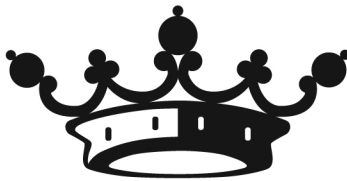


I N S I D E T H E M I N D S

Foreign Corrupt Practices Act Compliance Issues

*Leading Lawyers on Responding to Recent FCPA
Enforcement Actions, Maintaining an Effective
Compliance Program, and Navigating Risk in
Emerging Markets*



ASPATORE

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Emerging Markets: Risky Business or Golden Opportunities?

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ASPATORE

Introduction

The search for new investment and business opportunities has “gone global,” and U.S. businesses looking to increase their bottom line are more often turning to foreign markets to sell their products and services. As international business dealings continue to rise, so too does the risk of Foreign Corrupt Practices Act (FCPA) violations. So how can a U.S. company properly safeguard itself against FCPA risks? In addition to other risks it must assess when going into a foreign market (e.g., political, economic, operational), it must understand and assess the corruption risks posed by the venture and develop an effective compliance plan for managing these risks on an ongoing basis. Failing to adequately assess and safeguard against corruption risks at the onset of the venture can result in a very costly lesson for a U.S. company doing business abroad.

The FCPA Statute

One of the U.S. government’s main tools in the fight against corruption in international markets is the Foreign Corrupt Practices Act (the FCPA), 15 U.S.C. §§ 78dd-1, *et seq.* This 1977 statute was enacted as an effort to end the practice of corporate “slush funds,” where millions of corporate dollars were set aside and used to pay bribes to foreign government officials as a way to obtain or retain business. The FCPA’s main purpose is to outlaw bribery of foreign officials as a way to secure business.

The FCPA has a very broad reach and covers all U.S. companies and citizens doing business abroad as well as some foreign companies with sufficient contacts in the United States (e.g., companies trading on U.S. exchanges or those that use U.S. banks to transact business). If a foreign company hosts meetings in the United States where improper payments are discussed, this too may subject the company to U.S. jurisdiction under the FCPA.

The anti-bribery provision of the FCPA prohibits the giving of corrupt payments, gifts, or anything of value to foreign officials in order to obtain or keep business (whether or not the bribe resulted in any actual business). It also outlaws improper payments and gifts to agents, consultants, or other third parties that are made for the benefit of, or done at the behest of, foreign officials (including but not limited to

political, social, or charitable contributions solicited by a foreign official). In addition to the anti-bribery provisions of the statute, it also contains a books and records requirement for companies to keep appropriate records and to maintain adequate internal controls designed to prevent and detect possible FCPA violations.

The definition of a foreign official under the FCPA is also quite broad. It covers not only those holding public office, but also those local residents who are affiliated with a state-owned or state-run business (e.g., doctors employed by a state-run hospital or employees of a state-owned oil company). Depending on the geographic location and industry involved, the FCPA risk profile may vary significantly.

The Growth Factor

Multinational corporations are gravitating to emerging markets like moths to a flame. So why are emerging markets so attractive? They have several plus factors—they typically boast of rapid growth rates and large populations, and are usually rich in natural resources and human capital. See, e.g., Economist Intelligence Unit, *Operating Risk in Emerging Markets*, *The Economist* (Oct. 2006), (noting that emerging markets attract multinational companies because they serve as “both as a market for goods among a growing middle class and as a source of relatively cheap labor”).

In the wake of the recent global economic crisis, emerging markets have taken on added allure, particularly given their relative low debt to gross domestic product (GDP) growth ratios. See, e.g., B. Borzykowski, *Emerging Economies: Border Crossing*, *CANADIAN BUSINESS ONLINE* (May 10, 2010), (finding that emerging markets have a low debt-to-GDP ratio of about 40 percent as compared to 80 to 120 percent for developed countries). A lower debt-to-GDP ratio means that the country is less over leveraged and the investment less risky to an extent. Emerging markets can yield handsome returns for the investor or business looking for a good bargain or new revenue stream.

The amount of money being invested in emerging markets has also trended upward, culminating earlier this year in a record amount of M&A activity

that has surpassed spending levels in developed markets like the United States and Europe.

Thomas Reuters reported that so far this year [2010] the volume of emerging market-targeted M&A is at its highest level since the first quarter of 2008. A total of \$93.3bn in deals represents 48 percent of global activity. This marks the first time on record that emerging market-targeted M&A constitutes a greater portion of global volumes than either the U.S. or Europe, according to Thomas Reuters. The US constitutes 26.7 percent of global dealmaking for the year to date with Europe contributing 16.9 percent. The largest emerging market deal announced this year is America Movil's planned acquisition of Carso Global Telecom SAB de CV, a Mexico City-based telecoms company, in a stock swap transaction valued at \$27.5bn.

S. Basar, *Goldman Finance Head Chases Emerging Market Growth*, FINANCIAL NEWS (February 11, 2010), available at <http://www.efinancialnews.com/story/2010-02-11/goldman-finance-head-chases-emerging-market-growth-1>, at 1.

