



Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement

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Summary

The Foreign Corrupt Practices Act of 1977 (FCPA) was intended to prevent corporate bribery of foreign officials. The act has three major provisions; they concern the accounting standards of corporations, the requirements of Securities and Exchange Commission (SEC) registered issuers, and anti-bribery. The act was amended in 1988 and in 1998, but the three major areas of coverage remain.

Criticisms of the act's operation and scope began almost immediately after its passage and have continued. These kinds of criticisms range from its being too strict and therefore harmful to the competitive position of American businesses to its being unethical by allowing certain kinds of payments to foreign officials in the course of doing business. Especially prominent recently have been suggestions that businesses convicted of violating the Foreign Corrupt Practices Act should be debarred from receiving federal government contracts. Bills have been introduced in the 111th Congress to address this issue.

In addition to congressional scrutiny of the act, the executive branch appears to have increased oversight of suspected American businesses for alleged violations. There have been a number of settlements and indictments in 2010 concerning violations of the Foreign Corrupt Practices Act.

The major purpose of the Foreign Corrupt Practices Act of 1977¹ (FCPA) was to prevent corporate bribery of foreign officials. The act has three principal provisions.² The first provision amended section 13(b)³ of the Securities Exchange Act of 1934⁴ to require issuers which must register their securities with the Securities and Exchange Commission (SEC) to keep detailed books, records, and accounts which accurately record corporate payments and transactions. The second provision required SEC registered issuers to institute and maintain an internal accounting control system to assure management's control, authority, and responsibility over the firm's assets.⁵ The third provision of the original Foreign Corrupt Practices Act prohibited domestic corporations, whether or not registered with the SEC, from corruptly bribing a foreign official, a foreign political party, party official, or candidate for the purpose of obtaining or maintaining business.⁶

Frequent criticisms of the act's operation and scope began almost immediately after its passage. These criticisms covered a wide variety of issues, ranging from its putting American businesses at a competitive disadvantage to its allowing certain kinds of payments which many believed to be unethical.

For several years Congress considered responding to these criticisms by amending the 1977 Act. After considerable debate through at least three Congresses, the Foreign Corrupt Practices Act Amendments of 1988 were signed into law as Title V of the Omnibus Trade and Competitiveness Act of 1988 (Trade Act).⁷ Although the amendments maintained the three major parts of the 1977 Act—the accounting standards, the requirements of SEC registered issuers, and the anti-bribery provisions—the 1988 amendments made some significant changes to the 1977 Act.

Section 5002 of the Trade Act amended section 13(b) of the Securities Exchange Act to provide that no criminal liability shall be imposed for violation of the accounting standards unless a person knowingly circumvents or knowingly fails to implement a system of accurate and reasonable accounting controls. This section of the Trade Act also added to section 13(b) of the Securities Exchange Act a provision that an issuer holding 50% or less of the voting power of a domestic or foreign firm is required to use its influence only in good faith to cause the domestic or foreign firm to devise and maintain a system of acceptable accounting controls.

Section 5003 of the Trade Act amended the provisions of the Foreign Corrupt Practices Act concerning the anti-bribery prohibitions by issuers and domestic concerns. The Foreign Corrupt Practices Act continued to prohibit any issuer having a class of securities registered with the SEC or any officer, director, employee, or agent of the issuer or any stockholder acting on behalf of the issuer or any United States concern to offer, pay, promise to give, or authorize the giving of anything of value to a foreign official, a foreign political party, party official, candidate, or any person for the purpose of obtaining or maintaining business. Section 5003 also amended the 1977 Act to prohibit payments to any foreign official for the purpose of “influencing any act or

¹ P.L. 95-213, Title I; 91 Stat. 1494 (1977).

² For more detailed information on the content and history of the Foreign Corrupt Practices Act, see CRS Report RS21925, *Foreign Corrupt Practices Act (FCPA): A Legal Overview*, by Michael V. Seitzinger.

³ 15 U.S.C. § 78m(b).

⁴ 15 U.S.C. §§ 78a *et seq.*

⁵ 15 U.S.C. § 78m(b)(2)(B).

⁶ 15 U.S.C. §§ 78dd-1 and dd-2.

⁷ P.L. 100-418, Title V; 102 Stat. 1107 (1988).

decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official.” This language was inserted so that the foreign bribery standard would conform to the domestic bribery standard found in 18 U.S.C. section 201.⁸

The major changes which section 5003 of the Trade Act made to the 1977 Foreign Corrupt Practices Act had to do with when the bribery provisions apply to an American business or person acting on behalf of an American business. For example, the anti-bribery provisions under the 1988 Amendments did not apply to any facilitating or expediting payment to a foreign official, political party, or party official.

Criminal penalties for violations of the Foreign Corrupt Practices Act were also increased. The anti-bribery fine for a firm or domestic concern was raised from \$1 million to \$2 million and for individuals from \$10,000 to \$100,000. The maximum imprisonment for bribery for an individual remained five years.⁹ For willful violations of the accounting provisions, the fine for a corporation may not exceed \$25 million and for an individual not more than \$5 million and/or imprisonment of up to 20 years.¹⁰ The act also provides for civil penalties of up to \$10,000 for violations of the bribery provisions.¹¹

In 1998 the Foreign Corrupt Practices Act was again amended in order to implement the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transactions.¹² The 1998 Amendments expanded the scope of persons covered to include certain foreign nationals, such as any officer of a public international organization.¹³ The 1998 Amendments also extended the act’s jurisdiction beyond the borders of the United States.¹⁴

Criticisms of the Foreign Corrupt Practices Act have continued over the years, ranging from its putting American businesses at a competitive disadvantage in the global marketplace to its permitting unethical forms of payment tantamount to bribery. Especially prominent recently has been a call that businesses convicted of violating the act should be barred from or strictly limited in receiving government contracts. Bills in the 111th Congress have been introduced to address this issue. For example, H.R. 5366 would, unless waived by the head of a federal agency, permit any person found to have violated the Foreign Corrupt Practices Act to be proposed for debarment from any contract or grant awarded by the federal government. This bill was introduced on May 20, 2010, and reported by the Committee on Oversight and Government Reform on September 14, 2010, accompanied by H.Rept. 111-588. On September 15, 2010, the House passed the bill. On September 16, 2010, it was referred to the Senate Committee on Homeland Security and Governmental Affairs. The House report states the following need for the legislation: “Federal government contractors have used bribes in the past to influence the actions

⁸ H.REPT. 100-576, at 918 (1988).

