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The long arm of the law: Why non-US companies need to comply with the Foreign Corrupt Practices Act

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"I want to send a clear message today that if a foreign company trades on US exchanges and benefits from US capital markets, it is subject to our laws. The department will not hesitate to enforce the FCPA against foreign-owned companies, just as it does against American companies."

Former assistant attorney general Alice S. Fisher, on the US Department of Justice's successful criminal enforcement action in 2006 against Statoil, ASA, a Norwegian company, for violations of the Foreign Corrupt Practices Act.

Despite the tremendous surge in anti-corruption efforts during the past few years by governmental authorities around the world, particularly in the United States, many companies are still unprepared to combat the bribery risks they face. Worse, many companies are not even aware of the myriad anti-corruption laws with which they are required to comply or the severe penalties which will ensue if they violate any of those laws. The United States' Foreign Corrupt Practices Act is one such law, applying even to companies located outside the US. The US Department of Justice and Securities and Exchange Commission, the two governmental authorities principally responsible for the enforcement of the FCPA, have dramatically increased their enforcement efforts in recent years and have obtained multimillion dollar settlements from both US and non-US companies. Indeed, of the 10 largest FCPA-related settlements, eight were with multinational companies based outside the US:

- Siemens (Germany): $800m in 2008.
- KBR/Halliburton (USA): $579m in 2009.
- BAE Systems plc (UK): $400m in 2010.
- Snamprogetti Netherlands BV/ENI (Holland/Italy): $365m in 2010.
- Technip SA (France): $338m in 2010.
- Daimler AG (Germany): $185m in 2010.
- Panalpina (Switzerland): $81.8m in 2010.
- ABB Ltd (Switzerland): $58.3m in 2010.

- Shell (UK/Holland): $48.1m in 2010.

Clearly, companies that are not familiar with the FCPA should become so, or face the prospect of paying millions of dollars in fines, penalties and profit disgorgement, not to mention attorney's fees, investigative expenses, costs of independent monitors, shareholder lawsuits, loss of reputation, potential US and EU detainment and other damages.

A company is subject to the FCPA if it does business in the US; commits an act subject to the FCPA in connection with the US (e.g., a wire transfer of bribe money that clears through a US bank, e-mails, telephone calls or meetings); issues securities registered in the US; has securities (including American depository receipts) listed on the US stock exchange; or has a principal place of business in the US or is organized under the laws of the US. An individual is subject to the FCPA if he or she is a US citizen or lawful permanent resident of the US anywhere in the world, or a foreign national doing business in the US. The FCPA has two primary components: (i) the anti-bribery provisions; and (ii) the books and records provisions and internal controls provisions that are most often referred to as the accounting provisions.

Anti-bribery provisions

The anti-bribery provisions of the FCPA prohibit the payment, promise of payment, offer or giving (or the authorization of any payment, promise, offer or giving) of any money, gift or anything else of value, either directly or indirectly, to a "foreign official" for the purpose of obtaining or retaining business or otherwise securing an improper advantage. As the Department of Justice notes in its publication explaining the FCPA, "The Lay Person's Guide to the FCPA," the person making, promising, offering, giving or authorizing the payment must have a corrupt intent: to induce the recipient to misuse his official position to direct business wrongfully to the payer or some other person. The FCPA does not require that the purpose be achieved. The simple offer, promise or authorization of a corrupt payment is enough to constitute a violation of the statute.

Given that the FCPA prohibits these actions from being done indirectly as well as directly, the services of a third-party agent may not be used to try to circumvent the prohibitions of the FCPA. Antonia Chion, associate director of the SEC's Division of Enforcement, has said: "The SEC will not tolerate violations of the FCPA, regardless of the lengths to which public companies will go to structure their corrupt transactions to avoid detection. Multinational companies should know that attempting to conceal bribes by funneling them through intermediaries or offshore entities will not be successful."

