

## BRIBERY AND THE U.S. FOREIGN CORRUPT PRACTICES ACT: DO THEY HINDER GLOBAL COMPETITION?

### **Introduction**

The practice of bribery appears to be pervasive across many parts of the world. Understanding where it exists, why it exists, and how this affects American businesses are important to U.S. firms' ability to compete in the global economy. It is well known that the United States, unlike other countries, has to contend with the 1977 Foreign Corrupt Practices Act (FCPA) that attempts to address the issue of bribery for U.S. companies.

The FCPA was structured to help U.S. companies understand what bribery is and what is or is not acceptable behavior at home and in other countries. The confusing issue is that even with this guidance, it is not always clear what exactly is to be considered a bribe. Under the Act, not all payments are deemed to be bribes. For example, some payments are acceptable if they do not violate local laws. And, bribes given to influence political decisions are banned - but bribes to facilitate ongoing business activities are not. The distinction is blurred. It is gray, not black and white. Many U.S. business people do not know what is permitted and what is not. Consider the following: an American businessperson pays the green fees for an afternoon of golf for business associates from the host country; U.S. companies entertain their global business associates; U.S. company executives give that associate a personal gift. How do American companies and their employees make these decisions?

## **What FCPA Means for U.S. Firms**

It is believed that many U.S. companies are overreacting to the FCPA and are following guidelines in a stricter manner than was intended. But, most U.S. companies know the penalties (fines and even prison time) for being accused and convicted of bribery so they choose to err on the side of caution. These companies shun all types of bribes, legal or not. Part of the issue is that if all forms of bribery are off limits, employees will not have to individually make the distinction as a representative of the company. Everyone is on the same page. Secondly, there are different forms of bribery in different countries. How is an employee to keep up with what is acceptable and what is not if the area is gray and the company leaves the issue to the employee's discretion? In this same fashion, it is notable that U.S. business students are taught that bribery in all forms is unacceptable while students in many other countries are taught that cultural differences guide the correctness or incorrectness of various forms of bribery.

Of course, it takes two parties to facilitate a bribe. One has to ask for the bribe and the other has to accept/pay. Typically, the U.S. businessperson does not ask for a bribe, nor does he tend to offer one to a potential business partner. In some cases the recipient actually demands a bribe to facilitate what needs to be done. The FCPA focuses exclusively on the paying side of a bribery activity. The range of bribery activities varies greatly depending on the countries involved. Although the U.S. is trying to control and mandate activities of its businesses, it

has no control over all the other businesses in the world. It also has no control over the officials in other countries.

It seems unlikely that other countries will pass laws such as the FCPA and, therefore, they will not have the stringent rules that the U.S. has instituted. Various countries and certain parts of the world view bribery differently for a number of reasons. What an employee for a U.S.–based company might consider a bribe is often seen in Asia as an expected form of gift giving. If it is not cash, it is not considered a bribe. And, gift giving in a multitude of circumstances is a common and expected activity that is based on thousands of years of habit and cultural norms. In Japan, expensive gifts are expected and to refuse such a gift would humiliate the giver. In countries such as the Philippines, India, and most Latin American countries, rigid social hierarchies exist and there is a great difference in the economic, and more importantly, social status between groups of people. In these circumstances, it is almost always the case that an elite class exists. And, these elite classes of people believe (and behave as if) they are exempt from rules/standards that others must follow. This includes bribery activities. In some instances, the elite group includes higher-level government officials. Underdeveloped countries tend to be known for having low-paid bureaucrats. Productivity is low and not expected. Therefore, if timeliness and efficiency are needed, one must encourage it by giving gratuities. These gratuities supplement the income of the recipient and are often needed to sustain a living.

Countries that are the most likely to have severe bribery activity are usually those that have a culture deeply ingrained with nepotism, patronage, low government wages, poverty and a weak economic condition. Rules or laws alone cannot change the bribery activity since the root of the activity is tied into the conditions of the country itself. In these countries, laws are futile unless the above conditions are themselves changed. Legislation will not solve the bribery issue without first affecting institutional change. One argument against the viability of the FCPA is that it is purely a legislative action rather than a plan to implement change.

