The Foreign Corrupt Practices Act: Implications for the Real Estate Industry

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In this article, the authors summarize the Foreign Corrupt Practices Act's ("FCPA") key provisions, analyze a number of leading FCPA cases involving the real estate industry, and suggest compliance measures to reduce the risks of FCPA violations by industry participants.

The combination of expansive application and aggressive enforcement make the U.S. Foreign Corrupt Practices Act ("FCPA") a law to be reckoned with in any international transaction. Companies and individuals involved in real estate transactions have not been immune from FCPA enforcement. To the contrary, recent cases underscore that participants in the real estate industry must take care to ensure compliance with the FCPA.

In this article we summarize the FCPA's key provisions, analyze a number of leading FCPA cases involving the real estate industry, and suggest compliance measures to reduce the risks of FCPA violations by industry participants.

The FCPA's Key Provisions

The Accounting Provisions

The accounting provisions of the FCPA apply to issuers of securities registered with the Securities and Exchange Commission ("SEC"); officers, directors, employees, and agents of such issuers; and stockholders acting on behalf of such issuers. These provisions require that an issuer maintain books, records, and accounts that accurately and fairly reflect the transactions and dispositions of the assets of the issuer.

The accounting provisions also require that an issuer maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(i) transactions are executed in accordance with management authorizations,

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(ii) transactions are recorded as necessary to permit preparation of financial statements and to maintain accountability for assets,

(iii) access to assets is permitted only in accordance with management authorizations, and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Although the specific requirements of the accounting provisions apply only to issuers of securities, all businesses need to maintain the integrity and accuracy of their financial records in order to ensure that they can identify anti-corruption compliance risks. An appropriate system of internal controls, even if it does not guarantee protection against all violations, can be an important element in demonstrating to an enforcement agency that a violation has been an aberration rather than a systemic problem.

The Antibribery Provisions

The FCPA's antibribery provisions are quite broad, applying both to the persons subject to the accounting provisions as well as to the following persons: individuals who are citizens, nationals, or residents of the United States; corporations, partnerships, associations, joint-stock companies, business trusts, unincorporated organizations, and sole proprietorships, insofar as such entities have their principal place of business in the United States or are organized under the laws of any State, territory, possession, or commonwealth of the United States; officers, directors, employees, and agents of the foregoing entities; and stockholders acting on behalf of the foregoing entities.

These additional individuals and entities subject to the antibribery provisions are collectively referred to as "domestic concerns." Since it was amended in 1998, the law has also covered a number of foreign persons, which poses a particular risk for those in the real estate sector who may not ordinarily expect to be covered under the law.

Foreign persons that commit an act in the United States in furtherance of a foreign corrupt practice, as defined below, are subject to the FCPA, and in recent years the FCPA has been increasingly applied to foreign persons who commit these acts within the United States.

The antibribery provisions of the FCPA prohibit any subject person from offering or giving anything of value to a foreign government official (including any employee of a state-owned enterprise), a foreign political party or party official, a foreign political candidate, or an official of a public international organization for purposes of:

(i) influencing any act or decision of such recipient in an official capacity,

(ii) inducing the recipient to do or omit to do an act in violation of the lawful duty of such recipient, or

(iii) securing any improper advantage,

all in order to obtain, retain, or direct business for or to any person.

The antibribery provisions also prohibit any such person from offering or giving anything of value to any other person if the giver knows that all or a portion of the gift will be offered or given, directly or indirectly, to a foreign government official, a foreign political party or party official, a foreign political candidate, or an official of a public international organization for the foregoing purposes. In the context of this latter prohibition, the requisite knowledge exists if the giver is aware or has the firm belief that the prohibited conduct is substantially certain to occur; conscious disregard or deliberate ignorance of pertinent circumstances are not excused. Typically, the requisite knowledge is inferred from the circumstances.

As noted, the FCPA's reach is broad, and the Department of Justice ("DOJ") has aggressively used the law to pursue wrongdoing — even when the bulk of those actions occur outside the United States. Such efforts were most recently seen in *United States v. Odebrecht*, where the DOJ brought charges under the FCPA against Odebrecht S.A. for its involvement in a wide-ranging scheme to bribe Brazilian government officials in order to help Odebrecht obtain and maintain business in countries around the world.

