

**Three FCPA Considerations if Your Business  
Requires You to Interact with Foreign Officials**

If your business requires you to work with foreign officials, then you probably already know that the Foreign Corrupt Practices Act (FCPA) prohibits you from paying bribes to foreign officials to assist in obtaining or retaining business. The FCPA also requires you to maintain accurate books and records and have a system of internal controls sufficient to assure compliance with the prohibition. However, you may not realize just how extensive the U.S. Securities and Exchange Commission (SEC) expects those controls to be or how expensive it can be if you are not careful.

As with many areas of the securities laws that fall under the jurisdiction of the SEC, FCPA cases are typically settled and rarely litigated to completion. While those settlements do not create binding law, over the past five years the SEC has announced over 45 high profile complaints, sanctions, and settlement agreements against various companies that provide insight into what the SEC expects from businesses that are subject to the FCPA. In light of those settlements, these are three compliance points for you to consider.

**1. Do you include foreign officials in your hospitality programs?**

Golf outings, sporting event tickets, excursions, expensive gifts, and other favors are all common business practices that you may employ to attract and keep clients, customers, or contracts. These pampering practices are generally accepted across a variety of industries and are generally thought of as good practice to build goodwill and support business development efforts. However, what you think of as goodwill could be interpreted as a bribe if government officials are the recipients. Furthermore, in many foreign jurisdictions in which private enterprise and government commercial activities blur together, it can be easy to unwittingly deal with persons the FCPA considers to be government officials. Basically, what constitutes a bribe to government officials may not be as intuitive as you would think, and in the view of the SEC, if a hospitality event includes any type of foreign government official, you may be violating the FCPA.

This situation played out in the second quarter of 2015 when the SEC announced that mining giant BHP Billiton had agreed to pay \$25 million to settle charges alleging FCPA violations. The charges stemmed from BHP Billiton's inclusion of government officials in the hospitality packages it put together in connection with its sponsorship of the Sochi Olympics. According to the SEC: "BHP Billiton footed the bill for foreign government officials to attend the Olympics while they were in a position to help the company with its business or regulatory endeavors . . . yet the company failed to implement sufficient internal controls to address that heightened risk." Similarly, in another recent case, The Bruker Company, a manufacturer of scientific instruments, paid \$2.4 million to settle SEC allegations that the company had violated the FCPA "by providing



Betsy T. Voter is a corporate and securities attorney with Kruse Landa Maycock & Ricks. Drawing on her in-house financial institution experience, Betsy works with clients to develop preventative compliance programs in many areas of the securities laws.

[bvoter@klmrlaw.com](mailto:bvoter@klmrlaw.com)



James R. Kruse is a corporate and securities attorney with Kruse Landa Maycock & Ricks. He has been advising public companies for 45 years. He has been advising clients respecting the FCPA since the Act became effective in 1977.

[jkruse@klmrlaw.com](mailto:jkruse@klmrlaw.com)

non-business related travel and improper payments to various Chinese government officials in an effort to win business.” These improper payments included reimbursement to foreign officials for expenses like leisure travel, sightseeing, shopping, and tour tickets on trips that involved no work-product.

## **2. Are you monitoring FCPA compliance at your subsidiaries?**

If your company has subsidiaries, those entities are probably pretty well self-contained and may operate a little differently than your parent company. This is frequently the case of a subsidiary that has been recently acquired. Even if you have the same FCPA policies in place among your parent company and your subsidiaries, if you have different people running your subsidiaries, you will inevitably have differences in how the policies are or, as the case may be, are not administered.

In the last few years, the SEC has severely punished parent companies whose subsidiaries have failed to comply with the FCPA. For example, Goodyear, the global tire company, recently agreed to pay more than \$16 million to settle FCPA charges. According to the SEC’s settlement documents: “Goodyear failed to prevent or detect more than \$3.2 million in bribes during a four-year period due to inadequate FCPA compliance controls at its subsidiaries in sub-Saharan Africa.” Similarly, in 2014, the global aluminum producer Alcoa agreed to pay an astounding \$384 million to settle charges alleging a bribery scheme orchestrated by a subsidiary. In announcing the settlement George Canellos, co-director of the SEC Enforcement Division, stated: “As the beneficiary of a long-running bribery scheme perpetrated by a closely controlled subsidiary, Alcoa is liable and must be held responsible.” He also reminded companies: “It is critical that companies assess their supply chains and determine that their business relationships have legitimate purposes.”

## **3. Have you created a culture of FCPA compliance?**

The FCPA is a deceptively simple law. A prohibition on bribing foreign officials is about as straightforward as you can get, but things get a little more “corrupt” when you try to figure out a way to monitor and detect those bribes. A solid FCPA compliance program should involve coordination among sales teams, contract negotiators, and accounting and management personnel within a legal framework. In a large company, a bribe disguised as a valid reimbursement could easily pass through three departments and 10 different hands unnoticed if all employees are not monitoring for FCPA issues. Even in a small company the numbers on the expense reports at the end of the month probably will not look suspicious to your CFO if you have not trained him or her to look for red flags.

If you have not created a culture of FCPA compliance, you are likely at risk for failing to detect or prevent illicit bribes. Failing to detect or prevent illicit bribes has been a common theme of the SEC’s enforcement focus. Most recently, the popular cosmetics company, Avon, agreed to a \$135 million settlement with the SEC and the Department of Justice as a result of such shortcomings. The SEC alleges Avon failed to detect bribes to Chinese officials because Avon’s “books and records failed to accurately record the details and purpose of the payments. In some instances, payments were concealed by falsely recording the transactions as employee business expenses or as reimbursement of a third-party vendor.” To be fair, the large settlement figure in the Avon case partly reflects that Avon had become aware of the bribery scheme, but failed to correct it. However, if your only offense is a failure to detect, that should not bring you much comfort. In November 2014, Bio-Rad Laboratories entered into a \$55 million settlement with the SEC. In its press release the SEC stated: “Bio-Rad Laboratories failed to detect a bribery scheme and did not properly address red flags that such a scheme was underway. This enforcement action, which reflects credit for Bio-Rad’s cooperation in our investigation, reiterates the importance of all companies ensuring they have the proper internal controls to prevent FCPA violations.”

---

As you consider these points, remember, if you and your company aren’t bribing foreign officials then you probably aren’t violating the FCPA. However, you should bear in mind that the line between bribe and hospitality may be more blurry than you think; you are responsible for the actions of subsidiaries; and if you have not created a culture of FCPA compliance, you may not know if a bribery scheme is underway.