

# Foreign Corrupt Practices Act

15 February 2018

# Introduction

- **The Foreign Corrupt Practices Act (“FCPA”), codified at 15 U.S.C. §§ 78dd-1, et seq., has two separate parts.**
  - **The antibribery provisions prohibit bribery of foreign government or political officials to obtain/retain business.**
  - **The accounting provisions require publicly-traded companies to maintain accurate books and records and adequate accounting controls.**
- **FCPA generally prohibits bribery of foreign government or political officials to obtain/retain business.**

# What's Covered

- **The FCPA prohibits any “issuer” (listed company) or “domestic concern”, officers, directors, employees or agents from:**
  - **Making use of the mails or any means or instrumentality of interstate commerce to**
  - **Corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—**
  - **A foreign government official, political party or official thereof or any candidate for foreign political office for purposes of:**

# What's Covered

- **(i) Influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage, or**
- **Inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;**
- **The statutory prohibitions also apply to such actions directed toward:**
  - **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 or other person identified above.**

# What's Covered

- **This “business purpose” standard focuses on whether the activity relates attempts to obtain or retain business, such as:**
  - **Obtaining a contract award or otherwise influencing a foreign government’s procurement process,**
  - **Maintaining an existing contract,**
  - **Evading foreign government legal and regulatory requirements,**
  - **Seeking access to information,**
  - **Avoiding taxes, penalties, fines and other impositions.**

# What's Covered

- **The statute has broad coverage of prohibited behavior, for example:**
  - **There is no requirement that a payment in fact is made or accepted; an attempt will suffice,**
  - **The payment does not have to be solicited by the foreign official,**
  - **The corrupt scheme does not have to be successful, i.e., a payment that does not result in the desired outcome is nevertheless a violation,**
  - **Knowledge of the payment recipient's identity is not required.**

# What's Covered

- **The violation standard requires a person to have “knowledge” of conduct, a circumstance or a result.**
- **This includes actual knowledge of violative behavior and knowledge or belief that facts exist or that an outcome is substantially certain to take place.**
- **“Knowledge” includes awareness that there is a high probability that a fact exists.**
- **A person who avoids facts (“deliberate ignorance”) or appoints a third party to perform prohibited activities cannot claim lack of knowledge.**

# Who's Covered

- **Foreign officials include:**
  - **Government entities and officials of all branches of government;**
  - **Public international organizations (such as the World Bank, International Monetary Fund, World Trade Organization) and officials and persons acting on their behalf;**
  - **Employees of government-owned businesses, such as airlines, hospitals, or oil companies;**
  - **No “bright line” rule for coverage of activities having foreign government relationship; factors include analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government.**



# Who's Covered

- **Entities within the FCPA's scope include:**
  - **U.S. business organizations (companies, partnerships);**
  - **Foreign parent, subsidiary and affiliated companies;**
  - **Foreign companies listed on U.S. stock exchange;**
  - **U.S. citizens and resident aliens;**
  - **Foreign nationals acting for a U.S. company;**
  - **Foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in *any* act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States;**
  - **Parent, subsidiary and successor company liability.**

# Routine Action

- **Exception for payments for “routine governmental action”.**
  - **Limited to only 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;**

# Routine Action

- **Exception for payments for “routine governmental action”.**
  - **(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.**
- **Excludes any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.**

# Routine Action

- **The size of the payment is not dispositive of whether it qualifies; instead, coverage is based in the purpose of the payment.**
- **For example, a “one-time, small payment to obtain a routine, non-discretionary governmental service that” the payor “is entitled to receive (i.e., the stamping and filing of the permit application)” is permissible.**
- **A payment to influence the outcome of a discretionary act is prohibited.**

# Affirmative Defenses

- **Affirmative defenses to liability include proving that:**
  - **(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or**
  - **(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was 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.**

# Affirmative Defenses

- **Local law defense requires a showing that the payment was legal under the foreign country's written law.**
- **Justice Department position is that "the fact that bribes may not be prosecuted under local law is insufficient to establish the defense."**
- **The second affirmative defense, for payment of "reasonable and bona-fide travel and lodging expenses to a foreign official", applies when such "expenses are directly related to the promotion, demonstration, or explanation of a company's products or services, or are related to a company's execution or performance of a contract with a foreign government or agency."**

# Fines and Penalties

- **FCPA authorizes imposition of monetary fines and penalties:**
  - **Corporations face maximum criminal fines of \$2,000,000 and civil penalties of \$16,000.**
  - **Individuals who commit willful violations may be fined up to \$100,000, penalized \$16,000 and/or be imprisoned not more than 5 years, or both.**
  - **Actual amounts are determined under the U.S. Sentencing Guidelines.**
  - **Restitution of business proceeds resulting from the illegal activity may also be required.**
  - **The Justice Department may seek injunctive relief against ongoing violations.**

# Other Consequences

- **Besides criminal and civil liability, violators are subject to the following consequences:**
  - **Debarment from U.S. government contracts;**
  - **Cross-debarment by Multilateral Development Banks;**
  - **Denial of export licenses under the International Traffic in Arms Regulations.**



# Precautions

- **Be aware of “red flags” relating to third parties acting on a U.S. company’s behalf.**
  - **Excessive commissions to third-party agents or consultants;**
  - **Unreasonably large discounts to third-party distributors;**
  - **Third-party “consulting agreements” that include only vaguely described services;**
  - **The third-party consultant is in a different line of business than that for which it has been engaged;**
  - **The third party is related to or closely associated with the foreign official;**

# Precautions

- **Be aware of “red flags” relating to third parties acting on a U.S. company’s behalf.**
  - **The third party became part of the transaction at the express request or insistence of the foreign official;**
  - **The third party is merely a shell company incorporated in an offshore jurisdiction; and**
  - **The third party requests payment to offshore bank accounts.**
- **Be aware of “red flags” relating to transactions.**
  - **The transaction occurs in a country with a reputation for corruption;**
  - **Payments are described in vague or misleading terms;**
  - **Payment amounts are disproportionate to stated reason;**

# Precautions

- **Be aware of “red flags” relating to transactions.**
  - **One or more parties to the transaction objects to compliance provisions in contract, document review, audits or other compliance measures;**
  - **Lack of documentation for services performed;**
  - **Failure to follow terms of a compliance program;**
- **Systemic problems.**
  - **Lack of compliance program and inadequate training;**
  - **Failure to exercise “due diligence” over subsidiaries and consultants;**
  - **Inadequate expense reporting;**
  - **Subversion of compliance program by employees or management;**
  - **Failure to discover and disclose violations.**

# New Developments

- **The Trump Administration has implemented a new enforcement policy.**
  - **“When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.”**
  - **“Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.”**

# New Developments

- **The Trump Administration has implemented a new enforcement policy.**
  - **“To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.”**
  - **“A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company’s voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution.”**

# New Developments

- **Executive Order 13818.**
  - **New EO authorizes the Treasury Department to identify current or former government officials, persons acting for or on their behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in: corruption.**
  - **That term includes “the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery”, and also covers transferring the proceeds of these acts.**
  - **Authority further extends to leaders and officials of “an entity, including a government entity,” that engaged in such activity, “any person” who has assisted or supported them and “any entity . . . whose members have engaged in” them.**

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