

FCPA Landmines Beneath the Surface of the COVID-19 Crisis - May 6

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COVID-19 took the world by surprise and continues to spread across the globe in more than 210 countries and counting. The outbreak in the United States escalated rapidly, with over 585,000 confirmed cases as of April 14, 2020. The federal government and a number of hard-hit states were caught off guard, and soon learned that their inventories of personal protective equipment (“PPE”) and other life-saving equipment such as test kits and ventilators were insufficient to keep pace with the pandemic. The demand for equipment to fight COVID-19 skyrocketed and government and commercial entities have shifted into high gear to respond. Whether motivated by humanitarian concern or commercial enterprise, many state and local governments, companies and individuals are now looking abroad to procure critical supplies on an expedited basis. At the same time, many foreign industrial manufacturers are positioning themselves for the high demand of exports by adapting their facilities to produce PPE. For example, Chinese electric car maker BYD announced on March 13, 2020 it is now the largest face mask factory in the world—less than one month after converting its facilities in response to the pandemic. In the midst of these exigent circumstances, the global supply chain landscape is replete with Foreign Corrupt Practices Act landmines—and well-intentioned companies hoping to partner with foreign PPE manufacturers could become a casualty if they don’t watch their step.

Anticipated FCPA Enforcement in the Wake of the COVID-19 Pandemic

The Foreign Corrupt Practices Act of 1977 (“FCPA”) makes it unlawful for any commercial enterprise, or individual representing one, to offer, promise to pay, or direct or authorize another individual to pay money or anything of value to a foreign government official for the purpose of expanding or maintaining their commercial interests. 15 U.S.C. §§ 78dd-1, et seq. The FCPA also requires publicly traded companies “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” *Id.* The statute has a criminal and civil bite; the DOJ is responsible for all criminal enforcement of the FCPA and civil enforcement of its bribery provisions, and the SEC is responsible for civil enforcement of the FCPA’s “books and records” provisions if securities are involved. The DOJ and SEC rarely enforced the FCPA in its first three decades of existence. These agencies, however, have aggressively interpreted and enforced the law since the turn of the century. From

2000 to 2019, the DOJ brought 235 enforcement actions and the SEC brought 168 enforcement actions, together involving over \$11 billion in monetary resolutions. In 2019, the U.S. Government collected more in a single year through DOJ and SEC actions against companies in FCPA cases than ever before. There are several FCPA-related considerations for companies to keep in mind as they navigate business during the COVID-19 pandemic.

Indeed, U.S. companies would be wise to assume the government will persist in its aggressive “a bribe is a bribe” approach to the FCPA, even in the midst of a worldwide health crisis. First, corruption tends to thrive in times of crisis. Weaknesses in governmental systems become exposed, and those with nefarious intent, or just too much aggressiveness, seize on the opportunity to exploit the panic, fear and suffering that accompanies disasters. Increased corruption, in turn, often results in increased enforcement. The financial crisis of 2008, for example, increased FCPA enforcement. As companies faced pressure to obtain business and even maintain operational status during the crisis, their focus on FCPA compliance decreased. The global economy came to a halt, and many companies decided to quickly merge and consolidate. The speed of these consolidations resulted in the discovery by some acquiring companies of questionable payments and accounting practices both pre- and post-merger, resulting in increased FCPA compliance risks. The DOJ and SEC were alerted and brought more FCPA enforcement actions and imposed higher civil fines from 2008 to 2011 than ever before.

Second, although the current administration has not directly addressed whether and to what extent it will pursue FCPA enforcement actions as a result of the COVID-19 pandemic, the DOJ and SEC have announced their intent to prioritize coronavirus-related fraud schemes. For example, on March 20, 2020, the DOJ issued a [press release](#) announcing that Attorney General William P. Barr “is urging the public to report suspected fraud schemes related to COVID-19” and directing all U.S. Attorneys to prioritize investigating and prosecuting such schemes. Four days later, the DOJ established the COVID-19 Hoarding and Price Gouging Task Force “to address COVID-19-related market manipulation, hoarding, and price gouging.” Given the global supply chain pressure points and implications of the COVID-19 crisis, it would not be a stretch for the administration to extend its prioritization of such COVID-19-related fraud cases to include COVID-19-related global anti-corruption and bribery cases.

