The Foreign Corrupt Practices Act: Overview

by Practical Law Commercial Transactions, based on the original version by R. Christopher Cook and Kevin M. Comeau, Jones Day LLP

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A Practice Note providing an overview of the Foreign Corrupt Practices Act (FCPA). This Note provides a summary of the anti-bribery provisions of the FCPA and outlines how companies can avoid enforcement actions under the law.

Corruption poses a significant legal and economic risk for corporations doing business around the world, particularly in developing and transitioning countries. The US **Department of Justice** (DOJ) and the **Securities and Exchange Commission** (SEC) are fighting corruption by increasing the number of investigations, settlements, and prosecutions for violations of the **Foreign Corrupt Practices Act** (FCPA).

To assist corporations with FCPA compliance, the DOJ and SEC released non-binding FCPA guidance in November 2012, which it updated in July 2020, entitled, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Guide). The Guide provides information on the DOJ and SEC's FCPA enforcement approach and priorities.

The government's increased FCPA enforcement activity has caused the management and boards of multinational corporations to become more concerned about their compliance efforts. This Note explains how an organization can minimize the risks posed by foreign bribery by:

- Understanding the practices prohibited by the FCPA and other applicable laws.
- Remaining up to date on FCPA enforcement trends.
- Recognizing "red flags," circumstances under which the risk of corrupt practices is high and enforcement authorities expect corporations to be particularly vigilant (see Recognizing Red Flags).
- Evaluating the most appropriate systems to achieve corporate compliance.

With this knowledge and a commitment to ethical business practices, an organization can implement an effective compliance program to avoid the pitfalls of international corruption.

The Foreign Corrupt Practices Act

The FCPA includes two key elements:

- **Anti-bribery provisions.** These prohibit giving or offering money, gifts, or anything of value to a foreign government official to obtain or retain business.
- **Accounting requirements.** These seek to prevent accounting practices designed to hide corrupt payments by requiring companies to maintain accurate books and records and adequate internal accounting controls. See Box, Importance of Keeping Good Records.

The DOJ and SEC enforce the FCPA. This Note focuses on the FCPA's anti-bribery provisions.

Who Is Covered by the FCPA

The FCPA applies to two broad categories of persons:

- Those with formal ties to the US (see Formal Ties to the US).
- Those who take action in furtherance of a violation while in the US (see Actions in Furtherance of a Violation While in the US).

Recently, foreign companies in both categories have been the focus of an increasing number of enforcement actions (see Increasing Enforcement Against Foreign Companies).

Formal Ties to the US

Those with formal ties to the US include:

- **Issuers.** These include any company that has securities registered in the US or is otherwise required to file periodic reports with the SEC (15 U.S.C. § 78dd-1(a)). US issuers may be prosecuted under the FCPA for conduct both inside and outside the US. Specifically, US issuers are liable under the FCPA if they use the US mail or any other means of interstate commerce in furtherance of a corrupt payment to a foreign official. This includes placing a phone call or sending an email from, to, or through the US, as well as sending a wire transfer from or to a US bank and traveling to or from the US.

- **Domestic concerns.** This is a broader category, encompassing any individual who is a citizen, national, or resident of the US. The domestic concerns category also includes any corporation, **partnership**, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the US, or is organized under the laws of a US state, territory, possession, or commonwealth (15 U.S.C. § 78dd-2(h)(1)). US corporations and nationals can be liable for bribes paid to foreign officials even if no actions or decisions take place within the US.

Actions in Furtherance of a Violation While in the US

The DOJ and SEC interpret the FCPA to confer jurisdiction whenever a foreign company or foreign national directly or indirectly engages in any act in furtherance of a corrupt payment while in a US territory. The Guide notes that the action:

- May be taken by an agent of the foreign person or entity (Guide, at 10).

