WHITE PAPER

A Guide to the U.S. Foreign Corrupt Practices Act

What you need to know to mitigate compliance risk

The United States is committed to ridding the global business landscape of bribery and corruption. In the mid-1970's, in response to news of questionable payments to foreign officials made by major companies to facilitate business dealings, Congress began developing legislation to address foreign corporate payments. From among 20 bills introduced, the approach that won favor with Congress and then-President Jimmy Carter became known as the Foreign Corrupt Practices Act (FCPA), which was signed into law in January 1977. The law has since undergone two revisions, most recently in 1998, after the U.S. signed the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

What Does the Foreign Corrupt Practices Act Mandate?

In a global business landscape, companies must implement due-diligence and on-going monitoring processes that mitigate FCPA compliance risk effectively as well. In order to comply with OECD standards on preventing bribery and corruption, the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) work together to enforce the FCPA. Under the FCPA, it is an offence to bribe foreign public officials such as government ministers, customs officers and even—as several pharmaceutical companies have learned the hard way—physicians, administrators or others in the employ of state-owned hospitals.[1]

> *"The Act was intended to halt those corrupt practices, create a level playing field for honest business and restore public confidence in the integrity of the marketplace."*
>
> *A Resource Guide to the U.S. Foreign Corrupt Practices Act*

Unlike the UK Bribery Act, which prohibits all payments to foreign government officials, the FCPA does allow payments under specific circumstances.

- Payments to facilitate 'routine governmental actions' such as processing visas, providing police protection, or supplying utilities
- Payments that are within the law of the foreign official's country
- Payments to cover 'reasonable and bona fide expenditures' such as travel and hotel expenses directly related to a government contract

Despite these exceptions, the FCPA has extraterritorial reach, ensuring that companies are held accountable for illegal activities undertaken on their behalf. This includes subsidiaries operating outside the U.S., as well as third parties such as joint venture partners or sales agents. The FCPA clearly specifies that making a payment to a third party while knowing that all or part of the payment will go directly or indirectly to a foreign official violates the law.

FCPA's Acceptable Payments to Foreign Government Officials

PROCESSING VISAS, POLICE PROTECTION, SUPPLYING UTILITIES

WITHIN THE LAW OF THE FOREIGN OFFICIAL'S COUNTRY

CONTRACT RELATED TRAVEL EXPENSES

Moreover, the FCPA uses a broad definition of what an 'influence' might look like. In addition to cash payments, FCPA enforcement actions have targeted other gifts of value—ranging from the obvious, like lavish cars and jewelry or excessive travel and entertainment expenses to the more ambiguous, like company internships awarded without the same rigid standards expected for other applicants.[2]

The FCPA also requires companies whose securities are listed in the U.S. to meet specific financial rules, including keeping accurate books and records that reflect all company transactions and implementing a proactive system of internal accounting controls.

What Happens If Your Company Violates the Foreign Corrupt Practices Act?

In general, FCPA enforcement actions brought by the DOJ against companies are resolved through either a non-prosecution agreement (NPA) or a deferred prosecution agreement (DPA). What's the difference?

- An NPA does not get filed with a court. Instead, the DOJ privately negotiates an agreement with the company to not prosecute if the company acknowledges responsibility and agrees to pay substantial fines, fix all compliance process failures and deploy and pay for a monitor assigned by the regulator to ensure the company adheres to the agreement.
- A DPA, on the other hand, is filed with a court and therefore appears as a criminal indictment. Prosecution is deferred, however, for a period of years if the company agrees to admit culpability and meets all of the additional terms—fines, compliance process fixes and monitoring—within the agreed-upon time period, the DOJ dismisses the criminal charges.

The SEC adopted a similar approach in 2010 after the previous enforcement approach of resolving FCPA inquiries through a settled civil complaint or an administrative order—without any admission of wrongdoing—came under fire.

