

ABCs OF THE FOREIGN CORRUPT PRACTICES ACT

Diane L. Weinberg
Meeks, Sheppard, Leo & Pillsbury

GENERAL PURPOSE OF FCPA

- ▶ Prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business.
- ▶ The Department of Justice is the main enforcement agency along with the Securities Exchange Commission.
- ▶ DOJ is currently investigating whether banks and private-equity firms violated bribery laws in their dealings with sovereign-wealth funds.

BACKGROUND

- ▶ Congress enacted the FCPA in 1977, after approximately 400 companies admitted making illegal payments to foreign government officials, politicians and political parties as a result of investigations conducted by the SEC.
- ▶ e.g., illegal payments of 1.1 million to Prince Bernhard of the Netherlands, prince consort of Queen Juliana of the Netherlands in 1976 and “Bananagate” – resulted in the suicide of CEO Black of United Brands for payments to the Honduran president.

1998 AMENDMENTS TO FCPA

- ▶ Congressional concern that American companies were operating at a disadvantage to foreign companies.
- ▶ In some countries, companies were permitted to deduct the cost of bribes as business expenses
- ▶ 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed by 34 countries; entered into force in 1999 (now 38 countries).

OVERVIEW OF FCPA

- ▶ FCPA consists of two parts:
 - (1) Anti-bribery provisions
 - (2) Accounting provisions
- ▶ Department of Justice is responsible for criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and foreign nationals. Civil enforcement of the anti-bribery provisions with respect to issuers is left to the SEC.

BROKERS / FORWARDERS

- ▶ Government is focusing on third parties, such as forwarders

ANTI-BRIBERY PROVISIONS

- ▶ Unlawful for a U.S. person, and certain foreign issuers of securities, to make a **corrupt payment** to a foreign official for the purpose of obtaining or retaining business with, or directing business to, any person. (emphasis added).
- ▶ Since 1998 amendments, which ratified the OECD Anti-Bribery Convention, the anti-bribery provisions also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the U.S.

ANTI-BRIBERY PROVISIONS

- ▶ Prohibits US firms from corruptly paying foreign officials for assistance in obtaining or retaining business
- ▶ Prohibits payment to agent if firm knows portion of payment will go to public official
- ▶ Payment must be knowing
- ▶ Excepts payment of facilitating payments for routine government action
- ▶ Penalties: fines up to \$2 million for firms; fines of \$100,000 and up to 5 years in jail for individuals

ANTI-BRIBERY

- ▶ Unlawful to bribe foreign government officials to obtain or retain business. 5 elements constitute a violation:

WHO

- ▶ US citizens and residents – individual, officer, director, firm employee, or agent of a firm and any stockholder acting on behalf of a firm.
- ▶ Issuer – stock trades on a US exchange. Recent case expanded interpretation by claiming jurisdiction based on the fact that logistics/forwarder company by paying bribes to foreign government officials was acting on the behalf of its customers, who are U.S. issuers
- ▶ The 1998 amendments expanded the FCPA to cover foreign companies and foreign nationals while in the US. US parent corporations may be held liable for acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question.

CORRUPT INTENT

- ▶ The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person.

RECENT CASE

- ▶ Former Congressman William Jefferson of Louisiana was convicted, among other things, of conspiracy to violate FCPA – under appeal
- ▶ He was acquitted of a substantive violation of FCPA – Why?
- ▶ Where was the money found?

CORRUPT INTENT

- ▶ What if a foreign official is extorting a payment and threatening a US investor's business?
- ▶ Corruptness element is applicable to extortion victims.

PAYMENT

- ▶ FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.
- ▶ Is payment restricted to cash?

RECIPIENT

- ▶ Prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office.
- ▶ Rank doesn't matter

BUSINESS PURPOSE

- ▶ FCPA prohibits payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person.
- ▶ Note: The business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality.

THIRD PARTY PAYMENTS

- ▶ FCPA prohibits corrupt payments to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official.
- ▶ Recipient is the third party who is making the payment to the foreign official.

