

INTERNATIONAL BUSINESS TRANSACTIONS
COMPLIANCE WITH ANTI-CORRUPTION LAW

by

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Background

There was a time not very long ago when the bribery of foreign officials was not considered to be a criminal act by many of the major industrial countries, including some Western European countries where bribes paid to foreign government officials could be treated as tax deductions for business tax purposes. In the 1970's, the SEC conducted investigations in which over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials. Partly in response to these revelations, the United States prohibited such activity by the enactment of the Foreign Corrupt Practices Act of 1977 ("FCPA").¹

Many of the major industrialized countries, including all 30 member countries of the Organization for Economic Co-operation and Development ("OECD"), have joined the U.S. in combating corruption of foreign officials by signing and ratifying of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention") in 1997. Most of the signatory countries have enacted the enabling legislation as required by the Convention. The OECD Convention generally follows the provisions of the FCPA. The U.S. is a signatory of the OECD Convention, and the FCPA, as amended, is in compliance with the OECD Convention. Major industrialized countries that have not signed the convention include India, China and Russia.

A much broader approach to combating corruption has been taken by the United Nations as set forth in the United Nations Convention against Corruption (the "UN Convention") which came into force on 14 December 2005 following the ratification of the UN Convention by the thirtieth signatory country (on that date there were over 130 signatory countries). The UN Convention deals with corruption in the broad sense by not only requiring that countries covered by the convention make corruption of or by a government official a criminal offense, but also requires that measures such as ethics codes and anti-corruption commissions or agencies be established to prevent corruption in the first place. The UN Convention also requires cooperation among the signatories in fighting corruption and recovering illicitly acquired assets.

In addition to the FCPA, the OECD Convention and the UN Convention, there are numerous regional conventions and protocols dealing with the international fight against corruption.² It is beyond the scope of this article to cover all of the relevant international law with regard to the fight against corruption; however, in that the FCPA was the first and to

¹ 15 U.S.C. Sections 78dd-1, et seq.

² See UNODC Compendium of International Legal Instruments on Corruption, Second Edition, 2005.

some extent the motivating force and example for subsequent conventions and protocols in this area, a brief outline of the FCPA and suggested measures to be taken to comply with the FCPA follows. It should be noted that provisions in the FCPA require that certain companies having securities registered with the SEC or which are required to file reports with the SEC must keep their financial records as required by the relevant provisions of the FCPA³. Those record keeping and reporting requirements are beyond the scope of this article.

Main Provisions of the FCPA

Actions prohibited by the FCPA⁴:

- actions taken to further a payment or offer of payment, directly or through an agent, to any foreign official, foreign political candidate, foreign political party or official of a public international organization;
- if the purpose is to corruptly influence the recipient to act or refrain from acting in violation of his lawful duty, to misuse his position, or to obtain any improper advantage;
- in a manner intended to assist anyone to retain, obtain, or direct business to another; and
- such action is undertaken where there is a jurisdictional nexus to the United States.

Exception for "routine governmental action"⁵:

- any payment made to "expedite or secure the performance of routine government action" is exempted from the coverage of the FCPA even though such payments are made to a prohibited person; and
- such routine government actions may include obtaining permits, licenses and visas or for the provision of police protection, phone service or water supply.

Persons liable for actions prohibited by the FCPA

- "Issuers"⁶ – U.S. and foreign companies with securities issued in the United States and their employees, officers, directors and agents or stockholders acting on behalf of such issuers.
- "Domestic Concerns"⁷ – business entities under U.S. law or having their principal place of business in the U.S., as well as any individual "who is a citizen, national or resident of the United States".
- Others – "persons other than issuers of domestic concerns"⁸ whose prohibited conduct occurs "while in the territory of the United States."

³ 15 U.S.C. Section 78m

⁴ 15 U.S.C. Section 78dd-1(a), 2(a) and 3(a)

⁵ 15 U.S.C. Section 78dd-1(b), 2(b) and 3(b)

⁶ 15 U.S.C. Section 77dd-1(a)

⁷ 15 U.S.C. Section 77dd-2(a)

- Corrupt intent – the person making such payment must have a corrupt intent that the payment is intended to induce the recipient to misuse his official position.

Affirmative defenses⁹:

- the payment, gift, offer or promise was lawful under the written laws and regulations of the country where made; or
- the payment, gift, offer or promise is a bona fide expenditure, such as travel or lodging expenses, directly related to promotion or demonstration of a product or the execution or performance of a contract.

FCPA anti-bribery penalties¹⁰ include:

- for individuals, up to \$100,000 in fines and 5 years imprisonment;
- for corporations, up to \$2 million for each violation;
- fines can be increased significantly under the Alternate Fines Act¹¹; and
- "Blacklisting" in the form of debarment from government procurement and export licensing, and sanctions by the World Bank Group, Overseas Private Investment Corporation, et al.

Compliance

There are a number of difficult problems that arise with regard to a company's efforts to insure compliance with the provisions of the FCPA. For instance, a lower level company employee may be the individual who violates the act without the knowledge of senior management, yet the company as well as the individual will be held responsible for such conduct even though it was not sanctioned. Also, the foreign joint venture partner, or a foreign sales agent may be the party who violates the act possibly resulting in the company being held responsible. The broad scope of the FCPA along with the current trend of the Department of Justice ("DOJ") to vigorously expand its enforcement of the provisions of the FCPA and harsher penalties being handed down by the courts, make it incumbent upon companies involved in international business transactions to insure to the extent possible compliance with the FCPA. Some suggested measures are as follows:

- make all company officers, directors and employees aware of the provisions of the FCPA and the company's policy of strict compliance with the FCPA;
- conduct thorough due diligence when selecting joint venture partners, sales representatives and agents in foreign countries to verify their reputations, non-affiliation with any persons prohibited from receiving payments under the FCPA, and insure their familiarity with the FCPA and their compliance therewith;

⁸ 15 U.S.C. Section 77dd-3(a)

⁹ 15 U.S.C. Sections 78dd-1(c), 2(c) and 3(c)

¹⁰ 15 U.S.C. Sections 78dd-2(g) and 3(e)

¹¹ 18 U.S.C. Section 3571(d)

- make sure that relevant transactional documentation contains FCPA compliance provisions with strong remedies for the non-violating party in the event of non-compliance;
- police compliance by checking any expenses or fund transfers that appear suspect or out of the ordinary by the company, its subsidiaries, agents, or by joint ventures in which the company is a participant; and
- question and verify the legality of expenses incurred by company personnel, agents, or joint venture partners acting on behalf of the joint venture with regard to entertainment or other expenses incurred on behalf of persons who are prohibited from receiving gifts or payments under the FCPA.

Conclusion

With the current emphasis on corporate transparency and full compliance with the law, it is necessary for a company to be fully aware of its obligations under the FCPA and have a credible compliance program. In the event that the company, in spite of its best efforts, becomes involved in a DOJ FCPA investigation, its strongest defense is going to be that it did everything reasonably possible to comply with the law. This may not result in the company being released from any liability, but it will place the company in a good position to work out an acceptable out of court settlement with the DOJ which is the way many violations are disposed of by the DOJ where it has been shown that the company was making an honest effort to insure compliance with the law, promptly notified the DOJ of any violation, and cooperated fully with the DOJ with regard to any resulting investigation.

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