

The Foreign Corrupt Practices Act

Navigating a regulatory minefield





Introduction

In recent times, two parallel trends have combined to increase significantly the risk to businesses of serious damage arising from violations of anti-bribery laws and regulations around the world. The first is the inexorable globalisation of economic and business activity. This has opened up new exposures to a range of regulatory and legal risk, not least the risk of corruption. Emerging economies, into which companies from the UK and other developed countries are making substantial investments, are also countries generally recognised to represent significant challenges in terms of corruption risk. The second trend is the increased propensity for regulators and law enforcement agencies across the globe to investigate corrupt conduct and impose heavy sanctions on transgressors.

UK Directors not only need to be aware of UK legislation, but also legislation across the globe. The key provisions of the new Companies Act ('the Act') relating to Directors' duties come into force in stages over a 15 month period from 1 October 2007. The Act sets out various duties which require Directors, when promoting the success of the company, to have regard to the 'high standards of business conduct'. Whilst it is not yet clear whether this implies a higher standard of conduct than strict legal compliance, this seems an inevitable de minimis position. Legislation already on the statute book makes it a criminal offence to bribe or attempt to bribe members of public bodies in the UK (Prevention of Corruption Acts 1889-1916). More recent legislation, the Anti-terrorism Crime and Security Act 2001, extends this extra-territorially for UK nationals or bodies incorporated under UK law.

Arguably, the most wide-reaching law is the US Foreign Corrupt Practices Act ("FCPA"), originally enacted in 1977. This is robustly enforced by the US Department of Justice ("DoJ") and the US Securities and Exchange Commission ("SEC"). Any UK company with securities listed on a US exchange is subject to the jurisdiction of the FCPA. In addition, non-US listed UK companies may find themselves caught by the FCPA on other grounds.

Furthermore, most countries have legislation outlawing the bribery of government officials in those countries and many have laws that extend to the bribery of government officials elsewhere. In addition, the anti-bribery laws of many countries, including those of the UK, make no distinction between the bribery of public officials and the bribery of officers or employees of private enterprises.

Therefore, while this document focuses in particular on the FCPA, the risks associated with corrupt conduct and the practical approaches to managing such risks are likely to apply to any business, regardless of whether it is subject to the FCPA.

The terms bribery and corruption are often used interchangeably and mean different things to different people. There is a clear distinction between each and a variety of definitions available. For the purposes of this document, anti-bribery is referred to within the context of FCPA and as a subset of wider bribery which is itself a subset of the broader definition of corruption. This is explored in more detail on pages 4 and 5.

The Global costs of Corruption:

**5% of the world economy, i.e.
>US\$1.5 trillion per year**

(World Bank 2003)

**25% of African countries' combined national income -
i.e. \$148bn a year**

(President Obasanjo of Nigeria 2006)

\$4billion p.a. in Iraq

(Guardian 2006)

45% of Sierra Leone poor households' income spent on bribes

(Worldbank 2003)

R1000 bribe for a new water connection in India

(Outlook magazine)

The Foreign Corrupt Practices Act

The FCPA has two key elements. In practical terms, the two almost invariably go hand-in-hand. The FCPA outlaws both:

1. The offer, promise or provision of anything of value to a foreign official, either directly or indirectly, for the purpose of influencing that official so as to obtain or retain business or other advantage (the “anti-bribery provisions”)
2. The failure to:
 - Maintain accurate and detailed books and records
 - Maintain an internal control system to ensure accuracy of the books and records and prevent illegal activity (“the books and records provisions”).

The jurisdiction of the FCPA covers:

- Companies which issue securities registered on a US securities exchange (NYSE, NASDAQ, etc) (“issuers”) including foreign private issuers
- Other US domestic concerns (including individuals, corporations, partnerships, trusts, sole proprietorships, etc)
- Persons (natural or legal) other than issuers and domestic concerns (i.e. non-US individuals and companies) who breach the provisions of the FCPA while in the territory of the US
- Any officer, director, employee or agent of any of the above.

Companies subject to the jurisdiction of the FCPA are vicariously liable for violations perpetrated by officers, directors, employees and third party agents. They are also liable for the books and records violations of any majority owned subsidiary anywhere in the world.

