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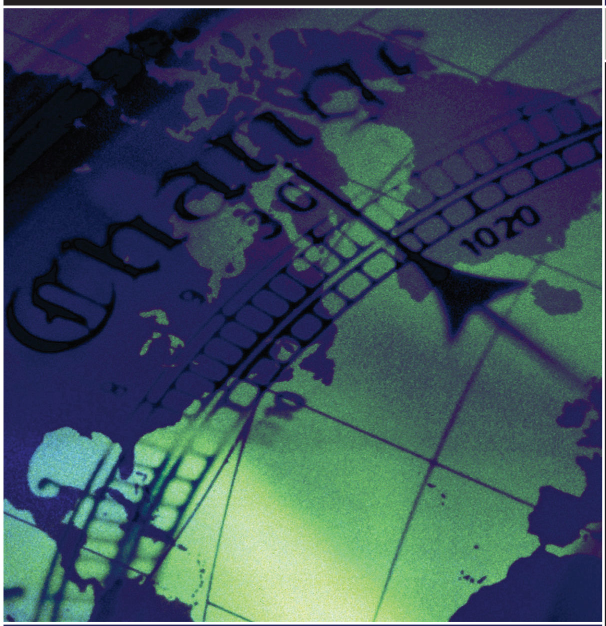

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Overview of the Foreign Corrupt Practices Act:

A Practical Guide For Businesses

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Overview of the Foreign Corrupt Practices Act: A Practical Guide For Businesses

The United States Foreign Corrupt Practices Act of 1977, as amended in 1988 and 1998 (the "Act" or the "FCPA"), broadly prohibits making corrupt payments to foreign officials in connection with international business.[1] The Act makes it unlawful for any entity or individual falling under its jurisdiction, including any U.S. company and any director, employee, or agent of a U.S. company, to offer, give, promise to give, or authorize the giving of money or anything of value, whether directly or through another person or entity, to a foreign official, political party, party official, or candidate for political office (collectively referred to as "covered officials") in order to influence any act or decision of such official or to induce such official to use his or her influence with a government or instrumentality thereof for the purpose of obtaining or retaining business for or with, or directing business to, any person or entity. The Act also requires publicly-held corporations reporting to, or having a class of securities registered with, the Securities and Exchange Commission ("SEC") to keep adequate books and records and to establish internal accounting controls designed, among other things, to prevent the maintenance or disbursement of funds that could be used as a source of improper payments to foreign officials.[2] The Act is enforced by the Department of Justice ("DOJ") and the SEC through criminal, civil injunctive and other actions and the imposition of criminal and civil penalties.

The Act initially was adopted in response to highly publicized disclosures during the early to mid 1970s of a pattern and practice of questionable foreign payments totaling over $300 million by more than 400 U.S. companies. After lengthy debate, Congress chose to prohibit such activities outright rather than simply to mandate disclosure. The Act was first amended in 1988 to relax the Act's accounting provisions somewhat and to clarify or allow several exceptions and defenses under the Act's anti-bribery provisions, while at the same time strengthening the penalties for violations.

After 1988, in an effort to "level the playing field" with regard to the business practices of foreign competitors of U.S. companies, the United States spearheaded negotiations within the Organization for Economic Cooperation and Development ("OECD"), culminating in 1997 with the negotiation of the Convention on Combating Bribery of Foreign Officials in International Business Transactions (the "OECD Convention"). The OECD Convention, now ratified by the United States and 38 other countries, obligates parties to make bribery of foreign government officials a criminal offense punishable "by effective, proportionate and dissuasive criminal penalties." In 1998, in connection with ratifying the OECD Convention, the United States amended the FCPA to bring its anti-bribery provisions into conformity with the Convention. The 1998 amendments expanded the Act's jurisdiction to include conduct of U.S. companies and citizens taking place wholly outside of the United States, as well as acts of foreign entities and individuals carried out within U.S. territory. The 1998 amendments also broadened the definition of "foreign official" to include officers and employees of public international organizations (e.g., the United Nations and the World Bank).

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[1] 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff.

[2] 15 U.S.C. § 78m(b).