- Can implicate co-conspirators, even if the co-conspirators did not take any actions in the US. However, the Second Circuit recently held that non-resident foreign nationals who operate entirely outside the US and do not act as agents of a US company cannot be tried as a conspirator under the FCPA (see Legal Update, Second Circuit Limits FCPA Extraterritorial Jurisdiction). Nevertheless, the Guide's discussion of this case as limited to the Second Circuit suggests that the DOJ may continue to pursue conspiracy FCPA cases against foreigners outside the Second Circuit (see Guide, at 36).

Increasing Enforcement Against Foreign Companies

Recently, US enforcement authorities have charged and prosecuted a number of foreign corporations, issuers, and non-issuers for bribing non-US officials. In December 2019, for example, Swedish-based Telefonaktiebolaget LM Ericsson agreed to pay total penalties of more than $1 billion to resolve the government's investigation into violations of the FCPA by Ericsson and its subsidiaries. Ericsson admitted to, among other activities, making approximately $2.1 billion in bribery payments to government officials in Djibouti to obtain a contract with the state-owned telecommunications company. (See DOJ: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case.)

In 2017, Rolls-Royce plc, a manufacturer and distributer of power systems based in the United Kingdom, agreed to pay the US almost $170 million to resolve charges the company conspired to violate the FCPA by paying more than $35 million in bribes through third parties to foreign officials in various countries in exchange for those officials providing confidential information and awarding contracts to Rolls-Royce and its affiliates (see DOJ: Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case).

In 2016, Amsterdam-based VimpelCom Limited agreed to pay almost $800 million to the SEC, the DOJ, and the Public Prosecution Service of the Netherlands for violating the FCPA and similar Dutch laws (see GC Agenda: April 2016: Landmark FCPA Settlement). VimpelCom Limited violated these laws by paying an Uzbek government official at least $114 million in bribes to gain an advantage in Uzbekistan's telecommunications market and obtain government-issued licenses, frequencies, and channels.

In 2012, Tyco International Ltd. (Tyco), a Swiss company with a class of securities that trades on the **New York Stock Exchange** (NYSE), pled guilty to a DOJ criminal charge and related SEC civil charges for conspiring to violate the FCPA (see DOJ: Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act). Tyco agreed to pay more than $26 million to resolve the charges, which stemmed from separate bribery schemes in a number of countries, including China, Thailand, Turkey, France, and Germany, over a ten-year time period. Tyco admitted that the schemes involved:

- Using third parties to make illicit payments to foreign officials and companies owned by state employees.
- Inflating expense reports.
- Fabricating invoices for travel and entertainment that did not occur.

Increasing Enforcement Against Individuals

US enforcement authorities have also recently charged and prosecuted several individuals for FCPA violations. In 2020, for example, a former general manager and partial owner of a Florida-based energy company was sentenced to 48 months in prison for his role in a bribery scheme involving Venezuela's state-owned energy company in violation of the FCPA. He was also ordered to pay a fine of $127,000 and forfeit $3 million. (See DOJ: Florida Businessman Sentenced to 48 Months in Prison for Role in Venezuela Bribery Scheme.)

In 2018, the former CEO and a former executive of an oil services company were sentenced to prison for their involvement in an international bribery conspiracy. The defendants had previously plead guilty to conspiracy to violate the FCPA in connection with a scheme to bribe foreign government officials in Brazil, Angola, and Equatorial Guinea. One defendant was sentenced to 36 months in prison and fined $150,000, and the other was sentenced to 30 months and fined $50,000. (See DOJ: Oil Services CEO and Executive Sentenced to Prison for Roles in Foreign Bribery Scheme.)

In 2011, two former executives of Terra Telecommunications were convicted of conspiracy to violate the FCPA and commit money laundering for bribing employees of Telecommunications D'Haiti S.A.M., a state-owned company in Haiti (*United States v. Esquenazi*, 1:09-cr-21010 (S.D. Fla. Oct. 25, 2011)). The judge sentenced one defendant to 15 years and the other defendant to 84 months in prison. The 15-year sentence was more than twice as long as any prior sentence for FCPA violations. The court also ordered the defendants to forfeit $3.09 million. The US Court of Appeals for the Eleventh Circuit affirmed their convictions and sentences in 2014 (*United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014)).

