The Foreign Corrupt Practices Act:

What You Need to Know, What You Need to Do

by Jonathan Leiken and Jocelyn Kelly

American companies with operations overseas are grappling with an unfortunate cost of doing foreign business: compliance with the U.S. Foreign Corrupt Practices Act.[1] The letters "FCPA" now roll off the tongue of every corporate general counsel with responsibility for even the smallest piece of international business, and for good reason: compliance with the statute is mandatory for U.S. public and private companies alike, and violations carry significant fines and even criminal penalties for companies and individuals. The stakes are high and, unfortunately, they are rising.

The heat is being generated by the U.S. enforcement community, which has made the FCPA its current object of affection. The Department of Justice and the Securities and Exchange Commission, in particular, have special units of lawyers dedicated to "ferreting out" and charging FCPA violations worldwide. Boards of directors, hearing the buzz and wondering about their own liability, are asking management: *what are we doing about this?*

This article is a simple FCPA reference guide for companies and their general counsel who are preparing to answer that question. The FCPA is, at its core, a legal issue: it is government lawyers who are investigating these cases, and for that reason, and the reasons described below, it should be company counsel that take the lead in assessing and mitigating FCPA risks for the corporate client.

THE STATUTE: In simple terms, the FCPA contains two discrete sets of provisions:

(1) *anti-bribery prohibition*[2] that makes it illegal for U.S. companies (and their employees and third-party agents/consultants/business partners) to offer or provide things of value to foreign public officials (including employees of state-owned or state-controlled commercial enterprises), for the purpose of "obtaining or retaining business," and

(2) *books and records requirement*[3] that require U.S. companies to maintain accurate accounting records and supporting documentation (including, ironically, the accurate recording of bribe payments to foreign public officials).

It will come as no surprise that prosecutors and regulators are interpreting these two sets of provisions very broadly, while the FCPA's limited exceptions (for instance, the exception for "facilitation payments") are being narrowly construed.

I. Assessment of Risks

What should U.S. companies do to comply with the FCPA? The first step is to assess, in practical terms, the risks of FCPA violations based on the company's overseas business operations. For starters: Transparency International, a non-profit organization, publishes an annual "Corruption Perceptions Index," which measures perceived incidences of corruption in particular countries around the world. The CPI attempts to identify those regions where business persons are most likely to be confronted with the words "*Bribes and kickbacks are how business is done here*." Those words may make sense to the company's sales representative while conducting a business deal in Mumbai, India, but they will be cold comfort to that person when he or she is testifying in one of the basement deposition rooms of the SEC's headquarters in Washington, D.C.

After assessing which parts of the world present risks to the company according to the CPI, the company should ask itself: how might our business operations result in FCPA concerns in these regions?

A. Government Customers

Multi-national companies should maintain a detailed understanding of which, if any, of their overseas customers are owned (even partially) or controlled (even indirectly) by a foreign government. In the wake of the world economic crisis in 2008, many industries have been nationalized or brought within foreign government control. Foreign equivalents of our TARP program have created millions of new "foreign public officials" worldwide. Manufacturing companies, the health care industry, financial institutions, and many users of goods and services around the world have foreign government connections that may not be obvious. Sales to these companies, and interactions with their employees at all levels of the organization, can fall within the FCPA's widening gyre. The phrase "know your customer" has greater meaning than ever before.

B. Third-Party Agents/Consultants/ Business Partners

Next question: what third parties support your business worldwide? The acts of third-party agents, distributors, subcontractors, and business partners can create FCPA liability for the company and its personnel if bribes are made,

or even offered, which could inure to the benefit of the company. (In 2005, for instance, the SEC charged GE Invision, Inc. with violations of the FCPA for having mere awareness with a "high probability" that its foreign distributor had paid bribes to foreign government customers in attempts to sell GE Invision's equipment.[4]) Screening programs and regular monitoring of third parties that support the company's business internationally is an essential part of FCPA compliance.

C. Customs Officials and Other Government Inspectors

Another key piece of a company's FCPA assessment involves interactions with other foreign government personnel. Customs officials, government inspectors and other government regulators overseas can (and do) demand bribes or kickbacks that could impede the company's business if they are not paid. An untrained employee, seeking to get his job done, might become comfortable making a payment in these circumstances. But, being extorted by a corrupt customs officer or inspector is not a defense to the FCPA if a bribe was made or offered. Companies should assess their risks of these types of interactions based on the nature of their foreign business.