Prohibited Payments

The operative language of the Act prohibits

- "an offer, payment, promise to pay, or authorization of the payment of any money or offer, gift, promise to give, or authorization of the giving of anything of value";[3]
- to any foreign official, foreign political party or official thereof, any candidate for foreign political office, or any other person with knowledge that all or a portion of such money or thing will be offered or given, directly or indirectly, to any of the foregoing;
- for purposes of (a) "influencing any act or decision of such [covered official] in his official capacity," (b) "inducing such [covered official] to do or omit to do any act in violation of the lawful duty of such official," (c) "inducing such [covered official] to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality," or (d) "securing any improper advantage";
- "in order to assist [the payor] in obtaining or retaining business for or with, or directing business to, any person."[4]

The phrase "anything of value," while not defined in the Act, has been construed very broadly under the FCPA to include tangible and intangible items expected or intended to benefit the payee. Given the broad construction of "anything of value," caution should be exercised in dealing with family members of covered officials and otherwise engaging in acts that might be viewed as indirectly benefiting such an official. For example, depending on the circumstances, an offer of employment to the relative of a covered official or a donation to an official's favorite charity could draw the interest of U.S. enforcement officials.[5]

As a general matter, all payments intended to influence any governmental act or decision for a proscribed purpose are prohibited, regardless of whether the payee accepts the payment or succeeds in producing the desired outcome. Although Congress indicated its intent to exclude certain widespread practices from the scope of the Act, it is often difficult to determine where the lines are to be drawn. These protected areas are discussed below; however, given the lack of clarity and the potential criminal and civil sanctions, any doubts should typically be resolved against making or continuing questionable foreign payments. Generally speaking, it should be assumed that any transaction in which there appears to be a *quid pro quo* or intended *quid pro quo* – i.e., where the payment follows or is followed by official action or inaction favorable to the business interests of the payor – will be of interest to the SEC and/or the DOJ.

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[3] For ease of reference, offers, payments, promises to pay, and authorizations to pay will be referred to simply as "payments," makers of such payments as "payors," and recipients of such payments as "payees."

[4] 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

[5] For example, the SEC brought an FCPA enforcement against a U.S. issuer several years ago based on contributions made by its Polish subsidiary to a charitable organization headed by a Polish official who played an important role in sales of pharmaceutical products in Poland. The issuer agreed to pay a $500,000 civil penalty to settle the matter. SEC Litigation Release No. 18740, June 9, 2004 (Schering-Plough Corporation) (in this case, the SEC charged violations of only the FCPA books-and-records and internal controls provisions).

Who is Covered By The FCPA's Anti-Bribery Provisions

In General

Although the required jurisdictional nexus varies according to the identity of the payor, the FCPA's anti-bribery provisions may apply to any of the following:

- any individual who is a citizen or lawful permanent resident of the United States;
- any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States, or that is organized under the laws of any state, territory, possession, or commonwealth of the United States;
- any corporation or other entity that has a class of securities registered with the SEC pursuant to section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or is required to file reports under section 15(d) of the Exchange Act (collectively, "issuers");
- any officer, director, employee, agent, or stockholder of an entity described above acting on behalf of the entity, <u>whether or not</u> such person (if an individual) is a citizen or permanent resident of the United States or (if not an individual) has its principal place of business in the United States or is organized under the laws of any state, territory, possession, or commonwealth of the United States; and
- any other entity or individual with respect to acts within U.S. territory.

The FCPA does not apply to a covered official who is the recipient of an improper payment, although the DOJ has from time to time used other federal criminal statutes such as the money laundering laws or the wire fraud statute to reach such individuals.

Foreign Subsidiaries and Affiliates of Issuers and U.S. Companies

The drafters of the FCPA decided against making foreign subsidiaries and affiliates of issuers and of U.S. companies automatically subject to the anti-bribery prohibitions of the Act, in view of the inherent jurisdictional, enforcement, and diplomatic difficulties involved. However, the prohibitions of the Act do apply to any "agent" of a covered business entity, including a foreign subsidiary or affiliate that acts as an agent of an issuer or a U.S. company. Payments made by a foreign subsidiary or affiliate that is not acting as an agent, and that does not receive the relevant funds from the issuer or the U.S. company, may nevertheless subject the issuer or U.S. company and its officers, directors, and employees to liability if they are involved in, facilitate, authorize or are aware of an improper payment by the foreign subsidiary or affiliate.

U.S. enforcement personnel take the position that mere acquiescence is sufficient to establish liability, and that acquiescence can be demonstrated by either (a) advance knowledge of the improper payments (absent a clear effort to stop them) or (b) the continuation of a business relationship after knowledge or reason to know that such payments have occurred and are therefore likely to occur again in the future (absent active efforts to stop the pattern of conduct, and some basis for believing that it has in fact halted).

