signatory countries to commit the necessary resources to pursue corporate wrongdoers. The response has been uneven, but many countries have begun for the first time to bring enforcement actions under their bribery laws against companies that pay foreign bribes.¹⁷

The U.N. Convention is the most global reaching and ambitious of the international bribery treaties. It had 165 signatory countries as of December 2012.¹⁸ The convention has a number of unique provisions not seen in other anti-bribery conventions or prior existing national laws. Its section on asset recovery provides inter-governmental mechanisms for the recovery of assets taken by corrupt governments and their officials.¹⁹ Article 34 of the convention requires states to address the consequences of corruption, such as the annulment or rescission of contracts or withdrawal of concessions that may have resulted from corruption. In addition, Article 35 requires states

to take such measures, in accordance with their domestic law principles, “to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”²⁰ This appears to require states to establish private rights for claiming damages through civil action in addition to implementing criminal anti-corruption laws. It should be noted that countries are not required to approve the entire convention. Many of them have only adopted certain sections of the convention or reserved themselves from the application of certain provisions. Nevertheless, the above provisions potentially have a direct impact on oil and gas companies and their investments in foreign countries.

All of these conventions set international standards on anti-corruption sanctions for ratifying countries since they are required to implement such standards in their national laws. Similar to the FCPA, these conventions require signatory countries to extend the jurisdiction of their national laws beyond their traditional boundaries. They also provide mechanisms to facilitate cross-border investigations and enforcement among signatory countries.

These conventions attempt to provide universal and consistent standards that signatory countries are required to implement in their national anti-bribery laws. They have achieved significant convergence in prosecuting transnational bribery by extending the extraterritorial reach of signatory countries’ laws, encouraging cooperation and mutual assistance and allowing the sharing and replication of compliance standards expected by investigative authorities. But it has not resulted in bribery laws that look and behave exactly the same in every jurisdiction. The reason for this is that the conventions rely on the criminal law standards of each signatory country to implement the conventions’ standards. It was not possible in the negotiation and drafting of these conventions to set a universal criminal standard given the diverse legal systems in signatory countries. Instead, the drafters of the conventions used the approach of *functional equivalency* in an attempt to harmonize all the resulting national anti-bribery laws. The conventions did this by first defining common goals for all and then allowing each country to implement its national law using its own criminal standards as long as the results were comparable.²¹ This approach has resulted in a divergence amongst countries in the various standards used in their national bribery laws.²²

As a result, one cannot assume that similar rules and practices under international bribery law apply to companies from different countries when they do business in the same foreign country. Even with all the international bribery conventions, there are still significant differences

that apply to different companies from different jurisdictions. There is therefore no universal set of rules that all companies can rely upon in setting their corporate compliance programs that will work seamlessly in every jurisdiction in the world. Since companies carry out their business transactions through multiple jurisdictions with joint venture partners and suppliers from different jurisdictions, companies have to individually figure out what best works for them.

2.3 National Laws

Sovereign states that ratify multilateral bribery conventions are legally required to enact and enforce national laws that implement the rights and obligations stated in the treaty. The treaties themselves do not impact individuals or corporate entities, only the signatory states. It is the national laws of each sovereign country, which flow from the treaties, that impose legal obligations on individuals and corporate entities. Therefore, it is necessary to analyze the national laws of signatory countries to understand how the principles enshrined in the treaties are applied and subsequently to determine the anti-bribery obligations of corporations.

This primer focuses on the anti-bribery laws of three countries from which many of the world’s international oil companies (IOCs) originate: the United States, the United Kingdom and Canada. The U.S. foreign anti-bribery law is the *Foreign Corrupt Practices Act* (FCPA).²³ The English law is the *Bribery Act 2010* (UK Bribery Act),²⁴ and the Canadian law is the *Corruption of Foreign Public Officials Act* (CFPOA).²⁵ All three countries are active in the investigation and prosecution of companies engaged in corrupt activities as shown in Table 2.

TABLE 2 TOTAL CASES PROSECUTED INVESTIGATIONS UNDERWAY
COUNTRY up to 2011 up to 2010 in 2011 in 2010

COUNTRY	up to 2011	up to 2010	in 2011	in 2010
United States	275	227	113	106
United Kingdom	23	17	29	26
Canada	3	2	34	23

These figures are taken from an annual TI Progress Report on the implementation of the OECD Convention.²⁶ The United States and the United Kingdom are classified as “Active Enforcement” countries, while Canada is classified as a “Moderate Enforcement” country. The U.S. continues to lead

14 For a detailed discussion of the OECD Convention and its effects, see Lucinda A. Low, Remarks Re: “The New Global Legal Framework: The OECD, OAS, and Council of Europe Antibribery Conventions: New International Standards and National Anti-Corruption Laws: Challenges for Effective Implementation and Enforcement,” at the Conference of the International Bar Association, International Chamber of Commerce, and Organization for Economic Cooperation and Development, *The Awakening Giant of Anti-Corruption Enforcement* (Apr. 22, 2004) (Paris, France).

15 Commentary 9 of the OECD Convention does state that “small facilitation payments” do not constitute an offense under Article 1 of the Convention, and provides information regarding what comprises such a payment. This allows the United States to continue its facilitation payment exception in the FCPA.

16 See OECD, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

17 See Transparency International, *Progress Report 2012: OECD Anti-Bribery Convention* (OECD Progress Report), available at www.transparency.org.

18 See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> for treaty status.

19 See the Stolen Asset Recovery Initiative (StAR), which is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime that supports international efforts to end safe havens for corrupt funds. Available at <http://www.unodc.org/unodc/en/corruption/StAR.html>.

20 United Nations Convention Against Corruption, U.N. Doc. A/58/422, *supra* note 13, art. 35.

21 Mark Pieth, “International Efforts to Combat Corruption in Business Transactions,” *Middle East Executive Reports*, Nov. 1999: 12.

22 Lucinda A. Low, “The New Global Legal Framework: The OECD, OAS and Council of Europe Anti-Bribery Conventions,” (Paris, France: IBA/ICC/OECD Conference: *The Awakening Giant of Anti-Corruption Enforcement*, April 2003), 44.

23 Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. 100-418, Title V, Sec. 5003(c), 102 Stat. 1107, 1419 (1988), and further amended by *The International Anti-Bribery and Fair Competition Act of 1998*, Pub. L. No. 105-366, 112 Stat. 3302 (1998). All codified at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78ff. It is available at: <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>.

24 *Bribery Act 2010*, c 23 was enacted on 8 April 2010 and came into force on 1 July 2011. It is available at <http://www.legislation.gov.uk/ukpga/2010/23>. Prior to the Bribery Act, English law depended upon the common law, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916 and the Anti-Terrorism, Crime and Security Act 2001. There are other laws that are used in prosecuting corruption including the Companies Act, Theft Act and the Proceeds of Crime Act. Books and records offenses are contained within these other Acts rather than the UK Bribery Act.

25 *Corruption of Foreign Public Officials Act*, S.C. 1998, c.34. It is available at: <http://laws.justice.gc.ca/eng/acts/C-45.2/index.html>.

26 See Transparency International, *Progress Report 2012: OECD Anti-Bribery Convention* (OECD Progress Report) at p. 9.



in foreign bribery prosecutions and is still by far the most active jurisdiction. The UK has made significant progress with its recent enactment of a modern bribery law, but questions remain on whether the UK government will provide adequate support and resources for its enforcement. The picture is rapidly changing for Canada and its companies since Canada has gone from one investigation in 2009 to thirty-four in 2011, which will inevitably lead to more prosecutions that will push it into the “Active Enforcement” category.

Effective anti-bribery national laws address two primary areas. One area deals with the prevention of bribery and the other deals with corporate accounting requirements. Quite often it is the latter area that is the most effective in investigating and prosecuting companies since it is the easier of the two to investigate and prove. The following is a brief summary of the national laws of the United States, the United Kingdom and Canada.

The FCPA is a U.S. criminal law that is applied extraterritorially to U.S. corporations and citizens to prohibit the bribery of foreign government officials in foreign countries. It does not deal with domestic bribery of American public officials in the United States. That is done with other U.S. laws. Nor does it deal with business-to-business bribery in the private sector. It establishes both criminal and civil penalties for bribing foreign public officials. Two different agencies of the U.S. government administer the FCPA: the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The FCPA has two parts, which are explicitly addressed in the statute: the anti-bribery provisions that prohibit bribes to foreign public officials and the

accounting provisions that impose accounting and recordkeeping requirements on companies that are publicly traded on U.S. exchanges.

The UK Bribery Act is a criminal statute with both domestic and extraterritorial coverage. The statute was enacted after criticism from the OECD and NGOs, such as Transparency International, who maintained that the existing English laws that the UK government relied upon were not adequate to meet their treaty obligations. The UK Bribery Act took a sweeping approach in revising the UK government’s position on bribery. It covers all forms of bribery (both domestic and foreign and both in the public and private sectors) with a focus on commercial bribery. The Act abolished and replaced the offenses of bribery at common law and the old statutory offenses found in the Public Bodies Corrupt Practices Act of 1889 and the Prevention of Corruption Act of 1906. It consists of four offenses, two of which are business related. There are two general offenses of bribing another person (active bribery) and being bribed (passive bribery). In addition, it created the discrete offense of bribing a foreign public official and a new Section 7 offense that occurs when commercial organizations fail to prevent bribery by persons associated with them.

The Serious Fraud Office (SFO) is presently the lead agency for investigating (often with the police) and prosecuting cases of overseas corruption. The UK government is proposing to transfer the SFO’s prosecutorial functions to a new Economic Crime Agency (ECA) in the future. The Crown Prosecution Service also prosecutes bribery offenses investigated by the police, committed either overseas or in the UK. The Act does not contain

accounting provisions. Instead, they are dealt with in separate corporate statutes and accounting standards.²⁷ Section 7 of the UK Bribery Act has created a new offense that imposes a statutory “adequate procedures” defense when a commercial organization fails to prevent bribery by any of its associated persons. This forces companies to implement proper internal controls and adequate accounting records. Otherwise, they can be found strictly liable.

The CFPOA is a Canadian criminal statute that prohibits the bribery of foreign public officials. It does not deal with Canadian public officials (which is dealt with elsewhere in the Canadian Criminal Code) or bribery in the private sector. Its language conforms to the OECD Convention and is broadly similar to the FCPA with regards to its anti-bribery provisions. It originally had two other offenses: one on the laundering of the proceeds of bribery and the other on possession of the proceeds of bribery. Those two offenses were subsequently moved to the Canadian Criminal Code. The CFPOA is enforced by criminal prosecution only. It was amended in 2013 to include nationality jurisdiction and to expand its coverage to include books and records requirements. The Canadian federal police force, the Royal Canadian Mounted Police (RCMP), conducts CFPOA investigations and federal prosecutors handle the prosecutions. It does not provide for civil investigations or penalties.

3. The Bribery Provisions of Anti-Bribery Laws

²⁷ Books and records offenses are contained in the Companies Act, Theft Act and the Proceeds of Crime Act.

3.1 Elements of a Bribery Offense

In general, laws that deal with the prevention of foreign bribery prohibit

- corporations or individuals (as defined and covered in the relevant law) from
- offering, promising, providing or authorizing the payment of money or anything of value to
- a foreign official (or in some jurisdictions, also a private individual), or
- any person while *knowing* that all or a portion of such money or thing of value will be offered, given or promised, *directly or indirectly*, to any such foreign official
- for influencing or inducing to omit any act or decision of such official, or to secure an improper advantage
- in order to obtain, retain or direct business.

These essential elements are covered in the anti-bribery provisions of the three jurisdictions (U.S., UK and Canada), but they vary in both subtle and significant ways as explained in the next sections.

3.2 Bribe Givers: Corporations & Individuals

The jurisdictional reach of these laws is quite broad. The FCPA covers U.S. corporations or any person acting on behalf of such corporations; U.S. citizens, nationals, or residents; foreign and U.S. issuers; or foreign persons and entities while in the territory of the United States. The FCPA does that by applying its jurisdictional reach to the following three entities, which are defined in the FCPA: “domestic concerns,” “issuers,” and “any person” acting in U.S. territory.²⁸

A *domestic concern* covers U.S. citizens and nationals (wherever they may be located), U.S. resident aliens, corporations or other business entities established under U.S. state or territory law or with their principal place of business in the United States; and officers, directors, employees, agents or shareholders of any of those entities, regardless of their nationality. An *issuer* includes companies that register securities with the U. S. Securities and Exchange Commission (SEC) in accordance with Section 12 of the Exchange Act or are required to file reports with the SEC under Section 15(d) of the Exchange Act, or any officer, director, employee, agent or shareholder of such a company. This would include foreign companies that issue stock, including American Depositary Receipts (ADRs) on a U.S. securities exchange and their personnel. The FCPA also covers *any person* (no matter what his or her nationality) who acts within U.S. territory.

The FCPA’s jurisdictional reach was initially based upon the concept of territoriality, i.e., there had to be some U.S. territorial nexus for the FCPA to apply. That did not prevent U.S. prosecutors in the early days of FCPA prosecutions from capturing conduct that was largely extraterritorial in nature.²⁹ They did that by using the evidence of faxes, e-mails, U.S. dollar

wire transfers or phone calls of an interstate or international character that crossed through or into U.S. territory to make proscribed acts subject to the FCPA. In response to the OECD Convention, the FCPA was amended in 1998 to expand its jurisdictional reach by applying the concept of nationality to covered persons so that proof of a U.S. territorial nexus for U.S. individuals and companies is no longer required. It covers them wherever they may be in the world.

The UK Bribery Act can apply either a territoriality or nationality test to capture prohibited acts. Section 6 of the Act applies to the bribery of a foreign official “if any act or omission which forms part of the offense takes place inside the United Kingdom.” In addition, the Act extends to any person or entity that has a “close connection” to the United Kingdom, including a British citizen or passport holder, a resident of the UK, or an entity incorporated in the UK or Scotland.³⁰ Section 7 of the UK Bribery Act goes even further in making it an offense for a “relevant commercial organization” to fail to prevent bribery. This strict liability offense potentially sweeps into its jurisdiction any body corporate or partnership carrying on a business in the United Kingdom, which could potentially cover many of the major corporations of the world since they conduct some kind of business in the UK in one form or another. This will be clarified once UK prosecutors indicate how aggressive they will be in extending the UK Bribery Act’s jurisdiction and the English courts confirm or deny such jurisdiction. Finally, the UK Bribery Act covers bribe givers in business-to-business transactions (not just to foreign public officials), which is explained further below.

The Canadian law, the CFPOA, was originally based on the concept of territoriality. The leading Canadian case on territoriality is the Supreme Court of Canada decision, *R. v Libman*³¹ where the court determined that for an offense to be subject to the jurisdiction of Canadian courts, a significant portion of the activities constituting that offense must take place in Canada. The court held that there must be a “real and substantial link” between an offense and Canada before criminal liability will be imposed in Canada. The OECD criticized this restriction and as a result, Canada amended the CFPOA in 2013 to include a nationality test.³² Article 5 of the amended CFPOA provides that every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offense is deemed to have committed that act or omission in Canada if the person is a Canadian citizen; a permanent resident of Canada who, after the commission of the act or omission, is present in Canada; or a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.

In addition, the amended CFPOA addressed the issue of double jeopardy, i.e., being charged

and convicted in multiple jurisdictions for the same offense. It provides that if a person is alleged to have committed an act or omission that is deemed to have been committed in Canada and they have been tried outside of Canada for an offense where they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, they are deemed to have been tried in Canada also.

3.3 Illegal Payments: Payments That Are Prohibited

U.S. law prohibits “offering, promising, or authorizing” anything of value to a foreign official. The FCPA does not define “anything of value.” U.S. prosecutors have interpreted this phrase to cover both tangible and intangible benefits that an official subjectively believes to be of value. It can include money, gifts, entertainment, excessive business promotional activities, reimbursement or payment of officials’ expenses, beneficial interests in a business, or in-kind contributions. The latter may consist of interests in companies, real estate, personal property, or any other interest that results from a business relationship. Companies have run afoul of the FCPA when they have provided excessive gifts, entertainment, sponsorship and hosting, internships and education, made questionable charitable or political contributions, or made operational payments to customs, immigration, tax, or regulatory personnel.

The DOJ and SEC state that they do not investigate small hospitality gestures such as cups of coffee, reasonable meals, taxi fare or company promotional items of nominal value on a one off basis. However, they have investigated and prosecuted small payments when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business. Also, the larger or more extravagant a gift, the more likely they will consider it was given with an improper purpose and therefore a bribe.

The UK Bribery Act covers similar kinds of payments as the FCPA. It does not expressly forbid the authorization of such payments as the FCPA does, but it does criminalize the “consent or connivance” of a “senior officer” of a company’s violation of the Act. The UK Bribery Act does not define “financial or other advantage”, rather the UK Joint Prosecution Guide issued by the UK government states that “advantage” should be understood to have its normal everyday meaning, which should be decided, as a matter of common sense, by the tribunal of fact.³³

The CFPOA prohibits “a loan, reward, advantage or benefit of any kind” made to a foreign public official. Canadian courts have interpreted this term broadly when applied against domestic offenses under the Canadian Criminal Code. In addition to money, benefits such as excessive gifts, travel, hospitality and entertainment are considered illegal under the CFPOA.³⁴

28 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd3(a), 78dd-3(f)(1).

29 Historically, most FCPA investigations have been resolved without trial. Instead, prosecutors have negotiated settlements with corporations. This has allowed prosecutors to interpret the FCPA without judicial oversight, resulting in the DOJ’s interpretation of the FCPA to become de facto jurisprudence. This is starting to change as the DOJ has attempted to impose jail sentences on individuals. They have naturally resisted, leading to trials where skeptical judges have begun to cast doubt on the broadness of some of those interpretations.

30 Bribery Act 2010, c 23, s 12(4).

31 [1985] 2 S.C.R. 178.

32 The Government of Canada introduced Bill C-31 in May 2009 with the intention of amending the CFPOA to establish nationality jurisdiction over the acts of Canadian citizens, permanent residents and legal entities (including corporations, partnerships, etc.) that are incorporated in, formed or otherwise organized under the laws of Canada on a similar basis as the FCPA amendments of 1998. It got held up as a result of internal Canadian politics. The Government of Canada introduced Bill S-14 on February 5, 2013 to address this and other amendments.

