

**The Foreign Corrupt Practices Act:
Enforcement in the Aftermath of Sarbanes-Oxley**

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1. Background of the Foreign Corrupt Practices Act (“FCPA”)

- FCPA enacted in 1977
- SEC investigations in the mid-1970’s: over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians and political parties (Lockheed scandal in Japan).
- Business backlash: Congress in 1988 directed Executive Branch to commence negotiations with Organization of Economic Cooperation and Development (“OECD”) to get major trading partners on board.
- 1997: U.S. and 33 other countries signed the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

2. Pre-FCPA Statutes

- *Securities Exchange Act of 1934*: requires all publicly traded companies in the U.S. to disclose any material fact necessary to make financial and management statements “not misleading”.
- *Mail and Wire Fraud Acts*: prohibit use of mails or interstate or international telecommunications for the purpose of executing any scheme to defraud.
- *Internal Revenue Code*: prohibits deduction of illegal payments to foreign officials.
- *False Statements Act*: imposes criminal penalties on persons or entities that knowingly make false statements to any U.S. government department or agency.

3. Post-FCPA Statutes

- *Sarbanes-Oxley Act of 2002*: requires companies to tighten internal controls and certify accuracy of financial statements, including an annual statement regarding the status of company internal controls.

4. Scope of FCPA – Antibribery Provisions

- *Who:* (i) any domestic concern, (ii) foreign and domestic companies registered with the SEC or required to periodic reports with the SEC (“issuers”), (iii) any person acting on behalf of such entities, (iv) any U.S. individual or any non-U.S. within United States jurisdiction. While non-issuer foreign subsidiaries are not covered, a U.S. parent corporation may be held liable if it authorized, directed or controlled the activity in question.
- *What:* unlawful to use the U.S. mails or other instrumentality of interstate commerce *corruptly* through an offer, payment, promise of payment, or authorization of payment of money or anything of value to a foreign official (including political parties and candidates for political office) for the purpose of (i) influencing an official act or decision of that person in their official capacity, (ii) induce that person to do or omit to do any act in violation of that person’s lawful duty, (iii) securing any improper advantage, and (iv) inducing that person to use his or her influence to affect any act or decision of a foreign to obtain or retain business. Also unlawful for a firm to make such payments to any other person while “knowing” that the payment or promise to pay will be passed on to a foreign official for a business purpose.
- *Exemption:* “facilitating or expediting” payments may be made to a foreign official, foreign party, or party official the purpose of which is to expedite or secure the performance of a *routine governmental action*. Examples referenced in the FCPA include obtaining permits, licenses, processing governmental papers such as visas and work orders), providing police protection, mail pick-up and delivery, loading and unloading cargo, protecting perishable goods, scheduling inspections associated with contract performance or transit of goods.
- *Affirmative Defenses:* (i) the payments are lawful under the written laws and regulations of the foreign country, and (ii) the payments were reasonable and bona fide expenditures related to promotion of products or the execution or performance of a contract.

5. Current Scope of FCPA – Accounting and Record Provisions.

Publicly held U.S. corporations (“issuers”) must (i) make and keep books, records, and accounts that accurately and fairly reflect the transactions and disposition of the assets of the issuer, and (ii) devise and maintain a system of internal accounting controls.

6. Penalties for Violation of FCPA's Antibribery Provisions

- Companies: criminal fines of up to \$2 million
- Companies: civil fines of up to \$10,000
- Individuals (Persons): criminal fines of up to \$100,000*
- Individuals (Persons): imprisonment for up to five years
- Individuals (Persons): civil fines of up to \$10,000*
- Alternative civil penalties of up to the greater of \$500,000 (\$100,000 in the case of individuals) or the gross amount of any pecuniary gain resulting from the violation.
- Private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO")
- FCPA violators may be barred from doing business with the Federal Government (OMB guidelines)

* fines imposed on individuals may not be reimbursed by their employer.

7. Interpretive Nuances

- *Foreign Official*: includes not only persons employed by a foreign government, but also persons employed by commercial enterprises owned or controlled by foreign governments and private persons who have responsibilities similar to those of governmental employees, such as private architects or engineers retained by government agencies.
- *Payment to Third Party*: may be prohibited by the FCPA even if the payor is not certain that the payment will be shared with a foreign official. It is sufficient if the payor acts with "willful blindness," or simply fails to make inquiries that a reasonable person would make given the information available concerning the third party and the nature of the payment.
- *Obtaining or Retaining Business*: includes not only payments made for the purpose of obtaining a government contract, but also payments made for the purpose of obtaining favorable regulatory decisions or other competitive advantage.

8. Recent Enforcement Actions

[Note: in the first 20 years following passage of the FCPA, the SEC and DOJ brought a total of only 30 cases, less than two per year. In 2003-2004, at least 27 investigations were initiated as these agencies have ramped up civil and criminal enforcement of the FCPA].

