

**WHAT THE U.S. GOVERNMENT CAN DO TO ASSIST U.S. COMPANIES  
WITH RESPECT TO TRANSNATIONAL CORRUPTION**

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Kathryn Nickerson<sup>1</sup>

Senior Counsel

Office of the Chief Counsel for International Commerce

U.S. Department of Commerce

## **Introduction**

I am very pleased to be here today to talk about the assistance that can be provided by the U.S. Government when companies, especially small and medium sized companies, or SMEs, are faced with problems related to international commercial bribery. Although I'm going to focus on what we do at the U.S. Department of Commerce because that's where I work, I'll also be mentioning some very important activities performed by the Justice and State Departments as well as the staff of the Securities and Exchange Commission (SEC).

I'm going to cover subjects that fall within four main categories:

- SMEs and the Foreign Corrupt Practices Act (FCPA);
- How companies can get advice or counseling about the FCPA if they have questions, and what compliance resources are available;
- How companies can get assistance in performing due diligence so as to better avoid potential problems under the FCPA;
- Finally, what companies can do if they believe a foreign competitor is seeking to obtain or has obtained a contract through bribery.

## **I. Small and Medium Sized Businesses and the FCPA**

The United States has been a leader in combating transnational bribery since it enacted the Foreign Corrupt Practices Act (FCPA) in 1977. Although most large multinational companies are aware of the FCPA's prohibitions, SMEs often face particular challenges in getting the information they need to comply with the FCPA. Perhaps due to their limited size and resources (small businesses are overwhelmingly privately-owned and generally have fewer than 500 employees), many are unaware of the FCPA, let alone have any kind of compliance program. I often get calls from the public, usually SMEs or outside counsel representing SMEs, and my own experience with these companies has confirmed to me that many such companies are unaware of the basic requirements of the statute and the importance of such compliance programs. Typical

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FCPA issues raised in such conversations include:

- Penalties, including alternative fines
- Liability for agents and joint venture partners
- Vetting agents and business partners
- Affirmative defenses
- Facilitating payments
- Statute of limitations
- Corporate compliance programs, including why they are necessary and model programs
- Antibribery agreements, FCPA compliance clauses in business contracts

From the above list of examples, you can see that SMEs generally have the same questions that other firms have when it comes to the FCPA, but it's surprising that on the 34<sup>th</sup> anniversary of the statute, these sorts of basic questions are still being asked, and some companies are unaware of its existence.

### **So why might SMEs in particular face problems complying with the FCPA?**

Definitions for SMEs vary, but according to the Small Business Act, a small business is “one that is independently owned and operated and which is not dominant in its field of operations.” <http://www.sba.gov/sites/default/files/files/Small%20Business%20Act.pdf>. The law also states that in determining what constitutes a small business, the definition will vary from industry to industry to reflect industry differences. The SBA website provides that small businesses generally have fewer than 500 employees. In some industries, some businesses have fewer than 100 employees, and some have up to 1500 employees and still fall within the statutory definition of small business. <http://sba.gov/size>.

The SBA reports that according to the Census Bureau's Statistics of U.S. Businesses, more than half of working Americans either own or are employed by a small business. Also, over about the last decade, small businesses created nearly 65 percent of net new private sector jobs. <http://web.sba.gov/faqs/faqIndexAll.cfm?areaid=24> Despite their size, SMEs make up a significant portion of the U.S. exporting community. According to a 2010 U.S. International Trade Commission (USITC) report, in 2007 direct exports of goods and services by U.S. SMEs totaled \$382 billion, or approximately 28 percent of total U.S. exports. Small- and medium-sized businesses account for approximately 40 percent of all export-supported jobs in the United States. See, <http://www.ustr.gov/about-us/press-office/press-releases/2010/november/smaller-exporters-play-large-role-trade>.