33 Joint Prosecution Guide of the Director of the Serious Fraud Office and the Director of Public Prosecutions – 30 March 2011 (UK Joint Prosecution Guide). Available at <http://www.sfo.gov.uk/bribery-corruption/the-bribery-act/the-bribery-act---useful-links.aspx>.

34 In Her Majesty the Queen v Niko Resources Ltd. (2011), it was found that Niko provided the use of a vehicle costing C\$190,984.00 to the Bangladeshi Minister for Energy and Mineral Resources and paid excessive travel costs for him. As a result, Niko was fined C\$ 9.5 million and agreed to a probation order that included a corporate compliance program and internal accounting controls that were to be audited by Canadian authorities.

3.4 Bribe Takers: Foreign Officials & Others

The definition of a “foreign official” under the FCPA is broad. It includes:

- Elected or appointed government officials
- Government officers or employees
- Candidates for political office, officials of a political party, or a political party
- Officials of public international organizations
- Officers, directors, and employees of government-owned companies or other agencies or instrumentalities

In addition to the classic concept of a public official, the FCPA can extend to anyone who carries out a public function. That will depend on whether the government has the authority to supervise that person’s day-to-day operations. The FCPA clearly covers wholly owned government corporations and those where a foreign state owns a majority interest. It is less clear for minority ownership or subsidiaries of state enterprises, even though U.S. prosecutors have expressed an expansive interpretation of their jurisdiction over such entities. The DOJ and SEC use an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government. In situations where a government has a minority ownership stake, they will focus on whether and how a government exercises control over that entity and how it places public officials in that entity.

The statutory definition does not include members of a government official’s family, but dealings with such family members are at risk because they could be considered an indirect payment to the government official.

The FCPA does not cover payments made directly to a government department or agency that are not for the personal benefit or use of a public official. The FCPA also does not cover the bribery of private individuals or entities, but the DOJ has used the Travel Act³⁵ for allegations of private bribery in foreign jurisdictions. The Travel Act prohibits travel in interstate or foreign commerce that carries out “unlawful activity.” That could include not only FCPA violations, but also U.S. state commercial bribery laws that would cover private commercial enterprises and their employees. The DOJ has begun to allege Travel Act violations in conjunction with FCPA violations. If a jury were to decide that the individual was not a public official, the DOJ could then still convict on a Travel Act violation.

The UK Bribery Act tracks the definition of foreign public officials under the OECD Convention and is similar to the FCPA in its coverage of such officials. It is broader in scope than the FCPA with regards to public international organizations. The FCPA presently only covers 83 public international organizations as designated under executive order;³⁶ whereas, the UK Bribery Act covers any public international organization whose members consist of countries, territories or governments.

The UK Bribery Act also goes further than the FCPA in that it covers private sector bribes and

private citizens, not just public officials. Section 1 of the UK Act extends its reach to bribes paid to corporate employees in business-to-business transactions, both in the UK and in foreign countries. The payment or financial advantage must induce or reward the business person for acting improperly in the course of his or her corporate duties. The test would be what a reasonable person in the United Kingdom would expect of a business person in carrying out his or her duties for an employer, not the local customs or practices of another country unless local law explicitly permits such payments.

In addition, the offense of being bribed is covered in the UK Bribery Act. The FCPA (and other similar laws) only punishes the “supply side” of the bribery equation, i.e., the bribe giver. Section 2 of the UK Bribery Act goes further and covers the “demand side” of corrupt acts, i.e., the bribe taker, which would include foreign public officials and corporate employees receiving a bribe. It is reasonable to see how UK prosecutors can pursue the latter, especially if they are British citizens, UK residents, UK government officials or work for UK companies. But it is untested how the UK Bribery Act can be imposed on foreign public officials resident in foreign countries.³⁷

Similar to the FCPA, Canadian law only covers foreign public officials and international public organizations. Unlike the UK Bribery Act, it does not address bribes in the private sector nor does it attempt to cover bribe takers. The CFPOA covers bribes to “a foreign public official,” which it defines, similar to the FCPA, as:

- a person who holds a legislative, administrative or judicial position of a foreign state, or
- a person employed by a board, commission, corporation or other body or authority...of the foreign state.

It is more akin to the UK Bribery Act with respect to officials of international public organizations by defining them as “an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.”

The CFPOA covers political parties and family members of public officials since it also covers “a person for the benefit of a foreign public official.” The guidance on the CFPOA issued by Canada’s Department of Justice states that coverage of such a person is “intended to cover the situation where a foreign public official might not receive the benefit himself or herself, but instead direct that the benefit be given to a family member, to a political party association, or to any other person for the benefit of the official.”³⁸

3.5 Intent Required for Offense

The FCPA requires that a payment must be made “corruptly.” The payment, offer or promise to pay must be intended to influence the recipient to misuse his/her position. There must be a *quid pro quo* element in the transaction. The bribe giver must have the intent and expectation that the

official would be influenced in exchange for the money or something of value provided. The focus is on the subjective intent of the bribe giver, rather than the official’s intent in carrying out the act being requested. It does not have to succeed in its purpose, e.g., the official could take the money without any intention of doing the requested act, or he/she could not have the ability to do so, or the official could attempt to carry out the request and fail. Also, as long as the offer, promise, authorization, or payment is made with corrupt intent, the briber does not need to know the identity of the recipient. A corporate executive does not have to target or name a specific foreign official to meet this standard.

Section 6 of the UK Bribery Act does not require the bribe giver to act “corruptly” or with any improper purpose. The UK government has taken the position that not requiring an “improper performance” test is appropriate since the exact nature of the functions of foreign public officials is often too difficult to ascertain with accuracy.³⁹ This results in a lot of prosecutorial discretion to investigate and prosecute what business considers as legitimate conduct. The UK government has however officially stated that it will not prosecute corporations for certain bona fide business expenditures.⁴⁰

The word “corruptly” is not used in the CFPOA. As explained in the Canadian Guide: “No particular mental element (*mens rea*) is expressly set out in the offense since it is intended that the offense will be interpreted in accordance with common law principles of criminal culpability. The courts will be expected to read in the *mens rea* of intention and knowledge.” Canadian courts have held in domestic bribery cases that bribers only need to have knowledge of the circumstances that make up the offense and the intention of completing the illegal act. They do not need actual knowledge of the offense. It is sufficient if the bribe giver is willfully blind to the danger that his or her acts could result in the prohibited offense. However mere recklessness is not. The Supreme Court of Canada has stated in a domestic bribery case that a person giving a gift or offer to a public official does not need a ‘corrupt’ intent beyond a *quid pro quo* element.⁴¹

Based upon the common law doctrine, a Canadian corporation until recently could only be held criminally liable if its “directing minds” engaged in the criminal actions and intentions. The Supreme Court of Canada has defined “directing minds” as being those within the corporation who have been assigned the authority to design and supervise the implementation of

39 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), ¶ 23. This Guidance is the public opinion of the Ministry of Justice as to the meaning and interpretation of the UK Bribery Act’s provisions. It is not delegated legislation. The only interpretation that can be relied on with certainty will come from the case law which will be created if, and when, any prosecution under the Act is considered by the judiciary.

40 *Id.*, ¶¶ 26-32. See also the UK Joint Prosecution Guide: “Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established and important part of doing business. The Act does not seek to penalize such activity.... The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstances) the greater the inference that it is intended to encourage or reward improper performance or influence an official. Lavishness is just one factor that may be taken into account in determining whether an offense has been committed. The full circumstances of each case would need to be considered. Other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.”

41 See *R v Hinchey*, [1996] 3 SCR 1128.

35 The Travel Act, 18 U.S.C. § 1952.

36 Under U.S. law, a public international organization is any organization designated as such by Executive Order under the International Organizations Immunities Act, 22 U.S.C. § 288, or any other organization that the U.S. President so designates. A comprehensive list of organizations designated as public international organizations available at <http://www.gpo.gov/fdsys/>.

37 There has been a case where a Ugandan official was arrested by Scotland Yard police at London Heathrow airport for receiving bribes from a UK company. He was successfully prosecuted, sentenced to 12 months imprisonment and deported after serving his sentence. That was in 2008 prior to the enactment of the UK Bribery Act. It also happened within UK territory and not in the foreign country. See the Ananias Tumukunde and CBRN Team Ltd. case.

38 Guide to Corruption of Foreign Public Official Act, May 1999 (Canadian Guide).

policy as opposed to those who simply carry out that policy. In 2004, the Canadian Criminal Code was amended to specifically address who, within a corporation or other organization, could cause it to be criminally liable and under what circumstances. In particular, Section 22.2 made an organization liable for the acts of its “senior officers,” which it defined as “a representative who plays an important role in the establishment of an organization’s policies or is responsible for managing an important aspect of the organization’s activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer”. The term “representative” is broadly defined as meaning “a director, partner, employee, member, agent or contractor of the organization”. A 2012 case, *R. v Global Fuels*, found that Section 22.2 has modified the common law test and that an “importance criterion” should be applied to determine who is a senior officer. That was to be determined by the importance to the business of the activities for which the individual in issue is responsible. An individual is now capable of causing a corporation to be liable if that individual plays an important role in the establishment of a corporation’s policies in relation to the impugned conduct or if that individual manages an important aspect of the corporation’s activities relating to the impugned conduct.

3.6 Knowledge & Vicarious Liability: Payments Through Third Parties

The FCPA prohibits making payments through intermediaries or third parties while “knowing” that all or a portion of the funds will be offered or provided to a foreign official. “Knowledge” is defined under the FCPA to be broader than actual knowledge. The FCPA deems that a person “knows” that a third party will use money provided by that person to make an improper payment or offer if he or she is aware of, but consciously disregards, a “high probability” that such a payment or offer will be made.⁴²

The U.S. Congress enacted these provisions to prevent companies from adopting a “head-in-the-sand” approach to the activities of foreign agents and business partners. Knowledge may be inferred even if a company does not have actual knowledge of a payment. The FCPA imposes liability not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge. This forces a company’s management to pay attention to certain “red flags”⁴³ that could result in an FCPA violation, such as:

- Excessive commissions to third-party agents or consultants;
- Unreasonably large discounts to third-party distributors;
- Third-party “consulting agreements” that include only vaguely described services;
- The third-party consultant is in a different line of business than that for which it has been engaged;
- The third party is related to or closely associated with the foreign official;

42 15 U.S.C. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B).

43 A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012) at p. 22. Available at <http://www.justice.gov/criminal/traud/fcpa/guidance/>.



- The third party became part of the transaction at the express request or insistence of the foreign official;
- The third party is merely a shell company incorporated in an offshore jurisdiction; and
- The third party requests payment to offshore bank accounts.

The result is that “conscious disregard”, “willful blindness” or “deliberate ignorance” is not a defense under the FCPA. However, this knowledge requirement is not equivalent to “recklessness”, “simple negligence” or “mere foolishness.” The difficulty is determining the dividing line between recklessness and willful blindness. There have been quite a number of U.S. bribery cases that involved intermediaries but they are not helpful in clarifying this uncertainty on what kind of payments to intermediaries are at risk.

The UK Bribery Act prohibits illicit payments to foreign officials through third parties. The Act states that a bribe can be paid either “directly or through a third party.”⁴⁴ It does not provide any guidance on what “through a third party” means, or what is the standard of knowledge required of corporations that use such third parties. The law does not use the concept of vicarious liability. Instead, it takes a different approach under Section 7 of the Act by making a “relevant commercial organisation” strictly liable for the acts of a person who is associated with that organization.

A person is “associated” with a corporation if that person “performs services for or on behalf” of that corporation under the UK Bribery Act.

The capacity in which the services are performed does not matter. The nature of the relationship or how it is described is not relevant. That person could be an employee, agent or subsidiary of the commercial organization. Whether that person is associated with a company under investigation is determined by reference to all of the relevant circumstances.⁴⁵ The existence of a joint venture entity will not of itself mean that it is “associated” with any of its members. However if the joint venture is conducted through a contractual arrangement, the degree of control that a participant has over that arrangement is likely to be one of the “relevant circumstances” considered by UK authorities. Companies also need to take their supply chains into consideration, since contractors could be “associated” persons.⁴⁶

The CFPOA states that a bribe which is given *directly or indirectly* to a foreign public official *or to any person for the benefit of a foreign public official* is an offense. The Canadian Guide briefly explains that the offense would cover bribes given through a third party (e.g. agents). The concepts of “knowledge” or “vicarious liability” are not clearly enunciated in Canadian law. Canadian courts would apply a subjective *mens rea* test that would be satisfied by proving the prohibited act was committed “intentionally or recklessly, with knowledge of the facts constituting the offense, or with willful blindness to them.”⁴⁷ Proof of negligence is not sufficient.

45 *Id* s 8.

46 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), ¶¶ 38-41.

47 *R. v Sault Ste. Marie* (1998), 3 C.R. (3d) 30, at 40 (S.C.C.).

44 The UK Bribery Act 2010, s 6(3).

3.7 Business Purpose Test: Requirement of Business Nexus

The FCPA prohibits an offer, promise, authorization or payment for purposes of influencing an act or decision (or a decision not to act) of a foreign public official or to induce such an official to use his or her influence on a governmental act or decision. The FCPA limits the scope of this prohibition by requiring that the illicit payment be made for the purpose of directing business to someone. It does this by applying a “business purpose” test with the words “in order to assist... in obtaining or retaining business for or with, or directing business to, any person.”

In addition, the FCPA includes “securing an improper advantage” as an improper purpose. This ensures that the FCPA covers not only the obtaining or retaining of business (such as the awarding or renewal of a government contract) but also illicit payments made to carry out existing business activity.

The UK Bribery Act is broadly similar to the FCPA in requiring a business purpose to the payment. Section 6 of the Act makes it an offense when a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so.⁴⁸

The CFPOA uses the broad words “in order to obtain or retain an advantage in the course of business.” It therefore also has a “business purpose” test similar to both U.S. and UK law. However, the word “business” was defined in section 2 of the CFPOA as “any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*.” Canada was criticized by the OECD for including the words “for profit” in its definition. The OECD Working Group pointed out that Canada was the only party to the OECD Convention to have included such a requirement in its foreign bribery offense. They were uncertain as to its meaning and whether such a definition would limit the applicability of the CFPOA to only for profit entities.⁴⁹ As a result of that criticism, Canada in its 2013 amendments to the CFPOA deleted the words “for profit” in the definition of business.

3.8 Exceptions & Affirmative Defenses

U.S. lawmakers provided that three kinds of activities are not offenses under the FCPA. They are:

1. Facilitating payments.
2. Payments that are lawful in a foreign country (the “local law” defense).
3. Reasonable and bona fide business expenditures, such as for travel and lodging.

The first is considered an exception under U.S. law and the latter two are defined as affirmative defenses. These three items are dealt with in different ways under other national anti-bribery laws. The most controversial of the three is facilitating payments.

3.8.1 Facilitating Payments

The FCPA does not apply to “any facilitating or expediting payment to a foreign official...the purpose of which is to expedite or secure the performance of a routine governmental action by [that] official,” which would otherwise be performed in the normal course of business.⁵⁰ This “facilitating payment” exception permits companies to make small payments to low-ranking foreign officials to expedite or secure the performance of something that the company was previously entitled to obtain. They are not payments to influence an official to make a decision that helps a company get or keep business or to secure an improper advantage.

The FCPA provides the following specific examples of facilitating payments:

1. Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
2. Processing governmental papers such as visas and work orders;
3. Providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or the transit of goods;
4. Providing phone, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
5. Actions of a similar nature.

Whether a payment falls within the exception is not dependent on the size of the payment. However, a large payment is suggestive of corrupt intent to influence a non-routine governmental action. Labeling a bribe as a “facilitating payment” in a company’s books and records does not make it one.

A payment permitted under this exception may be permissible under U.S. law but still may violate local law, which likely does not recognize such an exception. In addition, if a facilitating payment is made, it must comply with the FCPA’s recordkeeping provisions. Such payments must therefore be properly recorded and adequately controlled to ensure that they fall within the scope of the exception.

This exception is not found in other countries’ national anti-bribery laws, raising conflict-of-law issues. The OECD has recently requested signatory countries to eliminate such payments. Canada has eliminated and Australia is considering eliminating this exception as a result of pressure from the OECD and other organizations active in this area.⁵¹

Canadian law in this area was originally the same as U.S. law. The CFPOA allowed “facilitation payments,” which were made to expedite or secure the performance by a foreign public official of any “act of a routine nature” that was part of the foreign public official’s duties or functions. The CFPOA did not define “facilitation payments,” but provided a non-exhaustive list of examples that was the same as that provided in the FCPA. Canada eliminated this exception in its 2013 amendments to the CFPOA. Canadian companies that are listed on U.S. exchanges and subject to both jurisdictions’ laws will now have to comply with the stricter jurisdiction with regards to their corporate policies on facilitation payments, i.e., the CFPOA.

The UK Bribery Act does not (unlike the FCPA) provide any exemption for facilitating payments. Small bribes paid to facilitate routine government action could trigger an offense under the UK Bribery Act.⁵² However, UK prosecutors may not in practice investigate and prosecute companies for small, isolated facilitation payments. They do nevertheless expect companies that fall within their jurisdiction to adopt a “zero-tolerance” policy towards such payments, which may impact a company’s ability to use an “adequate procedures” defense under Section 7 of the Act.

Interestingly, there appears to be a convergence in practice in how facilitating payments are investigated and prosecuted in different jurisdictions, whether they provide for this exception or not. As an example, U.S. authorities are continually narrowing the fact situations that they consider eligible to qualify under this exception and UK authorities have publicly stated that they will ignore small, isolated instances.

3.8.2 Local Law Defense

The FCPA provides for an affirmative defense where the payment “was lawful under the written laws and regulations of the foreign official’s... country.”⁵³ Only the written law in a foreign country, not its customary practices, can provide this defense. The mere absence of a law prohibiting the conduct is not sufficient to qualify for this defense.

The facts of most cases rarely, if ever, support the application of this defense. It may assist a company in meeting its obligations under a host country’s written laws, e.g., a requirement that a state entity participate in a project, or that an investor satisfy other local terms or conditions in a government contract. But such situations are restricted to payments made directly to a government and not to its officials. There are limited instances where some governments permit payments to individual officials, such as the *Estacode* in Nigeria or through other laws that permit meals, entertainment and per diems under certain thresholds. A U.S. State Department survey in the late 1990s found that no foreign country’s written laws permitted bribery of its own officials. This defense is therefore of little, if any, help to companies.

