

Whistleblowers & The FCPA

DEFINING TERMS

The **Foreign Corrupt Practices Act (FCPA)** was passed by the United States Congress in 1977 and forbids bribing foreign officials to obtain or maintain business of any kind. Enforced by the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC), the law applies to all American nationals (be they private individuals or corporate entities) and to any foreign corporation registered with the Security Exchange Commission. The FCPA also applies to any foreign entity that commits the crime within United States territoryⁱ.

The FCPA's creation was part of a series of governmental reforms that came after the Watergate scandal, which included laws like the War Powers Act and the Freedom of Information Actⁱⁱ. Bribes had long been considered a necessary evil in conducting global commerce, and a Congressional report in the mid-70s found that over 400 American companies- 117 of which were in the Fortune 500- admitted to paying over \$300 million worth of funds or gifts to foreign entitiesⁱⁱⁱ. The practice inevitably led to greater corruption and stunted fair competition. The FCPA was the first in the world to make this practice illegal. This position became a global standard in 1999, when 41 nations signed the OECD's Anti-Bribery Convention^{iv}.

In the aftermath of the 2008 financial meltdown, the Obama administration and Congress enacted a sweeping piece of legislation called the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("The Dodd-Frank Act"). The Act strengthened business regulations and gave law enforcement more tools to prevent the kinds of fraud that caused the housing market collapse. When the Dodd-Frank Act was passed in 2010, one of the many items included was a "whistleblower" provision, modeled after a 2006 IRS program and the False Claims Act^v.

Should the violating company be successfully prosecuted in civil court with the evidence that the whistleblower has brought forth, then that whistleblower is eligible to receive 10% to 30% of the total **FCPA fines** retrieved when the fines exceed \$1 million. To date, the largest sum paid out under the Dodd-Frank whistleblowers provision has been a \$14 million award to an anonymous individual for critical material provided in a criminal case^{vi}.

GETTING INVOLVED:

As the world becomes more closely knit through trade and commerce, the United States has redoubled its efforts to fight corruption. The DOJ and SEC have made it a top priority to protect the functionality and integrity of international commerce and the reputation of American business around the globe. Although the FCPA Tips portion of the SEC Whistleblower program is in its early stages, the government's commitment has grown by leaps and bounds as they continue to expand their staffing and investigative capabilities. Tipsters filed 2,801 claims with the DOJ in 2015, coming from 61 nations and representing a 30% overall increase from the year before.^{vii}

ELIGIBILITY

Both Americans and foreign nationals are eligible for whistleblower awards. In fact, international citizens have been paid over \$30 million since the program began.

Several factors must be met for eligibility:

- 1) The Whistleblower must have submitted the information voluntarily.
- 2) The Whistleblower's information must be derived from exclusive knowledge and analysis. It cannot be drawn from public sources and cannot already be known to investigators.
- 3) The Whistleblower's information must play a significant role into opening and prosecuting a new investigation, or provide credible aid in a currently existing investigation.

Certain factors will render an individual ineligible for whistleblower awards. Some major ones include:

- 1) Already being obligated to report to the case investigators through a contract.
- 2) Being a foreign government official.
- 3) Providing information to investigators that was obtained illegally^{viii}

IDENTIFYING GLOBAL CORRUPTION

Although most corporations and governments conduct themselves with best practices and transparency, **foreign corruption** remains a widespread issue in global commerce. This is particularly true in the developing world, where weak institutional safeguards can create vulnerabilities to foreign exploitation. There are countless cases where providing gifts and “greasing the palms” of foreign officials have led to substantial business advantages. Bribery under the FCPA can take many forms: cash, property, employment, insurance, commissions, charitable contributions, or anything else of value^{ix}. All business sectors fall under the scope of the FCPA, and all have historically been subject to influence by bribery.^x

EMBED: <http://fcpamap.com/>

The respected anti-corruption watchdog group, Transparency International, defines “**corruption**” as the use of public power for private gain. Drawing on info for over 13 different NGOs, international banks, and fellow watchdog groups, it attempts to quantify global corruption levels through a yearly “Corruption Perceptions Index^{xi}”. As is evident by the 2015 report, well over 75% of the globe is ranked below average, revealing wide-ranging levels of systemic corruption throughout most of the world. Doing business with these place poses special challenges when faced with the FCPA. For some, the temptation to gain a competitive advantage by quietly issuing bribes is too great to deny.