As a consequence, in contemplating a non-U.S. acquisition or investment (including a foreign joint venture), an issuer or a U.S. company should look for any "red flags," such as a lack of transparency or a history of corruption or suspicious payments. Where an issuer or a U.S. company takes a minority stake in a foreign business venture that does not or may not provide sufficient power to prevent or halt improper payments, protective measures should typically include audit rights and the ability to disengage from the business venture if such payments occur.

Foreign Parents of Issuers and U.S. Companies

Because the FCPA applies to actions of "any stockholder" of an issuer or a U.S. company, non-U.S. companies and individuals that are stockholders of business entities covered by the Act are directly prohibited from making improper payments on behalf of such entities. As a practical matter, there would need to be some link to U.S. territory in order for liability to attach to the conduct of the foreign parent or other foreign stockholder; however, U.S. enforcement officials take an expansive view of the Act's jurisdictional reach (as discussed below).

Jurisdictional Reach

The required jurisdictional nexus under the FCPA anti-bribery provisions varies according to the identity of the individual or entity making the payment.

With respect to U.S. companies and citizens ("U.S. persons"), the 1998 amendments to the FCPA added worldwide nationality jurisdiction such that a payment by a U.S. person falls under the scope of the FCPA regardless of where the conduct takes place and "irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such [payment]".[6]

Foreign national employees and agents of U.S. companies do not fall under this worldwide nationality jurisdiction, and they remain individually liable under the FCPA only with respect to acts that are linked to U.S. interstate or international commerce. Depending upon the circumstances, however, the conduct of a foreign employee or agent that takes place completely outside the United States can create liability for the U.S. company.

With respect to issuers that are foreign entities, the FCPA extends only to those acts involving a link to U.S. interstate or international commerce. The officers, directors, employers, agents, and stockholders of such issuers can also be held individually liable, but (for non-U.S. persons) only where they engage in acts linked to U.S. interstate and international commerce.

[6] 15 U.S.C. §§78dd-1(g), 78dd-2(i).

In order for issuers that are foreign entities and their officers, directors, employers, agents and stockholders to face potential FCPA liability, it is not necessary for a means or instrumentality of interstate or international commerce to be used directly in the making of an improper payment; rather, it is sufficient that it be used to facilitate the improper payment. Thus, holding a meeting in the United States to arrange or further an improper payment could satisfy the jurisdictional link, as could placing a phone call or sending an email from the United States (even if the non-U.S. person is only transiting through the United States). Moreover, in the view of the DOJ and the SEC, even directing an electronic payment in dollars, which clears through a bank in the United States, can be sufficient to meet the jurisdictional requirement for non-U.S. persons.[7]

Finally, with respect to foreign entities that are non-issuers and non-U.S. persons, the FCPA requires conduct in furtherance of an improper payment to be taken while such entity or person is in the terrritory of the United States. This form of jurisdiction is commonly referrred to as "territorial jurisdiction."

Recipients of Prohibited Payments

In General

The FCPA forbids payments made directly or indirectly to (a) "any foreign official," or (b) "any foreign political party or official thereof, or any candidate for foreign political office." The Act defines "foreign official" as any "officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." Public international organizations include any entity designated as such by Executive Order of the President (e.g., the United Nations and the World Bank).[8]

As a general matter, the DOJ and SEC will regard officers and employees of corporations and other business entities wholly or primarily owned or controlled by a foreign government to be government officials for the purposes of the Act. In countries where enterprises owned or controlled by the government account for substantial economic activity (e.g., China), there can therefore be large numbers of individuals holding business positions who must be treated as "foreign officials" for FCPA purposes. Members of royal families are also considered to be "foreign officials," as are consultants and advisors that have been retained by foreign government agencies to assist in carrying out official functions.

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[7] In addition to pushing the boundaries of jurisdiction for substantive FCPA charges, U.S. enforcement officials have employed other tools to target international bribery with some link to the United States. Assuming a minimal connection to U.S. territory, non-U.S. entities and individuals can be targeted for U.S. enforcement action based on a charge of conspiracy to violate the FCPA or aiding and abetting an FCPA violation, as well as violating, conspiring to violate, or aiding and abetting a violation of some other U.S. law implicated by international bribery (such as laws related to money laundering). Depending on the circumstances, this is true even for a recipient of a prohibited payment (i.e., a covered official).