The UK Bribery Act, like the FCPA, does not criminalize conduct that is permitted under the written laws of a foreign country.⁵⁴ The UK Bribery Act Guidance speaks of public tenders where local law requires or permits officials to consider the needs of local economies or communities in awarding contracts that would force companies to include such provisions in their tenders.⁵⁵ However, that is not a situation where something of value is given to a foreign public official. For the same reasons as under the FCPA, this defense is of little value to companies wanting to use it in the case of making payments, directly or indirectly, to individual officials.

Similar to U.S. law, the CFPOA sets out an exception that if a payment was lawful in a foreign state or public international organization for which the foreign public official performs duties or

48 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), ¶ 21.

49 OECD Working Group on Bribery in International Business Transactions Report on Canada (Phase 3: 18 March 2011).

50 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

51 See notes 15 & 16 supra. Australia has recently issued a consultation paper on this issue and Canada has eliminated this exception after consultation.

52 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), ¶¶ 44-45. See also the UK Joint Prosecution Guide at p. 8-9.

53 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1).

54 The UK Bribery Act 2010, s 6(3)(b).

55 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), ¶¶ 24-25.

functions then it is a valid defense for making such a payment. Canadian law does not limit this defense to “written” laws. It is thus possible to argue that more than just the written statutory law or regulation of a country qualifies for this defense. This could include local court judgments based upon traditional law or case law. The absence of such laws or the customary local practice would not qualify for this defense.

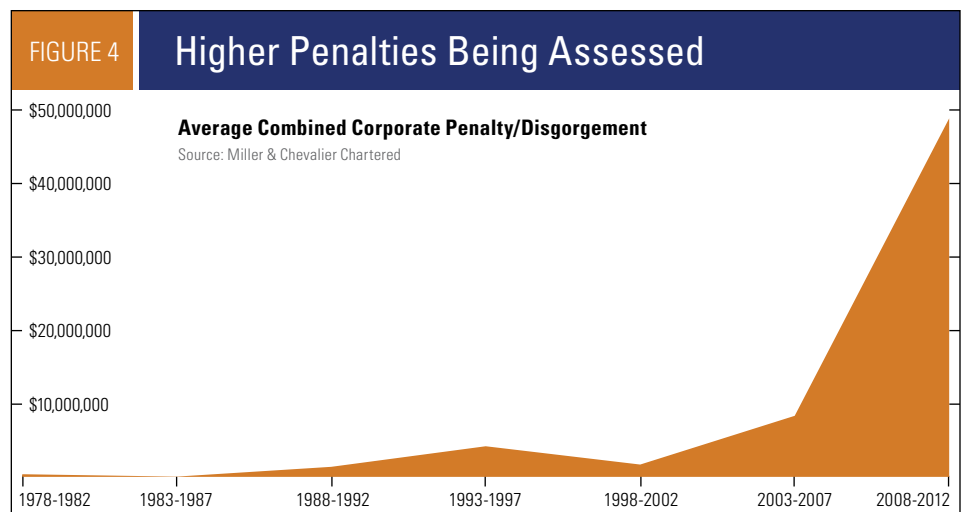
3.8.3 Reasonable & Bona Fide Expenditures

The FCPA provides an affirmative defense for “reasonable and bona fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official...” that are “directly related to (a) the promotion, demonstration, or explanation of products or services; or (b) the execution or performance of a contract with a foreign government or government agency.”⁵⁶ This provision simply clarifies that certain reasonable and bona fide expenditures made in connection with an official’s travel and lodging expense are permissible under the FCPA where there is no corrupt intent. This is the most frequently used defense in practice. However, these types of payments can be subject to abuse and must be carefully monitored and restricted to avoid running afoul of the bribery provisions of the FCPA. Companies should therefore put in place and follow clearly enunciated guidelines around travel and lodging for public officials.

The UK Bribery Act does not contain an affirmative defense of reasonable and bona fide expenditures. Nor does it have a corrupt intent or improper purpose requirement similar to the FCPA. The Act therefore, on its face, does not permit hospitality, promotional and similar business expenditures, such as paying for the travel and lodging costs of public officials. However, the UK Bribery Act Guidance does make clear that reasonable and proportionate hospitality and promotional or other similar business expenditures are permitted.⁵⁷ Since “reasonableness” is in the eye of the beholder, it will likely take several cases before companies have a clear idea of what that exactly means. In the meantime, the Bribery Act Guidance provides some useful hypotheticals. Companies can consider those examples along with FCPA cases that dealt with travel and hospitality expenditures in implementing their travel and lodging guidelines.

In considering whether to prosecute companies for making expenditures that it considers unreasonable, the UK Ministry of Justice has emphasized that their focus is on whether there is a sufficient connection between the advantage and the intention to influence. They will consider such factors as the type and level of advantage offered, the manner and form in which it is provided, and the level of influence of the official. The more lavish and extravagant the hospitality offered, the more likely prosecutors will want to investigate. Once again, the test is of reasonableness as applied by prosecutors. As a result, companies must view these expenditures through the lenses of prosecutors.

The CFPOA provides a virtually identical defense as the FCPA. The accused must show that



the loan, reward, advantage or benefit was a reasonable expense incurred in good faith made by or on behalf of the foreign public official, and directly in relation to (a) the promotion, demonstration or explanation of the payer’s products or services; or (b) the execution or performance of a contract between the payer and the foreign jurisdiction for which the official performs duties or functions.

3.9 Duress & Extortion

Situations involving duress or extortion will not result in liability under anti-corruption laws because a payment made in response to extortionate demands under imminent threat of physical harm or of threats to health and safety would not have been made with corrupt intent or for the purpose of obtaining or retaining business. However, economic coercion does not amount to extortion and payments made for any such reason would be in violation of such laws as per the standards described above.

3.10 Penalties for Anti-Bribery Provisions

The FCPA provides significant penalties under its anti-bribery provisions.⁵⁸ They include:

- Fines of up to \$2 million per criminal violation by companies. Additional penalties may be imposed if there is gain from the bribe or loss to another, including restitution, and forfeiture of profits.
- Fines of up to \$100,000 per criminal violation and \$16,000 per civil violation by individuals and imprisonment for up to five years. Additional penalties may be imposed if there is gain from the bribe or loss to another, which cannot be reimbursed by an employer. Authorities also may seek imprisonment, restitution and forfeiture.
- The SEC may impose on public companies consent decrees, civil fines, or orders to disgorge profits and it may debar individuals from roles in public companies. It may also seek costs of prosecution and civil forfeiture.
- Appointment of an independent compliance monitor and imposition of enhanced compliance and reporting requirements.

U.S. authorities can and do impose additional penalties for related charges, such as conspiracy

and money laundering. They have also relied upon the alternative fine provision of the U.S. Federal Sentencing Guidelines to impose penalties that are twice the gain or loss incurred. The cumulative effect of all these penalties can be quite large. Siemens settled with the DOJ and SEC for \$800 million in December 2008. It also settled for comparable amounts with German and other foreign authorities, in addition to paying the cost of investigation and remediation within their company, which has run into the hundreds of millions of dollars. As a result, Siemens has paid out more than \$2 billion. KBR and Halliburton agreed in February 2009 to pay penalties and disgorgement of profits of \$579 million to U.S. authorities. They then settled with Nigerian and other foreign authorities for significant amounts. In addition, executives from these companies and others have been successfully prosecuted and imprisoned.

In addition to criminal and civil penalties, individuals and companies risk collateral consequences, including suspension or debarment from contracting with the U.S. federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges.

Along with an increase in the number of FCPA cases being investigated and prosecuted, the size of the fines and penalties being assessed for a typical FCPA case has also increased over the years as shown in Figure 4.

There is also the risk that competitors or the plaintiff’s bar may initiate private causes of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or for actions under other U.S. federal or state laws.

The UK Bribery Act provides for an unlimited fine for a company or partnership and up to ten years imprisonment and an unlimited fine for an individual. The Act makes directors criminally liable if they consent or ignore an offense. Also if found guilty, a director can be disqualified from holding office as a director. A corporate entity or individual who deals with funds received as a result of a bribe, with knowledge or suspicion that they amount to criminal property, may be guilty of a money laundering offense under the UK’s Proceeds of Crime Act 2002. The SFO has the ability to recover dividend payments as criminal property.⁵⁹ If a company or one of its directors is

56 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

57 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), ¶¶ 26-32.

58 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(a), 78ff(c) and 18 U.S.C. § 3282.

59 See Mabey Engineering (Jan. 2012) and MW Kellogg (Feb. 2011).



convicted of bribery under the Bribery Act, EU law requires the mandatory and permanent exclusion of the company from public sector contracts within the EU.

Penalties under the CFPOA are unlimited. Instead, a convicted corporation or individual is subject to a fine at the discretion of the court.⁶⁰ Recent corporate fines imposed by Canadian courts have been in the \$10 million range, but are expected to increase over time. Section 3(2) of the CFPOA provides that the penalty for an individual is imprisonment in addition to a fine. The term was increased in the 2013 amendments from a maximum of five years to a maximum of fourteen years.

In addition to penalties imposed by regulators, companies can face shareholder suits and stock market devaluations. Goldman Sachs estimates that FCPA investigations have a three-year negative impact on a company and that the overall cost can reach 9% of profits before interest, taxes, depreciation and amortization.⁶¹ There is also reputational risk that makes it difficult to operate and effectively deal with governments and the public in the future.

3.11 Limitation Periods for Anti-Bribery Provisions

There is no specific limitation period for FCPA violations. Instead the statute of limitations for violation of U.S. federal criminal laws applies.⁶² That period is five years. However, the DOJ often uses the federal conspiracy statute to prosecute FCPA cases. Depending upon the facts, conspiracy can be a continuing conduct crime, which allows it to extend the five year limitation period. Prosecutors are therefore able to argue that if at least one act in furtherance of the conspiracy occurred within the limitation period then the entire course of conduct is subject to investigation and prosecution. As a result, at least half of the

FCPA cases brought by the DOJ are prosecuted as conspiracy cases. DOJ prosecutors have also managed to toll the statute of limitations for an additional three years by filing a request under a Mutual Legal Assistance Treaty. The limitation period for SEC cases is also five years.⁶³ However, the SEC relies on its equitable authority, which is not subject to any limitation period, to seek its remedies, including disgorgement of profits. The SEC has also investigated and successfully prosecuted cases going back more than five years.

The UK Bribery Act has no retroactive element. Therefore any offenses committed before July 2011 are not subject to that Act. Instead, those activities would be subject to the prior existing anti-bribery laws of the UK. Similar to other criminal laws of England and Wales, there is no statute of limitations for the UK Bribery Act. Therefore, UK prosecutors can lay charges under the Act at any time in the future for acts that occurred after July 2011.⁶⁴

Canadian criminal law, including the CFPOA, is similar to English law in that it has no statute of limitations. The CFPOA is also not retroactive. Therefore, any offenses committed prior to its enactment in December 1998 are not covered by the CFPOA, but any offenses committed after that date are always subject to a CFPOA investigation and prosecution, no matter when they are discovered.

4. The Accounting Provisions of Anti-Bribery Laws

Given the significance of the FCPA in determining how companies make and keep their corporate accounts, this section first focuses on the accounting provisions of the FCPA⁶⁵ and then provides a

brief analysis of analogous provisions under UK and Canadian law.

The accounting provisions of the FCPA have broad application since they apply to more than just bribery-related violations. They require all public companies in U.S. markets to account for all of their assets and liabilities accurately and in reasonable detail. The FCPA accounting section is an extremely powerful tool used by the DOJ and SEC and is the basis for most of their accounting fraud and issuer disclosure cases.

4.1 Issuers: Parties Subject to FCPA Accounting Provisions

The FCPA accounting and recordkeeping provisions apply to issuers, which are defined as companies that register securities with or are required to file reports with the SEC, whether or not the company is a U.S. or a foreign company. The accounting provisions are primarily focused on U.S. companies that are listed on U.S. stock exchanges or in the over-the-counter markets, but other issuers such as foreign companies that issue American Depositary Receipts (ADRs) would fall within the FCPA accounting requirements.

The SEC will hold an issuer responsible for the books and records and the internal accounting controls of its consolidated subsidiaries and affiliates, including foreign subsidiaries. The result is that U.S. authorities require issuers to ensure that all of their majority-owned affiliates comply with the FCPA accounting requirements. They also require issuers to use best efforts in good faith to ensure that their minority-owned affiliates also comply. In evaluating an issuer's good faith efforts, all the circumstances including "the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located" are taken into account. The SEC has made it clear that they will prosecute issuers for the accounting breaches of their foreign subsidiaries, even if they had no knowledge of and did not authorize the breach.

Officers, directors, employees, and stockholders or agents of an issuer acting on its behalf are also subject to the terms of the accounting and recordkeeping provisions. In addition, individuals and entities with no affiliation with an issuer can be subject to the accounting and recordkeeping provisions to the extent that they have aided and abetted or caused a violation of those provisions.

Corporate officers can be held liable as control persons under U.S. federal securities law. Individuals and entities can be held liable for falsifying an issuer's books and records or for circumventing internal controls. An issuer's officers and directors may also be held civilly liable for making false statements to a company's auditor. Finally, the principal executive and principal financial officer, or persons performing similar functions, can be held liable for violating Exchange Act Rule 13a-14 by signing false personal certifications as required by the Sarbanes-Oxley Act.

4.2 Components of FCPA Accounting Provisions

The FCPA accounting provisions have two main components. First, the FCPA requires issuers to make and keep books, records and accounts in

60 S. 735 of the Canadian Criminal Code.

61 "Walmart's Mexican Morass" *The Economist* (Apr. 28, 2012).

62 18 U.S.C. § 3282(a).

63 28 U.S.C. § 2462, cited in SEC Enforcement Manual § 3.1.2 (Jan. 13, 2010).

64 The UK Bribery Act came into force on 1 July 2011 and only activities after that date are covered by it.

65 See Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms*, Chicago: ABA Section of International Law, 2012, in particular the chapters on Accounting and Recordkeeping Provisions for more detail.

“reasonable detail” that “accurately and fairly reflect” transactions and dispositions of the assets of the issuer.

An issuer’s records must conform with accepted accounting standards, such as Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS), and should be designed to prevent off-the-books transactions such as kickbacks, bribes and slush funds. “Reasonable detail” is “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”⁶⁶

Reasonable detail, rather than materiality, is the threshold standard enforced by the SEC with regards to books and records offenses. As a result, the SEC’s enforcement policy is to treat any illicit payment as material, no matter how small. This means that relatively insignificant amounts of money can be in breach of the FCPA accounting provisions, if not properly recorded in a company’s books.

Second, the FCPA requires issuers to devise and maintain a system of internal accounting controls that provide reasonable assurance that:

- Transactions are executed in accordance with management’s general or specific authorization;
- Transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets;
- Access to company assets is permitted only in accordance with management’s general or specific authorization; and
- The recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

No particular system of internal controls is required. The test is whether a system, taken as a whole, reasonably meets the statute’s specified objectives. The FCPA requires “reasonable” rather than absolute assurances that accounting controls are adequate using the “prudent official” standard described above. The internal controls provision gives companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances. However, the SEC expects internal control systems to include at least the following elements:

- Written policies and procedures
- Independent audit committees
- Effective monitoring of internal control systems
- Regular and documented tests of internal control systems
- Reasonable assurance that internal accounting systems are working properly
- Internal accounting controls should be closely linked to corporate compliance program

4.3 Penalties for FCPA Accounting Violations

The DOJ and the SEC divide the enforcement of the accounting and recordkeeping provisions between the two agencies. The Justice Department is responsible for investigating and prosecuting all criminal charges that are brought against an individual or entity for violations of the accounting

and recordkeeping provisions. The SEC’s civil enforcement authority is limited to issuers as well as their officers, directors, employees, and agents and stockholders acting on their behalf.

The SEC may impose civil penalties under its general enforcement authority over all reporting companies. Under this authority, the SEC may impose civil fines, bring an injunctive action or enter a cease-and-desist order against a person who violates, or is about to violate, the anti-bribery provisions, or order disgorgement of ill-gotten gains. Civil penalties range up to \$150,000 for individuals and \$725,000 for corporations per violation.

The DOJ may find persons to be criminally liable under the accounting rules if they “knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account” required to be maintained under the FCPA. The penalties for a criminal violation of the accounting and recordkeeping provisions were dramatically increased by the Sarbanes-Oxley Act. Incarceration was increased from 10 to 20 years. Criminal penalties for individuals can be as much as \$5 million and up to \$25 million for corporate entities. A fine can be twice the gross gain or, if there is a pecuniary loss to an individual or entity other than the defendant, the fine can be the greater of twice the gross gain or twice the gross loss. In addition, a complex matrix is established by the U.S. Federal Sentencing Guidelines for determining fines based upon the culpability of the offender. The relevant factors in assessing culpability include the history of prior violations, the pecuniary gain obtained, and the steps taken by the offender to prevent violations. Under these Guidelines an individual may possibly face imprisonment for a violation of the FCPA accounting and recordkeeping provisions.

4.4 Limitation Periods for FCPA Accounting Provisions

The statutes of limitations for the enforcement of the accounting and recordkeeping provisions of the FCPA is five years.⁶⁷ This applies to both criminal and civil enforcement. However in a civil enforcement context, equitable relief is available and enforcement officials have proven to be effective in extending the five-year limitation period. Companies should therefore assume that the statute of limitations has been tolled in some manner and that their accounting records are subject to investigation for a longer period than five years.

4.5 UK Accounting Provisions

The UK Bribery Act does not have specific accounting provisions as the FCPA does. However, existing UK corporate law combined with the impact of Section 7 of the UK Bribery Act results in relatively similar requirements being imposed on UK companies. The UK Companies Act of 2006 requires companies to use UK GAAP or IFRS. That includes requiring companies to keep records to adequately show and explain their transactions, to disclose their financial position at any time with reasonable accuracy and to implement adequate internal controls in compliance with the Companies Act.

In order to invoke the “adequate procedures” defense of Section 7 of the UK Bribery Act, companies doing business in the UK will have to keep proper books and records and implement adequate internal controls. The combination of that requirement along with the accounting requirements of the UK Companies Act, the Theft Act and the Proceeds of Crime Act puts UK based companies in essentially the same position as an issuer under the FCPA accounting and internal control provisions.

There have been a number of corruption cases that have been successfully prosecuted in the UK based upon books and records offenses that have resulted in the civil recovery of monies.

