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ATTORNEYS AT LAW



THE FOREIGN CORRUPT PRACTICES ACT

I. THE FOREIGN CORRUPT PRACTICES ACT

The Foreign Corrupt Practices Act (FCPA or Act) is a federal law that prohibits companies from obtaining or directing business by paying bribes to foreign governmental officials and political figures. Congress passed the FCPA in 1977 to combat a large number of bribery scandals that damaged corporate financial integrity and caused political unrest in the United States and abroad. It has been amended a number of times, expanding its applicability and scope and relating it to similar anticorruption statutes around the world. The renewed focus on corporate accountability has led to a dramatic increase in the number of FCPA enforcement actions, from 5 in 2004 to 38 in 2007. As of October 2008, there were 91 open FCPA investigations.

The FCPA forbids companies from bribing foreign officials who are officers or employees of any component of a government, any agency or instrumentality thereof, or any public international organization (NGO), or any person acting on their behalf, political parties, political party officials, and candidates for political office. These prohibitions are known as the anti-bribery provisions of the Act. The FCPA also contains accounting provisions which are designed to detect and prevent bribery. The accounting provisions require companies to maintain accurate books and records and institute internal accounting controls. Congress included the accounting provisions because companies often conceal bribery by falsifying their financial records.

The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share responsibility for enforcing the FCPA. In general, the DOJ investigates and prosecutes the anti-bribery criminal violations and the SEC enforces the accounting provisions and related civil securities fraud actions.

Notably, there are serious penalties for violating the Act, including civil penalties, criminal fines, and imprisonment. Moreover, alleged violations expose companies to private civil lawsuits. Thus, companies are advised to develop and strictly enforce compliance programs.

II. ANTI-BRIBERY PROVISIONS

A. Persons and Businesses Prohibited from Making Improper Payments

The anti-bribery provisions of the FCPA cover a broad range of individuals and business entities.¹ The Act applies to “issuers,” “domestic concerns,” and foreign nationals and businesses. Because the FCPA applies to these groups in different ways, it is important to understand the distinctions.

1. Issuers

An issuer is any company that has securities registered in the United States or is required to file periodic reports with the SEC.

An issuer is subject to the anti-bribery provisions if it uses the U.S. mails or any means or instrumentality of interstate or foreign commerce in furtherance of a corrupt payment. “Means or instrumentality of interstate commerce” includes a wide variety of ordinary business activity, such as telephone calls, electronic transmissions, wire transfers, interstate travel, and international travel.

Additionally, an issuer is subject to the anti-bribery provisions if an act is committed outside the United States in furtherance of a corrupt payment. The issuer may be held liable even though the entire corrupt act was performed abroad.

2. Domestic Concerns

A domestic concern may be a person or a business entity. All individual citizens, nationals, and residents of the United States are domestic concerns. Additionally, “domestic concern” includes a business that is a corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or that is organized under the laws of a state, territory, possession, or commonwealth of the United States.

¹ The anti-bribery provisions are codified at 15 U.S.C. §§ 78dd-1 – 78dd-3.

Similar to issuers, domestic concerns may be held liable for an act in furtherance of a corrupt payment which uses the U.S. mails or any means or instrumentality of interstate commerce, or for an act that occurs outside the United States.²

3. Foreign Nationals and Businesses

Foreign nationals and foreign businesses are all persons and business entities that are not defined as issuers or domestic concerns. A foreign national or foreign business may be held liable for any act in furtherance of a corrupt payment which uses the U.S. mails or any means or instrumentality of interstate commerce. Unlike issuers and domestic concerns, foreign nationals and foreign businesses are not liable for acts wholly committed outside the United States.

4. Directors, Officers and Agents

An officer, director, employee, agent, or stockholder acting on behalf of an issuer, domestic concern, or foreign national or business is liable under the same conditions as the issuer, domestic concern, or foreign national or business. For acts wholly occurring outside the United States, only United States persons are subject to liability. The doctrine of respondeat superior applies to the FCPA. Thus, a corporation has vicarious liability for the illegal acts its employees commit while acting within the scope of their employment.