The most famous of the emerging markets are the BRIC countries (Brazil, Russia, India, and China). Investors have found highly profitable opportunities in these regions. Other strong emerging markets can be found in sub-Saharan Africa, the Middle East, Latin America, and Southeast Asia.

Emerging Market Growth: Sub-Saharan Africa – A Case Study

An example of an emerging market with a lot of upside potential is sub-Saharan Africa. For many investors, sub-Saharan Africa represents a land of great potential. Business opportunities abound, as do the natural resources. There is ample human capital, an unsaturated market full of potential customers, and the possibility for a high return on investment. Africa is the second largest continent in the world and is home to over one billion people, representing over 14 percent of the world's human population. See *World Atlas*, available at <http://www.worldatlas.com> (Last visited May 2010).

Private capital flows to the continent rose to a historic high of \$53 billion in 2007. African Economic Outlook, *Foreign Direct Investment* (Feb. 11, 2010), <http://www.africaneconomicoutlook.org/en/outlook/growth-of-aid-to-africa/foreign-direct-investment/>.

[A]ccording to recent estimates, while global FDI [foreign direct investment] may have fallen by up to 20 percent in 2008, flows to Africa have remained resilient, growing by 16.8 percent to USD 61.9 billion over 2008, despite the slowdown. The rate of return of FDI in Africa has been, increasing since 2004 and, at 12.1 percent, was the highest among developing host regions in 2007. Mergers and acquisitions (M&As) in Africa rose by an estimated 157 percent to USD 26 billion in 2008.

Id. at 1. The top fifteen performing countries on the continent had an average growth rate of 5.3 percent for more than a decade leading up to the recent financial crisis. See World Bank, *Sub-Saharan Africa Regional Brief* (April 2010), available at <http://www.worldbank.org> (Last visited May 2010).

Sub-Saharan Africa has also reaped these economic gains. This region has experienced steady growth rates of between 4 to 7 percent from 2003 to 2008. See *Sub-Saharan Africa GDP Growth (Annual %)* (Source: World Development Indicators 2009 (The World Bank), available at <http://data.un.org> (Last visited May 2010); see also Appendix I: Chart of Sub-Saharan GDP Growth Rates from 2000-2010. In 2006 and 2007, for example, GDP growth across the region remained steady at 6.2 percent and was projected to go even higher before the recent global economic crisis hit.

As a result, certain industries have flourished in sub-Saharan Africa in the past decade. For example, in the technology/telecommunications sector, cell phone subscriptions grew by more than 60 percent annually between 1994 and 2005. See ONE, *Economic Growth and Trade In Sub-Saharan Africa Progress Report* (2009), available at <http://www.one.org/c/us/progressreport/775/>. Internet usage is also on the rise, boasting an increase of 1,810 percent from 2000 to 2009. See Internet World Statistics, *Internet Usage Statistics for Africa* (Dec. 31, 2009), available at <http://www.internetworldstats.com/stats1.htm>. The energy and commodities markets have also seen

big gains. In 2007, for example, Nigeria accounted for 80 percent of total West African foreign investment (\$15 billion), mostly relating to oil expansion projects. See *Foreign Direct Investment*, <http://www.african-economicoutlook.org> at 1. From oil-rich countries like Nigeria and Angola to countries like South Africa, Ghana, Uganda, and the Democratic Republic of Congo with their rich deposits of gold, copper, diamonds, bauxite, coltan, and other precious metals, all make for very attractive business propositions for U.S. companies.

Other industries in the region are just beginning to recognize their potential—the banking and financial services sector, for example, will continue to grow as countries develop their credit systems and continue to move away from cash-based economies. Agriculture is another potential high growth area, given the available land resources and the need for higher and more modernized production. Other industries that have significant growth potential include manufacturing, defense, health care and pharmaceuticals, and construction. And given the reforms occurring in the region, doing business in some countries in this region has gotten easier. See, e.g., World Bank, *Sub-Saharan Africa Regional Brief*, available at <http://www.worldbank.org> at 1 (noting Rwanda as the top reformer in the seventh edition of The World Bank’s publication, “Doing Business 2010,” which ranks 183 economies on the ease of doing business based on ten indicators). Rwanda led the list in being the top reformer and Liberia ranked among the top ten reformers—this marks the first time a sub-Saharan African country has topped this list. Id.

As sub-Saharan Africa continues to develop and to participate more fully in the global economy, business opportunities in the region will continue to attract international investors, particularly American investors who have traditionally been strong supporters of the region. For example, the United States is one of the region’s strongest trading partners, along with China, Germany, and the United Kingdom. See International Trade Administration, *U.S.-African Trade Profile* (2009), available at http://agoa.gov/resources/US_African_Trade_Profile_2009.pdf. In recent years, China has also exerted a stronger presence in the region. See Economist Debates, *Africa and China*, *THE ECONOMIST* (Feb. 2010), available at <http://www.economist.com/debate/days/view/465> (Last visited May 2010). China’s newfound dominance in business transactions in sub-Saharan Africa has

been the subject of much debate. Some view China as a welcomed trading partner that will aid in the region's development needs. Others are more skeptical, as China has not always been known for transparency in its business dealings and, in some cases, has come under fire for ignoring human rights violations in order to achieve its national interests and objectives. Id.