4.6 Canadian Accounting Provisions

The CFPOA originally did not address accounting issues and internal controls. In 2012, the Canadian Government re-considered how it could increase corporate compliance of the CFPOA through enforcement of books and records offenses.⁶⁸ In its 2013 amendments of the CFPOA, the Canadian government made it a new offense for companies to conceal the bribery of foreign public officials in their accounts. It is now a criminal offense to:

- establish or maintain accounts that do not appear in a company’s books and records that they are required to keep in accordance with applicable accounting and auditing standards;
- make transactions that are not recorded;
- record non-existent expenditures;
- enter liabilities with incorrect identification of their object in those books and records;
- knowingly use false documents; or
- intentionally destroy books and records earlier than permitted by law.

The books and records offense in the FCPA requires proof on a civil balance of probabilities evidentiary standard. The new criminal books and records offense in the CFPOA requires proof beyond a reasonable doubt. This is a much higher standard and will present a challenge to Canadian prosecutors. Every person who contravenes this new section on books and records is guilty of an indictable offense and liable to imprisonment for a term of up to 14 years.

4.7 Effectiveness of Accounting Provisions

The accounting provisions associated with anti-bribery laws have turned out to be the most effective tool in investigating and prosecuting bribery offenses, as evidenced by the fact that as much as 80% of FCPA prosecutions are based on books and records or internal control violations. The reason for this is that it is much easier and more straightforward for prosecutors to prove a violation of the recordkeeping provisions than the anti-bribery provisions of the FCPA.

The evidence necessary to establish an accounting violation is much simpler and less likely to confuse the trier of fact. Prosecutors do not have to prove “corrupt intent”, whether a “foreign official” was involved or whether a promise,

66 15 U.S.C. § 78m(b)(7).

67 18 U.S.C. § 3282; 28 U.S.C. § 2462.

68 Canadian Workshop: New Ideas for Canada’s Fight Against Foreign Bribery. January 24 and 25, 2012, Chair’s Report.

FIGURE 5

Employees Most Likely Involved with Corruption

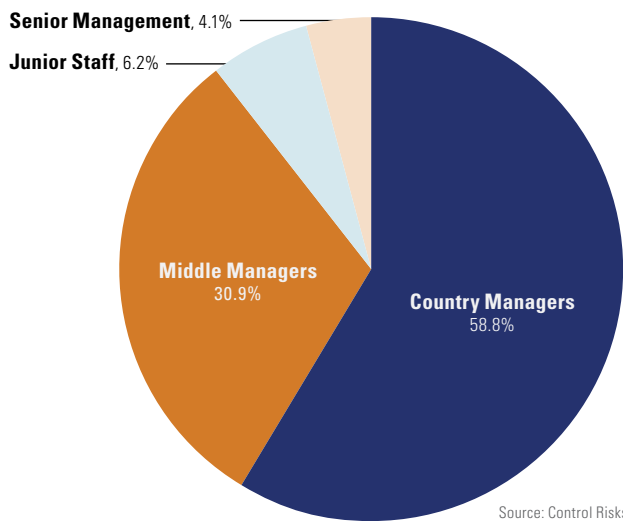
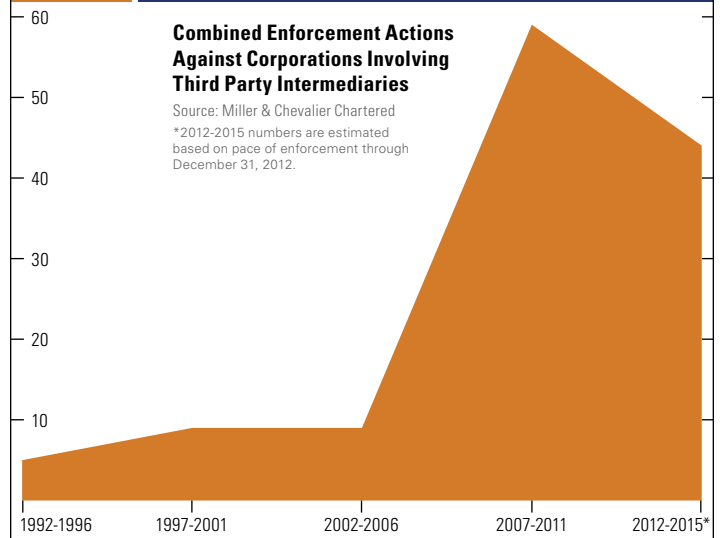


FIGURE 6

Enforcement Actions Involving Third Parties



offer, or payment was made “to obtain or retain business”, and their burden of proof in obtaining a civil offense conviction is not beyond a reasonable doubt. The elements of the offense are limited to whether the record is subject to the recordkeeping provisions of the FCPA, whether the conduct was willful, and whether the record was accurate in reasonable detail.

This highlights that companies must ensure that they have proper corporate books and records as required by the accounting standards applying to them and that they have a strong internal control system in place.

5. Identifying High-Risk Areas

There are a number of recurring areas that companies must assess to determine the extent of their corruption risk. Only then can companies properly manage that risk and limit their liabilities by putting into place a focused and effective compliance program.

5.1 Countries

No country is without corruption of some sort but some countries are more corrupt than others. Since corruption risk varies from one country to another, companies must identify those countries that are at high-risk at an early stage so that they will be able to implement strong and effective compliance programs for those at risk countries in which they plan to operate.

The best means of identifying countries at risk is the Corruption Perceptions Index (CPI) published annually by Transparency International since 1995.⁶⁹ The CPI ranks almost 200 countries by their perceived levels of public sector corruption, as determined by expert assessments and opinion surveys. A country’s score indicates the level of corruption on a scale of 0–10, where 0 means that a country is perceived as highly corrupt and 10 means that a country is perceived as very clean. A

country’s rank indicates its position relative to the other countries included in the index.

Significant country corruption risk starts well above scores of 5.0 or the bottom 50% of ranked countries. A high-risk country would typically fall below a score of 7.5 or outside the top 25 countries with low perceived corruption risk.

5.2 Industries

Certain businesses are more at risk than others. Transparency International publishes widely accepted data on this particular area. TI ranks 19 business sectors in its Bribe Payers Index.⁷⁰ The oil and gas business is one of the highest at risk business sectors. This is reflected in the high percentage of corruption cases against oil companies. As an example of how investigative authorities view the oil and gas industry, in Canada one of the two offices that the RCMP has established to investigate CFPOA cases is in Calgary, the headquarters of the Canadian oil and gas industry.

This makes it necessary for oil and gas companies to establish strong internal compliance programs for their foreign operations. Failure to do so will result in increased risk and liability under anti-bribery laws.

5.3 Employees

Some employees are more at risk than others. They are the employees on the front lines of business development and operations in high-risk countries. These employees require more attention and support in a corporate compliance program. They include business development managers, commercial negotiators, procurement and operational departments, and in-country staff as shown in Figure 5.⁷¹

The allocation of limited corporate resources dictates that these employees get more training and monitoring than others.

5.4 Agents

The use of agents has proven to be one of the most risk prone areas for companies. Many of the historical bribery cases revolved around the use of agents. That risk is increasing as evidenced by the fact that more FCPA enforcement actions involving third parties are being brought by U.S. authorities as indicated in Figure 6.

It is not illegal to use agents under most anti-bribery laws. Depending on the business, there may be a justifiable reason to use agents. However, intermediaries are high-risk and therefore need to be properly retained and managed within an effective corporate compliance program.

5.5 Corporate Entities

All facets of a company’s operations are at risk once they are in high-risk countries and industries. This includes joint ventures, in addition to contractors and suppliers throughout the supply chain. Companies need to include their dealings with these corporate entities in their compliance programs.

The other part of this risk area is mergers and acquisitions (M&A). This includes both corporate and asset sales. Corporate sales are higher risk. But both kinds of transactions require proper due diligence processes to be in place from start to finish. M&A transactions have seen a significant increase in FCPA investigations and prosecutions as shown in Figure 7 and are thus a high-risk area.

5.6 Dealings with Governments & their Officials

Companies deal with governments and their officials at many levels. There are many high-risk areas in corrupt countries, but recurring areas of concern are:

- Gifts and entertainment
- Travel and lodging
- Charitable donations and political contributions
- Facilitating payments

69 See www.transparency.org.

70 Bribe Payers Index Report available at Transparency International website: www.transparency.org.

71 See surveys conducted by Control Risks at: <http://www.controlrisks.com/>.

6. Managing High-Risk Areas

Once companies have identified high-risk areas that apply to them, they must then focus on managing those risks to reduce their exposure and liability.

6.1 Gifts & Entertainment

Based upon cases that have been prosecuted, and opinions and guidelines issued by regulatory authorities, there are a number of procedures that companies need to follow if they decide to provide gifts or entertainment to foreign public officials:⁷²

GIFTS:

1. The gift should be provided as a courtesy or in return for hospitality.
2. The gift should be of nominal value. It should not exceed the range of \$250.
3. Cash gifts should be prohibited.
4. The gift should be permitted under the local laws of the foreign country and the regulations and guidelines of the official's governmental entity.
5. The gift should be of a type and value that are customary in the foreign country and appropriate for the occasion.
6. When appropriate, the gift should be for official use, rather than for the individual or personal use, of the official to whom it is given.
7. The gift should be of appropriate value that showcases or demonstrates the company's products, such as a sample of a company product, or a product containing the company logo.

ENTERTAINMENT: It is acceptable to provide business entertainment during an official business trip on the following basis:

1. The business entertainment expense must be reasonable.
2. The expenditure should be permitted under local law, regulations and guidelines.
3. The business entertainment expenditure should be commensurate with local custom and practice.
4. The business entertainment expenditure should avoid the appearance of impropriety.

In addition, the costs for both gifts and entertainment should be properly recorded in the company's books and records.

6.2 Travel & Lodging

Companies should implement guidelines in administering the travel and lodging of foreign public officials based upon similar guidance and opinions from regulatory authorities:⁷³

1. The expenditure should be for a bona fide and legitimate business purpose.
2. The expenditure should be directly related to the promotion, demonstration or explanation of a product or service, or the execution or performance of a contract.
3. The company should exercise reasonableness in determining the level of service and hospitality.
4. The foreign official's government must be aware of the travel.
5. The payment of travel and lodging expenses should be permissible under local law and the foreign government's regulations and guidelines.
6. The appropriate government department should select the officials going on the business trip. When that is not possible, the selection should be based on pre-determined, merit-based criteria.
7. Wherever possible, the company should avoid making direct payments to a foreign official. In particular, the company should where practical:
 - a) Directly pay the government agency an agreed-upon per diem for each attendee. The government agency would then be directly responsible to pay each attendee's per diem living expenses.
 - b) Directly pay all travel expenses to the service providers, upon receipt of appropriate invoices.
8. Where direct payments are unavoidable, the company should reimburse the foreign official only upon receipt of appropriate invoices and confirmation that the expense has in fact been paid by the official.

9. The itinerary and budget for the trip should be reviewed and approved by a senior manager outside of the company's department dealing directly with the official.
10. Expenses incurred by the government official for side trips or stopovers for the pleasure of the official should not be paid or reimbursed by the company.
11. Expenses generally incurred for spouses and family members should not be paid or reimbursed, except in exceptional situations and subject to review by legal counsel.
12. The books and records should accurately record all such travel expenditures.

6.3 Charitable Donations & Political Contributions

The FCPA does not specifically prohibit charitable donations or political contributions. It covers the corrupt payment of anything of value to a foreign official, a foreign political party or party official, or a candidate for political office. Given that the intent of a political contribution in a foreign country can always be questioned, companies should adopt a policy of not making political contributions of any nature.

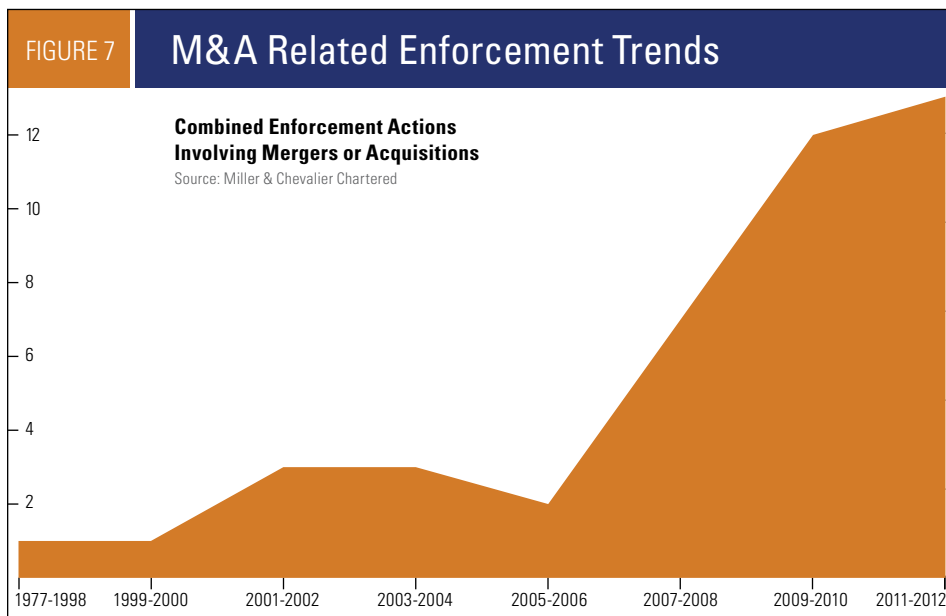
It makes good corporate sense for most companies to make charitable donations and contributions in the countries where they operate, in particular in the local communities where their operations are located. However, they should only be done after an appropriate due diligence review has been completed and the contribution has been properly structured to be in full compliance with the law. Such donations should not be personally linked to public officials, done in the name of the official, or be possibly perceived as benefiting or having value to such an official. Otherwise, prosecutors could argue that there is a *quid pro quo* and that something of value has been provided to a foreign public official.⁷⁴

The DOJ has approved charitable donations in the past under its opinion procedure process.⁷⁵ In doing so, it considers whether companies have done their due diligence and implemented appropriate control measures, such as:

1. Certifications by the recipient regarding compliance with the FCPA;
2. Due diligence to confirm that none of the recipient's officers were affiliated with the foreign government at issue;
3. A requirement that the recipient provide audited financial statements;
4. A written agreement with the recipient restricting the use of funds;
5. Steps to ensure that the funds were transferred to a valid bank account;
6. Confirmation that the charity's commitments were met before funds were disbursed; and
7. On-going monitoring of the efficacy of the program.

74 See SEC v Schering-Plough Corp., Case No. 1:04CV00945 (D.D.C. June 9, 2004); In the matter of Schering-Plough Corp., Administrative Proceeding File No. 3-11517, Rel. No. 49,838 (June 9, 2004) as an example.

75 See U.S. Dept. of Justice, FCPA Op. Release 10-02 (July 16, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf>, FCPA Op. Release 95-01 (Jan. 11, 1995), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/1995/9501.pdf>, FCPA Op. Release 97-02 (Nov. 5, 1997), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9702.pdf>, FCPA Op. Release 06-01 (Oct. 16, 2006), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf>.

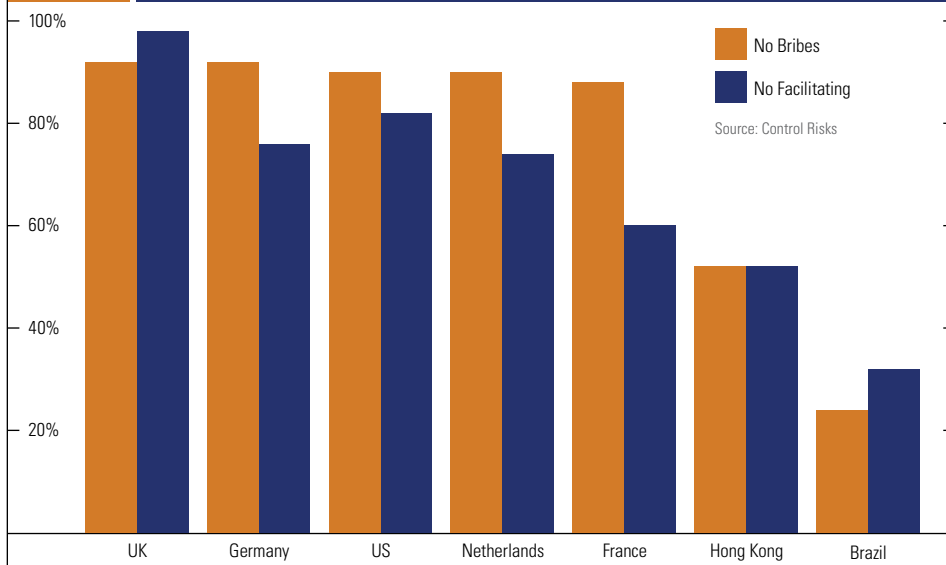


72 Don Zarin, Doing Business Under the Foreign Corrupt Practices Act (Practising Law Institute, 2010) at 5.8.

73 See Zarin at 5.9 citing FCPA Opinion Procedure Rel. No. 2007-01 & 2007-02 (July 24, 2007).

FIGURE 8

Companies with Codes Forbidding Bribes & Facilitating Payments



The DOJ and SEC expect companies to ask the following kinds of questions⁷⁶ before making charitable payments in foreign countries:

1. What is the purpose of the payment?
2. Is the payment consistent with the company's internal guidelines on charitable giving?
3. Is the payment at the request of a foreign official?
4. Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
5. Is the payment conditioned upon receiving business or other benefits?

6.4 Facilitating Payments

Even though facilitating payments are legal under the FCPA, there is a growing movement to stop such payments. The OECD has asked member states to eliminate them in their national laws and many western companies are prohibiting them in their internal policies, even when the laws of their host jurisdiction permit them, as shown in Figure 8.

There are a number of reasons for this trend:⁷⁷

Double Standard: Countries that permit facilitating payments overseas do not permit them at home.

Confusing Message: It is unclear to many employees why large bribes are prohibited but small bribes are acceptable.

Slippery Slope: Facilitating payments are difficult to define and impossible to control. The line between them and illegal bribes is often unclear.

Local Community: Buying one's way past local officials that local companies and people must endure is not viewed well.

Illegality: Even small bribes are illegal in a host country. So companies are breaking some law somewhere in paying facilitating payments.