[8] 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

The terms "foreign political party or official thereof" and "candidate for foreign political office" are not defined in the Act. The legislative history indicates that Congress did not intend to prohibit legitimate campaign contributions, but did intend to capture payments when there was some form of business-related *quid pro quo*.[9]

Third-Party Payments; "Willful Blindness" and Intermediaries

In addition to payments made directly to foreign officials, political parties, and candidates, the FCPA also prohibits any payment to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly," to a covered official for a proscribed purpose. The Act, as amended in 1988, defines "knowing" as actual awareness that an improper payment will be made, or a firm belief that such a result is "substantially certain."[10] The legislative history emphasizes that this standard encompasses instances of "willful blindness," "conscious disregard" or "deliberate ignorance" of the acts of an intermediary.[11]

Although the 1988 amendments reduced somewhat the risk of liability for the acts of an agent that existed under the "reason to know" standard contained in the Act before 1988, it remains highly advisable for issuers and U.S. companies to be aggressive in minimizing the risks of unlawful conduct by their agents. Clear policies explaining the prohibitions of the Act and prohibiting unlawful payments by agents should be adopted, reduced to writing, and circulated to employees and agents. Due diligence and qualification procedures should be developed, and should be carefully applied before new agents are retained. Agents should be required to acknowledge in writing the prohibitions of the Act and to agree to abide by its requirements. Agents' fees should be reasonably related to their services, and agents should be required to report periodically on their activities and to account for the disposition of funds provided to them. Agreements with foreign agents should also provide for damages and termination for violating prohibitions against illegal payments. Finally, depending on the nature of the business relationship and the risks it presents, companies should generally demand a right to audit the relevant books and records of their agents in order to ensure compliance with the FCPA.

[9] H.R. Conf. Rep. No. 100-576 (1988) at 918-19.

[10] 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3).

[11] H.R. Conf. Rep. No. 100-576 (1988) at 919-21.

Business Purpose Test

The FCPA prohibits payments made for the purpose of "obtaining or retaining business for or with, or directing business to, any person." For conduct to fall within the Act's scope, it is not necessary that the act sought on the part of a covered official be directly related to the award or retention of a government contract. U.S. enforcement personnel have interpreted this language broadly to encompass any business purpose, and thereby to apply to payments made to avoid or reduce customs, income or other taxes, to bypass customs, health, or other inspections, or otherwise to change the enforcement or application of laws or regulations.

In the most important court ruling to date regarding the meaning of the FCPA's business purpose test, the Fifth Circuit Court of Appeals reversed a lower court's dismissal of a prosecution under the FCPA alleging bribery intended to influence a foreign official to reduce customs duties and sales taxes on imports into Haiti. The Court of Appeals held that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and . . . bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage".[12]

Exceptions and Affirmative Defenses

"Grease" or "Facilitating" Payments

Since 1988, the Act has contained an express but narrowly defined exclusion for "grease" or "facilitating" payments. The exclusion applies to "any facilitating or expediting payment to a [covered official] the purpose of which is to expedite or to secure the performance of a routine governmental action by a [covered official]."[13] "Routine governmental action" is defined as "only an action which is ordinarily and commonly performed by a foreign official in –

- obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country;
- processing governmental papers, such as visas and work orders;
- providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- actions of a similar nature."

[12] *U.S.* v. *Kay*, 359 F.3d 738, 755 (5th Cir. 2004).

[13] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

In order to emphasize the limitation of this exclusion to expediting low-level, non-discretionary governmental actions, the Act goes on to state that "'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 . . . ."[14]

At a minimum, "grease" payments should be approached with considerable caution. In fact, FCPA compliance programs are trending away from corporate policies that allow employees and agents to make facilitating payments to covered officials. There are at least three good reasons for this shift in compliance practice. First, it is not necessarily easy to identify the dividing line between a permitted facilitating payment and a prohibited bribe, and permitting "grease" payments therefore involves a risk tolerance and a commitment of compliance resources that fewer companies are prepared to accept. Second, companies have become less willing to overlook the fact that facilitating payments contribute to local corruption problems and are almost invariably illegal where they occur. Last but not least, most countries that are parties to the OECD Convention have adopted anti-bribery laws that do not permit facilitating payments. Particularly noteworthy in this regard is the UK Bribery Act, the new anti-bribery law adopted in the UK in 2010,[15] which by its terms applies not only to all UK companies worldwide but also to all companies worldwide that are conducting business in whole or in part in the UK (with no exception for facilitating payments).[16]