Sub-Saharan Africa, like other emerging markets, has generally found itself to be more resilient than the developed economies of the world when it comes to bouncing back from the recent global economic crisis. The quick recovery is due, in part, to the relative health of the region's economies in the mid-2000s and the countercyclical macroeconomic policies that countries in this region took in response to the global economic crisis. See IMF Regional Economic Outlook Report, *Africa's Growth Set to Bounce Back After Short Slowdown* (April 23, 2010), available at <http://www.imf.org/external/pubs/ft/survey/so/2010/CAR042310A.htm>. As a result, the future for the region looks bright. According to the International Monetary Fund (IMF), sub-Saharan Africa's economy is expected to grow by 4.7 percent in 2010, which is more than double its 2 percent 2009 growth. See Id. at 1. IMF further estimates 2011 GDP growth for the region to increase to 5.9 percent, which outpaces the projected 2.4 percent growth for advanced economies like the United States and Europe. See IMF, *World Economic Outlook: Rebalancing Growth* (Apr. 2010), at 2, available at www.imf.org (Last visited May 2010).

While the business opportunities may be very enticing in emerging markets like sub-Saharan Africa, one must first assess and then remain vigilant to the potential FCPA risks involved in transacting business in these regions.

FCPA Risks in an Emerging Market

As with any business venture, doing business in an emerging market can be fraught with risk. Volatility is a primary risk for emerging market investments. Fragile political systems or dictatorships also pose significant risks. Another type of risk that must be safeguarded against is the risk of corruption. Managing FCPA risks in emerging markets is something all U.S.

investors and issuers need to remain vigilant about, particularly in this heightened enforcement environment.

FCPA Risk Factors

While there are many factors that can contribute to a high FCPA risk profile, U.S. companies doing business in emerging markets should be prepared to conduct specific FCPA due diligence on their proposed transactions *before* they start business operations. It is important to assess the FCPA risk level so that the diligence efforts can be planned and budgeted accordingly. Certain industries may lend themselves to a higher FCPA risk level, particularly where there is a lot of required interaction with government officials (e.g., energy, pharmaceuticals, health care, defense). Certain geographic areas may also call for more stringent scrutiny if there is a past history of FCPA related investigations. One resource for measuring the perception of public-sector corruption in an emerging market is the Transparency International Risk Level Index, which ranks 180 countries by their Corruption Perception Index (CPI) score. See Transparency International, CPI 2009 Table (2010), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (Last visited May 2010).

Other FCPA risk factors may include the type of relationship the U.S. company will have with its business partners or third party agents in the foreign market. The more significant the relationship—e.g., if the partner or agent is responsible for a significant portion of the business—the more FCPA due diligence is needed. In every instance, however, a U.S. company looking to do business abroad should determine its FCPA risk level (e.g., low, medium, or high) and then conduct reasonable risk-based FCPA due diligence before entering into the transaction.

Why the Risk of FCPA Violations in Emerging Markets Can Be High

There are many reasons why emerging markets can pose a high level of FCPA risk. First, U.S. regulators have signaled that emerging markets are subject to heightened scrutiny given recent law enforcement activity in these regions. Several large figure settlements against multinational companies doing business in emerging markets have justified this concern. See, e.g., DOJ Press Release, *Daimler AG and Three Subsidiaries Resolve Foreign*

Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties (Apr 1, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>; SEC Press Release, *SEC Charges KBR and Halliburton for FCPA Violations* (Feb. 11, 2009), available at <http://www.sec.gov/news/press/2009/2009-23.htm> (Halliburton/KBR assessed with \$579 million in penalties); DOJ Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of \$1.6 Billion* (Dec. 15, 2008), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>. These large penalties stemmed, in part, from business activities in emerging markets in Asia and Africa. This serves as an indicator that the U.S. government may give heightened scrutiny to certain business transactions in these regions.

Based on the recent stream of big-ticket settlements that have been reached in recent years, it is clear that FCPA enforcement has become a top priority of U.S. regulators. To date, there are currently 140 active FCPA investigations that are open at the Department of Justice (DOJ) as reported by Assistant Attorney General Lanny A. Breuer, who heads up the criminal division at the DOJ. See C. O'Reilly and J. Blum, *Smith & Wesson Executive Among 22 Accused of Bribery (Update 3)*, *BUSINESSWEEK* (Jan 19, 2010), available at <http://www.businessweek.com/news/2010-01-19/smith-wesson-executive-among-22-accused-of-bribery-update3-.html>. In the first quarter of 2010, the DOJ and the Securities and Exchange Commission (SEC) have imposed penalties of more than \$585 million, which included \$400 million against BAE Systems, the world's second largest defense contractor, and \$185 million against Daimler AG, the German automobile manufacturer. See DOJ Press Release, *BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine* (Mar. 1, 2010), available at <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>; DOJ Press Release, *Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties* (Apr 1, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-crm-360.html>.

