

FCPA Compliance in the Age of COVID-19

August 19, 2020 Taryn McDonald

PRACTICES Foreign Corrupt Practices Act FCPA

Even before COVID-19, the Foreign Corrupt Practices Act (FCPA) was becoming increasingly tricky to navigate and was actively enforced. But in light of the pandemic, which is forcing rapid changes to the global marketplace and causing unique supply chain challenges, the risk of a costly misstep has only increased. The risk is further amplified by other factors—including the pressure to maintain performance in a struggling economy and the difficulty of maintaining appropriate compliance oversight with many employees working from home.

Moreover, government interest in the FCPA has continued—or even intensified—during the pandemic. The SEC and DOJ have announced a number of enforcement actions and settlements over the past few months and they [recently released](#) a long-awaited update to “A Resource Guide to the Foreign Corrupt Practices Act,” and the DOJ this week released [its first FCPA advisory opinion in six years](#).

COVID-related Risks

The business landscape has changed in meaningful ways as a result of the pandemic. Businesses are navigating new federal, state, and local orders governing their operations and status. Supplies are scarce and supply chains have shifted (and often slowed). People are working from home. For many companies, budgets are tight. All of these issues create incentives for employees to figure out new ways to get things done and provide increased opportunity for bribery and corruption to take hold. There are several risks associated with the changing business landscape:

- *Shutdowns and Regulations:* Businesses around the world have been and remain beholden to orders issued by their national and local governments regarding if, when, and how they may operate amidst the pandemic. But businesses are also desperate to restore full operations. This push and pull presents the perfect environment for bribery and corruption, such as opportunity for a business owner to bribe a public official to get a favorable order or exemption, or to avoid scrutiny.
- *Supply Chain Concerns/Export Limitations:* Due to rolling global shutdowns and work from home orders, the capacity to source raw materials and manufacture goods is down, and demand in many sectors (including certain consumer goods) is up. There have also been new orders limiting exports of certain products. For example, many countries have imposed temporary restrictions on exports of medical goods and food items that are in short supply. Companies may be incentivized to sidestep these new restrictions or cultivate new (and potentially risky) relationships with suppliers, manufacturers, and agents in an effort to maintain “business as usual.” This creates opportunities for an employee to pay a bribe to influence conduct.
- *Customs/Expediting:* The pandemic has also impacted (and often slowed) the transportation of goods. This could encourage the payment of bribes to those officials who could help companies get those goods shipped more quickly, including customs agents and transportation authorities.

What Companies Should Do

These unprecedented times do *not* mean that the government will turn a blind eye to illicit conduct. In fact, the SEC and DOJ have continued to announce enforcement actions and settlements over the past few months and have shown no signs of slowing down. Thus, it is important to ensure that your company's compliance practices and internal controls are sufficient for the current environment. Companies can enhance their FCPA compliance efforts by:

- Ensuring their policies and procedures are updated and communicated to their employees regularly;
- Considering adding to their compliance policies to address specific risks created by COVID-19—for example, incorporating additional safeguards and check points to address the work from home environment;
- Considering appropriate methods to speed the process for retaining third parties (including, e.g., streamlining requirements for obtaining required approvals and finalizing contracts) so that employees do not attempt to work around compliance in order to get new third parties retained quickly;
- Considering enhanced diligence procedures for certain vendors providing sensitive goods or services;
- Adjusting diligence procedures to the extent they currently require steps that are difficult to accomplish due to shutdowns and travel restrictions (e.g., requirements for onsite/in-person visits) and instead allowing other types of diligence that provide reasonably equivalent assurances;
- Keeping tight oversight on cash disbursements;
- Continuing to require regular certifications of compliance from employees and third parties; and
- Emphasizing internal reporting procedures for reporting suspected FCPA violations.

If you need assistance with FCPA compliance, including navigating issues raised by the COVID-19 pandemic, please contact one of the attorneys listed below.