



Foreign Corrupt Practices Act

December 19, 2017

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Anti-Bribery and Corruption Overview

- U.S. enforces anti-bribery and corruption through the Foreign Corrupt Practices Act.
- The U.K. recently enacted a robust anti-bribery law.
- France has proposed but not approved a new anti-bribery law.
- Asian countries are “waking up” to the need to enhance their anti-corruption laws because of recent high profile scandals such as 1MDB.
- China has begun an aggressive campaign against corruption.
- In other words, this is a global problem that governments are trying to solve.

FCPA – Overview

- Foreign Corrupt Practices Act (“FCPA”) was enacted in 1977
- Two principal provisions
 - Anti-bribery – Prohibits bribery (corrupt payments) to foreign officials to obtain or retain business
 - Books and records – Requires companies with securities registered under the Securities Exchange Act of 1934 to make and keep appropriate books and records and to maintain a system of adequate internal accounting controls. (These provisions are not limited to accounting for corrupt foreign payments or any other particular type of transactions.)
- Fines, penalties & other sanctions
 - Criminal and civil penalties
 - Injunctive relief
 - Deferred prosecution agreements

FCPA anti-bribery provisions: Statutory Elements

- No *issuer, domestic concern*, person in U.S.
- May *corruptly*
- Take action *in furtherance of* payment or a promise, offer or authorization of payment
- Of a bribe or *anything of value*
- *Directly or indirectly*
- To a *foreign official*
- To *obtain or retain business or improper advantage*

FCPA – Foreign Corrupt Practices Act

- What does this mean? U.S. persons or companies that are listed on a U.S. exchange, are forbidden from
 - Giving or offering
 - Anything of value
 - To a non-U.S. government official
 - With the intent to:
 - Improperly influence that official in his or her official capacity or
 - Secure an improper advantage in order to retain or obtain business

FCPA – who is covered?

- The FCPA applies to:
- Issuers – any company whose securities (including ADRs and registered debt) are registered in the U.S. or must file periodic reports with the SEC.
- Domestic Concerns – any individual who is a U.S. citizen, national, or resident of the U.S., or any business organization that has its principal place of business in the U.S. or which is organized in the U.S.
- Other persons who take any action in furtherance of a corrupt payment while within U.S. territory.

FCPA – Anything of value

- Anything of value really means anything of value, including:
- Cash
- Gifts
- Entertainment
- Favorable treatment (e.g., lower commissions)
- Travel (including side trips or extended stays following legitimate business trips)
- Tickets to sporting events
- Internships or other employment for an official's child
- Loans at preferred rates
- Charitable contributions directed by, or that would otherwise benefit, an official
- **Anything of value includes things given to family members or associates of the official if the intent is to influence the official**

FCPA – Definition of Foreign Official

- The legal definition is very broad. It includes employees of government agencies, virtually all officers and employees of state-controlled entities, and those who act on their behalf. Low-ranking employees and high-levels are included.
- Examples –
 - Employees of state-controlled natural resource companies, sovereign wealth funds, pension funds and utilities
 - Employees of PdVSA, Electrobras, and its affiliates
 - Doctors in state-controlled hospitals (Argentina) (China)
 - Mechanics in state-controlled aviation authority (Panama)
 - Members of royal families
 - Employees of non-government organizations (e.g., United Nations)
 - Employees of government agencies at all levels, including customs and immigration authorities

FCPA – Potential Penalties

- Companies can be fined up to \$2 million for each infraction.
- Individuals may be fined up to \$250K per violation, and may be imprisoned for up to five years.
- The government can also seek disgorgement of any gains or benefits received from the payment of bribes. Fines in the amount of hundred of millions of dollars have been levied.
- The costs of the internal investigation (legal fees) can add millions more to the costs.



UK Bribery Act of 2010

- Went into effect July 1, 2011
- Creates four separate offenses
 - Offering, promising or giving a bribe to a private party
 - Agreeing to receive or accepting a bribe
 - Offering promising or giving a financial or other advantage to a foreign public official with the intention of influencing the official in the course of his or her duties
 - Failing as a commercial organization to prevent bribery
 - Provides defense if there are effective internal controls to prevent bribery
- Applies to any organization incorporated, formed or that carries on a part of its business in the UK, even if the bribery occurred elsewhere

Risk control



Potential exposure to corruption should be assessed in every transaction. When initial risk factors are identified, closely scrutinize reputation, operating history, existing controls, prior affiliation with government officials and organizational structure

Risk Categories

What are you doing

Where are you doing it

To what extent does it involve the government

Type of Activity

- **Internal Activities**
 - Business hospitality
 - Political/charitable contributions
 - Offers of employment
 - Engagement of third parties to obtain new business or seek government approvals or other action
- **External Activities**
 - Transaction/product/service risk
 - Pre-deal due diligence
 - Post-deal controls
 - Contractual representations and warranties