Second, the U.S. government has begun to utilize more aggressive investigatory tactics with regard to business transactions in the region. In

January 2010, for example, the Department of Justice pursued its first undercover FCPA sting operation that resulted in the arrest of twenty-two people, most at a trade show in Las Vegas. After an extensive two-year investigation involving 150 FBI agents and search warrants executed in multiple states, the government charged that these individuals violated the FCPA by agreeing to pay bribes to FBI agents posing as West African diplomats in an attempt to obtain a lucrative security contract for the presidential detail of the president of the Gabon. See DOJ Press Release, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan.19, 2010), available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>; Smith & Wesson Executive Among 22 Accused of Bribery (Update 3), *BUSINESSWEEK* at 1.

The SEC has also stepped up its enforcement activity by establishing a specialty unit that is focused on going after U.S. issuers that violate the FCPA's anti-bribery and books and records provisions. The SEC has vowed to be more proactive in making inquiries on an industry-wide basis rather than waiting to launch an investigation upon a voluntary disclosure or after whistleblower allegations. The DOJ also has a dedicated team of prosecutors and FBI agents that focus exclusively on the FCPA. Both the DOJ and SEC have stated that they will use more aggressive methods to ferret out potential FCPA violations. Such tactics may include the use of undercover techniques and a broader use of government inquiries and document requests performed on an industry-wide level during routine examinations, rather than initiating investigations in response to voluntary disclosures or allegations raised by cooperators or competitors. As the African FCPA sting operation referenced above has shown, the DOJ is pushing further in its efforts to stamp out corruption in international business transactions, and has signaled a focus on emerging markets.

A third reason why emerging markets can be high risk is that they have, in some ways, all the ingredients that can make them ripe for potential FCPA problems. They are usually comprised of developing, resource-rich nations, many of which are cash-based economies without strong banking systems or established regulatory controls necessary to prevent, detect, and combat corruption. In some instances, the corruption is deep-seated and engrained in the psyche of the citizenry, such that paying bribes has become a routine

part of daily life—e.g., obtaining routine government papers (e.g., a business permit) or passing through police checkpoints on the streets and highways may require one to have to pay a small bribe to a civil servant or police officer. Other times, it is the leaders at the highest levels of government that foster and benefit from an environment of corruption. They enrich themselves and spirit away their ill-gotten gains to offshore accounts at the tragic price of their citizens' well being and progress. Thus, it is no surprise that corruption and poverty are interrelated. As Nigeria's former chief anti-corruption prosecutor Nuhu Ribadu has said, "if you attack corruption, it's the best way to attack poverty." See S. Hamm, *Africa's Anti-Corruption Hero*, *BUSINESS WEEK* (June 12, 2009).

The statistics can be grim and the challenges high. For example, according to the African Union, \$140 billion is stolen from Africa *each year* because of corruption. See L.A. Adusei, *Graft in Africa: Where Does the Buck Stop?*, *THE AFRICAN EXECUTIVE* (2010), available at <http://www.africanexecutive.com> (Last visited May 2010). This represents approximately 25 percent of the total GDP in sub-Saharan Africa. See *Corruption Cop, A Conversation with Nuhu Ribadu, Anti-Corruption Crusader*, *THE WASHINGTON POST* (May 24, 2009), <http://www.washingtonpost.com> (Last visited May 2010). In a survey published by Deloitte in June 2009, 75 percent of the companies surveyed report increased concerns about potential violations of the anti-bribery provisions of the FCPA. See *Deloitte Survey: Three-Quarters of Survey Participants Report Increased Concern Over Violating Anti-Bribery Law* (June 4, 2009), at 1, available at <http://www.deloitte.com>. The most common bribery schemes reported in the Deloitte survey included: (1) subcontractors who did not add value (48 percent), (2) fraudulent training and travel expenses (45 percent), and (3) third-party foreign payers (45 percent). *Id.* at 1.

Fourth, the resources to fight corruption are also limited. Without independent funding, anti-corruption agencies and commissions in emerging markets are subject to the changing political winds. Also, without having the support of an independent judiciary that will aggressively punish the offenders, anti-corruption programs can lack "teeth" and may be viewed as ineffective. See M. Saltmarsh, *Efforts to Curb Foreign Bribery Lack Vigor, Report Finds*, *THE NEW YORK TIMES* (June 24, 2009), www.nytimes.com/2009/06/24/business/global/24bribe.html.

Fifth, the risk of corruption in emerging markets can be very high when there is a lack of political will or leadership to make the necessary changes to combat the problem. Promoting a culture of transparency and ethical dealings is something that is best accomplished from the “top down.”

Anti-Corruption Enforcement Efforts in Emerging Markets

Leaders in emerging markets need to set the tone that corruption will not be tolerated. In this regard, there have been positive developments coming from three sub-Saharan African leaders this year. In January 2010, for example, Sierra Leon President Ernest Bai Koroma became the first head of state to declare his assets to the country’s Anti-Corruption Commission. See A. Johnson, *West African Leaders Pledge To Battle Corruption*, Worldfocus (Jan. 7, 2010), available at <http://worldfocus.org/blog/2010/01/07/west-african-leaders-pledge-to-battle-corruption/9113>. President Ellen Johnson-Sirleaf of Liberia went one step further and offered financial incentives for whistleblowers to expose corrupt officials. Ghanaian President John Atta-Mills has publicly stated that he will not accept gifts from anyone. *Id.* at 1. The measures these three African leaders have taken are critical steps to combating the problem of corruption in sub-Saharan Africa.

