

Compliance Basics: An in-house perspective

February 7 2017

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Agenda

1. Introduction and level-setting
2. Elements of an effective Compliance program
3. Key anti-bribery laws
4. Recent case studies
5. Questions

Poll Question #1

- With respect to primary responsibility for Compliance, does your company have:
 - A specialized compliance officer/counsel/manager;
 - A commercial/general legal counsel with additional compliance responsibilities;
 - Someone from another function with additional compliance responsibilities; or
 - None of the above.

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What is "Compliance?"

= Rules of Conduct + Culture + Sustainable Program

Compliance function:

Ownership of "core" policy(ies) & processes

Ownership of Program

anti-bribery; healthcare fraud and abuse; competition law and others (depending on risks & organizational structure: promotional practices; conflicts of interest; export controls; supplier relationships privacy; etc)

Behavioural vs Product Compliance (regulatory or quality).

Effective Compliance Programs:

”Culture, more than rule books, determines how an organization behaves” (Warren Buffet)

When a Program is not Effective...

- Rolls Royce CEO publicly apologizes: <http://www.rolls-royce.com/media/press-releases/yr-2017/17-01-2017-statement.aspx>)

Seven Elements of an Effective Compliance Program (Office of the Inspector General, US - Healthcare)

- Implementing written policies and procedures
- Designating a compliance officer and compliance committee
- Conducting effective training and education
- Developing effective lines of communication
- Conducting internal monitoring and auditing
- Enforcing standards through well-publicized disciplinary guidelines
- Responding promptly to detected problems and undertaking corrective action

<https://oig.hhs.gov/>

Effective Compliance Program (Canadian Competition Bureau*)

- Employee and Senior Management Commitment
- Management Involvement & Support
- Corporate Compliance Policies and Procedures
- Training & Education
- Monitoring, verification, and reporting mechanisms
- Disciplinary procedures and incentives

*http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#appendix_a

Privacy Compliance Program (Canada)

1. Implement a privacy policy that reflects the privacy needs and risks of the organization and consider conducting an effective Privacy Impact Assessment
2. Link each requirement within the policy to a concrete, actionable item – operational processes, controls and/or procedures, translating each policy item into a specific practice that must be executed;
3. Demonstrate how each practice item will actually be implemented;
4. Develop and conduct privacy education and awareness training programs to ensure that all employees understand the policies/practices required, as well as the obligations they impose;
5. Designate a central “go to” person for privacy-related queries within the organization;
6. Verify both employee and organizational execution of privacy policies and operational processes and procedures; and
7. Proactively prepare for a potential privacy breach by establishing a data breach protocol to effectively manage a breach.

[*https://www.ipc.on.ca/wp-content/uploads/Resources/pbd-policy-not-enough.pdf](https://www.ipc.on.ca/wp-content/uploads/Resources/pbd-policy-not-enough.pdf)

”Adequate Procedures” under UK Bribery Act (2010)

- Risk Assessment
- Top level commitment
- Due diligence (eg third party screening; acquisitions)
- Clear, Practical and Accessible Policies and Procedures
- Effective implementation
- Monitoring and review

Poll Question #2

- Does your Company have:
 - A complete and managed Compliance Program;
 - Certain but not all elements (such as whistleblower hotline, anti-bribery policy or training or formal risk assessment process for third parties);
 - No code of conduct or anti-corruption guidelines but programmatic focus on other areas such as privacy, competition law, quality or Environment, Health & Safety; or
 - None of the above

Compliance Programs: Conclusions

Slight differences from jurisdiction to jurisdiction and subject matter to subject matter but, essentially, many similarities. My experience:

- Program must be alive – policies and procedures are worth very little unless well-communicated, understood and enforced
- Program must be appropriately resourced and prioritized
- It must be risk-based, ie tailored, and adaptable
- Leaders must be engaged – Legal department does not "own" Compliance culture
- "Culture eats 'strategy' for breakfast"
- Strong Compliance culture results in swifter responses to concerns and may result in more lenient treatment by authorities
- Legal/Compliance must work cross-functionally → HR, Finance, IT and Communications key partners

Key Laws

Key Legislation

- *The Foreign Corrupt Practices Act of 1977*, 15 U.S.C. § 78dd-1, *et seq.*: Enforcement via the DOJ and SEC
- *UK Bribery Act 2010 (c.23)*: Enforcement by SFO and DPP
- *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34: Enforcement by RCMP (only criminal liability)

Canadian Companies may be subject to FCPA and/or UK Bribery Act

→ “Carrying on business” in the UK: A Canadian company carrying on business in the U.K. could be criminally liable for failing to prevent bribery taking place on its behalf in China.

