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The Antibribery Provisions of the Foreign Corrupt Practices Act and How It Applies to Your Business

Investigations and reports in the 1970's revealed that hundreds of U.S. companies had engaged in the practice of making questionable or illegal payments to foreign government officials in order to secure some form of competitive advantage. At the time, the legal mechanisms prohibiting such behavior were limited to fraud actions by the Securities and Exchange Commission (SEC) or antitrust actions by the Department of Justice. These actions were simply incapable of deterring this corrupt behavior.

Enter the Foreign Corrupt Practices Act of 1977 (FCPA). The FCPA consisted of two major parts: (1) All domestic concerns were prohibited from engaging in the bribery of foreign officials; and (2) All entities (U.S. and foreign) that were trading securities on a U.S. exchange or were otherwise filing reports with the SEC were required to keep books and records that accurately reflected their business transactions and to establish and maintain effective internal accounting controls that assured management's control, authority and responsibility for the firm's assets. This white paper will analyze the antibribery portion of the FCPA.

Antibribery Provisions Explained

The FCPA's basic Antibribery Provision makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to this basic prohibition, there are a number of elements that must be met to constitute a violation of the FCPA.

Who: The FCPA applies to any individual firm, officer, director, employee or agent and any stockholder acting on behalf of the firm. This also includes any foreign-incorporated companies listed on a U.S. stock exchange or even any foreign person who acts while in the United States. However, a foreign-incorporated subsidiary of a U.S. firm would not be subject to the FCPA, though its U.S. parent may be liable under the FCPA if the parent authorizes, directs or participates in the activity in question.

Corrupt Intent: The person making or authorizing the payment must have a corrupt intent when they make use of the mails or any other instrumentality of interstate commerce. Please note that success of the corrupt act is not required for a violation to



occur; merely an offer to pay with corrupt intent is enough to trigger the enforcement provisions of the FCPA.

Payment: A violation of the FCPA must include the paying, offering, promise to pay or the authorization of payment either money or "anything of value." Note that while the term "anything of value" is not defined in the FCPA, the term has been broadly construed to include not only cash or any cash equivalent, but also: discounts; gifts; use of materials, facilities or equipment; entertainment; drinks; meals; transportation; lodging; insurance benefits; and promise of future employment. No de minimis value is associated with the "anything of value" element and the recipient's perception of the subjective valuation of the payment is a factor into whether "anything of value" has been given to a foreign official.

Recipient: Payment must be directed to either a foreign official or to a foreign political party. However, the definition of the term "foreign official" is significantly broader than those individuals working for or in concert with a foreign government. The Antibribery Provisions define the term foreign official to include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization..." U.S. enforcement agencies broadly interpret the term "instrumentality" to include not only traditional government entities, but also state-owned or state controlled entities. Moreover, once a foreign company is deemed an "instrumentality" of a foreign government, every single employee of that company will be considered a foreign official. Thus it is imperative that business leaders inquire as to whether any of their foreign customers are considered state-owned or state-controlled entities.

Business Intent: Payment must be intended to induce the recipient to misuse his or her official position to wrongfully direct business to the payor. This includes business with both public or private entities. Note that courts have broadly held that "business" does not solely mean the acquisition or retention of contracts, but instead prohibits a wide range of business purposes such as securing special tax or custom treatment, securing government licenses or permits needed to do business, or even securing any improper competitive advantage.

Acts of Intermediaries

In addition to the FCPA's criminalization of direct payments to foreign officials, the FCPA's Antibribery Provisions can also apply to payments made to third parties that are later used to bribe foreign officials. In other words, companies cannot escape FCPA liability by doing business abroad through others because the Antibribery Provisions cover improper payments 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



foreign official." Thus, the elements of a third-party offense are the same as a direct offense except that the recipient of the payment is an intermediary.

While knowledge that the intermediary will be using the payment to bribe a foreign official is an additional element needed in order to find a U.S. entity liable under the FCPA, the definition of "knowing" is much broader than a showing of actual knowledge. "Knowing" refers to any circumstance where there was either: (1) awareness that the intermediary is engaging in prohibited conduct or that such prohibited conduct is substantially certain to occur; or (2) a firm belief that the intermediary is engaging in prohibited conduct or that such prohibited conduct is substantially certain to occur. In addition to these subjective standards is an objective standard that infers knowledge based on whether there "is a high probability of the existence of such circumstance..." This includes the failure to take note of an event or being willfully blind to the event.

The only defense to that standard occurs if the U.S. entity can show that they "actually believe that such circumstance does not exist." Therefore, should your organization have even the slightest indication that an intermediary might make prohibited payments to a foreign official, it is your responsibility to investigate that possibility and, if needed, discontinue relations with that intermediary.

Exceptions and Affirmative Defenses to the FCPA

The FCPA contains only one exception and two affirmative defenses to an Antibribery Provision violation. These are each narrowly tailored and are of limited practical use.

Payments that are made to expedite or secure the performance of a routine governmental action by a foreign official, political party or party official are not considered a violation under the FCPA. This includes such action as obtaining permits, licenses or other official documents; processing governmental papers, such as visas and work orders; providing police protection; mail pick-up and delivery; providing phone service, power and water supply; loading and unloading cargo or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country. To claim that any other action would be subject to this exception, one must show that the foreign official's action is a non-discretionary function and would never include a decision by a foreign official to award new business or continue business with a particular party.

The two affirmative defenses to an Antibribery Provision violation are those instances where: 1. The payment was made under the written laws of the foreign country; or 2. the money was spent as part of a reasonable and bona fide expenditure to demonstrate a product or for the performance of a contractual obligation. Particular care must be shown when determining whether these affirmative defenses apply. Counsel should be



contacted in order to make the difficult determination of whether a specific payment was lawful under the written laws of a foreign country. Further, expenditures that are used to demonstrate a product must be reasonable, bona fide and directly related to a business purpose. This is made even more critical in situations where a foreign official travels to the United States for a legitimate business purpose. During that visit, the U.S. company may pay for only those expenses directly related to the business purpose. Any other expenses must be paid by the foreign official.

Note that since these defenses are "affirmative defenses", a defendant in any FCPA action would have to affirmatively prove all of the elements of the defense.

Penalties for Noncompliance

Penalties for violation of the FCPA are severe and can include both lengthy jail sentences and large criminal or civil fines. Specific criminal penalties that may be assessed for each instance of violation include:

- The company may be fined up to \$2,000,000.00; and
- Officers, directors, employees, agents or stockholders involved in the violation are criminally subject to up to 5 years in prison and fines of up to \$100,000.00.

Civil penalties are assessed following a civil action by either the Attorney General or the SEC and may include:

- The company, its officers, its directors, its employees, its agents or stockholders involved in the violation may be fined up to \$10,000.00.
- In an SEC enforcement action, the court may also impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation or (ii) a specified dollar limitation. The specified dollar limitation is based on the egregiousness of the violation, ranging from \$5,000.00 to 500,000.00.
- Injunctive relief of any act or practice of the company whenever it appears that the company (or its officers, directors, employees, agents or stockholders) is or is about to be in violation of the Antibribery Provisions.

Additional penalties may also apply. This includes criminal fines of up to \$250,000.00 or up to twice the amount of the gross gain or loss if the defendant derives pecuniary gain or causes pecuniary loss to another person due to the offense. Following an indictment on charges of violating the FCPA, a person or firm may be barred from doing business with the Federal government. Should a firm be found guilty of violating the FCPA, they may be ruled ineligible to receive export licenses, may be suspended or barred by the SEC from the securities business or may be suspended or barred by the Commodity Futures



Trading Commission and the Overseas Private Investment Corporation from agency programs. Note that any payment made to a foreign official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense. Finally, any conduct where it is alleged that bribery caused the defendant to win a foreign contract over another firm may give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO).