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Foreign Corrupt Practices Act (FCPA) Handbook

Eighth Edition – Excerpt

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Introduction

Since 1977, U.S. companies conducting business with foreign government entities and officials have had to comply with the Foreign Corrupt Practices Act (FCPA or the Act). Under the Act, U.S. companies may not bribe any foreign official to obtain or retain business. Companies and individuals who violate the FCPA may be subject to substantial fines, imprisonment, or forfeiture of property.

Since the last edition of this publication in 2019, the FCPA has remained an enforcement priority for the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). In 2019, annual corporate FCPA penalties reached their all-time peak, with the DOJ and SEC collecting approximately $2.65 billion in settlement amounts in 14 core corporate actions. 2019 saw two of the largest corporate FCPA enforcement actions in history. In March 2019, the DOJ and SEC reached an $850 million settlement with Russia-based Mobile TeleSystems PJSC (MTS) for violations of the FCPA. But in December 2019, MTS was eclipsed when the DOJ and SEC announced a record-setting $1.06 billion settlement with Swedish telecom company Ericsson for violations of the Act's anti-bribery provisions. While overall enforcement actions declined in 2020, the DOJ did reach its largest corporate resolution, setting another record and imposing more than $2.9 billion on Goldman Sachs and its Malaysian affiliate.

Heightened enforcement activity has resulted from the rise in voluntary disclosures, the increased resources committed to enforcement activities at the DOJ and the SEC, and the strict reporting requirements imposed by the Sarbanes-Oxley Act. Criminal enforcement actions against individuals also have risen sharply, and some have resulted in significant prison sentences and asset forfeitures. And, as discussed further in this handbook, in March and November 2019, the DOJ revised its FCPA Corporate Enforcement Policy (originally adopted in 2017) to incentivize transparency and cooperation.

In July 2020, the DOJ and the SEC released the Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the *Resource Guide*), the first substantial update since the *Resource Guide*'s original release in 2012. The *Resource Guide* is the U.S. enforcement authorities' detailed compilation of information about the FCPA, its provisions, and enforcement. The Second Edition accounts for changes in case law and DOJ and SEC policy in the intervening eight years since its release. Notably, and as detailed herein, the Second Edition includes guidance on the evaluation of corporate compliance programs, the FCPA's application to mergers and acquisitions, and the imposition of corporate monitors. It also incorporates the DOJ's revised FCPA Corporate Enforcement Policy. The *Resource Guide* continues to be the premier source for information related to the FCPA.

This handbook briefly reviews the principal provisions of the FCPA, outlines issues and factors likely to signal FCPA-sensitive situations, and summarizes recent developments that have kept international bribery and corruption in the political spotlight. U.S. companies should periodically and rigorously review their FCPA compliance programs and ensure that their

overseas branches, subsidiaries, managers, agents, and joint venture partners are aware of corporate procedures for handling business with foreign government entities or involving government officials. Compliance policies should also respond to anti-corruption legislation outside the United States, such as anti-bribery laws in the United Kingdom and Mexico, as well as increasing enforcement in foreign jurisdictions such as Brazil. Well-conceived and diligently implemented compliance programs can be effective in preventing bribery and preserving hard-won company reputations. These programs are also a critical mitigating factor under the corporate sentencing guidelines.

For More Information

Wiley attorneys are prepared to answer your questions on the FCPA and respond to specific corporate compliance and enforcement concerns. FCPA inquiries can be directed to Daniel B. Pickard (202.719.7285 or dpickard@wiley.law), Kevin B. Muhlendorf (202.719.7052 or kmuhlendorf@wiley.law), or the other attorneys listed at the end of this handbook.

