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CHARTERED ACCOUNTANTS

Training Program

FCPA & UKBA

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Content

#	Topic	Slide Number
1	Background	3
2	Introduction	4
3	Persons subjected to FCPA	5
4	Importance of Cross Border Compliance	6
5	Anti-bribery provisions	7
6	Basic Prohibition	8
7	Requirement of FCPA	10
8	Third Party payments	11
9	Exceptions and Affirmative Defenses	12
10	Sanctions against bribery	15
11	Alternative fines and Government Action	16
12	Application	17
13	Conclusion	18



Background

- As a result of U.S. Securities and Exchange Commission investigations in the mid 1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that were made to ensure that government functionaries discharged certain ministerial or clerical duties. One major example was the Lockheed bribery scandals, in which officials of aerospace company Lockheed paid foreign officials to favor their company's products. Another was the Banangate scandal in which Chiquita Brands had bribed the President of Honduras to lower taxes. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system. The Act was signed into law by President Jimmy Carter on December 19, 1977, and amended in 1998 by the International Anti-Bribery Act of 1998 which was designed to implement the anti-bribery conventions of the Organization for Economic Co-operation and Development



Introduction

- The U.S. Foreign Corrupt Practices Act (“FCPA”) prohibits the bribery of “foreign officials”, and also requires U.S. companies to maintain internal accounting controls and keep books and records that accurately reflect all transactions. Every Company employee and agent whose duties are likely to lead to exposure to international business activities is required to read and comply with both the Company’s FCPA policy and procedures. For companies eager to do business in India, compliance with the Foreign Corrupt Practices Act (FCPA) is an increasingly urgent priority as regulators around the world step up enforcement efforts and as corruption in the country continues to rise. The FCPA prohibits making and offering to make payments to foreign public officials, including members of political parties, to further business interests and requires that accurate books and records be kept for all transactions. Although the law was first passed in 1977, enforcement has ramped up in recent years as accelerating globalization has increased the opportunities for FCPA abuse. Additionally, the U.S. has become more serious about accurate books and records and robust internal controls due to passage of the Sarbanes-Oxley Act. Authorities around the world have been cooperating more fully to prosecute a greater number of FCPA violations and more stringent penalties are being levied.

Person subjected to FCPA

Issuers

Includes any U.S. or foreign corporation that has a class of securities registered, or that is required to file reports under the Securities and Exchange Act of 1934

Domestic concerns

Refers to any individual who is a citizen, national, or resident of the United States and any corporation and other business entity organized under the laws of the United States or having its principal place of business in the United States

Any person

Covers both enterprises and individuals



Importance of Cross Border Compliance

- As **nations and regional groupings** seek to implement stricter laws with respect to bribery and corrupt practices, the legal risks faced by **trans-national corporations** are becoming more complex.
- Scope and operation of anti-corruption laws such as the US FCPA and the new UK Bribery Act is **not restricted to territorial boundaries**.
- Anti-corruption compliance is a hot-button issue in countries such as **India**, where trans-national corporations are increasing presence.
- Anti-corruption is also gaining more relevance as, simultaneous with **increasing enforcement** of anti-corruption laws, nations have started to focus on **individual and corporate liability** in cases of violation of anti-corruption laws.
- In the context of these far-reaching developments, it appears unlikely that India can act very differently and buck this trend, in the current context. Moreover, India has entered into **mutual obligations with several countries** including the US, to extend cooperation in respect of investigations and legal proceedings

Anti-bribery Provisions

- The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. The ant bribery provisions apply both to certain issuers of registered securities and issuers required to file periodic reports with the SEC (referred to as "issuers") and to others (referred to as "domestic concerns".) A "domestic concern" is defined to mean any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.
- The FCPA's ant bribery provisions extend to two types of behavior. The basic prohibition is against making bribes directly; a second prohibition covers the responsibility of a domestic concern and its officials for bribes paid by intermediaries.
- The FCPA's basic ant bribery prohibition makes it unlawful for a firm (as well as any officer, director, employee, or agent of a firm or any stockholder acting on behalf of the firm) to offer, pay, promise to pay (or even to authorize the payment of money, or anything of value, or to authorize any such promise) to any foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. (A similar prohibition applies with respect to payments to a foreign political party or official thereof or candidate for foreign political office.)

