

How to successfully balance the complexities of international business practices with compliance risk*

The FCPA carries criminal penalties and fines of up to: **\$2 million or twice the gain for firms**
\$100,000 for individuals and up to five years imprisonment

In 1977, the U.S. Congress passed the Foreign Corrupt Practices Act (“FCPA”) in an attempt to ensure commercial fair dealing, government integrity and accountability, and the efficient and equitable distribution of limited economic resources. The FCPA established criminal and civil penalties for payments (or promises of payments) made by U.S. corporations or U.S. nationals, to foreign officials that could be considered bribes.

The FCPA’s two main areas of focus:

- 1. Anti-Bribery Provisions:** essentially prohibit the promise, payment or giving of money or anything of value to any foreign official for the purpose of obtaining or retaining business.
- 2. Accounting Requirements:** applicable for companies required to file periodic reports with the U.S. Securities and Exchange Commission (“SEC”). Such companies are required to (i) maintain a system of internal accounting controls that provide reasonable assurance that management’s instructions are being carried out and that discrepancies in the company’s books and records are detected and reconciled; and (ii) to make and keep books, records and accounts, which in reasonable detail, accurately reflect the transactions and dispositions of assets of the issuer.

A Global Threat

Multinational companies facing rapid growth in multiple jurisdictions often experience a wide variety of cultural, legal, financial and accounting complexities, along with new obligations and responsibilities as they navigate the global marketplace. Opportunities in transitional and developing countries often times require dealing with unfamiliar geographic territories, foreign governments where lines between official and non-official status are not always evident, and compliance with numerous international, regional or local laws. Business conducted in such jurisdictions can expose a company to unforeseen risk, and even civil and criminal penalties.

Transparency International, a non-profit advocacy organization working to curb corruption in international business transactions and other areas, reported that despite some gains; corruption remains an enormous drain on resources and the public sector is plagued by bribery. In its 2007 Corruption Perception Index, a total of 135 out of 180 countries scored 5 or lower against a clean score of 10, and 82 of those countries scored 3 or lower, indicating perceived rampant corruption. It is estimated that the amount lost due to bribery in government procurement is at least US\$ 400 billion per year worldwide.¹ Additionally, it is estimated by the World Bank Institute that more than US\$ 1 trillion is paid in bribes each year.²

Consequences

The federal government has dramatically sharpened its focus on business activities in foreign countries and the frequency of prosecutions under the FCPA has increased notably over the last few years. Regulators are now pursuing cases more aggressively and assessing larger penalties when violations are found. The severe penalties applicable under the FCPA make it imperative that a company invest in the development and implementation of a comprehensive FCPA compliance program.

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- \$2 million or twice the gain for firms
- \$100,000 for individuals and up to five years imprisonment

Under federal criminal laws other than the FCPA, individuals may be fined up to \$250,000 or up to twice the amount of the gross gain or loss if the defendant derives economic gain from the offense or causes economic loss to another person.

Civil actions may be brought by the U.S. Attorney General or the SEC. Conduct that violates the anti-bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under civil RICO (Racketeer Influenced Corrupt Organization), or to actions under other federal or state laws.

Finally, in guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be:

- barred from doing business with the federal government;
- ruled ineligible to receive export licenses;
- barred from securities business; and
- may be suspended from agency programs of the Commodity Futures Trading Commission and the Overseas Private Investment Corporation.

FCPA issues are also fertile ground for plaintiff actions or competitor lawsuits.

Management's responsibility and liability has significantly increased in the recent past. The Sarbanes-Oxley Act of 2002 ("SOx") is one example. SOx requires that CEOs and CFOs personally sign off on the accuracy of their company's financial statements and the effectiveness of their internal controls. This has placed more pressure on executives to ensure compliance with federal securities laws. The key to avoiding or limiting management's (and a company's) exposure is to have an effective compliance program in place, which can help to avoid large fines and other penalties.

More than any time in the past, regulators are focusing their attention and increasing their expectations of what is expected in compliance programs, spurred on by the new U.S. federal Sentencing Guidelines, which took effect on November 1, 2004. The guidelines require a company to implement, update, communicate and monitor clear and concise compliance standards. They also require a company to assign responsibility for the program to a credible person that is provided sufficient resources and has direct and regular access to the board of directors. A disciplinary mechanism and response plan must also be put in place for instances where violations are noted.

Mitigating the Threat

The PricewaterhouseCoopers Investigations & Forensics Services practice provides unparalleled, confidential, global resources to assist companies with implementing and/or assessing compliance programs, performing background due diligence investigations on agents and intermediaries, and performing transactional investigations, under the direction of a company and its counsel.

Our professionals have a global presence in approximately 70 territories and offer:

- A comprehensive understanding of local and regional culture, language, financial and regulatory systems
- An international network of partners and staff who offer a unilateral advantage in investigating issues that extend across borders and the ability to provide our clients unprecedented global reach in a coordinated and expedited manner
- An international network of individuals experienced in performing computer forensics and in conducting cyber-crime investigations
- The expertise of qualified investigators who have held senior-level positions with major prosecutorial and law enforcement agencies in the United States, Canada, the United Kingdom, Europe, South Africa, and Asia

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1 <http://www.transparency.org>

2 <http://web.worldbank.org>