The Foreign Corrupt Practices Act

Overview of the FCPA

Congress enacted the FCPA in response to disclosures in the early 1970s that hundreds of U.S. corporations had made billions of dollars in "questionable payments" to foreign officials, politicians, and political parties. The FCPA, passed by Congress in 1977, is meant to halt the bribery of foreign officials by U.S. citizens and companies, to improve recordkeeping and internal accounting controls to detect illegal payments, and to restore public confidence in the integrity of the American business system. In 1988, as part of the Omnibus Trade and Competitiveness Act, Congress amended the FCPA to clarify and narrow the scope of the statute. The Act also was amended in 1998 after the ratification of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

This handbook provides a general overview of both the anti-bribery and accounting and recordkeeping provisions of the FCPA. It also describes recent international and domestic developments with regard to the FCPA and other anti-bribery initiatives.

Overview of the Anti-Bribery Provisions

The FCPA prohibits U.S. companies (and certain foreign entities), their officers or employees, and third-party representatives or persons acting on their behalf, from corruptly giving or offering to give anything of value to any foreign official for the purpose of influencing that individual in his or her official capacity, or causing such official to influence the foreign government in order to obtain or retain business. The DOJ has exclusive jurisdiction over criminal prosecutions under the FCPA's anti-bribery provisions.

Who Is Covered

The anti-bribery provisions of the FCPA apply to:

- U.S. and foreign issuers of U.S. securities;
- Any entity that has its principal place of business in the United States, or that is organized under the laws of the United States, or a territory, possession, or commonwealth of the United States;
- Any individual who is a citizen or resident of the United States; and
- Some foreign non-U.S. residents.

The statute applies to any U.S. firm; officer, director, employee, or agent of the firm; and any stockholder acting on behalf of the firm, including U.S. employees of foreign companies. A U.S. parent corporation may be liable for a controlled foreign subsidiary's violation if the U.S. parent authorized, participated in, or "knowingly" permitted any corrupt payments. Beyond evidence of overt authorization or participation, the DOJ will also examine the extent to which the U.S. parent controls the foreign subsidiary. If the DOJ determines that the foreign

subsidiary is an "alter ego" or "agent" of the U.S. parent, then it may attribute the actions of the foreign subsidiary to the U.S. parent even without actual knowledge.

Payment

The FCPA prohibits paying, offering, promising to pay, or authorizing someone else to pay money or anything of value to a foreign official with the requisite corrupt intent. There is no minimum threshold amount (*i.e.*, the payment or offer to pay anything of value will satisfy the payment requirement). Under this definition, gifts of any type or entertainment with any value could constitute an illegal "payment." Further, since "authorization" of a payment is prohibited, a U.S. executive may be held liable even though he or she neither made the arrangements nor handled the money. Each officer, director, or organization authorizing an illegal payment may be held liable for separate FCPA violations.

Recipient

The FCPA covers corrupt payments to:

- Foreign officials;
- Foreign political parties or party officials;
- Candidates for foreign political office; and
- Officials of public international organizations.

A "foreign official" is any officer or employee of a foreign government or any department or agency of the government, or any person acting in an official capacity on behalf of the government. The definition may include a member of a legislative body or a royal family. A number of courts have considered whether employees of state-owned enterprises (SOEs) are "foreign officials" under the FCPA. Courts have generally affirmed the expansive definition advocated by the DOJ, finding that the status of an SOE is a question of fact and depends on a number of factors related to the degree to which the SOE can be considered an "instrumentality" of the foreign government.[1] The U.S. Circuit Court of Appeals for the Eleventh Circuit has defined "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[2] The *Resource Guide* urges companies to use the Eleventh Circuit's standard in evaluating the risk of FCPA violations and designing a compliance program. As a conservative approach, those doing business with foreign SOEs should assume that the FCPA will apply.