Western nations can also lend a hand in the fight against corruption in emerging markets. Their banks can require more due diligence before accepting large amounts of cash from the leaders of emerging market countries to better ensure that the proceeds are not derived from corrupt means. They can also go after multinational companies that offer bribes to get business in emerging markets to send a clear message that bribery is not acceptable. Great Britain, for example, has signaled an increased effort to fight corruption in foreign markets by passing the Bribery Act, effective as of April 2010. The UK Bribery Act is, in some ways, stricter than the FCPA in that it criminalizes all bribery, including commercial bribery, and criminalizes both offering a bribe as well as accepting one. It further eliminates the “facilitating payment” exception that is permissible under the FCPA. See UK Bribery Act of 2010, available at <http://www.justice.gov.uk/publications/bribery-bill.htm>.

There are other success stories in Africa’s fight against corruption. In Lesotho, for example, a Canadian engineering company was convicted in 2002 for

paying a \$260,000 bribe to secure an \$8 billion dam contract. See *Graft in Africa* at 1. In Zambia, the wife of the former Zambian president, Regina Chiluba, was convicted on corruption charges in 2009 and sentenced to three and a half years in prison. See *Regina Chiluba Found Guilty and Sentenced*, LUSAKA TIMES (March 3, 2009), <http://www.lusakatimes.com/?p=8974>. In Nigeria, the Economic and Financial Crimes Commission (EFCC), a government agency that has led the fight against corruption in the public sector, has shown great courage and bravery to investigate top political figures. However, as former EFCC head prosecutor Nuhu Ribadu has often said, “if you fight corruption, it fights you back.” C. Dugger, *Battle to Halt Graft Scourge in Africa*, THE NEW YORK TIMES (June 9, 2009), <http://www.nytimes.com/2009/06/10/world/africa/10zambia.html>. Mr. Ribadu, who is widely hailed as Africa’s anti-corruption hero, was removed from his post when he challenged powerful Nigerian state governors and other political figures and attempted to prosecute them for corruption related offenses. After surviving two assignment attempts, Mr. Ribadu sought asylum in the United Kingdom, where he has resided since September 2008. Id.

Other African countries have also stepped up their efforts to root out corruption, even if it means challenging powerful countries like China. For example, Namibia recently launched an anti-corruption campaign against three people, two Namibians and one Chinese national, charging that these individuals helped win a \$55.3 million contract in May 2008 for a Chinese company, Nuctech Company Limited, which was headed by the son of Hu Jintao, China’s president. See M. Wines, *Graft Inquiry in Namibia Finds Clues in China*, THE NEW YORK TIMES (July 22, 2009), www.nytimes.com/2009/07/22/world/Africa/22namibia.html?. The contract was to install Nuctech scanners at customs inspection points across Namibia.

Most of the cost was to be borne by a so-called soft loan—usually a loan at below market rates or with other favorable terms—that China’s government granted Namibia on the condition that it purchase scanners from Nuctech. Namibia’s government paid about \$12.8 million to Nuctech in February. But prosecutors allege that most of that money was quickly transferred to a Namibian company listed as a Nuctech consultant, and then split

among Mr. Yang [the Chinese national] and the two Namibian defendants.

Id. at 2-3. While this case is still pending and the facts are in dispute, it is a positive sign that countries in the region are now taking steps in the right direction in terms of challenging perceived corruption in the arena of government contracting and procurement. So, despite the challenges, this emerging market has produced some bright spots when it comes to the fight against corruption.

What Every U.S. Company Doing Business Globally Needs To Know About the FCPA

Any U.S. company doing business in emerging markets of the world must be aware of the potential for FCPA risks and develop ways to manage and minimize such risks. There are several key steps all U.S. companies should take when doing business in global markets:

Step One: Know how business is done. First, the U.S. company needs to have an accurate understanding of how business is done in the particular country/countries at issue, which sometimes can be localized to a particular subregion within the country (e.g., business customs in Northern Nigeria can differ from those in the Southern parts of Nigeria). Understanding the business culture in the particular situation is fundamental to the success of the venture. The company should find out who the key players are and how business is transacted within the industry and countries at issue. The company may also consider hiring a subject matter expert and evaluate whether a legal opinion from a local law expert is needed to ensure that the proposed transaction complies with local law.

Step Two: Conduct reasonable risk-based FCPA due diligence on the proposed transaction. FCPA-specific due diligence should be performed on any prospective business transaction being contemplated in an emerging market. This means that an FCPA risk level profile should be undertaken to identify whether the risk of corruption is low, medium, or high—depending on a number of factors, including whether the industry is heavily regulated, whether the country has a history of corruption investigations by U.S. regulators, and whether the company will rely on third-party agents in conducting its business

in the foreign market. An FCPA due diligence checklist should also be part of the overall due diligence *before* starting any business dealings in the region. The checklist should include, *inter alia*, a determination of whether there is any government interest in any entity that the U.S. company will be doing business with. The U.S. company should also review the books and records of those parties it will be doing business with to assess whether there are any past or current FCPA violations. Finally, the U.S. company also needs to ask the right questions of its business partners, foreign-based employees, and third parties to ensure that there are no FCPA issues that need to be addressed. These questions should include whether the company or person it will be doing business with has an understanding of the FCPA's anti-bribery and books and records provisions and whether they agree to comply with these requirements (and whether they are currently in compliance with the FCPA). The U.S. company should also consider adopting FCPA compliance language in future contracts, retaining audit and termination rights if an FCPA violation is suspected, and requesting FCPA-specific representations and warranties. For a sample of a basic FCPA due diligence checklist, see Appendix G.