Basic Prohibition



With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

- **Who** - The FCPA applies to any individual firm, officer, director, employee, or agent of the firm and any stockholder acting on behalf of the firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the ant bribery provisions or if they conspire to violate those provisions. A foreign-incorporated subsidiary of a U.S. firm will not be subject to the FCPA, but its U.S. parent may be liable if it authorizes, directs, or participates in the activity in question. Individuals employed by or acting on behalf of such foreign-incorporated subsidiaries may, however, be subject to the ant bribery provisions if they are persons within the definition of "domestic concern." In addition, U.S. nationals employed by foreign-incorporated subsidiaries are subject to the ant bribery provisions of the FCPA. 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 in order wrongfully to direct business to the payer. You should note that the FCPA does not require that a corrupt act succeed in its purpose.
- **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 in order wrongfully to direct business to the payer. You should note that the FCPA does not require that a corrupt act succeed in its purpose.

Basic Prohibition (Contd.)



- **Recipient** - The prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A "foreign official" means any officer or employee of a foreign government or any department or agency, or any person acting in an official capacity. You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a "foreign official", such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official." Prior to the amendment of the FCPA in 1988, the term "foreign official" did not include any employee of a foreign government or agency whose duties were essentially ministerial or clerical. Determining whether a given employee's duties were "essentially ministerial or clerical" was a source of ambiguity, and it was not clear whether the Act prohibited certain "grease" payments, such as those for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection. Accordingly, recent changes in the FCPA focus on the purpose of the payment, instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the ant bribery provision for "facilitating payments for routine governmental action" (see below).
- **Payment** - The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.
- **Business Purpose Test** - The FCPA prohibits payments made in order to assist the firm in obtaining, or retaining business for or with, or directing business to, any person. It should be noted that the business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality

Requirement of FCPA

The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States. The meaning of foreign official is broad. For example, an owner of a bank who is also the minister of finance would count as a foreign official according to the U.S. government. Doctors at government-owned or managed hospitals are also considered to be foreign officials under the FCPA, as is anyone working for a government-owned or managed institution or enterprise. Employees of international organizations such as the United Nations are also considered to be foreign officials under the FCPA. There is no materiality to this act, making it illegal to offer anything of value as a bribe, including cash or non-cash items. The government focuses on the intent of the bribery rather than on the amount. The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. An increasing number of corporations are taking additional steps to protect their reputation and reducing exposure by employing the services of due diligence companies. Identifying government-owned companies in an effort to identify easily overlooked government officials is rapidly becoming a critical component of more advanced anti-corruption programs.



Third Party Payments

- **Generally**

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make corrupt use of the mails or of interstate commerce in furtherance of 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" includes conscious disregard and deliberate ignorance. The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official." *You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.*

- **Permissible Payments and Affirmative Defenses**

As amended in 1988, the FCPA now provides an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

Exception for Facilitating Payments for Routine Governmental Actions



- There is an exception to the anti bribery prohibition for facilitating or expediting performance of "routine governmental 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 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.
- Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.
- "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

- A person charged with a violation of the FCPA's ant bribery provisions may assert as a defense that the 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.
- Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure review procedure for such issues as (a) the issuance of an advisory opinion by a foreign government agency; (b) the issuance of regulations by a unit of local government; and (c) a course of conduct of a foreign government or government agency indicating that the payment is legal.
- Moreover, because these defenses are "affirmative defenses," the defendant would be required to show in the first instance that the payment met these requirements. The prosecution would not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.
- A person charged with a violation of the FCPA's ant bribery provisions may assert as a defense that the 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.



