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The Foreign Corrupt Practices Act (FCPA): An Overview

The Foreign Corrupt Practices Act (FCPA) of 1977 generally prohibits corrupt payments to foreign officials in exchange for obtaining or retaining business. Congress enacted the FCPA in response to an investigation conducted by the Securities and Exchange Commission (SEC) following the Watergate scandal. That investigation revealed that U.S. companies had spent hundreds of millions of dollars bribing foreign officials to secure business abroad. The FCPA targets such practices through both anti-bribery and accounting provisions.

Anti-Bribery Provisions

The FCPA's anti-bribery provisions generally prohibit making corrupt payments (or giving anything of value) to a foreign official to obtain or retain business.

Who is covered? The anti-bribery provisions apply to the following categories of persons and entities, as well as to their officers, directors, employees, agents, or stockholders acting on their behalf.

1. **Issuers** (15 U.S.C. § 78dd-1): companies that have securities registered with the SEC or that must file reports with the SEC;
2. **Domestic concerns** (15 U.S.C. § 78dd-2): U.S. citizens or residents and businesses organized in the U.S. or that have their principal place of business in the U.S.;
3. **Territorial concerns** (15 U.S.C. § 78dd-3): foreign nationals or entities who engage in any act in furtherance of a covered corrupt payment while in U.S. territory.

Issuers and domestic concerns must use interstate commerce (defined to include "trade, commerce, transportation, or communication among the States or between any foreign country and the States") in furtherance of the corrupt act to fall within the scope of the FCPA.

Who is a foreign official? A foreign official refers broadly to an employee of a foreign government, whether high or low in rank. The term also includes employees of an "instrumentality" of a foreign government—which may include a state-owned or state-controlled enterprise (e.g., a state-run hospital or energy company). Courts consider factors such as the foreign state's degree of ownership and control over an entity in determining whether it is an "instrumentality" of the government. The definition further includes a foreign political party or candidate, as well as officers or employees of public international organizations (like the World Bank).

Intent and "business purpose." A defendant must act "corruptly" to violate the Act, that is, with an intent to wrongfully influence the recipient. Corrupt intent may include willful blindness or conscious avoidance. The purpose of the payment must be to assist any person or company in obtaining or retaining business. A common example of a violation is a bribe to obtain a government contract. A defendant need not have actually completed a bribe to violate the Act, so long as they offered, promised, or authorized it.

Exceptions and affirmative defenses. The Act contains a narrow exception for so-called "grease payments"—that is, payments to facilitate or expedite the performance of a nondiscretionary, routine governmental action. Examples may include processing visas or providing mail services. The Act also includes two affirmative defenses. First, under the "local law defense," a defendant can prove that the bribe at issue was legal under the foreign country's written laws. Second, the "reasonable and bona fide expenditure" defense applies to business-related expenses, such as a foreign official's travel and lodging, if directly related to the demonstration or performance of a company's services.

Accounting Provisions

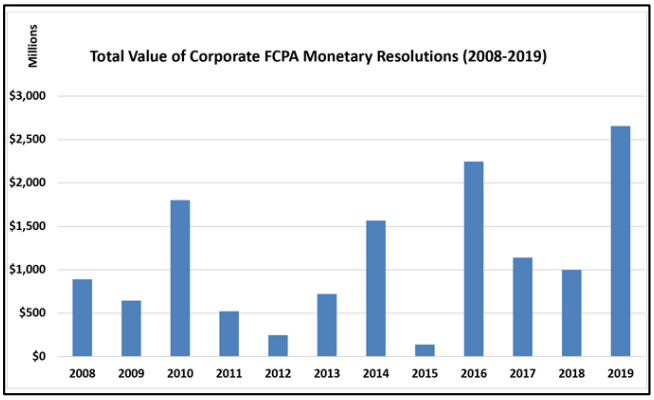
The FCPA's accounting provisions, 15 U.S.C. § 78m(b)(2), require issuers to keep accurate books and records in a reasonable level of detail and to devise and maintain adequate internal accounting controls. The purpose of the accounting provisions is to ensure that corporations do not conceal bribes in their accounts or use corporate funds for improper purposes. Although enacted as part of the FCPA, the accounting provisions do not apply just to bribery, but set forth a broad standard to be applied to a public company's accounting for its assets and liabilities. Under the Sarbanes-Oxley Act, passed in the wake of accounting scandals at a number of U.S. businesses in the early 2000s, certain company officers must evaluate and assess these internal controls, and certify that they are well-designed, as part of periodic financial filings with the SEC.