Payments in Connection with the Promotion or Demonstration of Products or Services

It is an affirmative defense to liability under the FCPA that a payment "was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a [covered official] 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."[17] The legislative history of this provision, introduced into the Act by the 1988 amendments, indicates that this defense was not intended as a free pass for any expenditures made in connection with product promotion or contract performance: "If a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a bona fide, good-faith payment, and this defense would not be available."[18]

[14] 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).

[15] The UK Bribery Act was adopted in April 2010, and went into effect July 1, 2011.

[16] It should also be noted that the OECD has adopted (with the concurrence of the United States) a recommendation to member countries that they encourage companies to prohibit or discourage facilitating payments in their internal controls and compliance and ethics programs. OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, adopted November 26, 2009.

[17] 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

[18] H.R. Conf. Rep. No. 100-576 (1988) at 922.

In order to qualify for this affirmative defense, the expenditure must be in connection with and proportionate to a legitimate business purpose. For example, a one day visit to a plant site preceded or followed by a one week, all-expenses paid trip to Disneyland for a covered official and his family is not likely to qualify for the defense and could easily draw the interest of U.S. enforcement agencies.[19] As a general matter, payments for the travel expenses of a covered official's family members are not advisable. Direct payments to foreign officials also should be avoided whenever possible. The nature and amount of the expenditure are also important. Under a test of reasonableness, business-related expenditures for the travel, lodging, feeding, or entertainment of government officials should not be extravagant, so as to avoid any suggestion that they effectively constitute a bribe.

Payments that are Lawful Under the Written Laws of the Covered Official's Country

It is also an affirmative defense to liability under the FCPA that a payment was "lawful under the written laws and regulations of the [covered official's] country."[20] In practice, this defense is rarely of much practical utility, since the conduct in question must be expressly permitted by a country's written laws (i.e., the absence of an express prohibition on the particular conduct is not sufficient). It is not surprising that, according to the State Department, no country's written laws permit the bribery of its officials.

[19] For example, the DOJ brought an enforcement action (resulting in an injunction and a $400,000 fine) against a U.S. company that provided a foreign official with an exorbitant per diem, first-class airfare, and the traveling expenses of the official's immediate family. *United States* v. *Metcalf & Eddy, Inc.*, Civ. Act. No. 99CV-12566-N6 (D. Mass 1999). As a more recent example, a former U.S. issuer agreed to pay a $1 million criminal fine and a $1.5 million civil penalty to settle DOJ and SEC charges that, over a three-year period, it spent millions of dollars on trips to the United States by Chinese officials that consisted primarily of sightseeing, entertainment, and leisure activities. DOJ press release dated December 21, 2007; SEC Litigation Release No. 20414, December 21, 2007 (Lucent Technologies Inc.) (in this case, the SEC charged violations of only the FCPA books-and-records and internal controls provisions).

[20] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

Books and Records and Internal Controls Requirements for Issuers

The FCPA requires issuers to "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." "Reasonable detail" is defined as the level of detail that "would satisfy prudent officials in the conduct of their affairs."[21]

In addition, the Act requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –

- transactions are executed in accordance with management's general or specific authorization;
- transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- access to assets is permitted only in accordance with management's general or specific authorization; and
- the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences."

"Reasonable assurances" is defined in a fashion similar to the definition of "reasonable detail": namely, the level of assurance that "would satisfy prudent officials in the conduct of their own affairs."[22]

Although the FCPA's accounting provisions arose as part of the Congressional effort to target overseas bribery of government officials – particularly by prohibiting the creation of slush funds and other off-the-books activities – these provisions are not limited to such conduct, and they have in fact been enforced in a number of other contexts. At the same time, these provisions are not enforced as abstract propositions, but rather tend to be wielded by the DOJ or the SEC where the creation of false books or records or the failure to maintain adequate internal controls has caused or facilitated some serious problem. The problem is commonly bribery (whether governmental or commercial); but it can also be inaccurate financial statements or other SEC filings or a misappropriation of company assets.

[21] 15 U.S.C. § 78m(b)(2)(A), (7).

[22] 15 U.S.C. § 78m(b)(2)(B), (7).

