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BRIBERY

Foreign Corporate Practices Act: Is Your Company Prepared for the New Era of Increased Enforcement?


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Make no mistake: one thing has become increasingly evident from recent press releases and headlines regarding settlements for violations of the Foreign Corrupt Practices Act[1]—we are in a new era of enforcement.

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[1] 15 U.S.C. § § 78dd-1 et seq.

Over the past year, the Department of Justice and the Securities and Exchange Commission have aggressively increased the level of cases being brought against companies and their executives for violations of the FCPA. In the past year alone, companies settling FCPA charges have paid a record $1.8 billion in penalties and fines to the SEC and DOJ.[2] The SEC and DOJ have also charged more than 50 individuals in FCPA-related cases resulting in imposition of criminal penalties and prison time.

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[2] *See* 2010 FCPA Enforcement Index, available at http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html

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In this climate of increased enforcement, it is imperative that all firms doing or seeking to do business in foreign markets become familiar with the FCPA.

In January 2010, DOJ unsealed indictments against 22 executives and employees of companies in the military and law enforcement products industry for allegedly engaging in transactions geared at bribing foreign government officials in an attempt to obtain business.[3] These indictments mark the single largest FCPA investigation and prosecution of individuals in the history of FCPA enforcement efforts. For the first time, an FCPA investigation utilized undercover law enforcement techniques, with undercover FBI agents soliciting bribes. This investigation, coupled with an unprecedented increase in the prosecution of companies and executives, demonstrates the SEC's and DOJ's new directive to aggressively pursue FCPA violations.

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[3] 5 WCR 62 (1/29/10).

Now more than ever it is important for company executives to become vigilant of FCPA compliance. The provisions of the act are stringent and require strict compliance. A company's failure to monitor and abide by the FCPA can result in being barred from bidding on U.S. government contracts, imposition of large monetary penalties, disgorgement of profits, and criminal convictions against company executives. As markets become more global, and business is no longer limited by jurisdictional boundaries, it is crucial for companies of all sizes seeking to do business in foreign markets to become familiar with the FCPA.

The FCPA specifically prohibits payment to a third party while “knowing”that all or a portion of such payment or thing of value will be offered, given, or promised to a foreign official.

This article is intended to provide executives a general history and better general understanding of the FCPA, as well as highlight emerging trends and what companies can do to ensure compliance with the FCPA.

History

The enactment of the FCPA in 1977 was a direct response to investigations led by the SEC into the way U.S. companies conducted business in foreign countries. As a result of those investigations, more than 400 U.S. companies admitted to making questionable or illegal payments, totaling more than $300 million, to various foreign government agencies and officials. The act was enacted with the intended aim of extinguishing such behavior and changing the way U.S. companies conduct business abroad. Specifically, the FCPA sought to achieve this purpose by prohibiting bribery of foreign officials and requiring companies to accurately record and account for financial transactions related to their foreign activities.

Since 1977, the United States has taken additional steps to deter and safeguard against corrupt practices in foreign business. The United States, along with 37 other countries, has adopted the Organisation of Economic Co-operation and Development Anti-Bribery Convention. The OECD's goal was to enact legislation similar to the FCPA at a global level. The United States amended the FCPA in 1998 to reflect the anti-bribery conventions of the OECD, expanding its authority and jurisdictional reach to apply to foreign companies and individuals who make and/or attempt to make corrupt payments in the United States.

Overview of FCPA Provisions

The FCPA prohibits bribes to foreign officials with the intent to obtain or retain business. The two main parts of the FCPA are anti-bribery and accounting provisions. These provisions work in conjunction to prohibit unlawful payments to foreign officials and require U.S. companies to maintain accurate records

and systems of internal controls for the purpose of monitoring FCPA compliance. In this era of increased enforcement, it is imperative that companies wishing to do business overseas become familiar with these provisions and consult with counsel about implementation of proper compliance programs.

Anti-Bribery Sections

The FCPA's anti-bribery provisions make it unlawful for companies, their officers and employees, third-party agents, or any person acting on their behalf to make payments or gifts or give anything of value to foreign government officials with the intent of influencing the official or causing the official to influence the foreign government to obtain or retain business.[4] In addition, these anti-bribery provisions extend to foreign companies and individuals who take acts in furtherance of making corrupt payments while in the United States.[5]

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[4] 15 U.S.C. § § 78dd-1 et seq.

[5] Id.

