

ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT IN THE AGE OF OBAMA

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Federal enforcement of the Foreign Corrupt Practices Act (the “FCPA”) has never been more sweeping, never more robust than it is today. Enacted in 1977 to bring a halt to what was seen as the widespread bribery of foreign officials as a way of doing business overseas, the FCPA was rarely enforced during its first 30 years. The year 2007 marked the beginning of an enforcement surge in the global war on graft, and heralded a new era in FCPA enforcement and compliance. In February 2007, the FBI announced that it was establishing a special team of agents exclusively tasked with investigating FCPA violations.¹ After President Obama’s election in November 2008, the SEC promised that it would be seeking fines “dwarf[ing] the disgorgement and penalty amounts that have been obtained in prior cases.”² The three years that have followed have seen more FCPA enforcement actions than the first 30 years of the statute’s existence.

In this age of enforcement, the need for anti-corruption compliance for firms competing in the global marketplace has never been more acute, and it is incumbent upon all those who do business overseas to be aware of and scrupulously avoid potential FCPA pitfalls. Though record-breaking fines are still generally limited to egregious violations, many FCPA enforcement actions do not stem from clear-cut instances of bribery. Indeed, agencies and courts have read several provisions of the FCPA so broadly that even seemingly innocuous actions, commonplace in certain business cultures, can lead to governmental scrutiny and the threat of FCPA liability.

I. The FCPA Generally

Congress passed the FCPA in 1977 in response to widespread allegations that U.S. companies were securing foreign government contracts through bribery.³ The reported abuses were not limited solely to bribery of high foreign officials, but also involved so-called “facilitating payments,” or “grease payments,” by U.S. companies—payments made to government functionaries to ensure and hasten government functionaries’ discharge of their existing ministerial or clerical duties.⁴ The FCPA broadly prohibits payments to foreign officials (the anti-bribery provisions) and requires SEC-registered companies to devise and maintain internal accounting controls accurately reflecting the disposition of corporate assets (the internal control provisions).⁵ The DOJ enforces the anti-bribery provisions and the SEC enforces the internal control provisions.⁶

A. Anti-Bribery Provisions

Generally stated, the elements of an improper payment under the FCPA are (1) payment of money or anything of value (2) to any foreign official (3) through the use of an instrumentality of interstate commerce (4) for the corrupt purpose of influencing an official act or securing an improper advantage (5) in order to assist in obtaining or retaining business.⁷ At first read, it appears that the FCPA simply prohibits bribery of foreign government officials. Agencies and courts read certain terms within this framework broadly (i.e., “anything of value,” “foreign official,” and “obtain or retain business”) and find that seemingly inoffensive actions actually constitute improper payments under the FCPA.

1. “Anything of Value”

The term “anything of value” is not defined by the FCPA, but it has been broadly construed to include gifts, discounts, entertainment (including tickets and passes), drinks, meals transportation, lodging (including accommodation upgrades), insurance benefits and a promise of future employment.⁸ The perception that the purpose of the payment is to influence the recipient to award business is an important factor in determining whether the “anything of value” element has been satisfied.⁹

A payment made for the purpose of influencing a foreign official’s decision to award business can violate the FCPA even if no monetary value actually accrues to the individual foreign official. In one high-profile example, the SEC sued a pharmaceutical company because a Polish subsidiary of the company made a series of charitable donations to a foundation headed by the director of a state-run health fund in Poland.¹⁰ Though the director of the health-fund personally received no benefit from the donations, the SEC pointed to the fact that the company’s subsidiary was the largest charitable donor to the fund and that the company’s sales increased disproportionately as compared with those of its competitors while it was making the donations. This was enough evidence for the SEC to conclude that pharmaceutical company intended to influence the director’s decisions to award business.

2. “Foreign Official”

The FCPA defines “foreign official” to include, among other things, any employee of an “instrumentality” of a foreign government.¹¹ Once an entity is considered an “instrumentality” of a foreign government, every employee of that entity is a “foreign official” under the FCPA. This definition has profound implications for companies doing business with hospitals overseas because many foreign hospitals are government-owned. FCPA enforcements in the last few years have made clear that U.S. enforcement agencies view such individuals as foreign officials.¹² The DOJ and SEC dockets are replete with examples of enforcement actions based on payments made to doctors in state-run hospitals.¹³

3. “Obtain or Retain Business”

It goes without saying that every business’ objective is to obtain or retain business. In many countries, underpaid public officials virtually expect payment from those who seek licenses, regulatory approval, or other government action.¹⁴ Although the FCPA generally prohibits payments designed to obtain an official act, the FCPA anti-bribery provisions make a special exception for so-called “facilitating payments” or “grease payments”: the FCPA’s prohibitions do “not apply to any facilitating or expediting payment” made to “expedite or to secure performance of a routine governmental action.”¹⁵ In making this exception, Congress sought to distinguish between bribery to induce officials to “misuse their discretionary authority” and which “disrupts market efficiency and United States foreign relations” from “smaller payments intended to expedite ministerial actions,” which should “remain outside of the scope of the statute.”¹⁶

