

The Foreign Corrupt Practices Act: Importance for world Economy

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Abstract:

Corruption is increasing day-by-day in the world. If we see the overall position in the world we find that major countries of world are facing the problem of corruption at every level of society. It is also said that some countries are engulfed by the poison of corruption to such a level that people are not able to survive. Every country is trying that strict laws can be made so that the problem can be solved or at least can be reduced. In this Research Paper the act which is discussed is enforced in the United States of America. In fact it is said that the Act is one of the best weapons in the hands of government of United States. It is also said by the world that this act is one of the best as far as the global economy is considered. USA is said to be one of the countries which is responsible for governing global economy along with other factors. Through this research paper Importance and overview of The Foreign Corrupt Practices Act is given along with the scope, implementation etc. in detail. Some of the disputes associated with the act are also considered here to some extent. Also it is discussed in the Indian perspective with the case of Wal-mart.

Keywords: Bribery, Corruption, Financial.

Introduction:

“Corruption is worse than Prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country” -Karl Kraus.

Corruption endangers the morals of the whole country. It is very well said by the author that corruption is very dangerous for the whole society. If we say any disease it would affect only a part of body and if we talk about the corruption, it would affect every organ of the body of society. One of the institutions who is famous in the name of Transparency International say that corruption is increasing with very high speed worldwide.

Jose Ugaz the Chairperson of Transparency International said that ⁵¹In too many countries, people are deprived of their most basic needs and go to bed hungry every night because of corruption, while the powerful and corrupt enjoy lavish lifestyles with impunity.”

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The US Foreign Corruption Practices Act (FCPA) of 1977 is most widely enforced Anti-Corruption law. It was noticed that FCPA is first of its kind which includes the terms like Corporate Social Responsibility, third party responsibility and extra-territorial for corruption. Through this act the companies and private individuals are liable for the corruption made abroad or globally.

Foreign Corruption Practices Act:

The Foreign Corruption Practices Act (in short "FCPA") of 1977 was passed because the mismanagement at corporate level was increasing day-to-day and it extends up to the base of financial business that is accounting. These irregularities were noticed by Northrop, Gulf oil by the Watergate Special Prosecutor and which is further investigated by the Securities and Exchange Commission (SEC). They found that the corruption is prevalent in America also which is having the top level companies of the world.

The FCPA makes it illegal for the US companies and officials who are working abroad to engage in corruption practices. The practices like bribing the officials. It also puts control on the other foreign firms to do the same kind of bribing in the US.

⁵²The Foreign Corrupt Practices Act (FCPA), enacted in 1977, generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business. The FCPA can apply to prohibited conduct anywhere in the world and extends to publicly traded companies and their officers, directors, employees, stockholders, and agents. Agents can include third party agents, consultants, distributors, joint-venture partners, and others.

The FCPA also requires issuers to maintain accurate books and records and have a system of internal controls sufficient to, among other things, provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorization.

The sanctions for FCPA violations can be significant. The SEC may bring civil enforcement actions against issuers and their officers, directors, employees, stockholders, and agents for violations of the anti-bribery or accounting provisions of the FCPA. Companies and individuals that have committed violations of the FCPA may have to disgorge their ill-gotten gains plus pay prejudgment interest and substantial civil penalties. Companies may also be subject to oversight by an independent consultant.

⁵¹ Transparency International : http://www.transparency.org/news/feature/corruption_perceptions_index_2016

⁵² U.S. Securities and Exchange Commission, <https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml>

The SEC and the Department of Justice are jointly responsible for enforcing the FCPA. The SEC's Enforcement Division has created a specialized unit to further enhance its enforcement of the FCPA.

⁵³American companies with listed securities must keep accurate, transparent records and not hide payments in “off-the-books” accounts.

The FCPA was passed when the US companies are funding the Election campaigning to US politicians and it was noticed by the Watergate Special Prosecutor. Lockheed which was also one of the reason because they were involved in the funding of millions to the Japanese Prime Minister.

⁵⁴The Foreign Corrupt Practices Act of 1977 was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. With the enactment of certain amendments in 1998, the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.

Anti-Bribery provisions

⁵³<https://qz.com/927217/one-of-the-worlds-best-weapons-against-bribery-and-corruption-is-under-threat-from-trump/>

⁵⁴ The United States Department of Justice, <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

The provision of Anti-bribery is one of the speciality of the Act.⁵⁵The FCPA's anti-bribery provisions apply broadly to three categories of persons or entities: 'issuers', 'domestic concerns' and certain persons and entities under 'territorial jurisdiction'. These provisions prohibit

- (1) US persons and companies (domestic concerns),
- (2) companies organized under US laws,
- (3) companies that have their principal place of business in the US,
- (4) companies listed on stock exchanges in the US or
- (5) companies required to file periodic reports with the SEC (issuers), and

(6) certain foreign persons and businesses acting while in the territory of the US (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business.