Odebrecht is a Brazilian company, and the "foreign officials" involved were either Brazilian officials at Petrobras, the state-controlled oil company, or elected Brazilian government officials. All of the Odebrecht officials involved in the scheme were also Brazilian citizens, but the Brazilian focus of activity was no bar to FCPA charges, since "Odebrecht and its employees and agents took a number of steps while in the territory of the United States in furtherance of the corrupt scheme."[1] In some instances, for example, individuals met while in the United States in furtherance of the bribery scheme. Offshore entities that were used by Odebrecht to disperse illicit funds were also, in some cases, established or owned by individuals located in the United States. This jurisdictional nexus was sufficient to bring charges under the FCPA, as Odebrecht, which will pay fines in the billions of dollars, can certainly attest.[2]

For that matter, the FCPA can even reach parties that make payments to foreign officials from their own country. In other words, so long as there is U.S. jurisdiction, the fact that "foreign officials" are not "foreign" to the parties making payments provides no safe harbor from FCPA liability.

In *Odebrecht*, for example, Brazilian individuals made payments to Brazilian government officials. Montedison S.p.A., a publicly-held Italian conglomerate, faced a similar situation in the charges brought against it by the Securities and Exchange Commission in 1996. The SEC alleged that Montedison violated the FCPA's "books and records" provisions by covering up payments to Italian politicians made through artificially high real estate purchase prices.[3] Thanks to the wide reach of the FCPA, Montedison could take no refuge in the fact that payments were made to politicians in the company's own country. The SEC had jurisdiction over Montedison because the company had American Depositary Receipts ("ADRs"), each representing ten shares of the company's common stock, listed on the New York Stock Exchange, making the company a U.S. "issuer."

Exceptions and Defenses

The FCPA's antibribery provisions include one exception and two affirmative defenses. Pursuant to the exception, the antibribery provisions do not apply to any facilitating or expediting payment the purpose of which is to expedite or secure the performance of routine governmental action by a foreign government official, a foreign political party or party official, a foreign political candidate, or an official of a public international organization. Routine governmental action may include:

- obtaining permits or licenses;
- processing governmental papers;
- scheduling inspections;
- providing police protection, postal services, and telephone service;
- supplying power and water;
- loading and unloading cargo;
- protecting perishable products from deterioration; and
- other similar actions ordinarily and commonly performed by foreign officials.

These examples would only qualify as routine governmental action if the action were one to which the party making the facilitating payment was legally entitled and were one as to which no official discretion or judgment was required. Routine governmental action does not include decisions to award or continue business nor actions affecting such decisionmaking. Since facilitating payments are unlawful under the anti-corruption laws of many jurisdictions, businesses often bar such payments by their employees regardless of the permissibility under the FCPA.

Pursuant to the affirmative defenses, a person may defend against prosecution for violations of the FCPA's antibribery provisions on the grounds that:

(i) the offering or giving of something of value was lawful under the written laws and regulations of the country of the official, party, or candidate involved, or

(ii) the offering or giving of something of value was a reasonable and bona fide expenditure (such as travel or lodging expenses) incurred by or on behalf of the official, party, or candidate involved and was directly related to the promotion, demonstration, or explanation of products or services or to the execution or performance of a foreign government contract.

In practice, the first affirmative defense is rarely invoked, but the second affirmative defense is commonly considered by businesses in determining whether to provide meals, entertainment, travel reimbursements, or other benefits to officials as part of business promotion efforts. Many enforcement actions have occurred in circumstances in which enforcement authorities concluded that business promotion veered into bribery.

Penalties for Violations

Violators of the FCPA may incur criminal or civil penalties, depending on the circumstances. Corporations may be fined up to $25 million per violation under the accounting provisions and up to $2 million under the antibribery provisions. Individuals may be fined up to $5 million and imprisoned for up to 20 years per violation under the accounting provisions and fined up to $250,000 and imprisoned for up to five years per violation under the antibribery provisions. The monetary penalties cited above may be increased to up to two times the gain that the violator sought to obtain by means of the violation. Any fines imposed upon officers, directors, stockholders, employees, or agents of a corporation must be paid by the individuals without reimbursement by the corporation.

In addition to these penalties, corporate or individual violators of the FCPA may be subject to additional fines or prison sentences under other federal criminal statutes, such as the Racketeer Influenced and Corrupt Organizations ("RICO") Act. Moreover, corporate violators may be barred from contracts with the United States Government, may be required to disgorge unlawfully obtained profits, and may be denied export licenses.

