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WALKING THROUGH THE FCPA AND TRAVEL ACT'S ANTI-BRIBERY PROVISIONS

Foreign Corrupt Practices Act:

Did an employee or third party acting on company's behalf give, offer, or promise "anything of value" to another with the intent of creating or maintaining business?

NO → No Liability

YES ↓

Was the recipient:

- A foreign official (defined as an officer or employee of a public international organization, foreign government, or any department, agency or instrumentality thereof or any person acting in an official capacity for or on behalf of the foregoing)?
- A foreign political party or party official?
- A candidate for foreign political office?
- A person who the entity knows will pass the payment, offer, promise, or authorization on to any of the above?

NO → Travel Act

YES ↓

Was the Act:

- Made by an issuer or a domestic concern making use of any means or instrumentalities of interstate commerce?
- Made by a national or entity organized under the law of the U.S. but operating outside of the U.S.?
- Made by another person (including foreign national or business) while physically located in the U.S.

YES ↓

Did the person or entity act for the *corrupt* purpose of:

- Influencing an official act or decision of the foreign official?
- Inducing the foreign official to do or omit doing any act in violation of his or her lawful duty?
- Securing an improper business advantage?
- Inducing the foreign official to use his influence with a foreign government to affect or influence any government act or decision?

NO → No Liability

YES → Was the act done with the intent to assist the company in obtaining, retaining, or directing business?

Travel Act (18 U.S.C. § 1952):

Did the payment, gift, or offer of payment or a gift:

1) Involve the use of a facility of foreign or interstate commerce (such as email, telephone, courier, personal travel);
2) with intent to promote, manage, establish, carry on, or distribute the proceeds of;
3) an activity that is a violation of state commercial bribery laws?

"Commercial bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any private agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs."

NO → No Liability

YES → 5 years imprisonment; $250,000 fine

Exemptions and Affirmative Defenses

YES → "Facilitating/Expediting Payments Exception"

"Facilitating/Expediting Payments Exception"

Was the payment made to expedite or secure the performance of a routine governmental action (essentially a ministerial action)?

Examples: obtaining permits, licenses, or other official documents to do business in a foreign country; processing governmental papers; providing police protection, mail services, or scheduling inspections; and providing utilities services, cargo services, or protecting perishable commodities. Note that this exemption has been construed extremely narrowly and that reliance on it is, therefore, not advised.

YES → No Liability

NO → "Local Law Exception"

"Local Law Exception"

Was the payment, gift, offer, or promise of anything of value lawful under the *written* laws and regulations of the foreign official's, political party's, party official's, or candidate's country?

YES → No Liability

NO → "Bona Fide Business Expenditure Exception"

"Bona Fide Business Expenditure Exception"

Was the payment, gift, offer, or promise of anything of value a reasonable and bona fide business expenditure incurred by or on behalf of the covered party, and was the gift or payment directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency thereof?

YES → No Liability

NO → Criminal FCPA Liability

Criminal FCPA Liability:

Individual: 5 years imprisonment; $250,000 fine

Company: $2 million fine per violation

→ Also:

Also:

- Disgorgement
- Reputational damage
- Loss of government contracts/licenses/debarment

The information contained herein is not, and should not be relied upon as, legal advice, and is not a substitute for qualified legal counsel.