FCPA vs UKBA

- The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.* ("FCPA") and UK Bribery Act (UKBA)

Similarities /differences	UKBA	FCPA
Extra-territorial	UK residents and legal persons, Corporate offence applies to all companies carrying on business in the UK	US residents and legal persons and US issuers Non-US persons where US connection or affect
Private Sector	Yes	Foreign Public Officials only
Facilitation Payments	Not permitted	Exception for small scale payments
Third Parties	Yes, if "associated persons"	Yes, if knowing disregard
Books and Records	No - but separate false accounting charge	Yes for US companies and US issuers
Compliance Program	Yes, for "adequate procedures" defence	Yes, for mitigation under Criminal Sentencing Guidelines

The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, *et seq.* (“FCPA”)

- 1) Accurate Books and Records (Security Exchange Act) and 2) Prohibition on bribery of foreign public officials
- **Long arm**: applies to all issuers and domestic concerns, wherever there is a sufficient connection to the United States (eg Canadian companies listed on the NYSE or companies with significant operations in the US)
- In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business
- The offer, promise or payment must be made “corruptly”
- This means an intent to influence the govt official wrongfully, to induce the official to misuse his/her official position

”Government Instrumentality” under the FCPA

“[T]he FCPA broadly applies to corrupt payments to “any” officer or employee of a foreign government and to those acting on the foreign government’s behalf; This includes employees of an instrumentality of the state

What is an instrumentality of a foreign govt? DOJ / SEC have long used an analysis of Ownership ... control ... status

Function extent of ownership of the entity degree of control over the entity characterization of the entity and its Employees; Circumstances surrounding entity’s creation; Purpose of the entity’s activities ; Entity’s obligations and privileges under foreign state’s law Exclusive or controlling power vested in the entity to administer its designated functions ;Level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans) ; Entity’s provision of services to the jurisdiction’s residents; Whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government, and The general perception that the entity is performing official or governmental functions

FCPA Guidance (SCE/DOJ): <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171485784>

DOJ Guidance Document: Case Study: Gifts, travel, entertainment

- Company A won a long term K to supply goods / services to the state-owned Electricity Commission. Company A periodically provides training to the Commission's EEs. Senior officials of the Commission inform A that they want to inspect the facilities and ensure that the training is working well.
- *A pays for the airfare, hotel and transportation for the senior officials to travel to Michigan to inspect A's facilities. Because it is a lengthy int'l flight, A agrees to pay for business class airfare, to which its own EEs are entitled for lengthy flights.*
- *The foreign officials visit for several days and perform an appropriate inspection. A takes them to a moderately priced dinner, baseball game and a play.*
- Result: Deemed **appropriate** because the sr officials' review of the execution and performance of the contract is a legitimate business purpose. *Even the provision of business class airfare is reasonable under the circs, as are the meals and entertainment, which are only a small component of the business trip.*

Canadian Anti-Corruption Law

- **OECD Convention on anti-corruption:** “Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” (signed in 1997; came into force Jan 15 1999)
- Canada among signatories: Implementation through *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (CFPOA)
- Canada had been criticized for weak enforcement of CFPOA but this seems to be changing; safe to say enforcement is on the rise: See: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corr-15.aspx?lang=eng#corruption> (eg Niko Resources; Griffiths International) – more on this later
- CFPOA largely harmonized with FCPA: extra-territorial reach but “substantial connect to Canada” required; offence to bribe foreign official. **Note:** no civil liability; criminal charges/liability only
- CFPOA may be applied with related provision of the *Criminal Code* – s. 380 (fraud) or s. 397 (falsification of books and records)
- Good summary of key differences between FCPA, UKBA and CFPOA: <http://www.fasken.com/files/Publication/2d7781e8-6529-487c-b2e3-fb5ab1773094/Presentation/PublicationAttachment/7a26738a-268e-48ca-99da-0934fd6b8f13/2014-Smitheman-Di%20Domenico%20Article%20Analysis%20of%20FCPA%20and%20Candian%20an....pdf>

Cases

Compliance Risk = Business Risk

- Large Fines
- Disruption to business due to internal and external investigations
- Reputational Harm (media; consumers); recall Rolls Royce CEO statement
- Potentially massive internal investigation cost
- Aftermath: consent decrees; monitors; exclusion from government contracts etc

