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The Foreign Corrupt Practices Act

An Executive Summary

November 8, 2022

The Foreign Corrupt Practices Act, or the "***FCPA***" as it is commonly referred, is among the most actively enforced anti-corruption statutes that apply to international transactions. Although the FCPA is primarily directed at U.S. individuals and companies, there are ways for U.S. authorities to assert jurisdiction over non-U.S. persons who support FCPA violations. In addition, the scope of the FCPA is quite broad. This act not only prohibits bribery, but also requires companies listed on U.S. stock exchanges to comply with certain accounting requirements. U.S. authorities have been known to hold companies liable for violating accounting requirements even in cases where there is no strong evidence of corruption.

The Department of Justice (**DOJ**) and the Securities and Exchange Commission (**SEC**) are primarily responsible for enforcing the FCPA. Fines and penalties imposed for FCPA violations have increased significantly over the years, in some cases reaching hundreds of millions of dollars. Although the number of FCPA enforcement cases varies year-by-year, both DOJ and SEC have made it clear that they will actively enforce this statute as part of their effort to combat international corruption.

The Biden Administration recently affirmed that anti-corruption enforcement is a high priority in a memorandum that declared that fighting bribery is a core element in protecting U.S. national security because, among other things, corruption supports authoritarian leaders in undermining democracies worldwide. DOJ also recently issued revisions to its corporate criminal enforcement policies that encourage prosecutors to take a tougher approach to investigations and enforcement cases involving the FCPA and other concerns. These revisions require prosecutors to hold individual officers and employees personally responsible for FCPA violations attributable to them. Also, U.S. authorities have made it clear time and again that they will carefully evaluate a company's FCPA compliance program when determining to what extent that company should be held accountable for the corrupt activities of its employees and other representatives.

Companies engaged in international business can encounter potential FCPA risk in a variety of instances – oftentimes without realizing the potential severity of the situation. The following discussion provides an overview of the FCPA and key items that require consideration.

Anti-Corruption Provisions.
The FCPA's anti-bribery provisions are fairly broad and prohibit individuals and companies from directly or indirectly authorizing, offering, or providing corrupt payments or other things of value to non-U.S. government officials, employees of certain types of state-owned entities, political candidates, political parties, and officials of public international organizations like the UN or the World Bank. U.S. enforcement authorities have held companies responsible for FCPA violations in a variety of cases, including where bribes were paid in exchange for government contracts, business, regulatory approvals, favorable tax determinations, confidential information, or other improper advantages.

Accounting Provisions.
Separate from the anti-bribery prohibitions above, the FCPA requires U.S. public companies and other "issuers" (such as non-U.S. companies with ADRs traded on U.S. stock exchanges) to maintain accurate books and records and a system of effective internal controls. U.S. enforcement authorities may claim that accounting violations have occurred if one conceals bribes or fraud in a company's books or maintains slush funds. The U.S. government has also held companies responsible for accounting violations even in the absence of strong evidence of corruption. For example, U.S. prosecutors have held public companies accountable for failing to perform anti-corruption due diligence on their business partners even though those prosecutors have not proven that those partners paid bribes.

Jurisdiction over Foreign Acts/Persons.
U.S. enforcement agencies have broadly interpreted their jurisdiction to prosecute companies and individuals with respect to alleged FCPA violations that occur either in or outside the United States. In addition, U.S. authorities have claimed FCPA jurisdiction over non-U.S. companies and individuals in certain cases. A recent appellate decision in *United States v. Hoskins* has restricted the scope of the U.S. government's extra-territorial jurisdiction with respect to FCPA matters; however, U.S. authorities may decide to interpret that decision narrowly and continue to assert jurisdiction over non-U.S. persons using alternative theories.

Enforcement and Consequences.
DOJ, the FBI, and the SEC continue to devote major resources to investigate FCPA violations and have significantly increased enforcement activity over the past decade. Violations can result in large fines, penalties, profit disgorgement, imprisonment, suspension/debarment from government contracting, the loss of export privileges, the appointment of compliance monitors, and other consequences. Many companies have had to pay hundreds of millions of dollars in penalties, and senior executives have been sentenced to prison for FCPA violations. U.S. prosecutors have also been known to charge defendants for fraud, money laundering, sanctions, Sarbanes-Oxley, and related violations based on the same facts that triggered an FCPA concern. Also, shareholders may attempt to bring derivative lawsuits against company management on the basis of an FCPA violation.

Officer, Director, and Affiliate Liability.
Enforcement agencies may seek to hold directors, officers, and managers personally accountable for authorizing, directing, or controlling FCPA violations committed by subordinates. Also, enforcement agencies have held U.S. parent companies responsible for FCPA violations caused by their domestic or *foreign* subsidiaries.

Investigations/Disclosures.
The U.S. government has stated that it expects companies to investigate and voluntarily disclose FCPA violations in a timely manner. Prosecutors may potentially claim that companies that turn a blind eye to FCPA concerns have implicitly authorized corruption in their ranks. The U.S. government has stated that companies that voluntarily disclose concerns in a timely manner, cooperate with investigations, and remediate issues may qualify for leniency (enforcement credit) in certain circumstances. Recent revisions to DOJ's corporate criminal enforcement policies referenced above contain a substantial discussion on voluntary disclosures.

