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How Companies Can Mitigate Potential Issues Arising Under the Foreign Corrupt Practices Act

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Robust compliance programs may avoid federal investigations under the Foreign Corrupt Practices Act or, alternatively, take advantage of the Department of Justice's policy of viewing such programs, even if not foolproof, as evidence of a company's good faith efforts to comply with the law.

The Foreign Corrupt Practices Act ("FCPA")[1] makes it illegal for U.S. companies and citizens, foreign companies listed on a U.S. stock exchange, or any person acting while in the U.S. to make payments to foreign government officials to assist in obtaining or retaining business. The FCPA specifically prohibits a person or company from making a bribe to a foreign official to influence that official or to secure an improper advantage in obtaining or retaining business. The FCPA applies to all U.S. persons and businesses, as well as foreign persons or businesses that cause an act related to a bribe to occur in the U.S. or its territories.

Congress passed FCPA in 1977 in response to voluntary disclosures by multiple large U.S. companies that had made questionable or illegal payments to foreign government officials, politicians or political parties.

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In 1976, following several prosecutions for illegal use of corporate funds arising out of the Watergate scandal, the U.S. Securities and Exchange Commission issued a report in which it determined that foreign bribery by U.S. corporations was "serious and sufficiently widespread to be a cause for deep concern."[2]

Compliance with the FCPA has recently taken on more importance in this era of international concern with business ethics and with the passage of the Sarbanes-Oxley Act and the Federal Organizational Sentencing Guidelines,[3] all of which encourage and often require ethics compliance programs.

RECENT FCPA ENFORCEMENT TRENDS

Although the FCPA has historically generated relatively few prosecutions, there has been a recent flurry of investigations and self-disclosures regarding FCPA violations. The United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), the two agencies charged with enforcing the FCPA, have, in the past few years, significantly increased enforcement activities related to the FCPA. Indeed, Lanny Breuer, assistant attorney general for the Criminal Division, recently gave a speech suggesting that the DOJ will continue to aggressively pursue FCPA investigations:

> [I]n the Criminal Division, we have dramatically increased our enforcement of the Foreign Corrupt Practices Act in recent years. That statute, which was once seen as slumbering, is now very much alive and well.... We recently promoted a new head of the Section's FCPA Unit and two assistant chiefs and we have also increased the number of line prosecutors in the Unit, attracting high caliber attorneys with extensive experience — including Assistant U.S. Attorneys with significant trial and prosecutorial experience and attorneys from private practice with defense-side knowledge and experience. These changes have significantly increased our FCPA enforcement capabilities.[4]

Thus, it is clear that the business community can expect to see more from the DOJ in this area.

RECENT FCPA ENFORCEMENT ACTIONS

Given the DOJ's apparent intent to keep pursuing FCPA investigations, here are a few examples that highlight the importance of FCPA compliance:

Lindsey Manufacturing

In the first trial against a corporation, Lindsey Manufacturing, a small, privately-held corporation based in California that manufactures and sells electricity transmission systems to electric utility companies, and two of its executives, were found guilty in May 2011 on six FCPA charges in California federal court.[5] In addition to being the first corporate trial (and trial conviction) in FCPA history, this case provides at least two critical lessons for companies and corporate executives subject to the FCPA. First, the court issued a significant ruling on the scope of the term "foreign official," finding that employees of state-owned entities may qualify as "foreign officials" for purposes of the FCPA. Second, this case demonstrates that juries are quite willing to convict corporate executives on FCPA charges, even when the only evidence against them is circumstantial and indirect.

However, the court, in December 2011, threw out the jury conviction against Lindsey and the two executives and dismissed the indictment with prejudice. The court found the government prosecutors engaged in misconduct during both the pre-indictment and post-indictment phases of the case. The pre-indictment misconduct included false statements in a search warrant and accompanying affidavits, failure to comply with federal law in searching and reviewing electronically stored information on seized computers, conducting unauthorized warrantless searches, and false grand jury testimony by an FBI agent. The post-indictment misconduct consisted of failing to produce the FBI agent's grand jury testimony, wrongfully obtaining co-defendant's privileged communications (and then making misrepresentations about it), and making an improper closing argument that tainted the jury. Unless the ruling is overturned on appeal, the defendants cannot be tried again for the same offenses.