The anti-bribery provisions focus on the corrupt intent of the parties making the payment. The intent of the payment must be to induce or influence a foreign official's decision, action or inaction, or to secure an improper advantage with the goal of procuring business. The business to be procured does not need to be with a foreign government or an instrumentality thereof, nor does the FCPA require that a company be successful in attaining business. Rather, the mere act of offering or promising to make payment or gift constitutes a violation of the FCPA.

For an offer to amount to a violation, the payment—or promise to pay—must be made to a foreign official. The FCPA defines foreign official very broadly to include any officer or employee of a foreign government, or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[6] However, the FCPA does not define the terms “department, agency, or instrumentality.”Rather, the SEC and DOJ have utilized this “catch-all”term to their advantage and have liberally interpreted the definition to apply to employees of state-owned or controlled enterprises. For example, a doctor of a government-owned or managed hospital or executive of a state-owned telecommunications company will be treated as falling within the definition of foreign official. Additionally, the FCPA places no emphasis on the title or rank of the foreign official.

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[6] 15 U.S.C. § § 78dd-1(F)(1)(A), 78dd-2(H)(1)(A), 78dd-3(H)(2)(A).

Given the expansive view taken by the SEC and DOJ, it is important for companies to formulate proper screening mechanisms with their counsel to ensure full compliance with the FCPA's anti-bribery provisions.

Third-Party Payments

The prohibition against making corrupt payments is not limited to actions taken by a company. Corrupt payments made by foreign subsidiaries of U.S. companies, third-party agents, consultants, distributors, joint-venture partners, or any other person acting on the company's behalf will be treated as if made by the company under the FCPA. While it is common practice for U.S. companies to hire third-party agents

and consultants to help facilitate and maneuver through regulatory and operational obstacles in doing business overseas, the use of a foreign intermediary does not shield U.S. companies and their executives from liability under the FCPA.

Now more than ever it is important for company executives to become vigilant of FCPA compliance. The provisions of the act are stringent and require strict compliance.

The FCPA specifically prohibits payment to a third party while "knowing"that all or a portion of such payment or thing of value will be offered, given, or promised to a foreign official. The FCPA defines knowing to include knowledge that an event is substantially certain or likely to occur. Further, the SEC and DOJ have taken an expansive view on knowledge and discern that intentional failure to investigate, or being willfully blind to a consultant's actions, constitutes knowledge. The agencies' stance is that companies and individuals can circumvent the FCPA when they learn of or should have been aware of illicit conduct on the part of their agents but fail to investigate the conduct. This expansive view has been used to assert that companies and individuals can violate the FCPA by failing to conduct adequate due diligence or sufficiently monitor the activities of third parties.[7]

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[7] See SEC press release, *SEC Charges Alcatel-Lucent with FCPA Violations*, available at http://sec.gov/news/press/2010/2010-258.htm.

U.S. companies seeking to do business overseas must take necessary precautions when entering into agreements with intermediaries. U.S. companies should conduct due diligence and ensure that consultants have not violated and will not violate the FCPA.

A proactive approach to investigating intermediaries must be taken before entering into any business relationship. This includes, but is not limited to the following:
• interviewing consultants to gauge understanding and compliance of FCPA and foreign laws;

• screening consultants to determine whether any owner or principal thereof may constitute a foreign official under the FCPA; and

• investigating and inquiring into proposed payment structures for the consultant(s) (i.e. unusually high commissions or payments linked to success of obtaining business may raise concerns).

These points only serve to highlight some of the efforts that should be undertaken by U.S. companies. As these third-party relationships continue to be under intense scrutiny by the SEC and DOJ, companies that fail to properly monitor these relationships will continue to be exposed to potential risk. To ensure compliance, U.S. companies should seek guidance from counsel and utilize the Justice Department's FCPA opinion procedure prior to engaging any intermediary to ensure that the proposed business relationship will not expose the company to liability under the FCPA.

Exceptions, Affirmative Defenses
To Anti-Bribery Provision

Facilitating Routine Government Actions

Payments made by companies for facilitating or expediting payments to a foreign official for the purpose of expediting or securing performance of a routine governmental action are an exception to the FCPA's anti-bribery provisions. Under the act, a routine governmental action includes any action ordinarily and commonly performed by a foreign official or government. Examples include obtaining permits or licenses, processing governmental papers (such as visas and work orders), providing police protection, mail pickup

and delivery, providing phone service, power and water supply, providing loading and unloading cargo, or protecting perishable products or commodities from deterioration, as well as payments for activities similar in nature to those mentioned.

However, the definition of “routine governmental action”specifically excludes any decision by a foreign official to award new business to or to continue business with a particular party, or any action taken in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party. Essentially, a company cannot violate the anti-bribery provision and then attempt to claim it qualifies as an exempt “routine governmental action.” Companies should seek guidance from counsel prior to making any payments not specifically enumerated in the FCPA to ensure it constitutes an exemption.