Foreign Subsidiaries and Affiliates of Issuers

The accounting provisions are interpreted by U.S. enforcement agencies to make issuers ultimately responsible for the books and records and internal controls failings of their subsidiaries, regardless of the materiality of those failings to the accuracy of the issuer's financial statements. On the criminal side, the requisite willfulness on the part of the issuer is specifically set forth in the Act (whether the conduct does or does not involve a subsidiary): namely, there must be either (i) knowing circumvention or knowing failure to implement a system of internal accounting controls or (ii) knowing falsification of any book, record, or account.[23] On the civil side, the SEC essentially takes the position that issuers are strictly liable for the books and records and internal controls failings of their subsidiaries.

Because the FCPA provides that "no person" may knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify a book, record, or account involving an issuer, the subsidiary itself can also be directly liable for knowing violations of the books and records and internal controls provisions – as can directors, officers, and employees of the issuer and the subsidiary.[24] Such knowing violations can lead to both criminal and civil penalties.

With respect to affiliates including joint ventures, the FCPA imposes essentially a "good faith efforts" requirement. Specifically, the accounting provisions provide that, where an issuer holds 50 percent or less of the voting power of a U.S. or foreign firm, it is required only to make a good faith effort to use its influence to cause the firm to devise and maintain a system of internal auditing controls along the lines described above.[25]

Given the enforcement and liability risks, issuers are well-advised to establish global books and records and internal controls policies and practices. The issuer should scrutinize carefully the books and records and internal controls practices of acquisition targets and, where an acquisition occurs, should ensure that the newly acquired company adopts the issuer's global policies and practices as quickly as feasible. The higher risk the company's country of operation is from a corruption perspective, the higher the priority should be assigned to these tasks, particularly where an acquired company's existing management will be largely retained.

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[23] 15 U.S.C. § 78m(b)(4)-(5).

[24] 15 U.S.C. § 78m(b)(5).

[25] 15 U.S.C. § 78m(b)(6).

Relationship to Anti-Bribery Provisions for Issuers

Because bribery of government officials is typically not recorded accurately in a company's books and records, violations of the books and records provision are commonly charged where violations of the anti-bribery provisions are charged. In terms of civil enforcement by the SEC, the same is also true with respect to internal controls charges – that is, both books and records and internal controls violations are commonly charged where violations of the anti-bribery provisions are charged. Although the SEC has not taken the position that any improper payment or any inaccurate recording of such a payment represents a *per se* failure to meet the internal controls requirement, any major problem or any pattern of problems in these areas will tend to result in internal controls charges. By contrast, DOJ enforcement officials have indicated that criminal charges for violating the FCPA internal controls provision will be limited to egregious cases involving widespread patterns of misconduct (such as the Siemens case, which is briefly discussed below).

On the other hand, FCPA books and records and/or internal controls charges will not necessarily lead to anti-bribery charges, even where the underlying problem is bribery of covered officials. Sometimes this is because the DOJ or SEC lacks the type of evidence on which it would typically base anti-bribery charges – for example, where there is no evidence that issuer personnel authorized or knew of bribery by the personnel of a non-U.S. subsidiary. Sometimes this is a result of the enforcement negotiating process, as issuers will commonly attempt to avoid anti-bribery charges, especially on the criminal side (where there can be substantial collateral consequences, as discussed below).

Where an issuer cannot avoid an anti-bribery charge by the DOJ altogether, it may still be able to negotiate a relatively positive outcome in which only its subsidiary has to accept such a charge. It should be noted, however, that success in avoiding an anti-bribery charge does not remove the threat of disgorgement, as the SEC regularly demands that issuers disgorge the profits associated with foreign subsidiary contracts that were obtained by means of bribing government officials even where just books and records and/or internal controls charges are brought by the SEC against the issuer (and even where there is no evidence that any issuer personnel authorized or had knowledge of the bribes).

Willful violations of the FCPA are subject to very serious criminal penalties. The DOJ has sole responsibility for criminal prosecutions.[26] The DOJ is also authorized to bring civil penalty and injunctive actions against persons other than issuers and their directors, officers, employees, and agents. Civil enforcement authority with respect to issuers and their directors, officers, employees, and agents is vested in the SEC.[27] Both the DOJ and the SEC have become increasingly aggressive in their enforcement efforts against FCPA violations, and in their efforts to use the available penalties to send a strong deterrent message.

