

IN FOCUS ANTI-BRIBERY / FCPA

Corruption Knows No Borders

FCPA compliance is not just an emerging market concern

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Transparency International, a global coalition against corruption, publishes an index that measures the perceived levels of public sector corruption worldwide. The 175 countries are ranked on a scale from zero (highly corrupt) to 100 (very clean). Only two countries (Denmark and New Zealand) rank above 90, and more than two-thirds of the countries rank below 50. The United States is tied with Barbados, Hong Kong and Ireland for 17th in the rankings with a score of 74. Prominent European economies that fall outside of the top 25 in ranking include France, Spain, Portugal and Italy.

With the debate about unethical business practices at fever pitch in the wake of the Great Recession, recent notable scandals such as FIFA and Petrobras have provided fresh emotional energy. Within FIFA, allegations suggest bribes in excess

of \$150 million to influence voting on host countries and meddling in political elections. At Petrobras, allegations suggest billions in bribes to influence the award of lucrative construction contracts. In spite of rationalizations, the payment of bribes does have consequences that most often affect the most vulnerable. Money that could otherwise be applied to social causes such as healthcare and medicine are directed to the benefit of relatively few.

There is no question that corruption is a problem in all countries. Corruption is possible because of different corporate and compliance cultures across geographical jurisdictions. Decentralized and inconsistent contracting procedures within multinational companies may also contribute to corruption. It is true that some countries have greater levels of sophistication regarding the nature of perceived risks in different geographies. For example, past settlements focused on customs clearance and duties issues in Brazil. In India and China, recent focus has been on payments to secure licenses and permits with government entities. In Russia, settlements have concentrated on payments to intermediary entities as conduits to government officials or other principals in state-owned enterprises.

Countries that are perceived to be “less corrupt” generally have rules and laws in place governing such behavior and mandating rigorous enforcement when such behavior is revealed. In the U.S., the Foreign Corrupt Practices Act addresses the bribery of foreign officials.

This federal law applies to U.S. companies engaging in international business and their foreign counterparts.

The U.S. Department of Justice and the Securities and Exchange Commission have compiled detailed guidance on the FCPA, its provisions and enforcement.¹ This guidance will be useful to many entities, from small businesses doing their first transactions abroad to multinational corporations with subsidiaries around the world. The wide variety of topics covered in this guidance places emphasis on areas of enforcement within the global reach of the FCPA’s anti-bribery and accounting provisions. Guidance is provided on such topics as:

- Who and what is covered by the FCPA
- The definition of a “foreign official”
- What constitutes proper and improper gifts, travel and entertainment expenses;
- The nature of facilitating payments
- How successor liability applies in mergers and acquisitions.

To provide greater assurance, an effective corporate compliance program is required to identify compliance issues that may arise, and qualified accounting professionals and other service providers can share the hallmarks of such a program.

In spite of the FCPA’s rules and regulations in the U.S., there are plenty of recent enforcement actions and settlements that involve U.S. companies and their foreign subsidiaries. In January 2015, Shearman & Sterling LLP published the *FCPA Digest*:



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Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act. The report reveals a surge in large corporate enforcement actions in 2014, generating the second-highest total amount of corporate penalties in history at \$1.566 billion. Average corporate fines and penalties in 2014 were \$156.6 million, which is the largest average in history. In addition, the DOJ's prosecution of Alstom resulted in the largest FCPA-related criminal fine in history of \$772 million – well above the \$450 million criminal fine in Siemens.

These statistics and trends demonstrate that much compliance work is to be done by

U.S. companies to avoid FCPA violations and subsequent enforcement actions. There is a confluence of circumstances in emerging markets that makes corruption risk greater. That is not to say such circumstances do not exist within the U.S., but industries that are privately owned in the U.S. and Western Europe are many times owned or controlled by the state in emerging markets, where a lack of transparency may foster a culture of corruption.

Enforcement actions around the world are a reminder that governments have an obligation to respond to citizens' needs.

Corruption is not endemic to emerging economies, as those in developed economies often participate in corrupt practices in order to secure lucrative deals. No matter who participates, it's still fraud. Newsworthy scandals such as FIFA and Petrobras oftentimes drive corrective action. We can only hope that these recent events will spur the additional reform that is necessary worldwide.

1. See for example, A Resource Guide to the U.S. Foreign Corrupt Practices Act, a publication that can be found at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> as of the date of this writing.