Growing Globally with the FCPA: Concerns Before and After International Expansion

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Is your client or organization expanding abroad? Does it already have an international presence? It's a complex endeavor to coordinate financing, taxes, site selection, staffing and training, among countless other considerations, all while minding foreign laws and regulations. But be careful not to overlook the pitfalls of global growth often associated with the Foreign Corrupt Practices Act (FCPA or "the Act"). Although the FCPA creates ongoing concerns for any organization operating internationally, stages of expansion require extra scrutiny in the context of anti-corruption compliance programs and related due diligence. Giving short shrift to these tasks can potentially lead to costly—and sometimes ruinous—criminal and civil investigations, not to mention multi-million-dollar penalties and, for executives at the helm, jail time.

In its most basic terms, the FCPA prohibits American companies and their agents from bribing foreign-government officials for some "business purpose." It also penalizes false accounting that results from bribes. But the expanse of those prohibitions is anything but basic. For purposes of the Act:

- Foreign officials can run the gamut from a high-ranking appointee to a common clerk working the night shift in a permit office. Sometimes, even private employees can be officials if their employers are sufficiently owned or controlled by the state.
- As for the person doing the bribing, it doesn't even have to be your employee. Agents acting on your company's or joint venture's behalf will suffice.
- A "business purpose" is liberally interpreted to mean nearly anything done to obtain or retain business or achieve a commercial advantage.
- The bribe can be any "thing of value," and the Act infamously has no de minimis exception—modest gifts and small-time kickbacks can lead to multi-million dollar fines.
- There is no such defense as "that's just how business is done there." Many have tried. All have failed.

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) enforce the FCPA with consistent vigor. In recent years, they announced a combined 53 enforcement actions in 2016, 39 in 2017, 39 in 2018, 54 in 2019, and 33 in 2020. While statistics were lower in 2020 than they have been recently (federal law enforcement was not immune from the temporary shutdowns and slowdowns caused by the pandemic), the year still saw the DOJ and SEC achieve a record-breaking penalty for Goldman Sachs, which agreed to pay more than $1.6 billion (plus billions more to foreign regulators) to settle FCPA violations by a Malaysian subsidiary.

Of course, not every company operating internationally has the size, revenues or profile of Goldman Sachs, and there are invariably too many companies for the DOJ and SEC—with their finite resources—to investigate. However, any organization doubting whether it should fret over the FCPA should keep in mind that the DOJ, SEC and countless plaintiffs' firms regularly seek out whistleblowers through internet advertisements, a significant portion of government investigations are in fact initiated based on information from those whistleblowers, and the number of companies investigated by the DOJ and SEC far exceeds the number of enforcement actions that the DOJ and SEC announce publicly. Then do the math. Organizations can be fined up to $2 million per bribery violation, up to $25 million per accounting violation, and be forced to disgorge *up to three times* the profits derived from foreign operations where a violation occurred. For their parts, executives and individuals can receive fines and prison sentences up to $250,000 and up to 5 years per bribery violation and up to $5 million and up to 20 years per accounting violation.

So, what is a savvy company with foreign interests to do? The good news is that, through their enforcement of the Act, the DOJ and SEC have driven home a consistent message for companies wishing to minimize criminal and civil exposure if an investigation were to arise and, potentially, to avoid a prosecution altogether: implement a *meaningful* FCPA compliance program. Better still, the DOJ and SEC have provided an outline of how to institute such a policy that, in addition to minimizing prosecution risk, will hopefully help your organization avoid acts of corruption in the first instance.

Compliance Policies

Whether your company already has operations abroad, is considering creating a foreign subsidiary abroad or is contemplating a cross-border merger or acquisition, FCPA compliance programs are of paramount concern; not just having them, but more importantly designing them to be effective, implementing them in a meaningful way and keeping them updated. Indeed, in 2020, the DOJ and SEC continued their long trend of ratcheting up criminal and civil penalties where a company's, *e.g.* Beam Suntory, Inc. and Herbalife Nutrition Ltd., foreign enterprise lacked effective internal policies at the time that FCPA violations occurred.

When evaluating a compliance program, the United States Justice Manual instructs federal prosecutors to inquire:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?"
3. "Does the corporation's compliance program work?"

In addition to those broad ideals, the DOJ and SEC have outlined specific compliance components that they see as essential, all of which underscore that the thoroughness and effectiveness of a compliance program are necessary to avoid prosecution and minimize penalties. Additionally, time is of the essence. The DOJ and SEC advise that the timeliness of implementing a compliance program demonstrates to them whether an organization is simply paying lip service to compliance or is truly serious about preventing corruption.

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The key to success here is ensuring that the author of a policy is truly knowledgeable about an organization's business operations. It is not enough to draft official-sounding boilerplate that simply tracks the guidance from the DOJ and SEC. Just as every organization is unique, a compliance policy will only be effective if it is tailored to that organization's size, structure, culture, industry, etc., and that is what the government wants to see.

Successor Liability

For companies seeking to grow through an acquisition or merger, your due diligence must include identifying whether the target company has an FCPA policy in place and if it knows of any possible past violations. The DOJ and SEC regularly rely on theories of successor liability when conducting investigations and imposing sanctions for violations. FCPA violations previously committed by your newly-acquired target or a partner in a recently-formed joint venture may be imputed to your organization after the fact if the acquired entity or partner was subject to the jurisdiction of the FCPA at the time of the violations.

As such, the DOJ and SEC have expressly encouraged companies to conduct pre-acquisition due diligence (inasmuch as it is possible) and to improve compliance programs and internal controls immediately after acquisition (if necessary). Identifying possible violations, investigating and remediating them and instituting compliance programs are actions that consistently convince DOJ and SEC investigators not to seek charges or at least to seek lesser penalties.

And again, timeliness is a factor. The DOJ and SEC consistently credit parent companies if they right the ship as soon as possible, *i.e.* implementing FCPA policies at the beginning of the new enterprise. However, by the same token, failing to uncover and address prior violations could be grounds for increased penalties if violations persist after your organization becomes involved.

What to Do when a Violation Occurred with No FCPA Policy in Place

It is never too late to implement an FCPA policy, even if you have already uncovered a potential violation.

Many decisions will need to be made in this scenario, such as how to conduct an internal investigation, whether to alter or cease the foreign operation and whether to self-report to the government. If you discover a violation committed by the target for your merger, acquisition or joint venture, your organization will have to decide it if can sufficiently protect itself to proceed with the deal. Additionally, because your organization might have, or might be taking on, criminal and civil exposure, it is best to involve counsel in these decisions so that, among other things, your work product will be privileged in the event a government investigation does arise.

However, regardless of the outcome of those decisions, the decision to implement an effective FCPA policy will always put a company and its executives in the best standing possible. Indeed, in the eyes of the prosecutors who may potentially investigate and prosecute your organization and its leadership, there is no excuse to forego an FCPA policy after learning of a violation.

Summary

In short, do not overlook the FCPA whenever you or your client is operating internationally, and remember that it is never too early—or too late—to implement a meaningful FCPA compliance policy to protect your company from corruption, waste, and prosecution.

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