What the FCPA Prohibits

A person or organization is guilty of violating the FCPA if the government can prove the existence of five elements:

- A payment, offer, authorization, or promise to pay money or anything of value (see Payment to a Foreign Official).
- The involvement of a foreign government official (including a party official or manager of a state-owned concern), or any other person, knowing that the payment or promise will be passed on to a foreign official (see Payment to a Foreign Official).
- A corrupt motive (see Corrupt Motive).
- Having the purpose to:
    - influence any act or decision of the person receiving the promise or payment;
    - induce that person to do or omit any action in violation of his lawful duty;
    - secure an improper advantage; or
    - induce that person to use their influence to affect an official act or decision.

(See Take Action to Benefit the Payor's Business Interest.)

- Assisting in obtaining or retaining business for or with, or directing any business to, any person (see Take Action to Benefit the Payor's Business Interest).

(15 U.S.C. §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a).)

The DOJ may criminally charge any covered individual or entity that violates the FCPA. Punishments can include imprisonment or a fine (see Penalties for Violating the FCPA Anti-Bribery Provisions), in addition to penalties by the SEC not to exceed the greater of $500,000 or the amount by which the entity profited from the offense.

Payment to a Foreign Official

The definitions of "payment" and "foreign official" are sufficiently broad to cover virtually any benefit conferred on someone in a position to affect a person's business dealings with a foreign government. Non-monetary benefits, including travel and entertainment, fall within the FCPA's definition. Under the terms of the FCPA, a person or organization need not actually pay a bribe to violate the law. Rather, the FCPA prohibits the offer, authorization, or promise to make a corrupt payment in addition to the actual payment.

In addition, the DOJ has taken the position that employees of state-owned business enterprises are foreign officials for purposes of the FCPA.

There is no monetary threshold to prohibited bribes. Even the smallest bribes are prohibited. The Guide explains that what may be considered a modest payment in the US could have significant value outside the US. It notes, however, that the DOJ and

SEC are unlikely to investigate the provision of items of nominal value, such as cups of coffee, taxi fare, or company promotional items as the provision of these items is unlikely to evidence a corrupt intent. (Guide, at 14.)

Corrupt Motive

The FCPA prohibits payments made with a corrupt motive. The legislative history of the statute describes this as an "evil motive or purpose, an intent to wrongfully influence the recipient" (S. Rep. No. 95-114, 1977 WL 16144, at *10 (1977)).

The US Supreme Court reinforced the notion that a criminal prohibition against corrupt conduct requires a consciousness of wrongdoing, although the court declined to provide an all-encompassing definition of the statutory term (*Arthur Andersen LLP v. United States*, 544 U.S. 696, 696-97 (2005)).

Corporations should be aware that, while innocent mistakes are not illegal under the FCPA, a corporation can be held liable for ignoring signs of corruption in connection with the actions of one of its agents (see Box, Knowledge Proven by Willful Blindness).

Take Action to Benefit the Payor's Business Interest

To constitute an FCPA violation, the payor must intend a payment to cause an official to take an action or make a decision that would benefit the payor's business interest. The business the payor seeks to obtain or retain with the corrupt payment need not be with the government or a government-owned entity. Rather, an individual or organization violates the FCPA if it makes a corrupt payment to aid in improperly obtaining or retaining business with a third party.

For example, after a lengthy appeals process, the US Court of Appeals for the Fifth Circuit held that payments made by two executives at American Rice Incorporated (ARI) to Haitian officials to reduce ARI's tax liabilities were indeed designed to obtain or retain any business as prohibited by the FCPA (*United States v. Kay*, 513 F.3d 432 (5th Cir. 2007)). The two executives were indicted in 2002 but argued that, because of the nature of their payments, their actions did not fall within the scope of the FCPA prohibition against payments to obtain or retain business under the conventional understanding of that language. The court held that Kay and Murphy's intent to reduce ARI's tax liabilities constituted an intent to obtain and retain business because, contrary to Kay and Murphy's arguments, Congress did not intend that the FCPA would apply only to the procurement of government contracts or government business.

