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FCPA: Handling Increased Global Anti-Corruption Enforcement

The US Foreign Corrupt Practices Act presents a crucial challenge for businesses in overseas markets. This white paper examines the scrutiny global companies are facing from the application of this law and suggests how to handle expanded global anti-corruption enforcement.

The content is drawn from an event in the Mayer Brown series, In Focus: Corporate Litigation Web Series, co-hosted with Incisive Media and featuring David Wilkins, director of Global Ethics & Compliance for The Dow Chemical Company.

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FCPA: Handling Increased Global Anti-Corruption Enforcement

By David Krakoff, Z Scott, Kwaku Akowuah, Kristy Balsanek and Clancy Galgay

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Introduction

As technologies advance, trade barriers lower, and economies open in formerly inaccessible countries, companies continue to expand their global operations. The US Foreign Corrupt Practices Act (FCPA) poses crucial challenges for businesses in overseas markets as governments attempt to facilitate trade, ensure fair competition, and promote business ethics abroad. The FCPA is a rigorous statute and compliance with its provisions requires an active and aggressive corporate integrity program implemented by companies operating worldwide. Greater cooperation between US and foreign regulators has resulted in increasingly global and complex anti-corruption investigations involving multinational corporations. This memorandum examines the intensified scrutiny global companies are facing from the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) and provides practical guidance on how to handle expanded global anti-corruption enforcement. Topics include (1) the legal provisions of the FCPA; (2) recent FCPA trends; (3) third-party intermediaries; (4) mergers and acquisitions; and (5) gifts, travel, and entertainment. Understanding these important FCPA issues will help companies navigate the challenges of operating abroad.

FCPA Legal Standards

Anti-Bribery and Accounting Provisions

The FCPA's two main components are the anti-bribery provisions and the accounting provisions.[1] The anti-bribery provisions prohibit offers, payments, promises, or authorizations to pay any money or thing of value to any foreign official, political party, or candidates for public office, intended to influence any act or decision in order to obtain or retain business. This encompasses a wide range of behavior and a variety of individuals. In addition, the FCPA proscribes payments made to third parties while "knowing" that a portion or all of the payments will be used by the third party as bribes to foreign officials. Avoiding an FCPA violation requires more than just ensuring that money is not intentionally given to a foreign official. Rather, it demands that companies exercise "due diligence" in determining whether a foreign transaction or business relationship violates the FCPA. Under the FCPA, knowledge of a violation can be inferred if the circumstances of the illegal payment were relatively evident and the company did not undertake an investigation to establish facts to the contrary. Companies cannot circumvent liability through "conscious disregard" or "deliberate ignorance" of the circumstances of the transaction.

The accounting provisions require companies to keep accurate books and records and maintain an adequate system of internal accounting and financial controls with proper authorization. As a result, companies must reflect any payments, bribes, or facilitation payments in their accounting books to allow preparation of financial statements that conform to generally accepted accounting principles. Mere technical errors or negligence are not

enough to establish liability—an individual must knowingly fail to implement a system of controls or intentionally falsify a record.

Liability

Under the FCPA, liability extends to "issuers" and "domestic concerns." An "issuer" is a corporation that issues securities registered in the United States or is required to file periodic reports with the SEC. Under the statute, foreign issuers whose American Depository Receipts (ADRs) are traded on US exchanges are "issuers." A "domestic concern" includes individuals who are US citizens, nationals, or residents, as well as corporations, partnerships, associations, joint-stock companies, business trusts, unincorporated organizations, or sole proprietorships that have their principal place of business or were incorporated in the United States. In addition, the FCPA states that any individual, officer, director, employee, or agent of any issuer or domestic concern is prohibited from violating the anti-bribery provisions. Individuals and firms also may be penalized if they order, authorize, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions.[2]

The FCPA has extensive jurisdictional reach. Liability for activities that violate the FCPA extends to parties located outside the United States based on US nationality. Further, foreign companies or persons are subject to the FCPA if they act, directly or through agents, to further the corrupt payment while in the United States or if they use any instrumentalities of interstate commerce of the United States, wherever located.[3] US parent corporations can be held liable for the acts of foreign subsidiaries where the US parent authorized, directed, or controlled the activity in question, as can US citizens or residents—themselves "domestic concerns"—who were employed by or acted on behalf of such foreign incorporated subsidiaries. In addition, companies owning more than 50 percent of a subsidiary must require their subsidiaries to comply with the FCPA's accounting provisions. For foreign subsidiaries with less than 50 percent ownership, US businesses must make "good faith" efforts to ensure compliance with the FCPA accounting provisions.

