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Practice note: US Foreign Corrupt Practices Act compliance program tips

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Sharie A. Brown – FCPA compliance tips

The Department of Justice and the Securities and Exchange Commission are issuing almost weekly announcements about criminal and civil enforcement actions against individuals, US companies and non-US companies under the [US Foreign Corrupt Practices Act](#). (See the DOJ's and the SEC's recent FCPA enforcement [actions and announcements](#).) The FCPA's anti-bribery [provisions](#) make it a criminal offense for a "domestic concern" to directly or indirectly promise, offer, or authorize bribes or anything of value to foreign officials in order to obtain or retain business or secure any improper advantage.

The act's recordkeeping, accounting and internal controls provisions require companies whose stocks are traded on US exchanges to keep accurate books, records and accounts, as well as maintain adequate systems of internal financial controls. In dollar figures, penalties and fines for FCPA violators have ranged in the millions, while outside counsel legal fees and FCPA compliance monitor fees have been nearly as high.

American companies and individuals with overseas operations and sales in all industries should take steps to ensure that all affected personnel are aware of the FCPA, as well as the public corruption challenges that they may face while doing business for their employers overseas. US and non-US companies – wherever they are located – that are issuers of securities on American exchanges also must ensure that they and their subsidiaries make and keep accurate books, records, and accounts that accurately and fairly reflect issuer transactions and asset dispositions in reasonable detail.

In addition, issuers are required to devise and maintain systems of internal accounting controls that provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to (I) permit the preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals, and appropriate action is taken regarding any differences.

This practice note will provide some tips on the elements of an effective FCPA compliance program that will help prevent potential violations of this act for companies or firms.

FCPA compliance program checklist (*not exhaustive*)

FCPA compliance risk assessment

- Companies first must assess the public corruption risks associated with their in-country locations and activities, as well as any industry risks; partner, consultant and third-party risks; customer relationships; and the nature and frequency of foreign official government contact in their businesses, among other items.
- Written FCPA internal controls and anti-bribery compliance program procedures must make it a priority to address the assessed corruption business risks in the specific locations.

Begin preliminary FCPA awareness training

- Companies must provide live and intranet training on the anti-bribery provisions, as well as the internal controls and accounting provisions. In addition, companies must make sure that they define a "foreign government official" so that employees understand that the term covers a foreign official (in other words, a legislative, administrative or judicial officer in a foreign government, department or agency, or publicly funded agency), a foreign political party or party official, a candidate for a foreign political office, an official of a public multilateral organization (e.g., the United Nations), or "any person" who intends to pass the payment to a foreign official (spouse, other family member of official), or who takes steps to further a bribe in U.S. or using U.S. instrumentalities (e.g., internet, wires, phones).
- Companies also must offer examples related to their business operations so that employees remain engaged.

Provide examples that show a bribe may come in many forms under the FCPA

- The procedures should reflect that offering or promising to pay money or "anything of value" could include paying for an official's medical expenses, an official's use of a corporate jet, an extravagant gift, or coverage of expenses for an official's visit to company facilities that includes a side trip for the official's family to visit Walt Disney World, Paris, Las Vegas or Brazil. It also could include a charitable donation at the request of the official to an organization recommended by the individual.

Include a policy on the FCPA 'facilitating payments' exception

- The written procedures should explain that facilitating or expediting payments to low-level employees to expedite or secure the performance of a routine governmental action (e.g., mail delivery, trash collection or immigration border clearance) is permissible under the FCPA, but may not be lawful under local law. Therefore, employees should contact their legal departments before making any payment, or the policies should provide guidance on when the companies will permit such facilitating payments.

Allow only entertainment and business expenses that are subject to strict guidelines: an affirmative defense

- Employees should have strict parameters regarding the permissible coverage of reasonable and *bona fide* expenses of foreign officials, as well as understand that these parameters only apply when such coverage is related directly to the promotion or demonstration of their companies' products or services; or when it pertains directly to the performance of specific contracts between the companies and the foreign governments. Extravagant entertainment and the inclusion of an official's family members will trigger an FCPA violation.

Procedures should call for obtaining a local law opinion in new markets

- The written policies should expressly require legal departments to obtain legal opinions indicating that the written laws of any foreign official's country permit the payments for the particular official or officer. Still, no local country law expressly allows for the bribery of a foreign government official. A list of foreign outside counsel should be maintained for this purpose.

Procedures should require due diligence/vetting for agents, consultants and partners

- A questionnaire should be developed for due diligence on agents, consultants and partners overseas that addresses issues such as business reputation, qualifications, reputation for ethical dealings, status as government officials, and prior misconduct.
- All due diligence should be documented, and all hiring results should be justifiable.

Parent company, controlling shareholder, subsidiaries, third parties must have accurate books and records

- The mandate for keeping accurate books and records should apply to the companies, as well as their subsidiaries, affiliates, joint ventures and third-party partners. This is the best way to ensure the detection and prevention of irregularities or sensitive payments that could create liability for companies from other parties.
- Financial software can be used to detect irregularities, as necessary.
- Internal auditors, controllers, CFOs and security personnel should be trained in identifying FCPA "red flags" that might signal a violation or corrupt payment.
- Facilitating payments and entertainment/travel expenses for foreign officials must be documented meticulously and clearly in the books and records.

Written internal controls must be followed

- The written internal controls procedures should identify management's level of authority clearly and be followed in all instances.
- No manager who has been involved in an internal controls failure should be permitted to continue in a position that authorizes the disposition of funds and assets.
- Assets should only be disbursed in accordance with the written procedures outlined by management's general or specific authorizations.

- Reviews should be conducted regularly to ensure that the recorded accountability for assets is compared with the existing assets.

Issuers with 50 percent or less ownership or control still must comply

- Provisions should reflect that issuers (US or non-US, wherever they are located) with 50 percent or less ownership or voting power must proceed in "good faith" to use their influence to cause the controlling companies to devise and maintain systems of internal accounting controls consistent with those required for controlling issuers. As a result, minority joint-venture partner issuers still must document and reflect the companies' efforts to influence the controlling partners with respect to internal controls and accurate books and records.

Contract provisions with termination clauses and audit rights

- Strong anti-bribery contract clauses are required today, including termination rights in transaction documents on suspicion of corrupt payments, as well as audit rights for business partners, agents, and third-party books and records.

Mergers and acquisitions FCPA due diligence

- Before firms or companies seek to acquire other companies (particularly foreign ones), they should conduct anti-corruption due diligence on the target companies to determine if corrupt payments have been made in connection with the core operations of the targets' businesses or contracts. This M&A anti-corruption due diligence will enable the boards of the purchasing companies to factor in any negative information that will influence the decisions to purchase or merge with the target companies. Successor liability can be minimized or even avoided as a result of such due diligence, and steps can be taken to address the underlying corruption issues with the DOJ and the SEC, as necessary, before the acquisitions.

Conclusion

Companies can prevent FCPA violations with careful planning; testing of compliance procedures; reviewing internal controls, as well as books and records; employee training; agent and M&A due diligence; and having strong anti-corruption contract terms. These steps will not prevent violations by individual employees, but they will demonstrate the companies' commitment and mitigate against extreme FCPA enforcement agency measures.

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