However, SMEs that are active abroad typically face greater challenges than larger companies with respect to trade barriers. Burdensome or discriminatory government regulations in foreign markets disproportionately affect SMEs. SMEs may lack the staff, expertise, or financial resources to meet foreign regulatory requirements. For example, U.S. small businesses typically sell niche products that are more susceptible to higher tariffs and oppressive tariff regimes. Likewise, customs policies and delays of foreign countries may pose greater burdens on SMEs and serve as prohibitive barriers to trade, and fixed costs of licensing requirements are more

costly on a per unit basis to small businesses.

Unlike larger firms, which may have pre-established business contacts in other countries, for example wholly owned subsidiaries to handle importation, licensing, and distribution, SMEs are usually dependent upon independent intermediaries, such as agents or joint-venture partners, to get their goods or services to foreign consumers. Using such intermediaries without an appropriate compliance program, including procedures for vetting the intermediaries, can lead to FCPA problems. Even if SMEs are aware of FCPA rules, SMEs are less likely to have the time and money to perform the necessary due diligence to investigate the agent's reputation and track record.

Of course, the anti-bribery provisions of the FCPA apply to all companies, irrespective of size. In fact, a recent FCPA prosecution involving a sting operation concerned mostly mid-sized and smaller firms, which may raise awareness about the statute among SMEs, and highlights the importance of all companies having effective compliance programs or measures in place. *See*, <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>. Criminal penalties may impact a small business in far more devastating ways than a large business because the fines that may be imposed are likely to make up a much larger proportion of the business' earnings. FCPA fines imposed on individuals may not be paid by their employer or principal. In addition, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government, or state and local governments, and ruled ineligible to receive export licenses. Indictment alone can lead to suspension of the right to do business with the Federal government.

The U.S. Government recognizes the limitations faced by some SMEs, and therefore the Department of Justice takes into consideration the facts and circumstances of each company, including its size and resources, during FCPA investigation and enforcement recommendation stages. *See* Principles of Federal Prosecution of Business Organizations at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>; *see also* OECD Phase 3 Report of the United State, para. 101, <http://www.oecd.org/dataoecd/10/49/46213841.pdf?contentId=46213842>.

The bottom line is that the adoption of compliance programs or measures by ALL companies is a key factor in reducing international corruption, and makes sense from a business perspective as well. Although many of the larger U.S. companies routinely educate and train their employees about the importance of good corporate behavior and stewardship through such compliance programs, due to a lack of knowledge, experience, and limited resources, many SMEs do not know about, are unable, or have chosen not to implement robust anti-corruption compliance programs or measures. However, for companies engaged in foreign markets, the benefits of implementing a strong FCPA compliance program certainly outweigh its cost. For example, while the existence of a compliance program will not necessarily absolve a company from criminal liability, federal prosecutors will evaluate a company's compliance program in determining what charges, if any, to bring against a company for potential FCPA violations. *See* Principles of Federal Prosecution of Business Organizations (Section 9-28.800) at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>. Furthermore, a robust compliance program can potentially reduce a company's criminal fine under the U.S. Sentencing

Guidelines. *See* 2010 Federal Sentencing Guidelines Manual, §8C2.5(f) and §8B2.1 at [http://www.uscourts.gov/Guidelines/2010\\_guidelines/Manual\\_HTML/Chapter\\_8.htm](http://www.uscourts.gov/Guidelines/2010_guidelines/Manual_HTML/Chapter_8.htm). As discussed below, the Sentencing Guidelines also set forth the requirements for what constitutes an effective compliance program. *See* §8B2.1. and commentary, at [http://www.uscourts.gov/Guidelines/2010\\_guidelines/Manual\\_HTML/Chapter\\_8.htm](http://www.uscourts.gov/Guidelines/2010_guidelines/Manual_HTML/Chapter_8.htm)

While recognizing that no one program is adequate for all companies, and that there is no “one size fits” all model, even small exporters should at least have a policy on the subject of not giving bribes or otherwise violating U.S. and foreign law while engaging in international business, appropriately tailored to the company’s needs. As discussed in more detail below, the U.S. Government is taking steps to ensure that more SMEs are aware of such compliance programs and the importance of adopting them.

