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# **An Introduction to the Foreign Corrupt Practices Act**

By:

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# **OVERVIEW OF FCPA**

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- **A statute designed to deter improper inducements to foreign officials in connection with business activities.**
- **Two mechanisms:**
  - **1. General Prohibition on Payments to Foreign Officials.**
  - **2. Books and Records provision.**

# **EFFECT OF FCPA**

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- **Enacted in 1977, amended in 1988 and 1998.**
- **Major role in jurisprudence.**
- **Direct bearing on foreign and domestic operations of businesses.**
- **Impacts practices of persons.**

# **SCOPE AND APPLICATION**

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- **Purpose and Language.**
- **Means of Application.**
- **Same facts, different results.**
- **Thorough understanding required.**

# **TWO MECHANISMS**

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- **Anti-bribery Provisions (proscriptive).**
- **Accounting and Record Keeping Provisions: the “Books and Records” Provisions (prescriptive).**

# **LACK OF JUDICIAL REVIEW**

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- **Provisions rarely subject to judicial scrutiny:**
  1. **Few prosecutions under anti-bribery provisions: most result in guilty plea or civil settlement.**
  2. **Far more prosecutions under Books and Records provisions: most result in settlement.**
- **Imprisonment: U.S. Sentencing Guidelines**

# **SCOPE AND JURISDICTION**

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- **Anti-Bribery: broad jurisdiction:**
  1. “domestic concerns.” (U.S. Persons)
  2. “issuers.”
  3. any individual or entity acting within territory of U.S. as prohibited inducer.
- **Territorial Principle: while in or connected to the U.S.: use of interstate or foreign commerce.**
- **Nationality Principle: Established or has principal place of business in U.S.**

# **ANTI-BRIBERY PROSCRIPTIONS**

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- **Issuer: entity required to register or file reports under Section 12 or 15(d) of Securities and Exchange Act. Issuer includes domestic and foreign concerns.**
- **Officers, directors, and employees of issuers do not have to be issuers or “domestic concerns.”**



# **ANTI-BRIBERY PROSCRIPTIONS**

- **Foreign Subsidiaries: Situs of Act Matters.**
  1. **If Use of U.S. Territory is not involved, foreign companies and foreign subsidiaries are not subject to the Anti-Bribery provisions of the FCPA.**
  2. **Ownership by issuer does not matter.**
- **Foreign Subsidiaries: Agency Matters.**
- **1. Foreign affiliate or subsidiary that acts as agent of issuer or domestic concern is subject to Anti-Bribery provisions.**

# **ANTI-BRIBERY PROSCRIPTIONS**

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- **Domestic Concerns: U.S. Individuals and Entities (persons).**
  1. **Regardless of nationality, any officer, director, member, employee, agent, or stockholder of a domestic concern is subject to Anti-Bribery provisions of the FCPA.**
  2. **Anti-Bribery provisions apply to Domestic Concerns hired by foreign entities and foreign subsidiaries that are not subject to the FCPA.**

# **ANTI-BRIBERY PROSCRIPTIONS**

- **Any Other Person: Jurisdiction is extended to individuals and entities, whether or not the person is domestic concern or issuer if:**
  - 1. instrumentalities of interstate commerce are involved; and**
  - 2. any act in furtherance of bribery of a foreign public official is conducted; and**
  - 3. “while in the territory of [U.S.]”**

# ESSENTIAL ELEMENTS

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- A payment, offer, or promise of anything of value to:
  1. any foreign official
  2. any foreign political party or party official,
  3. any candidate for foreign political office, or
  4. any other person while knowing it will be passed on to any of the foregoing.
- With corrupt intent;
- For the purpose of:
  1. influencing an official act or decision of the person;
  2. inducing that person to do or omit to do any act in violation of his or her lawful duty;
  3. inducing that person to use his influence with a foreign government to affect or influence any government act or decision; or
  4. secure any improper purpose;
- To assist in obtaining or retaining business for or with, or directing business to, any person.

# **PAYMENT, OFFER, OR PROMISE**

- **Whether a payment is actually made is not critical.**
- **Any offer or payment that reasonably could be believed to be an inducement is prohibited.**
- **No requirement for the bribe to be accepted.**
- **Manner or means of payment, promise, or offer is not critical.**

# **ANYTHING OF VALUE**

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- **What is given or offered is not critical.**
- **Direct or indirect benefit.**
- **Right to direct to whom benefit is given.**
- **Perception of potential benefit is critical.**
- **FCPA has no de minimis exception.**

# FOREIGN OFFICIAL

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- **Broadly Construed.**
- **Officials of foreign governments, paid or unpaid.**
- **Issue is whether the inducement is in any way associated with influencing what a person can do in his or her official capacity.**
- **De Facto Members of Government.**
- **Parastatals (instrumentalities, state-owned enterprises).**
- **International Organizations.**

# **CORRUPT INTENT**

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- **Intent must be corrupt: payment or offer made to induce the intended beneficiary to in some way misuse his or her official position.**
- **Capacity to influence an official decision is not relevant.**
- **Culpability is determined by intent of the person making the inducement.**
- **Also not relevant is whether inducements are made directly or indirectly to a foreign government official.**
- **Influencing an Official Act.**
- **Obtain or Retain Business.**



# EXCEPTIONS; AFFIRMATIVE DEFENSES

- Relief from prohibitions of Anti-Bribery provisions is limited.
- Anti-Bribery provisions contain:
  1. one category of exceptions; and
  2. two categories of affirmative defenses.
- Practical Effect: provide a form of safe harbor if:
  1. inducement falls within exception/defense; and
  2. if trier of fact is convinced.
- Department of Justice has limited form of opinion protection available only for FCPA's Anti-Bribery provisions (SEC has none available for issuers).

