

Business Ethics

- Ethics
- Antitrust
- Trade Regulation
- FCPA

International Operations

- Host country laws apply as well as U.S. laws which have extra-territorial effect
- Five U.S. laws (among others) which apply internationally are:
 - Antiboycott
 - Export Controls
 - Trade Sanctions
 - Antitrust
 - Foreign Corrupt Practices Act (FCPA)

Antiboycott – Overview

- Prohibits U.S. companies from participating in certain international boycotts
- Specific actions are prohibited:
 - agreeing to refuse to deal with a boycotted country
 - agreeing to refuse to deal with “blacklisted” companies or individuals
- International Construction Consulting, LLC must report to the U.S. government when we receive a boycott request, even if we don’t comply with the request

Export Controls – Overview

- U.S. regulations which prohibit export of certain materials from the USA
- Main purpose of the law is to stop the use of materials for nuclear, chemical, and biological weapons
- Managed by the U.S. Department of Commerce (BXA) which publishes “Commerce Control Lists”

Sanctions – Overview

- U.S. regulations which prohibit “transactions” with certain countries
- Main purpose of the regulations is to discipline other countries and shape foreign policy
- Managed by the U.S. Department of Treasury (OFAC) which issues regulations to comply with Presidential Orders
- Who is a “U.S. Person”?

Antitrust – Overview

- Antitrust does not directly affect International Construction Consulting, LLC, but contractors representing the Company should be aware of the provisions.
- Competition is the cornerstone of the free market system. The goal of the law is to provide the best products at the lowest possible price.
- U.S. antitrust laws and EU competition rules apply to many large entities active throughout the world.

Antitrust – The Law and Upstream Business

- Competitors are not allowed to agree upon commercial matters:
 - Prices
 - Wages
 - Rigging Bids

Antitrust – The Law and Upstream Business

- Competitors may agree upon certain arrangements with reasonable justification. Without such justification, such conduct may also violate the law:
 - Restrictions on Resale
 - Reciprocal Dealing
 - Joint Ventures

Antitrust – Application to Upstream Business

- Joint Operations raise antitrust issues because they involve collaboration by two or more companies which are often competitors.
 - If a joint operation results in the sharing of risks, economies of scale, or efficiencies of integration, it will usually be acceptable from an antitrust standpoint so long as:
 - The scope of the joining operation is reasonably limited.
 - A joint production operation may provide operational savings, but this would not necessarily justify joint marketing.
 - Information exchanged in the joint operation is not passed through to the participants' other businesses and mis-used to limit competition.

Antitrust – Application to Upstream Business

- Exchanges of Information with other companies, especially if they are competitors, raise antitrust issues.
 - Discussions or exchanges of information with a competitor concerning prices, costs, terms of sales, business plans, suppliers, customers, territories, capacity, production, or any other subject that could be commercially important are particularly sensitive.

Antitrust – Application to Upstream Business

- Exchanges of Information (*continued*)
 - If there is a legitimate business purpose for exchanging proprietary information among competitors, such information should normally be gathered from individual firms on a confidential basis by an independent outside party and disseminated on an aggregate, or at least company-anonymous, basis. Also, it is safest to collect only historical information.
 - Benchmarking, a structured approach to learning about the processes employed by the best companies in their class, is just another form of information exchange under the antitrust laws.
 - The purpose of benchmarking is to improve performance and quality, which enhances efficiency and is lawful.

Antitrust – Application to Upstream Business

- Trade Associations
 - The many legitimate functions served by trade associations, such as informing government officials on policy issues and educating the public, are acknowledged by enforcement authorities and the courts. However, trade association activities are antitrust sensitive because they involve joint activities with competitors.
 - An association's purpose and activities can change over time, so the Company should periodically review its membership.
 - In general, each meeting should have a written agenda, which should be reviewed with Management before the meeting.

Antitrust – Application to Upstream Business

- Trade Associations (*continued*)
 - Minutes of each trade association meeting should be kept to document that the proceedings were proper.
 - If you are in a trade association meeting when an improper discussion begins, insist that the discussion be terminated. If it is not, you should leave, announcing your departure and asking that it be noted.
 - Management should review any proposal for a trade association to engage in joint research, set standards, or collect data.

