

**ETHICS:
THE FOREIGN CORRUPT
PRACTICES ACT – ETHICAL
BUSINESS PRACTICES OF
CRIMINAL ACTIVITY IN
INTERNATIONAL BUSINESS**

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Litigation Management in a NEW YORK Minute – 2008 Edition

Ethics and Corruption In Global Business - The Foreign Corrupt Practices Act and its Emerging International Analogs

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LAS VEGAS ORANGE COUNTY PHOENIX SALT LAKE CITY TUCSON

FCPA criminalizes improper payments to foreign government officials to influence any official act or decision for the purpose of obtaining business.*

* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)

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FCPA has antibribery and accounting provisions.

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FCPA's "Books and Records" provisions require accurate records of transactions and dispositions of assets.

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FCPA also requires U.S. and foreign companies with publicly-traded securities in the U.S. to:

- Meet stringent record-keeping standards
- Maintain internal controls, and
- Ensure accurate and complete descriptions of company financial status

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FCPA is a sentinel enforcement vehicle, frequently supplemented by laws prohibiting:

- Tax evasion
- Mail and wire fraud
- Money laundering
- Racketeering
- Conspiracy

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FCPA Elements

- U.S. persons and entities (even re conduct entirely outside U.S.)
- Issuers
- Foreign persons and entities operating on U.S. territory (“nexus” to U.S.)

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FCPA Elements (cont'd)

Acts in furtherance

- “Corruptly” pay to any foreign official
- Knowing the payment is to:
Influence an official act or decision, or obtain, retain or direct business

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But, foreign affiliates acting independently may not be covered.

- Law is evolving
- Knowledge and “independence” issues

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The Corrupt Intent Element

- Subjective
- *Quid pro quo*
- Inducement to act in exchange for payment
- Includes “business entertainment”

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Conduct “in furtherance” suffices

- Actual payment not required
- Offer of payment is enough
- Third party payments violate (e.g. “consultants,” “intermediaries”)
- Conspiracy to violate expands net (e.g. preparation of fraudulent contract)

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Value

- Broadly defined
- Tangible or intangible benefits
- “Charitable” gifts
- Subjective value to foreign official
- Third party benefits (e.g. family)
- “Anything of value”

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Officials

- Foreign government
- Public international organizations
- State owned enterprises

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Knowledge

- Deliberate ignorance, conscious disregard, willful blindness
- “Hindsight” test
- Surrogates don’t immunize unlawful conduct

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Exceptions

- “Routine” government actions (license issuance, utility connections . . .)
- Payments lawful under written law of foreign country

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Exceptions (cont'd)

- The line between “routine” and “corrupt” is very dim
- Limited exception for product demonstration expenses or facility tours in execution phase of contracts

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FCPA enforcement is now a top DOJ and SEC priority.

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International compliance standards are strengthening

- Multiple international conventions
- Very little tolerance
- Increasing international enforcement cooperation
- Increasing government and private financial institution cooperation

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The U.S. is a party to 3 international anti-corruption conventions:

- Convention on combating bribery of foreign public officers (OECD Convention)
- Inter-American Convention Against Corruption (OAS Convention)
- UN Convention Against Corruption (UN Convention)

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The globalization of business has spawned increased enforcement interest and markedly heavier penalties.

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DOJ has more than 200 attorneys in the National Security Division.

- 15 cases in 2006
- 38 cases in 2007

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World Bank and International Financial Institutions (IFI's) have anti-corruption rules enforced by debarment and criminal referrals.

- Extends reach of international anti-corruption laws.
- Uninhibited by "niceties" of "nexus," venue and privilege

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Recent FCPA settlements

2008 Willbros Group Inc. \$32.3M

- Deferred prosecution agreement with SEC
- Disgorgement
- Permanent injunction re books and records
- Individual supervisors charged

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Willbros Group's charge: Bribes and false invoices to reduce Bolivian taxes [FCPA applicability is unclear]

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Recent FCPA settlements (cont'd)

2007 Chevron \$30M

- Kick-backs in UN oil for food program
- Book and record violations

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Recent FCPA settlements (cont'd)

2007 Ingersoll-Rand \$2.5M

- Foreign subsidiary travel and entertainment expenses for 8 Iraqi officers
- \$20,000 expended; 2.5M penalty

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FCPA is very serious business exposure

- Compliance issue
- No relief for “differing cultural expectations”
- Individual and corporate exposures
- Multi-jurisdiction indictments are becoming norm

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What to do?

