



Scrutiny Increases on Payments to Foreign Officials

by Bill Mateja and Kip Mendrygal | May 1, 2008



In various investigations by the Securities and Exchange Commission during the mid-1970s, more than 400 companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians and/or political parties. As an indirect

result of Watergate and these investigations, Congress enacted the Foreign Corrupt Practices Act (FCPA).

Increasingly, Dallas attorneys and corporate counsel have questions on FCPA issues, largely due to increased globalization, Dallas's important role in the international economy, and the Justice Department and the SEC ramping up FCPA investigations and prosecutions against U.S. and foreign companies and individuals. Therefore, it is important for Dallas attorneys to have a basic understanding of the FCPA which may account for the most significant white-collar crime trend in the months and years to come.

In a nutshell, the FCPA (15 U.S.C. § 78m) is made up of two parts: the anti-bribery provision and the accounting provision.

The anti-bribery provision prohibits the offer, authorization, promise or payment of anything of value to a foreign official, international organization official, political party, party official, or candidate for public office *in order to obtain or retain business*. It applies to issuers, domestic concerns, or persons acting within the U.S.

The accounting provision includes both a books and records provision and an internal control provision, and only applies to companies issuing securities registered on U.S. stock exchanges. The books and records provision requires issuers to accurately record transactions in reasonable detail. The internal controls provision requires public companies to maintain a system of internal policies and procedures sufficient to provide reasonable assurances that transactions are executed and recorded according to appropriate standards and under management's specific or general authorization.

Exceptions & Defenses

The FCPA explicitly excepts "grease payments" – payments that expedite or secure the performance of routine governmental action or merely move a particular matter toward an eventual act or decision.

In theory, these types of facilitating/expediting payments relate to actions on the part of foreign officials that are nondiscretionary. These types of grease payments could include payments made to obtain permits, licenses or other official documents and to receive services such as mail, telephone, water, power, cargo handling and protection of perishable products.

Affirmative defenses under the FCPA include:

- "[T]he payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to: (a) the promotion, demonstration, or explanation of products or services; or (b) the execution or performance of a contract with a foreign government or agency..."
- Payments that are lawful under the written laws and regulations of the foreign official's country (a *narrow* exception given that no country authorizes corrupt payments to its public officials).

Recent Trends

Increased DOJ and SEC Focus. One of the most important recent trends is the increased aggressiveness of government enforcement of the FCPA. In 2003, only nine companies reported new investigations. By contrast, there were 26 new investigations in 2006, and 29 in 2007. Presently, there are 82 companies currently reporting that they are under investigation for FCPA compliance.

Larger Penalties. In 2007, Houston-based Baker Hughes agreed to pay the largest FCPA penalty ever – \$44 million, of which \$11 million constituted a criminal fine and \$33 million constituted disgorgement and a civil penalty. Other notable penalties in 2006 and 2007 included:

- **Vetco Int'l** with a \$26 million penalty
- **Chevron** with a \$27 million penalty (plus \$3 million civil penalty)
- **York Int'l** with a \$22 million penalty (combined DOJ/SEC fines and disgorgement)
- **El Paso Corp.** with a \$7.75 million penalty (fine and disgorgement)

- **Statoil ASA** with a \$21 million penalty (DOJ fine and SEC disgorgement)
- **Schnitzer Steel** with a \$7.5 million penalty

Focus on Individuals. In the last two years, 25 individuals have been either sued by the SEC or prosecuted by the DOJ. Since 1990, the DOJ has brought at least twice as many prosecutions against individuals as it has against companies. Notably, in June 2007, a sitting member of the House of Representatives, William Jefferson, was charged under the FCPA with offering bribes to senior Nigerian government officials.

Proactive Industry Investigations. It appears the DOJ is following the SEC's lead in probing entire industries and practices. A prime example is the recent investigation into the use of customs brokers by the oil-services industry and the propriety of payments made by members of the medical devices industry.

Self-Reporting. More and more, companies appear to be self-reporting violations of the FCPA. One motivation is the perceived benefit that a company receives by self-reporting. Another is in the merger/acquisition context in which the acquiring company is concerned about potential successor liability arising from the conduct of the acquired company.

Because of such heightened focus, it is important for Dallas attorneys not only to have a working knowledge of the FCPA, but to be concerned when they hear of payments being made to foreign officials by their clients and to ask insightful questions about such payments.

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