

## FCPA, U.K. Bribery Act and Beyond: Anti-Corruption Considerations for International Public Affairs Professionals

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One of the primary goals of international public affairs is managing overseas risks. Public affairs professionals are on the front lines, guiding their organizations into new markets, forging relationships with foreign governments and regulators, and engaging with local communities. With overseas corporate bribery scandals making headlines in recent years, anti-corruption and compliance issues have received renewed attention from the international business community. Given the potential for significant financial penalties and reputational damage, the costs of violations can be significant for organizations. But transparent and compliant public affairs efforts can help companies avoid these risks.

This resource provides basic information on anti-corruption statutes, gathered from Public Affairs Council executive education programs on the topic, interviews with Council members and materials provided by the U.S. Department of Justice and the U.K. Ministry of Justice. This is *not* intended as legal guidance.

### Anti-Corruption Laws: The Basics

The prevailing anti-corruption laws affecting global businesses are the **Foreign Corrupt Practices Act**, enacted in 1977, and the **U.K. Bribery Act**, enacted in 2010.

A key element of both laws is that they are **extraterritorial**, applying to companies — and executives of those companies — wherever they conduct business. The Bribery Act applies to any company that “is carrying on business in the U.K.,” while the FCPA affects not only U.S. companies and individuals but also any foreign company that has listed securities in the U.S. or is acting on behalf of an entity covered by the FCPA (such as third-party agents, distributors or suppliers).

Consequently, any firm — regardless of its country of registration — with business in the U.K., or which has its securities listed in the U.S., is subject to these laws. Enforcement action may include both financial penalties against the company and criminal action against executives.

Under the FCPA, it is unlawful to “corruptly make, offer, promise or authorize a payment of money or anything of value directly or indirectly to a foreign official to influence or induce misuse of an official position to obtain or retain business.”

The FCPA also requires organizations and individuals to keep accurate records of business expenses.

The U.K. Bribery Act lists four main offenses:

1. Paying a bribe;
2. Receiving a bribe;
3. Bribing a foreign official; and
4. Failing to prevent a bribe by a person associated with the organization in question.

Many legal experts consider the U.K. Bribery Act to be stricter than the FCPA, as it explicitly makes failing to prevent bribery a crime, thus requiring companies to develop and adhere to appropriate protocols.

Other relevant anti-corruption policies include multilateral conventions such as the **United Nations Convention Against Corruption**, the **OECD Convention on Combatting Bribery**, the **OAS Inter-American Convention Against Corruption** and the **Council of Europe Criminal Law Convention**.

These international conventions are often the foundation for anti-corruption laws in other countries, which may involve additional anti-corruption requirements beyond those laid out in the FCPA or the U.K. Bribery Act.

Companies should inquire, through their internal counsel, about local anti-corruption and transparency laws in foreign markets of operation as well as compliance with the FCPA and the U.K. Bribery Act.

## FAQs

### **How are these laws extraterritorial? Do they also apply to employees in overseas markets who are not U.S. or U.K. citizens?**

Both the FCPA and the Bribery Act make it very clear that corruption is bad for business and increases the cost of doing business worldwide. These statutes and other international conventions seek to reduce the level of corruption globally and create a level playing field for international business transactions. While the laws apply to actions anywhere in the world, the FCPA's enforcement mechanisms apply in the U.S., while the Bribery Act's rules apply in the U.K. Citizens in both countries can be held criminally responsible under their country's respective anti-corruption laws, and companies can be held criminally and financially responsible for the actions of their employees, regardless of citizenship.

### **What if the country where the infraction takes place is not a party to international anti-bribery conventions and does not have its own anti-corruption laws?**

The FCPA and the U.K. Bribery Act are still applicable, regardless.

### **What determines “anything of value” in the FCPA?**

“Anything of value” is broadly defined and can include items other than those of direct monetary value (e.g., in-kind gifts and special favors, assistance with children's education, vacations and charitable donations in the name of a government official). There are precedents for prosecutions of FCPA violations involving in-kind favors rather than monetary bribes.

### **What defines “corruptly” and “bribe” as opposed to “hospitality” and “business gifts”?**

Under the FCPA, the word “corruptly” implies that the offer, payment, promise or gift is intended to induce the recipient to misuse his or her official position — for example, to wrongfully direct business to the payer or the payer's client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.

