

Domestic and International Anticorruption Initiatives

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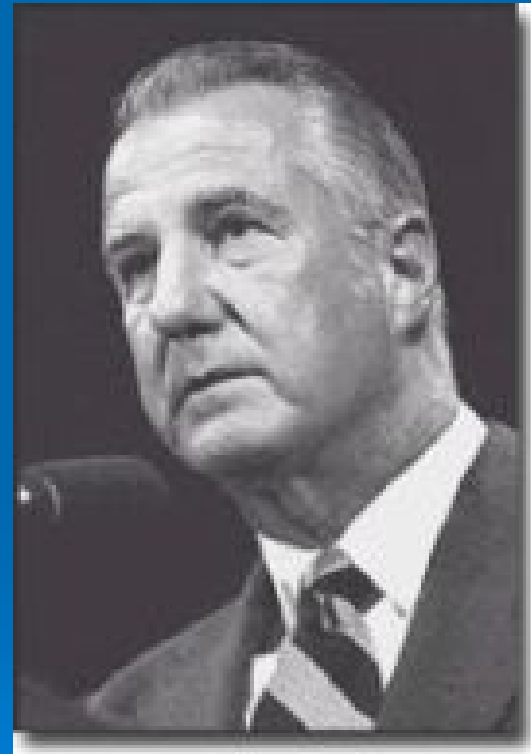
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Some Consequences of Bribery



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(CNN)

Why do we care about corruption?

- Economic development
- Political instability
- Vital health and safety issues
- Arms trade
- Drug and human trafficking
- Hurts U.S. exporters directly and indirectly

Why do we care about corruption?

- Relation to U.S. exports:
- ***Between 1994 and 2004, 561 contracts worth \$278 billion may have been affected by bribery of foreign public officials, with U.S. firms losing 126 of these contracts, worth \$43 billion.(USG Estimate)***
- *(Source: MAC reports online for 2003 and 2004)*

Foreign Corrupt Practices Act

- The primary U.S. domestic response to international corruption



Why do we care about FCPA enforcement?

- Assist U.S. exporters to be aware of the law and available compliance programs
- General obligation to assist law enforcement
 - ITA involvement should not hinder investigations or prosecution
- Avoid personal involvement in a case



The Most Important Thing You Need to Know About the FCPA

- Enforcement authority:
 - Department of Justice (Criminal Division, Fraud Section)
 - Securities and Exchange Commission

➤ **NOT COMMERCE**



What else do you need to know?

- Who is (and is not) covered
- What is prohibited?
- What are the penalties?
- What are the defenses?
- How can the exporter keep from getting into trouble?

Who is covered?

- An issuer, a domestic concern, or a foreign national or firm, and
- An officer, director, employee, or agent of a firm or any stockholder of a firm, acting on behalf of the firm

Foreign Nationals and Firms

- FCPA now includes both territorial and nationality jurisdiction
- Foreign company or person who takes action while in the territory of the United States IS COVERED
- No requirement of use of the U.S. mails or interstate commerce nexus
- Causing an act to be done in the United States may subject a foreign firm to jurisdiction and liability (e.g., emailing an instruction)

Recipient

- Any foreign official
- A foreign political party
- An official of a foreign political party
- A candidate for foreign political office

Who is a “Foreign Official”?

- Any officer or employee of a foreign government,
- Or any department, agency, or instrumentality thereof,
- Or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality.
- Definition is a matter of U.S. law, not local law

Foreign Official – 1998 Amendment

- Foreign official now includes officials of public international organizations
- BUT still does not include the International Olympic Committee



What is an “issuer”?

- A corporation that has issued securities registered in the United States, or
- who is required to file periodic reports with the SEC.
- Includes issuers of American Depositary Receipts (ADR) (several hundred firms)

What is a “Domestic Concern”?

- Any individual who is a citizen, national, or resident of the United States
- Any business that has its principal place of business in the United States, or
- Is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

What can't you do?

