THE FOREIGN CORRUPT PRACTICES ACT:

ENSURE COMPLIANCE, OR PAY THE PRICE

If your company, or your clients, are not up to speed with the Foreign Corrupt Practices Act of 1977 ("FCPA"), big penalties could be in store, even when violations are the result of simple errors or oversight. Understanding the law, analyzing your accounting practices, and training employees for compliance can save time and money down the road.

The FCPA prohibits United States companies from bribing foreign officials. The law applies to publicly held U.S. companies and foreign companies listed on the U.S. stock markets; it also applies to all subsidiaries, officers, employees and agents. The FCPA requires entities to establish internal accounting controls to prevent the concealment of bribes and to reflect all transactions accurately.

The FCPA consists of anti-bribery and accounting provisions that are enforced by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) respectively. Companies found to be in violation can be subject to criminal and civil enforcement actions resulting in large fines and prevention of participation in federal contract bidding. Criminal penalties can reach up to $2,000,000 for corporations per violation, and up to $100,000 for individuals and imprisonment for up to 5 years. Under the Alternative Fines Act these fines can actually rise even higher. The SEC may also bring civil actions against companies and individuals for violating the FCPA that can reach $25,000,000 or up to twice the benefit that the entity obtained through the violation.

Over the last several years, the DOJ and SEC have significantly increased their enforcement efforts, bringing in more investigative and prosecutorial staff to handle cases. Today, more cases are being handled by both the DOJ and SEC, while overall resources dedicated to enforcement are on the rise.

Some recent high-profile cases illustrate just how damaging non-compliance can be. In April 2007, a Baker Hughes subsidiary paid a $10 million criminal fine for FCPA violations. In 2006, Schnitzer Steel Industries paid $6.3 million for improper recording of cash payments and gifts given to managers of government-owned steel mills in China.

Of prime importance to many companies is the fact that the FCPA does not have a materiality standard. This means that accounting errors or oversight can result in a violation of the accounting provision of the FCPA. As a result, it is absolutely vital for companies to determine proactively the existence of FCPA violations, since conscious disregard or deliberate ignorance are not valid defenses.

In addition, for many entities engaged in global business deals, understanding what types of payments are actually permissible under the law is key. Clear policies and procedures should be put in place to avoid confusion between permissible payments and violations. Permissible payments include those for licenses, permits and processing of government papers. Permissible payments should not influence the decision of foreign officials to award new business or to continue business with a particular party.

To prevent FCPA violations, companies should implement a comprehensive approach designed to uncover errors or bad acts, while making sure that good accounting procedures are in place all around. Organizations should conduct a forensic analysis of all books and records, analyzing "soft" expenses including consulting services, advisory services and legal fees. In addition, a clear set of FCPA policies and procedures should be put in place on a company-wide basis, while FCPA training for key managers should be required. Finally, companies should conduct in-depth due diligence when making acquisitions, and should perform compliance assessments of their field offices.

Entities can usually mitigate fines through self disclosure and by proving that they have implemented internal controls to prevent further violations.

The detection and prosecution of corporate fraud and bribery is becoming truly international in scope. As FCPA enforcement efforts grow, and as international efforts to combat fraud become more accepted, the cost of not complying with FCPA and its intent will continue to increase. ⚖

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