Third, the federal government is in the process of rolling out over two trillion dollars in aid and recovery funding in response to the coronavirus pandemic, and it likely will be eager to replenish its resources after such an unprecedented relief package. The FCPA historically has generated significant revenue for the U.S. Government, and all criminal fines, civil penalties and disgorged profits resulting from FCPA violations go directly into the U.S. Treasury. When the COVID-19 crisis curve drops in the U.S., the DOJ, SEC, and federal prosecutors could turn to the FCPA to assist the U.S. Government in bouncing back from the financial impact of the pandemic.

Finally, the current administration and others have been critical of China’s response to the COVID-19 crisis; Secretary of State Mike Pompeo, for example, remarked in a March 5, 2020 press conference that “there was information [from China] that could have been made available more quickly and data that could have been provided and shared among health professionals across the world.” Further, on March 12, 2020, Chinese Foreign Ministry spokesman Zhao Lijian suggested, via Twitter, that the U.S. has not been transparent and that the U.S. Army may have brought the epidemic to Wuhan, China. In the wake of a potential diplomatic fallout between the U.S. and China, the administration may be particularly vigilant of and aggressive toward U.S.-China deals implicating the FCPA.

Potential FCPA Landmines

American companies that import goods or supplies from abroad frequently rely on customs agents and third-party brokers to assist them in maneuvering the often complex customs process. The use of such agents, however, may expose companies to FCPA compliance risks. Numerous FCPA enforcement actions brought by the DOJ and the SEC have focused on improper payments made by third-party agents to government officials to secure customs clearance or additional business.

For example, on September 26, 2019, the SEC announced that a Wisconsin-based digital and print marketing provider agreed to pay nearly \$10 million to settle charges that it violated the FCPA by engaging in multiple bribery schemes in Peru and China. The SEC Order found that from 2010 to 2015 the company's China-based subsidiary used sham sales agents to make and promise improper payments to employees of private and governmental customers to secure business. Similarly, on February 28, 2020, an American communication technology provider settled FCPA charges with the SEC and DOJ for \$8.8 million for using resellers and distributors in China to bribe government officials.

As companies face intense pressure to quickly obtain goods and clear them through the customs process to mitigate the healthcare and economic consequences posed by COVID-19, the risk of FCPA violations runs high. For example, a customs official could refuse to allow the export of PPE without a bribe, and a company employee may be desperate enough to decide that the payment is worth making to preserve his or her employment at a time when company revenues are declining, non-performing employees are subject to lay-offs and furloughs, and sales expectations and revenues remain high. Further, a company venturing into uncharted terrain by seeking to purchase high-demand and scarce products abroad to compensate for losses in traditional lines of business might face increased risks of bribery and corruption primarily due to inexperience. Indeed, the pressure to maintain business or get back to "business as usual" may lead some employees to get dangerously close to or even cross ethical boundaries by committing bribery or other similar misconduct.

Best Practices

Companies seeking to procure goods and supplies abroad during the COVID-19 pandemic should consider the following best practices to avoid falling out of compliance with the FCPA:

1. Maintain a Strong Compliance Presence

Company management should reinforce and reiterate the company's commitment to its anti-corruption and anti-fraud compliance programs. Many companies are taking proactive steps to ensure the safety and well-being of their employees, cope with new "Work From Home" policies, and brace for the financial impact of the pandemic. While a heightened focus on these critical areas right now is understandable, it is important now more than ever for companies and their compliance officers to remind employees, especially those responsible for facilitating the acquisition and importation of goods and supplies from abroad, of the company's commitment to ethical business practices.

2. Emphasize Reporting Procedures for Suspected FCPA Violations

Company management should conduct anti-corruption training for employees to ensure they are capable of recognizing unethical and potentially illegal conduct, and their responsibilities for reporting it according to company policies and procedures. Compliance departments should test their reporting procedures to ensure employees are at ease in reporting any suspected FCPA violations

through multiple avenues, and compliance officers should similarly test their ability to respond appropriately to reasonable suspicions of illegal activity.

3. Increase Screenings and Transaction Review

Finally, company management should consider increasing due diligence efforts and taking a “deeper dive” when it comes to interacting with new suppliers, agents, and distributors. For example, companies should pay particular attention to whether the individual being reviewed is related to any public officials in their country of residence, has a history of employment or business dealings with the government, and whether they previously have been the subject of any corruption complaints, investigations or negative news events. Further, companies that have instituted quantity, financial, or country of origin thresholds for reviews of transactions, expenses, and other aspects of company business for corruption risk, should consider adjusting such thresholds to include a broader and more conservative review process, at least until the COVID-19 pandemic and related equipment and supply demands substantially decrease.

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