



## Costly FCPA Misconceptions

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The Foreign Corrupt Practices Act (“FCPA”) makes it unlawful for a business or individual “corruptly” to offer, pay, promise to pay, or authorize payment of anything of value to a “foreign official” for the purpose of obtaining or retaining business or securing any improper business advantage. The Department of Justice (“DOJ”) and the Securities Exchange Commission (“SEC”) are charged with enforcing the FCPA – a task they have undertaken zealously. In fact, both the DOJ and SEC (along with the FBI) have formed special “FCPA Units” dedicated solely to ferreting out and punishing violations of the Act. As a result of the government’s determined efforts, FCPA enforcement has generated significant attention and become a governmental revenue engine. This potential for substantial treasury income has prompted increases in the budget allocated to FCPA cases at times when other departments have faced crippling cuts.

Despite the recent onslaught of FCPA enforcement actions, however, many companies doing business overseas remain unaware of the statute’s far-reaching prohibitions. Others choose to ignore the risks or harbor the delusion that they have somehow “outsmarted” the FCPA. Such a mindset is not recommended, especially in light of the DOJ and SEC’s decision to target certain industries, including the life sciences, logistics/transportation, financial services, and technology industries, for increased enforcement. This client alert will address several misconceptions surrounding the FCPA’s provisions and the government’s enforcement of the statute.

- **The FCPA only applies to “Hollywood-esque” bribes.**

- **False.** The FCPA does prohibit payments of cash to foreign officials in exchange for retaining or obtaining business, but its scope is much broader. The language of the statute refers to “anything of value,” and as a result, the FCPA prohibits improper benefits that come in various shapes and sizes. Travel expenses, expensive gifts, and even “charitable donations” can run afoul of the FCPA depending on the circumstances. The FCPA’s restrictions go beyond the typical “bribe for contract” situation, applying also to improper benefits intended to (i) secure favorable tax treatment; (ii) reduce or eliminate customs duties; (iii) obtain government action to prevent competitors from entering a market; or (iv) circumvent a licensing or permit requirement.

- **It’s not my problem if my company acquires a target that has committed FCPA violations in the past.**

- **Incorrect.** The FCPA, as enforced through successor liability theory, imposes FCPA risk on a purchaser based on the seller’s past actions. Accordingly, companies should be extra diligent in the M&A context. The DOJ and the SEC encourage companies to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition in order to (i) accurately value the target company; (ii) reduce the risk that the acquired company will continue to pay bribes; (iii) afford the parties an orderly and efficient manner to handle costs and responsibilities of investigations and remediation; and (iv) demonstrate a genuine commitment to uncovering and preventing FCPA violations.

- **FCPA violations occur only if a foreign official accepts a bribe.**

- **No.** FCPA violations may occur even if a bribe attempt is unsuccessful, and in some cases, even without any payment at all. In fact, a company's actions can violate the FCPA even if a foreign official never actually solicits, accepts, or receives the bribe, because the FCPA focuses on "corrupt" intent not just actual payment of a bribe. Under this intent requirement, it is unnecessary for a corrupt actor to have knowledge of the recipient's identity. Accordingly, an executive who authorizes payments abroad to "whoever can get the job done" *may* be in violation of the FCPA.

- **The FCPA only applies to high-level foreign government officials.**

- **Wrong.** The FCPA prohibits corrupt payments to a wide-ranging group of individuals, including foreign officials, foreign political parties or party officials, or any candidate for foreign political office. "Foreign official," the broadest and most nebulous of these categories, is defined in the statute as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof," or any person acting in an official capacity. The DOJ and SEC have explained that the use of the term "any" is a sign that the FCPA "covers corrupt payments to low-ranking employees and high-level officials alike." The government's broad interpretation of "foreign official" was recently reinforced by the *Esquenazi* decision, the subject of our May 19, 2014 update.

- **The FCPA prevents me from spending ANY money on foreign officials.**

- **Incorrect.** Remember – for a payment to violate the FCPA, it must be made "corruptly" with the intent to improperly influence a foreign official or other covered party. Consequently, companies need not worry about expenses they incur in the ordinary and legitimate promotion of their businesses. For example, the DOJ and the SEC note that cups of coffee, taxi fare, and company promotional items of nominal value will rarely evidence corrupt intent. Additionally, reasonable meals and entertainment expenses are unlikely to instigate a government investigation. However, companies should be on guard, for even these legitimate expenses can be given with improper purposes.

- **FCPA violations occur only in \*those\* countries.**

- **Wrong.** While certain jurisdictions have a higher bribery risk (See the Corruption Perception Index published by Transparency International), an FCPA violation may have its roots in business activity in any jurisdiction. Companies should take additional care when operating in jurisdictions such as Russia, China or Indonesia, but they should be aware that bribery can occur in seemingly 'clean' jurisdictions such as Canada, New Zealand or Germany.

- **FCPA compliance programs are pointless.**

- **False.** A well-designed compliance program can nip FCPA violations in the bud. Effective programs are not a "one-size-fits-all" package, but are crafted instead to address the specific business needs (and risks!) of your company. If FCPA violations do occur, the DOJ and the SEC have indicated that the adequacy of a company's compliance program will be considered in deciding what, *if any*, enforcement action to take. When assessing a compliance program in the wake of a violation, the government will consider the program's design and good faith implementation and enforcement. Accordingly, an effective compliance program is well worth the investment.

- **FCPA fines are small.**

- **No.** For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$2 million. Individuals are subject to a fine of up to

\$250,000 and imprisonment for up to five years. These fines are just the beginning, however. Under the Alternative Fines Act, a fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. This can mean big numbers depending on the size of the contract a company is after. Not real enough yet? Take a look at the settlements paid in top-ten FCPA enforcement actions of all time:

1. Siemens - \$800 million in 2008
2. KBR/Halliburton - \$579 million in 2009
3. BAE - \$400 million in 2010
4. Total S.A. - \$398 million in 2014
5. Alcoa - \$384 million in 2014
6. Snamprogetti Netherlands B.V./ ENI S.p.A - \$365 million in 2010
7. Technip S.A. - \$338 million in 2010
8. JGC Corporation - \$218.8 million in 2011
9. Daimler AG - \$185 million in 2010
10. Weatherford International - \$152.6 million in 2013.

These numbers are exclusive of attorneys' fees spent by the company, amounts paid by the company to investigate possible bribery, and reputational damage.

■ **The FCPA only applies to American companies and individuals.**

- **Wrong.** The government takes an expansive view of the FCPA's territorial jurisdiction. According to the DOJ and SEC, the FCPA's territorial jurisdiction includes foreign companies or persons if it causes, directly or through agents, an act in the furtherance of the corrupt payment to take place within the territory of the United States. Additionally, the FCPA applies to any company that has equity registered on an American stock exchange – including foreign companies. Any officers, directors, employees, agents, or stockholders acting on behalf of these companies (along with any co-conspirators), are also subject to the FCPA's provisions.

■ **I'm not liable under the FCPA if I hire a third-party overseas to take care of "those things."**

- **No.** A "head in the sand" attitude gets companies and individuals into trouble. The FCPA is clear about its prohibition on corrupt payments made through third-parties. Nevertheless, many companies continue to do business abroad by hiring local individuals or companies to help them conduct business. Companies enlisting the help of a third-party overseas should be aware that any bribes, offers of bribes, or promises of bribes that these third-parties make on the company's behalf will create FCPA liability for the company.

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