But this is an opaque and narrow exception. The term “routine governmental action” is limited to actions that are “ordinarily and commonly performed by a foreign official,” such as issuing licenses, processing papers, providing police protection or utility services and “actions of a similar nature.”¹⁷ Though the statutory definition does not clearly distinguish between payments for actions that are “ordinarily and commonly performed” from those that induce officials to misuse their authority and the phrase “actions of a similar nature” is open to a range of interpretations, government agencies frequently prosecute those who make payments to “grease the wheels” of foreign government officials if they perceive that any unfair advantage is being obtained. In one recent example, the DOJ announced an agreement reached with Hemerich & Payne Inc., where the company paid a \$1 million penalty for payments made to Argentinean and Venezuelan customs officials for the purpose of obtaining favorable handling of their goods in customs.¹⁸ In that case, the DOJ stated that Hemerich & Payne made the payments in order to secure an improper advantage in expediting the processing of goods that were not in compliance with the regulations of those countries.¹⁹ It appears likely that any non-trivial “grease payment” is likely to draw government scrutiny.

B. Internal Control Provisions

The FCPA also requires companies that have a class of securities registered with the SEC and companies required to file reports with the SEC to devise and maintain internal accounting controls that accurately reflect the disposition of corporate assets. The SEC has authority to assess civil fines for improper payments to foreign officials if a company inaccurately records the payment on company financial records. Typically, SEC enforcement actions are parallel to DOJ criminal enforcement for violation of anti-bribery provisions, though the SEC can and does prosecute violations of the internal control provisions without concurrent DOJ prosecution.²⁰

II. Trends in Recent Enforcement

The last few years have seen more enforcement of the FCPA than any other time since Congress passed the law in 1977.²¹ Before 2006, the DOJ and SEC typically brought only one or two cases per year.²² Since then there have been more FCPA enforcements than during the prior 30 years combined.²³

This trend is not simply an increase in the number of prosecutions, but a sharp increase in penalties and an expansion of the list of potential enforcement targets: the last few years have seen dramatically higher penalties and increased charging of individual officers of companies. The DOJ has also shown that it is investing more resources in investigating FCPA violations, from setting up a special team of agents exclusively tasked with investigating violations of the Act to executing undercover operations to ensnare large-scale bribery operations.

The most recent evidence of stepped-up enforcement is a \$185 million settlement with Daimler AG announced on April 2, 2010, stemming from the company's practice of paying foreign officials through corporate ledger accounts, offshore bank accounts and deceptive pricing arrangements, among other methods.²⁴ Daimler's infractions were so systemic that one prosecutor stated that the company and its subsidiaries "saw foreign bribery as a way of doing business."²⁵

This settlement is one of the largest obtained by the DOJ, and follows enormous settlements with Siemens AG (\$800 million)²⁶ in December 2008 and Kellogg Brown & Root LLC (\$579 million) in February 2009.²⁷

In another example illustrating the enforcement agencies' increasing willingness to pursue individual targets²⁸ and double-down on their investigatory and prosecutorial investments, in January 2010, the DOJ initiated a massive crack-down on members of the military and law enforcement products industry for alleged schemes to bribe foreign government officials for such things as contracts to supply arms to presidential guards.²⁹ The effort involved execution of 14 search warrants and 22 arrests by 150 agents based on undercover law enforcement techniques.³⁰ This is the first time federal agencies used undercover sting operations in connection with a FCPA investigation.³¹ While self-reported violations continue to be the main source of FCPA enforcement actions, recent examples have provided striking evidence that federal agencies will generate leads and investigate FCPA violations of their own accord.³²

III. Conclusion

Given this trend toward more active investigation of FCPA violations—as well as the higher fines sought by federal agencies—it is crucial that companies doing business overseas establish and maintain effective policies and procedures for detecting, evaluating and reporting potential FCPA violations. An important factor in determining appropriate sanctions for FCPA violations, including whether to impose criminal fines, is whether a violation is self-reported, the existing policies to detect and deter improper payments, remedial efforts undertaken by the company and the level of cooperation with federal authorities.³³

Robins, Kaplan, Miller & Ciresi L.L.P. attorneys have experience defending against FCPA violation claims and advising clients on FCPA compliance. We can help you and your company evaluate the potential risks associated with doing business overseas.

1 FBI News Release, "Bribes Beyond the Border" (Feb. 5, 2007) available at <http://www.fbi.gov/page2/feb07/fcpa020507.htm> (last visited Apr. 14, 2010) (quoting then Asst. Dir. of Criminal Investigations: "We recently set up a dedicated team of special agents in our Washington Field Office who are now working all FCPA cases . . .")