Kay and Murphy moved to dismiss the judgment based on lack of fair notice, a motion that the Fifth Circuit rejected after concluding that their convictions met the various standards of fair notice. The US Supreme Court denied their petition for writ of certiorari on October 6, 2008 (*Kay v. United States*, 555 U.S. 813 (2008)).

Other Relevant Laws

Other statutes that complement the FCPA also reach allegedly corrupt activities, such as:

- Conspiracy.
- Racketeering.
- Mail fraud.

- Wire fraud.
- Money laundering.

For example, federal money laundering laws list FCPA violations as predicate offenses and can be used to prosecute the funding of unlawful transactions (18 U.S.C. § 1956(c)(7)(B)(iv) and see DOJ: Former Russian Nuclear Energy Official Sentenced to 48 Months in Prison for Money Laundering Conspiracy Involving Foreign Corrupt Practices Act Violations). In 2008, the DOJ demonstrated its willingness to use forfeiture actions to target the proceeds of bribery overseas when it filed a forfeiture action against accounts totaling nearly $3 million alleged to be part of a conspiracy to bribe officials in Bangladesh (DOJ: Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments). This was a significant development, given that the recipients of bribes are excluded from prosecution under the FCPA and the US general conspiracy statute. Federal money laundering laws cover transactions that flow through the US involving proceeds of foreign offenses, including foreign bribery and extortion. The DOJ claimed the US had jurisdiction over the accounts because the illicit funds flowed through financial institutions in the US before being deposited in bank accounts in Singapore.

Penalties for Violating the FCPA Anti-Bribery Provisions

Individuals face up to five years' imprisonment for each violation of the anti-bribery provisions of the FCPA or up to 20 years for certain willful violations (15 U.S.C. §§ 78dd-1 and 78ff). Corporations and other business entities may be fined up to $2 million for each violation and individuals up to $100,000 (15 U.S.C. §§ 78dd-1 and 78ff). The maximum fine may be increased to $25 million for corporations and other business entities and $5 million for individuals in the case of certain willful violations (15 U.S.C. § 78ff(a)).

All criminal fines, including those imposed under the FCPA, may be increased to twice the gain obtained by reason of the offense or twice the loss to any other person (18 U.S.C. §3571(d)). Both the DOJ and SEC may seek a court order enjoining violations of the FCPA (15 U.S.C. § 78dd-1).

Indemnification Is Prohibited

The FCPA prohibits issuers (see Who is Covered by the FCPA), including all public corporations, from paying any criminal and civil fines that the government imposes on:

- Officers.
- Directors.
- Employees.
- Agents.
- Stockholders.

(15 U.S.C. § 78ff(c)(3).)

Collateral Consequences

Individuals and corporations that have violated the FCPA may suffer collateral consequences, such as:

- Exclusion or debarment from certain federal programs.
- Ineligibility to receive export licenses.
- Suspension or debarment from the securities industry.

Because violating the FCPA is also a predicate act under the Racketeer Influenced and Corrupt Organizations Act (RICO), a corporation or individual may be subject to additional civil or criminal actions, including a private RICO action by an aggrieved competitor or forfeiture proceedings by the government.

Exceptions and Defenses

The FCPA contains several provisions that exempt certain conduct from its anti-bribery provisions.

Facilitating Payments for Routine Governmental Actions

The FCPA contains a narrow exception permitting facilitating or expediting payments made to foreign officials for the purpose of causing them to perform routine governmental actions (15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b)). This provision is commonly referred to as the "grease payment" exception. To qualify for this exception, payments must relate to the performance of routine, nondiscretionary governmental functions, such as:

- Issuing routine licenses.
- Providing phone, power, and water service.
- Providing police protection or mail delivery.
- Scheduling inspections associated with contract performance or the shipment of goods.

