

THE FOREIGN CORRUPT PRACTICES ACT OF THE UNITED STATES

FCPA CHECKLIST

1. If dealing directly with a governmental official or department, have you done due diligence on the individual and department to ensure that they are not likely to ask for a bribe now or at some time in the future?
2. If dealing with a consultant, joint venturer, partner, distributor, subcontractor, supplier, etc., have you done due diligence on the individual or entity to ensure that they are not likely to give a bribe now or at some time in the future?
3. Is the country or region where you are doing business (or the place where your potential consultant, joint venturer, partner, distributor, subcontractor, supplier, etc. will do business) known as a place where officials are likely to ask for or accept bribes?
4. Do you know all of the owners of the entity with which you are dealing? Are there any owners who have a connection to a governmental official?
5. Who recommended the individual or entity with which you are dealing? Was it a trust-worthy source? Was it a government official?
6. Has the individual or entity you are dealing with requested that payments be made in an unusual manner (i.e., in cash, in a third country)?
7. Does the individual or entity you are dealing with currently have the experience or capability to perform the task?
8. Does the agreement you are entering into with the individual or entity contain written representations that FCPA laws and regulations will not be violated?
9. Does the commission for the individual or entity exceed the normal rate for commissions?

10. Is the individual or entity you are dealing with in an industry where bribery is not uncommon (such as the defense, aircraft, oil, and construction industries)?
11. If you are relying on an exception to the FCPA (i.e., payments to government officials to urge them to do (or do more quickly) that which they are already obligated to do, such as providing police protection), have you contacted the Law Department?

SCOPE OF THE U.S. FCPA

APPLIES TO:

ISSUERS

- companies registered pursuant to §15 U.S.C 781
- companies required to file reports under §15 U.S.C 780(d)
- individuals serving as officers, directors, agents, & employees in these companies

DOMESTIC CONCERNS

- individual U.S. citizens wherever located
- business entities organized under the laws of the US (partnerships, LLCs, etc.)
- business entities which have a principal place of business in the US

(1998) PLUS

- persons other than issuers and domestic concerns
- all foreign persons who commit an act in furtherance of a foreign bribe while in the US
- acts of US businesses and nationals to further unlawful payments made wholly outside the US
- US citizen, national, resident who acts on behalf of a foreign subsidiary where payment by the entity is the type that violates the FCPA

DOES NOT APPLY TO:

- Foreign subsidiary if its principal place of business is overseas
- Foreign subsidiary of US companies acting on their own behalf
- Foreign individuals who are not officers, directors, employees, or agents of a US issuer or domestic concern

ELEMENTS OF A DEPARTMENT OF JUSTICE BRIBERY VIOLATION OF THE FCPA

1. USE OF AN INSTRUMENTALITY OF INTERSTATE COMMERCE
IN FURTHERANCE OF
 1. A PAYMENT, OR OFFER TO PAY, ANYTHING OF VALUE
 2. TO ANY FOREIGN OFFICIAL, POLITICAL PARTY, POLITICAL CANDIDATE
 3. IF PURPOSE OF PAYMENT IS THE “CORRUPT” ONE OF GETTING THE RECIPIENT TO ACT OR REFRAIN FROM ACTING
 4. IN SUCH A WAY AS TO ASSIST THE COMPANY IN OBTAINING OR RETAINING BUSINESS
- OR IN
5. DIRECTING BUSINESS TO ANY PARTICULAR PERSON TO SECURE AN IMPROPER ADVANTAGE

***THEREFORE, NOT ALL PAYMENTS TO FOREIGN OFFICIALS
ARE VIOLATIONS OF THE FCPA...***

ONLY Offers & payments made corruptly

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They are intended to influence the official action of the recipient

OR

induce the recipient to use his/her influence to affect the official decisions/actions of others

IN ORDER TO

assist in: obtaining business
 retaining business

directing business

THE KNOWLEDGE STANDARD

The FCPA charges *issuers* and *domestic concerns* with knowledge they should have respect to their international business associates,

including:

- consultants
- joint venturers
- teaming partners
- distributors
- subcontractors
- suppliers

ELEMENTS OF KNOWLEDGE STANDARD

THE ISSUER OR DOMESTIC CONCERN

- a) is aware: that someone is engaging in such conduct
such circumstances exist
such result is substantially certain to occur
- OR
- b) has a firm belief that: such circumstances exist
such result is substantially certain to occur
- c) a person is aware of a high probability of the existence of such circumstances
UNLESS the person actually believes such circumstances do not exist

IN OTHER WORDS, A REASONABLE PERSON WOULD HAVE REALIZED THE EXISTENCE OF CIRCUMSTANCES OR RESULTS AND THE OFFENDER HAS CONSCIOUSLY CHOSEN NOT TO ASK WHAT HE HAD REASON TO BELIEVE HE'D DISCOVER.