2 Lynne Marek, *Larger Foreign Corrupt Practices Act Fines Ahead*, National Law Journal (Nov. 25, 2008), available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202426258993> (last visited Apr. 9, 2010).

3 Department of Justice, "Lay-Person's Guide to the FCPA," available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Apr. 14, 2010) ("As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. . . . Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.")

4 *Id.*

5 15 U.S.C. § 78m(a)-(b) (2009).

6 Oliver J. Armas, "The U.S. Foreign Corrupt Practices Act—An Overview," NYSBA International Law Practicum, Vol. 22, No. 1 (Spring 2009) available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=27877> (last visited Apr. 14, 2010).

7 See 15 U.S.C. § 78dd-1(a) (2009).

8 Mike Koeler, 38 U. of Mem. L. Rev. 261, 268 (2008) (collecting examples).

9 *Id.* at 268-69 ("Further, there is no de minimis value associated with the 'anything of value' element of an FCPA Anti-Bribery violation. Rather, the perception of the recipient and the subjective valuation of the thing conveyed is often a key factor in determining whether 'anything of value' has been given to a foreign official.") (footnotes omitted).

10 *SEC v. Schering-Plough Corp.*, Litigation Release No. 18740, 2004 SEC LEXIS 1183 (Jun. 9, 2004).

11 "The term foreign official means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-1(f) (2009).

12 See DOJ Press Release, "AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations" (Jun. 3, 2008) available at <http://www.justice.gov/opa/pr/2008/June/08-crm-491.html> (last visited Apr. 14, 2010) (improper payments to doctors employed at Chinese hospitals in exchange for purchase of AGA's products); *SEC v. Syncor Int'l Corp.*, Litigation Release No. 17887, 2002 SEC LEXIS 3143 (Dec. 10, 2002) (payments to physicians employed by state-owned hospitals by foreign subsidiaries for purpose of influencing doctors' decision to use the company's products and services).

13 *Id.*

14 While FCPA generally prohibits these types of payments, an affirmative defense to a FCPA charge is that the payment was lawful under the written laws and regulations of the foreign country. 15 U.S.C. § 78dd-1(c) (2009). A payment is also lawful if it was a reasonable and bona fide expenditure related to the promotion, demonstrating or explanation of a product or the performance of a contract with a foreign government. *Id.*

15 15 U.S.C. § 78dd-1(b) (2009).

16 *United States v. Kay*, 359 F.3d 738, 747 (5th Cir. 2004).

17 15 U.S.C. § 78dd-1(f)(3) (2009).

18 DOJ Press Release, "Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America" (July 30, 2009) available at <http://www.justice.gov/opa/pr/2009/July/09-crm-741.html> (last visited Apr. 14, 2010).

19 *Id.*

20 See, e.g., *SEC v. El Paso Corp.*, Litigation Release No. 19991, 2007 SEC Lexis 255 (Feb. 7, 2007).

21 Linda Chatman Thomsen, Director, SEC Division of Enforcement, *Speech by SEC Staff: Remarks Before the Minority Corporate Counsel 2008 CLE Expo*, at 5 (Mar. 27, 2008), available at <http://www.sec.gov/news/speech/2008/spch032708lct.htm> (last visited Apr. 14, 2010).

22 Alexandra A. Wrage, "Today, No Bribe is Too Small," Legal Times (Mar. 25, 2008) available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1206357951433> (last visited Apr. 14, 2010).

23 Linda Chatman Thomsen, *supra* note 21.

24 Mike Scarcella, *Daimler Agrees to \$185 Million Settlement in Bribery Cases*, National Law Journal (Apr. 2, 2010) available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202447341197> (last visited Apr. 9, 2010).

25 *Id.*

26 DOJ Press Release, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Files" (December 15, 2008) available at http://www.usdoj.gov/usao/dc/Press_Releases/2008%20Archives/December/08-1105.pdf (last visited Apr. 14, 2010).

27 DOJ Press Release, "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine; Enforcement Actions by DOJ and SEC Result in Penalties of \$579 Million for KBR's Participation in a Scheme to Bribe Nigerian Government Officials to Obtain Contracts" (Feb. 11, 2009) available at <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html> (last visited Apr. 14, 2010).

28 In 2008, the Director of the SEC Division of Enforcement commented that individual officers that were either complicit or authorized improper payments were increasingly being charged with FCPA violations. Linda Chatman Thomsen, *supra* note 21.

29 DOJ Press Release, "Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme" (Jan. 10, 2010) available at <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html> (last visited Apr. 14, 2010).

30 *Id.*

31 *Id.*

32 Alexandra A. Wrage, *supra* note 22.

33 See DOJ Press Release, "Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case" (Apr. 26, 2007) available at http://www.justice.gov/opa/pr/2007/April/07_crm_296.html (last visited Apr. 14, 2010).



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