Enforcement and Penalties

The Department of Justice (DOJ) and the SEC share enforcement authority under the Act. The DOJ has criminal enforcement authority and the SEC has civil enforcement authority over issuers. In practice, the DOJ and SEC settle most FCPA investigations with subject companies rather than obtaining a conviction or court judgment. FCPA settlements generally require cooperation with the government, payment of penalties, and remediation commitments. Settlement agreements may take different forms. For example, under a deferred prosecution agreement (DPA), the agency agrees to postpone prosecuting charges it has filed against the subject company, and to later dismiss them, if the company abides by the terms of the DPA. Under a non-prosecution

agreement (NPA), the agency foregoes filing and prosecuting charges if the company abides by the agreement.

FCPA settlements often require the subject corporation to pay criminal and civil penalties, or to disgorge gains, amounting to millions—if not hundreds of millions—of dollars. While the level of penalties varies from year to year, 2019 broke records, with corporate penalties totaling over $2.5 billion. This total includes a landmark settlement with Ericsson, a Swedish telecom company registered as an issuer with the SEC. Through a DPA, Ericsson agreed to pay penalties of over $1 billion for engaging in large-scale bribery schemes in five countries, including China and Vietnam. Ericsson subsidiaries paid bribes to win contracts from state-owned customers, recording the bribe monies in their books as expenses from sham service agreements.



Source: Gibson Dunn & Crutcher, LLP, 2019 Year-End FCPA Update (Jan. 6, 2020).

Notes: FCPA penalty figures reported by different sources may vary to some degree, depending on the components of the penalty they include in the total. For example, if a settlement agreement offsets penalties paid to foreign regulators for the same misconduct, some sources omit the offset amount when citing the total penalty amount, while other sources may include it.

The DOJ and SEC consider a number of factors when deciding whether to initiate or resolve corporate investigations under the FCPA. These include the pervasiveness of wrongdoing within the corporation, the existence and strength of a compliance program, and the corporation's cooperation in the investigation. Additionally, under its FCPA Corporate Enforcement Policy announced in 2017, the DOJ presumptively declines to prosecute voluntary self-disclosures by corporations that meet certain conditions. In 2018, the DOJ also announced a policy encouraging cooperation with foreign regulators to prevent "piling on" duplicative penalties for the same misconduct. The policy is particularly relevant to FCPA cases, due to the likelihood that companies may be liable in multiple jurisdictions based on the same conduct.

Issues for Congress

The goals of the FCPA include safeguarding the reputations of U.S. businesses abroad and maintaining public confidence in the integrity of markets. The Act also discourages harmful corruption overseas. Opponents have argued, however, that the Act has a chilling effect on U.S. corporations conducting business abroad, particularly given the large penalties that may be at stake. Some also argue that the FCPA puts U.S. businesses at a competitive disadvantage in the global marketplace. However, a convention of the Organization for Economic Co-operation and Development (OECD) that was finalized in 1997 requires all signatories to enact laws criminalizing foreign bribery, placing other nations on similar footing. Selected legal issues concerning the FCPA that have been considered by Congress, the courts, and commentators include:

Additional defenses. Some in the business community argue for strengthened affirmative defenses, such as a defense based on a company's implementation of a strong, good-faith FCPA compliance program. Proponents argue that such a "safe harbor" may provide businesses with increased certainty about their legal exposure. They posit that the prevalence of FCPA settlements means that there is a relative lack of judicial precedent and oversight when it comes to interpreting key FCPA provisions, making it difficult for companies to understand their precise obligations under the Act. The DOJ has stated, however, that the strength of compliance programs is already considered in prosecutorial decisions, and that this defense may cause a "race to the bottom" as companies institute mere check-the-box programs.

Extraterritorial reach to foreign actors. Some commentators also argue that the Act is vague regarding when foreign actors come within its scope. The enforcing agencies have stated that they might prosecute foreign actors under general principles of conspiracy and accomplice liability, even if they could not prosecute those parties independently under the Act (e.g., as "territorial concerns"). However, in a 2018 decision, *U.S. v. Hoskins*, the U.S. Court of Appeals for the Second Circuit rejected that approach. In *Hoskins*, the DOJ sought to impose conspiracy and accomplice liability on a foreign employee of a foreign company who coordinated a U.S. company's bribes to Indonesian officials, but had never set foot in the U.S. The court held that he could not be prosecuted unless the DOJ proved he was an "agent" of the U.S. company, and thus independently liable under the FCPA. The court reasoned that Congress's precise description of the categories of persons who can be liable under the FCPA reflects an intention to leave persons not specified in the Act's language beyond its reach. The court also held that Hoskins could not be held directly liable as a "territorial concern" because he was never present in the U.S.

No private right of action. Courts have repeatedly held that the FCPA does not authorize a private right of action. While observers posit that corruption potentially harms competitors, shareholders, government agencies, and the citizens of foreign countries, these FCPA "victims" do not typically receive compensation often available in other criminal or securities matters, such as restitution, grants from the Crime Victims Fund, or securities law Fair Fund distributions. Bills introduced in Congress have sought to provide a private right of action for harmed businesses or to use FCPA penalty funds for specific causes.

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