

Compliance to Foreign Corrupt Practices Act

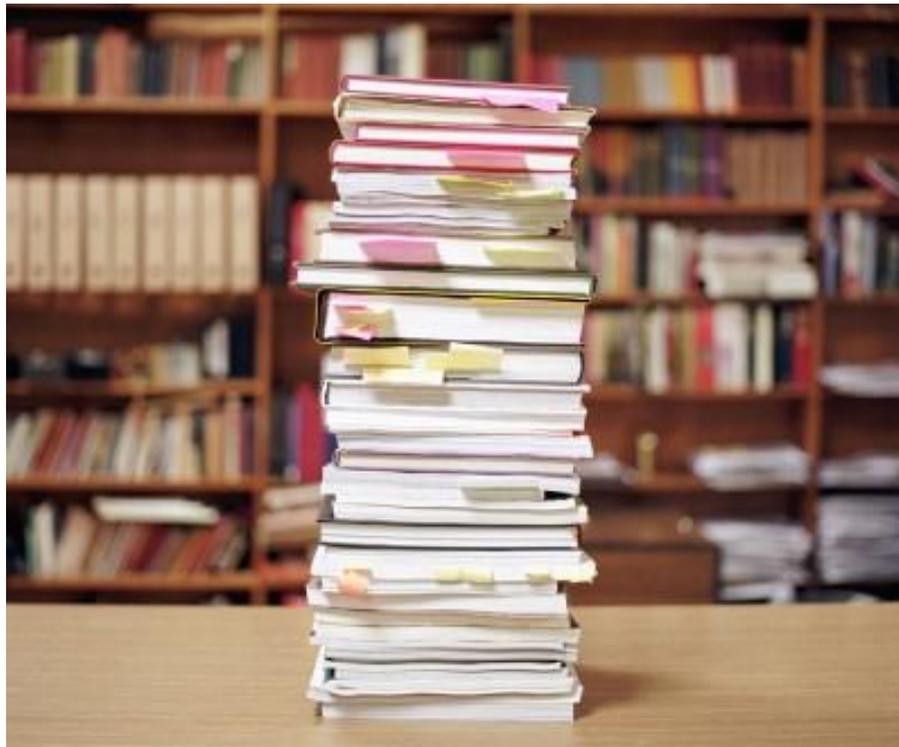


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Today's Objectives

1. To increase knowledge of the FCPA anti-bribery laws
2. To review anti-bribery prohibitions
3. To review accounting requirements

Today's Regulatory Environment



Anti-corruption Legislation Is Becoming a Global Standard

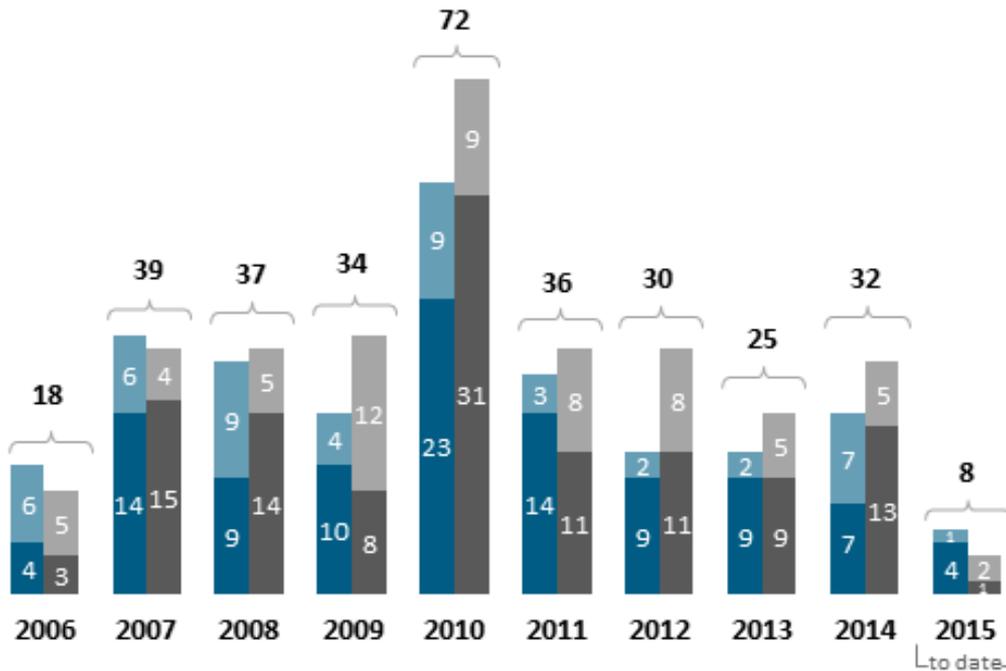
The Foreign Corrupt Practices Act (FCPA) was introduced in 1977 and amended in 1988 and 1998. Following the FCPA, a number of agreements have resulted in many other countries enacting similar legislation.

