

Anticorruption Legislation

What SH&E Professionals Need to Know

By Norm Keith and Ryan Campbell

The corruption of government officials is as old as government regulation and enforcement itself. There is a growing legislative response to this problem globally. Government safety and health inspectors are not immune from pressure and corruption. As the world continues to flatten, globalization compels regional and national firms to compete on an international scale. Cost pressures

from emerging economies and industries are enormous.

Methods to gain business are not always limited to ethical and lawful means. Pressures to engage in manufacturing, transportation, construction, mining and other commercial activities abroad are growing. North American businesses must comply with the legislative and regimes of numerous foreign governments, but foreign regimes are occasionally corrupt. The cultures, values and practices of the host country may vary from legislation and regulatory integrity at home.

Safety and health standards in foreign jurisdictions vary tremendously. Government officials are not always honest or ethical. Difficulties may arise for international firms when local business practices allow, encourage or accept payments to government officials. Government officials or offices may expedite processes, or circumvent safety and health legislative requirements, in exchange for bribes and benefits. To remain competitive with local organizations, international and multinational firms may be tempted to adopt similar strategies, values and practices to ensure their success. This raises serious challenges for international corporations and their SH&E and ethical values.

The law also has responded to the challenges of foreign corruption. Several developed countries, including the U.S., Canada and the U.K., have passed legislation to prohibit corrupt activity domestically and abroad. The scope of anticorruption legislation across these jurisdictions is relatively uniform, as will be discussed, but the jurisdiction asserted by each statutory regime varies.

These laws apply to SH&E professionals and these laws create significant penalties for those who disobey.

OECD Antibribery Convention

International corruption has been addressed by an international convention. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted by the Negotiating Conference on Nov. 21, 1997, in response to the Revised Recommendation on Combating Bribery in International Business Transactions, which itself was adopted by resolution C(97)123/FINAL of the Council of the Organization for Economic Cooperation and Development (OECD) on May 23, 1997. The preamble to the convention calls for:

[E]ffective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt crimi-

IN BRIEF

- Government corruption is a historical problem and has been the focus of legislation around the world.
- Safety and health standards in foreign jurisdictions vary tremendously. Difficulties may arise for international firms when local business practices allow, encourage or accept payments to government officials.
- From a safety perspective, corruption might manifest itself in the false reporting of workplace injuries, the bribery of compliance inspectors or acts taken to dissuade officials from prosecuting alleged offenses.

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nalization of such bribery in an effective and coordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country.

To accomplish these goals, Article 1 of the OECD convention calls on the parties to:

[T]ake such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

[T]ake any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offense. Attempt and conspiracy to bribe a foreign public official shall be criminal

offenses to the same extent as attempt and conspiracy to bribe a public official of that party.

Article 1 of the convention defines the term *foreign public official* broadly to mean “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.”

In addition, Articles 3 and 4 encourage parties to punish bribery offenses “by effective, proportionate and dissuasive criminal penalties” to impose “additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official” to “take measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory,” and to take measures necessary to establish jurisdiction to prosecute its nationals for offenses committed abroad in respect of bribery of a foreign public official.

In the interpretation document, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Con-

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ference on Nov. 21, 1997, OECD recognizes that certain defenses should be available to bribery and corruption offenses “if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law” (§8), or when small “facilitation” payments are legally paid to induce public officials to perform their functions, such as issuing licenses or permits.

United States

The U.S. has been a global leader in anticorruption laws. The U.S. Foreign Corrupt Practices Act (FCPA) was signed into law by President Jimmy Carter on Dec. 19, 1977, and 2012 marks its 35th anniversary. This legislation was in response to investigations conducted by the U.S. Securities and Exchange Commission (SEC) in the 1970s, which found that more than 400 U.S. companies had made questionable or illegal payments in excess of \$300 million, in aggregate, to foreign government offi-

cial, politicians and political parties. The types of payments detected ranged from outright bribery to “facilitating payments” to ensure that certain duties or functions were executed in a timely manner.

Originally, FCPA applied only to “issuers”—corporations that publicly issued securities registered in the U.S., or who were required to file periodic reports with the SEC—and to “domestic concerns,” including U.S. citizens and businesses. However, legislative amendments resulting from the International Anti-Bribery and Fair Competition Act of 1998 broadened the legislation’s scope, making it applicable to foreign companies and foreign nationals, and adopting the convention’s provisions. As a result, FCPA now applies, at least conceivably, to all persons and entities over whom the U.S. government can claim jurisdiction. Specifically, it may apply to any individual, firm, officer, director, employee, agent or stockholder acting on behalf of an organization.