Examples of high-risk industries

Sectors considered to be of high corruption risk:

- Arms and Defense
- Aerospace (civil)
- Extractive industries – oil, gas, mining
- Construction/public works
- Pharmaceuticals/medical care technology
- Petrochemicals
- Heavy engineering/manufacturing (including automotive)
- Telecoms
- Shipping/transportation

Six key elements of an anti-corruption program

Governance

- Senior management/board level participation and commitment
- Policies and procedures must outline responsibilities, detail controls, and set forth disciplinary procedures
- Autonomous, adequately resourced, high-level compliance oversight
- Adequate and clear disciplinary procedures and incentives
- Confidential reporting and internal investigation (whistleblowers)

Risk Assessment

- Find out who does what where
- Focus on real risk, e.g., due diligence on deals involving large government contracts v. routine expenses

Six key elements of an anti-corruption program

Training

- Effective, on-going communication of policies and procedures
 - no employee should be able to say “I didn’t know”
- Make advice available and valuable when most needed
- Cover agents and business partners

Testing/monitoring

- Broad non-compliance equals low-hanging fruit, small, isolated problems can become enterprise-wide fast
- Leverage internal audit/outside resources as required
- Use testing to target training and refine risk assessment

Six key elements of an anti-corruption program

Third parties – agents/consultants/distributors

- **Know and document the third-party's qualifications**
 - Perform due diligence and react to red flags
 - Require acknowledgement of anti-corruption policy/train if needed
- **Understand the business rationale**
 - Document the engagement's purpose
 - Ensure compensation makes sense
 - Require contractual anti-corruption provisions
 - Require senior management ownership of the relationship
- **Monitor the relationship**
 - Update due diligence/review business rationale
 - Confirm the third party actually doing what it was hired to do
 - Do payments conform to contract terms?
 - Consider exercising audit rights

Six key elements of an anti-corruption program

Mergers and acquisitions/Joint Ventures

- **Pre-deal due diligence**
 - What you should have known can hurt you
 - Direct criminal liability for continued bribery
 - Business and reputation risk – even if bribery stopped post-deal
 - Ensure the right eyes are on the deal
- **Post-deal compliance**
 - Ensure the new venture is resourced to comply
 - Make sure the new venture complies
 - Monitoring
 - Certification

“Red flags” to consider

▪ **Business profile**

- Business in high-risk countries
- Operations in high-risk industry
- High level of interaction with government-affiliated personnel / organizations

▪ **Tone from the top**

- Weak corporate governance
- No code of conduct and/or non-specific training and guidelines
- Decentralized operations / Corporate messaging v. local reality

▪ **Operating experience**

- Use of third parties, consultants, JVs and other business partners (e.g., distributors, logistics & other agents, service providers, etc.)
- Absence of / limited due diligence re: business partners
- Poor controls over disbursement substantiation and approvals
- Lack of guidelines re: travel & entertainment, gifts and product promotion
- History of actual or alleged improper payments

FCPA monetary penalties

Why addressing corruption is important?

Monetary Settlements:

Company Headquarters	Amount in Millions	Year
VimpelCom (Holland)	397.6	2016
Alcoa (US)	\$384	2014
Total SA (France)	\$398	2013
JGC Corporation (Japan)	218.8	2011
KBR / Halliburton (USA)	\$579	2010
BAE Systems (UK)	\$400	2010
Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy)	\$365	2010
Technip SA (France)	\$338	2010
Alstom (France)	\$772	2009
Siemens (Germany)	\$800	2008

FCPA Enforcement and Penalties: VimpelCom

- In 2016, VimpelCom came to a settlement agreement with both the U.S. and Dutch governments for bribing government officials in Uzbekistan in exchange for business.
- VimpelCom's Uzbek subsidiary, Unitel, said it paid more than \$114 million in bribes between 2006-2012.
- The VimpelCom settlement was for \$795 million:
 - \$167.5 went to U.S Securities and Exchange Commission
 - \$230.1 million to U.S Department of Justice
 - \$397.5 to Dutch Prosecutors
- Unitel pleaded guilty and VimpelCom entered into a deferred prosecution agreement with the Department of Justice.
- VimpelCom agreed to retain a compliance monitor for three years and comply with SEC ongoing investigation.
- VimpelCom has created a new position, Chief Values and Cultural Transformation Officer, to help with tone from the top.

Lessons Learned from Recent Prosecution Cases

- **Be proactive**
 - Effective training
 - Risk assessment
 - Early detection is key
- **Conduct meaningful due diligence**
 - Identify and understand ‘red flags’
 - Focus on agents and business partners
- **Monitor effectively**
 - Diagnostics
 - Effective internal audit
 - Internal coordination