

Navigating Privilege Considerations in Implementing Effective Corporate Compliance Programs

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Corporate Compliance Programs Can Serve a Host of Purposes

A company's industry, region, ownership structure, and applicable laws may require compliance with:

- State anti-bribery laws regarding any public official, such as Tex. Penal Code Chapter 36
- Federal anticorruption laws prohibiting bribery of foreign officials, such as the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, et seq.,
- Specifically regulated industries (healthcare, oil & gas, financial services, etc.)

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Anti-Bribery Under Chapter 36

- Texas Penal Code Chapter 36 prohibits intentionally or knowingly offering, conferring, or agreeing to confer on another, or soliciting, accepting, or agreeing to accept any benefit as consideration for a violation of a public servant's legal duty or a public servant's decision, opinion, recommendation, vote, or any other exercise of discretion.
- "Public servant" is defined in Penal Code Section 1.07 to include:
 - Government employees, officers, or agents
 - Jurors, arbitrators, attorneys when participating in a governmental function
 - Candidates for office
 - A person who is performing a governmental function under a claim of right although he is not legally qualified to do so

Anti-Bribery Under the FCPA

The FCPA makes it unlawful:

- To offer, pay, promise to pay, or authorize the payment of;
- Money or anything of value;
- To any person;
- While knowing that all or a portion of it will be offered (etc.) to a foreign official;
 - to influence an official act,
 - induce to do or omit to do any act in violation of lawful duty,
 - to secure an improper advantage, or
 - to use influence with the government to affect or influence any act or decision of the government;
- To obtain, retain, or direct business to any person;
- With corrupt intent.

Examples of “Value” from Past Enforcement Actions

- Cash
- Travel and Vacations
 - Incentive trips, “Training” trips (to Europe, Olympics, Super Bowl, etc.)
- Gifts
 - Jewelry, watches, smart phones, tablets, cars, points and bonus programs to redeem gifts, Christmas baskets, phone plans, car leases, gift cards, etc.
- Exclusive Distributorship Agreements
- Charitable Donations
- Consulting Agreements
- Employment for friends and relatives of government officials

The FCPA’s 2 Components

- Anti-Bribery
 - *Procurement Example: A U.S. company was trying to enter into a contract to sell product to a foreign government-owned company. The head of the procurement department told them he would give them the contract if they gave him 1% of every transaction. He bragged that his nickname was Mr. One Percent.*
 - *Permit Example: Walmart entered into a \$282 million settlement with SEC and DOJ over allegations that it had weak anti-corruption internal controls in Brazil, China, India, and Mexico that failed to catch that the company employed third-party intermediaries who made payments to foreign government officials in order to obtain construction permits.*
- Books & Records violations
 - Applies to companies that have to file reports with the SEC

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