Accounting Issues: Companies have to choose between falsifying their records in violation of their own laws or recording the payment accurately and documenting a violation of local law. As a result, many companies have eliminated facilitating payments by:

- Adopting a clear policy that bribes of any kind will not be paid. Employees need to be assured that they will not be penalized for delayed performance directly tied to a refusal to pay bribes. An exception can be made for medical and safety emergencies.
- Assessing high-risk areas by interviewing employees on the front line and providing them alternative approaches.
- Training high-risk employees, contractors and intermediaries so that they fully understand and implement the company's policy of not paying small bribes.
- Enforcing and following up on the policy.

6.5 Agents

The use of agents or intermediaries is one of the most high-risk areas encountered by corporations and needs close attention.⁷⁸

6.5.1 Reasons to Retain Agents

Companies often conduct their business in other countries through local consultants. There are many good reasons⁷⁹ why companies do this, including to:

- Access and build relationships with government officials.
- Pursue business opportunities without the expense of hiring or relocating employees.
- Penetrate opaque or restrictive markets.

78 See A. Timothy Martin, Using Local Consultants in Foreign Lands. Proceedings of the Fifty-Ninth Annual Institute on Oil and Gas Law, Matthew Bender, September 2008, 16-1 at p. 501 on which this section is based.

79 Alexandra A. Wrage, The TRACE Standard: Doing Business with Intermediaries Internationally (Washington DC: Trace International, Inc., 2002), 5.

- Comply with local law requiring the use of a resident intermediary.
- Pursue large volumes of modest sales in a number of countries.
- Establish an in-country presence on a temporary basis at minimal cost.

Local consultants or agents can add value to a company's business in certain circumstances. However if not properly recruited, retained and managed, they can significantly increase a company's liability. Companies have historically used intermediaries to pay bribes in order to cover their tracks. Despite their best efforts, they have not avoided the liabilities.⁸⁰

International companies are committing more resources to establish internal procedures to manage agents. This is reflected in the Rules of Conduct⁸¹ of the International Chamber of Commerce that deal with bribery in business. Article 3 of those Rules deals exclusively with the use of agents. Enterprises should take measures reasonably within their power to ensure that:

- Any payment made to an agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;
- No part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct; and
- They maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate, duly authorized governmental authorities under conditions of confidentiality.

Another indication that multinational companies are embracing best practices in recruiting, retaining and managing intermediaries is the establishment and growth of TRACE, which is a non-profit membership association that assists companies in the vetting and training of intermediaries.⁸² TRACE has a diverse corporate membership from many jurisdictions throughout the world.

6.5.2 Process

Companies should establish and follow a clearly defined process on how they are going to recruit, retain and manage intermediaries beginning with this basic question: Does the company really need to retain an intermediary? If the answer is no, don't hire one. If the answer is clearly yes, then a number of items need to be addressed in the company's decision to retain an intermediary in order to reduce the likelihood of corruption and the resulting liabilities. There is no guarantee that the following process will result in intermediaries conducting themselves in an ethical or legally compliant manner, but it will make the risk more

80 A number of research surveys have indicated this trend. See John Bray, "International Business Attitudes to Corruption – Survey 2006" (Control Risk, 2006), 13. Their other surveys available at <http://www.controlrisks.com/>. Similar research conducted by Transparency International. Available at www.transparency.org.

81 International Chamber of Commerce, ICC Rules of Conduct: Extortion and Bribery in International Business Transactions (Paris: ICC Publishing, 1999 Revised Version).

82 See the TRACE website at www.traceinternational.org for more details. TRACE is a good resource for both companies and credible intermediaries that offers its services at a reasonable fee. TRACE has also published a very good reference manual on how best to retain agents. See The TRACE Standard: Doing Business with Intermediaries Internationally. (Washington DC: Trace International, Inc., 2002) authored by its President, Alexandra Wrage.

76 A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012) at p. 19.

77 Alexandra A. Wrage, The High Cost of Small Bribes (Washington DC: Trace International, Inc., 2003).

manageable. The following items need to be addressed in the vetting process:

- Clearly establish the business justification for retaining an intermediary;
- Research for the best-qualified intermediary;
- Conduct an independent due diligence on the prospective intermediary;
- The contract retaining the intermediary must have an anti-bribery clause;
- Provide the intermediary a briefing on the company's bribery policy and ongoing training on anti-bribery laws and best practices;
- The final review and decision for retaining the intermediary should be done in the executive suite; and
- Document all of the above. This ensures that the process has been done correctly. It will also be the primary defense relied upon by a company if, despite all its efforts, the intermediary does the wrong thing and the company is investigated. The responsibility for this process should be split within a company. Project or business development managers who usually propose the use of intermediaries should not be expected to carry out the functions of recruiter, advocate, researcher, and judge. Their role should be confined to presenting a clear, justifiable business case why an intermediary should be retained and for being a proponent for their candidate. Their business justification and an acknowledgment that they are not aware of any reputational, business or other reason that would make the intermediary unsuitable should be documented in writing. The due diligence process must be conducted independently. In addition, the decision to hire a consultant must be done independently within a company, preferably by an independent committee of senior people in the organization, based upon qualified legal advice. This ensures good business judgment and impartiality around the decision making process.

6.5.3 Applicability

The first issue for a company is when and where it needs to conduct such a process since it takes significant resources to do it properly. Companies can use a risk management approach in determining that only intermediaries in countries that are at high-risk of corruption should have an anti-bribery due diligence conducted on them. This can be ascertained by using such criteria as the annual Transparency International Country Perceptions Index (CPI).⁸³ Each company using this approach will need to determine what risk level it considers appropriate in classifying countries high-risk.⁸⁴

The next issue to address is what kind of intermediaries need to be put through such a process. There are a number of different terms that are used for intermediaries, including: business or commercial agent, consultant, contractor, and business or sales representative. A very common one is the foreign sales representative. This is where a self-employed foreign individual or contractor assists a company to solicit business for the

sale of the company's products or services within a specified territory or to specific customers. The usual form of compensation is on a contingency basis, by commissions calculated as a percentage of the sales price of the product or service sold by the sales representative. A variation is the commercial agent who has continuing authority to negotiate and finalize the sale or purchase of goods (but not services) on behalf of the company. A commercial agent is generally compensated by commission.⁸⁵ The extractive industry often retains consultants or local representatives to assist in the obtaining of mining, oil and gas or forestry concessions. Compensation may be in the form of a commission or on a per diem or per hour charge.

Intermediaries would also include people and firms that provide a variety of services such as customs brokerage, obtaining immigration visas, and legal and political advice. Some of these intermediaries are more at risk than others as indicated by the increasing number of investigations of these kinds of intermediaries.

An intermediary may also be a distributor of products manufactured by a foreign company. A distributor purchases merchandise for its own account and independently contracts with its own customers for the resale of the product. Since the passage of title is not relevant to the establishment of vicarious liability, distributorship arrangements should be analyzed in the same manner as agency relationships.⁸⁶

Overall, it is not the label or title used to describe the intermediary that is important.⁸⁷ Rather, it is how much they interact with public officials in countries at high-risk for corruption, how they function and how they are compensated that determines whether they should be put through a rigorous due diligence process.

6.5.4 Selecting Intermediaries

Similar to any other business process, the objective in searching for an intermediary is to find the most qualified one. This would include individuals who are persuasive, well connected and tenacious; characteristics that you would expect of any good sales person or representative. However, they need to be more than that. They must know the business. They must be honest and display integrity in their business dealings. Companies need to keep in mind that if the individual they choose as their representative in a country is perceived as being dishonest, so is the company. If an intermediary has no business advantages apart from personal connections, serious questions concerning the appropriateness of that individual must be addressed and answered.

The company manager advocating a particular candidate should, based upon their interviews and inquiries, document the expertise and resources that candidate will bring to the job and that he or she has a good reputation in the community, understands the company's business values and will conduct the company's business with those same values.

6.5.5 Due Diligence

If the justification for retaining the intermediary is acceptable, another group within the company (such as legal, compliance or security) should conduct a due diligence on the candidate. Until that review is complete and final approval provided, the company needs to instruct the prospective intermediary not to undertake work on behalf of the company. It is not helpful if an intermediary starts acting on behalf of a company based upon an oral agreement or takes a personal initiative to prove his or her value to the company, especially if the company is subsequently accused of paying bribes because of something the intermediary did.

Due diligence is the most important, most intrusive and potentially the most offensive part of the entire process of retaining an intermediary. The company needs to first decide on whether it collects this information by itself using investigative firms or requests the intermediary to provide the information along with granting permission to independently verify its accuracy. The latter approach is much preferable. It is usually faster, more accurate and more transparent to the intermediary. It also throws up a red flag if the proposed intermediary objects to the process.

An important item to clarify in the due diligence process is whether the intermediary will be retained in an individual capacity or on a corporate basis. It is quite legitimate in many circumstances to retain corporate intermediaries if there are valid business reasons. But if the corporate entity is incorporated in a tax haven for the sole purpose of evading taxes or to ensure the anonymity of payments to the intermediary, then it is best to deal with the intermediary on an individual basis in their country of residence. If the agreement is directly with an individual, then the due diligence is much simpler since it is just focused on that individual. If the intermediary wants to use a corporate entity, then a more complex due diligence requiring information around the ownership of that entity will be needed.

Having determined all of those matters, a due diligence investigation should then be conducted using standardized questionnaires as much as possible to establish the background, status and qualifications of the intermediary. The first set of items listed below applies to all due diligence inquiries. A corporate intermediary requires further investigation to determine ownership and who ultimately is representing the company, as shown in the second set of items below.

Contact Information: Obtain the full name, address, email address, phone and fax numbers of the company (and its principals) or individual.

References: Intermediaries should provide three independent business references and one financial reference. Conduct character and financial reference checks on the intermediary's effectiveness, reputation, government relations' expertise and business ethics. Ask questions to get a "yes" or "no" response followed by an opportunity to elaborate in order to avoid purely subjective assessments. Wherever possible, confirm that the intermediary does not possess a criminal record.

Qualifications: Confirm the education and professional qualifications of the proposed intermediary or its management personnel.

Affiliations: Confirm the business and government affiliations of the proposed intermediary, his or her family and close associates.

⁸³ See TI website at www.transparency.org for details on annually updated surveys.

⁸⁴ A good rule of thumb is to consider countries at the 7.5 score and below on the CPI at high-risk. See also: TRACE Survey of Corporate Anti-Bribery Programs 2004 (Washington DC: Trace International, Inc., 2004) at p. 22 where it appeared that American companies applied more resources to high-risk countries and non-U.S. companies tended to apply resources more evenly.

⁸⁵ Zarin, *supra* id at 6-5 to 6-9.

⁸⁶ Zarin, *supra* id at 6-5 to 6-9.

⁸⁷ This does not appear to be the perception in many companies where there is great variation applied in the due diligence of intermediaries depending on their category or label. See TRACE Survey of Corporate Anti-Bribery Programs 2004 (Washington DC: Trace International, Inc., 2004) at p. 38.

Reputation: Investigate the reputation of the proposed intermediary or its management personnel who will perform the requested services.

Disclosures: Intermediaries should disclose prior bankruptcies, criminal convictions or pending investigations for bribery, tax evasion, and all civil and criminal litigation in which they are or have been defendants.

Conflicts: Determine whether the intermediary has any business conflicts that may make it an unsuitable candidate for business reasons, even though it may be suitable from a compliance perspective.

Media Search: Search media and social databases for the name of the intermediary, its owners, principals, partners, key employees, and third parties. This is a simple and cost effective way to determine if an intermediary is possibly involved in corruption. This can pop up in a newspaper, a website, on a social media page or someone's blog. The information may only be an allegation or even some offensive mud racking, but a company needs to be aware of these things in order to make informed decisions and not be caught by surprise.

Additional Due Diligence for Corporate Intermediaries:

Company Structure: Determine the organizational structure of the corporate intermediary. One can narrow the questions around ownership if the corporate structure of an intermediary, such as a partnership or corporation, is known.

Company Description: Corporate intermediaries should provide a brief history of their company and their qualifications, including years in business, number of employees, business experience and facilities. Check out their website if they have one, since a lot of information can be found there.

Ownership Information: Confirm the stockholders, partners or other principals of the proposed intermediary. Confirm if any of them are government officials, political party officials, political candidates or related to or close associates of any of them. A good rule of thumb is to identify ownership interests of 5% or more for publicly traded companies.⁸⁸ Complete beneficial ownership should be acquired for privately held firms. This ensures that people are identified, rather than holding companies or hidden trusts, and that those people are not public officials. Each person having an ownership interest in a privately held corporate intermediary should disclose his or her employment by the government and of any immediate family member and provide a CV. They should also be asked to provide information on other companies in which they are officers or directors or where they have a 5% or more interest. Even if the intermediary has no apparent ties to government, another company with the same ownership might have made illegal payments.

Management Information: Confirm the directors, officers and the management team of the proposed intermediary. Confirm if any of them are government officials, political party officials, political candidates, or any relative or close associate of the foregoing.

Employees and Third Parties: Corporate intermediaries should identify the key employees and third parties that they will use to act on behalf of the company. Intermediaries (and ultimately their clients) are responsible for the actions of their employees, independent contractors and subcontractors.

Financial Information: Examine the audited, or where unavailable the unaudited, financial statements of the proposed intermediary to confirm its ability to perform the services requested. If audited financial statements are not available, ask the financial reference about the length of the intermediary's relationship with it. Their answer can provide confirmation on the intermediary's financial stability as well as whether the intermediary banks locally rather than in another country where there may be less banking transparency.

6.5.6 Tiered Due Diligence

The list of due diligence items provided above can be overly extensive and burdensome when a company wants to sell a few low cost items using a local sales agent for a small commission or wants to use service providers such as accounting and law firms, real estate agents or public relations firms in high-risk countries. A tiered approach is therefore appropriate to address various business situations, kinds of intermediaries and levels of risk.

The level of due diligence required is determined by the nature, function and level of risk associated with the intermediary rather than its label or title. The following risk factors⁸⁹ should be used to set the appropriate level of due diligence:

- Purpose for retaining the intermediary.
- Whether the intermediary has direct contact with public officials on behalf of the company and the nature and frequency of that contact.
- Size or value of a concession or contract awarded by a government.
- Whether the intermediary sells or markets the company's products or services to government or business customers.
- Volume and value of the company's sales in the country or territory assigned to the intermediary.
- Amount and type of compensation paid by the company to the intermediary.

A company can use either two or three tiers or levels of due diligence by varying the kind of information compiled and how it is collected. Those items would be:

- Whether independent interviews are conducted on the intermediary.
- Information on all or some of the owners, directors and employees of corporate intermediary.
- Information on outside ownership interests, directorships or employment of intermediary.
- Information on intermediary's position in political parties or campaigns.
- Information on family members of intermediary who are public officials.
- Information on government contracts held by intermediary.
- Number of business and financial references checked.
- Requirement of audited financial statements or financial references as opposed to a self-certified financial position.

- Review of local laws by either relying on the intermediary, using a service such as TRACE described below or by using local counsel.
- Using TRACE or an investigative firm to conduct the due diligence.

Another item to consider is the frequency of due diligences. Most companies update their due diligences every 2–3 years, which usually coincides with the renewal of an intermediary's contract. Some companies renew their due diligences on an annual basis; quite often by varying the rigor and amount of detail in each annual review. The minority of companies that do conduct due diligences restrict it to the time of hiring the intermediary.⁹⁰ Best practice in this area would expect at a minimum that the company would update the due diligence at contract renewal (assuming a 2–3 year contract) and that an annual refresher would be best with a more thorough and complete due diligence done every 2–3 years or when the company was made aware of an alleged improper payment.

TRACE provides a good two tier due diligence process to its members.⁹¹ Their basic due diligence service, called TRACEcheck, allows member companies to pre-pay a modest fee. TRACE then issues an electronic code to the company who can provide it to their intermediary candidate. The intermediary can then go to the TRACE website, enter the code and input the requested information in an electronic questionnaire. TRACE conducts a media search and confirms that the information submitted is legitimate. TRACE then issues its report, which would highlight any red flags found during the process, to the company who would then decide to either act upon the report or follow up with more due diligence if appropriate. TRACE has recently upgraded and made their basic due diligence process easier with the release of their TRAC⁹² service. It is a user-friendly baseline due diligence tool, which is available to both member companies and non-members at no cost. This new service provides an automatic, ongoing update on the status of intermediaries registered with it.

6.5.7 Due Diligence Service Providers

Companies are usually not able to carry out extensive due diligences on their own. They will therefore need to outsource much of the due diligence work. A good source to consider is TRACE, which provides multiple due diligence reports for an annual corporate fee to its members. Its two tier due diligence service described above provides a very good process for the retention of most intermediaries. Where a company is retaining an intermediary to help on a very large government contract, it may also want to retain an investigative firm to provide a more extensive and detailed background check on the individual or principals being considered. In addition to investigative firms, companies may need to use law firms to advise on local law where appropriate. In many cases, the TRACE service described in the "Local Law" section below will be sufficiently adequate to confirm the legitimacy of retaining agents in a particular country.

88 See Alexandra A. Wrage, *The TRACE Standard: Doing Business with Intermediaries Internationally* (Washington DC: Trace International, Inc., 2008).

89 As an example, See TRACE's Resource Center located at www.traceinternational.org which is accessible to TRACE members only.

90 See TRACE Survey of Corporate Anti-Bribery Programs 2004 (Washington DC: Trace International, Inc., 2004) at p. 40.

91 See TRACE website at www.traceinternational.org for more details.

92 See <https://tracnumber.com>.

6.5.8 Compensation

There are two basic ways to compensate intermediaries: 1) a commission or contingency basis, or 2) a time basis such as monthly, daily or hourly fees. Both forms of compensation are legal in most cases. However, intermediaries compensated on a pure contingency basis present a much higher risk. When the awarding of a government contract triggers their payment, there is significant pressure to pay a bribe to a public official to ensure success. Intermediaries paid a flat hourly, daily or monthly fee have less incentive to make an illegal payment in order to secure business since their income is not immediately tied to obtaining or retaining business. Whatever the form of compensation, intermediaries in high-risk countries still need to be vetted. However, some forms of compensation are more at risk than others and thus need more vetting.