- Use the mails or any means or instrumentality of interstate commerce
- Corruptly
- In furtherance of an offer, payment, promise to pay, or authorization of the payment of...

- Any money
- Or offer, gift, promise to give, or authorization of
- The giving of anything of value



For what?

- Influencing any act or decision
- In order to assist the firm
- In obtaining or retaining business for or with, or directing business to, any person.
- There **MUST** be a “quid pro quo”

Penalties

- Maximum fines: \$2 million
- (\$100,000 for domestic concerns)
- Imprisonment for firm officials
- (both issuers and domestic concerns):
- up to 5 years
- Civil fines can be imposed (up to \$10,000 on an issuer)
- Both issuers and domestic concerns are subject to injunctions



Penalties II

- Alternative fines provisions (18 U.S.C. 3571) can result in much higher fines: twice gain to offender, or loss to victim
- Lockheed paid a fine of over \$24 million in 1994
- Titan paid over \$28 million in 2005

Penalties III

- A person or firm found in violation of the FCPA may be barred from doing business with the Federal government
- Both procurement and nonprocurement activities are covered
- Indictment alone can lead to suspension of right to do business with the government.
- A violator MAY lose its export licenses



Exception: facilitating payments


- EXAMPLES:
- Obtaining permits, licenses, or other official documents;
- Processing visas and work orders;
- Providing police protection, mail pick-up and delivery;
- Providing phone service, power and water supply,
- Loading and unloading cargo, or protecting perishable products;
- Scheduling inspections associated with contract performance or transit of goods across country; and
- **Actions "similar" to the examples above**

Affirmative Defenses

- The payment was lawful under the written laws of the foreign country, or
- The money was spent as part of demonstrating a product or performing a contractual obligation
 - Trips to U.S. – the Disney World issue!



Payments through Intermediaries

- Payments made to any person, while knowing that a bribe will be offered, given, or promised
 - “Knowing” encompasses “conscious disregard” and “willful blindness.”
 - Intermediaries include
 - Joint venture company
 - Local agent or representative
- 

Department of Commerce: Advocacy Assistance

- A company requesting advocacy assistance must sign the Agreement Concerning Bribery and Corporate Policy Prohibiting Bribery.
- The Agreement states that the company and its affiliates:
 - 1) have not and will not engage in the bribery of foreign officials in connection with the matter for which assistance is sought; and
 - 2) will maintain and enforce a policy that prohibits the bribery of foreign officials.

Advocacy Assistance

- What happens if a firm violates the agreement?
- We may deny further advocacy
- We don't intend False Statements Act to apply (but it might!)

Department of Commerce: Participation in Trade Missions

- Any company that wishes to apply to participate on a Commerce Department trade mission must agree that it and its affiliates:
 - (1) have not and will not engage in the bribery of foreign officials in connection with the company's involvement in the mission, and
 - (2) maintain and enforce a policy that prohibits the bribery of foreign officials.

WHAT DO YOU DO WHEN YOU GET EVIDENCE OF A POSSIBLE FCPA VIOLATION?



See cable from 2005, State 0020308 (Unclassified)

- Your response depends on –
 - The nature of the transaction and the allegation;
 - Who made the allegation; and
 - Your assessment of the circumstances.
- **DO NOT HESITATE** to ask for advice/assistance when this issue arises

Resources available at Commerce

- Informal FCPA guidance
- Joint Commerce-Justice brochure
- Trade Compliance Center reporting procedure
- Congressional reports on-line
- Other web-based resources

FCPA resources

- Detailed summary may be found in Justice-Commerce brochure:
- **FIGHTING GLOBAL CORRUPTION:
BUSINESS RISK MANAGEMENT**
- At <http://www.tcc.mac.doc.gov/Bribery>



Why Have International Initiatives Against Corruption?

- Level the playing field for U.S. companies
- Ensure that assistance money is spent properly
- Improve business climate--promote economic transformation and development
- Improve transparency, democracy
- Fight against terrorism

Transparency International

<http://www.transparency.org>

- **Corruption Perception Index (CPI)**
- **Global Corruption Barometer**
- **Bribe Payers Index (BPI)**

Who got better in 2007 (CPI)?

