



Track IV: Anti-Bribery Concerns FCPA and Beyond

November 12, 2009

Foreign Corrupt Practices Act

What is it and to whom does it apply?

▶ The Act:

- ▶ Anti-Bribery Provisions: Prohibits bribery (corrupt payments) to foreign officials to obtain or retain business
- ▶ Accounting and Internal Control Provisions: Requires companies with securities registered under the Securities Exchange Act of 1934 to make and keep appropriate books and records and to maintain a system of adequate internal accounting controls. These provisions are not limited to accounting for corrupt foreign payments or any other particular type of transactions.

▶ Applies to:

- ▶ “Issuers” under the SEC Act of 1934
 - ▶ “Domestic concerns” (any business with its principal place of business in the US)
 - ▶ Any nexus with US
 - ▶ US Citizens
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Anti-bribery provisions: elements

- ▶ No *issuer, domestic concern*, person in U.S.
 - ▶ May *corruptly*
 - ▶ Take action *in furtherance of* payment or a promise, offer or authorization of payment
 - ▶ Of a bribe or *anything of value*
 - ▶ *Directly or indirectly*
 - ▶ To a *foreign official*
 - ▶ To *obtain or retain business* or *improper advantage*
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Anti-bribery provisions: elements

- ▶ Examples of individuals potentially meeting the definition of “foreign official”:
 - ▶ Ministry, agency employee
 - ▶ Judge or legislator
 - ▶ Local officials
 - ▶ Employee of government-controlled company
 - ▶ Employees of state-owned universities
 - ▶ Private person acting officially
 - ▶ Official of public international organization
 - ▶ Candidates for office, political parties, or party officials
 - ▶ Spouse/dependent/sibling of an official
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Anti-bribery provisions: elements

- ▶ “To obtain or retain business, or an improper advantage”:
 - ▶ Win, retain or renew a contract
 - ▶ Prevent adverse government action
 - ▶ Seek or obtain regulatory approvals
 - ▶ Obtain a competitor’s bid
 - ▶ Avoid duties or reduce taxes
 - ▶ Receive money that is due you
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Anti-bribery provisions: Payments that are not prohibited

- ▶ Payments or gifts which are lawful under the written laws and regulations of the foreign country;
- ▶ Certain reasonable and bona fide expenditures such as travel and lodging expenses for foreign officials related to:
 - ▶ The promotion or demonstration of products or services, or
 - ▶ The execution of a contract with a foreign government
- ▶ Certain “facilitating payments,” i.e., payments of small value used to carry out routine government actions

Agents and consultants

- ▶ Bribes are often paid indirectly through agents
 - ▶ Red Flags include:
 - ▶ Country has historical bribery problem
 - ▶ An excessive commission
 - ▶ Government customer recommends or requires use of an agent
 - ▶ Partner or agent related to foreign official
 - ▶ Suggestions that money needed to “win the business”
 - ▶ Requests for false invoices or other documents
 - ▶ Invoice or request for payment that is unusual or departs from normal practice
 - ▶ Offshore payment requests
 - ▶ No one can describe services rendered by agent
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Best practices for agents and consultants

- ▶ Conduct FCPA due diligence prior to entering into relationship:
 - ▶ Internal approval process
 - ▶ Questionnaires and verification
 - ▶ External reference checks (e.g., D&B, banks)
 - ▶ Press/public information searches (including local press and “blacklist” searches)
 - ▶ Local law check
 - ▶ Documenting benchmarking of compensation
 - ▶ Investigation of specific “red flags”
 - ▶ Interviews/awareness training
 - ▶ Require a written contract clearly specifying work to be performed, payment terms, invoice requirements, etc.
 - ▶ Include FCPA language or certification in contract
 - ▶ Include audit rights
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Vendors

- ▶ Sales Representatives
 - ▶ Distributors
 - ▶ Law firms
 - ▶ Customs agents and freight forwarders
 - ▶ Accounting firms
 - ▶ Tax consultants/advisors
 - ▶ Other professional services firms
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Joint ventures

- ▶ Involves an equity relationship between a company and a third party
 - ▶ Company potentially liable under the FCPA for misconduct of its joint venture partners
 - ▶ Level of investment and control important
 - ▶ Monitoring of ventures important over time to reduce risks:
Negotiation of monitoring/audit mechanisms up front
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Travel, entertainment, gifts and related expenses

- ▶ When legitimate expenses become illegitimate benefits
 - ▶ Custom, local law, and common sense
 - ▶ 2007 DOJ Opinions allow for reasonable travel and entertainment of foreign officials in U.S. promotional tours
 - ▶ Red flags:
 - ▶ Business purpose is, or appears, incidental to entertainment purpose
 - ▶ Official is strategically placed to grant business or improper business advantage to company
 - ▶ Expenses are lavish or out of line with company guidelines and local customs
 - ▶ Spouse or children are invited
 - ▶ Expenses are paid to official personally
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Gifts to foreign government officials