⁵⁶15 U.S.C. § 78dd-1(a) of the FCPA provides that:

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to-

(i) any foreign official for purposes of-

(A) (i) influencing any act or decision of such foreign official in his official capacity,

(ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or

(iii) securing any improper advantage; or

⁵⁵ GAN: Business Anti-Corruption Portal

⁵⁶<https://www.bakerlaw.com/files/Uploads/Documents/FCPA/FCPA-OVERVIEW1.pdf>

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of-

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity,

(ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or

(iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of-

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity,

(ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or

(iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or

decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-2 applies identical prohibitions to “domestic concerns” which is defined to include any individual “who is a citizen, national, or resident of the United States . . . and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.”

The underlying premise of the FCPA is that bribes to foreign officials are prohibited and sanctionable. Bribes under the FCPA are regarded as the giving of anything of value to the foreign official, even if the payment is permissible under local law. Such corrupt payments, which can include both cash and gifts, are prohibited if they are intended to influence the act or decisions of a foreign official to secure or retain business transactions. Payments that influence foreign officials to omit acts or duties also fall within the purview of the FCPA. For the purposes of the FCPA, “foreign officials” include foreign political parties and candidates for foreign political offices.

FCPA Result:

As per the report of the QUARTZ the FCPA is passed in 1977 but its implementation is started under the president ship of George W. Bush. In International bribery index due to FCPA in 2016, 30 cases were found for bribing foreign officials. “The FCPA is the best thing to fight corruption that I have seen,” said DmytroShymkiv, the former CEO of Microsoft in Ukraine.

This act ensures that Executives should not pay bribes and favoritism should be avoided. On the same guideline the companies like Microsoft are doing their Internal audit on the provisions of the FCPA.

As per Quartz report Last year alone, the US Treasury collected \$2.43 billion in fines and penalties from over 20 firms that had brushed up against the FCPA.

Accounting Provisions:

5715. U.S.C. § 78m of the FCPA provides that:

Every issuer which has a class of securities registered pursuant to section 781 of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shallA. make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and B. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that-- C. transactions are executed in accordance with management's general or specific authorization; D. transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; E. access to assets is permitted only in accordance with management's general or specific authorization; and F. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. The accounting provisions, often referred to as books and records or internal control provisions, essentially requires companies to create and use regular bookkeeping, accounting, internal controls and compliance procedures sufficient to identify and prevent potential FCPA violations. The FCPA books and records provision requires reasonably current documents and information, such as annual and quarterly reports usually required by the SEC. It also requires the keeping of books in reasonable detail. The internal control provision requires a company to develop an internal compliance system to make reasonable assurances that, among other things, assets are compared at reasonable intervals with plans to reconcile differences in numbers if they do occur. The FCPA does not impose criminal liability for bookkeeping and internal control failures unless the party knowingly fails to implement internal systems, knowingly circumvents internal systems in place, or knowingly falsifies books or records.

Penalties

The penalty provision of FCPA act includes

Individual FCPA Violations :**Anti-bribery provisions**

⁵⁷<https://www.bakerlaw.com/files/Uploads/Documents/FCPA/FCPA-OVERVIEW1.pdf>

- A Civil penalty up to \$10,000.
- Criminal fine up to \$250,000 and imprisonment up to 5 years.

Under the Alternative Fines Act, the fine may be increased to twice the gross financial gain or loss resulting from the corrupt payment.

A criminal fine imposed on an individual cannot be paid directly or indirectly by the company on whose behalf the person acted.

Individual Penalties: **Accounting provisions**

- Civil penalty for bribes up to \$100,000.
- Criminal fine up to \$5 million or twice the gain or loss caused by the violation, and imprisonment up to 20 years.

Fines cannot be paid directly or indirectly by the company on whose behalf the person acted.

Fines and Penalties for entities: **Accounting provisions**

- A Civil penalty up to \$500,000.
- Criminal fine up to \$25 million or twice the gain or loss caused by the violation.

The act also requires issuers to keep accurate books and records and have a system of internal controls enough to, among other things, offer reasonable assurances that transactions are executed, and assets are accessed and accounted for under management's authorization.

