U.S. firms pay dearly if caught breaching anti-bribery laws
Matt Dunning

As global expansion among mid-market companies and the federal government's enforcement of the Foreign Corrupt Practices Act trend upwards, experts say now is the time for executives and their employees to educate themselves on the law's finer points.

Enacted in 1977 to combat bribery among U.S. companies doing business overseas, the law essentially prohibits firms and their representatives from paying any operative of a foreign government in exchange for contracts, unfair business advantages or other considerations.

The U.S. Department of Justice's enforcement of the law has increased 300% in the past 10 years, rising to 24 such enforcement actions in 2010. The U.S. Chamber of Commerce has made it a high priority to try to win changes in the law. Other business groups also have criticized on the law saying it puts U.S. companies at a competitive disadvantage in markets where bribery or other conduct prohibited by the law is customary.

While publicly traded companies are held to a stricter standard-including bookkeeping and internal control documentation-experts said smaller and midsize private companies and nonprofits should expect just as much scrutiny from federal regulators as their larger counterparts.

Criminal penalties for violation of the FCPA can carry fines of up to $2 million for companies and $100,000 for individuals-not to mention jail time-or, under the Alternative Fines Act, up to twice the cash value of the benefit sought in making the bribe or other corrupt payment. The government also can impose civil fines of up $10,000 per employee convicted of violating the anti-bribery law.

Beyond fines, companies risk forfeiting their right to bid for U.S. government contracts, suspension or revocation of their export licenses, as well as possible external civil litigation for damages under other federal or state laws. For example, a company alleging that bribery led to a competitor winning a foreign contract could sue for damages under the Racketeer Influenced and Corrupt Organizations Act, according to the Justice Department.

Though 88% of corporate FCPA violations filed since 2008 have been brought against publicly traded companies, roughly 78% of individuals charged have been representatives and/or employees of privately held companies.

"Private companies have to take this law seriously," said Coleen Freil Middleton, of counsel at Wilson Elser Moskowitz Edelman & Dicker L.L.P. in White Plains, N.Y. "It's complicated and there's a lot to it."

Without an in-house compliance program (see story, page 12), mid-market companies could run afoul of the FCPA in several scenarios.

Experts say it is important for mid-market companies to know that the Justice Department's definition of a foreign official includes direct employees of the local government, as well as employees of wholly or partially government-owned companies.

Especially in countries such as China, Russia and India-where governments have more minority or controlling stakes in private firms-U.S. companies run the risk of unwittingly making improper payments to a de facto government official when they thought they were interacting with a private executive, experts said.

FCPA violations can occur even if not one dollar was paid directly to a foreign official.

While it is permissible for a U.S. company to cover certain costs of doing business-travel expenses for on-site demonstrations, utility payments, clerical and other locally sanctioned administrative fees, those expenditures are allowed only for "routine governmental action,"

according to Justice Department publications. Excessive expenses, such as lavish hotel rooms, pricey meals or other gifts, are likely to be interpreted as an attempt to curry undue favor, experts said.

Mid-market companies also should recognize that the law applies not only to direct employees but also to business and trading partners, agents, emissaries or any other third party representing its interests abroad. A company could draw a FCPA violation even if it were unaware of the third party's illegal action in securing a business contract, retaining a contract or facilitating business. Similarly, the FCPA prohibits improper payments to third parties representing a foreign official when the U.S. company or one of its intermediaries knows that all or a portion of the payment eventually will land with the official.

"You might rightfully believe that you can control your own enterprise; but when you also need to control the actions of third parties with which you're doing business, that becomes a much tougher task," said Ann Longmore, executive vp at Willis North America in New York. "Smaller and midsized companies are clearly at a disadvantage here, and might actually be more exposed to FCPA violations than larger companies, because they have fewer resources and are less likely to have people on the ground abroad that could foresee or prevent these kinds of actions."

When evaluating the risks of international commerce, a key step that mid-market companies often overlook, experts said, is evaluating a target market's local traditions and laws with the FCPA in mind. Many regions of the world, and particularly emerging markets, treat payments that the Justice Department likely would construe as bribery as a matter of etiquette or even necessity in the course of doing business.

"Frankly, one of the biggest risks a company can take is failing to familiarize yourself with the culture, the language and the rules in the countries in which you're doing business," Ms. Middleton said. "You do so at your own peril."

Conversely, most industrialized foreign states have their own laws governing international trade to which a U.S. company could be held accountable.

The recently updated U.K. Bribery Act should be a particular focus for mid-market companies in that it applies to a significantly wider range of circumstances. Under that law, enacted July 1, penalties can be applied to any company with direct or indirect dealings with a British entity. That means U.S. companies could find themselves in violation the U.K. and U.S. anti-bribery laws for the same act. Additionally, the U.K. law prohibits payments to private companies and their executives just as it does payments to government officials.

"The U.K. act is essentially our FCPA laws on steroids," said Dana Kopper, senior vp and director at Lockton Cos. L.L.C. in Los Angeles "You're pulling in your whole supply chain and the vast array of your external business relationships with third parties, and in doing so, you risk running into issues that you could be totally ignorant of but, under the U.K. law, you are at least partially culpable."

Fines against an individual employee or representative for an unintentional act likely would be covered by directors and officers insurance, experts say.

But coverage for fines against the corporation itself, regardless of the nature of the violation, would be much harder to get, specifically for mid-market companies.

It also is possible that an individual's D&O coverage would be exhausted by investigation and litigation costs before a fine is levied.

Fonte: Business Insurance, v. 45, n. 40, p. 9-10, 17 Oct. 2011. [Base de Dados]. Disponível em: <http://web.ebscohost.com>. Acesso em: 8 Nov. 2011.