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Introduction to the U.S. Foreign Corrupt Practices Act

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Introduction

- FCPA was first enacted in 1977 but it has acquired new vigor in the post-SOX environment.
- The FCPA has two parts:
 - The anti-bribery provisions (applies to “U.S. persons”)
 - The books and records/internal controls provisions (applies to “U.S. issuers”)
- The U.S. was a pioneer in passing legislation against the payment of bribes to foreign officials.
- Since then many other countries have followed suit and today there are several international initiatives against transnational corruption.

Introduction

- OECD Anti-bribery Convention – Effective: February 1999.
 - Ratified by 38 countries – including, Argentina, Canada, France, Italy, Mexico, United Kingdom and the United States.
- U.N. Convention Against Corruption – Effective: December 2005.
 - Ratified by 143 countries – including Angola, Argentina, Brazil, Canada, Colombia, France, Mexico, Norway, The Netherlands, Russia, United Kingdom and the United States.
- Inter-American Convention Against Corruption – Effective: March 1997.
 - Ratified by the 38 countries – including Argentina, Brazil, Canada, Mexico, United States and Venezuela.
- African Union Convention on Preventing and Combating Corruption – Effective: August 2006.
 - Ratified by 31 countries – including Algeria, Congo, and Nigeria.

Introduction

- However, \$1 trillion are paid in bribes each year
(Source: World Bank Institute)
- Transparency International Global Corruption Index
(Where are you doing business?)

Country	Ranking 2009	Score
New Zealand	1	9.4
Norway	11	8.6
United Kingdom	17	7.7
United States	19	7.5
Chile/Uruguay	25	6.7
Spain	32	6.1
Cuba	61	4.4
Colombia/Brazil/Peru	75	3.7
China	79	3.6
India	84	3.4
Mexico	89	3.3
Argentina	106	2.9
Egypt/Indonesia	111	2.8
Nigeria	130	2.5
Ecuador	146	2.2
Angola/Venezuela	162	1.9
Somalia	180	1.1

Anti-bribery Provisions

It is a crime for any U.S. Person or Company to directly or indirectly pay or promise money or anything of value to any foreign official to obtain or retain business or any other improper advantage.

Key Terms

- U.S. Person or Company
- Money or Anything of Value
- Directly or Indirectly
- Foreign Official
- Obtaining or Retaining Business

Key Terms — U.S. Person or Company

- Entities organized under U.S. law.
- Entities that have their principal place of business in the U.S.
- Issuers of securities in the U.S.
 - Including foreign companies with ADRs listed in the U.S.
 - Siemens (2008); Statoil (2006); PetroCanada (2003)
- Employees, officers, directors and agents of U.S. issuers and entities.
 - Regardless of their nationality or location.
- U.S. nationals or residents.
- Any person while located in the U.S.
- Subsidiaries of U.S. entities.

Key Terms — Money or Anything of Value / Obtaining or Retaining Business

- Cash
- Gifts (such as expensive meals, wines, merchandizing with the Company logo)
- Services
- Travel expenses
 - Lucent Technologies (2007)
- Business Opportunities
- Bribe need not to be paid — the promise of a bribe is also illegal.
- The terms “obtaining or retaining business” or any “improper advantage” are construed very broadly.

Key Terms — Directly or Indirectly (Through Intermediaries)

- It is unlawful to make a payment to any third party while “knowing” that all or a portion of such payment will go directly or indirectly to a foreign official.
- “Knowledge” is broader than “actual knowledge,” and includes “conscious disregard” and “willful ignorance.”
 - “Firm belief” that an illegal payment is “substantially certain to occur.”
- Any third party – Agents; consultants; contractors; representatives; partners in a joint venture; subsidiaries.
 - Vetco Gray (2007)
 - Baker Hughes (April 2007)
 - KBR (2009)

Key Terms — Directly or Indirectly (Through Intermediaries)

- When dealing with intermediaries or prospective partners or representatives:
 - Pre-retention due diligence / background check and post-retention oversight – it must be reasonably documented.
 - No cash payments
 - Reasonable commissions and no reimbursements without supporting documentation.
 - Written agreement – FCPA representations, right to terminate, audit rights, etc.

Key Terms – Foreign Official

- Government officials and employees
- Political party candidates and employees
- Employees of government controlled companies or instrumentalities
- Employees of public international organizations
- Any others in an official capacity (including honorary positions)

Exceptions and Affirmative Defenses

- Facilitating or Expediting Payments
 - Small payments for the purpose of expediting or securing the performance of a routine AND non-discretionary governmental action.
 - Facilitating payments need to be properly recorded and identified as such.
 - Facilitating payments are usually illegal under local laws.
 - Vetco Gray – average \$5,550 (378 payments in 2 years = \$2.1M)
- Current trend: limit facilitating payments to life threatening situations

NOTE: THIS EXCEPTION MUST BE
NARROWLY CONSTRUCTED.