Antitrust – Application to Upstream Business

- Penalties & Enforcement
 - Criminal & Civil Penalties
 - Dismantling of Company
 - In 2000, Justice filed 63 cases against 40 corporations and 60 individuals. (5500 days in jail time served by individuals; 1 billion in civil fines)

Foreign Corrupt Practices Act

FCPA Basics

- International; Construction Consulting, LLC is committed to conducting its business according to the highest ethical standards and complying with all laws which apply to its worldwide business activities
- One such law is the U.S. Foreign Corrupt Practices Act or FCPA

FCPA Basics *(continued...)*

- The FCPA is a criminal statute that prohibits improper payments to, or other improper transactions with non-U.S. government officials to influence performance of official duties
 - Prohibits every U.S. company and its employees and representatives from giving, paying, promising, offering, or authorizing payment, directly or indirectly through a third party, of anything of value to any “foreign official” to persuade that official to help the company, or any other person, obtain or keep business or to secure some other improper advantage
 - Requires U.S. companies and majority-owned affiliates to keep accurate and complete records of the transactions in which they engage

Elements of a FCPA Violation

- Making, authorizing, promising or offering to make a payment of money or anything of value to any foreign official
- Or, to any other person while knowing that the payment will be passed on to a foreign official corruptly for the purpose of influencing any official act or decision of that person, or to induce that person to use his/her influence to affect any governmental act or decision in order to obtain, retain, or direct business to any person, or to secure any improper advantage

Anything of Value

- Cash
- Car
- Seat on Company aircraft
- Surplus equipment
- Art
- Contract Rights
- Personal Gifts
- Travel Expenses
- Accommodations, Meals, Entertainment
- Per diems
- Services
- Carried Interests
- Loans

Anything of Value *(continued...)*

- Excessive Discounts
- Preferential options
- Selling at less than fair market value
- Purchasing goods or services at above market rates
- Job for relative
- Donation to charity
- Scholarship for family member

Foreign Officials

- Any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity on behalf of any such government or department, agency or instrumentality

Foreign Official *(continued...)*

- Foreign Ministers
- Heads of agencies and departments
- Procurement officials
- Every government employee
 - elected
 - appointed
 - career officials
 - executive branch officials
 - legislators
 - judges
 - part time
 - unpaid

Foreign Official *(continued...)*

- Political Parties, Party Officials, and Candidates for Political Office
- Officials of Public International Organizations
 - International Monetary Fund
 - International Finance Corporation
 - United Nations
 - Organization of American States
 - International Red Cross
- Employees of State-Owned Companies
 - National Oil Companies
 - National Utilities & Airlines

Third Party or Vicarious Liability

- Area or particular concern
- Company and individuals may be liable for payments made by a third party - such as a consulting, agent, or joint venture participant if they give money or something of value that was paid to them by the Company to a foreign official
- Examples:
 - a consultant gives a portion of his consulting fee to a government official in exchange for the award of a contract
 - a joint venture participant makes an illegal payment using joint account funds

Third Party or Vicarious Liability *(continued...)*

- Liability can accrue even if the Company had no actual knowledge of the “pass through” payment (remember earlier discussion of FCPA definition of “knowledge”)
- Also can cover payments to third parties which are seen as reimbursement for past payments to foreign officials
- How do we protect ourselves
- Choose business associates carefully

Third Party or Vicarious Liability *(continued...)*

- Conduct due diligence investigations to determine that:
 - third party is not a foreign official or company in which a foreign official has an interest
 - the third party is not likely to engage in any improper practices that could expose the Company to liability or are otherwise inconsistent with our business practices and reputation
 - learn to recognize warning signs or “red flags”

Red Flags

- Country has a reputation for corruption
- Foreign official has a reputation for corruption
- Third party is suggested or recommended by government official
- Party objects to FCPA representations and warranties in agreement
- Close personal or family relationship with government official
- Request for unusual contract terms, such as cash payments or payments to offshore accounts

