



## THE END OF CORRUPTION

### FCPA Pocket Handbook

The WorldCompliance FCPA Pocket Handbook is an introductory guide to the Foreign Corrupt Practices Act.

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## **FOREIGN CORRUPT PRACTICES ACT - What and Who?**

The Foreign Corrupt Practices Act is a federal law enacted in 1977 by the United States of America, prohibiting payment of bribes to foreign government officials and political figures.

There are two provisions to the Foreign Corrupt Practices Act; The anti-bribery provisions, enforced by the Department of Justice, and the accounting provisions, enforced by the Securities and Exchange Commission.

The following entities are particularly prohibited from making improper payments.

- Issuers
- Domestic concerns
- Foreign nationals and businesses
- Third Parties and agents

### **Issuers**

Companies that have securities registered in the U.S. or are required to file reports with the Securities and Exchange Commission are considered issuers.

### **Domestic concerns**

Any business entity, with its principal place of business in the U.S. or organized under the laws of the U.S., as well as nationals and residents of the U.S. are considered domestic concerns. Both, issuers and domestic concerns may be held liable for any act that promotes a bribe, by using the U.S. mail or any means or instrument of interstate commerce or for an act, which occurs outside of the U.S.

### **Foreign nationals and businesses**

A foreign national or business may be held liable for any act that promotes a corrupt payment within the U.S. Unlike the first two entities, foreign nationals and businesses are not liable for acts committed outside of the U.S.

### **Third parties and agents**

A third party or agent acting on behalf of an issuer, domestic concern or foreign national or business is liable under the same conditions as the issuer, domestic concern or foreign national or business.



### Violations of the FCPA

The following five elements constitute a violation of the anti-bribery provision

#### Payment

The FCPA states that payments includes offers, payments and promises to pay, gifts, promises to give or authorization to pay, offer or give anything of value. Anything of value includes tax benefits, information and promises of future employment, scholarships, discounts, entertainment, travel expenses and insurance benefits.

#### Foreign official

The Foreign Corrupt Practices Act prohibits payments made to a foreign official, political party, political party official or a candidate for foreign political office. Payments made to third parties are prohibited if the payer knows that the payment is meant for the foreign official, whether direct or indirectly. Knowledge includes deliberate ignorance or conscious disregard.

#### Corrupt intent

Corrupt intent is defined as any payment made with the purpose of Influencing an act or a decision.

- Inducing an official to act in violation of that official's lawful duty
- Securing an improper advantage
- Inducing an official to use their influence to affect any governmental act or decision

#### Business purpose

In addition to a corrupt intent, a payment must be made with the objective of obtaining, retaining and or directing business.

#### Exceptions to the rule

Several types of payments are exempt from FCPA regulations:

- Payments for routine government actions
- Payments, which expedite or secure the performance of a routine governmental action by a foreign official, political party or party official, are not prohibited.
- Payments which are lawful under foreign law
- A payment is not prohibited if it is lawful under the laws and regulations of the relevant foreign country.
- Reasonable and bona-fide expenditures
- A payment, which is a reasonable and bona fide expenditure and directly related to the promotion, demonstration or explanation of products or services or directly related to the execution or performance of a contract, is not prohibited.



### **FCPA Accounting Provisions**

Accounting provisions only apply to issuers who are required to keep records and accounts, which accurately reflect the transactions and dispositions of the issuer's assets. A company may be liable if its records:

- Omit a transaction, such as a bribe, illegal commission or other improper payment.
- Disguise records to conceal improper activity or fail to identify the improper nature of a recorded transaction.

### **Internal controls**

Issuers are required to maintain a system of internal accounting controls to provide reasonable assurances that transactions are executed in line with management's authorization. All transactions must be recorded in a manner that permits the preparation of financial statements that conform with generally accepted accounting principles (GAAP) and to maintain accountability for assets.

The access to assets is allowed only with management's authorization and the accountability for said assets must be compared with the existing assets at reasonable intervals. When identified, appropriate action must be taken with respect to any differences.

### **Liability for acts of subsidiaries**

Issuers can be held liable for the conduct of their foreign subsidiaries, even though the improper conduct occurred outside of the U.S. The scope of liability is based on the issuer's incorporation of the subsidiary's financial statements in its own records and SEC filings.