## **II. Resources, Information, and Assistance for U.S. Companies**

### **A. Information and Guidance for U.S. Companies on the FCPA, Compliance and International Anticorruption Initiatives**

The rest of my remarks will focus on what the U.S. Government is doing to assist U.S. businesses in complying with the FCPA and international initiatives, and doesn’t apply to just SMEs, although SMEs may use such resources (if they know about them) more often than larger companies.

#### **1. Basic Information and Guidance from the Departments of Commerce and State**

At the Commerce Department, our first and foremost role is as the promoter of U.S. domestic and foreign commerce, including promoting U.S. exports, and that is the primary reason for our involvement with the FCPA and related anti-corruption instruments, such as the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Antibribery Convention) and the United Nations Convention Against Corruption (UNCAC). The United States has also included anticorruption provisions in all of its recent Free Trade Agreements (FTAs).

Corruption can be a significant barrier to international trade. In 2009, it is estimated that companies lost more than \$25 billion in deals to companies that were willing to pay bribes to secure the deal. However, FCPA compliance certainly should not be a hindrance or barrier to U.S. exports. In fact when all governments and companies work together to enforce and abide by high anticorruption standards, FCPA compliance can facilitate trade and enhance competitiveness. Companies known for their integrity and quality business practices are more likely to be highly valued by capital markets. Governments seeking sustainable growth prefer doing business with reputable companies that deliver high-quality products and services without undermining good governance.

Therefore, we want to make sure that exporters and their counsel have the best possible

information available to them when they deal with an FCPA question, an anticorruption issue under foreign laws, or a problem concerning corruption by a foreign competitor.

Neither the Commerce Department nor the State Department are law enforcement agencies, and when we are addressing a particular fact situation we make it clear that there are limits to what we can do. We cannot bind the federal government concerning any interpretation or enforcement action with respect to the FCPA. Although we have no enforcement role, we are part of the federal government, and that means that if we or any other U.S. Government employee has information about a possible FCPA violation, we arrange for the information to be transmitted to the Justice Department or the SEC as appropriate. We cannot guarantee that information that is given to us about a past, ongoing or proposed violation of law will not be shared with enforcement authorities.

On the other hand, although we can't provide fact specific advice like law firms do, we can provide general information and guidance that firms often find useful concerning the basic provisions of the FCPA, other countries' antibribery laws, and international anti-corruption instruments such as the OECD Antibribery Convention, the Inter-American Convention Against Corruption (or OAS Convention), and the UNCAC. We also provide information to companies through a number of U.S. and international publications designed to assist firms in complying with anti-corruption laws, described in more detail below.

## **2. U.S. Government Resources on the FCPA and Compliance**

### *Basic Information on the FCPA*

The U.S. Department of Justice has a comprehensive website on the FCPA, which includes a useful one-page description of the statute, *see*: <http://www.justice.gov/criminal/fraud/fcpa>. The Departments of Justice and Commerce have also published a joint brochure called the *Lay-Person's Guide* to the FCPA, summarizing the antibribery provisions of the FCPA in more detail, available at: <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>. The joint FCPA brochure was updated after the 1998 amendments to the FCPA implementing the OECD Antibribery Convention. It has been useful to many companies, especially small firms and those that are new to exporting.

Another excellent resource for U.S. companies seeking information and guidance on the FCPA and related issues is the *OECD United States Phase 3 Report on the Application of the Convention On Combating Bribery Of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation On Combating Bribery in International Business Transactions* (OECD U.S. Phase 3 Report) and other reports analyzing the implementation and enforcement of anticorruption laws of the United States, related U.S. responses to OECD and other international organizations' questionnaires, and relevant appendices, all found at: <http://www.justice.gov/criminal/fraud/fcpa/intlagree/>.

An important part of compliance is ensuring that employees, agents, and other relevant business partners understand the laws to which a company is subject. That is why both our website and the Department of Justice's provide links to unofficial translations of the FCPA in Spanish, French, Arabic, Chinese, Portuguese, Russian, and several other languages (at: <http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives> and <http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html>). The goal of providing these unofficial translations is to increase the general awareness and understanding of the FCPA by U.S. exporters and their foreign partners.