- Namibia, Seychelles, South Africa and Swaziland
- Costa Rica, Croatia, Cuba, Czech Republic, Dominica, Italy, FYR Macedonia, Romania and Suriname.

Who got worse in 2007?

- Austria, Bahrain, Belize, Bhutan, Jordan, Laos, Macao, Malta, Mauritius, Oman, Papua New Guinea and Thailand.

Who is the very worst?

- (40% of the countries in the world are “very corrupt”)

- Afghanistan
- Sudan
- Chad
- Uzbekistan
- Tonga
- Haiti
- Iraq
- Somalia
- Myanmar

Who is at the top?

- New Zealand
- Denmark
- Finland
- Singapore
- Sweden
- Iceland
- Netherlands
- Switzerland
 - (U.S. is 20th)

International Anti-Bribery Convention


- 20 years in the making
- Began in the United Nations after passage of FCPA
- Could have been done country by country
- Finally found a home in the OECD
(Organization of Economic Cooperation and Development)

Omnibus Trade and Competitiveness Act of 1988

- “Sense of Congress” that the President should pursue the negotiation of an international agreement
- Among the members of the OECD
- Concerning acts of bribery by persons from those countries



Organization for Economic Cooperation and Development

- 1994 Recommendation of Council on Combating Bribery in International Business Transactions
 - 1996 Recommendation on Tax Deductibility
 - 1997 Revised Recommendation with Agreed Common Elements (based on the FCPA!)
- 

OECD Antibribery Convention

- Negotiated, adopted, and signed in 1997
- Entered into force February 1999
- 30 OECD Countries (among them the largest exporting countries)
- Seven nonmembers have acceded:
Argentina, Brazil, Bulgaria, Chile, Slovenia (2001), Estonia (2004), and South Africa (2007)

OECD Anti-Bribery Convention

- Each Party MUST make it a criminal offense under its law
- For “any person” to engage in bribery of a foreign public official
- Intentionally
- Whether directly or through intermediaries
- In order that the official act or refrain from acting in relation to the performance of official duties,
- In order to obtain or retain business or other improper advantage in the conduct of international business.

- Foreign Public Officials--broadly defined to include:
- Persons in all branches of government, appointed or elected,
- Any person exercising a public function and
- Any official of a public international organization.

- Covers offers, promises or giving of any undue pecuniary or other advantage
- Covers bribes to third parties
- Covers bribes to intermediaries



- Parties must provide for "effective, proportionate and dissuasive criminal penalties"
- Parties whose legal systems lack the concept of criminal corporate liability must provide for –
 - equivalent non-criminal sanctions, including monetary penalties
- Accounting provisions

➤ Based on FCPA, but DOES NOT COVER BRIBES TO

- political parties,
- candidates, or
- party officials

What next for the OECD?

- Business Community wants cases!
- OECD Bribery Working Group monitoring
- Phase I: Countries' Laws, began in 1999
- Phase II: Implementation and Enforcement, began in 2001, and continues

Major Cases Brought by Other OECD Convention Parties?

(a few)



BAE case: a failure of the convention?

- BAE a U.K. defense firm, allegedly made illegal payments to Saudi officials related to a sale of British jets.
- The U.K. terminated its investigation into the case, citing the “public interest”
- The OECD Convention specifically prohibits national economic interest and relations with another State from affecting investigation and prosecution of foreign bribery.
- - The U.S. and other OECD Member states have sharply criticized the U.K.
- U.K. courts are reviewing the legality of the termination.