2016 Corruption Index

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

2016 Rank	Country	2016 Score	2015 Score	2014 Score	2013 Score	2012 Score	Region
1	Denmark	90	91	92	91	90	Europe and Central Asia
1	New Zealand	90	88	91	91	90	Asia Pacific
3	Finland	89	90	89	89	90	Europe and Central Asia
4	Sweden	88	89	87	89	88	Europe and Central Asia
5	Switzerland	86	86	86	85	86	Europe and Central Asia
6	Norway	85	87	86	86	85	Europe and Central Asia
7	Singapore	84	85	84	86	87	Asia Pacific
8	Netherlands	83	87	83	83	84	Europe and Central Asia
9	Canada	82	83	81	81	84	Americas
10	Germany	81	81	79	78	79	Europe and Central Asia
10	Luxembourg	81	81	82	80	80	Europe and Central Asia
10	United Kingdom	81	81	78	76	74	Europe and Central Asia
13	Australia	79	79	80	81	85	Asia Pacific
14	Iceland	78	79	79	78	82	Europe and Central Asia

2016 Corruption Index

35	Botswana	60	63	63	64	65	Sub Saharan Africa
35	Saint Lucia	60	N/A	N/A	71	71	Americas
35	Saint Vincent and the Grenadines	60	N/A	67	62	62	Americas
38	Cape Verde	59	55	57	58	60	Sub Saharan Africa
38	Dominica	59	N/A	58	58	58	Americas
38	Lithuania	59	61	58	57	54	Europe and Central Asia
41	Brunei	58	N/A	N/A	60	55	Asia Pacific
41	Costa Rica	58	55	54	53	54	Americas
41	Spain	58	58	60	59	65	Europe and Central Asia
44	Georgia	57	52	52	49	52	Europe and Central Asia
44	Latvia	57	55	55	53	49	Europe and Central Asia
46	Grenada	56	N/A	N/A	N/A	N/A	Americas
47	Cyprus	55	61	63	63	66	Europe and Central Asia
47	Czech Republic	55	56	51	48	49	Europe and Central Asia

2016 Corruption Index

60	Cuba	47	47	46	46	48	Americas
60	Italy	47	44	43	43	42	Europe and Central Asia
62	Sao Tome and Principe	46	42	42	42	42	Sub Saharan Africa
62	Saudi Arabia	46	52	49	46	44	Middle East and North Africa
64	Montenegro	45	44	42	44	41	Europe and Central Asia
64	Oman	45	45	45	47	47	Middle East and North Africa
64	Senegal	45	44	43	41	36	Sub Saharan Africa
64	South Africa	45	44	44	42	43	Sub Saharan Africa
64	Suriname	45	36	36	36	37	Americas
69	Greece	44	46	43	40	36	Europe and Central Asia
70	Bahrain	43	51	49	48	51	Middle East and North Africa
70	Ghana	43	47	48	46	45	Sub Saharan Africa
70	...	43

Largest Fines imposed under FCPA

- 1) Siemens (2008) - \$800M - Germany
- 2) Alstom (2014) – \$772M - France
- 3) KBR/Halliburton (2009) - \$579M - US
- 4) Teva Pharmaceuticals (2016) - \$519M – Israel
- 5) Odebrecht (2016) - ~400-600M (total fines globally: \$3.5B – largest ever) - Brazil

World Bank Group v. Wallace, 2016 SCC 15

“Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. **In order to tackle this global problem, worldwide cooperation is needed.** When international financial organizations, such as the World Bank Group, share information gathered from informants across the world with the law enforcement agencies of member states, they help achieve what neither could do on their own.”

- Clear sign that SCC has global fight against corruption on its radar and that it supports international cooperation
- World Bank investigators had provided material to RCMP suggesting executives of a SNC Lavelin had paid bribes to win a Bank-financed contract in Bangladesh.
- Result: World Bank could share information from their investigation without waiving immunity under Canadian law.
- World Bank barred SNC Lavelin from contracts for 10 years

Canadian Cases

- **SNC Lavalin:**

SNC charged with one count of corruption under paragraph 3(1)(b) of the *Corruption of Foreign Public Officials Act*(CFPOA) and one count of fraud under paragraph 380(1)(a) of the *Criminal Code* related to conduct to win contracts in Libya. Connection to Mohamar Gadhafi and family. Set for trial in September 2018.