The FCPA provides that a routine governmental function does not include any decision by a foreign official to award new business or to continue business with a party. This exception also does not grant permission to make small bribes. The Guide notes that the purpose of the payment, and not its size, determines whether a payment falls within the facilitating payment exception (Guide, at 26). Relying on this exception is risky, however, as a facilitating payment that is permitted under the FCPA may still be unlawful under other laws, including those of the country in which the payment was made.

Payments Permitted by Written Laws

The FCPA does not prohibit payments that are lawful under the written laws and regulations of the foreign official's country (15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)). This exception would arguably apply, for example, if a corporation

followed a foreign country's written regulations regarding permissible financial arrangements with managers of a state-owned business, provided the payments were not made in exchange for corrupt actions by the recipient. There do not seem to be any countries with written laws that permit bribery.

Reasonable and Bona Fide Expenditures

It is not a violation of the FCPA if the person charged can prove that the payment in question:

- Constituted a reasonable and bona fide expenditure, such as travel and lodging expenses.
- Was directly related to either the:
  - promotion, demonstration, or explanation of products or services; or
  - execution or performance of a contract with a foreign government or agency.

(15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2).)

Despite this affirmative defense, travel and lodging expenses intended to influence a foreign official's actions can violate the FCPA. For example, the DOJ has taken the position that luxury or recreational travel provided to government officials can form the basis for FCPA prosecution.

Application to Foreign Subsidiaries

Corporations cannot insulate themselves from liability under the FCPA for actions taken overseas merely by moving foreign operations to a subsidiary. While the FCPA's anti-bribery provisions do not explicitly make a parent corporation liable for violations committed by a foreign subsidiary, enforcement authorities may employ other legal theories to hold parent corporations responsible for their subsidiaries' actions.

The books and records provisions of the FCPA require corporate parents to ensure their subsidiaries' compliance (see Box, Importance of Keeping Good Records). Of course, corporations almost never record corrupt payments accurately on their books, making every anti-bribery case a potential books and records case. Therefore, corporations that fall within the SEC's jurisdiction should implement comprehensive policies to ensure the accuracy of recordkeeping at the subsidiary level. The US increasingly has pursued several US companies and their foreign subsidiaries for FCPA violations (see SEC: SEC Charges Microsoft Corporation with FCPA Violations; SEC: Tech Company Bribed Chinese Officials; SEC: SEC Charges Alcoa With FCPA Violations; and *In the Matter of Schnitzer Steel Indus., Inc.*, SEC Admin. Proceeding File No. 3-12546, 2006 WL 2987067 (Oct. 16, 2006)).

Generally, a parent corporation is potentially liable for the actions of its subsidiaries to the extent that the parent controls in any way the subsidiary's operations. Prosecutors can use several legal theories to bring an action against a parent for its subsidiary's actions. The prosecutor might seek to establish that:

- The subsidiary was the "alter ego" of the parent.

- The parent and subsidiary formed a single "integrated enterprise."
- The corporate veil should be pierced, destroying the corporate separateness between the organizations.

If the parent's employees are directly involved in the subsidiary's affairs, the government may seek to attribute to the parent responsibility for the employees' actions under the legal theory of respondeat superior. Under this doctrine, responsibility can be attributed to a corporation for an employee's illegal actions when the employee acted within the scope of his duties and for the benefit of the corporation. The act of any employee within a company, not just high-level officials, can trigger criminal responsibility.

For all of these reasons, corporations should ensure that their foreign subsidiaries have in place adequate corporate compliance policies and procedures to prevent illegal activity. For sample policies, see Standard Documents, Foreign Corrupt Practices Act Anti-Corruption Policy and Policy for the Use of Third-Party Agents Outside of the United States.

Obtaining Advisory Opinions for Future Conduct

The DOJ has created procedures, which it details in the Guide, for issuers and domestic concerns to seek and obtain an opinion from the Attorney General on whether certain specified, prospective (not hypothetical) conduct conforms with the DOJ's present enforcement policy regarding the anti-bribery provisions of the FCPA (28 C.F.R. §§ 80.1 to 80.16; see also Guide, at 84-85). The Attorney General publishes these opinions without specifically naming the companies and persons involved. While the opinions only bind the requestor, the government's approach to specific fact situations can be a valuable resource for any company evaluating a similar proposed course of action. The DOJ does not offer advisory opinions related to the FCPA's books and records provisions.

