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The FCPA Extends Its Reach

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Stephen Hood
Partner, São Paulo
+55 11 21 26 48 55
shood@mayerbrown.com

David Krakoff
Partner, Washington D.C.
+1 202 263-3370
dkrakoff@mayerbrown.co

Lynn A. Neils
Partner, New York, N.Y.
+1 212 506-2568
lneils@mayerbrown.com

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DOJ & FBI Warn Of “Increased Vigilance” in Pursuing FCPA Cases

- "FCPA violations have been and will continue to be dealt with severely by the SEC and other law enforcement agencies any company that seeks to put greed ahead of the law by making illegal payments to win business should beware that we are working vigorously across borders to detect and punish such illicit conduct."

Chairman Mary L. Schapiro, Feb. 11, 2009

- “The Department continues to enforce vigorously the Foreign Corrupt Practices Act (FCPA), and since 2001 the Department has substantially increased its focus and resources on enforcing this important law.”

Attorney General Mukasey, Jan. 30, 2008

Vigorous Enforcement Has Led To Unprecedented Number of Actions



- There has been a continued explosion of enforcement activity by both the SEC and the DOJ
- Approximately 120 other companies currently have open FCPA investigations
- Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ, recently noted that the recent flurry of enforcement actions is “just the tip of the iceberg” and that the DOJ has “many more matters under investigation”



The Foreign Corrupt Practices Act

What is the FCPA?

- The Foreign Corrupt Practices Act makes it a crime to bribe foreign government officials, either directly or through intermediaries, in order to obtain or retain business

Why the FCPA?

- As a result of SEC investigations in the mid-1970s, over 400 US companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties
- Abuses ran from bribery of high foreign officials, to paying the expenses of family members, to making smaller, regular payments to lower-level officials
- Congress enacted the FCPA in 1977 to halt bribery of foreign officials and to restore public confidence in the integrity of the American business system

Why the FCPA?

- The FCPA has been amended several times since 1977, and has had an enormous impact on the way American firms do business around the world
- The US government has investigated many firms for violations of the FCPA; it has
 - Levied large fines
 - Initiated criminal charges
 - Suspended companies from federal contracting, and even
 - Sent some individual employees to jail

The FCPA: Overview

- The FCPA consists of two sections:
 - Anti-Bribery Provisions
 - Record-Keeping and Internal Control Provisions
- U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) work in conjunction to enforce the FCPA, both separately and in combined efforts

The FCPA: Anti-Bribery Provisions

- The anti-bribery provisions of the FCPA make it unlawful for a US person, and for most foreign companies who are issuers of US securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business, or for directing business to any person
- There must be proof of:
 - Offer or promise to pay
 - Any money or thing of value
 - To any foreign official
 - With corrupt intent
 - For the purpose of obtaining or retaining business

The FCPA: Books and Records Provisions

- Requires all companies whose shares are traded on an American exchange or is required to file reports with the SEC 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 issuer; and
 - Devise and maintain a system of internal accounting controls
- Company accounting records often disguise corrupt payments (e.g., “commissions”, “consultant fees”)
- Encourages self-policing: requirement of accurate records forces companies to have effective internal controls to detect corrupt conduct

The FCPA: Definition and Requirements

- A foreign official includes any of the following
 - Officer or employee of a foreign (i.e. non-US) government or agency, member of a political party, party official, legislator or candidate
 - Member of royal family who has official governmental responsibilities
 - Employee of state-controlled business (such as a doctor in a state-controlled hospital or employees at state-owned airports)
 - Business person who is a government agent acting on behalf of the government
 - A public international organization as well as its employees
 - The official's rank is not significant, focus is on the payment's purpose not duties
- Practice pointer
 - In many countries, the line between “public” and “private” may be blurred so be careful

The FCPA: Definition and Requirements

- The offer or promise of a corrupt payment can constitute a violation (the corrupt act need not be successful)
- Knowledge includes:
 - Actual knowledge
 - Awareness or suspicion that an event is likely to occur
 - Avoiding knowledge of corrupt acts through willful blindness



"That's all I know, because it was at precisely that moment that I pulled the wool over my eyes."

The FCPA: Direct and Indirect Payments

- The FCPA does not just prohibit direct transactions - it also prohibits corrupt payments through intermediaries
 - Intermediaries may include joint venture partners or agents
- It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official
- In other words, you can't "play dumb"

The FCPA: Who Is Subject to the Provisions?

