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Business in a Global Society:

**A Guide to Understanding the
Foreign Corrupt Practices Act**

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- **History of the Foreign Corrupt Practices Act (FCPA)**
- **FCPA Overview**
- **Anti-Bribery Provisions**
- **Enforcement of the Anti-Bribery Provisions**
- **Accounting Provisions**
- **Know Your Business Partners**
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History of the Foreign Corrupt Practices Act (FCPA)

In the mid 1970s, the Securities Exchange Commission (SEC) discovered that 450 companies had made questionable or illegal payments in excess of \$300 million to foreign public officials. In 1977, Congress enacted the Foreign Corrupt Practices Act (FCPA) as a means to stop the bribery of foreign officials and in an attempt to change the way U.S. firms conducted business overseas. In the 1980s, Congress began to realize that American companies were at a disadvantage as foreign companies routinely paid bribes and could even deduct them as a business expense. As a result, the U.S. government sought to negotiate an agreement with its major trading partners to pass similar legislation. In 1997, the United States and 33 other trading partners signed the Organization of Economic Cooperation and Development (OECD) Convention on combating bribery of foreign public officers in international business transactions.



FCPA Overview

The FCPA contains two complementary sets of provisions: the anti-bribery and books and records provisions. The first prohibits the bribery of foreign public officials. The second requires publicly traded companies to maintain an adequate system of internal accounting controls and to keep proper accounting standards that provide an accurate and fair reflection of the transactions of the corporation.

Anti-Bribery Provisions

The FCPA prohibits both U.S. and foreign corporations and nationals from offering, paying or authorizing the offer or payment of anything of value to a foreign government official, foreign political party, party official, candidate for foreign public office or to any official of a public international organization in order to obtain or retain business.



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Red Flags

There are a number of red flags that may indicate a violation of the FCPA, including:

- Unusual payments or financial arrangements.
- A family relationship between participants and government officials.
- A history of corruption in a particular country.
- A refusal by a foreign joint venture partner or agent to provide verification that it will abide by the FCPA.
- Unusually high commissions as compared to the value of the transaction.
- Lack of transparency in expenses and accounting records.
- Apparent lack of qualifications or resources to perform the services offered.
- Referral of a joint venture partner or agent by a government official.

The Violator: Issuer, Domestic Concern, Foreign National or Business

U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an “issuer,” a “domestic concern” or a foreign national or business. An “issuer” is a corporation that has issued securities that have been registered in the United States or someone who is required to file periodic reports with the U.S. SEC.

A “domestic concern” is any individual who is a citizen, national or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship that has its principal place of business in the United States or is organized under the laws of a state of the United States or a territory, possession or commonwealth of the United States. “Issuers” and “domestic concerns” may be held liable under either territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, “issuers” and “domestic concerns” are liable if they take any act in furtherance of a corrupt payment to a foreign official using the U.S. mail or other means of interstate commerce. For acts taken outside of the United States, U.S. issuers and domestic concerns are liable if they take any act in furtherance of a corrupt payment, even if the offer, promise or payment is accomplished without any conduct within U.S. territory. In addition, U.S. parent corporations or U.S. citizens or residents employed by or acting on behalf of foreign-incorporated subsidiaries may be held liable for the acts of their foreign subsidiaries where they authorized, directed or controlled the activity in question.



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Corrupt Intent

Under the FCPA, the person making or authorizing the payment must have a corrupt intent. When such intent is present, the FCPA prohibits offers, gifts, corrupt payments or promises to foreign officials, foreign political party officials or foreign candidates for office, for the purpose of influencing official acts or decisions in order to obtain, retain or direct business. The FCPA does not require that a corrupt act succeed in its purpose. The offer or promise of the corrupt payment alone can constitute a violation of the statute.

Lawful Payments and Affirmative Defenses

The FCPA allows for certain affirmative defenses that can be used to defend against alleged violations, of the FCPA. A person charged with a violation of FCPA anti-bribery provisions may assert a defense that the payment was lawful under the written laws of the foreign country or that money was spent as part of demonstrating a product or performing a contractual obligation. To invoke an affirmative defense, a defendant is required to show in the first instance that the payment met these requirements.

Enforcement of the Anti-Bribery Provisions

Criminal Penalties

The U.S. Department of Justice (DOJ) is responsible for all criminal investigations and prosecutions. The sanctions against bribery are severe. Corporations and other business entities are subject to a fine of up to \$2 million per violation, and officers, directors, stockholders, employees and agents (including non-U.S. nationals) are subject to a fine up to \$100,000 and imprisonment for up to five years. Under the Alternative Fines Act, the actual fine may be up to twice the amount of the benefit that the defendant sought to obtain by making the corrupt payment. In addition, fines imposed upon individuals may not be paid by their employer or principal.



