

The Foreign Corrupt Practices Act: Pitfalls in Doing Business Overseas

THE LATEST ACCOUNTING SCANDAL?—it's yesterday's news. Back dating stock options?—we've already heard about it. Today's headlines whisper of international intrigue: foreign bribes from Americans looking for overseas deals. The Foreign Corrupt Practices Act (FCPA)¹, after decades of obscurity, now occupies center stage in the federal government's war on white-collar crime. The U.S. Department of Justice (DOJ) increased the number of its FCPA investigations sevenfold in the last three years, and that is just the beginning. According to a recent press release, the DOJ is hiring an army of new prosecutors just to handle these cases.

No one is immune from FCPA scrutiny. Current cases and subpoenas directed to entire industries are probing every manner of transaction—from a shipment of rice to the design of a space station. Whenever American business steps across a border, an FCPA investigation is now a distinct possibility.

Many people know that the FCPA imposes reporting obligations on public companies—similar to the requirements of the Sarbanes-Oxley Act of 2002.² But the anti-bribery provisions of the FCPA also apply to private businesses—both large and small—and to individuals. Penalties can include stiff prison terms and millions of dollars in fines. Americans can be held accountable for the acts of their foreign sales and marketing agents, distributors, and consultants—even if they have no direct knowledge of an illegal payment.

The act is a labyrinth of undefined terms, exceptions, and defenses. Add foreign locales and separate laws in each country, and FCPA compliance can seem as elusive as finding a reasonably priced hotel in Tokyo. Still, it is possible—and even critical—to identify risks, develop a workable compliance policy, and handle small problems before they become (literally) a federal case.

The FCPA in a Nutshell

The FCPA was enacted in 1977 to restore confi-

dence in U.S. companies operating abroad. In addition to imposing record keeping and reporting obligations on public companies, the FCPA prohibits offering or promising anything of value to a foreign official “corruptly,” for the purpose of “obtaining or retaining business for or with, or directing business to, any person” involved in interstate commerce.³ That prohibition applies not just to issuers of registered securities, their officers, directors, employees, agents, or stockholders who act on the issuer's behalf but also to any “domestic concern,” including a U.S. citizen, national, resident, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship. A 1998 amendment made the provisions applicable to “any person” as well—in other words, to everyone.⁴

Violators risk criminal and civil penalties in actions commenced by the DOJ and the U.S. Securities and Exchange Commission (SEC). Public companies face criminal fines of up to \$2 million per violation. Officers, directors, employees, agents, and stockholders risk up to five years in person and a \$100,000 fine. If a violation is “willful” or results in “willful and knowing” false or misleading statements in a document required to be filed under SEC or self-regulatory organization laws or rules, penalties of 20 years and a \$5 million fine per violation are possible for an individual; the fine can be \$25 million for a corporation.⁵ In separate civil actions, the SEC can seek fines of up to \$500,000, restitution of ill-gotten gains, and cease-and-desist orders. Many countries have strengthened their own anticorruption laws, and investigators from multiple countries typically coordinate investigations.

The mere opening of an inquiry can trigger fiduciary or reporting obligations, investor and customer trepidation, harm to careers and good will, and—at the very least—distraction and legal costs. It is not unusual for an investigation to continue for five years or more.

Government activity in September 2008 illustrates its broad reach in this area. In September, Albert “Jack” Stanley, former officer and director of Halliburton, admitted that he had conspired to pay Nigerian officials \$180 million for engineering, procurement, and construction contracts spanning more than a decade. Stanley now faces years in prison and \$10.8 million in fines. Also in September, the DOJ arrested four employees of a private company that exported equipment and technology on charges that they had paid

\$150,000 to Vietnamese officials for supply contracts. That same month, a 62-year-old assistant to the vice president for a telecommunications company, Alcatel CIT, was sentenced to 30 months in prison for paying \$2.5 million to Costa Rican officials in exchange for \$149 million in mobile telephone contracts. Finally, in September, the FBI arrested a physicist from Newport News, Va., on charges of bribing Chinese officials. The physicist, who was a consultant for a French company, allegedly induced the award of a \$4 million contract for work at a Chinese facility designed to send space stations and satellites into orbit.

These very different cases send the message that government is looking for targets large and small, individual and corporate, public and private, high-tech and low-tech. Anyone considering doing business overseas needs a basic understanding of the FCPA and needs to develop some simple compliance strategies.

The Anti-Bribery Provisions

To prove a criminal FCPA violation, the government must prove the following:

- an offer, payment, promise to pay, or authorization of payment for a “thing of value”;
- the item in question has a value;
- the offer or payment was made by a publicly traded company or a U.S. citizen, national, resident, domestic corporation, partnership, trust, association, or sole proprietorship;
- the offer or payment was made to a foreign official, political party, or candidate for a foreign government or “instrumentality” or to anyone acting on their behalf;
- the offer or payment was made for the corrupt purpose of influencing the foreign official to act or not to act, with the aim of obtaining or retaining business or of directing business; and
- the offer or payment was made to an entity involved in interstate commerce.

Under the FCPA, it is not necessary for a “thing of value”—such as money, a vacation stay, an exchange of rights for other than fair market value—to change hands. The “foreign official” need not be a government employee or someone able to direct business; under the act, a laboratory worker in a state-owned hospital was considered a “foreign official.”⁶ The American person involved does not have to actually do anything; known or foreseeable actions on behalf of a U.S. person by a foreign person are prosecuted. It is not even necessary for an attempt to succeed. As with fraud, it is the intent—not the success or failure of the scheme—that establishes the crime.

No particular business needs to be at stake. In a leading case, an American company, American Rice Inc. (ARI) told the SEC that two of its executives had paid Haitian officials to understate customs duties on rice shipments. The district court dismissed criminal

charges, finding that a general purpose to lower a tax burden was not an effort to obtain or retain business under the FCPA. The appellate court reversed the district court. Although the appellate court criticized the act’s language as “oblique,” the court found that money saved on duties and taxes contributes to the bottom line and goes to “FCPA’s core of criminality” and thus can establish an FCPA violation. The executives were convicted. On appeal, the same court held that whatever the act’s wording, the defendants were culpable, because “a man of common intelligence would have understood that ARI, in bribing foreign officials, was treading close to a reasonably-defined line of illegality.” But even the Justice Department requires more in the way of intent: “The payment must be intended to induce the recipient to misuse his official position to *direct business wrongfully to the payer or to any other person.*”⁷ No such direction of business was involved in *United States v. Kay*.⁸ The U.S. Supreme Court denied certiorari on Oct. 8, 2008.

Exceptions and defenses are murky as well. Payments “to expedite or secure the performance of a routine governmental action”—such as permits, visas, police protection, mail delivery, scheduling of border inspections, phone, water, power, cargo loading, or an “action of a similar nature,” commonly called grease payments—are exempt.⁹ In the real world, however, it may be impossible for an American to know whether the same official in the Duchy of Fenwick handles both routine and discretionary functions. Moreover, what is “action of a similar nature?”

It is a defense that a payment “was lawful under the written laws and regulations” of the foreign country. It is trickier to use the defense that a payment “was a reasonable and bona fide expenditure, such as travel and lodging expenses,” and “directly related to the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract” with a foreign government.¹⁰ Therefore, according to the FCPA, it is a crime to pay for business, but it is legal to pay for promotion of products or services. It is extremely difficult to prove whether a payment was “reasonable,” “bona fide,” or “directly related” to product promotion after the payment has been made.

Industrywide Investigations and Individual Targets

Instead of merely targeting persons for their own conduct, in FCPA cases, the government is using the more aggressive strategy of subpoenaing all players in an industry. When the DOJ and the SEC investigated the involvement of oil companies in the now defunct United Nations Iraq Oil for Food program, the government targeted multiple participants. In 2007, the DOJ and the SEC investigated a dozen oil companies for customs payments they had made in Nigeria and elsewhere.

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on behalf of the United States,” and willingness to “perform noncombatant services in the Armed Forces of the United States.”⁴ Other than these phrases, no part of the oath may be modified.

Conclusion

Representing a Jehovah’s Witness who is seeking U.S. citizenship can be a rewarding and unique experience. During the initial consultation with the client, practitioners should ask each potential naturalization applicant whether he or she is a Jehovah’s Witness. Filing thorough Form N-400 packages for Jehovah’s Witnesses can avoid undue delays. **TFL**

Additional resources

- Official Jehovah’s Witness Web page: www.watchtower.org
- U.S. Jehovah’s Witness branch office: 25 Columbia Heights, Brooklyn, NY 11201-2483.
- Jehovah’s Witnesses’ Legal Counsel: Carolyn Wah, CWAH@jw.org
- “A Guide to Naturalization” found at www.uscis.gov/files/article/M-476.pdf

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The medical device industry is the latest to feel the effect of an industrywide probe. In an early case, in 2004, Schering-Plough settled claims that its Polish subsidiary had contributed to the favorite charity of a regional health fund director (a Polish castle restoration project) to induce purchases. Johnson & Johnson voluntarily disclosed its own possible FCPA violations to the SEC in 2007. In June 2008, Wright Medical Group joined SEC targets Smith & Nephew PLC, Biomet Inc., Medtronic Inc., Zimmer Holdings Inc., and Stryker Corp. in a probe of alleged payments made to European doctors for using or prescribing the companies’ products. Also in June, AGA Medical Corporation, a privately held manufacturer of medical devices, entered into a deferred prosecution agreement with the Justice Department concerning payments made by the company’s Chinese distributor.

The DOJ has also escalated prosecutions of individuals. Since 1990, it has charged more than twice as many people as companies, with a corresponding increase in the severity of penalties.¹¹ During the first 25 years the act was in force, four companies paid \$1 million to settle FCPA enforcement actions. Since January 2005, six multimillion-dollar fines and disgorgements have been ordered—four of them more than \$15 million each.¹² In April 2007, Baker Hughes agreed to pay a \$44.1 million penalty in connection with payments to employees of a Kazakhstan-owned oil company. Parallel litigation, which takes the form of shareholder suits, employee stock pension fund claims, or com-

where she is managing partner and the immediate past Jacksonville USCIS liaison for the Central Florida Chapter of the American Immigration Lawyers Association. She is available as a mentor in Jehovah’s Witness naturalization cases and would be happy to provide the Watchtower articles, samples of the suggested congregation letter, and statement of personal beliefs mentioned in this article. She may be contacted at Elizabeth@rambana.com.

Endnotes

¹www.uscis.gov/propub/DocView/afmid/1/187/189/197.

²Defined in INA § 337 (8 U.S.C. 1448).

³The oath may be modified for applicants other than Jehovah’s Witnesses. Even though such applicants are not required to believe in God or belong to a specific church or religious denomination, they must have a sincere and meaningful belief that has a place in their lives that is equivalent to the role that is held by someone with traditional religious convictions. *See U.S. v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. U.S.*, 398 U.S. 333 (1970); *see also* INA § 337 (8 U.S.C. 1448).

⁴*See* Interpretations INA § 337.2(b)(2)(v).

petitors’ claims that a bribe caused a competitive disadvantage, is a risk for individuals as well.

On the brighter side, the DOJ has begun to use deferred prosecution agreements, in which the government agrees not to prosecute a violation of the FCPA in exchange for future compliance; however, any further violation results in prosecution for both offenses. Even though the company in question would obviously prefer deferred prosecution to an indictment, deferred prosecution also involves years of investigation, significant costs related to compliance and monitoring, and general disclosure to shareholders.¹³ In addition, deferred prosecution often leads to prosecution of individuals.

Compliance is Key

How is a person to distinguish a lawful “facilitating payment” from an illegal bribe, or a legal “routine” action from an unlawful benefit, or a legal product “promotion” from an illegal boondoggle? Despite heightened enforcement and the FCPA’s land mines, it is possible to minimize the risk of a government inquiry and to limit the damage if an investigation does result. Self-assessment, effective and documented compliance, investigation, and professional handling of suspected violations translate to fewer and shorter investigations, lower penalties, and reduced likelihood of prosecution.

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Take a good look at your business. The extent of your planned or existing relationships outside the United States dictates your exposure. If you rely on consultants, sales or marketing agents, or distributors abroad, your risk increases. Check the laws of countries where you do business or solicit business. Monitor foreign travel, promotions, and charitable contributions.

Educate yourself and your outside agents about the FCPA. Do not limit training to employees who have direct contract with foreign governments. Require outside agents as well as employees to attend annual training sessions and certify their compliance. Equip your accounting staff with auditing methods to track troublesome expenses and payments, and make sure they use random and unannounced techniques and report results to senior management. Document all training and auditing efforts you undertake.

Make FCPA compliance part of the written ethics and conflict-of-interest policies of your business. Make it simple for employees to report violations—through supervisors, a designated individual, or via an anonymous hotline. Establish consequences for violations, then apply them from the bottom to the top—with no exceptions.

Make sure your foreign sales and marketing representatives, distributors, and consultants know the person at your company they should contact with questions or concerns. Consider making FCPA compliance a standard provision in outside contracts, including a right to conduct unannounced audits or inspections and to run criminal background checks; then actually perform those checks.

If you uncover a problem, get ahead of the government. Those who disclose and take responsibility for their actions get better treatment. Even if you decide against disclosure, a credible internal investigation allows you to take (and document) appropriate remedial measures, which is an advantage if the government ever does knock on your company's door. The investigation must be professional and unbiased; otherwise, it can backfire and result in even greater skepticism and scrutiny.

The Justice Department's Web site posts advisory opinions and a "Lay Person's Guide to FCPA" at usdoj.gov/criminal.fraud.fcpa. You can also request an advisory opinion from the Securities and Exchange Commission, but you should seek legal advice before taking such a step.

Conclusion

For anyone who does business overseas, awareness of the Foreign Corrupt Practices Act is de rigueur, but commonsense principles still apply. As with everything, knowledge is power. With so much at stake, it is critical to know the international realities of your business. An FCPA compliance program should build

on the same ethical standards that guide your overall business. As long as those practices do not collect dust and are consistently put in play, it should be safe to pick up the newspaper for another day without finding yourself reported in it. **TFL**

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Endnotes

¹15 U.S.C. §§ 78dd-1 et seq.

²Sarbanes-Oxley Act of 2002, 115 Stat. 745.

³15 U.S.C. §§ 78dd-1(a), 2(a), 3(a).

⁴*Id.*

⁵15 U.S.C. §§ 78ff.

⁶*United States v. DPC (Tianjin) Co. Ltd.*, No. CR 05-482 (C.D. Cal. 2005).

⁷U.S. Attorney's Manual, Title 9, Criminal Resource Manual, § 1018 "Prohibited Foreign Corrupt Practices" (November 2000) (emphasis added).

⁸*United States v. Kay*, 359 F.3d 738 (5th Cir. 2004); after remand, 513 F.3d 432, 442 (5th Cir. 2007); rehearing and rehearing en banc denied, 513 F.3d 461 (2008); petitions for certiorari filed April 2008 (no. 07-1281).

⁹*Id.*

¹⁰15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

¹¹Danforth Newcomb and Philip Urofsky, *The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks*, 1665 P.L.I. 367, 375 (2008).

¹²Betty Santangelo, Gary Stein, and Margaret Jacobs, *The Foreign Corrupt Practices Act: Recent Cases and Enforcement Trends*, 8 J. INV. COMPLIANCE 31, 32 (2007).

¹³Form 8-K, Item 1.01, instructs registrants that have "entered into a material definitive agreement not made in the ordinary course of business of the registrant" to disclose the pertinent information.