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A portrait of Laura Ellis, a woman with long, wavy blonde hair and blue eyes, smiling. She is wearing a black blazer over a white top with small black polka dots. The background is a blurred indoor setting with a red wall on the left.

Meet Laura Ellis

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Anti-bribery/compliance pitfalls at the U.S. state level

- » The United States state and local government sales market is very large.
- » The state and local sales markets permit easy access to decision makers.
- » Significant compliance issues must be addressed when selling directly to state and local government employees and leaders.
- » A compliance strategy must be incorporated into corporate sales planning.
- » Failure to address compliance issues can lead to severe penalties and public scrutiny.

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As compliance and legal professionals, we are asked to help business leaders determine specific and potential risks when entering a new market, developing a new product or solution, or partnering with others in the market. In these evaluations, there is much emphasis on compliance with anti-bribery laws, such as the United States’ Foreign Corrupt Practices Act (FCPA) and the United Kingdom’s Anti-Bribery Act, as well as country-specific anti-bribery laws. In recent history, we have seen a lot of research, training, and effort put into spreading the word about various compliance issues involving global trade and bribery, data protection, and export/import concerns in those cross-border transactions. This effort is important, because transparency and an even playing field will help ensure a thriving global economy.

It is equally important, however, to remember the United States’ domestic laws, which are designed to prevent domestic

bribery and increase transparency when businesses engage with state or local governments. Rather than providing broad-brush guidance to “not engage in bribery,” these laws provide specific rules that must be followed in government procurement or government engagement. These rules (1) outline the activities that require individuals to publicly register as lobbyists and report their activities (Lobby Laws); (2) limit the types of payments that can be made to third parties in government procurement (Contingent Fee Bans); (3) limit the types of expenditures vendors and those acting on their behalf can make to government employees (Gift Rules); and (4) provide limits on transitions from public to private sector, and sometimes from private to public sector (Revolving Door/Conflicts of Interest). Failure to comply with these rules can subject your company and its employees to adverse media attention, debarment from government contracting or bidding on a contract at issue, contract cancellation, and significant criminal or civil fines and penalties.



McCorquodale



Carr

The rules apply to practically all businesses selling and marketing into United States federal, state, and local governments. Although the laws have the common foundation to prevent bribery and foster transparency in government procurement, they are different in each jurisdiction, and businesses selling to governments at all levels in the U.S. would be wise to implement a domestic anti-bribery compliance program that is equally as robust as their global anti-bribery compliance program.

Market

The United States government sales market has several common attributes among the federal, the 50 states, and more than 89,000 local governments. These common attributes include: each governmental entity generally has a need for technology, goods, and services; and each entity has some level of autonomy to make purchasing/implementation decisions from the more geographically senior government body (i.e., federal government for states and state government for locals).

Likewise, these entities are also quite diverse in reference to social priorities, historical implications, economic factors, and current economic conditions. Because of this diversity, one set of marketing and sales strategies will not fit well across the state and local geographies.

Many companies have targeted the United States government marketplace for sales because of the size of the cumulative marketplace. Many people know that the

federal budget is massive. However, many are surprised to discover that state and local government spend is nearly equal to the federal spend. The total federal budget is approximately \$3.8 trillion per year, with approximately \$450 billion awarded in new prime contracts each year.¹ The National Contract Management Association (NCMA) expects total state and local government expenditures to be a very similar number of \$3.5 trillion dollars in 2018.

One can also compare individual US states to various global national economies. The gross domestic product for the three largest US states are: California, \$169 billion; New York, \$101 billion; and Texas, \$82 billion.

California's economy is the eighth largest in the world, just ahead of Russia.²

In addition to being a large marketplace, state and local governments are particularly attractive to sales professionals because of comparatively easy access to decision makers. For example, it is not out of the

ordinary for a company representative to call on a state governor, her/his staff, or an agency head to discuss/pitch a product. These senior state and local leaders in turn have much more autonomy and influence on the final contract decisions.

Pitfall areas: Compliance perspective

The large revenue potential and easy access to decision makers make the state and local government sales pool particularly attractive, and the company sales team will want to jump in quickly and wade in as deeply as possible. However, the sales teams may not be aware of

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risks and restrictions associated with selling in the state and local government marketplace. It is true that companies and their sales teams have much easier access to decision makers at the state level compared to the federal or international levels. However, with this ease of access comes risk of undue influence or ethics violations. A recent 50-state study conducted by the Center for Public Integrity gave only three states a grade higher than a D+ for integrity in the state public sector.³

Companies would be wise to provide a life raft in the form of compliance training, oversight, and auditing incorporated into the sales process, before sales professionals engage directly with government employees.

Whether your sales team is already in the pool or considering jumping in, here are a few compliance items that must be considered and addressed along with associated risks.

