

# DON'T MESS AROUND WITH THE FOREIGN CORRUPT PRACTICES ACT

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## The dangers of complacency

In the 1970s, a popular television show's jingle warned not to "mess around with Jim." If corporate counsel today were to resort to jingles to reinforce warnings to their clients, a plea not to "mess around" with the Foreign Corrupt Practices Act (FCPA) would definitely be in order.

Enacted in 1977, the FCPA makes it a crime for U.S. companies to "bribe" (i.e., give or offer value for corrupt purposes) any foreign government official in order to secure business. For nearly three decades, that central FCPA proscription remained little more than aspirational, with the three enforcement agencies—the U.S. Department of Justice, the U.S. Securities and Exchange Commission and the U.S. Treasury—bringing only two FCPA enforcement actions.

But that has all changed. Prosecutions jumped from 15 in 2006 to 37 in 2007, and as of mid-2008, there were more than 100 active FCPA cases.

Such prosecutions raise serious "bet the company" risks: The consequences of conviction can be severe, with a record fine last year of \$44 million, and prison terms for corporate executives—up to 20 years under the statute—becoming increasingly common.

Why have prosecutions skyrocketed? First, the world has become, to quote Thomas Friedman, increasingly flat. Electronic commerce has exponentially increased the volume of transactions and number of currencies changing hands. Monetary wires are transferred from Dubai to Beijing to San Francisco in a matter of minutes. This global interconnectedness has infinitely multiplied the opportunities for financial corruption. The confluence of a weakened domestic economy; prevalent, ingrained corruption in many attractive foreign markets; more temptation to "play along" with dubious foreign customs; and heightened FCPA enforcement creates the perfect storm for global companies. And it's up to corporate counsel to navigate their companies through this storm.

## What the FCPA Prohibits

The FCPA prohibits: (1) the giving or offering of anything of value, (2) for corrupt purposes, (3) to a foreign official (referred to herein as "bribes"). To be "for corrupt purposes," the offering is made to induce the governmental official, regardless of rank, to assist the company in obtaining or retaining governmental or nongovernmental business or gaining some advantage in so doing, whether or not that corrupt purpose succeeds.

## The Common Exceptions:

### ***Not for Corrupt Purpose***

First, the giving or offering of things of value ("giving or offering") are not bribes when they are not for corrupt purposes.

While this "intent to corrupt" prong is critical, it is often difficult to prove a negative: that the company had no such intent. This is even more challenging because reliance on prevalent local customs will not help the company. The DOJ "places no weight on common practice."

## ***Sanctioned by Local Written Laws***

Another exception, for payments lawful under written local law, is of little use. It is narrowly construed. Payments to facilitate a transaction are rarely codified in formal, written laws; and of course, no countries' laws sanction official bribery.

### ***Facilitating Payments for Routine Government Action***

This frequently used exception encompasses payments solely to facilitate or expedite a "routine governmental action" (not involving decisions to award or continue business), such as obtaining permits or licenses; processing visa and work orders; providing police protection; mail, phone, power and water service; scheduling inspections; shipping goods across the country; and "similar routine governmental action."

### ***Bona Fide Expenses Criteria; Record Keeping Requirements***

The most prevalent exception is for bona fide expenses, i.e., legitimate payments to or on behalf of a foreign official for valid and justifiable expense. While this category has received the greatest enforcement attention from the DOJ and SEC, neither agency opinions nor the prosecuted cases (and settlements) have established clear "safe harbors" for establishing bona fide expenses. Rather, the determination of bona fides has turned on the sifting and weighing of particular facts and circumstances. The following broad guidelines drawn from these cases indicate bona fides will more likely be found where:

- Expenses are directly related to the "promotion, demonstration or explanation of the products or services."
- Expenses are paid directly to the vendor, and if not possible, for the exact documented, reasonable amount (and not as a flat per diem or stipend).
- They are for standard, necessary and reasonable (not lavish) costs: e.g., coach, not first class; two- and three-star, not four- and five-star accommodations.
- They are for the official only and not for his or her family or entourage.
- Expenses are overwhelmingly for the work-related activities, e.g., 10 days for training includes one or two days at large vs. six of 10 days in pleasure travel.
- Officials attending are selected by the foreign government with no influence of the U.S. company.
- Expenses are limited to U.S. domestic (not international) travel costs.
- Overseas tours of operations sites are required since the company has no comparable sites closer to the official's residence.
- Souvenirs are of nominal value, related to the company's business and/or bear its logo.

