



FCPA Training



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FCPA Training

Anti-corruption, why should you care?

Ethical reasons (right thing to do)

Practical Reasons

Criminal and civil liabilities

Contractual liabilities

Business Reasons

Bribes increase the cost of doing business

Buy unenforceable contract

Induce officials to create new rules and delays

Undermine your company's compliance culture

Damage to the SMSA brand

Customers require compliance

The Foreign Corrupt Practices Act

US anti-corruption law with extra-territorial reach

Prohibits making improper payments to foreign officials for the purpose of obtaining or retaining business

Two components:

Anti-bribery provisions

Accounting provisions (internal controls and record-keeping)

Applies to you as a SMSA representative!

FCPA: Anti-bribery Provisions

The FCPA defines bribery broadly to include:

- a “covered” person
- making a payment, offering to pay, promising to pay, or authorizing a payment of money or anything of “value”
- to any foreign government official, political candidate or political party, or public international organization
- directly or indirectly
- to “obtain or retain business” or other improper business advantage
- with “corrupt” intent

FCPA: Who is a “Covered” Person?

The FCPA covers:

1. U.S. citizens and U.S. companies wherever they are located
2. Non-U.S. citizens employed by U.S. companies
3. Foreign citizens or entities when they are engaged in activities in the U.S.
4. Vendors when acting on a US company's behalf, even if SMSA is unaware

FCPA: What Types of Payments Violate the Law?

Making, offering, promising payment

Any benefit to recipient

cash, reimbursements, lavish hospitality, travel, lodging, transportation, meals, entertainment, gifts, loans, services, vacations or other benefits, even offers of future employment

No matter how small the amount

any payment made with corrupt intent can violate the law

Even if it is not given directly to the foreign official

scholarships for family members indirectly benefit the official

contributions to a designated charity can also violate the law

FCPA: Who is a “Foreign Official”?

Foreign officials regardless of rank or position - very broadly defined

Persons employed by a foreign government

Political candidates and parties

Officials of a state owned or controlled business

Public international organizations (e.g. World Bank, IMF)

Private companies wholly or partially owned by a foreign official or in which a foreign official holds an interest

Private persons acting in official capacity

Includes ceremonial advisors, consultants, etc.

Remember: Gifts to private persons at the request of officials are prohibited

FCPA: to “Obtain or Retain Business”?

Prohibited is a payment made to obtain or retain business by:

- Influencing any official act or decision
- Inducing official to do or omit to do acts in violation of official duties
- Securing any improper advantage

Need not relate to a specific business opportunity

Business need not be with the foreign government

FCPA: Is there “Corrupt” Intent?

Benefit must be conferred or offered to induce foreign official to abuse or misuse his/her position or authority through action or inaction

Quid pro quo generally assumed

- Gift/payment made with reasonable expectations of some official favor in return
- Quid pro quo need not be executed
- Official need not be able to deliver “quo”

Government need not establish defendant knew his/her conduct violated FCPA

FCPA: Exceptions and Affirmative Defenses

Exception: Facilitating payments

A facilitating payment is a small nominal amount paid to a foreign official to expedite or secure the performance of a routine governmental action (an action which is ordinarily and commonly performed by a foreign official (a non-discretionary duty), e.g. processing a visa, providing police protection, ...)

Only if legally permitted under local law (almost never the case)

Only permitted with prior SMSA approval

Affirmative defenses (violation exists, but defense possible)

Payments authorized by written foreign law (almost never the case)

Bona fide & reasonable business expenditures

FCPA: Accounting Provisions

Record keeping provisions

Keep accurate books and records

Facilitating payments (if approved) must be accurately described

Meals, gifts and other expenses involving officials must be fully and accurately documented

FCPA never permits payments to government officials

“Off the books” or

“Out of your own pocket”

Internal accounting controls must be in place to ensure compliance

Include FCPA concerns in regular audits of books and records

Periodic targeted internal audits of high risk countries & departments

FCPA: Enforcement and Penalties

Enforced by DOJ and SEC

Penalties Include

Criminal and Civil Fines

Imprisonment

Plus disgorgement of all related profits

Liability for bribery under local laws

Collateral Consequences

Harm to SMSA reputation and brand name

Make ineligible for export licenses and governmental contracts

Unlawful FCPA payments are not tax deductible as business expense, but are taxable items

FCPA: Recent Enforcement Trends

Record increases in enforcement activity and penalties

Non-prosecution or deferred prosecution agreements

Increased use of independent compliance monitors

Increased voluntary disclosures

FCPA: Recent anti-bribery cases

Siemens – USD 1.6 billion in fines and penalties to US and Germany

Novo Nordisk – USD 18 million in fines and penalties

Halliburton – USD 579 million in criminal and civil penalties (additional criminal indictments)

Organization for Economic Cooperation and Development (OECD) Anti-bribery Convention

Globalization" of U.S. law

Makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain international business deals

Ratified by 30 OECD countries and 8 non-OECD countries

All ratifying countries have enacted some form of anti-bribery laws based on the convention

Ratification of OECD Convention

Other anti-bribery rules/initiatives

Note that (almost) every country in the world has anti-corruption legislation: corruption is not permissible in any territory even if corruption is considered a genuine business practice locally!

UN Convention against Corruption

Council of Europe Criminal Law Convention on Corruption

World Economic Forum Partnering Against Corruption Initiative (PACI)



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