

How to Educate Top Management on the Importance of Anti-Corruption Compliance

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Corruption is in the headlines, perhaps as never before. Large multinationals are paying record fines for bribing foreign officials, the Justice Department is prosecuting the leaders of FIFA for corruption, and politicians and business leaders across the globe are standing accused of corruption. Corruption is one of the factors that precipitated the 2011 protests in the Middle East that have come to be known as the “Arab Spring,” and the recent change in government in Ukraine stemmed, at least in part, from popular outrage at the excesses of the former president’s corruption. In Spain, the entire country is reeling from corruption scandals spanning nearly every corner of public life. The monarchy, the ruling party, the former and current heads of several regional governments – all are embroiled in corruption scandals that have left the government paralyzed since December, when elections failed to produce a decisive result. Even the anxieties being expressed in the spectacle of this year’s U.S. presidential campaign can be at least partly attributed to fears that the political system has been corrupted beyond all repair.

At a time such as this, it seems worth reflecting on what we mean when we talk about corruption. What is its history, and more importantly, what is the history behind fighting corruption? Is corruption indeed worth fighting, from the perspective of both the public and the private sectors? For companies at the forefront of this battle against corruption, what is the appropriate attitude they should encourage their employees to adopt? How can those individuals charged with the responsibilities of governance – in particular the chief compliance officers or the general counsels – best frame this issue for their organizations, and especially for those who run their organizations?

A (Brief) History of Corruption

Corruption, as we will discuss it in this article, refers to the misuse of public power for personal gain. While theft, embezzlement, fraud and corruption are as old as humanity, the modern concept that corruption should be restrained by law seems to have accompanied the rise of the modern, complex nation-state along with the classically liberal idea that government should represent the will of the governed and be held accountable for the activities it exercises on their behalf.

The delegation of state responsibility to individuals who oversee large publicly financed budgets for building the modern state’s economic infrastructure (think dams, bridges, roads, rail lines and airports), carries with it the risk that those individuals will misuse at least a portion of their economic power for personal benefit. In a fully functioning modern democratic state, the establishment of an independent judiciary, an enfranchised and engaged populace, as well as a free and independent press corps, collectively provide a system of checks and balances on the exercise of political power. These institutions likewise provide a central role in controlling corruption.

Lessons From Denmark

While all nations have implemented laws against corrupt activity, it is hardly a secret that not all countries enforce those laws with equal enthusiasm, as Transparency International’s Corruption Perceptions Index illustrates rather graphically and dramatically every year. Denmark, the nation that consistently leads that index as the least corrupt nation on earth, is a valuable case study. In a recent working paper published by the University of Gothenburg and

reviewed by TI's Anti-Corruption Research Network, historian Mette Frisk Jensen provides insight into the question of how Denmark came to be the paragon of clean government.

During the mid-17th century, the establishment of the power of the absolute monarchy within Denmark required the development of a cadre of loyal civil servants who would implement the monarch's will. Holders of positions within the bureaucracy were required to swear an oath of fidelity and loyalty to the king in person and were expected to be "honest, hardworking, diligent," and to "work for the best of the king at all times and secure the king's fortune." Eventually bribery, embezzlement and fraud were criminalized.

At the same time, the procedures for carrying out the administrative duties of the realm were formalized into a system of laws and mastery of those laws became a prerequisite for obtaining these highly desirable positions within government. By the time a liberal constitution was introduced in the mid-19th century, government salaries and retirement benefits had become sufficiently generous that bureaucrats could enjoy a comfortable middle-class lifestyle. Because corruption was aggressively condemned and punished, Danish administrators found that accepting bribes was not worth the risk of losing their compensation packages.