Anti-Bribery Provisions

Criminal Penalties

Companies that violate the anti-bribery provisions of the FCPA may be fined the greater of (i) $2,000,000 per violation or (ii) twice the gain or loss resulting from the improper payment. Individuals who violate the anti-bribery provisions are subject to penalties of the greater of (i) $250,000 per violation or (ii) twice the gain or loss resulting from the improper payment, and may also face up to five years' imprisonment.[28] The applicable statute of limitations is five years.[29]

Officers, directors, stockholders, and employees of business entities may be prosecuted for violations of the Act irrespective of whether the business entity itself is prosecuted. Any fine imposed upon an officer, director, stockholder, employee or agent may not be paid or reimbursed, directly or indirectly, by the business entity.[30] Although criminal enforcement of the FCPA anti-bribery provisions against individuals was relatively infrequent for the first three decades in which the FCPA was in effect, that has changed dramatically in the last couple of years. Indeed, DOJ enforcement officials now regularly emphasize the importance they attach to prosecuting individuals in deterring FCPA violations.

[26] In addition to the criminal penalties for FCPA violations set forth below, it should be noted that conspiracy to violate the FCPA's anti-bribery or accounting provisions constitutes a separate criminal offense punishable by a fine of up to the greater of $500,000 (companies)/$250,000 (individuals) or twice the value gained or lost, as well as imprisonment for up to five years. 18 U.S.C. §§ 371, 3571.

[27] Traditionally, the SEC focused its enforcement activity on issuers and their directors and officers. More recently, it has brought a number of enforcement actions against subsidiaries of issuers, especially based on charges of creating false books and records and circumventing internal controls. More recently still, the SEC has begun charging companies other than issuers and their subsidiaries with aiding and abetting FCPA violations by issuers. For example, in a settlement announced in November 2010, the SEC charged Panalpina, Inc. (the U.S. subsidiary of a Swiss company that was not an issuer) with aiding and abetting violations of the FCPA anti-bribery, books and records, and internal controls provisions by issuers (its freight forwarding customers), as well as with violating the FCPA anti-bribery provision by acting as an agent of its issuer customers. See SEC press release dated November 4, 2010 (Panalpina, Inc. and several other companies) and the SEC's complaint against Panalpina, Inc. (November 4, 2010, U.S. District Court for the Southern District of Texas, Houston Division).

[28] 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(c); 18 U.S.C. § 3571. In practice, U.S. courts have shown considerable variation in their willingness to impose substantial prison sentences for FCPA violations. The longest prison sentence handed down to date for bribing covered officials is 15 years. See DOJ press release dated October 25, 2011 (Joel Esquenazi).

[29] 18 U.S.C. § 3282.

[30] 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3),78ff(c)(3).

Anti-Bribery Provisions
Accounting Provisions

Civil Penalties

The FCPA provides that the DOJ or the SEC, as appropriate, may impose civil penalties not greater than $10,000 per violation of the anti-bribery provisions.[31] In practice, however, these relatively modest civil fines tends not to be meaningful, because the DOJ invariably brings FCPA enforcement cases as criminal cases and the SEC uses other civil enforcement powers available to it. The SEC's civil enforcement powers include cease-and-desist orders and disgorgement of profits, and, through court action, civil injunctions and a range of civil fines (depending on the level of culpability and the amount of loss caused).[32]

Other Governmental Action

Any entity found to have violated the FCPA's anti-bribery provisions may be barred from U.S. government contracting. Even an indictment may render an entity ineligible to sell goods or services to the U.S. government. A finding that an entity has violated the Act can also have negative collateral consequences in other dealings with U.S. government agencies, including (i) the ability to obtain U.S. export licenses and (ii) the ability to participate in programs sponsored by the Overseas Private Investment Corporation, the Export-Import Bank of the United States, the Agency for International Development, and other agencies.

Accounting Provisions

Criminal Penalties

Companies that violate the books and records and internal controls provisions of the FCPA may be fined the greater of (i) $25,000,000 per violation or (ii) twice the gain or loss resulting from the improper conduct. Individuals who violate these provisions are subject to penalties of the greater of (i) $5,000,000 per violation or (ii) twice the gain or loss resulting from the improper conduct, and may also face up to 20 years' imprisonment.[33] The applicable statute of limitations is five years.[34]

Civil Penalties

The SEC's civil enforcement powers with respect to violations of the accounting provisions are similar to its powers with respect to violations of the anti-bribery provisions. They include cease-and-desist orders and disgorgement of profits, and, through court action, civil injunctions and a range of civil fines (depending on the level of culpability and the amount of loss caused).[35]

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[31] 15 U.S.C. §§ 78dd-2(g), 78dd-3, 78ff(c).

