



BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.



## An Overview of the Foreign Corrupt Practices Act

Presentation to:

Ninth Annual Pharmaceutical Regulatory and Compliance Congress  
Washington, DC  
October 27-29, 2008

Joseph B. Tompkins, Jr.  
Sidley Austin LLP  
Washington, DC

# FCPA Overview

- Anti-bribery Rules
- Enforcement and Penalties
- OECD and United Nations Anti-bribery Conventions
- Enforcement Environment and Trends
- Actual Prosecutions



# Anti-bribery Rules

# U.S. Foreign Corrupt Practices Act (FCPA)



- FCPA first enacted in 1977
- Criminalizes the bribery of foreign officials anywhere in the world where the purpose of the bribe is to influence an official decision in order to obtain or retain business.
- Jointly enforced by the U.S. Department of Justice and the U.S. Securities and Exchange Commission



# Elements of an FCPA Violation

- A “covered” person / entity
- Must offer or give something of “value”
- To a “foreign official”
- To “obtain or retain business”
- With “corrupt” intent

# Who is a “Covered” Person?

- **Issuers** of registered securities in the U.S. (includes non-U.S. companies who trade ADRs on U.S. stock exchanges)
- All “**domestic concerns**” meaning U.S. citizens, residents, companies, and foreign branches of U.S. companies
- Officers, directors, employees, and agents of the above
- **Foreign companies or persons** who commit acts in furtherance of corrupt payments while in the U.S. or who cause others to do so.

# What is “Value”?

- Anything of value broadly construed
  - Cash and cash equivalent
  - Extravagant hosted travel and non-monetary gifts
  - Intangible benefits such as enhanced reputational value for the official or benefit conferred to favored cause or charity
  - Benefit to third persons with connection to government officials
- Includes offer or promise alone
- NO *de minimis* exception if improper intent



# Who is a “Foreign Official”?

Foreign officials at all levels very broadly defined

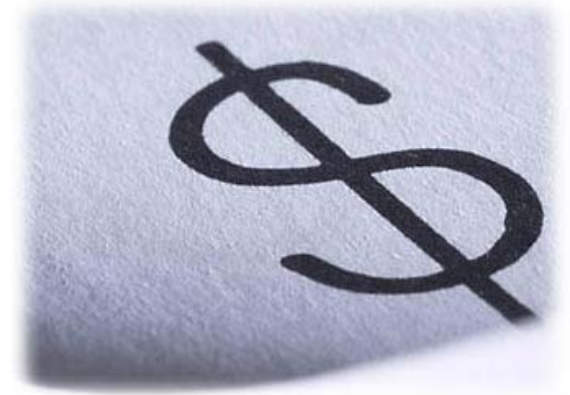
- any officer or employee of a government or any department, agency, or instrumentality of a government;
- any person acting in an official capacity on behalf of a government;
- any officer or employee of a company or business owned in whole or part by a government;
- any officer or employee of a public international organization such as the World Bank or the United Nations;
- any officer or employee of a political party or any person acting in an official capacity on behalf of a political party; and/or
- any candidate for political office.





# Is the Payment to “Obtain or Retain Business”?

- Payment made to obtain or retain business by:
  - Influencing any official act or decision
  - Inducing official to do or omit to do acts in violation of official duties
  - Securing any improper advantage
  - Inducing official to influence acts of government
- Need not relate to specific business opportunity
- Bribes with any “business nexus” such as to reduce foreign duties/taxes can violate FCPA



# Is There a “Corrupt” Intent?

- Benefit conferred or offered to induce foreign official to abuse or misuse his/her position or authority through action or inaction
- Quid pro quo generally assumed
  - Gift/payment made with reasonable expectations of some official favor in return
  - Quid pro quo need not be executed
  - Official need not be able to deliver “quo” herself
- Government need not establish defendant knew his/her conduct violated FCPA

# Indirect Offers/Payments Prohibited

- Payment or offers/promises to pay any person while knowing all or portion of value will be given, directly or indirectly, to any foreign official are prohibited
- “Knowing” means:
  - Actual awareness
  - A firm belief as to the existence of such circumstance or that such circumstance will occur
  - A high probability of the existence of circumstance unless the person “actually believes that such circumstance does not exist”
  - No “willful blindness” - i.e., conscious disregard or deliberate ignorance of known circumstances that should alert one to FCPA violations is not permitted

# Exceptions and Affirmative Defenses

- Exception
  - “Routine” governmental action - i.e., “grease payments”
- Affirmative Defenses
  - Payments authorized by written foreign law
  - Bona fide business expenditures