The U.S. government takes the FCPA quite seriously and is not hesitant to prosecute violators. An intensification of enforcement activity has been evident over the past five years. Until fairly recently, fines and monetary penalties in the tens or hundreds of millions of dollars were unusual.

In recent years, however, FCPA enforcement has increased dramatically; four of the ten largest enforcement actions in the history of the FCPA took place in 2016, and, in total, companies paid more than $2 billion that year in fines related to FCPA enforcement. Many other major investigations are reportedly underway, as are criminal prosecutions. Among the key features of the current enforcement environment are enforcement actions that range across a company's global operations, prosecutions of multiple members of the same industry, actions against individuals, and new emphasis on violations arising from promotional expenditures and violations uncovered in the context of acquisitions and joint ventures.

FCPA Cases Implicating the Real Estate Industry

The U.S. government has shown a very broad interest in enforcing the FCPA in the real estate sector to discipline foreign corrupt behaviors. Many different players in the real estate sector have been targeted in FCPA enforcement actions, including:

- owners of foreign properties;
- consultants/brokers for real estate transactions;
- real estate investment funds and investment fund managers (e.g., hedge funds);
- engineering and construction firms bidding on foreign development projects; and
- property managers.

Since real estate is typically regulated by government agencies, which play a critical role in zoning, permitting, safety and environmental regulation, and other functions on which real estate industry participants depend, the risk of corruption can be high.

In its enforcement actions, the U.S. government does not limit its interest to real estate transactions where the buyer or seller is a U.S. entity or those for which the funding originates in the United States. Rather, engaging a U.S. entity as a third-party consultant can be the sole U.S. contact of the transaction, but the U.S. government has not hesitated to pursue pure foreign parties under "conspiracy" and "aiding and abetting" theories in such a case.

The U.S. government is very experienced in prosecuting FCPA violations involving shell companies and the improper use of third-party intermediaries. Regarding FCPA enforcement in the real estate sector, to date, the U.S. government has targeted bribery schemes involving the development of a direct relationship with a corrupt foreign official and funneling improper payments either through a specifically established shell company that is an alter ego of the foreign official or an existing entity closely affiliated with the foreign official. The *Garth Peterson* and *PBSJ* cases discussed below illustrate such bribery schemes.

The government has also prosecuted bribery schemes involving a third-party intermediary known to be "well-connected" with foreign officials in the jurisdiction of concern. Schemes of this nature aim to take advantage of the intermediary's preexisting government relationship and usually try to shroud the illicit payments under terms like "commissions" and "deal fees." The *Och-Ziff* case discussed below provides a good example of similar schemes. Improper use of third-party intermediaries has been a focus of FCPA enforcement actions, and the real estate sector is no exception.

To highlight some of the ways in which the FCPA has been used against participants in real estate transactions, we discuss four enforcement actions brought by the U.S. government in recent years.

"Landmark 72"

On January 10, 2017, the DOJ unsealed its charges against four individuals in the U.S. District Court for the Southern District of New York for a bribery scheme involving an office building in Vietnam.[4] Ban Ki Sang ("Ban"), a South Korean national, was a senior advisor at a South Korean construction company, Keangnam Enterprises Co., Ltd ("Keangnam"). Ban's son, Joo Hyun Bahn ("Bahn"), a South Korean national and a U.S. permanent resident, worked as a commercial real estate broker in New York. Sang Woo ("Woo"), a South Korean national and a U.S. permanent resident, was a colleague of Bahn and worked as a real estate broker in New York. Malcolm Harris, a U.S. national, is described in the unsealed indictment as a "self-described arts and fashion consultant and blogger" who resided in New York.

Keangnam built and owned Landmark 72, a large commercial building in Hanoi, Vietnam. According to the indictment, Keangnam started to search for an investor to purchase or refinance Landmark 72 in 2013 for approximately $800 million, as the company was facing a liquidity crisis. At Ban's advice, Keangnam entered into an exclusive broker agreement with his son and his realty firm regarding the Landmark 72 search, under which the company offered a multi-million dollar commission contingent upon the completion of a transaction. Later, Bahn came across Malcolm Harris, who claimed to have connections to the royal family of a Middle Eastern country.

During their discussions, Harris allegedly offered to use his connections to approach the Middle Eastern country's sovereign wealth fund with the goal of securing its investment in Landmark 72. In return, Bahn agreed to share with Harris a portion of his commission from completing the transaction.

To facilitate this quid pro quo scheme, Bahn and his father allegedly arranged for Keangnam to pay a commission advance of $500,000 to Bahn's firm, which Bahn then relayed to a company controlled by Harris. The payment to Harris was allegedly made with the understanding that it would be used as a bribe in order to finalize the sovereign fund's investment in Landmark 72. Woo, Bahn's colleague, helped arrange the payment to Harris's company by routing it through a "businessman." Upon receipt of the $500,000 from Bahn, Harris appropriated the funds for his personal use, apparently never intending to use it to curry favor with any foreign official.

Although deceived by Harris, Ban, Bahn, and Woo were nonetheless charged with engaging in a conspiracy to violate the FCPA. Ban and Bahn were separately charged with three counts of violating the FCPA, for which Ban, a Korean national and a non-U.S. resident, was charged with aiding and abetting the violation of a domestic concern, i.e., his son Bahn.

Harris was not charged with any FCPA violations, presumably because he never offered or paid a bribe to a foreign official, but he will face multiple counts of wire fraud, money laundering, and aggravated identify theft charges in connection with the scheme. DOJ's indictment also includes wire fraud and money laundering charges against Ban and Bahn.

Och-Ziff

On September 29, 2016, the DOJ announced a deferred prosecution agreement ("DPA") with Och-Ziff Capital Management Group LLC ("Och-Ziff") for a widespread bribery scheme involving officials in multiple African countries.[5] Och-Ziff is a Delaware limited liability company and one of the largest alternative asset and hedge fund managers in the world. It is headquartered in New York and has been listed on the New York Stock Exchange (and is therefore an "issuer") since November 14, 2007. Och-Ziff, through a network of consolidated subsidiaries and affiliates, operates and provides investment advisory and management services to investor funds in exchange for management fees and incentive income.

In the Criminal Information released concurrently with the DPA, DOJ charged Och-Ziff with two counts of conspiracy to violate the antibribery provisions of the FCPA, one count of falsifying its books and records, and one count of failing to implement adequate internal controls. Pursuant to the three-year DPA, Och-Ziff agreed to pay a total criminal penalty of $213 million, implement rigorous internal controls, retain an independent compliance monitor, and cooperate fully with DOJ's ongoing investigation, including its investigation of individuals.

In related proceedings, the SEC filed a cease and desist order against Och-Ziff and its affiliate, OZ Management LP, under which Och-Ziff agreed to pay approximately $199 million in disgorgement to the SEC, including prejudgment interest. Therefore, Och-Ziff paid a total penalty of approximately $412 million in order to resolve the criminal and civil charges, representing the most significant FCPA enforcement action against a financial institution to date. The *Och-Ziff* case also marks the first time that a hedge fund was found liable for violations of the FCPA.

Och-Ziff's elaborate bribery schemes in Africa include one involving the Libyan real estate sector. From around 2007 to 2010, Och-Ziff retained a London-based third-party consultant ("Libyan Intermediary") to aid the company's business in Libya, including to obtain investments from Libya's sovereign wealth fund. Och-Ziff once made a $40 million investment in a Libyan real estate development project and allegedly paid an entity controlled by the Libyan Intermediary a $400,000 so-called "deal fee." Behind the scenes, both parties understood this payment to be a compensation for bribes paid to Libyan officials in order to secure the real estate development business.

The terms of the DPA took into account Och-Ziff's failure voluntarily to self-disclose the FCPA violations, which DOJ considered to be very serious considering the high value of the bribes paid to foreign officials and the involvement of a high level employee within Och-Ziff. Nevertheless, the criminal penalty demanded by DOJ reflected a 20 percent reduction from the bottom of the U.S. Sentencing Guidelines fine range because Och-Ziff cooperated with the U.S. government's investigation into the African bribery scheme.

PBSJ

On January 22, 2015, the SEC announced a DPA with the PBSJ Corporation ("PBSJ") (now the Atkins North America Holdings Corporation), an engineering and construction firm based in Tampa, Florida.[6] The DPA deferred FCPA charges against the company for a period of two years and required the company to comply with certain anticorruption-related requirements.

The FCPA charges arose from a former officer, Walid Hatoum, allegedly offering and authorizing bribes and employment to foreign officials in order to secure Qatari government contracts. PBSJ was an "issuer" when the alleged bribery scheme was ongoing but has since ceased offering securities in the United States. As part of the DPA, PBSJ agreed to pay a total of $3.4 million, including a civil penalty of $375,000 on top of the disgorgement of the ill-gotten gain.

