As more American businesses expand overseas, and as worldwide marketing of products and services becomes commonplace, the pressure on salespeople and business executives to maintain and to expand sales continues to increase. That said, many businesses and their employees have sought to grow their international businesses by courting government officials overseas. Such courting may include giving a small token of esteem to an official, purchasing a meal, or it may involve providing substantial gifts of cash or automobiles. These business practices can easily run afoul of the Foreign Corrupt Practices Act (hereinafter “FCPA” or “the Act”). Accordingly, they are now the subject of great scrutiny by both the United States Department of Justice (DOJ) and the United States Securities and Exchange Commission (SEC). Fortunately, the DOJ and the SEC have recently issued detailed guidance interpreting the FCPA provisions. All business leaders and their corporate counsel should pay close attention to this guidance in order to avoid violations of the FCPA.

The DOJ/SEC guidance for FCPA enforcement was issued in November of 2012. Since that time, it has been the topic of much commentary, including continued speculation concerning what is or is not prohibited under the Act. By design, the FCPA contains a two-pronged attack to prevent the anti-competitive impact that bribery may have in the competitive marketplace. The first prong is the anti-bribery provisions, which prohibit domestic entities (including corporations, partnerships, limited liability companies, and the principals of such entities) from making “corrupt” payments to foreign officials in order to retain or to obtain business. The second prong is the “books and records” provisions, which require corporations to maintain detailed and accurate books and records and to implement internal controls to uncover and prevent improper financial transactions.

THE FCPA ANTI-BRIBERY PROVISIONS

The FCPA applies not only to domestic corporations and their employees that do business overseas, but also to foreign entities and individuals who commit any act in furtherance of a corrupt payment while in the United States. On its face, the Act applies to “corrupt” payments to individual government officials, i.e., payments that are intended to influence a foreign official to use his or her position “in order to assist...in obtaining or retaining business” for any person. This “business purpose test” is to be broadly interpreted and it clearly reaches bribes given to public officials for the purpose of obtaining or retaining government contracts. It also covers payments to obtain “favorable tax treatment,” or to eliminate duties that would give the bribing company an advantage not given to competitors. The DOJ/SEC guidance states that bribery to obtain any of the following actions would meet the “business purpose test” and would thus violate the FCPA:

- Winning a contract
- Influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid information in order to gain an advantage in the bidding process
- Evading taxes or penalties
- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination

In order to violate the FCPA anti-bribery provisions, the payment or offer of
payment to a government official also must be made “corruptly.” The word “corruptly” essentially means improperly or wrongfully. Thus, the FCPA makes clear that the payment or offer of payment to the public official must be intended to induce the recipient “to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to perform an official function.”

The FCPA does not distinguish between small or large payments. However, by requiring “corrupt” intent, the FCPA effectively insulates companies that may engage in the “ordinary and legitimate” giving of small gifts to local officials. Such gifts will be deemed a permissible token of respect or esteem. Similarly, it is not a violation of the FCPA to give an official “cups of coffee, taxi fare, or company promotional items of nominal value.” In such cases, there generally is no evidence that providing small tokens of esteem or small gifts are intended to corrupt public officials. Nevertheless, even in those instances where the gifts may be small, the government reserves its right to pursue criminal charges where there is a pattern showing a consistent or long-term effort to corruptly influence foreign officials in order to obtain or retain business. Moreover, the larger the gift, the more likely the government will see it as a corrupt effort to influence a public official.

Aside from examining the value of gifts given to a public official, the government will scrutinize the manner in which the gift is given. Cash gifts are inherently suspect unless they are given to reimburse an official for some travel or other expense that the official incurred in furtherance of the company’s legitimate business. Moreover, cash gifts are often delivered to the public official in a manner that bespeaks corrupt intent. For example, when the cash payment is disguised on the corporate books as a legitimate expense, or the cash is secretly paid in a surreptitious manner such as by delivery in plain envelopes, in suitcases filled with cash, or through offshore accounts, corrupt intent will be assumed by the government.