Table 1
Anticorruption Legislation Across Jurisdictions

Prohibited conduct	Affirmative defenses	Maximum penalties
United States		
Any act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official, foreign political party, or any person for the purposes of influencing a foreign official or political party in its official capacity, inducing a foreign official or political party to do or omit to do any act in violation of its lawful duty, inducing a foreign official or political party to use its influence with a foreign government to affect or influence any act or decision of such government, or secure an improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.	<ol style="list-style-type: none"> 1) The payment, gift, offer, or promise of anything of value that was made was lawful under the written laws and regulations of the foreign country. 2) The payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure incurred by or on behalf of a foreign official or party and was directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof. 	<p>Corporations: \$25 million per count.</p> <p>Individuals: \$5 million per count, up to 20 years imprisonment, or both.</p>
Canada		
Giving a benefit of any kind to a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties or functions, or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.	<ol style="list-style-type: none"> 1) The payment is made to expedite or secure the performance of an act of a routine nature that is part of the official's duties or functions. 2) The benefit is permitted or required under the written laws and regulations of the foreign country. 3) The benefit was to compensate for reasonable expenses incurred by the foreign public official, and directly related to the promotion, demonstration or explanation of the person's products and services, or the execution or performance of a contract between the person and the foreign state. 	<p>Corporations: No limit.</p> <p>Individuals: No limit, 5 years imprisonment, or both.</p>
United Kingdom		
Bribing another person; accepting a bribe; failure of commercial organizations to prevent bribery.	<ol style="list-style-type: none"> 1) The conduct is permitted under the written law applicable to the country or territory concerned. 2) The conduct was necessary for the proper exercise of any function of an intelligence service, or the proper exercise of any function of the armed forces when engaged in active service. 	<p>Corporations: No limit.</p> <p>Individuals: No limit, 10 years imprisonment, or both.</p>

FCPA prohibits these business entities from making “use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give or authorization of the giving of anything of value” to any foreign official, any foreign political party or any person for the purposes of:

- influencing a foreign official or political party in its official capacity;
- inducing a foreign official or political party to do or omit to do any act in violation of its lawful duty;
- inducing a foreign official or political party to use its influence with a foreign government to affect or influence any act or decision of such government;
- securing an improper advantage in order to assist the entity “in obtaining or retaining business for or with, or directing business to, any person” [§78dd-1(a), 78dd-2(a), 78dd-3(a)].

Like the convention, FCPA defines the term *foreign official* broadly:

The term foreign official means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. [§78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A)]

Notwithstanding the general prohibitions enumerated in FCPA, a few narrow exceptions should be noted. These include situations where a facilitating or expediting payment is made to a foreign official or political party in order to “expedite or secure the performance of a routine governmental action by that individual” [§ 78dd-1(b), 78dd-2(b), 78dd-3(b)]; the payment is lawful under the written laws and regulations of the foreign country [§78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1)]; or the payment was a reasonable and bona fide expenditure incurred by or on behalf of the foreign official or party and was directly related to the promotion, demonstration or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof [§78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2)].

For the purposes of interpreting these exceptions, the term *routine governmental action* has been defined as follows:

(A) The term routine governmental action means only an action which is ordinarily and commonly performed by a foreign official in: (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods

across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

(B) The term routine governmental action does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business or to continue business with a particular party. [§78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4)]

Contravention of FCPA has significant penalties. In criminal proceedings, corporations may be subject to maximum penalties of \$2 million per count, while individuals face maximum fines of \$100,000 per count and imprisonment for up to 5 years. In civil proceedings, consideration is given to the seriousness of the offense, with sentences ranging from \$50,000 to \$500,000 for corporations, and from \$5,000 to \$100,000 for individuals. FCPA also provides for increased penalties for wilful violations, including wilfully and knowingly making a false or misleading statement; in such cases, corporations face a maximum penalty of \$25 million per count, while individuals may be fined up to \$5 million per count, or imprisoned for up to 20 years or both.

Corporate directors, officers, employees, agents or stockholders should take particular note of the sentencing provisions for criminal proceedings. Unlike other statutory regimes that may allow the corporation to pay a criminal fine on behalf of its agents, FCPA explicitly prohibits such conduct, directly or indirectly [§78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3)].