Ideally, intermediaries should first state the range of commissions or fees that they want and how appropriate it is for the region. The company then needs to confirm whether the level of compensation is reasonable given the experience of the intermediary, the country where the services are to be performed, the expected results, and the amount and difficulty of the work to be performed. Some benchmarks must be determined in order to justify the compensation package. This is usually not easy to do; especially for unique, difficult and large projects where the intermediary is paid on a contingency basis. It can be easier to justify the amount of compensation for time based fee structures. TRACE has done a survey on ranges of reasonable contingency fees but it is very general in nature and scope and does not lend much assistance in determining reasonable rates by country or industry.⁹³

6.5.9 Local Law

Prior to retaining an intermediary, companies need to confirm whether local law requires, permits or prohibits the retention of an intermediary.⁹⁴ This can be verified in several ways. Firstly, TRACE provides its members an extensive database on its website of approximately 70 countries that includes information on whether agents are permitted or prohibited, and if so, under what circumstances.⁹⁵ Secondly, a company can request the intermediary to identify the laws and regulations that apply to their industry in their home country. This allows the intermediary to show its willingness to research and comply with governing laws. Thirdly, a company's legal department can obtain an opinion from local counsel. Individual intermediaries or owners of corporate intermediaries should also provide citizenship information. There are a number of countries that restrict the role of non-citizen

intermediaries. Companies need to ensure that these local laws are not breached. All or some of these techniques can be used to determine if the country where business will be conducted requires, permits or prohibits intermediaries.

6.5.10 Employee Certification

Where a company does not retain intermediaries on a regular basis, a good technique to use is to require employees who propose the retention of an intermediary to certify in writing that the intermediary has been personally interviewed by that employee and that there is no reason to believe that the intermediary has violated or will violate anti-bribery laws or the company's policy on improper payments regarding any activities on behalf of the company. This makes employees think twice before they make such a proposal and limits the retention of intermediaries only to situations where it makes good business sense.

6.5.11 Red Flags

Investigative officials have identified a number of "red flags" that indicate potential risks.⁹⁶ Any red flags that are identified in the due diligence process should be noted and investigated. The more red flags and the more serious they are, the greater the risk with the intermediary. All of which must be considered in the approval process. Red flags do not necessarily result in an intermediary being rejected. But they do require significant additional investigation so that a company can clarify the facts and properly assess the risk before making its decision. A list of red flags to consider is provided below.

GENERAL RED FLAGS

The following are general red flags that do not by themselves indicate specific liability risks on a particular transaction. They indicate areas where the risks are heightened.

- A company has received an "improper payment" audit in the past five years.
- Payment in a country with widespread corruption or a history of bribery violations occurring in that country.
- Widespread news accounts of payoffs, bribes, or kickbacks.
- The industry involved has a history of bribery violations. These include the defense, aircraft, energy and construction industries.

TRANSACTION RED FLAGS

- An intermediary refuses to provide confirmation that it will abide by applicable bribery laws, or is ignorant of or indifferent to local laws and regulations.
- Family or business ties of an intermediary with a government official.
- The intermediary has a bad reputation or is the subject of credible rumors or media reports of inappropriate payments. This is a significant flag.
- The intermediary requires that its identity not be disclosed.
- A foreign government official recommends the intermediary. This could suggest a coordinated scheme to divide a payoff.

- An employee recommends the intermediary with enthusiasm out of proportion to qualifications.
- Lack of appropriate facilities or qualified staff.
- Insolvency or significant financial difficulties.
- Use of shell companies that obscure ownership without a credible explanation or refusal to disclose owners, partners or principals.
- Lack of experience or track record in the industry.
- Misrepresentation or inconsistencies in the intermediary's representations found through the due diligence process.
- A business reference declines to respond to questions or provides an evasive response.
- Any other odd request by an intermediary that arouses suspicion.

PAYMENT RED FLAGS

- Excessive or unusually high compensation. The appropriate compensation will vary depending upon the extent of the intermediary's obligations, the risk that the intermediary must incur, whether it is committing its own capital to the venture, or if it is incurring high documented expenses.
- Requests for unusual bonuses or extraordinary payments.
- Requests for an unorthodox or substantial up front payment or a request that invoices be backdated or altered.
- Payment through convoluted means.
- Over-invoicing (e.g., the intermediary asks you to cut a check for more than the actual amount of expenses).
- Requests that check be made out to "cash" or "bearer", that payments be made in cash, or that invoices be paid in some other anonymous form.
- Requests for an unusually large credit line for a new customer.
- Requests for increase in compensation during the contract term.
- Requests for payments to a bank account in a country other than the intermediary's country of residence or the country of the business activity, into a numbered account or to third parties or their bank account.

6.5.12 Approval

After the completion of the due diligence, the legal or compliance team should write a report or memo summarizing the review process with a conclusion that the intermediary is or is not an appropriate choice. The memo should be reviewed and approved by senior management with no direct interest in the retention of the intermediary on the following basis:

- There is a clear business justification for retaining an intermediary.
- The person or organization being proposed is well qualified and is the most suitable candidate to act as an intermediary for the company.
- The level and form of compensation for the intermediary is reasonable and appropriate for the services being performed.
- The services of the intermediary are clearly defined and are valid under all applicable laws. This would include the domestic laws applicable to the company and the intermediary and the domestic laws of the countries where the business activity is occurring.

⁹³ TRACE International, Inc. has conducted a contingency fee survey which is available only to its corporate members.

⁹⁴ The Hilmarton arbitration case involved the retention of an Algerian agent by a European company, which maintained that the agent's agreement was invalid because Algerian law prohibited using agents to gain business from the Algerian government. There were allegations of bribery. The sole arbitrator found the contract null and void. The Swiss courts overturned this decision and appointed another arbitrator who found the contract valid. Collection of ICC Arbitral Awards (1991-1995) 220. ASA Bull. 1993, 247; Rev. arb. 1993, 327; Riv. Dell' Arbitrato 1992, 773; Yearbook Comm. Arb'n XIX (1994) 105 (in English).

⁹⁵ See the Country Bulletins in TRACE's Resource Center located at www.traceinternational.org which is accessible to TRACE members only.

⁹⁶ See A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012) at p. 22. Available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/>. For the list of red flags identified by the Serious Fraud Office in the UK, see <http://www.sfo.gov.uk/bribery--corruption/corruption-indicators.aspx>.

6.5.13 Contract

After obtaining internal approval, a company should only retain an intermediary using a written agreement⁹⁷ with the following provisions:

- A precise definition of the scope of the intermediary's duties.
- The intermediary acknowledges that it understands the provisions of the company's policy on improper payments and agrees to comply with its terms as well as with any provisions of applicable law.
- The intermediary acknowledges that the contents of the agreement may be disclosed by the company to third parties as appropriate.
- The intermediary provides representations and warranties that neither it nor any of its principals, staff, officers or key employees are public officials, candidates of political parties, or other persons who might assert illegal influence on the company's behalf, and that it will promptly inform the company of any changes.
- The intermediary will promptly advise the company of any accession to an official position.
- The company expressly states that its choice of intermediary was made after considering factors that support a belief that the applicable law and its policy will not be violated.
- Assignment of the agreement by the intermediary is prohibited without the company's prior written consent.
- Payment will be by check made out in the intermediary's name or by wire transfer to a bank account that is registered in the name of the intermediary and agreed upon by the company.
- Travel, entertainment and other miscellaneous expenses will not be paid without the company's prior written approval. The intermediary will keep detailed records of those expenses.
- The company has the right to audit the intermediary's records, including the expenses and invoices of the intermediary.
- The agreement provides for automatic termination without compensation in the event of an improper payment in violation of applicable law or the company's policy.
- The intermediary will make annual certifications of its compliance with applicable law and the company's policy and that none of the payments made to it by the company have been directed towards a public official.

Corporate intermediaries present an extra challenge around potential future changes in the shareholder structure of the corporate intermediary. Since a company always wants to know who is acting on its behalf, it should consider requiring, in addition to the consultant agreement, a shareholder agreement signed by all the shareholders of the corporate intermediary and itself that restricts the ability of the corporate intermediary and its shareholders from changing its share structure without the prior approval of the company.

A good precedent agreement to consider for retaining intermediaries, especially for the extractive industry, is the *Model Consultant Agreement for Business Development in a Host Country* issued by the Association of International Petroleum Negotiators.⁹⁸

6.5.14 Documentation

It is very important for companies to keep detailed written records of their entire process of recruiting and retaining intermediaries. This would include interviews, the due diligence documentation, written recommendations, approvals, training programs and contracts. These records should be available to the company's internal and external auditors and, upon specific request, by authorized government authorities under conditions of confidentiality.

Such evidence can reduce criminal and civil liabilities and mitigate reputational damage if a company is the subject of a bribery investigation and prosecution, since it documents that the company took all reasonable steps to prevent the payment of a bribe.

6.5.15 Managing Intermediaries

The management of the relationship with an intermediary and its associated risks is not a single event. It is an ongoing process. The company (through its employees who manage the relationship with the intermediary) should take reasonable measures within its power to ensure that going forward:

- Any payment made to an intermediary represents no more than an appropriate remuneration for legitimate services rendered by that intermediary.
- No part of those payments is passed on by the intermediary as a bribe in contravention of applicable law or the company's policy.
- The intermediary will provide an annual certification of its compliance with applicable law and the company's policy and will certify that none of the payments made to it by the company have been directed towards a public official.
- The intermediary is fully briefed on the company's policy and the company's business practices to ensure that it is in complete alignment and agreement with the company on how it will represent the company and assist it in obtaining or retaining business.
- The intermediary is trained in the anti-bribery laws of the company's and the intermediary's country.⁹⁹ Companies can provide the training for intermediaries themselves or can require the intermediary to acquire proper training from a qualified organization such as TRACE.
- The intermediary will become and will maintain a membership in an organization such as TRACE.
- It maintains a record of the names and terms of employment of all intermediaries who are retained by it in connection with transactions with public bodies or state enterprises. This record will be available for inspection by the company's auditors and, upon specific request, by appropriate, duly authorized governmental authorities under conditions of confidentiality.
- The activities of the intermediary are appropriately monitored to ensure that there is no breach of applicable law or the company's policy.

Many of the above requirements can be made conditions subsequent in the intermediary's contract. What is most important is that the company ensures that those requirements are managed and met on an ongoing basis.

It must be emphasized that this process is not a matter of checking the boxes. Unfortunately, many companies manage this issue with more and more boxes each year. What is important is to complete a thorough analysis of the ascertainable facts and to exercise independent judgment around the decision to retain an intermediary. Ultimately the decision maker needs to step back, analyze the situation for what it is and determine whether he or she is hiring an honest person or organization that will not pay bribes. It is often this lack of analysis and exercise of independent judgment that is at the root of a future problem.

6.6 Employees

Companies need to ensure that employees who have a high-risk exposure to corruption are given extra support, training and advice. In particular, a company must:

- Identify positions most at risk
- Recruit carefully in filling those positions
- Educate high-risk employees with thorough training programs
- Support in country staff
- Maintain open communication channels
- Require significant decisions out of country
- Discipline breaches quickly and effectively

Even the largest of companies are not able to provide such significant resources across the entire company for every employee. Instead companies make the process work effectively by identifying employees at risk and focusing their resources on them.

6.7 Joint Ventures

When companies form a contractual joint venture, they appoint an operator to act on their behalf to carry out operations for the joint venture group. The concept of vicarious liability and the standard of knowledge expected of non-operators within the joint venture group are the same as in the principal-agent relationship. Therefore, the expectations around a due diligence process for selecting joint venture operators should be the same as in retaining agents. However the dynamics of the relationship between a principal and its agent and amongst non-operators and their operator are quite different, and therefore the vetting process, contracts, dialogue, training, etc. are also quite different.

The dynamics of establishing a corporate joint venture are slightly different once again, but the principles around governance and compliance remain the same. A strong governance and compliance culture needs to be put in place and the shareholders must ensure that the JV corporation's board and management consistently apply it.

The risks in a joint venture increase when the following kinds of "red flags" arise:

- The foreign partner is a shell company or has other irregularities in corporate structure or operations.
- There is a question whether the foreign partner or a principal shareholder has a government affiliation.
- The foreign partner does not reveal the identities or principals or others holding a beneficial interest in the entity.
- The foreign partner can contribute only influence with government agencies or officials to the venture.

⁹⁷ It may be appropriate for a company to deviate from its standard contract in certain circumstances. If there is a deviation, records should be kept as to why the standard contract has been changed.

⁹⁸ See AIPN website at <http://www.aipn.org/>.

⁹⁹ See TRACE Survey of Corporate Anti-Bribery Programs 2004 (Washington DC: Trace International, Inc., 2004) at p. 28. It indicates that less than half of all companies surveyed provide training to intermediaries and that it was primarily given at the time of hiring.

- The foreign partner refuses to agree to reasonable financial and other controls in the joint venture.
- The venture is questionable under local laws or rules, including conflict-of-interest rules for officials.
- The foreign partner has a reputation for bypassing normal business channels.
- The foreign partner seeks approval of a significantly excessive operating budget or unusual expenditures.
- The company learns that the foreign partner made a prior improper payment to relevant officials.
- The foreign partner insists on unduly generous financial terms in light of its contributions to the venture.
- The foreign partner insists on having sole control over any host country government approvals.

It is therefore important to conduct effective due diligence processes in selecting partners and entering into joint venture agreements or corporations. There is variance in corporate behavior from one country to another. So depending on the country of origin, some joint venture partners are more at risk than others. This is indicated in the rankings of countries and their companies in the *TI Bribe Payers Index* as shown in Figure 9.¹⁰⁰

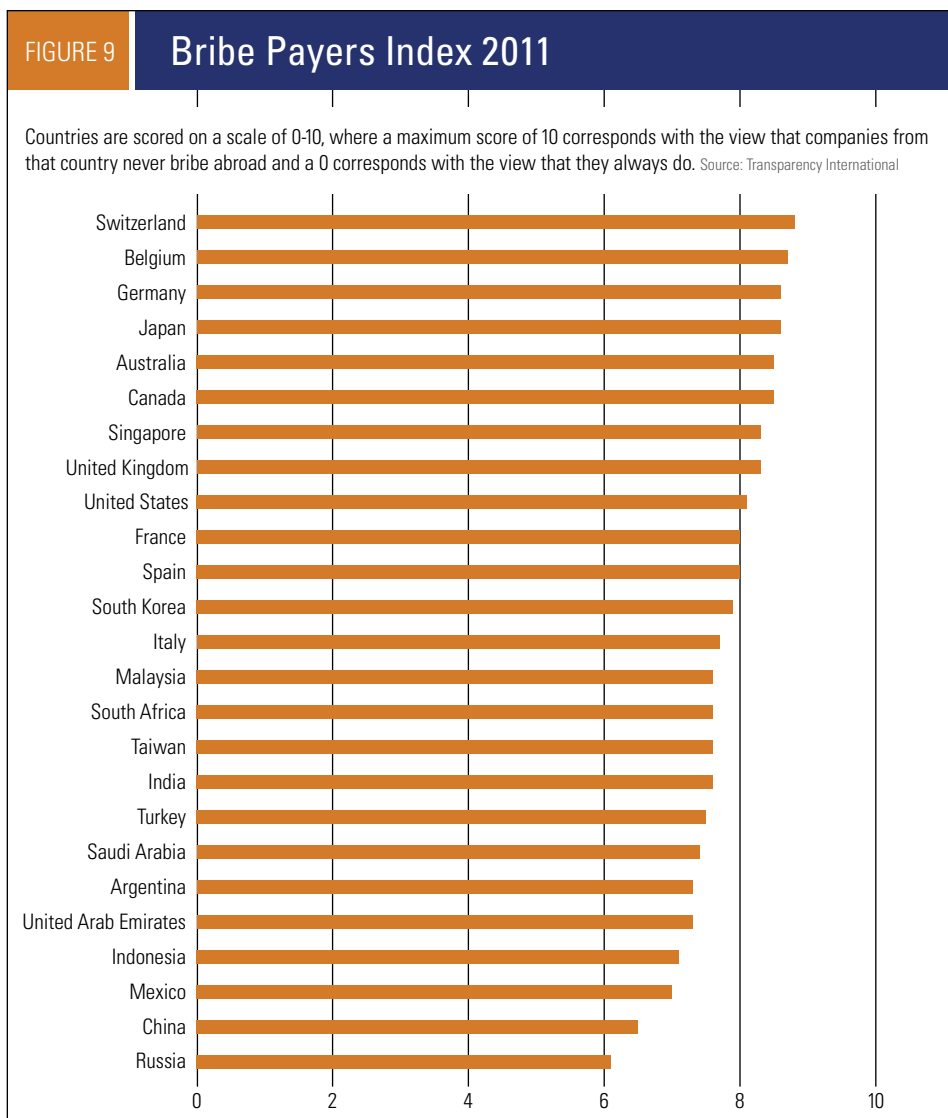
This area continues to increase in importance and potential concerns, as evidenced by the recent revisions in the sections of the AIPN Model International Joint Operating Agreement (JOA) that deal with compliance requirements.¹⁰¹ The section of the model JOA dealing with bribery was significantly revised and expanded to meet the ever increasing developments in this area.

6.8 Mergers & Acquisitions

The area of mergers and acquisitions has seen a need for more in-depth and sophisticated due diligence processes around corruption risks.¹⁰² The DOJ has issued a number of opinions in response to questions arising from M&A activities,¹⁰³ which indicates that regulatory authorities are focusing more attention on public companies and how they conduct their due diligence in M&A transactions where corruption issues lurk. There have been no similar investigative and prosecutorial actions by Canadian and UK authorities around M&A transactions within their jurisdictions. However, they regularly cooperate with U.S. authorities in such matters.

6.8.1 Successor Liability in M&A

Companies acquire liabilities when they merge with or acquire another company, including those arising out of contracts, torts, regulations and statutes. These include both civil and criminal liabilities. As a result of the increased risk in mergers and acquisitions, an acquiring company must conduct extensive pre-closing due diligence specifically



targeted at corruption issues. On the other side of the transaction, target companies need to get their house in order sooner rather than later.

Acquiring companies want to resolve any bribery issues before closing the deal because:

- It avoids successor liability.
- Enforcement agencies are willing to “release” acquiring companies from pre-closing activities.
- It creates a huge incentive for acquiring companies to require disclosure.

There is successor liability in corporate transactions if the acquiring company is not careful in its due diligence, in particular:

- In mergers and acquisitions, most corporate statutes provide that the surviving or resulting corporation will be responsible for the “debts, liabilities and duties” of the constituent entities or targets.
- In asset deals, successor liability does not automatically attach. Common law tests for successor liability in asset purchases include the following factors:
 - » Express assumption of liabilities by the purchasing company;
 - » De facto consolidation or merger;
 - » Purchasing corporation is merely a continuation of the selling corporation; or

» Fraudulent transaction undertaken to avoid liability.