### *Resources for Information on Compliance Programs*

The Department of Justice has required companies to implement rigorous compliance programs as part of plea agreements and consent judgments in FCPA matters, which also serve as excellent guidance for other companies in developing and maintaining their compliance programs. For some recent examples which include many of the elements described below from the *OECD Good Practice Guidance*, and more, see the Deferred Prosecution Agreement between the Department of Justice and Panalpina World Transport (Holding) Ltd., (Attachment C) at <http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf>; and the Deferred Prosecution Agreement between the Department of Justice and Johnson & Johnson, its subsidiaries, and its operating companies (Attachments C and D) at <http://www.justice.gov/criminal/fraud/fcpa/cases/depuyc-inc/04-08-11depuyc-dpa.pdf>.

As mentioned above, U.S. companies should also consult the U.S. Sentencing Guidelines for what constitutes an effective compliance program. See Chapter 8, Part B. §8B2.1. and commentary, [http://www.uscourts.gov/Guidelines/2010\\_guidelines/Manual\\_HTML/Chapter\\_8.htm](http://www.uscourts.gov/Guidelines/2010_guidelines/Manual_HTML/Chapter_8.htm).

To further assist SMEs with their compliance efforts, the Department of Commerce produced a practical guide for businesses involved in international trade, entitled *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, available online at [www.ita.doc.gov/goodgovernance](http://www.ita.doc.gov/goodgovernance). This manual is intended to aid enterprises in designing and implementing a business ethics program that meets emerging global standards of responsible business conduct. This manual provides a wealth of information on the subject of ethics and corporate compliance for all enterprises, and is particularly helpful to SMEs and others that are new to international trade. Included among the subjects in the manual is practical information on the FCPA, other international corruption instruments as well as the value of corporate compliance programs.

The State Department also published a brochure in conjunction with the Department of Commerce on "Fighting Global Corruption: Business Risk Management" (State Department Brochure). Written specifically for businesses, the brochure contains helpful information on the FCPA, corporate compliance programs, and international initiatives to fight corruption. (The brochure can be found on the State Department's website at: <http://www.state.gov/>, as well as our website, at <http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives>; [http://www.ogc.doc.gov/pdfs/Fighting\\_Global\\_Corruption.pdf](http://www.ogc.doc.gov/pdfs/Fighting_Global_Corruption.pdf)).

Finally, the Departments of Commerce and Justice and staff from the Securities and Exchange Commission also participate in numerous seminars and conferences on the FCPA and related corporate compliance issues sponsored by professional associations and industry groups, many of which are attended by outside and in-house counsel representing SMEs.

For links to the compliance guidance and initiatives described above and more, *see* our website, at: <http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives>

### **3. International Guidance and Compliance Initiatives**

The United States has been a leader working in international organizations to promote the development of guidance for the private sector on combating international bribery and corruption. Particularly helpful for SMEs is the recently issued *OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance*, developed and agreed upon by the United States and 37 other countries which are parties to the OECD Antibribery Convention. The *OECD Good Practice Guidance* sets forth non-legally binding good practices for companies to consider (among others) for ensuring effective internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery, which, briefly summarized, include:

- Effective internal controls, ethics, and compliance programs or measures based on a risk assessment, that should be regularly monitored, reassessed, and adapted to ensure continued effectiveness;
- Strong, explicit and visible support of senior management;
- A clearly articulated and visible corporate policy prohibiting bribery;
- A duty of compliance with the policy or measures by individuals at all levels of the company;
- Oversight by an empowered organizational compliance structure at senior levels (depending on the size of the company, this could range from one person to a team of compliance or ethics officers), and the structure should have adequate resources and authority and an appropriate level of autonomy from management;
- Ethics and compliance programs or measures designed to prevent and detect foreign bribery at all levels of the company, applicable to entities over which a company has effective control, and where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries and business partners;
- Properly documented due diligence reviews, including self-monitoring and vetting of new hires, agents and other business partners;
- Appropriate education and regular oversight of, and reciprocal commitments from, business partners about the company's commitment to abiding by anti-bribery laws and its compliance program or measures;
- A system of financial and accounting procedures, including internal controls;
- Measures designed to ensure periodic communication, and documented training and education at every level of company, as well as, where appropriate, for subsidiaries;
- Appropriate measures to encourage and provide positive support (incentives) for the observance of ethics and compliance programs or measures at all levels of the company;