A company's failure to monitor and abide by the FCPA can result in being barred from bidding on U.S. government contracts, imposition of large monetary penalties, disgorgement of profits, and criminal convictions against company executives.

Affirmative Defenses

In addition to the routine governmental action exemption, companies may assert the defense that a payment was lawful under the laws of the foreign country or that the payment was reasonable and a bona fide expenditure related to promotion or demonstration of a product of service. However, determining whether a payment is allowed under a foreign jurisdiction may be difficult to decipher and should not be made without seeking advice of counsel regarding the legality of the payment. Further, because these defenses are affirmative defenses, it is the burden of the party making the payment—not the SEC or DOJ—to establish that the payments are not an FCPA violation.

Accounting Provisions

Unlike the anti-bribery provisions, the accounting provisions regarding recordkeeping and internal controls apply only to publicly held U.S. companies—companies that are issuers of securities registered on a national securities exchange or required to file periodic reports with the SEC. The FCPA requires these companies to “make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company.”[8] Additionally, the FCPA mandates that these companies maintain a system of internal accounting controls sufficient to ensure that transactions are authorized, recorded accurately, and reviewed periodically.[9] All books and records must be kept in conformance with generally accepted accounting principles to allow preparation of financial statements and maintain accountability of assets.

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[8] 15 U.S.C. § 78m(b)(2)(A).

[9] 15 U.S.C. § 78m(b)(2)(B).

U.S. companies seeking to do business overseas must take necessary precautions when entering into agreements with intermediaries.

The SEC and DOJ have continually and repeatedly cited companies in connection with improper payment, for failure to keep accurate books and records, and failing to implement an effective system of internal controls. Companies should note that knowingly circumventing or failing to implement a system of internal controls, or failing to accurately account for a payment, may result in criminal liability and additional fines under the FCPA even in the absence of an improper payment.

Penalties for FCPA Violations

Failure to comply with the FCPA can result in serious fines and imprisonment for individuals. Corporations may be fined up to $2 million for each violation and individuals as much as $100,000.[10] These amounts may be increased to $25 million for corporations and $5 million for individuals in the case of certain willful violations.[11] Individuals face further risk with up to five years of imprisonment for each violation of the FCPA's anti-bribery provisions, and in certain cases, up to 20 years for willful violations.[12] All criminal fines imposed under the FCPA may be increased to as much as twice the gain under the Alternative Fines Act,[13] and officers, directors, employees, agents, or stockholders are barred from seeking any indemnification from their company for FCPA violations.[14] The SEC and DOJ also have the ability to enjoin any conduct and/or practice that violates the FCPA[15] or completely bar a noncompliant company from bidding on U.S. government contracts.

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[10] 15 U.S.C. § 78dd-1 et seq.; 18 U.S.C. § 3571.

[11] 15 U.S.C. § 78ff(a).

[12] 15 U.S.C. § 78dd-2, § 78ff.

[13] 18 U.S.C. § 3571(d).

[14] 15 U.S.C. § 78ff(c)(3).

[15] 15 U.S.C. § 78dd-1 *et seq*.

Enforcement Trends

The unprecedented escalation in enforcement actions brought by the SEC and DOJ has ushered in a new era of FCPA enforcement. This surge in FCPA prosecutions marks a shift at the agencies to aggressively pursue and combat corruption abroad with newfound zeal. This shift is evident in the agencies' allocation of resources and mobilization of staff dedicated to FCPA investigations, including the formation of the SEC's FCPA Unit. As recently noted by Assistant Attorney General Lanny A. Breuer, "FCPA enforcement is stronger than it's ever been—and getting stronger."[16] With the emergence of new trends, it appears that the aggressive enforcement by the SEC and DOJ will only increase in the foreseeable future.

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[16] *See* Assistant Attorney General Lanny A. Breuer's remarks as prepared for delivery at 24th National Conference on Foreign Corrupt Practices Act (Nov. 16, 2010); transcript available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

Imposition of Large Corporate Fines

One of the most visible trends is the continued rise in civil and criminal penalties levied against companies for FCPA-related violations. BAE Systems Plc's $400 million fine,[17] Daimler AG's $185 million fine,[18] and Alcatel-Lucent SA's $137 million fine[19] are just some examples of recent newsworthy penalties levied in 2010 alone.[20] This past year saw the largest aggregate amount of penalties ever levied against companies, resulting in $1.8 billion in fines and disgorgements of profit. In 2010, the SEC and DOJ also recorded eight of the 10 largest settlements paid in the history of the FCPA.[21] Given the increase in resources and focus, the SEC and DOJ seem poised to continue aggressively pursuing companies and imposing large penalties in the coming years.