- Inter-American Convention (1996)
- Organization for Economic Cooperation and Development (OECD) Convention (1997)
- United Nations Convention Against Corruption (2005)
 - First session held December 2006
- United Kingdom's Bribery Act (2010)
- Additional country-specific legislation

The Current Enforcement Climate



**Resolved FCPA Enforcement Actions By Year
from 2006 to 2015**



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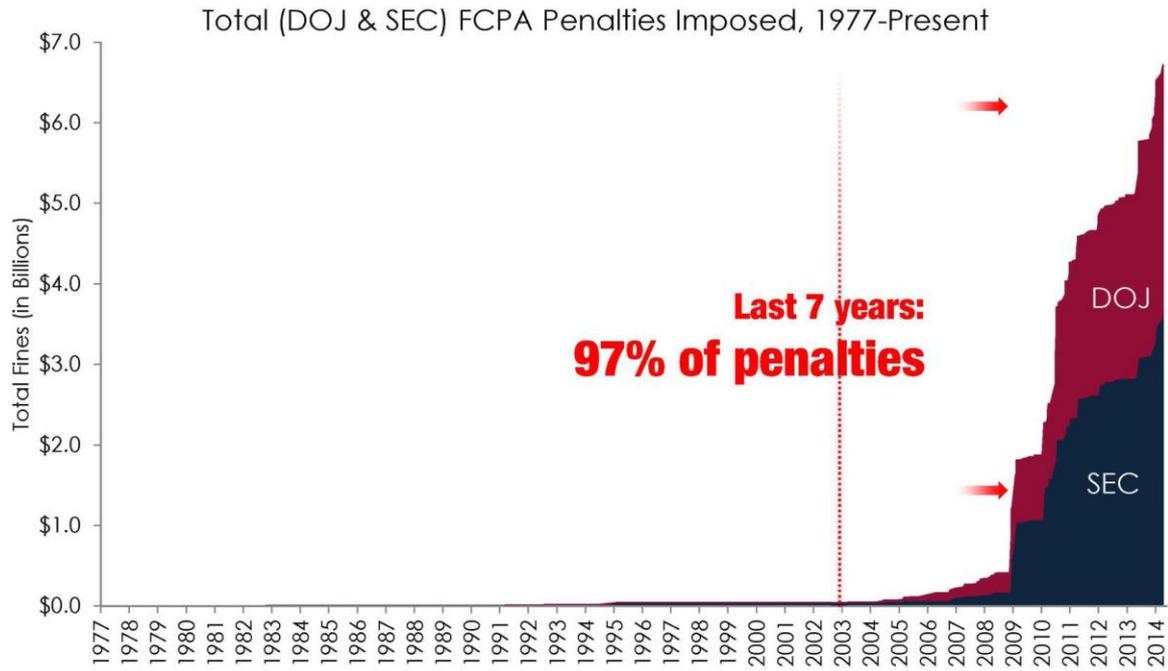
■ SEC Corporate ■ SEC Individual ■ DOJ Corporate ■ DOJ Individual

Note: Updated through July 15, 2015. These statistics count each distinct resolution involving a company and its affiliates as a separate enforcement action. They also include: (a) resolved enforcement actions against Keyuan Petrochemicals, BAE and James Giffen as FCPA-related; and (b) SEC default judgments.

The Current Enforcement Climate

Size of Penalties Are Growing

FCPA ENFORCEMENT OVERVIEW



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Trends: United Kingdom Passes Bribery Act 2010

- The Act was passed by Parliament in the last days before the 2010 General Election (5/6/2010); it had received 'royal assent' on 4/8/2010 ('royal assent' is a method by which any constitutional monarch formally approves and promulgates an act of his or her nation's parliament, thus making it a law)
- Broader and more robust than FCPA
 - Covers bribery of private individuals as well as public officials
 - Extraterritorial application
 - Prohibits the receipt of bribes
 - No exception for facilitation payments

Trends: Comparison of the UK Bribery Act to US FCPA

UK's Bribery Act

US FCPA

<ul style="list-style-type: none">• Focused on bribery of <u>any</u> public officials <u>or</u> private individuals	<ul style="list-style-type: none">• Focused on bribery of foreign public officials
<ul style="list-style-type: none">• Prohibits actual, attempted or <u>received</u> bribery	<ul style="list-style-type: none">• Prohibits actual or attempted bribery of officials
<ul style="list-style-type: none">• Strict liability offence of failing to prevent bribery	<ul style="list-style-type: none">• No strict liability offence of failing to prevent bribery
<ul style="list-style-type: none">• <u>Unlimited</u> fines and prison terms up to <u>10 years</u>	<ul style="list-style-type: none">• Up to \$2 million <u>per violation</u> and prison terms up to 5 years
<ul style="list-style-type: none">• <u>No</u> facilitation payment exception even if allowed in accordance with local laws and regulations	<ul style="list-style-type: none">• Low level facilitation payments allowed in accordance with local laws and regulations
<ul style="list-style-type: none">• Non UK companies are covered if they have a UK office, UK located operations, or employ UK residents	<ul style="list-style-type: none">• FCPA covers any US person or company, foreign issuers or domestic concerns

Trends: Senior Level Management Will Face Increased Compliance Risk – Nature's Sunshine Products, Inc.

