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Ten Things Companies Should Know About the Foreign Corrupt Practices Act

ERIC J. WILSON AND DANIEL C.W. NARVEY

The authors provide a broad overview of common questions that arise under the Foreign Corrupt Practices Act. The answers provide a handy reference guide for basic questions about this much-publicized enforcement tool for the government.

In recent years, government enforcement of the Foreign Corrupt Practices Act (“FCPA”) has increased dramatically. As a result, many companies have heard about the FCPA, but are left wondering how it might apply to them. The list below provides some basic answers to frequently-asked questions. No summary like this can cover all the intricacies of the FCPA and its interpretation. Of course, before taking action, seek legal advice regarding your specific facts and circumstances.

1. What does the FCPA prohibit?

The FCPA has two main provisions: (a) an anti-bribery provision that prohibits corrupt payments to foreign officials to obtain or retain business; and (b) a record-keeping provision that mandates accurate record keeping and sound systems of internal controls.

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2. Does the FCPA apply to my company?

The record-keeping provision only applies to companies with securities registered with the U.S. Securities and Exchange Commission and companies that must file reports with the SEC. The anti-bribery provision, however, applies more broadly and encompasses any company with its principal place of business in the United States. Even if your company does not have any foreign operations, it could be held liable for a FCPA violation committed by a foreign agent of your company, such as a business consultant.

3. Does the FCPA prohibit all payments to foreign officials?

The FCPA prohibits acts that are committed “corruptly” — in other words, payments intended to induce the recipient to misuse his or her official position. In addition, to be a violation, the payment must have been made to obtain or retain business. However, this requirement is read broadly. For example, payments designed to lessen customs or tax liability are considered as intended to obtain or retain business.

4. Who qualifies as a foreign official?

The definition of “foreign official” is broad and subject to varying interpretation. The term encompasses not only executive branch employees and legislators, but also employees of state-affiliated enterprises. The FCPA also bans payments made to foreign political parties, officials of foreign political parties and candidates for foreign office. (In addition, the United Kingdom (U.K.) Bribery Act prohibits improper payments to secure a business advantage that are made to any person, not only foreign officials. Companies that may fall within the jurisdiction of this Act should be aware of its broader scope.)

5. Are hospitality expenses subject to the FCPA?

Companies sometimes pay travel and entertainment expenses for foreign officials. A defense to the anti-bribery provision exists if the payment was a reasonable and bona fide expenditure directly related to the promo-

tion, demonstration or explanation of products or services, or to the performance of a contract with a foreign government. For example, travel and lodging expenditures and costs associated with product demonstrations may be permitted. However, this defense is treated narrowly by government enforcers, and therefore only non-extravagant costs that are closely connected to legitimate business purposes should be considered.

6. What if the local law of the foreign country allows the payment?

A defense to the anti-bribery provision exists if a company can show that the payment, gift or offer was lawful under the written laws of the foreign party's country. However, the defense is limited to explicit, written laws and does not apply to local customs. "This is how business is done over there" is not a defense.

7. Can I pay a consultant to drum up business overseas?

The FCPA does not prevent the use of consultants or other third-parties to solicit business, but companies may be liable for illegal payments made by their agents. Third-party contractors should be carefully evaluated with proper due diligence. Contracts with foreign third parties should contain language specifically aimed at promoting FCPA compliance.

8. Can I avoid the FCPA by using distributors?

The general rule is that after a company sells an item, later illegal payments made by a distributor or reseller will not be attributed to the original seller. However, a company may be held liable for illegal payments by a distributor if the company knows or has reasonable suspicion about the illegal payments. Failure to prevent such payments also could be evidence of a lack of internal controls that amounts to a violation of the FCPA record-keeping provision. A "head in the sand" approach to your distributors' conduct will not avoid liability.

9. Are charitable contributions subject to the FCPA?

Charitable contributions may violate the FCPA if they are made to a foreign official, or to an organization associated with a foreign official, when that foreign official has the authority or ability to award business to the company or influence the ability of the company to obtain or retain business. Companies should have a formal policy governing charitable contributions and maintain transparency with respect to such contributions.

10. What is a “facilitating payment” and should my company make them?

The FCPA creates an exception for so-called “facilitating payments” — or payments made to expedite ordinary and routine actions of a foreign official. However, distinguishing a lawful facilitating payment from an anti-bribery violation is difficult. In addition, because the U.K. Bribery Act does not exempt facilitating payments, the exception is of limited use for companies that might fall within the jurisdiction of that Act. To avoid confusion and communicate a consistent message, many companies have decided to ban facilitating payments altogether, even though such payments are technically permissible under the FCPA.

DOES YOUR FCPA COMPLIANCE POLICY STACK UP?

To prevent FCPA violations from occurring and to mitigate potential penalties in the unfortunate event that a violation does occur, an effective FCPA compliance program is a must. The program should include:

- Clearly written and visible FCPA policy
- Standards governing specific expenses and payments such as gifts, donations, and political contributions
- Risk assessment
- Senior executive responsibility

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- Financial and accounting procedures
- Training and certifications regarding FCPA compliance
- Voluntary internal reporting
- Contractual provisions in contracts with foreign agents/business partners