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Corruption to Good Governance: Are There Lessons from Abroad?

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July 9, 2014

Overview

- Introduction to US Foreign Corrupt Practices Act
- Problem Scenario: Facilitation Payments
- Problem Scenario: "Foreign Official”
- Problem Scenario: Agent or Independent Contractor

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US Foreign Corrupt Practices Act

FCPA Intro

➓ 1977 U.S. Statute

- Origins in "Watergate" scandal and resignation of President Nixon
- >400 US companies
- Bribed foreign officials to obtain business
- Made illegal campaign contributions

➓ Subsequent multinational conventions

- OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions
- UN Convention Against Corruption

➓ Domestic Enforcement: “Honest Services”

- ➓ Catch all anti-bribery statute
- ➓ US Sup. Ct narrowed application primarily to government officials

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FCPA Key Elements

- ❿ Anti-bribery: civil and criminal penalties
- ❿ Mandates transparency --
  - Books and record keeping
  - System of internal controls
- ❿ Broad Application
  - US Companies and individuals
  - Many non-US entities listed on US securities exchanges
  - Directors, officers, shareholders, employees, agents
  - Non-US nationals in territorial jurisdiction of US

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FCPA Anti-bribery provisions

- Giving anything of value
- To "Foreign Official"
- Intending to influence FO
- To misuse his position
- To obtain or retain business
  - Obtain / retain contract
  - Circumvent import / export rules
  - Special regulatory treatment
  - Avoid taxes
  - Influence litigation outcomes
  - ?Burden a competitor

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FCPA Record Keeping and Internal Controls

- ❿ Prohibits "off the books" payments
  - Corporate "slush fund" common activity pre-FCPA
- ❿ Promoting transparency
- ❿ Facilitates internal discipline
- ❿ Encourages self-policing
- ❿ Expands potential penalties and plaintiffs
  - Expenditure not accounted for as a bribe becomes securities law violation
- Ties in with FCPA enforcement scheme
  - Incent companies to develop effective compliance programs
  - Self-reporting (voluntary confession) gains leniency
  - Facilitates evidence gathering in government investigations

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FCPA Definitional Challenge - Corrupt payment or not?

- Boundary problem: legitimate or corrupt payment?
  - Major enforcement challenge
  - Unclear mandates impede businesses changing internal culture
- Two Affirmative Defenses available in FCPA
- Local law defense
  - Payment must be permissible *de jure*, not merely *de facto*
- Reasonable and bona fide expenditure defense
  - Payments to promote, demonstrate, explain products

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FCPA Enforcement Strategies

- Objective: change business culture
  - Domestic operations
  - International business transactions
- Government prosecutions
  - Two pronged: Dept of Justice & SEC
  - Follow-on private investor lawsuits for lost shareholder value
  - Expense, time, deterrence unproven
- Whistle-blower incentives
- Leniency for self-reporting violations
- Guidelines for enforcement and acceptable practice
  - Can benefit companies who want to comply

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Problem Scenarios

Facilitation Payment or Bribe?

- Clerk requests payments to process applications
  - Permits to operate a plant
  - Approvals for utility connections
- Police chief requests payments for patrols
- Are these payments only expediting the inevitable
  - Even if "non-discretionary" timing matters
- Does presence / absence of competitors matter
- Does this encourage entrenched "low level" corruption

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Facilitation ("Grease") Payments

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- ❿Payments for routine, non-discretionary acts
  - Defined in terms of purpose of payment
  - Example: issue permits, providing police protection, utility services
  - Not payments to obtain business contract
- ❿Congress struggled with definition
  - Initial focus: "foreign official" excluded persons who performed only ministerial / clerical acts
  - Replaced debate over what is ministerial / clerical acts
  - Debate over whether the payment merely speeds an inevitable action
- Not a bona fide business payment
  - May be an illegal bribe under local law

Foreign Official as SOE Employee

- ❿Core problem: distinguishing payments with:
  - "corrupt" objective from
  - legitimate compensation for business service
- Is recipient being paid because of:
  - Status and power as foreign official; or
  - Specialized knowledge and skill, independent of political power
- US FCPA assumes private enterprise model
  - State Owned Enterprises challenge that model
- Molecular geneticist at public university
  - Specialized knowledge valuable to US biotech firm
  - Participation as adviser on Scientific Advisory Board
  - To support petition for drug approval

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Agent or Independent Contractor?

- ❿Core problem: distinguishing relationships with:
  - "Agents" acting under direction and control of foreign parent; from
  - Independent local business services providers
- Building local capacity a valuable national goal
- Risk / Opportunity for foreign business
  - Loose enforcement: local entity provides immunity
  - Strict enforcement: local entity kept under tight control

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