KING & SPALDING

The Foreign Corrupt Practices Act

Frequently Asked Questions

WHAT IS THE FCPA?

The Foreign Corrupt Practices Act ("FCPA") generally prohibits bribery of foreign officials and requires publicly traded companies to maintain accurate books and records and effective internal accounting controls. Violating the FCPA may subject companies and individuals to severe criminal and civil penalties. In 2016 alone, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") won nearly $2.5 billion in financial penalties for FCPA violations, the highest amount in the history of the statute.

WHO MUST COMPLY WITH THE FCPA?

The FCPA has two primary prongs: the anti-bribery provisions and the accounting provisions.

The FCPA's accounting provisions generally apply only to issuers — that is, U.S. and foreign companies that have registered securities in U.S. markets or are required to file reports with the SEC. This may include foreign companies that list American Depository Receipts on U.S. exchanges, and those whose securities are traded in the over-the-counter ("OTC") market.

The anti-bribery provisions apply much more broadly. For example, the anti-bribery provisions may apply to, among others: (1) issuers, or any officer, director, employee, agent, or stockholder of an issuer; (2) domestic concerns (e.g., U.S. companies, citizens, nationals, and residents); and (3) any other person or entity taking action in furtherance of an FCPA violation, while in the territory of the U.S.

TWO-TIME WINNER
LAW360
White-Collar Practice Group of the Year
2010 2016

WHAT TYPES OF PAYMENTS DOES THE FCPA PROHIBIT?

The FCPA's anti-bribery provisions prohibit any corrupt offer, promise, authorization, or payment of money or anything else "of value," directly or indirectly, to a foreign official in order to obtain or retain business or secure an improper business advantage. Notably, a company does not have to succeed in making a corrupt payment to violate the FCPA — a simple offer or an agreement to make the payment may be enough. Payments may be improper even if they are not directly connected to winning or keeping particular contracts or business. For example, payments to decrease taxes or fines, to secure local business permits, or to obtain customs approvals could all constitute an "improper business advantage."

WHAT IS "ANYTHING OF VALUE"?

The term "anything of value" encompasses anything that might benefit, however nominally, the recipient — there is no de minimis exception to the FCPA. This may include: cash, gifts, preferential treatment or advantages, personal favors or services, meals, travel, entertainment, stock, discounts on products and services not readily available to the public, loans and loan guarantees, sponsorships, investments or investment opportunities, refunds or other incentives, offers of employment, political contributions, property or equipment, charitable and other contributions, travel expenses, payment of or forgiveness of debt, or other concessions provided to a foreign official or his or her family members.

WHO IS A "FOREIGN OFFICIAL"?

According to U.S. authorities, a "foreign official" is essentially anyone who works for, or on behalf of, any foreign government entity, including employees of companies owned or controlled by a foreign government. The term also includes political parties and their employees, candidates for office, and other similar individuals.

The term "foreign official" is construed very broadly by U.S. enforcement agencies and can include persons who may not intuitively seem like government officials. For example, U.S. authorities would likely conclude that the term "foreign officials" includes employees of foreign public health care systems (e.g., doctors, nurses, hospital administrators); employees of state-owned companies (e.g., state-owned oil, bank, and telecommunications companies); and other low-level public functionaries (e.g., customs and tax agents, judicial clerks, or policemen).

"The term 'foreign official' is construed very broadly by U.S. enforcement agencies and can include persons who may not intuitively seem like government officials."

AM I RESPONSIBLE FOR BRIBERY BY THIRD PARTIES?

The FCPA expressly prevents companies from insulating themselves by using middlemen. The statute prohibits the "knowing" provision of anything of value to a government official — even indirectly — and a person or entity acts "knowingly" if he or she is aware of a high probability of bribery, unless she actually believes it is not occurring. Thus, it is not possible to escape liability for the corrupt actions of third parties by avoiding knowledge of what third parties are doing or red flags about how they operate. Common red flags that could potentially signal wrongdoing by third parties are excessive commissions to consultants, unreasonably large discounts to distributors, vague consulting agreements, close ties to foreign officials, and the use of offshore accounts or shell companies.

WHAT DO THE ACCOUNTING PROVISIONS REQUIRE?

The FCPA's accounting provisions generally require issuers to make and keep accurate and reasonably detailed books, records, and accounts, and to devise and maintain internal accounting controls sufficient to provide reasonable assurances that transactions are authorized and that the company's resulting financial statements conform with generally accepted accounting principles.

It is important to note that the accounting provisions require public companies to maintain accurate books and records and internal controls — irrespective of whether there are corruption issues involved.

COULD A PARENT COMPANY BE LIABLE FOR MISCONDUCT AT A SUBSIDIARY?

