

Foreign Corrupt Practices Act Considerations

1. The US Foreign Corrupt Practices Act (“FCPA”) is a “top priority” for US law enforcement.
 - 1.1 Before 2000, only a small number of FCPA bribery cases were brought by the US Department of Justice and the US Securities and Exchange Commission.
 - 1.2 Since 2000, and the implementation of the OECD Convention, there has been a steady and dramatic increase in the number of FCPA cases.
 - 1.2.1 While only five such cases were brought in 2004, 40 were brought in 2009, and there is every indication that the government will be much more aggressive in 2010.
 - 1.3 Enforcement of this law increased significantly under the Bush administration, but the Obama Administration has declared it to be one of the Justice Department’s “top priorities.”
 - 1.3.1 Last summer, senior Justice Department officials were candid about their plans to prosecute individuals as well as companies, noting that the only credible way to deter foreign bribery is to put people in jail.
 - 1.3.2 Earlier this year, the head of the Justice Department’s criminal division promised to be “proactive and innovative” in enforcing the law – one example of which is that prosecutors are using undercover techniques typically reserved for narcotics and organized crime cases. In January, FBI agents posing as representatives of an African defense minister conducted a “sting” operation, arresting one man in Miami and 21 others at a trade convention in Las Vegas, and charging them with attempted bribery in connection contracts to provide uniforms and weapons.
 - 1.3.3 The Securities and Exchange Commission (SEC), which also enforces the FCPA, recently announced that its investigators are now using methods customarily employed by criminal prosecutors, such as paying informants and offering immunity. The head of the SEC’s Enforcement Division, who is himself a former criminal prosecutor, called this a potential “game changer.”
 - 1.4 As the 2008 Siemens case and others reflect, there is increasing international cooperation among law enforcement authorities.
 - 1.4.1 Unhappy with the efforts of other OECD nations to enforce their anti-bribery laws, US authorities have also targeted foreign companies where they are able to assert jurisdiction over their activities.
 - 1.5 Violations of the FCPA can result in significant civil and criminal penalties, for companies and for individuals, as well as significant reputational damage.
 - 1.5.1 Violations may also affect a company’s ability to participate in government contracts, or to obtain certain export permits.
 - 1.6 Law enforcement officials are seeking to put even more pressure to assure compliance with this law – and are now putting much more emphasis on very large fines, criminal prosecutions and on prosecutions of individuals.

- 1.6.1 The head of the Justice Department's Criminal Division recently said that "the prospect of prison sentences for individuals should make it clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.
 - 1.6.2 The fact is, any US company engaged in international business faces risks under the FCPA.
2. Who is subject to the FCPA?
 - 2.1 The FCPA applies to any action that takes place in US territory.
 - 2.1.1 US law enforcement authorities have interpreted this very aggressively, to include any course of action that has any connection with the US banking system or with US communications networks – even if there is no other point of contact with the US.
 - 2.2 The FCPA also applies to the actions of "US persons" no matter where they take place. US persons include both US companies, and US citizens and permanent residents.
3. Elements of FCPA liability.
 - 3.1 In general, the FCPA's anti-bribery provisions make it illegal to:
 - 3.1.1 Pay, or promise to pay anything of value,
 - 3.1.2 To any official of a foreign government or foreign political party,
 - 3.1.3 In order to obtain or retain business, or to gain any other improper advantage.
 - 3.2 Corrupt.
 - 3.2.1 Not every gift or payment to a foreign official is against the law.
 - (a) The FCPA prohibits "corrupt" payments – payments that are made for an improper purpose, to get something that you're not entitled to.
 - (i) To "obtain or retain business," or
 - (ii) To gain some other kind of improper advantage.
 - 3.3 Anything of value.
 - 3.3.1 This can include not only money but things like expensive gifts or entertainment; travel and lodging; the opportunity to make an investment on preferential terms; or providing a job to the relative of an official.

- 3.4 Pay or promise to pay.
 - 3.4.1 You don't even have to actually follow through to run afoul of the law --- the law prohibits both payments and "offers" or "promises" to pay.
 - 3.5 Directly or indirectly.
 - 3.5.1 This includes things provided directly to a foreign official, and things provided "for the benefit of" the foreign official.
 - 3.5.2 It also makes no difference whether you do something yourself, or if you hire someone to do it for you – you're still responsible for it.
 - 3.6 To a foreign government official.
4. Key risks under the FCPA.
- 4.1 Who is a foreign official?
 - 4.1.1 Elected and appointed officials of any foreign government, at any level, as well as employees of government agencies.
 - 4.1.2 Political parties and their employees, as well as candidates for public office.
 - 4.1.3 Persons working for public international organizations, like the International Monetary Fund and the World Bank.
 - 4.1.4 Officials and employees of state-owned and state-controlled enterprises, *even those engaged in ordinary commercial activities.*
 - 4.2 Liability for actions of third parties.
 - 4.2.1 The law prohibits what it calls any "knowing" act in furtherance of an improper payment – but this concept of "knowing" includes not only what you actually "know" – it also includes situations where one consciously avoids knowing that an improper payment will be made, or consciously disregards circumstances indicating a high likelihood that an improper payment will be made.
 - 4.2.2 In other words, you can be "deemed" to have knowledge, even where you don't have "actual knowledge."
 - (a) This is intended to hold people responsible where they "turn a blind eye" to misconduct, or "bury their heads in the sand."
 - (b) What it also means is that you can be liable for what an employee does, or for what an agent or other intermediary hired by the company does, if the circumstances should have alerted you to the fact that it was very likely that an improper payment was going to be made.