Most nations have not evolved in the same way as the Northern European and Anglophone countries that generally top the Corruption Perceptions Index. Even the history of the United States, a relatively uncorrupt government on the list (tied with Austria for Number 16 out of 167 countries reported on the 2015 list), has a far from pristine history of development. For example, there were obscene abuses of the public purse during the construction of the 19th century railroads connecting the East and West Coasts. Despite these types of obstacles, by the last quarter of the 20th century, following the horrors of two cataclysmic wars in Europe and a global nuclear standoff, there began to emerge a consensus among "well-developed" democracies that corruption is a hindrance to the goal of achieving peace and prosperity throughout the globe.

Is Corruption Worth Fighting From a Public Policy Perspective?

Now that the United States, the U.K. and Canada have taken the position that they will aggressively combat corruption outside their borders, some argue there is a whiff of cultural moralizing when rich and powerful Anglophones scold the rest of the planet for being corrupt. If gift-giving and bribery are so interwoven into the fabric of certain cultures, is it not an act of cultural imperialism to expect them to abandon those practices? Who are we, these arguments suggest, to impose our values on these cultures, to say that "our" way is the "right" way?

But these arguments miss an important point. There is no evidence that corruption is favored by the vast majority of citizens who live within corrupt environments. In fact, the evidence suggests quite the opposite. Corruption creates market distortions by favoring public works projects that benefit the corrupt official (or certain factions he or she favors) but that may only provide little, or even no, benefit to the wider populace. It discourages local investment by creating additional costs to individuals who wish to start a business. In systems with a deeply ingrained system of patronage, corruption can steer the young toward bureaucratic positions that have a reputation for providing lucrative "corruption bonuses," instead of to careers that would help build the wider economy and perhaps be more personally satisfying.

Most damagingly, corruption contributes to widening inequality, harming the poor and depriving them of basic services such as education and healthcare. In extreme cases, such as the full-scale looting of Ukraine and Iraq by former heads of state, the country can ultimately be plunged into civil war. It is indeed no accident that all of the world's migration flows are in one direction – from more corrupt nations into less corrupt ones. In my conversations through the years with recent immigrants to the U.S., the despair over endemic corruption is the reason they almost universally provide for having uprooted themselves and their families to take on the daunting task of starting life over again in a strange country.

In a world that now counts its population in the billions and that is interconnected by a widely accessible communications technology not known a mere generation ago, the question is not whether corruption is a necessary evil. Instead, the question is how sustainable the systems can be that have allowed kleptocrats to plunder their countries with the impunity they have enjoyed in the past.

How to Frame the Argument for Anti-Corruption Compliance to the C-Suite

It is worth recalling that the Foreign Corrupt Practices Act was signed into law in the wake of the Watergate scandals that brought down a sitting U.S. president. When President Jimmy Carter signed the FCPA into law in 1977, he stressed its ethical dimensions while noting that one of the principal drivers for passing the law was the damage to U.S. foreign policy that widespread bribery caused. Carter said:

I share Congress's belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions.

In a perfect world, virtuous corporate behavior would be its own reward. We know, however, that this is not always the perception within an organizational setting. With constant pressures to meet sales targets and to expand markets – perhaps even in the service of preserving jobs in those very markets – bribery may often seem like a necessary evil. Accordingly, those working in an organization's compliance function must be armed with arguments for why combating corruption actually improves the company's bottom line.

In an increasingly data-driven world, it is unlikely that the spotlight on corruption will disappear. There is a growing consensus that corruption does enormous harm to society, and it is a fair bet that the global

anti-corruption movement generally, and FCPA enforcement specifically, will be with us for a long time. Organizations can simply no longer afford to ignore these trends. The framework for communicating to the highest levels of an organization the importance of achieving an ethically compliant culture will include addressing the importance of good organizational citizenship, the enormous consequences and penalties of being caught, the imperatives of reducing the costs of doing business, and the importance of maintaining high employee morale.