- Discipline for violations of anticorruption laws, and the ethics and compliance program or measures, at all levels of the company;
- Compliance mechanisms (guidance and reporting mechanisms, “help-lines”, internal and where possible confidential reporting, protections for those that report, and appropriate follow up)
- Periodic reviews of the ethics and compliance programs or measures.

*The OECD Good Practice Guidance* also provides that ethics and compliance programs or measures should cover, among other things: gifts; hospitality, entertainment and expenses; customer travel; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion. Note that the introduction to the *OECD Good Practice Guidance* explains that it is flexible, and intended to be adapted by companies, particularly SMEs, “according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.” For the complete *OECD Good Practice Guidance* text, see: <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

This OECD Good Practice Guidance reflects the requirements of an effective compliance program as set forth in the U.S. Sentencing Guidelines mentioned above, and also builds upon similar guidance issued by Transparency International ([http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles)), the International Chamber of Commerce (<http://www.iccwbo.org/policy/anticorruption/>) The World Economic Forum Partnering Against Corruption Initiative (PACI), <http://www.weforum.org/paci> and the Asia-Pacific Economic Cooperation Forum (APEC, described in more detail below), among others. All of these are good resources for companies to consult in developing their compliance programs or measures.

In 2007, APEC Leaders including the United States endorsed a Code of Conduct for Business as well as complementary Anti-Corruption Principles for the Public and Private Sectors. The APEC Code of Conduct for Business provides descriptions of various forms of bribery, clear guidance on how to identify corrupt practices, and practical steps businesses should take to counter corruption. See: [http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~/\\_media/Files/Groups/ACT/07\\_act\\_codebrochure.ashx](http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~/_media/Files/Groups/ACT/07_act_codebrochure.ashx) It was a result of collaboration between APEC governments and APEC businesses. The APEC Experts Task Force on Anti-Corruption and Transparency has been helping small and medium enterprises implement the Code of Conduct by holding capacity-building seminars and workshops for such enterprises as well as chambers of commerce.

The United Nations Global Compact initiative has also issued several publications helpful to the business community in combating international corruption. See: [http://www.unglobalcompact.org/AboutTheGC/tools\\_resources/anti\\_corruption.html](http://www.unglobalcompact.org/AboutTheGC/tools_resources/anti_corruption.html)

The United States is also working with G20 partners to conduct outreach to the business community to partner with G20 country companies to encourage the development of public-

private efforts to fight corruption, and we expect to see more guidance stemming from these efforts soon.

## **B. Department of Justice Opinion Procedure**

The Department of Justice will provide FCPA advice to U.S. companies and their attorneys only in the context of the Foreign Corrupt Practices Act Opinion Procedure. The Department of Justice is prohibited from rendering any advice with respect to criminal statutes other than as authorized by law or regulation.

U.S. companies concerned about whether certain prospective conduct might violate the FCPA may request a written opinion from the Justice Department under the procedure. The opinion procedure is set forth at 28 C.F.R. Part 80. Information about the DOJ opinion procedure is also available on DOJ's FCPA Fraud Section website at: <http://www.justice.gov/criminal/fraud/fcpa/>

There are a number of positive aspects of the Justice Opinion Procedure. For example, activities for which the Department of Justice has issued an opinion stating that the conduct conforms with its current enforcement policy will be entitled to a presumption of compliance in any subsequent enforcement action under the FCPA. Further, the discussions that often occur between Justice and counsel for the company concerning the application can give counsel an indication of the legal and factual issues that the company needs to be concerned about. I understand that the give-and-take in these discussions often serves to assist the requestor in identifying potential risk areas and find solutions to them, so that the proposed action can be undertaken.