It is worth noting that the penalty reflected a credit granted by the government for PBSJ's cooperation with the SEC's investigation after the firm discovered and disclosed the FCPA violations. Former officer Hatoum was separately charged on the same day in a SEC cease-and-desist order, which found that he violated the anti-bribery, internal accounting controls, books and records, and false records provisions of the Securities Exchange Act of 1934. Without admitting or denying the findings, Hatoum agreed to pay a penalty of $50,000.

The alleged FCPA violations originated with PBS&J International, Inc. ("PBS&J Int'l"), a wholly owned subsidiary of PBSJ. PBS&J Int'l engaged in the business of providing engineering services in international markets, including the Middle East and North Africa. In 2009, PBS&J Int'l secured two multi-million dollar contracts for a hotel resort development project in Morocco and a light rail transit project in Qatar.

Both projects were awarded to the company through a competitive bidding process conducted by the Qatari Diar Real Estate Investment Company ("Qatari Diar")—an agency of the Qatari government tasked with real estate investments. Hatoum, then a PBSJ employee and later President of PBS&J Int'l, allegedly led the efforts to pursue the two Qatari Diar projects, which included engaging a local subcontractor (the "Local Intermediary") to take charge of managing the project's local operations.

The SEC alleged that Hatoum secured the two businesses for PBSJ through a secret bribery scheme involving the Local Intermediary. Hatoum allegedly hid from his employer the fact that the Local Intermediary was owned and controlled by the Director of the Qatari Diar ("Foreign Official"). According to the SEC, Hatoum concocted a scheme to share 40 percent of the project profits with the Local Intermediary and pay additional "agent fees" to this local partner for successful tenders. In addition, PBS&J Int'l agreed to pay half of the salary of the Foreign Official's wife, who was employed by the Local Intermediary. In return, the Foreign Official allegedly provided PBS&J Int'l with confidential bid information that caused PBS&J Int'l to win the two Qatari Diar contracts.

The SEC found that PBSJ, as a company, had no knowledge about the bribery scheme because the PBSJ officials who oversaw the bid process were never aware of the Local Intermediary's true connections to the Foreign Official. Nevertheless, the SEC required the company to enter into a DPA as it considered that PBSJ officials ignored significant red-flags about potential bribes.

The SEC's finding was based on the following circumstances:

(i) PBS&J Int'l received confidential bid information,

(ii) Hatoum described the Foreign Official as a good friend, and

(iii) one PBS&J official was aware that the Foreign Official was an employee of the Local Intermediary.

Even though the PBSJ officials did not know the Foreign Official's position with the Qatari Diar nor his ownership of the Local Intermediary, the SEC found that these facts would have been revealed easily had PBSJ conducted meaningful due diligence.

Meanwhile, the SEC also found that several facts constituted mitigating factors in deciding the penalties appropriate for the company, including that PBSJ took quick steps to end the misconduct after self-reporting to the SEC, and that the company voluntarily made witnesses available for interviews and provided factual chronologies, timelines, internal summaries, and full forensic images to cooperate with the SEC's investigation.

Garth Peterson

On April 25, 2012, the DOJ announced that a former managing director for Morgan Stanley's real estate business in China, Garth Peterson, pled guilty for his role in a bribery scheme involving an executive of a Chinese state-owned enterprise ("SOE") (the "Chinese Official").[7] Morgan Stanley is a global financial-services firm whose shares are listed on the New York Stock Exchange; hence, it is an "issuer" within the meaning of the FCPA. Peterson pled guilty to one count of conspiring to evade internal accounting controls that Morgan Stanley is required to maintain and was sentenced to nine months in prison by the court.

In a related civil complaint, the SEC charged Peterson with violations of the antibribery, books and records, and internal control provisions of the FCPA. Peterson consented to a court order under which he agreed to the disgorgement of approximately $3.8 million (including prejudgment interest), which was satisfied primarily by relinquishing his interest in the Jin Lin Tiandi Serviced Apartments valued at approximately $3.4 million at the time of the order.

