



SEC

OFFICE of INVESTOR
EDUCATION and ADVOCACY

Investor Bulletin: The Foreign Corrupt Practices Act – Prohibition of the Payment of Bribes to Foreign Officials

The Foreign Corrupt Practices Act (“FCPA”) generally prohibits the bribing of foreign officials.

The FCPA also requires publicly traded companies to maintain accurate books and records and to have a system of internal controls sufficient to provide reasonable assurances that transactions are executed and assets are accounted for in accordance with management’s authorization and recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles (known as “GAAP”).

The FCPA can apply to prohibited conduct anywhere in the world, even, in certain circumstances, where there is no U.S. territorial connection, and extends to publicly traded companies (“issuers”) and their officers, directors, employees, agents, and stockholders. Agents can include third party agents, consultants, distributors, joint-venture partners, and others.

Anti-Bribery Provisions

The anti-bribery provisions of the FCPA generally prohibit any offer, payment, promise, or authorization to pay money or anything of value to any foreign official, foreign political party, or candidate for public office, intended to influence any act or decision in order to assist in obtaining or retaining business.

- The term “anything of value” may include, among other things, cash, computer equipment, medical supplies, and vehicles.
- The term “foreign official” is defined broadly and can include any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or anyone acting on behalf of such government or department. For example, foreign officials would include foreign military officers in charge of procurement contracts, ministry-level officials, and officers and employees of government-owned or government-controlled entities.

The FCPA also prohibits bribes made to any person (“indirect bribes”) while “knowing” that some or all of the payments will be used by the person, directly or indirectly, to bribe foreign officials or other prohibited recipients. In this context, “knowing” includes willful blindness to the high probability of bribery.

An Exception – and Two Affirmative Defenses

Generally, there are three situations in which payments to foreign officials would not result in liability under the FCPA. One approach is to show that the

challenged conduct falls within the so-called “routine governmental action” exception to the FCPA. The other two situations involve invoking what are known as “affirmative defenses.”

An affirmative defense generally is an assertion of facts and arguments that, if true, will defeat the prosecution’s claim, even if all the allegations made by the prosecution are true. There are two affirmative defenses under the FCPA.

The exception and the two affirmative defenses are discussed in greater detail below.

The “Routine Governmental Action” Exception

The FCPA does not apply to any “facilitating or expediting payment,” the purpose of which is to expedite or secure the performance of a “routine governmental action.”

Routine governmental action encompasses those actions which ordinarily and commonly are performed by a foreign official in: (a) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (b) processing governmental papers, such as visas and work orders; (c) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (d) providing telephone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (e) actions of a similar nature. Routine governmental action does not include, among other actions, any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a company, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to, or continue business with, a company.

It is critical for those issuers that permit facilitation

payments to have appropriate internal controls and compliance procedures designed to provide that such payments satisfy the exception for routine governmental action and are properly approved and documented in the issuer’s books and records.

The Two Affirmative Defenses under the FCPA

There are two circumstances under which a payment, gift, offer, or promise of anything of value to a foreign official may qualify as an “affirmative defense” under the FCPA: (1) the payment, gift, offer, or promise of anything of value is lawful under the *written* laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or (2) the payment, gift, offer, or promise of anything of value is a reasonable and *bona fide* expenditure, such as travel and lodging expenses, directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof.

This means that, if you are accused of bribing a foreign official, you would have an affirmative defense if you could show that the payment, gift, offer, or promise of anything of value to the foreign official was lawful under the written laws and regulations of that foreign official’s country, or was related to a reasonable and *bona fide* expenditure as described above.

In relying on the local law of the foreign country as an affirmative defense for a payment, gift, offer, or promise of anything of value to a foreign official, the law or regulation being relied upon, at the time of the conduct, must be “written.” Local practice, custom, or other unwritten policies do not qualify as an affirmative defense.

In addition, recent FCPA enforcement actions have involved travel, lodging, and entertainment provided to foreign officials. As with the exception for facilitation payments, issuers that incur these types of expenses on behalf of foreign government officials must have the

appropriate internal controls and compliance procedures in place to provide that these expenses satisfy the “reasonable” and “*bona fide*” criteria of this affirmative defense and are properly approved and documented in the issuer’s books and records.

Accounting Provisions

The FCPA has two related accounting requirements: (1) books and records; and (2) internal controls. The “books and records” provisions require a company to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company. The “internal controls” provisions require a company to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (a) transactions are executed in accordance with management’s authorization; (b) transactions are recorded as necessary to permit preparation of financial statements and to maintain accountability for assets; (c) access to assets is limited to management’s authorization; and (d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Enforcement of the FCPA

The Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) are jointly responsible for enforcing the FCPA. The SEC brings civil enforcement actions against issuers and their officers, directors, employees, and agents. The DOJ criminally prosecutes issuers and their officers, directors, employees, agents, and domestic concerns, as well as foreign persons and entities (acting within the U.S.). The DOJ also has civil anti-bribery enforcement authority over persons and non-issuers subject to the FCPA. Violations of the FCPA can constitute violations of other federal securities laws and criminal laws.

Penalties

The sanctions for FCPA violations can be significant. Companies that have committed either civil or criminal FCPA violations may have to pay back profits obtained by making improper payments through disgorgement or restitution plus prejudgment interest, pay substantial criminal fines or civil penalties, and/or be subject to oversight by an independent compliance monitor, and for criminal violations they may also be subject to suspension and debarment actions limiting business opportunities with the U.S. government.

For individuals, conviction of a criminal FCPA violation may result in imprisonment and significant fines. The FCPA prohibits companies from paying fines incurred by individuals, either directly or indirectly. Individuals also are subject to significant civil penalties and disgorgement plus prejudgment interest.

Related Information

[Press Release: SEC Charges Liquor Giant Diageo with FCPA Violations \(July 27, 2011\)](#)

[Press Release: SEC Charges Armor Holdings, Inc. With FCPA Violations in Connection With Sales to the United Nations \(July 13, 2011\)](#)

[Press Release: SEC Charges Tyson Foods with FCPA Violations \(February 10, 2011\)](#)

[Press Release: SEC Charges RAE Systems for Illegal Payments Made Through Joint Ventures to Win Chinese Government Contracts \(Dec. 10, 2010\)](#)

[Press Release: SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials \(Nov. 4, 2010\)](#)

[Press Release: OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery \(Oct. 20, 2010\)](#)

[Press Release: SEC Charges ABB for Bribery Schemes in Mexico and Iraq \(Sept. 29, 2010\)](#)

The Office of Investor Education and Advocacy has provided this information as a service to investors. It is neither a legal interpretation nor a statement of SEC policy. If you have questions concerning the meaning or application of a particular law or rule, please consult with an attorney who specializes in securities law.