A violation of the FCPA may also result in a civil and criminal forfeiture of assets. Any property, real or personal, that constitutes or is



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derived from proceeds traceable to a violation of the FCPA or a conspiracy to violate the FCPA may be forfeited.

Civil Penalties

In addition to criminal investigations and prosecutions, the Attorney General or SEC may bring a civil action for a fine up to \$10,000 to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent or stockholder acting on behalf of the firm) is in violation (or about to be) of the FCPA anti-bribery provisions.

Other Sanctions

A person or firm found in violation of the FCPA may be ruled ineligible to receive export licenses and/or be barred from doing business with the federal government or from participating in any procurement or non-procurement activity. Indictment alone can lead to suspension of the right to do business with the government. Additionally, the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA. Similarly, the Commodity Futures Trading Commission and the Overseas Private Investment Corporation may suspend persons from agency programs for breach of the FCPA anti-bribery provisions.

Contravention of the FCPA may give rise to a private cause of action for treble damages by a competitor who alleges that foreign contact was won as a result of bribery. This remedy may also result in a possible source of information for authorities.

Accounting Provisions

The FCPA requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require issuers to make and keep books and records that accurately and fairly reflect the transactions and dispositions of the assets of the corporation. Such corporations must devise and maintain a system of



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internal accounting controls adequate to provide reasonable assurances that:

- Transactions are executed in accordance with management's authorization;
- Transactions are recorded as necessary to enable preparation of financial statements in accordance with GAAP and to maintain accountability of assets;
- Assets are accessed only as permitted and in accordance with management's authorization; and
- Recorded assets are periodically compared with existing assets and the differences are addressed.

The issuer is also responsible for the books and records of subsidiaries over which it exercises control. The willful circumvention of or failure to implement a system of internal accounting controls, or willful falsification of an issuer's books, records or accounts, in violation of Title 15, United States Code, Section 78(m), is a criminal offense, whether such falsification is related to the FCPA.

Know Your Business Partners

Partnerships can pose potential risks to companies conducting business overseas. As a result, companies should evaluate the competence and experience of joint venture partners, agents (consultants, contractors, lawyers, etc.) and intermediaries by examining or auditing their books and inquiring about relationships they have with government officials.

Agents

Bribery is often done through an intermediary such as an agent, spouse, relative, friend, consultant, etc. It is a violation to bribe through an agent when the principal knew or should have known there would be a bribe. For example, hiring a "connected" consultant for too much money and turning a blind eye to his or her activities equates to bribery if the consultant then offers money to a government official. In order to avoid problems with agents, the company should:

- Obtain certifications from its agents stating that they will comply with the company's policies and the requirements of the FCPA;
- Investigate agents that they do not know; and
- Require their agents to keep records of expenditures made on the company's behalf.

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Joint Ventures

Pitfalls can also arise when a company partners with another company through a joint venture. Joint ventures can be problematic as one company may find itself liable for the wrongdoing of a partner in a joint venture. A company cannot claim ignorance when there is a reason to be suspicious. In order to avoid problematic joint ventures, companies should conduct due diligence in advance, include a walk-away provision for suspected FCPA violations and ensure compliance policies are in place.

Mergers and Acquisitions

The government expects due diligence regarding the FCPA prior to any merger or acquisition. Due diligence requires a careful review of the FCPA compliance of the entity being acquired, including assessing the strengths and weaknesses of the target companies' anti-corruption policy, internal controls and training as well as the adequacy of its books and records. Any history of prior violations must be thoroughly reviewed. Moreover, the acquiring entity must determine if any potential violation discovered in the due diligence process must be disclosed to the government. Accordingly, it is critical that the merger or acquisition agreement include full rights to conduct due diligence prior to closing as well as protection for the acquiring entity should FCPA issues be discovered.



Compliance

Reporting FCPA Violations

If there is knowledge or suspicion of corruption or theft, fraud, extortion or forgery or uttering of a forged document involving \$100,000 or more, the “person in authority” has the duty to report the offense. Those recognized as holding a position of authority include: the director general of the national/provincial department; public officer in senior management services of a public body; and the CEO or equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute or any other organization established by contract, legislation or legal means.



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Good corporate governance requires that business policies be put in place regarding the reporting of improprieties in relation to business activities. Staff should be trained on how to recognize and report an impropriety and should be able to report violations without fear of victimization or occupational detriment. A company may want to consider establishing an incentive system to encourage staff to report crimes and irregularities.

Key Elements of an Effective FCPA Compliance Program

A proactive and documented compliance program will be taken into consideration by regulators in the advent of a subsequent FCPA investigation.

