



Private Sector Tools for Anti-Corruption Compliance

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Responsibility for the business ethics of a company's international partners has obvious legal implications, but it is also good business to know those with whom a company is working. Reputational damage can be extraordinarily costly, but so too is unreliability. Business people should be aware if their suppliers are near bankruptcy or whether they'll be in business long enough to complete the contract. Anti-corruption due diligence is good business practice. Ultimately, of course, companies are answerable to both shareholders and courts for their business *and* compliance decisions.

An extensive review to satisfy both business and legal concerns may be undertaken by an internal due diligence team. The review may also be undertaken by law firms or investigative services companies. Large U.S. companies spend as much as \$15,000 per intermediary for a comprehensive compliance review and their efforts often duplicate those of other companies working with the same intermediary.

The importance of this process to the economies of developing countries is difficult to overestimate. Business executives, conscious of cost and delay, increasingly place countries with little transparency in a "too hard to do" category. Regardless of viable sales opportunities and real chances of success, companies are walking away because of the level of compliance that would be required prior to closing the deal. Whole markets are being written-off by executives who do not want to become embroiled in an exhaustive compliance effort. Companies want the predictability of enforceable contracts, not the ambiguity of contracts that have been negotiated in the dark corners of restaurants. This needs to be communicated throughout a company's supply chain and marketing network.

One newly available option for combating corruption and enhancing compliance is TRACE, a non-profit membership organization setting the highest standard internationally for member companies that choose to commit voluntarily, publicly and decisively to ethical business practices.

TRACE was founded by private sector regulatory lawyers and compliance officers. At the 10th International Anti-corruption Conference in Prague last year, a consensus developed

that most businesses have access to state-of-the-art compliance programs. Similarly, there was general agreement that governments have access to top-flight consultants who can explain how to implement more effective laws to deter bribery. The weak links, according to many, are international business intermediaries.

Intermediaries (including sales agents, consultants, suppliers, distributors, resellers, subcontractors, franchisees and joint venture partners) play a pivotal role in bridging the gaps of distance, time, custom and language imposed between the corporate culture of principal companies and local business communities. The best intermediaries open markets to a company's products, provide access to customers, identify new opportunities and trends and address customer concerns while promoting the company's image to the world. This is a group, which, until recently, had no organization, no voice, and on the whole, access to none of the resources available to multinationals and governments.

Regardless of the actual authority given to them by a company, intermediaries often are thought to speak for the "head office." When a company has no local employees in the country, intermediaries often have extraordinary access to customers. For this reason, most new anti-bribery laws expressly state that companies may not make inappropriate payments either directly or indirectly, *through their intermediaries*.

These laws require companies doing business internationally to take steps to ensure that the intermediaries with whom they work share their commitment to transparent business practices regardless of business pressure, local law or custom. This leaves companies asking: "How much due diligence, training and management of foreign intermediaries is enough?" Laws are vague on this point and typically state only that a company is responsible for the corrupt acts of its intermediaries if the company "knew or *should have known*" that the intermediary was likely to make an inappropriate payment.

The mandate then is to have effective controls in place to minimize the chances of this happening. Because there is little formal guidance about how much due diligence is sufficient, ensuring that your company is doing as much as everybody else provides the confidence that your company can meet a test of reasonableness; a determination of a corrupt motive is less likely.

To foster this consistency, TRACE has established a single high standard of due diligence. After polling more than 30 companies in several countries and across numerous industries, the highest common denominator across all of these different compliance plans was ascertained. The result – *The TRACE Standard for Doing Business with Intermediaries Internationally* – is a very practical guidebook for the international business community.

TRACE applies the Standard when it prepares due diligence reports on members who submit to the process voluntarily. These reports are made available to member companies

requesting them. Sharing information eliminates duplication of effort by both companies and their intermediaries. In addition, intermediaries that submit voluntarily to this high standard of review and training identify themselves to companies as business partners that share their commitment to ethical business practices.

Companies have welcomed the TRACE Standard as an important part of their compliance programs. Member intermediaries have welcomed the opportunity to complete once – and to the highest standard – the due diligence process and to have it made available to member companies. There is no duplication and no wasted time, effort or expense.

The review of intermediaries includes:

- Contact information, including multiple offices if applicable.
- Business and technical qualifications within the industry.
- Company ownership: the ownership and management of the entity and whether any government official or political candidate has any ownership interest.
- Family relationships of individuals, owners or management and whether they have close associations with the government.
- Financial information to ensure that the individual or entity can meet its obligations.
- CVs or resumes to verify qualifications.
- Three independent business references.
- Review of employees and third parties, if any.
- Disclosures of prior bankruptcies or lawsuits if applicable.
- An extensive media search of the intermediary and its principals.

Member intermediaries also must have or adopt a written code of conduct and TRACE works with members to help them tailor a code that addresses bribery, kickbacks, nepotism and extortion. Members are required to attend annual anti-corruption training provided at locations around the world at no additional cost.

Certain “red flags” should alert companies to heightened legal and business risk associated with an intermediary. Companies need to ensure that they are not working with intermediaries who can “guarantee” sales, or whose qualifications are *exclusively* their ties to customers, or those requested by customers, or intermediaries who have no experience in the principal’s industry, or who are indifferent to or ignorant of the local law, as we discussed, or who hide the ownership of their company through a series of trusts or shell companies. Additional inquiry is required for intermediaries that are understaffed or ill-equipped to take on the work that they are promising to undertake; intermediaries that ask for exceptionally high pay and, particularly, high pay with payment prior to a procurement decision.

TRACE circulates a quarterly newsletter highlighting new initiatives and changes in anti-corruption laws and posts new laws on its website. The goal of these projects is to demystify anti-bribery laws, making them accessible in several languages to the broadest possible audience.

Employees and intermediaries determined to break the law will probably succeed in spite of the efforts of TRACE and other anti-corruption organizations, but for the great majority of intermediaries and businesses pursuing legitimate business opportunities -- promotion of the best product at the best price in exchange for a reasonable remuneration -- TRACE can simplify their task with one consistent high standard. Companies need not adopt the TRACE Standard, but they should use a consistent and rigorous standard, applied evenly across all countries.

For companies doing nothing at all, TRACE can provide an extraordinarily cost-effective compliance tool. For companies doing too much to simply generate paper, TRACE can offer effective tools in place of more paperwork. For companies between the two extremes adopting the TRACE Standard, they should be comforted to know they are in good company. The due diligence they are doing with respect to their international intermediaries is the international "best practices" standard

TRACE reduces the time and expense associated with companies' anti-corruption compliance programs, while providing intermediaries with an opportunity to showcase their commitment to ethical, transparent business practices. The business community has been looking for new, practical and cost-effective tools to ensure compliance with anti-corruption laws. TRACE is providing intermediaries and the corporations they work with effective, innovative solutions to what has been a difficult, time-consuming, expensive and uncertain process.

For a copy of the TRACE Standard, please write to info@TRACEinternational.org