B. Payments

The payment is the core act regulated by the anti-bribery provisions. "Payment" for FCPA purposes extends far beyond its ordinary meaning. Under the Act, a payment includes an offer, payment, promise to pay, gift, promise to give, or authorization to pay, offer, or give anything of value. The phrase "anything of value" is interpreted liberally and may include non-cash items such as excessive meals and entertainment, tax benefits, information, promises of future employment, and scholarships.

² Liability for an act occurring outside the United States is limited to individual nationals and businesses which are organized under the laws of the United States or any state, territory, possession, or commonwealth of the United States. Business entities which are domestic concerns only because they maintain a principal place of business in the United States, and United States residents who are not nationals, are not liable for acts wholly committed outside the United States.

C. Recipients

A payment is only prohibited if it is made to a specified type of recipient. The FCPA prohibits payments made to a “foreign official,” foreign political party, foreign political party official, or candidate for foreign political office.³

“Foreign official” means any officer or employee of a foreign government or a public international organization, any department, agency, or instrumentality thereof, or any person acting in an official capacity on its behalf.⁴ “Foreign official” also includes officers and employees of state-owned or state-controlled enterprises. A company that is partially owned by a foreign government may be considered an “instrumentality” of the government if the government exercises substantial control over the company.

1. Third Party Intermediaries

It is also impermissible to make a payment to any third person if it is “known” that any portion of the payment will be offered, given, or promised, either directly or indirectly, to any prohibited recipient.

For the purpose of using a third party to funnel a corrupt payment, “knowledge” includes deliberate ignorance (also referred to as “conscious disregard” or “willful blindness”). There is no deliberate ignorance if the person actually believes that the prohibited circumstances do not exist.

Third party intermediaries may be joint venture partners or agents. Accordingly, the DOJ advises companies to exercise due diligence and ensure that their business partners are reputable and qualified. Recommended due diligence includes investigating partners’ qualifications, their governmental relationships, and their reputation with the United States government, local banks and clients, and other business partners. The DOJ further recommends to be wary of “red flags” such as unusual financial arrangements or excessive

³ While the anti-bribery provisions do not address private or commercial bribery, such conduct may violate the FCPA’s accounting provisions and may be prohibited by other United States and foreign laws and international treaties.

⁴ A public international organization is an organization designated by Executive Order pursuant to the FCPA or the International Organizations Immunities Act (22 U.S.C. § 288). Examples include the United Nations, the International Committee of the Red Cross, and the European Space Agency.

payments, payments being moved through offshore accounts unnecessarily or in locations known for corruption, unusually high commissions, lack of transparency in accounting records, whether the governmental customer has recommended the business partner, and whether there is a history of corruption in the country. A company should also be cautious of a partner which refuses to certify that it does not violate, nor will it cause the company to violate, the FCPA or any similar anti-bribery statute.⁵

D. Corrupt Intent

Because preventing corruption is the purpose of the anti-bribery provisions, liability is limited to payments made with a corrupt intent. A payment is made with a corrupt intent if its purpose is to (1) influence any official act or decision of the recipient, (2) induce the recipient to do or not do any act in violation of that person's lawful duty, (3) secure any improper advantage, or (4) induce the recipient to use his or her influence to affect or influence any governmental act or decision. The payment may be impermissibly corrupt even if it does not succeed in its purpose.

E. Business Purpose Test

In addition to a corrupt intent, a payment must be made to obtain, retain, or direct business to any person or business entity. The DOJ advises that it interprets this requirement broadly: it covers more than the award or renewal of a contract, the business need not be with the foreign government, and the beneficiary may be any person or business.⁶

F. Exceptions

There are three types of payments for which a person or company is not liable: (1) payments that facilitate routine governmental actions; (2) payments that are lawful in the relevant foreign country; and (3) reasonable and bona fide expenditures.⁷

⁵ See Department of Justice, Lay-Person's Guide to FCPA, available at <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> (last visited Mar. 1, 2009).