Step Three: Follow up on any FCPA “red flags.” During the due diligence process, companies should be aware of and follow up on any FCPA red flags that are raised. Red flags do not necessarily mean that the transaction should be canceled, but all red flags require further investigation. Terms of the contract can be renegotiated or cancelled depending on how these red flags are addressed and remedied. Red flags can include, but are not limited to, the following:

- ☞ History of corruption-related investigations in the region or industry
- ☞ Highly regulated industry or transaction
- ☞ Use of agents or third party intermediaries (e.g., business development consultants, sales agents, etc.) without formal agreements or entering into agreements after the business has been awarded or use of “success fees”
- ☞ High compensation paid to third parties (e.g., agents, distributors, suppliers, etc.)

- 📄 Use of cash payments
- 📄 Third parties recommended by government officials
- 📄 Third parties who are former government officials
- 📄 Lack of transparency in contracts (e.g., no written contract; contract executed after work awarded; lack of need for services rendered; lack of detail for work performed or payments made; etc.)
- 📄 Payments that increase around the time government contracts are awarded or that otherwise involve “success fees” that depend on the award of the contract/business
- 📄 Payments outside the country where the goods or services are rendered
- 📄 Use of shell companies
- 📄 Consultants who are not well known in the industry or who lack experience with the country at issue
- 📄 Lack of internal controls (e.g., anti-corruption policies and trainings; approval limits on travel, entertainment, gifts, and expenses; centralized contract review process for third parties)
- 📄 Lack of transparency in the accounting/books & records
- 📄 Failure of a party to sign FCPA certification or otherwise failing to cooperate in the due diligence process

Step Four: Know with whom you are doing business. As shown above, many FCPA-related problems can occur because U.S. companies are not knowledgeable about who they are doing business with in foreign markets or how their employees, business partners, and third parties do the business that is being done. While the business cultures encountered in sub-Saharan Africa and other parts of the world may be different from that of the U.S., one thing remains the same—to minimize FCPA risks, U.S. companies should ask the right questions and get to know

their foreign-based employees, business partners, customers, and third party agents. U.S. companies should follow these tips when vetting new business partners and/or third party agents in international business deals:

- Require a formal application process and review publicly available information on the proposed business partner, third party agent, or consultant.
- Do a background check and assess their business reputation. Request references and check them. Find out whether they have any government ties.
- Document all efforts and maintain those records for at least five years.
- Insist on formal contracts with clear payment terms and structure. Define the scope of work in detail and itemize the required documentary support necessary for payment in the body of the contract.
- Require third parties to sign FCPA certifications and include FCPA representations and warranties in contracts.
- Require centralized approval of all third party contracts.
- Interview those who will be performing the actual services to ensure they are competent.
- Ask to review the anti-bribery policies and codes of conduct for your key business partners and agents. If they lack such policies, ask them to review and agree to abide by the FCPA and the U.S. company's anti-corruption policies.
- Conduct anti-corruption trainings for sales agents, distributors, suppliers, consultants, and key business partners. Require periodic FCPA certifications from same.

Employing these safeguards will minimize your FCPA risks.

Step Five: Ensure you have an effective compliance program designed to prevent, detect, and remedy FCPA violations. Companies doing business in emerging markets need to ensure that they have a strong compliance program in place that is able to prevent, detect, and remedy FCPA violations. While it should be a prerequisite to do a thorough

FCPA risk assessment before entering into a proposed transaction or expanding business operations to other parts of the world, it is also highly advisable that the U.S. company's compliance program be sufficiently strong enough to ensure that FCPA problems are minimized once it has started to do business in emerging markets, and at all times moving forward. The compliance program should be reviewed on a periodic basis so that modifications can be made as needed. As the U.S. Sentencing Commission's 2010 amendments to the "Effective Compliance and Ethics Program" standards in the Federal Sentencing Guidelines describe, a company should review its compliance plan and "make modifications necessary to ensure that the program is effective... [which] may include the use of an outside professional adviser to ensure adequate assessment and implementation of any modifications." U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines* (Apr. 29, 2010), available at <http://www.uscourts.gov/2010guid/finalamend10.pdf>. The more lax the company is on its compliance regiment, the more it opens itself up to exposure under the FCPA (particularly the internal controls requirement). Thus, periodic reviews of the compliance plan are strongly recommended.

Step Six: Adopt FCPA best practices for specific regions. After conducting a reasonable risk-based FCPA due diligence of the proposed transaction or business expansion opportunity and vetting any business partners, sales agents, distributors, suppliers, or other third-party consultants to verify that there are no FCPA lurking issues, U.S. companies should adopt best practices for avoiding FCPA risks in the particular emerging region(s) where it is doing business to ensure continuing compliance under the FCPA.

