

A 360-DEGREE VIEW OF COMPLIANCE

In the rush to comply with new legislation,
remember that old anticorruption statutes still have teeth.

BY SHARIE A. BROWN

Between the Sarbanes-Oxley Act, the USA Patriot Act, and the Justice Department's revised criteria for effective compliance as articulated in the agency's "Principles of Federal Prosecution of Business Organizations," corporate legal departments have their hands full when it comes to developing new policies and procedures. But in the midst of focusing on new regulations (and associated compliance costs), chief legal officers should watch that they don't increase their exposure to an older but still very potent law: the U.S. Foreign Corrupt Practices Act.

Briefly put, the FCPA is an antibribery law that applies to all U.S. businesses and their personnel, no matter where in the world they are located, and bars payment or promises of payment of anything of value to foreign politicians and officials "with corrupt intent to influence an official act or decision of that official in order to obtain or

[IN BRIEF]

You may think they're part of the cost of doing business around the world, but some practices will draw the scrutiny of federal regulators. To comply with the U.S. Foreign Corrupt Practices Act, law departments should:

- Review their antibribery policies to ensure they meet current standards
- Make sure policies exist to effectively transmit changes in antibribery policy and procedure to management, employees, and agents
- Create an environment that encourages, rather than discourages, internal whistle-blowers to come forward and report violations

retain business, or secure an improper advantage." And despite the fact that, according to the European corruption-tracking organization Transparency International, business in much of the world is facilitated by everything from minor baksheesh to large-scale bribery (the United States is ranked eighth least cor-

rupt by the group, while Finland wins the honesty stakes at No. 1 and Bangladesh has just beaten out Nigeria for the bottom rung at No. 133), the U.S. government is very serious about enforcing the FCPA. Just ask executives at Delaware-based Syncor International, a radio-pharmaceutical maker, and its Taiwanese subsidiary, which pled guilty and paid a \$2 million fine last year for violating record-keeping provisions and illegally paying commissions to doctors in Taiwan; or ask the marketing vice president at American Rice Inc., who is currently under indictment for bribing a Haitian customs official to accept false bills of lading, to name a couple of cases that have recently been heard under the act.

The good news is that there are a number of things chief legal officers can do to comply with the FCPA and other antibribery statutes, including those of Canada (tied for eighth least corrupt), which recently passed



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Brown: American companies need to be careful not to fall afoul of the law in countries where they are doing business.

a near-mirror image of America's law. Among other practices (see "10 Steps to Staying Compliant," next page), law departments should review their antibribery policies to ensure they meet current standards (this includes checking up on agreements with international consultants, agents, and joint-venture partners); make sure policies exist to effectively transmit changes in antibribery

policy and procedure to senior management and any affected employees and agents; and create an environment that encourages, rather than discourages, internal whistle-blowers to come forward and report violations.

Exceptions to the Rule

While at first glance the FCPA looks like a statute with very little wiggle room (just ask the officers of the companies men-

tioned earlier), the law is not completely naive about the nature of doing business in those 125 nations that are ranked as more corrupt than the United States. One of the major acknowledgments of this fact comes in the form of the "facilitating payment" exception, which permits so-called "grease" payments to low-level employees of foreign governments to expedite or secure the performance of what would ordinarily be considered routine services. This means that a U.S.-based employee won't be met by federal marshals upon return to the United States because he had to fold a \$20 bill into his passport to leave a foreign country, and that a subsidiary's office manager can still slip money to postal or garbage workers to make sure the mail gets delivered and the trash picked up in a reasonably timely fashion.

The FCPA also provides for an affirmative defense for payments made to foreign officials where the payments are "reasonable and bona fide and directly related to promotion or demonstration of a company's products or services, or directly related to the performance of a particular contract between a company and the foreign government." This would cover activities such as a company inviting foreign officials to the United States to see their American factories or view presentations. But be warned: Spouses can't come along for a free ride, and itineraries that include a free week in Disneyland after a day of touring manufacturing plants are strictly forbidden.

(Interestingly, there is another exception that is technically allowed but will almost surely never be invoked: the FCPA allows payments to foreign government officials when such payments are permitted under the written law of that country. But since no country has ever institutionalized bribery to that extent—some have come close—this is more a curiosity than anything else.)

Good Records Make Good Practice

For any company that is forced to make payments to foreign officials under any of the above exceptions, good record keeping is vitally important, as documentation failures are where most companies that fall afoul of the FCPA get tripped up. One of the biggest traps is failing to properly call such payments what they are and instead trying to hide the money under some other account. This is dangerous business after the accounting scandals of a few years ago, which created an environment where the Securities and Exchange Commission (which, along with the Department of Justice, is

10 Steps to Staying Compliant

Despite the crush of competing compliance initiatives and requirements, there are steps one can take to ensure compliance with U.S., Canadian, and local anticorruption statutes:

1. Review current FCPA and local antibribery policies and procedures to ensure that they meet current legal standards.
2. Review all agreements for international consultants, agents, and joint venture partners to ensure that appropriate antibribery or FCPA representations and warranties are included.
3. Prior to entering agreements with international consultants, agents, and joint venture partners, conduct appropriate due diligence on their reputations and business practices; this includes checks of the Office of Foreign Assets Control's Specially Designated Nationals list to ensure that no parties are on the U.S. government's list of terrorists, drug traffickers, or other prohibited parties.
4. Timely communicate changes in antibribery procedures, policies, third-party agreements, or due diligence to senior management,

affected line management, other affected employees, as well as agents.

5. Train affected employees annually.
6. Document all training efforts and keep attendance records.
7. Review all international agreements for antibribery issues to ensure that structural or operational issues that create legal exposure are addressed.
8. Create a whistle-blower-friendly environment, which encourages employees to share knowledge of violations with senior management, the legal department, or a special hotline, and take action to help management and board members become more receptive to loyal, internal whistle-blower activities.
9. When potential misconduct is uncovered or reported, conduct a thorough independent investigation and take tough action against all offenders (as well as corrective action).
10. Ensure that annual audits, by outside or internal auditors, cover the company's FCPA and antibribery policies and record-keeping requirements.

responsible for enforcing anticorruption law) is always on the lookout for such behavior. Intentionally false record keeping, even if the payments themselves were legal, is enough to be

a potentially very expensive violation in the eyes of the government.

The fact is that when it comes to anticorruption statutes, the enforcement climate is now tougher than ever. Along with U.S. government agencies, American companies need to be careful not to fall afoul of the law in countries where they are doing business, as many local authorities are more than happy to cooperate with Washington on such matters. And it's not just governments that American companies need to worry about: the United Nations has its own Convention Against Corruption in force, and the World Bank regularly investigates the contracts the bank finances and

is not shy about sharing its information with both local governments and regulators in Washington. Considering that the legal damage from lax corporate antibribery controls often doesn't surface for one to two years, there's no time like the present for CLOs who haven't recently done so to start thoroughly reviewing their policies on the subject. •

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Mexico Gets Tough on Bribery

Stemming from its signing the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Mexico has drafted its own antibribery conventions.

According to the OECD, Mexico's antibribery bill was scheduled to be voted on by the end of 2003 and focuses on increasing transparency to limit corruption. At the same time, Mexico's procurement and public works laws are being amended, and new amendments to rules for civil servants should help prevent public officials from engaging in illegal conduct or activities involving business conflicts of interest.