

# Foreign Corrupt Practices Act When Can Concerns Arise?

By Daanish Hamid

Both U.S. and, in some cases, non-U.S. companies can encounter concerns under the Foreign Corrupt Practices Act of 1977 (FCPA) in a variety of ways. The FCPA contains very broad anti-corruption provisions that prohibit individuals and businesses from directly or indirectly offering, promising, or providing bribes to non-U.S. government and other officials. The FCPA also requires companies that are publicly listed in the United States as well as other “issuers” (such as non-U.S. companies with ADRs traded in the United States) to maintain accurate books and records and a system of internal controls. Violations of the FCPA can result in serious consequences, including significant fines and penalties -- in some cases reaching the hundreds of millions of dollars or more. Also, individuals who violate the FCPA may face imprisonment. Both the Department of Justice and the Securities and Exchange Commission devote significant resources to FCPA enforcement and have stated that they are currently reviewing potential FCPA violations involving multiple companies. Given these circumstances, it is important to appreciate the various instances in which FCPA issues can be triggered. Here is a list of illustrative examples gleaned from FCPA cases and U.S. government guidance:

- **Government Contracts.** Companies that sell their products or services to non-U.S. governments or militaries can face FCPA risk. Corrupt officials pressure businesses to pay bribes as a condition of awarding business. Cash exchanged in briefcases may not be as common as they once were (though they still do occur occasionally). More sophisticated bribery methods are typically leveraged, including directing companies to hire and make payments to phony subcontractors that act as conduits of bribes to government officials.
- **Regulatory Approvals and Lobbying.** Companies that expand their business and operations beyond the United States typically face regulatory hurdles such as completing commercial registrations, qualifying for special industry licenses, receiving building permits, obtaining import/export approvals, and satisfying tax and employment reporting requirements. In certain cases, businesses may even need to engage in lobbying activities. These efforts typically involve direct or indirect engagement with officials, elected representatives, and political parties which could raise FCPA and other concerns if not addressed responsibly.

- **Dispute Resolution.** When engaging in international commerce, some companies may become parties to litigation before foreign courts or administrative tribunals to settle commercial, tax, employment, and other disputes. These proceedings can be very demanding in terms of time, effort and cost. Litigants in certain countries may even be asked to provide improper payments to accelerate court or other proceedings or achieve a favorable outcome. Companies that engage in cross-border dispute resolution need to ensure that their employees overseeing such matters as well as their local counsel are cognizant of these concerns and have a clear understanding of their clients' anti-corruption posture.
- **Third Party Relationships.** FCPA cases against companies typically involve bribes paid by third parties that serve those companies such as sales representatives, distributors, resellers, consultants, brokers, licensees, and joint venture and other partners. In certain cases, U.S. enforcement agencies seek to hold companies responsible for third party bribery even if those companies had no actual knowledge of bribes paid by their business partners. The U.S. government expects companies to perform risk-based due diligence on their business partners, insert appropriate FCPA and other legal compliance clauses in third party agreements, and actively monitor those relationships for FCPA risk even after they have commenced.
- **Industry Concerns.** FCPA enforcement has occurred across various industries. The defense, aerospace, oil & gas, mining, and infrastructure sectors have traditionally been the focus of anti-corruption scrutiny and prosecution. However, in recent years, the U.S. government has also pursued FCPA action against companies in the healthcare, technology, telecommunications, consumer goods, and financial services industries.
- **Country-Specific Risk.** FCPA and other anti-corruption risk can vary according to country and circumstances. Some countries present a higher risk than others and as a result a company is expected to apply additional mitigation measures to counter that risk. Recent FCPA cases have been triggered by improper payments occurring in China, India, Indonesia, Vietnam, Colombia, Angola, South Africa, Egypt, Brazil, and Russia to name just a few.
- **Mergers & Acquisitions.** A target company in an M&A transaction that has a history of corruption may cause the acquiring company to face successor liability. The acquiring company can also violate the FCPA if it allows the target company's corrupt activities to continue after the acquisition has been completed. Due diligence, contract language, monitoring, and effective compliance programs are important tools to counter these risks.
- **Gifts & Hospitalities.** The FCPA prohibits bribes in the form of cash or in-kind benefits. This means that gifts, entertainment, or hospitalities can violate the FCPA if they are given to non-U.S. officials in exchange for a contract, approval, or other advantage. Of course, the FCPA does not impose a blanket ban on in-kind benefits provided for legitimate business promotion purposes. However, distinguishing between permissible and prohibited benefits may require the review of a seasoned FCPA legal practitioner.

- **Charitable and Political Contributions.** Companies that seek to support charities need to ensure that donation recipients are not conduits for bribes intended for government officials. Also, companies that make political contributions outside the United States may face greater scrutiny under both the FCPA and local law than they would in the context of U.S. political donations. Again, proper FCPA and other legal due diligence are important measures to mitigate against this type of risk.
- **Investments.** In many cases, emerging companies seek financing from a variety of non-U.S. sources, including sovereign wealth funds (affiliated with non-U.S. governments) or family offices belonging to royal family members or government officials. FCPA risk can arise if improper benefits are provided to representatives of those investors in order to secure financing from them.
- **Public International Organizations.** Bribes directed at employees and officials of public international organizations such as the United Nations, the World Health Organization, or the World Bank can result in FCPA violations. In addition, those organizations maintain their own sanctions and debarment procedures. Companies that work on infrastructure, health, or other projects that are financed, sponsored, or otherwise supported by these institutions must ensure that their compliance efforts account for these concerns.
- **Private-Sector Bribery.** The FCPA's anti-bribery prohibitions apply to corrupt payments made to government officials; they do not explicitly prohibit private-sector bribery. Nevertheless, such bribes concealed in a public company's books and records can still violate the FCPA's accounting provisions. Also, prosecutors have used the U.S. Travel Act, mail and wire fraud statutes, and anti-money laundering laws to combat corruption in its various forms.

**Feel free to contact the author below if you require any support with FCPA/anti-corruption investigations or compliance matters.**



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