

INTERNATIONAL BUSINESS AND THE CHALLENGES OF COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT

BY DEAN GONSOWSKI, EDISCOVERY COUNSEL, SYMANTEC

In today's global economy, cross border commerce is vital to the success of many businesses. However, to ensure that lawful business practices are adhered to more corporations are increasingly coming under the federal government's microscope for their international operations. After several investigations in the mid-1970s into a range of international corruption, the Foreign Corrupt Practices Act (FCPA) was created to address the bribery of foreign officials and address accounting transparency requirements under the Securities Exchange Act. While the FCPA was created to safeguard against corruption, it also poses some difficult challenges for legal and IT departments when it comes to anti-bribery cases due to the complexity of today's communication mediums and transaction types.

It has become extremely difficult to identify how bribes are suggested, accepted and transacted. Adding to the complexity of these investigations is that most suspects typically use nuanced communications in different languages to disguise wrongdoings. As suspects become savvier in hiding their digital paper trail, corporations face increased difficulty with FCPA compliance. With greater FCPA enforcement looming, many enterprises are taking a proactive approach to this problem by turning to electronic discovery (e-discovery) technologies to expedite and streamline the discovery of electronically stored information (ESI) for compliance purposes.

THE CHALLENGES OF FCPA COMPLIANCE

2010 was a record breaking year for FCPA enforcement with the number of enforcement actions jumping 85 percent, according to data tracked by the law firm Gibson Dunn & Crutcher. Last year's passing of the Dodd-Frank Wall Street Reform and Consumer Protection Act will also likely have a great impact on FCPA enforcement as whistleblowers will be rewarded for voluntarily providing original information about violations of the securities laws. To further complicate matters, more countries are instituting their own similar regulations – like the U.K. Bribery Act – making it all the more challenging for multi-national companies to comply with a wide range of disparate international laws.

Given our digital era, at the heart of every FCPA investigation is electronic data. FCPA matters are inherently complex, high stakes and international in scope, presenting a broad range of challenging investigatory issues, especially relating to privacy. When an FCPA investigation looms, counsel face the daunting task of uncovering conduct that was designed to remain secret. In an FCPA case, that might mean searching through terabytes of electronically stored information to find the proverbial needle in a haystack. Even worse, the ESI is likely to be in multiple languages, housed under multiple custodians virtually anywhere in the world, and stored in a variety of formats. Additionally, companies must often comply with FCPA mandates under tight deadlines. So, for any enterprise doing business outside the United States, FCPA compliance can be a minefield of potential dangers.

HOW E-DISCOVERY TECHNOLOGIES CAN HELP

In light of the inherent complexities of FCPA investigations and rising enforcement, enterprises are increasingly repurposing analytical, e-discovery technologies to help minimize the burden and increase the efficiency of finding and producing relevant ESI. Advancements in today's e-discovery software solutions allow companies to readily address the nuances of FCPA investigations

with help of automated and repeatable workflows. By choosing the right e-discovery product, companies can dramatically turn the tide on these investigations, and not only more easily uncover critical case facts, but also resolve cases in less time leading to overall cost savings.

When looking for the best analytical solution for FCPA investigations, there are a few things to keep in mind:

- Investigations under FCPA require analysis of email in different languages, travel records, financial transactions and employee declarations. So, look for a product that goes beyond just basic search functionality to provide advanced analysis and review features like discussion threading, concept search, "find similar" and metadata filtering options. These capabilities will allow the compliance team to more rapidly pinpoint relevant information.
- Time is precious and at any given moment you might need to address multiple investigations simultaneously. Make sure the e-discovery product you choose can easily load and configure cases of any size, and quickly have data available for analysis and review. This will enable IT, legal and compliance teams to easily manage, prioritize and collaborate on cases.
- Ease of use is key. It's always difficult to learn to use a new technology, and even more so when you're under tight deadlines. It's in everyone's best interest to find a solution that's simple and intuitive for all stakeholders to use. With all the intricacies and time sensitivities involved, it's important to make the adoption of an e-discovery product investment as simple as possible to transcend language and geographic barriers.
- It doesn't take much to calculate the hard costs associated with managing an FCPA investigation, but also consider that business transactions are often stalled because they're dependent on the outcome of a particular FCPA case and the final price tag can result in a serious case of sticker shock. The more quickly and efficiently your e-discovery solution can help find relevant information, the faster regular business transactions can resume and the more cost-effective the entire process will be. However, don't sacrifice security and defensibility for speed – there needs to be a balance.

While FCPA investigations can be trying and difficult to manage, they are meant to ensure the reputation of organizations while upholding the integrity of transparent financial transactions. The good news is that many of the complexities involved in FCPA investigations can be easily unraveled by leveraging the right e-discovery technology. While there are many options to choose from, the important things to remember are that your solution should be able to rapidly assess case facts, correlate data with other business records, and identify the relevant information despite language complexity and nuanced communication. By following these best practices, you can ensure that your e-discovery product will have been well worth the investment.

ABOUT THE AUTHOR

Dean Gonsowski is eDiscovery Counsel for Symantec.

Dean Gonsowski brings more than 15 years of e-discovery consulting and legal practice experience to his position as eDiscovery counsel for Symantec. He is a member of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1), the Electronic Discovery Reference Model (EDRM) and Association of Corporate Counsel (ACC). He also teaches a series of continuing legal education (CLE) courses on various topics.

