The Foreign Corrupt Practices Act

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Institutional Affiliation:
The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) is a law targeting fraud and public corruption in the international marketplace (Colton, 2001). The FCPA imposes both criminal and civil penalties, while making it a federal offense for any United States entity, person or issuer of the United States securities, acting in any country and any foreign persons who may act within the United States, through corrupt payment foreign government officials in a direct or indirect manner to retain or obtain business. It also encompasses provisions that require companies with registered securities on the United States stock exchanges to keep accurate records while implementing significant internal controls to prevent corruption.

The FCPA was enacted in 1977 by the United States Congress (Singer, 2006). Before the implementation of the FCPA, the United States criminal laws had no express prohibition to bribery of and by foreign officials. The FCPA was amended in 1988 to incorporate the mental capacity considered as adequate for a violation of the FCPA when an intermediary is paid. The FCPA was amended again in 1998 through legislative action implementing and ratifying the Organization for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) (Colton, 2001). These amendments widened the applicability and scope of the FCPA in several significant ways; meanwhile, the United States Department of Justice Securities (DOJ) and the United States Securities Exchange Commission (SEC) increased their efforts in enforcing the FCPA implementation, hence marking a significant improvement in the United States ambitions to influence antibribery initiatives all over the world.

Governments around the world have significantly appreciated the fact that corruption, if left unchecked, may impact the global marketplace negatively, at the same time, harming
economic development efforts. Various countries have enacted legislation and created treaties which aim at eliminating bribery and any form of corruption. It is evident that enforcement initiatives and efforts have continued to increase all over the world. Intergovernmental cooperation has increased significantly which has targeted significant multinational entities. On the one hand, the enforcement of the United States criminal law has been critically aided by Mutual Legal Assistance Treaties (Cassin, 2008). This have enabled foreign and domestic prosecutors to exchange information effectively, hence enabling the enforcement of the United States criminal law. On the other hand, agreements entailing information sharing and memoranda of understanding between the United States and foreign securities regulators have significantly facilitated the initiation and investigation of FCPA violations, which occur in foreign countries.

The FCPA’s antibribery aspect provides an affirmative defense in that the payment in question is made lawfully under the express laws of the country; or that the payment was a justifiable and reasonable expense such as lodging and travel costs incurred on behalf of or by a foreign person; Thus, it has a direct relationship to the explanation or demonstration of a performance, service or product of a contract with a governmental entity or agency. On the other hand, the FCPA integrates an exception providing for facilitating or greasing payments, which are payments made to secure performance expedite a nondiscretionary, routine governmental activity.

The FCPA accounting provisions require that businesses issuing registered securities with the United States stock exchanges keep up to date records and books using internal control systems regarding all activities and transactions, and not those limited to violating the FCPA antibribery provisions. Violating The Foreign Corrupt Practices Act carries significant penalties
which include civil fines, criminal liability, substantial loss of goodwill, and other consequences like the potential suspension or loss of licenses (Biegleman & Biegleman, 2010).

The FCPA applies to varying persons or entities. The FCPA antibribery provisions relate to certain corrupt payments made by foreign persons referred to as issuers or the United States citizens referred to as domestic concerns. These people may be acting anywhere in the world or within the boundaries of the United States. The FCPA accounting provisions are applicable only to issuers but do not apply to domestic concerns. Therefore, the FCPA is applicable to all companies which are subject to the reporting and registration requirements of the Securities Exchange Act of 1934 regarding foreign persons (Colton, 2001). However, the FCPA antibribery provisions are applicable to the broader spectrum of domestic concerns which includes any United States business or any person including United States citizens employed by foreign concerns and any person operating within the United States. Significantly, these provisions impact foreign affiliates and subsidiaries of issuers, hence they make the United States companies suffer liability for actions executed outside the borders of the United States.

