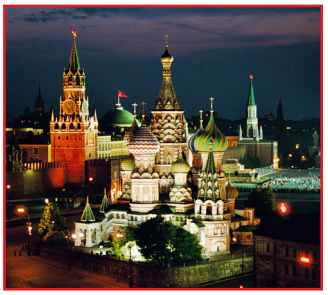
BAKER DONELSON
FOREIGN CORRUPT PRACTICES ACT



BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

EXPAND YOUR EXPECTATIONS™

Photos by Howard Baker, senior member of the Firm, and former chief of staff to the President, Senate majority leader and ambassador to Japan.

There are two key aspects of the FCPA: (1) the anti-bribery and anti-corruption provisions of the FCPA; and (2) accounting and reporting requirements, as outlined below. Violators of the FCPA are subject to severe criminal and civil penalties, including fines and jail time.

1. **FCPA Anti-Bribery Provisions.** The FCPA's anti-bribery and corrupt payment provisions make illegal any corrupt offer, payment, promise to pay, or authorization to give money, a gift or anything of value to any Foreign Official or any foreign political party, candidate, or official, for the purpose of :

- Influencing any act or failure to act, in the official capacity of the recipient, in order to obtain or retain business for anyone or direct business to anyone, or
- Inducing the recipient to use influence to affect a decision of a foreign government or agency in order to obtain or retain business for anyone or direct business to anyone.

"Foreign Official" means any officer or employee of a non-U.S. government, a public international organization or any department or agency thereof or any person acting in an official capacity for such an entity. Foreign Officials include employees of state-owned enterprises, such as postal services, incumbent telephone and electric companies, national airlines and other national, state, provincial, or local government-owned companies. Foreign Officials also include officials who represent provinces, states, territories, cities and regions. The FCPA applies to payments to any Foreign Official, regardless of rank or position.

Payments to or offers, promises or authorizations to pay any other person, American or foreign, are likewise prohibited if any portion of the contemplated payment is subsequently given or promised to a Foreign Official, political party or candidate for any of the illegal purposes outlined above. For example: A payment to a company (whether or not owned by a Foreign Official) or a partner that will provide some or all of the payment to a Foreign Official could fall within the FCPA.

2. **Accounting Requirements.** While the accounting requirements of the FCPA apply to publicly traded or listed companies in the U.S. and their subsidiaries and parents, complying with those requirements is an essential part of even a private company's compliance program. Failing to report a transaction, mischaracterizing a transaction (for example, in order to disguise the payment of a bribe or other improper payment) or creating any false, inaccurate, misleading or intentionally incomplete documentation, even if it has no impact on the revenues or obligations of the company (for example, creation of a false invoice to accommodate a foreign customer's request), must be prohibited. Also, any use of corporate funds or access to corporate assets, without proper authorization, must be prohibited.

Private, commercial bribery is also off-limits for two reasons. The UK Bribery Act prohibits it, but, more importantly for U.S. companies, the Justice Department has devised and used a tactic to prosecute U.S. companies and individuals for private bribery. The Travel Act outlaws the use of a facility of foreign or interstate commerce (telephone, personal travel, courier, etc.) in furtherance of the violation of any of various state and federal laws, including, for example, laws against bribery in the states where violators are located while on the telephone and from which they travel. The Justice Department used state law, through the Travel Act, to reach the conduct of a California company, Control Components, Inc., which pled guilty in 2011 to bribing an employee of a private Qatari company.

Any expenses of entertaining government officials must be directly related to the marketing of products or the fulfillment of contracts with the governments for which the officials work. American and other companies have been prosecuted for paying for government officials' vacations.

With regard to liability for the acts of third-party agents and contractors, U.S. persons and companies that know, or have reason to know, that third parties are engaging in prohibited acts are in violation of the FCPA. Willful blindness offers no protection.

Foreign agents and contractors themselves can be prosecuted for bribery committed while working for U.S. businesses. This happened in the Lindsey Manufacturing case in 2011, in which a Mexican marketing agent pled guilty to money laundering after making payments and gifts to executives of the Mexican government-owned electric utility company.