Foreign Officials

The FCPA extends to corrupt payments made to a foreign official, a foreign political party or party official, or any candidate for foreign political office.[4] "Foreign official" is defined broadly by the FCPA to mean any officer or employee of a foreign government, a public international organization or any of its departments or agencies, or any person acting in an official capacity, regardless of rank or position.[5] Under the FCPA, a government official can be a member of a royal family, a member of a legislative body, or even an official with a state-owned business. For example, in China, doctors employed by state-owned hospitals are considered foreign officials.[6] Not surprisingly, the notion of who constitutes a foreign official should be carefully considered by companies when doing business overseas.

Exception: Facilitation Payments

The FCPA explicitly exempts "facilitating payments" for "routine governmental action" from the bribery prohibition.[7] The statute provides a list of examples, including obtaining permits or

licenses to allow a person to do business in a country; processing governmental papers, such as visas and work orders; providing police protection, mail service, phone service, and power and water supply; loading and unloading cargo; protecting perishable products; and scheduling required inspections. This list is not exhaustive, and actions must be those "ordinarily and commonly performed" by the official.[8] "Routine governmental action" does not include any decision-making or discretion by a foreign official to award new business or to continue business with a particular party.[9] Obviously, this exemption can be treacherous. Companies should be extraordinarily cautious in making payments to foreign officials in any manner. The line between routine governmental action and "assisting in obtaining or retaining business" can be muddled in practice. In questionable cases, companies are best served by delaying the transaction and requesting a DOJ opinion on the transaction's legality.

Affirmative Defenses

Payments that are lawful under a written law of the foreign official's country do not violate the FCPA.[10] The law must be affirmatively stated and written; neither negative implication, custom, nor tacit approval satisfy this defense. In addition, payments that are directly related to the promotion or sales of products or services or the execution of a contract do not violate the FCPA.[11] Again, if a company is uncertain about the FCPA implications of a transaction, it should consider requesting an opinion from DOJ.[12]

Penalties

Corporations and individuals who violate the FCPA face harsh sanctions.[13] Corporations face criminal penalties up to $2 million for each violation of the anti-bribery prohibitions and criminal fines of up to $25 million for accounting provision violations. In addition, corporations may have to disgorge profits associated with improper payments and obey an injunction to prevent future violations. Corporations also may incur penalties such as suspension and debarment.

For anti-bribery violations, individuals are subject to up to five years in prison and up to $250,000 in fines. Individuals can face civil penalties up to $10,000. For accounting provision violations, criminal penalties for individuals can reach $5 million and 20 years' imprisonment for each offense. The government prohibits companies from indemnifying these individuals. The government may also levy equitable remedies on individuals, such as an injunction that bars them from serving as a director or an officer in a public company.

Recent FCPA Trends

There has been a dramatic increase in the number of FCPA enforcement actions pursued by US authorities and a corresponding rise in the penalties paid by companies in settlement of enforcement actions. In 2003, the DOJ and SEC brought a total of two FCPA enforcement actions. By 2005, that number had increased to 12, and 2007 saw a record 38 FCPA enforcement actions. In 2008, the DOJ and SEC filed 42 enforcement actions. During this time frame, eight-figure FCPA penalties—once a rarity—have become commonplace. The

largest penalty to date is the $800 million fine paid in 2008 by Siemens, but the steep sanctions levied against companies such as Baker Hughes Inc. ($44 million), Titan Corporation ($28.5 million),[14] Statoil ASA ($21 million),[15] York International[16] ($12 million), and ABB Ltd. ($10.5 million),[17] have drawn attention as well. One reason why these penalties are so large is the government's practice of seeking disgorgement of the profits earned on any project deemed to have been procured through the payment of an illicit bribe. In the *Baker Hughes* case, for example, over half of the total penalty (some $23 million) was attributed to disgorgement of profits.[18]