One of the largest prosecutions in FCPA history concluded Dec. 15, 2008, when Siemens AG and three of its subsidiaries plead guilty to FCPA violations and agreed to pay \$450 million in combined criminal fines in the U.S., with global penalties amounting to \$1.6 billion. As reported by the U.S. Department of Justice on Dec. 15, 2008, court documents indicate that Siemens AG engaged in various corrupt practices from the mid-1990s until approximately May 2007, including corrupt payments to foreign officials exceeding \$1.4 billion, paying nearly \$1.8 million in kickbacks to the Iraqi government, more than \$31 million in corrupt payments to various Argentine officials, nearly \$19 million in payments to various Venezuelan officials and more than \$5 million in corrupt payments to Bangladeshi officials. The company had disclosed these violations after initiating an internal FCPA investigation.

Currently, the U.S. Department of Justice is investigating News Corp. for potential FCPA violations arising from the alleged bribery of British policy officers in relation to the *News of the World* phone hacking scandal in July 2011.

Given the extensive reach of this legislation, and the severity of the penalties for noncompliance, the



FCPA now applies, at least conceivably, to all persons and entities over whom the U.S. government can claim jurisdiction. Specifically, it may apply to any individual, firm, officer, director, employee, agent or stockholder acting on behalf of an organization.

U.S. government felt that companies over which it had jurisdiction were put at a competitive disadvantage on the world stage. Consequently, the government encouraged OECD to pass the Convention on Combating Bribery of Foreign Officials in International Business Transactions in 1997, and encouraged member-states to ratify this convention domestically. It was ratified by the U.S. on Dec. 8, 1998.

Canada

Canada was an early adopter of the OECD Anti-bribery Convention; it passed the Corruption of Foreign Public Officials Act (CFPOA) in 1998 and ratified the convention on Dec. 17, 1999. However, this was more than 20 years after the U.S. enacted the FCPA. Both the CFPOA and the convention came into force in Canada on Feb. 14, 1999. Significantly shorter and narrower than its U.S. counterpart, the Canadian legislation does not purport to apply to foreign companies or foreign nationals; to be prosecuted under CFPOA, the offender's actions must have a "real and substantial" link to Canada. This requires a portion of the illegal activity to have been committed in Canada or for the illegal activity to have a real impact on Canadians.

Subsection 3(1) of CFPOA creates an offense for directly or indirectly giving a benefit of any kind to a foreign public official:

[A]s consideration for an act or omission by the official in connection with the performance of the official's duties or functions, or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

In the Canadian legislation, *foreign public official* is defined as:

(a) a person who holds a legislative, administrative or judicial position of a foreign state; (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and (c) 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." (§2)

Similar to FCPA and as encouraged by the convention, the CFPOA contains defenses if: the payment is made to expedite or secure the performance of an act of a routine nature that is part of the foreign public official's duties or functions (§4); the benefit is permitted or required under the written laws and regulations of the foreign country with whom the foreign official is affiliated [§3(3)(a)]; or if the benefit was to compensate for reasonable expenses incurred in good faith by the foreign

public official and is directly related to "the promotion, demonstration or explanation of the person's products and services, or the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions" [§3(3)(b)].

To determine whether conduct can be classified as an *act of a routine nature*, the term is defined at subsection 3(4) of the CFPOA:

(a) the issuance of a permit, license or other document to qualify a person to do business; (b) the processing of official documents, such as visas and work permits; (c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and (d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

For greater certainty, subsection 3(5) of CFPOA states:

[A]n "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.

While the FCPA can be enforced through both criminal and civil sanctions, CFPOA can only be enforced by way of a criminal prosecution. On conviction, an individual may face up to 5 years' imprisonment. Fines for both individuals and corporations are left to the court's discretion, with no legal limit.

Since passing the act, Canada has been criticized by OECD for its general lack of prosecution of bribery offenses and, in particular, for weak penalties, insufficient prosecutors and law enforcement officials assigned to monitor compliance, and an unwillingness to prosecute bribery offenses unless a "real and substantial link" to Canadian territory can be established (OECD, 2011b).

In addition, only two convictions pursuant to CFPOA have occurred to date. The first involved Alberta-based Hydro-Kleen Group Inc., which, in 2005, pleaded guilty to two counts of bribing an U.S. immigration official at Calgary International Airport. The cause for OECD's criticism in this case is the amount of the penalty compared to the amount of the bribe: \$25,000 penalty compared to approximately \$30,000 in bribes—which OECD believes is too low to be effective, proportionate and dissuasive.