Lobbying

Individuals who engage in certain interactions with government officials and employees may be required to register or report under applicable lobbying laws.⁴ The historical definition of lobbying has expanded greatly in the local and state government marketplace over the past ten years because of various pressure points such as government investigations, media attention, and public outcry for more transparency. The definition of lobbying in many state jurisdictions is much broader than many people would imagine. The general lobbying definition is “an attempt to *influence a decision*.” In many jurisdictions, an attempt to influence a decision can include a conversation with a senior state official about a company’s product. Because of the broad definition, a sales person’s efforts at the state level could easily cross the lobbying threshold, which could impose specific obligations and restrictions for the sales person and the company. At the local government level, large municipalities—such

as New York City, Los Angeles, Chicago, and Boston—have implemented lobbying guidelines similar to state restrictions that should be considered before proceeding with direct sales.

Note that most state and local enforcement agencies have the authority to impose civil fines for failure to register. For example, the city of Chicago imposed a \$90,000 fine in 2017 on a large internet company whose executive sent an email to the mayor referencing a city ordinance that affected the company. It was determined that the email was considered lobbying, and a violation occurred.

Selling product or solution to senior agency staff, elected officials, or elected officials’ staff

During the past several years, there has been a noticeable increase in sales interactions and marketing events in state and local government capitals across the United States. In fact, many companies now employ sales teams based in the capitals, with the specific goal of engaging with these senior government officials. If your company is targeting senior agency or elected officials as part of the sales strategy, it would be important to develop specific training, monitoring, and audit systems for these employees and those who support the sales efforts. As you develop the training, monitoring, and audit process, you should review the various statutory requirements that are generally enforced by either the state ethics office, secretary of state office, or the attorney general. If your budget allows, it is a good practice to establish a relationship with outside counsel that is familiar with multistate issues.

Once a sales person or other company employee crosses the lobbying threshold definition, the sales person—and likely the company—will have very specific registration and reporting requirements that will follow them throughout the year and likely

into the next year. These requirements vary widely throughout the states—from minimal reporting to very detailed and as frequent as every two weeks. In addition, civil and criminal penalties may apply if a deadline is not met or a form is intentionally not completed correctly.⁵ Here is an example of an affirmation that a sales person or compliance person may need to make in Massachusetts:

Under the pains and penalties of perjury, I certify that I am (Name) of (Company) and that the disclosure report I am submitting is complete and accurate for the period indicated. I further understand that any violation of the lobbying laws is punishable by civil and/or criminal penalties.

Gifts

Simply providing a pen or a book outlining the need for your product to a government employee could cause issues for you or the recipient. Many jurisdictions provide very specific definitions of gifts and impose limits on the amounts vendors or lobbyists can spend for the benefit of a government employee.⁶ Your sales team should be aware of these rules and should comply fully. Some jurisdictions may permit a small gift, such as a reasonable meal, but others prohibit even a cup of coffee or bottled water.

Unfortunately, there is no standard guidance that works for all jurisdictions. If you do not want to invest the time and energy to research the various rules and guide your sales team as questions arise, the best option

is to train your sales team to avoid giving any gift to any state employee.

Although many of the gift restrictions are imposed on the government employee, many states also impose these same gift restrictions on the company and/or company employee. In 2012, a New York utility was fined \$1.2 million for violating the state prohibition of giving gifts to state workers.

Revolving door

Hiring a former government employee can help companies better understand government opportunities and provide greater access to decision makers, but it can also create issues under laws restricting movement between the

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public and private sector. Government employees have unique knowledge about government needs, agency or government operations, familiarity with the decision makers, and an understanding of issues the agency may be facing. Historically, the media and the public have shown

interest, and at times outrage, when a government employee leaves government and applies their unique knowledge and contacts to financially enrich themselves. To protect governments from misuse of power, many state and local governments implemented specific rules a government employee—and in many cases, the new employer—must follow when transitioning to the private sector, so called “revolving” door laws.⁷ These restrictions could also affect how your company bids on a contract if an agency employee is being considered or simply expressed an interest in

a job. Many sales teams ask their HR counterparts to recruit government employees. If your company plans to hire a current government employee, it is very important that you have a solid process in place to ensure you and the candidate are complying with the revolving door rules. This process should include: (1) training for the HR recruiter and sales management, and (2) an audit mechanism to make sure pre- and post-employment restrictions are followed.

Compliance leadership is needed

State and local government sales are further complicated by the political undertones that underlie government operations. If, for example, a contract is championed by one administration, the purchase objective/decision may not be supported by the new administration. The new administration may look for superficial ways to terminate the agreement, including violation of lobbying or procurement rules. By following the domestic anti-bribery laws that seek to ensure open, transparent, and honest government procurement, you can protect your company, employees, and customers from a shifting political climate.

If your company has not previously addressed the risks of domestic anti-bribery law compliance, I encourage you to take the lead to understand the risks and chart a path forward to help guide your sales and sales support teams who are targeting state and

local opportunities. Compliance can be a valuable partner to Sales as they navigate the United States government marketplace. If you will be creating a domestic anti-corruption program, be prepared for some pushback, or outright dismissal, from your sales colleagues. Be confident in your role and know that your guidance will position your company and colleagues as trusted partners in the government sales space.

One of the most important factors in being a successful salesperson and vendor in the government space is transparency and acting in an ethical manner. Many of the government employees and senior officials appreciate vendors that respect the rules and help them avoid tripping over the ethics and compliance line. *

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