Corrupt Intent

The person making the payment must have a corrupt intent. The payor must intend to induce the recipient to misuse his or her official position in order to obtain or retain business for the

[1] *See United States v. Aguilar*, No. 2:10-cr-01031-AHM, 783 F. Supp. 2d 1108 (C.D. Cal. Apr. 20, 2011; *United States v. Carson*, No. 8:09-cr-00077, 2011 WL 5101701, at *4-5 (C.D. Cal. May, 18 2011); *United States v. O'Shea*, 4:09-cr-00629 (S.D. Tex. 2011) (ECF Nos. 47 and 142) (summarily denying defendant's motion to dismiss the indictment arguing that state-owned enterprise employees are not "foreign officials").

[2] *U.S. v. Joel Esquenazi*, 752 F.3d 912, 925-26 (11th Cir. 2014).

payor or another party. Specifically, the FCPA prohibits the corrupt use of the mail or other means of interstate commerce in furtherance of a payment to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, or to induce a foreign official to use his or her position improperly to affect or influence any act or decision. Notably, the FCPA does not require that a corrupt act succeed in its purpose. The mere offer of a corrupt payment may constitute a violation.

Business Purpose

The FCPA prohibits corrupt payments made, "in order to assist [a covered individual or entity] in obtaining or retaining business for or with, or directing business to, any person." The Fifth Circuit has held that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person." In enacting the FCPA, Congress was concerned with "the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country." In this regard, for example, illicit payments to officials to obtain favorable but unlawful tax treatment are proscribed.[3]

Third-Party Payments

The FCPA also prohibits corrupt payments to foreign officials through third-party intermediaries, such as agents or joint venture partners. It is unlawful to make a payment to a third party while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "knowing" encompasses such notions as conscious disregard for the truth, deliberate ignorance, or a "head in the sand" attitude. A U.S. citizen or company may be found culpable under the Act even without affirmative knowledge of illicit payments by a third party.

Permissible Payments

The FCPA excepts so-called "grease payments" from the prohibition on bribery. Grease payments are defined as "facilitating payments" for "routine government action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pickup and delivery, phone service, and power and water supply; loading and unloading cargo, or protecting perishable products; and the scheduling of inspections associated with contract performance or transit of goods across the country. This list is solely illustrative, and other actions may also be covered by the exception.

This exception should be interpreted very narrowly. While the exception for "grease payments" remains on the books, the Fifth Circuit's decision in *United States v. Kay* significantly restricts a company's ability to use this exception and permits the government to

[3] *United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004); *see also United States v. Duperval*, 777 F.3d 1324, 1334-35 (11th Cir. 2015).

prosecute a broad array of conduct. Further, "grease payments" are increasingly prohibited in other jurisdictions.[4]

Affirmative Defenses

There are statutory "affirmative defenses" to some actions that appear to violate the FCPA. A person charged with a violation of the FCPA's anti-bribery provisions may assert as an affirmative defense that the payment was lawful under the written laws of the foreign country (the "local law" defense). In practice, this is extremely difficult to prove. The DOJ may consider indicators such as (i) the issuance of an advisory opinion by a foreign government agency; (ii) the issuance of regulations by a unit of a local government; or (iii) a course of conduct of a foreign government indicating that the payment is legal. However, most countries (including many where corruption is widespread) have laws on the books prohibiting bribes and kickbacks.

A person also may assert that the payment was a reasonable and bona fide expenditure directly related to promoting, demonstrating, or explaining products or services or performing a contractual obligation (the "reasonable and bona fide marketing expense" defense). This provision allows for reasonable expenditures for business hospitality, such as travel and lodging for foreign officials. The person accused of an FCPA violation bears the burden of demonstrating the applicability of these affirmative defenses.

Penalties

The DOJ may seek criminal penalties for violations of the FCPA's anti-bribery provisions, including imprisonment and substantial fines against a firm and – when they are acting on behalf of the firm – its officers, directors, stockholders, employees, and agents. Companies may be criminally fined up to $2 million for each violation, yet the United States Sentencing Guidelines, which ultimately drive the fine amounts, often result in fines above the $2 million maximum. Officers, directors, shareholders, employees, and agents who willfully violate the FCPA may receive a sentence of not more than five years imprisonment and/or $250,000 in fines per violation.[5] For violations of the accounting provisions, entities are subject to a fine up to $25 million while individuals are subject to a fine up to $5 million and imprisonment for up to 20 years per offense.