The Increasing Cost of Noncompliance

I recently overheard a man in an airport speaking into his mobile phone, "I don't care how you do it; tell Jack to go there and find that customs agent and just fix it. We're not going to hit our numbers this month unless that shipment gets through." Perhaps this conversation had nothing to do with corruption, but let's imagine that his exhortation to "fix it" was indeed an instruction to one of his employees to pay a bribe to a customs agent. This gentleman no doubt considers himself a law-abiding, respectable citizen, a high-performing manager within his company who was just doing his job. He might argue that he was working not only to secure his own position but also that of others within his department. His response to an inquiring compliance officer might well be that this is just how things are done "over there." Compliance would almost certainly seem to him to be more expensive than noncompliance, and it would be unsurprising if he were to find laughable the abstract concept that we should all work to create a better system of government for the children who live "over there."

It is thus unfortunately true that the most immediately compelling case for supporting anti-corruption compliance in an organization is that the threat of getting caught is greater than ever and that the costs of being caught are potentially disastrous. Whistleblower protections and bounty provisions provide enormous incentives for employees to report suspected wrongdoing as never before. Regulatory investigations of corrupt activity almost inevitably lead to the identification of corrupt activity by other companies within the same industry. The threat

of prosecution may now come from a jurisdiction other than that of the United States. There are now 41 signatories to the OECD's 1997 anti-corruption convention, and both the U.K. and Canada have passed tough new anti-bribery statutes that cast a broad jurisdictional net. Furthermore, the explosion in data analytics capabilities available to regulators affords unprecedented opportunities to identify illicit patterns. And the release last September by the Justice Department of the "Yates Memo," which calls for holding individuals, and not only organizations, accountable for organizational misconduct, portends an environment in which there is a greater threat than ever before that individuals themselves will face criminal prosecution.

See "*How Will the Yates Memo Change DOJ Enforcement? (Part One of Two)*" (Sep. 23, 2015); *Part Two* (Oct. 7, 2015).

A Non-Productive Expense

But there are other compelling arguments for supporting a bribery-free organizational culture. For one thing, bribery is a non-productive expense. Many of the recent studies of corruption have found that bribe-payers actually end up spending more than their non-bribe-paying counterparts as bribe-takers demand more and more bribes once that door is opened. And while it may be difficult to form a direct link between an FCPA investigation and a measurable loss of revenue, no company relishes the bad publicity that attends a headline-grabbing government investigation.

The Company's Role in the Fraud Triangle

A culture of bribery can also turn on the company by indirectly encouraging other unethical behavior. Most employees will not behave like Reinhard Siekaczek, the Siemens executive who oversaw an annual bribery budget of more than \$40 million, but who apparently never took a dime for himself. It is far more likely that those entrusted with the bribery function of a company will succumb to the temptation to help themselves to some of the cash or to abuse a no-questions-asked expense reimbursement policy.

As research into corporate fraud has shown, three elements need to be present for an employee to commit fraud: some form of economic pressure, the opportunity to commit the fraud and the ability to rationalize the fraud. By assigning unethical activity to an employee's set of duties, the organization provides the two most difficult components of the "fraud triangle" – the opportunity and the rationalization for it. All that's left is for the employee to feel some form of personal economic pressure, and presto, the company has now enabled an act of fraud against itself. It is an ethical no man's land to ask employees to behave dishonorably on behalf of the company while at the same time expecting them to behave honorably toward the company itself.

See "*Six Steps for Converting a 'Paper' FCPA Compliance Program Into a Pervasive Culture of Anti-Bribery Compliance (Part One of Two)*" (Feb. 20, 2013); *Part Two* (Mar. 6, 2013).

Bribery's Effect on Employee Morale

Perhaps the most interesting reason to support a culture of compliance comes out of a 2013 study reported by Paul M. Healy and George Serafeim of the Harvard Business School. The researchers found that it was employee morale that was most significantly affected by bribery. Respondents to the survey who had actually dealt with a bribery incident reported that damage to employee morale was far more important than any other factor – more than the firm's reputation, the bribery's impact on business relations and the firm's relations with its regulators.

See "*EY's Asia-Pacific Fraud Survey Finds Correlation Between Talent Retention and Ethical Business Conduct*" (Jul. 22, 2015).

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