

**THE FOREIGN CORRUPT
PRACTICES ACT:
WHAT NEEDS TO BE
KNOWN NOW**

BRANT PHILLIPS
Bass Berry & Sims



The Foreign Corrupt Practices Act

Brant Phillips
Bass Berry & Sims
Nashville, TN

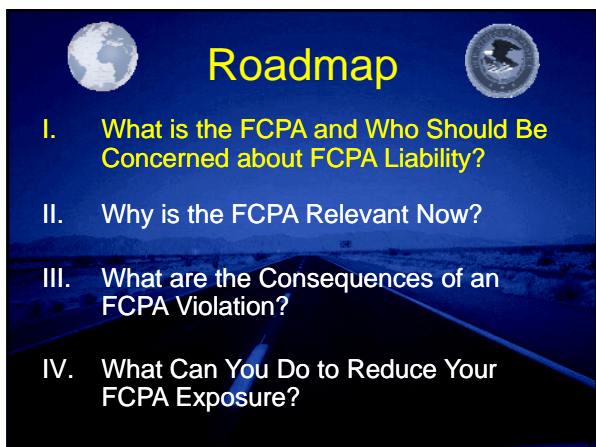
Litigation Management in a NEW YORK Minute
2009 Edition



TRIAL.COM
THE NETWORK OF TRIAL LAW FIRMS

 **Roadmap** 

- I. What is the FCPA and Who Should Be Concerned about FCPA Liability?
- II. Why is the FCPA Relevant Now?
- III. What are the Consequences of an FCPA Violation?
- IV. What Can You Do to Reduce Your FCPA Exposure?



A. The FCPA Generally

- Anti-foreign corruption statute passed in 1977, revised in 1988 and 1998
- Intended to reduce foreign corruption
- Enforced by DOJ and SEC

B. Short Version

Federal anti-bribery statute that prohibits:

Corruptly offering anything of value to any foreign official for the purpose of influencing the decision of that official to do anything that assists the offeror in the obtaining or retaining of business.

Breadth of the Statute

- Foreign "Official" →
 - Employees of state-run enterprises
 - Political party officials
 - Employees of public international organizations
- Anything of value
 - Travel, entertainment, souvenirs
 - Gifts
 - Jobs for relatives
 - Donations to charities



Breadth of the Statute

- Third Party Liability
 - "Conscious Disregard"
 - "Deliberate Ignorance"
 - ~30 TPL cases in the last 2 years
- Exception:
 - Facilitating Payments
- Affirmative Defenses:
 - Reasonable and Bona Fide Business Expense
 - Lawful under Written Local Law



D. Accounting Requirements

- Issuers must “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.”
 - No materiality standard
 - “Satisfy prudent officials [as in] the conduct of their own affairs”
 - Applies to dealings with non-state actors
- Issuers must maintain a system of internal controls that “provides reasonable assurances that . . . transactions are executed in accordance’ with GAAP.



F. Who Should Be Concerned about FCPA Liability?

- “Domestic concerns:” (1) any citizen, national, or resident of the US; (2) nearly every entity with its principal place of business in the U.S.; and (3) nearly every entity organized in the U.S.
- Issuers under the Exchange Act, including:
 - Class of securities registered pursuant to Section 12(b) of the Exchange Act
 - Equity securities listed on NASDAQ
 - Foreign private issuers whose securities are registered with the SEC (including American Depositary Receipts)
- Any other person who, while in the territory of the U.S., corruptly does any act in furtherance of a prohibited payment, offer, etc.



Roadmap



- I. What is the FCPA and Who Should Be Concerned about FCPA Liability?
- II. Why is the FCPA Relevant Now?
- III. What are the Consequences of an FCPA Violation?
- IV. What Can You Do to Reduce Your FCPA Exposure?

Priorities of Federal Enforcers

Los Angeles Times

Avery Dennison Case a Window on the Pitfalls U.S. Firms Face in China

By Don Lee
Jan. 12, 2009

“Justice Department officials say enforcement of the FCPA is second only to fighting terrorism.”

Increase in Prosecutions

- More prosecutions in the last 5 years than last 20 years combined
- 300% increase in prosecutions from 2005-2007
- Industry-wide investigations (e.g., medical devices, freight forwarding, etc.)

Recent Headline

THE WALL STREET JOURNAL

U.S. Cracks Down on Corporate Bribes

By Dionne Searcey
May 27, 2009, p. A1

“The crackdown under the FCPA – a post-Watergate law largely dormant for decades – now extends across five continents and penetrates entire industries, including energy and medical devices.”