It also is helpful to have obtained opinions from reputable legal counsel in both the U.S. and the foreign country that the payments are not contrary to the law of either country. In addition to this guidance, the company can seek a specific DOJ opinion.

The following two directives should always be followed:

- Records are transparent and detailed and omit no relevant item: e.g., do not omit the number, names, etc., of foreign officials taken to dinner.
- Records are not destroyed or purged; internal controls ensure integrity of records. Shoddy or lost records are likely to arouse suspicion from enforcement agencies.

### **Who is a Foreign Government Official?**

Defining who is a "foreign official" in connection with employees of an "instrumentality" of the state, or of a state-owned business enterprise (as opposed to the actual government agencies) is one of the most vexing questions under the FCPA. Again, in these situations, the company should seek the legal opinion of reputable legal counsel in both countries. Where any reasonable doubt remains, the company should either seek a DOJ opinion or treat the person as if he or she were a "foreign official."

In the midst of the Watergate scandal, Bess Meyerson observed: "The accomplice to the crime of corruption is frequently our own indifference." Mark Twain counseled: "Always do right. This will gratify some people and astonish the rest." Following those aphorisms will not make your company FCPA-compliant. The FCPA is too nuanced and country/cultural impacted, and requires judgment calls in many situations. But they are good "core values" for your program and compliance team as they sift through each situation knowing the devil is in the details. By not "messing around" with the FCPA, you'll keep the Feds far away from your company's door.

## **Seven Compliance Tips:**

### **1. Implement the best compliance program**

The best compliance programs are minutely detailed and comprehensive. Make all key actors well informed (and incessantly reminded), responsible and accountable through internal controls, regular reporting, automatic record keeping and a periodic monitoring loop with corporate counsel, and call for them to review expenditures for officials before they occur.

### **2. Train repeatedly**

Conduct FCPA training and periodic retraining for affected company employees, as well as those running travel, tours and entertainment for foreign officials.

### **3. Know your customer up front**

Analyze and classify at the outset whether your foreign contact is connected to a nongovernment, nonpolitical enterprise, or is subject to the FCPA. In the difficult cases, or if in a gray area, either strictly comply with the FCPA or seek a DOJ opinion.

### **4. Review payments before disbursed**

The legal department should work hand-in-hand with operational and accounting people to provide payment guidelines and, if possible, review and approve the items for the foreign official before they are incurred.

### **5. Follow the bona fide expense criteria and record-keeping directives**

Meet all or as many as possible of the aforementioned bona fide expense criteria. Always follow the two directives relating to record keeping and internal controls.

### **6. Use common sense and the "smell test"**

Don't leave your common sense at home. Does flying the head of a foreign authority from Kuala Lumpur with his wife and kids first-class to stay at a four-star hotel in Hawaii smell bad? When a foreign official suggests a lavish dinner with an unlimited liquor tab for his entourage, and requests their names not be included on the account forms, does your red flag go up? Also, use your common sense when checking out legitimacy: Ask your trusted, knowledgeable employees if the official has a valid need to be on the tour or in training; ask whether the chosen places of entertainment in that country "are trouble" (e.g., infamous for very high prices, gambling, strippers, prostitution and other lavish excesses).

### **7. Be credible and sensitive to business concerns, but inflexible when necessary**

Establish solid and responsive communications with your FCPA compliance people and key actors; help them develop an appreciation for any disparities between the local business customs and FCPA compliance; be

quick to suggest viable and compliant alternatives to dubious proposed arrangements; and streamline the FCPA review and approval process (so you don't kill the deal with "red tape").

Make the key operations and salespeople know they are the "eyes and ears"—integral parts of the company's compliance program—and that you are working with them on the common "grow the business but with compliance" goal. The last thing you want is for those employees to see you as a hyper-technical deal killer to be avoided like the plague. But when necessary, just say no.

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