In July 2009, SEC charged senior executives (CEO and former CFO) under Section 20(a) of the Securities Exchange Act of 1934.

- Section 20(a) states “[e]very person who, directly or indirectly, controls any person liable under any provision of this title... shall also be liable jointly and severally...”
- This was the first time the SEC prosecuted under Section 20(a)
- The SEC did not allege that either of the executives engaged in any affirmative act related to the improper payments, or that they had any awareness of the payments
- However, they “directly or indirectly, as Control Persons, failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions were recorded as necessary...”

Trends: Senior Level Management Face Increased Compliance Risk – Avon

In April 2010, Avon Products Inc. suspended four executives based on an internal investigation of possible FCPA violations. The investigation was initiated after an employee notified an executive of improper spending related to travel.

- Individuals suspended include Avon's Chinese unit's President, CFO, and Head of Corporate Affairs and Government Relations. Additionally, the head of Avon's Internal Audit group was suspended.
- Investigation began with the company's operations in China, but now involves more than a dozen countries
- Potential bribes under investigation include alleged purchase of trips to France, New York, Canada and Hawaii for Chinese government officials.

The Books and Records Provision Aggressively Enforced – Veraz Networks, Inc.

In June 2010, the SEC charged Veraz Networks with violating the books and records and internal controls provisions of the FCPA for bribing foreign officials in China and Vietnam.

- Veraz engaged a consultant in China who in 2007 and 2008 gave gifts and offered improper payments valued at \$40,000.
- Veraz also made improper payments to the CEO of a government controlled telecommunications company in Vietnam to win business.
- Without admitting or denying guilt, Veraz agreed to pay a fine of \$300,000 for failing to accurately record the improper payments in its books and records and for failing to devise and maintain a system of effective internal controls to prevent such payments.

M&A Due Diligence and FCPA Risk

- DOJ Opinion Procedure

“[T]he Requestor conducted and documented reasonable due diligence of the anticipated seller... with attention to both FCPA risks and compliance with local laws and regulations...”

- Increasing focus on FCPA risks and M&A due diligence procedures

- Successor Liability
- Penalties (Criminal and Civil)
- Legal Fees/Cost of Investigation
- Level of Due Diligence - case-by-case Basis
- Scope of Due Diligence - explicit or implicit expectations of regulators

Financial Reform Package Created Whistleblower Program

- Under the Dodd-Frank Act, the SEC will pay cash rewards of between 10% - 30% of any monetary sanctions in excess of \$1 million that is recovered through either civil or criminal proceedings because of whistleblowers' assistance
 - Extends to whistleblower disclosures of violations to the U.S. Commodity Futures Trading Commission.
- To qualify, whistleblowers must provide the SEC with:
 - Original information derived from the independent knowledge or analysis of a whistleblower;
 - Information cannot be known to the SEC from any other source; and
 - Cannot be exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media.

Foreign Corrupt Practices Act



The Foreign Corrupt Practices Act

The FCPA has two elements:

- Prohibits the promise, authorization, payment or giving of money or anything of value, directly or indirectly, to any foreign official for the purpose of obtaining or retaining business or securing any other improper advantage  Anti-Bribery Provision
- Companies are required to make and keep:  Accounting Requirements
 1. Accurate books and records
 2. Maintain adequate internal controls.

FCPA Sanctions and Penalties

- Criminal and civil penalties for companies and individuals
- Imprisonment and fines
 - Siemens (2008) \$1.6 Billion
 - Daimler (2010) \$185 Million
- Appointment of a compliance specialist (aka monitor)
- Debarment from doing business with the U.S. government and perhaps other countries

Consequences of Violations Can Be Severe

- Cost of an internal investigation
- Negative publicity
- Class action lawsuits by shareholders
- Loss of “goodwill”
- Terminations
- Employee morale

Anti-bribery Provisions



Anti-bribery Provisions: Who Is Covered?

