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The Unique Challenges of FCPA Compliance for U.S. Companies Doing Business in Sub-Saharan Africa

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In the decade following the 2000 African Growth and Opportunity Act ("AGOA"), which offered tangible incentives for African countries to continue their efforts to open their economies and build free markets, Sub-Saharan Africa has rapidly become a far more attractive place to do business. Indeed, significant new investment in institutions and infrastructure has generated a veritable gold rush in the region—creating both significant new opportunities and significant new challenges for U.S. companies wishing to invest there. But it is worth noting that of the 47 Sub-Saharan African countries reviewed in the 2009 Transparency International's Corruption Perceptions Index, 31 scored less than 3 (out of 10) indicating that corruption is perceived as rampant, while 13 scored between 3 and 5, indicating that corruption is perceived as a serious challenge by country experts and businessmen. Only three countries scored more than 5: Botswana, Mauritius and Cape Verde. As a result, U.S. companies and their foreign affiliates and agents cannot afford to assume that they can conduct business as usual in Sub-Saharan Africa, especially given the U.S. government's aggressive enforcement of the Foreign Corrupt Practices Act ("FCPA").

By way of illustration, the following incidents represent only a smattering of the FCPA issues that have arisen out of Sub-Saharan Africa in recent years:

- On February 6, 2007, three subsidiaries of Vetco International agreed to pay a combined $26 million in criminal fines to settle charges that they corruptly made 378 payments totaling $2.1 million to Nigerian customs officials in connection with a Nigerian deepwater drilling project;
- In February 2007, Baker Hughes agreed to pay an $11 million criminal fine, a $10 million civil penalty, and $23 million in prejudgment interest to resolve a U.S. Justice Department criminal investigation and a Securities and Exchange Commission (SEC) enforcement action involving improper payments to officials in Nigeria and Angola, among other countries;
- In September 2007, Stephen Head, a former president of Titan Corporation's operations in Africa, was sentenced to six months in prison and fined $5,000 after pleading guilty to charges in connection with a $3.5 million payment to officials in Benin;
- In September 2007, Paradigm B.V. entered into a non-prosecution agreement pursuant to which it agreed to pay a $1 million penalty in connection with payments to officials in Nigeria and four other countries;
- Between July and September 2008, two former executives of ITXC were both

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sentenced to five years probation and fined $10,000 and $7,000 respectively for bribing employees of foreign-state owned and foreign-owned telecommunications carriers in Nigeria, Rwanda, and Senegal; and

- On January 28, 2010, two former managers of Willbros Group, Inc. were each sentenced to more than one year in prison and fined $17,500 and $2,000 respectively for, among other things, corrupt payments to Nigerian officials totaling $1.8 million.

While these problems exist in many other countries and regions of the world, AGOA and other initiatives that have spawned rapid new investment and infrastructural development, combined with a general lack of knowledge about the local practices and customs of the region, make U.S. companies particularly vulnerable to FCPA violations in Sub-Saharan Africa. This problem is further compounded by the culture of corruption that remains endemic to the region. To avoid the risks of enforcement actions and potential civil and criminal sanctions under the FCPA, it is critical for U.S. companies to act proactively to develop, implement, and monitor internal controls that take cognizance of the unique problems in Sub-Saharan Africa.

Anti-Bribery Provisions of the FCPA

The anti-bribery provisions of the FCPA can be found at 15 U.S.C. § 78dd et seq. In general, they prohibit U.S. companies and their officers, directors, employees, and agents from making a corrupt payment of (or an offer, authorization, or promise to pay) money or anything of value, directly, or through a third party, to any foreign official for the purpose of influencing any official act or decisions of that person in order to obtain or retain business, direct business to any person, or to secure an improper advantage. The "business advantage" requirement, also known as the "business nexus test," is interpreted very broadly and may include just about anything that benefits a business' bottom line.

The FCPA applies to U.S. citizens, nationals, residents, U.S.-incorporated companies, companies with their principal place of business in the U.S. (whether incorporated in the U.S. or not), issuers [U.S. and foreign entities that have a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (Act) or are required to file periodic reports with the SEC pursuant to Section 15(b) of the Act], and to foreign persons or entities acting within the territory of the United States as well as third parties acting on behalf of such persons or entities. It also applies to companies other than issuers and to "domestic concerns," which is intended to cover non-U.S. companies.