- *American Rice* (July of 2005). Former president and vice president of Houston-based rice exporter sentenced to five year and three year prison terms, respectively, for authorizing over \$500,000 in bribes to Haitian customs officials during 1998 and 1999 with the objective of reducing American Rice's import taxes (Fifth U.S. Circuit Court of Appeals upheld jury verdicts). Commentators have pointed to this case as holding that payments made to a foreign official need not be made for the specific purpose of obtaining new contracts or maintaining existing ones to be violate of the FCPA – any payment to secure competitive advantage will suffice.
- *Titan Corporation* (March of 2005). Major defense contractor entered into settlements with SEC and IRS and a plea agreement with the DOJ stemming from improper payments made by a Titan foreign sales agent to a government official in the Republic of Benin. Payment of bribes exceeding \$2 million (agent submitted false invoices to Titan) was intended to influence the upcoming presidential election to secure favor on a wireless telephone network project in Benin on which Titan was working. Titan charged by the DOJ with one felony count of bribery under FCPA, one felony account of falsification of books and records, and one felony account of aiding and assisting in the filing of a false tax return. Titan paid a \$28.4 million penalty (largest FCPA penalty to date) and was required to “disgorge” profits stemming from the illicit payment. *[The violations were uncovered during the due diligence phase of an intended merger with Lockheed Corporation that Lockheed declined to pursue amid worries of public attention and scrutiny].*
- *Monsanto Company* (January of 2005). Global producer of agricultural products settled two enforcement proceedings with SEC and DOJ stemming from the action of a senior U.S.-based manager who authorized and directed an Indonesian consulting firm to make an illegal payment of \$50,000 to a senior Indonesian government official to influence the repeal of an unpopular environmental regulation that had adversely affected Monsanto's sales of genetically modified crops in Indonesia. Monsanto was also charged with inaccurately recording or failing to record \$700,000 of illegal or questionable payments to at least 140 Indonesian government officials and their family members. Monsanto paid a \$500,000 civil penalty and a criminal penalty of \$1 million (DOJ agreed to defer criminal prosecution for three years).

- *GE/InVision Technologies, Inc.* (December 2004). California-based manufacturer of explosive detection machines used in airports settled civil liability with SEC and criminal liability with DOJ arising out of certain transactions conducted by InVision in the Kingdom of Thailand, PRC, and the Republic of the Philippines. Enforcement agencies charged that “InVision was aware of a high probability that its agents or distributors had paid or offered to pay money to foreign officials or political parties in connection with the airport security machines”. [*Violations discovered during the course of General Electric Company’s due diligence in connection with its proposed acquisition of InVision*]. In view of the “voluntary disclosure” of the illegal activities, InVision was assessed a reduced penalty of \$800,000 and no criminal fines.

- *ABB Ltd.* (July of 2004). Global provider of power and automation technologies headquartered in Zurich settled civil enforcement actions with SEC; two of its subsidiaries settled criminal prosecution cases with DOJ. SEC complaint charged that ABB violated the antibribery, books and records, and internal control provisions of the FCPA by making payments totaling over \$1.1 million to government officials in Nigeria, Kazakhstan, and Angola through two subsidiaries intended to assist those subsidiary companies in obtaining and retaining business related to oil and gas contracts [*Violations were discovered during the course of due diligence for the sale of related ABB’s assets to a consortium of private equity investors*]. In the SEC settlement, ABB Ltd. agreed to disgorge profits and pay prejudgment interest in the total amount of \$5.9 million and accept a penalty of \$10.5 million (satisfied by payment of \$5.25 million each by the two subsidiaries to settle DOJ’s related criminal enforcement actions). The acquisition was completed after the purchasers were granted a “DOJ FCPA Opinion Procedure Release” that obligated the acquirers to implement an extensive list of FCPA compliance measures within the purchased ABB divisions. (See discussion below).

9. FCPA Red Flags

- Is the country where an agent is located frequently cited by the U.S. or foreign governments for not enforcing antibribery laws?

- Does the company’s industry have a history of corruption and bribery?

- Do any parties to the transaction have ties to a foreign government?

- Is the size or method of the payment outside the ordinary course for business in that regional location?

- Is the agent's commission commensurate with the type of work or service performed?
- If the payment is to a "charitable organization", is it linked to the company's business or some identifiable business benefit?
- Do the company's accounts and records provide sufficient detail to substantiate the payment of "consulting services" for a contract being actively worked in the particular location where the payment is made?

10. Successor Liability and DOJ Opinion Procedure Releases

A major concern of the purchasers in the referenced transactions that gave rise to the enforcement matters discussed above was the potential for successor liability, a concept that imposes liability on the acquiring individual or entity for the illegal conduct on the theory that such party is the "successor-in-interest" or "ratifier". As part of their due diligence, purchasers are increasingly using DOJ's FCPA Opinion Procedure Release process under which issuers and domestic concerns may obtain an opinion of the Attorney General as to whether certain conduct conforms to the Department's current enforcement policy regarding the antibribery provisions of the FCPA (See C.F. R. Part 80.1)