Red Flags *(continued...)*

- Unusual corporate structure
- Only qualification is influence with government official
- Request to make transaction or relationships non-transparent
- Excessive fees or compensation
- International Construction Consulting, LLC practice calls for all agreements with third parties to be formally defined in writing before the third party begins any work
- Must continue to monitor third party's activities for continued compliance with the FCPA and International Construction Consulting, LLC policies

Exception and Defenses

- Facilitating Payments Exception
- A payment does not violate the FCPA if the purpose is:
 - To expedite or secure the performance of a routine governmental action ordinarily and commonly performed by a foreign official
- Examples of routine governmental actions:
 - Obtaining permits, licenses or other official documents (not including oil and gas exploration and production agreements)
 - Processing government papers such as visas and work orders
 - Providing police protection, mail pick-up and delivery or scheduling inspections
 - Providing telephone service, power and water supply, loading and unloading cargo

Exceptions and Defenses *(continued...)*

- Does not include any decision making or discretionary actions
- Facilitating payments are typically small
- Must be properly recorded
- Local Law issues
- No exception for gifts
- Permissibility based on lack of corrupt intent
- Frequent gifts followed by a pattern of favorable action could be viewed as a bribe

Business & Promotional Expenses Defense

- Act Allows
 - Payments made to reimburse foreign officials for expenses associated with business development, such as marketing and promotional activities
 - Payments of expenses directly related to the execution or performance of a contract
 - Examples include:
 - Visit to a US city to tour an associates Research facilities in order to demonstrate to the official, the Company's technical capabilities
 - Trip to view an on-going project
 - Hosting government auditors in location where books are kept
 - Hosting government representatives for contract negotiation sessions

Business & Promotional Expenses Defense *(continued...)*

- Expenses must be reasonable and bona fide
 - Must not include
 - Family travel
 - Side trips unrelated to business activity
 - Non-justified per diems
 - Excessive entertainment

Local Law Defense

- Act allows payments that are “lawful under the written laws and regulations” of a foreign official’s country
- Countries generally have laws prohibiting bribery

Accounting Provisions

- Books and Records
 - Keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect transactions and disposition of assets
- Accounting Controls
 - Required to devise, implement and maintain a system that provides reasonable assurances that transactions are executed in accordance with management's authorizations
- Issues
 - Vague, misleading or misidentified transactions
 - Misidentified expenses
 - Unrecorded accounts or transactions
 - Over invoicing

Penalties

- Imprisonment for up to 5 years; and or
- Criminal fines of up to \$250,000 for individuals and \$2,000,000 for corporations
- Federal sentencing guidelines can result in increased fines based upon a multiple of the gross gain or loss resulting from the transaction
- Civil penalties
- Individual fines cannot be paid by the company

FCPA Guidelines & Policies

- FCPA Compliance Guide

An overview of the law, reoccurring issues and frequently asked questions.

- Guidelines for Interactions with Foreign Officials

- **GIFTS** <\$50 and <3 times per year to the same recipient do not require approval (logo items <\$25 exception)
- **ENTERTAINMENT** >\$200 requires management approval (amount is per individual “official”)
- **HOSTING** means assuming financial responsibility for all or part of a foreign official’s travel expenses
 - all trips require management approval
 - trips costing <\$1,000 require advance review by management (except local trips in-country)

All trips costing >\$1,000 must be reported to management.

FCPA Guidelines & Policies *(continued...)*

– FACILITATING PAYMENTS

- <\$25 do not required approval, but must be reported
- >\$25 but <\$50 requires management approval
- >\$50 requires management approval

All facilitating payments must be reported to management.

Summary for Avoiding Trouble

- Be familiar with the Law, but do not try to make interpretations alone. Consult management.
- Protect against violations:
 - Conduct due diligence on third parties
 - Obtain pre-approvals where required
 - When in doubt, ask questions
 - If you hear rumors of improper payments or see red flags, don't ignore them
 - Monitor third parties
 - Record and document all payments and other dispositions of company assets
 - Remember local law

Summary for Avoiding Trouble *(continued...)*

- If you receive a request for an improper payment:
 - Refuse to make the payment; explain that International Construction Consulting, LLC does not make such payments
 - If a third party is involved, explain that they are not authorized to make the payment on International Construction Consulting, LLC's behalf
 - Make clear that your refusals are absolute
 - Immediately report the request to management