The second conviction was secured on a guilty plea by Niko Resources Inc. on July 24, 2011, after allegations concerning the provision of a vehicle for the personal use of the then-Bangladeshi energy minister, valued at nearly \$200,000, and payments

covering travel costs of the same individual to go to Calgary, Alberta, Chicago, IL, and New York, NY, valued at \$5,000. The company was fined \$9.499 million and placed under a probation order, which puts the company under court supervision for 3 years to ensure that audits are completed to examine the company's compliance with CFPOA (Foreign Affairs and International Trade Canada, 2011).

A third prosecution involving allegations against Nazir Karigar of Cryptometrics, a Canadian high-tech firm, for allegedly making payments to an Indian government official to facilitate the execution of a multimillion dollar contract for the supply of a security system, is currently before Canadian courts.

United Kingdom

The U.K. has recently modernized its anticorruption legislation with the passing of the Bribery Act of 2010 on April 8, 2010. This legislation came into force July 1, 2011, replacing antiquated provisions contained in the Public Bodies Corrupt Practices Act (1889), the Prevention of Corruption Act (1906) and the Prevention of Corruption Act (1916), and supplementing the ratification of the convention by the U.K. on Dec. 14, 1998. Similar to FCPA, the Bribery Act attempts to extend the jurisdiction of the U.K. parliament far beyond the geographic borders of the U.K. In particular, prosecutions against commercial organizations for failure to prevent bribery can be commenced in the country, regardless of whether the crime actually took place within its borders [§12(5), 12(6)].

The Bribery Act addresses general bribery offenses (§1, 2), as well as bribery of foreign public officials (§6). As to the former, the act prohibits both the giving and the receiving of a financial or other advantage to induce a person to improperly perform a function or activity, or to reward a person for improperly performing a function or activity. The latter branch of the Bribery Act prohibits the giving of financial or other advantage or otherwise unlawfully influencing a foreign public official with the intention of obtaining or retaining business or an advantage in the conduct of business (§6).

Like the corruption and bribery legislation in other jurisdictions, the act contains its own definition of the term *foreign public official*. In the U.K., the term means:

[A]n individual who (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the U.K. (or any subdivision of such a country or territory); (b) exercises a public function (i) for or on behalf of a country or territory outside the U.K. (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or is an official or agent of a public international organisation. [§6(5)]

Also similar to FCPA, CFPOA and the convention, the Bribery Act provides a defense for conduct permitted under the written law applicable to the

country or territory concerned [§6(3)(b)]. Moreover, pursuant to section 13 of the act:

[I]t is a defense for a person charged with a relevant bribery offense to prove that the person's conduct was necessary for the proper exercise of any function of an intelligence service, or the proper exercise of any function of the armed forces when engaged in active service.

Commercial organizations also may be guilty of an offense if they fail to prevent the types of bribery described above (§7). In this situation, the organization may raise a defense of due diligence by proving that, at the time of the alleged offense, it "had in place adequate procedures designed to prevent persons associated with [the organization] from undertaking such conduct" [§7(2)].

The act may only be enforced by way of criminal prosecution; it prescribes no corresponding civil remedies. On conviction, an individual may face up to 10 years' imprisonment. Fines for both individuals and corporations are left to the discretion of the court, with no legal limit.

The first conviction and sentence under the act was registered on Nov. 18, 2011, against Munir Yakub Patel, 22, a court clerk, who plead guilty to requesting and receiving a bribe of £500 in exchange for not entering details of a speeding charge onto the court system, thereby influencing the course of criminal proceedings. These actions were caught on film. Recognizing Patel's position of responsibility as a public servant, and the fact that he had realized a personal gain of at least £20,000 from similar conduct in the past, Patel was sentenced to 3 years in prison for the bribery offense and 6 years in prison for misconduct in public office. These sentences are to run concurrently.

While this decision does not provide any insight into the penalties that might be imposed on a corporate defendant, it signals the courts' intention to impose tough sentences on those who contravene the act's provisions.

Other Jurisdictions

Since the passing of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions by OECD in 1997, 35 additional countries, including four nonmember countries, have ratified the convention and passed domestic laws to deter international corruption and prohibit bribery of foreign public officials. These countries include Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland and Turkey. Once a country has ratified the convention, OECD conducts "rigorous peer-review examinations" of each country to assess its implementation and compliance efforts. OECD posts the results of these examinations online (www.oecd.org/dac/peerreviewsofdacmembers).