Both the DOJ and the SEC may seek civil injunctions and penalties (up to $10,000 or $21,410 respectively) against certain entities and individuals for violations of the FCPA's anti-bribery provisions. For violations of the accounting provisions brought by the SEC against issuers and their employees and agents, a court can impose a fine not to exceed (i) the gross pecuniary

[4] For example, the UK Bribery Act, passed in April 2010, explicitly prohibits such payments. And in October 2017, Canada repealed the facilitation payments exception in its Corruption of Foreign Public Officials Act.

[5] But, as with the fines against corporations, fines up to twice the pecuniary gain or loss may be imposed under the Alternative Fines Act, 18 U.S.C. § 3571(d).

gain as a result of the violation, or (ii) a specific dollar value, which depends on the type of violation.[6]

Companies and individuals may also face collateral punishment, such as suspension or debarment from participating in federal contracts or programs.[7] In addition, a person or firm found in violation of the FCPA may be ruled ineligible to receive export licenses for defense articles under the International Traffic in Arms Regulations. The circumstances that give rise to an FCPA violation could also lead to a violation of other federal antifraud statutes, which can provide an alternative basis for fines up to twice the amount of any pecuniary gain to the company. FCPA violations also can serve as predicates in Racketeer Influenced and Corrupt Organizations (RICO) actions and certain state law tort claims.

Overview of the Recordkeeping and Internal Accounting Provisions

The FCPA requires companies that are registered with the SEC under the Securities and Exchange Act of 1934 (the 1934 Act), or are required to file periodic and other reports with the SEC, to keep accurate accounts of the disposition of the firm's assets and the assets of any majority-owned (more than 50% of the voting stock) domestic or foreign subsidiary. Where a reporting company holds 50% or less of the voting stock of a domestic or foreign affiliate or subsidiary, the company must make a reasonable and good faith attempt to use its influence to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with the FCPA. The SEC will evaluate the facts on a case-by-case basis to determine, *inter alia*, whether the company's ownership interest affords it a "significant degree of control" over the operations of the affiliate such that the company can be held responsible for the affiliate's or subsidiary's accounting and recordkeeping practices.

Recordkeeping

All companies subject to the 1934 Act, foreign or domestic, are required to maintain records and accounts that accurately reflect transactions and the disposition of the firm's assets. These records are for financial statement preparation and asset accountability purposes. This requirement is intended to eliminate slush funds, off-the-book accounts, and improperly classified expenses that are often used to conceal corrupt payments. However, the provision can be invoked against any 1934 Act reporting companies with inadequate recordkeeping that is also unrelated to bribery of foreign officials.

Internal Accounting Controls

All companies subject to the FCPA are required to "devise and maintain" systems that will provide reasonable assurance that transactions and access to the company's assets are permitted in accordance with management's general or specific authorization. The system

[6] The fine can range from $9,639 to $192,768 for an individual and $96,384 to $963,837 for a company.

[7] The EU's European Union Directive 2004/l8/EC similarly provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts.

also must provide reasonable assurance that transactions are recorded for the purposes of preparing financial statements, accounting for assets, and taking corrective action when discrepancies arise. A company must have and maintain a system of internal accounting controls that provide reasonable assurance that:

- All transactions are properly authorized;
- Transactions are recorded in accordance with applicable accounting standards;
- Access to company assets is controlled and requires specific authorization; and
- Transactions and asset spending are reviewed at reasonable intervals.