These staggering numbers are just the beginning of the FCPA-enforcement story, however. At least four additional trends can be discerned from the recent actions. First, it has become clear that the government has placed renewed emphasis on individual liability—including high-ranking executives—suspected of authorizing payments that violate the FCPA. In 2007, the US government filed an unprecedented 15 cases against individuals. In one high-profile case, the former chief executive of engineering and construction giant KBR, Inc., Albert "Jack" Stanley, pleaded guilty to having participated in the payment of nearly $180 million in bribes to Nigerian government officials. Under the terms of an accompanying criminal plea agreement, Stanley will serve a seven-year prison term and pay a $10.8 million fine.[19] Similarly, former Alcatel executive Christian Sapsizian, a French citizen, was recently sentenced to serve a 30-month term of incarceration for his role in making $2.5 million in payments to Costa Rican telecommunications officials.[20] According to Mark Mendelson, the Justice Department official chiefly responsible for FCPA prosecutions, the current surge in the number of individual prosecutions is no accident: "It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate."[21]

The second and third trends relate to the government's enforcement actions against companies. Perhaps prompted by the infamous collapse of accounting giant Arthur Andersen, the Justice Department has shown a willingness to resolve criminal FCPA investigations through deferred prosecution and non-prosecution agreements. This has been particularly true in cases where a company initially makes a voluntary disclosure of the FCPA violation and then cooperates fully with the government's investigation. This trend, though welcome, has given rise to another development that carries significant costs for FCPA violators—the government's frequent insistence that the settling company accept the appointment of an outside compliance monitor as a condition of settlement.[22] The costs associated with this trend come in two forms. First, the settling company is invariably compelled to pay the monitor's fees, which, according to published reports, have exceeded $20 million in some cases.[23] Additionally, compliance monitors exact an indirect price in the form of diminished corporate independence. Monitors typically sit on the board of the settling company for a two- or three-year term and must be granted full access to the company's books and records, internal controls protocols, FCPA compliance training programs, and the results of any internal audits that are performed. Moreover, compliance monitors usually report directly to the SEC or the DOJ, leaving companies with little control over when or how to disclose any irregularities that are discovered.

A fourth major trend applies equally to all FCPA enforcement actions. A substantial increase in the frequency and depth of cooperation among enforcement authorities in different countries appears to be underway. For example, when announcing the plea agreement in the *Albert Stanley* case, the Justice Department declared that authorities in France, Switzerland, Italy, and the United Kingdom had provided significant assistance to the US government's investigation.[24] In other cases, US enforcement authorities appear to have reduced their own penalty demands because the target company would face sanctions in another jurisdiction for the same underlying conduct.[25]

Intermediaries/Third-Party Consultants

Today, the majority of FCPA enforcement cases brought by the DOJ and SEC involve the use of third party intermediaries. For example, in the *Baker Hughes* case, a Kazakh government official directed the use of a specific consultant based on the Isle of Man to secure development of a Kazakh oil field.[26] Baker Hughes made approximately $4.1 million in payments to the consultant. Similarly, in *BellSouth*, the company allegedly paid a $60,000 "consulting fee" to the wife of the chairman of a legislative committee.[27] In *Delta Land*, payments were allegedly made to foreign officials through a third party contractor for travel and gifts.[28] Likewise, in *Vetco International*, a forwarding agent allegedly paid a Nigerian customs official to obtain a temporary import permit for an oil rig.[29]

This development has made companies realize that they must be vigilant about due diligence in hiring intermediaries. Under the FCPA, if companies render a payment to a third party "knowing" that all or part of the payment will be received either directly or indirectly by a foreign official, that payment is illegal. A company cannot "consciously disregard" information or remain "willfully blind" to discovering information regarding a third party simply in order to circumvent FCPA liability. Rather, knowledge is established if companies know it is highly probable that specific circumstances in a transaction violate or could violate the FCPA.

Companies positioned worldwide dealing with local customs and local managers must understand and develop global operational controls. This is difficult, however, when consultants, distributors, vendors, professional services firms, and agents are often hired locally. To confront the risk presented by the use of intermediaries, companies should develop a pre-hiring due diligence program that requires a thorough background check. Companies should identify the intended intermediary's country of operation, the proposed services, why this specific intermediary should provide the services, the compensation terms, and whether the intermediary will be required to interface with the government. The process also should require disclosure by the intermediary of any prior government affiliations or employment.

"Red flags" often appear during pre-hiring due diligence. For example, a consultant with no experience in the field may be hired simply because a government official is a relative. The consultant's payment terms also may be unusual, such as requiring to be paid in cash or to be paid through an overseas numbered account. Companies need to thoroughly explore any of these red flags that arise in the due diligence process.