Parent corporations may also be held liable for the acts of their non-US subsidiaries where the parents authorized, directed or controlled the activity in question, as may US citizens or residents who were employed by or acting on behalf of the non-US subsidiaries. A recent example was RAE Systems, which paid more than $2.8m on December 10, 2010, to settle charges by the Department of Justice and the SEC that RAE Systems violated the FCPA through actions taken by employees of two of the company's Chinese joint venture subsidiaries.

"Foreign official" is a term that is defined broadly under the FCPA and includes entities as well as individuals. A "foreign official" is: (i) any officer or employee of a foreign government or any department, agency or instrumentality thereof; (ii) any public international organization (such as the International Olympic Committee, World Health Organization, World Bank and International Monetary Fund); and (iii) any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality thereof or public international organization.

The definition of "foreign official" is written and interpreted so broadly that it even includes employees of companies that would otherwise be considered private companies, but for the fact that they are owned or controlled by the foreign government. For example, many companies in the People's Republic of China are state-owned enterprises, and their employees are considered to be foreign officials under the FCPA. Similarly, doctors, nurses and other personnel of nationalized healthcare systems and employees of sovereign wealth funds could also be considered foreign officials. Not all payments to foreign officials violate the FCPA. The FCPA expressly permits:

- payments that are lawful under the written laws and regulations of the foreign official's country; and

- payments that are reasonable and *bona fide* expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official that are directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract with a foreign government.

Note that payments intended to fit within the latter category must be "reasonable" and "*bona fide*". They must be reasonably necessary (expenses for travel and lodging are examples expressly set forth in the statute) and they must not be unduly lavish. Payments for travel, lodging, gifts and entertainment constitute an area where companies often fall foul of the FCPA. Payments for stays at five-star resorts or lavish dinners, or for long excursions to places unrelated to a contract with a foreign government, generally violate the FCPA.

In another situation, a company also wanted to pay modest daily expenses for the incidentals purchased by government officials and take them on a four-hour tour of the city where meetings were being held, and the Department of Justice indicated that these payments would be permissible, as long as the company had receipts to document the expenses. (See FCPA Op. Proc. Rel. 2007-01 and 2007-02.)

There is also a technical exception to the anti-bribery prohibition of the FCPA. A "facilitating or expediting payment" may be made "to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official", such as to obtain permits, licenses, visas and work orders, or obtain mail pick-up and delivery or phone service, power and water supply. There has, however, never been a documented case in which a payment was held to be valid facilitating or expediting payment rather than an illegal bribe. A facilitating payment is, after all, a bribe, albeit a supposedly minor one. For a variety of reasons, many companies prohibit their employees and agents from making any bribes at all, even arguably minor ones. For example, it is extremely difficult to determine which payments may be valid facilitating payments rather than illegal bribes; prohibiting all bribes except "minor" bribes sends a mixed message to employees and agents. The new UK Bribery Act does not contain an exception for facilitating payments and the Organization for Economic Cooperation and Development has issued guidance which

frowns upon facilitating payments.

Books and records and internal controls provisions

Companies that have securities listed on a stock exchange in the United States or that are required to file reports with the SEC are referred to under the FCPA as "issuers" and are also subject to the FCPA's books and records provisions. It is important to note that issuers may violate the FCPA's books and records provisions, even in the absence of a bribe. The FCPA requires that issuers maintain their books and records in reasonable detail, such that their books and records accurately and fairly reflect in reasonable detail all their transactions and dispositions of assets.

In addition, issuers are required to devise and maintain a system of internal controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to (a) permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (b) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Non-US subsidiaries that are majority- or wholly-owned by an issuer are also subject to the FCPA's books and records provisions. Issuers may be held strictly liable for the actions of such non-US subsidiaries for violations of these provisions, regardless of any knowledge or suspicion of wrongful conduct by the issuer. Books and records cases are often brought by the SEC as civil cases, rather than as criminal cases. That is because the SEC's burden to prove a books and records or internal controls violations in a civil case is a "preponderance of the evidence", in other words, the allegation is more likely to be true than not, which is a lower standard of proof than the criminal standard of "beyond a reasonable doubt". The Daimler, Technip, Panalpina and ABB cases in the previously mentioned top 10 list are examples of the SEC's civil enforcement of the FCPA's books and records and internal controls provisions.

