An overview of the U.S. Foreign Corrupt Practices Act (FCPA)

1. THE U.S. FOREIGN CORRUPT PRACTICES ACT “FCPA”

The FCPA is a United States federal law, which prohibits payments of bribes to foreign officials to assist in obtaining or retaining business. These payments are not restricted to monetary forms and may include anything of value.

It is one of the anti-corruption laws that have been developed in some countries (also including the UK and Australia) that make an act to bribe an official in a foreign country a crime in the home country of the person or company who undertook the act of bribery.

The FCPA applies to any act by U.S. businesses, foreign corporations trading securities in the U.S., American nationals, citizens and residents acting in furtherance of a foreign corrupt practice whether or not they are physically present in the U.S. Additionally, the FCPA applies to any natural or legal person who has a certain degree of connection to the United States and engages in foreign corrupt practices.

The FCPA has two main provisions.

2. THE ANTI-BRIBERY PROVISIONS


The FCPA’s anti-bribery provisions prohibit the corrupt payment of money or “anything of value” to a “foreign official” in order to “obtain or retain business”. The FCPA anti-bribery provisions apply to (i) “issuers”, (ii) “domestic concerns” and (iii) “any person”.

The anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business. Thus, it is illegal to give, pay, promise, offer, or authorize the payment of anything of value, either directly or indirectly through a third party, to an official of a government or its representative to obtain or retain business, or to secure an unfair advantage.

The term “anything of value” has been broadly defined to include all types of gifts (car, jewelry, excessive travel and entertainment expenses …), educational or executive training expenses, promises of future employment, shares or dividends of a company offered or promised either directly or indirectly to a government official in order to obtain or retain business.

The FCPA has also broadly defined “foreign official” as any foreign government leaders, officers and employees of public international organizations as well as employees of foreign government’s departments and “agencies or any person acting in an official capacity for or on behalf of any such government or any entity controlled by the government of a foreign country, which performs a function the controlling government treats as its own.”
Furthermore, the term “obtain or retain business” has been broadly defined to include all payments to “a foreign official” to secure a foreign government contract or directly and indirectly influence the acquisition or retention of foreign government contracts.

3. THE ACCOUNTING OR BOOKS AND RECORDS AND INTERNAL CONTROL PROVISIONS


The FCPA’s accounting or books and records and internal control provisions require that “issuers” (explained in paragraph 4 below) make and keep books, records and accounts accurately and fairly reflecting the transactions, and devise and maintain a system of internal accounting controls of recorded transactions permitting preparation of financial statements in conformity with generally accepted accounting principles.

The accounting provisions prohibit individuals and companies from knowingly falsifying issuers’ books and records or failing to implement a system of internal controls.

4. PERSONS SUBJECT TO THE FCPA

i. Issuers

It includes any U.S. or foreign corporation, which has a class of securities, registered or required to file periodic and other reports with the Security Exchange Commission (SEC).

As to U.S. Issuers, the FCPA applies to both territorial and nationality jurisdictions whereas to foreign issuers it applies only to territorial jurisdiction.

ii. Domestic concerns

It refers to any individual who is a citizen, national or resident of the United States and any corporation and other business entity organized under the laws of the United States or any individual U.S. State or having its principal place of business in the United States.

iii. Any person

It refers to both companies and individuals (legal and natural persons).

5. CIVIL AND CRIMINAL PENALTIES AND FINES

The FCPA has both criminal and civil penalties, and is aggressively enforced respectively by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).

The DOJ, a criminal law enforcement agency, is the sole agency responsible for criminal enforcement of the anti-bribery provisions and willful violations of the books and records and internal control provisions. DOJ has jurisdiction over “issuers”, “domestic concerns” and “any person”. Significantly,
DOJ has both criminal and civil enforcement responsibility for the FCPA’s anti-bribery provisions over “domestic concerns”.

The SEC, a civil law enforcement agency, is responsible for bringing civil charges of violations of the anti-bribery provisions and the books and records and internal controls provisions. SEC has jurisdiction over “issuers”.

The following list (from www.sec.gov) shows the largest corporate FCPA settlements.

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount</th>
<th>Year</th>
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<tbody>
<tr>
<td>1. Siemens</td>
<td>$800 Million (DOJ – $450 Million) (SEC – $350 Million)</td>
<td>2008</td>
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<tr>
<td>2. Alstom</td>
<td>$772 Million (DOJ – $772 Million)</td>
<td>2014</td>
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<tr>
<td>3. KBR / Halliburton</td>
<td>$579 Million (DOJ – $402 Million) (SEC – $177 Million)</td>
<td>2009</td>
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<td></td>
<td>Net U.S. settlement amount taking into account credits including for foreign law enforcement actions.</td>
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<tr>
<td>6. Alcoa</td>
<td>$384 Million (DOJ- $209 Million) (SEC – $175 Million)</td>
<td>2014</td>
</tr>
<tr>
<td>7. Snamprogetti / ENI</td>
<td>$365 Million (DOJ – $240 Million) (SEC – $125 Million)</td>
<td>2010</td>
</tr>
<tr>
<td>8. Technnip</td>
<td>$338 Million (DOJ – $240 Million) (SEC – $98 Million)</td>
<td>2010</td>
</tr>
<tr>
<td>9. JGC</td>
<td>$219 Million (DOJ – $219 Million)</td>
<td>2011</td>
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<tr>
<td>10. Daimler</td>
<td>$185 Million (DOJ – $94 Million) (SEC – $91 Million)</td>
<td>2010</td>
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6. FCPA STATUTE OF LIMITATIONS

The FCPA does not have a specific statute of limitations for criminal actions.

7. FACILITATING PAYMENTS

The FCPA provides a narrow exception for “facilitating payments”. The exception applies only to payments made to foreign officials with the purpose to “facilitate or expedite routine governmental action, which involves non-discretionary acts”. The exception focuses on the purpose of the payment rather than on its value. Facilitating payments that are not properly documented may violate the FCPA’s accounting provisions.

8. FCPA AFFIRMATIVE DEFENSES

The FCPA has expressly provided for two defenses: (i) the local law defense (written laws of the foreign country) and (ii) the reasonable and bona fide promotional expense defense (money is spent for promoting a company’s product and services or in performing a contractual obligation).

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3 March 2016