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{>> Foreign Corrupt Practices Act //]

FCPA Definition
FOREIGN CORRUPT PRACTICES ACT -

The risk of doing business abroad has just increased dramatically as non compliance with the Foreign Corrupt Practices Act has made the need to evaluate relationships with third party representatives, customers, and merger and acquisition partners imperative.

This paper is designed to describe the act in detail and provide guidance for multinational companies on creating a proactive approach to keep in step with the spirit of the act. The objective is not only to discuss how to create and implement a policy, but also to discuss ways to implement controls so that any legal professional can make sure these policies are being implemented and risk is being properly assessed. This guide will initially describe the act in detail, give tips on creating strategies that will help to stay in compliance, and then concludes with an in depth process for establishing ongoing due diligence procedures.

Definition

The Foreign Corrupt Practices Act is a federal law enacted in 1977 to prohibit companies from paying bribes to foreign government officials and political figures for the purpose of obtaining business. In a recent press release, the Department of Justice stated that the number of investigations increased to 120 separate companies, up from 50 investigations in 2007. There are two provisions to the Foreign Corrupt Practices Act. First, the anti-bribery provisions which are enforced by the Department of Justice and second, the accounting provisions which are enforced by the Securities and Exchange Commission (SEC).

There are three types of entities prohibited from making improper payments:

Issuers, domestic concerns, foreign nationals and businesses

< Issuers >

Companies that have securities registered in the U.S. are required to file reports with the Securities and Exchange Commission and are considered issuers.

< Domestic concerns >

Any person or business entity, as well as nationals and residents of the U.S. are considered domestic concerns. This includes any entities who have their principal place of business in the U.S. or who are organized under the laws of the U.S. Both issuers and domestic concerns may be held liable for any act that promotes a corrupt payment, through U.S. mail or any instrument of interstate commerce, or for an act which occurs outside of the U.S.

< Foreign nationals and businesses >

A foreign national or business may be held liable for any act that promotes a corrupt payment within the U.S. Unlike the first two entities, foreign nationals and businesses are not liable for acts committed outside of the U.S.

Third parties and agents

A third party or agent acting on behalf of an issuer, domestic concern or foreign national or business is liable under the same conditions as the issuer, domestic concern, foreign national or business.

IN THE NEWS

"Frederic Bourke was convicted ... of conspiring to violate the Foreign Corrupt Practices Act and the Travel Act, and lying to FBI agents. He was acquitted of money laundering. The judge has already said she will impose less than the 10-year maximum sentence prosecutors have asked for. Bourke, 63, is co-founder of well-known handbag brand Dooney & Bourke. The jury found that he invested in Czech-born promoter Viktor Kozeny's unsuccessful attempt in 1998 to gain control of Azerbaijan's state oil company, Socar, despite knowing Kozeny planned to bribe Azeri leaders. Kozeny has also been charged in the case but is a fugitive living in the Bahamas."
Source: FCPA Blog

"Valve-maker Control Components Inc. (CCI) of Rancho Santa Margarita, California pleaded guilty... to violating the anti-bribery provisions of the Foreign Corrupt Practices Act and the Travel Act. It admitted bribing foreign officials in a decade-long scheme to secure contracts in about 36 countries. CCI's plea agreement requires it to pay a criminal fine of $18.2 million, implement an anti-bribery compliance program, retain a compliance monitor for three years, serve a three-year term of organizational probation, and cooperate with the DOJ's ongoing investigation."
Source: FCPA Blog

FCPA Violations / Exceptions / Accounting Provisions

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VIOLATIONS OF THE FCPA

Here are the five elements that constitute a violation of the anti-bribery provision:

Payment

The FCPA states that payments includes offers, payments and promises to pay, gifts, promises to give or authorization to pay, offer or give anything of value. Anything of value includes tax benefits, information, and promises of future employment, scholarships, discounts, entertainment, travel expenses and insurance benefits.

Foreign official

The Foreign Corrupt Practices Act prohibits payments made to a foreign official, political party, political party official or a candidate for foreign political office. Payments made to third parties are prohibited if the payer knows that the payment is meant for the foreign official, whether direct or indirectly. Knowledge includes deliberate ignorance or conscious disregard. A foreign official also can be an executive of a company that is owned by a foreign government.

Corrupt intent

Corrupt intent is defined as any payment made with the purpose of influencing an act or decision or inducing an official to act in violation of that official's lawful duty.

Securing an improper advantage

Inducing an official to use their influence to affect any governmental act or decision is also a violation of the FCPA.

Business purpose

In addition to a corrupt intent, a payment must be made with the objective of obtaining, retaining and/or directing business.

FCPA Exceptions

There are three exceptions to the Foreign Corrupt Practices Act:

Payments for routine government actions

Payments which expedite or secure the performance of a routine governmental action by a foreign official, political party or party official are not prohibited.

