

국제계약, 영문계약에서 Anti-Corruption, Compliance 쟁점, 미국법 FCPA 관련 주요내

용, 최근 제재사례 및 실무적 포인트 몇 가지



미국법 BUT 모든 계약실무에서 고려해야 함

U.S. Foreign Corrupt Practices Act - FCPA

Lockheed 스캔들 이후 미국 기업들이 해외에서 뇌물을 공여하는 행위를 처벌하기 위하여 1977년 연방법으로 제정

뇌물 관련 조항

- 부당한 방법으로 해외공무원에 대한 영향력을 행사하여 사업을 취득하거나 기타 부당한 이익을 취득하기 위한 목적으로 경제적 가치가 있는 것을 해외 공무원에 대하여 공여하는 것은 금지됨

회계 관련 조항

- 미국 회사들은 정확하게 장부를 관리할 의무가 있음
[장부의 계정, 부정확한 기록, 허위비용 기록, 허위 문서 금지]

미국 법규정의 요지

- **Anti-Bribery Provision (15 USC §§ 78dd-1 –78dd-3):**
 - prohibits the offer, authorization, promise or payment of "anything of value" to a foreign official, international organization official, political party, party official, or candidate for public office in order to obtain or retain business.
 - It applies to companies which have issued securities registered in the US or which are required to file reports under the Securities and Exchange Act; citizens, nationals, or residents of the US or businesses with a principal place of business in the US or organized under the laws of any state; any person or agent thereof while in the territory of the US.
- **Accounting Provision (15 USC § 78):** Not limited to bribery-related violations. Applies only to companies issuing securities registered on U.S. stock exchanges and includes two provisions:
 - The **Books and Records Provision** requires issuers to accurately record transactions in reasonable detail.
 - The **Internal Controls Provision** requires public companies to maintain a system of internal policies and procedures sufficient to provide reasonable assurances that transactions are executed and recorded according to appropriate standards and under management's specific or general authorization.

법적책임 성립요건 광범위 - 대응방안

뇌물 관련 책임

회사는 뇌물 제공 사실을 알았을 경우("knowledge") 뿐만 아니라
묵인한 경우("willful blindness", "conscious disregard")에도 책임

- Distributor, consultant 등 THIRD PARTY의 행위에 대하여도 회사 책임이 인정될 수 있음 : 사전에 (1) 이들에 대한 실사를 하고 (2)이들과의 계약상 적절한 장치(reps & warranty, audit right 등)를 마련해두지 않은 경우

뇌물 관련
조항의 예외



- 급행료 지급(Grease Payment/Facilitating Payment)

최근 미국 SEC 제재처분 사례 몇 가지

- 2019. 3. 29. - 독일회사 Fresenius Medical Care (FMC)
- 미국 외 다른 국가, 중동, 아프리카 다수 국가에서 수년 동안 의료기기 신장투석기 영업활동 - FCPA 위반행위 판단 - 법원 제소 후 penalty \$231 million 합의 중결
- 2018. 12. 26. - 미국회사 Polycom
- 중국소재 자회사의 통신기기 영업활동 - FCPA 위반행위 - penalty \$16 million
- 2016년 - 이스라엘 회사 Teva
- 러시아, 멕시코, 우크라이나 현지 자회사 및 현지 타회사의 의약품 영업활동 FCPA 위반행위 판단
- penalty \$619 million 합의

최근 미국 SEC 제재처분 사례 몇 가지

GlaxoSmithKline

- 2016 settlement for alleged payments to doctors by Chinese subsidiary in pay-to-prescribe schemes to boost sales.
- Between 2010 and 2013, allegedly spent nearly \$225M on planning and travel services. Payments also allegedly included gifts, improper entertainment with little or no educational value, shopping excursions, family and home visits, and cash.
- These costs were allegedly falsely recorded as legitimate expenses.
- In related Chinese action, GlaxoSmithKline was fined \$490M and its former head of China Operations was given a three-year suspended prison sentence and deported.
- GlaxoSmithKline had hired a private investigator in China to investigate possible whistleblowers, including a clandestinely-filmed sex tape involving a member of company management. The investigator was arrested and jailed in China.
- \$20M disgorgement to SEC.

