
THE FOREIGN CORRUPT PRACTICES ACT: COMPETING AND COMPLYING IN FOREIGN MARKETS

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FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AGENCIES

- ◆ U.S. SECURITIES AND EXCHANGE COMMISSION (SEC)
 - Limited to Issuers
 - Limited to Civil Enforcement
- ◆ U.S. DEPARTMENT OF JUSTICE
 - Everyone Else for Civil Enforcement
 - Everyone for Criminal Enforcement

FOREIGN CORRUPT PRACTICES ACT – TWO MECHANISMS

- ◆ ANTI-BRIBERY PROVISIONS
 - Proscriptive in Orientation
 - Criminal Violations – 5 Years
 - Similar to International Conventions
- ◆ ACCOUNTING AND RECORD-KEEPING PROVISIONS
 - Prescriptive in Orientation
 - Criminal Violations – 20 Years
 - Not Part of International Conventions

KEY DISTINCTIONS

◆ ANTI-BRIBERY PROVISIONS

- Relates to Foreign Activities
- Applies to U.S. persons anywhere – nationals and domestic concerns
- Applies to Issuers
- Applies to anyone in U.S.

◆ ACCOUNTING AND RECORD-KEEPING PROVISIONS

- Relates to Foreign and Domestic Activities
- Limited to Issuers
- Foreign Subsidiaries – over 50 percent interest

ANTI-BRIBERY PROVISIONS

- ◆ OFFER OR PAYMENT
- ◆ ANYTHING OF VALUE
- ◆ WITH CORRUPT INTENT
- ◆ TO FOREIGN OFFICIAL
- ◆ TO INFLUENCE OFFICIAL ACT
- ◆ TO OBTAIN OR RETAIN BUSINESS

EXCEPTIONS OR AFFIRMATIVE DEFENSES

- ◆ LOCAL LAW EXCEPTION – WRITTEN LAW
- ◆ *BONA FIDE* BUSINESS EXPENDITURES
- ◆ FACILITATING PAYMENTS
- ◆ OPINION PROCEDURE

ACCOUNTING AND RECORD-KEEPING PROVISIONS

- ◆ INTERNAL ACCOUNTING CONTROLS
- ◆ RECORD-KEEPING PROVISIONS

INTERNAL ACCOUNTING CONTROLS

◆ BASIC CRITERIA

- Controlling Environment
- Reviewing Internal Controls
- Monitoring Compliance
- Reasonable Assurance

◆ SARBANES-OXLEY CERTIFICATIONS

- No Material Weaknesses

SEC CATCH-ALL PROVISION

- ◆ ALMOST ALWAYS CIVIL IN NATURE
- ◆ PROVIDES ALMOST UNLIMITED JURISDICTION FOR SEC TO ADDRESS PROBLEMS AFTER-THE-FACT
- ◆ NO INTENT REQUIRED FOR CIVIL ENFORCEMENT

RECORD-KEEPING PROVISIONS

- ◆ ACCURATE BOOKS AND RECORDS
- ◆ LYING TO AUDITORS

EFFECTIVE ENFORCEMENT TOOL

- ◆ NO MATERIALITY REQUIREMENT
- ◆ MUCH EASIER TO PROVE
- ◆ SUPPLEMENTS ANTI-BRIBERY PROSECUTIONS
- ◆ CIVIL ENFORCEMENT - NO INTENT REQUIRED
- ◆ IMPLICATIONS FOR FACILITATING PAYMENTS

LYING TO AUDITORS

- ◆ MUST BE OFFICER OR DIRECTOR
- ◆ EXTENDS TO INTERNAL AND EXTERNAL AUDITORS
- ◆ RELATES TO MATERIAL OMISSIONS AS WELL MATERIAL MISREPRESENTATIONS
- ◆ EXTENDS TO MANIPULATING, COERCING, OR MISLEADING AUDITORS
- ◆ CIVIL ENFORCEMENT – NO INTEND REQUIRED

AUDITORS - HEIGHTENED RESPONSIBILITIES

- ◆ SECURITIES REFORM ACT OF 1995
- ◆ SAS No. 99
- ◆ SARBANES-OXLEY – CERTIFICATIONS
 - CEOs and CFOs
 - Attest Function of Auditors

DISCLOSURE ISSUES: MATERIALITY

- ◆ QUANTITATIVE
 - CONTINGENT LIABILITIES
 - IMPACT OF SENTENCING GUIDELINES
- ◆ QUALITATIVE
 - STAFF ACCOUNTING BULLETIN NO. 99

NEW INTERNATIONAL NORMS

- ◆ OECD CONVENTION
- ◆ INTER-AMERICAN CONVENTION
- ◆ COUNCIL OF EUROPE CONVENTION
- ◆ UNITED NATIONS CONVENTION

NEW INTERNATIONAL NORMS: COMMON TRAITS

- ◆ ADDRESS OFFERS AND PAYMENTS TO FOREIGN OFFICIALS
- ◆ PROVIDE FOR COOPERATION AND EXCHANGE OF EVIDENCE
- ◆ DO NOT HAVE RECORD-KEEPING PROVISIONS LIKE FCPA
- ◆ DO NOT ADDRESS PAYMENTS TO POLITICAL PARTIES

COMPLIANCE PROGRAMS

- ◆ ATTITUDE AT THE TOP OF ORGANIZATION IS THE KEY
- ◆ MUST BE MORE THAN WRITTEN PROCEDURES
- ◆ MUST BE APPLIED AT ALL LEVELS
- ◆ *CAREMARK* DECISION
- ◆ *TITAN* 21(a) REPORT

DUE DILIGENCE

- ◆ KEY FACTOR: EVERYTHING REASONABLE WAS DONE UNDER THE CIRCUMSTANCES
- ◆ WRITTEN RECORD
- ◆ MUST BE AVAILABLE FOR REVIEW