

Compliance with U.S. Antibribery Laws

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Client Advisory

June 1, 2009 by Guy P. Lander, Gary D. Sesser and Jinsoo J. Ro

Background

The past two years have seen a substantial increase in the investigation and prosecution of international business corruption cases. In the United States, the antibribery provisions of the Foreign Corrupt Practices Act ("FCPA") prohibit U.S. persons from making corrupt payments to certain prohibited foreign persons for the purpose of obtaining or retaining business for or with, or directing business to, any person.

Prohibited foreign persons include foreign officials, foreign political parties and their officials, and candidates for foreign political office. The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

Additionally, the FCPA prohibits U.S. persons from making corrupt payments to any person while knowing that the payment is intended for a prohibited foreign person.

Since 1998, the FCPA also applies to foreign firms and persons who take any act in furtherance of a corrupt payment to a prohibited foreign person while in the U.S. The Department of Justice is responsible for all criminal enforcement and for civil enforcement with respect to domestic concerns and foreign companies and nationals. Violations of the antibribery laws may result in severe penalties, including criminal penalties and imprisonment for individuals.

Illegal Payments

- **Bribes:** Do not give or offer to give any money, gift, or thing of value to any foreign official to obtain or retain business.
- **Political Contributions:** Do not make contributions to political parties or officials to obtain their support for executive, legislative, administrative, or other action that may be favorable to the company.
- **Third-Party Payments:** Do not give or offer to give any money, gift, or thing of value to a third party when you know or have reason to know that it will be offered to a foreign official to obtain or retain business.

Legal Payments

- **Social Amenities:** You may make payments for meals, travel, entertainment, and other normal social amenities for foreign officials provided the expenses are not extravagant and otherwise conform to the laws and customs of the country in which the expenditures are incurred.
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- Gifts: Except as described under "Bribes" above, you may give gifts to foreign officials provided the gifts are of modest value and conform to laws and normal social customs in the official's country.
- Routine Governmental Action Payments: Certain countries require payments to foreign officials to expedite or secure performance of routine governmental actions. The FCPA includes an exception for payments that facilitate the following governmental actions:
 1. Providing licenses, permits, and other official documents to qualify to do business in a foreign country.
 2. Processing governmental papers such as visas and work orders.
 3. Providing police protection, mail services, and inspections of goods.
 4. Providing phone service, power and water supplies, loading and unloading cargo, and protecting perishable goods from deterioration.
 5. Other actions of a similar nature.

In certain parts of the world it is common for government employees to receive "grease," "facilitating," or "expediting" payments. These payments are prohibited if they are intended to influence the decision or action of a foreign official concerning the awarding of new business or continuation of existing business.

Record Keeping and Accounting

To assure compliance with the FCPA, it is necessary to maintain books and records that accurately and fairly reflect the transactions of the Company. A parent company subject to the FCPA is also legally responsible for the accounting practices of all its international subsidiaries unless the parent company owns less than 50 percent of the international subsidiary, and the parent company reasonably and in good faith uses its influence to cause the less than 50 percent owned international subsidiary to make and keep 1) accurate books and records, and 2) a system of internal accounting controls.

Other Considerations

- Retaining Agents: Because the actions of a third party acting as an agent can expose a company to liability under the FCPA, exercise caution in retaining agents. You must sufficiently investigate each agent to ensure that the agent does not intend to engage in any improper practices. Questions to consider include:
 1. What is the relevant country, and does it have a history of FCPA violations?
 2. What is the agent's reputation?
 3. What is the commission amount? If it is above the "going rate," then a high-risk situation might exist.
 4. Has the agent refused to provide representations on his conduct (such as whether he or she is aware of the FCPA and has taken no action that would violate the FCPA)?
 5. What is the relationship between the agent and the government? If he or she is related to the country's royal family or top government officials, the possibility of a problem is greater.

6. Have there been any corporate political contributions reported in the relevant country?
7. Have there been any payoffs to foreign government officials in the relevant country?
8. Has a payment been made to a third party or through a third country?
9. Have any transactions been recorded as “cash” or otherwise recorded without proper documentation?
10. Have managers of foreign operations been paid unusual bonuses?
11. Has the agent employed a subagent without prior written approval?
12. Does the agreement between the company and the agent contain a clause stating that the agent understands and will comply with the FCPA?
 - Government-Owned Businesses: It is common practice in some countries for government officials to own or operate business enterprises. The FCPA does not prohibit legitimate business relationships with these enterprises, but be careful to avoid any association with such an enterprise in circumstances that might constitute an evasion of the FCPA.

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