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The FCPA Challenges of Doing Business in Cuba

From the Experts

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On December 17, 2014, President Barack Obama announced a set of diplomatic and economic changes aimed at normalizing relations between the United States and Cuba after nearly 55 years of barriers between the two countries. Obama stated that diplomatic relations would be re-established with Cuba, and on May 29 his administration removed Cuba from the U.S. list of state sponsors of terrorism. New regulations issued by the U.S. Department of Treasury and U.S. Department of Commerce on January 16, 2015, allow certain U.S. exports of telecommunications, construction materials and farming equipment, and allow U.S. banking transactions in Cuba.

The new regulations create opportunities for U.S. companies to do business in Cuba, especially telecommunications and infrastructure companies that now are permitted to sell directly to the Cuban government. The regulations also facilitate travel to Cuba for authorized purposes, raise the limit on certain categories of remittances to Cuba, authorize certain transactions with Cuban nationals located outside of Cuba, and allow a number of other activities related to financial services, trade and shipping. However, before jumping headlong into the new Cuban market, U.S. companies need to be cognizant of, and prepare for, the significant Foreign Corrupt Practices Act (FCPA) risks associated with doing business in Cuba.

FCPA RISKS IN CUBA

To review, the FCPA is a U.S. federal law that prohibits bribery of "foreign officials" for the purpose of obtaining or retaining business. It applies to U.S. public and private companies, including their non-U.S. subsidiaries and all of their employees. The FCPA also applies to any person or company who commits an act in furtherance of a foreign bribe while in the territory of the U.S. A "foreign official" is defined broadly to include:

- Any officer or employee of a foreign government.
- Any department, agency or instrumentality of a foreign government.
- Any person acting in an official capacity on behalf of any department, agency or instrumentality of a foreign government.
- Any foreign political party official or candidate for foreign political office.

Thus, given that the Cuban government has only recently permitted its citizens to start private business ventures, and the vast majority of Cuban companies are government-owned, U.S. companies wishing to do business in Cuba need to be prepared to handle considerable exposure to FCPA liability arising out of doing business there.

Transparency International ranked Cuba as the 63rd most corrupt country out of the 175 countries in its "2014 Corruption Perceptions Index." That places Cuba ahead of countries like

Thailand, Argentina and Pakistan, but behind South Korea, Georgia and Ghana. Cuba has a corruption score of 46 out of 100, with zero indicating a high level of corruption and 100 indicating a low level of corruption.

To combat Cuba's history of public sector corruption, in 2011 President Raúl Castro launched a widespread campaign in which dozens of Cuban government officials and state company executives were arrested and imprisoned for graft, and numerous foreign businesspeople and companies were kicked out of the country.

Most famously, Sarkis Yacoubian, owner of import firm Tri-Star Caribbean, was sentenced to nine years in prison after he confessed to bribing Cuban officials. Yacoubian admitted that he had paid Cuban officials bribes ranging from $10 and dinner to as much as $50,000. Yacoubian's confession triggered further arrests and exposed widespread corruption in Cuba's cigar, nickel, communications and international trade sectors.

Despite Castro's efforts, systematic corruption reportedly still remains a considerable problem in the country.

3 Root Causes of Corruption

There are several root causes of corruption in Cuba, all of which are likely to continue to exist for some time. They include the following:

1. Cuban public officials are paid very modestly—some as little as $20 to $40 a month. Cuban public officials often are simultaneously charged with managing hundreds of millions of dollars in contracts for the government. This combination creates incentives for illicit enrichment through the taking of bribes.
2. The Cuban government controls almost all economic activity in Cuba, including implementing price controls, mandating that most foreign businesses form joint ventures with the Cuban government in order to do business in the country, issuing licenses, establishing work arrangements, and controlling the labor force and financial sector. Thus, the overarching reach of the Cuban government in economic activities creates numerous points of contact with Cuban government officials and plenty of opportunities for corruption to occur.
3. Cuban regulations reportedly are inconsistently applied, leading to an environment in which government procurement often is handled behind closed doors and in a nontransparent manner.

All of these factors, combined with the new opportunities for U.S. companies in Cuba, create significant FCPA risks.

5 Tips for Mitigating FCPA Risk While Doing Business in Cuba

1. **Conduct a risk assessment:** Since the Cuban government is involved in almost all economic activities in the country, a U.S. company's points of contact with the Cuban government will be numerous. Understanding the nature and extent of your company's interactions with the Cuban government will help the company create and implement a tailored and effective anti-corruption compliance program.
2. **Establish a "culture of compliance":** Since corruption is still reportedly prevalent in Cuba's public sector, U.S. companies doing business there must ensure that all directors, senior executives, managers, employees and agents know about and consistently implement the company's anti-corruption policy, code of conduct and any other compliance measures established by the company. Doing so will help promote a strong ethical culture throughout the company and will help ensure that anti-corruption standards are met.
3. **Ensure that anti-corruption compliance program policies and materials are available**: Anti-corruption policies, codes and training materials should be in both English and Spanish to ensure that they are accessible and understandable to all employees and agents in the U.S. and Cuba.
4. **Adequately train employees and agents:** Since FCPA liability can arise out of improper conduct taken both in Cuba and the U.S., employees and agents of U.S. companies doing business in Cuba need to understand the FCPA and how it affects their everyday duties and responsibilities. With this knowledge, your company's employees and agents will be less likely to commit inadvertent violations of the FCPA that could cost millions of dollars.
5. **Promptly respond to possible violations:** Companies should investigate any suspected FCPA violations arising out of doing business in Cuba and swiftly implement any necessary corrective action. Doing so may help avoid exposure in the form of large fines to the U.S. government and costly government investigations.

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