What Nonprofits Should Know About Anticorruption Laws

Compliance and Ethics

Nonprofit organizations based in the United States work hard to further their missions while navigating the complexities of the Internal Revenue Service (IRS) tax-exempt organization compliance. However, nonprofits must also be mindful of anticorruption responsibilities that apply to

all corporations within and outside of the United States.

Many governments have put in place structures to ensure that companies are not using their funds to bribe or receive bribes from government officials. This is particularly relevant in the nonprofit world as organizations may not have the staffing, compliance structures, or resources in place to manage these risks. This article provides a high-level summary of the US Foreign Corrupt Practices Act (FCPA) along with information about the UK and Canadian anticorruption laws that could impact US nonprofits.

Foreign Corrupt Practices Act (FCPA)

The FCPA is the primary anti-bribery law in the United States. The FCPA applies to "all US persons," including small businesses like nonprofits, and is enforced by the US Department of Justice and the Securities and Exchange Commission (SEC). It is comprised of two components: anti-bribery and accounting. Both are summarized here:

> *The anti-bribery provisions prohibit US persons and businesses (domestic concerns), US and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (issuers), and certain foreign persons and businesses acting while in the territory of the United States (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business.*
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> *The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.*

The component that directly applies to US nonprofits is anti-bribery, since nonprofits are US businesses and have been considered a "domestic concern" by the Department of Justice. In 2010, the Department of Justice issued an opinion that applied the FCPA to nonprofit organizations, considering them to be a "domestic concern" within the meaning of the FCPA.

Although the accounting provision directly applies to companies that are regulated by the SEC, which is not the case for US nonprofit organizations, these provisions provide good practices to consider implementing to improve internal controls and consequently help mitigate the risk of bribery and corruption at an organization.

Under the FCPA's anti-bribery provisions, it is unlawful to offer, pay, promise to pay, or authorize payment of money, or to offer, give, or promise to give anything of value to a foreign official in order to obtain or retain business or secure an improper business advantage. It is a crime to offer or provide, directly or through a third party, anything of value to a foreign government official with corrupt intent to influence an award or continuation of business or to gain an unfair advantage.

These prohibitions are pertinent in the nonprofit sector where there may not be strong internal controls or practices in place to ensure that funds are not being used for unlawful purposes. Many US nonprofits work in geographies where their missions can make a significant impact. Unfortunately, these are often jurisdictions where corruption is more common, and it's necessary for nonprofits to keep this in mind.

Violation of the FCPA can subject a nonprofit organization, as well as individuals who act on behalf of a nonprofit, to significant criminal and financial penalties, as well as reputational harm.

- Companies can be subject to up to US$2 million for criminal violations and up to US$25 million for willful violations.
- Individuals can be subject to up to US$100,000 and imprisonment for up to five years for criminal violations and up to US$5 million and up to 20 years for willful violations.
- Companies and individuals can be subject to civil penalties of up to US$10,000 per violation.

Additional fines may be imposed by the courts under the Alternative Fines Act, 18 U.S.C. § 3571 (d).

There also may be collateral consequences resulting from FCPA violations, including suspension or debarment from contracting with the federal government, cross-debarment by multilateral development banks (such as the World Bank), and suspension or revocation of certain export privileges.

US nonprofit organizations should be mindful and aware of the FCPA and its implications on their activities within and outside of the country. The penalties can be severe and have a significant impact on an organization.

UK Bribery Act

The UK Bribery Act applies to US companies, including nonprofits, with a presence in the United Kingdom. A US company that implements any part of its business in the United Kingdom can be prosecuted for failure to prevent bribery, even if the activity takes place outside of the United Kingdom.

If your organization has any operations in the United Kingdom, you should determine whether you are compliant with the UK Bribery Act. The UK Charity Commission lists resources for nonprofits.

Canadian Corruption of Foreign Officials Act

The applicable anti-bribery law in Canada is the Canadian Corruption of Foreign Officials Act (CFPOA) makes it a criminal offense to engage in corrupt behavior in and outside of Canada. CFPOA applies to Canadian companies and companies doing business in Canada, as well as organizations that have incorporated or formed in Canada and persons anywhere in the world whose acts or omissions have a “real and substantial connection” to Canada.

Like the FCPA, the CFPOA also requires that all transactions and expenditures be adequately and accurately identified in the books and records. The CFPOA is similar to both the FCPA and the UK Bribery Act, therefore a violation of the CFPOA is likely also to result in a violation of the FCPA and the UK Bribery Act.

Conclusion

As nonprofit organizations focus on accomplishing their missions and working towards a greater good, they must still be mindful of the potential for their resources being used for corrupt purposes and the impact such activities — and consequently violations of anticorruption laws — could have on their operations. With strong internal controls and an understanding of the risks, nonprofits can

further their missions while remaining compliant with anticorruption laws.

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