It is important to note that an FCPA opinion issued by Justice has no application (i.e., no presumption will apply) to any party which does not join in the request for the opinion nor to any facts not described in the request. Only a well-informed private practitioner can decide whether the procedure will be helpful to an individual client with a particular set of facts and issues. For more information on the Justice FCPA opinion procedure, as well as published opinions already issued, I recommend that you visit the Department of Justice Fraud Section's very comprehensive website at: <http://www.justice.gov/criminal/fraud/fcpa/>.

At various conferences I've spoken at over the years, I've often asked businesses whether or not they use the Justice Opinion Procedure. Some have informed me that they are aware of the procedure and they either have used it or might use it. But some have said that the Opinion Procedure takes time (under the regulations, within 30 days of receiving the request, and longer if additional information needed) and often business decisions need to be made more quickly than the procedure can afford. Although the Opinion Procedure is being utilized with increasing frequency over recent years, in my view, it's regrettable that the procedure hasn't been more widely used, as the published opinions provide another great resource from the U.S. Government for guidance on the statute. Where business decisions need to be made more quickly, the Department of Justice has worked closely with companies to expedite the procedure to get the needed advice in time. Unfortunately, if companies do not use the procedure, there will be no new published opinions to guide companies. (Another reason there may be fewer published

opinions is because if Justice notifies the requester of its intention to issue a negative response, the requester may (and typically does) withdraw the request before the formal answer).

Note that the Opinion Procedure is only for prospective conduct. In addition, the prospective conduct must be concrete – the Department of Justice cannot opine on hypothetical situations. If a company believes that it has already violated the FCPA, voluntary disclosures are encouraged by U.S. Government policy guidelines, such as the Department of Justice Principles of Federal Prosecution of Business Organizations, and the U.S. Sentencing Guidelines, which require the government to consider a company's voluntary disclosure or failure to disclose in charging, settling and sentencing decisions. *See* Principles of Federal Prosecution of Business Organizations (Section 9-28.700) at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>; *see also* U.S. Sentencing Guidelines at [http://www.ussc.gov/Guidelines/2010\\_guidelines/index.cfm](http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm).

### **III. Assisting with Due Diligence Information on International Partners**

U.S. companies can be held responsible under the FCPA for acts in furtherance of bribes to foreign public officials by their joint venture partners or agents. The FCPA prohibits corrupt payments made through agents of domestic concerns and issuers. It is unlawful to make a corrupt payment to a third party while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "knowing" includes conscious disregard and deliberate ignorance. As mentioned above, SMEs may be more likely than larger companies to use intermediaries because of their small size and lack of experience and resources. So how should U.S. companies and businesspersons, especially SMEs, go about locating partners or agents who will play by the rules? Options available to U.S. exporters to complement their own procedures include U.S. Department of Commerce Commercial Service programs.

#### **A. U.S. Department of Commerce Commercial Service Programs**

The Department of Commerce's International Trade Administration's United States and Foreign Commercial Service (US&FCS) has a network of export and industry specialists located in more than 100 U.S. cities and over 80 countries worldwide. These trade professionals provide counseling and a variety of products and services to assist small and medium-sized U.S. businesses in exporting their products and services, including in finding business partners, and conducting due diligence when choosing business partners or agents overseas. For example, the **International Partner Search Program** can assist U.S. companies in finding the most suitable strategic partners abroad. *See* [http://www.export.gov/salesandmarketing/eg\\_main\\_018204.asp](http://www.export.gov/salesandmarketing/eg_main_018204.asp). As part of the program, you provide your marketing materials and background on your company, and the US&FCS will use its strong network of foreign contacts to interview potential partners and provide you with a report that includes up to five pre-qualified partners.

