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# Foreign Corrupt Practices Act

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Based on -The Foreign Corrupt Practices Act Handbook:

A Practical Guide for Multinational General Counsel, Transactional Lawyers, and White Collar Criminal Practitioners.

By Robert W. Tarun and Peter P Tomczak.

2017, 5<sup>th</sup> edition

[Foreign Corrupt Practices Act](#)

# HISTORICAL PERSPECTIVE

- The United States Foreign Corrupt Practices Act (FCPA)<sup>1</sup> was enacted in 1977, in the wake of public revelations that more than 400 companies admitted to having made more than \$300,000,000 in questionable or illegal payments to foreign government officials, politicians and political parties.
- The FCPA contains two types of provisions: (1) antibribery provisions, and (2) accounting provisions,
- This presentation only covers the Antibribery provisions

# THE FCPA'S ANTIBRIBERY PROVISIONS

- the FCPA's antibribery provisions potentially apply to four categories of individuals and entities:
- (1) "issuers" (or any officer, director, employee or agent of any such issuer, or any stockholder acting on behalf of any such issuer);
- (2) "domestic concerns" (or any officer, director, employee, or agent of any such domestic concern, or any stockholder acting on behalf of any such domestic concern); and
- (3) foreign nationals or businesses or any officer, director, employee or agent of such foreign business or national, or
- (4) any stockholder acting on behalf of such foreign business. who take any action in furtherance of a corrupt payment while within the territory of the United States.

# Elements

- A violation of the antibribery prohibition by a person as defined above consists of five elements:
- 1. A payment, offer, authorization, or promise to pay money or anything of value, directly or indirectly (through a third party);
- 2. To (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while “knowing” that the payment or promise to pay will be passed on to one of the above;
- 3. Using an instrumentality of interstate commerce (such as telephone, telex, e-mail, or the mail) by any person (whether U.S. or foreign) or an act outside the United States by a domestic concern or U.S. person, or an act in the United States by a foreign person in furtherance of the offer, payment, or promise to pay;
- 4. For the corrupt purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit doing any act in violation of his or her lawful duty, (c) securing an improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; and
- 5. In order to assist the company in obtaining or retaining business for or with any person or directing business to any person.

# 1. Offers, Payments, Promises to Pay, or Authorizations of Payments

- A company or person can be liable under the FCPA not only for making improper payments, but also for an offer, promise, or authorization of a corrupt payment, even if the employee or agent does not ultimately make a payment. In other words, a bribe need not actually be paid, and a corrupt act need not succeed in its purpose.

## 2. Money or Anything of Value

- The FCPA prohibits paying, offering, or promising to pay (or authorizing to pay or offer) money or making a gift of anything of value.
- Although neither has the statute defined nor has any FCPA decision addressed the concept of a “thing of value,” it certainly includes cash equivalents and other forms of valuable inducements such as travel and travel-related expenses, jewelry, housing expenses, country club memberships, luxury cars, entertainment, shopping excursions for the foreign official or his or her relatives, and positions of employment for relatives.

# 3. Corrupt Intent

- Corruptly -
- The offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so. . . . [A]n act is “corruptly” done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.

# Corrupt Intent continued

- Willfully
- The government must prove an individual acted purposefully and with knowledge he or she was doing a “bad act” under the general rules of law.<sup>43</sup> The government must prove an individual acted willfully to be held criminally liable. However, proof of willfulness is not required to establish corporate criminal or civil liability.



# Corrupt Intent continued

- Factual Considerations
- Prosecutors look at potential bribery allegations to both see whether a foreign official recipient has personally benefited or whether the target or subject giving something of value has so benefited. While there is no such requirement under the FCPA antibribery section, the DOJ understands there is much less jury appeal when a defendant has not personally benefited.

## 4. Directly or Indirectly

- The FCPA statute contains the explicit language “directly or indirectly,” which is meant to cover individuals and companies that use third parties to handle bribes intended to obtain or retain business.
- as many companies cannot employ salespersons to cover the globe and have outsourced functions to reduce costs and focus on core competencies, and in light of the near necessity of using local third parties to interact with foreign governments.
- Using third parties to conduct bribery activity **does not** shield them from criminal liability

## 5. Recipients

- The FCPA prohibition extends only to corrupt payments (or offers, promises to pay, or authorizations of payment) to a foreign official, foreign political party, party official, or a candidate for foreign political office, and any other person while the payer “knows” that the payment or promise to pay will be passed on to one of the above persons or party

# Foreign Officials

- The term “foreign official” is defined under the FCPA as “any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of, any such public international organization.”
- that the term covers low-ranking employees as well as high-ranking officials of governments. This broad definition is normally considered to encompass executive branch employees, elected legislators or parliamentarians and their family members. The government need not prove the identity of a particular foreign official in its pleadings.