⁹ 15 U.S.C. § 78dd-2(g).

¹⁰ 15 U.S.C. § 78ff(a).

¹¹ 15 U.S.C. § 78dd-2(g).

¹² P.L. 105-366; 112 Stat. 3302 (1998).

¹³ 15 U.S.C. § 78dd-1(f).

¹⁴ 15 U.S.C. §§ 78dd-1(g) and 78dd-2(i). United States businesses and persons are prohibited from acting corruptly outside the United States “in furtherance of” a bribe whether or not using the “mails or any means or instrumentality of interstate commerce.”

of foreign governments. The source of these bribes in part is American tax dollars paid by the federal government to contractors. This bill seeks to root out companies which tarnish the image of the United States of America by engaging in illegal activities.”¹⁵

H.R. 5837 would prohibit an executive agency from entering into a contract for goods or services unless that person or entity has certified that it and each of its officers, employees, and agents have not violated the Foreign Corrupt Practices Act or any comparable law of any other country. A contractor awarded a contract by a federal agency would be prohibited from entering into any subcontract at any tier with any person or entity which has not made this certification.

Another bill would address the criticism that the act does not allow a private right of action. H.R. 2152 would amend the Foreign Corrupt Practices Act to authorize a private right of action against a company for violation of the act. Lawsuits have been brought to urge allowing a private right of action, but the Sixth Circuit in 1990 found that the act does not allow a private right of action.¹⁶

In addition to congressional scrutiny of the act, the executive branch appears to have increased oversight of suspected American businesses for alleged violations of the act. On January 19, 2010, the U.S. Department of Justice (DOJ) announced that it had indicted 22 executives and employees in the military and law enforcement products industry for engaging in schemes to bribe foreign government officials to obtain and retain business.¹⁷ According to Assistant Attorney General Lanny A. Breuer, “This ongoing investigation is the first large-scale use of undercover law enforcement techniques to uncover FCPA violations and the largest action ever undertaken by the Justice Department against individuals for FCPA violations.”¹⁸

Several other events indicate executive branch concerns with Foreign Corrupt Practices Act violations. On August 6, 2010, Mercator Corporation pled guilty to charges that it had made an illegal payment to a senior government official in Kazakhstan in violation of the act.¹⁹ It has been reported that the Department of Justice and the Securities and Exchange Commission are looking into whether Merck has violated the act in multiple foreign countries.²⁰

On July 27, 2010, General Electric agreed to pay \$23.4 million to settle a complaint brought by the Securities and Exchange Commission that it had bribed Iraqi government officials to win contracts for supplying medical and water purification equipment under the United Nations oil-for-food program. It has been reported that the General Electric case is the fourth biggest such anti-bribery case brought in the oil-for-food program, after the cases filed against Siemens, Chevron, and Innospec.²¹

¹⁵ H.REPT. 111-588, at 2 (2010).

¹⁶ *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029-1030 (6th Cir. 1990).

¹⁷ <http://www.justice.gov/opa/pt/2010/January/10-crm-048.html>.

¹⁸ *Id.*

¹⁹ *United States v. Mercator Corporation*, S3-03-CR (S.D.N.Y. Aug. 6, 2010).

²⁰ Linda A. Johnson, *Merck Being Probed for Possibly Violating Anti-Bribery Laws*, WASHINGTON POST, August 10, 2010, at A14.

²¹ Zachary A. Goldfarb, *GE Agrees to Settle with SEC on Charges of Foreign Bribery*, WASHINGTON POST, July 28, 2010, at A11.

There have been reports that federal investigators have been looking into the possibility that Blackwater (renamed Xe) may have violated the Foreign Corrupt Practices Act. An indictment in April 2010 by a federal grand jury in North Carolina contained the following allegation:

Another means [of circumventing the possession and disposition of arms] consisted of Blackwater/Xe's efforts to gain favor with the Government of the Kingdom of Jordan. When the King of Jordan came to examine Blackwater/Xe's training facility at Moyock, North Carolina, the defendants arranged to present the King and/or his entourage with several firearms as gifts. When the defendants subsequently realized they were unable to account for the disposition of the firearms, they falsified four separate Alcohol, Tobacco, and Firearms (ATF) Form 4473s for submission to federal authorities. The defendants falsely completed the forms to give the appearance that the weapons had been purchased by them as individuals.²²

In October 2010 Assistant Attorney General Breuer emphasized that the United States takes seriously the enforcement of the Foreign Corrupt Practices Act. He is reported as stating that companies and individuals can expect to see "more and more prosecutions [under the 1977 Foreign Corrupt Practices Act] by the United States and more and more [joint] prosecutions with members of the OECD and throughout the world."²³

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²² <http://www.fcablog.com/blog/2010/4/19/blackwater-and-bribery.html>.

²³ Breuer Says U.S. Expects High Marks for Foreign Corruption, Bribery Efforts, DAILY REPORT FOR EXECUTIVES, 197 DER EE-18 (BNA October 14, 2010).