4.2.3 As a result, there may be corporate and/or personal liability under the FCPA for the actions of:

- (a) Employees.
- (b) Foreign subsidiaries.
- (c) Agents and intermediaries.
- (d) *Even for actions that were unauthorized or unknown.*

5. FCPA compliance.

5.1 US companies seek to reduce their risks of violating the FCPA by implementing a corporate compliance program directed at preventing and detecting improper payments.

5.1.1 Although U.S. law does not expressly require companies to have an FCPA compliance program, in practice U.S. law enforcement policy creates powerful incentives for every company involved in international commerce to take meaningful steps to prevent improper payments.

- (a) For those that do so, the consequences of a violation, if one occurs, are likely to be less severe: penalties may be lessened and in some cases, prosecution of the company may be avoided altogether.
- (b) By contrast, the failure to have a program may exacerbate the consequences of any violation that comes to the attention of the authorities.

5.2 Although no organization can prevent every unauthorized action by its personnel or by third parties acting on the company's behalf, the risks of legal liability can be significantly reduced through a well-designed FCPA compliance program.

5.3 In this regard, there are several steps, which can be relatively simple and inexpensive, that every company that may be subject to the FCPA should consider.

5.3.1 Identify the points of contact between your company and foreign government officials.

- (a) Each company has a unique set of circumstances in which it deals with government officials. Understanding when and where these interactions occur – and precisely who is a foreign government official – is the starting point for assessing the company's corruption risks.

5.3.2 Consider whether your existing policies and procedures are sufficient to mitigate the risks identified.

- (a) Effective compliance programs often include:
 - (i) A prohibition of improper payments.
 - (ii) Controls over gifts and entertainment involving government officials.

- (1) Such expenditures do not violate the law so long as they are not excessive in value, and do not occur under circumstances where they could be construed as a bribe or an effort to obtain an improper advantage.
- (iii) Due diligence procedures to evaluate the legitimacy and reputation of third parties that may act on the company's behalf (such as agents, consultants, and other intermediaries) and joint venture partners.
 - (1) As noted above, these parties can create FCPA liability for you, even if you don't know that they are acting improperly.
 - (2) In doing this, one is looking for "red flags" that may suggest potential corruption issues, or a willingness to make improper payments.
 - a. One factor may be the business environment in which you are operating.
 - b. Another is whether the party has a reputation for being involved in corrupt activities.
 - c. Others include:
 - i. Unusual payment arrangements.
 - ii. Unusually high commissions.
 - iii. A lack of skills or resources needed to perform the contract.
- (iv) This due diligence can protect you and the company, and to assure that it does, the policy requires that it be documented and filed, so that if questions later arise, the company can establish that it acted in good faith and without reason to suspect that the third party would make improper payments on its behalf.
- (v) These same types of due diligence procedures have value in connection with joint ventures and in merger and acquisition transactions, to assure that the company does not take on FCPA liabilities by acquiring or partnering with another company.

5.3.3 Provide training to relevant company personnel.

- (a) A written policy alone is unlikely to be effective unless it is effectively communicated to employees and reinforced with periodic training that assures their understanding.

5.3.4 Convey the proper tone from the top.

- (a) As with any other corporate directive, an FCPA policy will be taken seriously only if supervisory personnel show, by words and actions, that the policy is important and must be followed.
- (b) That message should begin with the chief executive and be conveyed throughout the organization.

5.3.5 Monitor and audit compliance with policies and procedures.

- (a) This often includes mechanisms for reporting certain types of payments and expenditures, such as gifts, entertainment expenses, and payments to consultants; annual certifications of compliance by relevant personnel; and internal auditing of selected accounts, such as employee reimbursements and promotional and marketing expenses.

5.3.6 Follow up on "red flags" and take remedial steps as needed.

- (a) If potential corrupt payment issues arise, companies must be prepared to take prompt action and make appropriate inquiry into the situation.
- (b) If a problem is found to exist, companies are expected to take steps both to correct it and to prevent a similar recurrence.
 - (i) Indeed, in many US law enforcement actions, the severity of sanctions appears to have been greatly increased by a pattern of failing to respond to repeated indications that improper payments were being made.