# Instrumentality

- As noted above, the FCPA defines a foreign official as “any officer or employee of a foreign government or any department, agency or instrumentality thereof.
- It further prohibits payments to foreign officials to induce them to use their influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality. Nowhere does the statute define “instrumentality” or provide guidance about what types of partially state-owned or state-controlled entities are foreign government “instrumentalities” such that their officers or employees are foreign officials.

The nonexhaustive list of five characteristics the district court found that support a quasi-government entity being an “instrumentality” are

- the entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction;
- the primary officers and directors of the entity are government officials, or are appointed by them;
- the entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees, or royalties, such as entrance fees to a national park;
- the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
- the entity is widely perceived and understood to be performing official (i.e., governmental) functions.

# the question of whether a business entity constitutes a government instrumentality

- the foreign state's characterization of the entity and its employees;
- the foreign state's degree of control over the entity;
- the purpose of the entity's activities;
- the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- the circumstances surrounding the entity's creation; and
- the foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

## 6. Business Purpose Test

- The FCPA prohibits payments, offers, or promises to pay made in order to assist a company in obtaining or retaining business for or with, or directing business to, any person. Business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality. As a result of the 1998 amendments, the FCPA also prohibits payments to foreign officials for the purpose of “securing any improper advantage.” This can include payments to foreign customs and tax officials.



seven areas where FCPA compliance risk and problems are most likely to be encountered in connection with import/export operations:

- 1. avoidance of customs duties and import taxes—especially in a number of emerging countries that impose high customs duties and import taxes on imported merchandise;
- 2. under invoicing schemes whereby foreign customers ask United States suppliers to understate a declared value for local customs purposes;
- 3. avoidance of import regulatory requirements and restrictions including import licensing requirements, product certification and detailed technical data filing requirements, and product testing and inspection requirements;
- 4. offshore payments to third-party intermediaries including customs brokers, import/export agents, and trade consultants who may provide bona fide services, or be a vehicle to avoid dealing directly with wayward local officials;
- 5. hospitality and gifts for foreign customs and import regulatory officials;
- 6. export compliance with respect to the export of defense articles under the International Traffic in Arms Regulations (ITAR); and
- 7. merger and acquisition transactions and the failure to engage international trade professionals in the FCPA compliance pre- and post-acquisition due diligence.

# 7. Knowledge—Actual and Constructive

- The FCPA allows for, but does not require proof of, actual knowledge that a payment to or promise to pay an intermediary will be passed on to a foreign official. Instead, a person or entity may be deemed to have violated the FCPA’s antibribery provisions on the basis of constructive knowledge. Unlike the terms “corruptly” and “willfully,” the FCPA defines the knowledge requirement, stating:
  - (2)(A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if— (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
- When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist

## 8. Authorization

- The FCPA prohibits the “authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” to foreign officials for improper purposes. The statute does not define “authorization,” but the legislative history makes clear that authorization can be either implicit or explicit. Authorization issues frequently arise when U.S. companies fund overseas operations, approve budgets, and take similar actions with respect to foreign subsidiaries or joint ventures. In suspicious circumstances, U.S. directors and managers should disavow any possible improper payments and take affirmative steps to avoid even the appearance of acquiescence or approval.

## 9. Permissible Payments and Affirmative Defenses

- **the FCPA provides an exception for so-called “facilitating,” “expediting,” or “grease” payments to low-level foreign officials who perform “routine governmental actions.”**
- The purpose of this limited exception is to avoid FCPA liability when small sums are paid to facilitate certain routine, nondiscretionary government functions such as the processing of permits, licenses, visas, work orders, or other official documents; providing police protection, power and water supply, cargo handling, or protection of perishable products; and scheduling inspections associated with contract performance or transit of goods across the country

# Parent-Subsidiary Liability

- two ways a parent company may be liable under the FCPA's antibribery provisions for bribes paid by a subsidiary:
- (1) direct liability arising out of sufficient parent activity in the bribery activity; and
- (2) agency liability where under circumstances of sufficient control, a subsidiary's action and knowledge are imputed to the parent.

# Commercial Bribery

- The FCPA antibribery provisions do not govern or prohibit bribes paid to officers or employees of wholly private, nongovernmental entities. These provisions apply only to improper payments made, directly or indirectly, to a foreign official, political party or official thereof, or political candidate in order to obtain or retain business or to direct business to any business or to secure an improper advantage.
- However, commercial bribery payments that are mischaracterized or under characterized on the books and records of a public company may constitute FCPA booksand-records or internal controls violations. In addition, the DOJ has charged private improper payments or kickbacks along with foreign official bribes in FCPA cases<sup>118</sup> under the general conspiracy statute<sup>119</sup> and the Travel Act.<sup>120</sup> The DOJ has also required in some deferred prosecution agreements (DPAs) that the company not engage in acts of commercial bribery