
Andrew Legg

Compliance is key

Lack of an FCPA compliance programme can incur heavy costs or even imprisonment, but contrasting rules between the US and the EU make navigation of these laws complicated

Although the United States Foreign Corrupt Practices Act (FCPA) has been on the books in roughly its current form for more than 30 years, its practical importance has increased dramatically in recent years, with the US authorities stepping up FCPA enforcement and demanding ever-steeper penalties from companies charged with having violated its terms. This trend has major implications for European companies which are often directly subject to the FCPA, either because they have US-based operations, or because they issue securities that are traded on US exchanges.

Indeed, major European companies such as Siemens, Akzo Nobel, Alcatel, ABB and BAE Systems have found themselves embroiled in expensive, messy and high-profile investigations with US authorities in recent years. And yet, according to one recent survey, executives at nearly half of the companies listed on the FTSE 350 were unaware of whether their company is subject to the FCPA, and nearly two-thirds responded that their company had no FCPA compliance programme or that they were unaware of whether any such programme existed.

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As recent cases indicate, this sort of ambivalence can carry a heavy price for an organisation and, for individual executives, violations can lead to criminal fines or even a term of imprisonment in the US.

The FCPA bans the payment of bribes to officials of non-US governments. Specifically, it forbids those subject to its terms to offer or give "anything of value" to any official (broadly defined to include even low-level actors such as administrators of government-owned hospitals) of any foreign government or public international organisation, whether directly or through an intermediary, for the purpose of obtaining or retaining business.

The FCPA also imposes reporting requirements that obligate issuers of securities traded on US exchanges to keep books and records that, "in reasonable detail, accurately and fairly reflect the transactions and dispositions" of their assets, and maintain a system of internal accounting controls designed to ensure their accuracy. In essence, the provisions buttress the FCPA's anti-bribery provisions by making it unlawful for issuers to fail to accurately record any transaction – including by describing a bribery payment as a legitimate business expense.

Recent cases make it clear that European companies can encounter new and damaging exposure to FCPA liability in two ways: companies can inherit so-called "successor liability" for the past acts of a US target company, and secondly the FCPA makes it unlawful for foreign companies to take action "in furtherance" of a prohibited offer or payment while in US territory. Further, a European company could find itself on the hook for FCPA liability if a US-based employee, or an employee of a US subsidiary, were to commit such an act on its behalf.

Managing the pressures of FCPA compliance requires European companies to navigate the sometimes contradictory enforcement efforts of the US and European governments in this area. Although these legal regimes can appear highly complementary (an Organisation for Economic Cooperation and Development accord commits all member countries to combat foreign public bribery, and the laws of the major European countries all reflect this commitment), in other respects these regimes are sharply at odds.

For example recent US Department of Justice (DOJ) Opinion Procedure Releases 08-01 and 08-02 highlight the level of due diligence companies must conduct in merger and acquisition transactions to avoid prosecution for illicit payments. The DOJ did not seek enforcement actions where

the potential investors or acquirers made extensive "personal" inquiries (e.g. government and political parties affiliations or past criminal conduct) concerning the target's officers, directors, employees, and agents, including their family members. European Union (EU) data privacy laws, however, often prohibit the transfer of such personal information to countries outside the EU that fail to provide "adequate" protections to personal data. To date, the EU has not formally designated the US as offering an "adequate level of protection."

Similarly, US enforcement authorities routinely expect companies to preserve and hold massive quantities of data and correspondence at the outset of an investigation, and may view refusals to comply with such a request as reflecting an unwillingness to cooperate. However, European data protection laws often forbid such broad-based preservation efforts. UK companies, therefore, often find themselves compelled to provide information to US agencies that may contravene EU law.

Some European legal regimes have 'blocking' statutes which ostensibly bar extra-erritorial enforcement of US law and may restrict or prohibit the production of documents and discovery of information meant for disclosure in a foreign jurisdiction. The US courts have, however, required companies to produce documents in the US despite the possibility of violating such foreign blocking statutes.

Further, while some European countries view the entry of judgment in one jurisdiction as barring another from imposing punishment for the same underlying conduct (a doctrine known as international double jeopardy), US authorities disagree, taking the view that each sovereign may separately punish the same conduct.

Dealing with the US's current approach to the FCPA requires diligence and expertise – a test that many European companies, by their own admission, are badly failing. In conducting FCPA due diligence, companies should pay particular attention to the warning signs, including business activity in countries with widespread official corruption; payments of unusually high compensation; requests for payments in cash; absence of written agreements; close relationships to government officials; and refusal to certify compliance with the FCPA. However, these general principles are only the beginning.

An FCPA compliance programme is essential in helping a company prevent criminal acts, reduce negligence and set up a mechanism for early detection. US enforcement authorities have made clear that companies that employ effective FCPA compliance policies will be rewarded in settlement negotiations, and that those that do not may receive harsher punishments. Given this enforcement environment, the value of an effective compliance programme in international operations cannot be overstated.

Andrew Legg is a partner and Kristy Balsanek and Ilana Golant associates at Mayer Brown.