FCPA: Good Compliance and Monitoring Will Keep the Government at Bay

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The United States government has enforced the Foreign Corrupt Practices Act (FCPA) with increasing vigor in recent years. The number of FCPA actions and settlements has risen dramatically—and in-house counsel responsible for ensuring that a company's overseas operations are handled appropriately need to pay close attention to the strictures of the FCPA and to the development of a comprehensive FCPA compliance program.

A. The Act

In 1977, Congress enacted the FCPA as part of the 1934 Securities Exchange Act. The FCPA criminalized the bribery of foreign officials by U.S. corporations and individuals pursuing business in other countries and required that companies with publicly traded stock meet certain standards regarding their accounting practices, books and records, and internal controls. The FCPA was amended in 1988 and 1998.

A violation of the anti-bribery provisions of the FCPA occurs when: (1) a person who is subject to U.S. jurisdiction; (2) offers, gives, promises, or authorizes the giving of; (3) anything of value; (4) to a non-U.S. government official; (5) whether directly or indirectly through a third party; and (6) for an improper purpose, that is, for the corrupt purpose of intending to influence official action or inaction or decision, or to induce the use of official influence or otherwise secure an improper advantage to obtain or retain business. See 15 U.S. C. §§ 78dd-1 et seq. The provisions apply to any company with securities registered in the U.S. or required to file periodic reports with the SEC; any U.S. domestic concern, including any U.S. citizen, resident, or national; any business organized under the laws of the U.S.; any business with its principal place of business in the U.S.; and any overseas branches of U.S. companies; officers, directors, employees, agents, or stockholders acting on behalf of stock issuers or domestic concerns; and any other person while in the U.S. The provisions only apply to foreign-organized issuers if they use instrumentalities of U.S. commerce in furtherance of the bribe.

Although the statute does not define the term "corruptly," legislative history indicates that the payment must be intended to influence the recipient to "misuse his official position" in order to wrongfully direct, obtain, or

retain business. H.R. Rep. No. 95-640, at 7-8 (1977). The U.S. Senate indicated that the purpose of including the word "corruptly" was "to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client . . . The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient." S. Rep. No. 95-114, at 10 (1977).

There is one exception and two statutory affirmative defenses to an anti-bribery violation. The one exception is if the payment to a foreign official is to expedite or secure the performance of a routine governmental action. The so-called "facilitating" payment or "grease" payment exception has limited application, and generally only applies to non-discretionary actions by a foreign official, such as processing government paperwork, providing routine government services (i.e., police protection, mail pick-up, etc.), and actions of a similar nature. Routine governmental action does not include a decision by a foreign official to award business to, or to continue business with, a company. The two affirmative defenses to an anti-bribery violation are those instances in which the payment to a foreign official is: (1) lawful under the written laws and regulations of the foreign country; or (2) a reasonable and bona fide expenditure directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.

The accounting provisions of the FCPA require issuers of U.S. securities to maintain accurate books and records, report transactions in reasonable detail, and have adequate internal controls over accounting records and assets. See 15 U.S.C. § 78m(b). "Reasonable detail" is defined as "such level or detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m (b)(7). In addition, the provision requires issuers to "devise and maintain a system of internal accounting controls" sufficient to provide reasonable assurances that, among other things, transactions are executed in accordance with management's general or specific authorization, and transactions are recorded as necessary to permit the preparation of financial statements in conformity with Generally Accepted Accounting Principles (GAAP) and to maintain accountability of assets. 15 U.S.C. § 78m(b)(2)(A). Criminal liability will only attach to a company for violating the books and records provisions of the FCPA where the business concern "knowingly circumvent[ed] or knowingly fail[ed] to implement a system of internal accounting controls or knowingly falsif[ied] the accounting records." 15 U.S.C. § 78m(b)(4) and (b)(5).

B. Compliance and Disclosure

The government has brought an increasing number of FCPA cases each year. 2010 set a record for FCPA settlements and charges, with 48 new cases being brought by the Department of Justice (DOJ), an 85 percent jump over the previous year. The U.S. Securities and Exchange Commission (SEC)—which has civil

jurisdiction over the FCPA—brought 26 new cases in 2010, compared to 14 during the prior year. Recently, the Dodd-Frank whistleblower statute was enacted, making it easier and more lucrative for employees to bring FCPA violations to the attention of the government.

The new laws and increased level of enforcement means that it is becoming increasingly important for companies to have comprehensive FCPA compliance programs. A good compliance program will have several critical elements to ensure proper monitoring and internal oversight of FCPA issues. This should include, among other things: high level management (including legal) oversight of the company's FCPA compliance program; a code of conduct distributed to all employees that includes anti-bribery provisions; guidelines and policies distributed to employees that educate them on the FCPA and set forth standards to ensure compliance; careful review and approval of any overseas agents who may be hired by the company; careful crafting of contracts with agents and follow-up monitoring of any payments made to, and the activities of, the agents; in-person and online training of employees on the FCPA; a procedure for the appropriate reporting of actual or suspected violations of the company's FCPA policies; and periodic employee certifications that they understand and have complied with the company's code and policies.

If a company believes that it or its employees have possibly violated the FCPA, the question arises whether the company should self-disclose to the DOJ and SEC. Under DOJ's "Principles of Federal Prosecution of Business Organizations," the Department will give credit to companies that voluntarily disclose wrongdoing. The Department will consider a variety of factors, including whether the wrongdoing is isolated or part of an ongoing pattern of illicit conduct, whether the company had a strong compliance program in place, and whether the company cooperated with the government in its investigation of the alleged wrongdoing. Depending on these and other factors, the government may credit the company and discount the punishment it would otherwise seek/impose. In-house counsel and senior management must carefully consider whether to voluntarily disclose the conduct to the government. Whether to do so may depend on the degree of corporate culpability, the amount at risk, the likelihood of discovery of the alleged violation, and other factors.

C. Mergers and Acquisitions

In an increasingly global corporate environment, companies are often looking overseas for possible partners and business opportunities. In a world where the FCPA and other bribery acts are constantly lurking, however, companies have to be careful when purchasing foreign entities. A buyer may unwittingly find itself purchasing substantial FCPA liability if it does not do proper due diligence and draft appropriate contractual protections.

A company that purchases an entity that has engaged in FCPA violations may be responsible for those violations and must proceed cautiously. The buying company should determine the countries in which the target company operates and how they rank on Transparency International's Corruption Index. It should consider the extent to which the selling company does business with foreign governments and whether it needs licenses and other approvals from foreign governments. Through due diligence and contractual processes, it should assure itself that the selling company and its employees have not violated the FCPA and should receive representations and warranties to that effect. The buying company should receive indemnifications from the sellers and their officers and directors in the event that any FCPA violations are uncovered. Of course, if it appears that FCPA violations may have occurred, the buying company should consider whether it is worthwhile to purchase the entity at all.

D. Conclusion

The government will likely continue to be aggressive in its enforcement of the FCPA. In-house counsel and senior management need to ensure that they have a strong compliance program in place, and need to be vigilant in rooting out any problems that could lead to FCPA violations. They must also be careful in choosing which agents and companies to do business with overseas.