The compliance undertakings are varied. Companies and individuals found to have violated the FCPA are subject to penalties including:

CRIMINAL PENALTIES

- Fines of up to $2,000,000 for corporations and other business entities
- Fines of up to $100,000 and imprisonment for up to five years for officers, directors, stockholders, employees and agents
- An alternative fine equal to as much as twice the financial benefit gained by a bribe

CIVIL PENALTIES

- Additional fines
- Disbarment from doing business with the U.S. government
- Loss of an export license
- Suspension from working within the same industry
- In combination, the fines can add up to substantial sums. For instance, just two years ago, Alcoa paid $384,000,000 to resolve its FCPA violations.

What's more, it's conceivable that a competitor might bring a case under federal or state laws to seek damages based on lost contracts due to violating company's unfair advantage.

How Can Companies Stay in Compliance with the Foreign Corrupt Practices Act?

In the introduction to *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, published by the DOJ, it states, "The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace."[3] To help companies comply with the FCPA, the DOJ says that "Comprehensive due diligence demonstrates a genuine commitment to uncovering and preventing FCPA violations."[4] While no system is perfect, the DOJ takes into account the compliance processes a company has in place, particularly if the company self-reports when a violation is suspected.

What to Look for in Due Diligence and Monitoring Solutions

Manual due diligence and monitoring simply can't offer the risk mitigation needed in a world where news travels at the speed of social media. To build a proactive compliance process for the FCPA and other similar regulations, companies need to invest in the right tools to support compliance teams.

With the right tools in place, you are better positioned to implement a due-diligence process that mitigates FCPA compliance risk. What should that process entail?

1. **Understand Compliance Concerns**—Focus on mitigating risk exposure, not just internally but among the partners and third parties on whom you rely.
2. **Define Corporate Objectives for Due Diligence**—Make sure your process aligns with strategic, financial, regulatory and reputational risks, particularly if your company relies on third parties in countries that attract high levels of regulatory scrutiny.
3. **Gather Key Information**—Whether you're researching individuals or other entitites, you need to start with the basics and escalate your due-diligence research should red flags appear.

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4. **Screen Prospective Third Parties against Watchlists and PEPs**—Prospective third parties—both companies and individuals—should be subjected to a watchlist screening process to mitigate risk.
5. **Conduct a Risk Assessment**—Once preliminary information collection and watchlist screening has taken place, perform a risk assessment to identify factors that indicate higher risk such as significant country or industry risks.
6. **Validate the Information Collected**—Verify the information and move high-risk third parties to an escalated due-diligence process.
7. **Maintain an Audit Trail**—Keep a comprehensive record of your due-diligence efforts including relevant documents, assessments and decisions to demonstrate your commitment to compliance to enforcement agencies.
8. **Establish an On-going Monitoring Plan**—Risk doesn't stop; neither should your due-diligence process. Set up alerts and continue to monitor negative news to mitigate risk over time.
9. **Reassess Your Due-Diligence Process**—Periodically evaluate how you conduct due diligence to ensure your process stays in line with emerging threats and new legislation.

How LexisNexis can help you comply with FCPA Requirements

We help our customers mitigate business risks, meet their strategic goals and accomplish greater return on investment. Using our efficient, flexible and cost-effective due-diligence and monitoring solutions empowers our customers to find the information they need on people, companies and countries:

- Best-in-class global news archive featuring more than 26,000 licensed news sources with international, national and regional coverage
- More than 1 million PEPs and 1,000+ sanctions and watch lists from OFAC, HM, Treasury, FBI and more
- In-depth country, industry and company reports to aid in risk evaluation
- International court cases with coverage across U.S., UK, EU and select Asian jurisdictions
- Extensive U.S. public records on individuals and businesses
- Negative news screening and monitoring
- Enhanced due diligence and reporting

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1 https://www.sec.gov/litigation/admin/2016/34-77058-s.pdf
2 http://www.fcpablog.com/blog/2015/8/18/bny-mellon-pays-15-million-in-fcpa-settlement-for-internship.html
3 https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf
4 IBID.

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