



## DOESN'T PAY TO BRIBE FOREIGN OFFICIALS

### Feds step up enforcement of Foreign Corrupt Practices Act

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Amidst continuous revelations of fraud relating to the current financial crisis, it might be tempting to assume that the Department of Justice and the Securities and Exchange Commission are now too preoccupied to devote substantial resources to pursuing bribery of foreign government officials.

In fact, however, combating bribery remains a top enforcement priority – both in the United States and overseas. Consequently, U.S. companies operating overseas must remain vigilant about the risks of doing business abroad and take necessary steps to ensure that compliance and internal control systems are in effect to prevent and detect corruption.

The principle U.S. enforcement regime for targeting bribery of foreign government officials is the Foreign Corrupt Practices Act (FCPA). Under the FCPA, it is unlawful for a covered business or individual to “corruptly” to offer, pay, promise to pay, or authorize payment of anything of value to a “foreign official” (including employees of state-owned enterprises and certain public international organizations) for the purpose of obtaining or retaining business or securing any improper business advantage. The FCPA also makes it unlawful to fail to meet specified record-keeping and internal control requirements.

Payments made to foreign officials through intermediaries (such as agents or consultants) are as illegal as direct payments

by a company employee or official if made knowing that any portion of the payment will go directly or indirectly to a foreign official. Moreover, evidence of conscious disregard or deliberate ignorance with respect to payments to intermediaries can constitute actionable knowledge of illegality.

The FCPA’s anti-bribery and accounting provisions apply to both domestic and foreign companies whose stock is traded on U.S. exchanges, and to domestic and foreign companies required to file reports with the SEC. The act’s provisions also broadly

apply to “any person” (both business entities and natural persons) who engages in covered conduct, regardless of whether

the person is a U.S. citizen or resident or does business in the United States. In that regard, U.S. companies should be aware that violations by a foreign subsidiary may be attributable to the U.S. parent.

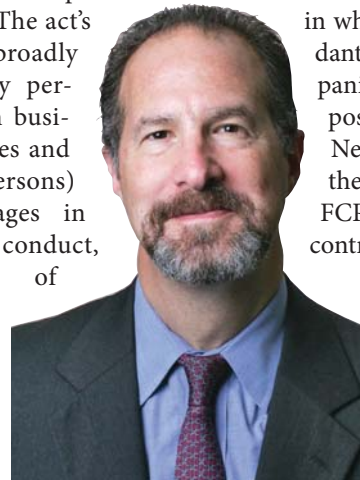
FCPA prosecutions demonstrably have assumed a higher priority for the Department of Justice and the SEC. In the first 20 years after the FCPA’s enactment in 1977,

the government prosecuted only 17 companies. In contrast, between 1998 and 2008, more than 50 companies were prosecuted. Enforcement activity particularly has increased over the past three years: in 2008, the Justice Department criminally prosecuted 16 FCPA cases, compared to only six in 2007. According to a senior Justice Department official, approximately 110 FCPA investigations are currently open.

Nor have recent prosecutions targeted only U.S. companies. In December 2008, for example, the Justice Department reached a \$17.8 million settlement with Fiat in which all the corporate defendants were foreign-based companies that had American Depository Receipts traded on the New York Stock Exchange and therefore were subject to the FCPA’s accounting and internal control provisions.

The magnitude of fines also is reaching new heights. In December 2008, the German corporation Siemens AG and three of its subsidiaries pleaded guilty to FCPA violations resulting from approximately \$1.4 billion

in payments to government officials and intermediaries in Asia, Africa, Europe, the Middle East and South America. As a result of the company’s cooperation with U.S. authorities, Siemens avoided conviction un-



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der the anti-bribery provisions of the FCPA (and thereby avoided potential debarment), pleading guilty instead to criminal violations of the statute's internal controls and accounting provisions.

But it shattered all previous records by paying a criminal fine of \$450 million as well as disgorgement of profits totaling \$350 million (on top of approximately \$856 million in fines and disgorgement of profits imposed by the German government).

The Siemens case also exemplifies burgeoning international cooperation in anti-bribery investigations. Nearly 40 countries are now signatories to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and several countries have adopted domestic anti-bribery legislation. It was German authorities who initiated the massive Siemens investigation, and when Siemens pleaded

guilty in the U.S., the Justice Department acknowledged that the unprecedented sharing of information and evidence between U.S. and German prosecutors was made possible by the use of mutual legal assistance provisions in the OECD Convention.

Prosecutions of individuals also are on the rise. Between 1977 and 1997, only 33 individuals were prosecuted. But between 1998 and 2008, the government charged

more than 70 individuals with FCPA violations. Senior company officials, moreover, are fair game for prosecution: Albert Stanley, the former chairman of Halliburton subsidiary KBR, recently agreed to serve seven years in prison as part of a plea agreement stemming from the payment of \$182 million in bribes to Nigerian government officials.

#### COMPLIANCE CHALLENGES

U.S. companies operating overseas face a range of compliance challenges to avoid running afoul of the FCPA. For example, tax obligations and regulatory and licensing requirements create the potential for

improper payments to obtain or continue business or to secure an advantage over a competitor. Pressures to maintain revenues in the current economic downturn will enhance the potential for violations.

For enforcement agencies, it is insufficient for companies merely to have a written code of conduct that prohibits improper payments to foreign officials. Rather, companies should undertake and systematize several prudential measures. First, they should conduct risk assessments based on the incidence of corruption in the countries in which they operate and the nature of their interaction with foreign government

officials.

Second, they should translate their code of conduct into the languages of each country where they operate and ensure that it is disseminated to officers, employees, consultants, and agents there. Third, company personnel – as well as foreign consultants and agents – should be required to receive interactive Internet training in their native language, accompanied, where possible, by in-person training by company lawyers or ethics officials.

Fourth, companies should conduct rigorous vetting of any foreign agents or consultants, including in-person interviews by in-house compliance lawyers and background checks with the U.S. embassy or consulate. Expenditures by agents and consultants should be subject to more frequent audits, particularly in high-risk countries. Fifth, anything that is or could be construed as a payment to a foreign official – particularly gifts and entertainment expenses – should receive prior scrutiny for their reasonableness and connection to a bona fide business purpose, and should be fully documented in the company's books and records.

Although permitted under the FCPA, "facilitating" payments to foreign officials to expedite "routine governmental functions" – such as payments to obtain permits or license to do business in a foreign country, or to process visas and work orders – should be barred as best practices to avoid even the appearance of impropriety.

Finally, companies should institute confidential reporting mechanisms, such as a "hotline" or special website, for individuals to report allegations of corruption, and should act upon credible allegations of wrongdoing in a timely manner. ■

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