Recognizing Red Flags

Corporations and individuals may be subject to prosecution for corrupt payments even if they have no actual knowledge that bribes are being paid. The FCPA imposes criminal sanctions on persons who pay money to third parties with a reckless disregard for circumstances that suggest the money is being used for corrupt purposes (see Box, Knowledge Proven by Willful Blindness). Therefore, if an executive agrees to pay a consultant, who in turn gives some of that money to a government official in exchange for official actions that benefit the corporation, the DOJ may target the executive and the corporation for violating the FCPA even without their actual knowledge of the corrupt payment.

Whether the government believes that the company and its employees should be held liable for these indirect bribes largely depends on whether the circumstances should have put the company on notice that corrupt payments were likely to occur. The government has provided guidance regarding circumstances it considers to be red flags for FCPA violations, including:

- Unusual financial arrangements for the payment of services (see Unusual Payment Patterns or Financial Arrangements).
- Doing business in a country with reputation for public corruption (see A History of Corruption in the Country).
- A foreign business partner's refusal to agree to anti-corruption provisions in its contract (see Rejection of Anti-Corruption Provisions).
- A request to pay unusually high compensation (see Unusually High Commissions).

- A lack of transparency in expenses and accounting records (see Lack of Transparency in Expenses and Accounting Records).
- A joint-venture partner or representative that does not appear capable of performing the services offered (see Apparent Lack of Qualifications or Resources).
- A government official's recommendation to hire a particular third party (see Recommendation by a Government Official).

Unusual Payment Patterns or Financial Arrangements

Although the methods of making bribes have become increasingly sophisticated, improper payments made to foreign officials almost always involve an unusual payment arrangement. Companies should be vigilant when asked to make payments for services in a bank account not located in either the country where the services were provided or the country where the recipient of the funds is located. Similarly, the use of shell entities or aliases should trigger heightened scrutiny of the transaction to ensure that it is not a vehicle for corrupt payments.

History of Corruption in the Country

Although bribes may be paid or demanded in all countries, certain nations (many of those in the developing world) suffer from more corruption than others. When doing business in a country with a reputation for public corruption, corporations must be particularly suspicious of any activity that may suggest that their employees or agents are paying bribes. Enhanced compliance and training efforts are often necessary.

At a minimum, corporations doing business abroad should be familiar with the annual Corruption Perceptions Index published by Transparency International. Additional resources regarding the prevalence of corruption in a particular country are available from the US Department of State. International legal counsel can provide further details regarding the likelihood of officials or agents demanding or soliciting bribes in particular circumstances.

Rejection of Anti-Corruption Provisions

A corporation subject to the FCPA often asks a foreign business partner to warrant that it will not take any action:

- To further an unlawful offer, promise, or payment to a foreign public official.
- That would cause the corporation to violate the FCPA.

(See, for example, Standard Document, Anti-Bribery Compliance Certificate (Third-Party Intermediaries) and Standard Clauses, General Contract Clauses: Anti-Bribery Representations and Warranties and General Contract Clauses: Anti-Bribery Covenants.)

To the extent that a prospective business partner refuses to agree to this type of contract provision or other written certification, the corporation should be on alert that the partner may not intend to meet those standards.

Unusually High Commissions

Because commissions have historically been a vehicle through which bribes can be funneled to government officials, a request to pay unusually high commissions is a warning sign of possible corruption. A request to deposit commissions in multiple bank accounts, perhaps in offshore banks, also justifies additional scrutiny.

Lack of Transparency in Expenses and Accounting Records

As demonstrated by the books and records provisions of the FCPA, Congress and enforcement authorities view accurate books and records as a critical restraint against corrupt payments. A foreign business partner's lack of transparency in the books and records is a possible indicator of corrupt activity. A business partner seeking to shield expenses, accounting records, and other financial information from view could be trying to hide improper payments to government officials.