The term "foreign official" in the FCPA includes officers or employees of foreign governments as well as any department, agency or instrumentality thereof. It also includes any person acting in an official capacity for or on behalf of any government, department, agency or instrumentality. Under this definition, employees of state-owned or controlled entities should be presumed to be foreign officials under the FCPA. Accordingly, although U.S. companies may often entertain commercial clients to foster good relationships, the fact that many of the largest corporations in Sub-Saharan Africa are under state ownership or control may make such entertainment

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illegal, as this ownership or control may make employees of these companies qualify as foreign officials for purposes of the FCPA.

The FCPA does not directly apply to foreign affiliates of U.S. companies acting wholly outside of the United States. Those U.S. companies, however, violate the FCPA if they have knowledge that an affiliate or an entity acting on their behalf is engaging in conduct contrary to the FCPA. The term "knowing" includes conscious disregard, willful blindness and deliberate ignorance. Thus, tell-tale signs can give rise to liability under the FCPA for a mere failure to investigate.

15 U.S.C. § 78dd-1 spells out one exception to liability under the FCPA: payments to foreign officials to facilitate or expedite performance of a "routine government action" (e.g., payments made to obtain permits, licenses, or other official documents). It also spells out two affirmative defenses: (1) a reasonable bona fide payment or promise of payment incurred by or on behalf of a foreign official to promote or demonstrate a product or to execute a contractual obligation; and, (2) a payment or promise of payment that is lawful under the written laws and regulations of the foreign country. Each exception and affirmative defense carries a different risk, and companies vary in their approaches on how/whether to use the exception and affirmative defenses.

Accounting Provisions of the FCPA

Regarding the FCPA's accounting provisions requirement, accuracy is the issue, rather than materiality. The accounting provisions apply to issuers, regardless of whether the issuer is a U.S. company. Thus, many non-U.S. companies are subject to the FCPA because they are issuers.

The FCPA's books and records component of the accounting provisions are located at 15 U.S.C. § 78m. They require issuers to make and keep their books, records and accounts in reasonable detail so that they accurately and fairly reflect their transactions and dispositions of their assets.

The FCPA's internal controls provisions require issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that transactions and assets are properly maintained. The FCPA defines "reasonable assurances" to mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

Criminal penalties under the accounting provisions may be imposed where a person "knowingly" circumvents or fails to implement a system of internal accounting controls or "knowingly" falsifies any book, record or account. Civil liability, however, may arise for issuers any time their books contain an inaccurate entry, especially when the inaccuracy pertains to an improper payment.

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Risk Factors of Doing Business In Sub-Saharan Africa

Two unique characteristics of Sub-Saharan Africa require U.S. companies doing business in the region to pay special attention to the FCPA. *First*, many major businesses in the region with which U.S. businesses are likely to interact are at least in part state-owned or state-controlled. Thus, employees of these businesses may be considered "foreign officials" for purposes of the FCPA. For instance, the Nigerian National Petroleum Corporation ("NNPC")—the state oil corporation through which the Federal Government of Nigeria regulates and participates in the country's petroleum industry—is entirely state-owned and state-controlled. NNPC by law manages the joint ventures between the Nigerian government and a number of U.S. and other foreign multinational corporations that have invested heavily in the region. As a result, employees of NNPC with whom U.S. companies may engage in Nigeria may be considered foreign officials for purposes of the FCPA.

Second, corrupt practices are so prevalent in the region that they are often tolerated as acceptable local practices and customs, even if they are illegal under the FCPA. What is considered a bribe in the United States under the FCPA may be considered a customary showing of gratitude in Sub-Saharan Africa.

