

Chapter 13

Avoiding FCPA Liability: Practical Compliance Considerations for Energy Companies

Erica Williams

Shelby Smith

James Bowden, Jr.

Kirkland & Ellis LLP

Washington, DC¹

Synopsis

§ 13.01.	Introduction	370
§ 13.02.	Overview of the FCPA	370
	[1] — History of the FCPA	370
	[2] — FCPA: Elements and Defenses	371
	[3] — Anti-bribery Provisions	372
	[4] — Accounting Provisions	373
	[5] — Affirmative Defenses	374
§ 13.03.	FCPA Enforcement	375
	[1] — FCPA Enforcement by the SEC	378
	[2] — FCPA Enforcement by the DOJ	379
	[a] — FCPA Pilot Program	380
	[b] — FCPA Corporate Enforcement Policy	381
	[3] — Anti-bribery and Anti-corruption Statutes Around the World	383
§ 13.04.	FCPA Compliance Considerations for Energy Companies	384
	[1] — General Considerations	384
	[2] — Hallmarks of an Effective Compliance Program	385
	[3] — Special Compliance Considerations for Energy Companies	386
	[a] — Contract Policies	386
	[i] — Audit Rights	387
	[ii] — Legal Inclusions	387
	[b] — Engagement with Local Entities	388
	[c] — Interfacing with State-Owned Entities	389
	[i] — An Example of Bribery Risk with State-Owned Entities: <i>DOJ v. Keppel Offshore & Marine Ltd.</i>	390

¹ The opinions expressed in this chapter are the authors' alone and should not be attributed to Kirkland & Ellis LLP. Nothing in this chapter should be construed as legal advice.

[d] — Due Diligence in Contracts with Third Parties391

[i] — An Example of the Importance of Conducting Due Diligence of Third Party Contractors: *SEC v. Halliburton*393

[e] — Training Employees Abroad394

§ 13.05. Conclusion..... 395

§ 13.01. Introduction.

In the absence of a strong compliance program, the U.S. Foreign Corrupt Practices Act of 1977 (“FCPA”) can ensnare even the most scrupulous of companies.² This is especially true for energy companies, which often work with foreign entities located in politically unstable areas that are at high risk for corruption. To avoid FCPA liability, it is essential that energy companies understand the U.S. anti-bribery laws and create robust, risk-based compliance programs. This chapter provides an overview of the FCPA, describes recent developments in government enforcement of the FCPA, and sets forth practical compliance tips energy companies may wish to consider in developing compliance programs to avoid FCPA violations.

§ 13.02. Overview of the FCPA.

[1] — History of the FCPA.

The FCPA was enacted in 1977 to combat a bribery culture that negatively impacted some of America’s largest companies.³ The House Report on the then-titled “Unlawful Corporate Payments Act of 1977” noted that bribery and corruption were perceived as widespread and entrenched.⁴

² 15 U.S.C. § 78dd-1 *et seq.*; Mike Koehler, *Foreign Corrupt Practices Act Statistics, Theories, Policies, and Beyond*, 65 CLEV. ST. L. REV. 157, 172 (2017).

³ A well-known example of bribery occurred at Lockheed Martin. The scandal involving Lockheed Martin came to a head in 1976. Lockheed Martin, at the time, was ranked as a Fortune 500 Company with over \$2 billion in revenues. Lockheed paid various governments (Italy, Germany, and Japan) over \$22 million in bribes for these sovereigns to complete purchases of its military aircrafts. The scandal and its aftermath nearly put the company out of business. H.R. Rep. No. 95-640, at 1-2 (1977).

⁴ *Id.*; Senate Banking Housing and Urban Affairs Committee, 94th Cong., Rep. of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and