Alleged \$47M in paid in bribes over 10 year period in Libya; multitude of criminal investigations ongoing.

- **R. v. Niko Resources Ltd**

Niko, an oil and gas exploration company headquartered in Calgary, was convicted under s. 3 of the CFPOA and fined \$9.5M for bribery committed by its Bangladeshi wholly owned subsidiary in 2005. It was also ordered to implement a Compliance Program.

Niko Bangladesh provided a Toyota Land Cruiser, as well as paid for trips to New York and Calgary, to a foreign public official (a Minister) to secure favourable treatment in dealings with Niko (with respect to a prior gas explosion and to secure deals in the country), violating the CFPOA.

→ RCMP special unit more active and anti-corruption compliance something Canadian companies need to take seriously.

Telia Sonera (Sweden) and Vimpelcom (Netherlands)

- \$1.4B Settlement Offer from DOJ and Dutch authorities to Telia (Swedish-based Telco)
- Investigation began in 2014 relating to conduct occurred in 2007, including bribes to daughter of Uzbekistan's President, Gulvana Karimova
- Telia has stated it acted in a "wrongful way" in its entry into the Uzbek market, but that the settlement proposal is "high"
- Connection to Vimpelcom (Dutch Telco) case (who paid a total of \$795M to settle charges for bribery of the daughter of of Uzbekistan's President); 6th highest enforcement under FCPA (230M fine and 197M disgorgement)
- <http://www.fcpablog.com/blog/2016/9/15/telia-receives-14-billion-settlement-offer-from-us-dutch-aut.html>
- <http://www.fcpablog.com/blog/2016/2/18/vimpelcom-reaches-795-million-resolution-with-us-dutch-autho.html>

Johnson Controls Inc.

Declination according to "Pilot Program"

- Chinese subsidiary paid bribes to win business and for personal enrichment
- Bribes over \$4M to government-owned shipyards
- Chinese subsidiary operated with little oversight of Danish HQ for JC's global Marine business
- Use of sham vendors, low amounts to bypass JC's third party controls

\$14M in disgorgement and fines for bribery of Chinese public officials

Declination letter as part of the "DOJ Pilot Program" (June 21 2016) to close inquiry related to FCPA "books and records" offences based on JC's:

- voluntary self-disclosure
- thorough investigation undertaken by the Company;
- the Company's full cooperation in this matter and its agreement to continue to cooperate in any ongoing investigations of individuals;
- Enhancement of compliance program and its internal accounting controls; the Company's full remediation (including separating from the Company all 16 employees found to be involved in the misconduct, - See more at: <http://www.fcpablog.com/blog/2016/7/12/johnson-controls-pays-sec-14-million-to-settle-china-bribe-c.html#sthash.xLXDwkk7.dpuf>)
- <http://www.fcpablog.com/blog/2016/7/12/johnson-controls-pays-sec-14-million-to-settle-china-bribe-c.html>

Teva Pharmaceuticals ([United States v. Teva Pharmaceutical Industries Ltd.](#), S.D. Fla., No. 1:16-cr-20968, 12/22/16):

- 4th largest fine ever under FCPA: Total of \$519M in fines: \$283 million in a criminal penalty to the DOJ, and \$236 million to resolve a parallel investigation by SEC
- Teva, the world's biggest maker of generic medicines, admitted to making corrupt payments to public officials and doctors, including an unidentified high-ranking Russian government official
- Teva entered into a "deferred prosecution agreement" under, additionally to the fine, the following conditions:

Teva will continue to cooperate with the department's investigation, enhance its compliance program, implement rigorous internal controls ; and retain an independent corporate compliance monitor for a term of three years

<https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>

Takeaways

- Recent cases show that effective Compliance Programs key in protecting companies from legal compliance and reputational risk
- Programs not only key for anti-bribery compliance but also export controls, competition law, privacy and others (EH&S, quality etc)
- Third parties and operations in high-risk countries pose highest risk
- Enforcement not letting up; more countries more active; more international cooperation (see *Wallace* decision)
- Risks stem from national but also foreign laws with extra-territorial reach, especially for multinationals → Canadian companies may be subject to FCPA, UKBA and other bribery laws
- Compliance risk = business risks (eg exclusion from government contracts – Canada’s integrity framework, CFPOA violations in-scope: <https://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html>)
- Canada, Sweden, US, Germany etc all rank high (low-risk) but doesn't mean nationals of those countries won't engage in high-risk behaviour

Questions?

Thank you!

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