# Exception: “Routine” Governmental Action

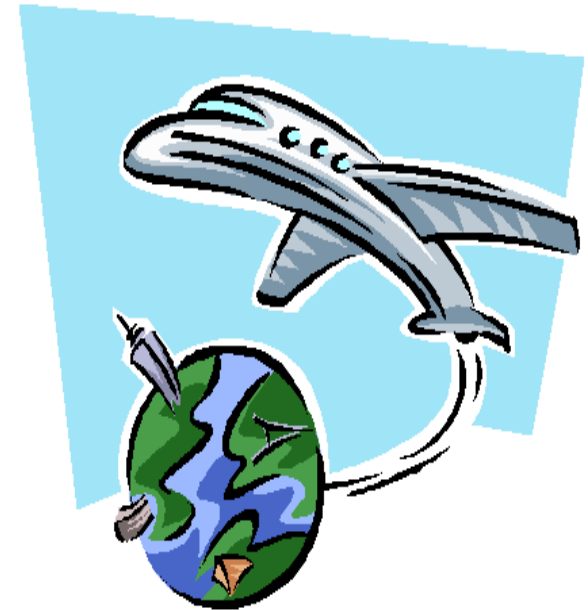
- Anti-bribery rules do not apply to payment to secure “routine” governmental action
- Examples
  - Obtain permits, licenses, visas
  - Secure police protection, timely official inspections
  - Provide phone, mail, power, water service, loading/unloading cargo, protecting perishable products
  - “Actions of a similar nature”
- Ministerial acts, not discretionary actions
- Perform official function faster, not make a different substantive decision

# Affirmative Defense: Written Foreign Law

- Lawful under written law of host country
  - Informal business customs or practices NOT covered
- Examples
  - Lawful political contributions, modest gifts, training of officials
- Limited Utility
  - Must be explicitly authorized
  - Significant downside risks

# Affirmative Defense: Bona Fide Expenditures

- Reasonable Business Expenditures
  - Directly related to legitimate promotional or contract activities
  - Reasonable under the circumstances
  - Bona fide and made in good faith
- Examples
  - Reimbursement for travel, meals, entertainment
  - Product samples
  - Customer training



# Record Keeping Requirements

- Keep accurate books, records and accounts
  - In reasonable detail to accurately and fairly reflect the transactions and dispositions of the assets of the issuer
  - Requirement can apply to foreign subsidiaries
- Adhere to internal controls to ensure compliance
  - Expenditures have proper management authorization
  - In accordance with GAAP principles
  - Audited to show existing assets match books and records



# Enforcement and Penalties

# Anti-bribery Penalties: Companies

- Criminal Penalties
  - Up to \$2 million criminal fine per violation
- Civil Penalties
  - Up to \$11K civil fine per violation
  - Up to \$25M for books and records violations
- Collateral Consequences
  - Harm to public relations and reputation
  - Inability to partake in U.S. government procurement or receive export licenses
  - Unlawful FCPA payments are not tax deductible as business expense, but are taxable items

# Anti-bribery Penalties: Individuals

- Criminal Penalties
  - Up to \$100K criminal fine per violation
  - Up to 5 years' imprisonment per violation
  - Up to \$5M or 20 years in prison for books and records violation
- Civil Penalties
  - Up to \$11K civil fine per violation
  - SEC may seek additional fines up to \$100K based on expected profit
- Collateral Consequences
  - Fines are NOT reimbursable by the company

# OECD and United Nations Anti-bribery Conventions

# OECD Anti-bribery Convention

- “Globalization” of U.S. law by Organization for Economic Cooperation & Development (OECD)
  - Establishes standard to be met by all Parties in defining offense of bribery of foreign officials, which is similar to FCPA
  - Calls upon Parties to take all necessary measures to establish bribery of foreign officials as a criminal offense
  - Requires Parties to adopt effective, proportionate and dissuasive criminal penalties for bribery of foreign officials
- Ratified by 30 OECD countries and 6 non-OECD countries
- All ratifying countries have enacted some form of implementing legislation



# Ratification of OECD Convention

## United States

### Other OECD Countries

|   |                |   |         |   |                 |   |                 |
|---|----------------|---|---------|---|-----------------|---|-----------------|
|    | Australia      |    | France  |    | Japan           |    | Poland          |
|    | Austria        |    | Germany |    | Korea           |    | Portugal        |
|    | Belgium        |    | Greece  |    | Luxembourg      |    | Slovak Republic |
|    | Canada         |    | Hungary |    | Mexico          |    | Spain           |
|    | Czech Republic |    | Iceland |    | The Netherlands |    | Sweden          |
|   | Denmark        |   | Ireland |   | New Zealand     |   | Switzerland     |
|  | Finland        |  | Italy   |  | Norway          |  | Turkey          |
|   |                |   |         |   |                 |  | United Kingdom  |

### Non-OECD Countries

- Argentina
- Brazil
- Bulgaria
- Chile
- Estonia
- Slovenia



# United Nations Convention Against Corruption

- Entered into force on December 14, 2005
- Key Provisions:
  - Standards for corruption prevention applicable to both public and private sectors
  - Criminalization requirements for corruption offenses
  - International cooperation in the investigation and prosecution of cases
  - Asset recovery mechanisms and private rights of action for victims of corrupt practices
- Anticipate increased international cooperation in investigations and prosecutions

