

FCPA: Anti-Bribery Provisions

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The Foreign Corrupt Practices Act (FCPA) addresses the problem of international corruption in two ways: (1) the anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business; and, (2) the accounting provisions impose certain recordkeeping and internal control requirements on issuers and prohibit individuals and companies from knowingly falsifying an issuer's books and/or records or circumventing or failing to implement an issuer's system of internal controls. Violations of the FCPA can lead to civil and criminal penalties, including fines, disgorgement of profits, and/or imprisonment. Generally, the FCPA prohibits offering to pay, paying or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. **Who is Covered by The Anti-Bribery Provisions?** The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in U.S. territory. **Issuers—15 U.S.C. § 78dd-1** Section 30(a) of the Securities Exchange Act of 1934 contains the anti-bribery provision governing "issuers." A company is an "issuer" under the FCPA if it has a class of securities registered under § 12 of the Exchange Act or is required to file periodic and other reports with the SEC under § 15(d) of the Exchange Act. In practice, this means any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with the SEC, is an "issuer". A company need not be a U.S. company to be an issuer. **Domestic Concerns—15 U.S.C. § 78dd-2** The FCPA also applies to "domestic concerns." A domestic concern is any individual who is a U.S. citizen, national, or resident, or any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship that is organized under U.S. laws, or that has its principal place of business in the United States. Officers, directors, employees, agents, or stockholders acting on behalf of the domestic concern, including foreign nationals or companies, are also covered. **Territorial Jurisdiction—15 U.S.C. §78dd-3** The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the FCPA's anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an

agent, engage in any act in furtherance of a corrupt payment (or an offer, promise or authorization to pay) while in U.S. territory. Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA's anti-bribery prohibitions. **What Jurisdictional Conduct Triggers The Anti-Bribery Provisions?** The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines "interstate commerce" as "trade, commerce, transportation or communication among the several states, or between any foreign country and any state or between any state and any place or ship outside thereof." The term also includes the intrastate use of any interstate means of communication or any other intrastate instrumentality. Thus, placing a telephone call or sending an email, text message or fax from, to, or through the United States involves intrastate commerce, as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States. **What Is Covered? The Business Purpose Test** The FCPA applies to payments intended to induce or influence a foreign official to use his or her position "in order to assist...in obtaining or retaining business for or with, or directing business to, any person." This requirement is known as the "business purpose test" and is broadly interpreted. Not surprisingly, many enforcement actions involve bribes to obtain or retain government contracts. The FCPA also prohibits bribes in the conduct of business or to gain a business advantage. For example, bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test. As companies develop their efforts to ward off public bribery and corruption within their operations, the U.S. government continues to refine the way it brandishes the FCPA to fight global corruption. General counsel would be well advised to keep current on the Department of Justice's enforcement trends and evolving prosecution theories.

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