

Brief

Clean Hands, Smart Deals

A primer on complying with foreign anti-bribery laws

November 2015



With the approaching financial year-end and the consequences of external audits along with the new and increased risk of individual liability executives now face in light of the recent Department of Justice Yates memorandum, it is prudent to revisit and supplement the lessons learned from the presentations at the Paris Air Show. BakerHostetler, in a showcase of our depth of experience, presented an informational seminar in June 2015 at the 51st Paris Air Show, the largest aerospace trade show in the world. In partnership with PricewaterhouseCoopers (PwC), the well-received seminar focused on developments in anti-corruption enforcement, export control compliance, and government contracting rules. Discussions also covered ways that companies and senior executives can avoid compliance violations.

Seminar attendees included key executives from major aerospace companies, as well as clients and prospective clients from other industries.

Participating in the seminar were Congressman Mike Oxley, Ray Whitman, John Carney, George Stamboulidis, Jonathan Barr, Mel Schwechter, Hilary Cairnie, and Sonny Carpenter, along with Bill Waldie, Mark Gerber, John May, and Jeannette Chu from PwC.

The discussions highlighted important perspectives of in-house and outside counsel entrusted with protecting companies and institutions from corruption and compliance violations, as well as supporting clients on other needs, such as white collar defense and investigation, export control, and government contracting experience.

Panel 1: Anti-Corruption Statutes and Investigations

The first panel consisted of BakerHostetler Partners John Carney, George Stamboulidis, and Jonathan Barr; PwC Partner Mark Gerber; and PwC Director Bill Waldie.

The panel looked at the consequences of violating the Foreign Corrupt Practices Act (FCPA) and the increased risk as more governments place a heightened focus on many industries. It was pointed out how companies can indirectly violate the FCPA and that an effective investigative and FCPA compliance program can stop violations and increase profitability.

Legislative History of the FCPA

Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), U.S. businesses have faced criminal penalties if they engaged in business-related bribery of foreign public officials. The passage of the FCPA created a disadvantage for American businesses relative to foreign competitors who continued to pay bribes without fear of penalty.

In 1997, the United States and 32 other nations came together to sign the International Anti-Bribery and Fair Competition Act of 1998, thus amending the FCPA. This Act made certain changes to the existing FCPA to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, leveling the playing field for American businesses.

“The aggressive efforts of U.S. and Foreign regulators in enforcing anti-corruption laws like the FCPA and recently enacted foreign anti-corruption statutes demonstrate a concerted effort by OECD member nations to level the playing field for doing business on a Global scale. These enforcement efforts also heighten the importance for companies to be more proactive and diligent than ever in developing and managing risk based anticorruption compliance programs that emphasize prevention, and also the detection, investigation and remediation of issues.”

— Jonathan R. Barr, Partner

Anti-Corruption Statute

The panel noted that there are three components to anti-corruption statutes being enforced by U.S. criminal and civil authorities:

- Anti-bribery provisions
- Accuracy of accounting books and records requirements
- Effective internal controls requirements

Anti-bribery provisions prohibit the giving, paying, promising, offering, or authorizing of payment of anything of value, whether given to someone directly or indirectly through a third party. This includes providing anything of value through foreign officials, political parties, or candidates to influence officials or secure an improper advantage in order to obtain or retain business.

Escalating Enforcement of the FCPA

The Federal Bureau of Investigations (FBI), Department of Justice (DOJ), and Securities Exchange Commission (SEC) have greatly increased their enforcement of the FCPA. Corporate fines and penalties continue to grow, jumping from \$28 million in 2004 to more than \$1.5 billion in 2013.

The DOJ and FBI formed three squads of FBI agents to investigate corruption cases in Washington, D.C., New York, and Los Angeles. The Washington, D.C. FBI squad investigates cases nationwide.

Examples of What Constitutes Gifts or Bribes

Obvious Bribe

- Cash
- Car
- Seat on company aircraft
- Surplus equipment
- Art
- Contract rights
- Personal gifts
- Purchasing goods and services at above market rates
- Job for relative
- Donation to charity
- Lavish gifts

Gifts Considered Bribes

- Prostitutes
- Travel expenses
- Accommodations, meals, entertainment
- Per diems
- Carried interests
- Loans
- Excessive discounts
- Preferential options
- Selling at less than fair market value
- Scholarship for family member

Dealing With Foreign Officials

Our panel shared the importance of knowing what constitutes dealing with a foreign official. This includes any officer or employee of a foreign government or any department, agency or instrumentality thereof, or any person acting in an official capacity on behalf of any such government or department, agency or instrumentality. This includes anyone in an unpaid, part time or honorary position, or any official or employee of a public global organization or person acting on its behalf.