EXCEPTION TO THE ANTI-BRIBERY PROHIBITION

- ▶ Payments to facilitate or expedite performance of a routine governmental action – the limited “petty graft” exception
 - Obtaining permits, licenses or other official documents,
 - Processing governmental payments such as visas and work orders,
 - Providing police protection,
 - Mail pick-up and delivery,
 - Providing phone service,
 - Power and water supply,
 - Loading and unloading cargo or protecting perishable products and scheduling inspections associated with contract performance or transit of goods across country

NOT COVERED BY THE EXCEPTION

- ▶ Routine governmental action does not include any decision by a foreign official to award new business or to continue business with a particular party

AFFIRMATIVE DEFENSES

- ▶ Payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.
- ▶ However: bribery is not legal in any country

ACCOUNTING PROVISIONS

- ▶ The FCPA also requires “an issuer,” a company whose securities are listed in the United States to meet its accounting provisions.
- An issuer must maintain books and records that “in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”
 - ▶ Issuers must devise and maintain a system of internal controls that are capable of detecting and preventing improper payments to foreign officials and utilizes accepted methods of accounting
 - ▶ The purpose is to prevent bribery by requiring the disclosure of unlawful bribery payments to officials. No disclosure = FCPA violation.

MATERIALITY IS NOT THE ISSUE

- ▶ "But, materiality, while appropriate as a threshold standard to determine the necessity for disclosure to investors, is totally inadequate as a standard for an internal control system. It is too narrow -- and thus too insensitive -- an index. For a particular expenditure to be material in the context of a public corporation's financial statements -- and therefore in the context of the size of the company -- it would need to be, in many instances, in the millions of dollars. Such a threshold, of course, would not be a realistic standard. Procedures designed only to uncover deficiencies in amounts material for financial statement purposes would be useless for internal control purposes. "

CRIMINAL PENALTIES AGAINST BRIBERY

- ▶ Corporation subject to fine up to \$2,000,00
- ▶ Corporate officers, directors, stockholders, employees and agents are subject to a fine of up to \$100,000 and imprisonment for up to 5 years.
- ▶ Fines on individuals may not be paid by their employers. Please note that insurance will **not** cover fines on individuals.

CIVIL PENALTIES

- ▶ Attorney General or SEC, as applicable, may institute a civil action for a fine of up to \$10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm who violates anti-bribery provisions.
- ▶ SEC enforcement action may result in additional fines.
- ▶ AG or SEC may bring a civil action to enjoin any act or practice of the firm that is in violation of the anti-bribery provisions.

OTHER GOVERNMENTAL ACTION

- ▶ Barred from government contracts.
- ▶ Indictment alone can lead to suspension of the right to do business with the government.
- ▶ A person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses.
- ▶ SEC could suspend or bar persons from securities business
- ▶ OPIC and CFTC also provide for suspension
- ▶ Unlawful payment under the FCPA is not deductible as a business expense.

GUIDANCE FROM DOJ

- ▶ DOJ established Foreign Corrupt Practices Act Opinion Procedure, which permits companies to request a statement of the Justice Department's present enforcement intentions under the anti-bribery provisions of the FCPA regarding any proposed business conduct.

HOUSE JUDICIARY COMMITTEE OVERSIGHT

- ▶ Chamber of Commerce wants FCPA amended to include an “adequate procedures” defense to corporate liability; that the definition of “foreign official” should be amended to provide greater clarity; and limit liability of companies that acquire companies that have been liable for prior FCPA violations.

ANTI-BRIBERY COMPLIANCE PROGRAMS SHOULD MEET HIGH STANDARDS

- ▶ Increased enforcement of US FCPA
 - ▶ Good Practice Guidance on Internal Controls
 - ▶ Ethics and Compliance (OECD Good Practices)
 - ▶ July 1, 2011 UK Bribery Act
-
- ▶ A company's compliance efforts can affect whether the government will decide to enter a deferred prosecution agreement

FCPA COMPLIANCE PROGRAMS

- The implementation of a proper FCPA compliance program may mitigate potential criminal punishment and monetary penalties for a company facing an enforcement action.
- Senior management involvement
- Written policies and procedures
- Training and education of employees, directors, agent, consultants
- Reporting mechanism for employees to report bribery
- Periodic review
- Recordkeeping and internal controls
- Due Diligence on third parties/acquisitions

FCPA COMPLIANCE PROGRAMS

Gift Guidelines – No Cash; Nominal Value

- Meal and Entertainment – Legitimate Business Purpose, No Cash and Not Excessive
- Travel – Reasonable and Bona Fide Expenditures in Connection with Product Demonstration

SEC ADOPTS DODD FRANK WHISTLEBLOWER PROGRAM

- ▶ Corporate whistleblowers will be allowed to receive up to 30% of the penalties assessed for reporting financial wrongdoing even if they go to the SEC first and do not report the problem internally.

CONTACT INFORMATION

*This presentation is not intended as legal advice,
but only as general background information.*

Diane L. Weinberg
Meeks, Sheppard, Leo & Pillsbury
355 Lexington Avenue, Suite 1400
New York, NY 10017
(T) (212) 949-7120
(F) (212) 949-7271

diane.weinberg@mscustoms.com