Teva

- 2016 settlement related to charges of allegedly doing business with company owned by Russian Ministry of Health official, allegedly bribing government doctors in Mexico, and hiring a Ukrainian official as a consultant.
- In Russia, Teva allegedly did business with repackaging company owned by an official at the Ministry of Health. The official allegedly earned about \$65M through the agreement.
- In Ukraine, Teva allegedly hired a government official as a consultant and paid him \$200,000 through monthly fees and travel.
- In Mexico, Teva allegedly bribed doctors.
- \$283M penalty to DOJ and \$236M to SEC.
- The DOJ reduced Teva's criminal penalty by 20% because of its substantial cooperation and remediation.

샘플 조항 – 계약서 Compliance 조항

- 4.1. **Compliance with Legal Requirements.** Licensee shall conduct, and shall ensure that its Affiliates, Sublicensees and Subcontractors, conduct, all activities hereunder, including all Development and Commercialization of the Product, in compliance with all Applicable Laws. In addition, Licensee hereby certifies that (i) to its reasonably knowledge or belief neither Licensee nor its Affiliates has been, prior to the Effective Date debarred under United States law, including Section 21 U.S.C. 335a (or any foreign equivalent thereof), and (ii) neither Sub-Licensee nor its Affiliates will, from and after the Effective Date, employ or otherwise use in any capacity, the services of any Person, who to the knowledge or belief of Licensee or any of its Affiliates is, debarred under United States law, including Section 21 U.S.C. 335a (or any foreign equivalent thereof) to perform any portion of the activities hereunder, including any Development and Commercialization of the Product. Sub-Licensee shall notify Sub-Licensors in writing promptly upon becoming aware of any such debarment of any such Person, and shall, upon becoming so aware, promptly remove such Person from performing any such activities and from any function or capacity related to any such activities.
- 4.2. **Compliance with Ethical Business Practices.**
- (a) **Compliance with Laws and Policies.**

샘플 조항 – 계약서 Compliance 조항

- 4.3. **Termination for Non-Compliance.** Any uncured violation by Licensee or any of its Affiliates of any applicable **anti-corruption laws** in connection with its obligations under this Agreement shall be a material breach of this Agreement entitling Sub-Licensors to terminate this Agreement pursuant to Section 11.2(c).
- 4.4. **Responsibility for Compliance.** Licensee acknowledges and agrees that neither Licensors, nor or any of its Affiliates or Licensors' or its Affiliates' officers, directors, employees, agents and representatives is authorized to waive compliance with the provisions of Section 4.3 and/or to give any direction, either written or oral, relating to the making of any commitment by Licensee or its agents to any Third Party in violation of the terms of this ARTICLE 4, and that Licensee shall be solely responsible for its compliance with all applicable anti-corruption laws irrespective of any act or omission of Merck or any of Merck's Affiliates or Merck's or its Affiliates' officers, directors, employees, agents and representatives.

계약서 Compliance 조항의 적용 범위

Business Are Now Requiring these Clauses in Contracts With:

- Clients
- Subcontractors
- Joint venture partners
- Bidders
- Vendors
- Sales agents/business development agents
- Advisors
- Consultants
- Distributors
- Other third parties and intermediaries

계약서에서 과도한 의무 부과 - 부담 발생

Impact of ethics and compliance clauses and certifications on businesses

- Disclosure of sensitive business operations and procedures
- Disclosure of ongoing internal or government investigations
- Disclosure of confidential settlements settlements
- Contract terms that expand legal definitions
- Contractual obligations that disproportionately impact one party
- Overly broad audits by business partners
- Excessive compliance costs – human capital and actual cost
- No method to execute such broad due diligence
- No mechanism to comply with ongoing obligations

대응방안 - 계약실무

Negotiating Ethics & Compliance Clauses

- Tailor clauses to conform with applicable laws
- Add definitions – eg “conflict of interest”
- Limit conflicts to situations where the Contractor is unable to render impartial assistance, advice, or services to the Client
- Limit application of clause to Contractor and to personnel on the contract
- Qualify clauses “to the actual knowledge” of the signatory
- Edit so that clauses are true and accurate for your company
- Limit/qualify to link to material adverse impact on performance of contractual obligations

국제계약, 영문계약, 계약분쟁, 손해배상, Claim, License, R&D 제휴계약

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