

How Does the FCPA Apply to Your Business?

One question that I often hear about the application of the Foreign Corrupt Practices Act (FCPA) is something along the lines of the following: “I am not in the international energy business, I am in the restaurant, retail, banking, or *(fill in the blank)* business. And yes my company has international operations but we don’t transact business with foreign governments. Why do I need to worry about the FCPA?”

The answer to this oft-asked question is laid out in a new resource for the FCPA practitioner. It is a book entitled “*Foreign Corrupt Practices Act – A Practical Resource for Managers and Executives*” authored by Aaron Murphy. It is a welcome addition to the growing literature on the FCPA, which, as noted by Mr. Murphy’s title, is designed to be a practical resource. Aaron is a partner in the Los Angeles office of Latham & Watkins, who practices in the White Collar and Government Investigations Group and in his introduction states that this book is primarily for managers and “the most common problems areas where managers get themselves into FCPA trouble.”

One chapter is entitled “*You Do More With the Government Than You Think*”. In this chapter Aaron gives several examples of how any US company doing business overseas will come into contact with a foreign governmental official and, thereby, create a possible FCPA liability. These interactions include some of the following examples:

- ***Interactions with Customs Officials.*** Every time your company sends raw materials into, or brings them out of, a country there is an interaction with a foreign governmental official in the form of a Customs Official. Every customs transaction involves a payment to a foreign government and every transaction involves some form of a foreign governmental regulatory process. While the individual payment per transaction can be small, the amount of total transactions can be quite high, if a large volume of goods are being imported into a foreign country.
- ***Interaction with Tax Officials.*** While noting that interacting with international tax authorities can present problems similar to those with customs officials, Murphy observes that the stakes can often be much higher since tax transactions may be less in frequency but higher in financial risk. These types of risks include the valuation of raw materials for VAT purposes before such materials are incorporated into a final product, or the lack of segregation between goods to be sold on the foreign country’s domestic market as opposed to those which may be shipped through a free trade zone for sale outside that country’s domestic market.
- ***Licensing and Permits.*** Your company is a retail seller of clothes and cosmetics and you do not understand how the FCPA applies to your foreign sales operations? Every physical location that you sell your goods in will require some type of license to operate your business. It could require multiple license such as a national license, state license and

local municipal license, additionally you will need a building permit if you intend to build out or modify your retail stores.

- **Work Permits and Visas.** If your company does any business overseas it will have to send someone from the home office to operate in-country at some point. In the post-9/11 world this probably means that, at a minimum, your company will have to obtain a visa for each employee who enters the foreign country and perhaps a work permit as well. The visa process can start in the United States with a trip to foreign government consulate or even the embassy and at that point you are dealing with a foreign governmental official. The work permit process can also begin in the United States but often may continue in the foreign country.
- **Inspections and Certifications.** We recently wrote about franchising overseas and the impact of the FCPA on such businesses. Consider the Tex-Mex restaurant chain which desires to take this cuisine across the world. In any city in the world there will be some type of certification process to enable the business to set up and start operating and then there will be the need for ongoing inspections for sanitary conditions. Such inspections may be rare but if there is “*slime in the ice machine*” it may be grounds to close the restaurant.
- **Bid and Tender Process.** Your company is one of the worlds best at designing and constructing LNG facilities. You have assisted a foreign government to draft the specifications for the world’s largest, most technologically advanced LNG facility. During this specification development phase, your company has paid for all meals delivered during meetings and flown certain officials from the National Energy Company to the US to work on these specifications. Now the specifications go out to bid for the construction phase and your company is the successful bidder. Has your company violated the FCPA? According to Murphy, “Telling the difference is tough”.

These examples are not an exclusive list. Murphy also notes that in some foreign jurisdictions, the bribery of judges may be prevalent or even standard in both civil and criminal litigation. The clear message that Murphy brings is that anytime a US company conducts business outside the US it impacts the FCPA. But in addition to his warnings, Murphy lays the steps he believes can assist a company to keep it from running afoul of the FCPA. We welcome Aaron’s work as a new and valuable resource for the FCPA compliance practitioner. We applaud his work in this area.

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