The criminal penalties for breaches of the FCPA can be severe:

- Anti-bribery violations: For companies, a fine of up to US\$2 million per violation. Fines may alternatively be levied up to twice the benefit gained or sought by the corrupt act. For officers, directors, employees and agents, a fine of up to US\$250,000 or up to five years’ imprisonment, or both
- Books and records violations: For companies, a fine of up to US\$25 million. As for anti-bribery violations, fines may alternatively be levied up to twice the benefit gained or sought by the corrupt act. For officers, directors, employees and agents, a fine of up to US\$5 million or up to 20 years’ imprisonment, or both.

Besides the direct legal sanctions, substantial collateral damage is also likely to ensue, including:

- Costs (in the form of legal and advisers’ fees and diversion of management time) of remediation programmes, which will in all probability be a requirement of any settlement with regulators
- Reputational damage
- Potential exclusion from government business, not necessarily limited to the country in which the original corrupt conduct occurred
- Shareholder lawsuits
- Lawsuits brought by disadvantaged competitors.



Who is at risk?

In principle, any company subject to the FCPA is at risk. Given that the FCPA is focused on the corruption of foreign officials, the risk attaches to dealings of whatever kind with government entities and officials, the definition of which is wide ranging and covers, inter alia:

- Ministers of state and civil servants
- Government employees, including doctors, teachers, law enforcement and military personnel
- Employees of any enterprise majority owned or otherwise controlled by the state
- Tax authorities
- Local government officials
- Officials of any political party and candidates for political office
- Judges, prosecutors and other court officials.

Some industry sectors face heightened exposure in this way. These include:

- Oil and gas, mining and other extractive industries
- Energy generation and distribution
- Construction of roads, buildings and infrastructure
- Pharmaceuticals and medical equipment
- Aerospace and defence
- Information technology.

Typical high risk activities

Activities which will generally heighten the risk of FCPA violations include:

- Sales to government and government related entities (see definition above)

- Other dealings with government such as settlement of tax affairs, applications for licences, concessions, planning consent, travel visas, provision of utilities, etc
- Dealings with customs officials relating to the import or export of goods
- Provision of gifts, entertainment, reimbursement of travel expenses, etc to government officials
- Donations to or sponsorship of government related entities, or even charities and not-for-profit organisations where there is a link to a government entity or official
- Lobbying of government on policy, legislation, etc
- Use of intermediaries, such as agents (sales, customs, etc), representatives, business consultants, lobbyists and anyone else interacting with government on the company's behalf
- Entering into acquisitions of, or joint ventures or consortia with, companies involved in any of the above activities.

The risks attached to these activities are further heightened where they take place in countries with a poor record on corruption, of which there are many.

Probably the most comprehensive source of guidance on this point is the annual Corruption Perceptions Index produced by Transparency International, which ranks countries according to perceived levels of corruption. On a scale of 10 (clean) to zero (corrupt), 135 out of 180 countries ranked have a score of 5.0 or less, including all of the major emerging market economies, indicating a high degree of corruption risk.



Mitigating the risk of, or damage from, FCPA violations

There are fundamentally two ways to mitigate the risk of incurring significant damage as a result of FCPA violations. The first is to take all reasonable steps to reduce the risk of such violations occurring in the first place. The second is to ensure that the company responds appropriately to violations, should they occur.

US sentencing guidelines and pronouncements by both the SEC and the DoJ at various times have created a strong link between the two approaches, by indicating that companies are likely to earn credit for having put in place a regime of appropriately designed and (notwithstanding one or more isolated breaches) effectively operated anti-bribery controls. To the extent that a company has not done so (or cannot demonstrate otherwise) at the time of a violation, then this will invariably be a condition of any settlement of charges brought.

In general, factors likely to count in a company's favour include:

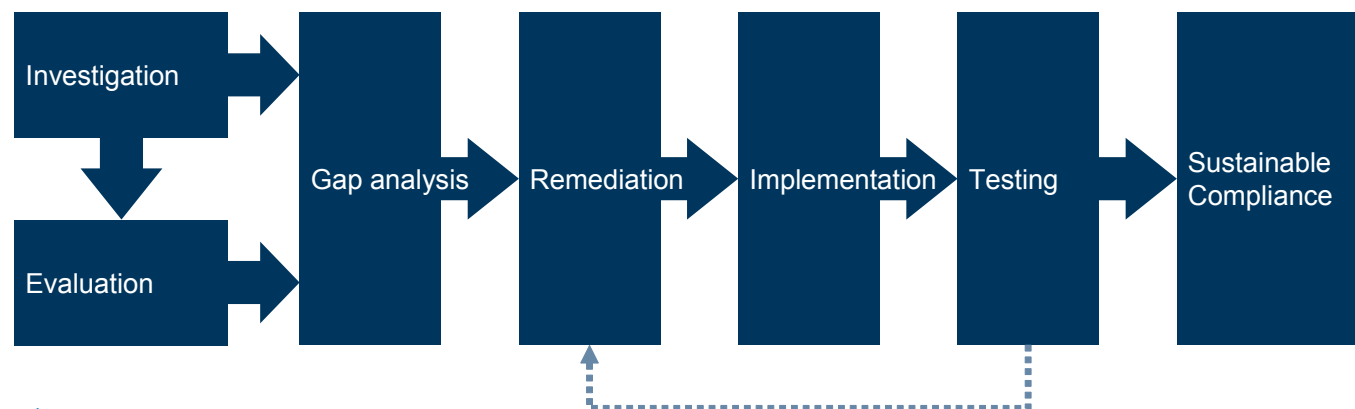
- Timely and voluntary disclosure of violations
- Cooperation with any DoJ/SEC investigation. This will generally involve the company appointing independent legal counsel and forensic accountants to carry out an investigation, the progress and results of which will be periodically reported to the DoJ and the SEC
- The extent and adequacy of pre-existing anti-bribery controls and compliance programmes
- The extent and appropriateness of remedial actions taken by the company to establish or improve anti-bribery controls and compliance programmes.

As part of any settlement, it is also possible that the company will be required to agree to the appointment of a Monitor, whose role is to monitor for a defined period the effectiveness of the company's remediation programme and its ongoing conduct.

A definition of corruption:

There are many ways to define corruption. Robert B. Zoellick, president of the WorldBank, says it is “a cancer that steals from the poor, eats away at governance and moral fibre, and destroys trust.”

How PwC can help



PwC has extensive experience of assisting clients in relation both to managing the risk of corruption and dealing with the consequences of an FCPA violation. We have worked with a wide range of multinational companies who face major challenges in this complex area.

Investigation

Working closely with independent counsel, we bring experience as well as tried and tested methodologies to bear on arguably the most challenging and insidious form of financial crime. To do this we apply:

- Knowledge of corrupt transaction patterns and typical high risk accounts
- Use of advanced technology to identify potentially corrupt transactions
- Other forensic skills such as interviewing, data and document analysis
- Accounting, tax and disclosure expertise to identify and quantify tax and accounting adjustments and disclosures arising from anti-bribery violations
- Experience of supporting legal counsel and dealing with regulators.

Evaluation

Regardless of whether a violation has occurred, it is advisable for companies to take a critical look at their anti-bribery controls. We can assist clients in performing compliance reviews and/or controls

evaluations to ascertain the design and/or operating effectiveness of existing anti-bribery controls and compliance programmes. The result is a gap analysis and recommendations for additions or enhancements to the existing regime, in order to optimise its effectiveness.

Remediation

Having identified the gaps in the existing anti-bribery regime, we can assist clients in remediating those gaps. Areas where we have supported clients include:

- Drafting of codes of conduct, handbooks, policies and guidelines
- Advising on appropriate organisational structures for an effective compliance function
- Advising on other organisational aspects, such as the interaction between different stakeholders (compliance, legal, accounting, HR, internal audit, etc) in the anti-bribery regime
- Reviewing and advising on internal audit effectiveness, including the scope and nature of internal audit compliance testing
- Support remediation project management and monitoring of remediation progress
- Roll-out programmes, supporting local entities in the interpretation and application of central policies and guidelines
- Design and delivery of training programmes
- Design and operation of whistle-blower or ethics hotlines

- Design and operation of other support functions, such as consultation hotlines
- Communication strategy and delivery programmes to reinforce appropriate “tone from the top” messages
- Practical advice and support in how to deal with specific high-risk activities, such as the use of intermediaries
- HR activities, such as sanctions policies, the use of compliance metrics in performance evaluation and reward
- Advice on the detailed design and operation of anti-bribery financial, accounting and operational controls.

Implementation

Implementation is fundamentally the responsibility of central and local management and involves embedding sound anti-bribery practices and procedures into business-as-usual. We can and will, of course, support central and local management in these activities as required.