Gabon Sting/SHOT Show Case

In late 2009 and early 2010, a District of Columbia grand jury indicted 22 defendants, charging them with, among other things, violations of the FCPA, and conspiracy to violate the FCPA.[6] The indictments all related to a purported deal to sell $15 million in military and law enforcement products to the Ministry of Defense for Gabon. The case is often referred to as the "SHOT Show Case" because the vast majority of defendants were arrested at a shooting and hunting convention in Las Vegas in January 2010. Originally, the grand jury returned 16 indictments against the 22 defendants, but the grand jury later returned a superseding indictment in April 2010 that consolidated all 22 defendants into one case, the largest ever for an FCPA case.

When the indictments were unsealed in 2010, the DOJ publicized the FCPA prosecution as evidence that it was focusing on individuals (and not just companies) in its FCPA investigations. Last year, one of the cases proceeded to trial. A mistrial was declared when jurors were unable to reach a verdict. The second trial of six defendants (including a former Secret Service agent) commenced in September 2011. The results were not good for the DOJ. One defendant was acquitted by the judge for insufficient evidence before the case went to the jury. After 17 weeks of trial, the case went to the jury for deliberations in January 2012. In February 2012, the jury acquitted two defendants and was unable to reach a verdict on three defendants. The judge declared a mistrial against the three defendants and the DOJ decided to dismiss the Superseding Indictment and all underlying indictments with prejudice.

Las Vegas Sands

In the first FCPA investigation aimed at the hospitality industry, the SEC and the DOJ are investigating the Sands Macau, operated by Las Vegas Sands (LVS) based on the company's disclosure in its annual report that it received a subpoena from the SEC requesting documents concerning its FCPA compliance.[7] The government's focus on LVS appears to arise out of a lawsuit filed by Steven Jacobs, who was fired from his role as CEO of the company's Chinese affiliate.[8] In a complaint filed in Nevada

State Court in October 2010, Jacobs makes a number of allegations concerning "repeated and outrageous demands" by LVS CEO Sheldon Adelson.[9] Among those claims, Jacobs alleged that Adelson demanded that he exert "leverage" over certain government officials in Macau in order to further LVS's interests. He also charged that Adelson mandated the continued retention of a Macau attorney despite concerns that the individual's employment posed "serious risks" under the FCPA. In addition, following on the allegations made by Jacobs, five shareholder groups filed derivative suits in March and April 2011 against Las Vegas Sands Corp. and its directors in Nevada state and federal court, alleging that the defendant directors breached their fiduciary duties by failing to implement sufficient internal controls to prevent FCPA violations in Macau. The DOJ and the SEC are also conducting their own investigations of the allegations.[10]

EFFECTIVE FCPA COMPLIANCE

FCPA "Red Flags"

A review of the most recent FCPA actions, discussed *supra*, suggests certain red flags that should be recognized to avoid the problems others have faced. The most common FCPA violation is a payment that does not have an identifiable legitimate purpose. But there are other red flags with which companies should be familiar to evaluate the risk of doing business overseas. Some countries, for example, have a reputation for corruption and bribery; and companies doing business in those countries must exercise particular care.[11] Furthermore, certain industries are considered particularly susceptible to bribery issues. These include defense, energy, construction services, the hotel industry, and other cash-flow intense projects.

Certain behaviors in a company's foreign contacts may raise red flags regarding potentially problematic payments. The DOJ and SEC expect companies to be meticulous in selecting partners in foreign countries. It is sometimes necessary, and often helpful, to engage local representatives to navigate the customs and bureaucracy of a foreign country, but one of the FCPA's most dangerous traps is the use of foreign agents or middlemen. Foreign agents must be carefully selected, screened and supervised. For example, an agent's request for a sizable "commission" is considered a

warning sign. If a large commission is requested, it is quite possible that part will end up as a payoff to a foreign government official. Any agreements with a foreign agent need to be documented in detail, describing the specific services to be performed and forbidding any conduct that would be considered a violation of the FCPA. Only a foreign agent with the resources and experience may complete the contemplated project. Other potential indicia of an illegal practice may include:

- The involvement of shell companies in the transaction, especially ones located offshore;
- The involvement of a government official in an unofficial capacity — as an owner of the company, a recommender of the company, or as a relative of someone involved in the deal; or
- A requirement of up-front payments or payments in cash.

