

为何中国企业需要关注？ ——美国《反海外贿赂行为法》

Why It Matters To Chinese Companies
The FCPA Anti-corruption Compliance

文/文森·艾尔斯律师事务所
Vinson & Elkins LLP



Star Zhang
上海代表处律师



Rita Glavin
纽约办公室合伙人

美国的《反海外贿赂行为法》（以下称“FCPA”）是美国一部非常重要的成文法。其制定起源于美国20世纪70年代的水门事件，旨在防止国际商事中企业对政府以取得利益为目的作出支付或赠送礼品等不当行为。它主要由两组条款构成：反贿赂条款及帐簿与会计条款。该部法律由美国司法部和证监会作为执行机构，通过施加民事及刑事责任，对于规范美国企业的国际化运营产生了巨大的推动作用。近十年来，FCPA的执法有日益加强的趋势，包括成立专门执行委员会、扩大法律解释、严格个人刑事责任等。值得中国企业注意的是，FCPA不仅适用成立于

美国的公司，对于任何在美国证券交易所进行公开交易证券的中国公司也有同样的约束和执行力。另外，由于美国公司就其在中国成立的子公司、代理机构和商业合作伙伴的行为需要承担FCPA责任，前者在多数情况下均通过合同等方式对中国公司的行为进行限制。因此，了解并掌握FCPA规则有助于中国企业避免海外法律责任，也有利于中国企业为在美国发行证券或与美国企业进行多方位的合作做好法律准备。

FCPA Overview

What Is the FCPA

First enacted in 1977 and amended since then, the U.S. Foreign Corrupt Practices Act (the “FCPA”) is aimed at combating

international government bribery. In general, it prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business and requires companies to keep accurate books and records and to devise and maintain an effective internal control system. The FCPA has been a focus of U.S. government enforcement. The Fraud Section of the Department of Justice (“DOJ”) has resolved nearly 40 FCPA related actions since 2004, totaling more than \$1.5 billion in combined fines. The past two years have seen a more significant increase in the number of cases and the value of settlements, e.g. \$800 million for Siemens (2008), \$579 million for Kellogg Brown & Root LLC / Halliburton (2009) and \$400 million for BAE Systems (2010).

Why the FCPA Matters to Chinese Companies

The FCPA has a wide scope of application with respect to covered entities and persons.

The anti-bribery and accounting provisions apply to any issuer, U.S. or foreign, that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 or is required to file periodic reports with the U.S. Securities and Exchange Commission (the “SEC”) pursuant to Section 15 (d) of the Act, including companies with ADRs (American Depositary Receipts) traded on a U.S. stock exchange. The anti-bribery provisions also apply to (i) any U.S. “domestic concern”, including any U.S. citizen, national, resident, or corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship with principal place of business in U.S. or organized under U.S. law; and (ii) any officer, director, employee, or agent acting on the issuer’s or domestic concern’s behalf. FCPA liability may also stem from the actions of foreign subsidiaries and agents.

As such, Chinese companies which are listed on any stock exchange in the U.S., owned by a U.S. company, or acting as an agent or business partners of such a company can all be subject to the FCPA. As more Chinese companies succeed in issuing securities in the U.S. and as doing business in China rapidly becoming

commonplace for U.S. companies, the FCPA will impact numerous Chinese companies. Another important reason that the management of Chinese companies should attach importance to FCPA compliance is that recent FCPA enforcement has significantly focused on imposing personal liabilities on the individuals, including imprisonment and high amount of fines.

Who Enforces the FCPA?