Best Practices for Minimizing FCPA Risks in Emerging Markets

The best way to prevent and minimize FCPA risks in other parts of the world is by being proactive. It is often said that the best offense is a solid defense. In the world of FCPA compliance, that means having a robust compliance plan that is able to detect, prevent, and minimize these risks. Some best practice tips on ways to avoid or minimize corruption risks when doing business in emerging markets include the following:

- Implement a strong code of conduct that is endorsed by senior management and the board of directors. It is important to set the tone “from the top” to create a culture of compliance that rewards transparency and ethical business dealings.
- Train employees on the FCPA. Expand trainings to key business partners, sales agents, business development consultants, and other third-party intermediaries as appropriate. Have trainings in the local language and in person to the extent possible.
- Be visible—the company’s anti-corruption policies need to be communicated clearly in order for them to be effective. FCPA policies should be made widely available to assure that all relevant parties are knowledgeable about them—post them on the corporate Web site and in public meeting places. Tell your key business partners, customers, and third-party agents about your policies—provide them along with third-party contracts. Having these policies readily accessible and translated in local languages for all employees is highly advisable.
- Have a clear protocol on what people should do if they suspect a FCPA violation has occurred. Having a point person who is in charge of all compliance matters and communicating how FCPA violations should be reported is another key element of an effective compliance program. Some companies also use hotlines, surveys, and other anonymous reporting mechanisms to ensure candid responses.
- Stay abreast of changes—review existing contracts to ensure FCPA compliance; require periodic audits of major business partners and third-party consultants; retain audit rights to review their books and records to ensure FCPA compliance; include rights of termination in contracts if they engage in behavior that would violate the FCPA; require new employees or third parties to sign FCPA compliance certifications.
- Include FCPA due diligence checklists as part of overall due diligence for all international transactions.
- Ensure the compliance program meets the criteria set forth in Chapter 8, Section B.2.1 of the United States Sentencing Guidelines, and includes the following elements:

- Have a point person in charge of compliance. This person should have a direct reporting relationship with senior management and the governing board of the company or organization.
- Have clear anti-corruption policies, including a strong code of conduct.
- Make policies available and visible; translate in local language(s) where business is being done.
- Give policy “teeth” by ensuring appropriate disciplinary action for violators; ensure policies are implemented consistently.
- Have adequate ways and sufficient resources to enforce policy.
- Reinforce your message in live compliance training sessions that are geared toward different groups and their functions (e.g., sales, marketing, finance, legal, management, etc.). Provide meaningful examples that could arise in their work.
- Involve others in the process—compliance is not just for the compliance team; everyone should be involved (e.g., legal, management, finance, human resources, sales team, etc.).

Given today’s heightened FCPA enforcement environment, U.S. companies doing business abroad should be prepared for more informal inquiries from federal investigators that address the FCPA’s anti-bribery or books and records requirements. It is also likely that the federal government will take a more proactive stance to look at an entire industry rather than waiting to open cases initiated through self-reporting or leads gained from cooperators or competitors. Given the more aggressive investigatory tactics being employed by federal regulators when it comes to the FCPA, increased attention and focus will be put on a company’s existing compliance program and whether it was effective or merely a “paper program.” In light of this increased attention on the FCPA, companies should take proactive measures to ensure that their anti-corruption policies are being adhered to and that their compliance programs are effective.

What Happens if the U.S. Regulator Comes Knocking

Given all this increased attention on the FCPA by U.S. regulators, there is a chance that a U.S. company could find itself on the receiving end of an informal inquiry or subpoena from a U.S. regulator despite conducting proper FCPA due diligence and having an effective compliance plan in place.

If a U.S. company does receive an FCPA-related inquiry from a U.S. regulator, many considerations must be contemplated. First, it needs to consider whether to cooperate with the regulator making the request and, if so, to what extent. This determination may rest on a variety of factors, including the regulator making the request, the consequences for not abiding with the request, and the type of information being requested. Concerns of privilege, disclosure of proprietary information, cooperation credit, and the impact on the business reputation of the company all need to be thoroughly considered.

Second, should the inquiry be the sort that calls for an internal investigation, in-house counsel needs to develop an internal investigation plan for addressing the matters under review. As part of this process, counsel needs to determine whether the internal investigation should be handled by the corporation and its internal auditors or whether outside counsel and/or a forensic accounting firm is needed. If outside counsel is to be engaged, in-house counsel needs to further determine whether its regular compliance counsel or outside lawyer should be retained. From the perspective of the DOJ or SEC, independence of the counsel conducting the internal investigation will be a factor in its analysis of whether the company's internal investigation was creditable and properly conducted.

Third, determinations about the scope and methodology of the internal investigation need to be made (including how far back in time the review should cover, the geographic parameters for the internal investigation, what business units or subsidiaries should be included, and the order and methodology of gathering the relevant documents and interviewing witnesses). Counsel also needs to ensure that it does not create collateral damage by conducting its investigation—e.g., steps should be taken to ensure all relevant documents are preserved and the required disclosures are made (especially if the company is publicly traded). If the investigation involves places outside the U.S., counsel needs to be cognizant of the local laws in the other jurisdictions involved so as not to unintentionally run afoul of local law (e.g., data privacy concerns in Western European countries).