Whistleblowers.
The Dodd-Frank Act provides financial incentives to whistleblowers who report a public company's FCPA and other securities violations to U.S. authorities. These incentives may range up to 30% of the fines and penalties eventually imposed on a guilty company. If a company is slow to address FCPA violations, employees, competitors, or other whistleblowers may report those concerns to U.S. authorities in an effort to earn a reward.

Third Party Risk.
U.S. enforcement agencies have held companies responsible for improper payments made by their third party consultants, representatives, distributors, brokers, or joint venture partners. This has occurred even if the government does not prove that the company had actual knowledge of the corruption. Many enforcement cases involve companies that have worked with corrupt third parties. The U.S. government has advised that it expects companies to perform FCPA-specific due diligence before retaining such third parties, monitor their activities, and insert appropriate anti-corruption compliance language in their agreements. Companies that rely on international supply chains can also face third party risk under the FCPA in certain cases. As a result, the U.S. government looks to see what due diligence procedures a company has in place.

FCPA Risk in M&A Transactions.
According to the U.S. government, in certain cases, a target company in an M&A transaction that has a history of corruption may cause the acquiring company to face successor liability. U.S. authorities have claimed that this can be a concern in cases where an acquiring company allows the target company's corrupt activities to continue post acquisition. The U.S. government has observed that due diligence, reps and warranties, and effective compliance programs are important tools to counter these risks. DOJ's recent revisions to its corporate criminal enforcement policies recommend prosecutors to evaluate whether (i) the acquiring entity has integrated that target business into an effective, well designed compliance program; (ii) the acquiring entity had already addressed the root cause of the prior misconduct before it was committed by the target business; and (iii) the acquired entity has engaged in full and timely remediation.

Other Anti-Bribery and Related Laws.
In addition to the FCPA, the United States has several other anti-corruption laws in place at both the federal and state level. For example, U.S. enforcement agencies have used the Travel Act to prosecute companies for private-sector or commercial bribes in violation of applicable state-level statutes. Prosecutors have also used wire and mail fraud statutes in their fight against corruption. According to the U.S. government, parties that provide bribes and then help recipients conceal those bribes as legitimate payments may face money laundering charges as well.

In addition to the United States, most countries maintain their own versions of domestic and foreign anti-corruption laws. For instance, the United Kingdom has the UK Bribery Act 2010, which prohibits not only the provision of bribes, but also their acceptance. U.S. enforcement agencies have demonstrated in several cases that they will cooperate with other governments in sharing evidence of bribery. As a result, the same set of facts the trigger FCPA concerns can also cause companies to face prosecutions in other countries that can claim jurisdiction.

Compliance Programs.

The U.S. government has stated that it expects companies to implement risk-based compliance programs. According to enforcement authorities, they account for a company's compliance program when determining whether they are culpable if their employees or representatives engage in FCPA violations. The U.S. government has stated that the hallmarks of an effective compliance program consist of the following measures:

- Company executives/directors who create a "**culture of compliance**" and set a proper tone from the top.
- A **code of conduct** that acts as the foundation of the compliance program.
- **Policies and procedures** that address anti-corruption and other compliance responsibilities, internal controls, and auditing/documentation practices.
- **Compliance officers** who have sufficient authority, independence, resources, and funding.
- Policies/procedures that are communicated to personnel *via* **periodic training and certifications**.
- Appropriate and consistent **disciplinary measures** imposed on employees that engage in violations.
- Evaluations, promotions, bonuses, and/or other forms of recognition used to **incentivize employee compliance**.
- The performance of **risk-based due diligence** and continuous **monitoring** of agents, consultants, distributors and other third party business partners.
- Appropriate due diligence performed on **M&A, joint venture, and other transactions**.
- The prompt application of c**ompliance programs to newly acquired subsidiaries or businesses**. Such efforts may include employee training, contractor evaluations, and audits if appropriate.
- Mechanisms that allow company personnel and others to **report violations or concerns** on an anonymous and/or confidential basis and without fear of retaliation.
- Procedures in place for **investigating allegations** and documenting results, including disciplinary measures and other forms of remediation.
- Compliance programs that are subjected to **periodic reviews and improvements** to account for weaknesses or changes in the company's business or customers, applicable laws, and industry standards.

According to the U.S. government, a one-size-fits-all approach to compliance should be avoided. Instead, the government prefers that a compliance program accounts for the risk profile of the company. The U.S. government expects companies to conduct a risk assessment to determine the extent of their potential corruption exposure and then design a compliance program based on those findings.

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Daanish's practice also covers OFAC sanctions, anti-money laundering laws, and national security/CFIUS reviews. He has represented clients before the Department of Justice, the Securities and Exchange Commission, the Department of Treasury, and other government agencies. He has a law degree with honors from the **University of Oxford** and a Juris Doctor from the George Washington University Law School, where he was a member of the **International Law Review**.

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