Risk Assessment

Assessing an organization's exposure to bribery and corruption requires the company to do an in-depth risk assessment of its business, focusing on:

- Products and services provided. Certain industries such as defense, medical equipment, oil and energy, communications and those involved in large infrastructure projects are at higher risk.
- Customers with whom it conducts business, specifically foreign governments or agencies.
- Geographies in which it does business, particularly "high risk" bribery and corruption jurisdictions.
- Distribution channels, paying particular attention to work done through intermediaries or consultants.

Investigative Due Diligence

Investigative due diligence (IDD) is the proactive identification of risks not ordinarily apparent from financial or legal reviews. It includes applying exploratory techniques developed by law enforcement agencies, analyzing large volumes of publicly available information and identifying red flags. All parties represent a degree of risk to an organization (employees, customers, business partners, etc.) and identifying and evaluating these risks ensures that they are appropriately addressed and that financial, legal or reputational damage is mitigated.

Policy and Procedures

An organization should establish a clearly defined FCPA compliance policy that is fully supported and endorsed by the board of directors



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and senior management. It should include conduct codes and internal controls over accounting and general ledger maintenance, expense claim management, bid and tendering, etc. The FCPA compliance policies and procedures should clearly reference what is and is not acceptable, providing illustrative examples, and focus on “grey areas.” For example, in the case of facilitating payments, small facilitating payments, such as customs clearance, are not considered a violation of the FCPA, but this is a narrow defense under U.S. law. Employees should consult the general counsel or their FCPA compliance officer before making any payment, even if it is thought to be just a facilitating payment. Employees and organizations should also be aware of non-defenses that will not hold up in court such as claiming “everybody does it in this country,” turning a blind eye and ignorance.

FCPA Compliance Officer

A company should designate an FCPA compliance officer. The position should report to the chief of compliance and the board of directors and have the full support of senior management and the board of directors. The FCPA compliance officer should be given the authority to coordinate FCPA compliance activities, including oversight over high-risk jurisdictions.

Training

The compliance policy needs to be communicated to and understood by all relevant employees as well as overseas intermediaries, agents, consultants and other third parties through a comprehensive training program. The training should cover: a code of conduct; policies and procedures, including an anti-bribery and corruption policy; penalties for noncompliance; contact information; confidential reporting lines; and whistle-blower protection. Personnel who have completed the program should receive certification of compliance.

Current FCPA Trends

Surge in Cases

Enforcement of the FCPA is at an all-time high. The DOJ and SEC brought twice as many cases in 2008 as they had the previous year. This pace continued through 2009 with the number of enforcement actions only marginally below that of 2008.

Globalization of Anti-Corruption Enforcement

FCPA prosecutions increasingly involve non-U.S. companies. As one investigation can trigger others in separate jurisdictions, there has been



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a trend towards increased coordination and collaboration between foreign enforcement agencies. In 2008, the DOJ sent 48 letters of request for Mutual Legal Assistance Treaties (MLAT) and is involved in multiple multijurisdictional investigations with anti-corruption officials across Europe and Asia.



Escalating Penalties

Penalties and disgorgements have increased as evidenced in some recent FCPA violation cases:

- Baker Hughes Inc., \$44.1 million
- Siemens, \$1.9 billion
- Kellogg Brown & Root LLC, \$579 million

In addition, these organizations incurred significant legal, consulting and remediation fees. Siemens paid more than \$1 billion in investigative and remediation fees.

Conclusion

It is extremely important for all companies to have an effective corporate compliance program to prevent and detect violations of the FCPA and similar anti-corruption laws, both domestic and foreign, and to ensure that their books and records are legally compliant. Having an effective corporate compliance program in place may prevent a violation from occurring in the first instance. However, if a violation does occur, a diligently enforced compliance program is a mitigating factor considered by the Justice Department in exercising prosecutorial discretion and by the court in imposing a fair and just sentence.

Additional Resources

- [9-47.00 Foreign Corrupt Practices Act of 1977](#)
- [Lay Person's Guide to FCPA Antibribery Provisions](#)
- [Anti-Bribery and Books and Records Provisions of the FCPA](#)
- [Inter-American Convention Against Corruption](#)
- [OECD Convention Combating Bribery of Foreign Public Officials in International Business](#)
- [Principles of Federal Prosecution of Business Organizations](#)
- [U.S. Department of Justice: United States v. Siemens](#)



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- [U.S. Securities and Exchange Commission: SEC v. Nature's Sunshine Products, Inc.](#)
- [FCPA Opinion Procedure](#)
- [Opinion Procedure Release 08-02 – No. 9-01 – August 3, 2009](#)
- [Opinion Procedure Release 08-02 – No. 8-02 – June 13, 2008](#)
- [Questions for Regarding Exported Potential ITAR Products](#)

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