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Greasing Global Palms

EMPLOYMENT COLUMN
By Kent Schmidt
and Mandana Massoumi

As companies shift work overseas to meet the challenges of globalization, they must also consider regulatory requirements in balancing their employment and business needs. Among these regulations, the U.S. Foreign Corrupt Practices Act of 1977 is being wielded against companies pursuing business in foreign countries. Violation of the FCPA, which can include providing "gifts" or "entertainment" to foreign officials, has under some circumstances resulted in significant fines. For example, in February 2007, a subsidiary of an offshore oil field equipment manufacturer paid $26 million in fines, one of the largest criminal fines issued, for violation of the statute. Other companies have been fined up to $1 million for improperly recording expenses.

What is the FCPA?

The "corrupt practices" provisions of the FCPA prohibits U.S. companies, their subsidiaries, officers, directors, employees and agents from providing anything of value (including money, entertainment, goods and gifts) to a "foreign official" to assist the company for an improper advantage. In addition to the express prohibition against improper payments, the FCPA includes strict record-keeping and accounting regulations designed to prevent cash transactions or "off the books" payments from being made to foreign governments. The FCPA was passed by Congress in 1977 in the wake of the Watergate scandal as a reaction to perceptions of governmental corruption in the United States and abroad. The law was prompted by an SEC study revealing over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians and political parties.

The law applies to any corrupt payments to foreign officials whether the violator is an "issuer" (generally a publicly traded company or a company otherwise required to report to the SEC) a "domestic concern" or a foreign national or business. A domestic concern is any individual who is a citizen, national or resident of the United States; or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship that has its principal place of business in the United States; or that is organized under the laws of a state of the United States, or a territory, possession or commonwealth of the United States. The law also applies to foreign companies doing business in the United States.

The difficulties in addressing FCPA violations stem from a number of factors, not the least of which is the fact that these violations typically occur in a foreign territory, making it a challenge to exercise oversight and implement preventive steps. Further, the inherent covert nature of the type of bribery that the FCPA prohibits makes detection difficult, if not impossible. The prohibited conduct frequently occurs in a quid pro quo transaction or a context in which the company employees have done nothing more than turn a blind eye to conduct that would lead a reasonable person to suspect an employee or outside consultant is making improper payments.

The FCPA prohibits not only a corrupt payment, but also an offer or promise to make such a payment. With few exceptions, a payment or offer or promise of payment is corrupt if it is intended to influence any act or decision of a foreign official in his or her official capacity or to obtain an improper advantage with respect to a facilitating payment. The definition of a "foreign official" is also broad. It includes not only elected or appointed officials but also representatives of state-owned businesses. In many countries, participants in telecommunications, health care, transportation and other services are deemed governmental entities.

Steps to Mitigate Risks

Notwithstanding these unique challenges, there are proactive measures that vigilant companies can undertake to ensure compliance with the FCPA and reduce the risk of a violation.

The first step to mitigating risks of an FCPA violation is to prepare a written policy that strictly prohibits any conduct that can be construed as a statutory violation. A comprehensive compliance policy is recommended to address commercial bribery in all forms — even if not a per se violation of the FCPA. This includes transactions in which the company or its subsidiary is a purchaser of goods or services from a private entity. The policy should include a clear statement of obligations under the law. It should also clearly outline the company's process and procedures for receiving, investigating and responding to any complaints of alleged violation. To prevent potential whistle-blower liability, the FCPA policy should clearly reiterate the company's "no retaliation" policy as part of its commitment to investigate any such complaint.

Proper implementation of the policy requires ensuring that executives and managers receive training on the FCPA requirements and the scope of the policy. The company's key executives and management, particularly those involved in overseas operations and sales, should be subject to this training. To further document compliance, it is advisable to retain signed statements acknowledging that the policy and training on the policy have been provided.

In addition to training sales staff, separate training should be provided to the finance department related to the record-keeping requirements under the FCPA.

Many violations of the FCPA are committed not by employees but by outside consultants. By summarizing and incorporating the strict requirements of the statute in contractual agreements as well as indemnity provisions for violation of the law, risks of prosecutions can be mitigated. This is particularly important where the company is involved in offshore outsourcing. Additionally, the agreements can require consultants to undergo training related to these statutory requirements as a condition to do business with the company, prior to commencing work.

The company should also consider whether existing compensation guidelines could indirectly advance compliance objectives. Therefore, in drafting bonus or commission plans, particularly for those working overseas, the FCPA requirements should be considered. Reasonable mechanisms to oversee discretionary bonuses and commission payments and other incentive pay can be implemented to mitigate a risk of undue motivation to engage in illegal behavior.

Similar controls and certifications can apply to contracts with distributors, agents and manufacturer representatives. Contracts concerning these types of relationships should be reviewed to ensure that the distributor is affirming its principals and representatives have an adequate understanding of the FCPA's prohibitions and requirements.

Relevant compliance policies and communications about the policies should be translated into a foreign language where appropriate.

Because the FCPA not only prohibits improper payments but also mandates adequate record keeping, a review of accounting controls should be completed. The "cardinal rule" of an FCPA-compliant accounting program is documentation of expenditures. Thus, at a minimum, every marketing expense should be documented — cash payments should be discouraged. The paper trail can discourage some improper payments. Efforts should also be made to retain documents reflecting that the goods or services were in fact provided, to guard against fraud or use of manufactured receipts.

Since marketing expenses are frequently used to mask improper payments, particular controls and processes should be established for all such expenses. A system should be established whereby the greater the marketing expense, the more management approvals required. Ordinary marketing expenses under a certain amount require documentation that might be expected — e.g., receipts for a dinner accompanied by a form that indicates who attended the dinner, the purpose and the amount. More significant documentation should be required for greater expenses. Any written proposal for an extraordinary marketing expense above a certain threshold should include a statement of FCPA and local law compliance to be signed by the individual requesting the expenditure approval.

To further ensure compliance with the FCPA requirements, the company should periodically audit its record-keeping and accounting practices. A similar audit can also be performed on records of executives to ensure that their practices do not provide any potential risk of violation.

Kent Schmidt is a partner at Dorsey & Whitney in Irvine, where he is a member of the trial department and provides advice relating to securities compliance and other white-collar crime matters, including Foreign Corrupt Practices Act and insider trading. *Mandana Massoumi* is a partner in the firm's labor and employment group, where her practice focuses on employment litigation, including wage and hour class actions. She also regularly advises employers on various state and federal employment laws, and provides strategic advice to ensure compliance.