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Sanctions Against Bribery

- The following criminal penalties may be imposed for violations of the FCPA's ant bribery provisions: firms are subject to a fine of up to \$2 million; officers, directors, and stockholders are subject to a fine of up to \$100,000 and imprisonment for up to five years; employees and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years. You should also be aware that fines imposed on individuals may not be paid by the firm.
- There can be civil penalties as well. The Attorney General or the SEC, as appropriate, may bring 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 the ant bribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 for a natural person and \$50,000 for any other person, to \$100,000 for a natural person and \$500,000 for any other person.
- The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the ant bribery provisions. The SEC may also enter a cease-and-desist order against a person who violates, or is about to violate, the ant bribery provisions.



Sanctions Against Bribery

Alternative Fines

Under federal criminal laws other than the FCPA, individuals may be fined up to \$250,000 or up to twice the amount of the gross gain or gross loss if the defendant derives pecuniary gain from the offense or causes a pecuniary loss to another person. The FCPA's penalty provisions do not override the provisions in these other statutes providing for alternative fines.

Other Governmental Action

- Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. The President has directed that no executive agency shall allow any party to participate in any procurement or non procurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or non procurement activity. No executive party or agency will allow any party to participate in any procurement or non procurement activity if any agency has excluded that party.
- In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

Application

- Notable cases of the application of FCPA are with BAE Systems, Baker Hughes, Daimler AG, Halliburton, KBR, Lucent Technologies, Monsanto, Siemens, Titan Corporation, Triton Energy Limited, Avon Products and Invision Technologies. Former Representative William J. Jefferson, Democrat of Louisiana, was charged with violating this act by bribing African governments for business interests. In 2008, Siemens AG paid a \$450 million fine for violating the FCPA. This is one of the largest penalties ever collected by the DOJ for an FCPA case.
- The U.S. Justice Department and the Securities and Exchange Commission are currently investigating whether Hewlett Packard Company executives paid about \$10.9 million in bribery money between 2004 and 2006 to the Prosecutor General of Russia "to win a million-dollar contract to supply computer equipment throughout Russia. Indeed, ramped up USDOJ and SEC enforcement transformed 2010 into the FCPA's break-out year, and all indications are that 2011 and beyond will witness increasingly vigorous enforcement efforts and additional record-breaking prosecutions, fines, and disgorgements.
- In July 2011, the DOJ opened an inquiry into the News International phone hacking scandal that brought down News of the World, the recently-closed UK tabloid newspaper. In cooperation with the Serious Fraud Office (United Kingdom), the DOJ will examine whether News Corporation violated the FCPA by bribing British Police Officers.



Conclusion



- It is the responsibility of every employee to ensure that no gifts, payments or offers of gifts, payments or anything of value are made or authorized to “foreign officials” without following the procedures set forth in this Policy and the FCPA Guide.
- The Internal Compliance Department is responsible for monitoring and reviewing payments to and made on behalf of foreign officials and for auditing the Company’s compliance with this Guide and the related policies and procedures that comprise the Company’s internal control system.
- The International Legal Department and the Company’s General Counsel are responsible for reviewing requests for authorization of facilitating payments and promotional or marketing expenses and for approving such requests when such payment, gift or offer would not violate either the FCPA or the Company’s FCPA Policy. The International Legal Department is responsible for training appropriate employees, agents, consultants and business partners with respect to the Company’s FCPA policy, for obtaining certifications of compliance from such personnel, and for maintaining proper FCPA compliance and oversight files.
- The Finance Department is responsible for maintaining and enforcing the Company’s accounting and recordkeeping policies, and maintaining the Company’s system of internal controls to ensure that assets of the Company are disbursed only as authorized by management, as set forth in this Guide.

NANGIA & CO LLP

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Thank you!

We expect everyone who works at Nangia & co. LLP to behave in accordance with the principles contained in the Code of Conduct. If you do not understand the principles contained within the Code, or are not sure how to apply them, you should consult with an appropriately qualified colleague to get your questions answered.



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