Payments which are lawful under foreign law

A payment is not prohibited if it is lawful under the laws and regulations of the relevant foreign country.

Reasonable and bona-fide expenditures

A payment which is a reasonable bona fide expenditure and directly related to the promotion, demonstration or explanation of products or services, or directly related to the execution or performance of a contract is not prohibited.

FCPA Accounting Provisions

Accounting provisions only apply to issuers who are required to keep records and accounts which accurately reflect the transactions and dispositions of the issuer's assets.

A company may be liable if its records:

- Omit a transaction, such as a bribe, illegal commission, or other improper payment
- Disguise records to conceal improper activity or fail to identify the improper nature of a recorded transaction

Internal controls

Issuers are required to maintain a system of internal accounting controls to provide reasonable assurances that transactions are executed in line with management's authorization. All transactions must be recorded in a manner that permits the preparation of financial statements that conform to generally accepted accounting principles (GAAP) and maintain accountability for assets. The access to assets is allowed only with management's authorization and the accountability for said assets must be compared with the existing assets at reasonable intervals. When identified, appropriate action must be taken with respect to any differences.

Liability for acts of subsidiaries

Issuers can be held liable for the conduct of their foreign subsidiaries, even though the improper conduct occurred outside of the U.S. The scope of liability is based on the issuer's incorporation of the subsidiary's financial statements in its own records and SEC filings.

Obligations of minority owners

An issuer who owns fifty percent or less of the voting power of another company is subject to modified accounting provisions. It is the issuer's responsibility to use his or her influence to have the company develop and maintain a system of internal accounting controls.

National security exception

The accounting provisions do not apply if an issuer's liability results from their cooperation with the federal government on a matter concerning national security.

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Senior management may be liable if they certify statements which fail to disclose known violations of the Foreign Corrupt Practices Act's accounting provisions.

FCPA Penalties / Sanctions

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FCPA Penalties

The Securities and Exchange Commission is charged with enforcing violations of the accounting provisions, while the Department of Justice is primarily responsible for enforcing the anti-bribery provisions. Both agencies can institute civil actions, but only the Department of Justice is authorized to file criminal charges.

Penalties for individuals: Anti-bribery provisions

- Civil penalty up to $10,000
- Criminal fine up to $250,000 and or imprisonment up to 5 years
- Under the Alternative Fines Act, the fine may be increased to twice the gross financial gain or loss resulting from the corrupt payment.
- A criminal fine imposed on an individual cannot be paid directly or indirectly by the company on whose behalf the person acted

Penalties for entities: Anti-bribery provisions

- Civil penalty up to $10,000
- Criminal fine up to $2 million
- The Alternative Fines Act may increase the criminal fine to twice the gain or loss resulting from the corrupt payment

Penalties for individuals: Accounting provisions

- Civil penalty up to $100,000
- Criminal fine up to $5 million or twice the gain or loss caused by the violation, and or imprisonment up to 20 years
- Fines cannot be paid directly or indirectly by the company on whose behalf the person acted

Penalties for entities: Accounting provisions

- Civil penalty up to $500,000
- Criminal fine up to $25 million or twice the gain or loss caused by the violation

FCPA Other Penalties / Sanctions and Consequences

Other government penalties and negative effects of non-compliance that apply are:

- Suspension or debarment from securing contracts with the government
- An indictment can lead to suspension
- The suspension or debarment of a business by one government agency disqualifies it from contracting with any other government agency
- Private lawsuits
- No private rights of action
- Securities class actions or shareholder derivative suits

Other negative pecuniary effects:

- Lawsuits based on antitrust laws and common law prohibitions due to contract and unjust competition
- Reputational and brand image damage, which can lead to decrease in overall value of company
- Additional man hours needed to deal with investigations which creates additional controls if cited for a violation
- Costs of restructuring organization during and after investigation
- Fees associated with dealing with a investigation can exceed penalties themselves
- Additional civil lawsuits by shareholders against executives can be costly to litigate

How to Prevent FCPA Liability

Compliance programs

Employees should receive regular training on anti-bribery laws and certify that they understand and will follow corporate policy. Employees should also be informed on the proper procedure, contact channels for guidance, and how to report possible violations. Third party relationships (joint venture partners and agents) should be required to verify their compliance with anti-bribery laws. Companies should develop comprehensive due diligence procedures to investigate joint venture partners, agents, and targets of prospective mergers and acquisitions. Finally, companies should monitor current records to maintain that individuals do not hold a political office or have close relationships with government officials or organizations.