[32] 15 U.S.C. §§ 78u, 78u-3.

[33] 15 U.S.C. § 78ff(a); 18 U.S.C. § 3571.

[34] 18 U.S.C. § 3282.

[35] 15 U.S.C. §§ 78u, 78u-3.

In addition to the severe penalties that can apply to violations, there are very good reasons why issuers and U.S. companies have committed significant resources to FCPA compliance in recent years. The language of most of the relevant FCPA provisions is broadly phrased and broadly interpreted by the DOJ and SEC. Neither agency has issued regulatory or other material that provides "bright lines" or other clear guidance in interpreting the Act, and very few issues of interpretation have been litigated.[36] By and large, business entities are extremely reluctant to litigate FCPA enforcement cases, and virtually all DOJ and SEC enforcement cases against business entities are settled. In addition to disgorgement of profits, heavy fines, and negative publicity, settlement can impose burdensome requirements on a going forward basis, including compliance program enhancements, the appointment of a compliance monitor, and special audits.[37]

With or without an actual enforcement case, the costs of investigating FCPA problems can be substantial, especially where there appears to be a pattern of problematic payments in multiple jurisdictions. Whether a business entity decides to make a voluntary disclosure or not, there are important reasons to conduct a thorough investigation. Gathering and reviewing electronic and paper documentation, interviewing witnesses, identifying the scope and nature of FCPA violations, formulating remedial measures, and briefing and advising board and/or management personnel can be both costly and disruptive.[38]

Moreover, the existence of meaningful FCPA problems is almost guaranteed to complicate a company's relationship with its outside audit firm, which will want to understand the nature and scope of the problems, the timing and nature of remedial measures taken or planned, whether the potential FCPA liability is material, whether the problems affect the adequacy of the company's financial statements or internal control systems, and whether a voluntary disclosure is being made. Last but not least, public disclosure of FCPA problems by issuers almost invariably leads to shareholder litigation against a company and/or its directors and executive officers, which imposes yet another serious layer of costs, even with a successful outcome.[39]

In sum, every issuer and U.S. company would be well-advised to create a robust FCPA compliance program, reflecting a high-level commitment to compliance, a design that matches a company's international risk profile, and a strong commitment to training, oversight, auditing, and internal reporting.

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[36] In those instances in which issues of interpretation have been litigated, for example a series of recent challenges to the definition of "foreign official," the courts have largely endorsed the broad interpretation advanced by the government.

[37] As an example of how costly FCPA settlements can be, Siemens AG agreed in December 2008 to resolve DOJ and SEC allegations of a global pattern of improper payments by paying a $450 million criminal fine, disgorging $350 million in profits, and appointing an independent compliance monitor for four years. (In two rounds of settlements with the Munich Public Prosecutor's Office, Siemens also paid fines and disgorged profits totaling another $856 million to German enforcement authorities.) *See* DOJ press release dated December 15, 2008; SEC press release and SEC Litigation Release No. 20829, both dated December 15, 2008 (Siemens AG). Moreover, Siemens' two-year internal investigation reportedly cost over $800 million in legal and professional fees.

[38] The cost and scope of internal investigations is driven by the perceived risk exposure (including disgorgement risk) and the actual or anticipated level of interest on the part of U.S. enforcement officials. As a consequence, relatively small improper payments can produce substantial investigative and remedial costs. For example, Team, Inc., a US company and issuer, has disclosed that an internal FCPA investigation in 2009-2010 cost it over $3 million in legal and other fees, resulting in an investigative finding that the company had made improper payments of under $50,000 in a single country over the past five years. *See* Team, Inc. Form 10K dated August 6, 2010.

[39] Although the FCPA does not create a private right of action, creative shareholders' counsel have based claims on other elements of U.S. securities laws and on director/officer fiduciary responsibilities.

This memorandum provides a broad overview of the FCPA, and is not intended as specific legal advice with respect to any set of facts. In general, we recommend extreme caution when considering the adoption or continuation of any practice that may fall within the prohibitions of the Act.

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