The Panalpina case is noteworthy because neither the Swiss parent nor its US subsidiary (both were implicated in the FCPA violations) is an issuer under the FCPA. The SEC's action, which was against the US subsidiary only, was for aiding and abetting issuers' violations of the books and records provisions in addition to acting as a bribe-paying agent. Cheryl Scarborough, chief of the SEC's FCPA unit, noted that this was the first time the SEC brought an FCPA enforcement action against a company that was not an issuer. Surely it will not be the last.

FCPA enforcement actions and Argentina

The FCPA's long arm stretches all the way to Argentina. Foreign companies such as Siemens AG and Helmerich & Payne, Inc, have faced charges for violation of the FCPA's books and records and internal controls provisions and for

improper payments through their wholly-owned subsidiaries in Argentina. As a result of increasingly bureaucratic procedures and limited resources to process applications and/or documentation within the statutory terms, most activities that require government permits, certificates or supervision have a red flag for foreign companies that interact through their subsidiaries with Argentine governmental agencies, whether directly or indirectly through brokers. Excessive bureaucracy and the high opportunity costs associated with procedural compliance demanded by governmental agencies act as incentives for companies to cut corners and circumvent legally required steps to prevent delays that might have a negative impact on business.

The FCPA landmark case in Argentina is Siemens AG's identity card bribery case. In December 2008, Siemens AG, a German company with global operations and shares listed on the New York Stock Exchange, agreed to pay $1.6bn in combined fines and penalties (taking into account a previous settlement with German regulators) to settle FCPA charges for engaging in a pattern of bribery which the Department of Justice termed "unprecedented in scale and geographic scope".

As was the case with H&P, companies are inclined to make improper payments for the purpose of avoiding potential delays typically associated with their core activity. H&P's alleged improper payments were made to avoid such delays and to permit the import and export of equipment and materials without the required certifications. Unlike large multinationals, foreign companies usually set up small or medium-sized operations in Argentina, which are generally understaffed and conduct business in a highly informal manner. In addition, local management and employees tend not to be aware of the FCPA and the consequences of noncompliance. This, when coupled with a broker's even more informal way of rendering services, creates a perfect storm for FCPA violations. In some cases, foreign companies acquire local businesses and inherit improper ways of conducting business, at least until key management is replaced, which could take years.

Argentine customs are a breeding ground for potential FCPA violations. As a result of President Kirchner's protection of Argentine products and production policies, customs officers have been delaying customs clearance of imported products. Local companies tend to hire customs brokers to handle their customs affairs. It has become a common practice for small and medium-sized Argentine companies to engage brokers to take care of their affairs with governmental agencies. Upon completion of their tasks, the brokers send invoices to their corporate customers. The invoices contain their fees and expenses, which often are marked up to cure their bribe payments. In H&P's case, such payments were disguised in its invoices from its customs broker as "additional assessments", "extra costs", "extraordinary expenses", "urgent processing", "urgent dispatch" and "customs processing fees".

Often, no formal contract is executed with the customs broker because companies want to avoid stamp-tax payments that are levied on all formal contracts executed in, or that have an effect in, Argentina. Such a hiring practice has yet another down side from an FCPA standpoint, because when companies do not execute formal contracts with their brokers, the companies miss a unique opportunity to stipulate in writing the negative covenants that their brokers will refrain from engaging in corrupt practices, which would also show the company's commitment and endeavor to comply fully with the FCPA.

Closing thoughts

Alice S. Fisher's words were not just a clear message about the FCPA's huge reach. They were also a wake-up call for non-US companies all around the globe, including those that do business in Argentina, which made it clear that familiarity with the FCPA was essential if they were to conduct business safely in today's global economy. Unless they wanted to become prospective members of the FCPA's top 10 enforcement list, they would need to implement policies and procedures to prevent violations, and to conduct training for their staff.

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