

FCPA Compliance Training

I. WHAT IS THE FOREIGN CORRUPT PRACTICES ACT?

The FCPA prohibits making improper payments to foreign officials (antibribery provision). It also imposes record-keeping and internal controls requirements on all companies subject to SEC jurisdiction. (Accounting provision).

II. WHO IS SUBJECT TO THE ACT?

1. Issuers of publicly-held securities;
2. "Domestic concerns" - A "domestic concern" is defined broadly to include any U.S. citizen, national or resident, and any corporation which has its principal place of business in the U.S. or is organized under U.S. laws. Includes the officers, directors, employees and agents of the domestic concern; and
3. Any natural person committing any act in furtherance of the corrupt payment while within the U.S.

** 1 and 2 can be liable whether or not they took an action in the U.S. in furtherance of the corrupt payment**

III. WHAT IS PROHIBITED?

1. **Payment or promise of a payment** - the offer, payment, promise to pay, or authorization of the giving of money or anything else of value, directly or through a third party;

Notes:

- Includes mere *promise* of a payment, even if payment is never actually made.
- Includes monetary payment or offer of anything of value, including: cash, purchase of something from foreign official at inflated price, offer of something valuable to beneficiary of foreign official.

2. **"Corruptly"**;

Notes:

- For purposes of the FCPA, "an act is corruptly done if done voluntarily, and intentionally, [a]nd with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

3. **To a foreign official** (defined as any officer, employee or other party acting on behalf of any foreign government or any department, agency, or instrumentality thereof, or of a public international organization), **a foreign political party** (or official thereof), or **a candidate for foreign political office**;

Notes:

- Foreign official can include representative of such including employees of state owned companies and quasi-governmental bodies
- Can include private individuals working on behalf of the governmental entity such as government contractors.

4. For **purposes of assisting in obtaining or retaining business** for or with, or directing business to, any person.

Notes:

- Prohibited purpose can include: i) influencing an act or decision of a foreign official in his or her official capacity; ii) inducing that person to do or omit to do an act in violation of his or her official duties; iii) securing any improper advantage; or iv) inducing that person to use his or her influence with a government or instrumentality thereof to affect an act or decision by the government or instrumentality.

IV. WHEN WILL YOU BE HELD LIABLE FOR ACTIONS BY THIRD PARTIES?

The FCPA also prohibits payment, offer to pay / promise to pay to *any person*, “while *knowing* that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official ...”

Notes:

- Payments made to a third party intermediary can also fall under the prohibitions of the Act.
- “Knowing” requirement means not just actual awareness that the third party will make a subsequent improper payment; but also includes a firm belief as to the existence of such circumstance or that such circumstance will occur; or even a high probability of the existence of circumstance.
- Conscious disregard, deliberate ignorance, or “willful blindness” of known circumstances that should alert one to violations of the Act will result in liability. Thus, ignoring warning signs that a third party will make an improper payment does not avoid liability.

V. WHAT ARE THE EXCEPTIONS AND DEFENSES?

Exception 1: Grease payments - Anti-bribery provisions do not apply to “facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or secure the performance of a *routine governmental action* by a foreign official.”

Notes:

- A “routine governmental action” is “an action which is ordinarily and commonly performed by a foreign official in --
 - (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - (ii) processing governmental papers, such as visas and work orders;
 - (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - (iv) providing phone service, power and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration; or
 - (v) actions of a similar nature.”
- A grease payment will cause a person to perform official function faster, not make a different substantive decision or take a discretionary action.

Defense #1: The act is permitted under the written laws of the foreign country.

Note:

- The fact that payments are a common unwritten custom or practice in that country is not an adequate defense.

Defense #2: The payment, gift, offer, etc. was made as a reasonable and bona fide expenditure.

