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Practical considerations for implementing an internal fair market value policy

by Segev Shani

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Worldwide, many acts and laws prohibit the act of bribery, either internally in their territory or externally in other territories, with the U.S. Foreign Corrupt Practices Act (FCPA) being the most known and enforceable act of law. As business organizations are implementing compliance programs in order to comply with all laws and regulations, one important aspect of such a program is the anti-bribery policy of the organization. In order to avoid excessive payments that might be interpreted as an act of bribery, organizations are required to assure that the payment they provide to a service provider is of fair market value (FMV).

FMV is defined as the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

However, without a definition of an internal procedure for determining FMV, any company could end up facing a federal prosecutor whose views define the concept of FMV differently. Therefore, each company needs to establish an FMV policy and program that can demonstrate a consistent and logical methodology applied to determining allowed payments, including the establishment of internal thresholds for compensation with an internal calculator.

The objective of this article is to provide some input regarding the practicalities that need to be considered when developing and implementing an internal FMV policy and program that should be robust enough when investigated.

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