



# The Foreign Corrupt Practices Act

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# The Key Provisions of the FCPA

- The FCPA makes it illegal for any U.S. person or company or anyone acting on their behalf (whether U.S. person or not) or for any issuer (whether U.S. entity or not) to bribe a foreign official or foreign political party for the purpose of obtaining or retaining business
  - The FCPA prohibits not only direct payments, but also any payments made through any intermediary to a foreign government official
  - The FCPA prohibits the giving of anything of value, not just money
  - Accounting provisions under the FCPA require “issuers” 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.
- \* *Many countries have laws similar to the FCPA*



# Who is a Foreign Official?

- An employee of a government agency;
- A legislator;
- A member of a political party;
- A candidate for political office;
- A member of a royal family who has official governmental responsibilities;
- An official or employee of a state-controlled or state-owned business enterprise (includes doctors in government hospitals);
- A consultant acting for or on behalf of a government or government agent; or
- A public international organization.



# What Conduct Does the Anti-Bribery Provision of the FCPA Regulate?

- Payment, offer of payment, promise to pay, or authorization to pay
- Money or anything of value
- Corruptly or with Improper Purpose
- To a foreign official or third parties while knowing that all or a portion will be used by the third party for the prohibited activities



# What does “anything of value” mean?

- The FCPA prohibits the giving (directly or indirectly) of anything of value, not just money
- It therefore applies to gifts, charitable donations, travel expenses, goods or services, loans, excessive entertainment, or other personal or financial favors for the foreign official or any member of his or her family
- The FCPA also including favors such as requested political or charitable donations



# What Does “Improper Purpose” or “Corruptly” Mean?

- An improper purpose includes:
  - To obtain or retain business
  - To direct business to another person or firm
  - To obtain any other unfair advantage, such as:
    - Tax exemption or benefit
    - Reclassification or under valuation for customs purposes
    - Issuance of license or permit
    - Government concession, franchise, or contract
    - Waiver of penalties for non-compliance with law



# What Does Knowledge of Improper Purpose Mean?

- Knowledge can be demonstrated where a party is aware of:
  - An improper payment
  - Circumstances for an improper payment exist
  - An improper payment is substantially certain to occur

# Affirmative Defenses under the FCPA

- Payments which are lawful under the written laws of the foreign country; and
- Payments, gifts, offers or promises of anything of value that are reasonable and bona fide expenditures, such as travel or lodging expenses incurred by or on behalf of a foreign official, and directly related to:
  - The promotion, demonstration or explanation of products or services or
  - The execution or performance of a contract



# Entertaining/Expenses

- Certain expenses including but not limited to gifts, business entertainment, payment of travel expenses, lodging, meals, charitable contributions, educational or employment opportunities and/or assumption or forgiveness of debt may be treated as "bribes" under relevant laws and the FCPA, as may any other thing of value, if offered or given in order to obtain an improper business advantage
- All expenses should be:
  - Moderate or reasonable
  - Company representative present
  - Contemporaneous with event (directly related to promotion of product or execution of contract) and balance between business purpose and the entertainment and leisure activities
  - Decision-Maker alone; No spouses, children etc.
  - Transparent
  - Expenses supported by appropriate receipts



# Limited Exception - Facilitating Payments

- Ordinarily and commonly performed by a foreign official
- Not intended to influence the exercise of discretion by the foreign official
- Nominal amount and is made for the sole purpose of facilitating, expediting or securing the performance of a non-discretionary routine act to which Company is entitled
- These include:
  - Obtaining permits, licenses, or other official documents;
  - Processing papers such as visas and work orders;
  - Providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods;
  - Providing telephone service, power and water supply, loading and unloading cargo, or protecting perishable products from deterioration; or
  - Actions of a similar nature
- May not be permitted under local law
- Not permitted under anti corruption laws enacted by many countries



# Third Parties, Agents, and the Need for Due Diligence

- FCPA prohibits corrupt payments through intermediaries, including distributors, joint venture and agents;
- Prior to using any third party agent, companies should:
  - Establish that the third party is not a foreign official;
  - Establish that the third party is qualified;
  - Evaluate the proposed compensation;
  - Evaluate the reputation of the third party;
  - Investigate red flags; and
  - Ensure that any third party signs agreements that include anti-bribery provisions, and is aware of the law and corporate policy



# Red Flags to Possible Violations

- Money passing through an agent or consultant to a foreign official or political leader to obtain certain actions;
- Use of a consultant who is connected or affiliated with a foreign official or political leader;
- Prior accusations involving the agent or consultant alleging improper business practices;
- Requests that commissions or other payments be made in a third country or to another entity; Requests that commission payments be made before award decision;
- Payments that appear to be higher than customary or standard rates;
- Payments to persons outside the scope of a transaction; or
- Insistence by the foreign customer that a particular person be used as an intermediary



# Accounting Provisions

You are required to:

- Keep books and detailed records that accurately reflect the transaction and disposition of corporate assets, including the proper monitoring of associate expense reports
  
- Devise and maintain an adequate system of internal accounting controls:
  - Ensure transactions are executed in accordance with management's general or specific authorization
  
  - Ensure transactions are recorded to permit preparation of financial statements in conformity with generally accepted accounting principles, and to maintain accountability for assets



# Areas of Concern for the Pharmaceutical Industry

- Distributors
- Clinical Trials
- Product Selection
- Importation
- Formulary Committees
- Sponsoring to Conferences
- Gifts



# Growth & Reach: Harsher Penalties

- A corporation that willfully violates the anti-bribery provisions faces up to \$2 million in criminal fines, or two times the gross gain from the offense.
- An officer, director, employee, or agent of the corporation who willfully violates these provisions may be fined up to \$250,000 and/or imprisoned up to five years.
- A corporation or individual that violates the FCPA is also subject to a civil penalty of up to \$10,000 (which is not indemnifiable by a principal or employer).
- Additional possible penalties: (1) civil fines; (2) prosecution for violating other laws (money laundering, fraud, conspiracy, etc.); (3) suspension of certain of the company's business activities; (4) debarment from contracting with the US government; or (5) private follow-on civil lawsuits from shareholders, competitors, or foreign governments.