How Most Companies Become Exposed to an FCPA Violation

The biggest risk is the use of third-party agents and consultants, but there are other exposures to be aware of when it comes to potential violations. These include acquisition of or joining a company making improper payments, employees taking improper actions without knowing they do, improper training of employees on anti-corruption policy, and instances where local customs of gift-giving and relationship-building clash with anti-corruption policies.

A person cannot avoid liability by avoiding knowledge of a likely bribe payment. The FCPA imputes knowledge of violations where information possessed by the person or company indicates a “high probability” that prohibited conduct will result.

“Just because the CEO doesn’t have direct knowledge concerning the circumstances of a bribe doesn’t mean he can’t be held liable for the actions of others in his employ.”

— John J. Carney, Partner and Co-Leader
White Collar Defense and Corporate Investigations
Practice Team

Knowing the Red Flags of Potential Violations

Companies should be on the alert for:

- Unusually high commissions or fees in relation to services provided
- Unusual bonuses paid to foreign operational managers
- Unusual invoicing, payment patterns, or financing
- A lack of transparency in expense records and accounting

Other red flags may include a mandated third-party agent or distributor, or government official who suggests or recommends a third party, or requests for unusual compensation arrangements such as cash payments or payments to offshore accounts.

“The best defense is a good offense. Companies that take compliance seriously and seek out good representation in this area set themselves up for greater success. They greatly reduce the risks associated with potential fines and penalties that can undermine and destroy business success.”

— George A. Stamboulidis, Partner and Co-Leader
White Collar Defense and Corporate Investigations
Practice Team

Making the Business Case for an Effective FCPA Investigative and Compliance Program

The panel outlined what is involved in an effective program. Internal investigations can result in legal benefits, economic advantages, and a reinforcement of corporate culture. The government takes compliance seriously; FCPA corporate fines and penalties can be severe, as recent fines of \$446 million, \$579 million, and \$772 million indicate.

Companies can take several steps to expand globally without violating the FCPA. Strategies include:

- Implementing a stand-alone FCPA compliance policy
- Charging one high-level employee with the responsibility to monitor compliance, reporting to the board or board committee
- Conducting annual FCPA risk assessments and annual training sessions
- Messaging at appropriate levels

Additional support can include embedding control into the infrastructure, tracking and accessing expenses to entertain foreign officials or government employees, and monitoring charitable and political contributions.

Panel 2: Export Controls and Government Contracts

The second panel consisted of BakerHostetler Partners Melvin Schwechter and Hilary Cairnie, PwC Partners Mark Gerber and John May, and PwC Director Jeannette Chu.

This presentation focused on the rules and recent reforms for export controls and sanctions, how companies may violate those rules and thus risk significant penalties, and how an effective compliance program can stop violations and increase profitability.

The second part of this presentation offered attendees the opportunity to see how government contracting can open up exposure and how export and anti-corruption laws can lead to suspension and debarment.

Avoiding Compliance Problems

The establishment of an effective compliance program goes a long way toward reducing risk associated with export controls and government contracts. Important steps in reducing this exposure include:

- Having the full support of the board and senior leadership
- Running risk assessments
- Maintaining updated written policies and procedures
- Running comprehensive screening, including counterparty ownership
- Training and recordkeeping program

Other program development needs include creating reliable reporting and escalation procedures, self-assessments, and voluntary self-disclosures, treating government inquiries seriously, and integration of the compliance function into the business.

Avoiding Suspension and Debarment, and Mitigating Factors

The panel covered the root causes of suspension and debarment:

- Criminal misconduct
- Civil judgment
- Intentional breach of contract

The conduct that leads to suspension and debarment includes not conducting open contracting and bidding, and imputable actions at all levels of the company.

Conclusion

A strong compliance program should contain provisions that might be mitigating factors should a company find itself under investigation for FCPA violations. Those provisions include:

- Self-disclosure
- Internal investigation and a policy of cooperation with investigators
- Effective controls and procedures
- Restitution and other corrective action
- Eradication of the causes and conditions of a violation
- Management awareness of the seriousness of the conduct and consequences

Contact one of the attorneys below if you have questions about the FCPA or how we can help your company set up an effective compliance policy.

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