- Anti-Bribery Provisions apply to
 - Any company that has issued securities that have been registered in the US or who is required to file periodic reports with the SEC
 - Any company that has its principal place of business in US
 - All US nationals, citizens or residents
 - Non-US companies and individuals who cause an act in furtherance of corrupt payment in the US through the use of instrumentalities of interstate commerce
 - Officers, directors, employees, agents and shareholders acting on behalf of all of the above

The FCPA: Who Is Subject to the Provisions? (cont'd)

- Books and Records/Internal Controls Provisions
 - Apply to any company that has issued securities that have been registered in the US or is required to file periodic reports with the SEC
 - An officer, director or employee can also be charged with aiding and abetting or causing a company's violation of the accounting provisions of the FCPA
 - Apply not only to issuer, but to subsidiaries, joint ventures or affiliates owned and controlled by (more than 50%) the issuer

The FCPA: Penalties- Corporate sanctions



- Fines of up to \$2 million for each violation of the anti-bribery prohibition
- Fines up to \$25 million for violation of accounting provision
- Up to twice the benefit sought to be obtained (Alternative Fines Act)
- Disgorgement of proceeds associated with improper payments
- Injunction to prevent future violations
- Suspension and debarment

The FCPA: Penalties - Individuals

- Anti-Bribery violations
 - Criminal
 - Fines - \$100,000 per violation or twice the gain sought to be obtained
 - Prison – five years' imprisonment
 - Civil - \$10,000 fine per violation
- Accounting violations
 - Criminal
 - Fines - \$5 million or twice the gain sought to be obtained
 - Prison – twenty years' imprisonment
 - Civil - up to \$100,000 fine
- Other consequences
 - Ban on serving as officer or director of a public company
 - Civil judgment
 - Loss of licence

The FCPA: Anti-Bribery Provisions - Exception

Facilitating Payments

- The FCPA carves out **an exception** to the anti-bribery provisions for facilitating payments
- This exception allows certain payments, where permissible under local laws, to be made for the purpose of facilitating “routine governmental actions” – actions which are ordinarily and commonly performed by a foreign official
- Examples of routine actions which are ordinarily and commonly performed by a foreign official
 - Approving permits, licenses, or other official documents
 - Processing papers such as visas and work orders
 - Providing police protection, mail pick-up and delivery or scheduling inspections associated with contract performance or transit of goods
 - Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products

The FCPA: Anti-Bribery Provisions – Affirmative Defense

Promotional Expenses

- Payment lawful under the written laws and regulations of the country involved
 - Not the absence of written laws
- Legitimate business expenditure/reasonable hospitality directly related to
 - The promotion of products or services, or
 - The performance of a contract with the government

The FCPA: Anti-Bribery Provisions – Affirmative Defense

What payments can be made?

- Hospitality if reasonable and not lavish
 - Consider cost, occasion, customs, frequency, dealings
- Entertainment if reasonable and not lavish
- Reasonable transport, lodging and meals and incidental expenses if related to the promotion of product or performance of contracts
- “De minimis” gifts given as a courtesy – think company logo pens or cups – but still for bona fide business or promotional purposes

The FCPA: The Top Ten Trends for 2010

1. The level of enforcement is at an all-time high and is likely to remain there.
2. Prosecuting senior company executives in their individual capacities will be a priority.
3. The US will investigate US and foreign issuers equally, as well as companies operating within US territory.
4. Multi-jurisdictional investigations are on the rise.
5. Informal international cooperation will continue to improve, together with increased mutual legal assistance.

The FCPA: The Top Ten Trends for 2010 (cont'd)

6. The DOJ and FBI are committing more resources to FCPA enforcement, including eight full-time, dedicated FBI investigators.
7. The DOJ will coordinate, where appropriate, sector-wide investigations, as it has in the oil and gas, medical devices and freight forwarding industries.
8. The pace of voluntary disclosures is likely to continue.
9. FCPA due diligence will be a regular feature of mergers and acquisitions and transactional work.
10. Increased enforcement of other crimes, alongside FCPA violations, is expected, including money-laundering, export controls violations and false accounting.

Recent FCPA Cases in Latin America

Company	Year	Location
Control Components/Executive	2009	Brazil
Siemens	2008	Argentina, Venezuela
Bridgestone Executive	2008	Argentina, Brazil
Willbros	2008	Bolivia, Ecuador
Alcatel Executive	2007	Costa Rica
Paradigm	2007	Mexico
Tyco	2006	Brazil
Bell South	2002	Nicaragua, Venezuela
IBM	2000	Argentina

The FCPA: Corporate Compliance

Corporate Liability

- Government places weight on whether and to what extent a company had an effective pre-existing compliance program
- Case study
 - United States v. Siemens
 - SEC v. Siemens

The FCPA: Corporate Compliance

Siemens

- Failure to establish “tone at the top”
- Failure to establish a “sufficiently empowered and competent” compliance department
- Department was understaffed
- Compliance officers had full time jobs other than compliance
- Failure to clearly distinguish duties of compliance department
- Limiting audit resources available to detect compliance failures