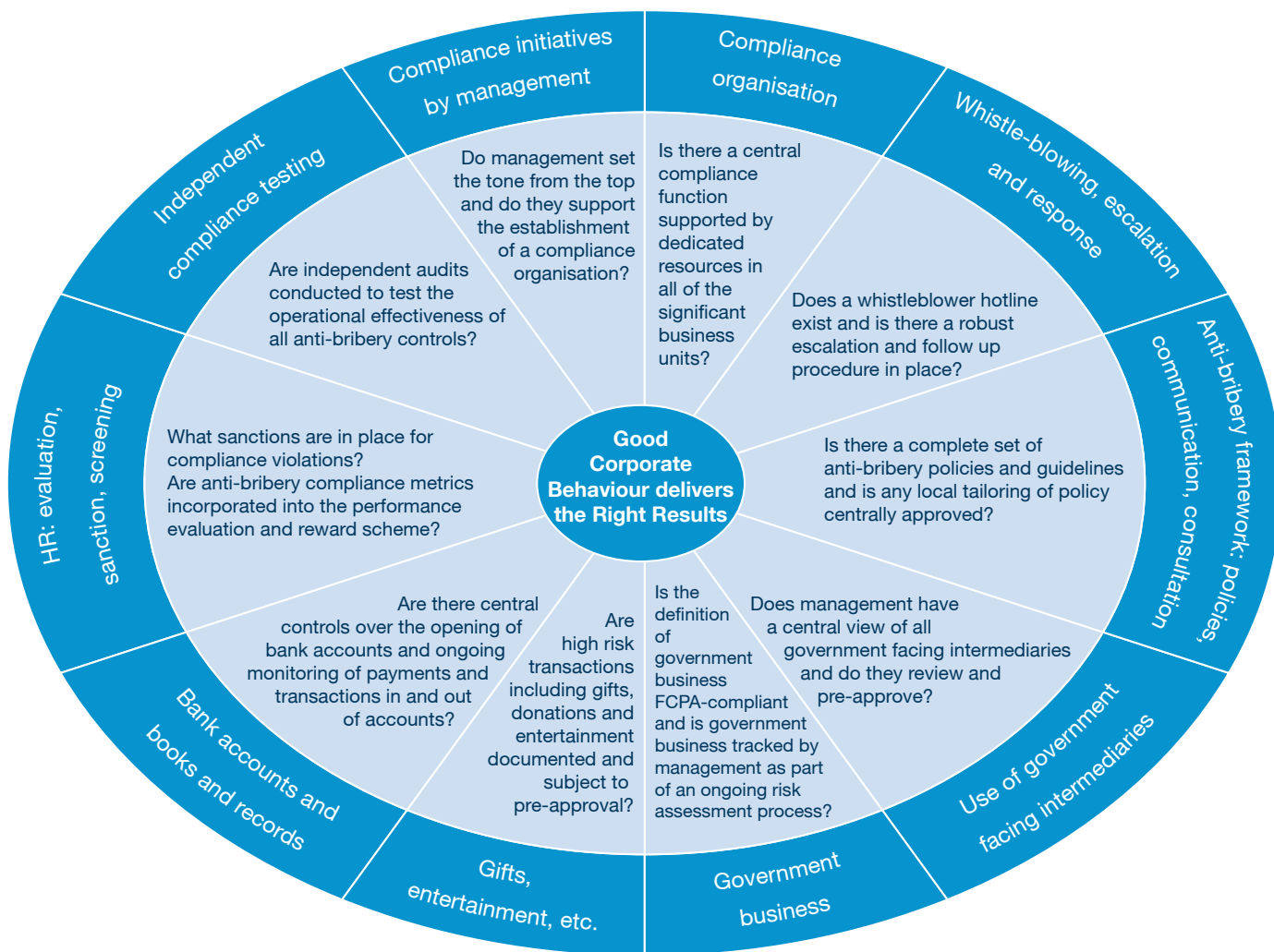
Testing

We can assist in the design and execution of targeted testing of the operation of anti-bribery controls at any stage of the process. Where testing reveals gaps in design or operation, further remediation may be required.

