



---

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | [www.law360.com](http://www.law360.com)  
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | [customerservice@portfoliomedia.com](mailto:customerservice@portfoliomedia.com)

---

## The Modern Reality Of The FCPA

*Law360, New York (February 19, 2009)* -- The number and severity of U.S. Department of Justice and Securities and Exchange Commission enforcement actions pursuant to the Foreign Corrupt Practices Act ("FCPA") have steadily increased.

In 2008 alone, the DOJ and SEC brought 11 enforcement actions against organizations and 26 against individuals. There are nearly 50 pending FCPA investigations, some involving up to 12 companies from a single industry.

In recent years, companies increasingly have been held accountable not only for the actions of their employees, but also for the actions of their business partners and other third parties doing business on their behalf.

Taking measures to encourage third-party compliance with the FCPA can be challenging, especially where a company relies entirely on third parties to do business in certain international markets. In these instances, a company's visibility of third-party operations may be minimal to non-existent.

Given recent trends in FCPA jurisprudence, companies doing business abroad would be well advised to take proactive steps to address third-party FCPA risk.

Pursuant to the "deliberate ignorance or conscious disregard" standard of the FCPA, companies "turning a blind eye" to third-party operations likely will face the same potential consequences as a company that directed or authorized impermissible conduct.

To address these concerns, companies should (1) develop FCPA policies and programs that directly address third-party conduct; (2) implement training of third parties; and (3) conduct periodic audits of third parties around the globe and take immediate and appropriate action based on the audit findings.

## **The Risk is Real**

Recent cases illustrate the increased risk presented by third party conduct.

For example, in June 2008, AGA Medical agreed to pay a \$2 million penalty and enter into a deferred prosecution agreement with the DOJ based on \$460,000 in bribes paid to doctors of government-owned hospitals and patent-office officials. The terms of the agreement also require the appointment of a compliance monitor.

Although all of the improper payments at issue were made by a third party — a Chinese distributor — AGA emails allegedly illustrated the company's awareness of the possibility that the distributor was making payments in exchange for preferential treatment from government entities.

## **The Fines are Real**

Although developing, implementing and maintaining an effective compliance program is a costly endeavor, the costs are nominal in comparison to the potential penalties. FCPA violations can result in fines for businesses of up to \$2 million per violation.

These numbers add up, however, as evidenced most recently by German engineering company Siemens' agreement to pay \$1.6 billion in fines to resolve its worldwide FCPA and anti-bribery liability.

Other large settlements or pending settlements in 2008 include, Halliburton for \$559 million; Willbros Group for \$32.3 million; AB Volvo for \$19.6 million; and Fiat for \$17.7 million.

These costs only represent the disgorgement and fines paid. They do not take into account the additional terms typically incorporated into deferred prosecution agreements, such as the appointment of a monitor or additional follow-up audits.

## **The Compliance Solution**

Companies can spend a comparatively small amount of money now to protect against the risk of liability in the future. Effective FCPA compliance programs will take three components into account: instruction, training and policing. Each one of these components is further described below.

### *Instruction*

The first component in a compliance solution requires companies to instruct third parties about their robust FCPA policies and procedures.

- Creation of a Robust FCPA Policy

The first step in an effective FCPA compliance program for third parties is to create a clear and robust FCPA policy that focuses on third party compliance.

- Agreements and Certifications to Comply with Policy, FCPA and other Applicable Laws

Requiring FCPA compliance certification by distributors, suppliers, consultants and agents serves as a useful screening tool. If a third party refuses to execute a compliance certification, the company should heed that warning and refuse to do business with the entity.

- Mandatory Third-Party Due Diligence and Related Representations

Rather than learning after FCPA violations have occurred that there were indications that “should” have led the company to know that the third party was likely to violate the FCPA, proper due diligence can identify warning signs at the outset of the third-party relationship.

Examining references and investigating third parties before forming a business relationship with them are just some of the steps a company can take as part of their due diligence.

In addition, companies should require that third parties with whom they do business consent to continued audit rights and sharing of financial statements. Contracts with third parties should also include a termination provision for improper conduct or failure to comply with diligence requirements.

### *Training*

The effective and thorough implementation of the compliance program is just as important in minimizing third party FCPA risk.

Indeed, to avoid the appearance of being deliberately indifferent to the actions of third parties, it is crucial that companies train their employees and the third parties with whom they do business.

In many instances, the FCPA is in direct contradiction to local custom and practice. Training is necessary to allow third parties to understand how the FCPA impacts them in their particular country and industry.

### *Policing*

Despite thorough instruction and training, third-party compliance is not certain. Thus, companies should consider policing mechanisms that test a third party's commitment to conducting itself in a compliant fashion.

- Conduct Regular Third-Party Audits

Companies should conduct periodic audits or compliance assessments of third-party operations. As part of the audit or compliance assessment, companies should thoroughly review the financial statements and operations of third parties doing business on their behalf abroad.

- Respond Immediately and Appropriately to Audit Findings

Should a company learn of potential improper conduct, the company should consider immediate and appropriate action to learn the truth and stop any such conduct.

Utilizing a third party to conduct a company's affairs in a foreign country brings a new element of risk to FCPA compliance.

Creating a robust FCPA compliance program that covers third parties and ensuring that this policy is implemented through actions such as training and auditing are necessary steps for decreasing the risk of high fines for the FCPA violations of third parties.

It is not prudent to assume that third parties will take the initiative to comply, especially in countries where the improper payments may be considered "just a way of doing business."

Failure to oversee third-party actions risks millions, and possibly even billions, of dollars in future liability, whereas a comparatively small investment in compliance procedures can allow companies to confidently utilize third parties as their businesses continue to grow.

--By Asheesh Goel, Amanda N. Raad and Cassandra H. Welch, Ropes & Gray LLP

*Asheesh Goel is a partner with Ropes & Gray in the firm's Chicago office. Amanda Raad is an associate with the firm in the Chicago office. Cassandra Welch is an associate in the firm's Washington, D.C., office.*

*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*