Similarly, under the Bribery Act, “bribe” refers to giving someone an advantage — financial or otherwise — to encourage that person to perform his or her functions or activities improperly or to reward that person for having already done so. The Act also applies to non-government officials.

The theme common to both is the prohibition of making an attempt — usually in secret — to influence decision-making through gifts and offers that go beyond routine business courtesies.

### **Gift giving can be an important cultural aspect of conducting international business. Does this raise compliance concerns?**

Indeed, exchanging gifts can be an important part of business transactions, events, meetings, etc., and some cultures may place greater importance on gifts than others. The U.S. DOJ states that some hallmarks of appropriate gift-giving are instances in which “the gift is given openly and transparently,

properly recorded in the giver's books and records, provided only to reflect esteem or gratitude and permitted under local law.”

While there are no monetary value guidelines for gifts, red flags include lavish gifts exceeding cultural norms or the standards of the business being conducted, high frequency of gifts to the same official(s) and the exchanging of valuable gifts before an important government procurement contract, policy decision, etc.

**How do these statutes treat company-sponsored travel and hospitality for officials? For example, what about educating government officials and other stakeholders on a company's operations through sponsored site visits in order to properly inform policy decisions?**

It is worth reviewing the specific details outlined in guidance materials provided by the U.S. DOJ and the U.K. Ministry of Justice on business hospitality and legal precedent. However, the general principle is that travel and hospitality for officials are permitted if they are bona fide expenditures directly related to the promotion, demonstration or explanation of a company's productions and operations. Furthermore, they must not be extravagant.

As with gifts, lavish hospitality, frequency of travel/hospitality for the same official(s) or payment for travel of family members of officials are considered “red flags.” Clearly defined and maintained internal procedures for the approval and record keeping of travel and hospitality are mentioned in both laws as an important factor in determining enforcement action.

**Is a company held responsible for the actions of consultants and other agents?**

Yes. Under both statutes — and in general under all the aforementioned international conventions — a company can be held liable for the infractions of those formally acting on its behalf. For example, a consultancy that makes a payment to a government official to provide an advantage to its client is committing a violation of both the FCPA and the U.K. Bribery Act; consequently, the client company may be prosecuted.

Due diligence on consultancies and other business partners is extremely important, particularly in markets which are rated highly on corruption indices like the [Transparency International Corruption Perceptions Index](#), widely recognized as an authoritative source.

**What triggers an investigation by the authorities?**

In many cases, investigations are undertaken by authorities based on information provided by whistleblowers within the company. Other sources may include media reports, referrals from other agencies, other companies and, increasingly, a company's self-reporting when it discovers an employee infraction. In the case of the FCPA, the DOJ's guide on compliance specifically states that both the DOJ and the SEC “place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.” The U.K. Ministry of Justice also takes into consideration the “affirmative defense” in bribery cases in which the offending company self-reports and shares information on its internal compliance procedures.

**Given the compliance risks in markets where corruption is prevalent, is public affairs activity and engagement with government officials worth it?**

The extent of your public affairs activity in an international market can depend on a number of factors and is ultimately determined by business need. If your company is operating in a market and government relations is important to success in that market, there is no reason why a well-run, compliant government

affairs program should not be instituted. In addition, avoiding engagement with the government can create a host of other risks to your company's license to operate.

**International growth is critical to my company. What can we do internally to manage international risks?**

Both the DOJ and the Ministry of Justice offer official guidance on effective internal anti-corruption compliance programs. Here are a few key hallmarks of such programs, with an emphasis on international public affairs:

1. A senior-level commitment to a "culture of compliance"
2. A clear code of conduct and company procedures in local languages
3. Continued training and up-to-date resources in accessible formats
4. Internal monitoring procedures and accounting provisions
5. Efforts to assess local corruption risk (Note: the U.S. and U.K. embassies are often excellent in-market resources)
6. Due diligence on third parties
7. Pre-acquisition due diligence on companies acquired
8. Incentives for adhering to compliance procedures and disciplinary measures for violations
9. Confidential channels for internal reporting
10. Periodic testing and review

**Additional Resources**

**DOJ/SEC Guide to the U.S. Foreign Corrupt Practices Act**

<http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

**U.K. Ministry of Justice Bribery Act Guidance**

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

**Transparency International Country Profiles**

<http://www.transparency.org/country>

For more information on Public Affairs Council programs and resources, please contact Jason Jarrell, head of international programs, at [jjarrell@pac.org](mailto:jjarrell@pac.org).