[17] 5 WCR 178 (3/12/10).

[18] 5 WCR 205 (3/26/10).

[19] 5 WCR 925 (12/31/10).

[20] *See* DOJ press releases at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html, http://www.justice.gov/opa/pr/2010/April/10-crm-360.html, and http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

[21] *See* http://www.fcpablog.com/blog/2011/1/5/recent-cases-foreign-companies-dominate-new-top-ten.html

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The DOJ's priority on prosecuting individuals for FCPA violations only appears to be escalating, with several indictments in just the first quarter of 2011.

Continued Focus on Individual Prosecutions

Notwithstanding the unprecedented increase in corporate penalties, the most notable trend is the newfound focus of the SEC and DOJ on targeting individuals for criminal prosecution for FCPA-related violations. Over the course of the past year, 50 individuals, ranging from high-level executives to consultants, have been charged with FCPA-related violations. This stands in stark contrast to just a few years ago; in 2006, only nine individuals were charged with FCPA violations. The prosecution of individuals was brought to the forefront in 2010 with the high-profile indictment of the military and law enforcement products industry executives.[22] The defendants were accused of attempting to pay large commissions to undercover FBI agents posing as salesmen with the intent that a portion of the commission would be used to funnel bribes to foreign officials to win certain government contracts. The indictment showcases the escalating trend toward FCPA enforcement actions directed at corporate officers and employees. As Breuer recently noted, "prosecuting individuals—and levying substantial criminal fines against corporations—are the best ways to capture the attention of the business community."[23]

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[22] *See* DOJ press release at http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

[23] *See* note 16.

The penalties that can be levied against individuals for FCPA violations can be severe. In April 2010, a Virginia man was sentenced to 87 months in prison and fined more $15,000 for his part in paying bribes to former Panamanian government officials to secure maritime contracts.[24] In July 2010, a Miami businessman was sentenced to 57 months in prison and ordered to pay $73,824 in restitution and forfeit $1,028,851 in profit for his participation in a conspiracy to pay bribes on behalf of three different Miami-Dade County telecommunications companies for the purpose of securing business advantages from officials of Haiti's state-owned national telecommunications company.[25]

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[24] 5 WCR 289 (4/23/10); *see* DOJ press release at http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

[25] 5 WCR 565 (8/13/10); *see* DOJ press release at http://www.justice.gov/opa/pr/2010/July/10-crm-

883.html

These cases from the past year serve as some of the longest sentences ever received by individuals in FCPA-related actions. The SEC and DOJ have noted that these cases also serve as "example[s] how those who intentionally bribe and mislead the government for their personal gain will be prosecuted to the maximum extent."

The unprecedented escalation in enforcement actions brought by the SEC and DOJ has ushered in a new era of FCPA enforcement.

The DOJ's priority on prosecuting individuals for FCPA violations only appears to be escalating, with several indictments in just the first quarter of 2011. Thus, corporate officers must remain diligent as federal prosecutors have commenced seeking larger penalties and prison time as tools to negate corrupt corporate behavior.

Increased Use of Law Enforcement Tactics

Since 2010, the SEC and DOJ have taken a proactive approach to FCPA investigations with the increased use of law enforcement tactics traditionally reserved for organized crime cases. The indictment of the military and law enforcement products industry executives is an example, involving the most extensive use of law enforcement tactics in an FCPA investigation. The investigation involved nearly 150 FBI agents, execution of more than a dozen search warrants, and coordination among various law enforcement agencies. This case also illustrates a newly forged relationship between the FBI, the SEC, and DOJ and marks a departure from previous passive FCPA investigations, which heavily relied on self-disclosure or reporting. Given the success of these tactics, it is likely that the SEC and DOJ will continue to increase use of traditional law enforcement tactics such as undercover agents, wiretaps, and other law enforcement techniques.

This surge in FCPA prosecutions marks a shift at the agencies to aggressively pursue and combat corruption abroad with newfound zeal.