- *US v. Bright:* awareness of the high probability of the fact
- *Mester v. Ins:* constructive knowledge
- *US v. London:* conscious disregard
- *US v. Kaplan:* willful blindness

- *US v. Manriquez Aribijo*: deliberate ignorance

PENALTIES / SENTENCING GUIDELINES

BASED ON U.S. SENTENCING GUIDELINES MANUAL OF 1998:

INDIVIDUALS:

- a) a base offense level is determined
- b) then the level can be raised by certain variables
- c) then a determination if fraud or bribery
(under USSG, maximum of \$100,000 + 5 yrs. in prison)
- d) then provisions from Sentencing Reform Act added on
(higher penalties are added)

CORPORATIONS:

- a) base offense level is determined
- b) then culpability score is calculated and converted into a maximum and minimum multiplier to determine fine:
 - reduced by effective compliance program
 - raised by participation of high level officials
- c) anti-bribery provisions: \$2,000,000

ALL ENFORCED BY THE DEPARTMENT OF JUSTICE

INTERNAL CONTROLS REQUIRED:

- = a system of internal accounting controls providing reasonable assurances that transactions are properly authorized
- = designed to prevent unauthorized or unrecorded transactions

Adequacy of internal controls determined by:

- 1) Role of Board of Directors
(if Board creates an audit committee, the committee **MUST** exercise appropriate internal accounting oversight as a means of reasonably assuring that FCPA provisions are followed)
- 2) Communication of corporate procedures and policies
- 3) Assignment of authority and responsibility
- 4) Competence and integrity of personnel
- 5) Accountability for performance and compliance with policies and procedures
- 6) Objectivity and effectiveness of internal audit function

CRIMINAL LIABILITY

(ENFORCED BY SEC)

ELEMENTS:

Knowingly circumvent OR fail to implement an internal system of accounting controls

Knowing falsify any book, record, or account

(**Knowingly** = willful blindness or conscious attempt not to know)

- Parent company must have acted in good faith
- Parent company must encourage compliance with the FCPA's accounting controls

NOT:

- for technical or insignificant accounting errors
 - for issuers who own 50% or less of a business concern
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PENALTIES:

- \$1 million in fines + 10 years imprisonment
- Barred from serving as officer/director of public company

RED FLAGS

(PROVIDED BY DEPARTMENT OF JUSTICE)

GENERAL RED FLAGS

- 1) Your company has received an “improper payment” audit in the past five years
 - 2) Payment in a country with widespread corruption and/or a history of FCPA violations occurring in that country (e.g. some Middle Eastern, Asian, and former Soviet Union countries)
 - 3) Widespread news accounts of payoffs, bribes, kickbacks.
 - 4) The industry has a history of FCPA violations
 - 5) Due diligence on proposed foreign partner suggests possible ethical issues
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TRANSACTION-SPECIFIC RED FLAGS:

- 1) Agent refuses to provide confirmation that s/he will abide by the FCPA
- 2) Foreign partner refuses to agree to reasonable financial & other controls in the joint venture
- 3) Family/business ties of a sales agent with a government official
- 4) Proposed foreign partner is owned by a key government official or relative of such an official
- 5) US company hears “rumors” that the foreign partner has a “silent partner” who is a high government official
- 6) Bad reputation of the agent (parties should document the good reputation & experience of the agents they hire)
- 7) Agent requires his identity not be disclosed

- 8) Foreign partner insists on having sole control of any host country government approvals
- 9) The proposed relationship with the foreign partner is not in accordance with local laws or rules
- 10) The potential foreign government customer recommends the sales agent. (Coordinated scheme to divide a payoff?)
- 11) Foreign partner cannot contribute anything to the joint venture except influence
- 12) Agent lacks facilities and staff to perform required services
- 13) Agent is new to the business
- 14) Any other odd request by an agent that reasonably arouses suspicion (e.g. invoices backdated)

PAYMENT RED FLAGS

- 1) Payment of a commission that is at a level substantially above the going rate for agency work in a particular country
 - Excessive might mean a portion is going to foreign official...
 - Agent just might be greedy...
 - “permissible” commission varies between countries...
 - Is agent committing his own capital to the venture?
 - Is agent incurring high documented expenses?
- 2) Payment through convoluted means (numbered account in the Bahamas)
- 3) Over-invoicing (cut a check for more than amount of expenses)
- 4) Requests that checks be made to “bearer” or “cash”, payments be made in cash, or bills paid in some anonymous form
- 5) Payment in a third country (plan to divide commission in third country away from government scrutiny)
- 6) Agent requests an unusually large credit line for a customer
- 7) Requests for unusual bonuses or extraordinary payments
- 8) Requests for an unorthodox or substantial up-front payment
- 9) There’s significant mismatch between the foreign partner’s economic interest in the venture and its contributors

- 10) The values ascribed to assets contributed by the foreign partner to the joint venture are excessive