The FCPA does not outlaw facilitation payments, for example, payments that merely encourage a government employee to perform a nondiscretionary function like issuing a license; however, the Department of Justice (DOJ), which enforces the FCPA, interprets facilitation payments very narrowly, so it is bad idea to make them. Also, facilitation payments are illegal under the laws of virtually all countries where they are made, and many non-UK companies are subject to the UK Bribery Act, under which facilitation payments are illegal.

Efforts to enforce the FCPA and other countries' anti-corruption laws have increased dramatically in recent years. There is significant international cooperation in investigating corrupt payments, and among the countries of the Americas, there is a treaty requiring information sharing to facilitate prosecution of FCPA violators.

Penalties for violating the Act are stiff for individuals and companies. Individuals face up to 20 years in prison and a fine of up to $5 million per violation, and companies are prohibited from paying fines for their employees or agents. Corporate fines can be as high as $200,000 or twice the resultant profit for each

violation, and the fines are imposed in addition to disgorgement of profits and the appointment of a "compliance monitor," which is a law firm that the company has to pay to be its babysitter.

The Importance of a Corporate Compliance Program

"***FCPA enforcement is stronger than it's ever been – and getting stronger***," declared Assistant Attorney General Lanny A. Breuer on November 16, 2010, addressing the American Conference Institute's 24th National Conference on the Foreign Corrupt Practices Act. Indeed, FCPA enforcement actions nearly doubled from the prior record of 40 in 2009 to 74 just one year later. Both the DOJ and the Securities and Exchange Commission (SEC) – the statute's dual enforcers – have vowed to continue to aggressively investigate and prosecute violators. In addition to Breuer's promise that "[W]e are in a new era of FCPA enforcement; and we are here to stay," Cheryl J. Scarboro, Chief of the SEC's FCPA Unit, has pledged that the SEC "will continue to focus on industry-wide sweeps, and no industry is immune from investigation."

The new era of FCPA enforcement activity is characterized by escalating numbers of enforcement actions, bolstered by industry-wide investigations and a focus on prosecuting individuals in the midst of heightened levels of international anti-corruption cooperation and enforcement. As the level of enforcement activity escalates, companies of all sizes transacting business internationally and their employees must be vigilant in conducting their business, particularly in the world's most challenging environments such as Brazil, Russia, India and China.

United Kingdom Bribery Act

Under the new UK Bribery Act, which is widely regarded as tougher and broader than the U.S. FCPA, UK legislators haven't just banned companies and individuals from bribing foreign officials in order to win contracts or other business. They've also banned corporate hospitality, gifts and facilitation payments — so-called grease payments, or small monetary sums that don't necessarily earn companies any points with officials but might, for example, speed a shipment through customs.

The act, which modernizes the UK's existing but arcane anti-corruption regime, also gives prosecutors a tool to combat commercial and private bribery — not just bribery aimed at public sector contracts — and to crack down on bribe-takers themselves.

Perhaps of the greatest concern in the business community, the new law makes a company criminally liable if an employee offers or pays a bribe and the company fails to prevent it by not having adequate compliance programs in place.

Management Liability

The FCPA and UK Bribery Act potentially apply to any individual, firm, officer, director, employee or agent of a firm. Individuals and firms may be penalized if they order, authorize or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions. The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person.

It is important to understand that the recent trends in FCPA enforcement demonstrate a drastic increase in the prosecution of individuals and an increase in penalties. Furthermore, more aggressive theories and enforcement activities as well as increased global coordination make it imperative that the FCPA become a priority on all levels of the company. Informing individuals of their potential liability and confirming their understanding of the personal liability involved in an FCPA violation is key.

A board of directors has a duty of care to the company that requires that they be informed of the company's business and potential liabilities. An important case, *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), held that the failure of a board of directors to ensure that its company had adequate corporate compliance information and reporting systems could "render a director liable for losses caused by non-compliance with applicable legal standards." Directors have an affirmative duty to find and correct illegal behavior by corporate employees. A more aggressive theory that has been recently used by the SEC is the "control person" theory, allowing liability for the failure to accurately keep books and records/internal controls. "Conscience avoidance" has also become a basis for prosecution, where actual knowledge is not necessary if the situation is seen as the individual or company "burying their heads in the sand."