⁶ See Department of Justice, *supra* note 5.

⁷ The latter two exceptions are technically referred to as affirmative defenses, meaning the person or company accused of making an improper payment bears the burden of proving their applicability.

It is not a valid defense to claim that the country's business customs required the payment or that the recipient requested the payment.

1. Payments for Routine Governmental Actions

So-called "grease" or "facilitating" payments are not prohibited. These are payments that expedite or secure the performance of a "routine governmental action" by a foreign official, foreign political party, or foreign political party official.

A "routine governmental action" is a non-discretionary act commonly performed by a foreign official. The FCPA lists the following as examples: obtaining permits, licenses, or other official documents to qualify a person to do business; processing governmental papers such as visas and work orders; providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; and providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration. Similar actions are also included in the exception.

Routine governmental action does not include any decision by a foreign official whether, or on what terms, to award new business or to continue business with a particular party. It also does not include any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business or to continue business with a particular party.

2. Lawful under Foreign Law

A payment is not prohibited if it is lawful under the written laws and regulations of the relevant foreign country.

3. Reasonable and Bona Fide Expenditures

There is no liability for a payment which is a reasonable and bona fide expenditure directly related to the promotion, demonstration, or explanation of products or services, or directly related to the execution or performance of a contract. Examples of reasonable and bona fide expenditures are reasonable travel and lodging expenses. Entertainment expenses and excessive per diem allowances are generally not reasonable and bona fide.

The DOJ recognizes that this exception is vulnerable to abuse and prosecutes companies which conceal improper payments as permitted expenditures.

G. Attorney General Opinions

Issuers and domestic concerns can receive written guidance from the Attorney General on whether certain conduct would, for purposes of the DOJ's current enforcement policy, violate the FCPA's anti-bribery provisions. The advice cannot be for hypothetical situations; instead, the request must specify exact facts related to actual prospective conduct. The Attorney General will not offer opinions on past acts.

If the Attorney General issues an opinion declaring that the proposed conduct does not violate the anti-bribery provisions, then the requester is presumed to be in conformity for that conduct. Nevertheless, the government may subsequently bring an enforcement action and rebut the presumption of conformity if warranted upon considering all relevant factors. For example, the requester may lose its presumption of conformity if the information it submitted was not accurate and complete or if its actual conduct exceeded the scope of conduct described in its request.

The Attorney General Opinion procedure has not been heavily utilized, with only 47 opinions released since 1980.⁸ Nevertheless, the Opinions offer valuable insight into the DOJ's interpretation of the anti-bribery provisions and its current enforcement policies. Companies are encouraged to review past Opinions, but they should recognize that the presumption of conformity is limited to the actual requester and does not extend to other parties which rely upon past Opinions.

III. ACCOUNTING PROVISIONS

The FCPA's accounting provisions apply only to issuers (companies which have securities registered in the United States or are required to file periodic reports with the SEC).⁹ While the purpose of the accounting provisions is to detect and prevent violations of the anti-bribery provisions, the accounting provisions apply to a broader range of conduct and may be violated despite lacking any

⁸ All past Attorney General Opinions are available at <http://www.usdoj.gov/criminal/fraud/fcpa>.

⁹ The accounting provisions are codified at 15 U.S.C. § 78m(b)(2).

connection to an improper payment. Moreover, unlike other securities laws, the accounting provisions may be violated even if the wrongful act is not material.

A. Books and Records

The accounting provisions require every issuer to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer's assets.

A company may be liable if its records omit a transaction, such as a bribe, illegal commission, or other improper payment. Other types of violations include disguising records to conceal improper aspects and failing to identify the improper nature of an otherwise properly recorded transaction.

B. Internal Controls

Issuers are also required to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (1) transactions are executed in accordance with management's authorization; (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other applicable criteria, and to maintain accountability for assets; (3) access to assets is permitted only in accordance with management's authorization; and (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

C. Prudent Person Standard

The reasonableness required by the accounting provisions is defined as the level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

D. Liability for Acts of Subsidiaries

Issuers are often held liable for the conduct of their foreign subsidiaries, even if the improper conduct occurred entirely abroad. Liability is often based on the issuer's incorporation of the subsidiary's financial statements in its own records and SEC filings. The issuer's incorporation of a subsidiary's improper records may result in a books and records violation, and the failure to prevent or discover a subsidiary's conduct may support an internal controls violation.