Attorney general opinions

Issuers and domestic concerns can contact the Attorney General for guidance concerning whether certain conduct violates the FCPA's anti-bribery provisions. The request must specify exact facts related to the actual conduct since the Department of Justice will not provide opinions on hypothetical situations. After a potential violation is discovered, it is recommended to conduct an internal investigation, preferably by outside counsel in the country where the violation took place. It is important to implement prompt remedial and disciplinary action as deemed necessary.

FCPA Recommended Steps

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Recommended steps for compliance with FCPA:

Step 1 Create an internal "FCPA policy" that states what relationships should be evaluated by your organization. This policy should create a risk rating based on location of business, corruption history of the region. The policy should also institute a due diligence procedure for all new and existing external relationships. External relationships include all third party intermediaries such as consultants, marketing representatives, mergers and acquisitions partners, agents, vendors, and customers.

The policy needs to assess the threshold of ownership to be considered a "government owned business" so that all employees know that a certain percentage of ownership represents a certain level of risk. If an institution has a high number of third parties to evaluate, said organization might want to lower the ownership threshold for high risk countries. For example, your policy may state to consider all companies that have over 50% government ownership to be considered high risk, while companies in countries known for corruption would need to be defined as very high risk with the ownership threshold being lowered to over 25% government ownership.

Step 2 Create a written policy to be used by all business partners overseas to adhere to your FCPA guidelines. For example, the policy should describe how all expenses are to be monitored and documented.

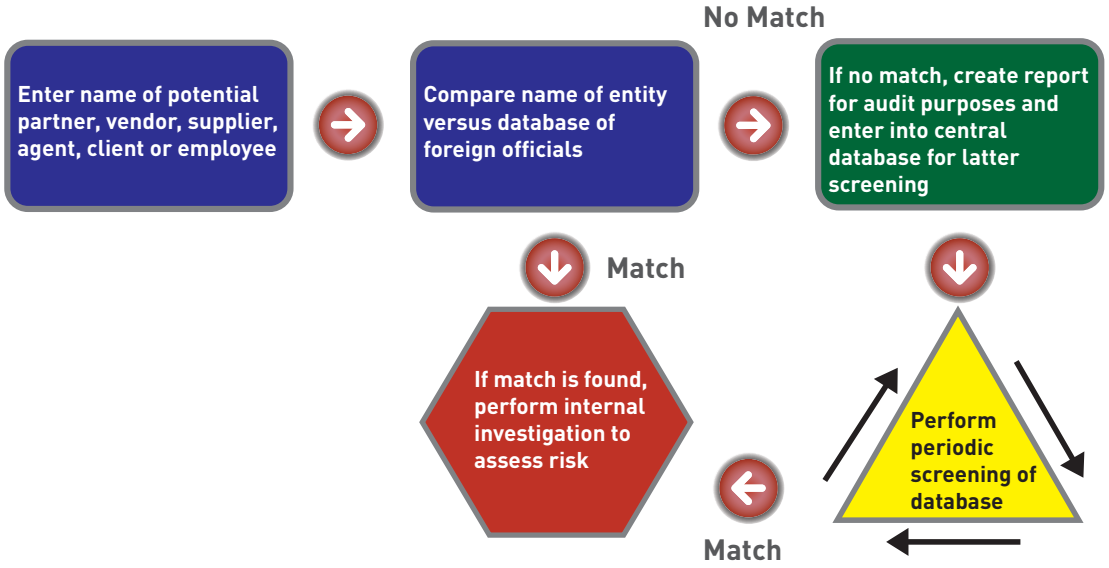
Step 3 Create a system where all new relationships in foreign countries with vendors, third party agents, resellers, etc. are properly vetted and screened to ensure individuals or companies are not linked to politicians or their contacts (PEPs). Institute a system to screen all current relationships periodically to measure the risk of individuals and companies. This step is necessary to identify whether the entity or organization in question has been linked to high risk activities or persons with political influences, or PEPs since the previous screening. A comprehensive database covering PEPs, individuals on sanction lists and entities on enforcement lists should be utilized during this process and reports generated to track these activities.

The database should contain the following types of entities:

- Foreign Officials: The definition should meet the FCPA requirement
- Foreign Officials Family Members/Associates: The database should reflect business partners and family members of foreign officials
- Government Owned Entities: After defining the ownership threshold, the database should be able to match your requirements
- Associates (Government Owned Entities): The associates should be defined so that the high ranking executives and board members are included within the database

Conclusion

Meeting your organization's risk management requirements is a demanding and time consuming responsibility. The relationships between multiple vendors, agents, and partners across continents are complex and extremely fluid. To meet this challenge, WorldCompliance has created one of the most sophisticated tools that will allow your organization to recognize and assess risk. More than any other open source intelligence company, WorldCompliance provides the combination of comprehensive database coupled with the capacity to tailor the information to your specific risk management needs. Our global presence and experience working with Fortune 1000 companies provides us with the unique ability to help your organization navigate through the FCPA requirements.



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