

Venable LLP

# Foreign Corrupt Practices Act:

Charities, Colleges and Other Nonprofits:  
The Foreign Corrupt Practices Act Really  
Does Apply to You

**Value Added, Values Driven™**

# FCPA: A Brief History

- Product of Watergate
  - Investigation revealed payments to foreign officials to obtain/retain business
  - Books and record keeping requirement
  - Internal procedures requirement evolved over time
- Civil and criminal penalties apply
  - Civil: \$10,000 for company, \$100,000 for individual.
  - Criminal:
    - \$100,000 plus 5 years for individual
    - \$2 million for organization

# FCPA: Evolution of International Regime

- U.S. alone for a number of years.
  - Legal in FRG to deduct foreign bribes from corporate income tax
- Development of Multilateral Agreements
  - Organization for International Cooperation and Development (OECD)
  - Organization of American States
  - United Nations

# FCPA/OECD

- OECD Anti-Corruption Convention (1999)
  - Leading instrument
    - Increasing number of countries signing on every year (38 as of July 1, 2010)
    - Requires signatory countries to
      - Enact conforming laws
      - Allow compliance inspection
  - Cautions
    - Signatory country laws unique
    - Multiple countries laws may apply

# FCPA: To Whom It Applies

- All U.S. Citizens, wherever located.
  - Includes real persons and fictitious entities
  - Overseas subs not included if no U.S. control
- Anyone in the U.S.
- Permanent residents of the U.S.
- Note on U.S. organizations:
  - Applies to all officers, directors, employees and agents

# FCPA: Actions to Which Applies

- Any payment, offer or promise to pay, or gift
- To a foreign official, political party, or candidate for public office
- For the purpose of
  - Obtaining or retaining business
  - Securing and improper advantage

# FCPA: Red Flags

- U.S. organization may not ignore actions of
  - Offshore employees
  - Agents, wherever located.
- Commissions greater than industry norm (over 10% is suspect)
- Payments to third countries without reason
- Unnecessary or unusual middle men
- “Special” Invoices
- Charitable Contributions

# **FCPA Enforcement: Focus on Individuals**

**2009, 40 individuals charged  
with FCPA crimes.**

**2010, 23 charged through Q1,  
2010**

**2010, 19 Convicted or Pled Out  
(DOJ)**

**140 active investigations in 2009**  
**Current Examples**

# FCPA: Due Diligence

- Establish compliance policy
- Establish internal controls
  - Two signature rule
  - Due diligence check list
    - Assess risk of doing business in each country
      - Check for status under OECD anti-bribery convention
      - Transparency International
      - U.S. Embassy
    - Assess risk of line of business
    - Match degree of due diligence to risk
  - On-going monitoring

# FCPA: Affirmative Assent

- U.S. & Overseas Employees
  - Annual Training
  - Sign training certificate
- Agents
  - Affirmative obligation by contract to comply with FCPA/host and third country laws.
  - Consider annual certification

# FCPA: Related Laws (1)

- Economic embargoes against
  - Countries
  - Entities
  - Individuals
- Application to Universities, Charities and Other Non-profits: E.O. 13224 (2001)
- Office of Foreign Assets Control, U.S. Treasury, maintains list of prohibited parties

# FCPA: Related Laws (2)

- Antiboycott law
  - U.S. persons must report any request to abide by Arab boycott of Israel
  - Report on IRS or Commerce form
    - IRS Form 5713
    - BIS Form 621P
- Questions? Office of General Counsel, U.S. Treasury & Department of Commerce, Office of Antiboycott Compliance.

# FCPA: Related Laws (3)

- Foreign Bank Account Report (“FBAR”)
  - Form 990, Part V, line 4a
  - Financial Interest
  - Signature or Other Authority
  - Report on TD F 90-22.1 (“FBAR” form)
- Questions? Internal Revenue Service
- Penalties? Civil and Criminal.
- Enforcement Focus -- Amnesty Period Over

# FCPA: Employee Responsibilities

- Understand and fulfill responsibilities
  - Complete regular training
  - Willful blindness = liability
  - Conduct appropriate due diligence on agent(s)
  - Use standard form contract
  - Know “red flags”
- If in doubt, ask organization management.
- Keep good records.

Venable LLP

# Foreign Corrupt Practices Act

## Charities, Colleges and Other Nonprofits: The Foreign Corrupt Practices Act Really Does Apply to You

Ed Wilson  
Venable LLP  
202-344-4819  
[dwilson@venable.com](mailto:dwilson@venable.com)

**Value Added, Values Driven™**