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Setting precedent.

FOREIGN CORRUPT PRACTICES ACT

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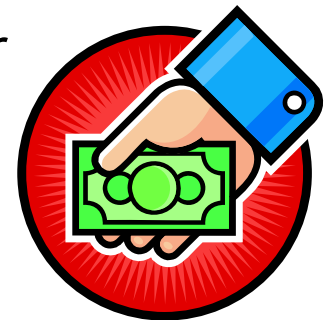
What is the FCPA?

- U.S. law passed in 1977 to prohibit bribery of foreign officials.
- Two key components:
 - Anti-bribery provisions.
 - Accounting provisions that require accurate books and records and adequate accounting controls.



FCPA: Anti-Bribery Basics

Prohibits corrupt offers or payments to foreign government officials, political parties, political party officials or candidates, or officials of public international organizations, or to any person (i.e., intermediary) for payment to such foreign official or candidate or official of public international organization for improper advantage.



Who is Covered by the FCPA?

- **U.S. Person/Company.** Any U.S. person or company, including any officer, director, employee or agent of the company and any stockholder acting on behalf of the company.
- **Foreign Persons in U.S.** All foreign persons who commit act in furtherance of a foreign bribe while in the U.S. Employees of foreign subsidiaries of U.S. companies can be liable for acts committed while in the U.S.
- **U.S. Parent Company for Acts of Subsidiary.** Foreign subsidiaries can cause liability for U.S. parent for acts outside the U.S.
 - “foreign person”
 - “agent” of the company

FCPA Elements

- **Act:** Any act in furtherance of an offer, payment, promise to pay, or authorization of payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value
- **Recipient:**
 - Foreign official
 - Political party, official, or candidate
 - Public international organization official, or
 - Any third person with knowledge that all or a portion will be paid to any of the above
- **Purpose:**
 - Influencing an official act
 - Inducing a violation of a lawful duty
 - Inducing official use influence
 - Securing any improper advantage
- In order to obtain or retain or direct business



One Exception: “Facilitating Payments”

- Also referred to as “grease payments”
- Payments to expedite or secure performance of a routine governmental action by a foreign official, political party or party official
- Limited exception:
 - Only applies to actions which are ordinarily and commonly performed by the foreign official
 - Does not include any discretion or decision making

Affirmative Defenses

- **Lawful Payment.** Payment was lawful under the written laws and regulations of the foreign country, or
- **Reasonable Payments.** Payments for reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by the foreign official and directly related to:
 - The promotion, demonstration or explanation of products or services, or
 - The execution or performance of a contract with a foreign government

Punishment for Violations

- Dual Enforcement by DOJ and SEC
 - Department of Justice can bring civil and criminal enforcement actions
 - SEC can bring civil enforcement actions
- Penalties can include:
 - Imprisonment
 - Fines
 - Loss of expert licenses
 - Disgorgement
- Local authorities in foreign country can bring action for violation of domestic anti-bribery laws



Punishment (cont.)

- Violations by an Individual:
 - Civil: up to \$10,000 per violation
 - Criminal:
 - Willful violation of accounting provisions: up to \$1MM fine and 10 years in prison; with passage of Sarbanes-Oxley, up to \$5MM fine and up to 20 years in prison
 - Willful violation of anti-bribery provisions: up to \$100,000 fine and 5 years in prison
- Violation by a Corporation or Business Entity:
 - Civil: up to \$10,000 per violation
 - Criminal:
 - Willful violation of accounting provisions: up to \$2.5MM; with passage of Sarbanes-Oxley, up to \$25MM fine
 - Willful violation of anti-bribery provisions: up to \$2MM
 - Higher fines available under alternative fines provision
 - Corporations may also be banned from transactions with U.S. government entities

Example 1

- Company Corp. sought to obtain business contracts with Country A.
- Company Corp. worked with its lawyer in Country A to arrange payments to the foreign official overseeing the contract selection.
- Company Corp. itself did not make any payments to the foreign official.

Since Company Corp. worked with a lawyer and did not make any direct payments to the foreign official, did its conduct violate the FCPA?

Example 1 (cont.)

- Yes, the conduct still violates the FCPA
- Real world example: General Electric executive used an Israeli attorney to set up a payment scheme to an Israeli government official.
 - Executive was charged with violations of the FCPA, wire fraud, money laundering and conspiracy.
 - Executive plead guilty and was sentenced to 7 years in prison/\$1.7 million forfeiture .
 - Israeli attorney and foreign official were also charged, but failed to appear before U.S. courts.
- Working with an attorney will not insulate conduct that violates the FCPA.

Example 2

- International Inc. (Int'l) is a U.S. company.
- Int'l entered into a contract to sell product to Country B.
- Int'l provided the products in accordance with the contract.
- Country B failed to pay Int'l as promised.
- Through its broker in Country B, Int'l arranged payment to a senior government official who had power to authorize payment of the balance owed to B.

Would the payment to the foreign official fall within the "facilitating payments" exception?

Example 2 (cont.)

- No
- Real world example: Vitusa Corp. paid \$20,000 to an official in the Dominican Republic to authorize payment of \$163,000 debt legitimately owed to Vitusa.
- DOJ filed criminal charges against Vitusa Corp. and its CEO/President.
 - Corporation plead guilty and was fined \$20,000.
 - CEO/President plead guilty, received 2 years probation, fined \$5,000.
- Despite the relatively low level of punishment, this case is important because it illustrates narrowness of facilitating payments exception.



Compliance - Red Flags

- History of corruption in the country
- Rumors regarding unethical or suspicious conduct by an employee, marketing representative, consultant or other business partner, or by a government official
- Use of unnecessary intermediaries or other third parties
- Requests for payments to a third party rather than the consultant
- Requests for cash payment
- Refusal to document agreements
- Agents or consultants related to foreign officials
- Agents or consultants with a lack of obvious qualifications for the job

Compliance - Red Flags (Cont.)

- Requests for payments that appear excessive for the service rendered (e.g., unusually large commissions)
- Requests for reimbursement of expenses that are poorly documented (or not documented at all)
- Incomplete or inaccurate information in required disclosures
- Requests to prepare false documentation
- Refusal to certify compliance with FCPA

Compliance – Best Practices

1. Prohibit bribery in written ethics policy
2. Perform due diligence effort for all third party participants (agents/representatives; consultants; joint venture partners, others)
3. Enter into written contract commitments and protections; avoid oral agreements
4. Make sure that expenditures are reasonable fees paid for real services
5. Conduct training about policy and problems
6. Establish periodic review and monitoring, as well as internal reporting procedures





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