CASES

Case	Overview
<u>SEC v. Bell South Corp.</u> (2002)	Some of the alleged wrongdoing involved a minority owned company. Without admitting or denying the charges, Bell South agreed to cease & desist from violating the FCPA provisions. It also took remedial steps to improve its FCPA compliance program & discipline and terminate various employees
<u>SEC v. Chiquita Brands Int'l</u> (2002)	The actions were taken without the knowledge or consent of any Chiquita employees outside Columbia and in violation of Chiquita's policies. Without admitting or denying the charges, Chiquita agreed to the entry of the order and settled a separate complaint to pay a \$100,000 penalty
<u>US & SEC v. KPMG-Siddharta et al.</u> (2001)	First ever joint civil injunctive action of Department of Justice and SEC. Because of the efforts to correct the conduct & prompt disclosure to the SEC & Department of Justice and its cooperation with the SEC's investigation by declining to assert attorney client privilege, the company reached a settlement and avoided a fine
<u>SEC v. IBM</u> (2000)	SEC pursued the FCPA books and records case against IBM even though the false books & records were those of a foreign subsidiary & the issuer (IBM) had no knowledge of their falsity or of the underlying impropriety. Also, the SEC did not allege that IBM's internal controls were inadequate, <i>which means that the SEC believes an issuer may still be liable for books and records violations of its foreign subsidiaries, even if it had reasonable controls in place</i>

Case	Overview
<u>SEC v. Montedison, S.p.A</u> (1996)	Signifies the return of the Sec to bribery-type cases. Also is an excellent illustration of the “issuer” concept of jurisdiction. The case involves an Italian company bribing Italian officials, yet its status as an NYSE-listed issuer enabled it to fall under the jurisdiction of the US FCPA
<u>US v. Steindler</u> (1994)	Sentenced to 84 months in jail. Forfeiture of \$1,741,453
<u>US v. Vitusa</u> (1994)	Company fined \$20,000. President given two years unsupervised probation + \$5,000 fine
<u>US v. Lockheed</u> (1994)	\$21.8 million in criminal fines \$3 million settlement One player: probation + \$20,000 fine One player: 18 months imprisonment + \$125,000 fine
<u>US v. Goodyear, Int’l</u> (1989)	Fined \$250,000
<u>US v. Crawford Enters</u> (1984)	Company fined \$3.45 million Crawford fined \$309,000 Hall fined \$150,000 Garcia fined \$75,000 Eyster fined \$5,000 Smith fined \$5,000
<u>US v. Int’l Harvester</u> (1982)	Fined \$10,000 and assessed \$40,000 in costs
<u>US v. Kenny, Int’l</u> (1979)	Fine of \$50,000 plus restitution to the government of the Cook Islands for NZ \$337,000.

LEVELING THE PLAYING FIELD GLOBALLY

EUROPEAN UNION

- '95 – established sanctions framework for countries to enforce administrative sanctions against acts of corruption
- '95 – criminal penalties in cases of serious fraud
- '97 – *Convention on the Fight Against Corruption...*
prohibits bribery of public officials within the EU
does not outlaw bribes to foreign nationals within the EU
does not outlaw bribes to foreign officials from non-EU countries
- '97 – *Protocol to Convention on Protection + General Convention*
(covering corruption by EU or member state officials whether or not it impacts the finances of the EU)
requires members to impose criminal liability for corrupt acts
mandates members to ensure that corruption is punishable by “effective, proportionate, and dissuasive criminal penalties”
obligation to extradite or prosecute offenders

ORGANIZATION OF AMERICAN STATES

- '96 – criminalizes transnational bribery throughout western hemisphere
requires member states to implement the accord through internal legislation criminalizing bribery
requires each member to prohibit illicit enrichment, defined as “unexplainable significant increase in wealth”
forbids government officials from demanding improper payments
requires members to criminalize:
- solicitations and acceptance of illegal payments (demand side)
 - offering of illegal payments (supply side)
 - acts or omissions by government officials for the purpose of obtaining a bribe
 - fraudulent use of property derived from such activities
 - participation as a principal, accomplice, accessory after the fact, in a conspiracy to commit those acts

ORGANIZATION OF ECONOMIC COOPERATION & DEVELOPMENT

(ATTACKS SUPPLY SIDE OF BRIBERY)

34 nations signed agreement which requires:

- all parties to criminalize bribery of foreign officials
- outline appropriate sanctions for violations
- agree to extradite those charged with bribery offenses

UNITED NATIONS

'98 – Resolution “Actions Against Corruption and Bribery In...”

- urges members to eliminate corruption
- obligates the UN to provide advice, technical support in order to assist members to develop anti-corruption policies

'00 – “UN Convention Against Transnational Organized Crime”

- criminalizes offenses including corruption & corporate organized crime
- criminalizes acts of corruption including bribery, or offering a bribe to public officials
- speeds up and widens reaches of extradition
- boosts prevention of organized crime at national and international levels
- develops protocols containing measures to combat specific acts of transnational organized crime

WORLD BANK AND INTERNATIONAL MONETARY FUND

'96 – instituted policies allowing them to investigate complaints of corruption

- blacklist companies and governments that participate in bribery
- cancel financing to a country that condones bribery
- prevent a bribing company from participating in contracts financed by the World Bank (e.g. no money to Nigeria, Zaire, Kenya, and assistance to curb corruption to Uganda, Tanzania, Bolivia, Ukraine, Nicaragua)

WTO

- Increasing transparency in the process by which governments are awarded contracts
- Implement domestic procedures to enforce rules against government officials abusing their discretion in the contract procurement process