Foreign Corrupt Practices Act & What Corporate Counsel Should Know

What Corporate Counsel Should Know: In addition to understanding the summary of the Foreign Corrupt Practices Act given below, corporate counsel must pay heed to the potential conflicts of interest and maintaining the attorney-client privilege.

- **Independent, outside corporate counsel should be a must**, as inside corporate counsel is a generalist in a specific area, and is generally not geared toward defending a federal criminal prosecution.
- **Outside, independent counsel for any director, officer, stockholder, employee or agent is a must.** Counsel for the corporation, whether inside counsel or outside counsel, must beware the conflicts of interest.
- **Corporate counsel must NOT make statements regarding confidentiality or legal representation** in speaking with the individuals involved, and should keep in mind that the FCPA does not allow the corporation to indemnify the "persons" involved. In that light, it is recommended that inside counsel speak with any director, officer, stockholder, employee or agent, and relay any information learned directly to outside corporate counsel, who has attorney-client privilege with the corporate. The catch is that there is no attorney-client privilege between the inside, corporate counsel and the director, officer, stockholder, employee or agent involved.
- **Disclosure**: Whenever necessary or appropriate, corporate counsel should make clear that officer, employee, etc. understands that you represent the corporation, not them, and that anything you learn in the course of your investigation will be reported back to the corporation. Use a written disclosure and acknowledgement.
- **Confidentiality**: Anything learned during the investigation is reportable back to the appropriate corporate representatives. If it is believed that some act should be reported to the DOJ, then the corporation can pass a resolution waiving the confidentiality. The officer/employee, etc. has no reasonable expectation of confidentiality when the written disclosure and acknowledgement is utilized.

FCPA Summary: The Foreign Corrupt Practices Act (FCPA) controls bribery in two ways: 1) prohibits any U.S. person, real or corporate, from bribing a foreign official; and 2) mandates record-keeping standards for publicly-held corporations registered under the Securities Exchange Act of 1934.

Record-keeping requirements are two-fold: 1) all issuers are required to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;" and 2) mandates corporations to create a system of internal accounting controls which provide "reasonable assurance" that transactions are properly authorized. "Reasonable assurances" and "reasonable detail" are defined under the "prudent man: standard to mean a "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

The minimum accounting and international record keeping procedures apply only to "Issuers" of securities, which the Act defines as either (1) corporations with a class of

securities registered under section 12 of the 1934 Act (all stock issuers who engage in interstate commerce, whose securities are traded on a national stock exchange, whose assets exceed one million dollars, and who have more than 500 shareholders), or (2) companies required to file reports under section 15(d) of the 1934 Act (issuers required to file form 10-K reports and quarterly 8-K reports, unless exempted by satisfaction of registration provision of section 12). Therefore, issuers with securities held of record by fewer than 500 persons or less than one million dollars are exempt from the FCPA's record-keeping requirements.

Criminal liability under the Act as modified by the 1988 amendments applies only to those persons who "knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book record or account." Penalties will not be imposed for "insignificant or technical infractions" or "inadvertent conduct."

The anti-bribery provisions are similar to the domestic bribery statute. The FCPA explicitly prohibits **all** firms (whether subject to SEC regulations or not) from: 1) directly, indirectly or through a third-party bribing a foreign official, foreign political party, party official or candidate in order to obtain or retain business; 2) using the mail or interstate commerce "corruptly in furtherance of an offer or payment of money or anything of value to a 'foreign official'"; 3) prohibits the giving or promising to give anything of value to foreign officials or foreign political parties to influence any act within their "official capacity" or to induce foreign officials to violate their "lawful duty.". All prohibits the indirect or third-party bribery of foreign officials, political parties, or candidates.

In order to prove a violation of sections 103 and 104, the following elements must be established:

(a) the issuer or domestic concern has utilized a means of interstate commerce

(b) corruptly;

(c) in furtherance of an offer, payment, promise to pay or authorization of a payment;

(d) of any money, offer, gift, promise to give or authorization of the giving of anything of value;

(e) to a foreign official, or foreign political party or its officials, any candidate for foreign political office, or any third party with the knowledge that part of the money will go to such an official, party or candidate;

(f) with the purpose of influencing any act, or decision or to induce the official, party or candidate to influence a foreign government or instrumentality to affect or influence any decision or act of the government or its instrumentality;

(g) in order to help the issuer or domestic concern to obtain or to retain business.