In M&A transactions, the risks for the acquiring company are:

- Criminal and civil liability for pre-closing conduct of the target company.
- Potential shareholders lawsuits.
- Delay in closing the deal.
- Increased legal costs.
- Reduced market “enthusiasm” for the deal.

Similarly, the risks for the target company are:

- The deal could unwind.
- Shareholder lawsuits.
- Reduced purchase price.
- Delay in closing the deal.
- Increased legal costs.

Successor liability does not create liability where none existed before. As an example, the acquisition of a foreign company that was not previously subject to the FCPA’s jurisdiction would not retroactively create FCPA liability for the acquiring company that is subject to the FCPA.

6.8.2 Conducting an M&A Due Diligence

Compliance reviews should be done early in the M&A process. The due diligence should look at both internal and external sources of information. The due diligence required during an M&A transaction should focus on the following factors:

100 Bribe Payers Index Report 2011 available at Transparency International website: www.transparency.org.

101 See 2012 AIPN Model International JOA Available at <http://www.aipn.org/>.

102 For a comprehensive review of what an FCPA M&A due diligence looks like See William B. Jacobson, et al. Caveat Emptor: Why And How FCPA Due Diligence Should Be Conducted Prior To Mergers And Acquisitions, Corporate Counsel Review (Vol XXIX, No. 1, May 2010).

103 No. 01-01 (Joint Venture between a U.S. and a French company). No. 03-01 (Acquisition of a U.S. company with foreign subsidiaries and known FCPA issues). No. 04-02 (Acquisition of U.S. and foreign companies with known FCPA issues).

LOCATION

One of the first items to consider is whether a target company's operations are located in one or more countries that have a high-risk for corruption. This can be done using the CPI published by Transparency International.¹⁰⁴

The places to conduct the due diligence include corporate offices, the geographic locations of the target company's operations (subsidiaries, customers, agents, etc.) and regional treasury hubs.

PERSONNEL

The due diligence should focus on the key decision makers in the target company, including the executive officers, country managers, business development managers, and project managers. This would include background checks and interviews of these personnel. The chief compliance officer or person responsible for the target's compliance and ethics program needs to be interviewed also. Key topics for this interview might include the target company's program to vet third parties, consultants and agents prior to their engagement and the target company's process for coordinating government activities including the approval of any paid travel by government officials for meetings, training or conferences.

The due diligence needs to vet the agents and intermediaries retained by the target company, their activities and contracts. Finally, a review of the target company's government contracts and relationships needs to be made to confirm that there are no illegal transactions.

COMPLIANCE PROGRAM

The due diligence should include a review of the following aspects of the target company's compliance program:

- The written policies and procedures for improper payments.
- Intermediary and local joint venture relationships, contracts, due diligence files, payment histories and applicable local laws. The due diligence, screening and monitoring practices in this area need to be closely reviewed.
- Gifts, hospitality and travel provided to foreign officials.
- Facilitating payments made to foreign officials.
- Political and charitable contributions in high-risk countries.
- Training programs (content, frequency, audience).
- Examine the policy vs. practice for all of the above.

FINANCIAL SYSTEMS

The target company's financial systems need to be reviewed to ensure they have robust internal controls. Included in this review would be:

- Review corporate structure (including foreign affiliates and joint ventures).
- Understand veracity of target's internal audit group and procedures.
- Determine types of data systems (centralized vs. decentralized); i.e., accounting, email and reporting structure.
- Sophistication of bookkeeping methods in all jurisdictions.
- Minutes of the audit committee.

Many small companies that are acquisition targets do not have comprehensive compliance programs or none at all, and they usually do not have anyone assigned to manage these risks; so red flags appear as a matter of course. The appearance of red flags requires the acquiring company to dig deeper in the due diligence process. A due diligence request that is comprehensive and assumes the worst from the start is often met with fierce resistance. A layered approach that asks a series of more detailed questions or makes increasingly detailed requests for information as follow-ups to obvious red flags is usually more effective. Denials of requests for information based on the need to resolve obvious red flags are hard to justify. In some cases it will be appropriate to ask to speak to counsel responsible for the issue or operation generating the red flag (if they exist). Otherwise, clear support and direction from the CEO or Board Chair of the company being acquired will be needed to resolve the issue.

7. Transparency & Public Reporting

7.1 Extractive Industries Transparency Initiative

There has been increasing pressure on companies, especially in the resource sector, to disclose more detailed information on payments they make to governments. This is exemplified by the Extractive Industries Transparency Initiative (EITI), which began with an announcement in October 2002 by Tony Blair, the UK Prime Minister at the time, at the World Summit for Sustainable Development in Johannesburg, South Africa. The goal of the EITI¹⁰⁵ is to mitigate the negative impact of poor economic performance, conflict and poor governance in resource rich developing countries by encouraging greater transparency. It is a coalition of governments, corporations and civil society groups. It works by applying the following criteria:

1. Regular publication of all material oil, gas and mining payments by companies to governments (payments) and all material revenues received by governments from oil, gas and mining companies (revenues) to a wide audience in a publicly accessible, comprehensive and comprehensible manner.
2. Where such audits do not already exist, payments and revenues are the subject of a credible, independent audit, applying international auditing standards.
3. Payments and revenues are reconciled by a credible, independent administrator, applying international auditing standards and with publication of the administrator's opinion regarding that reconciliation including discrepancies, should any be identified.
4. This approach is extended to all companies including state-owned enterprises.
5. Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.
6. A public, financially sustainable work plan for all the above is developed by the host government, with assistance from the international financial institutions where required, including

measurable targets, a timetable for implementation, and an assessment of potential capacity constraints.

The EITI process begins when a country applies to be a candidate under the initiative. It must then go through a validation process to become compliant. Companies operating in such countries are then expected to report their payments under the EITI system. Over 60 of the world's largest oil, gas and mining companies have chosen to become EITI Supporting Companies. There are no disclosure requirements for those companies in countries that are not implementing the EITI.

7.2 UN Global Compact

The UN Global Compact has published "Reporting Guidance on the 10th Principle Against Corruption"¹⁰⁶ that provides guidance to companies on how to report comprehensively on anti-corruption policies and implementation mechanisms. It provides a comprehensive set of 22 reporting elements organized in a matrix. There are 7 reporting elements that provide a basic level of reporting on a company's anti-corruption policies and procedures with an additional 15 elements that allow more extensive reporting. The reporting elements are broken down into three categories:

1. Commitment and Policy: How a company has committed to a zero-tolerance of corruption.
2. Implementation: How a company's commitment has been put into practice through detailed policies and systems.
3. Monitoring: How a company monitors progress and has a continuous process for improvement.

7.3 Dodd-Frank Act

The U.S. Government enacted the Wall Street Reform and Consumer Protection Act (commonly referred to as the Dodd-Frank Act) in 2010 in response to the financial crisis that occurred in 2008/2009. Its stated purpose was to protect the American consumer through significant financial regulatory reform. Buried within its many pages were new requirements on resource companies registered with the SEC to disclose their payments to governments.

Section 1504 of the Act requires resource extraction issuers who are engaged in the commercial development of oil, natural gas or minerals to include any payments to a foreign government, including subnational governments, or the U.S. federal government in their annual reports filed with the SEC. The types of payments that must be disclosed include taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends, infrastructure improvements and other material benefits consistent with guidelines that the Extractive Industries Transparency Initiative determines are part of a commonly recognized revenue stream.

The following information must be disclosed to the SEC in a company's annual report:

- Type and total amount of such payments made for each project.
- Type and total amount of such payments made to each government.

¹⁰⁴ Similar country risk assessments should be given in an M&A due diligence as in a due diligence conducted on a potential agent. A good rule of thumb is to consider countries at the 7.5 score and below on the CPI as high-risk.

¹⁰⁵ See <http://eiti.org>.

¹⁰⁶ "Reporting Guidance on The 10th Principle Against Corruption" TI & Global Compact (2009) at http://www.unglobalcompact.org/Issues/transparency_anticorruption/Anti-corruption_Guidance_Material.html.

- Total amounts of the payments, by category.
- Currency used to make the payments.
- Financial period in which payments were made.
- Business segment of the resource extraction issuer that made the payments.
- The government that received payments, and the country in which government is located.
- The project of the resource extraction issuer to which the payments relate.

The oil and gas industry through its representative organizations¹⁰⁷ objected to the implementation of this section of the Dodd-Frank Act. Their first concern was around the threat to the safety and security of U.S. oil company personnel and assets abroad that would flow from detailed disclosure on a project-by-project basis. The second concern was based on the potential that this requirement would force U.S. companies to breach their existing contracts with host governments and possibly lose them. Many host government contracts have a confidentiality obligation that requires the investing company to obtain the approval of the host government before it can release such financial information. Section 1504 would conflict with that contractual obligation putting the oil company in the untenable position of being forced to materially breach its contract and having it subsequently cancelled by the host government. A third concern was that only companies registered with the SEC would be obligated to provide such disclosures. Many IOCs and all of the NOCs are not registered with the SEC and therefore do not make any disclosures. Those companies hold more than 90% of the world's oil and gas reserves.¹⁰⁸ Therefore, any information made available from such disclosures would have limited impact on the behavior of oil and gas producing countries.

As a result of these concerns, the industry advocated that this part of the Dodd-Frank Act be implemented on a multilateral basis using the agreed global norms reflected in the EITI. The industry did not support the unilateral approach taken by the U.S. government because it was counterproductive, limited in changing corrupt behavior and potentially damaging to those companies that were obligated to make such disclosures.

The SEC ignored the industry's concerns when it issued its final rules¹⁰⁹ implementing Section 1504. The new rules require oil, gas, and mining companies to disclose and report "non de minimus" payments, defined as any payment over \$100,000, which they, a subsidiary, or an entity under their control make to U.S. and/or foreign governments for purposes of the commercial development of oil, natural gas, or minerals. Beginning on September 30, 2013, such issuers must file a new form called Form SD with the SEC no later than 150 days after the end of their fiscal year.

The SEC estimated that nearly 1,100 companies would be affected by this rule and that initial industry-wide compliance costs for implementing the rule would be in the range of \$1 billion with ongoing compliance costs between \$200 million and \$400 million.

The American Petroleum Institute, along with other industry groups and the U.S. Chamber of Commerce, challenged the Securities and Exchange Commission in U.S. federal court in October 2012 with the goal of overturning the Section 1504 rule. They argued that it put U.S. companies at a competitive disadvantage because it "...required them to turn over their playbooks for how they bid and compete." They also argued that the economic analysis behind the rule was deficient, and that the regulators illegally excluded industry-sought provisions that would have provided companies leeway under the mandate. They stated that they backed transparency, but that the SEC mandate was onerous and forced disclosure of commercially sensitive information. This litigation was ongoing at the time this primer was written.

The Dodd-Frank Act had one other provision that has FCPA implications. Section 922 of the Act added a new rule 21F to the Securities Exchange Act that dealt with whistleblower incentives and protection. This new rule rewards "whistleblowers" who provide original information to the SEC about potential violations of SEC regulated laws, including the FCPA. Under this new provision, a whistleblower can recover 10–30% of the settlement reached by the U.S. Government with an FCPA violator.

This has significant implications for companies. It will likely increase the level of U.S. government FCPA investigations since it incentivizes people to report potential violations. But more importantly, it possibly deprives companies of the opportunity to internally review issues prior to disclosure to government. The opportunity to manage such a risk is lost by a company when a whistleblower provides information to the SEC, especially when it is not aware of any potential violation itself.

7.4 EU Directive

European Union (EU) member states as of the writing of this primer were considering proposals within the EU Transparency and Accounting Directives similar to the Dodd-Frank Act that would mandate payment disclosures at the country and project level. If enacted, European Union listed and large unlisted European extractive companies would be required to publicly disclose their tax and revenue payments to governments worldwide on a similar basis as U.S. companies under the Dodd-Frank Act.

8. Corporate Compliance Programs

One of the key components in managing corruption risk and eliminating or reducing liability under anti-bribery laws is to implement an effective corporate compliance program. Regulatory authorities in many jurisdictions have continually emphasized the need for good compliance programs. They pay a lot of attention to these kinds of programs and therefore companies need to do so also.

Anti-bribery compliance programs do not always look the same from one company to another. They should be tailored to a company's business and to the risks associated with that business. They therefore tend to be drafted in a way that

reflects a company's culture and personality.¹¹⁰ But they do address similar issues. There are a number of templates that companies can refer to in building their compliance program.¹¹¹ In addition, companies should pay attention to the guidelines or recommendations issued by regulatory authorities and multilateral organizations, of which there are a number.

8.1 U.S. Guidelines

The DOJ and SEC released new guidance in November 2012.¹¹² The position of the DOJ and SEC on what they expect of corporations has not changed with the issuance of their new Resource Guide to the FCPA, which provides a consolidated and comprehensive collection of useful information. That position is based on the U.S. Sentencing Guidelines and is described in detail in the appendices of their non-prosecution agreements (NPA) and deferred prosecution agreements (DPA). DPAs and NPAs are agreements between the DOJ and SEC and companies to resolve a case short of prosecution, provided the company adheres to a number of conditions in the agreement. Those conditions are essentially the establishment of a corporate compliance program.¹¹³

The DOJ and SEC state that they do not have formulaic requirements regarding compliance programs.¹¹⁴ Instead, they evaluate corporate compliance programs using a common sense and pragmatic approach, while asking three basic questions:

- Is the company's compliance program well designed?
- Is it being applied in good faith?
- Does it work?

The U.S. Sentencing Guidelines include a Guidelines Manual¹¹⁵ that sets out seven principles that companies should address and include in their compliance programs. These principles cover corporate compliance programs that deal with white collar crime in general, and not just anti-bribery laws. The programs should include:

- Written compliance standards and procedures.
- Senior level personnel assigned overall responsibility for compliance.
- Due care not to delegate authority to individuals who the company knew or should have known had propensity for illegal activities.
- Effective communication standards through training programs or disseminating written materials.
- Procedures to achieve compliance, such as a monitoring and auditing system to deter violations, and a process for employees to report violations by others without fear of retribution.

107 See Analysis of Section 1504 of the Wall Street Reform and Consumer Protection Act (Feb. 10, 2011) by the American Petroleum Institute at http://www.api.org/policy-and-issues/policy-items/congress/analysis_of_section_1504.aspx.

108 See BP Statistical Review.

109 SEC Press Release 2012-164, August 22, 2012.

110 See "Anti-Corruption Policies and Measures of the Fortune Global 500" published by UNODC in Cooperation with PricewaterhouseCoopers Austria.

111 See "First to Know: Robust Internal Reporting Programs", TRACE (2004) as an example.

112 A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012). Available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/>.

113 See Jay Martin, Ryan D. McConnell & Charlotte A. Simon, "Plan Now Or Pay Later: The Role Of Compliance In Criminal Cases" University of Houston International Law Journal, Spring 2011 for a good explanation of how DPAs and NPAs work and their impact on corporate compliance programs.

114 A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012) at p. 56.

115 See GUIDELINES MANUAL, § 8B2.1(b) at <http://www.uscc.gov/Guidelines/index.cfm>.

- Appropriate incentives to comply with the compliance program and appropriate disciplinary procedures for a violation.
- After a violation has been detected, appropriate steps to respond, and to prevent similar violations in the future, including making modifications to its compliance program.

The Resource Guide lays out the hallmarks of an effective compliance program that the DOJ and SEC expect from corporations:

- Commitment from Senior Management
- Clearly Articulated Policy Against Corruption
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third-Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

U.S. authorities first laid out their detailed view of good corporate anti-bribery compliance programs in a 2004 FCPA Opinion,¹¹⁶ which they update on an ongoing basis in their DPAs and NPAs.¹¹⁷

The DOJ expects companies to implement and maintain corporate compliance programs that include: (a) a system of internal accounting controls designed to ensure that a company makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws. At a minimum, this should include, but not be limited to, the following elements to the extent they are not already part of the company's existing internal controls, policies, and procedures:

1. The company will develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA and other applicable foreign law counterparts (collectively, the "anti-corruption laws"), which policy shall be memorialized in a written compliance code.
2. The company will ensure that its senior management provides strong, explicit, and visible support and commitment to its corporate policy against violations of the anti-corruption laws and its compliance code.
3. The company will develop and promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and the company's compliance code, and the company will take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery by personnel at all levels of the company. These anti-corruption standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the company in a foreign jurisdiction, including but not limited to, agents

and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners (collectively, "agents and business partners"), to the extent that agents and business partners may be employed under the company's corporate policy. The company shall notify all employees that compliance with the standards and procedures is the duty of individuals at all levels of the company. Such standards and procedures shall include policies governing gifts; hospitality, entertainment, and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion.

4. The company will develop these compliance standards and procedures, including internal controls, ethics, and compliance programs on the basis of a risk assessment addressing the individual circumstances of the company, in particular the foreign bribery risks facing the company, including, but not limited to, its geographical organization, interactions with various types and levels of government officials, industrial sectors of operation, involvement in joint venture arrangements, importance of licenses and permits in the company's operations, degree of governmental oversight and inspection, and volume and importance of goods and personnel clearing through customs and immigration.
5. The company will review its anti-corruption compliance standards and procedures, including internal controls, ethics, and compliance programs, no less than annually, and update them as appropriate, taking into account relevant developments in the field and evolving international and industry standards, and update and adapt them as necessary to ensure their continued effectiveness.
6. The company will assign responsibility to one or more senior corporate executives of the company for the implementation and oversight of the company's anti-corruption policies, standards, and procedures. Such corporate official(s) will have direct reporting obligations to independent monitoring bodies, including internal audit, the company's Board of Directors, or any appropriate committee of the Board of Directors, and will have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.
7. The company will ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts to ensure that they cannot be used for the purpose of foreign bribery or concealing such bribery.
8. The company will implement mechanisms designed to ensure that its anti-corruption policies, standards, and procedures are effectively communicated to all directors, officers, employees, and, where appropriate, agents and business partners. These mechanisms will include:
 - a) periodic training for all directors, officers, and employees, and, where necessary and appropriate, agents and business partners; and
 - b) annual certifications by all such directors, officers, and employees, and, where necessary and appropriate, agents, and business

partners, certifying compliance with the training requirements.

