

What You Need to Know About the FCPA

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Understanding The Legal Risks

The FCPA prohibits:

Improper payments and other practices in connection with overseas business activities

The Anti-Bribery Provision

How is it applied?

The anti-bribery provision applies to:

- U.S. companies, public and private
- Most foreign subsidiaries of U.S. companies
- U.S. citizens and resident aliens
- Foreign nationals acting for a U.S. company
- Foreign nationals who commit an act in furtherance of a foreign bribe while in the U.S.

The Anti-Bribery Provision

How is it applied?

- U.S. companies and U.S. citizens and resident aliens may be liable for FCPA violations committed by foreign subsidiaries, partners, consultants, joint venturers, distributors, representatives and agents that they work with
 - U.S. citizens and resident aliens may face individual liability

The Anti-Bribery Provision

The FCPA forbids people and entities from:

- Corruptly
- Making a promise or offer, or authorizing the payment of
- Money or anything of value
- Directly or indirectly
- To a foreign government official
- To obtain or retain business or to gain an improper business advantage

The Anti-Bribery Provision

How Does It Affect Me?

- The FCPA imposes liability on you and your company if you know or should have known that (i.e., you had a conscious disregard for):
 - An improper payment or offer for payment was made;
 - An improper payment or offer for payment is likely going to be made; or
 - There are circumstances in place that will lead to an improper payment or offer for payment
- Thus, to be liable under the FCPA:
 - There does not need to be an actual payment, and
 - You do not need actual knowledge of the payment or offer

The Anti-Bribery Provision

How Does It Affect Me?

Examples of liability-imposing behavior:

- Approving an improper payment
- Knowingly creating or accepting a false invoice
- Covering up an illegal payment or activity
- Knowing an improper payment was made or likely made, and not reporting it
- Making payments or allowing payments to be made to third parties or intermediaries “knowing” they will ultimately go to a foreign official

The Anti-Bribery Provision

How Does It Affect Me?

Examples of liability-imposing behavior:

- Making or ignoring statements like:
 - We really need this deal, just do what it takes
 - Payments are part of Russian culture, I don't want to know the details
- Making or ignoring comments indicating problematic business dealings (e.g., in China, a suggestion that something was handled “the Chinese way”)

The Anti-Bribery Provision

Payments by Third Parties

- Indirect payments are prohibited:
 - Making a payment to a third party while knowing that all or a portion of the payment will ultimately go to a government official
- A U.S. company and its directors and officers can be held liable for improper payments made or actions taken by third parties who act or acted on behalf of the company

Due Diligence

Warning Signs

- Anyone who suggests that a sum of money will fix the problem
- An agent or business partner whose main qualification appears to be a personal relationship with government officials
- Requests for large amounts of money or for payment in cash or unusual means of payment (gold bars)
- Payments through a third party or to an account in a third country
- Inflated commissions (size of commission in relation to service performed)
- Contracting with an entity whose ownership is not disclosed
- An agent, representative, distributor, consultant or business partner who refuses to enter into a written agreement governing his conduct, including compliance with FCPA prohibitions on bribery

Due Diligence

Warning Signs - continued

- Over-invoicing or use of non-standard invoices
- Unusual bonuses paid to foreign representatives
- Large and frequent 4th quarter adjustments
- False or incomplete information or misrepresentations
- Lavish entertaining of government officials or their relatives
- Insistence by the foreign customer that a particular agent or representative be used
- Objections to FCPA, anti-bribery, or other compliance requirements

Due Diligence

Warning Signs in “Plain English”

- “Please Pay Me in Cash”
- “Pay Me Through My Offshore Bank Account”
- “My Close Relative Is A Government Official, and You Don’t Have A Chance Unless You Deal With Me”
- “My Commission Rate Is Twice the Market Average, But I’m Worth It”

Due Diligence

Warning Signs in “Plain English”

- “Bribery and gifts are a common and necessary way of doing business here in Ukraine”
- “This is not really illegal or immoral”
- “Actions will be taken in your company’s best interest”
- “This will never be discovered”
- “There is no other way to achieve your goal or get the deal done”
- “Business cannot be done in Vietnam without bribing officials”
- “Other U.S. companies are doing it”

The Penalties

For the Company

- Anti-Bribery:
 - Up to \$2 million fine (per violation) and/or restitution
- In addition, a company can be:
 - Suspended or debarred from contracting with the U.S. Government
 - Have its import and/or export licenses revoked or denied

The Penalties

For Individuals

- **Anti-Bribery:**
 - Up to \$250,000 fine (per violation), 5 years in prison, and/or restitution
 - Civil: \$10,000 fine per violation
- Fines assessed against an individual may not be paid by the employer or insurance company
- Foreign nationals may face extradition to the U.S. and/or seizure of personal assets

FCPA Take-Aways

- An art, not a science.
- Put an FCPA compliance program in place now. Enforce it.
- Conduct due diligence periodically on your business affiliates.
- Watch out for red flags.
- Foster a corporate culture from the top down that takes bribery payments seriously.
- Use objective criteria to identify potential problems and risks.
- If you suspect something, investigate it.
- If you uncover an FCPA violation, consider reporting it voluntarily and have a plan for remediation in place.

What You Need to Know About the UK Bribery Act 2010

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Bribery Act 2010

Offenses

- Bribing another person – “active” bribery
- Receiving a bribe – “passive” bribery
- Bribery of a Foreign Public Official (“FPO”)
- Failure of a commercial organization to prevent bribery – the “corporate offense”

Section 1 - Active Bribery



Offense to:

- offer, promise or give an advantage
- intending to induce or reward improper performance of a relevant function, or
- knowing or believing that acceptance would in itself constitute improper performance of a relevant function

Section 2 - Passive Bribery

Offense where:

- Person requests, agrees to receive or accepts a bribe:
 - as a reward for improper performance
 - performs or intends to perform improperly in anticipation or consequence of the bribe
- The request or receipt in itself constitutes improper performance of a relevant function
- Irrelevant whether recipient knows or believes that the performance or activity is improper

Section 6 - Bribery of FPO

Offense to:

- Offer, promise or give an advantage
 - to a Foreign Public Official (“FPO”)
 - intending to influence the FPO to obtain/retain business or an advantage in business
 - FPO not permitted by law to be influenced or receive the advantage
- No need to prove impropriety

Bribery Offenses - Scope

- Apply to individuals, companies and non-incorporated bodies

Corporate Offense

- Offense committed by a relevant commercial organization where it fails to prevent an associated person from bribing another intending to obtain/retain business or a business advantage for that organization
- Applies to:
 - a UK corporation (wherever it carries out business)
 - any non-UK corporation which carries on business or part of a business in the UK

Associated Person



- A “person” is associated with an organization if they perform services for or on behalf of that organization
- It does not matter in what capacity
- Issue determined by reference to relevant circumstances
- Can be employee, agent, joint venture partner, intermediary, subsidiary, consultant, etc.

Penalties

- Individual
 - 10 years imprisonment
 - Unlimited fine
 - Directors disqualification (15 years)
- Corporate
 - Unlimited fine
 - Debarment
 - Confiscation
 - Civil Recovery
 - Recovery of dividends
 - Reputational damage

Questions