II. Assessment of Corporate Policies, Training

The company's greatest protection against FCPA exposure is a well-conceived, reasonably designed compliance and training program: one which takes into account the specific risks identified in the company's assessment described above. A thoughtful FCPA compliance program will prevent violations and encourage employees to seek guidance from management or legal when difficult questions arise. And, if something does go wrong and someone actively engages in wrongdoing, the company and its leadership can mitigate their own liability by demonstrating the good-faith approach to the risks through the compliance program.

A. Training

FCPA compliance can be counterintuitive. Most employees of international companies know that "bribery" is illegal, but FCPA issues frequently do not present themselves as "bribes." Sophisticated international business people find ways to finesse and obscure kickback payments, or foreign business partners may insist that illegal payments are the "cost of doing business here." Only through effective, regular, documented training can employees know what to look for, and how to respond.

B. Accounting Protocols

Compliance with Sarbanes-Oxley is not enough to ensure that the companies accounting protocols comply with the FCPA. Companies must maintain and disseminate accounting policies which reference the statute specifically. Maintaining inaccurate books and records can result in FCPA violations even where there is no direct proof of bribe payments to foreign public officials. (In 2010, for instance, the SEC charged NATCO Group, Inc. with violating the FCPA for maintaining inaccurate books and records in a foreign business, even where there were no allegations of specific bribe payments.[5])

C. Travel and Entertainment

Travel and entertainment is a necessary part of international business. But it also creates risk where expenditures might inure to the benefit of a foreign public official. (In 2007, for instance, Lucent Technologies was charged by the DOJ and the SEC with violations of the FCPA for providing lavish and excessive travel and entertainment to government customers in China.[6]) Companies should maintain detailed procedures to ensure that gifts, benefits, meals, travel and entertainment are not provided to foreign public officials in a way that could be construed as excessive or corrupt.

D. Acquisition Due Diligence

Acquiring companies in foreign jurisdictions frequently present significant FCPA risks to American companies. Due diligence must include specific FCPA considerations, and red flags of potential bribes must be considered, addressed and documented. It is easy, without the right due diligence, to buy a problem through an international acquisition. (In 2009, for instance, Halliburton Company settled DOJ charges for failing to address FCPA risks identified in the course of an international acquisition.[7])

III. Responding to Problems: Attorney-Client Privilege

Prosecutors and regulators in the FCPA arena, many of whom are lawyers themselves, are generally respectful of the attorney-client privilege attendant to FCPA compliance reviews. Evidence of potential FCPA issues within the company should be discussed and considered with, and preferably investigated by, company counsel. Approaching FCPA problems with a legal perspective allows the corporate client to be informed of all of the facts and to receive privileged and confidential legal advice as to how to proceed. Considerations of whether, when, and how, to disclose FCPA issues to government authorities is a fact-specific consideration which should include detailed legal analysis.

Conclusion

For U.S. companies with international operations, FPCA compliance is now, unfortunately, a necessary cost of doing business. But the path to compliance is not a straight one: it is marked with all kinds of obstacles and twists, including false assurances from foreign parties of the "customary" practices in international locations. Focusing on the practical considerations, as highlighted above, will help counsel to carefully and thoughtfully guide their companies through the labyrinth and past these dangers, to permit international business to grow and thrive.

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[1] 15 U.S.C. §78dd-1 et seq.
[2] 15 U.S.C. §78dd-1(a), §78dd-2(a), §78dd-3(a).
[3] 15 U.S.C. §78dd-1(b), §78dd-2(b), §78dd-3(b).
[4] *See* SEC v. GE InVision, Inc., No. C-05-0660 (N.D. Cal.), *available at* http://www.sec.gov/litigation/litreleases/lr19078.htm.
[5] *See* SEC v. NATCO Group Inc., No. 4:10-CV-98 (S.D. Tex.), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21374.htm.
[6] *See* http://www.justice.gov/opa/pr/2007/December/07_crm_1028.html and SEC v. Lucent Technologies Inc., No. 1:07-cv-02301 (D.D.C.), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20414.htm.
[7] *See* SEC v. Halliburton Company and KBR, Inc., 4:09-CV-399 (S.D. Tex.), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm.