The Legal and Policy Framework of the U.S. FCPA

Combating Corruption When Doing Business Globally: Corporate Compliance Programs and the FCPA

November 6, 2009

Paul E. McGreal

Associate Dean and Professor of Law
Southern Illinois University School of Law

pmcgreal@siu.edu
Foreign Corrupt Practices Act

1. Accounting Provision

FCPA: Accounting Provisions

1. Record-Keeping
2. Internal Controls
Record-Keeping

An issuer must “make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer.”
Anti-Bribery Provisions

1. Use of Interstate Commerce
2. Covered Person
3. Payment
4. Foreign Official
5. Corrupt Purpose
6. To Obtain or Retain Business
1. Interstate Commerce

United States Constitution:

- The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .
2. Covered Person

a. Issuer

b. Domestic Concern

c. Other Person
Domestic Concern

“[A]ny individual who is a citizen, national, or resident of the United States, and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.”
Other Person (Added 1998)

“It shall be unlawful for any person other than an issuer . . . or a domestic concern, . . . or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States,“ to make a payment prohibited by the FCPA.
“while in the territory of the United States”

**DOJ’s View:**

- “A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.”
3. Payment

“[A]n offer, payment, promise to pay, or authorization of the payment of any money, or offer to give, promise to give, or authorization of the giving of anything of value . . . .”
Payment Examples

► Vacation Expenses
► Favorable Loans
► Moving Expenses
► Golf & Sporting Goods
► College Tuition
► Car
► Worthless stock
► Future Employment
Payment?

United States v. Liebo

- Honeymoon Tickets
Payment?

United States v. Rasco

- 5% commission on all business done under the contract to be approved
4. Foreign Official

- Employees and agents of government agencies and businesses
- Public international agencies (e.g., UN, IMF, WTO)
- Foreign political party or official
- Candidate for foreign political office
Payment to Intermediary

Payment to any person *knowing* that the value will go directly or indirectly to a foreign official.
DOJ’s View on Intermediaries

“To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives.”
DOJ’s Red Flags

1. Suspect country
2. Commission (excessive or in cash)
3. Related to a government official
4. Illegal agency
5. “Necessary to get the business”
6. False documentation
7. No FCPA compliance
8. Relationship with royal family
5. Corrupt Purpose

“[A] purpose to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation.”

“[C]onotes an evil motive or purpose, and intent to wrongfully influence the recipient.”
Corrupt Purpose

► Quid Pro Quo ("This for That")
► Looks to the Payor’s Intent
6. Obtain or Retain Business

1. Influencing an official act or decision.
2. Inducing an unlawful act or omission.
Obtain or Retain Business

- Business need not be with the government.
- Has been applied to a bribe paid to reduce customs duties.
Facilitating or Grease Payments

- Facilitate or expedite non-discretionary, “routine government action.”
Facilitating or Grease Payments

Examples:

- Obtaining permits, licenses, or other official documents
- Visas and work orders
- Police protection and mail pick-up and delivery
- Phone service, power and water supply
Affirmative Defenses

1. Reasonable Expenses for Promotion, Demonstration, or Explanation

2. Payments Allowed Under Written Law of Foreign Country
Promotion, Demonstration, or Explanation Expenses

Opinion Procedure Release 07-02

Reimbursement of travel for foreign government officials to visit company facility