RECENT FCPA VIOLATION CASES

December 2008: The German-based Siemens corporation settles with the DOJ for \$800 million over charges it has consistently violated the FCPA over a 20-year-period, paying hundreds of millions of dollars in bribes to foreign entities around the globe. An attorney for the DOJ states that FCPA violations appear to have been, “standard operating procedure.”^{xii} This remains the largest FCPA prosecution to date.

February 2009: Halliburton/KBR agrees to pay \$402 million dollars in fines after settling with the DOJ for \$182 million worth of bribes it paid out to Nigerian officials between 1995 and 2004. The funds were used to secure the construction of natural gas facilities in that nation; a joint venture worth some \$6 billion^{xiii}

March 2010: Defense Contractor BAE Systems plc (BAES) pleads guilty to a host of charges pertaining to the illegal sale of weapons abroad. BAES facilitated these sales by providing millions of pounds in bribes to unnamed “marketing advisors” through Caribbean shell companies. Although BAES is a UK-company, BAE Systems plc is an American subsidiary based out of Virginia and subject to FCPA. The company settles with a \$400 million fine.^{xiv}

October 2015: American pharmaceutical giant Bristol-Myers Squibb (BMS) settles with the SEC over charges that it had paid bribes to providers at state owned and operated hospitals in China to earn over \$11 million. BMS paid the US government \$14 million in fines^{xv}.

MEDIA/LINKS

Firestone & The Warlord: PBS special examining Firestone’s collaboration with Liberian dictator Charles Taylor during that country’s civil war. In exchange for bribes and material resources to Taylor’s rebel army, Firestone was eventually allowed to retain control of their critical rubber plantation. The extent of their collaboration remains disputed, but the attached article makes a strong case that they engaged in impropriety.

<https://www.propublica.org/article/firestone-and-the-warlord-chapter-5>

Transparency International’s “Corruption Perception Index” report:

<http://www.transparency.org/cpi2015>

The SEC’s FCPA Page: A more extensive listing of FCPA cases can be found on that government agency’s website. <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>

ⁱ <https://www.perkinscoie.com/images/content/2/2/v2/22172/comm-10-09-whitecollarcrimereport.pdf>

ⁱⁱ <http://www.nytimes.com/1982/06/13/us/widespread-effects-are-felt-from-post-watergate-reform.html?pagewanted=all>

ⁱⁱⁱ <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-640.pdf>

^{iv} <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html>

^v <http://www.bafirm.com/publication/the-intersection-of-the-dodd-frank-act-and-the-foreign-corrupt-practices-act-what-all-practitioners-whistleblowers-defendants-and-corporations-need-to-know/>

^{vi}

https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.Um_01_msi-1

^{vii} <http://www.whistleblowersblog.org/2015/11/articles/corporate-whistleblowers/sec-annual-report-highlights-success-of-international-whistleblower-program/>

^{viii} <http://www.bafirm.com/publication/the-intersection-of-the-dodd-frank-act-and-the-foreign-corrupt-practices-act-what-all-practitioners-whistleblowers-defendants-and-corporations-need-to-know/>

^{ix} <http://www.secwhistleblowerprogram.org/whistleblower-fraud/bribes-vs-payments>

^x <http://fcpamap.com/>

^{xi} <http://www.transparency.org/>

^{xii} <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>

^{xiii} <http://www.fcpablog.com/blog/2009/2/12/kbr-and-halliburton-resolve-charges.html>

^{xiv} <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>

^{xv} <https://www.sec.gov/news/pressrelease/2015-229.html>