The Act expressly defines several of the above elements, and legislative history of the 1977 Act explains how "corruptly" should be interpreted:

Congress explicitly defined the word "corruptly" as that offer, payment, promise, or gift, which is intended to induce the recipient to abuse his official capacity to unlawfully direct business to the payor or client, or to provide a favorable legislative or regulatory

outcome." This is true regardless of who initiates or suggests the payment of the gift or offer. Congress clearly stated that the defense that a payment or offer was required by a foreign official in order to conduct business is inadequate, since at some point the U.S. company must make a "conscious decision" to pay the bribe. On the other hand, Congress recognized that extortionary demands for payment, such as payment in order to keep an oilrig from being dynamited, would not be held to contain the requisite corrupt purpose.

The most important revisions of the 1988 amendments to the FCPA modified the knowledge standard for liability under the Act. "Knowing" is now defined under the FCPA as follows:

(a) awareness that the third party is engaging in prohibited conduct, or that a prohibited circumstance exists or that a prohibited result is substantially certain to occur;

(b) belief that the prohibited circumstance exists or is substantially certain to occur; or

(c) awareness of a high probability that a prohibited circumstance exists, unless the person actually believes that the circumstance does not exist

In the 1988 amendments to the Act, Congress warned against a "head-in-the-sand" attitude and cautioned against "conscious disregard" of indications of a high likelihood of a violation. Any American company that is willfully blind or consciously avoids learning whether its local agent is likely to bribe an official is probably violating the FCPA. However, mere recklessness is not sufficient to establish liability under the Act.

The FCPA provides a number of exceptions or affirmative defenses to its prohibition on illicit payments. 1) If the purpose of the payment is to expedite routine governmental action, which is defined as an activity ordinarily and commonly performed by a given foreign official. In other words, a U.S. company is permitted to pay a local official to do something that the official must do anyway. This exception was introduced by Congress because of the concern that American companies could be disadvantaged in countries in which such "grease" payments were the routine way of doing business.

2) By showing that the gifts or payments to foreign officials were reasonable and bona fide expenses involving promotion of business, demonstration of products, or the execution or performance of a contract with a foreign government or agency.

3) Pursuant to the Act, companies and individuals facing bribery charges may argue that their payments were lawful under the written laws of the foreign country, provided these laws explicitly permitted the given payment (rather than merely not prohibiting it). The local law must be distinct and written; it is not a defense to simply assert that the country lacks express anti-bribery laws.

Enforcement: The Department of Justice (DOJ) has the jurisdiction for all criminal enforcement under the VCPA and the SEC is responsible for some aspects of civil enforcement. Both can bring an action against the corporation, its officers, directors, stockholders, employees and agents. With regard to action against a corporate employee, the FCPA allows for individual convictions regardless of whether the corporation is found guilty. Foreign officials who receive bribes from American companies remain

outside the reach of the FCPA. However, the few cases that the DOJ has brought under the bribery provisions have involved egregious violations of the FCPA, such as the Pemex cases.

In the Pemex cases, bribery payments were so blatant that knowledge, under either the pre- or post-1988 amendments, was not even an issue. The defendants either guilty or nolo contendere and paid fines. One corporation was fined $3,450,000; its president $309,000 and other defendants $235,000. None of the defendants received prison terms.

Penalties: Violations of the bribery and recordkeeping provisions of the FCPA result in a base offense level of eight under the Sentencing Guidelines. Sentence lengths accrue depending upon the amount of money involved when the amount is greater than $2,000. Other factors which may increase the sentence term are whether the offense involved the use of foreign bank accounts or transactions to conceal the true nature of the conduct; whether the offense substantially jeopardized the safety and soundness of a financial institution; and whether the defendant has a prior criminal record. In addition to criminal punishment, the Act provides for civil penalties of up to $10,000. In order to maximize the effectiveness of the penalties, ***companies are prevented from indemnifying their officers and employees against liability under the Act***. Furthermore, a corporation or an individual found to be in violation of the FCPA may be subject to debarment before thirty-three government agencies. An indictment under the FCPA can lead to the suspension of one's right to do business with the government. Accordingly, no party may participate in procurement or non-procurement activities if one of the governmental agencies debarred or suspended the party for violations of the FCPA.