The FCPA is enforced by the DOJ and the SEC. Echoing recent trends in enhancing enforcement of federal laws, the U.S. Congress has increased funding to the DOJ and the SEC for enforcement efforts. On May 20, 2009, the U.S. President Obama signed the Fraud Enforcement and Recovery Act (“FERA”) into law, which provides an additional \$165 million funding to the DOJ for the hiring of fraud prosecutors and investigators and \$20 million to SEC for investigations and enforcement proceedings. Furthermore, the SEC conducted the largest reorganization of its Division of Enforcement in 30 years. It created five specialized units, including the Foreign Corrupt Practices Unit. It also created an Office of Market Intelligence, which will serve as a centralized database for SEC to look for leads, emerging trends, and patterns of behavior. In 2009, the SEC received approximately 700,000 tips, complaints and referrals.

FCPA Provisions and Enforcement

The FCPA has two principal components being the anti-bribery provisions and the recordkeeping and accounting requirements.

Anti-bribery Provisions

The FCPA anti-bribery provisions prohibit individuals and businesses from directly or indirectly making or offering payments, gifts of money or anything of value to a foreign official, with corrupt intent, for the purpose of:

- (a) influencing any act or decision of the foreign official in his official capacity; or
- (b) inducing such official to do or omit to do any act in violation of his lawful duty;
- (c) secure any improper advantage, in order to help the payer obtain or retain business or direct business to any person.

We analyze below the most important elements with respect to the provisions.

“Anything of Value”. The term of “anything of value” is broadly construed. There is no materiality threshold - even relatively small or seemingly insignificant gifts, payments, or offers can give rise to a violation of the anti-bribery prohibition. Although a foreign official’s request may seem insignificant, the fulfillment of that request

may be of tremendous benefit to the requesting official.

In a recent case, the SEC reached a settlement of \$300,000 with a company called Veraz Networks Inc. (“Veraz”), based on allegations of an alleged gift scheme for illicit payments and gifts of approximately \$4,500 in value, including gifts of flowers to the spouse of a foreign state company’s CEO, and an offer of a \$35,000 payment that was intercepted before it was paid. This settlement demonstrates that there is no de minimus exception to the FCPA, and even seemingly minor infractions may lead to enforcement action. The allegation of the gift flowers casts further questions on what type of gift would be regarded as nominal and permissible.

The Veraz case is a contrast with past enforcement actions relating to gift schemes, which typically have involved substantial payments over a sustained period of time. Nevertheless, the consequences for Veraz have been significant, including the lengthy and expensive internal investigation, and the subsequent effect on the company’s share price and a warning of potential de-listing from NASDAQ for its delayed filing of its quarterly reports due to the ongoing investigation. From this settlement, it appears that there may not be a readily discernable threshold for an FCPA enforcement action. No gift, payment, or bribe may be too small to capture the attention of U.S. regulators. This settlement further underscores the need for vigorous compliance.

“Foreign Officials”. The term “foreign official” includes any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a “public international organization,” or any person acting in official capacity for or on behalf of such entity. This includes officials and employees of state-owned enterprises. Foreign political parties and candidates for political office are also considered “foreign officials” under the FCPA.

Many major businesses in China are state-owned or state-controlled even if some portion of their shares are owned by other entities or publicly traded. Such businesses are operated under the supervision of the State-owned Assets Supervision and Administration Commission of the State Council (“SASAC”). The SASAC performs the function of a state owner, representing the state as shareholder in the company. Thus, employees of many Chinese businesses and industries maybe considered foreign officials under the FCPA.

Corrupt Intent. For a payment to a foreign official to constitute a “bribe”, it must be made “corruptly” with the intent to influence the recipient for an improper purpose of the payer. A corrupt payment need not to succeed to for the payor to be held culpable.

Knowledge. The FCPA prohibits payments made while

“knowing” such payment will be directed to foreign officials. “Knowing” includes conscious disregard or deliberate ignorance of facts, ignorance of the “red flags” that would create reasonable suspicion that illegal payments have been made. Some common “red flags” when dealing with potential agent/business partners are: refusal by potential agent/partner to certify compliance with the FCPA, unusual payment patterns or financial arrangements, unusually high commissions, reputation of the agent/potential partner, apparent lack of qualifications or resources of agent to perform the services offered, and ties between potential agent/partner and foreign official or potential governmental customer.

