

DEAL OF A LIFETIME – OR JAILTIME AND FINES? 5 BEST PRACTICES TO AVOID FOREIGN CORRUPT PRACTICES ACT VIOLATIONS

Insights
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One of your employees working overseas emails you with great news – they’re about to close a \$50 million sale with a new customer. They tell you everything looks great, but there’s just one thing. The local political party chairman said he’ll support your business license application if his company gets the exclusive rights to provide janitorial services at your local affiliate’s new offices. You need janitorial services there anyway – and this seems like a win-win – so you accept his proposal. Did you know you may have just committed a U.S. federal crime? Many employers operating with overseas personnel might not know the nuances of the Foreign Corrupt Practices Act (FCPA), so read on if you want to learn five best practices and minimize your chances of violating the law.

What is Prohibited?

Before we review some best practices, it’s a good idea to understand the basics. The FCPA makes it a crime for any U.S. person or company to directly or indirectly pay or promise to pay money or anything “of value” to a “foreign official” to obtain or retain business or any other improper advantage. Failure to properly record the payment or transaction may also be a separate violation. A guilty verdict can result in significant fines for your company – and possible fines and prison terms for the U.S. individuals involved.

What is “Of Value”?

A thing of value includes, but is not limited to:

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- Money
- Gifts and offers of gifts
- Stock and other equity
- Payments for entertainment, travel, and lodging
- Charitable donations that could be a conduit for bribes
- Offers of employment
- Discounts not readily available to the public
- Assumption or forgiveness of a debt
- Personal favors
- Business Opportunities

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Importantly, the law contains no *de minimis* or small payment exceptions. Nor does a bribe have to be paid – the mere promise of a bribe is also illegal.

Who is a “Foreign Official”?

The definition of “foreign official” is not limited to elected government officials and employees. It also includes:

- Political party candidates, officials, and employees
- Employees of government-controlled companies or instrumentalities
- Employees of public international organizations
- Any others in an official capacity (including honorary positions)
- A family member of the foreign official in certain circumstances
- Any person, while knowing that all or a portion of thing of value will be promised or given to foreign official

Are Any Payments Ever Allowed?

The law permits certain “facilitating” payments in a few very limited circumstances. For example, payments for routine and non-discretionary actions or situations involving life-threatening circumstances. Such payments are very

narrowly construed and should be approved in advance if feasible.

It is also essential that any such payments be properly logged in the company's records with sufficiently detailed information about the facts and circumstances justifying them. If possible, seek advice from counsel prior to making any such facilitating payments.

Severe Consequences Await Violators

The Department of Justice and the Securities and Exchange Commission are charged with enforcing the law – and those found caught up in the government's sights can face some staggeringly severe consequences. If you're looking for some facts and figures to scare you into compliance, the Stanford Law School Foreign Corrupt Practices Act Clearinghouse reports:

- The average sanction in 2022 was over \$150 million.
- The average cost to an employer in connection with an FCPA investigation is over \$1.5 million *per month*.
- The average length of an FCPA investigation is 39 months (you can do the math there).
- Individuals found guilty of violating the law receive an average sentence of 28 months imprisonment or house arrest.

Clearly, these claims can be costly and have a significant impact on a company's and an individual's reputation. Moreover, the statistics show that these unlawful transactions can occur anywhere in the world – Europe, Asia, South America, and Africa – so any company engaging in international commerce or employment should be on notice of the FCPA rules and requirements.

Look Out For the Warning Signs

While it can be very difficult to monitor international transactions for signs of potential corruption, the following should be on your radar screen:

- *Any lack of transparency and/or traceability* in transactions, expenses, and statements of operations.

- Any request to *pay costs in cash and/or insufficiently documented* payments without reference to an invoice or an order.
- Any *method of payment not provided for contractually*. This includes requests for transfer to a third party or to a third country, requests for modification of certain payment methods, etc.
- Any proposal to use *intermediaries unnecessarily or without explanation*.
- Any proposal of an *advantage and/or request for a gift in cash* or in kind for the performance of a service.
- Any employee of a company or public official who gives *the impression of acting alone or outside the structure or organization* to which they belong.
- Any *request for commissions or fees of a high amount, or other questionable contract provisions compared to the market practices*, without objective reason.
- Any *refusal to certify in writing that they comply with the anti-corruption legal provisions*.
- Any *request for employment outside of the company's formal recruitment process* for a friend or family member.
- Any *request for a donation to a charitable organization* in exchange for a benefit.
- Any *negative information relating to the reputation of the person or company with whom the business relationship is established*, incriminating article in the local press, previous conviction for offences against probity, etc.

5 Best Practices to Avoid FCPA Charges

There are numerous steps you can take to reduce the likelihood of an FCPA violation. Effective actions and compliance programs designed to prevent bribery and corruption can help prevent the illegal acts from occurring or help reduce the penalty in the event of a potential violation. Here are five of the best practices you should consider implementing to reduce the chances of a costly FCPA charge.

1. Implement an Effective Compliance and Ethics Program

These programs establish the company's expectations for ethical behavior and intolerance of corruption and bribery. Such programs are also useful for setting the proper compliance tone coming from the top of the organization directed to all employees. Well-crafted compliance and ethics programs also establish that the company's standards for ethical business practices applies to all employees, agents, and business partners.

2. Offer Training to Your Workforce

Train all employees during orientation and periodically thereafter regarding your compliance and ethics program. Educate them on how they can report (either directly or anonymously) concerns that might come to their attention. Provide targeted training for employees working internationally regarding the company's ethical expectations and the elements of the FCPA.

3. Conduct Proper Screening of Agents and Business Partners

Research available information about other parties involved in your business transactions to ensure they have a reputation for ethical business practices. Avoid doing business with any party that has a questionable history.

4. Ensure Proper Documentation

Ensure all transactions are properly documented and all payments are justified based on the nature of the transaction.

5. Ask Questions

Focus on potential warning signs and train your employees to ask questions if any situation seems questionable or suspicious.

Conclusion

If you have questions regarding best practices for ensuring compliance with the FCPA, please reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Corporate Compliance and Governance](#) or our [International Practice Groups](#). Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date

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