
The Ever Increasing Importance of Foreign Corrupt Practices Act Compliance

In the post Enron/Sarbanes-Oxley world, most domestic corporations realize that compliance programs are both good management and a legal necessity. However, many industries that deal directly with foreign government officials in international business transactions are not adequately prepared for the legal risks associated with doing business in foreign countries. In the last few years, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have stepped up their enforcement of Foreign Corrupt Practices Act (FCPA) violations. Companies must concern themselves with both the anti-bribery and the books and records provisions of the FCPA. My seven years experience as Chief of the Department of Justice's Criminal Fraud Section, which supervises all FCPA investigations nationwide, affords me a unique perspective on FCPA enforcement issues.

FCPA compliance is now critical for most companies doing business internationally. Based on recent prosecutions and settlements, the FCPA poses special risks for pharmaceutical and durable medical equipment companies and for companies doing business wherever the government has ownership of raw materials or must license and approve items for use. For example, in countries with socialized medicine, physicians are government employees and may be responsible for approving a drug for use in the country or actually prescribing its use. Payments to a physician as a consultant may be construed as a bribe in violation of the FCPA. Similarly, payments to local agents and co-ventures have been at the core of bribes to obtain government licensed oil rights and bribes for the right to install equipment in a government run airport. The key relationships that facilitate a company's ability to get approvals for their products and promote the sales of those products in a foreign country can, if not handled correctly, be a minefield of FCPA violations.

In seeking to avoid the potential pitfalls of doing business in foreign countries, companies should focus on three aspects of FCPA compliance. First, existing compliance programs need to be fine tuned and tailored to the known risks. Second, if a problem is discovered, a company must respond quickly with expert advice to determine the extent of the problem and to decide whether or not it is in the company's interest to make a voluntary disclosure. If a voluntary disclosure is poorly handled, a company may find that even though its disclosure led to the criminal investigation, it is not receiving credit from the government for having made that disclosure. Finally, for companies with an existing FCPA problem, a sophisticated understanding of potential dispositions and various remedial and cooperation requirements is necessary before undertaking settlement negotiations with the DOJ and SEC.

The cases summarized below highlight some of the types of FCPA violations that have been investigated and prosecuted in recent years.

- In March 2004, subsidiaries of ABB Vetco Gray Inc. pleaded guilty to FCPA

violations for paying bribes in connection with oil exploration projects in Nigeria. In addition to a substantial monetary settlement with both the DOJ and SEC, the company was required to hire an outside consultant to review its internal controls.

- InVision Technologies, Inc. entered into a December 2004 non-prosecution/deferred prosecution agreement with the DOJ relating to the “high probability” that agents had paid or offered to pay money to foreign officials in Thailand and elsewhere in connection with the sale of airport security screening machines. General Electric, which was acquiring InVision, took on responsibility for ensuring future compliance and for hiring an independent consultant.
- The Diagnostic Products Corporation matter involved guilty pleas in 2005 by a subsidiary, DPC (Tianjin) Ltd, and a separate SEC enforcement action for payments of illegal “commissions” or bribes totaling \$1.6 million to physician and laboratory personnel employed by government-owned hospitals in the People’s Republic of China. The company paid penalties totaling \$2 million for the criminal case alone and has hired a compliance expert.
- The Micrus Corporation matter involved a California medical device company that entered into a non-prosecution/deferred prosecution agreement in 2005 as a result of paying \$105,000 to physicians at publicly owned hospitals in several European countries. The payments were made to purchase medical devices and were disguised in the company’s books and records as stock options, honorariums, and commissions.
- In March, 2005, the Titan Corporation pleaded guilty to multiple counts charging that it made improper payments through an agent to support the reelection of the president of Benin in connection with a project to build a wireless telephone network. Titan paid more than \$28 million in criminal fines and settlements with the DOJ and SEC. Titan was also required to institute a strict compliance program.

The above examples make clear that stepped up enforcement of the FCPA is not confined to any one industry. For the first twenty-five years after enactment of the FCPA, the DOJ brought a limited number of cases and there were no clear patterns of enforcement. However, in recent years, the number of reported matters has significantly increased and a large number of cases have been brought to conclusion by both the Justice Department and the SEC.

The increase in FCPA enforcement activity is due to the confluence of several factors. First, since 1998, the United States’ jurisdiction has reached far more international activity than in years prior. The DOJ will now prosecute virtually any bribery of a foreign official where there is any U.S. nexus. Such a “nexus” may be as simple as a single wire through a U.S. bank or a phone call to the U.S. from a joint venture that facilitates the improper payment. Prosecutions can also be based on the fact that the “bribe” ended up as an entry on the U.S. company’s books and records. In addition, jurisdiction exists where any act was committed by a U.S. citizen. Second, in the post Sarbanes-Oxley environment, companies are sensitive to the importance of compliance and the need to make disclosures of wrongdoing. Executives have become well aware of their personal obligations to certify the accuracy of their accounting reports and the company’s need to certify that it has adequate internal controls. Finally, both the DOJ and the Sentencing Guidelines reward companies that have sound compliance programs and internal controls. The practical outcome of this has been that most companies have reached the conclusion that compliance programs must be robust and once illegal activity is uncovered, they have no choice but to voluntarily disclose the wrongdoing to the DOJ and SEC.

FCPA cases increasingly involve bribes and books and records violations arising from transactions involving specific geographic areas and specific kinds of business relationships. As a result, companies doing business in parts of Africa, parts of Asia, and Eastern Europe need to understand and evaluate the issues inherent in their business dealings. Another risk arises from the use of consultants and contractors in foreign countries who may make improper payments to government officials. Due diligence and tight fiscal controls must be exercised over business dealings with local consultants, agents, and business partners. Companies need to ensure that the professionals they hire document the work that they are doing and that the work is meaningful. Compliance programs should be designed to identify government positions held by contractors and consultants and to rule out undocumented expenses and slush funds. Books and records must accurately describe expenses. Mischaracterized and fraudulent entries which flow through to the books and records of the parent company in the United States need to be detected before they provide the jurisdictional hook for an FCPA violation.

Successor liability has been a prominent issue in several of the recent FCPA cases. No company wants to inherit the potential criminal liability of a company it is acquiring. Due diligence is again the key. Fortunately, the DOJ has shown that it will work with companies to resolve successor liability issues by settling the underlying investigation and, in some cases, issuing advisory opinions that provide other assurances to the acquiring company.

Where is the Department of Justice heading in terms of FCPA enforcement? The Department partners with the SEC on almost all cases. As is common in enforcement, once a problem area is identified during the investigation of a particular case, both agencies are likely to focus on other similarly situated companies and similar types of violations. The enforcement agencies may also expect companies to examine and self report problems in previously identified industry practices. Finally, the Department of Justice is using an increasingly sophisticated model in evaluating whether or not a company, as distinct from its individual employees, should be prosecuted. The Department considers the numerous "Thompson Memo" factors, as well as its own track record in FCPA and corporate settlements, in deciding whether a prosecution of a parent or subsidiary, a deferred prosecution agreement, a non-prosecution agreement, a civil settlement, or a SEC sanction is appropriate.

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