Companies also must oversee third parties after retaining them. Contracts with third parties should have covenants that require: compliance with FCPA and local law; documentation of work, fees, and expenses; rights to audit the third party's books and records; prior approval for gifts, entertainment, and travel; and termination rights. In addition, firms should publish their written FCPA compliance programs in the local language of the hired third party. It is also suggested that third-party intermediaries attend and complete certifications of FCPA training.

Mergers & Acquisitions

As a number of cases have shown, unwary companies can "purchase" FCPA liability by failing to conduct appropriate due diligence of their intended partner in mergers and acquisitions. Companies alert to this risk have been able to avoid successor liability altogether or, more frequently, to obtain assurance about the scope of potential FCPA liability before the transaction is complete. Companies seeking to minimize their FCPA liability risks should pay careful attention to the potential exposure created by these transactions.

FCPA Cases

The *GE/InVision* case is illustrative. In December 2004, proposed merger partners General Electric and InVision Technologies, Inc. (InVision) entered into separate agreements with the DOJ and the SEC to resolve charges that InVision had violated the FCPA through the actions of its agents in several Asian countries. These agents had paid or offered to pay money to foreign officials and political parties to secure the purchase of InVision's airport security screening machines.[30] General Electric's pre-acquisition due diligence was instrumental in uncovering these alleged FCPA violations, which were promptly reported to the US government. InVision ultimately consented to a two-year non-prosecution agreement with the DOJ in which, among other provisions, it accepted responsibility for its misconduct and agreed to pay an $800,000 criminal fine.[31] General Electric, for its part, agreed in an ancillary agreement to fully integrate the InVision business into General Electric's FCPA compliance program, retain an independent consultant, oversee InVision's performance of its obligations under the non-prosecution agreement, and disclose any evidence material to the then-ongoing government investigation. The merger then closed successfully.[32]

A similar discovery of likely FCPA violations during pre-merger due diligence prompted Lockheed Martin (Lockheed) to walk away from a proposed merger with Titan Corporation (Titan), a military intelligence and communications company.[33] These violations stemmed from Titan's decision to employ a third-party agent to assist on a project to build a wireless telephone network in Benin. After Lockheed discovered evidence of misconduct, Lockheed and Titan jointly disclosed their findings to US authorities, who promptly initiated an investigation. The merger ultimately collapsed when Titan was unable to reach a settlement with the government prior to a June 2004 merger deadline.[34]

A third case suggests that the government may be disinclined to bring direct criminal charges against an acquirer. Johnson Controls, which acquired York International Corp. (York) in

2005, was not charged with any wrongdoing and was not prosecuted for any of York's actions in connection with York's 2007 settlement of charges stemming from bribes paid to Iraqi officials under the United Nations Oil-for-Food program, as well as from kickbacks to government agents in Bahrain, India, Turkey, the United Arab Emirates, and China. Among other sanctions, York paid a $10 million criminal penalty under a deferred prosecution agreement, and an additional $12 million in civil fines and disgorgement.[35] York also settled with the SEC and agreed to disgorge about $10 million and pay $2 million in civil fines.[36]

DOJ Opinion Releases

Two recent DOJ opinion releases provide additional guidance about how companies should approach pre-acquisition due diligence. Opinion Release 08-01 was issued in response to an inquiry from an unnamed Fortune 500 company that was preparing to a make a major investment in a foreign company.[37] The foreign company was jointly owned by a private individual (the controlling shareholder) and the government of a foreign country. This circumstance prompted the prospective investor to wonder whether the private individual was a foreign official within the meaning of the FCPA, and therefore whether its planned investment violated the FCPA. The DOJ quickly determined that it would not take any enforcement action on the proposed transaction, in prominent part because of the investor's extensive due diligence and the resulting transparency surrounding the transaction.[38]

Opinion Release 08-02 also concerned a complicated acquisition and was prompted by Halliburton Company's (Halliburton) efforts to reconcile apparent conflicts between US and UK law in conducting FCPA due diligence. A competing firm had submitted a bid for the acquisition target—a British public company providing upstream oil and gas products and services through operations in more than 50 countries. The competing bid, which the target company's board approved, did not include any conditions relating to FCPA due diligence. Under British law, the board's recommended approval meant that the target (1) was not required to provide additional information that would allow Halliburton to make a full due diligence review prior to placing a bid, and (2) was not required to entertain any offer from Halliburton that contained FCPA-related conditions. In addition, due to the terms of a confidentiality agreement between Halliburton and the target, Halliburton was restricted from sharing with the DOJ any FCPA violations discovered prior to the proposed acquisition. Halliburton's hands were substantially tied. It could not require the target company to disclose all of the information needed to conduct comprehensive FCPA due diligence, and was barred from disclosing any potential violation uncovered before the acquisition was complete.