Notes:

- Examples of bona fide expenditures include travel or lodging expenses, directly related to:(a) “the promotion, demonstration, or explanation of products or services”; or (b) “the execution or performance of a contract with a foreign government or agency thereof.”
- Such reimbursement may include the reasonable cost of an official's meals and lodging and a reasonable amount for entertainment. However, there is no exception for expenses unrelated to the promotion of products or performance of a contract.

VI. RECORD-KEEPING AND ACCOUNTING PROVISIONS OF THE FCPA

Corporations must also maintain certain record-keeping and accounting practices to ensure against violations of the FCPA. These requirements apply to any company that is subject to the federal securities laws. Specifically, the company must:

- 1) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the [company]; and

2) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that --

- i. transactions are executed in accordance with management's general or specific authorization;
- ii. transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (2) to maintain accountability for assets;
- iii. access to assets is permitted only in accordance with management's general or specific authorization; and
- iv. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences."

Notes:

- "Reasonable detail" means such level of detail as would satisfy prudent officials in the conduct of their own affairs.
- Provisions do not mandate any particular kind of internal controls system, rather the test is whether the system, taken as a whole, reasonably meets the statute's objectives
- Corporations and individuals can be criminally prosecuted for knowingly failing to implement a system of accounting controls or knowingly falsifying any book, record, or account.

VII. WHAT ARE THE POTENTIAL PENALTIES?

A. Criminal Penalties

Corporations -- \$2 million fine for anti-bribery violations; \$2.5 million for record-keeping violations

Individuals -- \$100,000 fine and five years for anti-bribery violations; \$1 million fine and ten years for record-keeping violations

B. Civil Penalties

Corporations and Individuals -- \$10,000 fine per violation of anti-bribery; SEC may seek fines based on expected profit from transactions up to \$500,000 for corporations; \$100,000 for individuals

C. Collateral Consequences

Debarment - Corporations and individuals may also be barred from doing business with the federal government, deemed ineligible to receive export licenses, suspended from the securities business, and excluded from consideration for various forms of financing and insurance, such as programs offered by the Commodity Futures Trading Commission and Overseas Private Investment Corporation.

RICO lawsuit – Violators may also be subject to third party causes of action such as Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuits that may involve awards of treble damages.

VIII. RED FLAGS

As mentioned above, one can violate the FCPA if (s)he “knows” that a third party is making illegal payments on his or her behalf. The following "red flag" scenarios for alerting an employee to potential violations:

- Off-the-book accounts with diversion of proceeds to a separate account;
- Shell companies created to receive revenues and facilitate transactions;
- Unusual requests, such as to backdate or alter invoices, or for payment by unusual means, such as through bank accounts outside the country where the services are being offered, or to third persons;
- Requests for over-invoicing, checks be made out to "bearer" or "cash," or payments by other anonymous means;
- Payments made in a country with a widespread history of corruption;
- Requests to work without a contract or refusals to certify compliance with the provisions of the FCPA;
- Requests for commissions that are substantially higher than the "going rate" in the foreign country among comparable service providers (especially where the amount or nature of work does not justify the large payments);
- Requests for unusually large credit lines for a new customer, unusually large bonuses or similar payments, or substantial and unorthodox up-front payments;
- Agent or consultant has family or business ties with government officials, or has a bad reputation in the business community;
- Potential government customer or authorizing agency recommends an agent or consultant (reasons for recommendation should be carefully evaluated);

- Agent or consultant appears to lack sufficient staff (or staff qualifications) or resources to perform the services offered, is new to the business, or cannot provide references to document claimed qualifications;
- Information is kept to a small number of officers within the corporation.

In addition, the following situations have a high potential for violations of the FCPA and should be the subject of further inquiry:

- Use of consultants who are connected with the governments or political parties of the countries in which the corporation is doing business;
- Gifts or gratuities to government officials, political candidates, or political party officials or their families in such countries;
- Extravagant entertaining of government officials, political candidates, or political party officials or their families in such countries;
- Use of company facilities by government officials, political candidates, or political party officials.