Both the Securities and Exchange Commission and the Department of Justice have jurisdiction in enforcing the FCPA; however, only Department of Justice has jurisdiction in pursuit of criminal penalties. The Department of Justice has been seen to focus primarily on compliance issues with the FCPA antibribery provisions, while the Securities and Exchange Commission pursues violations with regard to the FCPA accounting provisions (Cassin, 2008). While these distinctions over jurisdictional mandate may be apparent, the Securities and Exchange Commission and the Department of Justice have brought actions in enforcement for the violations of both aspects of the FCPA and work as a unitary function in regard to FCPA matters.
In the event when an entity under the FCPA’s blanket or any individual acting on the entity’s behalf makes contact with a governmental entity, there is a probability of encountering issues that will attract the FCPA’s attention. Therefore, any interaction or association with a government representative, officer or a family member that may touch on the provision or offers of valuables may present possible conflicts that could involve the FCPA enforcers (Singer, 2006). In spite of the initial years of FCPA focusing energy and defense contractors, presently, all industries are subject to the FCPA. The Departments of Justice and the Securities and Exchange Commission have initiated and pursued FCPA violation investigations in many varying industries. In light of this, it is crucial in the prevalent business climate to comply with the records and books provisions of the FCPA.

Essentially, a company can identify itself as potentially facing an FCPA violation in various ways. They include a critical compliance system and programs which entail encouraging employees to detect and report on suspected and potential violations through integrated internal reporting system or compliance information centers. Meanwhile, expenditures are suspected to be in violation of FCPA provisions, and questionable actions can be identified and prevented through comprehensive compliance audits (Singer, 2006). On the one hand, a company may identify an FCPA violation at a potential acquisition subject through the exercise of standard due diligence. On the other hand, a company may learn about a possible violation through a lawsuit filed by a vested and interested party or third parties like a whistle blower. Meanwhile, the problem may be brought to light by an enforcement agency either abroad or domestically where an investigation of the company’s possible violations of the FCPA provisions is carried out. In some cases, private plaintiffs may bring actions against an individual or a company who is in violation of FCPA provisions; these actions subsequently lead to inquests or investigations by
the responsible government agencies. Additionally, the actions of a foreign agency or government may lead to the initiation of the United States scrutiny of the entity in question (Cassin, 2008). Given the advancements in information technology, information is readily available and accessible through forums in the internet (Deming, 2010). Therefore, a significant percentage of companies are leaning towards self-reporting on potential FCPA violations with the aim of securing leniency from the government on possible penalties. However, these initiatives do not guarantee the abatement or avoidance of substantial penalties in spite of the extraordinary cooperation.

FCPA violations do not always lead to litigated decisions. Hence, FCPA direction must be obtained from Department of Justice or from declarations of settlements with Department of Justice or the Securities and Exchange Commission that arise from third party or voluntary disclosure of a violation. A significant number of cases initiated by the Department of Justice is dealt with through settlements (Colton, 2001). Therefore, the government opts to enter into deferred prosecution agreements or non-prosecution agreements with companies where the government is assured of proof of a continued compliance to FCPA provisions in exchange for not pursuing prosecution actions against the company. However, these agreements include payment of penalties and fines as well as continuous scrutiny and monitoring.

In the current atmosphere of significantly heightened enforcement, a company whose operations extends beyond the United States borders, either through the activities of a subsidiary or an affiliate or direct operations, should critically focus on complying with FCPA provisions. It is evident that as a result of the increase in number of FCPA investigations initiated, significant FCPA enforcement characteristics and policies have emerged (Biegleman & Biegleman, 2010). The United States agencies are increasingly willing to pursue individuals as
well as companies in respect to FCPA violations. Hence there is an increased emphasis on rooting out corruption in all industries and business practices that are known and suspected to be rife with the vice.

Critically, companies are faced with the possibility of prosecution by foreign enforcement agencies as multilateral organizations and countries have entered and committed themselves into enacted legislation and treaties aimed at eliminating bribery and corruption. In light of this, the penalties facing companies which do not comply with the FCPA are ever increasing and critically grave. This include millions of dollars in civil and criminal penalties and fines which may involve surrendering of company profits as a result of violating FCPA provisions.
References