- Issuers
 - Publicly held companies subject to reporting provisions of the Securities Exchange Act of 1934
- Domestic Concerns
 - Principal place of business is in the U.S. or
 - Business is incorporated in U.S.
- Foreign issuers who commit an act in the U.S in furtherance of a prohibited payment
- U.S. persons, including those who commit an act outside the U.S. in furtherance of a prohibited payment
- U.S. or foreign agents of those described above

Anti-bribery Provisions

The FCPA prohibits the offer, payment, promise to pay, authorization, or giving of:

- Anything of value
- To a foreign official directly, indirectly through a third person, or to a third person for the benefit of an official
- For the corrupt purpose of influencing the foreign official
- To obtain or retain any business or secure any other improper advantage

Offer, Pay, Promise to Pay, Authorize, Or Give Anything of Value

The FCPA prohibits any:

- Offer
- Payment
- Gift
- Promise
- Authorization of an offer, payment, gift or promise



Of anything of value, including cash, gifts, services, travel, entertainment, and business opportunities

Even the attempt to **influence** an official to secure an advantage is punishable. Payment or gift **does not** have to be completed or successful in achieving the desired outcome.

Foreign Official

- Officer, employee, or person acting in official capacity for:
 - A foreign government
 - Department, agency, or instrumentality
 - Government-owned or controlled entities
 - A public international organization
- Political party, candidate for political office, or political party official

Payments Using Third Parties

- FCPA imposes liability if individuals authorized or “knew” the payment or offer would be made by a third party (agent, consultant, subsidiary, attorney, customs broker, etc.) to a foreign official.
- Knowledge can include:
 - Being aware of, or consciously disregarding, a high probability of corrupt payment
 - Willful blindness
 - Authorization after the fact

Payments Using Third Parties (continued)

Improper indirect offers to a government official include:

- Payments to official's agent/nominee
- Payments to third party where the party does not share the benefit with the official if the official may nevertheless be influenced
 - A close friend or relative of an official
 - The favorite charities of an official
 - Political campaign activities

Liability for Acts of Others

- FCPA can be violated “indirectly”, through the conduct of an agent, a consultant or joint venture partners
- U.S. DOJ/SEC looks for due diligence on agents/consultants
 - Due diligence should be documented and retained
- Due Diligence is designed to discover whether:
 - The agent is an “official” himself
 - The agent is likely to pay an “official”

Liability for Acts of Others (continued)

- FCPA compliance procedures recommended for agents:
 - FCPA warranties in contract
 - Annual or periodic certification
 - Audit rights
 - Training of agents

Payments to Influence Officials

- FCPA prohibits payments to officials with the corrupt intent to influence an official
 - To refrain from acting
 - To take any official action
 - To use his influence improperly
- Corrupt intent can be proven with circumstantial evidence

Obtain or Retain a Business Advantage

There is a violation if the intended result is:

- To get or keep any government or commercial business
- To obtain anything that gives a direct or indirect business advantage
 - Special permissions
 - Participate in competitions for business
 - Avoidance of unfavorable circumstances
 - Tax reduction
 - Favorable regulatory environment

Facilitation Payments

There is an exception to the anti-bribery prohibition for “facilitating payments”

- Payments to facilitate or expedite routine, non-discretionary government actions
- Small facilitation payments are permitted under the FCPA but may not be permitted under local law
- Facilitating payments can include:
 - Obtaining permits and licenses
 - Processing of governmental papers (visas or work orders)
 - Mail delivery, police protection, fire services
 - Utilities: phone, water, electricity

FCPA Defenses: Bona Fide Expenditures

- Bona fide expenditures are reasonable payments related to:
 - Promotion, demonstration or explanation of products or services
 - Performance of a contract with a foreign government
- Activities must be conducted without corrupt intent or the appearance of impropriety

Criteria for Bona Fide Expenditures

Reasonable means:

- Does not violate local law
- Not lavish or excessive, cannot be disproportionate to business activity
- Serves a valid business purpose
- Customary and proper, gives no appearance of impropriety, and is consistent with company business ethics
- Openly incurred; no effort is made to conceal the facts
- Will not impose a sense of obligation for the recipient

Accounting Requirements



Accounting Requirements: Who Is Covered?

- U.S. and foreign companies with registered securities in the U.S. markets
- Companies that are required to file reports with the SEC



Books and Records Provisions

- Requires issuers to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets.
- Reasonable – such level of detail that would satisfy prudent officials in the conduct of their affairs.
- No financial materiality test
- “Records” is broadly defined:
 - Documents reflecting corporate transactions and disposition of assets in any form (SEC applies a broad view)
 - May include records of transactions with third-party vendors and/or joint ventures
- Expenses must be accurately, transparently and timely reported and recorded in company records and files (e.g. expense reports; facilitation expenses; commissions)
 - Facilitating expenses are often inaccurately recorded

Internal Controls Provisions

- Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that:
 - Transactions are executed in accordance with management's general guidance or specific authorization
 - Transactions recorded as necessary
 - To permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and
 - To maintain accountability for assets
 - Access to assets is permitted only in accordance with management's general or specific authorization
 - Recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences

Questions?

