

US legislation: How the FCPA affects SA companies trading in the US?

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians and political parties. In 1977, the US Congress enacted the Foreign Corrupt Practices Act (FCPA) to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system. The provisions of the FCPA prohibit the bribery of foreign government officials by U.S. persons and prescribe accounting and record-keeping practices.

The Act was amended in 1998 by the International Anti-Bribery Act of 1998 which was designed to implement the anti-bribery conventions of the Organisation for Economic Co-operation and Development (OECD). Since 1998, the anti-bribery provisions of the FCPA also apply to *foreign firms* and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. *The term "knowing" includes conscious disregard and deliberate ignorance.* Intermediaries may include joint venture partners or agents.

Penalties for violating the anti-bribery provisions of the FCPA vary based on whether the violator is a U.S. company or a U.S. individual. U.S. companies can be fined up to \$2 million while U.S. individuals (*including officers and directors of companies that have wilfully violated the FCPA*) can be fined up to \$100,000 and imprisoned for up to five years, or both. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. *Fines imposed on individuals may not be paid by their employer or principal.* In addition, civil penalties may be imposed. The Securities Exchange Commission (SEC) has enforced a higher priority of this Act, bringing more "big cases" to book than previously. 'Companies that lack "living, breathing" FCPA compliance programs are paying heavy penalties and are being required to submit to an independent compliance monitor as a condition of settlement.'

South African companies who trade with the U.S. and those with primary or secondary listings in the U.S may well want to obtain a full copy of the Foreign Corrupt Practices Act.

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