

ARE THERE RED FLAGS SIGNALING FCPA EXPOSURE IN YOUR COMPANY?

It's not just fines and jail time. FCPA violations can increase your tax bill too!



By Vicky Gregorcyk, head of UHY Advisors' National FCPA Practice, and Meril Markley, principal with UHY Advisors' International Tax Practice.

Can you describe what FCPA is in a sentence or two?

The Foreign Corrupt Practices Act became law in 1977, designed to support U.S. policy against corruption of foreign officials by U.S. companies and those who represent them. Generally, it outlaws payments that influence the decisions of public officials, that induce them to act, or to omit to do any act in violation of a lawful duty, and payments to secure an improper advantage, whether the payment involves obtaining new business or retention of existing business. The Act provides both for civil and criminal penalties, including fines and imprisonment of individuals and fines and disgorgements of profits for the companies involved.

What is a bribe?

An illegal payment under the FCPA may come in many forms and can be difficult to detect. We tend to think of it in terms of suitcases full of cash but an illegal payment could also be supplying tuition for a government official's child at a Swiss boarding school, the promise of future employment, or a trip on the corporate jet.

What about so-called "grease" payments to make the wheels of foreign government turn more smoothly?

There is an exception for payments to lower level foreign officials to encourage them to undertake the nondiscretionary, routine administrative tasks they are already required to do such as clearing goods through Customs or processing approvals to make payments to foreign suppliers.

There have been some huge fines in recent cases involving well-known companies, so is this just a concern for big, multinational corporations?

No. We have found that U.S. companies are "going global" at ever earlier points in their lifecycle and for Texas-based companies, that can mean business in countries that are fairly far down in the rankings of Transparency International. To compete on the international stage, U.S. companies might be tempted to seek a competitive advantage through illegal payments, particularly if vying for a contract against a company from a country that does not have laws similar to FCPA. Or someone acting on their behalf, such as a local agent, could make the illegal payment and the U.S. company could still be liable under FCPA.

What are some of the costs related to FCPA compliance?

While the fines grab headlines, there are other financial burdens for a company such as the costs of investigation, development and execution of the legal strategy for the company to fight the accusations or to settle, and then the costs of remediation to fix the conditions that led to the violation. And there may be tax costs.

What are the tax ramifications for a company that has had an FCPA violation?

Several different aspects of the Internal Revenue Code come into play. First of all, the fines paid by a company or an individual are not deductible for tax purposes. Second, if a foreign subsidiary of a U.S. corporation made the illegal payment, the amount of that payment is not deductible in computing the Earnings & Profits of the foreign subsidiary and will be considered a deemed dividend to the U.S. parent company in the year the payment is made. Third, if the U.S. corporation itself made the illegal payment, the inability to deduct it could mean filing amended tax returns and owing additional U.S. corporate income tax plus interest and penalties. Fourth, FCPA has become an important part of tax due diligence in Mergers & Acquisitions since violations can impact not only current tax planning but exposure for past years.

Do you sense that the Justice Department is ramping up investigations and enforcement?

The sheer number of investigations has skyrocketed, with more attention to companies below the Fortune 500. In the last few years, the Department of Justice has hired more than 700 additional investigators. So, it's not just the "big boys" who need to comply, it's anyone selling or otherwise doing business outside the U.S. with government owned and/or controlled entities.

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Are there things U.S. companies can do to make it less likely a violation of FCPA may occur?

In today's environment, there are several key areas in which U.S. companies should be vigilant. First, they should have an FCPA policy that employees review and agree to abide by, there should be regular education on FCPA. Second, there should be a compliance program in place so that not only are potential violations avoided but, if one does occur, the company can confront the situation, undertake an internal investigation, and come forward instead of waiting for the Justice Department to drive up to the door with a bus load of investigators. Third, if a U.S. company is contemplating using third parties in foreign countries, those parties should be investigated and required to conform to the U.S. company's FCPA policy. Finally, companies should periodically test the level of compliance by employees with the company's anti-fraud program.

Does FCPA have any specific requirements for record-keeping?

It is important to remember that the FCPA applies not just to prohibit unlawful payments, but also includes sweeping requirements from an accounting perspective. For example, it requires that SEC registrants make and keep accurate books and records, and devise and maintain a system of internal accounting controls. Through such records it is possible to determine what illegal payments have been made, but also to keep questionable payments from happening by having an approval process in place to flag items such as unusually high commissions paid to agents, payments to parties unrelated to a transaction, and unexplained expenditures.

If a company suspects there has been a violation or is under investigation, how can UHY Advisors help?

UHY Advisors has created a team that can cover all the bases related to such investigations, including eDiscovery, which allows us to capture and process the spectrum of required data, and often to ferret out hidden or "deleted" electronic files. Our data mining capabilities can detect patterns that could be indicators of fraudulent activity, without having to sift through literally millions of pages of data. With access to the UHY International network, we can provide great assistance under the direction of our Global Intelligence investigators; there's less need to fly people all over the globe on the client's dime. We have compliance experts and experienced professionals to help effectively manage these projects, including the education of companies to help them prevent such violations and to assist in the remediation process often dictated by settlements with the government. And finally, the financial investigation aspects can quickly get at the issues because UHY Advisors applies decades of experience directly to the engagement, actually doing the work. Perhaps most importantly, UHY Advisors can help companies set up the policies and systems to make it less likely that FCPA violations will happen in the first place.

For more information on the tax aspects of FCPA, please contact Meril Markley, International Tax Principal, at 713.407.3206 or mmarkley@uhy-us.com. To reach our FCPA Practice Leader, please contact Vicky Gregorcyk at 713.407.3964 or vgregorcyk@uhy-us.com.



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