Permissible Payments

Certain payments to the foreign officials are permitted by the FCPA, including (i) payments or gifts that are legal under the written laws and regulations of the host country; and (ii) “reasonable and bona fide” expenditures which are directly related to promotion or demonstration of products or services or to the performance of a contractual duty. It should be noted that the defendant bears the burden of proving that the payment falls within one of these two categories.

The FCPA also creates an exception for payments made for the purpose of facilitating or expediting a “routine governmental action.” “Routine governmental action” is defined under the FCPA to include certain types of government actions that are ordinarily and commonly performed. It excludes payments made relating to “any decision by a foreign official... to award new business to or to continue business with a particular party,” or any actions taken to encourage such a decision. 15 U.S.C. §78dd-1(f)(3)(B).

The DOJ has issued a number of Advisory Opinions regarding allowable payments that should be consulted before authorizing payments to foreign officials. For example, the advisory opinions address when payments may be permissible with respect to sponsored travel and hospitality for foreign officials, and what types of business gifts may be permissible. Specific examples can be found at DOJ’s website. However recent case such as the Veraz case demonstrate that such standards governing permissible payments are not necessarily clear-cut and are subject to a court’s discretion.

Accounting provisions

The FCPA’s accounting provisions are independent obligations, separate from the anti-bribery provisions. Even if a company has complied with the anti-bribery provisions in making a payment without “corrupt” intention, it can still be held liable under the accounting provisions if such payments are not properly reflected in its books and records.

The accounting provisions require that issuers (the public

companies) “make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of issuer.” The provisions also require that issuers create and maintain system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed with management authorization and are recorded to maintain accountability for assets and permit the creation of financial statements.” The terms “reasonable detail” and “reasonable assurances” mean a level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs.

The accounting provisions also requires an issuer to use good faith influence to induce compliance of the entities, domestic or foreign, which such issuer owns 50% or less of voting power. For subsidiaries, an issuer is liable if the subsidiary creates false records to conceal illicit payment and issuer-parent then incorporates subsidiary’s information into its books and records.

DOJ Opinion Procedure

To facilitate compliance, the FCPA has a special consultation mechanism whereby companies may request a statement of the DOJ’s enforcement intentions regarding proposed business conduct. Conduct for which the DOJ has issued opinion is entitled to a presumption of conformity with the FCPA. The DOJ encourages companies to seek such opinion for potentially problematic conduct. The opinions are not binding “precedent” but provide guide for what the DOJ considers to be appropriate conduct. The previously-issued opinions are available at the DOJ’s official website: <http://www.usdoj.gov/criminal/fraud/theFCPA.html>.

FCPA Penalties

The penalties for FCPA violations are significant. With respect to the anti-bribery provisions, companies may face criminal fines of up to \$2 million per violation, or up to twice their pecuniary gain, in addition to civil penalties of up to \$10,000 per violation, and disgorgement of any benefit the company received by the violation. With respect to the accounting provisions, a company may be fined up to \$25,000,000, and may be required to pay an additional SEC civil penalty of up to \$500,000 per violation. It is important to note that the FCPA imposes liabilities on companies for payments made by any third parties acting on its behalf, even if the company was not aware of the third party’s conduct. Companies may also be prevented from participating in U.S. government procurement and contracting programs.

Individuals who violate the anti-bribery provisions face criminal fines of up to \$100,000 per violation or twice the amount of pecuniary gain resulting from the payment, or imprisonment for not more than five years. In addition, the statute authorizes civil

penalties of up to \$10,000 per violation. Individual fines may not be paid for or reimbursed by the employer. Those who violate the accounting provisions may be imprisoned for up to 20 years, fined up to \$5,000,000 or both.