The board of directors should exercise due diligence. An effective compliance program may include a clearly articulated corporate policy prohibiting violations of the FCPA (including standards and procedures), the assignment to one or more senior corporate officials the responsibility of overseeing the compliance program, establishment of a committee to review and conduct due diligence on agents, corporate procedures to ensure that the company does not deal with individuals who the company knows (or should know) have a propensity to engage in illegal activities, and corporate procedures to ensure the company establishes business relationships with reliable agents. It is useful to establish company-wide individual responsibility for compliance monitoring as well as explicit and visible support from senior management.

Business Activities

In light of the foregoing, we believe the company and its affiliates should consistently follow certain fundamental practices when conducting operations in foreign countries:

1. "Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." (United States Sentencing Commission, Guidelines Manual Section 8B2.1 (Nov. 2010).

2. Recall that the Act reaches conduct by consultants, agents and foreign subsidiaries that are controlled or directed, either directly or indirectly, by a U.S. parent or U.S. citizens.

3. Constantly test business activities under the *New York Times* rule: Notwithstanding the technicality of the law, would the conduct or activity imply corruption if reported in a newspaper, and could/would a competitor

point a reporter in our direction because of that activity?

4. Avoid creating the impression of impropriety. For example:

   (a) Never employ members of the immediate family of a government or political party official unless there is a clear and easily recognizable business purpose and there is no one else available to perform the work.

   (b) Entertainment and transport provided to a government official should not be excessive in its regularity or expense.

   (c) Do not ask or allow a government official to make business arrangements on behalf of the company or provide any funds to that official for payment to another party.

   (d) When regular contact with government officials is necessary, prefer the lower level bureaucrat who performs "ministerial" or "clerical" tasks over the official who has the authority and discretion to recommend or take action that can result in contracts or business transactions in favor of the company.

Organization for Economic Cooperation and Development (OECD) has also developed a "Good Practice Guidelines on Internal Controls, Ethics and Compliance" that includes the following:

- Due diligence of business partner risk exposure
- Company-specific risk assessment and regular reviews
- Widely distributed and clearly articulated policy
- Regular, documented retraining at all levels
- Company-wide individual responsibility for compliance monitoring
- Strong, explicit, and visible support from senior management
- Substantial oversight by one or more senior officers
- Appropriate disciplinary measures in place for violations
- Modern, confidential reporting mechanisms

The foregoing are not the only guidelines for conduct under the FCPA, but they are useful reference points by which to gauge possible exposure to liability under the Act. We recommend circulating this memorandum to all company officers and employees for their review and confirmation of its receipt. Each situation is evaluated on a case-by-case basis so we encourage you to contact us with any questions.

Doreen M. Edelman
Shareholder
Washington, D.C.
Phone: 202.508.3460
Fax: 202.220.2260
dme@bakerdonelson.com

Doreen Edelman has significant experience in import and export matters. She ensures that export and import legal requirements are met in merger and acquisition due diligence and advises clients regarding compliance anti-corruption laws, including the FCPA, and in U.S. government investigations relating to export controls. Ms. Edelman works with U.S. companies entering new markets overseas and foreign companies doing business in the U.S. This includes drafting agency, licensing and distribution agreements for large and small companies, working with foreign counsel to assist her clients overseas and navigating U.S. foreign investment reporting requirements. She helps companies prepare global business plans, establish offshore corporations and obtain foreign government approvals. For companies expanding into the U.S. market, Ms. Edelman advises on product importation issues such as tariff classification, valuation and duty rate as well as the benefits of free trade programs like GSP and NAFTA.

Firm Recognition

- Ranked by FORTUNE as one of the top ten public policy firms in Washington, D.C. in its most recent survey of this kind.
- Named as 73rd largest law firm by *National Law Journal* in 2011 (number of attorneys).
- Ranked 116th largest law firm in the U.S. by *The American Lawyer* in 2011.
- Listed as a "Go-To Law Firm" in the Directory of In-House Law Departments of the Top 500 Companies published by CORPORATE COUNSEL.
- Ranked by FORTUNE as one of the "100 Best Companies to Work For" in 2010 and 2011.
- Consistently ranked in the "Top 100 U.S. Law Firms For Diversity" by *Multicultural Law* magazine since 2005.
- Ranked in the "Top 100 Law Firms For Women" since 2008 by *Multicultural Law* magazine.