

What Chinese Companies Need to Know About The US Foreign Corrupt Practices Act (FCPA)

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What is the US FCPA?

- US federal law that makes it illegal to give money or anything of value to an official of a foreign government for the purpose of obtaining business or gaining any improper business advantage.
- Signed into US law by President Jimmy Carter on December 19, 1977.

Why Should A Chinese Company Care About The FCPA?

- The US is very aggressive about enforcing the FCPA, even against non-US Companies.
- US business partners will expect compliance
- Penalties are very large:
 - Siemens: \$800 million (2009)
 - BAE: \$400 million (2010)
 - Bonny Island/TSKJ consortium (KBR, Technip, Snamprogetti, JGC): \$1.5 Billion (2009-2011)
 - Total SA: \$398 million (2013)
 - Alcoa: \$384 million (2014)

Overview of the Foreign Corrupt Practices Act

Two parts to the statute:

- Anti-Bribery (15 U.S.C. §§ 78dd-1, 78dd-2, 78dd3, 78ff)
 - Prohibits corrupt payments to foreign officials for the purpose of obtaining or retaining business
 - Enforced by the Department of Justice (DOJ), with overlapping civil jurisdiction of the Securities and Exchange Commission (SEC) in relation to US issuers.
- Books and records (15 U.S.C. § 78m)
 - Requires U.S. issuers of securities to keep accurate records and develop a system of internal accounting controls
 - Generally enforced by the SEC

Elements of an FCPA Bribery Violation

- Payment, offer or promise of anything of value
 - Examples: Cash, Stock, Gifts, Travel Expenses, Medical Expenses.
- To: (i) foreign government official, (ii) a foreign political party or party official, (iii) a candidate for foreign political office, or (iv) any other person while knowing that the payment will be passed to one of these
 - Employees of State-Owned Enterprises are considered government officials (majority state control)
 - FCPA does not apply to bribery of non-government officials (business bribery)
- With corrupt intent
 - It is not necessary to have actual knowledge that a bribe will be paid, so long as circumstances indicate there is a high probability or substantial certainty.
 - Hiring agents or intermediaries to pay bribes does not protect you

Elements of an FCPA Bribery Violation (cont'd)

- For the purpose of: (i) influencing an official act or decision, (ii) inducing a person to do or omit to do acts in violation of his official duty, (iii) inducing that person to use his influence with a foreign government to affect or influence any government decision or action, or (iv) otherwise securing an improper business advantage.
 - Payment does not have to go directly to decisionmaker, so long as it is intended to influence the decision
 - Business advantage can include obtaining confidential information, for example information about upcoming projects, status of bidding for a project, or confidential bids submitted by competitors
- To assist in obtaining or retaining business

Exceptions and Affirmative Defenses

- “Grease Payments”
 - “Facilitating or expediting payments” made to foreign officials for the purpose of securing non-discretionary “routine governmental actions.”
- Payment was lawful in the official’s country
 - Must be under written law, not simply a custom or practice
- “Reasonable and bona fide expenditures” related to promotion or demonstration of a product or service, or the execution of an existing contract
 - Permits some gifts, paying travel and entertainment expenses, for legitimate business purposes and not intended to improperly influence public official.

Who The Anti-Bribery Provisions Apply To

- US Issuers
 - Any company with securities registered in the United States, or that has to file periodic reports with the SEC
- United States citizens and companies
 - Conduct anywhere in the world will violate the FCPA
- Foreign persons or companies that cause conduct in the U.S. in furtherance of corrupt payments to foreign officials
 - 1998 Amendments to FCPA extended jurisdiction over foreign companies that may have no other connection to the U.S.

When Could The FCPA Apply To A Chinese Company?

- Defendant does not have to come to the US, merely causing others to take actions in US in furtherance of a corrupt payment can be sufficient
- Non-US parties can be criminally liable for conspiring with US persons or persons who cause actions in the US
- Foreign parties can be criminally liable for aiding and abetting conduct of persons in the US
- Successor liability: Acquiror can be liable for past FCPA violations of acquired company if it knowingly enjoys the benefits of those violations

Examples of Prosecutions of Non-US Companies

- JGC/Bonny Island Project (2011)
 - Japanese EPC company settled charges for conspiring with US company and aiding and abetting US Company (KBR) to pay bribes on Nigeria LNG project (\$219 million)
- Marubeni/Bonny Island Project (2012)
 - Japanese trading company settled charges for conspiring with US company and aiding and abetting US Company (KBR) to pay bribes in Nigeria LNG project (\$54 million)
- Marubeni/Tarahan Project (2014)
 - Japanese trading company pleaded guilty to FCPA violations regarding payments to agents in power project in Indonesia (\$88 million)

Compliance Programs

- Required for US issuers; can be mitigating factor in prosecution of others, but is not a “safe harbor”
- Corporate Policy and Code of Conduct
 - Apply to all subsidiaries, intermediaries and agents (by contract).
- Strong Compliance Function and Internal controls
- Training, Reporting, Discipline
- Lines of authority for expenses
- Due diligence on potential agents/business partners
- Written agreements with agents/business partners

Red Flags to Look for in Due Diligence/Internal Investigation

- “Risk Based” Due Diligence
 - History of corruption in the country/Transparency International corruption perception index ranking
 - Nature of industry, transaction, government involvement
- Agents, intermediaries, consultants must always be examined closely
 - Qualifications
 - Source of agent and agent’s connections
 - Lack of transparency about who agent is and what they do
- Payments
 - Reasonable (market) value for the services rendered
 - Offshore payments, payments through shell entities
 - Unusual payment arrangements, e.g., success fees