Corruption to Good Governance: Are There Lessons from Abroad?

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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

10 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

10 Subsequent multinational conventions
• OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions
• UN Convention Against Corruption

10 Domestic Enforcement: “Honest Services”
• Catch all anti-bribery statute
• US Sup. Ct narrowed application primarily to government officials
FCPA Key Elements

10 Anti-bribery: civil and criminal penalties

10 Mandates transparency --
   • Books and record keeping
   • System of internal controls

10 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
FCPA Anti-bribery provisions

1. Giving anything of value
2. To "Foreign Official"
3. Intending to influence FO
4. To misuse his position
5. To obtain or retain business
   - Obtain / retain contract
   - Circumvent import / export rules
   - Special regulatory treatment
   - Avoid taxes
   - Influence litigation outcomes
   - Burden a competitor
Prohibits "off the books" payments
- Corporate "slush fund" common activity pre-FCPA

Promoting transparency

Facilitates internal discipline

Encourages self-policing

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
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
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
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
Facilitation ("Grease") Payments

Payments 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

Congress 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
Core 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
Core 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