Halliburton responded to this situation by proposing a series of post-acquisition measures that it would take to ensure FCPA compliance. It then asked the DOJ whether the potential acquisition transaction would violate the FCPA, and whether Halliburton would be liable for the target company's pre-acquisition conduct or post-acquisition FCPA violations. In response to the first question, the DOJ stated that it did not intend to take enforcement action against Halliburton purely for engaging in the transaction because the target was a public company listed on a major exchange—with the result that there was a very low probability that shareholders obtained shares in corrupt transactions. The DOJ also indicated that it was

unlikely to take any action against Halliburton for any FCPA violations that the target company committed before or after the transaction, provided that Halliburton adhered to the ambitious post-closing due diligence and disclosure plan that it had proposed in its opinion request.[39]

Post-Acquisition Obligations

Several other cases make clear that a company's obligation to identify and disclose potential FCPA violations does not end with the close of a merger or acquisition. In fact, these cases show that the immediate post-acquisition period is critical because the government expects acquirers to quickly harmonize the companies' FCPA policies and compliance programs. For example, in a 2001 case, the SEC charged that just two months after Baker Hughes acquired an Australian subsidiary, the subsidiary's employees made a suspicious payment that was improperly recorded in Baker Hughes' books and records.[40] A more recent case involving Con-way International warns that the activities of even a partly-owned subsidiary can lead to FCPA liability for a parent company—Con-way was hit with a $300,000 civil penalty for FCPA violations committed by a Philippines-based firm in which Con-way indirectly held a 55 percent ownership stake.[41]

Mitigating Steps

These cases and DOJ Opinion Releases show that companies undertaking mergers and acquisitions can take certain basic steps to mitigate the risks of FCPA liability. These include assessing the corruption level in the target's countries, its subsidiaries' countries, and relevant industries; identifying the target's business involving foreign officials; evaluating the company's use of third-party intermediaries; reviewing the target's anti-corruption policies and procedures; performing a financial audit on the target's books and records; including in the purchase agreement FCPA compliance and resolution of FCPA issues as conditions to closing; and voluntarily disclosing to the government agencies any past unlawful activities before closing.

Gifts, Travel & Entertainment

While prohibiting payment of any money or thing of value to foreign officials to obtain or retain business, the FCPA arguably permits incurring certain expenses on behalf of these same officials. Under the FCPA,

> [i]t shall be an affirmative defense [that] the payment, gift, offer or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to…the promotion, demonstration, or explanation of products or services; or…the execution or performance of a contract with a foreign government or agency thereof.[42]

This affirmative defense recognizes the practical realities of doing business overseas. Companies have used gifts and travel to obtain or retain business. However, companies must be alert to the fact that gifts, travel, and entertainment can be recast as bribes if the facts so suggest. Therefore, this affirmative defense contains limitations. Specifically, while the affirmative defense permits travel and lodging expenses, they must be connected with the promotion, demonstration, or explanation of products, or the execution or performance of a contract with a foreign government agency.

Wrong Way: Lucent

The *Lucent Technologies* (*Lucent*) case illustrates the wrong way to handle travel and lodging expenses.[43] Lucent paid more than $10 million for approximately one thousand Chinese telecommunications employees of state-owned enterprises to take approximately 315 trips to the United States over a three-year period. The mere fact of the trips might not have presented FCPA problems had they been done correctly. However, the SEC alleged that these trips had a "disproportionate amount" of sightseeing and leisure time. For example, although Lucent paid for officers and engineers of a subsidiary of a government majority-owned company to travel to the United States, only five days were spent at Lucent facilities, whereas nine days were spent on activities at locations other than the Lucent facilities. There were side trips to places such as Las Vegas, Disney World, Niagara Falls, and Hawaii. In some instances, spouses and children were included on these trips and the officials were given a high daily expense allowance upwards of $500 to $1000.