Industry-Wide Approach to Enforcement

Over the past year, the SEC and DOJ began to utilize an industry-wide approach in FCPA investigations. This is evidenced by the high-profile Panalpina Inc. case, which resulted in sweeping settlements with the global freight-forwarding company and six other companies in the oil services industry.[26] The companies paid millions of dollars in bribes to foreign officials to receive preferential treatment and improper benefits during the customs process.[27] The agencies'coordinated effort resulted in obtaining settlements totaling $236.5 million. These investigations arose from a prior FCPA investigation into a Panalpina customer that agreed to cooperate in providing information related to its competitors' and clients' corrupt conduct in exchange for receiving credit against its own FCPA violations. This case presented the first large sweep of its kind and illustrates how the SEC and DOJ leveraged a single case into an industry-wide prosecution. Given the continued coordinated efforts between the SEC and DOJ, and the success of the investigations, more industry-wide sweeps are likely to follow. This is evidenced by a remark made by the head of the SEC's FCPA unit regarding industry-wide sweeps: "no industry is immune from investigation."[28]

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[26] 5 WCR 802 (11/19/10).

[27] *See* DOJ press release at http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

[28] *See* SEC press release at http://www.sec.gov/news/press/2010/2010-214.htm.

Prevention and Compliance

With no immediate end in sight for the surge of FCPA enforcement actions, companies operating or wishing to operate in global markets must be vigilant and employ preventive measures and resources to comply with the act or face stringent consequences.

DOJ Guidance Regarding Prospective Conduct

Companies seeking to venture into foreign markets should take advantage of and utilize the Justice Department's FCPA opinion procedure process to ensure compliance with the act.[29] DOJ has established a process by which companies may submit a formal written request for an opinion regarding whether certain prospective conduct conforms to the FCPA's requirements.

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[29] 28 C.F.R. Part 80.

To receive an opinion, the requester must provide a detailed description of the prospective conduct, along with all relevant information necessary for DOJ to analyze. The department will issue an opinion within 30 days of receipt of the request or 30 days from the date it receives any additional information it has requested. Opinions based on a hypothetical transaction will not be issued. The subject of the request must be based on an actual transaction, and the portion of the request for which the opinion is sought must be prospective. DOJ will issue an opinion only if all the requirements are met. If the activity conforms, then the opinion will provide a rebuttable presumption in favor of the requester that the activity is lawful. However, the opinion can be relied upon only by the requesting parties; it cannot be used by any other company or individual.

For the first time, an FCPA investigation utilized undercover law enforcement techniques, with undercover FBI agents soliciting bribes.

It should be noted that DOJ's opinions have no bearing on the requester's obligations under the accounting provisions or the ability of another governmental agency to object to the proposed activity. Companies should consult with their counsel prior to submitting a formal request to ensure that they have provided all the necessary disclosures and are in compliance with all other laws and regulations related to the activity. Failure to provide all material disclosures can negatively impact a company and result in a negative opinion or an investigation by DOJ.

Preventive Measures for FCPA Compliance

Today, it is incumbent upon companies to take a proactive approach to FCPA compliance. There are several measures that companies and their executives can take to protect against potential FCPA violations. The most basic of those measures include:
• Implement an effective corporate compliance program that will not only deter criminal activity, but may also help avoid or, at a minimum, mitigate associated civil and regulatory liability. The corporate compliance program should include:

i. written and clearly defined policies and procedures addressing the FCPA;

ii. procedures to effectively disseminate and communicate policies and procedures from the top down;

iii. comprehensive literature for employees regarding the FCPA and restrictions on conduct when transacting business globally;

iv. guidance regarding procedure for engaging third-party relationships, including gifts, entertainment, travel, political contributions, charitable donations, facilitation payments, and required due diligence before commencing the relationship;

v. reporting requirements for any potential infractions;

vi. procedures to minimize any contagion; and

vii. periodic program review, including audits of business units to ensure that controls and policies are being complied with by employees and relevant third parties.

• Ensure that the chief compliance officer has direct access to board of directors to provide periodic reports regarding the implementation and effectiveness of the compliance program.

• Maintain accurate books and records, including documentation of all transactions in which the business engages, whether internationally or domestically. An effective accounting and financial reporting procedure that accurately reflects a company's transactions, dealings, and asset disposition will provide evidentiary support to regulatory authorities of a transparent and well monitored compliance program.

• Consult in-house counsel or seek outside legal advice to investigate any potential infractions and ascertain the effectiveness of the corporate compliance program.

• Seek guidance from the SEC and/or DOJ regarding any proposed international transaction.

Conclusion

In this climate of increased enforcement, it is imperative that all firms doing or seeking to do business in foreign markets become familiar with the FCPA. This article underscores new enforcement techniques and prosecutorial tools being used by the SEC and DOJ to aggressively investigate and prosecute FCPA violations. Companies without specific FCPA compliance programs should consult with counsel to create such programs, and those with existing programs should commit to a re-evaluation of their programs in light of the recent developments.