### **Obligations of minority owners**

An issuer who owns fifty percent or less of the voting power of another company is subject to modified accounting provisions. It is the issuer's responsibility to use its influence to have the company develop and maintain a system of internal accounting controls.

### **National security exception**

The accounting provisions do not apply if an issuer's liability results from its cooperation with the federal government on a matter concerning national security.

### **SARBANES-OXLEY**

Senior management may be liable if they certify statements, which fail to disclose known violations of the Foreign Corrupt Practices Act's accounting provisions.



### FCPA Penalties

The Securities and Exchange Commission is charged with enforcing violations of the accounting provisions while the Department of Justice is primarily responsible for enforcing the anti-bribery provisions. Both agencies can institute civil actions, but only the Department of Justice is authorized to file criminal charges.

#### Penalties for individuals: Anti-bribery provisions

- Civil penalty up to \$10,000
- Criminal fine up to \$250,000 and or imprisonment up to 5 years
- Under the Alternative Fines Act, the fine may be increased to twice the gross financial gain or loss resulting from the corrupt payment
- The company on whose behalf the person acted cannot pay a criminal fine imposed on an individual directly or indirectly

#### Penalties for entities: Anti-bribery provisions

- Civil penalty up to \$10,000
- Criminal fine up to \$2 million
- The Alternative Fines Act may increase the criminal fine to twice the gain or loss resulting from the corrupt payment

#### Penalties for individuals: Accounting provisions

- Civil penalty up to \$100,000
- Criminal fine up to \$5 million or twice the gain or loss caused by the violation, and or imprisonment up to 20 years
- The company on whose behalf the person acted cannot pay fines directly or indirectly

#### Penalties for entities: Accounting provisions

- Civil penalty up to \$500,000
- Criminal fine up to \$25 million or twice the gain or loss caused by the violation



### **FCPA Other Penalties / Sanctions**

#### **Other government penalties that apply are:**

- Suspension or debarment from securing contracts with the government
- An indictment can lead to suspension
- The suspension or debarment of a business by one government agency disqualifies it from contracting with any other government agency

#### **Private lawsuits**

- No private rights of action
- Securities class actions or shareholder derivative suits.
- Lawsuits based on antitrust laws and common law

### **Important Elements of Compliance with FCPA regulations**

#### **Compliance programs**

Companies should incorporate compliance programs, policies and training throughout the entire organization, including:

- Training employees on anti-bribery laws and ask them to certify that they understand and will follow corporate policy. Employees should also be informed on the proper procedure and contact channels for guidance and or to report possible violations;
- Verifying that third party relationships (joint venture partners and agents) comply with anti-bribery laws;
- Performing in depth due diligence on joint venture partners, agents and targets of prospective mergers and acquisitions;
- Periodic monitoring of third parties to detect entities with close relationships to Foreign Officials or government entities.



### **Third Party Risk Monitoring**

All corporations subject to FCPA regulations should perform a risk assessment on all business partners, third party agents, and potential merger partners to understand whether any company or individual is affiliated with a foreign government.

The purpose of this risk assessment is the detection of bribes and corruption within the third party network, by determining whether Foreign Officials or State Owned Enterprises are hiding within the business network. A good first line of defense is the screening of all third parties against a comprehensive database of Foreign Officials and their family members, State Owned Enterprises and their executives and directors, to ensure that funds transferred to these entities are not conflicting with the regulations of the Foreign Corrupt Practices Act. Such a screening should be performed on a regular basis, such as monthly or quarterly to be protected from frequent changes in the Political arena.

### **Components of a database of Foreign Officials and State Owned Enterprises:**

- Contains over 6,000 State Owned Enterprises;
- Contains up to 900,000 known Politicians and family members;
- Contains over 50% primary unique identifiers, such as dates of birth, photographs, passport numbers and national id numbers;
- Contains names in primary language such as Chinese or Arabic to increase the screening accuracy.

### **Attorney general opinions**

Issuers and domestic concerns can contact the Attorney General for guidance concerning whether certain conduct violates the FCPA's anti-bribery provisions. The request must specify exact facts related to the actual conduct, the Department of Justice will not provide opinions on hypothetical situations.

After a potential violation is discovered, it is recommended to conduct an internal investigation, preferably by outside counsel in the country where the violation took place. It is important to implement prompt remedial and disciplinary action as deemed necessary.