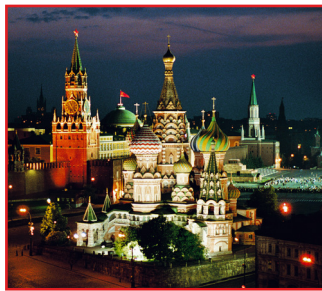


# BAKER DONELSON FOREIGN CORRUPT PRACTICES ACT



**BAKER DONELSON**  
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**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