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Occupational Safety & Corruption Enforcement

In most jurisdictions, matters of occupational safety and health are prescribed by legislation and regulation, with compliance enforced by government agencies. Agency officials are responsible for proactive compliance, random workplace inspections to ensure compliance, and reactive compliance, responding after a workplace incident has occurred to determine whether legislative requirements were violated.

When organizations have contravened occupational safety and health obligations, government officials have the authority to make orders, levy penalties and/or commence prosecutions to ensure future compliance. This enforcement system also creates an incentive for organizations to avoid incident reporting or to persuade government officials to resolve compliance issues favorably.

From a safety perspective, corruption might manifest itself in the false reporting of workplace injuries or lost-time claims, the bribery of compliance inspectors, any acts taken to dissuade the administrative branch of the government from prosecuting alleged offenses, or any attempts to bias the objectivity of judicial decision making. Some of these behaviors may be more common in developing economies, and SH&E professionals may not be at the front lines participating in the corruption or bribery firsthand; rather, they may become aware of business units in other jurisdictions perpetuating such activity.

To minimize the likelihood of corrupt practices among SH&E professionals, bodies such as the BCSP, Board of Canadian Registered Safety Professionals and the Engineering Council (U.K.) have implemented strenuous ethical obligations upon their memberships. For example, BCSP's code of ethics and professional conduct requires its members to:

[B]e honest, fair and impartial; act with responsibility and integrity. Adhere to high standards of ethical conduct with balanced care for the interests of the public, employers, clients, employees, colleagues and the profession. Avoid all conduct or practice that is likely to discredit the profession or deceive the public.

Failure to comply with these professional obligations may result in disciplinary measures, including the revocation of the CSP designation.

Notwithstanding these ethical obligations, SH&E professionals should recognize their additional legal obligations prescribed by anticorruption and antibribery legislation. One can cite many examples of corruption and bribery in occupational safety and health compliance and enforcement from various jurisdictions around the world that may trigger corresponding liabilities of SH&E professionals and their employers.

One early example involves the FBI's investigation into a complex bribery scheme involving OSHA's regional offices in Philadelphia in 1986. This case involved allegations of an OSHA direc-

tor accepting cash payments from union officials to dispatch OSHA inspectors to nonunion construction sites to look for violations of federal safety and health rules. That same year, OSHA removed top officials in the New York regional office after the agency had failed to correct serious health violations in two factories over a 4-year period.

In 2003, a Massachusetts employee who was about to fail an OSHA licensing test for the third time was fined \$2,000 after attempting to bribe an OSHA employee with \$100.

Other examples of bribery and corruption can be found in Malaysia. In 1995, a factory manager was charged after attempting to bribe officers of the Occupational Safety and Health Department to encourage them not to take any action against the factory for using machinery without valid certification.

In 2005, a former assistant director of the department was charged with accepting a bribe from a factory manager in exchange for rendering a favorable report following a repeat inspection of the factory. In 2008, a company manager was charged with attempting to bribe occupational safety and health personnel after the discovery of nine foreign employees working illegally.

Similar issues have surfaced in Australia. For example, in 2009, a property developer allegedly attempted to bribe its safety representative with \$57,000 after work was stopped at a luxury apartment development due to potential asbestos exposure. On May 18, 2009, the safety representative and shop steward discovered that two men had unwittingly been using a demolition saw on and off for 4 hours to cut through concrete that contained asbestos, without wearing respiratory masks.

The material was moved by wheelbarrows through lifts on the site and to the ground floor, leading many workers on site to believe that they had been exposed to asbestos. Out of concern for their safety and well-being, workers stopped work for 3 days, causing a dispute over whether more than 300 workers should be paid. When confronted by the media, representatives of the property developer denied the bribery allegations.

In Canada, the *Toronto Star* published an expose in 2008 entitled "Hiding injuries rewards companies; Star investigation reveals job safety numbers are underreported, cutting employer costs." The report suggested that the workers' compensation regime in Ontario provides an incentive to companies who pressure or bribe workers not to report major injuries. In fact, the newspaper suggested it had identified 3,000 serious injuries that occurred between 2004 and 2008 that companies had reported, allegedly improperly, as resulting in not even one day off work.