- Compliance
- “Triage” problems promptly
- Voluntary disclosure

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Compliance – Internal

- Culture of compliance
- Training, policies, procedures
- Accounting controls and audits
- Consistent enforcement and discipline
- Pre-transaction diligence
- Record retention

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Compliance – External

- Standardized written compliance directives
- Contract provisions requiring compliance
- Affiliate supervision
- Diligence in joint ventures (“imputation” exposure)
- Diligence in M&A

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“Triage” / Investigations

- Encourage reporting (confidentiality protection)
Investigate promptly
- Investigation team-legal, audit, security, compliance
- Board vs. management?
- Outside vs. inside counsel issue

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“Triage” / Investigations (cont’d)

- Maximize privilege protection
- Secure and preserve records
 - Papers
 - Electronic
- Identify and locate witnesses
- Document corporate advice and authorizations

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To Tell or Not to Tell?

- Federal sentencing guideline issues
- Self disclosure benefits?
 - Deferred prosecution
 - Compliance monitoring option
- Privilege waiver conundrum

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To Tell or Not to Tell? (cont'd)

- Whistle-blower exposure
- Competitor exposure
- Cumulative prosecution risk
 - Combined U.S. and foreign enforcement
 - “Rendition” to circumvent privileges

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Charging decision can be death penalty.

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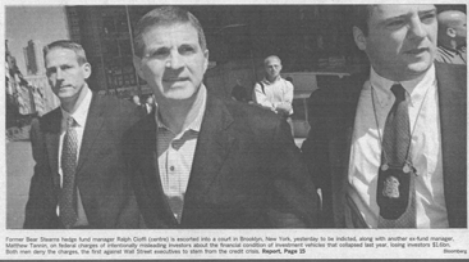
Inside Counsel Exposure

- Don't be a “facilitator”
- Look for indices of corruption
- “Call it when you see it”

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Inside Counsel Exposure – Don't be a "Perp"

Bear charges Ex-hedge fund chiefs face US federal case



Former Bear Stearns hedge fund manager Rajiv Doshi (center) is escorted into a courtroom in Manhattan, New York, yesterday to be indicted along with another ex-hedge manager, Matthew Taylor, on federal charges of knowingly misstating assets about the financial condition of investment vehicles that released last year. Hedge funds \$1.6B. Both men deny the charges. The first appeal will Street resolutions to stem from the credit crisis. [Report, Page B1](#)

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Final Thoughts

- FCPA and its analogs are as significant as SOX
- Compliance is critical
- Corporate counsel are gatekeepers and guardians

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The FCPA buck stops with you.

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Professional Recognitions & Awards

Southwest Super Lawyer, Law & Politics Magazine (2007-2008)

The Best Lawyers in America® (1991-2007)

Professional Memberships & Activities

State Bar of Arizona

Maricopa County Bar Association

American Bar Association

Fellow, Arizona Bar Foundation

University of Kansas School of Law, Board of Governors (1998-2000)

Arizona Association of Defense Counsel

American Academy of Healthcare Attorneys

Judge Pro Tempore, Maricopa County Superior Court

Maricopa County Superior Court Civil Study Committee,

Maricopa County Superior Court (1998-present)

The Sandra Day O'Connor Inn of Court (1997-2000),

Pupillage Leader (1998)

Medical-Legal Committee, Maricopa County Bar Association, Chair (1995-1996)

American Bar Association, Section of Business Law

State Bar of Arizona, Jury Instructions Committee (1989-

1991), Public Relations Committee, Chair (1984-1985),

Ethics Committee (1983-1984)

Maricopa County Bar Association, Public Relations Committee, Chair (1982-1983)

State Bar of Arizona and Maricopa County Bar, Joint Ad Hoc Media Relations Committee (1982-1983)

Military

Commissioned, United States Air Force (1971)

Captain, United States Air Force, Office of the Judge

Advocate General (1973-1978)

Education

University of Kansas School of Law (J.D., 1973)

University of Kansas (B.A., with honors, 1971)

Court Admissions

Supreme Court of Arizona
Supreme Court of Colorado

Supreme Court of Florida
Supreme Court of Kansas
United States Supreme Court

United States Court of Appeals, Ninth Circuit
United States Court of Appeals, Tenth Circuit
United States Court of Appeals, Armed Forces
United States District Court, District of Arizona