Apparent Lack of Qualifications or Resources

Corporations doing business abroad should be suspicious if a **joint-venture** partner or representative does not appear capable of performing the services offered. Numerous enforcement actions have resulted from sham service contracts, under which corrupt payments are disguised using a consulting agreement or other arrangement. Similarly, organizations and individuals doing business in a foreign country should be particularly cautious of anyone who claims to have the ability to obtain licenses or other government approval without providing a description of the legitimate manner in which those goals will be accomplished.

Recommendation by a Government Official

Government officials need not demand a bribe directly to create potential FCPA liability for an organization or individual. Instead of demanding a bribe outright, a government official who is not a potential customer but exercises authority over a transaction may suggest that a particular third party be hired as a consultant or in some other capacity. Numerous enforcement actions have resulted from payments to third parties at the request of foreign government officials. Therefore, any organization or individual doing business in a foreign country must be cautious when a government official suggests in any way that it pay or hire a particular third party.

Corporate Compliance Programs

Any organization seeking to do business lawfully and ethically in a foreign country should implement and maintain a compliance program designed to detect and prevent corrupt payments to government officials. This has the benefit of:

- **Educating employees.** An effective corporate compliance program reduces the risk of employees breaking the law out of ignorance or in the mistaken belief that paying bribes, although unlawful, is in the best interest of the organization. For sample FCPA training presentations for employees, see Standard Documents, Foreign Corrupt Practices Act (FCPA) Training for Employees: Presentation Materials and Foreign Corrupt Practices Act (FCPA) Training Hypotheticals for Employees: Presentation Materials.

- **Demonstrating good faith efforts.** If an individual pays a bribe despite the organization's best efforts, a compliance program serves as tangible evidence of the organization's good faith. The DOJ and SEC have identified the existence of a corporate compliance program in the US as one factor in deciding whether to bring charges against a corporation

for an employee's illegal actions (see Guide, at 57; see also GC Agenda: June 2012: Compliance Programs). Likewise, corporations convicted of criminal charges in the US are eligible to pay lower fines if they have corporate compliance programs in place.

According to the Guide, the hallmarks of an effective compliance program include:

- Commitment from senior management and a clearly articulated policy against corruption.
- A code of conduct and compliance policies and procedures.
- Oversight, autonomy, and resources.
- Risk assessment.
- Training and continuing advice.
- Incentives and disciplinary measures.
- Third-party due diligence and payments.
- Confidential reporting and internal investigation.
- Continuous improvement with periodic testing and review.
- Investigation, analysis, and remediation of misconduct.

(Guide, at 56-67.)

The precise details of a company's compliance program can vary from one company to another, depending on factors such as:

- The size of the organization.
- The nature and location of its operations.
- The degree to which its employees interact with government officials.

Typically, an organization with significant overseas operations will include specific procedures for conducting due diligence of foreign consultants, agents, and business partners in its FCPA compliance program. The program also should set a company policy regarding the use of contract terms relating to FCPA compliance, providing model language where appropriate.

For more information and guidance on FCPA compliance, see Foreign Corrupt Practices Act Compliance Checklist. For a sample FCPA compliance policy, see Standard Document, Foreign Corrupt Practices Act Anti-Corruption Policy.

Deciding Whether to Self-Disclose

If a company learns of a possible FCPA violation, perhaps through its compliance program, it must decide whether to alert the authorities. Corporations are increasingly self-reporting to enforcement authorities when their employees and business partners potentially violate the FCPA, due to several factors, including:

- The Whistleblower requirements of the **Sarbanes-Oxley Act of 2002** (SOX), which make it more likely that an employee will report potential violations.
- The DOJ's policies that now identify timely and voluntary disclosure of wrongdoing as a key consideration in deciding whether to prosecute a company.
- The likelihood of enforcement authorities discovering violations that are not disclosed. Enforcement agencies have committed considerable resources to investigating and prosecuting corporate misconduct over the last several years.