The bribery scheme concocted by Peterson developed when he was leading Morgan Stanley's efforts to build a Chinese real estate investment portfolio for the firm's real estate funds. In that role, Peterson cultivated a personal relationship with the Chinese Official, who was an executive of Shanghai Yongye Enterprise (Group) Co. Ltd. ("Yongye"), a SOE incorporated by the local government of Luwan District in Shanghai and operating as the local government's real estate development arm. The Chinese Official steered to Morgan Stanley several opportunities for partnering with Yongye on a significant real estate investment and used his influence to help obtain necessary governmental approvals. Peterson returned the "favor" by engaging in a series of personal business dealings with the Chinese Official.

Most significantly, he encouraged Morgan Stanley to sell an interest in the Jin Lin Tiandi Serviced Apartments in a transaction he said was with Yongye. However, unbeknownst to the firm, the interest was in fact to be conveyed to a shell company controlled by Peterson, the Chinese Official, and a Canadian attorney. Peterson's misrepresentation caused Morgan Stanley to sell the Jin Lin Tiandi interest at a discount to the market value, resulting in a profit of more than $2.5 million to the two partners in the bribery scheme.

The pair also invested together in Chinese franchises of well-known U.S. fast food restaurants. Peterson failed to disclose any of these investments in annual disclosures required by Morgan Stanley as part of his employment.

Morgan Stanley, Peterson's employer, avoided any FCPA charges for its former executive's misconduct. Both the DOJ and the SEC, in their respective filings, noted Morgan Stanley's strong compliance program and the lengths to which the firm went to train and remind Peterson of FCPA compliance. DOJ's press release stated:

> After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation.

The contrast between the *Garth Peterson* case and the *PBSJ* case demonstrates how important a robust FCPA compliance program is to businesses in the real estate sector. While both companies dealt with a "rogue" employee hiding key facts from his employer, Morgan Stanley was not penalized, while PBSJ had to suffer the financial and reputational losses associated with a DPA.

Compliance Measures for the Real Estate Industry

The foregoing examples of FCPA enforcement actions targeting participants in real estate transactions underscore the importance to the real estate industry of robust anticorruption compliance programs.

The first step should be an assessment of the compliance risks facing the particular business, since compliance measures need to address those aspects of a business that are most risky. The risks may stem from the geographical focus of the business and its assets, the business's use of third-party intermediaries, the frequency and purpose of the business's interaction with foreign officials, and the business's involvement in joint ventures and partnerships.

Once the most material compliance risks have been identified, the next step is to devise or revise a compliance program so that it addresses those risks. In shaping or reshaping a compliance program, the DOJ Fraud Section's recent guidance for the evaluation of corporate compliance programs provides useful insights.[8]

According to the guidance, chief among the considerations that prosecutors are to take into account in deciding whether to charge a company or to negotiate a plea are the specific actions taken by company leadership to model and demonstrate effective compliance behavior and the importance given to compliance and control functions by the board of directors and by company executives.[9] The guidance also stresses, among other factors, the importance of proper autonomy for compliance functions, as well as the proper integration of compliance training into a company's various functions and the accessibility of policies and procedures and regular evaluations of their usefulness.[10]

Insights into the criteria for effective compliance programs can also be found in the plea agreement reached in the *Odebrecht* case. Odebrecht was required to implement compliance policies for directors, officers, employees, and, in some cases, outside parties acting on its behalf in foreign jurisdictions.[11] Odebrecht was required to put in place policies to address the risks of charitable donations and promotional hospitality expenses, among other corporate activities. The policies required that transactions be authorized at levels of authority appropriate to the risks associated with the transactions, and that all transactions be accurately and timely recorded. The Odebrecht plea agreement also stressed that compliance policies should be reviewed annually to ensure that they are up to date and reflect current standards.[12]

Additional compliance measures of particular importance to the real estate industry include:

- *Due diligence with respect to brokers, consultants, subcontractors, and other intermediaries*. The *Landmark 72*, *Och-Ziff*, and *PBSJ* cases all teach the importance of adequate due diligence in the engagement of third parties. A third party's business reputation, government affiliation (if any), status on U.S. government sanctions lists, and experience in the tasks to which the party will be assigned should all be checked in advance of an engagement. The same should be done prior to engaging property managers. Once due diligence is completed and assuming no red flags are identified, a written contract clearly defining the scope of the engagement and including anti-corruption safeguards should be executed.