FCPA Anti-bribery framework

10 key areas of focus

The 10 focus areas below represent key elements of an effective anti-bribery regime which are delivered through addressing some tough core questions which lie at the heart of embedding a compliance mindset:



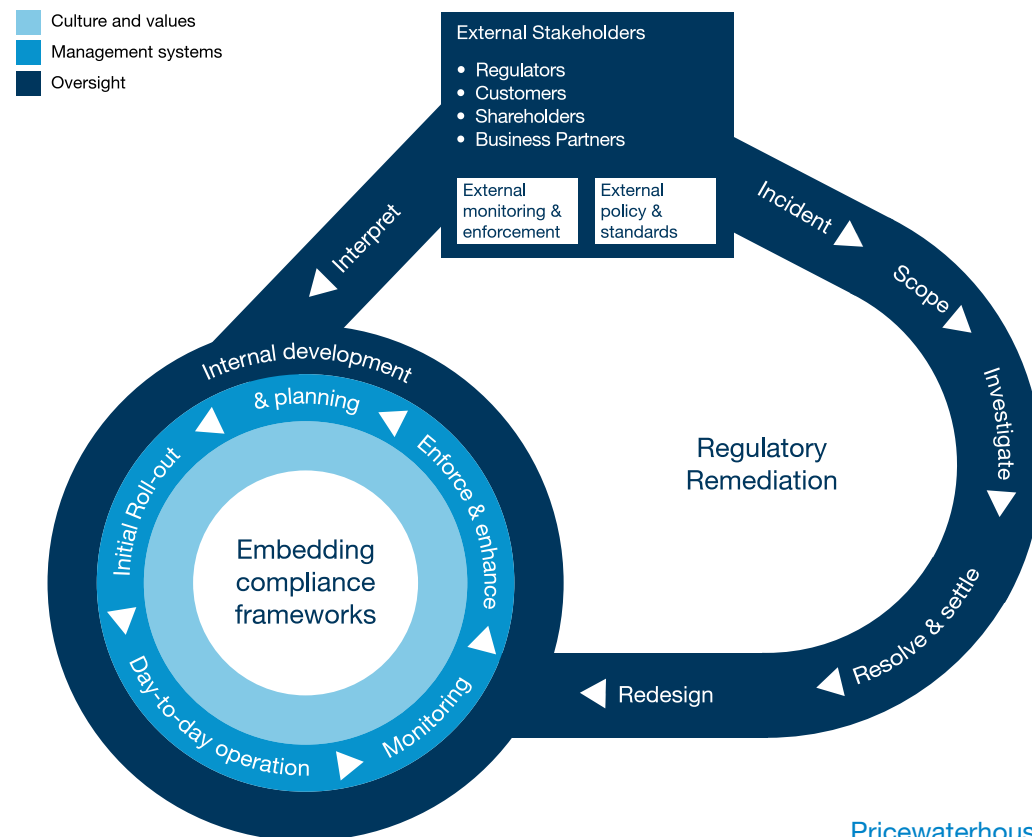
The PwC approach

Our approach to FCPA and other anti-bribery investigation and remediation assignments is shaped by the following principles:

- We take a multidisciplinary approach, drawing the right skills, experience and expertise from our international network to ensure that we put the best that we have to offer at our clients' disposal.
- We believe that we have built a position of trust and good standing with regulators over time. We know the regulators and their approaches and expectations. We cannot and will not shy away from delivering tough messages to clients who we believe are not responding adequately to those expectations.
- Effective remediation is an essential part of any company's response to an anti-bribery violation. The effectiveness of any remediation programme lies in its implementation.
- There is no one-size-fits-all solution. We help clients to understand, interpret and apply general legal and regulatory principles in the context of their business environment and activities. We provide practical, workable recommendations and solutions which meet regulatory requirements while optimising efficiency and cost effectiveness.
- Regulatory compliance is not a project – it's a way of life. It should not be approached as a one-off

exercise, but as something to be embedded in the business and engrained in the corporate DNA. Our aim is to assist clients in achieving sustainable compliance, which means, amongst other things, not being dependent in the long term on external advisers such as us! Accordingly, training and knowledge transfer to our clients is a major part of what we do.

- Regulatory compliance should not be seen as a cost. The best compliance always adds something to the business by increasing efficiency through greater discipline and control over critical business processes. Strong business ethics should be at the forefront of an organisation's culture.



Contact us

For more information on how PwC can assist in tackling the risk or the occurrence of anti-bribery violations and navigate the regulatory minefield, please contact any one of the following:



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Notes

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