In addition to the disproportionate amount of non-business activity, the SEC elaborated that Lucent "improperly recorded expenses for these trips" under phrases like "factory inspection account." Further, the SEC alleged that Lucent's accounting books were not transparent and failed to show what actually had occurred. Overall, the company lacked adequate controls and training on how to properly provide gifts, travel, and entertainment to foreign officials. In a non-prosecution agreement with the DOJ, Lucent was required to adopt new, or modify existing, internal controls, policies, and procedures to ensure fair and accurate books, records, and accounts.[44] In addition, Lucent agreed to implement a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable corruption laws.[45] Following the *Lucent* case, many companies have reduced the travel, gifts, and entertainment they provide to foreign officials and have imposed more stringent controls.

Right Way: DOJ Opinion Procedure Releases 2007-01 / 02

In 2007, the DOJ issued two FCPA Opinion Procedure Releases which offer guidance to companies considering whether and, if so, how to incur travel and lodging expenses for government officials.[46] Opinion Procedure Releases 07-01 and 07-02 describe a list of steps companies may follow to avoid FCPA liability. First, companies should not select the officials who will travel. Having the foreign agency nominate the officials for travel demonstrates transparency between the company and the foreign government. Second, the travel must directly relate to "promotion, demonstration, or explanation of products or services." Minor

souvenirs are allowed. Similarly, modest "educational or promotional" tours are permitted, but side trips to places like Disney World or Las Vegas will pose a problem. Third, the DOJ Opinions stress moderation, mentioning that travel should be economy airfare and any per diem should be modest ($35/day). Of course, companies must accurately record the expenses in their books and records. Further, travel will more likely comply with the FCPA when the travelers have no authority to award business or a license to the company, and when no contracts or licenses are pending before the officials' agencies. In short, while the FCPA does not prohibit the provision of travel and lodging to foreign officials in practice, the scope of this affirmative defense is narrowly drawn.

Corporate FCPA Compliance Program

Companies can minimize the risks of FCPA liability by establishing a carefully tailored compliance program that educates employees about the conduct that is prohibited by the FCPA, thereby signaling that management takes that prohibition seriously. An effective FCPA compliance program increases the odds that any misconduct that does occur will be detected and deterred at an early stage.

The value of an effective FCPA compliance program goes well beyond prevention and detection. US enforcement authorities have made clear that companies with effective FCPA compliance policies will be rewarded in settlement negotiations, and that those without effective policies may receive harsher punishments.[47] In fact, in several cases, government officials have made it clear that the sanction imposed reflected, in part, their view that the company's compliance program was woefully insufficient. The SEC's 2007 complaint against Lucent, for example, specifically alleged that "Lucent's violations occurred because Lucent failed, for years, to properly train its officers and employees to understand and appreciate the nature and status of its customers in China in the context of the FCPA."[48] Similarly, the SEC's complaint against Titan blasted the company's alleged compliance shortcomings:

> Despite utilizing over 120 agents and consultants in over 60 countries, Titan never had a formal company-wide FCPA policy, failed to implement an FCPA compliance program, disregarded or circumvented the limited FCPA policies and procedures in effect, failed to maintain sufficient due diligence files on its foreign agents, and failed to have meaningful oversight over its foreign agents.[49]

For all of these reasons, an FCPA compliance program should be viewed as an essential risk management tool. Every company with potential FCPA exposure should adopt a compliance program that takes, at a minimum, the following ten steps: (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; and (10) adjust the compliance program to current risk assessment.

Conclusion

The FCPA is a demanding statute requiring companies to exercise due diligence in preventing violations when conducting business overseas. Companies are best positioned to mitigate violations by incorporating robust FCPA compliance programs into their international operations. Global companies are best-served when risks of corrupt activity are fully appreciated and properly managed before the misconduct occurs.

Endnotes

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1 15 U.S.C. § 78dd-1(a).

2 15 U.S.C. § 78dd-1(a).

3 *See e.g., United States v. DPC (Tianjin) Co., Ltd.*, No. CR 05-482 (CD Cal filed 20 May 2005).

4 15 U.S.C. § 78dd-1(a)(2).

5 15 U.S.C. § 78dd-1(f)(1).

6 *See e.g., United States v. AGA Medical Corp.*, Dep't of Justice Press Release No. 08-491 (June 3, 2008).

