

7 KEY TAKEAWAYS

Bribery & The Boardroom

Kilpatrick Townsend Partner [Joe Dowdy](#) recently gave a presentation at the [Charlotte Chapter of the Association of Corporate Counsel](#) that addressed the enforcement of high-profile federal criminal laws rooted in bribery, including the Foreign Corrupt Practices Act, the Travel Act, and the Anti-Kickback statute. Mr. Dowdy discussed strategies for prevention and responding to government investigations.

7 key takeaways from the presentation include:

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Companies should identify and be aware of state and local anti-bribery and anti-corruption laws. Though the enforcement of such provisions has been lax in some jurisdictions, these statutes can provide a basis for criminal liability. Companies should update their policies and procedures to account for the laws of those states and municipalities in which they do business and should require third parties or acquisitions to warrant compliance with these laws.

Under 18 U.S.C. § 201, it is always a violation to offer or provide “anything of value” to a former or current public official or to person selected to be a public official if it is done with the intent to influence an official act. The exclusions for de minimis gifts to public officials set out in 5 C.F.R. § 2635.204 do not apply if the gifts are made to influence official acts.

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Pursuant to 42 U.S.C. §1320a-7b(b)(2)(A), it is a felony to offer a bribe, kickback, or rebate to induce a person arrange for healthcare services that will be paid entirely or partially under a Federal health care program.

The U.S. Foreign Corrupt Practices Act (FCPA) prohibits offering anything of value, directly or indirectly, to a non-U.S. government official for the purpose of influencing any decision to obtain or retain business or to get an unfair advantage for the company or its employees. 15 U.S.C. § 78dd-1, et seq. It also requires publicly-traded companies maintain reasonably complete and accurate books and records and implement a system of internal financial controls. 15 U.S.C. § 78m.

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The activities of third parties are the single biggest challenge to anti-corruption compliance. Approximately 90% of reported FCPA cases involved misconduct by third party intermediaries such as distributors, partners, intermediary customers, vendors, and consultants.

Legitimate charitable giving does not violate the FCPA, but questionable charitable contributions can. In making charitable contributions in other countries, companies should consider, among other things, the purpose of the payment, company guidelines, local law, whether a foreign official is involved who can make decisions regarding the company’s business in that country, and whether the payment conditioned upon receiving business or other benefits.

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Diligence in commercial transactions and acquisitions should be thorough and well documented. Companies should be mindful that the DOJ or SEC may second-guess diligence after-the-fact. Diligence and strong anti-corruption policies and procedures are especially important when doing business in jurisdictions with unfavorable Corruption Perceptions Index scores.