A parent company that directs or participates in bribery carried out by a subsidiary would be liable for that conduct. But authorities have also held parent companies liable for a subsidiary's actions under aggressive interpretations of concepts like agency and respondeat superior. Navigating these issues is thorny and highly fact-intensive.

In addition, the FCPA's accounting provisions may extend to not only the accounting records of the U.S. company but also those of consolidated subsidiaries and joint ventures. Authorities maintain that an issuer must ensure that the books, records, and internal controls of controlled subsidiaries comply with the FCPA.

WHAT ABOUT SITUATIONS IN WHICH A COMPANY IS ONLY A MINORITY SHAREHOLDER?

The fact that a company does not own a majority share of a subsidiary or joint venture does not absolve the company from misconduct at its subsidiary or joint venture. The accounting provisions of the FCPA generally require a parent company with 50% or less of the "voting power" of the entity to nonetheless demonstrate good faith efforts to ensure that the minority-owned entity has adequate internal controls

IS THE FCPA A STRICT LIABILITY LAW?

Only payments that are made "corruptly" violate the anti-bribery provisions of the FCPA. A payment is generally considered to be "corruptly" made if there is an intent or desire to improperly influence the recipient of the payment.

Further, in order to establish a criminal violation of the FCPA, the DOJ must establish that an individual also acted knowingly and willfully, that is, with a bad purpose and a general knowledge that the action violates the law. Knowledge may be shown even where an individual purposefully "turns a blind eye" to apparent misconduct. There is no willfulness requirement for civil or corporate criminal liability.

However, the SEC has historically treated failure to comply with the accounting provisions of the FCPA as a strict liability offense.

WHAT ARE FACILITATION PAYMENTS?

Facilitation payments are a narrow exception to the FCPA. The exception has been construed by the authorities to include only small payments to government officials to expedite routine, non-discretionary functions, not including decisions as to whether or under what terms to award business.

While facilitation payments may be exempt from the FCPA, they are widely prohibited by anti-corruption laws in other countries and potentially by other laws that U.S. authorities may enforce.

ARE THERE FCPA RISKS IN MERGERS AND ACQUISITIONS?

Companies conducting mergers and acquisitions must be mindful of the significant risks of successor liability for misconduct that may have occurred at the company being acquired. As a general matter, when a company merges with or acquires another company, the acquiring company inherits the liabilities of the target company. This concept of "successor liability" applies in both the civil and criminal contexts, and is not limited to the FCPA.

The enforcement authorities have repeatedly cautioned acquiring companies to conduct rigorous FCPA diligence, including after a transaction closes, in order to detect, stop, and remediate any potential corruption-related issues at the acquired company.

"It is not possible to escape liability for the corrupt actions of third parties by avoiding knowledge of what third parties are doing or red flags about how they operate."

WHAT SANCTIONS COULD BE IMPOSED FOR FCPA VIOLATIONS?

The penalties for violating the FCPA are severe.

For criminal violations of the anti-bribery provisions, corporations can be fined up to $2 million for each violation, and individuals can be fined up to $100,000 per violation and sentenced to five years in prison. Under laws that apply to corporate fines, these amounts can be dramatically increased, up to twice the revenue obtained or sought.

For criminal violations of the accounting provisions, corporations can be fined up to $25 million for each violation, and individuals can be fined up to $5 million per violation and sentenced to twenty years in prison. Significant civil penalties, as well as disgorgement of illicit gains, may also be imposed by the SEC. Additional consequences may include, among other things, the imposition of independent monitors, debarment from contracting with the U.S. government, and sanctions by multilateral development banks.

COULD OTHER LAWS APPLY?

Conduct that raises FCPA concerns may also implicate a host of other U.S. laws, including those concerning money laundering, mail and wire fraud, tax fraud, international trade, and interstate travel. In addition, countries other than the United States are increasingly enforcing their own anti-corruption laws, including the UK Bribery Act, Brazil's Clean Company Act, and France's so-called "Sapin II" law.

HOW CAN I GET MORE ADVICE?

Anti-corruption investigations can be extremely difficult to navigate, and their consequences can be devastating. King & Spalding's Global Anti-Corruption and FCPA practice has extensive experience on both sides of the table and a strong network of relationships in the global enforcement community. This gives us the perspective and credibility to counsel you on multiple fronts and across borders — and help reduce your risks when you do business overseas.

Our anti-corruption practice is one of the most experienced and extensive in the world, and includes former senior government officials from both the DOJ and the SEC.

With decades of experience across dozens of practitioners, our team successfully leads numerous simultaneous investigations around the world with the skill to recognize where investigative lines should be appropriately drawn. Most important, our credibility with the enforcement authorities allows them to be confident regarding our findings and representations when considering the particular circumstances of each of our clients.

CONTACTS

Jason Jones
+1 202 626 2645
jajones@kslaw.com