

January 7, 2015



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## A Primer on the Foreign Corrupt Practices Act

By Radha D. S. Kulkarni

The conduct of your employees can implicate statutes other than the familiar federal and state fair employment laws, and an unwary employer can find itself subject to stiff fines and unwelcomed publicity by ignoring its compliance obligations under those statutes. For example, does your company conduct business abroad, and, if so, are you familiar with the Foreign Corrupt Practices Act ("FCPA")? If you are an entity traded on an American exchange, incorporated under the laws of the United States, or acting while in the territory of the United States, or you are an individual who is an officer, director, employee, agent, or shareholder of such a company, are a citizen of the United States, or are a person acting in the United States, you are subject to liability under the FCPA. The FCPA prohibits giving or attempting to give anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. The phrase "anything of value" has a very broad definition and includes even charitable contributions or gifts to family members of foreign officials, and bribes come in all shapes and sizes, often making them difficult to detect.

In recent years, the Securities and Exchange Commission ("SEC") and Department of Justice ("DOJ") have increased their focus on FCPA compliance, including securing a record \$772 million fine against one company last year. Those agencies have also been increasingly targeting (or, at least, stated their intentions to increasingly target) individual actors, in addition to the increased

enforcement against companies. This means that you and your employees are at risk under the FCPA in the event of a suspected or actual violation.

A robust FCPA compliance program can be a strong defense or prevention against FCPA issues. Compliance programs should be individually and narrowly developed and tailored to a company's needs and risks. While there is no guaranteed checklist for an effective compliance program given the unique nature of companies, some hallmarks of an effective FCPA compliance program are:

- A commitment from senior management and a clearly articulated policy against corruption;
- Well-established and -disseminated codes of conduct and compliance policies and procedures;
- Sufficient oversight, autonomy, authority, and resources for the program;
- Risk assessment, resource allocation, and due diligence proportional to the type of activity or business opportunity, the particular country and industry sector, potential business partners, level and amount of government involvement, governing regulation and oversight of the activity, and exposure to customs and immigration in conducting the business;
- Training and continuing advice throughout the company that clearly communicates, in the local language where appropriate, the policies and procedures, case studies, and practical advice for real-life scenarios individuals will encounter in their specific roles;
- Disciplinary measures that are well publicized and clearly applicable to all levels of the organization;
- Effective due diligence, review, and monitoring of transactions and dealings with third parties and vendors, as they are among the most common means through which violations take place;
- Mechanisms that facilitate and encourage confidential reporting, such as hotlines or ombudspersons, and that properly document and evaluate actual and possible FCPA issues; and
- Periodic testing, review, audit, and analysis of the effectiveness of the program to ensure it is the best program in place for your organization.

However, as employers with strong anti-discrimination and anti-harassment policies know, even the best written and most well-intentioned policies cannot guarantee insulation from liability or from investigation by the government of suspected/potential violations. In the event a company discovers a violation by its employees, the DOJ and SEC encourage self-reporting and cooperation by entities and individuals, and cooperation can

facilitate and expedite any potential investigation by government authorities and possibly result in non-prosecution agreements and reduced penalties.

Conversely, failing to disclose known violations can result in harsher penalties, thus providing incentive to identify and self-report violations. For its part, the government has created incentives to increase the chances that if a company will not report violations, its employees will. The Dodd-Frank Act established a whistleblower program that rewards whistleblowers between 10-30% of total recovery when the recovery exceeds \$1 million, giving financial incentive for individual employees to come forward with reports of FCPA violations. Another important consideration when developing FCPA compliance measures and programs is to ensure that the compliance program is independent of and given due weight in relation to business decisions. All too often, FCPA issues are not timely discovered when compliance programs are not properly implemented because of a perceived business cost, and companies and employees face crippling fines and punishment as a result.

In any event, companies that are navigating these waters would be wise to consult with experienced legal counsel familiar with the FCPA and the government agencies charged with its enforcement, both when developing any compliance program and when dealing with a suspected violation.

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