But suppose you or your client have already found a potential partner, either on your own or through the US&FCS. You may not want to approach such a foreign company before first acquiring some basic background in case this information would change your mind about

starting a relationship in the first place. The US&FCS provides information on each potential partner in a report called an **International Company Profile (ICP)**, which includes a listing of the potential partner's key officers and senior management, banking relationships and other financial information about the company; and market information, including sales and profit figures and potential liabilities. ICPs also provide an opinion as to the viability and reliability of the potential partner, as well as an opinion on the relative strength of that company's industry sector. Reports on SMEs cost \$500 (and \$900 for large companies). They are delivered within 10 days and many banks and government export financing organizations require them in certain situations. They are not, however, intended to substitute for a company's own due diligence and the Commercial Service does not offer ICP in countries where Dun & Bradstreet or other private sector vendors are already performing this service. *See,*

[http://www.export.gov/salesandmarketing/eg\\_main\\_018198.asp](http://www.export.gov/salesandmarketing/eg_main_018198.asp)

It's also always a good idea to consider having a detailed face-to-face conversation with a US&FCS Officer stationed in the U.S. overseas post in the country where you are thinking of doing business. These services are a good start. Again, by themselves they will not fully protect an exporter, but they can complement your compliance and due diligence programs.

For more information on these and other related programs, you can contact the US&FCS directly through its offices in many major U.S. and foreign cities or through its website at:

<http://www.export.gov/eac/>. In addition to the programs discussed above, U.S. Department of Commerce US&FCS Officers and State Department Foreign Service Officers receive training on the FCPA and other international anticorruption instruments, and provide general information to U.S. exporters on international corruption issues.

## **B. U.S. DOC Anti-corruption Programs for Advocacy and Trade Missions**

As a provider of services to the exporting community, the U.S. Government has adopted its own anti-corruption programs. These supplement the FCPA and in certain ways go beyond the requirements of the FCPA.

### **1. Advocacy Support**

The U.S. Departments of Commerce and State provide worldwide support for qualified U.S. companies bidding for foreign government contracts. This advocacy can give a U.S. company the edge on its foreign competition and can help when unanticipated problems, such as bribery or corruption by a foreign competitor, arise. Support can range from meetings attended by our commercial officers and ambassadors to letters and calls, and can extend to advocacy from high-level officials including at the Cabinet level, and even, on some occasions, at the Presidential level.

In October 1996, the Commerce and State Departments revised their advocacy guidelines to require an anti-corruption agreement from companies seeking U.S. advocacy. The advocacy guidelines assist USG personnel in determining whether and to what extent USG support is

appropriate in connection with a transaction involving U.S. interests.

A firm seeking USG advocacy support must agree in writing:

- (1) that it and its affiliates have not and will not engage in the bribery of foreign officials in connection with the matter for which advocacy assistance is being sought;
- (2) that it and its affiliates maintain and enforce a policy that prohibits the bribery of foreign officials.

The firm must further acknowledge that failure to comply with the terms of this agreement may result in the denial of advocacy assistance.

In some respects this policy reaches conduct that is not prohibited by the FCPA. For example, the advocacy guidelines require a firm seeking support to certify not only as to its conduct, but also as to the conduct of its affiliates. We specifically intend the term "affiliate" in the Advocacy Guidelines to include foreign parent firms. The conduct of the foreign parent covered by the certification includes conduct that in many cases falls outside of the jurisdiction of the FCPA-- such as bribery of a foreign official where there is no link to the United States. Foreign firms are generally only subject to FCPA provisions when they fall under the definition of an "issuer" or perform acts in furtherance of bribery in U.S. territory.

Why did we do this? Some U.S. companies had expressed the view over the years that foreign-owned U.S. companies were able to avail themselves of U.S. Government advocacy support while their foreign parent company or its other subsidiaries were able to continue engaging in the bribery of foreign officials, even in connection with the same transaction.

The Advocacy Center is currently engaged in advocacy efforts on behalf of more than 300 companies, all of which have signed the antibribery agreement in connection with their applications for advocacy assistance.