9. The company will maintain, or where necessary establish, an effective system for:
 - a) Providing guidance and advice to directors, officers, employees, and, where appropriate, agents and business partners, on complying with the company's anti-corruption compliance policies, standards, and procedures, including when they need advice on an urgent basis or in any foreign jurisdiction in which the company operates;
 - b) Internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents and business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, agents and business partners, willing to report breaches of the law or professional standards or ethics concerning anti-corruption occurring within the company, suspected criminal conduct, and/or violations of the compliance policies, standards, and procedures regarding the anti-corruption laws for directors, officers, employees, and, where necessary and appropriate, agents and business partners; and
 - c) Responding to such requests and undertaking appropriate action in response to such reports.
10. The company will institute appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws and the company's anti-corruption compliance code, policies, and procedures by the company's directors, officers, and employees. The company will implement procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, ethics, and compliance program and making modifications necessary to ensure the program is effective.
11. To the extent that the use of agents and business partners is permitted at all by the company, it will institute appropriate due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including:
 - a) Properly documented risk-based due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners;
 - b) Informing agents and business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance standards and procedures and other measures for preventing and detecting such bribery; and
 - c) Seeking a reciprocal commitment from agents and business partners.
12. Where necessary and appropriate, the company will include standard provisions in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include:

¹¹⁶ FCPA Review Opinion Procedure Release No. 04-02 (July 12, 2004).

¹¹⁷ An example is *United States of America v Bizjet International Sales and Support, Inc.* U.S. District Court for the Northern District of Oklahoma, Case No. 12 CR 61 CVE which is used as the basis for the sample compliance program in this section.

- a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws;
 - b) rights to conduct audits of the books and records of the agent or business partner to ensure compliance with the foregoing; and
 - c) rights to terminate an agent or business partner as a result of any breach of anti-corruption laws, and regulations or representations and undertakings related to such matters.
13. The company will develop and implement policies and procedures for mergers and acquisitions requiring that the company conduct appropriate risk-based due diligence on potential new business entities, including appropriate FCPA and anti-corruption due diligence by legal, accounting, and compliance personnel. If the company discovers any corrupt payments or inadequate internal controls as part of its due diligence of newly acquired entities or entities merged with the company, it shall report such conduct to the Department of Justice.
14. The company will ensure that the company's policies and procedures regarding the anti-corruption laws apply as quickly as is practicable to newly acquired businesses or entities merged with the company and will promptly:
- a) Train directors, officers, employees, agents, consultants, representatives, distributors, joint venture partners, and relevant employees thereof, who present corruption risk to the company, on the anti-corruption laws and the company's policies and procedures regarding anti-corruption laws.
 - b) Conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable.
15. The company will conduct periodic review and testing of its anti-corruption compliance code, standards, and procedures designed to evaluate and improve their effectiveness in preventing and detecting violations of anti-corruption laws and the company's anti-corruption code, standards and procedures, taking into account relevant developments in the field and evolving international and industry standards.

8.2 UK Guidelines

The Serious Fraud Office in the UK has issued guidance notes¹¹⁸ on how to deal with self-disclosure of corrupt activities discovered by corporations. The SFO also provided its expectations around proper corporate culture and internal procedures. In particular, it states that a corporation should have:

1. A clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporation.
2. A Code of Ethics.
3. Principles that are applicable regardless of local laws or culture.
4. Individual accountability.
5. A policy on gifts and hospitality and facilitating payments.
6. A policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments.

7. A policy concerning political contributions and lobbying activities.
8. Training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporation.
9. Regular checks and auditing in a proportionate manner.
10. A helpline within the corporation, which enables employees to report concerns.
11. A commitment to making it explicit that the anti-bribery code applies to business partners.
12. Appropriate and consistent disciplinary processes.
13. Remedial action if there have been prior violations.

In addition, the UK authorities have issued six principles¹¹⁹ that they consider important in corporate anti-bribery compliance programs:

PRINCIPLE 1: PROPORTIONATE PROCEDURES

A commercial 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

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.

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.

8.3 Canadian Guidelines

Canadian authorities have not issued any official guidance or recommendations on corporate anti-bribery compliance programs. Instead, they have begun to state their expectations of the Canadian corporate world in the settlements they have made with violators of the Canadian foreign bribery law, the CFPOA. The probation order that Niko

Resources signed after its conviction contained an undertaking by Niko to implement a compliance program that was based almost verbatim on a U.S. deferred prosecution agreement (DPA) arising out of a case called U.S. v Panalpina,¹²⁰ which is very similar to the program described in section 8.1 above. This is a classic example of how standards established in one jurisdiction are migrating and being adopted in other jurisdictions.

8.4 OECD Guidelines

The OECD has issued its "Good Practice Guidance on Internal Controls."¹²¹ It is the most universal of guidelines since all members of the OECD have endorsed it. It recognizes that to be effective, such programs should be interconnected with a company's overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programs for preventing and detecting foreign bribery. The Guidance is meant to be flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (SME), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

Effective internal controls, ethics, and compliance programs for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programs.

Companies should consider the following good practices:

1. Strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programs.
2. A clearly articulated and visible corporate policy prohibiting foreign bribery.
3. Compliance with this prohibition and the related internal controls, ethics, and compliance programs is the duty of individuals at all levels of the company.
4. Oversight of ethics and compliance programs regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority.
5. Ethics and compliance programs designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company

118 The Serious Fraud Office's Approach To Dealing With Overseas Corruption. ¶ 22.

119 The UK Bribery Act 2010 – Guidance (Ministry of Justice 2011), p. 20.

120 "Spotlight on Anti-Corruption: Current Issues Day of Dialogue" TI-Canada Rapporteur Reports (19 April 2012) at p. 13.

121 "Good Practice Guidance on Internal Controls, Ethics, and Compliance." Adopted on 18 February 2010 by the OECD Council as an integral part of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009.

FIGURE 10

Integrated Compliance Program



has effective control, including subsidiaries, on the following areas: gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion.

6. Ethics and compliance programs designed to prevent and detect foreign bribery of third parties such as agents and other intermediaries, consultants, representatives, distributors, and business partners such as contractors and suppliers, consortia, and joint venture partners should include the following essential elements:
 - a) Properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
 - a) Informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programs for preventing and detecting such bribery; and
 - a) Seeking a reciprocal commitment from business partners.
7. A system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery.
8. Measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programs regarding foreign bribery, as well as, where appropriate, for subsidiaries.

9. Appropriate measures to encourage and provide positive support for the observance of ethics and compliance programs against foreign bribery, at all levels of the company.
10. Appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programs regarding foreign bribery.
11. Effective measures for:
 - a) Providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programs, including when they need urgent advice on difficult situations in foreign jurisdictions;
 - b) Internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and
 - c) Undertaking appropriate action in response to such reports.
12. Periodic reviews of the ethics and compliance programs, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

8.5 Integrated Compliance Programs

Companies should design compliance programs that conform with the anti-bribery law(s) that apply to them and that, at the same time, match their corporate values and culture. It can do so by using one or a combination of the above guidelines. They all address similar issues and take similar approaches in managing corruption risk. In designing and implementing an anti-bribery compliance program, a company should ensure that all its components are fully integrated and work well together as illustrated in Figure 10.

This integrated approach can also extend to other areas of international compliance law; such as human rights, environmental law, export controls, sanctions, and competition law.

The implementation of a successful anti-bribery compliance program is not a one time event. It needs to be dynamic and evolve as a company's business and markets change. A company must therefore continuously review, update and improve its program if it is going to be effective and accepted as such by investigative authorities.

9. Conclusion

Companies have an increasing challenge to manage the risk of corruption in their international operations. Along with that increase in corruption risk, they face increasing liabilities if they do not manage that risk properly. This primer is designed to provide the knowledge and tools needed to manage that risk and minimize that liability.

Appendix A: Bribery of Foreign Officials Laws Comparison

	U.S. – FCPA	UK – BRIBERY ACT	CANADA – CFPOA
OFFENSES			
Foreign Public Officials	Prohibits the offering, payment, promise to pay (or authorization of such) of a bribe (anything of value) to a foreign official.	Prohibits the offering, promising, or giving of a bribe to foreign public officials.	Prohibits a loan, reward, advantage or benefit of any kind made to a foreign public official.
Private Bribery	Not applicable.	Prohibits the offering, promising, or giving of a bribe to any person in the private sector.	Not applicable.
Receiving Bribe	Not applicable.	Prohibits the requesting, agreeing to receive, or accepting of a bribe.	Not applicable.
DEFENSES			
Local Law	Payment, gift, offer, or promise of anything of value lawful under the written laws and regulations of the relevant foreign country.	Official permitted or required to be influenced by the advantage offered, promised or given, as determined by written law applicable to foreign official.	Provides exception for payments lawful in a foreign state or public international organization. Does not limit defense to written laws.
Reasonable & Bona Fide Expenditures	Reasonable and bona fide expenses that are directly related to product demonstrations, tours of company facilities or "the execution or performance of a contract" with a foreign government or agency.	Genuine hospitality or similar business expenditures that are "reasonable and proportionate" are exempt.	Similar defense as provided in FCPA.
Facilitating Payments	Allows facilitating payments, which are payments to expedite or secure the performance of "routine" governmental actions. Actions involving exercise of discretion are not included.	No exception for "facilitation" payments. Decision to prosecute is based on whether it is in public interest.	Originally allowed "facilitation payments." Now eliminated under CFPOA amendment.
Adequate Procedures	Not applicable.	Available to corporations with adequate procedures in place to prevent bribery. Six principles used: 1. Proportionality 2. Top-Level Commitment 3. Risk Assessment 4. Due Diligence 5. Communication and Training 6. Monitoring and Review.	Not applicable.
JURISDICTION			
Nationality: Individuals	U.S. persons acting anywhere in the world.	Persons having "close connection" with UK. Includes all British citizens and residents of UK.	Persons that are Canadian citizens or a permanent resident of Canada acting anywhere in the world.
Nationality: Corporate	U.S. corporations, corporations that operate within the United States, and corporations listed on U.S. stock exchanges (issuers) acting anywhere in the world.	UK corporations or partnerships or corporate bodies or partnerships that carry on business or part of a business in the UK (irrespective of place of incorporation or formation). UK subsidiary or listing on UK exchange not sufficient by itself for jurisdiction.	Public body, corporation, society, company, firm or partnership that is incorporated or organized in Canada acting anywhere in the world.
Territorial	Non-U.S. persons and corporations whose actions take place in whole or in part within the territory of the United States.	Any act or omission that forms part of the offense takes place in the UK.	A significant portion of the activities constituting the offense must take place in Canada. There must be a "real and substantial link" between the offense and Canada.
OTHER ELEMENTS			
Indirect Liability	Liable for payments made through intermediaries or third parties while "knowing" that all or a portion of the funds will be offered or provided to a foreign official.	Liable if person "associated" with organization that performs services for organization pays bribe. JV member is liable only if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member.	A bribe that is given directly or indirectly to a foreign public official or to any person for the benefit of a foreign public official is an offense.
Accounting	Requires issuers to keep accurate books and records (in reasonable detail) and to establish and maintain a system of internal controls. Breach results in civil offense.	Not in Bribery Act. Found in other UK laws: Companies Act, Theft Act and Proceeds of Crime Act.	Criminal offense to establish or maintain accounts that do not appear in books and records, make transactions that are not recorded, record non-existent expenditures, knowingly use false documents or intentionally destroy books and records.
Enforcement	Civil and criminal enforcement.	Only criminal enforcement.	Only criminal enforcement.
Plea Agreements	Enforcement authorities negotiate corporate settlement agreements, including penalty and disgorgement levels. Federal Rules of Criminal Procedure provide for deferred prosecution agreements (DPA) and non-prosecution agreements (NPA).	Prosecutors can decline cases in public interest. Authority of prosecutors to negotiate plea agreements is subject to affirmation of courts. UK authorized use of DPAs with corporations as an alternative to criminal prosecution.	Provides for settlement of criminal charges through "resolution discussions" to avoid unnecessary litigation.
Limitation Periods	Five-year limitation period under U.S. federal criminal law. Often extended under conspiracy statute or Mutual Legal Assistance Treaty.	No limitation period.	No limitation period.

Appendix A: CONTINUED

U.S. – FCPA

UK – BRIBERY ACT

CANADA – CFPOA

PENALTIES

Criminal Penalties	Individuals: up to \$250,000 per violation (or the greater of twice the gross pecuniary gain or loss) and/or up to five years' imprisonment. Corporations: up to \$2M per violation (or the greater of twice the gross pecuniary gain or loss).	Individuals: Up to 10 years in prison with no limit on amount of fine. Corporations: no limit on amount of fines.	Individuals: Up to 14 years in prison with no limit on amount of fine. Corporations: Penalties are unlimited. Fine is at the discretion of the court.
Civil Penalties	Anti-bribery Violations: up to US \$10,000 per violation and/or disgorgement of ill-gotten gains. Books and Records or Internal Controls Violations: from \$5,000 to \$100,000 (for individuals) or \$50,000 to \$500,000 (for corporations) per violation (or the gross pecuniary gain) and/or disgorgement of ill-gotten gains.	Not applicable.	Not applicable.

Source: Miller and Chevalier Chartered and Tim Martin.

Appendix B: Reference Materials and Sources

International Conventions

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>
- United Nations Convention against Corruption: <http://www.unodc.org/unodc/en/treaties/CAC/index.html>
- Inter-American Convention against Corruption: <http://www.oas.org/juridico/english/FightCur.html>

Anti-Bribery Laws

- U.S. Foreign Corrupt Practices Act: <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>
- UK Bribery Act: <http://www.legislation.gov.uk/ukpga/2010/23>
- Canadian Corruption of: Foreign Public Officials Act: <http://laws.justice.gc.ca/en/acts/C-45.2/index.html>

U.S. Government

- Department of Justice, Fraud Section (FCPA): <http://www.justice.gov/criminal/fraud/fcpa/>
- Securities and Exchange Commission, Division of Enforcement: <http://www.sec.gov/divisions/enforce.shtml>
- Department of Commerce, Trade Compliance Office: <http://tcc.export.gov/Bribery/index.asp>
- Department of Commerce, Good Governance Program: <http://www.ita.doc.gov/goodgovernance/>
- Department of Commerce, Office of General Counsel: <http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives>
- Department of State, Bureau of International Narcotics and Law Enforcement Affairs: <http://www.state.gov/j/inl/c/crime/corr/index.htm>

Canadian Government

- Foreign Affairs and International Trade: <http://www.international.gc.ca/crime/corruption.aspx?lang=eng&view=d>
- Royal Canadian Mounted Police: Anti-Corruption Unit: <http://www.rcmp-grc.gc.ca/ccb-sddc/international-corrup-eng.htm>

UK Government

- Serious Fraud Office: <http://www.sfo.gov.uk/bribery--corruption.aspx>
- Scotland Yard: http://www.met.police.uk/sco/specialist_units/economic_specialist_crime.htm
- London Police: <http://www.cityoflondon.police.uk/CityPolice/Departments/ECD/anticorruptionunit/>

International Organizations

- United Nations, Global Compact: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html>
- UN TRACK (Tools and Resources for Anti-Corruption Knowledge): <http://www.track.unodc.org/Pages/home.aspx>
- OECD: <http://www.oecd.org/daf/anti-bribery/>
- OAS: <http://www.oas.org/juridico/english/FightCur.html>
- World Bank: <http://www1.worldbank.org/publicsector/anticorrupt/>
- World Trade Organisation (WTO): http://www.wto.org/english/tratop_e/gproc_e/gprtan_e.htm
- International Chamber of Commerce (ICC): <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/>
- The World Economic Forum: Partnering Against Corruption Initiative (PACI): <http://www.weforum.org/issues/partnering-against-corruption-initiative/index.html>

Anti-Corruption Organizations

- Transparency International: <http://www.transparency.org/>
- TRACE: <http://www.traceinternational.org/>
- TRAC: <https://tracnumber.com/>
- The FCPA Blog: <http://www.fcpablog.com>

Web-Based Materials

- OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance: <http://www.oecd.org/dataoecd/5/51/44884389.pdf>
- A Resource Guide to the U.S. Foreign Corrupt Practices Act: <http://www.justice.gov/criminal/fraud/fcpa/guidance/>

- TI Guidance to UK Bribery Act: <http://www.transparency.org.uk/our-work/publications/10-publications/95-adequate-procedures-guidance-to-the-uk-bribery-act-2010>
- Transparency International: Business Principles for Countering Bribery: http://www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery/1/
- TRACE: The High Cost of Small Bribes; Due Diligence Guidebook: Doing Business with Intermediaries Internationally; First to Know: Robust Internal Reporting Programs; Global Enforcement Report: https://secure.traceinternational.org/Knowledge/TRACE_Publications.html
- ICC Rules on Combating Corruption: <http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2011/icc-rules-on-combating-corruption/>
- United Nations Global Compact: Guidance on 10th Principle Against Corruption: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html>
- International Association of Oil and Gas Producers (OGP) Guidelines on Reputational Due Diligence: <http://www.ogp.org.uk/publications/management-committee/guidelines-on-reputational-due-diligence/>
- OGP Training Template: Combatting Corruption: <http://www.ogp.org.uk/publications/management-committee/ogp-training-template-combatting-corruption-a-general-presentation/>

Print Books

- Don Zarin. Doing Business Under the Foreign Corrupt Practices Act. New York: Practising Law Institute (Updated Periodically).
- Stuart H. Deming. The Foreign Corrupt Practices Act and the New International Norms. Chicago: ABA Section of International Law, 2012.
- Jeffrey P. Bialos and Gregory Husisian. The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies. New York: Oceana Publications, 1997.
- Francois Vincke and Fritz Heimann (Editors). Fighting Corruption: A Corporate Practices Manual. Paris: ICC Publications, 2003.
- John T. Noonan, Jr. Bribes. New York: Macmillan Publishing Company. 1984.

Over the next ten years,
America's **independent** oil and natural gas producers
will generate almost **\$1 trillion** in government revenue
and help create nearly **one million jobs**.

It's an incredible story.

And we're making sure it's told.



IPAA
INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA

the **national** voice of American oil and natural gas

To learn more, please visit:
WWW.IPAA.ORG





INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA

1201 15th Street, NW, Suite 300
Washington, DC 20005
202.857.4722
<http://www.ipaa.org>

CONTACT:

Tara Lewis
Chairwoman, International Committee, IPAA
tlewis@heycoenergy.com

Frederick Lawrence
Vice President of Economics &
International Affairs and
Staff Liaison to the
International Committee, IPAA
flawrence@ipaa.org