

**IN FOCUS**

CORPORATE LITIGATION WEBSERIES

## **FCPA: Handling Increased Global Anti-Corruption Enforcement**

**Allison Hoffman, Incisive Media**  
**David Krakoff, Mayer Brown LLP**  
**Claudius Sokenu, Mayer Brown LLP**  
**David Wilkins, The Dow Chemical Company**

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### **Overview of Program**

- Overview of the US Foreign Corrupt Practices Act
- FCPA Trends
- Dealing with Intermediaries
- Mergers and Acquisitions
- Corporate Compliance Policies
- Gifts, Travel and Entertainment

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## FCPA Overview

- U.S. law passed in 1977 to prohibit bribery of foreign officials / first aggressive anti-bribery statute among developed nations
- Two main components:
  - Anti-Bribery Provisions: Prohibits bribes (or offers to bribe) made to foreign officials, political parties, candidate for public office whether made directly or through a third party for the purpose of obtaining or retaining business
  - Accounting Provisions: Requires accurate books and records and adequate accounting and financial controls / No allegations of bribery are required

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## FCPA Overview

- Violations: Provides for both criminal and civil penalties including imprisonment, fines, loss of export licenses and suspension from competing on government contracts
- Exception: Small “grease” payments to facilitate routine activities are permissible
  - Examples: Obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country
- Affirmative defense: Reasonable and bona fide expenditures, such as travel and lodging
- Affirmative defense: If payment is lawful under laws of foreign official’s country

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## Who Is Liable Under the FCPA?

- Domestic
  - All US “issuers” and private companies (“domestic concerns”) using instrumentalities of interstate commerce
  - Any US corporation or national or any foreign bribery-related conduct
  - US citizens or foreign nationals operating in the US or using instrumentalities
- Foreign
  - Foreign corporations subject to SEC regulation (e.g., via ADRs) and using instrumentalities
  - All foreign corporations when in US territory, whether or not they use instrumentalities of interstate commerce
- Includes directors, officers, employees and agents of entities subject to the statute

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## FCPA Penalties: Criminal and Civil

- Corporate sanctions:
  - Fines of up to \$2 million for each violation of the anti-bribery prohibition
  - Fines of up to \$25 million for violation of accounting provision
  - Record \$44.1 million monetary sanction (Baker Hughes)
  - Disgorgement of proceeds associated with improper payments
  - Injunction to prevent future violations
  - Suspension and debarment

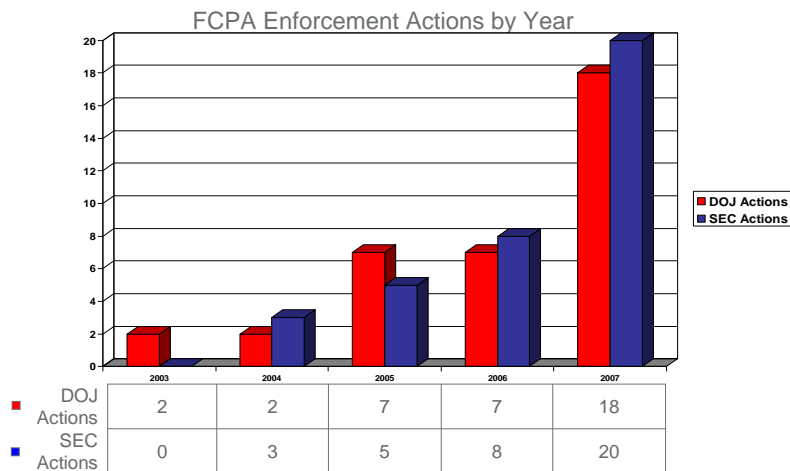
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## FCPA Penalties: Criminal and Civil

- Individual sanctions:
  - Up to \$250,000 per criminal violation
    - Government prohibits indemnification for fines
  - Up to 5 years imprisonment
    - Recent sentences: 36 months, 18 months, 6 months
  - Equitable remedies: Injunction, bar from serving as director or officer

## Increasing FCPA Enforcement Activity



## Corporate Penalty - Compliance Monitors

- Probation – out source oversight
- Company pays – blank check
- 2-3 years
- Full access to
  - Company books
  - Internal controls
  - FCPA compliance training
  - Internal audit
- Reports to SEC / DOJ

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## Recent Monitors

- AGA Medical
- Diagnostic Products Corp.
- Faro Technologies
- GE/InVision
- Schnitzer Steel
- York International
- Willbros

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## Prosecution of Individuals

