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Beware increased enforcement of FCPA Provisions, especially for recent international construction business acquisitions

The global construction market is expected to exceed $16 trillion by 2025, opening the door to new opportunities as well as unknown risks.

While expanding to global markets can have high rewards, risks such as those pertaining to the US Foreign Corrupt Practices Act (FCPA) are real. Within the last 10 years, sanctions have reached more than $23 billion. [1] While enforcement in the first part of 2021 has slowed following a record 2020, leadership at both the US Department of Justice and the Securities and Exchange Commission[2] indicate that the FCPA continues to be a high priority, and that they continue to have strong pipelines of enforcement actions. President Joe Biden has enforced the message, establishing the fight against bribery and corruption as a core national security interest for the US. [3]

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The FCPA speaks to two primary areas of law: corruption (anti-bribery provision) and the books and records and internal controls (accounting provision). In simplest terms, the FCPA prohibits pay-to-play activities. If your firm plans to acquire or has acquired a foreign company to take advantage of infrastructure-building opportunities, be mindful of pay-to-play activity during due diligence. In some parts of the world, pay-to-play is a common modus operandi. However, the FCPA specifically prohibits payments of any kind to state-owned entities to win or keep work by any publicly traded US organization.

Any due diligence should encompass a comprehensive forensic investigation to look for such potential bribery mechanisms as higher-than-expected commissions, “success” or consulting fees, rebate programs, invoice write-offs, lavish travel and entertainment expenses.

Beyond avoiding hefty fees from the DOJ, there is much value in due diligence. If the company being acquired has won contracts and is recognizing revenue due to pay-to-play schemes, and those activities cease when your organization takes over, anticipated revenues could be severely impacted. It

may be prudent for the company making the acquisition—or entering a joint venture—to review outstanding accounts receivable and negotiate a post-acquisition adjustment to goodwill funded by the seller, should said receivables become questioned.

If inappropriate activities are discovered during due diligence, a privileged discussion with outside counsel should be invoked, and a decision made to go forward or abandon the relationship. If a decision is made to move forward despite any identified risk, counsel may advise asking for an opinion from the governing regulatory body; ideally, the DOJ and/or the SEC.

Pay special attention to clients that are state-owned entities, and implement compliance programs for newly acquired companies that include the buy-in from third-party agents. The cost of proper due diligence or internally investigating potential issues will pale in comparison to an FCPA investigation and subsequent penalties.

While no industry will be immune from scrutiny[4], HKA professionals are uniquely positioned in the capital projects and infrastructure industries to assist with both compliance and internal investigations.

Citations

1. https://fcpa.stanford.edu/statistics-analytics.html?tab=2
2. https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases
3. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/
4. www.natlawreview.com/article/doj-announces-major-changes-to-corporate-criminal-enforcement-policies)

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