Finally, an internal investigation can raise ethical concerns including the point at which corporate or outside counsel need to decide whether employees under

investigation require separate counsel. If FCPA violations are uncovered in the internal investigation, the company needs to decide whether to voluntarily disclose the violation(s) to the federal authorities. Voluntary disclosure can be one way to mitigate damages and, in some cases, it has been an effective way to completely eliminate any successor liability or other adverse action that could result from a proposed international business transaction. Cf. Department of Justice Opinion Release Procedures, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/frgnrcrpt.pdf> for a description of how to request an Opinion Release from the DOJ on a proposed transaction that may pose FCPA related risk.

Given all the complexities involved with conducting an FCPA investigation, it is not surprising that many companies choose to seek guidance of those knowledgeable about the process, rather than going it alone.

Conclusion

Emerging markets such as sub-Saharan Africa have much to offer, but U.S. companies need to be cognizant of the FCPA risks in these regions, and be proactive to safeguard against such risks. Taking the above-described steps will help companies manage their corruption risks while doing business in these regions while ensuring that emerging markets remain golden opportunities for U.S. companies.

Legal Takeaways

- Managing corruption risks in emerging markets is something all U.S. investors and issuers need to remain vigilant about, particularly in this heightened enforcement environment.
- Emerging markets such as sub-Saharan Africa can offer tremendous growth opportunities for U.S. companies, however, they can also be ripe for potential FCPA problems—particularly given that they are typically comprised of developing, resource-rich nations, many of which are cash-based economies without established regulatory controls necessary to prevent, detect, and combat corruption.
- An FCPA due diligence checklist should be part of the overall due diligence *before* starting any business dealings in an emerging

market. It is important to establish an effective compliance program, investigate all FCPA “red flags,” perform FCPA due diligence on new business partners and third parties and adopt FCPA best practices for specific regions.

- Companies should train their employees, key business partners, and third-party agents on the FCPA, and publish FCPA compliance policies in key locations. Periodic reviews of the compliance program should be undertaken to ensure its effectiveness.

Related Resources:

- The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq.*, <http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html> (translated in English, Spanish, Russian, Chinese, and Arabic)
- Doing Business 2010: Reforming Through Difficult Times, www.doingbusiness.org/economyrankings/
- Transparency International Corruption Perception Index, www.transparency.org
- Department of Justice Opinion Release Procedures, <http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf>
- For more information on how to manage FCPA risks in sub-Saharan Africa or other emerging markets, please contact Obiamaka P. Madubuko, at omadubuko@mwe.com.

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Ms. Madubuko advises companies on a host of compliance and transactional due diligence issues arising under the Foreign Corrupt Practices Act (FCPA), Office of Foreign Asset Control (OFAC) and other global trade regulations. In addition, Ms. Madubuko assists clients that are undertaking internal investigations and independent audits concerning critical matters. She also helps clients draft, evaluate, and update their corporate policies to ensure compliance with anti-corruption and other global trade laws.

In addition to her significant corporate advising practice, Ms. Madubuko is also an experienced trial lawyer. She has defended individuals and corporations in complex civil litigation and white-collar criminal cases in state and federal courts. She represents clients under investigation by the United States Congress, the United States Department of Justice, the Securities and Exchange Commission, the Equal Employment Opportunity Commission, the Federal Election Commission, and other federal and state authorities. Ms. Madubuko has tried cases in federal and state courts, including the successful defense of a client accused of federal fraud, racketeering, extortion, and bribery violations in a three month, multiple defendant jury trial in federal court.

Ms. Madubuko's litigation experience covers a range of industries including securities, financial services, real estate, health care, intellectual property, energy, manufacturing, and consumer products. Ms. Madubuko also has experience in international litigation matters. She has assisted clients to procure documents and witness testimony from foreign persons and entities located outside the United States and has litigated claims against foreign companies seeking immunity under Foreign Sovereign Immunity Act. In addition, she has also represented corporate clients in civil actions to enforce domestic judgments against foreign entities.

Before joining McDermott, Ms. Madubuko was in private practice in New York and Washington, D.C. She also served as a law clerk to the Honorable Constance Baker Motley of the United States District Court for the Southern District of New York.

Ms. Madubuko is active in various pro bono activities including representing clients in domestic violence, immigration, and asylum cases as well as mentoring lawyers, law students, and high school students interested in pursuing careers in law. As an associate, Ms. Madubuko participated in an externship program with the Legal Aid Society of the District of Columbia where she served as lead counsel on more than thirty-five cases. She also chairs McDermott's Women of Color Subcommittee to the Gender Diversity Committee and is a member of the American Bar Association.

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Dedication: *I would like to dedicate this chapter to my talented and loving husband, Victor Madubuko, for all his encouragement and support.*



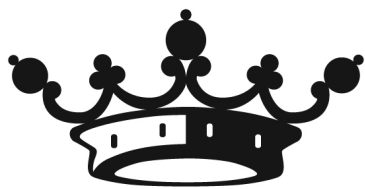
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