Impact of FCPA on India: with reference to WAL-MART case

In India the corruption index remains very high at all level. The Indian Society is too much affected by the corruption. In 2011, Wal-mart which is one of the US based companies started review of its policies and practices and internal controls for compliance of FCPA. As far as review of global compliance program is considered, the company found additional allegations regarding violation of FCPA.

As per the news reports, Bhartiwal-mart, wal-mart's joint venture with India's Bharti enterprise suspended a few of its associates and committed a complete investigation. The company decided that the opening of new cash and carry wholesale stores in India and more suspension of employees may be followed.

Disputed question raised over here is FCPA is a US act and why it is concerned about corruption in India?

⁵⁸The principal objective of the FCPA is to prohibit United States companies and their employees, officers, directors and agents from paying or promising to pay bribes to foreign officials, political parties, candidates or their conduits to obtain or retain business.

It means the company is US based and FCPA is applicable to it.

The focus of the FCPA is two-fold:

- it prohibits actions in furtherance of foreign corrupt payments by any person while in the United States, by any U.S. person abroad or by any person abroad working for a US company and
- it includes record-keeping and accounting provisions intended to deter the establishment of off-the-books slush funds to finance the illegal payments.

Focus of FCPA is on foreign corrupt practices by any person while in US.

Subject of FCPA: The anti-bribery provisions of the FCPA acts in furtherance of the direct or indirect bribery of foreign officials -

- by any person while in the territory of the United States,
- by any U.S. person while acting wholly outside the United States or,
- by any person abroad working for a US company.

Prohibition and defenses: The FCPA prohibits those subject to the FCPA from giving or promising to give anything of value to:

- any foreign official for purposes of influencing any act or decision of such official or inducing such official to influence any act or decision of a foreign government or instrumentality to obtain or retain business or for purposes of obtaining any improper advantage;
- any foreign political party or party official or any candidate for foreign political office for purposes of influencing any act or decision of such party, official or candidate or inducing such party, official or candidate to influence any act or decision of a foreign government or

⁵⁸<http://www.mondaq.com/india/x/220198/Compliance/FCPA+and+its+impact+on+India>

instrumentality to obtain or retain business or for the purposes of obtaining any improper advantage; and

- any person while knowing or having reason to know that such money or thing of value will be offered or given to any foreign official, foreign political party, party official or candidate for foreign political office for purposes of influencing any act or decision or inducing such foreign official, political party, party official or candidate to influence any act or decision of a foreign government or instrumentality to obtain or retain business or for the purposes of obtaining any improper advantage.

The FCPA provides two affirmative defenses for U.S. companies accused of making prohibited payments.

First, a U.S. company may make a payment, gift, offer or promise of anything of value to a foreign official, a political party or a candidate's country provided such action is expressly permitted under the written laws of that country.

Secondly, a U.S. company may make a payment, gift, offer or promise of anything of value that constitutes a reasonable and bona fide expenditure directly related to the promotion of products and services or the execution of a contract with a foreign country or agency.

Penalties: The penalties for violation of the FCPA are severe for both companies and individuals. There are two sets of penalty provisions: the anti-bribery provisions and the accounting provisions. Both provisions may impose civil and criminal penalties. The largest penalty, so far under the FCPA, has been by Siemens in Germany, which paid \$800 million in 2008. KBR/Halliburton paid \$600 million in the US in 2009. Also there is no limitation for the amount of infraction and even what might be considered small bribes can result in big penalties. Parent entities can be held responsible for their entities and the Penalties can include fines and bouncing of profits that a company might have realized from its unlawful conduct. FCPA is particularly more challenging for companies operating in corruption-prone countries, such as India.

The India fallout for US Corruption is not only restricted to the cost of an internal investigation, which can be expensive but also large fines and criminal prosecution for Indian Partners, the risks lie in it having to pay compensation on the quantum of fine in case it has indemnified the US Corporation, as is often the case in foreign-local joint ventures.

Thus, any penalty of a heavy quantum can put Indian Companies in the dock, especially if their litigation insurance claim is rejected on grounds that there was willful bribing through intermediaries. It may also limit the Indian Companies in case of any future fund-raising in the US.

Conclusion:

Corruption is very bad at each and every level. It always hinders the growth of any country. Globally also it has very bad effects on the economy of the whole country, as we have seen in above work about the condition of corruption in world. The economies are affected by corruption a lot. FCPA, although a difficult act to implement but still the results which is coming out of it, is very effective. The FCPA can cover a number of cases and parties if the foreign party or subsidiary is involved. It is also very useful in the country where the bribery is very common.

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