- Change behavior / get corporate attention
- DOC / SEC fines, penalties, jail
- InVision
  - 2006 / Aerospace security products
  - Individual served as SVP for sales and marketing
  - Settled SEC charges / agreed to pay \$65k fine
- Schnitzer Steel
  - 2007 / Scrap metal
  - Individual served as President, CEO and Chairman
  - Pled guilty/pending sentencing
  - Settled SEC charges / agreed to pay \$75k fine and disgorge \$187k
- KBR
  - 2008/Technical Services
  - Individual served as Chairman and CEO
  - Pled guilty Sept. 3/agreed to 7 years in prison and disgorgement of \$10.8 million
  - Pending sentencing

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## Checklist for Hiring Intermediaries

- Retention process
  - Application
  - Background check
  - Interview
  - Management approval
- Red flags: experience, payment terms, family members, former government official, prior legal problems
- Contractual safeguards
- Training

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## Types of Intermediaries

- Consultants
- Vendors
- Distributors
- Professional services firms
- Agents

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## Agents/Intermediaries

- Enforcement actions
  - Baker Hughes (2007) – \$5.2 million to consultant in Isle of Man to secure development of Kazakhstan oil field
  - BellSouth (2002) – Nicaragua/Venezuela; \$60K to wife of Chairman of legislative committee as “consulting” fee
  - Delta Land (2007) – Payments to foreign officials through third party contractor for travel, gifts
  - Vetco International (2007) – Payments to Nigerian customs official by carrying and forwarding agent in order to obtain temporary import permit for oil rig

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## Practical Implications - M&A Activities

- Titan (2005) – While conducting pre-acquisition due diligence of Titan, Lockheed discovered payments to obtain telephony contract in Republic of Benin. Deal failed to close because of FCPA problems. Titan prosecuted.
- GE / InVision (2005) – While conducting pre-acquisition due diligence of InVision, GE discovered FCPA concerns. Target had enlisted consultants to obtain contracts for explosives detection equipment in China, Thailand and Philippines. Deal closed, but acquiring company forced target to make a voluntary disclosure.
- ABB/Vetco Gray subsidiaries/Investment Group of JP Morgan/Candover; voluntary disclosure \$26 million fines/penalties.
- Johnson Controls (2007) – Acquisition of York International. \$21 million fines, penalties, disgorgement.
- Halliburton (2008) – DOJ opinion Release No. 08-02. Post-acquisition due diligence.

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## Due Diligence: M&A

- Due diligence: the rationale
  - The spectre of successor liability
  - The opportunity to resolve potential liabilities
  - The determination of transaction structure and value
  - The assessment of corporate integration issues
  - Proposed Lockheed – Titan merger: Scuttled
- Due diligence: the process
  - Risk assessment
  - Compliance assessment

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## Due Diligence Checklist for Prospective Acquisitions

- Evaluate compliance program
  - Content
  - Training
  - Internal controls
  - Books and records
  - Compliance history
- Review business with government
- Due diligence of third parties on government business
- Public/proprietary databases

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## Gifts, Travel and Entertainment

- Affirmative defense: Company is permitted to pay “reasonable and bona fide” expenses of government officials “such as travel and lodging expenses” incurred in connection with either:
  - “Promotion, demonstration or explanation” of products or services
  - “Execution or performance of a contract with a foreign government or agency”

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## Travel and Entertainment

### Right Way:

#### DOJ Opinion Procedure Releases 2007-01/2007-02

- Government officials selected by foreign country
- Official had no decision-making authority regarding operations in country
- Payments directly to service provider, not government official
- Airline economy class
- Sponsorship for US visit complied with local law
- No per-diem stipend
- Reimbursement for incidental daily expenses with receipts
- Souvenirs are nominal value
- No expenses for family members
- Modest tours permitted

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## Travel and Entertainment

### Wrong Way:

#### Lucent

- 315 Trips
- Value = \$10 million
- "Side trips:" Las Vegas, Disney World, Hawaii, Niagara Falls
- Spouses and children included
- Per diem: \$500 - \$1,000
- MBA tuition - \$21,000
- Internal controls violations – Lack of training
- Books and records violations – "Factory Inspection Account" without factory tours

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## Importance of Corporate Compliance Policy

- Preventive medicine with respect to possible violations
- Detect misconduct
- Educate/train employees
- Foster culture of compliance
- Mitigating consideration in event of violation
- Potential exposure in M&A transactions (ABB Ltd., GE/InVision, Titan Corp.)
- Sarbanes-Oxley Act of 2002
- Suspension or debarment from government contracting

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## Importance of Corporate Compliance Policy

### Top 10 elements of an effective compliance program

1. Instill a corporate culture of compliance
2. Issue a written compliance policy
3. Assign implementation responsibility
4. Promulgate specific compliance measures
5. Provide periodic training programs and ready access to legal advice
6. Require periodic self-certification of compliance
7. Maintain compliance records
8. Apply disciplinary measures as appropriate
9. Conduct periodic internal and external compliance audits
10. Adjust the compliance program to current risk assessment

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## **FCPA: Handling Increased Global Anti-Corruption Enforcement**

Speakers:

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