



INTEG TREE

Ethics, Compliance & Sustainability Services™

THE FCPA: PART ONE OF THREE

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Overview: This is the first of a three part series on the FCPA. In this Section the FCPA anti-bribery provisions are set forth and explained. Part Two and Three identify specific areas of risk - such as gift giving, political contributions and third party risks – and offers solutions to mitigate those risks. To receive FREE access to Part Two and Three of this Series, as well as other information, please join our newsletter by [clicking here](#). We also invite you to visit our blog at www.ethicsresources.org.

TABLE OF CONTENTS

Part One:

- I. **The Law**
 - A. **Who is Subject to the FCPA?**
 - B. **How is Jurisdiction Exercised?**
 - C. **When is a Payment Corrupt?**
 - D. **What is a Foreign Official?**
 - E. **Exceptions to the FCPA**

Part Two

- I. **Actions Commonly Associated with Corruption & Bribery**
 - A. **Gift Giving**
 - B. **Charitable Giving and Due Diligence**

Part Three

- I. **Actions Commonly Associated with Corruption & Bribery (cont)**
 - A. **Third Party Risks, Red Flags, and Responses**
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INTRODUCTION

The importance of understanding and complying with the FCPA cannot be overstated. If your organization does business abroad, this may very well be the most important regulation with which you must comply.

The FCPA has become the centerpiece of the Department of Justice's strategy for policing multinational corporations, whether headquartered in the United States or elsewhere. Prosecutions are up, way up. The top ten settlements in overseas bribery cases have all come since 2008.¹ Lanny Breuer, the Assistant Attorney General for the Criminal Division at the Department of Justice, said, "We are in a new era of FCPA enforcement; and we are here to stay".² And the DOJ is just half of the equation – the SEC has concurrent criminal and civil jurisdiction over the FCPA.³

Moreover, individuals *are* going to jail for violations of the FCPA. Along with monstrous fines that may be imposed both on the corporation and on individual wrongdoers, individuals face up to 5 years in prison for violations of the corruption provision and 20 years for violations of the accounting provisions.⁴ In recent years numerous executives have been sentenced to multi-year sentences for violations of the FCPA.⁵

It would be a mistake to believe that your organization is below the radar of the DOJ or SEC. But for those so inclined to take false comfort, know too that actions arising from foreign bribery may lead to civil claims under federal securities laws, claims under RICO, antitrust laws, and state laws pertaining to tortious interference with contract, unfair competition and more.⁶ And commercial (private-to-private) bribery may still violate the FCPA's accounting provisions, the Travel Act, anti-money laundering laws, and other federal or foreign laws. Any type of corrupt payment thus carries a risk of prosecution.⁷

For all of these reasons, it is essential to understand first, what the FCPA provisions say; second, how it is applied in practice; and, third, how to protect yourself with compliance programming.

TOP TEN FCPA PAYOUTS OF ALL TIME

1. **Siemens** (Germany): \$800 million in 2008.
2. **KBR / Halliburton** (USA): \$579 million in 2009.
3. **BAE** (UK): \$400 million in 2010.
4. **Total S.A.** (France) \$398 million in 2013.
5. **Alcoa** (U.S.) \$384 million in 2014.
6. **Snamprogetti Netherlands B.V. / ENI S.p.A** (Holland/Italy): \$365 million in 2010.
7. **Technip S.A.** (France): \$338 million in 2010.
8. **JGC Corporation** (Japan) \$218.8 million in 2011.
9. **Daimler AG** (Germany): \$185 million in 2010.
10. **Weatherford International** (Switzerland): \$152.6 million in 2013.

- Provided by FCPA Blog
(www.fcpablog.com)

¹ Peter J. Henning, *Be Careful what you wish for: Thoughts on A Compliance Defense Under the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 883, 884 (2012).

² Henning, *Supra* note 1 at 883-884.

³ Henning, *Supra* note 1 at 883-885.

⁴ 15 U.S.C. §§ 78dd-2(g)(2)(A); 15 U.S.C. §§ 78ff(a)

⁵ See FCPA Blog (available at <http://www.fcpablog.com/blog/2012/2/28/a-survey-of-fcpa-sentences.html>).

⁶ Gideon Mark, *Private FCPA Enforcement*, 49 American Bus. L. J. 419 (2012).

⁷ Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, 21 (available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>).

Anti Bribery: The Law

1. **Who is Subject to the FCPA:** The anti bribery provisions apply to “issuers”, “domestic concerns” and any “person” that bribes a foreign official.⁸ Issuers include companies registered with the SEC or foreign companies with shares on the US stock exchange. Domestic concerns cover virtually any business operating in the United States, including corporations, partnerships and sole proprietorships. And persons can be anybody, including foreign corporate concerns, whose corrupt act occurs, in any part, within the United States. Individuals and companies can be liable even if the bribery is done on behalf of another person or company.

2. **How is Jurisdiction Exercised:** US courts can exercise jurisdiction for FCPA violations over U.S. nationals. For non-nationals, some action in “interstate commerce” must have taken place.⁹ This requirement is easily met – it may mean making a telephone call, sending an email, text message or fax, sending a wire transfer from a US bank, or travelling across state borders or internationally to or from the United States.¹⁰

3. **When is a Payment Corrupt, or a Bribe:** The FCPA applies only to payments intended to induce or influence a foreign official to use her position “in order to assist ... in obtaining or retaining business for or with, or directing business to, any person.” This requirement is the ‘business purpose test’ and, as *U.S. v. Jefferson*¹¹ showed, this requirement is broadly interpreted.¹²

Congressman William Jefferson was found guilty of conspiring to violate the FCPA after helping American businesses broker deals in West Africa in exchange for compensation to businesses controlled by his family.¹³ Jefferson argued that because payments to his family were periodic, and not causally associated with any one act, it couldn’t be shown that the payments were provided to him with intent to bribe.¹⁴ The Fourth Circuit disagreed, finding that the “ongoing course of illicit and repugnant conduct by Jefferson – conduct for which he was compensated considerably by those on whose behalf he was acting”,¹⁵ was sufficient to show that the purpose of the payment was to obtain an improper influence. Consequently, in the *Jefferson* case the court inferred a quid pro quo in order to establish intent.

Moreover, the corrupt act need not actually succeed, so long as the requisite intent is present. Even if the foreign official doesn’t accept or receive the payment, the payor may be liable.¹⁶ And executives who authorize others to do their bidding – a “pay whoever you need to, but don’t tell me about it” mentality– may be liable even if such a bribe is not ultimately paid.¹⁷

⁸ 15 U.S.C. §§ 78dd-1(a).

⁹ 15 U.S.C. §§ 78dd-1(a).

¹⁰ DOJ & SEC, *supra* Note 6 at 12.

¹¹ 1:07-cr-00209-TSE-1 (available at <http://www.ca4.uscourts.gov/Opinions/Published/095130.P.pdf>).

¹² DOJ & SEC, *supra* Note 7 at 12.

¹³ *Id* at 11.

¹⁴ *Id.* at 9-10. (This allegation focused on the domestic bribery charge, rather than the FCPA. However, both the domestic statute and the FCPA require intent, and so this issue is analogous to the foreign official context.)

¹⁵ *Id.* at 46.

¹⁶ DOJ & SEC, *Supra* Note 7 at 14.

¹⁷ DOJ & SEC, *Supra* Note 7 at 14.

4. What is a “Foreign Official”: A foreign official includes any employee, regardless of rank or title, of a foreign government or department thereof.¹⁸ But it also includes “instrumentalities” of a foreign government as well as public international organizations such as the World Bank, IMF, and WTO.¹⁹

“Instrumentalities” extend the reach of the FCPA greatly, and may leave companies unsure whether a partner or client is a foreign official. Many states own or control companies within the country either wholly or in part – think of medical providers; Russian oil companies; Chinese extractive industries. These are all state owned entities, and the FCPA reference to “instrumentalities” of the foreign government renders such entities as foreign officials.²⁰

Although numerous factors are considered in establishing an instrumentality, the ownership percentage of the state is the most important factor. Usually, less than 50% governmental ownership means the company is not an instrumentality. However, the nature of the state means that even where there is no de jure ownership, de facto control may necessitate a re-categorization. In one case, the DOJ categorized a company as an instrumentality of the government where the Malaysian Ministry of Finance, though a minority owner, nonetheless exercised veto power over important decisions.²¹

Bribery of all types is inadvisable; but public sector bribery heightens the risk, and so companies should engage in due diligence to properly identify whether their local contacts, clients or partners are foreign officials or instrumentalities.

Where a contact is determined to be a foreign official, take steps to increase transparency of operations, including documenting all actions taken with regards to the foreign official, stating the intent behind any payments made, and ensuring that all employees assigned to the foreign official are unblinkingly clear as to their limitations and obligations with respect to bribery.

5. Exceptions to the FCPA: The FCPA is not violated where the payment was lawful under the written laws of the foreign country. This is an affirmative defense, meaning that the defendant must prove that it is legal in the country.²² Therefore, the mere absence of a law prohibiting bribery is not sufficient. In practice, this defense is rarely raised, as countries rarely permit corrupt payments.²³

A second defense is the “facilitating payment” defense. “Grease payments”, as they’re also known, facilitate the performance of a routine governmental action by a foreign official. This is a “narrow exception” that only applies to non-discretionary acts such as obtaining permits, telephone service, water or power.²⁴

Erroneously relying on the facilitating payment exception is a prominent danger to companies. In many countries, laws may be *designed* to be broken. Then, when a U.S. company official enters the scene, the foreign official will ask for a payment to overlook the “violation”.²⁵ This violates the FCPA, because the payment is indeed for the purpose of influencing the governmental official to engage in an act which is, technically at least, illegal.

Moreover, most countries prohibit facilitation payments, and many anti-corruption laws (including most prominently the U.K. Bribery Act) outlaw facilitation payments wherever they occur.²⁶

¹⁸ 15 U.S.C. §§ 78dd-1(f)(1)(A).

¹⁹ 15 U.S.C. §§ 78dd-1(f)(1)(A)-(B).

²⁰ DOJ & SEC, *Supra* Note 7 at 20.

²¹ DOJ & SEC, *Supra* Note 7 at 21.

²² DOJ & SEC, *Supra* Note 7 at 23.

²³ DOJ & SEC, *Supra* Note 7 at 23.

²⁴ DOJ & SEC, *Supra* Note 7 at 25.

²⁵ This is a risk especially in countries where corruption is embedded into the government and even society.

²⁶ APEC Anti-Corruption Code of Conduct for Business, available at [http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~media/Files/Groups/ACT/07_act_codebrochure.ashx](http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~/media/Files/Groups/ACT/07_act_codebrochure.ashx)

Therefore, this exception should be relied on only in exceptional circumstances, if at all. Many companies find it expedient to prohibit facilitation payments in their entirety.

Companies can rest assured, and employees should be made aware, that a payment made in response to a threat to one's physical safety is *not* considered a FCPA violation. However, importantly, economic coercion (e.g., requiring a payment to gain entry into a market or obtain a contract) is illegal.²⁷ For more on the distinction between extortion and economic coercion, see *United States v. Kozeny*.²⁸

-Learn how to **protect your company** from the most severe FCPA risks by accessing Part Two and Three of this series, as well as other information, by joining our newsletter by [clicking here](#). We also invite you to visit our blog at www.ethicsresources.org.

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²⁷ DOJ & SEC, *Supra* Note 7 at 27.

²⁸ Available at: <http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/10-13-08bourke-deny-motion.pdf>