7 15 U.S.C. § 78dd-1(b).

8 15 U.S.C. § 78dd-1(f)(3)(a).

9 15 U.S.C. § 78dd-1(f)(3)(b).

10 15 U.S.C. § 78dd-1(c)(1).

11 15 U.S.C. § 78dd-1(c)(2).

12 In enacting the FCPA, Congress created a procedure that would permit any person or company subject to the FCPA to ask DOJ, in advance, whether it would prosecute proposed conduct under the statute. Under the law, "[the opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section." 15 U.S.C. § 78dd-1(e). A DOJ opinion creates a "rebuttable presumption" that the conduct in question complies with the FCPA and with the DOJ's current enforcement practices.

Regulations related to the opinion procedure can be found in 28 CFR Part 80. The regulation provide instructions to requestors on the scope of information needed for the opinion including the requirement "to make full and true disclosure with respect to the conduct for which an opinion is requested." The DOJ will issue a written Opinion Procedure within 30 days of the request. While only the requesting company can use these opinions as precedent, they provide guidance into how the DOJ views particular conduct from an FCPA enforcement standpoint.

13 15 U.S.C. § 78ff.

14 *SEC v. Titan Corp.*, 05-CV-0411 (D.D.C. 2005); *United States v. Titan Corp.*, (SD Cal. No. 05-0314, 2005).

15 *In the Matter of Statoil ASA*, Admin. Proc. File No. 3-12453; *US v. Statoil, ASA*. No. 06-CR-00960-RJH-1 (S.D.N.Y. 2006).

16 *SEC v. York Int'l Corp.*, No. 1:07-CV-01750 (D.D.C. 2007).

17 *United States v. Vetco Gray Controls et al.,* No. 07-CR-004 (SD Tex. 2004).

18 DOJ Press Release No. 07-296 (Apr. 26, 2007).

19 *United States v. Stanley*, Crim. No. H-08-597 (SD Tex. 2008).

20 DOJ Press Release No. 08-848 (Sept. 23, 2008).

21 *See* 22 Corporate Crime Reporter 36(1), Sept. 16, 2008 ("Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007").

22 Recent settlements featuring compliance monitors include: *SEC v. Willbros Group Inc., et al.* No. 4:08-CV-01494 (SD Tex. 2008); *US v. AGA Medical Corp.*; and *United States v. Faro Techs.*, DOJ Press Release No. 08-505 (June 5, 2008).

[23] The *Washington Post* has reported, for example, that one monitoring assignment secured by the consulting firm of former Attorney General John Ashcroft was expected to produce approximately $25 million in fees. *See* Carrie Johnson, "Ex-Officials Benefit From Corporate Cleanup," *Washington Post*, Jan. 15, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/14/AR2008011402939.html.

[24] DOJ Press Release No. 08-772 (Sept. 3, 2008).

[25] *See* SEC Litigation Release No. 20410 (December 20, 2007), stating that Akzo Nobel will enter into a non-prosecution agreement, pursuant to which it would pay a criminal fine to Dutch authorities; Dep't of Justice Release No. 06-700 (October 13, 2006) (quoting Assistant Attorney General Alice S. Fisher as stating that the government's willingness to resolve the case through a deferred prosecution agreement was due, in part, to "the fact that the Norwegian authorities also investigated and sanctioned Statoil.").

[26] *SEC v. Baker Hughes Inc.*, No. H-07-1408 (SD Tex. filed Apr. 26, 2007); *see also* Litigation Release No. 200094 (Apr. 26, 2007); DOJ Press Release No. 07-296, *Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case* (Apr. 26, 2007).

[27] *In re BellSouth Corporation*, SEC Admin. Proc. Rel. No. 34-45279 (Jan. 15, 2002).

[28] *In re Delta & Pine Land Co.*, Exchange Act Release No. 56,138 (July 26, 2007).

[29] *Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines*, DOJ Press Release No. 07-075 (Feb. 26, 2007).

[30] *SEC v. GE InVision, Inc.*, C 05 0660 (ND Cal filed Feb. 14, 2005).

[31] *InVision Technologies Inc. Enters into Agreement with the United States*, Dep't of Justice Release No. 04-780 (Dec. 3, 2004). InVision settled a companion SEC case approximately two months later by agreeing to pay $500,000 in civil penalties and $617,700 in disgorgement and pre-judgment interest, totaling approximately $1.2 million. *SEC v. InVision, Inc.*, C 05 0660 (ND Cal. filed Feb. 14, 2005).