There appear to be two levels of bribery – petty bribery and grand bribery. Most bribery tends to be based on need or greed. Usually petty bribery is based on need and is ingrained in the culture of the area. An example is asking for a gratuity to expedite a common activity whereby the expeditor considers the amount received to be part of his living wage. And, since petty bribery is often based on seeking a living, it is unlikely that these activities will be easily eradicated via laws. Although there are many more instances of petty bribery than grand bribery, their overall impact is still relatively small. Due to the huge number of instances of world-wide petty bribery, it is very unlikely that any form of legal body will be able to enforce laws regarding identifying and prosecuting the individuals involved. Grand bribery is normally based on greed and its potential impact can be very large. The FCPA has been criticized for not making a distinction between petty bribery and grand bribery.

Of interest is the fact that even Canada and Germany do not ban bribery, as does the U.S. Until a 1997 international agreement, these two countries allowed bribery to be deducted as a normal business expense for tax purposes.

Japanese and European business people find the U.S. rules on bribery amusing. Also of interest is the fact that a majority of international business transactions do not even involve U.S. businesses. So, in a majority of cases, U.S. bribery rules do not apply and are not considered. As noted before, most countries do not have U.S. guidelines or rules to follow. Even though this is the case, however, many countries know that they will have to 'clean up' their act to encourage foreign investment. And, the level of bribery is one measure of the investment climate of the country.

## **Conclusion**

The major issue concerning U.S. firms comes down to the following: due to its laws on bribery, are U.S. businesses at a disadvantage in the international business arena? Or, stated differently, can U.S. companies conduct business in such an international atmosphere? In 1997, 34 countries signed an anti-bribery agreement proposed by the Organization for Economic Cooperation and Development (OECD). This is the first time that many countries acknowledged that bribery was an international issue. Bribery promulgations by the FCPA and the OECD have brought awareness of the issue out in the open. Furthermore, many U.S. companies have set up written guidelines to help their global employees to better understand the company's stand on various forms of bribery.

Some of these companies include bribery issues in their Codes of Conduct. It has also become evident that a positive global reputation is worth having. International recognition of bribery tied to a company can have devastating outcomes. Therefore, this can be a potent deterrent for many companies that believe that integrity gets them farther than corrupt activities.

There is more awareness today regarding which countries are corrupt or clean based on level of bribery. An organization called Transparency International publishes the names of the top 10 most corrupt as well as top 10 least corrupt countries based on bribery activities. (And the US did not make the list of the top 10 least corrupt countries!) In addition, many worldwide organizations such as the World Bank and the U.N. are focusing on questionable international activities. Attention to corrupt activities heightens the awareness of those countries and companies that behave in an unacceptable manner. In order to facilitate business in most countries, it has been found that the local U.S. Chamber of Commerce may be one of the best sources of information. These Chambers are staffed with Americans who live in and know about local business practices. They also know the U.S. law. So, quite often these people can assist American businesses in their attempts to do business in that country.

Overall, attention to corruption and related practices of companies and countries is on the rise. Consumers are known to alter their buying activities based on their concept or knowledge of the corruptness of a company. Employees tend to

leave employers that they find to be dishonest and not trustworthy. Investors are paying attention to studies that indicate which companies are unethical or are under legal proceedings due to dishonest behavior. Socially responsible investing is on the rise. Globalization of the world and increased access to this type of information have allowed these groups to base their decisions in part on such information.

Although the FCPA has been in existence for almost 25 years, American companies seem to be surviving quite well in the international business arena by finding ways to work within the guidelines given to them. It appears that resourceful, but honest, American companies can, in fact, be competitive in the global economy.

Teresa K. Beed, Professor of Accounting and Director of the Masters of Accountancy Program; Maureen J. Fleming, Professor of Management and Director of Internship Programs; and Nader H. Shooshtari, Professor of Management and Chair of the Marketing and Management Department. All are at the University of Montana – Missoula.