

SUMMARY OF THE U.S. FOREIGN CORRUPT PRACTICES ACT

deKieffer & Horgan, Washington

The purpose of this memorandum is to provide an overview of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78m and 78 dd-1 *et seq.*, as recently amended by Congress. The memorandum also provides a sample listing of the more prominent types of actions prohibited by the statute, certain suspect situations that should alert management to potential FCPA violations, and special considerations regarding the use of "consultants."

Background

The FCPA was initially enacted in 1977. It has been the subject of controversy since that time. Critics have argued that its provisions are an unnecessary, if not moralistic, impediment to U.S. export trade. These criticisms have largely fallen on deaf ears, particularly in Congress. However, several of its key provisions were amended in a major trade legislation (the "Trade Bill") signed into law in 1988.

Prior to the enactment of the FCPA, no federal law explicitly prohibited U.S. companies from making payments to foreign officials to secure business. However, with certain facts present, such payments could have resulted in prosecution under the bribery, conspiracy, mail fraud or wire fraud provisions of federal criminal law.

As discussed more fully below, the FCPA has two basic parts: the antibribery provisions and the accounting provisions.

Antibribery Provisions

Under the antibribery provisions of the FCPA, issuers of securities ("issuers") registered pursuant to the Securities and Exchange Act of 1934 ("the 1934 Act") and other "domestic concerns", [\(4\)](#) or officers, directors, employees and agents acting on their behalf, are prohibited from using the mails or any instrumentality of interstate commerce to corruptly propose or give money or other things of value to a foreign official, candidate for foreign political office, foreign political party or an official thereof for the purpose of:

influencing any act or decision of such official, candidate or party in his or its official capacity,

inducing such official, candidate or party "to do or omit to do" any act in violation of his or its lawful duty, or

inducing such official, candidate or party to use his or its influence with a foreign government or instrumentality to affect or influence any governmental act or decision, in order to assist the donor in obtaining or retaining business or directing business to any person.⁽²⁾

The knowing making of such payments through intermediaries is also forbidden. These basic prohibitions are new amendments from the Trade Bill. Under the prior law, prohibited payments were those made to a foreign official for the purpose of influencing or inducing the official to make a decision or fail to perform his official functions.

The original 1977 enactment exempted a limited category of so-called facilitating or "grease payments" from the prohibitions of the FCPA. These were payments to government officials whose duties are essentially ministerial or clerical. Under the recent amendments, payments to expedite or secure the performance of "routine governmental action" by an official are exempted from the prohibitions of the FCPA.

The Conference Report on the Trade Bill makes it clear that the exemption for "routine governmental action" applies only to the following categories and actions of a similar nature:

Obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country,

Processing governmental papers such as visas and work orders, and

Providing police protection, mail pick-up and delivery or scheduling inspections associated with contract performance or inspection related to transit of goods across the country, providing phone service, power, and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration.

However, the Conference Report also clearly states that "'ordinary and commonly performed' actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official where the actions for or with, or directing business to any person." (Emphasis added). Accordingly, "routine government action" does not include any action taken by a foreign official involved in the decision-making process to influence or induce the award of new business or the continuation of old business.

The Trade Bill also created two affirmative defenses to enforcement actions under the antibribery provisions:

The payment made was lawful under the written laws of the payee's country.

The payment was a reasonable and bona fide expenditure, "such as travel and lodging expenses," and was directly related to promotion or demonstration of products or services or the execution or performance of a contract with a foreign government or agency thereof.

These provisions should be approached warily and not treated as certain safe harbors. Their scope and utility may become clear as attempts are made to assert them as defenses to enforcement actions brought by the SEC or Justice Department.

In addition, the Trade Bill changed the standard of liability for acts of third parties. Under the original statute, civil and criminal liability attached to firms and individuals who made such payments would be used by the third party for activities banned under the FCPA. Under the

amendments, the "reason to know" standard was deleted. Consequently, criminal liability is now limited to payments knowingly made for illicit purposes.

The meaning of the "knowing" standard was discussed in the Conference Report:

In clarifying the existing foreign antibribery standard of liability under the Act as passed in 1977, the Conferees agreed that "simple negligence" or "mere foolishness" should not be the basis for liability. However, the Conferees also agreed that the so-called "head-in-the-sand" problem -- variously described in the pertinent authorities as "conscious disregard", "willful blindness" or "deliberate ignorance" -- should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action "or inaction", language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation.

Prior to the FCPA amendments, the Criminal Division of the Department of Justice would, in certain circumstances, review proposed conduct and state its present enforcement intentions regarding the FCPA's antibribery provisions with respect to the proposed conduct. The statement would be binding on the Justice Department with respect to the party submitting the request and only if the underlying facts remain unchanged. The use of this procedure, however, was tempered by the caveat that one should only ask the government questions for which one already knows the answers.

The Trade Bill directed the Attorney General to develop guidelines in conjunction with other agencies which describe types of conduct in conformance with the FCPA and to establish a formal advisory opinion procedure. However, like any request for a governmental advisory opinion or no action letter, the new procedure will have to be used with care and, if possible, only when the answer is known beforehand and the request is made to achieve greater legal comfort and/or official confirmation.

Accounting Provisions

The accounting provisions of the FCPA, unlike the antibribery provisions, apply only to issuers and not to domestic concerns, as defined in the statute. Every issuer is required:

- (a) To make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets; and
- (b) To devise and maintain a system of internal controls sufficient to provide reasonable assurances that
 - (i) transactions are executed in accordance with management's general or specific authorization;
 - (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets;
 - (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
 - (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any

differences. (Emphasis added).

The Trade Bill made two major changes to the accounting provisions. The first change decriminalized the accounting provisions absent a knowing circumvention of such provisions, a knowing failure to implement accounting controls or a knowing falsification of any "book, record, or account."

The second change provides that an issuer with 50% or less of the "voting power" of a domestic or foreign subsidiary is required to proceed in "good faith" to use its influence, to the extent reasonable under its circumstances, to cause the subsidiary to devise and maintain a system of internal accounting controls. An issuer who demonstrates good faith efforts to use such influence shall be conclusively presumed to be in compliance with the FCPA's accounting provisions.

The FCPA does not mandate any particular kind of internal controls system. The test is whether a system, taken as a whole, reasonably meets the statute's specified objectives. "Reasonableness" depends upon an evaluation of all facts and circumstances.

The Trade Bill defined the terms "reasonable assurances" and "reasonable detail" in the accounting provisions to mean the level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs. These definitions were adopted in order to make it clear that the current standard does not require an unrealistic degree of exactitude or precision. The concept of reasonableness contemplates a weighing of a number of relevant factors, including the cost of compliance.

In interpreting and applying the accounting control provisions of the FCPA, the SEC has consistently recognized that systems of internal accounting control must be designed to fit individual circumstances. Numerous factors, such as the types of products or services provided, types of customers, degree of centralization, and areas of operation, will affect the choice of control procedures that may be necessary or appropriate to achieve the broad objective of the FCPA. Consequently, the SEC has never attempted to prepare a comprehensive list of internal accounting control procedures which would be appropriate for all companies.

Enforcement

Enforcement responsibility under the FCPA is divided between the SEC and the Department of Justice. Generally, the SEC enforces the recordkeeping and accounting provisions of the law, while the Justice Department enforces the antibribery provisions.

The SEC has civil investigative powers and may bring actions for injunctive relief under both the antibribery and the accounting provisions. However, the Justice Department alone may institute criminal proceedings. It also has civil subpoena authority and may bring civil injunctive actions against violators.

The maximum criminal fine for a violation of the antibribery provisions is \$2 million for an issuer or domestic concern. For individuals, the maximum fine is \$100,000. The maximum potential imprisonment for a violation of the antibribery or accounting provisions is 5 years.

There is no express concern in the FCPA authorizing private suits by shareholders or competitors of issuers or domestic concerns.

Prohibited Practices

The practices set out below are prohibited under the FCPA. However, they are not meant to be an exclusive list.

The establishment of undisclosed or unrecorded funds or assets by a corporation or any of its subsidiaries.

The knowing making of false or artificial entries in the books or records of a corporation or its subsidiaries.

Corporate payments on behalf of a corporation or any of its subsidiaries authorized or made with the intention that they will be used for any purpose other than that described by supporting records.

The making of payments by company officers or employees or third parties acting for a corporation which could be interpreted to be bribes, kickbacks or other payments, regardless of form, to or for the benefit of any foreign official, foreign political party or official thereof in order to gain business advantage.

Suspect Situations

Management should be alert for situations of the type described below. These situations have a high potential for violations of the FCPA and should be the subject of additional inquiry by management. As with the prohibited practices set out above, these situations do not constitute an exclusive list.

Money or property passed through a consultant to a public official, political candidate or political party official to obtain or influence certain government actions.

Use of consultants who are connected with the governments or political parties of the countries in which the corporation is doing business.

Gifts or gratuities to government officials, political candidates, or political party officials or their families in such countries.

Extravagant entertaining of government officials, political candidates, or political party officials or their families in such countries.

Indirect payments to government officials, political candidates, or political party officials or their families in such countries.

Use of company facilities by government officials, political candidates, or political party officials.

Special Considerations Regarding Consultants

There has been a significant number of FCPA prosecutions and enforcement actions involving the use of agents, distributors and consultants, particularly in foreign countries. Following is a list of prudent procedures concerning relationships with such individuals.

The consultant should be investigated prior to his engagement to ascertain his experience,

capability, reputation, character and educational and work background. A written report of the investigation should be made.

Relationships with consultants should be reduced to a written contract which specifies the services to be performed and any compensation or commission to be paid therefor.

Each consultant should agree in writing (under penalties of perjury) that he is aware of the FCPA, will take no action in violation thereof, and will make no payment or transfer anything of value, directly or indirectly, to any foreign official, political candidate or political party or official thereof, to influence any decision to obtain or retain business.

Commissions or other compensation should be in amounts that are reasonable and customary in relationship to the services provided.

Commissions and other compensation must be properly reflected in the corporation's records and financial statements.

Agreements with consultants should include a statement by them that the corporation's auditors and accountants will be granted access to the consultants' books and records.

An opinion should be obtained from local foreign counsel regarding any engagement of a consultant which indicates that the engagement complies in all respects with the laws of the foreign jurisdiction and, more particularly, that the method and place of payment of any commission do not violate either the currency exchange controls or tax laws of the foreign jurisdiction.

A signed statement of continuing compliance with the FCPA should be obtained from each consultant upon each successive payment of a commission or other type of compensation.

Any contract between the corporation and a foreign government (or instrumentality thereof) should include a clause to the effect that such government acknowledges that it is aware of the agency relationship with the consultant, all persons connected therewith, and all financial terms related thereto.

Conclusion

The potential exposure of a corporation under the FCPA will vary according to the products or services marketed, the areas of the world where such products or services are offered, and other factors. Even the best designed and maintained system of internal accounting controls may not prevent isolated violations of the FCPA. Nevertheless, a corporation should periodically review its existing controls and overall compliance program in light of changing domestic and foreign laws and changes in its business operations (e.g., new products, services, markets and customers).

Endnotes

- (1) "Domestic concern" is defined as any "citizen, national, or resident of the United States" and any corporation, partnership, or other business organization "which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."
- (2) The FCPA's antibribery provisions do not expressly apply to foreign subsidiaries of U.S. corporations. However, the Securities and Exchange Commission ("SEC") and the Department of Justice may nevertheless be able to reach an illegal payment planned in the U.S., but made through a foreign subsidiary, under the FCPA

or other provisions of federal criminal law.

729 Fifteenth Street NW
Suite 800
Washington, DC 20005
USA

Tel: +1 202 783-6900
Fax: +1 202 783-6909
www.dhlaw.com

Beethovenstraße 13
Postfach 10 33 63
D-66033 Saarbrücken
Germany

Tel: +49 681 379 3220
Fax: +49 681 390 7219
www.dhlaw.de

Rio Mississippi 51 Pte.
Colonia del Valle
San Pedro, Nuevo León 66220
Mexico

Tel: +52 8 278 1990
Fax: +52 8 378 0420
www.dhlaw.com.mx

ATTACHMENT 1

Sample Memorandum for Personnel on Foreign Corrupt Practice Act Compliance

The Foreign Corrupt Practices Act ("FCPA") is a U.S. law which forbids certain payments and other practices in connection with our business activities. It also requires that the company maintain certain accounting records which accurately reflect our transactions. The FCPA carries criminal and monetary penalties. It should be taken very seriously by all of our employees. Management is determined that all of the company's activities will be conducted in full compliance with the requirements of the FCPA and other applicable laws and regulations.

The purpose of this memorandum is threefold:

To convey to you in the clearest possible manner that management expects all the company employees, distributors, agents and consultants to conduct their professional activities in full compliance with the provisions of the FCPA and other applicable laws.

To acquaint you with the basic provisions of the FCPA so that you will know what activities are clearly forbidden by it, and will be able to recognize the most common types of situations that may involve violations.

To strongly urge you to consult with this office whenever you have a question or concern about the propriety of some business activity, transaction or payment.

The FCPA was initially enacted in 1977. It was subsequently amended. It has two basic parts: the antibribery provisions and the accounting provisions.

Under the antibribery provisions, U.S. corporations, and officers, employees and agents acting on their behalf, are prohibited from corruptly proposing or giving money or other things of value to a foreign official, an official of a foreign political party, a candidate for foreign political office, or a foreign political party for the purpose of:

Influencing any act or decision of such an official, party or candidate, in his or its official capacity,

Inducing such an official, party or candidate "to do or omit to do" any act in violation of his or its lawful duty, or

Inducing such an official, party or candidate to use his or its influence with a foreign government or instrumentality to affect or influence any governmental act or decision, in order to assist the donor in obtaining or retaining business or directing business to any person. The FCPA also imposes criminal liability on firms and individuals who make payments to third parties "knowing" that they will be used by the third party for activities banned under the FCPA.

Payments to expedite or secure the performance of "routine governmental action" by an official are exempted from the prohibitions of the FCPA. This exemption applies only to the following categories:

Obtaining permits, licenses or other official documents to qualify a person to do business in

a foreign country,

Processing governmental papers such as visas and work orders, and

Providing police protection, mail pick-up and delivery or scheduling inspections associated with contract performance or inspection related to transit of goods across the country, providing phone service, power, and water supply, loading and unloading cargo or protecting perishable products or commodities from deterioration.

Under the accounting provisions, the company is required to keep accounting records which reflect in reasonable detail its financial transactions and the disposition of its assets. It is also required to maintain internal financial controls that provide reasonable assurances regarding the propriety of transactions and the use of corporate assets.

Enforcement responsibility under the FCPA is divided between the Securities and Exchange Commission ("SEC") and the Department of Justice. Generally, the former enforces the recordkeeping and accounting provisions of the law; the latter enforces the bribery provisions.

The maximum criminal fine for a violation of the antibribery provisions is two million dollars for an issuer or domestic concern. For individuals, the maximum fine is \$100,000. The maximum potential imprisonment for a violation of the antibribery or accounting provisions is a term of five years. The FCPA expressly provides that whenever a fine is imposed on a corporate employee under the antibribery provisions, it may not be directly or indirectly paid by the corporation.

Prohibited Practices

The practices shown below are prohibited under the FCPA. However, they are not an exclusive list.

The establishment of undisclosed or unrecorded funds or assets by a corporation or any of its subsidiaries.

The knowing making of false or artificial entries in the books or records of a corporation or its subsidiaries.

Corporate payments on behalf of a corporation or any of its subsidiaries authorized or made with the intention that they will be used for any purpose other than that described by supporting records.

The making of payments by company officers or employees or third parties acting for a corporation which could be interpreted to be bribes, kickbacks or other payments, regardless of form, to or for the benefit of any government official or foreign political party or candidate for a foreign political office, in order to gain business advantage.

Suspect Situations

You should be on alert for situations of the type described below. These situations have a high potential to involve violations of the FCPA, should be the subject of additional inquiry, and should be reported to management. This is not an exclusive list, but an illustrative sample of typical situations that should put you on alert.

Money or property passed through a consultant to a public official to obtain certain government actions.

Use of consultants who are connected with the government or a political party of the country in which the corporation is doing business ("the country").

Gifts or gratuities to government officials or political party officials, candidates for public office, or their families in the country.

Extravagant entertaining of government officials or party leaders or their families in the country.

Any indirect payments to government officials or their families.

Use of company facilities by such government officials.

Special Considerations Regarding Consultants

There has been a significant number of FCPA prosecutions and enforcement actions involving agents, distributors and consultants ("consultants"). The following is a list of prudent procedures regarding relationships with such individuals.

The consultant should be investigated prior to his engagement to ascertain his experience, capability, reputation, character, educational and work background. A written report of the investigation should be made.

Relationships with consultants should be reduced to a written contract which specifies the services to be performed and any compensation or commission to be paid therefor.

Each consultant must agree in writing that he is aware of the FCPA, will take no action in violation thereof, and will make no payment nor transfer anything of value, directly or indirectly, to any foreign official, political candidate, political party or official thereof, to influence any decision to obtain or retain business.

Commissions or other compensation should be in amounts that are reasonable and customary in relationship to the services provided.

Commissions and other compensation must be properly reflected in the company's records and financial statements.

Agreements with consultants should include a statement that the company's auditors and accountants will be granted access to the consultants' books and records.

A signed statement of continuing FCPA compliance should be obtained from each consultant upon his receipt of each successive payment of a commission or other type of compensation.

Any contract between the company and a foreign government (or instrumentality thereof) must include a clause that the latter acknowledges that it is aware of the agreement with the consultant, all persons connected therewith, and all financial terms related thereto.

Conclusion

All questions concerning the FCPA should be directed to _____.
Employees are urged to ask questions whenever they have even the slightest reason to doubt the propriety of a particular activity, transaction or payment.

If an employee is aware of or suspects that the company personnel are violating the FCPA, the employee must immediately contact _____ and report such information. Employees who report such information may request that their identities be held in confidence.

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