- *Due diligence with respect to assets to be acquired*. Before acquiring properties or interests in properties, or financing such acquisitions, the anti-corruption compliance risks associated with those properties should be scrutinized. The business reputation of the seller, the history of the property, the employees or third parties responsible for the government authorizations that the property holds, and the government authorizations that may be needed in order to enable the property to be used for the acquirer's purposes, all should be thoroughly reviewed. Acquisition agreements should include appropriate anti-corruption representations.

- *Compliance controls at the subsidiary, partnership, and joint venture levels*. As the *PBSJ* case demonstrates, it is not sufficient for a real estate business to have anti-corruption compliance measures at the corporate parent level. Foreign subsidiaries and joint ventures face the greatest compliance risks and should be accorded commensurate compliance attention. Compliance policies and procedures that make sense at the parent level may need to be adapted to make sense at the local operational level, but dilution of compliance controls is hazardous. The FCPA enforcement agencies expect that even minority owners in partnerships or joint ventures make good faith efforts to ensure that those entities comply with the FCPA.

- *Frequent, specific, and updated training, communications, and other means of demonstrating the company's commitment to compliance*. That Morgan Stanley escaped punishment for the corrupt conduct of one of its real estate executives was largely due to its regimen of training, communication, and other demonstrations of corporate leadership's commitment to compliance.

Morgan Stanley's compliance department had direct access to the board of directors, a fact that was specifically cited by DOJ as evidence of the company's thorough compliance program.[13] Peterson received annual FCPA compliance training and also received more than 35 reminders and written materials regarding Morgan Stanley's FCPA policies related to, among other subjects, gift giving and entertainment.[14]

These reminders were specifically tailored for the particularities of the Chinese market, providing specific guidance about particular state-owned entities and their employees (including whether they were considered "government officials" for FCPA purposes), and even guidance around specific events like the Beijing Olympics. A Morgan Stanley compliance officer specifically informed Peterson in 2004 that employees of Yongye were government officials for purposes of the FCPA.

Effective anti-corruption compliance may be challenging for many participants in the real estate industry. But the *Garth Peterson* case, on the one hand, and the *Landmark 72*, *Och-Ziff*, and *PBSJ* cases, on the other, confirm the value of effective compliance and the severe consequences of failure.

NOTES:

[1]Information at 8, United States v. Odebrecht S.A., Cr. No. 16-643 (E.D.N.Y. 2012).

[2]United States v. Odebrecht S.A., No. 16-cr-00643 (E.D.N.Y. 2016). Odebrecht pleaded guilty and agreed to pay a combined total penalty of $3.5 billion to resolve charges with authorities in the United States, Brazil, and Switzerland.

[3]Complaint at 7–8, SEC. v. Montedison S.p.A., No.

1:96-CV-02631, (D.D.C. 1996).

[4]United States v. Woo, 1:17-mj-00139 (S.D.N.Y. 2016); United States v. Bahn, No. 1:16-cr-831 (S.D.N.Y. 2016). For details about the case, see the press release issued by the Department of Justice at https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-scheme-involving-800-million.

[5]United States v. Och-Ziff Capital Management Group LLC, No. 16-516 (E.D.N.Y. 2016). For official documents related to the *Och-Ziff* case, see https://www.justice.gov/criminal-fraud/fcpa/cases/och-ziff-capital-management-group-llc.

[6]SEC v. PBSJ Corporation (2015). For official documents related to the *PBSJ* case, see https://www.sec.gov/news/pressrelease/2015-13.html.

[7]United States v. Garth Peterson, No. 12-cr-224 (E.D.N.Y. 2012); *see also*, SEC v. Garth Ronald Peterson, No. 12-cv-2033 (E.D.N.Y. 2012), For official documents related to the criminal case, see https://www.justice.gov/criminal-fraud/case/united-states-v-garth-peterson-court-docket-number-12-cr-224; for official documents related to the civil case, see https://www.sec.gov/news/press-release/2012-2012-78htm.

[8]U.S. Department of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs (2017).

[9]*Id*. at 2.

[10]*Id*. at 4.

[11]Plea Agreement at C-2, United States v. Odebrecht S.A., No. 16-cr-00643 (E.D.N.Y. 2016).

[12]Plea Agreement at C-4, United States v. Odebrecht S.A., No. 16-cr-00643 (E.D.N.Y. 2016).

[13]Information at 5, United States v. Garth Peterson, No. 12-cr-224 (E.D.N.Y. 2012).

[14]Complaint at 12–13, SEC v. Garth Ronald Peterson, No. 12-cv-2033 (E.D.N.Y. 2012).