E. Obligations of Minority Owners

An issuer that owns 50 percent or less of the voting power of another company is subject to modified accounting provisions. Under the modified provisions, the issuer must proceed in good faith to use its influence, to the extent reasonable under the circumstances, to cause the company to devise and maintain a system of internal accounting controls. The relevant circumstances include the issuer's degree of ownership and the laws and practices of the country in which the company is located. These modified provisions apply whether the other company is foreign or domestic. Moreover, the modified provisions do not impose any books and records obligation on the issuer.

F. National Security Exception

The accounting provisions do not apply if an issuer's liability results from its cooperation with the federal government on a matter concerning national security.

G. Criminal Liability

Individuals and business entities may be criminally prosecuted for violations of the accounting provisions. However, criminal liability may only be imposed if the person or entity knowingly falsifies a book, record, or account, knowingly circumvents a system of internal controls, or knowingly fails to implement a system of internal controls. There is no criminal liability for mere mistakes or negligence.

H. Sarbanes-Oxley Act

The Sarbanes-Oxley Act requires senior management to certify, under threat of criminal prosecution, that financial statements filed with the SEC fully comply with certain legal obligations, including the FCPA's accounting provisions. Senior management are also required to certify, under threat of civil penalty, that they are responsible for establishing and maintaining internal controls and have evaluated the internal controls within the past 90 days. Accordingly, senior management may expose themselves to liability if they certify statements which fail to disclose known violations. These obligations have led to an increased number of self-reported FCPA violations based on the assumption that companies will receive lighter sanctions, and perhaps avoid criminal prosecution, if they voluntarily disclose violations.

IV. PENALTIES

The DOJ and SEC both have enforcement responsibilities. The SEC generally takes the lead role in enforcing violations of the accounting provisions, and the DOJ has primary responsibility for enforcing the anti-bribery provisions. Both agencies may institute civil actions, but only the DOJ is authorized to file criminal charges.

A. Anti-bribery Provisions

1. Individuals

An individual who violates the anti-bribery provisions may be subject to a civil penalty up to \$10,000. An individual may also be criminally fined up to \$250,000 and/or imprisoned up to 5 years. Under the Alternative Fines Act, the fine may be increased to twice the gross financial gain to the person or twice the gross financial loss to any other person or entity. A criminal fine imposed on an individual cannot be paid either directly or indirectly by the company on whose behalf the person acted.

2. Business Entities

A business entity which violates the anti-bribery provisions may be subject to a civil penalty up to \$10,000. A business entity may also be criminally fined up to \$2 million. As with individuals, the Alternative Fines Act may increase the criminal fine to twice the gain or loss resulting from the corrupt payment.

B. Accounting Provisions

1. Individuals

An individual who violates the accounting provisions may be subject to a civil penalty up to \$100,000. An individual may also be subject to a criminal fine up to \$5 million or twice the gain or loss caused by the violation, and/or imprisonment up to 20 years. The fine cannot be paid directly or indirectly by the company on whose behalf the person acted.

2. Business Entities

A business entity which violates the accounting provisions may be subject to a civil penalty up to \$500,000. A business may also be subject to a criminal fine up to \$25 million or twice the gain or loss caused by the violation.