# EXCEPTIONS

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- **Facilitating Payments:** payments made to “expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official.”
- **Non-Discretionary Act:** payment relates to actions of foreign officials that official is already obligated to perform.
- **Need for Caution:** dependent upon facts.

# AFFIRMATIVE DEFENSES

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- **Bona Fide Business Expenditures**
- **Whether Permitted by Official's Government**
  - **Threshold determination: whether an official or unit of government may be paid or reimbursed for expense that may be incurred.**
- **Reasonable Business Expenses**
  - **are the expenditures reasonable in terms of purpose and amount?**
  - **are the expenditures made in good faith?**
  - **do the expenditures related directly to:  
promotion, demonstration, or explanation of products or services  
or the execution or performance of a contract with a foreign  
government or agency?**
- **Local Law**

# FCPA OPINION PROCEDURE

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- **Department of Justice opinion may be sought by an issuer or a domestic concern.**
- **No equivalent procedure offered by the SEC but SEC sympathetic if DOJ opinion issued.**
- **Written Opinion based upon request that must be “specific and must be accompanied by all relevant and material information bearing on the conduct” for which opinion is requested.**

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# **An Overview of Due Diligence and Compliance with the Foreign Corrupt Practices Act**

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# ***Consider The Territory***

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- **Higher incidence of government corruption = more due diligence**
- **Obtain ranking from**
- **Transparency International**

# **Determine The Consultant's Competence**

- **Check out consultant's education, background, experience before engaging him or her.**
- **Company rep. to visit consultant's org.**

# Determine The Consultant's Integrity

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- **General business reputation**
- **Sources: U.S. Embassy; major banks; ministry of trade ; dept. of commerce international company profile**
- **Inconsistent reports = red flags = more investigation – possible local counsel**



# Identify Relationship to Foreign Gov. Officials

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- **Is Consultant or anyone with direct financial interest a gov. official under FCPA?**
- **Family relationship?**
- **Detailed relationship of official to consultant – may get FCPA certification from official**

# **Reasonableness of Compensation/ Payment**

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- **No unusually high compensation/analyze any commission arrangement**
- **Determine local market rate for consultant**
- **Document Rationale for compensation**
- **Avoid Swiss Bank account payments**
- **Avoid 11th hour increases to “Save the Deal”**

# **Ensure Answers Are Accurate**

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- **Info should be current, accurate and responsive**

# COMPLY WITH LOCAL LAWS

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- **Failure to comply with local law =  
FCPA Red Flag**
- **Registration of local agent with local gov.**

# Integrate FCPA Standards into Consultant Agreement

- **Consultant agrees to abide by FCPA**
- **Company has right to immediately terminate Consultant's Agreement on failure to comply with FCPA**
- **Reps & warranties to comply with local law**
- **Right to audit Consultant's books**

# **Provide For Continuing Oversight of Consultant's Activity**

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- **EEA (Economic Espionage Act of 1996) compliance makes it a crime to receive competitor bid information**
- **Monitor Consultant Activity**

# **Maintain Accurate Books and Records**

- **Documents knowingly misrepresenting true nature of transaction is an FCPA violation**
- **Full and accurate report of fees and commissions or possible prosecution for:**
  - 1. Mail or wire fraud**
  - 2. Violation of munitions sales regulations**

# When Appropriate Seek Guidance From Dept. of Justice

- **If normal due diligence not enough**
- **Material facts for DOJ recommendation must be accurate**



# **Consistent Standards and Common Sense**

- **Avoid “Willful Blindness” issues  
by consistency**
- **Use prudence and common sense**

# Suggested Additional Reading

United States Department of Justice,  
“Lay-Person’s Guide to FCPA,”

[http://www.usdoj.gov/criminal/fraud/docs/  
dojdocb.html](http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html)

J.Lanier Yeates, “An Introduction to the  
Foreign Corrupt Practices Act,”  
Proceedings of the 53d Louisiana Mineral  
Law Institute 180 (2006)

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**J. Lanier Yeates, “The Accounting Provisions of the Foreign Corrupt Practices Act,” 13 Petroleum Accounting and Financial Management Journal 199 (1994)**

**Evan P. Estelle, The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction, 83 Tul. L. Rev. 527 (2008).**

# THE END

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What you  
do when  
you  
complete  
your due  
diligence

