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COMPLIANCE IN A  
**GLOBAL  
ECONOMY**

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GETTING  
**VAT DOWN PAT**

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**CORRUPTION**

RED FLAGS TO WATCH FOR

**THE  
NEXT  
FRONTIER  
OF IMMIGRATION**  
REGULATORY EXPANSION, COMPLIANCE CONCERNS, AND RISK MANAGEMENT

The background of the entire image is a close-up, slightly angled view of white horizontal window blinds. The blinds are partially open, creating a series of parallel horizontal lines that create a strong sense of perspective and depth. The lighting is soft, highlighting the texture of the blinds and the shadows between the slats.

# 'AM I MY BROTHER'S KEEPER?'

CORRUPTION, TRANSPARENCY, AND THIRD-PARTY VENDORS  
BY ANDREA ELLIOTT AND CARLIJN LANGEVELD



**T**he question of who is responsible when a party with a relationship to a company carries out noncompliant activities is as old as time. In fact, the biblical reference (Genesis 4:9) to the dispute between brothers Cain and Abel in our title illustrates how far back this discussion goes.

“Most large-scale bribery investigations focus on the use of intermediaries,” says Richard L. Cassin, editor and publisher of *The FCPA Blog*, the world’s biggest online anti-corruption compliance portal.

With growth and opportunity comes the opportunity for corruption. Smart multinational companies (MNCs) recognize the immensely profitable possibilities that today’s fast-growing, less regulated locations and cheaper labor can offer them. Business expansion to far-flung markets is booming.

**The distance between the home office and a far-flung business location does not diminish the requirement for compliance.**

As with all good things, there is often a “but.” And here it is: In addition to increased monetary gain, economic growth, and new opportunities, this rapid growth often involves higher risks when dealing with unknown third parties and hidden noncompliance traps. Deep due diligence is the key to staying on the right side of the growth.

#### OPPORTUNITIES AND CHALLENGES

Let’s take a look at the acronym of the last decade—the BRIC countries. Brazil, Russia, India, and China are all locations in which MNCs may have set up new entities or branches due to the economic

benefits enumerated above. All four countries score relatively low on the Corruption Perceptions Index of Transparency International—42, 28, 36, and 40, respectively, on a scale of 100, with 0 being perceived as highly corrupt and 100 considered very clean.

The BRIC acronym has been supplemented by MINT—Mexico, Indonesia, Nigeria, and Turkey. With the exception of Turkey, these new MINT kids on the block all fall as low as or lower than the BRIC countries on the Corruption Perceptions Index.

For the first time, Africa has officially joined a popular up-and-coming market acronym, although some would argue that BRIC was really BRICS, with the S representing South Africa. Incentives are growing for companies from member states of the Organization for Economic Cooperation and Development (OECD) to outsource work to Africa and to set up low-cost operations in the same way such activities were shifted to China over the past decade.

MNCs looking to tap into opportunities in Africa must understand and carefully manage the myriad of risks associated with investing and operating in Africa. Corruption remains the largest risk factor, and liability under the U.S. Foreign Corrupt Practices Act (FCPA), the U.K. Bribery Act, and other similar anti-corruption laws poses the greatest concern for companies.

There are multiple challenges, the most fundamental of which is a paradigm shift. A largely cash-based economy, unstable local regimes, poor local infrastructure, and increased worksite enforcement of blurry regulations that are easily resolved with the payment of a “fine” are all very real considerations for an MNC that is planning to set up and run compliant operations in Africa.

What to do? Most MNCs look to local third-party providers to furnish services in country, including immigration and payroll. MNCs, especially those who conduct business in the U.S., are required to keep a very close watch on any corrupt payments planned or made outside of the U.S. The distance between the U.S. and the far-flung business location does not diminish the requirement for compliance.

Ensuring that your employees stay compliant with the FCPA and all anti-corruption regulations can be difficult for a compliance officer located in the home office. However, the FCPA also applies to any corrupt actions taken by third-party vendors on behalf of the company.

How, then, do you ensure that your company is not involved, even unknowingly, in violating anti-corruption measures via third parties acting on your behalf?