Other Anti-Corruption Conventions

- Inter-American Convention Against Corruption
- Council of Europe Criminal Law Convention
- United Nations Convention Against Corruption

Inter-American Convention Against Corruption

- (OAS Convention)

- Adopted in 1996
- Entered into force March 1997
- Number of signatories: 28
- Number of ratifications/accessions: 34

OAS Convention

- Preventing conflicts of interest and protecting resources entrusted to government officials;
- Reporting of acts of corruption;
- Registration of government officials' income, assets and liabilities;
- Open, equitable and efficient systems of government hiring and government procurement;
- Denial of tax benefits for illegal corrupt payments;
- Government revenue collection and control systems to report corrupt acts;
- Records systems and internal accounting controls for publicly held companies;
- Encouragement of private sector participation in fighting corruption.

OAS Convention

- Bribery of domestic and foreign public officials
- Illicit Enrichment
 - a significant increase in the assets of a government official
 - that cannot reasonably be explained in relation to lawful earnings
- Monitoring

Council of Europe Criminal Law Convention on Corruption

- Opened for signature 1999
- Entered into force 2002
- Number of signatories 49
- Number of ratifications 36
- U.S. (Nonmember state - observer status)
– signed but has not yet ratified.

Council of Europe Convention

Basic Prohibitions

- Covers all bribes (domestic, foreign, active, passive)
- Commercial bribery (B2B)
- Not limited to business-related bribes
- Allows for reservations

United Nations Convention Against Corruption

- Negotiations began 2002, concluded in Oct. 2003
- Signatories: 140 (including U.S.)
- Ratifications: 103 (including U.S. on Oct. 30, 2006)
- Entered into force December 14, 2005

UN Convention Against Corruption

- **Substantive Provisions: both sides of the corruption equation addressed**
- **Preventive Measures**
- **Asset Recovery (addresses the problem of illicitly acquired assets hidden in another country)**
- **Parties must criminalize: bribery, embezzlement, money laundering, obstruction of justice**
- **Private sector concerns w/compensation for damage and extraterritorial jurisdiction**
- **International Court of Justice for dispute settlement**
- **Monitoring?**

Advice from the United Nations

You can stop
CORRUPTION

Reporting Information on International Corruption

- The FCPA reporting cable referred to above also governs international bribery generally
- If a firm or individual from an OECD convention party has bribed, contact USG agencies!
- (DOC: Jeff Kozlowicki, Kathryn Nickerson, Gwenann Manseau, or Art Aronoff)
- Do not conduct your own research/investigation into the case unless and until advised by USG agencies.



Other Anticorruption Initiatives...

- WTO Agreement on Government Procurement
- Trade Promotion Authority: Transparency and Anticorruption are key negotiating objectives
- FTAs - transparency & anticorruption provisions
- Global Forum on Fighting Corruption (GF5 was held in 2007)

...Other Anticorruption Initiatives...

- G-8 Initiatives
- Millennium Challenge Account & other aid programs
- World Bank programs

...and Still Other Anticorruption Initiatives

- ITA Good Governance Programs: Russia, Latin America
- The OECD/ADB (Asian Development Bank) Anticorruption Compact
 - Signed in 2001 by seventeen nations.

...and Still Other Anticorruption Initiatives

➤ Africa:

- Organization of African Unity (OAU) draft Protocol Against Corruption
- Southern African Development Community (SADC) Protocol Against Corruption
- Twenty-five Anticorruption Principles of the Global Coalition for Africa (GCA).

➤ Middle East and North Africa (MENA) Good Governance Initiative

Useful Anticorruption Websites

- <http://www.osec.doc.gov/ogc/occic/tab1.htm>
- .IN PARTICULAR SEE ARTICLE BY KATHRYN NICKERSON
- [.http://www.tcc.mac.doc.gov](http://www.tcc.mac.doc.gov)
- [.http://www.usdoj.gov/criminal/fraud/fcpa.html](http://www.usdoj.gov/criminal/fraud/fcpa.html)
- [.http://www.state.gov/g/inl/corr/](http://www.state.gov/g/inl/corr/)
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- [.http://www.usaid.gov/democracy/anticorruption](http://www.usaid.gov/democracy/anticorruption)
- [.http://www.transparency-usa.org/](http://www.transparency-usa.org/)