An awareness of these issues can save the company time, money, and the threat of criminal investigation.

Avoiding an FCPA Issue

Compliance

According to the DOJ, the key to avoiding an investigation is a well-designed and fully-executed compliance program.[12] "The fundamental questions any prosecutor will likely ask are: "Is the corporation's compliance program well-designed?" and "Does the corporation's compliance program work?"[13] The DOJ will likely consider:

> [T]he comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate

> governance mechanisms that can effectively detect and prevent misconduct.[14]

An effective compliance program can help a company successfully avoid an FCPA investigation. Unfortunately, the DOJ does not have formal guidelines for evaluating compliance programs, which makes compliance potentially tricky.[15]

Informal DOJ guidance provides a specific, though onerous, road map to compliance. The major elements of an effective compliance program include:

1. Sound corporate policy;
2. Training in regard to the policy and the law;
3. Adequate staffing to monitor compliance and possibly an independent internal auditor or oversight committee,
4. proper standard clauses in all international agreements;
5. A reporting system for suspected violations and protection of whistleblowers;
6. Delineated disciplinary procedures; and
7. A recordkeeping system to ensure compliance with the FCPA.[16]

Unfortunately, even a corporate compliance program may "not absolve the corporation from criminal liability under the doctrine of *respondeat superior*."[17] Even with an effective compliance program in place, if an employee engages in criminal conduct, a company may still be implicated. Companies may want to allow only their most trusted employees to be involved with projects overseas.

In addition to a compliance program, a U.S. business can also limit FCPA exposure by negotiating contracts that minimize FCPA risks. For example, a company can include standard representations, warranties, and covenants in a contract with agents and distributors wherein they affirm their understanding of and commitment to comply with the FCPA. More practical suggestions include translations, into the primary language, of

FCPA guidelines and handbooks for those employees, agents, and partners who cannot be assumed to read, understand, and interpret FCPA guidance that is written in English.[18]

Role of the Attorney

Experienced legal counsel play a central role in any investigation of an FCPA issue. The attorney-client privilege can be essential to determining whether or not a violation has actually occurred. However, whether to have the company's legal department or outside counsel handle the investigation often presents a dilemma. The current trend, especially in light of the recent rash of stock back-dating investigations, is to engage outside counsel to handle internal investigations of possible criminal acts. In addition to the normal representation letter, the appropriate company official or committee should provide written instructions and authority to the outside counsel to conduct the investigation.

During the internal investigation, discussed *infra*, attorneys should work in teams, especially when interviewing employees. It is important that, before asking questions, counsel explain the purpose of the investigation to the employees whom they represent (i.e., the company). It is also advisable to have the employees sign a "rights statement" to show they have been advised of their rights, including the right to their own attorney.

Addressing an FCPA Violation

When an FCPA violation occurs, the company first finds out what happened and the extent of the potential violation. All illicit company activity stops if the company determines that continued activity may be unlawful or inappropriate in light of the ongoing investigation. This activity includes further payments to its overseas agents and it may even be proper to suspend or terminate involved employees. The bottom line is that every alleged or potential FCPA compliance violation should have a documented investigation that is reviewed by an internal and external source to determine if a violation has actually occurred.

The investigation may be authorized through the general counsel by the board of directors to ensure it has the appropriate independent author-

ity to act on behalf of the company. Care should be taken regarding attorney-client relationships and separate counsel should be considered for the investigation. At the beginning of the investigation, a "preservation" memorandum may be issued to preserve all potentially relevant documents (both hard copy and electronic). Document retention is vital to how an investigation and its results are viewed.

