

FCPA Basics and Compliance Challenges

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imagination at work

Foreign Corrupt Practices Act

- 1) How We Got Here
- 2) FCPA Key Provisions
- 3) Compliance Challenges

History

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- 1970** SEC investigations uncover questionable payments to foreign officials
 - 1977** FCPA enacted after SEC reports > 400 companies paid \$300M + in bribes
 - 1988** FCPA amended; easier to prosecute employees and agents
 - 1996** OAS Inter-American Convention on Corruption
 - 1998** US signs international anti-bribery law implementing OECD; expands FCPA jurisdiction over foreign persons and corps
 - 1999** OECD Convention takes effect
 - 2002** Council of Europe (EU) Convention on Corruption takes effect
 - 2005** UN Convention on Corruption takes effect
 - 2008 Present:** Unprecedented growth in US and int'l enf of anti-corruption laws

30 years of increasing worldwide enforcement

What's at stake?

Investigative costs can be huge (attorneys, investigators, experts, consultants) Siemens >€649MM

Significant jail time for individuals

Suspension, debarment, stock price impact ... and obvious reputational harm

Multi-jurisdiction prosecutions, follow-on civil litigation (e.g., Titan \$60MM class action; Iraqi govt today suing 91 OFF companies)

FCPA ... 3 Key Provisions

Anti-bribery

Can't offer anything of value to a foreign official (or international organization / party official) **for purpose of gaining improper business advantage**

- *US nexus required*

Internal controls

Must maintain internal accounting controls reasonably designed to ensure **transactions & access to assets are executed per policy & mgmt approval, and that accurate financial reporting is enabled**

- *Not restricted to bribery*

Accurate books/records

Issuer must keep **accurate and reasonably detailed** books and records

- *Not restricted to bribery*

No Materiality Threshold...

What's a corrupt payment?

Anything offered or promised to induce or reward an action

- ***Need not be for personal benefit – charitable contributions***
- ***Success of bribe irrelevant***
- ***Need not be monetary – anything of value***

By an employee or an official of a government, political party, or int'l organization

To gain an improper business advantage

- ***Includes payments to support business operations – customs, tax, patent advantages***

Allowable facilitating payments

- ✓ Exception for
 - small payment to expedite
 - “routine government action”
 - to which already entitled under local law
- ✓ Can include:
 - Obtaining permits and licenses
 - Processing of governmental papers (visas or work orders)
 - Mail delivery, police protection, fire service
- ✓ Must be accurately documented in books and records

Allowable travel and living

Directly related to business

Permitted under laws, contracts and customer policy

Bona fide and reasonable

Documented purpose, request, cost, itinerary, attendees

Best Practices:

Invitations to employer entity, not individuals

Accompany travelers

Pay service providers directly

Get receipts

Risk of masking improper payments

Allowable gifts and entertainment

Unequivocally ordinary and reasonable

Allowed by receiver's employer

Nominal value, token of esteem/thanks

Tasteful and appropriate

Consistent with standards of the business

Highly regulated and often prohibited

Who is a government official?

Anyone employed by:

- Govt agency or dept.
- State instrumentality
- State-controlled enterprise
- Public international org
- Political party, party official or candidate

Hospitals are State-Owned Enterprises in Many Countries

Books and records

Make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect underlying transactions.

- Not restricted to bribery
- No materiality threshold
- No knowledge requirement
- No jurisdictional nexus to subs required

What controls are required?

Not defined by statute

Must be designed to prevent, detect improper payments

Some examples

- Up to date policy and procedures
- Training and communication
- Management approval for high risk payments
- Risk assessment
- Periodic audit
- Reporting system
- Third-party due diligence
- Etc., etc.

Compliance Challenges

Area

What's prohibited / potential risk

Specific payments

**Travel & Living,
Gifts & Entertainment**

Paying for travel of a Government Official or lavish gifts/entertainment unrelated to a business purpose

**Donations, Charitable
& Political
Contributions**

Donations for supposedly charitable purposes or contributions to Gov't Official with intent to influence a business decision

Facilitating Payments

Making payments that do not meet GE policy for facilitating payments, have not been approved, and/or are not properly accounted for

General areas

**Third Party
Representatives**

Exposing the Company to liability by associating with corrupt agents, consultants, distributors, ASPs or other Representatives

M&A & Joint Ventures

Exposing the Company to FCPA or local anti-bribery liability by not thoroughly investigating partner before entering into a transaction

Remote Locations

Failing to exercise strong controllership over remote outposts



Whose knowledge of what?

Whoever acts on your behalf

Directly or indirectly

“See No Evil, Hear No Evil” – no defense

Conscious avoidance/willful blindness = knowledge

Awareness of high probability, unless you actually believed circumstances did not exist

**Viewed in hindsight by enforcement authorities/inferred
Authorization after the fact**

Can't Stick Your Head in the Sand

Third parties

Sales Agents/Distributors/JV's

Government-facing vendors

- Customs Brokerage
- Visas and Work Permits
- Security
- EHS Permits
- Etc., etc., etc.

Managing risk from 3d Parties

Extent of diligence that is due depends characteristics of third party:

Type of Firm

- ✓ Customs brokers
- ✓ Work permits/visas
- ✓ EHS permits
- ✓ Tax/accounting
- ✓ Law firms
- ✓ Security firms

Type of Risk

- Function
- Geography
- Degree of supervision
- Industry

3d party due diligence

Ownership and business, qualifications, references, and background

Economic justification of proposed compensation

Reputation checks

Management level review

FCPA contractual obligations

3d party red flags

High risk countries

Lack of facilities or qualified staff

Excessive or unusually high compensation

Request for reimbursement without receipt and/or with vague descriptions

Request for payments to third countries or third parties

Request for payments in cash or bearer instrument

Facilitating Payment Pitfalls

Aggregation of small payments

Inadvertent payment for non-ministerial act

Books and records

Non-US enforcement

Violation of local law