[32] DOJ Press Release, *InVision Technologies, Inc. Enters into Agreement with the United States* (Dec. 6, 2004) (discussing InVision's resolution of criminal FCPA liability and General Electric's acquisition of InVision).

[33] *SEC v. Titan Corp.*, No. 05-0411, at ¶ 3 (DDC filed Mar. 1, 2005); *United States v. Titan Corp.*, Case No. 05 CR 0314-BEN (SD Cal. filed Mar. 1, 2005).

[34] Renae Merle, "Lockheed Martin Scuttles Titan Acquisition," *Washington Post*, June 27, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A8745-2004Jun26.html.

[35] *United States v. York Int'l Corp.*, No. 1:07-CR-00253 (DDC filed Oct. 1, 2007).

[36] *SEC v. York Int'l Corp.*, No. 1:07-CV-01750 (DDC filed Oct. 1, 2007).

[37] DOJ Opinion Release 08-01 (Jan. 15, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf.

[38] This due diligence included the following steps: (i) the requestor commissioned a report on the foreign private company owner by a reputable international investigative firm; (ii) the requestor retained a business consultant in the foreign municipality, who provided advice on possible due diligence procedures in the foreign country; (iii) the requestor commissioned international company profiles on the investment target and foreign private company from the US Commercial Service of the Commerce Department; (iv) the requestor searched the names of all relevant persons and entities, including the foreign private company owner, the investment target, and the foreign private company, through the various services and databases accessible to the requestor's international trade department—including a private due diligence service—to determine that no relevant parties were included on lists of designated or denied persons, terrorist watches or similar designations; (v) the requestor met with representatives of the US Embassy in the foreign municipality and learned that there were no negative records at the Embassy regarding any party to the proposed transaction; (vi) outside counsel conducted due diligence and issued a preliminary report, with an updated report to be completed prior to the closing date of the proposed transaction; (vii) an outside forensic accounting firm prepared a preliminary due diligence report, with a final report to follow; and (viii) a second law firm reviewed the due diligence.

[39] In its opinion request, Halliburton had committed to take the following post-acquisition steps: (1) immediately disclose any violations discovered in pre-closing investigations; (2) within 10 days of closing, submit an FCPA due diligence plan to the DOJ to be completed within 180 days of closing, and fully investigate any issues within one year from the closing date; (3) retain outside counsel, third-party consultants, and forensic accountants; (4) sign new contracts that incorporate anti-corruption provisions with all agents and other third parties associated with the target; (5) impose all of its Code of Business Conduct and FCPA anti-corruption policies on the target and conduct anti-corruption training immediately following closing; and (6) disclose all FCPA and related violations discovered during the 180 day due diligence and follow any additional steps requested by the DOJ.

[40] SEC Exchange Act Release No. 44784 (September 12, 2001). The case was resolved through a cease-and-desist order that enjoined Baker Hughes from committing future FCPA violations.

[41] *SEC v. Con-way Inc.*, Civ. Action No. 08-cv-01478 (EGS) (Aug. 28, 2008).

[42] 15 U.S.C. § 78dd-1(c)(2)(A)-(B).

[43] *SEC v. Lucent Tech. Inc.*, Civ. Act. No. 1:07-cv-02301 (DDC filed Dec. 21, 2007); Litigation Release No. 20414 (Dec. 21, 2007); DOJ Press Release 07-1028, *Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations*.

[44] DOJ Press Release 07-1028 (Dec. 21, 2007).

[45] *Id.*

[46] FCPA Op. Proc. Rel. 2007-01 (2007); FCPA Op. Proc. Rel. 2007-02 (2007).

[47] The SEC and the DOJ have each announced that the quality of a company's pre-existing compliance policies will be considered in fashioning penalties for businesses that violate US law. *See* SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 34-44969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm [commonly known as the "Seaboard Report"]; Paul J. McNulty, Deputy Attorney General, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

[48] *SEC v. Lucent Techs.*, Civ. Action No. 1:07-cv-02301 (RBW) (DDC Dec. 21, 2007), at ¶ 3.

[49] *SEC v. Titan Corp.*, Civ. Action No. 05-0411 (JR) (DDC March 1, 2005), at ¶ 6.

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