

FCPA - Foreign Corrupt Practices Act

Understanding compliance issues key to operating abroad

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PANELISTS:

John A. Ruhnka, Professor of International Business, University of Colorado Denver

Suzanne Schoettger, Vice President of Business Controls Compliance, Liberty Global, Inc.

Frank Schuchat, founding member law firm Schuchat, Herzog & Brenman, LLC

Henry Tsuei, (retired) Senior Vice President Western Union Co.

Global companies of every size need to understand the nuances of the Foreign Corrupt Practices Act (FCPA) and the potential civil and criminal penalties that can result from a lack of compliance with its rules and regulations, according to speakers at a meeting of the KPMG-University of Colorado Denver Global Enterprise Institute.

"Violators of the FCPA risk not just regulatory penalties but criminal charges, heavy fines and jail," said Michael Schwartz who led a panel discussion of the 1977 statute.

Enforcement of FCPA provisions is split between the Department of Justice (DOJ) and the Security and Exchange Commission (*see sidebar above*). "In recent years the DOJ and the SEC have made enforcement a priority," Schwartz said, pointing out that "between 2003 and 2007, the number of FCPA enforcement actions increased tenfold.

"And yes, the DOJ and SEC do talk to each other about cases," said Schwartz. This may not be cause for concern – unless one or the other wants to talk to you.

NOTICE: Information contained in this article is of a general nature and should not be construed as advice.

Key FCPA provisions

Anti-bribery - it is illegal to directly or indirectly offer, promise, or make a corrupt payment to a foreign government official for the purpose of obtaining or retaining business. Enforcement responsibility: Department of Justice (DOJ)

Books and Records - companies are required to (1) keep accurate books and records and (2) devise and maintain an adequate system of internal accounting controls.

Schwartz reminded the audience that "the FBI in the 1930s caught Al Capone not for doing something illegal but for failing to report the illegal income on his federal income taxes. So if you pay a bribe, you need to report it promptly and describe the payment for what it is" even though you are confessing to a crime.

Enforcement responsibility: Securities and Exchange Commission (SEC)

For more information log on to usdoj.gov/criminal/fraud/docs/statute.html

Affirmative defenses

There are certain affirmative defenses that can be employed if challenged. John Ruhnka noted an affirmative defense that is called 'facilitating payments' – a small sum given to low-level government officials to get them to do what they're supposed to do anyway." These officials are not in a position to award contracts or influence decisions, but they can hold up permits, licenses and generally hinder application processes and services. The FCPA allows this defense if the payment is lawful under the written laws of the foreign country.

While this is indeed an affirmative defense, "the burden of proof is on you," said Schwartz, "and there is no country that has a written law saying it is okay to make payments to government officials to get them to do their jobs. So that affirmative defense can be difficult to argue."

Another affirmative defense, and "one that comes up all the time," said Schwartz, "is that the payment was made as part of product promotion activities which may or may not include bringing the government official to the home office for a product demo or to a conference and paying reasonable expenses associated with the visit. In such cases the government official can be treated in the same manner as any other customer."

There are caveats, Schwartz said, referring to a case where a trip to Disneyland was tacked on to the home office visit and the company reimbursed the official for his expenses. "The company crossed the line from reasonable marketing and selling expenses to an illegal payment to a government official."

Frank Schuchat said, "My rule of thumb is never put cash in the hands of the foreign official; that's risky. Have your company pay the expenses directly." Also, he added, document those expenses.

"In China there is a cultural norm which is very different from ours," said Henry Tsuei. "Customers expect the vendor to pick up the tab. Be aware of that and look for expertise to help you navigate the environment."

Schwartz pointed out that businesspeople in China may be in what appears to be a private-sector enterprise but which may in fact be owned by the government. "Know your customer and who you're doing business with," he said.

Not just the FCPA

When the FCPA was enacted, the statute met with derision in the rest of the world, said Ruhnka. "But gradually, that has changed. Now individual European Union countries are adopting FCPA-type guidelines."

In February 1999 the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention became effective and has now been ratified by 37 countries. It criminalizes in each country the same kinds of conduct that the FCPA criminalizes for US companies. Unlike the FCPA, the OECD has no enforcement authority but monitors implementation by participating countries.

"There are any number of agencies around the world that share information about bribery investigations so it's not surprising when someone gets caught in the net," said Schwartz.

Something as simple as an e-mail from any employee worded in an ambiguous way can trigger an investigation that necessitates the hiring of external attorneys, said Suzanne Schoettger. “In the end you find out nothing wrong happened, but meanwhile you were distracted from business and potentially ruined your relationships in a foreign country. This is why all employees should be given training in the corruption laws.”

Red flags

Schwartz and panelists agreed that risk assessments should start with the most obvious red flags.

■ Some countries are more likely to be hotbeds of corruption than others. The Transparency International Corruption Perception Index ranks countries perceived to be high risk for this kind of activity. Companies low on the index automatically raise a red flag.

■ Bonuses or payments directed to an account in the Channel Island for services provided in some other country.

■ Beware the ‘politically exposed person’ which is a government official’s close

family member or business associate. This might be a very innocent relationship but could be very risky under the FCPA rule.

■ Joint ventures. From an FCPA perspective, this is a high risk area to the extent that you rely on third parties or agents to do business on your behalf. And if you are a minority partner you have very little ability to control the business activity of the company. This is why it’s important to know who you’re dealing with, their reputation and business practices and how they acquired their book of business. It’s a good idea to write compliance issues into contracts and it’s best to do so in the local language.

“The FCPA is about where you touch government, and there are particular industries that are problematic in distinguishing between private and state-owned entities,” said Schwartz. He cited oil and pharmaceuticals in China, telecom in Netherlands, and the health care industry in Canada.

“Canada may be fine from a corruption perception, but the reality is you’re dealing with government officials when you’re dealing with health care in Canada.”

It’s critical for every global company to do due diligence, and if you’re a board member and have any doubt about a relationship, “ask questions and document the questions and responses,” said Schuchat.

Schwartz agreed. “The board has a role to play. Somebody has to be minding the store.” ♦

FCPA jurisdiction

The FCPA has territorial jurisdiction over foreign companies and nationals. Briefly, this includes:

■ Any company doing business abroad, whether foreign or domestic, that has traded on any exchange in the US;

■ Any foreign or domestic company doing business in the US whether or not it’s publicly traded;

■ US residents working for a foreign company. Said Schwartz, “Even if you’re working for a company that is organized and existing under the laws of France and doesn’t do business in the US or have any trades in the US, you’re still subject to the FCPA.”