

COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT

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One of the more significant federal laws affecting companies doing business in a foreign country is the Foreign Corrupt Practices Act (the "FCPA"), yet many companies, and in particular many privately owned companies, are totally unaware of its provisions and its implications. This article will review the impact of this law on privately owned companies.

There are two components to the Act, the anti-bribery provisions and the accounting and record keeping provisions. The accounting and record keeping provisions apply only to certain public companies. On the other hand, the anti-bribery provisions apply to all U.S. companies, including privately owned companies. Since the focus of this article is FCPA compliance for privately owned companies, this article will focus strictly on the anti-bribery provisions.

The FCPA prohibits certain offers or payments to public officials and others in seeking business in a foreign country. These anti-bribery provisions are far-reaching. Because a certain practice may be followed in a particular country does not necessarily make that practice lawful.

The anti-bribery provisions apply to all U.S.-formed entities, to any U.S. citizen or resident and to any business entity that has its principal place of business in the U.S. It applies to any stockholder, officer, director, employee or agent of any of the foregoing. Finally, the anti-bribery provisions apply to any natural person or any foreign business entity located in and acting in the territory of the United States. Foreign sales agents while in the United States are subject to the FCPA based on this definition.

For a violation of the anti-bribery provisions to occur, the offender must give, offer, pay, or promise to pay anything of value to a prohibited person for a prohibited purpose, with corrupt intent, to assist the offender in obtaining or retaining business or in directing business to any person. A prohibited person is either:

- a foreign official,
- a foreign political party or official of that party or any candidate for foreign political office, or

- any other person who knows that all or a portion of the money or thing of value will be offered, given or promised directly or indirectly to any of the foregoing.

A prohibited purpose is for the purpose of:

- influencing an official act or decision of a prohibited person,
- inducing such person to do or omit to do any act in violation of that person's lawful duty,
- inducing such person to use his influence with the foreign government to affect or influence any act or decision of that government, or
- securing any improper advantage.

The statute contains two affirmative defenses to violations. There are severe civil and criminal penalties for violations under the Act, which can be enforced by the U.S. Department of Justice.

The Act contains an exception for "facilitating payments". These are payments to expedite or secure the performance of a routine governmental action by a foreign official, political party or party official. These are nondiscretionary acts that an official is already obligated to perform. In other words, if it is merely a question of moving an approval or process along and there is no discretion involved in the granting of the approval, then this would be a facilitating payment. Because it is a narrowly construed exception, caution should be taken before making facilitating payments.

Many companies contract with foreign sales agents to sell their products overseas. While the foreign sales agent would not be covered under the FCPA for actions outside of the United States, the U.S. company for which the agent is working will be vicariously liable under the Act if it "knows" that the payment is for a prohibited purpose in violation of the FCPA. Under the statute, a person "knows" of any prohibited conduct, circumstance or result if the person is aware that the recipient is engaging in prohibited conduct or if the person is aware or has a firm belief that the prohibited circumstance exists or that the prohibited result is substantially certain to occur. Actual knowledge on the part of the company is not a prerequisite to liability. Therefore, while the company's sales agent may not be liable under the Act for prohibited conduct, the company and its officers and employees could be held vicariously liable for the agent's conduct.

It is important that a company adopt a Foreign Corrupt Practice Act compliance policy. This compliance policy consists of the policy statement, of certification forms for agents and in some cases employees to sign, a designation of an FCPA compliance officer, and an administrator's manual for that compliance officer.

In a global marketplace where culture and corruption vary among countries and where American companies are fiercely competing with companies from around

the globe, a U.S. company may feel the pressure to make payments considered illegal under the FCPA. Despite these pressures, most countries and foreign companies recognize that U.S. companies are subject to prohibitions against bribery, as are European and other western countries with similar laws. The direct importance of compliance with the FCPA cannot be overemphasized.