

Focusing on Criminal Intent

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One area where compliance officers and practitioners need to focus is on the requisite intent for a criminal violation. For compliance officers facing difficult policy choices on FCPA compliance policies, the touchstone of such policies should be the employee's intent — was it criminal, negligent or benign?

It is one thing to have a policy which requires prior approval for any gift to a foreign official with a value of over \$50 but it is another to examine the amount, the employee's intent, the context and the surrounding circumstances to determine if the employee was giving the gift with the intent to break the law – ultimately that is the question and the standard to apply.

The FCPA has three separate knowledge or scienter standards for an anti-bribery criminal violation:

(1) any violation must be done “corruptly”;

(2) for criminal penalties to be imposed on an individual, the individual must additionally have acted “willfully” (for corporations, there is no requirement that the violation be committed “willfully”); and

3) if liability is premised on a payment to a third party, the payment must have been made “while knowing” that the money or thing of value would be directed in whole or part to a foreign official.

Of the three, only one—the requirement of knowledge that a payment to a third party will be directed to a foreign official—is defined in the statute. There is no definition of “corruptly” or “willfully.”

For payments to third parties, the statute provides that a person's state of mind is “knowing” with respect to conduct, a circumstance, or a result if: a) the person is aware that he is engaging in the conduct, that the circumstance exists or that the result is substantially certain to occur; or b) the person has a firm belief that the circumstance exists or that the result is substantially certain to occur. Knowledge of the existence of a particular circumstance is established if the person is aware of a high probability of the existence of such circumstance, unless the person actually believes that the circumstance does not exist.

The “high probability” standard was intended by Congress to ensure that “knowledge” encompassed the concepts of “conscious disregard” and “willful blindness.” The head-in-the sand or “ostrich” concept is thus addressed: recklessly ignoring red flags can and will lead to a finding of knowledge under the anti-bribery provisions. This knowledge standard is important because very often a payment in violation of the FCPA is made to a foreign official by a third party, such as a foreign agent.

But what about “corruptly” and “willfully”?

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Although neither of these terms is defined in the statute, the legislative history of the FCPA provides guidance on the meaning of “corruptly.” The Senate indicated that the purpose of including the word “corruptly” was “to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client. Thus, the word ‘corruptly’ connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

Courts now define an act done as “corruptly” done if done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result but by some unlawful method or means. The term “corruptly” in the FCPA requires that the act was done with intent to induce the recipient to misuse his official position.

With respect to the term “willfully,” the Supreme Court has long criticized Congress for using such term because of its inexact meaning. In the FCPA context, it has been defined to require that the individual knew he was doing something generally “unlawful” at the time of his action.

The bottom line when it comes to compliance is that the alleged criminal acts have to be done “corruptly” and “willfully” if for an individual – meaning with a bad purpose or evil motive to induce the recipient to misuse his or her official position, and while knowing that he or she was doing something unlawful at the time of his or her action.

The intent can be inferred from the surrounding circumstances but the implication for compliance purposes is obvious – for example, if a gift is given with documentation of a review and approval process which confirms the lack of any illegal intent, then the compliance program has done all that it can and should do to protect the company and the individuals.

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