If you would like U.S. Government advocacy support for a bid on a foreign government procurement, the Advocacy Center can be reached through the Department of Commerce International Trade Administration in Washington (202-482-3896), or its main website at: <http://www.export.gov/advocacy/index.asp>.

## **2. Trade Missions**

We have a similar policy with respect to Commerce-led trade missions. In a statement issued in 1998, the Secretary of Commerce made an anti-corruption agreement a condition precedent for companies wishing to participate in our trade missions. Just as with advocacy assistance, a company wishing to participate in a trade mission must now certify that it and its affiliates:

(1) have not and will not engage in the bribery of foreign officials in connection with the company's participation in the mission; and

(2) maintain and enforce a policy that prohibits the bribery of foreign officials.

Since this requirement was established, hundreds of firms have signed the antibribery agreement in connection with an application to participate in a Commerce-led trade mission. In calendar year 2010 alone, 401 companies participated in 35 trade missions, and all of those companies signed the anti-bribery certification listed above.

As with applications for advocacy assistance, this agreement reaches conduct that may go beyond the coverage of the Foreign Corrupt Practices Act.

#### **IV. Options When Foreign Competitors Bribe**

What can be done about the ongoing bribery of foreign public officials by competing foreign firms? We know it is going on, although bribery and corruption are hard to uncover and even harder to prove, as my colleagues from the Justice Department will tell you. There are corruption problems in customs clearances and duties as well as investment licenses and permits, and I am in no way minimizing the crippling effect these forms of corruption have on economies and trade. However, most large transborder bribery allegations are connected to foreign government contracts in sectors including military procurement, energy, telecommunications, construction, and transportation. In fact, from 2005 through 2009, the U.S. Government estimates that competition for over 305 contracts valued at approximately \$230 billion may have been affected by the bribery of foreign officials. Bribery in these types of business transactions is particularly dissuasive to SMEs who can least afford to expend the extensive resources often required to make bids, especially if they must take the chance that the outcome of their efforts will not be determined entirely by commercial considerations.

So what are a U.S. company's options when it learns that a foreign competitor has bribed? The Departments of Commerce, State and Justice are available to assist U.S. companies when these problems arise. For example, the U.S. Department of Commerce now has a "bribery hotline" accessible from the Commerce website, found at [http://tcc.export.gov/Report\\_a\\_Barrier/index.asp](http://tcc.export.gov/Report_a_Barrier/index.asp), through which U.S. companies can report bribes by their foreign competitors in international business transactions. The Department of Justice also has an e-mail hotline specifically for FCPA complaints, at [FCPA.Fraud@usdoj.gov](mailto:FCPA.Fraud@usdoj.gov). And of course, all of the old-fashioned methods of communication are still acceptable as well: call us, write us, or fax us. The bottom line is: we'd like to hear from you when you have problems in this area. We worked hard to negotiate the OECD and other international anticorruption conventions, and we'd like to know whether our trading partners are following through on enforcement.

In some situations, if the procurement or bribe payment has not actually been completed, it may be appropriate to inform a foreign government that we are aware of the potential corruption of the transaction, in order to try to obtain a "clean" procurement process for any U.S. company

involved in the bidding. If a contract has been awarded and the bribe already paid, we may still complain to the procuring foreign government since there might be a chance of re-opening the bidding. Such communications may be made through diplomatic channels by U.S. Embassy officers abroad or through communications from Washington. In other cases, where we may learn of the bribe after the fact and it is too late to re-open the bidding, the U.S. Government may still alert foreign governments and press for enforcement action.

At a minimum, we want to put countries on notice that we are watching and expect action. So if you think you are about to lose or have already lost business to a foreign competitor because of a bribe to a foreign public official, don't assume that your Government can't do anything about it. We firmly believe that informing other governments of bribery by persons falling within their jurisdiction is an effective way to ensure that cases will be brought against this pernicious practice that we have outlawed since 1977.