

Expect FCPA Violations Uptick

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In a new survey by Deloitte Financial Advisory Services, only 31% of respondents indicated that their company had in place "comprehensive FCPA (Foreign Corrupt Practices Act) compliance program." Only 32% of respondents said their company addresses FCPA risks "proactively."

For insurers offering D&O cover, threats from any increase in FCPA enforcement activity may not impact claims because, typically, any FCPA fines and penalties likely accrued would not be covered under most D&O policies. Rather, notes a blog hosted by Kevin LaCroix, an attorney and a director of OakBridge Insurance Services, the threat is from the potential liability that could arise in any follow-on civil action, including any follow-on lawsuits, for which settlement or judgments incurred in a follow-on action, as well as defense expenses, would usually be covered under the typical D&O policy.

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the anti-bribery provisions, or if they conspire to violate those provisions.

The idea that companies are not taking proactive FCPA compliance measures, says Butler University's Mike Koehler, assistant professor of business law for the College of Business, is a problem.

"While it perhaps used to be the case that only oil and gas companies needed to be concerned about FCPA compliance, the game has changed and U.S. enforcement agencies are initiating FCPA actions at a record-level against large and small companies alike in a variety of industries, and against individuals. No company is immune from FCPA scrutiny," Newswire quotes Koehler as saying.

Adding to the problem of companies being lax in their FCPA compliance efforts is the basic lack of understanding about the law's enforcement actions, which, experts say, include several other illegal means to secure business besides providing a suitcase full of cash to a government official to secure a government contract. According to Koehler, recent enforcement actions have been based on providing excessive travel and entertainment benefits to "foreign officials" and making payments to secure a foreign license or permit. This interpretation surprises most business leaders.

As businesses evaluate FCPA compliance in foreign countries, particularly FCPA high-risk jurisdictions such as China and India, Koehler suggests they first conduct an FCPA risk assessment specifically tailored to how the company does business in a foreign jurisdiction, and then develop robust and pro-active FCPA compliance policies and procedures based on the risk assessment.

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