## TWO BEST PRACTICES

There are two best-practice measures that every MNC should take, and we outline them here for guidance.

- **Employee Commitment to Anti-corruption Policy.** First, ensure that all internal stakeholders—your employees—commit to a policy and mission of abiding by compliance regulations. The key to limiting the risk of FCPA noncompliance is educating each and every one of your employees about what is and is not allowed under the FCPA (see “Anti-corruption Laws Differ”), as well as making them understand the possible consequences for both themselves and the company if they were to become involved in corrupt practices. A zero-tolerance policy toward noncompliance to the FCPA, included in a code of conduct to be read and acknowledged by all your employees, can help make your employees understand the importance of compliance.

## ANTI-CORRUPTION LAWS DIFFER

The U.S. Foreign Corrupt Practices Act (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.” However, facilitation payments, which are meant to expedite a process—but not to alter its outcome—are allowed under the FCPA, as long as good records are kept.

Anti-corruption laws differ by country. The U.K. Bribery Act of 2010 is more stringent and does not allow for facilitation payments. On the other hand, if laws and regulations in the country where, according to the FCPA, a corrupt payment—or other type of gift or promise—takes place allow this type of payment, this can be used as an affirmative defense.

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# CORRUPTION RED FLAGS

It can be difficult to spot corrupt actions that will hold you liable when they take place on the other side of the world by a third party or an employee. However, here are some red flags:

- Simplified or waived process steps.
- Shortened processing times.
- Multiple entries into the same country on business visas over a long period of time without any immigration inspection.
- References to a “special relationship,” “special agreement,” or “trusted agent.”
- Missing receipts for payments and/or higher fees for services than in the past.

Although perfectly legitimate reasons might exist for any of the above situations, such as recent changes in regulations or differences in criteria by country, these should trigger further investigation.

A simple inquiry to your trusted immigration provider should be a first step when there is any doubt as to the veracity of payments. A seasoned provider who is “in the trenches” at the immigration offices daily will have firsthand expertise in what the official government filing fees are. It would also be advisable to bring in the finance department of the company to ensure that a confidential audit of the expense reports is done to look for the triggers listed above.

- **Deep Due Diligence on Third-Party Consultants.** Practice due diligence when engaging third-party consultants who are in contact with foreign officials and/or are directly involved with, for example, obtaining contracts, working on international projects, or setting up entities abroad, but also with employees in supporting roles. At our company, not only are all counsel and global immigration specialists trained on how the FCPA and U.K. Anti-Bribery Act and other laws affect their work, but the entire group is taught to watch for red flags. For example, the finance department has a key role in ensuring that all partners around the globe stay FCPA-compliant (see “Corruption Red Flags”).

The following six key elements characterize a solid due diligence program:

*Genuine expertise.* Check whether the third party has true and genuine expertise in the field. Get credible

references, and verify information from different parties and from publicly available information.

*Reputation.* Check whether the third party has a solid reputation and good track record in their field.

*Scope of services.* Ensure that the contract clearly outlines the scope of services.

*Wrongdoing termination provisions in contract.* Ensure that the contract includes provisions requiring that the third party will not engage in conduct that would violate the FCPA or any anti-corruption laws, and always negotiate the right to terminate the contract on reasonable suspicion of wrongdoing.

*Acknowledgment to comply.* Require consultants, business partners, and relevant employees to sign a written acknowledgment that they will comply with all U.S. and international anti-bribery laws. The best practice is to complete this certification at the start of a relationship and annually thereafter.

*Reviewing payments.* Carefully review all overseas consultancy or agency engagements, as most FCPA violations involve payments made through intermediaries.

- Scrutinize the third-party individual or company involved and their relationship with foreign government agencies.
- Review any fees for reasonableness.
- Review all invoices to ensure official receipts from government agencies.

## CONSEQUENCES OF NONCOMPLIANCE

Noncompliance with the FCPA can have severe consequences for the company, including civil and criminal penalties, fines, and even imprisonment for its directors, even if not personally involved; the supply chain rules apply.

So, the age-old question remains: Am I my brother's keeper? For mobility professionals, this much is clear: The increased risk of becoming involved with corrupt practices cannot be taken lightly. **M**

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