

# Avoiding the Pitfalls of the Foreign Corrupt Practices Act

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The past several years have seen a dramatic increase in the enforcement of the US Foreign Corrupt Practices Act [as amended, 15 U.S.C. §§ 78dd-1, et seq.], commonly referred to as the “FCPA”. Originally enacted in 1977 and amended in 1998, the FCPA specifically outlaws payments to foreign government officials “to assist in obtaining or retaining business.” The anti-bribery provision applies to all US citizens, residents and companies as well as to foreign individuals and entities if they are involved, directly or indirectly through third party agents, “in furtherance of such a corrupt payment to take place within the territory of the United States.”

Assistant US Attorney General Lanny Breuer, who has overseen FCPA enforcement actions and prosecutions for the US Department of Justice (“DOJ”), is quoted in a recent speech as saying, “I’m proud to say that our FCPA enforcement is stronger than it’s ever been – and getting stronger. To give you just one metric, in the past year, we’ve imposed the most criminal penalties in FCPA-related cases in any single 12-month period – ever. Well over \$1 billion.” According to Breuer, in 2004, the US government levied about \$11 million in fines and prosecuted only two individuals under the FCPA. Whereas in 2010, nearly \$2 billion in fines were levied and some 50 individuals and entities were prosecuted. Indeed, 8 of the top 10 FCPA settlements ever occurred in 2010, with total fines of over \$1.6 billion. The exceptions being Siemens in 2008 for \$800 million and KBR/Halliburton in 2009 for \$579 million.

Consider the following FCPA enforcement case settlements in just the past few months:

On February 10, 2011, Arkansas-based Tyson Foods, Inc. (“Tyson”) agreed to settle alleged criminal violations of the FCPA with the DOJ and the US Securities & Exchange Commission (“SEC”) agreeing to pay fines and penalties totaling \$5.2 million. Prosecutors alleged that through Tyson’s Mexican subsidiary, it paid some \$100,000 in bribes to two government meat processing plant inspectors using “false books and sham jobs” to help obtain contracts. To settle the charges, Tyson agreed to pay a \$4 million fine in the DOJ case and in a separate, related matter brought by the SEC, agreed to pay about \$1.2 million in a consent decree.

On January 31, 2011, San Diego, California-based Maxwell Technologies, Inc. (“Maxwell”) agreed to settle alleged criminal violations of the FCPA with the DOJ and the SEC, agreeing to pay fines and penalties totaling some \$14.35 million. Prosecutors alleged that from 2002 through 2009, through Maxwell’s Swiss subsidiary, it paid an agent in China more than \$2.5 million to secure contracts in that country. Maxwell’s Chinese agent, in turn, paid bribes to various Chinese government officials, according to the DOJ complaint. Maxwell agreed to a deferred prosecution with the DOJ paying an \$8 million criminal penalty and a fine of some \$6.35 million in the SEC case.

On December 10, 2010, San Jose, California-based RAE Systems, Inc. (“RAE”) settled alleged criminal violations of the FCPA with the DOJ and the SEC, agreeing to pay some \$2.9 million in fines and penalties. Prosecutors alleged that from 2004 through 2008, RAE, directly and through two of its joint venture entities, made \$400,000 in “improper payments” to Chinese government officials to secure contracts, among other alleged violations of the anti-bribery, books & records, and internal controls provisions of the FCPA. Maxwell settled the DOJ case with a non-prosecution agreement, paying a \$1.7 million penalty and a total of about \$1.2 million in disgorgement and interest in the SEC case.

Given the emphasis on FCPA enforcement in recent years, organizations operating internationally, especially in high risk countries, should enact plans to mitigate the risk. Organizations can protect themselves from the pitfalls of FCPA violations (and some other potentially serious legal issues), by taking some practical steps, including, but not limited to the following:

- Develop and widely publish a corporate code of conduct including policy regarding the FCPA – regular reminders and training for employees is critical. Be sure local employees in overseas offices have the policy in their own language.
- Assess your risk – are you operating in high risk countries, known for corrupt business practices? Check Transparency International’s annual corruption perception index.
- Create a compliance function – with specific FCPA authority. The compliance officer should be charged with training and awareness as well as providing a check and balance.
- Set up a compliance/ethics hotline – again publish this number widely and make sure employees have an affirmative duty to report suspected wrongdoing (which should be included in the code of conduct). Allow for anonymous tips.
- Audit overseas branch offices/operations regularly and irregularly – make sure compliance/audit is comfortable with all disbursements of funds.
- Conduct rigorous due diligence vetting of all third party agents and consultants working on your behalf overseas. In our experience, many of these so-called “five percenters,” charged with helping the company develop a particular overseas market, operate with a different ethical standard and can often get a company into FCPA trouble.
- Know your customer – conduct rigorous due diligence on your clients to make sure they are reputable and do not have a history of corrupt business practices.
- Be sure consultant/agent contracts clearly state your company policy and expectation that violations of the FCPA are strictly prohibited. Make sure they sign onto the company’s code of conduct. The reality is that even though an agent may not be a direct employee, if they are operating on your behalf, you will bear the liability of any corrupt business practices, such as bribery or kickbacks.
- To the extent practicable, maintain branch office finances and financial operations from the headquarters offices rather than the field. Do not allow large cash transactions.
- When acquiring overseas companies or operations, conduct rigorous due diligence vetting of all key personnel and agents, audit contracts and business relationships and make sure they have a history of ethical business practices.

Below are some of the “red flag” warning signs and risk factors for FCPA issues:

- Conducting business in countries with high corruption risk factors;
- Cash or other unusual means of payment;
- Payments to family members of government officials;
- Engagements with third party agents with little or no apparent qualifications;
- Payments to shell companies;
- Unusual or excessive commissions or “success fees” paid to third parties;
- Donations to special charities, institutions or agencies on behalf of government officials;
- Unusual processing or transactional fees;
- Excessive entertainment, travel or gifts;
- Lax or improper record keeping;
- Foreign clients or third party agents who have had a history of improper business practices;
- Insistence that a particular third party agent be used; and,
- Incomplete responses and/or objections to FCPA/compliance certification.

If you find your company the subject of an FCPA enforcement action, some immediate steps should be taken:

- Engage reputable counsel with FCPA experience – local counsel may also be necessary;
- Do not destroy any books and records – in fact, preserve records and other evidence;
- Cooperate with the government – consider self reporting potential issues;
- Document any interviews conducted; and,
- Follow counsel’s advice.

In short, due to the significant negative impact on businesses which are subject to FCPA enforcement actions, it makes sense that some prudent action be taken to prevent an occurrence.

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FCPA Resources:

U.S. Department of Justice’s [Lay Persons Guide to FCPA Anti-Bribery Provisions](#)  
U.S. Department of Justice’s [FCPA Opinion Procedure](#)  
Assoc. Corp. Counsel’s [FCPA Checklist](#)  
Helpful blogs: [FCPA Enforcement](#)  
[FCPA Blog](#)  
[White Collar Crime Prof Blog](#)

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