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When being hospitable can land you in trouble (Part 3)




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In articles [one](#) and [two](#), we introduced the Foreign Corrupt Practices Act, discussing its basic provisions, its growing importance as a law enforcement tool by U.S. authorities, and its general application to the hotel industry. As we noted, the law is now the Justice Department's second highest enforcement priority, has led to mammoth fines and criminal sentences, and creates particular susceptibility for the hotel industry given its worldwide nature and frequent government contacts. This week's article focuses on how a company can avoid becoming the latest statistic in the growing FCPA trend. The short answer is to create a robust FCPA compliance program.

Formulate your FCPA policy

An effective FCPA compliance program begins with a strong FCPA policy. Yours should include expectations governing FCPA adherence, and defined procedures for making lawful payments to foreign officials or governments.

For example, the FCPA recognizes a narrow exception for "facilitating payments" to expedite routine, non-discretionary government services where such payments are permitted in the foreign country. As this exception is frequently misunderstood and because facilitating payments often are illegal under local laws, your policy should clearly set forth whether you intend to allow facilitating payments at all, and if so, the maximum amount that can be paid as a facilitating payment, when they can be provided, and how they will be recorded in your books and records.

Implement and enforce your FCPA policy with vigor. Your FCPA policy should not be a mere fig leaf—it must be implemented and enforced. Indeed, a significant focus for U.S. enforcement authorities in FCPA investigations is the strength of corporate compliance programs. Where programs are fully integrated into business practices, companies tend to be treated with substantially greater leniency than those whose programs are a dead letter.

Fulsome and effective compliance programs have several components:

- Train key employees, including all who interact with foreign governments or who make financial decisions, and in particular employees of foreign subsidiaries. Include the FCPA's basic principles, pertinent hypotheticals, and how to recognize and handle issues when they arise. Tailor the training to spot red flags associated with the particular country of operation and anticipated government interactions. Conduct the training at least annually and in advance of new overseas projects. Consider training in both English and native languages, to ensure maximum effectiveness.
- Have knowledgeable personnel available in real-time to provide guidance when questions arise. FCPA concerns can crop up quickly, and having dedicated internal or external personnel who can resolve confusion is an effective way to avoid violations.
- Create multiple mechanisms for employees and third-parties to report problems. Some companies prefer anonymous hotlines, but other methods, such as reporting to an independent audit committee, parent compliance officers or others also are common. Regardless of the techniques, strive to foster an atmosphere that encourages reporting, where concerns will be taken seriously and not lead to retribution.

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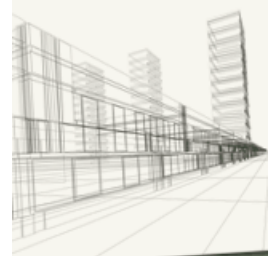
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Key practice tip: Though it may seem counter-intuitive, the hallmark of any effective compliance program—and a key criterion the U.S. government scrutinizes—is having such concerns actually raised, as it demonstrates FCPA awareness and concern among employees and an open line of reporting.

- When concerns are registered or other FCPA issues are known, investigate immediately. Investigations can utilize internal or external personnel. If problems are discovered, address them rapidly and appropriately, through remediation, disciplinary measures or other means. In some situations, such as where a problem is in fact a widespread practice, self-disclosure to government agencies may be appropriate.
- Pay close attention to overseas agents, joint ventures and other third parties. Frequently, FCPA problems arise from foreign entities acting on behalf of a U.S. entity or individual. Given that threat, develop standard methods of due diligence for selecting, retaining, and monitoring foreign distributors, agents, and partners.

Key practice tip: Include in contracts with those parties clauses that require adherence to the FCPA, making prohibited practices a breach of the agreement that allows for immediate termination. Consider a provision requiring key third-party employees to undergo training and annual certifications. Also consider including requirements and expectations regarding third-party subagents, and include provisions that permit some means of monitoring third-party conduct.

Audits and financial controls are essential

After a compliance program is established, verify that it is working. Perform periodic internal, external or management audits. That might include third-party agents, through periodic inspections or audits, annual interviews and other similar methods. Consider asking relevant employees and third-parties to sign annual certifications affirming that they are unaware of FCPA problems.

Related to a strong compliance program are strong financial controls. Those charged with reviewing and approving expenditures from employees and third-parties must identify problematic payments or unclear records, ask questions before approving expenses they do not fully understand, and ensure that all payments of any size comport with applicable laws. That is particularly important for companies listed on a U.S. exchange, as the FCPA requires they keep detailed and accurate records and employ proper internal accounting controls. It is a practice that all companies, public or private, ought to follow.

Following these steps, of course, will not eliminate the possibility of an FCPA violation. Corruption is, after all, among the world's oldest professions, and there is no limit to human ingenuity. But installing a strong compliance program with effective financial controls can help ensure that you do not end up as a guest in one of the federal government's sparsely furnished rooms.

Next week's article will focus on some recent enforcement efforts that highlight why your investment of time to read this series and, hopefully, to implement our suggestions could be your wisest move of 2009.

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