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What's Clear at Home Remains Clear Abroad

Friday, July 19, 2013

A recent newspaper article on the Foreign Corrupt Practices Act included a phrase used by a company employee who referred to “the moral ambiguities of doing business abroad.”

Here is everything you need to know about the FCPA: if it’s illegal in the US, it’s illegal anywhere in the world.

Having poured this triple shot of micro-brewed espresso to start your Friday morning, let’s rewind for a moment and go over a few key topics associated with the FCPA.

Passed in 1977, the FCPA didn’t gather enforcement steam until about 2009 when the Department of Justice and the Securities & Exchange Commission started to step-up investigations and charges. Perhaps because of this delayed enforcement, FCPA has suffered also from delayed implementation at the company level. There is nothing like headlines of white collar arrests, incarceration, and multi-million dollar fines to motivate compliance. These days, FCPA is part of routine compliance conversation.

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Eye On

FCPA Featured Article

Orchid Advisors was featured in this month's edition of Acquisition International magazine. Read more in the current issue called "The Importance of Anti-Corruption Due Diligence in Corporate Transactions."

Enacted

05/16 - Maryland (SB 281)
04/16 - Kansas (SB 102)
04/04 - Connecticut (GAB 1160)
03/20 - Colorado (HB 1224)
01/15 - New York (SB 2230)

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On the Governors' Desks

MO - HB-436 (2013)
NJ - SB-2723 (2013)
NY - SB-4536A (2013)

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Off the Floor

The FCPA does not apply to all businesses. It only applies to those companies that are SEC-registered and doing business outside the United States. There are two main provisions that apply to such companies: (1) an anti-bribery provision enforced by the DOJ; and, (2) a books and records provision enforced by the SEC.

A simplified description of the two provisions would be this. Under the anti-bribery provision, companies and individuals can be charged if they make corrupt payments to foreign officials for the purpose of obtaining or retaining business. The books and records provision requires books, records, and accounts to be kept in reasonable detail that accurately and fairly reflect transactions of money, goods, and services, as well as a system of internal accounting controls.

An FCPA investigation is not something you want to have to take to shareholders. Among the ways that the FCPA investigation and defense impacts the bottom line – even if there is a successful resolution – would be attorney’s fees. The annual reports of just four of the 100-plus companies currently under FCPA investigations disclose legal and professional fees of \$339.7 million since 2009, \$179 million since 2011, \$157 million in the past year, and \$125 million in 2012 plus an additional \$45 million from 2007 to 2009.

Having followed a number of the recent FCPA prosecutions, the allegations tend to reveal an ethical tension within a company that has several compliance elements in place. The defendant companies typically do have a compliance team, some have FCPA written policies, others have ethics statements, and each company appears to have the capacity for internal audits and prior use of or at least consultation with an external auditing firm. The corrupt practices seem to come to light through one or more employees who is aware of company policy and whose moral compass goes off.

And that is the specific point at which the road splits. Those companies that take seriously the employee concern when it reaches the high-ranking company official are those companies that fare better during the investigation and resolution phase. By contrast, those companies facing allegations that they knew of the corruption and either ignored, actively sought to hide, or (worse) condoned the behavior ended up with a more invasive, far-reaching, and expensive settlement agreement.

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Virtual Roundtable

Upcoming Roundtable: Sept 19
Topic: Dealer Mini Series - Part 1
Free Sign-up. Featuring Thomas
McDermott, former ATF Industry
Executive.

Recent Roundtable: June 27
Topic: New Lawsuits - CO, CT,
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Whitepaper Series

Successful FCPA compliance rests on ownership and management and whether corrupt practices are a bright line not to be crossed. If that belief is coupled with an FCPA program, policies, standard operating procedures, and employee training, you potentially save your company more than \$100 million in legal fees, alone.

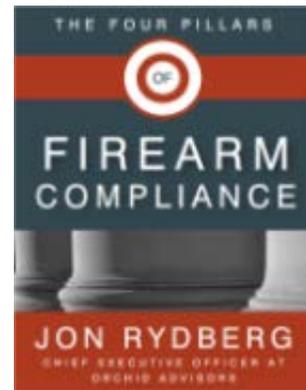


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