From Arizona to China, businesses must comply with anti-bribery laws

By Richard C. Katz and Marshall P. Horowitz

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Many businesses in the Southwest have growth strategies that feature opportunities in China. Since 2001, China has skyrocketed from being Arizona's 17th highest export destination to its third highest — currently behind only Mexico and Canada.

In the past decade, exports from Arizona to China have grown at an astounding annual average of nearly 37 percent.

Similar narratives apply to the economies of California, Utah, Colorado and Nevada.

One of the inevitable risks of increased business with China is violating the U.S. Foreign Corrupt Practices Act (FCPA), a post-Watergate law enacted in 1977 to curb overseas bribery of foreign public officials by U.S. multinational corporations. Over the past few years, the U.S. Department of Justice has greatly revved up its FCPA prosecutions. In 2005, the Justice Department brought five FCPA cases with $16.4 million in penalties; by last year there were 34 cases and $435.3 million in penalties.

In addition to imposing monetary penalties, the Justice Department has recently served notice that it will vigorously pursue prison sentences for executives who intentionally violate the FCPA.

The FCPA contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit any U.S. "person" (entity or individual) from offering or providing money or anything of value to foreign public officials with the intent to obtain or retain business.

The accounting provisions require public companies to have accounting practices that make such payments difficult to disguise.

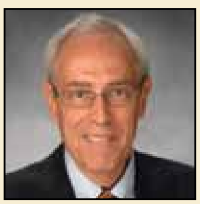
Given that the FCPA prohibits payments to foreign public officials, one of the major challenges for U.S. companies doing business in China is the prevalence of state-owned enterprises in that country. The pervasive presence of the government, both directly and indirectly, in Chinese business makes business dealings there rife with potential FCPA risks.

Another particular concern in China is that the FCPA also prohibits payments to a third party when the U.S. company has reason to believe that such payments may be turned over to a foreign official.

Since "going it alone" is not often a viable option for Americans doing business in China, companies cannot turn a blind eye toward the intermediaries they regularly hire to help conduct business abroad. If such payments raise any suspicion that they could find their way to Chinese government, or other public officials, they must be carefully scrutinized.

A second area of FCPA compliance concerns the accounting provisions for public companies. These rules require that companies keep books, records and accounts that accurately reflect transactions and payments. Public companies must maintain reasonable internal accounting controls to prevent and detect FCPA violations. This includes a system of red flag warnings and accountability whenever overseas payments appear suspect.

The FCPA penalty scheme is complex, including both civil and criminal fines and imprisonment for individual violators. Suffice it to say the penalties are horrific. Given that corruption of public officials in China remains a serious concern, it is essential for companies to devise solid compliance programs which prevent, insofar as possible, FCPA violations. As companies in Arizona continue to take greater advantage of business opportunities in China, executives must develop a strategy to avoid violations of the FCPA.



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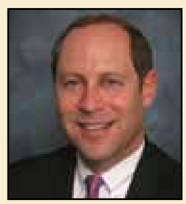

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