“At least 120 companies are under investigation, according to Mark Mendelsohn, a deputy chief in the Justice Department division overseeing the prosecutions, up from 100 at the end of last year.”

Sources of Investigations

- Whistleblowers/
disgruntled employees
- Competitors
- Customers
- Foreign enforcers
- Active investigations

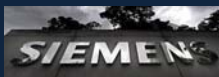


Recent Individual Prosecutions

- Former finance director and sales executive of valve company (Richard Morlok and Mario Covino): **Felony pleas, face 5 years in prison**
- Former executive of Willbros Int'l Inc. (James K. Tillery): **Charged, faces 35 years in prison**
- Former CEO of KBR (Albert "Jack" Stanley): **Felony plea, faces 10 years in prison**
- Former executives of KBR (Jeffrey Tesler and Wojciech Chodan): **Charged, face 55 years in prison**

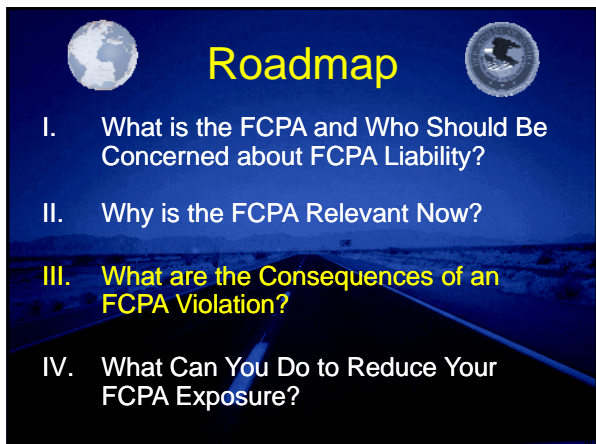


Recent Corporate FCPA Activity



- Novo Nordisk - (\$18 mil. settlement)
- Sun Microsystems - (disclosed potential violations)
- Latin Node, Inc. - (\$2 mil. settlement)
- Morgan Stanley - (disclosed potential violations)
- KBR/Halliburton - (\$579 mil. settlement)
- ITT Corp. - (over \$1.5 mil. settlement)
- Siemens - (\$800 mil. settlement)






Roadmap

- I. What is the FCPA and Who Should Be Concerned about FCPA Liability?
- II. Why is the FCPA Relevant Now?
- III. **What are the Consequences of an FCPA Violation?**
- IV. What Can You Do to Reduce Your FCPA Exposure?

Consequences of an FCPA Violation?

A. Corporate Liability


1. Felony conviction
2. Fines of up to \$2,000,000 *per violation*
- Alternative Fines Act: Up to twice the benefit
3. Disgorgement
4. Denial of export licenses
5. Debarment
6. Compliance monitor
7. Defense costs (Siemens ~ \$850 mil.)
8. "Parasite" suits: Wire fraud, tax fraud, RICO, shareholder

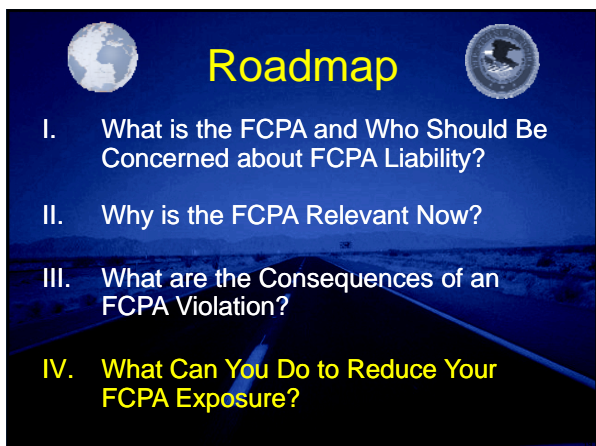


Consequences of an FCPA Violation?

B. Individual Liability

1. Felony conviction
2. Imprisonment up to 5 years *per violation*
3. Fines of up to \$100,000 *per violation*
- Alternative Fines Act: Up to twice the benefit
3. Disgorgement
4. Debarment
5. Defense costs
6. Personal and professional ruin





Roadmap

- I. What is the FCPA and Who Should Be Concerned about FCPA Liability?
- II. Why is the FCPA Relevant Now?
- III. What are the Consequences of an FCPA Violation?
- IV. What Can You Do to Reduce Your FCPA Exposure?

What Can You Do to Reduce Your FCPA Exposure?

- A. Assess Current FCPA Risks
- B. Establish Compliance Program to Reduce Exposure
- C. Acquisition Due Diligence

20

What Can You Do to Reduce Your FCPA Exposure?