Attorneys exercise particular care when conducting interviews due to the potential criminal charges facing the company and its employees. Both employees and the company are potential defendants, making the situation ripe for conflict, should the interests of the parties diverge. Also, companies are often asked to waive their attorney-client privilege as part of a non-prosecution agreement. That means that statements that were made during company interviews, even by in-house counsel, may become evidence against those employees if criminal charges are brought. Therefore, particular care must be taken in advising employees of their rights orally and in writing.

Conducting an investigation is especially important because the actions a company takes after the suspected or alleged FCPA violation is discovered may allow a company to avoid criminal prosecution. The DOJ specifically examines post-violation conduct to determine whether to charge a company or the individuals involved with an FCPA violation. First, investigators consider the promptness of any disclosure of wrongdoing by the company's agents to the government, as well as the extent of a company's cooperation with the government's investigation, in determining the extent of punishment. According to the DOJ, "[a] corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur."[19] Second, when determining whether prosecution is necessary for an FCPA violation, the DOJ considers a company's willingness to take meaningful remedial actions and make restitution.[20] Remedial actions include the same exact actions that the company should have taken *before* the alleged violation, such as implementing an effective corporate compliance program, "improving an existing compliance program, and disciplining wrongdoers."[21]

Voluntary disclosures are a growing trend in FCPA investigations. This suggests that companies perceive that self-disclosure will result in more

favorable treatment by the DOJ. This disclosure likely must be accompanied by full cooperation during the federal investigation, which, unfortunately, may include an attorney-client waiver and its natural repercussions. The possible benefit to voluntary disclosure is that the DOJ might be more likely to enter into a deferred prosecution agreement with the company. As part of this type of agreement, companies are often required to submit to monitoring. On the other hand, self-reporting may not always be appropriate because a company may have legitimate reasons not to self-report.

CONCLUSION

Despite recent setbacks in several high-profile cases, the U.S. government has shown an expanded willingness to investigate and indict companies and individuals alike for alleged violations of the FCPA. Robust FCPA compliance programs may avoid such investigations or, alternatively, take advantage of the DOJ's policy of viewing such programs, even if not foolproof, as evidence of a company's good faith efforts to comply with the law.

NOTES

[1] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (amended 1988 and 1998), codified at 15 U.S.C. §§ 78dd-1, *et seq*.

[2] Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act, *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

[3] *See* Sentencing Guidelines for the United States Courts, 69 Fed. Reg. 28,994 (May 19, 2004); *but see United States v. Booker*, 543 U.S. 220, 221 (2005) (reasoning that mandatory application of the Guidelines is unconstitutional, but are still advisory and considered in plea negotiations).

[4] Breuer, *supra* note 2.

[5] *United States v. Noriega et al*, Case No. 2:10-cr-01031-AHM (C.D. Ca.).

[6] *United States v. Goncalves et al*, Case No. 1:09-cr-00335-RJL (D.D.C.).

[7] Las Vegas Sands Corp., Annual Report (Form 10-K), at 31 (Feb. 28, 2011).

[8] *Id.* at 43.

[9] *Jacobs v. Las Vegas Sands Corp*., Case No. A-10-627691-B (Nev. Dist. Ct.).

[10] Las Vegas Sands Corp., Annual Report, *supra* note 7, at 43.
[11] Countries perceived to be highly corrupt include: Somalia, North Korea, Myanmar, Afghanistan, Uzbekistan, Turkmenistan, Iraq, Haiti, Venezuela, Equatorial Guinea and Burundi. Transparency International, 2011 Corruption Perceptions Index 2011.
[12] *See* United States Attorneys' Manual § 9-28.800.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *See* United States Department of Justice, Foreign Corrupt Practices Act Review, Opinion Procedure Release 04-02.
[17] *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ...such acts were against corporate policy or express instructions.").
[18] Daniel Margolis and Brent Carlson, *Mitigating FCPA Risks when Doing Business in China*, 4 Bloomberg corp. l. j. 117, 124 (2009).
[19] United States Attorneys' Manual, *supra* note 12, § 9-28.900.
[20] *Id.*
[21] *Id.*