In 2016, the DOJ began a one-year pilot program that encouraged self-reporting of FCPA violations in exchange for lesser criminal penalties. The pilot program's success led the DOJ to issue an FCPA Corporate Enforcement Policy in 2017. This policy offers a presumption that the DOJ will decline to prosecute companies that:

- Voluntarily self-disclose a potential FCPA violation.
- Fully cooperate with further DOJ investigative efforts.
- Engage in timely and appropriate remediation.

This presumption is predicated on the absence of aggravating circumstances relating to the seriousness of the offense and the nature of the offender. Companies that self-report, fully cooperate, and timely remediate but do not qualify for a declination of prosecution due to aggravating circumstances can still qualify for lesser penalties, however. For more information on the Corporate Enforcement Policy, see Practice Note, The FCPA Corporate Enforcement Policy and Legal Update, DOJ Makes Changes to FCPA Corporate Enforcement Policy.

When deciding whether to self-disclose, corporations must be cautious. While disclosure may result in a declination of prosecution or reduction in penalties and avoid negative publicity, it is only one of the factors used to determine the penalty for foreign corruption offenses. Some companies escape serious consequences when they self-disclose, but there is no guarantee of leniency from the DOJ or SEC when companies report voluntarily. In short, some companies are subject to enforcement actions even after self-disclosure (see DOJ: Louis Berger International Resolves Foreign Bribery Charges). Companies must be aware that the practical consequences of disclosure remain unpredictable.

Importance of Keeping Good Records

In complying with the FCPA, an organization cannot neglect its books and records. For those corporations that issue US securities, the FCPA explicitly imposes recordkeeping and internal control requirements that extend to the company's foreign and domestic subsidiaries. It is, for example, a separate and independent violation for a company to book as "consultant fees" money paid to a third party for other reasons, regardless of whether the

funds actually can be traced to a foreign official. Most FCPA enforcement actions brought by the SEC arise from accounting violations, not bribery per se.

Although the FCPA's accounting provisions apply only to issuers of securities in the US, all organizations should focus on maintaining accurate financial records to avoid risky or suspicious payments.

Knowledge Proven by Willful Blindness

Although the FCPA prohibits only a knowing violation, knowledge can be proved by evidence of willful blindness. When it amended the FCPA in 1988, Congress indicated that it intended to prohibit actions that "demonstrate evidence of a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to high probability of violations of the Act" (HR Conf. Rep. No. 100-579, at 919-20 (1988)).

However, the DOJ may take an expansive view of the FCPA and find liability based solely on a company's failure to investigate, regardless of the reason (see *United States v. Green*, 2009 WL 2523865 (C.D. Cal. Aug. 13, 2009), proposed instruction 31 (noting that the knowledge requirement may be satisfied if a person is aware of a high probability of the existence of a particular fact and "fails to take action to determine whether it is true or not")). The Guide notes that to be guilty, a defendant must act with a bad purpose, knowing generally that its conduct is unlawful. It need not know, however, that its actions violate the FCPA (Guide, at 13-14).

In 2011, the US Court of Appeals for the Second Circuit upheld the conviction of Frederic Bourke, a private investor, for FCPA violations, relying on evidence that Bourke had consciously avoided confirming that his business associate, Viktor Kozeny, had promised millions of dollars to Azerbaijani officials if they advanced the privatization of Azerbaijan's state-owned oil company (*United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011)). As evidence to support Bourke's conviction on conscious avoidance grounds, the court cited Bourke's:

- General awareness of pervasive corruption in Azerbaijan.
- Knowledge of Kozeny's reputation as the "Pirate of Prague," a nickname given to him for his role in a massive fraud involving the privatization of state-owned industries in the Czech Republic.
- Participation in the Azerbaijani investment scheme through intermediary companies in an attempt to insulate himself and other investors from FCPA liability.
- Taped phone conversations in which he voiced concerns about whether Kozeny was paying bribes.