Exceptions and Affirmative Defenses

- Payments authorized under written laws of the foreign country.
- Reasonable and bona fide expenses directly related to:
 - The promotion or demonstration of products and services; or
 - The execution and performance of a contract with a foreign government or instrumentality.
 - Lucent Technologies (2007)

NOTE: THESE AFFIRMATIVE DEFENSES MUST BE
NARROWLY CONSTRUCTED.

Exceptions and Affirmative Defenses

- It is NOT a defense that “everyone else is doing it.”
- This, unfortunately, can give a sense of false security, but will provide absolutely no protection in the event the underlying activities are not in compliance.
- Use thoughtful common sense, and don’t be lulled into thinking it’s OK because “That’s the way XX does it” or “Its always been done that way here in XXX.”

AGAIN: THESE AFFIRMATIVE DEFENSES
MUST BE NARROWLY CONSTRUED.

Books and Records Provisions/ Internal Controls

- Make and keep books and records in reasonable detail to accurately and fairly reflect any transactions or dispositions of assets.
- Devise and maintain a system of internal accounting controls that provides reasonable assurances that:
 - transactions are executed in accordance with management's authorization;
 - there is accountability for assets; and
 - transactions are recorded according to GAAP.
- It is a crime to knowingly circumvent controls or falsify books and records.

Books and Records Provisions/ Internal Controls

- Apply to "Issuers."
 - Reasonable detail – such level of detail that would satisfy prudent officials in the conduct of their own affairs.
 - No materiality standard – all transactions.
 - Applicable to foreign subsidiaries of any "Issuer"
 - “Good faith efforts”: required if the Issuer is not the controlling shareholder of the foreign entity.
 - Bristow Group (2007)

Enforcement

- U.S. Department of Justice — Criminal.
- U.S. Securities and Exchange Commission — Civil.
- The number of enforcement actions by both the DOJ and the SEC has increased significantly in the last few years.
- Declared intent to continue to prosecute large and also medium and small size corporations, and the individuals involved as well.
- Sentencing is structured to “reward” self-policing, self-reporting, remediation and cooperation.

Sanctions

- Anti-bribery Provisions:
 - \$100,000 criminal fine and/or 5 years imprisonment for individuals and \$2 million criminal fine for corporations.
 - \$10,000 civil penalty for individuals and corporations.
 - Fines imposed on individuals may not be paid by their employer or principal.
 - NOTE THAT OFFICERS AND EMPLOYEES MAY BE HELD PERSONALLY LIABLE.

Sanctions (cont.)

- Books and Records Provisions:
 - \$5 million in criminal fines and/or 20 years imprisonment for individuals and \$25 million for corporations.
 - The greater of \$100,000 civil penalty for individuals and \$500,000 civil penalty for corporations, or the gross amount of any pecuniary gain (per violation).
 - Under the alternative fines statute the actual criminal fine could be up to twice the gross gain sought to be obtained.
- Injunctive relief; barred from doing business with the U.S. Government; loss of export licenses.

Sanctions(cont.)

- These penalties are alternative and not exclusive:
 - Titan Corporation Settlements (2005) — \$28.5 million in penalties: \$15.5 million disgorgement and prejudgment interest (SEC) and \$13 million fine (SEC and DOJ).
 - Statoil Settlement (2006) — \$21 million — \$10.5 million fine (DOJ) and \$10.5 million disgorgement (SEC).
 - Vetco-Gray Settlements (2007) — \$26 million in fines.
 - Baker Hughes (2007) — \$44 million in penalties: \$23 million disgorgement and prejudgment interest (SEC), \$10 million penalty (SEC) and \$11 million criminal fine (DOJ).
 - Siemens (2008) — \$1.6 billion: \$350 million disgorgement (SEC), \$450 million criminal fine (DOJ), and \$854 million fine (German DOJ).
 - KBR/Halliburton (2009) — US\$579 million in sanctions: US\$177 million in disgorgement and prejudgment interest (SEC) and US\$402 million criminal fine (DOJ).

Final Remarks

- The stakes are getting higher – increase in enforcement activity and regulators seeking disgorgement of profits.
 - There is no such thing as a small bribe.
- Exceptions are being constructed very narrowly (*i.e.*, facilitating payments).
- Significant fines and imprisonment for the companies and the employees involved.

Final Remarks

- Need for compliance policies and procedures - robust and verified compliance is expected.
 - Clearly articulated policy and procedures.
 - “Tone from the top” and culture of compliance.
 - Education and training to all employees involved in international matters.
 - Periodic certifications from employees and business partners.
 - Periodic FCPA audits and reviews of policies and procedures.
 - Screening and monitor of agents and business partners.

Final Remarks - Q&A

Thank You !!!

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