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FCPA: The Basics

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Introduction

The Foreign Corrupt Practices Act ("FCPA") is one of the most-talked about federal law enforcement statutes in the past decade. It has spawned an industry of compliance and ethics experts and consultants, and given rise to the C-level Chief Compliance Officer. And while arguing its finer points is an exercise best reserved for those who are in a place to change it (policy makers on Capitol Hill) or those who may have run afoul of it (white collar litigators), a basic understanding of the statute is a required foundation for any general counsel or compliance officer who hopes to steer a corporation clear of FCPA violations.

The FCPA was enacted as a reaction to the revelation of widespread use of bribes in foreign countries by U.S. companies. Congressional hearings held in the wake of the Watergate scandal focused on foreign bribes paid by some of the largest U.S. corporations, such as Lockheed, Exxon, and Northrop Corporation. Successive administrations worked on passing a law that would directly prohibit foreign bribery, as there was no U.S. law directly addressing the issue. Approximately 20 different bills were introduced in Congress. A bill was finally passed and President Carter signed it into law in 1977.[1]

But it wasn't until the past decade that enforcement of the FCPA rose to levels of indictments and fines that garnered the attention of the wider business community. Reasonable minds can disagree, but this upswing in enforcement traces back to several causes. First, the very public disintegration of companies such as Enron, and the financial destruction they wrought, made corporate ethics and behavior a focus for the American public and lawmakers alike. At the same time, the ever-increasing global nature of business caused the unavoidable collision between U.S. anti-corruption laws and local business ethics in far corners of the world. Finally, new laws arising out of financial crises, such as Sarbanes-Oxley, encouraged whistleblowers to come forward with evidence of corporate wrongdoing – both by giving them protection from retaliation, and by offering them the chance to share in damages recovered from corporations.

Thus, for better or worse, the FCPA has become more than just a specific legal risk to certain companies, it has driven changes in corporate culture and become a necessary area of expertise for any company doing business globally. With that in mind, the remainder of this paper covers the most basic interpretation of who the FCPA applies to and what acts it prohibits or requires. In the end, it is the author's opinion that a company's money and time is better spent crafting a proactive compliance program, rather than hoping to skirt the FCPA's goal of eliminating bribery of foreign officials. While the statute has definite "grey areas" ripe for litigation, the reality is that most companies cannot afford to risk an FCPA violation. Thus, the pragmatic company should look to preventing FCPA violations as much as possible, rather than preparing to defend questionable payments. A focus on high ethical standards and a commitment to compliance will keep the company out of most trouble, and the company will be best positioned to argue for leniency if trouble occurs despite its best efforts.

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[1] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 5, 932-933 (2012). This is a good resource for tracing the history of the FCPA. Professor Koehler also runs a popular FCPA blog, *The FCPA Professor*, which tracks current events in the FCPA arena (http://www.fcpaprofessor.com/).

The FCPA Statute and Basic Interpretation

The FCPA statute, found within the Securities and Exchange Act of 1934 at 15 U.S.C. §§ 78dd-1, et seq., is confusing during a first read-through.[2] It easier to break it into its two main components: (a) the prohibition of corrupt payments to foreign officials for a business purpose (the "anti-bribery" portion), and (b) the "books and records" provision that requires companies to accurately record payments in their financial records.

I. FCPA's Prohibition on Corrupt Payments

a. Who does the FCPA apply to?

The prohibition on corrupt payments is found in 15 U.S.C. 78dd-1 through dd-3. Subsections dd1, dd-2, and dd-3 are applicable to three separate categories of entities and persons, but the prohibitions applied to the three categories are identical. Thus, it makes sense to first analyze whether a particular person or company falls within one or more of the three categories, and then move on to a consideration of the prohibitions. The three categories are:

1. "Issuer," which is any company (foreign or domestic) that has a class of securities traded on a U.S. Exchange or which is traded in the over-the-counter market and is thus required to file reports with the SEC.
2. "Domestic Concern," which is any business form (e.g., LLC's, partnerships, sole proprietorships) with a principal place of business in the U.S. or which is organized under U.S. law. It also includes any individual that is "a citizen, national, or resident" of the United States.
3. "Person," other than an "issuer" or "domestic concern." This category general includes any foreign national or foreign company that is a non "issuer."

For "issuers" and "domestic concerns", the FCPA has both territorial and extraterritorial jurisdiction, meaning that it will reach a bribery scheme here in the United States as well as a scheme wholly conceived and carried out abroad, without any U.S. nexus other than the fact that an "issuer" or "domestic concern" is the defendant. The third category of "persons" is any person or entity that is not an "issuer" or "domestic concern." For foreign issuers and persons, the jurisdiction of the FCPA is confined to the territory of the United States, and reaches only those

[2] The Department of Justice website provides the FCPA statute, as well as links to the statute in 50 different languages, at http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html.

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