

The U.S. Government Wants to Put You in Jail for Breaking This Law . . . and Your Chances of Going Are Increasing!

[Part 1 in a Series](#)

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SUMMARY

The Securities and Exchange Commission (SEC) and the Department of Justice (DoJ) are stepping up enforcement of the law known as the “Foreign Corrupt Practices Act.” This comes in the face of continuing complaints by U.S. business leaders that the FCPA unfairly ties the hands of U.S. companies and their overseas affiliates by denying them the ability to compete on a level playing field with their direct competitors in other countries. But neither the SEC nor the DoJ is losing any sleep over these complaints. In fact, they’re getting tougher.

Put ‘Em in the Slammer. Less than a year ago the Attorney General in charge of FCPA enforcement at the DoJ said in a major policy speech that **“Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”** If his intention was to catch the attention of the U.S. business community, he clearly succeeded. Since then, the internet has buzzed with advice on what U.S. business leaders should do - not only how to comply with the law, but how to react if and when they’re caught not complying with it.

Who’s at Risk?

The FCPA covers **all** U.S. companies (big or little, public or private), together with all their employees and agents, all their overseas affiliates and partners, and **all** U.S. individuals wherever located.

What’s the Law?

The FCPA prohibits bribery of foreign officials. There are **five** elements to an FCPA Violation: **1)** a payment or promise of **anything of value**; **2)** to a foreign official, political party official, candidate for office or official of public international organization (Foreign Official); **3)** by you or your company, or its employees/agents in the U.S., or its employee/agents **outside** the U.S., or by a foreign person **inside** the U.S. assisting in the payment or promise; **4)** for the corrupt purpose of influencing an official act or decision of the Foreign Official; **5)** to assist you or your company **obtain or retain business**, to **direct business** to any person, or to secure **an improper advantage**.

Is That All?

No. You can be liable for a **promise of payment**, even if payment is never made. **Foreign officials** include almost everybody even remotely connected to government, including officials of public international organizations, political parties and candidates for foreign political office - and perhaps even to their family members. **Anything of value** includes not only cash, but information, testimony of a witness, loans, promises of future employment, scholarships, sports equipment, trips, and the like. **Corrupt intent** means intending to induce the recipient to misuse his position or to influence someone else to do so. The business to be obtained/retained does not have to be with the foreign government, so long as the payment/promise is for the purpose of securing **an improper advantage** in obtaining/retaining any business with anybody. And finally, you don’t have to know a payment by an overseas employee/agent will be passed on to a foreign official so long as you’re aware there’s a **substantial possibility it might be**.

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Who Enforces This Law?

The SEC enforces FCPA bribery and FCPA accounting violations by public companies, and the DoJ has exclusive jurisdiction over criminal violations. The SEC and DoJ share jurisdiction over civil violations.

What Are the Penalties?

The FCPA imposes both **civil and criminal penalties**. Civil penalties for anti-bribery violations include fines up to \$10,000 for companies or individuals **per violation**. Civil penalties for accounting violations range up to \$500,000 for companies and \$100,000 for individuals **per violation**.

Criminal penalties for anti-bribery violations include fines of up to \$2 million for companies and \$250,000 for individuals, again **per violation**, and jail terms for individuals of up to five years. Criminal penalties for accounting violations range up to \$25 million for companies and \$5 million for individuals.

Note that these penalties are **per violation**, and the FCPA cases brought by the government typically include **multiple counts** of alleged violations. In 2009, the average FCPA violation fine was \$7 million and the highest was \$579 million. Twenty individuals were indicted, and, as you might have guessed by now, an individual's fines are **not indemnifiable** by his or her employer or principal.

Recent Penalties Assessed

Just six years ago (2004), the DoJ brought only **three** FCPA criminal cases. In 2009, this number had climbed to **34**. This year the DoJ has over **120** open FCPA investigations. So far in 2010, the SEC and DoJ have announced civil and criminal fines against nine companies and 31 employees and agents amounting to **over \$1.1 billion**, and the DoJ has obtained jail terms amounting to a **collective 16 years** for these employees and agents as guests in our federal prison system. Additionally, in the single largest FCPA prosecution ever against individuals, there are proceedings in progress involving over 20 company employees and agents with possible criminal fines in excess of \$5 million and a collective 110 years in jail terms for the individuals involved.

A Glimmer of Leniency From the DoJ?

Effective just yesterday (November 1), the Sentencing Guidelines of the DoJ were amended to give compliance credit (lowering the penalty level) to companies like yours if 1) you have an ethics and compliance program (Program) in place with the persons responsible for the operation of the Program reporting directly to your Board or one of its committees, 2) your Program manages to detect an FCPA violation before it's discovered (or reasonably could have been discovered) by persons "outside" your company, 3) you promptly report the violation to the appropriate governmental authorities, and 4) no one responsible for the Program either participated in the reported violation, condoned it, or willfully ignored it.

Given the draconian consequences (only some of which are described above) of getting caught violating the FCPA, setting up a Program would seem to be a "no brainer."

Coming Next.

Part 2 of this Series (next month) will focus on the **types of FCPA risks** facing **you** and **your company** as a result of actions of **your overseas partners, agents and consultants** that you may know little or nothing about until you hear from your government - which, believe it or not - may want to put **you** in jail for **someone else's** actions.

More Information.

For more information about the FCPA and how to create an effective FCPA Compliance Program for your company, please phone your principal Luce Forward lawyer or contact the author of this article at jwbrooks@luce.com.