# Growth & Reach: Harsher Penalties

- A corporation that willfully violates the FCPA's accounting and internal control provisions is subject to criminal fines of up to \$25 million per violation (or, if greater, twice the pecuniary gain from the offense).
- An individual who willfully violates these provisions may face criminal fines up to \$5 million (or, if greater, twice the pecuniary gain) and/or be sentenced to up to 20 years' imprisonment.
- A corporation that violates these provisions may also be subject to a civil penalty of up to \$500,000, while an individual may be subject to a civil penalty of up to \$100,000.
- Note: Under the FCPA's record-keeping and internal control provisions, the SEC has held parent companies responsible for the conduct of their subsidiaries, even where the parent companies had no knowledge or suspicion of any FCPA violations by the subsidiary.



# Current Enforcement Trends

- Greater resources being dedicated to prosecutions than ever before, and the number of prosecutions continues to rise (DOJ prosecuted more FCPA cases in 2008 and 2009 than in the preceding 20 years combined)
- Increasing corporate penalties, and corresponding civil penalties, disgorgement, and prejudgment interest in parallel SEC enforcement actions
- Heightened focus on non-traditional bribes e.g., travel, entertainment, and hospitality expenses
- Heightened focus on payments through intermediaries (indirect bribes through agents, consultants, distributors or other third parties)



# Current Enforcement Trends (cont.)

- Improved information-sharing arrangements and prosecution by foreign regulators – both through treaties and informal arrangements with law enforcement counterparts
- Industry probes (where one single voluntary disclosure can lead...)
- Prosecutions of individuals
- DPAs/NPAs
- Potential whistleblower rewards
- Use of Travel Act to prosecute commercial bribery

# Dodd-Frank Act

## Whistleblower Provisions: Section 922

- Act amends the Securities Exchange Act and establishes a new whistleblower incentive program that provides monetary rewards between 10 and 30% to whistleblowers who report securities violations that lead to the recovery of sanctions exceeding \$1 million in criminal and civil proceedings.
- Amount received includes not only monies collected by the SEC, but also fines and penalties assessed by the DOJ, self-regulatory organizations and state Attorneys General.
- Whistleblower provisions previously only covered insider trading violations and applied solely to civil penalties recovered and did not provide guaranteed minimum reward.
- Dodd-Frank expands scope of conduct to include violations of Foreign Corrupt Practices Act (worldwide reach).



# Whistleblower Provisions: Section 922 Amount

- Amount - Discretion of Commission
- Criteria:
  - Significance of the information
  - Degree of assistance
  - Programmatic interest
  - Other relevant factors



# Whistleblower Provisions: Section 922

## Original Information

- Original Information:
  - Derived from independent knowledge or analysis
  - Not previously know to the Commission
  - Not derived from material uncovered in existing investigations, attorney or client communications, but there is a significant issue here over what the SEC can use with respect to a company's internal personnel and its communications with company personnel
  - Cannot be obtained from publicly available sources, but question remains what about "analysis" of public information
  - Does not have to be "first hand" account of information



# Whistleblower Provisions: Section 922

## Representation

- Whistleblower may be represented by counsel through whom they can provide information anonymously
- Identity of whistleblower must be disclosed prior to payment of any award
- Claims to the SEC must be filed under oath and subject to perjury charges (the SEC provides claim forms in the proposed rules)



# Whistleblower Provisions: Section 922

## Practical Considerations

- Internal controls & audit
  - Enhanced need to identify potential issues
- Investigation of complaints
  - Ensure whistleblowers are protected
  - Shorter time frame to investigate
- Disclosure
  - Potential whistleblower has financial incentive, thus increasing likelihood of SEC/DOJ report
  - Shorter time frame to make decision



# Whistleblower Provisions: Section 922

## Impact on the FCPA

- Incentive program for whistleblowers: size of FCPA penalties has greater potential to trigger increase in reporting
- Increase in the number of FCPA investigations and prosecutions as SEC typically will refer matters to DOJ
- Impact on non issuers through industry probes
- DOJ may share information with foreign prosecutors



# FCPA Compliance Program Pitfalls

- Gold standard compliance program on paper
- Lack of appropriately dedicated resources to ensure that management's control objectives are being adequately met
- Lack of or insufficient monitoring activities to ensure program is implemented and fully functioning throughout the company
- Lack of understanding of higher risk third parties
- Lack of appropriate third party management program to mitigate risk associated with using a third party
- Contracts contain audit rights but lack specificity on when to exercise the rights
- Lack of benchmark to assess fair market values of HCP services



# Final Thoughts on Anticorruption Laws

- Increasing focus on financial controls: monitors now required to evaluate internal controls, recordkeeping and financial reporting policies and procedures
- Thorough analyses/audits can demonstrate to regulators that the company's compliance program is robust
- Understand key areas of operation, business models and risk factors
- Be aware of business activities with governmental entities for evidence of potential corruption
- Understand the activities of third parties and what specific services they are providing
- Understand what accounts are used to record compliance sensitive transactions, support required, and what is recorded in these accounts
- Insights on payment and third party retention processes
- Get to know any local regulations applicable to this area – consult with local counsel

