



PRACTICE BRIEF



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A Summary of U.S. Law Against the Bribery of Foreign Officials:

The U.S. Foreign Corrupt Practices Act

The U.S. Foreign Corrupt Practices Act (the “FCPA”) prohibits corrupt payments to foreign officials. In addition, other U.S. statutes such as the mail and wire fraud statutes and the Travel Act, which provide for federal prosecution of violations of state commercial bribery statutes, may also apply to conduct prohibited by the FCPA.

The FCPA’s Accounting and Antibribery Provisions

The Accounting Provisions

The FCPA requires companies whose securities are listed in the United States to meet its accounting requirements, which require affected corporations to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. A company subject to the FCPA’s accounting requirements is also responsible for ensuring that its controlled subsidiaries, including its foreign subsidiaries, comply with the FCPA’s accounting requirements. This summary focuses on the FCPA’s antibribery provisions.

The Anti-bribery Provisions ¹

The FCPA’s antibribery provisions prohibit persons who must comply with the FCPA from bribing foreign officials. More specifically, the FCPA, among other things, prohibits any “domestic concern” or any officer, director, employee, or agent of a domestic concern or any stockholder of a domestic concern acting on behalf of a domestic concern from, directly or indirectly, offering, paying or promising to pay, giving or promising to give, or authorizing the payment of any money or anything of value, directly or indirectly, to a “foreign official,” international organization official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business for or with, or directing business to, any person or to gain any improper

¹ In addition to the FCPA, U.S. companies operating internationally must also be mindful of laws of other countries against domestic bribery and the bribery of foreign officials that may apply to their activities. There are several international anti-bribery conventions (treaties). For example, 36 countries, including the United States, are party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and many countries have passed national legislation to implement the provisions of the Convention.



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business advantage. Persons subject to the FCPA can be held liable for prohibited payments made on their behalf by agents, distributors, and consultants.

Under the FCPA, the term “foreign official” means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. Generally, this definition also includes officers and employees of state-owned companies, uncompensated honorary officials, and certain members of royal families. The U.S. Justice Department interprets the term “foreign official” broadly. This term can even include an official of a foreign company or entity that is not wholly-owned by a foreign government if the foreign government exercises substantial control over the company or entity. An officer or employee of a company substantially controlled by a foreign government falls within the definition of the term “foreign official.”

The FCPA prohibits paying, offering, promising, or authorizing the payment of money or anything of value. Such items may include securities, the assumption or forgiveness of debts, discounts or rebates, offers of employment, personal favors or gifts, payments or reimbursements for travel, and entertainment. The business retained or obtained does not necessarily need to be with a foreign government instrumentality. The terms “obtaining” and “retaining” business are also interpreted broadly.

The FCPA applies to payments to any public official, regardless of rank or position. The FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment. There are exceptions to the FCPA’s anti-bribery provisions for “facilitating payments for routine governmental action.”

Exceptions to Prohibitions for Routine Governmental Action

Certain payments to facilitate or expedite routine governmental action are allowed under the FCPA. These payments are sometimes referred to as “grease” or “facilitating” payments. Examples include payments to obtain permits or licenses, visas, police protection, mail pick-up and delivery, or police protection. The term “routine governmental action” does not include 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. Even though “grease” payments are permitted under U.S. law, they may be prohibited by the laws of other countries.



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Affirmative Defenses to Violations

A person charged with a violation of the FCPA's anti-bribery provisions may assert as a defense 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.

Who Must Comply with the FCPA?

The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a company and any stockholder acting on behalf of a company. Individuals and companies may also be penalized if they order, authorize, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business.

An "issuer" is a corporation that has issued a security that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

The FCPA also applies to foreign companies and individuals if they cause an act in furtherance of a prohibited payment to take place within the United States. Additionally, under vicarious liability principles, U.S. corporations may be held liable for the acts of foreign subsidiaries or there agents where they authorized,



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directed, or controlled the activity in question, as can U.S. citizens or residents who are employed by or acting on behalf of a U.S. company's foreign subsidiary.

Direct/Indirect Corrupt Payments and the Knowledge Standard

The FCPA prohibits corrupt payments directly and through their intermediaries. Intermediaries may include joint venture partners or agents. It is unlawful to make a payment to a third party or to permit the third party to make a payment, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "knowing" includes conscious disregard and deliberate ignorance. Corporate officers are not allowed to turn a "blind eye" to prohibited payments, activities, or suspicious circumstances and may be imputed to have sufficient knowledge to constitute violations. Knowledge includes awareness that prohibited payments or activities are substantially certain to occur and conscious disregard of circumstances. U.S. companies may be held liable for the acts of their foreign subsidiaries where the U.S. parent authorized, directed, or controlled the activity in question.

Under the FCPA, 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.

Enforcement of and Penalties for Violations of the FCPA

The U.S. Department of Justice is responsible for all criminal enforcement and for civil enforcement of the FCPA's anti-bribery provisions with respect to U.S. citizens, U.S.-based companies, and foreign companies. The U.S. Securities and Exchange Commission ("SEC") is responsible for civil enforcement of the anti-bribery provisions with respect to corporations that have issued securities registered in the United States or that are required to file periodic reports with the SEC.

Criminal Penalties

The following criminal penalties may be imposed for knowing, willful and deliberate violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to \$2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite



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higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. Fines imposed on individuals may not be paid by their employer or principal.

Civil Penalties

The U.S. Department of Justice or the SEC, as appropriate, may bring a civil action for a fine of up to \$10,000 per violation against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the FCPA's anti-bribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person.

The U.S. Department of Justice or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the anti-bribery provisions.

Other Penalties/Sanctions

A person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; and the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violations of the FCPA. And, payments that are unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

Private Cause of Action

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.



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Reputational Harm

Violations or even alleged violations of the FCPA, which are usually publicized, cause harm to a company's or individual's reputation.

FCPA Compliance

Companies and individuals who must comply with the FCPA and who do business in foreign countries should adopt and implement an FCPA compliance program. Some of the elements of an effective FCPA compliance program include:

- adoption of an internal corporate policy which requires strict compliance with the FCPA;
- conducting regular training and awareness sessions for officers, employees, agents, consultants, distributors, joint venture partners regarding the FCPA's requirements;
- requiring agents, consultants, distributors, joint venture partners to comply with the FCPA as a condition of doing business with them; and
- requiring protective FCPA covenants and warranties in contracts with agents, consultants, distributors, joint venture partners, and periodic FCPA compliance certifications.

For further information and questions regarding FCPA issues, please contact:

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This summary is for general information and it does not constitute legal advice with respect to any specific set of facts, nor does it represent any commitment to keep readers advised on all developments with respect to the FCPA.

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