Some of these situations may attract liability under CFPOA; furthermore, the attempt by the American and British governments to extend the application of their respective corruption and bribery legislation extraterritorially would almost certainly result in American and British entities being held liable in similar situations. In addition, the

U.K.'s Bribery Act addresses general bribery offenses, which may attract further liability for organizations in situations where employees are being bribed to withhold information from occupational safety and/or workers' compensation authorities.

Recommendations

On Nov. 26, 2009, OECD adopted the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, including Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance, to help organizations comply with the convention and domestic legislation passed in response. This document outlines several practices for ensuring effective internal controls, ethics and compliance programs or measures for the purpose of preventing and detecting foreign bribery.

1) Strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery.

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 or measures is the duty of individuals at all levels of the company.

4) Oversight of ethics and compliance programs or measures 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 or measures designed to prevent and detect foreign bribery, applicable to all directors, officers and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, 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 or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia and joint venture partners (business partners), including, inter alia, 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;

b) 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 program or measures for preventing and detecting such bribery;

c) 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 program or measures 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 or measures 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 program or measures 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 or measures, 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;

c) undertaking appropriate action in response to such reports.

12) Periodic reviews of the ethics and compliance programs or measures, 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.

Transparency International Canada Inc. has created a six-step compliance program for corporations to follow in ensuring compliance:

Step 1: Assess. Where do you stand? What are the risks? (1 month)

Step 2: Plan. Benchmark against best practices using a code and develop detailed policies (3 to 6 months).

Step 3: Act. Implement no-bribe policies through detailed procedures (1 year).

Step 4: Monitor. Conduct continuous self-checks and improvements (continuous).

Step 5: Report. Report to internal and external stakeholders on steps taken (at least annually).

Step 6: Assure. Raise the credibility of the company's actions (ongoing).



From a safety perspective, corruption might manifest itself in the false reporting of workplace injuries, the bribery of compliance inspectors or acts taken to dissuade the administrative branch of the government from prosecuting alleged offenses.

Transparency International also publishes several resources to help organizations design compliance checklists, including examples of compliance checklists; these are posted at www.transparency.org and www.transparency.ca.

Given the broad, international reach of domestic anticorruption and antibribery legislation, organizations are advised to coordinate global (rather than regional) compliance efforts to ensure that the business activities of each regional subsidiary and the corresponding compliance obligations of each jurisdiction in which business is conducted are understood by a centralized authority. To ensure global compliance, this central authority should begin by understanding the written laws of each jurisdiction in which the organization operates, paying particular attention to the payments to public officials expressly authorized or required by law in each jurisdiction.

Once this is completed, the central authority should compare the payments authorized or required by law with those that have been historically made by or on behalf of the organization to public officials, to determine whether any gaps exist in compliance. If so, the central authority should immediately contact a lawyer in the jurisdiction where the unauthorized payment has been made. Given the extraterritorial application of American and British legislation, as well as others, it also is advisable to contact counsel in other jurisdictions in which the organization operates.

This proposed central authority should then develop a global anticorruption/antibribery policy that applies to all of the organization's officers, directors, employees, agents and shareholders and each of its affiliated entities around the world. The policy should contain appropriate whistleblower provisions to allow inappropriate behavior to be reported to the organization anonymously, and should outline and authorize progressive disciplinary measures to ensure compliance.

All individuals to whom the policy applies should receive training on the global anticorruption/antibribery policy, as well as jurisdiction-specific training on compliance and regulatory issues in their home country. The organization should ensure that training is documented in writing and refreshed on a regular basis. Individuals also should be notified of any modifications to the anticorruption/antibribery policy immediately, and a copy of the most recent version of the policy should be accessible to all individuals at all times.

Finally, the organization should monitor and continuously improve its compliance program to ensure that it reflects new developments in anticorruption/antibribery legislation. This may include an audit process whereby the past performance of local operations in various regions of the organization's global operations are evaluated for compliance with legislation and company policies.

Conclusion

In light of the recent emphasis on compliance, anticorruption and antibribery, SH&E profession-

als should take note of the legislative requirements associated with each concept, evaluate the potential effect of these obligations on their employers' global operations and implement measures to mitigate risk of liability. By proactively identifying situations that could lead to corruption or bribery, SH&E professionals can help their employers mitigate risk and avoid significant legal liability.

Furthermore, SH&E professionals can help their employers ensure that corruption or bribery situations are identified and addressed by designing and implementing reporting protocols to encourage employees or others to report prohibited or questionable conduct, and taking timely and appropriate action after becoming aware of any prohibited or questionable conduct. **PS**

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