C. Recent Fines

Following are fines from recent FCPA violations:

Defendant	Country	Violation	Fine (in millions)
Siemens AG (2008)	Argentina; Bangladesh; France; Venezuela; Iraq; Turkey	Anti-bribery; accounting	\$800
Kellogg Brown & Root LLC, KBR, Inc., Halliburton Company (2009)	Nigeria	Anti-bribery; accounting	\$579
Baker Hughes Inc. (2007)	Angola; Indonesia; Kazakhstan; Nigeria; Russia; Uzbekistan	Anti-bribery; accounting	\$44
Willbros Group, Inc. (2008)	Bolivia; Ecuador; Nigeria	Anti-bribery; accounting	\$32.3
Chevron Corp. (2007)	Jordan; Iraq; Lebanon	Accounting	\$30
Vetco International Ltd. (2007)	Nigeria	Anti-bribery	\$26
York International Corp. (2007)	Bahrain; China; Egypt; India; Iraq; Jordan; Nigeria; Turkey; United Arab Emirates	Anti-bribery; accounting	\$22
Statoil ASA (2006)	Iran	Anti-bribery; accounting	\$21
AB Volvo (2008)	France; Iraq; Jordan; Sweden; Tunisia	Accounting	\$19.6
ABB Ltd. (2004)	Angola; Kazakhstan; Nigeria	Anti-bribery; accounting	\$16.4
Schnitzer Steel Industries, Inc. (2006)	China; South Korea	Anti-bribery; accounting	\$15.2
Flowserve Corp. (2008)	France; Netherlands; Iraq; Jordan	Accounting	\$10.6

D. Other Government Sanctions

Individuals and companies that violate the FCPA may be suspended or barred from contracting with the government. In fact, indictment alone may lead to suspension. Under current federal policy, the suspension or debarment of a business by one agency disqualifies it from contracting with any government agency. Other penalties include ineligibility to receive export licenses and SEC suspension or debarment from engaging in the securities business.

V. COMPLIANCE PROGRAMS

An effective compliance program is essential to minimizing liability or preventing FCPA violations entirely. In addition, a thorough and well-enforced compliance program may assist a company in its dealings with the government should a violation arise.

A proper compliance program begins with a strict no-bribery policy. Employees and agents, particularly those working in vulnerable positions, should receive regular education on anti-bribery laws and sign certifications affirming that they understand and will follow the company's policy. Employees should also know who to contact for further guidance or to report possible violations.

Compliance programs should also address third party relationships by requiring joint venture partners and agents to verify their compliance with anti-bribery laws. Due diligence policies should direct a detailed investigation into joint venture partners, agents, and targets of prospective mergers and acquisitions. Finally, regular reviews of the compliance program are essential to ensure that the policy is properly designed and followed.

VI. CURRENT TRENDS

A. Increased Enforcement

The federal government has dramatically increased its enforcement of the FCPA in recent years. The SEC continues to use the accounting provisions of the FCPA to prevent and punish the high-profile corporate accounting and management scandals that have marked the past decade. Additionally, the

United Nations Oil for Food Program scandal continues to lead to many prosecutions under both parts of the Act.

As of October 2008, the total number of open FCPA investigations against corporations was 91. The SEC alone has brought 38 FCPA cases since January 2006. To put that figure in context, in the late 1990s the SEC handled about one FCPA case per year. A similar trend is reflected in the DOJ's recent enforcement activity, where the increased scrutiny is expected to continue as the DOJ has added lawyers specializing in FCPA enforcement.

B. Private Lawsuits

Private individuals do not have the right to bring a lawsuit directly under the FCPA. Nevertheless, plaintiffs are increasingly filing other, traditionally permitted types of lawsuits based on companies' alleged FCPA violations. These lawsuits are often brought as securities class actions or shareholder derivative suits. Additionally, companies which lose business due to another company's improper payments are filing lawsuits based on antitrust laws, the Racketeer Influenced and Corrupt Organizations Act (known as RICO), and common law prohibitions on interference with contract and unjust competition.

VII. CONCLUSION

Federal officials are increasingly prosecuting companies for violating the Foreign Corrupt Practices Act. This trend is expected to continue, partly based on the certification and review obligations imposed on management by the Sarbanes-Oxley Act. Noncompliant companies and individuals are subject to severe civil and criminal penalties, and private third party lawsuits often follow the federal charges. Companies are advised to implement and monitor strict compliance programs, including evaluations of potential business partners and due diligence for prospective mergers and acquisitions.

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