Recent FCPA Enforcement Trend

FFETF and Enforcement Against Individuals. In the recent efforts to further enhance FCPA enforcement, a presidential executive order created a Financial Fraud Enforcement Task Force (“FFETF”) in November 2009, replacing the Corporate Fraud Task Force. FFETF teams up forces from both the SEC, the DOJ and other federal agencies and is chaired by Attorney General Eric Holder. The is aimed at combating all types of financial fraud, increasing coordination/information-sharing among federal, state and local agencies, and making full use of the government’s law enforcement and regulatory tools. To date, 25 federal law enforcement agencies including the Department of Homeland Security to the Department of Treasury are members of the FFETF.

The enhanced enforcement has resulted in an increase in the number of cases brought against individuals. The DOJ has brought FCPA cases against 81 individuals since 2004. Forty-six of these individuals were charged since 2009 alone. The goal of DOJ is to make real “the prospect of very significant prison sentences for... every corporate executive, every board member, and every sales agent” implicated in FCPA violations. Prosecution of individuals has proved to be one of the key deterrents to foreign bribery. The recent FCPA enforcement also has received extraordinary cooperation with the foreign governments. DOJ teamed up with German prosecutors in Siemens case in 2008 and with UK’s Serious Fraud Office in BAE case in 2010.

Expansion of the FCPA Law. On the substantive side, the FCPA law has been construed more broadly in some areas. A “foreign official” can be a private citizen if that person works for a company owned by the government.

In the case involving conviction of an American investor Frederic Bourke for his investment into a State Oil Company, the court has taken a more expansive approach in interpreting “willful blindness” to the extent of examining the level of adequacy in due diligence by the potential investor. At trial, the DOJ pursued a theory of willful blindness by Mr. Bourke, i.e. that he consciously avoided learning the relevant facts and that as an experienced investor, he should have known of the corrupt scheme. Bourke was not alleged to have paid the bribes (a co-conspirator paid the bribes). The DOJ successfully argued to a jury that Bourke must have known that bribes would be paid

because his business partners knew about the bribes and the country in which they were operating was known for widespread corruption. The jury was instructed that Bourke could be found guilty if he consciously avoided learning facts that he thought to be true. The DOJ used the absence of well-conceived due diligence as part of its evidence that Mr. Bourke had the knowledge of a corrupt scheme necessary to support a criminal charge and, ultimately, a conviction. The jury agreed.

Another expansion of the FCPA is the Section 20(a) “control person” liability. SEC brought charges under Section 20(a) against COO and CFO of a company that made improper payments to Brazilian customs officials. The SEC did not specifically allege that the two executives authorized the payments. Liability was solely based on the fact that the executives had supervisory responsibility over the managers and policies involved, who failed to maintain adequate system of internal accounting controls.

“Whistleblower” Act. The Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law on July 21, 2010, has taken a step further in information gathering by including a “whistleblower” provision. It can reward “whistleblowers” who provide original information to the SEC about potential violations of SEC-regulated laws, including the FCPA, which result in the U.S. government recovering more than \$1 million. The “whistleblower” can recover in any related action, including DOJ FCPA settlement potentially for 10% - 30% of the government’s recovery. It may lead to increase in already significant level of government investigations.

Conclusion

In the wake of the U.S. government’s increasingly rigorous stance in pursuing individuals and companies that violate the FCPA, U.S. companies are acting with more caution in dealing with their foreign agents and business partners. They are widely advised to include contractual compliance provisions in commercial contracts and conduct due diligence on FCPA compliance. Hence, Chinese companies are becoming more legally and practically constrained by the FCPA. Chinese companies who are issuers in the U.S. are even more directly governed by the FCPA. As such, Chinese companies should equip themselves with an understanding of the FCPA and seek relevant advice with respect to its compliance. Before long, they will find that such efforts will provide them with a competitive advantage when dealing with U.S. business opportunities.

(本文作者为Vinson & Elkins LLP纽约办公室合伙人Rita Glavin、上海代表处律师Star Zhang、上海代表处律师Tju Liang Chua、上海代表处首席代表暨合伙人David Blumental)