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# Pushing the envelope

Corruption is debilitating for investors, projects, governments and people across the continent. We take a look at the regulations tackling the scourge of infrastructure deals and what more needs to be done

## contractors' and consultants' corner

## Foreign contractors and consultants working in Africa need to be aware of the US Foreign Corrupt Practices Act; it has a broader reach than many realise, says **Matthew Reinhard**

**A**s African economies modernise, the demand for experienced contractors and consultants to provide infrastructure services and support will only increase. Unfortunately, official corruption remains a major hurdle to the full development of these economies, and presents a number of legal and logistical challenges.

Companies that provide infrastructure services in Africa are acutely affected by official corruption. Not only must such contractors work closely with government officials when bidding on infrastructure projects (where the pressure to make corrupt payments to secure business may be intense) but the more mundane logistical challenges of executing such projects – from importing necessary materials to securing work permits and visas for skilled foreign workers – present additional avenues for corrupt officials to demand inappropriate payments.

Using the Foreign Corrupt Practices Act (FCPA), US enforcement authorities are aggressively pursuing companies and individuals suspected of making corrupt payments in foreign countries in order to secure business. Given the

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scope and breadth of the FCPA, even ostensibly “non-US” companies and their employees can be caught up in investigations and prosecutions.

#### The long arm

The FCPA makes it illegal for US companies (including, in some cases, their foreign affiliates), US citizens or residents, and non-US companies or persons acting in the United States, to pay, or offer or promise to pay, a foreign official (either directly or through an intermediary) to receive or keep business or to obtain any “improper advantage.” A payment can include the giving of “anything of value” including excessive gifts and entertainment, beneficial interests in a business venture, or other in-kind contributions. A “foreign official” includes not only elected or appointed officials, but any government employee. The FCPA also encompasses payments or gifts to employees of companies in which the government has an ownership interest, officials’ family members, and giving anything of value to a candidate for office, political party, or officials of public international organisations such as the World Bank. Beyond the large fines and

disgorgement of profits that may be levied against companies (not to mention the costs associated with defending against FCPA charges), individuals responsible for corrupt payments may be subject to individual fines and prison sentences.

The consequences of violating the FCPA are not theoretical. In February 2007, three subsidiaries of an international oilfield services company, one based in the UK, paid a combined fine of \$26 million – the largest in the history of the FCPA – relating to payments made to officials in connection with a Nigerian deepwater drilling operation. In 2005, another multi-national corporation paid a total of \$28 million in fines and disgorged profits to settle FCPA charges arising out of a subsidiary’s work on a telecommunications project in Benin. Those charges arose from the payment of \$2 million in “social fees” to support the re-election campaign of Benin’s president, as well as \$15,000 in cash to an employee of the World Bank to secure local investors.

#### Net cast wide

While the FCPA clearly applies to companies based in the United States and US citizens, the law also applies to any “issuer” – a company whose stock is traded in the US securities’ markets. The definition of “issuer” includes non-US companies that raise capital through the issuance of American Depositary Receipts (“ADRs”).

Foreign-owned affiliates of US companies may also create liability for their parent companies under certain provisions of the FCPA if the affiliate’s books and records are consolidated into the US parent’s records, and enforcement authorities will often attempt to establish some connection between the affiliate and the US in order to assert jurisdiction over the affiliate itself. Similarly, joint ventures controlled by an entity subject to the FCPA may render the entire venture subject to provisions of the FCPA.

Non-US citizens may be subject to the law if they are employees or agents of a US company or issuer. Similarly, US companies and issuers may be subject to FCPA liability based on the actions of their non-US employees and agents. Even non-US citizens working for a foreign company may subject themselves and their employer to FCPA liability if they take any “act in furtherance of” a corrupt payment within the United States or its territories.

#### Staying clean

Obviously, preventing corrupt payments in the first instance is the best way to protect against FCPA liability. Therefore, the institution of a strong



compliance programme that trains and educates employees to spot and avoid official corruption is essential. Additionally, because the actions of

### One oilfield services company paid a fine of \$26m relating to payments made to Nigerian officials

third-party agents may be attributed to their employers, agents who regularly interact with government officials (such as sales representatives, consultants, or customs brokers) should be carefully vetted prior to being engaged and, once hired, clearly instructed (in writing) not to make any inappropriate payments on behalf of the company.

The “everyone is doing it” defence to corrupt payments holds no sway with US enforcement authorities. Companies must take firm steps to ensure they are not making or authorising corrupt payments. However, through careful planning and vigilance, companies can be well-positioned to profit from investment in Africa while remaining compliant under the FCPA. **A**

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