- ▶ Prevalent in countries where gift giving is ingrained in the business culture
 - ▶ Must never be given in connection with processing business
 - ▶ Must be modest in amount, never in cash
 - ▶ Promotional items with corporate logos preferred
 - ▶ Best practices: monetary limits on gifts, tracking through gift registers; GL coding; audit and review.
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Charitable and social contributions

- ▶ Donations can be considered “anything of value”
- ▶ If other elements of an FCPA violation are present, it is not a defense that the charity is legitimate

FCPA: Accounting, record-keeping, and internal controls

- ▶ Issuer must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”
 - ▶ Issuer must also “devise and maintain a system of internal accounting control sufficient to provide reasonable assurances” that
 - ▶ Transactions are executed and access to assets is permitted only in accordance with management authorization and that
 - ▶ Transactions are recorded in a way to permit financial statements to be prepared in accordance with GAAP.
 - ▶ “Reasonable detail” and “reasonable assurance” mean the level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.
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FCPA: Internal control structure

- ▶ Key elements:
 - ▶ Creating a culture of compliance
 - ▶ Training people to recognize and report red flags
 - ▶ Special training for finance professionals
 - ▶ Special training for senior executives
 - ▶ Special training for others in FCPA high-risk positions
 - ▶ Policies, procedures and financial controls around high risk areas:
 - ▶ Dealings with governments, government-owned entities
 - ▶ Dealings with customs
 - ▶ Dealings with licensing authorities, tax authorities, regulators
 - ▶ Due diligence and financial controls over agents, consultants and other high-risk vendors, including contracting controls and payment review processes
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FCPA: Internal control structure

- ▶ Key elements:
 - ▶ Accounting and financial controls surrounding cash, petty cash, expense authorization and reimbursement
 - ▶ Controls around gift giving, travel and entertainment of government officials, and charitable contributions including pre-approval process and transparency for transactions
 - ▶ Robust FCPA compliance program including clear company policies, communication of policies, helpline, training and education, investigative function, discipline and zero tolerance for violations
 - ▶ Robust FCPA auditing process for compliance
 - ▶ Documentation of FCPA internal control processes
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Sample FCPA compliance program

Risk assessment

Examples of criteria applied to business during risk assessment:

- ▶ Government end-users
 - ▶ High risk geographical markets and end users in export destinations
 - ▶ Commission arrangements and payment terms
 - ▶ Significant sub-contracting and use of third parties and agents
 - ▶ Government touch points such as customs, taxes, licenses, etc.
 - ▶ NGO's, lobbying costs, PR expenditure, political contributions etc.
 - ▶ Previous issues, incidents, or whistleblower activity
 - ▶ Individually material contracts
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Sample FCPA compliance program

Initial review

Examples of criteria applied during initial review:

- ▶ Review Internal Control Questionnaire and Internal Audit testing results
 - ▶ Business performs a process, controls and FCPA/corruption risk self assessment
 - ▶ Review business unit history; any whistleblower activity; any other business related concerns
 - ▶ Review trial balance
 - ▶ Conduct selected telephonic interviews
 - ▶ Confirm training, certifications, employee declarations etc. process in place
 - ▶ Confirm agent/vendor DD procedures in place
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Sample FCPA compliance program

Process testing

Examples of procedures performed during detailed process review:

- ▶ Perform initial review
 - ▶ Document business model and particularly distribution channel
 - ▶ Review detailed accounting data (consider analytics if appropriate)
 - ▶ Review approval matrix and expense policies
 - ▶ Inquire about existence of, and processes around, high risk payments (see next slide)
 - ▶ Conduct more detailed interviews of finance, compliance and business/sales personnel
 - ▶ Review training attendance, certifications, employee declarations etc.
 - ▶ Review a sample of vendor DD procedures
 - ▶ Review a sample of high risk contracts to ensure compliance with policy and procedures
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Sample FCPA compliance program

Transaction testing

Additionally test identified high risk transactions

Examples of transactions tested during detailed transaction testing:

- ▶ Commission payments (and other payments to intermediaries), including success or finder's fees
 - ▶ Distributors/agents/intermediaries
 - ▶ Payments made to and from third-party accounts
 - ▶ Professional fees/consulting fees
 - ▶ Customs brokerage fees
 - ▶ Travel, entertainment and gifts
 - ▶ Petty cash
 - ▶ Subcontractors (if required)
 - ▶ Charities, PR expenses, political contributions and NGOs
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Red flags

- ▶ Rumors regarding unethical or suspicious conduct by an employee, marketing representative, consultant or other business partner, or a government official
 - ▶ Unnecessary third parties or multiple intermediaries
 - ▶ Requests for payments to a third party rather than the consultant
 - ▶ Requests for payments in a third country
 - ▶ Business in a country with bribery problems
 - ▶ Requests for payment in cash
 - ▶ Requests for unusually large commissions or other payments, or payments that appear excessive for the service rendered
 - ▶ Political contributions
 - ▶ Requests for reimbursement of expenses that are poorly documented
 - ▶ Incomplete or inaccurate information in required disclosures
 - ▶ Refusal to certify compliance
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