In sum, the FCPA does not outlaw all gift-giving to foreign officials. Instead, it prohibits the corrupt payment of bribes, including those that are designated as “gifts.”

THE FCPA “BOOKS AND RECORDS” REQUIREMENTS

While the FCPA’s bribery prohibitions receive the attention of most lawyers and business leaders, it is the FCPA’s requirements concerning both internal bookkeeping and accounting controls that are more likely to trigger a violation of the FCPA. Indeed, while the anti-bribery provisions reach “foreign” bribery, the “books and records” provisions apply to accounting practices that have no “foreign” component whatsoever. The SEC interprets these provisions not simply as protection against accounting fraud to hide bribes, but broadly to ensure that all financial statements are honest. As a result, the books and records provisions have given rise to far more enforcement actions than have the better known anti-bribery provisions.

The “books and records” provisions apply both to domestic and foreign operations of businesses that are required to file reports with the SEC. They also may apply to certain subsidiaries and joint ventures. These requirements can create major problems for corporate executives because accounting practices in many countries are far different from the practices in the U.S. Nevertheless, corporate executives who are subject to the FCPA must ensure that all operations, both foreign and domestic, comply with the Act.

In general, the “books and records” provisions mandate that corporations subject to the Act (a) maintain accounting records that, in “reasonable detail,” fairly and accurately show all corporate transactions involving the purchase or disposition of corporate assets, and (b) implement and maintain a system of internal accounting controls that reasonably ensure management’s control over the corporation’s assets. According to the DOJ/SEC guidance, “the accounting provisions assure that all public companies account for all of their assets accurately and in reasonable detail.”

The term “reasonable detail” was deemed a necessary element of the Act to make it clear that complete exactitude in accounting records, especially for diverse and multi-national corporations, is neither expected nor required. Instead, the Act merely requires that the accounting detail be sufficient to “satisfy prudent officials in the conduct of their own affairs.” The Act also is clear, however, that it is never permissible to mischaracterize any financial transaction in the company’s books and records. As a result, the Act reaches transactions both big and small. There is no requirement that falsely reported transactions involve an amount material to the corporation.

Aside from requiring books and records to be properly maintained, the FCPA mandates the implementation of sufficient “accounting controls” to reduce the likelihood that bribes prohibited by the Act could be concealed from auditors and regulators. The controls must be “sufficient to provide reasonable assurances” that transactions are executed and recorded in conformity with corporate policies, that they comply with appropriate accounting standards, and that they are examined periodically to uncover or prevent improper transactions. The FCPA does not specify how corporations must maintain their books and records, nor does the Act set forth the internal controls that must be implemented to comply with the Act. Instead, the FCPA imposes a reasonableness test under which books and records must be maintained in “reasonable detail” and internal controls must be devised to provide “reasonable assurance” that transactions are properly reflected in the corporation’s accounting records. Among the “internal controls” deemed essential is an effective compliance program. Such a program will take into account many factors, including the nature of the business, the degree of regulation by governmental entities, the amount of government interactions and the amount of business that the corporation conducts in nations with a high risk of government corruption. A corporation whose business involves a substantial risk of corruption, for example, would be expected to create and install a far more complex internal control system than would a company with little exposure to corruption.

CONCLUSION

Corporate executives, especially corporate counsel, should never consider the FCPA in a vacuum. It now operates in a regulatory environment both more complex and comprehensive than when it was first enacted in 1977. With the subsequent enactment of similar statutes, corporate executives must not simply assume that their accounting records are being properly maintained, they must actively take steps to “reasonably” assure themselves that the records are accurate and complete and that the internal control system is such that it will uncover significant departures from corporate accounting requirements. Such vigilance will help avoid FCPA violations and will ensure that corporations implement and maintain sound business practices.

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