THE FOREIGN CORRUPT PRACTICES ACT: AN OVERVIEW

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This white paper summarizes some of the key points, considerations, and factors when faced with a "Foreign Corrupt Practices Act" matter. As with any overview, this one is not designed to answer the specifics of a particular case. Indeed, specific legal advice should be sought if you or your company is confronted with a Foreign Corrupt Practices Act matter.

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The Foreign Corrupt Practices Act

WHAT IS THE FOREIGN CORRUPT PRACTICES ACT?

The Foreign Corrupt Practices Act ("FCPA") is a federal statute that makes it unlawful for companies to pay foreign government officials for the purpose of obtaining or maintaining business. Put more bluntly, it prohibits companies and individuals from bribing foreign officials to get work.

In addition, although more "famous" for prohibiting bribery, a second component of the FCPA, generally known as the accounting provisions, requires companies to maintain accurate records and have sufficient internal controls.

This overview will focus on the "anti-bribery" provisions because they garner the most attention, although the accounting provisions should be considered in every case.

WHO ENFORCES THE FCPA?

The FCPA can be both criminal and civil. Thus, both the U.S. Department of Justice (criminal) and the U.S. Securities and Exchange Commission ("SEC") (civil/regulatory) investigate and prosecute FCPA cases. In addition, both agencies typically conduct "parallel investigations" of the same company and/or the same individuals. Consequently, no company or individual that confronts a parallel investigation can ever deal with one agency in a vacuum; something done with one agency could have unintended consequences with the other agency. Finally, almost all criminal FCPA matters are handled or directed by the Justice Department's Criminal Division, Fraud Section in Washington, DC.

On November 14, 2012, the Justice Department and the SEC jointly issued a 120-page "Resource Guide to the U.S. Foreign Corrupt Practices Act."

HOW AGGRESSIVE IS FCPA ENFORCEMENT?

In a word, "very." The FCPA was enacted in 1977, but over the past decade, FCPA enforcement has skyrocketed. Corporate executives have gone to federal prison, and companies have paid hundreds of millions of dollars to settle and resolve FCPA cases. Here are some top corporate settlements over the past several years:

SIEMENS
$800 million (2008)

KBR/HALLIBURTON
$579 million (2009)

ALCOA
$384 million (2014)

TECHNIP S.A.
$338 million (2010)

DAIMLER AG
$185 million (2010)

WEATHERFORD INTERNATIONAL
$152.6 million (2013)

MAGYAR TELEKOM/ DEUTSCHE TELKOM
$95 million (2011)

This trend can be expected to continue. Indeed, at a conference in November 2013, the chiefs of the respective FCPA units at the Justice Department and the SEC made it very clear that FCPA enforcement would be a priority, and they touted their increased resources to serve that purpose. This was put more directly (or ominously, depending on one's point of view) by Professor Mike Koehler, author of the pre-eminent "FCPA Professor" blog, in January 2014: "Like all statutes, the Foreign Corrupt Practices Act has specific elements that must be met in order for there to be a violation. However, with increasing frequency in this new era of FCPA enforcement, it appears that the Department of Justice and the Securities and Exchange Commission have transformed FCPA enforcement into a free-for-all in which any conduct the enforcement agencies find objectionable is fair game to extract a multimillion dollar settlement from a risk-averse corporation."

WHAT CAN VIOLATIONS LEAD TO?

Violations of the FCPA can lead to civil and criminal prosecutions and/or penalties (including prison for individuals), sanctions, fines, disgorgement, debarments, injunctions, deferred prosecution agreements, and appointment of an outside monitor, not to mention legal fees, human capital in handling investigations, and business and reputational harm.

WHAT ARE THE ELEMENTS OF THE ANTI-BRIBERY PROVISIONS?

In order to prove a violation of the anti-bribery provisions of the FCPA, the Justice Department and/or the SEC must prove essentially the following elements:

1. A payment, offer, authorization, or promise to pay money or anything of value
2. To a foreign government official, or to any other person, knowing that the payment or promise will be passed on to a foreign official
3. With a corrupt motive
4. For the purpose of influencing any act or decision of that foreign official, inducing that foreign official to do or omit any action in violation of his/her lawful duty, securing an improper advantage, or inducing that foreign official to affect an official act or decision
5. In order to assist in obtaining, retaining, or directing business.

WHO IS COVERED BY THE FCPA?

The FCPA applies to "issuers," "domestic concerns," and foreign nationals or businesses who take any action regarding a corrupt payment while within U.S. territory. Essentially, an "issuer" is a corporation that has issued securities that have been registered in the US or who is required to file periodic reports with the SEC. A "domestic concern" is an individual or corporation that has its principal place of business in, or is organized under the laws of, the US. "Foreign nationals or businesses" means any such national or business (other than an issuer or domestic concern) who, while in the territory of the US, makes use of the mails or any means of interstate commerce in furtherance of a bribe. These definitions are very broad and have many case-specific nuances, all of which must be analyzed and assessed given the particular facts of any case.

ARE THERE ANY DEFENSES TO FCPA ALLEGATIONS?

Other than factual innocence, of course, the statute permits certain payments as well as provides affirmative defenses. Specifically, payments are permissible if they facilitate or expedite performance of "routine government action," for example, obtaining permits or licenses; processing government papers such as visas or work orders; or providing police protection, mail pick up and delivery, or phone, power, or water service. This category has been analogized as applying to "non-discretionary" functions.

The affirmative defenses include payments that are permitted under the written laws of the foreign official's country (although

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it will be exceedingly difficult to successfully argue that bribery is acceptable under any country's laws), and that payments were a reasonable and bona fide expenditure. Even this latter "protection" related to expenditures can be viewed as crossing the line if it is intended to influence (for example, a luxury hotel stay for a foreign official).

HOW CAN A COMPANY BEST PROTECT ITSELF?

There are several actions through which a company can best protect itself against FCPA allegations and investigations. First, it is imperative to have a robust training and education program. Second, it is critical to have an equally robust and vibrant compliance program run by a dedicated person or persons who pro-actively ensure that the program is adhered to. Third, any instances of even the appearance of a problem (before the government gets involved) should be internally and thoroughly investigated by experienced counsel. Based upon the outcome of that internal investigation, a company might want to consider whether to self-report; this is a critical decision that, while beyond the scope of this outline, has a variety of potential consequences.

Fourth, if the matter arises from a government inquiry (as opposed to self-detection), experienced counsel should be retained immediately; there are many moving parts to government investigations, and an erroneous decision early can influence the entire course of the investigation and ultimate outcome. Fifth, a company should familiarize itself with the well-known "red flags" of a potential FCPA violation, particularly including the use of third-party "consultants," "agents," or "experts." It is absolutely essential that any such third-party person be fully vetted and that due diligence be conducted on his/her background, the services he/she is providing, and his/her experience in providing such services. Other "red flags" include unusual payment arrangements or patterns, the "history" of the country (a publicized "Transparency International Corruption Perception Index" ranks countries on a corruption scale; the "lower" the ranking, the bigger the "red flag"), unusually high commissions, payments to third parties that are high relative to the overall value of a project, and lack of transparency and/or lack of paperwork.

The U.S. government, through the Justice Department and the SEC, have made the FCPA a cornerstone of their respective law enforcement missions. The recent trend, which is unlikely to change, is toward aggressive enforcement. Any company or individual conducting business abroad must be fully familiar with the FCPA and be cognizant of both how to pro-actively minimize the risk of a violation and how to manage an investigation should one arise.

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