A. Assess Current FCPA Risks

- 1. Inform Key Compliance Employees
- 2. Identify Risk Areas
- 3. Review Code of Conduct & FCPA Policies
- 4. Review Third Party and Agent Contracts
- 5. Review Accounting and Internal Controls

21

The Importance of a Compliance Program

“We have yet to bring a case where we’ve had a company come before us with a meaningful compliance program.”

-- Mark F. Mendelsohn, Deputy Chief of the DOJ’s Criminal Fraud Division (Apr. 6, 2006)



22

What Can You Do to Reduce Your FCPA Exposure?

B. Establish Compliance Program

DOJ Talking Points

- 1. “Tone at the top”
- 2. Corporate policy delivered from top to all relevant persons
- 3. Senior compliance chief who reports directly to the Audit Committee



23

What Can You Do to Reduce Your FCPA Exposure?

B. Establish Compliance Program

DOJ Talking Points

- 4. Training of directors, officers, employees, agents, and partners
- 5. Appropriate disciplinary process
- 6. Reporting system with anonymous hotline for reporting suspected violations



24

What Can You Do to Reduce Your FCPA Exposure?

B. Establish Compliance Program

DOJ Talking Points

- 7. Due diligence on acquisitions, third parties
- 8. Periodic audits
- 9. "Tough look" when operating in red flag areas (e.g., China, Latin America, etc.)



25

What Can You Do to Reduce Your FCPA Exposure?

C. Acquisitions

- 1. Interview compliance and sales personnel
- 2. Review FCPA/international policies, internal controls, certifications, and contracts
- 3. Investigate previous reports/terminations
- 4. Forensic review of data room financials and last 5 years' auditors' reports
- 5. Include reps and warranties

26

What Can You Do to Reduce Your FCPA Exposure?

C. Acquisitions

- 1. eLandia/Latinode (2009): FCPA violations discovered post-closing led to write-downs of nearly \$21 mil.
- 2. Lockheed/Titan (2004): Purchase price reduced 9% (\$179 million) ... and Lockheed still walked away
- 3. Cardinal Health/Syncor (2002): Purchase price reduced 27% (\$291 million)



27



Litigation and Dispute Resolution

Education

Washington & Lee University - J.D., 1997

Duke University - M.P.P., 1997
Birmingham Southern College - B.A., 1991

Honors & Distinctions

Phi Beta Kappa

Omicron Delta Kappa

Listed in *The Best Lawyers in America® and Benchmark Litigation* "Future Stars"

Tennessee Bar Association Leadership Law, 2006

Harry Phillips American Inn of Court, Barrister

Senior Articles Editor, *Washington & Lee Law Review*, 1996-1997

Law Clerk to Hon. William M. Acker, Jr., U.S. District Court, Northern District of Alabama, 1997-1998

Publications

"Chasing Down the Devil: Standards of Prudent Investment Under the Restatement (Third) of Trusts," 54 *Wash. & Lee L. Rev.* 335 (1997)



W. Brantley Phillips, Jr.

Member

Nashville

P: (615) 742-7723

F: (615) 742-2842

Brant Phillips is a Member of the firm's Litigation and Government Relations Practice Areas. In addition to complex business litigation, including securities and shareholder class action defense, derivative actions and business fraud, Brant's practice includes regular work in various administrative and regulatory proceedings. Brant is listed in *The Best Lawyers in America®* for administrative law.

Brant graduated *magna cum laude* in 1991 from Birmingham-Southern College, where he was elected to Phi Beta Kappa, Omicron Delta Kappa and Mortar Board. He received his law degree, *cum laude*, in 1997 from Washington & Lee University School of Law. Brant also holds a master's degree in public policy from Duke University, where his work centered on issues affecting state and local governments. Prior to joining the firm in 1998, Brant served as a law clerk to Judge William M. Acker, Jr., on the United States District Court for the Northern District of Alabama.

In addition to his litigation practice, Brant regularly advises firm clients on state and federal campaign finance and ethics law issues. Brant is the author of the chapter on Tennessee law found in *Lobbying, PACs and Campaign Finance: 50 State Handbook*, which is published by Thomson/West, and he has given numerous presentations to corporate and community groups on the subject.

Brant is a member of the Tennessee and American Bar Associations, and he served as the chair of the TBA's Federal Practice Section in 2007-08. His community involvement includes service with the Young Leaders Council, the YMCA of Middle Tennessee, the Alcohol & Drug Council of Middle Tennessee and the "Room in the Inn" homelessness relief program. Brant also is active in state and local politics. Since 2007, Brant has served as chief legal counsel to the Tennessee Democratic Party.