Overcoming the Hurdles of Doing Business in Sub-Sahara Africa

Accordingly, the enormous business opportunities created in Sub-Saharan Africa in the last decade offer significant FCPA-related risks for unwary U.S. companies. But American companies wishing to do business in Sub-Saharan Africa can take a number of relatively simple steps to avoid these potential pitfalls:

- *Train local agents and partners in native languages on FCPA compliance*: Compliance training in English may not sufficiently focus on the specific FCPA problems in the relevant country and is likely to be doomed *ab initio*. Therefore, said training should be conducted in native languages and tailored specifically to the special issues that arise in the particular country. The training should also include written materials. Continuous compliance training of employees after beginning business in the country is also very critical in ensuring continuous compliance with the FCPA.
- *Learn the culture of the country from a competent third party:* Consulting firms and other entities specialize in such training. Engaging such assistance may be the ultimate key to navigating "grey areas" that pose the most challenges in FCPA compliance in the region.
- *Evaluate incentives with commercial partners to reduce corruption risks:* Adopt, for instance, wage-based, not commission-based, remuneration for all agents and local partners. This will reduce the incentives for the local agents and partners to pay bribes to secure businesses. To be sure, the local agents and partners may lose business opportunities by playing in an uneven field. But it is better to do so than to run afoul of the FCPA.
- *Liaise with a competent entity to identify government-owned businesses*: This may be an investigative firm, a law firm or a local counsel. The entity must have

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an established and proven method for conducting due diligence investigations for clients. At a minimum, it must include database research, industry inquiries, and contacts with the U.S. Embassy and other government agencies within the country.

- *No "greasing the wheels" payments*: People in many Sub-Saharan African countries are not shy in asking for "greasing the wheels" payments to expedite business transactions. This has been standard practice since the colonization of Africa by the Europeans, and is often justified by the saying that "the left and right hands must necessarily wash each other." Even after a company has performed, its goods or money may be held up in exchange for a demanded payment. But such a request should be a "red flag" and should be resisted. Note that almost all Sub-Saharan African governments have some sort of anti-corruption legislation and related agencies to enforce these laws. Accordingly, U.S. companies should consider eliciting the help of these agencies if they feel they cannot resolve such disputes amicably without running afoul of the FCPA. Although involving local anti-corruption agencies in such situations may cause U.S. companies to lose other business opportunities, again, it is better to do so than to run afoul of the FCPA.
- *No payment to shell companies*: "Shell companies" are entities that generally lack a bona fide business purpose, often with limited or no operations and assets. In many countries in the region, invoices for fictitious services are typically generated and payments made to the shell companies in order to pass money to government officials. A company's internal controls should monitor for such shell companies.
- *No charitable contributions that may benefit a government official*: American businesses should ensure that any charitable contributions are made only to a charity that has a bona fide charitable purpose, not one where the funds later are funneled to government officials. It is important to investigate the charity thoroughly, because even legitimate charities may later direct some benefits to government officials.
- *No payments to relatives, friends and acquaintances of foreign officials*: Payments or other benefits offered to relatives, friends and acquaintances of foreign officials in an effort to gain special benefits or obtain new business must be avoided.
- *Avoid payments that exceed the stated or normal rate for similar goods and services*: Such payments are sometimes referred to as "upfront commissions" or "success fees," and are usually disguised as payments to agents, distributors, vendors, or other third-party intermediaries who then channel the funds to government officials.
- *Always use reputable auditor to audit operations in the country*: Unlike in the U.S., detailed information may not be a matter of record in Sub-Saharan Africa. Knowing what information or data is available and where it can be kept, unfortunately, may dictate the thoroughness of the effort. This makes skilled culturally fluent auditors and investigators all the more important. In addition to looking for "red flags" such as the payments identified above, the auditor should also look for fraudulent account entries in which payments may appear legitimate in a company's books and records (e.g., as invoices for consulting projects, environmental studies, etc.), though no product or service is actually provided.

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Conclusion

Doing business in Sub-Saharan Africa is fast becoming an essential part of the business plan for U.S. companies seeking to succeed in the global market. Although the region presents enormous business opportunities, it also poses tremendous risks of running afoul of the FCPA. The recent increase in FCPA enforcement by the U.S. government has been widely noted and will likely continue. As a top FCPA criminal prosecutor has stated "the level of enforcement is at an all-time high and is likely to remain there." And the attendant bad publicity such enforcements bring is very damaging to a company's reputation and may be career-ending for involved executives. Avoiding FCPA violations is, therefore, essential for affected businesses.

Moreover, an internal investigation into possible FCPA violations can be quite expensive, and those costs grow with the scope of previously undetected problems. In addition, penalties for violations run into millions of dollars in fines and disgorgement of profits. *Sine qua non* prerequisites to doing business in the region, therefore, are strict FCPA compliance policies that can prevent, detect and timely remedy any deficiencies that may lead to violations.

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