Disclosure of Potential Violations: Sarbanes-Oxley and SEC Reporting Requirements

While the FCPA does not impose a duty to disclose potential violations of its anti-bribery or accounting and recordkeeping provisions, the certification and reporting requirements imposed on "issuers" may compel a company to disclose problematic payments. In particular, the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), which made sweeping reforms in various aspects of corporate governance, may require a company to disclose its FCPA issues.

Sarbanes-Oxley provisions significantly affect companies' decisions regarding the disclosure of FCPA violations. Section 302 requires a certification regarding the disclosure to the auditors and board of directors of any fraud involving persons with significant roles in corporate internal controls. FCPA violations are considered a type of fraud. Additionally, Sarbanes-Oxley requires periodic reports filed with the SEC to identify any significant change in internal controls, including corrective actions with respect to material deficiencies and weaknesses. This requirement could apply to corrective measures implemented in the wake of an internal investigation of an FCPA violation. Sarbanes-Oxley also increases the role and responsibilities of independent audit committees and the board of directors in corporate compliance matters, including the oversight of internal investigations. Sarbanes-Oxley requirements prompted a significant increase in the number of voluntary disclosures of FCPA violations.

Sarbanes-Oxley also significantly increased penalties for willful violations of the 1934 Act, including the FCPA's accounting provisions. The maximum penalty for violations by individuals was increased to a fine of not more than $5 million (up from $1 million) and/or up to 20 years imprisonment (up from 10 years). Maximum fines for violations by a corporation increased from $2.5 million to $25 million.

Sarbanes-Oxley requires companies to develop and oversee internal controls and compliance programs, including FCPA compliance. Moreover, reporting under Sarbanes-Oxley has fostered a more aggressive approach to enforcement of the FCPA, along with other federal securities and corporate compliance laws. Given the escalating costs of FCPA

violations, it is increasingly important that companies demonstrate constant attention to their compliance programs.

About Wiley

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About the Authors

For more information about the Foreign Corrupt Practices Act or the information contained in this reference guide, please feel free to contact one of the attorneys listed below.

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As co-chair of the Foreign Corrupt Practices Act and Anti-Corruption (FCPA) Practice, and partner in the Litigation and White Collar Defense & Government Investigations Practices, Kevin's practice focuses on securities fraud, defense procurement fraud, and FCPA matters. Kevin was the former Assistant Chief in the Fraud Section of the Criminal Division of the U.S. Department of Justice (DOJ) and Senior Counsel in the Enforcement Division of the U.S. Securities and Exchange Commission (SEC), and has firsthand knowledge and insight into government operations and processes. He relies on his prosecutorial experience to develop thoughtful investigative and trial strategies. Read full bio.

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Laura, a partner in the International Trade Practice, represents numerous domestic industries – including steel and related steel products, solar cells, hardwood plywood, and aluminum extrusions – in trade litigation and trade policy matters, including AD/CVD investigations, export controls, and FCPA compliance programs. She represents these and other clients before the U.S. International Trade Commission (USITC), the U.S. Department of Commerce's Bureau of Industry and Security (BIS) and International Trade Administration (ITA), the U.S. Court of International Trade, and the U.S. Department of State's Directorate of Defense Trade Controls (DDTC). Read full bio.

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Greg, a partner in the Government Contracts Practice, focuses on complex commercial litigation and arbitration and the Foreign Corrupt Practices Act (FCPA). His diverse experience includes significant commercial litigation involving contractual, business tort, and product liability claims; False Claims Act (FCA) matters; Administrative Procedure Act (APA) issues; intellectual property disputes; international arbitrations; and anti-corruption matters.

Greg's FCPA experience runs the gamut, including managing worldwide internal investigations; conducting due diligence on international agents, joint venture partners, and other third parties; and designing corporate anti-corruption compliance and training programs. Read full bio.

Wiley's FCPA and Anti-Corruption Team

Led by partners Daniel B. Pickard and Kevin B. Muhlendorf, our FCPA experts counsel a wide variety of clients across multiple industries on conducting business globally in an era of heightened FCPA enforcement.

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